



Barnhart



Dresser



Foley



Erickson



Hernandez



Keith



Miller-Cormier



Molster



Natkin



Saitta



Sanders



Tavenner



Terry

**Kelly M. Barnhart** is an associate with the Norfolk firm Roussos, Lassiter, Glanzer & Marcus PLC, as well as counsel for R. Clinton Stackhouse Jr., a Chapter 13 bankruptcy trustee for Norfolk and Newport News. Barnhart focuses her practice on bankruptcy and restructuring matters. She has a bachelor's degree from Randolph-Macon Women's College and a law degree from the University of Mississippi.

**Lara Dresser** is the law librarian at the Richmond Public Law Library. She received a law degree from Southwestern Law School, a master's degree in library and information science from the University of Washington, and an undergraduate degree from the University of Oregon. She is a member of the American and Virginia associations of law libraries.

**Elizabeth H. Erickson** is a senior associate at Winston & Strawn LLP and a member of the e-discovery and information management practice group in the firm's Chicago office.

**Douglas M. Foley** is chair of the restructuring and insolvency department in the Norfolk office of McGuireWoods LLP, where he is a partner. He has a bachelor's degree from the University of Mary Washington and a law degree from George

Mason University. He served as law clerk to Judge Douglas O. Tice Jr. of the U.S. Bankruptcy Court for the Eastern District of Virginia and to Judge Loren A. Smith of the U.S. Court of Federal Claims.

**Mirna Hernandez** is client services director for the Legal Information Network for Cancer. In that job she has helped more than three hundred cancer patients and their families with nonmedical needs. She has a master's degree in public administration from Virginia Commonwealth University, with a concentration in nonprofit management. Her previous nonprofit experience includes working with Immigration and Refugee Services of Hampton Roads, the Community Tax Law Project, and Connect Richmond.

**Patrick T. Keith** has been on the board of directors of the Legal Information Network for Cancer for four years, and currently serves as the treasurer. He graduated from the University of Richmond School of Law in 2002, and is a consumer bankruptcy attorney with the Boleman Law Firm in Richmond.

**Suzanne Miller-Cormier** is the executive director of the Legal Information Network for Cancer. She has a master's

degree in adult education, training, and organizational development. Much of her career has been spent working in hospices and health care. Suzanne also has been a free-lance grant writer and trainer and a development director.

**Charles B. "Chip" Molster III** practices with Winston & Strawn LLP in Washington, D.C. His practice focuses on complex litigation involving patent infringement, telecommunications, antitrust, commercial, other intellectual property, and product liability. He is a member of the VSB Committee on Technology and the Practice of Law.

**Mary Z. Natkin** is assistant dean for clinical education and public service and clinical professor of law at the Washington and Lee University School of Law.

**Rebecca L. Saitta** is an associate attorney in the McLean office of Wiley Rein LLP. She has a bankruptcy and commercial litigation practice and has published several articles on bankruptcy and other topics. She has an undergraduate degree from Villanova University and a law degree from George Mason University. She formerly clerked for Magistrate Judge Barry R. Poretz of the U.S. District Court for the Eastern District of Virginia, Alexandria Division.

**Elwood Earl Sanders Jr.** is the appellate procedure specialist for Lantagne Legal Printing in Richmond. He was the appellate

defender for the Commonwealth of Virginia from 1996 to 2000 and an associate with Framme Law Firm from 2000 to 2007. He is a member of the appellate practice subcommittee of the Virginia State Bar Litigation Section and the Appellate Practice Section of the Virginia Bar Association. He speaks to bar associations and law firms about appellate procedure.

**Lynn Lewis Tavenner** is a founding member of Tavenner & Beran PLC in Richmond, where she has practiced since 2002. She is a Chapter 7 panel trustee for the Richmond Division of the United States Bankruptcy Court for the Eastern District of Virginia. She is secretary of the board of governors for the VSB Bankruptcy Section and a member of the board of directors of the American Bankruptcy Institute.

**Roy M. Terry Jr.** is a Chapter 7 panel trustee of the U.S. Bankruptcy Court for the Eastern District of Virginia, Richmond Division. He is chair of the bankruptcy practice group at DuretteBradshaw PLC and has represented debtors and creditors for thirty-one years. He has a bachelor's degree from the College of William and Mary and a law degree from the University of Richmond.

# CLE Calendar

## **Annual VTLA Family Law Seminar: Representing Older Clients and Their Families**

8:45 AM–4:30 PM on July 1 at the North Richmond Marriott Courtyard, July 22 at the Roanoke Higher Education Center, July 27 at the Norfolk Airport Marriott, and July 29 at the Hilton Garden Inn, Fairfax. Sponsor: Virginia Trial Lawyers Association. Details: Alison Love at (804) 343-1143, ext. 310, or [alove@vtla.com](mailto:alove@vtla.com)

## **Introduction to Sentencing Guidelines**

9:30 AM–5 PM on August 19 at the Henrico Training Center, September 2 at the Fairfax Government Center, September 28 at the Southwest Virginia Higher Education Center in Abingdon, and October 5 at the Portsmouth Department of Social Services. Sponsor: Virginia Criminal Sentencing Commission. Details: <http://www.vcsc.virginia.gov/training.htm> or (804) 225-4398

## **Advanced Sentencing Guidelines Topics and Ethical Hypotheticals**

9:30 AM–5 PM on September 3 at the Fairfax Government Center, September 29 at the Christiansburg Library, October 6 at the Portsmouth Department of Social Services, October 14 at Petersburg Probation and Parole, and October 21 at the Woodrow Wilson Rehabilitation Center in Fishersville. Sponsor: Virginia Criminal Sentencing Commission. Details: <http://www.vcsc.virginia.gov/training.htm> or (804) 225-4398

## **Annual VTLA Criminal Law Seminar**

8:45 AM–4:30 PM on September 14 at the North Richmond Marriott Courtyard; September 21 at the Hilton Garden Inn, Fairfax; September 23 at the Roanoke Higher Education Center; and September 28 at the Norfolk Airport Marriott. Sponsor: Virginia Trial Lawyers Association. Details: Alison Love at (804) 343-1143, ext. 310, or [alove@vtla.com](mailto:alove@vtla.com)

## **Ethics for the Trial Lawyer Telephone Seminar**

NOON–2 PM on October 13. Details: Alison Love at (804) 343-1143, ext. 310, or [alove@vtla.com](mailto:alove@vtla.com)

*Virginia Lawyer* publishes at no charge continuing legal education program announcements for nonprofit bar associations and government agencies. The next issue will cover October 19–December 18, 2010. Send information by August 11 to [chase@vsb.org](mailto: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.

## **Your Sentencing Guidelines Manual Is Out of Date! Significant changes effective July 1, 2010**

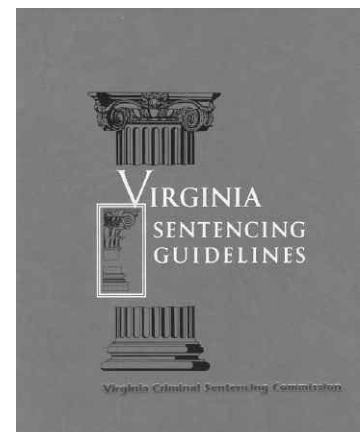
**Order Your Guidelines Manual Today**

**Register for a 2010 CLE**

- “Introduction to Sentencing Guidelines” (6 CLE)
- “Advanced Sentencing Guidelines Topics & Ethical Hypotheticals” (6 CLE (1 Ethics))

Download the registration/manual order form at [www.vcsc.virginia.gov/training.htm](http://www.vcsc.virginia.gov/training.htm)

*Virginia Criminal Sentencing Commission*  
(804) 225-4398



## Pro Bono by In-House Counsel Should Be Easier

Congratulations to Richmond attorney John M. Oakey Jr. for providing eleven years of full-time pro bono legal services. Mr. Oakey was recognized at a summit held by Virginia Supreme Court Chief Justice Leroy Rountree Hassell Sr., who called for attorneys across the state to perform more pro bono work.

A laudable goal — but we need more than just good intentions to increase the number of attorneys providing quality legal advice to those in need. We need ethical reform.

When Verizon set up its pro bono program last year, the biggest challenge was dealing with the patchwork of state ethics rules that govern pro bono practice by in-house counsel. With offices in twenty-one U.S. jurisdictions, and because the company has relocated offices many times, a large number of these attorneys are not licensed in the jurisdiction where their office is located.

In Virginia almost two-thirds of our attorneys work under an in-house license because they're not licensed in the commonwealth. Some jurisdictions — Virginia falls into this group — require in-house attorneys to work only with certain approved organizations and under the supervision of a member of the state bar association, even if they are licensed in Virginia.

Over the years, I've heard many of my colleagues say that one of the things that they miss most about practicing at a law firm is the pro bono work, so I'm heartened by the fact that nearly half of Verizon attorneys in Virginia have volunteered to provide free legal services to victims of domestic violence, a fallen veteran's family, and a start-up school, among other clients.

Given the hurdles that an in-house attorney must overcome to volunteer services at a time of great need in our

society, one has to wonder how many more attorneys in the state might volunteer if it was easier.

Jennifer L. McClellan  
Assistant General Counsel Mid-Atlantic South, Verizon Communications

*Editor's Note: The justices of the Supreme Court of Virginia on May 20, 2010, invited the Virginia State Bar to work with the Virginia Bar Association to submit a rule for the Court's consideration that would address the provision of pro bono services by Virginia corporate counsel.*

## Judge Gregory's Award Well-Deserved, but Appointment Wasn't Unique

A friend who knows how much I admire Judge Gregory sent me an image of your recent report (*Virginia Lawyer*, April 2010, [http://www.vsb.org/docs/valawyer magazine/vl0410\\_noteworthy.pdf](http://www.vsb.org/docs/valawyer magazine/vl0410_noteworthy.pdf)) on the prestigious award to Judge Roger L. Gregory by the University of Richmond School of Law. He is a remarkable individual. He has always been the ultimate gentleman and demonstrated incisive legal acumen. The award was well-deserved and your reporting allowed it to reach someone in the hinterland like me, a quasi-retired African American lawyer in Los Angeles. Thank you.

I did want to point out a potential inaccuracy in the article's closing line. At least one other federal judge was nominated by presidents of different parties. He was, like Judge Gregory, both a graduate of the University of Michigan Law School and an African American. Cecil Poole was nominated twice by Democrat Lyndon Johnson (confirmation blocked), then in 1976 by Republican Gerald Ford (confirmed to the U.S. District Court for the Northern District

of California), and finally in 1979 by Democrat Jimmy Carter (confirmed to the Ninth Circuit U.S. Court of Appeals). I knew him well, because he was a very close friend of my father, William Hastie.

Again thank you for reporting this event.

William H. Hastie  
Los Angeles, California

## Oakey's Journey Led to Writer's Own

I wanted to offer a couple of observations to complement those in John M. Oakey Jr.'s fine article, "Pro Bono Journey" (*Virginia Lawyer*, April 2010, [http://www.vsb.org/docs/valawyer magazine/vl0410\\_journey.pdf](http://www.vsb.org/docs/valawyer magazine/vl0410_journey.pdf)).

First, it was nice to know that someone I have known for over twenty years remains productive practicing law on behalf of clients for whom representation is so meaningful. That is consistent with the encouragement I received from John and others to offer pro bono services when I was an associate at the firm now known as McGuireWoods.

Second, I hope that even the most junior of lawyers recognize the benefits of pro bono work. The effort is not only rewarding in the Hallmark moment sense. To the inexperienced lawyer, especially in a bigger civil practice, it may offer faster and more intense experiences at developing client relationships, thinking about relevant factual as well as legal issues, and negotiating or litigating disputes to resolution.

To use just one personal example, I recall vividly that my first evidentiary hearing came in a pro bono child-custody dispute. The case involved what I will politely call difficult facts, an interesting client, and a last-minute evidentiary issue prompted by client melo-

drama with authorities. The court ruled in my client's favor. The judge then noted that I was serving pro bono, commended me for the services, and told me she'd look forward to seeing me again. That case let me hone skills relevant to my private practice and motivated me to continue doing pro bono work.

I congratulate John on his own pro bono journey, thank him for helping encourage my own, and emphasize that pro bono service can help not only one's conscience or the community, but one's own full-time practice as well.

Paul G. Gill  
Assistant Federal Public Defender  
Richmond

## Gutterman Rebuts Brazell Indigency Status

Contrary to Clarence M. Dunnville Jr.'s assertion ("Letters," *Virginia Lawyer*, April 2010), *Brazell* was not indigent when the Fairfax Circuit Court terminated her parental rights.

*Brazell* stated under oath throughout the [termination] hearing that she was earning monies that would plainly show, had a calculation been done at that time, that she did not qualify for court-appointed counsel, and further, that when [her prior court-appointed counsel] withdrew as her counsel, she was put on notice that she needed to have counsel at the time of the trial, and the case would not be continued for her failure to do so.

[I]'t's plain that her responses to the interrogatories are consistent with her testimony given at trial that she was, in fact, employed and, in fact, earned monies that would disqualify her for the appointment of counsel.

*Brazell v. Fairfax County Dep't of Soc. Servs.*, 2008 Va. App. Lexis 388.

At the remand hearing, *Brazell's* counsel conceded this point without qualification. *Brazell's* counsel likewise admitted that *Brazell* was earning "over the guideline" amount at the time of the remand hearing, rendering her ineligible for appointment of counsel for appeal. In an abundance of caution, however, the circuit court appointed counsel for *Brazell* for purposes of this appeal.

*Brazell* may be an example of the problems the working poor who do not meet the definition of indigence and cannot afford counsel have in navigating our overwhelming and complex legal system. But contrary to Mr. Dunnville's assertions, *Brazell* is not an example of the "huge impact" of the inability of indigent persons to have legal counsel in civil proceedings. From the Court of Appeals' opinion, *Brazell* was not indigent as of trial. Had she been indigent, she would have been entitled to court-appointed counsel per Virginia Code § 16.1-266(D)(2).

Kim V.H. Gutterman  
Rockingham County Assistant County Attorney  
Harrisonburg

Mr. Dunnville's response:

*I appreciate the opportunity to once again respond to Assistant County Attorney Gutterman's continuing assertion that Ms. Brazell was not indigent. I can only repeat my statement in the April 2010 Virginia Lawyer that Ms. Brazell was found indigent by legal services, and the trial court recognized that determination at the August 16, 2007, remand hearing required by the Court of Appeals. The trial court in fact appointed counsel, but unfortunately*

## 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/vlawyer/>.

*too late for Ms. Brazell. To hopefully end this matter, I am sending Ms. Gutterman a copy of the relevant portions of the transcripts of the August 10 and August 16, 2007, hearings so that she can see for herself that this is true.*

*At the August 16 remand hearing it was stipulated that she had a monthly income of \$1,585. The guidelines were \$1,426. Her counsel agreed that she earned \$1,585 per month. However, it was asserted that she had a small child at home, paid rent, and was entitled to deductions which would bring her well within the guidelines for indigency. The Department of Social Services agreed that she was entitled to some deductions and had a child, but would not agree on all of the deductions which it was asserted that she was entitled to. The court did not take any evidence as to whether Ms. Brazell was entitled to the claimed deductions, and this was never resolved by the trial judge. The court never determined whether she was indigent on the record.*

Clarence M. Dunnville Jr.

# New VSB President's Code Is Law and Loyalty

by Dawn Chase

It's hard to imagine Irving M. Blank in a room by himself.

Even when he is, you figure he must be on the phone, or sitting back reliving a conversation he had.

His stories — and he has a lot of them — are peopled with clients and former classmates; judges and lawyers; politicians, ambassadors, and clergymen.

And family. Almost always, the stories come around to family: wife Rhona, son Jonathan, daughter Lisa, their spouses, and the four grandchildren.

"My Dad loves to tell stories," said Jonathan T. Blank, managing partner of McGuireWoods LLP's Charlottesville office. "Maybe that's why he's such a great trial lawyer. He's been around so many interesting people."

"I'm about family and the law and the community," Irv Blank said in an interview before he assumed the presidency of the Virginia State Bar.

In the few weeks it took to put this profile together, Irv's calendar was full of family, law, and community commitments:

## Practicing Law

Blank tended to business at his firm, ParisBlank LLP in Richmond, where he shares a plaintiffs personal injury practice with partners Leonard A. "Len" Paris and Keith B. Marcus, whose willingness to cover for him makes it possible for him to serve as VSB president.

## Birthday Party

He whisked his wife off to Los Angeles for the final *American Idol* — a gift for her birthday. Rhona Blank was a huge fan, Jonathan said. As for Irv, "He knows nothing about *American Idol*."

## Preparing His Inaugural Message

In pre-inaugural interviews, Irv fretted about the General Assembly's decision, for money-saving reasons, to suspend filling empty non-appellate judgeships until 2012.

"In my world, that's a big issue. I don't think you take an equal branch of government and virtually gut it. You need a courtroom for the rule of law to be applied. Whatever the reason, the public suffers," Blank said.

## Grandfathering

With his thirteen-year-old grandson, Lev Looney, at his side, he was at the seminar "Free Speech, Fair Speech, Fear Speech: Civil Discourse in a Volatile World," part of the Virginia Law Foundation and Virginia Holocaust Museum observance of Law Day. Lev had recently been called an anti-Semitic epithet by another student at school. Taking his grandson to the seminar was Blank's way of helping him through the experience.

The two viewed a presentation of websites sponsored by hate groups and participated in conversations about appropriate individual and collective responses to hate speech. Lev's mother, Lisa Looney, said the field trip is an example of Irv's approach: "Learn right from wrong. Respond not from a violence perspective or a retributive perspective."

"I talk with my Dad at least twice a day every day," she added. Many mornings before he heads to court, "he stops by to say goodbye to my kids."

## Giving Back

Blank attended the luncheon that honored Henry W. McLaughlin III on his retirement as executive director of the

Central Virginia Legal Aid Society. Blank has been on the CVLAS board for more than twenty-five years.

And Irv Blank accepted four clients from the VSB's Virginia Lawyer Referral Service. Director Toni B. Dunson called him last month to offer him a year off from his commitment to the service, but he declined. "I just think it's an acknowledgement that being given the opportunity to practice law carries some responsibility to society," he said.

## Community Service

The day news broke that Israeli commandos had raided a flotilla carrying humanitarian aid to Gaza and killed nine people, invoking international protests, Blank was on standby for a conference call with the Israeli ambassador to the United States. As a fundraiser for Israel and active leader of Richmond's Jewish community, he wanted a fix on what kind of public relations challenge was in store.

## Wedding Plans

He also made plans for a trip to Japan with Jonathan, to attend the wedding of the Japanese "brother" Jonathan had stayed with during a three-month student exchange years ago. When the "brother" came to Jonathan's wedding in 2001, Irv promised he would reciprocate when the Japanese man decided to get married.

"My Dad, with everything he has going on, is going July 19th to the wedding," Jonathan said. "That's the kind of guy my Dad is. He's just incredibly giving to so many people."

IRV BLANK WAS RAISED IN DANVILLE. His parents sent Irv, his brother, and two sisters to a strict orthodox synagogue for religious grounding. He later attended Virginia Tech, where he played varsity tennis. He also wrote a sports column for the Danville *Commercial Appeal*.

In Danville’s public schools, Blank said, “I was the only Jewish person in my class all the way through school, and had almost no Jewish contact through Virginia Tech, because I was basically playing tennis.”

Did he think about that much as he was growing up? “All the time,” he said. “Every minute of every day. It’s part of my being.”

Blank was accepted at the University of Richmond School of Law before his undergraduate education was completed. Tech credited his first year of law school as his last year of undergraduate, and he eventually received his bachelor’s degree. He graduated from law school in 1967.

He married the former Rhona Mandel, who became an entrepreneur. She once owned *Pretty Paper*, a Richmond stationery business.

Irv Blank had always wanted to be a lawyer, and he found that practice lived up to his expectations.

“I like people, and I like lawyers,” he said. “I love the stories of the law. I love to see the law working. You build some bond when you try cases with people.” He chuckled over memories of a time when lawyers, mostly men, called each other by nicknames such as “Chief” and “Horse.”

“I carried his briefcase when I was nine,” Jonathan said. His father took him and his sister to court and not only to temple, but to Greek Orthodox Christian ceremonies and African American gatherings, “where we were instilled with this ideal ... that all men are created equal.”

Jonathan remembers that, when he was a child, “a guy who was a bouncer in a bar” showed up at the Blanks’ house,



Irv Blank celebrates his installation as VSB president with his family at the annual meeting banquet.

Blank addresses the members attending the banquet.



“bloody after being in a fight.” Irv Blank helped him out. Now, the man has turned his life around. “Your dad was the one that stood by me and stood up for me,” he told Jonathan.

The younger Blank described his father’s code as “the rule of law and sticking by people.”

Daughter Lisa, who runs the speakers forum at Richmond’s Jewish Community Center, says she sees his commitment not so much to law, but to justice and fairness. “He always tries to show us the right path to the bigger picture.”

In Richmond, Blank threw himself into Jewish community organizations and projects that support the nation of Israel — “every Jewish agency in town,” as he described it. Six Virginia governors appointed him to commissions and boards that involve the Virginia-

### Biography

#### Irving M. Blank

ParisBlank LLP  
Richmond

#### Education:

Bachelor’s degree from Virginia Tech  
Law degree from the University of Richmond

#### Family:

Wife — Rhona  
Children — Jonathan T. Blank, Lisa B. Looney  
Four grandchildren

President continued on page 54

# President's Message

by Irving M. Blank



## Contribute to Your Bar

AS I BEGIN TO SERVE as your seventy-second president, let me assure you that I am humbled and honored to be leading the Virginia State Bar. I have been practicing law in this commonwealth for more than forty-three years, and I believe that I understand lawyers' needs and the pressure that every lawyer feels. I assure you that I will devote my best efforts to making your life as a lawyer better, while at the same time placing public protection at the top of my priorities.

When I was installed last month at the annual meeting in Virginia Beach, I set out a modest agenda as president. My acceptance speech promised that I would do my best to keep this organization running as smoothly as it has in the past. Indeed, when attending national and regional bar meetings, it does not take long to realize that we have one of the, if not *the*, best mandatory bars in this country.

I do not intend to take on a project, as some presidents have. I do, however, hope to continue Immediate Past President Jon D. Huddleston's wonderful Virginia Is for Good Lawyers program. Past President Manny A. Capsalis's Diversity Initiative is now a Court-approved conference of the bar and it will take on an identity of its own.

This office has a history of attracting issues that are unexpected, but require immediate attention.

One issue is the budget recently passed by our General Assembly, which, when signed into law by the governor, created a restriction on the appointment of non-appellate judges until 2012. While the VSB is limited in its ability to lobby, it is not limited in calling on its members to express our concerns about this action.

In February 2010, your bar council voted 53–2, with 1 abstention, to object to the decision to not appoint judges to fill the nineteen current vacancies and the more than fifty that will exist by 2012. I ask each of you to let your legislator and the governor know that this failure to adequately staff our courts directly affects our mission to advance the availability and quality of legal services provided to the people of Virginia, as well as to assist in improving the legal profession and the judicial system. We will face a judicial system that will be hard-pressed to deliver the required services that our citizenry will rightfully demand. This will be felt throughout our society. We will have to deal with the lack of judges to issue protective orders in domestic violence cases, and injunctions in business disputes. The crisis will include the inability to resolve civil disputes — both tort and contract — in a timely manner, as well as to get the guidance of the courts in estate matters and the prompt adjudication of criminal and regulatory violations.

In a state that ranks near the top of America's fifty states in income, employment, education, transportation, and almost every meaningful category, we have severely limited the delivery of legal services by our judicial branch of government by not appointing needed judges. This needs to be addressed by every member of the bar and I hope that you will do so at every opportunity.

Another issue that seems to get worse every year is the funding for legal aid. Part of our mission statement is to advance access to legal services. In the economic environment in which we find ourselves, this problem needs to be addressed in a creative and sustained fashion, and I hope to be able to communicate with you in the near future about ways to do just that.

I pledge to you that I will be ever mindful of the mission of the VSB and that I will try to listen to as many of you as want to communicate with your bar office. At this time next year, I hope that I can say that Virginia's legal profession is in the same enviable position as it was when the bar year started. Just remember that this is your bar and you need to participate to make your professional life better, so please do not sit on the sidelines. Get involved, be heard, and contribute to your profession.

# Executive Director's Message

by Karen A. Gould



## VSB Status Report

### VSB/VBA Pro Bono Task Force

The Supreme Court of Virginia has asked the Virginia State Bar, in conjunction with the Virginia Bar Association, to submit for the Court's consideration a proposed rule on pro bono practice by corporate counsel admitted under the Virginia Corporate Counsel Rule (Sup. Ct. Rule 1A:5). That rule now generally requires that Virginia corporate counsel licensed under Rule 1A:5 and providing pro bono services to be associated with a legal aid society and to have his or her pro bono work overseen by a supervising attorney who is a VSB member.

The request followed comments made April 29, 2010, by Randal S. Milch, executive vice president and general counsel of Verizon Communications Inc., about "regulatory impediments" to pro bono work by corporate counsel. Milch contended at the VBA's Pro Bono Summit in April that corporate counsel are "no less talented or committed to meeting the needs of the poor" than are other lawyers.

A Joint VSB/VBA Corporate Counsel Pro Bono Task Force has been formed to draft a revised rule. This proposal will be published for comment and then presented to the VSB Council for approval, hopefully at the October 2010 meeting.

### Permanent Bar Cards

Associate VSB members will receive newly designed permanent cards upon payment of their 2011 dues this summer. Active members will receive the current card design upon payment of their 2011 dues. This is an interim card and will expire December 31, 2010. New permanent cards will be issued in December to all active members in

good standing. Membership cards will no longer be issued each year. Members will be able to receive a replacement card for a \$10 fee.

### Spare the Child DVD

With funding from the Virginia Law Foundation, the VSB Family Law Section's *Spare the Child* DVD has been completed. The new production replaces an outdated video, which was used for many years to guide divorcing parents in visitation, custody, and child support issues, stressing the best interests of children. Many courts show the video in mandatory litigant education programs required under Va. Code § 16.1-278.15. It is also used by judges, lawyers, and civic groups to encourage mediation and responsible parental behavior. It is anticipated that the video will be seen by at least thirty thousand people a year. English and Spanish versions of *Spare the Child* will be made available for viewing at [www.vsb.org](http://www.vsb.org). A copy of the DVD will be available from the VSB on request, by contacting Shannon Quarles at [quarles@vsb.org](mailto:quarles@vsb.org) or (804) 775-0512.

### Supreme Court Forms

The Supreme Court Forms for Bar Members project is moving forward and is expected to be online by July 1, 2010. The forms are ones to which lawyers have indicated they would like to have online access. The Court's Office of the Executive Secretary will make the forms available to VSB members through a Web-based interface between the VSB and the Virginia's Judicial System website. The forms will be accessible through the VSB's members-only portal at <https://member.vsb.org/vsbportal/>.

The forms will not be placed on the Court's public website.

### Supreme Court Rule Changes

At its business meeting on March 19, 2010, the Supreme Court of Virginia approved several proposed rule changes, effective immediately:

- Paragraph 10 of Part 6, § IV of the Rules of the Virginia Supreme Court, which governs the promulgation of Legal Ethics and Unauthorized Practice of Law (UPL) Opinions and Rules of Court, was amended to update terminology and eliminate redundancy in procedures for notice and public comment. The rule was reformatted into new subparagraphs to conform to the recent reformatting of Paragraph 13 of the Rules of the Virginia Supreme Court. Paragraph 10 was further amended to require that the bar seek comment from the Attorney General's Office analyzing any restraint on competition resulting from any proposed UPL opinions or Unauthorized Practice Rule amendments that declare activity conducted by a nonlawyer to be UPL. The amendment eliminated the requirement that an attorney general's opinion on restraint of trade be sought for all other UPL and ethics opinions and for all other rule amendments.
- Paragraph 13 of Part 6, § IV of the Rules of the Virginia Supreme Court was amended in various subparagraphs to clarify the term "charge of misconduct." Paragraph 13-10 was amended to delete language regarding mutual agreement. Paragraph 13-22

Director's Message continued on page 60



# Highlights of the Virginia State Bar Council Meeting

June 17, 2010

At its meeting on June 17, 2010, in Virginia Beach, the Virginia State Bar Council heard the following significant reports and took the following actions:

## Budget

The council approved a proposed budget of \$12.3 million for 2010–11, which represents an increase of \$230,000 over FY 2010, due to a 3 percent bonus for the bar staff, which has not received a raise since November 2007.

## Rule 1.15 Changes Approved

The council approved the Ethics Committee's proposed amendments to the Rules of Professional Conduct 1.15, the Rules of the Virginia Supreme Court Part 6, § IV, ¶ 20, and the trust account notification agreement. The proposal will be sent to the Court for its consideration. Details: [http://www.vsb.org/pro-guidelines/index.php/rule\\_changes/item/rule-115-of-rules-of-professional-conduct-and-paragraph-20-of-part-6-iv/](http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/rule-115-of-rules-of-professional-conduct-and-paragraph-20-of-part-6-iv/)

## ALPS

ALPS Executive Vice President Christopher L. Newbold reported that, over the last four years, ALPS has experienced a marked increase in the Virginia loss ratio and the claims frequency ratio. As a result, ALPS has adjusted an aspect of its underwriting formula specific to Virginia risk factors (the Virginia relativity factor) by reducing a credit it had ordinarily applied to Virginia law firms from 39 percent to 35 percent. This may result in increased premiums for some firms. Newbold reported that ALPS is financially strong with \$30,000,000 in policy holder surplus and maintains an A-minus (Excellent) A.M. Best rating.

## Diversity Conference

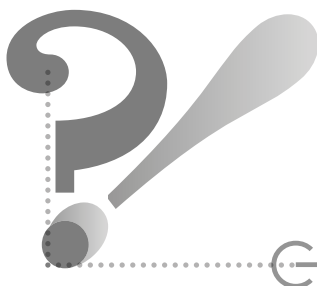
The new VSB Diversity Conference has its first board of governors, appointed by outgoing president Jon D. Huddleston. Officers are Manuel A. Capsalis of Arlington, chair; Michael HuYoung of Richmond, vice chair; Linda Y. Lambert

of Richmond, secretary; and Edward L. Weiner of Fairfax, treasurer. The conference must raise private funds to support its operations.

## Strategic Planning Session

The 2010 VSB Strategic Plan sets out five goals in support of the VSB mission statement and outlines strategies to implement those goals. The goals are protecting the public, regulating the profession, advancing access to legal services, improving the legal profession and judicial system, and operating the bar.

# Immigration law has a lot of gray areas.



## We put it in black and white.

An alarming number of immigrants in Virginia fall victim to immigration fraud. How can immigrants distinguish an authorized immigration representative from a fraudulent consultant? Or a non-lawyer holding out as a licensed practitioner?

With your help, and ours.

Inform the public with straightforward immigration fraud materials in four languages. Downloadable. Printable. Free to distribute. <http://bit.ly/immigrationfraud>

**Immigration Fraud in Black & White.**  
Empowering consumers with answers to immigration fraud questions.

Immigration Fraud in Black & White is a project of the VSB Unauthorized Practice of Law Committee.

# George Warren Shanks of Luray Is President-elect of Virginia State Bar

George Warren Shanks, who began a practice in Luray thirty-three years ago after working for U.S. Senator Harry F. Byrd Jr., is the Virginia State Bar's new president-elect. He will serve a year, then succeed Irving M. Blank of Richmond for the 2011-12 term as president.

Shanks took the office June 18 during the VSB's annual meeting in Virginia Beach.

A native of Wilmington, Delaware, Shanks earned an undergraduate degree from Indiana University and a law degree from Temple University. He began his legal career at a firm in Winchester before he joined Byrd's staff as a special assistant in 1972. Five years later, he moved to Luray, where he is now a partner in the firm Miller, Earle & Shanks PLLC.

Shanks served in the Virginia Army National Guard from 1969 until 1974, and in the U.S. Army Reserve from 1974 until 1975.

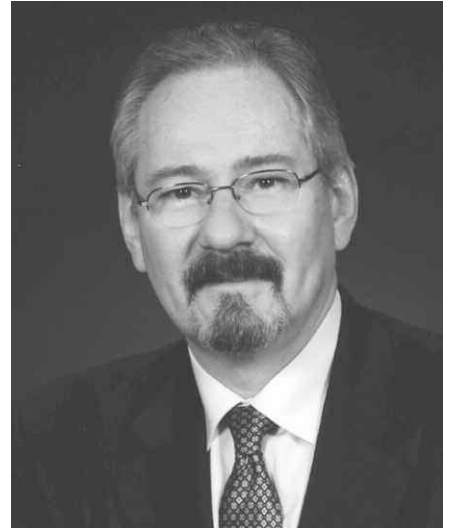
Shanks is the county attorney and commissioner of accounts for Page

County, and he is a commissioner in chancery in the Twenty-Sixth Judicial Circuit. In 1986, he created the award-winning Law-Related Education Project of the Page County Bar Association.

Through the program, which continues today, attorneys visit classrooms to talk to public school students about the law, and students are taken on a field trip to the U.S. Supreme Court.

He was named a Local Bar Leader of the Year by the VSB in 1990, and he has been an active volunteer at the agency for many years. His service has included professional discipline, substantive law, member support services, and administration of the agency.

He sat on the district committee that hears lawyer disciplinary cases in his region; is on the board of Lawyers Helping Lawyers, a program that assists lawyers impaired by substance abuse and mental illness; served on the board of governors of the General Practice Section that educates members on substantive law; was chair of the Conference



of Local Bar Associations, which provides support to practitioners throughout Virginia, and the Senior Lawyers Conference, which gives voice to lawyers aged 55 and older; and is a member of the bar's governing Council and Executive Committee.

He also is on the board of directors of Blue Ridge Legal Services.

Shanks and his wife, Janice D. Butler, have between them nine children and 11 grandchildren. They reside in Warren County.

## NOTICE: Check Your MCLE Hours Online Now

Your MCLE compliance deadline is October 31, 2010. Go to <https://member.vsb.org/vsbportal/> to review your MCLE record.

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

## NOTICE: New MCLE Regulations Effective for the Compliance Year Ending October 31, 2011

The new regulations include a limitation on prerecorded programs. Members must attend a minimum of four hours of live interactive programs. Live interactive programs include traditional live programs, live telephone courses, and live webcasts through which the attendees can interact with the speaker. See the new regulations and other MCLE compliance information at <http://www.vsb.org/site/members/mcle-courses/>.

## Virginia State Bar Harry L. Carrico Professionalism Course

August 19, 2010  
Roanoke

September 30, 2010  
Richmond

December 9, 2010  
Richmond

See more dates and registration information at <http://www.vsb.org>.

## VSB Honors Dedicated Attorneys

The Virginia State Bar recently recognized members with the following awards:

### FAMILY LAW SERVICE AWARD

**Christine E. “Christie” Marra,**  
Virginia Poverty  
Law Center,  
Richmond  
*Presented by the  
Family Law Section*



Marra is known as a tireless advocate for children, especially those in the foster care system. She developed an art project, Voices for Change, as a self-advocacy tool for teens in foster care. She has worked to make divorce more accessible to low-income persons and to legalize cooperative adoption, so youths can have permanent adoptive families and maintain ties to their birth families.

*Presented April 30 at the Advanced Family Law Seminar in Richmond*

### LIFETIME ACHIEVEMENT AWARD

**William C. Wood,**  
Batzli, Wood &  
Stiles PC,  
Richmond  
*Presented by the  
Family Law Section*

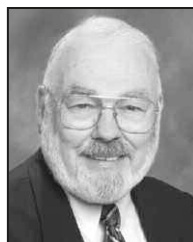


Wood has impressed the bar with his professionalism. Fellow lawyers in the Henrico County bar praise his honesty and integrity toward clients, colleagues, and the courts. “I am repeatedly told by other attorneys that it is ‘refreshing’ to have a case with Bill,” one of his partners wrote. In forty-four years of practice, he has volunteered for the VSB and helped develop uniform practices and procedures for domestic relations cases in metropolitan Richmond

*Presented April 30 at the Advanced Family Law Seminar in Richmond*

### LOCAL BAR LEADER OF THE YEAR AWARD

**Raymond B. Benzinger,**  
Law Office of  
Raymond  
Benzinger PC  
*Presented by the  
Conference of Local  
Bar Associations*



Benzinger has never turned the Arlington County Bar Association away when it asked for help. He has been its president, sponsored networking opportunities, served as a mentor, and spent two birthdays installing shingles on senior citizens’ roofs as part of a bar community service project. He has an active family law practice that includes serving as a motions conciliator and a neutral case evaluator to help divorcing parties divide property without court intervention.

*Presented June 18 at the VSB Annual Meeting*

### TRADITION OF EXCELLENCE AWARD

**V.R. “Shack” Shackelford III,**  
Shackelford,  
Thomas & Gregg  
PLC, Orange  
*Presented by the  
General Practice Section*



Shackelford has been a country lawyer with a general practice for thirty-six years. “His legal life is balanced by an active outdoor life,” Gail Starling Marshall wrote. He has always accepted court appointments. They “are not remunerative, nor are they glamorous or publicly heralded or even known about. But they are enormously important to the individual clients, as well as to the justice system.”

*Presented June 19 at the VSB Annual Meeting*

### R. EDWIN BURNETTE JR. YOUNG LAWYER OF THE YEAR

**Robert E. “Bob” Byrne Jr.,**  
MartinWren PC,  
Charlottesville  
*Presented by the  
Young Lawyers  
Conference*



The YLC credits Byrne with revitalizing the YLC Professional Development Conference — an annual program that offers practice management and substantive law training to young attorneys — in 2008. “Bob was conscientious (in) crafting a detailed program that would actually give young attorneys the practical skills to help them in their individual practices,” wrote Monica A. Walker, who cochaired the Professional Development Conference with Byrne last year.

*Presented June 18 at the VSB Annual Meeting*

These are in addition to three awards presented by the Special Committee on Access to Legal Services. (See pages 32 and 67.)

## VSBA Honors Local Bar Associations

### CLBA Awards

The following bar association projects received awards from the Conference of Local Bar Associations during the annual meeting. The awards recognize projects that serve the bench, the bar, and the people of Virginia. The CLBA makes information on winning projects available to other groups that want to sponsor similar programs.

### AWARDS OF MERIT

*For excellence in bar projects*

#### Charlottesville Albemarle Bar Association

- Senior Law Day: A Toolkit for Surviving Life's Later Challenges, a seminar

#### Fauquier County Bar Association

- Fauquier County Circuit Court Neutral Case Evaluation Program

#### Norfolk & Portsmouth Bar Association

- Foster Children Training Program

#### Roanoke Bar Association

- You and the Law public education program

#### Salem/Roanoke County Bar Association

- Certification Training for Court-Appointed Attorneys

#### CERTIFICATES OF ACHIEVEMENT

*For high achievement in bar projects*

#### Fredericksburg Area Bar Association

- **Wills for Heroes Program** to help first responders with estate planning

#### Metropolitan Richmond Women's Bar Association

- **Partnership with Boaz & Ruth**, a non-profit project that helps formerly incarcerated persons make the transition back into a community.

#### Norfolk & Portsmouth Bar Association

- **Ruffner Academy Mentoring Program**

for children in a Norfolk middle school.

- **Pro Bono Legal Outreach Clinic** with the Southeastern Tidewater Opportunities Project Inc.

#### Prince William County Bar Association Inc.

- **Arthur Meets the President** project to introduce the presidency and citizenship among elementary school students.
- **Wills for Heroes** to help first responders with estate planning

#### Washington Metropolitan Area Corporate Counsel Association

- **General Counsel Breakfast Club** for informal discussion experiences and best practices topics

#### Virginia Women Attorneys Association, Loudoun Chapter

- **Empty Bowls Project** to work with local potters to raise money for a local food bank

## Virginia State Bar Card Revised

Beginning in the 2010–11 fiscal year, the Virginia State Bar will provide permanent bar cards to members with the following statuses:

- active;
- active/Virginia corporate counsel (VCC);
- active/military legal assistance attorney (MLAA); and
- emeritus.

Associate members will be sent a permanent bar card after they pay dues for 2010–11.

Temporary cards with an expiration date of December 31, 2010, will be sent to active, active/VCC, active/MLAA, and emeritus members

when they pay their 2010–11 dues. In December, the bar will send them permanent cards with no expiration date.

VSB members in other categories — judicial, retired, and disabled — no longer will be issued bar cards.

A member who changes status to active, associate, or emeritus will be sent the appropriate bar card at no charge.

Replacement cards will be provided for a \$10 fee.

In the past, the VSB annually sent all dues-paying members bar cards that expired in a year.

Initiated at the request of incoming president Irving M. Blank, the change saves the bar the annual cost of

printing and mailing cards to its forty-five thousand members.

The bar is also going to make changes that will permit security personnel at courts and correctional facilities to verify that an attorney has not been suspended or revoked, through a VSB-maintained online database.

The new cards will not include photos, but the VSB hopes eventually to issue cards with photos provided by members.

Questions about bar cards should be addressed to the VSB Membership Department at [membership@vsb.org](mailto:membership@vsb.org) or (804) 775-0530.

## Mims Installed as a Justice of the Supreme Court

William C. Mims was formally installed as a justice of the Supreme Court of Virginia by Chief Justice Leroy R. Hassell Sr. on April 29, 2010. Mims is a former member of the Virginia House of Delegates and Virginia Senate who represented Loudoun and Fairfax counties. He served as Virginia attorney general last year, when Robert F. McDonnell resigned to run for governor. Mims was elected by the General Assembly to succeed Justice Barbara Milano Keenan (left), who now sits on the Fourth U.S. Circuit Court of Appeals.

Photo by Bob Brown, *Richmond Times-Dispatch*



## VSB Investigator Awarded for Work in Titus Cases

O. Michael Powell, an investigator for the Virginia State Bar Department of Professional Regulation, has received a public service award from U.S. Attorney Neil H. MacBride for his investigations of convicted swindlers and revoked lawyers Troy Aurelius Titus and Kristina Marie Cardwell, both of Virginia Beach.

Powell's investigation of bank reports that Titus had overdrafts in his attorney escrow and real estate trust accounts led to the revocation of his license to practice law ([http://www.vsb.org/disciplinary\\_orders/titus\\_consent\\_revocation93005.pdf](http://www.vsb.org/disciplinary_orders/titus_consent_revocation93005.pdf)) in 2005—four years before a federal jury found him guilty of thirty-three fraud-related charges. <http://norfolk.fbi.gov/dojpressrel/pressrel10/nf041610.htm>

About thirty victims were defrauded of more than \$7 million by Titus, through a Ponzi scheme involving real estate and investments. The victims included elderly and incapacitated persons who were left penniless, unable to recover their life savings even where civil verdicts were awarded.

Titus, now 44, was sentenced to thirty years in federal prison.

After Titus consented to revocation of his law license and agreed that he will not pursue reinstatement, Investigator Powell turned his attention to Cardwell, a law firm associate of Titus who participated in his mortgage fraud schemes.

Powell shared his findings with federal prosecutors. Cardwell, now 40, pled guilty to wire fraud in 2008. She was sentenced to sixty-six months in prison and ordered to pay restitution. [http://www.mortgagefraud.org/storage/cardwell\\_pr.pdf](http://www.mortgagefraud.org/storage/cardwell_pr.pdf) Her license to practice law was revoked with her consent in April 2009. [http://www.vsb.org/docs/Cardwell\\_4-14-09.pdf](http://www.vsb.org/docs/Cardwell_4-14-09.pdf)

Powell was one of eleven law enforcement agents and others who were recognized by MacBride for their contributions to the Titus and Cardwell cases. The criminal cases were prosecuted by Michael C. Moore—a former member of the VSB committee that hears disciplinary cases in Norfolk—and Melissa E. O'Boyle.

"Titus's multifaceted scheme and artifice to defraud was complex and sophisticated, which made it difficult to both investigate and prosecute," according to a statement from MacBride's office. "These agents played critical roles in prosecuting ... Titus."

Powell joined the VSB staff in 2002 after a twenty-year career with the Defense Criminal Investigative Service, for which he investigated health-care and contract fraud, bribery, and theft. In that job he worked collaboratively with the Department of Justice and agency attorneys.

He drew on those skills for the Titus and Cardwell investigations, which required tracing monetary investments by each victim through multiple investment and real estate transactions. "Multiply that by the number of victims, and it was just a massive undertaking," Powell said.

The VSB routinely cooperates with law enforcement agencies in furtherance of the bar's public protection mission. "The Virginia State Bar is very pleased at the recognition of the bar's contribution to this criminal prosecution," said VSB Counsel Edward L. Davis, who oversees the Professional Regulation Department.

Powell's award "has shown that the VSB investigators have the skill level and reliability to prepare a very complicated prosecution, such as those of Titus and Cardwell," Davis said.

The VSB Clients' Protection Fund has paid out \$330,786—the maximum allowed under the rules of the fund—to victims of Titus. No claims have been paid to Cardwell's victims, and none are pending.



## Local Bar Elections

### **The Alexandria Bar Association**

Barbara Sattler Anderson, President  
Heather Nicole Jenquine, President-elect  
Sean Peter Schmergel, Secretary  
Kathleen Maureen Uston, Treasurer  
Stephen Christopher Swift, Director  
Sarah Elizabeth McElveen, Director  
Nicholas John Gehrig, Director  
Phoenix Shannon Michele Ayotte Harris,  
Director

### **Arlington County Bar Association**

Brent Eugene Baxter, President  
Jay Evan Burkholder, President-elect  
Lisa Joy Harwood, Secretary  
Timothy Raymond Hughes, Treasurer

### **Fairfax Bar Association**

David John Gogal, President  
William Patrick Daly Jr., President-elect  
Jay Barry Myerson, Vice President  
David Lyndon Marks, Secretary  
Edward Laurence Weiner, Treasurer

### **Harrisonburg-Rockingham Bar Association**

Laura Ann Thornton, President  
Wynn Andrew Harding, President-elect  
Lindsay Cole Brubaker, Secretary  
Grant David Penrod, Treasurer

### **Lynchburg Bar Association**

Sharon Kathleen Eimer, President  
Susan Lynn Wright Hartman,  
President-elect  
Burton Leigh Drewry Jr., Secretary-  
Treasurer

### **Metro Richmond Family Law Bar Association**

Robert Edward Henley III, President  
Vanessa Laverne Jones, Vice President  
Christopher Hunt Macturk, Secretary  
Carrie Willis Witter, Treasurer

### **Metropolitan Richmond Women's Bar Association**

Jayne Ann Pemberton, President  
Alexandra Silva Fannon, President-elect  
Sakina Karima Paige, Vice President  
Colleen Marea Quinn, Secretary  
Sharon Choi Stuart, Treasurer

### **Norfolk & Portsmouth Bar Association**

Jeffrey Lance Stredler, President  
Nathaniel Beaman IV, President-elect  
Virginia Lynn Van Valkenburg, Secretary  
Gary Alvin Bryant, Treasurer  
Kevin Patrick Greene, YLS Chair

### **Northern Virginia Chapter, VWAA**

Kyung Nam Dickerson, President

### **Old Dominion Bar Association**

Robert Allen Williams, President  
Vinceretta Taylor Chiles, President-elect  
Leonard Lee Brown Jr., Vice President  
Doris Elcenia Henderson Causey,  
Secretary  
Tabrica Cook Rentz, Treasurer

### **Powhatan Bar Association**

Anastasia Kerry Jones, President  
Tara Dowdy Hatcher, Vice President  
Richard Kenneth Cox, Secretary  
Philip Leroy McDaniel, Treasurer

### **Prince William Chapter, VWAA**

Jane Oliver Smith, President

### **Richmond Bar (The Bar Association of the City of Richmond)**

Thamer Eugene Temple III, President  
Tyler Perry Brown, President-elect  
Craig Thomas Merritt, Vice President  
The Honorable Mary Hannah Lauck,  
Honorary Vice President  
Anne Gaines Scher, Secretary-Treasurer

### **Roanoke Bar Association**

Francis Hewitt Casola, President  
Lori Dawn Thompson, President-elect  
Thomas Harlan Miller, Secretary-  
Treasurer

### **Salem-Roanoke County Bar Association**

Compton Moncure Biddle, President  
Matthew Jason Pollard, 1st Vice  
President  
Patricia Ann McGee Green, 2nd Vice  
President  
Lora Ann Keller, Secretary-Treasurer  
Holly Stemler Peters, Judge Advocate

### **Virginia Trial Lawyers Association**

Matthew B. Murray, President  
Thomas Joseph Curcio, Vice President  
John Eric Lichtenstein, Vice President  
Edward Lefebvre Allen, Vice President  
Barbara S. Williams, Vice President  
Lisa Palmer O'Donnell, Vice President  
Stephanie Elaine Grana, Treasurer

### **Virginia Women Attorneys Association**

Christine Helene Mouglin-Boal,  
President  
Catherine Mary Reese, President-elect  
Lauren Ebersole Hutcheson, Secretary  
Cynthia Kaplan Revesman, Treasurer

### **Williamsburg Bar Association**

Daniel Read Quarles, President  
William Hunter Old, Vice President  
Nancy Kahn Bolash, Secretary  
Gordon Carmalt Klugh, Treasurer

### **Winchester-Frederick County Bar Association**

Beth McNally Coyne, President  
William Andonia Truban Jr.,  
President-elect  
William August Bassler, Secretary  
Barbara S. Williams, Treasurer

### **York County-Poquoson Bar Association**

Melanie Barbour Economou, President  
Karla Jeanette Keener, President-elect  
Patricia Ann Dart, Secretary  
Barbara Buchanan Cooke, Treasurer

## In Memoriam

**F. Mather Archer**  
Virginia Beach  
February 1930–May 2010

**James Emmett Anderson**  
Richmond  
October 1950–April 2010

**Kathleen Carson Barger**  
Alexandria  
April 1948–October 2009

**Kevin Jerome Barry**  
Chantilly  
September 1942–April 2009

**Douglas Gregory Campbell**  
Tazewell  
June 1947–May 2010

**Nathaniel Elliott Clement II**  
Chapel Hill, North Carolina  
July 1945–March 2010

**Robert Wayne Dawson**  
Richmond  
September 1946–April 2010

**James Lyle DeMarce**  
Arlington  
October 1939–April 2010

**Susan Marker Dern**  
Christiansburg  
January 1948–April 2010

**Lora Antoinette Dunlap**  
Orlando, Florida  
October 1955–January 2010

**Richard Elliott Henning Jr.**  
Reston  
May 1950–March 2010

**Robert E. Jackson**  
Seattle, Washington  
May 1919–June 2009

**Robert E. Jordan III**  
Washington, D.C.  
June 1936–May 2010

**Edward Emerson Lane**  
Richmond  
January 1924–August 2009

**Marvin Monroe Long**  
Falls Church  
June 1918–February 2010

**Samuel Arold Mohr**  
Bronxville, New York  
October 1958–January 2010

**R. Lamar Moore**  
Moultrie, Georgia  
March 1918–April 2010

**John Frederick Moring**  
White Stone  
October 1935–May 2009

**Theodore L. Plunkett Jr.**  
Roanoke  
August 1923–March 2010

**Beverley Ann Ramsey**  
Chantilly  
October 1947–December 2009

**William Elmore Spruill**  
Richmond  
August 1966–May 2010

**Richard C. Steffey**  
Washington, D.C.  
May 1920–October 2009

**Frances Sears Taylor**  
Williamsburg  
July 1948–May 2010

**John Paul Trygar**  
Sinking Spring, Pennsylvania  
October 1934–January 2010

**C.W. Wilkinson**  
Virginia Beach  
September 1915–January 2010

**Hon. William R. Yates**  
Richmond  
January 1921–April 2010

### VLF Elects Officers, Board

At its annual meeting on June 18, 2010, the Virginia Law Foundation Board of Directors elected the following officers: David P. Bobzien, president; Frank A. Thomas III, president-elect; Manual A. Capsalis, vice president; Guy K. Tower, secretary; Karen A. Gould, treasurer; and Sharon K. Tatum, assistant treasurer.

Elected to three-year terms on the board were incumbent members James V. Meath and J. Page Williams and new members F. Anderson Morse, John M. Oakey Jr., and John D. Epps.

## Law in Society Scholarship Competition

Winners of the Virginia State Bar Law in Society Scholarship Competition, sponsored for high school students by the VSB Litigation Section were recognized at the VSB Annual Meeting. Shown at an awards presentation were U.S. Magistrate Judge B. Waugh Crigler, Virginia Supreme Court Justice S. Bernard Goodwyn, second-place winner Hailey Sadler of Gloucester, first-place winner Daniel S. Reuwer of Chesapeake, and Circuit Judge Wilford Taylor Jr.



## Painting Honors Howard Martin



Crenshaw Ware & Martin LLP of Norfolk has donated a painting to the Virginia State Bar President's Collection in honor of the firm's managing partner, Howard W. Martin Jr. Martin (right) served as VSB president for the 2007–08 bar year.

The work, *Canada Goose Decoy*, was painted by Paul E. Fisher, a neighbor of Martin's. The President's Collection also includes a painting donated by the family of another Crenshaw Ware & Martin partner, the late Edward R. Baird, VSB president in 1959–60. That painting, *Snow Whisper*, is a winter scene of Canada geese flying over a barn on the Eastern Shore.

Artist Fisher is a former Suffolk County planning director and retired executive director of the Richmond Regional Planning Commission. The medium is acrylic on watercolor board.

On the left in the photo is outgoing VSB President Jon D. Huddleston. The presentation took place last month at the VSB Annual Meeting.



## Nominations Sought for VSB Disciplinary Board, MCLE Board, and Council Members at Large

President Irving M. Blank has appointed a nominating committee to consider nominees for board vacancies in 2011 to be filled by the Supreme Court. The nominating committee consists of Jon D. Huddleston chair; Brian L. Buniva; Mark B. Holland; Ray W. King; Darrel T. Mason, Jean K. Niebauer; and Edna Ruth Vincent.

Vacancies beginning on July 1, 2011, are listed below. Appointments are for the terms specified. The nominating committee's recommendations will be acted on by the Virginia State Bar Council in October 2010, and the names of the nominees will then be forwarded to the Supreme Court of Virginia for consideration.

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

**Disciplinary Board:** 5 lawyer vacancies and 2 lay member vacancies (of which 2 lawyer members are eligible for reappointment to a second 3-year term, 1 lawyer member is eligible for reappointment to a full 3-year term, and 2 lay members are eligible for reappointment to a second 3-year term). District committee service is preferred. May serve 2 consecutive 3-year terms.

**Mandatory Continuing Legal Education Board:** 5 lawyer vacancies (of which 3 current members are eligible for reappointment to a second term). May serve 2 consecutive 3-year terms.

Nominations, along with a brief résumé, should be sent by September 7, 2010, to  
Jon D. Huddleston, Chair, VSB Nominating Committee, Virginia State Bar,  
707 E. Main St., Suite 1500, Richmond, VA 23219, or e-mailed to  
Valerie Breeden at [breeden@vsb.org](mailto:breeden@vsb.org).

Mark Your Calendar

### Bar Leaders Institute

Friday, October 22, 2010

Roanoke Higher Education Center, Roanoke, Virginia

More information will be posted when available on the Conference of Local Bar Associations page at  
<http://www.vsb.org/site/conferences/clba/>.

## Virginia Lawyer Referral Service brings clients to you.



For more information see <http://www.vsb.org/site/public/lawyer-referral-service/>.

## Free and Low-Cost Pro Bono Training

Visit the Pro Bono page on the VSB website for free and low-cost pro bono trainings and volunteer opportunities:

[http://www.vsb.org/site/pro\\_bono/resources-for-attorneys](http://www.vsb.org/site/pro_bono/resources-for-attorneys)

## Virginia Law Foundation Accepting Nominations for Fellows Class of 2011

Nominations for the 2011 class of Virginia Law Foundation fellows will be accepted through September 13, 2010. The 2011 class will be inducted at a dinner meeting in Williamsburg on January 20, 2011, during the Virginia Bar Association's annual meeting.

Candidates must (1) be an active or associate member of the Virginia State Bar for at least ten years; (2) be a resident of Virginia; (3) be a person of integrity and character; (4) have main-

tained and upheld the highest standards of the profession; (5) be outstanding in the community; and (6) be distinguished in the practice of law. Sitting full-time judges and constitutional office holders are not eligible during their tenures, but retired and senior status judges are eligible.

Nominations must be received by September 13, 2010, and should be submitted on a nomination form provided by the Virginia Law Foundation. To

obtain a nomination form, please contact the Virginia Law Foundation at 600 East Main Street, Suite 2040, Richmond, VA 23219 (804) 648-0112, or at [vlf.info@virginialawfoundation.org](mailto:vlf.info@virginialawfoundation.org). To obtain a form online, go to [www.virginialawfoundation.org/fellownoms.htm](http://www.virginialawfoundation.org/fellownoms.htm). For a complete listing of current fellows, visit [www.virginialawfoundation.org/](http://www.virginialawfoundation.org/).

### SAVE THE DATE

## PROFESSIONAL DEVELOPMENT CONFERENCE

October 1, 2010,  
10:00 a.m. – 5:00 p.m.,  
at Hunton & Williams LLP, Richmond

### WHAT EVERY ATTORNEY NEEDS TO KNOW: SIX CORE TIPS AND TRAITS OF SUCCESSFUL YOUNG LAWYERS

6.0 CLE Credit Hours (pending)  
(including 1.0 Ethics Credits)

This daylong seminar will include discussions on growing your practice, practice essentials for both litigators and transactional attorneys, and avoiding the pitfalls that face every young attorney.

Sponsored by the VSB Young Lawyers Conference, the Professional Development Conference is open to attorneys of all experience levels.

More information to come at [www.vayounglawyers.com](http://www.vayounglawyers.com)

# Benchmarks

*The following new judges have been elected by the 2010 Virginia General Assembly:*

## SUPREME COURT:

**William C. Mims** of Richmond succeeds **Barbara Milano Keenan**, who was appointed to the Fourth U.S. Circuit Court of Appeals.

## CIRCUIT COURT:

19th Circuit (Fairfax): **Lorraine Nordlund** succeeds **Gaylord L. Finch Jr.**, who retired in December 2009; **Brett A. Kassabian** succeeds **Michael P. McWeeny**, who retired in December 2009; and **Michael F. Devine** succeeds **Stanley P. Klein**, who retired in March 2010.

*The following sitting justice and judges were elected to new terms:*

## SUPREME COURT

**Cynthia D. Kinser** of Pennington Gap

## COURT OF APPEALS

**Walter S. Felton Jr.** of Williamsburg

## CIRCUIT COURT

2nd Circuit: **Stephen C. Mahan** of Virginia Beach

3rd Circuit: **Kenneth R. Melvin** of Portsmouth

4th Circuit: **Charles E. Poston** of Norfolk

10th Circuit: **Joel C. Cunningham** of Halifax

12th Circuit: **Harold W. Burgess Jr.** and **Frederick G. Rockwell III**, both of Chesterfield

13th Circuit: **Beverly W. Snukals** and **Walter W. Stout III**, both of Richmond

22nd Circuit: **William N. Alexander II** of Rocky Mount

23rd Circuit: **Charles N. Dorsey** and **William D. Broadhurst**, both of Roanoke.

27th Circuit: **Colin R. Gibb** of Pulaski

29th Circuit: **Michael Lee Moore** of Lebanon and **Henry A. Vanover** of Clintwood

## GENERAL DISTRICT

2nd District: **Teresa N. McCrimmon** and **Gene A. Woolard**, both of Virginia Beach

3rd District: **Morton V. Whitlow** and **Douglas B. Ottinger**, both of Portsmouth

4th District: **Joseph A. Migliozzi** and **James S. Mathews**, both of Norfolk

9th District: **Jeffrey W. Shaw** of Saluda

10th District: **J. William Watson Jr.** of Halifax and **Charles H. Warren** of Boydton

11th District: **Lucretia A. Carrico** of Petersburg

13th District: **Joi Jetter Taylor** and **David Eugene Cheek Sr.**, both of Richmond

16th District: **Edward K. Carpenter** of Goochland

18th District: **Becky J. Moore** of Alexandria

19th District: **Thomas E. Gallahue** and **Mitchell I. Mutnick**, both of Fairfax

20th District: **Julia Taylor Cannon** of Leesburg

22nd District: **M. Lee Stilwell Jr.** of Danville

24th District: **Harold A. Black** of Bedford

25th District: **Gordon F. Saunders** of Lexington

27th District: **Edward M. Turner III** of Hillsville and **Randal J. Duncan** of Christiansburg

28th District: **Joseph S. Tate** of Marion

31st District: **Steven S. Smith** of Manassas

## JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT

2nd District: **Deborah V. Bryan** of Virginia Beach

3rd District: **William S. Moore Jr.** of Portsmouth

4th District: **Joseph P. Massey** of Norfolk

5th District: **Alfreda Talton-Harris** of Suffolk

7th District: **Ronald Everett Bensten** of Newport News

9th District: **George C. Fairbanks IV** of Williamsburg

10th District: **Marvin H. Dunkum Jr.** of Buckingham

12th District: **D. Gregory Carr** of Chesterfield

14th District: **Stuart L. Williams Jr.** of Henrico

17th District: **George D. Varoutsos** of Arlington

19th District: **Teena D. Grodner** of Fairfax

22nd District: **Dale M. Wiley** of Danville

24th District: **Robert Louis Harrison Jr.** of Bedford

26th District: **Elizabeth Kellas Burton** of Winchester

31st District: **D. Scott Bailey** of Manassas

*Because of budget constraints, the General Assembly put a freeze on filling circuit, general district, and J&DR judicial vacancies through 2012. The following vacancies remain unfilled:*

## CIRCUIT COURT

2nd Circuit: Retirement of **A. Joseph Canada Jr.** in December 2009

5th Circuit: Retirement of **Westbrook J. Parker** in June 2010

9th Circuit: Death of **N. Prentis Smiley Jr.** in December 2008

11th Circuit: Retirement of **Thomas V. Warren** in January 31, 2010

13th Circuit: Retirement of **Theodore J. Markow** in December 2009

15th Circuit: Retirement of **Horace A. Revercomb III** in February 2010

24th Circuit: Retirement of **J. Leyburn Mosby Jr.** in January 2010

27th Circuit: Retirement of **Ray W. Grubbs** in February 2010

## GENERAL DISTRICT COURT

2nd District: Retirement of **Virginia L. Cochran** in November 2009

6th District: Retirement of **Kenneth W. Nye** in January 2010

13th District: Retirement of **Thomas O. Jones** in December 2009

19th District: Elevation to circuit court of **Lorraine Nordlund**

20th District: Retirement of **Charles B. Foley** in February 2010

25th District: Retirement of **A. Lee McGratty** in December 2008

27th District: Retirement of **Edward M. Turner III** in December 2010

## J&DR COURT

11th District: Retirement of **James E. Hume** in December 2009

14th District: Retirement of **Sharon B. Will** in April 2010

15th District: Retirement of **Larry E. Gilman** in March 2010

27th District: Retirement of **M. Keith Blankenship** in December 2008, and pro tem appointee **Harriet D. Dorsey** declined to stand for election to a full term

# How to Avoid Serious Error under the New Appellate Rules

by Elwood Earl Sanders Jr.

The Supreme Court of Virginia has completely updated its rules of appellate procedure — Part 5, The Supreme Court, and Part 5A, the Court of Appeals — effective July 1, 2010. The new rules reduce the chance of a fatal appellate error. However, there are areas in the new rules that can cause fatal problems for litigants bringing appeals in Virginia.

Rule 5:1A is a serious warning:

Except as provided in Rule 5:17(c) regarding assignments of error, prior to the dismissal of an appeal for any defect in the filings related to formatting, curable failure to comply with other requirements, or the failure to meet non-mandatory filing deadlines, this Court may issue a show cause order to counsel..., prescribing a time in which to cure such defect or to otherwise show cause why the appeal should not be dismissed or other penalty imposed.

I do not find that language comforting; rather it should cause all litigants to have a zero tolerance for rules violations.

## Assignments of Error

Under the previous rules, not having specific assignments of error in your petition resulted in dismissal of the appeal. This consequence still exists and has now been extended to the Court of Appeals by virtue of the change that abolished questions presented in both courts.<sup>1</sup>

The new rules also require the assignments of error to have a “Separate Heading”; failure to add the heading is grounds for dismissal of the appeal.<sup>2</sup> Finally, assignments of error in both courts must now have a reference to where the alleged error is preserved in the trial court or commission or an argument as to why the appropriate ends of justice exception applies.<sup>3</sup>

Any rule relating to assignments-of-error rules in both courts should be treated as jurisdictional requirements. Both courts now also require a “standard of review” as another separate heading

within the argument; I would also view that section to be mandatory.<sup>4</sup>

## The Mailing Rule

Submitting a pleading by certified mail has long been the requirement as an exception to the rule that a pleading must be physically filed in the court.<sup>5</sup> The new rules allow the use of a “third party commercial carrier” or even priority or express mail in addition to certified mail.<sup>6</sup> However, the “official receipt” is still required.<sup>7</sup> If you do not have the receipt or cannot get it, you must not use this means of mailing. I would be very careful using the new mailing options until the appellate courts clearly hold what is an official receipt.<sup>8</sup>

## The Transcript

In the Supreme Court, a litigant still has sixty days to file the transcript in the Clerk’s Office, however, there are two potential exceptions stated in new Rule 5:11(d):

If material is “omitted from or misstated in the transcript,” or if the “transcript of any portion thereof is untimely filed, by omission, clerical error, or accident” the litigant has the right within seventy days of the final order to supplement, correct, or modify the transcript.<sup>9</sup> There is no leave of court required — just a second notice given to opposing counsel.<sup>10</sup>

After the seventy days, there is an additional requirement that two justices must approve the tardy filing. The standards are the same.

In the Court of Appeals, it is still sixty days to file a transcript from the date of the final order, but now ninety days to ask for an extension of time “for good cause shown.”<sup>11</sup> This allows a filing after the fact for transcripts.<sup>12</sup>

These new rules on transcripts have great potential to remedy catastrophic malpractice, but should not be relied upon for day-to-day appellate practice.

## Reread the Rules

Frequent rereading of the new rules is strongly suggested.<sup>13</sup> This article is not

meant to be an exhaustive list of all issues arising under the new rules. It is still my fervent hope that all appeals in Virginia be decided on the merits.

*Author’s note: At press time, the Virginia Court of Appeals hinted that even failure to comply with the rules governing tables of contents or authorities might result in dismissal. See Smith v. Commonwealth, Record No. 0422-09-1, decided June 15, 2010 (\_\_\_ Va. App. \_\_\_, \_\_\_ S.E.2d \_\_\_).*

Endnotes:

- 1 New Rule 5:17(c)(1)(iii) and new Rule 5A:12(c)(1)(ii) (which are identical in pertinent part) cover specificity in assignments of error. The assignments of error are to be done “without extraneous argument.” New Rule 5:17(c)(1) and new Rule 5A:12(c)(1)
- 2 New Rule 5:17(c)(1)(i). I would do the separate heading in the Court of Appeals as well. See last sentence in New Rule 5A:12(c)(1)(ii).
- 3 New Rule 5:17(c)(1) and new Rule 5A:12(c)(1)
- 4 New Rule 5:17(c)(6); Rule 5A:12(c)(5)
- 5 See e.g., *Mears v. Mears*, 206 Va. 444, 143 S.E.2d 889 (1965)
- 6 Rule 5:5(c), Rule 5A:3(d)
- 7 *Id.*
- 8 *Commonwealth v. Green*, No. 1845-03-2 (Va. Ct. App. Unpub. 2004) (Home-grown receipts are not acceptable.)
- 9 New Rule 5:11(d)
- 10 *Id.* The standard is “good cause sufficient to excuse the deficiency.”
- 11 See New Rule 5A:8(a)
- 12 Normally motions for extension of time must be filed on or before the deadline. See *Jordan v. Price*, 3 Va. App. 672, 353 S.E.2d 168 (1989) That is still true under the new rules with this exception.
- 13 The most recent posting of the rules as of this writing, with early typographical errors corrected, is on Virginia’s Judicial System website, maintained by the Supreme Court’s Office of the Executive Secretary, at [http://www.courts.state.va.us/courts/scv/amendments/2010\\_0513\\_part\\_five\\_and\\_part\\_five\\_a.pdf](http://www.courts.state.va.us/courts/scv/amendments/2010_0513_part_five_and_part_five_a.pdf). As typographical errors are discovered, the OES updates the posting. Check <http://www.courts.state.va.us/courts/scv/amend.html> for recent updates.

## Three Honored by VSB Access Committee

The Virginia State Bar Special Committee on Legal Access has recognized two Virginia attorneys and a law student for their contributions to low-income or underserved populations. The awards were presented June 18 at the Virginia State Bar Annual Meeting.

The awards and their honorees are:

### Lewis F. Powell Jr. Pro Bono Award

*Recognizes dedication to development and delivery of pro bono services that benefit poor and underserved persons in Virginia.*

The award was presented to William B. Reichhardt, a Fairfax County lawyer whose practice and volunteer work focus on special education law.

Reichhardt was nominated by Angela A. Ciolfi of JustChildren, a Legal Aid Justice Center program. “Bill’s contributions have been crucial to our efforts to expand the pool of qualified advocates for children in Virginia,” she wrote. “In addition to the substantial pro bono hours he has logged providing advice and consultation to low-income clients on a dizzying array of legal problems, he has dedicated innumerable hours of his time — sometimes on a moment’s notice — to mentor legal aid attorneys in the complex and dynamic field of special education law.”

Reichhardt hosts a blog, *Holding the Torch* — <http://holdingthetorch.wbri.com/holdingthetorch/> — designed to help parents advocate for their children without lawyers, and to educate about policy issues that affect special education, children’s mental health services, and treatment of children in correctional facilities.

He wrote four chapters in the *Juvenile Law and Practice Manual* used by lawyers and judges across Virginia.

Reichhardt is the principal of the Law Offices of William B. Reichhardt & Associates, where he encourages his colleagues to take pro bono representations. With a master of education degree in counseling from the University of

Virginia, he was a probation officer and director of a group home and a special education school for emotionally disturbed adolescent boys before he earned his law degree from George Mason University in 1983.

### Virginia Legal Aid Award

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

The award was presented to Kathryn L. “Kathy” Pryor, who has a statewide reputation for advocacy in elder law and Social Security disability issues.

Pryor had a master’s degree in gerontology when she joined the Central Virginia Legal Aid staff as a paralegal. After she graduated from the University of Virginia School of Law in 1989, she worked for a private law firm and volunteered at CVLAS. She became a full-time staff attorney at CVLAS in 1992. In 2002, she argued a case before the U.S. Supreme Court on behalf of a client who was denied Social Security disability benefits because of his attempt to return to work.

Pryor now works for the Virginia Poverty Law Center, where her duties encompass elder law. She meets regularly with an elder law task force that includes legal aid lawyers and long-term care ombudsmen. She provides technical assistance on elder law and long-term care issues. And she works on policy involving long-term care, legal services delivery to the elderly, and other elder law concerns.

She tracks legislation and talks to Virginia legislators about bills that affect assisted living and nursing home residents, civil monetary penalties, adult protective services, supportive services, health care decision making, and guardianship.

“Kathy is considered the state expert on nursing home discharge matters,”

according to the nomination letter from her colleagues at the Virginia Poverty Law Center.

“I cannot underestimate the value of Kathy’s effort to keep a large network of advocates informed,” wrote Joy Duke, executive director of the Virginia Guardianship Association. Terri Lynch, director of the Arlington Area Agency on Aging, wrote, “Thousands of older adults who have never heard of Kathy Pryor have better lives and protected rights because of her.”

Pryor holds a bachelor’s degree from the College of William and Mary and a master’s degree from Virginia Commonwealth University.

### Oliver White Hill Law Student Pro Bono Award

*Recognizes a law student’s commitment to uncompensated or minimally compensated pro bono work and other public service.*

The award was presented to Robert J. Poggenklass, who graduated in May from the College of William and Mary School of Law. Poggenklass has provided pro bono service on many fronts, according to the nomination letter from Robert E. Kaplan, associate dean and director of externships for the law school. Poggenklass eventually hopes to have a civil rights practice.



Reichhardt



Pryor



Poggenklass

He assisted victims of hurricanes Katrina and Rita, worked for four public defender offices in exchange for a stipend or academic credit, advocated on behalf of disenfranchised felons who have served their sentences, founded and led a W&M Law School chapter of the Student Hurricane Network, and helped revive the law school's chapter of the American Civil Liberties Union.

His public defender work — which took place in Manassas, Norfolk, Richmond, and San Francisco — included death penalty cases and indigent defendants in federal and state courts.

When he came to Virginia for law school, he already had volunteer experience. He received the Iowa Governor's Volunteer Award in 2007 for serving on the board of directors of an organization that focused on urban revitalization.

"My parents did a really good job of instilling in me a sense that the world is bigger than just me and that I need to spend my time helping people. Otherwise I'm not living a productive life," Poggenklass was quoted as saying in a W&M publication. He added that pro bono work in courtrooms and jails is "more important than a lot of the stuff I do in class."

Poggenklass is a native of Guttenberg, Iowa. In addition to his law degree, he holds a bachelor's degree in philosophy from Cornell College. He has an upcoming fellowship planned with the Virginia Public Defender Office in Alexandria.

## Indigent Defense Seminar Focuses on Evidence, Due Process

At the sixth annual Indigent Criminal Defense seminar in April, speakers talked about how to counter evidence uncovered by dogs, processed by laboratories, and identified through DNA testing.

The seminar, offered without charge to Virginia lawyers who take court-appointed cases, featured six speakers from outside Virginia who have faced challenging issues in criminal defense. They include:

Photo 1 — Stephen P. Hurley (left), with Virginia Court of Appeals Judge Walter S. Felton Jr., vice chair of the program committee. Hurley talked about how to detect when a dog has been used inappropriately to uncover evidence. He practices with Hurley, Burish & Stanton SC in Madison, Wisconsin.

Photo 2 — Jeffrey L. Fisher (right), director of the Supreme Court Litigation Clinic at Stanford Law School in California, described due process challenges to discretionary sentences. Here, he talks with Steven D. Benjamin, program committee chair.

Photo 3 — Professor John M. Burkoff (left) addressed criminal defense ethics. W. Edward Riley IV, a member of the program committee is on the right. Burkhoff teaches at the University of Pittsburgh School of Law.

The Indigent Criminal Defense seminar is designed for experienced practitioners. It is sponsored by the Chief Justice and Justices of the Supreme Court of Virginia and the Virginia State Bar. The seminar took place April 9, with the live program in Richmond and simultaneous webcasts in Wytheville and Weyers Cave.



## Critical Issues Summit

### Improving the Education of Lawyers In and Out of School

by Mary Z. Natkin

We continue to learn and develop over the lifetime of our careers as lawyers. This lifetime of learning was at the center of a national Critical Issues Summit held last fall. The summit—Equipping Our Lawyers: Law School Education, Continuing Legal Education, and Legal Practice in the Twenty-first Century<sup>1</sup>—brought together judges, lawyers, professors, deans, CLE providers, in-house development professionals, and state bar officials to explore how best to develop a road map for the profession as a whole to improve lawyer education and development.<sup>2</sup>

In sixteen specific recommendations, the report urges the profession to identify core lawyering competencies and to develop effective strategies for learning and developing these throughout a lawyer's education and career.<sup>3</sup> Many of the recommendations focus on engaging lawyers through experiential learning techniques, given how much of our professional lives are spent in self-directed learning situations rather than in a classroom. Put simply, adults learn best by doing and through reflection. Skills such as problem solving or managing a client's expectations are best learned in context and not separately from substantive law and procedure. One method for this contextual training is a traditional course in which substantive law is learned and evaluated through lawyering activities, rather than through traditional examinations. Another training method is in-house professional development and CLE programs that engage a range of skills and competencies in progressively demanding tasks, with feedback and opportunity for improvement. The report also keys in on the fundamental values of service to the profession and the duty to promote justice.<sup>4</sup>

There are many interesting models to explore that assist in the transition from law student to practicing lawyer, such as the Canadian articling process<sup>5</sup> and the State Bar of Georgia Transition into Law Practice Program<sup>6</sup>. Several large law firms also have responded to the need for more substantial training of new associates. Dinker Biddle; Orrick, Harrington & Sutcliffe; DLA Piper; Howrey; and other firms are moving away from traditional advancement models and toward merit-based systems that involve significant training and evaluation of associates.<sup>7</sup>

We have a wealth of programs in Virginia that directly respond to the call to service as well as to the call for more rigorous and intentional development of core competencies. Law firms, not-for-profits, and governmental entities currently collaborate with law schools to address unmet need in the state through robust clinical and internship programs, as well as through service opportunities. At the Washington and Lee University School of Law, where I teach, our third-year students enroll in an in-house clinic, an externship (which is an internship for academic credit governed by Department of Labor regulations—see sidebar, page 35) or a transnational program. These programs do not substitute skills training for substantive learning, but instead teach the substantive law and procedure through actual legal work. Additionally, beginning last fall, each third-year student at W&L must complete a minimum of sixty hours of law-related service. A number of innovative projects arose from the service requirement. For example, law students, in connection with Blue Ridge Legal Services and the Office of the Executive Secretary for the Supreme Court of Virginia,

developed an empirical study to determine which parties are unrepresented in Virginia's general district courts. The survey instrument has been approved and will now be deployed to collect data. This type of innovative service improves access to justice while simultaneously developing important analytical skills in these soon-to-be-practicing lawyers.

The Virginia State Bar's Section on the Education of Lawyers engages these issues deeply. On June 18, during the VSB Annual Meeting at Virginia Beach, lawyers, judges, and educators discussed innovations and approaches to improving lawyer education and development in Virginia.

#### Endnotes:

- 1 The final report, released April 28, 2010, is at [www.equippingourlawyers.org](http://www.equippingourlawyers.org). The summit was sponsored in Scottsdale, Arizona, by American Law Institute-American Bar Association Continuing Professional Education and the Association of Continuing Legal Education.
- 2 The preamble to the summit report reads, in part: "All members of the legal community share responsibilities to initiate and maintain the continuum of educational resources necessary to assure that lawyers provide competent legal services throughout their careers, maintain a legal system that provides access to justice for all, and remain sensitive to the diverse client bases they must serve. These recommendations are offered as a blueprint for strengthening that continuum of educational resources and those values. . . ."
- 3 See previous publications on core competencies: *Legal Education and Professional Development—An Educational Continuum: The Report of the Task Force on Law Schools and the*

*Profession: Narrowing the Gap*, <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>; *Educating Lawyers: Preparation for the Practice of Law*, 2007, <http://www.carnegiefoundation.org/publications/educating-lawyers-preparation-profession-law>; *Statement of Best Practices for Legal Education*, 2007, [http://www.cleaweb.org/best\\_practices-full.pdf](http://www.cleaweb.org/best_practices-full.pdf).

- 4 The summit report's final recommendation is that "the legal community should continue to develop programs that will prepare and encourage law students and all lawyers to serve the underserved." *Equipping Our Lawyers: The Final Report of the Critical Issues Summit*, at 12, [www.equippingourlawyers.org](http://www.equippingourlawyers.org).
- 5 *Articling In Canada*, Canada's Higher Education and Career Guide, [http://www.canadian-universities.net/Law-Schools/Law\\_Articling.html](http://www.canadian-universities.net/Law-Schools/Law_Articling.html) (last visited June 7, 2010).
- 6 State Bar of Georgia, *Transition Into Law Practice Program*, [http://www.gabar.org/programs/transition\\_into\\_law\\_practice\\_program/](http://www.gabar.org/programs/transition_into_law_practice_program/) (last visited June 7, 2010).
- 7 Amanda Becker, *Times are a changin' for associates*, CAPITAL BUSINESS, April 26, 2010, at 15.

### Thinking of Bringing In an Unpaid Intern?

Much national attention has been directed to academic internships for credit.<sup>1</sup> The American Association of Law Schools and the American Bar Association have long regulated the award of academic credit for off-campus activities.<sup>2</sup> The ABA standards help ensure that the student intern's educational goals remain the driving force for the placement, instead of any benefit to the work site.

The U.S. Department of Labor (DOL) recently issued a fact sheet that clarifies the requirements for students to be considered "interns," rather than "employees" of for-profit private sector employers.<sup>3</sup> The DOL standards are based on a 1947 Supreme Court case.<sup>4</sup>

For employers to call a volunteer worker an "intern," the DOL says the placement meet the following criteria:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment.
- The internship experience is for the benefit of the intern.
- The intern does not displace regular employees, but works under close supervision of existing staff.
- The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded.
- The intern is not necessarily entitled to a job at the conclusion of the internship.
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The DOL fact sheet clarifies that the Fair Labor Standards Act minimum wage requirements do not apply to volunteers at governmental and not-for-profit worksites.

— Mary Z. Natkin

#### Endnotes:

- 1 See, e.g., *The Unpaid Intern*, Legal or Not, N.Y. Times, April 2, 2010, <http://www.nytimes.com/2010/04/03/business/03intern.html>.
- 2 See ABA Standards and Rules of Procedure for Approval of Law Schools, Standard 305, <http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%203.pdf>.
- 3 U.S. Department of Labor, Wage and Hour Division, April 2010, at <http://www.dol.gov/whd/regs/compliance/whdfs71.htm>.
- 4 *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).



# Lifting the Financial Burden of Cancer

by Patrick T. Keith, Suzanne Miller-Cormier, and Mirna Hernandez

Jane never imagined a routine exam would land her in an oncologist's office and ultimately lead to her cancer diagnosis. Her immediate concerns were how this would affect her husband and two small children. The family was struggling financially, and her out-of-pocket medical expenses were going to significantly increase. Jane underwent two surgeries and began treatment. As a part-time secretary, she was not eligible for paid leave. As a result the household income decreased and the family fell behind on all of its bills.

Overwhelmed, Jane was battling her creditors as well as her cancer. She wasn't able to focus on getting better because of her inability to earn a living while going through treatment. A hospital social worker recommended the nonprofit LINC (Legal Information Network for Cancer). LINC's mission is to ease the burden of cancer for patients and their families by providing assistance and referral to legal, financial, and community resources. LINC referred her to the Boleman Law Firm for bankruptcy counseling and Clearpoint Credit Solutions for debt management and credit counseling. Both worked with creditors and the hospital to get the household's finances in order. These collaborative efforts eased the financial burden of Jane's diagnosis and allowed her to focus on her health.

Cancer patients frequently endure treatments that dramatically impair their ability to financially support their families. Patients often incur significant medical debts, and they use credit cards to supplement their income and pay for medications. This added financial stress is harmful in their battle to overcome disease. Many LINC clients are young and some have small children. They worry about how their sickness will affect their families. It is overwhelming for them to confront their creditors on

their own, and providing an advocate for them dramatically reduces their stress.

Patrick T. Keith of the Boleman Law Firm, a pro bono attorney with LINC, said, "Many people decide to obtain their law degree so they can provide a positive impact in people's lives. LINC provides attorneys this opportunity. As a bankruptcy attorney, I am able to assist clients that are suffering significant financial issues, and provide them relief and hope for their future. Providing pro bono services to LINC clients is rewarding, as you can truly make a tangible difference in the lives of cancer patients and their families. LINC provides them with advocates to ensure they are not alone in facing the financial realities that cancer can create.

"When a resolution is discussed, it is common for the clients to sob as they release the stress they have been holding back. The client has a renewed sense of hope, and this can only positively impact their battle against cancer.

*Cancer patients frequently endure treatments that dramatically impair their ability to financially support their families.*

"As a pro bono attorney with LINC, you will be rewarded with the realization that you have assisted a person on their road to recovery against this much-too-common disease."

LINC was founded in 1996 by attorneys Ann C. Hodges and Phyllis C. Katz who are breast cancer survivors. During their treatments, they met other cancer patients who were not receiving needed treatments or were not able to

provide for their basic needs because they lacked the financial resources. They saw the need for an organization to help cancer patients find the means to sustain themselves and their families during treatment.

LINC also provides educational services to cancer patients and the medical community. LINC believes that education enables individuals to be more effective advocates. With LINC's information, resources, and skills training, patients are better able to meet the day-to-day challenges of cancer. Individualized support provided by LINC allows cancer patients to find the means to sustain their lives while in treatment, which enables them to focus their energies on fighting the disease.

LINC provides services free of charge to clients and uses other community resources that charge nothing or a nominal fee. Attorneys who partner with LINC agree to a sliding fee

scale or charge nothing, depending on the client's finances.

LINC needs attorneys and certified financial planners willing to help on a pro bono or nominal fee basis. To learn more about LINC, give of your time to help a LINC client, or make a donation, go to [www.cancerlinc.org](http://www.cancerlinc.org).

# What a Difference ...

by Roy M. Terry Jr.

When the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) became law on October 16, 2005, bankruptcy practice all but stopped.

What a difference four years and a recession have made. Whether their focus is consumer or commercial, debtor or creditor, bankruptcy lawyers have never been busier. This phenomenon has also occurred at a time when lawyers practicing in certain other areas are in search of billable hours and revenue. For those lawyers now intending to get involved with a bankruptcy-related practice, or who are returning to bankruptcy after a hiatus, the Bankruptcy Section of the Virginia State Bar is here to support you. During April, the section joined with Virginia Continuing Legal Education in presenting two live, full-day nuts-and-bolts seminars. These seminars remain available through Virginia CLE.

In this issue, the Virginia State Bar is featuring the Bankruptcy Section. The four diverse articles that follow aptly represent the breadth of issues arising in

bankruptcy. With a focus on consumer issues, Rebecca L. Saitta provides an “Overview of the Bankruptcy Process.” Kelly M. Barnhart offers “In Light of Current Mortgage Crisis, Errors in Proofs of Claim on the Rise.” Switching to more commercial topics, Lynn L. Tavenner has written “Section 101 (51D): A Benefit or Burden for Small Business Debtors?” Finally, Douglas M. Foley provides “The Demise of Credit Bidding at Plan Sales: So What Constitutes the ‘Indubitable Equivalent’ of a Secured Creditor’s Claim?” Biographies of the authors are found on page 9.

On behalf of the Bankruptcy Section, I hope you enjoy these articles. We would also welcome you join in. For information, see [www.vsb.org/site/sections/bankruptcy](http://www.vsb.org/site/sections/bankruptcy).

# Overview of the Bankruptcy Process

by Rebecca L. Saitta

In times of economic struggle, consumers and business owners may consider filing a bankruptcy petition with the hope of obtaining a fresh start. Many factors need to be considered prior to seeking bankruptcy protection and the technical rules of the U.S. Bankruptcy Code (Bankruptcy Code) must be followed precisely. This article provides a general overview of the bankruptcy process and some of the paramount considerations that should factor into this important decision. It is critical that competent and experienced counsel be consulted prior to the commencement of a bankruptcy filing.

## The Basics

Bankruptcy is a legal process governed by federal rules and procedures contained in the Bankruptcy Code and the Bankruptcy Rules. The primary purpose of bankruptcy law is to provide a debtor with a fresh start through which some debts can be paid, restructured, or discharged. Bankruptcy can also protect asset values and provide a way for creditors to be treated fairly and equitably. The debtor is the person who files the bankruptcy petition (or in some cases the party against whom an involuntary petition is filed) and who owes money, goods, or services. The creditor is the person to whom the money, goods, or services are owed.

On April 20, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) was enacted, with most provisions becoming effective on October 17, 2005. This new law provided the most substantial changes to bankruptcy law in many years and the case law is still developing as judges interpret the act's provisions.

A case begins when the debtor pays a filing fee and files a petition with the bankruptcy court in the jurisdiction where he or she resides. Financial information, including a list of assets, debts, and creditors, must be provided. This information must be certified by the debtor under penalty of perjury. One of the changes imposed by BAPCPA requires individual debtors to participate in consumer credit counseling with an approved nonprofit agency within 180 days prior to the filing of a bankruptcy petition. Failure to do so may result in dismissal of the case.

In all Chapter 7 cases (see discussion of the types of bankruptcy cases below), the United States Trustee automatically appoints a trustee to administer the case. The trustee is responsible for collecting and liquidating the debtor's assets for the benefit of the creditors. Debtors must provide the trustee with copies of their federal tax return for the most recent tax year ending prior to the filing of the petition, along with certain copies of pay stubs. The tax return must be provided to the trustee seven days prior to the initial meeting of creditors (discussed below) and the pay stubs must be provided at this meeting. Some Chapter 7 trustees may require additional financial documentation. In Chapter 11 cases, the appointment of a trustee is not automatic and requires a showing of cause such as fraud or mismanagement by the debtor.

As soon as the bankruptcy petition is filed, the debtor's creditors are notified of the filing and the automatic stay goes into effect. The automatic stay generally stops most debt collection efforts against the debtor, unless a creditor obtains permission from the bankruptcy court to pursue collection activities. The bankruptcy court and trustee (if one exists) oversee the debtor's activities, and the debtor, subject to some exceptions, receives a discharge or court-ordered release of liability. In a Chapter 7 case, the debtor will typically receive an order discharging most of his or her debts within three to four months. Chapter 13 usually requires payments over several years before a debtor will receive an order discharging his or her debts.

### Parties Who May File a Bankruptcy Petition

Almost any person who has a residence, business, or property in the United States is eligible to be a debtor under the Bankruptcy Code. Individuals, sole proprietorships, partnerships, corporations, and family farmers are eligible for bankruptcy relief. In rare cases, creditors may force someone into bankruptcy by filing an involuntary petition against a debtor.

Generally, there are no minimum financial or solvency requirements for the filing of a bankruptcy case by the debtor. However, BAPCPA imposed heightened eligibility requirements for filing a petition under Chapter 7. A debtor must pass the means test provided by the new law, which compares his or her family's current monthly income with the statewide median income. As a result, certain individuals may now be required to proceed under Chapter 13 (where they must pay at least some portion of their debts) because they are ineligible for Chapter 7. Note that certain debt restrictions or financial requirements may also apply in other chapters of the Bankruptcy Code.

### Different Types of Bankruptcy Cases

There are several different types of bankruptcy cases:

- Chapter 7 — Liquidation
- Chapter 11 — Reorganization (or Liquidation)
- Chapter 12 — Family Farmer and Fisherman Reorganization
- Chapter 13 — Adjustments of Debts of Individual Regular Income

In a **Chapter 7** liquidation case, sometimes referred to as “straight bankruptcy,” a trustee is appointed to collect and liquidate the debtor's nonexempt assets (see below for an explanation of nonexempt assets) and to pay the proceeds to creditors in the order set forth in the Bankruptcy Code. Most Chapter 7 cases are no-asset cases. This means that the debtor does not have sufficient nonexempt assets or sufficient income to make any distribution to unsecured creditors. Unsecured creditors are those who do not have a valid lien on collateral.

**Chapter 11** is available to individuals and businesses that seek to reorganize their affairs or to liquidate in an orderly manner. In Chapter 11, the debtor typically remains in control of his or her property and operates as a debtor in possession, subject to bankruptcy court supervision. A Chapter 11 debtor is allowed a certain

period of time within which to propose a plan of reorganization which, if approved by the court, will govern payment of the debts. The terms of Chapter 11 plans depend on the nature of the debt or the type of business the debtor operates. A creditors' committee, comprising representatives of the creditor body, assists with the negotiation of the plan.

**Chapter 12** allows family farmers and family fishermen with regular annual income to adjust their debts. Generally, the family farmer must have less than \$3,544,525 in debts (50 percent of which must arise out of the farming operation), and at least 50 percent of the individual's gross income must come from the farming operation. The aggregate debts of a family fisherman must not exceed \$1,642,500 (80 percent of which must arise out of the commercial fishing operation) and at least 50 percent of the individual's gross income must come from the fishing operation. A debtor under Chapter 12 must have regular and stable income that enables him or her to repay his or her creditors under a long term plan.

**Chapter 13** is available to individuals with regular income who owe unsecured debts of less than \$336,900 (unsecured debts are debts owed to creditors who do not have liens on any collateral) and secured debts of less than \$1,010,650 (secured debts are debts subject to valid liens such as mortgages and car loans). By choosing Chapter 13, an individual debtor may avoid a Chapter 7 liquidation, stop home mortgage foreclosure, reinstate a defaulted home mortgage, and obtain a broader discharge of debts than is available in a Chapter 7 liquidation. In exchange, the debtor in a Chapter 13 case must repay unsecured creditors a portion of their claims from the debtor's future income over a three- to five-year period. Ordinarily, payments to unsecured creditors will

**There are no minimum financial or solvency requirements for the filing of a bankruptcy case by the debtor.**

be made by the Chapter 13 trustee according to the plan filed by the debtor and approved by the bankruptcy judge.

**Going to Court**

In the early stage of a bankruptcy case, the debtor must attend a meeting of creditors (also called a Section 341 meeting), during which the debtor must provide information and answer questions under oath (without a bankruptcy judge) from the bankruptcy trustee, the U.S. Trustee, or creditors.

**The ultimate goal for most debtors is to obtain a discharge from certain debts that arose prior to the commencement of the case.**

Bankruptcy courts are part of the federal judicial system, and federal bankruptcy judges decide most disputes that arise in bankruptcy cases. Many of the legal issues and procedures that arise in a typical individual case can be handled by an attorney without requiring the debtor's attendance at hearings, though in some instances it may be necessary for the debtor to testify in court.

**Benefits of a Bankruptcy Filing**

Bankruptcy protection can benefit a debtor in a number of ways. As mentioned above, the filing of a bankruptcy petition automatically stops most collection actions, such as garnishments, foreclosures, and lawsuits — at least temporarily. This automatic stay allows the debtor to have a breathing spell during which the debtor has the opportunity to put his finances in order and try to chart a more promising financial future. While the case is pending, creditors cannot pursue most actions against debtors without bankruptcy court approval.

The ultimate goal for most debtors is to obtain a discharge from certain debts that arose prior to the commencement of the case. Debts that are not listed on the bankruptcy schedules will likely not be discharged, so it is important to complete the schedules accurately and completely. Once the discharge of a debt is obtained, creditors cannot pursue collection efforts against the debtor, and those claims are permanently forgiven unless a lien remains in place or the debtor reaffirms his obligation to the creditor. If a lien remains in place, the creditor can pursue the collateral securing the lien even after bankruptcy. If a

debt is reaffirmed, then the creditor can pursue the debtor personally even after bankruptcy.

The bankruptcy process also affords a debtor an opportunity to reject ongoing obligations under certain types of contracts, recover property or assets that were transferred or seized prior to the bankruptcy case, and remove certain kinds of liens.

**The Effect of a Bankruptcy Filing on Credit Ratings and Employment**

A bankruptcy filing can be reflected on a debtor's credit report for up to ten years, regardless of the type or outcome of the bankruptcy case. A bankruptcy filing may also affect the debtor's ability to borrow money, although the effects of such a filing vary significantly depending on the creditor and the nature of the debt. A debtor should consult an attorney to learn more about the likely effects of a bankruptcy filing.

Private employers are prohibited from terminating or otherwise discriminating against an individual solely because of a bankruptcy filing. A governmental employer may not terminate or refuse to hire a person solely as a result of a bankruptcy filing. Similarly, a governmental unit may not deny, suspend, or refuse to renew a license, permit, or similar grant to a debtor as the result of a bankruptcy filing. The filing of a bankruptcy petition may affect a debtor's security clearance or the ability to obtain a clearance in the future, though the impact of a bankruptcy filing on one's security clearance will depend on the specific facts and circumstances of the case.

**Exempt Property**

The Bankruptcy Code allows the individual debtor to retain certain property as exempt. Exempt property is free of the claims of creditors and cannot be taken by the trustee to be liquidated. Virginia law determines the types and amount of exempt property. The debtor is entitled to a homestead exemption that allows each debtor to claim a one-time exemption for any property of up to \$5,000 (or up to \$10,000 if the debtor is 65 years of age or older) plus \$500 for each dependent. The debtor is also entitled to a specific exemption, sometimes referred to as the "poor debtor's" exemption, in different types of property (for example, clothes up to \$1,000; household furnishings up to \$5,000; or tools of a person's trade or business up to \$10,000). Other types of property (such as proceeds from a personal injury settlement or award and certain contributions to qualified

pension plans or individual retirement accounts) may also be exempt under Virginia law. A debtor must claim the property as exempt in his bankruptcy schedules in order to claim the homestead exemption. His or her lawyer must also properly prepare and file a homestead deed within a certain time limit. Creditors or the bankruptcy trustee can challenge the type or amount of the exemptions claimed by the debtor, and in some cases a hearing may be necessary to resolve the validity of a particular exemption.

A debtor may reaffirm his obligations to a secured creditor who holds a lien on a house, car, or other significant item. A reaffirmation agreement must be in writing, signed by both the debtor and the debtor's attorney, and must be filed with the bankruptcy court. A debtor may rescind a reaffirmation agreement within sixty days after the agreement is filed with the court. A debtor may also free or redeem property from a lien by paying the secured creditor the fair market value of the property in a lump sum. The bankruptcy judge can set the value if the parties do not agree.

### Surviving Claims

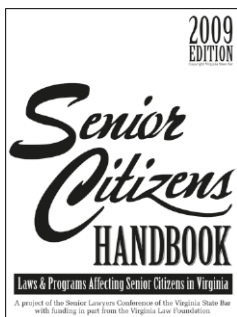
The liens of secured creditors survive bankruptcy unless the underlying debt is paid off or the lien is removed during the bankruptcy case. This means the creditor can pursue the collateral (for example, repossess the vehicle) but the creditor cannot collect against the debtor personally unless the debt has been reaffirmed. Debts that are reaffirmed during the bankruptcy case will survive.

Certain types of debts generally cannot be discharged in a bankruptcy case. These include recent taxes, alimony or child support obligations, student loans, and driving-under-the-influence claims. Debts incurred as the result of a debtor's fraud are likewise nondischargeable. If a debt is nondischargeable, the debtor is legally obligated to pay the debt even after the bankruptcy. Certain types of generally nondischargeable debt may be discharged in a Chapter 13 case but not in a Chapter 7 case.

### Alternatives to Bankruptcy

Bankruptcy is typically thought of as a last resort for individuals and entities that have serious financial problems. Prior to a bankruptcy filing, it is common for financially troubled individuals or entities to consider alternatives such as consumer credit counseling or an out-of-court workout or debt restructuring in which obligations to some or all creditors are modified to provide the individual or entity with financial relief. Virginia law also provides for an assignment for the benefit of creditors, under which another individual handles the disposition of assets and proceeds for the benefit of creditors.

The nature and extent of a debtor's financial problems will dictate the course of action or the legal procedure that should be followed in a particular case. Individuals or entities who are experiencing such problems should consult with knowledgeable and competent professionals before deciding whether to seek bankruptcy protection.



## The Senior Citizens Handbook: a resource for seniors, their families, and their caregivers. 2009 edition available.

We're as busy as ever at age fifty-five and over, and we face new challenges and opportunities, with little time to search them all out. How can anyone find out about them all and, with such an array of choices, how does anyone begin to make a selection?

The Senior Citizens Handbook. Available online at <http://www.vsb.org/docs/conferences/senior-lawyers/SCHandbook09.pdf>.

# In Light of Current Mortgage Crisis, Errors in Proofs of Claim on the Rise

by Kelly M. Barnhart

Newspaper headlines scream out the news: “Foreclosures at All-time High,” “Bankruptcies on the Rise.” More and more consumers are filing for bankruptcy relief under Chapter 13, Title 11, of the U.S. Bankruptcy Code in an effort to save their homes and to catch up their mortgages.

The holders of the mortgages, in order to be paid, must file a proof of claim in the bankruptcy proceeding. However, errors in proofs of claim filed by servicers and other parties have been on the rise.

Rule 3001(f) of the Federal Rules of Bankruptcy Procedure provides that a proof of claim executed and filed in accordance with the rules of procedure constitute prima facie evidence of the amount and validity of the claim. The burden then shifts to the opposing party to object to the claim.<sup>1</sup> In the absence of a properly documented claim under Fed. R. Bankr. P. 3001(c), however, the prima facie presumption as to validity and amount may not be applicable.<sup>2</sup> But the absence of the Rule 3001(f) presumption does not mean that a filed proof of claim is automatically disallowed.<sup>3</sup> The grounds for disallowance of a proof of claim are specifically provided for in 11 U.S.C. § 502. If the only basis for disallowing the claim is for lack of documentation, such disallowance may not be justified or appropriate.<sup>4</sup> As more clearly explained in both *In re Fleming*<sup>5</sup> and *In re Simms*<sup>6</sup>, the debtor must also assert a grounds for disallowance under § 502. In *Simms*, the bankruptcy court for the Northern District of West Virginia overruled the debtor’s objection that the creditor failed to properly document its proof of claim because, “even if the Debtor’s objection to lack of proper documentation is proper under Rule 3001(c), the Debtor has not raised any legal or factual dispute regarding the validity or amount of eCAST’s claim under § 502(b).”<sup>7</sup>

A proof of claim that lacks sufficient documentation may nevertheless become prima facie evidence of a claim when considered in conjunction with the debtor’s schedules, based on the rea-

soning that while the proof of claim may not establish the prima facie case, the schedules signed under oath and under penalty of perjury by the debtor would.<sup>8</sup> In addition, if the claimant does not get the presumption, its claim may still be allowed by proving its claim by a preponderance of the evidence.<sup>9</sup> “[L]ack of proper supporting documentation does not, in and of itself, result in a claim’s disallowance; rather, it strips it of any prima facie validity, requiring the creditor to offer the supporting documentation to carry its burden of proof in the face of an objection.”<sup>10</sup>

Given the growth of the mortgage market, including the securitizing and servicing of these loans by affiliates of lending institutions or independent loan servicers, there has been an inevitable increase in problematic claim filings. Some mortgage companies or their agents have filed proofs of claim without proper documentation. Some have filed proofs of claim while another mortgage company or its agent has filed a motion for relief against the same debtor for the same property.

For example, in *In re Hayes*<sup>11</sup>, the debtor executed a note and mortgage for property with Argent Mortgage Company LLC (Argent), as the lender. AMC Mortgage Services Inc. (AMC), not Argent, filed a proof of claim in the debtor’s bankruptcy case, as loan servicer for Argent. The debtor objected, claiming that the fees sought were unreasonable and excessive, and that AMC failed to attach a copy of the note or mortgage. One month later, Deutsche Bank filed its motion for relief, as trustee of Argent Mortgage Securities Inc. In the motion, Deutsche Bank alleged it was the current holder of the mortgage, that the debtor failed to stay current on post-petition mortgage payments, that there was little to no equity in the property, and that the property was

unnecessary for a successful reorganization. The debtor objected to the motion, asserting she did not have sufficient information to either admit or deny the allegation that she had failed to make post-petition payments and objected to Deutsche Bank's standing to bring the motion.

AMC responded to the claim objection and attached a copy of the note and mortgage, along with a loan history. Approximately sixteen months later, an attorney filed a related transfer of claim other than for security whereby AMC attempted to transfer the claim it filed on behalf of Argent to Citi Residential Lending Inc., as loan servicer for the secured creditor Deutsche Bank National Trust Company, as trustee, in trust for the registered holders of Argent Securities Inc. One can understand the confusion surrounding this sequence of events.

The bankruptcy court consolidated the hearings on the objections to the claim and motion. At trial, Deutsche Bank actually presented a witness, a bankruptcy specialist with Citi Residential Home Lending Inc. The court held that there was insufficient evidence presented to establish that the claim could be traced from Argent to AMC and then from AMC to Argent Securities Inc. It disallowed the claim and denied the motion for relief.<sup>12</sup> The facts of this case demonstrate why "it is axiomatic that in federal courts a claim may only be asserted by the real party in interest."<sup>13</sup>

On the other end of the spectrum, some servicers or mortgage companies have filed proofs of claim even though at the time of filing, they are not owed anything by the debtor. In a recent case before the Northern District of Ohio, Countrywide Home Loans referred a loan account to a law firm to file a proof of claim and objection to confirmation of the debtor's Chapter 13 plan, although the property in question had been sold in a short sale prior to the bankruptcy filing.<sup>14</sup> Countrywide provided to the firm a copy of the note and mortgage, but not the payment history or notes for the file. According to the proof of claim filed, the debtor owed approximately \$88,000, all of which was secured.<sup>15</sup> It should be noted that the mortgage and note had been entered into with Ameriquest Mortgage Company, not Countrywide, and the proof of claim failed to attach any assignment or other transfer documents from Ameriquest to Countrywide. The debtor responded to the objection to confirmation and objected to the claim, alleging that she had sold the property in a short sale prior to the filing of her bankruptcy case, with Countrywide's permission. The court sus-

tained the objection to the proof of claim, but, unfortunately for Countrywide, that was not the end of the story. The Office of the U.S. Trustee argued that Countrywide was guilty of abusing the court process, acting recklessly and in bad faith.<sup>16</sup> Given what transpired in the case, the court determined that sanctions were appropriate, given the violations of Rule 9011 of the Federal Rules of Bankruptcy Procedure and 11 U.S.C. § 105, and also "other sanctions sufficient to deter repetition of this conduct or comparable conduct by others" and scheduled another trial with respect to the appropriate level of sanctions.<sup>17</sup>

Similarly, in *In re Wells*<sup>18</sup>, the Chapter 13 debtors objected to a mortgage arrearage proof of claim. The debtors, in their schedules, listed Aegis Mortgage Corp. as a secured creditor, holding a claim for \$96,000, secured by their residence, and identified Ocwen Financial Corporation as an additional party to receive notice. U.S. Bank National Association (U.S. Bank), as Trustee for the Registered Holders of Aegis Asset Backed Securities Trust Mortgage Pass-Through Certificates, Series 2005-4, filed a proof of claim, secured by the debtors residence, and listed Ocwen to receive notices. The claim was signed by an individual in the quality control, bankruptcy department, without identifying for whom she filed it. The claim did not have a power of attorney designation or attachment. Other documents, including an itemization of the claim, payoff information, expense breakdown, mortgage, and note, were attached to the proof-of-claim form. Nothing was attached evidencing the transfer of the note to U.S. Bank. Later, U.S. Bank provided copies of two assignments of the note and mortgage. The first assignment was from MERS as nominee for Aegis Lending Corporation to U.S. Bank, Successor-in-Interest to Wachovia Bank, National Association, as Trustee for the Registered Holders of Aegis Asset Bank Securities Trust Mortgage Pass-Through Certificates, Series 2005-4. The second assignment was made by U.S. Bank for Wachovia, to U.S. Bank, as Trustee for the Registered Holders of Aegis Asset Backed Securities Trust Mortgage Pass-Through Certificates, Series 2005-4. While the second assignment was dated August 23, 2007, it was notarized on March 24, 2009, and filed on April 3, 2009 — well after the proof of claim was filed.

The *Wells* court sustained the objection of the debtors, concluding that the claim was filed by U.S. Bank, and the documents attached did not

Errors continued on page 48



# Section 101(51D)

## A Benefit or Burden for Small-Business Debtors?

by Lynn L. Tavenner

A basic goal of Chapter 11 of the Bankruptcy Code<sup>1</sup> is to rehabilitate and reorganize the business debtor through a confirmed plan voted on and approved by a majority of creditors. Yet, more and more Chapter 11 debtors never achieve such rehabilitation. Instead, their assets are sold via the bankruptcy process and, as Douglas M. Foley writes beginning on page 49, recent jurisprudence has focused on the parties' relative rights in such alternative scenarios — especially in larger cases. There are many small businesses, however, that still hold out hope for a successful reorganization of their debts so that a viable entity is preserved at the end of the day. When Congress overhauled the Bankruptcy Code in 2005<sup>2</sup>, it attempted to add small-business provisions whereby a company fitting within the definition could achieve a successful reorganization through a quicker and more streamlined time frame. While the process has proven more unwieldy than likely contemplated, if properly planned and professionally guided, the small-business provisions can be a useful tool.

Section 101(51C) of the Bankruptcy Code defines a small-business case as “a case filed under chapter 11 of this title in which the debtor is a small business debtor.” The term “small business debtor” is defined at § 101(51D) as:

(A) Subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning or operating real

property or activities incidental thereto) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition or the date of the order for relief in an amount not more than \$2,190,000 (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor; and (B) does not include any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than \$2,190,000 (excluding debt owed to 1 or more affiliates or insiders).

For purposes of this article, the term “small business” is defined above. While there remains sparse case authority on this new process, the Bankruptcy Code itself provides a road map to obtain a relatively quick reorganization for a small-business debtor as long as the practitioner is careful to follow the map. While the concepts for the small-business provisions are admirable, the specific language of the relevant code sections has made the implementation somewhat unwieldy. This article will identify certain issues and suggest practical solutions for guiding a small business through a Chapter 11 reorganization.

### Reporting Requirements

Reporting requirements are elevated for small-business debtors. The Office of the United States Trustee (UST) is a branch of the U.S. Department of Justice and is charged with oversight of the bankruptcy system. In such capacity the UST reviews required reporting of all debtors-in-possession. Such reports are increased for small-business debtors — presumably under the theory that there will be no Official Committee of Unsecured Creditors (as discussed hereafter) to assist in oversight, and the case will proceed with quicker pace

than other Chapter 11 cases—so that the UST, the court, and others will have the information readily available. The Bankruptcy Code delineates the specific additional reporting requirements, and other duties for the trustee or the debtor-in-possession of a small business. For example, Bankruptcy Code § 308 establishes reporting requirements for a small business such as periodic reports detailing its profitability, projected cash receipts and disbursements, comparison of actual receipts and disbursements to its earlier projections, and statements concerning compliance with bankruptcy rules, tax requirements and other obligations. Furthermore, pursuant to 11 U.S.C. § 1116:

[I]n a Small Business case, a trustee or the debtor-in-possession, in addition to the duties provided in this title and as otherwise required by law, shall —

(1) append to the voluntary petition or, in an involuntary file not later than 7 days after the date of the order for relief —

(A) its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return; or

(B) a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no Federal tax return has been filed;

(2) attend, through its senior management personnel and counsel, meetings scheduled by the court or the United States trustee, including initial debtor interviews, scheduling conferences, and meetings of creditors convened under section 341 unless the court, after notice and a hearing, waives that requirement upon finding of extraordinary and compelling circumstances;

(3) timely file all schedules and statements of financial affairs, unless the court, after notice and a hearing, grants an extension, which shall not extend such time period to a date later than 30 days after the date of the order for relief, absent extraordinary and compelling circumstances;

(4) file all postpetition financial and other reports required by the Federal Rules of Bankruptcy Procedure or by local rule of the district court;

(5) subject to section 363 (c)(2), maintain insurance customary and appropriated to the industry;

(6) (A) timely file tax returns and other required government filings; and

(B) subject to section 363 (c)(2), timely pay all taxes entitled to administrative expense priority except those being contested by appropriate proceedings being diligently prosecuted; and

(7) allow the United States trustee, or a designated representative of the United States trustee, to inspect the debtor's business premises, books, and records at reasonable times, after reasonable prior written notice, unless notice is waived by the debtor.<sup>3</sup>

While at first blush it might seem that these additional reporting requirements will make Chapter 11 cost prohibitive for small businesses, Chapter 11 is not a free pass for any debtor. Practically speaking, any small-business debtor that seriously desires to reorganize under Chapter 11 should be in a position to comply with these requirements. If it cannot do so, then such debtor likely would have had a difficult time achieving confirmation even before the enactment of the small-business provisions of the Bankruptcy Code.

#### Plan Issues

Under the Bankruptcy Code, a small business has unique issues related to its plan of reorganization in terms of exclusivity, disclosure and solicitation,

## Chapter 11 is not a free pass for any debtor.

and confirmation. First, a small business has different exclusivity periods for the filing and solicitation of a plan of reorganization. Specifically, § 1121 provides:

(e) In a small business case —

(1) only the debtor may file a plan until after 180 days after the date of the order for relief, unless that period is —

(A) extended as provided by this subsection, after notice and a hearing; or

(B) the court, for cause, orders otherwise;

## It is imperative that the small-business debtor (and its counsel) be aware of the deadlines.

(2) the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief; and

(3) the time periods specified in paragraphs (1) and (2), and the time fixed in section 1129(e) within which the plan shall be confirmed, may be extended only if—

(A) the debtor, after providing notice to parties in interest (including the United States trustee), demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time;

(B) a new deadline is imposed at the time the extension is granted; and

(C) the order extending time is signed before the existing deadline has expired.<sup>4</sup>

On the front end, a small-business debtor has 180 days (as opposed to the traditional 120 days) for exclusivity, with extensions available up to 300 days. But it should move forward with diligence. Specifically, while a small business may have unique exclusivity, it also has specific deadlines that counsel must be cognizant of and operate within—the 300th day appears from the Bankruptcy Code to be a drop-dead date for the debtor (not others) to file a plan. It remains

to be seen from a judicial perspective in bankruptcy courts in Virginia what will happen if a small business does not perform within the delineated parameters. It could be that the debtor is out of luck if it misses these deadlines, and a disgruntled creditor might suggest that such action constitutes cause to convert or dismiss the case pursuant to § 1112 of the Bankruptcy Code. Therefore, it is imperative that the small-business debtor (and its counsel) be aware of the deadlines.

The Bankruptcy Code provides additional disclosure and solicitation alternatives to a small business. Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), conditional approval of a disclosure statement in a small-business case was the extent of available relief. As we may recall from our pre-BAPCPA practice, after the court conditionally approved a disclosure statement, the debtor solicited acceptances or rejections of the plan by mailing a copy of the conditionally approved disclosure statement. Thereafter, the court held a combined hearing on the plan and the disclosure statement. BAPCPA provides more flexibility to this process. For example, pursuant to Code § 1125(f) a court may now conclude that the plan itself provides adequate information; thus, the need to file a separate disclosure statement is eliminated. A court may also now approve a form disclosure statement. And BAPCPA preserves a court's ability to conditionally approve a disclosure statement and combine the disclosure statement and plan confirmation hearings.<sup>5</sup> These additional disclosure and solicitation alternatives for a small business could significantly reduce the traditional costs of the plan solicitation process. Counsel should take advantage of these options.

In addition to the solicitation alternatives, BAPCPA has changed confirmation deadlines for a small business. Specifically, pursuant to § 1129(e), a timely filed plan of a small business must be confirmed with forty-five days of filing. This period may be extended if, after having given requisite notice, the movant demonstrates by a preponderance of the evidence that it is more likely than not the court will confirm a plan within a reasonable time.<sup>6</sup> Given the short window, a small-business debtor arguably should file a motion to extend the time for plan confirmation beyond the forty-five day period along with the plan and disclosure statement. This is especially true given that § 1121(e)(3)(c) provides that

the order extending time must be signed before the expiration of the existing deadline.<sup>7</sup>

### Cost Issues

While Congress attempted to reduce the expense associated with a small-business reorganization through the streamlined process, the jury is still out on whether this goal was achieved. There has been little empirical evidence collected to date. From a legal fee perspective the costs remain — but hopefully only for a compressed period of time (and at an amount no greater than those arising in a similar non-small-business case for the same time period). In addition to legal fees, the small-business debtor still has to pay UST fees under the same scale as other debtors.

Furthermore, there is no discount on the required filing fee. Accordingly, the small business debtor should be prepared for significant reorganization costs; however, in many instances, achieving a successful reorganization could be well worth the costs.

One potential area for cost reduction relates to creditor committees. Pursuant to § 1102(a)(1), the UST “shall appoint a committee of creditors holding unsecured claims” to assist in the oversight of the case. However, pursuant to § 1102(a)(3), “[o]n request of a party in interest in a case in which the debtor is a small-business debtor and for cause, the court may order that a committee of creditors not be appointed.” The Bankruptcy Code does not define cause. Furthermore, there is little if any published case law on the issue. However, some small-business debtors have been proactive at the inception of the case and requested the court to find cause to not appoint an official committee.

Indeed, there is precedent in the Eastern District of Virginia for the court to find cause to not appoint a creditors committee in a small-business case. While “cause” is not defined in the Bankruptcy Code, and the legislative history does not provide assistance in developing a definition, cause has been found to not appoint a committee for the following reasons: not in the best interests of the debtors’ estates, creditors, and parties in interest; the administrative costs resulting from appointment of an unsecured creditors committee will necessarily be disproportionate to the claims pool that such a committee represents; the financial burden on the debtors’ estates caused by the appointment of a committee of unsecured creditors greatly outweighs any benefit; and appointment will serve only to dilute recoveries for unsecured creditors.<sup>8</sup> While each case is certainly fact-specific, practitioners should consider

whether their small-business debtor can establish the same type of “cause” to have the court enter a similar order.

### Conclusion

The foregoing does not constitute an exhaustive list of all Bankruptcy Code provisions that affect small businesses, but it does identify major issues that every small-business debtor will likely face and should be prepared to effectively address.<sup>9</sup> While no Chapter 11 filing or out-of-court restructuring will provide a small business with a fix for a bad business model, lack of financing, or other disreputable business issues, the small business provisions of the Bankruptcy Code to provide a springboard for professionals to assist their clients in obtaining access and effectively utilizing the bankruptcy process.

#### Endnotes:

- 1 All statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* unless otherwise noted.
- 2 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).
- 3 11 U.S.C. § 1116.
- 4 11 U.S.C. § 1121(e).
- 5 11 U.S.C. § 1125(f).
- 6 11 U.S.C. § 1121(e)(3).
- 7 *See In re Caring Heart Home Health Corp.*, 380 B.R. 908, 910 (Bankr. S.D. Fla. 2008) (noting that the BAPCPA amendments “include a number of traps for the unwary”).
- 8 *See In re Greenbrier Hotel Corp.*, No 09-31703-KRH (Bankr. E.D. Va. March 20, 2009) (Order Granting Motion of the Debtors for Entry of an Order Finding Cause to Not Appoint a Committee of Unsecured Creditors Pursuant to Bankruptcy Code § 1102(A)(3)), in which Judge Kevin R. Huennkens found cause to order the UST not to appoint a committee).
- 9 For additional information on this topic, *see Chapter 11 Bankruptcy for Small Businesses: The Good, the Bad and the Ugly*, Beran, P. and Tavenner, L., Virginia CLE Program, July 16, 2009.

Errors continued from page 43

establish it was a secured creditor of the debtors; and therefore, the court disallowed the claim.<sup>19</sup>

Even if the claimant is the right party, that fact does not alleviate other important proof of claim issues, including claiming the appropriate amounts as being owed. If the amounts alleged as being owed in the proof of claim are unclear or incorrect, bankruptcy courts may order damages to be paid by the filing party. For example, the Bankruptcy Court for the Eastern District of Louisiana ordered Wells Fargo to pay \$10,000 in damages to the debtor, plus \$12,350 in legal fees, “for the abusive imposition of unwarranted fees and charges.”<sup>20</sup> In *Stewart*, Wells Fargo was held accountable for unwarranted fees and charges, imposition of fees, the negligent imposition of fees and costs not due, the improper calculation of escrow payments, the misapplication of fees, the failure to notify the debtor of fees and charges, and the improper payment of unnoticed fees and charges during the bankruptcy case.<sup>21</sup> The court also ordered Wells Fargo to audit every proof of claim filed on or after April 13, 2007, and to include a loan history with each claim.<sup>22</sup> In addition, the court ordered Wells Fargo to review proofs of claim already filed and to amend, where necessary.

Wells Fargo, in a separate case also before the Eastern District of Louisiana, admitted that there were irregularities in how it accounted for payments on its claims, including application of trustee payments to postpetition charges rather than payments towards the prepetition debt they were remitted to satisfy; applying debtor payments to prepetition arrearages although intended for current mortgage payments; failure to notify borrowers of charges; postpetition imposition of professional (attorney) fees without prior court approval; and imposition and payment of postpetition fees from estate funds without disclosure.<sup>23</sup> Wells Fargo further admitted that these practices occurred in every case filed in the United States.<sup>24</sup> Wells Fargo contended that, although it suggested that it had systemic problems in every bankruptcy case, every debtor should have to make a challenge, by separate suit, to the proofs of claim filed by Wells Fargo.<sup>25</sup>

There are potential problems associated with this position, including the fact that Wells Fargo may have admitted presenting incorrect information in proofs of claim in contravention of specific statutes warning against and perhaps criminalizing such behavior. The idea that this conduct is acceptable as long as it remains unchallenged with regard to each specific claim is problematic. “Wells Fargo’s position also requires the Court to participate in its egregious conduct .... Because Wells Fargo takes a ‘scream or die’ approach to judicial review, it would require this Court to not only honor, but enforce collection on illegally imposed debt.”<sup>26</sup> As a result, the court ordered injunctive relief directing Wells Fargo to account for all postpetition payments received as professional fees and to verify that estate funds were not being used in a manner in conflict with the provisions of plans and confirmation order.

Attorneys who file either proofs of claim or motions for relief on behalf of mortgagees or servicers should keep in mind that by signing, filing, or arguing in support of a pleading, they have a duty to the court to tell the truth and are to be held accountable for mistakes and may be the person sanctioned for a violation. If a court finds that a party has violated Rule 9011 of the Federal Rules of Bankruptcy Procedure, the attorney may be held accountable. Every attorney is under a duty to make a reasonable investigation before filing a document or submitting a document with the court for consideration. When preparing proofs of claim, it may not be wise solely to rely on information supplied by a client, without further inquiry.

Endnotes:

- 1 *In re Fleming*, 2008 Bankr. LEXIS 4021, \* 2 (Bankr. E.D. Va. Oct. 15, 2008).
- 2 *In re Andrews*, 394 B.R. 384 (Bankr. E.D.N.C. 2008); *In re Tran*, 369 B.R. 312, 317 (S.D. Tex. 2007).
- 3 *See, e.g., In re Herron*, 381 B.R. 184, 190 (Bankr. D. Md. 2008).
- 4 *See, e.g., Perron v. eCAST Settlement Corp. (In re Perron)*, 2006 Bankr. LEXIS 2639 at \*12 (BAP 6th Cir. Oct. 13, 2006) (holding that “[t]he mere failure to comply with the rules concerning the form and content of a proof of claim is not justification under the Bankruptcy Code to judicially invalidate a creditor’s otherwise lawful claim.”); *Dove-Nation v. eCast Settlement Corporation (In re Dove-Nation)*, 318 B.R. 147 (B.A.P. 8th Cir. 2007); *Heath v. American Express Travel Related Company (In re Heath)*, 331 B.R. 424 (B.A.P. 9th Cir. 2005).
- 5 *Fleming*, 2008 Bankr. LEXIS 4021, at \*2 (Bankr. E.D. Va. Oct. 15, 2008).
- 6 Case No. 06-1206 (Bankr. N.D. W. Va. 12/17/2007).
- 7 *Id.* at 5.
- 8 *In re Jorczak*, 314 B.R. 474 (Bankr. D. Conn. 2004).
- 9 *In re Porter*, 374 B.R. 471, 483 (Bankr. D. Conn. 2007); *In re Tran*, 369 B.R. 312, 317 (Bankr. S.D. Tex. 2007).
- 10 *In re Armstrong*, 320 B.R. 97, 104-05 (Bankr. N.D. Tex. 2005).
- 11 393 B.R. 259 (Bankr. Mass. 2008).
- 12 *Id.* at 270.
- 13 *In re Smith*, 41 B.R. 622, 628 (Bankr. E.D. Va. 2008).
- 14 *In re O’Neal*, Case No. 07-51027 (Bankr. N.D. Ohio May 1, 2009). The debtor, given the short sale, did not list Countrywide or any other mortgage company in her schedules, nor did she list the property as being an asset.
- 15 *Id.* at 15.
- 16 *Id.* at 18.
- 17 *Id.* at 22-23. *See also, In re Varona*, 388 B.R. 705, 717 (Bankr. E.D. Va. 2008) (explaining, “Despite the availability of other statutory or rule-based remedies, the Court’s power to remedy and punish for the filing of a false or fraudulent claim is within the strictures of its authority pursuant to 11 U.S.C. §105.”).
- 18 407 B.R. 873 (Bankr. N.D. Ohio 2009).
- 19 *Id.* at 883.
- 20 *In re Stewart*, 391 B.R. 327, 357 (Bankr. E.D. La. 2008).
- 21 *Id.*
- 22 *Id.*
- 23 *In re Jones*, Case No. 03-16518, Section A, 14 (Bankr. E.D. La. Oct. 1, 2009).
- 24 *Id.*
- 25 *Id.* at 14-15.
- 26 *Id.* at 16-17.

# The Demise of Credit Bidding at Plan Sales:

## So What Constitutes the “Indubitable Equivalent” of a Secured Creditor’s Claim?

by Douglas M. Foley

Two recent circuit court opinions have concluded that a secured creditor’s right to credit bid is no longer sacrosanct in the context of a sale proposed in a Chapter 11 plan under Section 1129 of the Bankruptcy Code.<sup>1</sup> Although considered in different procedural contexts, both the U.S. Court of Appeals for the Third Circuit (*Philadelphia News*)<sup>2</sup> and the U.S. Court of Appeals for the Fifth Circuit (*Pacific Lumber*)<sup>3</sup> have now ruled that Section 1129(b)(2)(A)(ii) is not the exclusive means for a debtor to sell a secured creditor’s collateral under a Chapter 11 plan. Section 1129 provides in relevant part as follows:

(b) (1) . . . the court, on request of the proponent of the plan, shall confirm the plan . . . is *fair and equitable*, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be *fair and equitable* with respect to a class includes the following requirements:

(A) With respect to a class of *secured claims*, the plan *provides*—  
(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another

entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder’s interest in the estate’s interest in such property;

(ii) *for the sale, subject to section 363 (k)*<sup>4</sup> of this title, of any property that is subject to the liens securing such claims, *free and clear of such liens, with such liens to attach to the proceeds* of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; *or*

(iii) for the realization by such holders of the *indubitable equivalent* of such claims.

11 U.S.C. §1129(b) (emphasis added).

When a debtor proposes to sell a lender’s collateral outside of a Chapter 11 plan, § 363(k) allows the secured creditor to credit bid its secured claim. A credit bid allows a secured lender to bid its debt in lieu of cash at a sale of its collateral. The rationale for allowing a lender to credit bid is that the secured creditor likely would not outbid a cash bidder unless it thought the collateral had greater value than represented by the cash bid since its lien would typically transfer to the proceeds of sale.

While § 363(k) expressly authorizes credit bidding in sales conducted outside of a plan, both the Third Circuit in *Philadelphia News* (in the context of bidding procedures) and the Fifth Circuit in *Pacific Lumber* (in the context of plan confirmation) have recently held that there is no guarantee of a secured creditor's right to credit bid at a sale of its collateral under a Chapter 11 plan. In both cases, the debtor proposed sales or processes that expressly prohibited credit bidding.

### Less than six months after the *Pacific Lumber* decision, the Third Circuit decided *Philadelphia News* in the context of bidding procedures.

In *Pacific Lumber*, a class of undersecured creditors challenged confirmation of a plan that proposed selling their collateral without allowing the opportunity to credit bid. They challenged the legality of the plan, arguing it could not be confirmed over their objection because under § 1129(b)(2)(A)(ii) (Clause (ii)) the plan had to afford them an opportunity to credit bid at the sale. The bankruptcy court overruled the objection and on appeal the Fifth Circuit, in an opinion authored by Judge Edith H. Jones — a former Chapter 11 bankruptcy practitioner — affirmed the ultimate conclusion that Clause (ii) does not provide the exclusive means for a debtor to sell collateral under a Chapter 11 plan. Instead, the Fifth Circuit focused on how to define § 1129(b)(2)(A)(iii) (Clause (iii)), which allows for confirmation over the objection of a class of secured creditors if such creditors are receiving the indubitable equivalent of their claims.<sup>5</sup>

The Fifth Circuit held the secured creditors did not have an automatic right to credit bid at the sale under Clause (iii) because the three prongs are joined together by the disjunctive “or” and are therefore to be viewed as alternatives, and was not persuaded by the argument that Clause (ii) applies exclusively in cases where collateral is sold under a plan. The Fifth Circuit court held that Clause (iii) — the indubitable equivalent prong — was not intended by Congress to be a “capacious but empty semantic vessel” but rather provides a separate and distinct basis for confirming a plan.<sup>6</sup> The court stated that “[w]hatever uncertainties exist about indubitable equivalent, paying off secured creditors in cash can hardly be

improper if the plan accurately reflected the value of the . . . collateral” and that the Bankruptcy Code “does not protect a secured creditor’s upside potential [i.e., the right to potentially increase the value of the return on its claim by credit bidding]; it protects the ‘allowed secured claim.’”<sup>7</sup>

Less than six months after the *Pacific Lumber* decision, the Third Circuit decided *Philadelphia News* in the context of bidding procedures. The case involves several print media companies, and the debtors proposed a plan of reorganization that included a public auction of substantially all of the debtors’ assets. The bidding procedures provided that all bids must be in cash and thereby prohibited credit bidding. The bankruptcy court held that when a sale is taking place pursuant to a plan, the secured creditor must be allowed to credit bid. However, relying partly on *Pacific Lumber*, the district court reversed and held that a plan may be confirmable without giving secured creditors credit bidding rights as long as one of the other prongs of section 1129(b)(2)(A) was satisfied.

In a deeply divided decision, the Third Circuit affirmed the district court, holding the three prongs of Section 1129(b)(2)(A) are written in the disjunctive and therefore the plain meaning is they are separate and distinct requirements (i.e., options) for demonstrating the plan is fair and equitable to a dissenting secured creditor class for confirmation purposes. The court rejected the argument that the specific provision in Clause (ii) referencing credit bidding with respect to sales is exclusive, absolute, or precludes confirmation of a sale plan under Clause (iii) if the dissenting secured creditor class is otherwise being provided the indubitable equivalent of their claims. The court also stated, however, that the absence of the ability to credit bid could be a factor, depending on the particular facts and circumstances, in determining whether the Clause (iii) indubitable equivalent requirement is being satisfied.

In a thorough and well-reasoned dissenting opinion, Judge Thomas L. Ambro — a former Chapter 11 bankruptcy practitioner — argued that the specific credit bidding right found in Clause (ii) is always presumptively applicable whenever a plan proposes the sale of collateral and, under such circumstances, should always govern over the more general indubitable equivalent requirement found in Clause (iii). He concluded that Section 1129(b)(2)(A) is ambiguous — given that the bankruptcy court and district court disagreed about its meaning — and is open to a more than one plausible reading. As such, he

analyzed the statute practically and in the context of other statutes (§§ 363(k) and 1111(b)) protecting secured creditors' rights. He also reviewed the legislative history and bankruptcy policy to discern congressional intent. Judge Ambro read the statute as a road map that provides different specific routes to follow, depending upon how a plan proposes to treat secured claims: Clause (i) applying when a secured creditor retains its lien, Clause (ii) applying when there is a sale free and clear of liens, and Clause (iii) applying when it is proposed that the indubitable equivalent of a secured creditor's claim be provided under the plan (e.g., abandonment, or replacement lien on similar collateral).<sup>8</sup> He concluded that the majority opinion's fixation on the disjunctive "or" between Clause (ii) and Clause (iii) as being a "textual show-stopper" is a grossly oversimplified analysis that undermines the design and function of the Bankruptcy Code and a secured creditor's rights under applicable nonbankruptcy law — namely, to foreclose on its collateral and credit bid at the sale.<sup>9</sup>

It is unclear what practical impact, if any, *Pacific Lumber* and *Philadelphia News* will have on either the credit markets or in Chapter 11 practice.<sup>10</sup> It is likely that more sales will be attempted, time permitting, as part of the plan confirmation process than under § 363, since debtors may have more options in disposing of encumbered assets in light of these decisions. However, many questions remain unanswered about satisfying the indubitable equivalent prong found in Clause (iii) with respect to a plan sale.

Both *Pacific Lumber* and *Philadelphia News* involved cash-only auction processes with the liens attaching to the proceeds of sale. In this context, it is arguably difficult to see how a secured creditor is harmed — provided the price obtained accurately reflects the value of the secured creditor's collateral, which might be presumed by bankruptcy courts if the collateral was sold at a properly conducted noncollusive, arms-length public auction. But what if the terms of the auction sale process were more complicated or involved different currency?

These two decisions seem to suggest that, at its core, determining a secured creditor's indubitable equivalent may involve only the valuation of the secured creditor's collateral accurately under the plan. This may be the focus of future disputes in confirmation battles yet to come. As debtors develop more creative ways to treat secured claims in Chapter 11 plans under the indubitable equivalent prong, there may be more

challenges to valuation methodology, thus testing the outer reaches of what constitutes fair and equitable under § 1129(b). Unless other circuit courts follow Judge Ambro's dissenting opinion, it is unlikely that the U.S. Supreme Court will weigh in on the debate. Until then, it would be wise for secured creditors and bankruptcy courts to prepare to analyze and wrestle with a myriad potential plan treatments that attempt to further the define contours of indubitable equivalence.

#### Endnotes:

- 1 All statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* unless otherwise noted.
- 2 *In re Phila. Newspapers LLC*, 599 F.3d 298 (3d Cir. 2010) (hereinafter "*Philadelphia News*").
- 3 *Bank of New York Trust Co. NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009) (hereinafter "*Pacific Lumber*").
- 4 Section 363(k) provides:  
At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.  
11 U.S.C. § 363(k).
- 5 Judge Learned Hand first coined the phrase "indubitable equivalent" in *In re Murel Holding Corp.*, 75 F.2d 941, 942 (2d Cir. 1935). In interpreting the Bankruptcy Act of 1898, Judge Hand found that a secured creditor could not be deprived of his collateral "unless by a substitute of the most indubitable equivalence." *Id.* The phrase now appears in the Bankruptcy Code.
- 6 *Pacific Lumber*, 584 F.3d at 247.
- 7 *Id.* The court also suggested that the undersecured creditors' real complaint seemed to be with the Bankruptcy Court's valuation process. The court concluded, however, that the process was extensive, fair, and equitable, and thus satisfied Clause (iii). *Id.* at 249.
- 8 *Id.* at 337
- 9 *Id.*
- 10 Judge Ambro also surmised that the majority opinion may increase the cost of credit, since it would upset "three decades of secured creditors' expectations." *Id.* at 337.



# UPL Committee Takes on Immigration Consultant Fraud

by Dawn Chase

In Virginia, unqualified immigration consultants — some of whom masquerade as lawyers — defraud immigrants who are trying to live legally in the United States. Fraudulent consultants proliferate in metropolitan areas such as Northern Virginia, with a large immigrant population.

The consultants go by different names, depending on the population they target. In Hispanic communities, for example, some nonlawyers call themselves *notarios*, a designation in their homelands for lawyers with additional credentials.

Some of the victims are applying for green cards — permanent resident status that puts the immigrant on the path to citizenship. Some victims want temporary work-related visas. Some are American citizens who need help getting immigration papers for spouses, children, and other family members. Other victims seek legal services in non-immigration matters, such as traffic offenses or family law. They hire someone who advertises, often in their language, as an expert. Frequently, the victims pay high fees for the service, as they would expect to in their countries of origin.

In order to practice as an advocate before the U.S. Bureau of Citizenship and Immigration Services, its courts, and the U.S. Justice Department's Board of Immigration Appeals (BIA), the advocate must be a lawyer licensed in the United States or a nonlawyer certified by the BIA.

Notarios and other unqualified immigration consultants are neither lawyers nor BIA-certified. In many cases, the service the victim pays for is not accomplished. The victim learns that the consultant is not permitted to advocate for him or her before the federal agencies and courts. One possible conse-

quence — which can happen months or years after the fraud is committed — is deportation, which leaves victims unable to seek a remedy against the consultant.

The Virginia State Bar Unauthorized Practice of Law (UPL) Committee has launched a campaign to warn the public about scams and poor service by notarios and other unqualified immigration consultants.

The committee also is seeking authority from the VSB Council to request legislation to tighten Virginia's UPL laws by increasing the statute of limitations and imposing civil penalties and restitution. Often, the client does not find out about the fraud until the current one-year statute for criminal prosecution has run.

"The UPL Committee has long been frustrated by the difficulties of prosecuting fraudulent consultants under the current UPL statutes," said Sharon D. Nelson, committee chair. "The statute of limitations is too short and the punishment too slight. We are looking to give the fight against UPL real teeth.

"In addition to seeking to amend the law, we have decided to educate immigrant communities in Virginia about how to select a qualified advocate, how to spot someone who is not qualified, and how to complain and take meaningful legal action if someone is victimized."

In the education campaign, VSB-produced brochures, posters, and palm cards will be distributed to churches, community centers, social services agencies, and other places where immigrants might go.

The material, available at <http://www.vsb.org/site/public/immigration-fraud>, offers information on protecting against fraudulent consultants, reporting fraud, and seeking

recovery for victims. The materials are printed in English, Spanish, Korean, and Vietnamese.

Lawyers can help detect unscrupulous immigration consultants by reporting possible UPL or their suspicion that a client was defrauded to the VSB and Federal Trade Commission (see sidebar, page 53).

## Solving the Problem

The UPL Committee investigates allegations of unauthorized practice and brings its findings to law enforcement agencies, which occasionally prosecute. To prosecutors, UPL is a low-priority crime; it is a misdemeanor and, in the case of immigration fraud, the victim often has been deported and cannot testify.

An immigration consultant who was prosecuted after a UPL Committee referral was Hans L.H. Gouw, who operated the Chinese Indonesian Society. Gouw was not a lawyer, and his organization was not certified by the BIA. The UPL Committee investigated six complaints about him in 2001 and 2002 and found that he had committed unauthorized practice of law. The U.S. Attorney's Office and federal Department of Homeland Security used the committee's evidence to help close down a major immigration fraud organization and prosecute Gouw and twenty-six others. Gouw was convicted of money laundering and of conspiracy to commit immigration fraud, identification document fraud, and sex trafficking. [http://www.justice.gov/usao/vae/Pressreleases/05-MayPDFArchive/05/5305gouw\\_komalanr.pdf](http://www.justice.gov/usao/vae/Pressreleases/05-MayPDFArchive/05/5305gouw_komalanr.pdf)

But many UPL cases are not prosecuted.

Two years ago, Virginia lawyer and consumer law practitioner David A. Zetoony was listening to a radio story about children of legal residents who were living in the United States illegally because their immigration consultant had failed to check a “dependants” box on their parents’ forms. As the story described the difficulty prosecuting such cases, Zetoony had a thought: Why not sue the consultants under state consumer protection statutes, which can result in treble damages and attorney fees?

With the backing of his law firm — Bryan Cave LLP in Washington, D.C. — Zetoony worked pro bono with the American Bar Association and Catholic Charities of the Archdiocese of Washington to develop a civil action strategy and to train immigration attorneys and litigators on how to use state statutes to recover against deceptive immigration consultants. Their first workshops — two in Washington and one on the Internet — trained up to four hundred lawyers, including some from Virginia. The strategy now has been used with success in several states.

In Virginia, Zetoony and Daniel T. O’Connor — also of Bryan Cave — sued Cecilia E. Olazabal-Valencia in Fairfax County Circuit Court for fraud under the Virginia Consumer Protection Act, Va. Code Ann. § 59.1-200. Olazabal-Valencia did business as CKMC Multiservices in Woodbridge, and, as alleged in the complaint, represented herself on her business card as a “specialist in Taxes, Criminal, Family Law, Traffic and Immigration.”

The complaint alleged that Olazabal-Valencia, in exchange for fees, advised the plaintiff on what immigration status to file for, selected the forms, and filled them out for the complainant. The Bureau of Citizenship and Immigration Services ultimately denied the plaintiff’s application for

## Immigration Consultant Fraud Resources

### Virginia State Bar Website — <http://www.vsb.org/site/public/immigration-fraud>

Here you can find information about immigration consultants, questions to ask, and how to report fraud. You also can download brochures, posters, and palm cards in English, Spanish, Korean, and Vietnamese.

### U.S. Bureau of Citizenship and Immigration Service —

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=915c9ddf801b3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=915c9ddf801b3210VgnVCM100000b92ca60aRCRD>

This site provides advice on how to protect yourself from immigration consultant fraud. The website has brochures and posters in English, Chinese, Creole, Polish, and Spanish.

### U.S. Justice Department’s Accreditation Roster —

<http://www.justice.gov/eoir/statspub/raroster.htm>

This website has links to lists of agencies and individuals who are accredited to represent people before the Board of Immigration Appeals and the U.S. Department of Homeland Security.

### VSF Membership — (804) 775-0530

Call this number to verify that a person is a lawyer in good standing with the Virginia State Bar.

### VSF Discipline — <http://www.vsb.org/site/regulation/disciplinary-system-actions/>

Here you can search for an attorney’s record of public discipline. Disciplinary history of an attorney also can be obtained by calling (804) 775-0593.

### Virginia Lawyer Referral Service — (800) 552-7977

At this number you can arrange for a one-half-hour consultation with a lawyer in your area, for a fee of \$30. The lawyers are licensed and in good standing with the Virginia State Bar.

### VSF Complaint Form — [http://www.vsb.org/profguides/upl/upl\\_form.pdf](http://www.vsb.org/profguides/upl/upl_form.pdf)

If you believe you have been the victim of a person who is practicing law without a license, fill out this form and send it to Ethics Department, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, VA 23219. You can also order a form by calling (804) 775-0557.

### Federal Trade Commission Complaint Form — <https://www.ftccomplaintassistant.gov/>

You can report suspicion of immigration consultant fraud here. You can also call the FTC at (877) FTC-HELP (877-382-4357).

### American Bar Association —

[http://www.abanet.org/publicserv/immigration/notario/fight\\_notario\\_fraud.shtml](http://www.abanet.org/publicserv/immigration/notario/fight_notario_fraud.shtml)

At this site, the ABA’s Fight Notario Fraud project helps connect victims of immigration consultant fraud with pro bono lawyers who are willing to represent them. The site includes a referral form:

[http://www.abanet.org/publicserv/immigration/notario/referring\\_probono\\_case.shtml](http://www.abanet.org/publicserv/immigration/notario/referring_probono_case.shtml).

protected residency status and employment authorization.

The defendant did not admit liability, but the case settled with the defendant agreeing to a ten-year injunction, during which time she would refrain from calling herself a lawyer or stating that she could give legal advice or provide legal services, from displaying scales of justice on her advertising, and from receiving compensation for “selecting, drafting,

or filing forms on behalf of another.” She also agreed to pay \$3,000. *Reyes v. Olazabal*, Case No. 2009-02006, slip op. (Va. Cir. Ct. [Fairfax] May 22, 2009).

In the same case, the UPL Committee found that Olazabal-Valencia was engaged in unauthorized practice and reached a settlement that included her agreement that she would refrain from any further UPL.

Zetony’s case shares many elements in common with the cases that

routinely come before the UPL Committee.

“The cases we see are very sad,” said committee Chair Nelson. “People will hand over their life savings for a shot at the American dream. . . . It’s helpful for lawyers to know how egregious these violations of the law are, and to know how to counsel the victims of immigration fraud.”

**President** continued from page 15

Israel relationship. He founded and still serves as treasurer of the Virginia Congressional Committee, a political action committee that contributes to candidates who support a strong United States-Israel relationship.

On the Virginia Tech campus where Blank was so isolated from other Jews in his undergraduate years, he is now involved in a \$3 million fundraising effort to build a Hillel House, where students can “further their Jewish identity while becoming part of the Hokie nation,” he said.

Last year, the Richmond Jewish Community Federation awarded him its highest honor, the Distinguished Community Service Award.

At the Virginia Holocaust Museum in Richmond, Blank was cochair for fundraising to build a replica of the Nuremberg courtroom where war crimes were prosecuted after World War II. Early in the project, Blank found himself on a bus ride with the man he was to succeed as VSB president, Jon D. Huddleston.

Blank described the courtroom project, and Huddleston, who was on the board of the Virginia Law

Foundation, talked about the foundation’s plans to change its grant strategy to supporting larger projects.

From this conversation, the VLF made a \$100,000 grant to the museum and established a commitment to cosponsor annual programs and a Rule of Law Award.

Despite all his personal projects, Blank has no president’s project planned for the VSB. “My feeling is to take the mission statement of the Virginia State Bar and keep this train on the tracks,” he said.

He likes the Virginia Is for Good Lawyer project created by Huddleston. “I want to find a way to continue it,” he said.

And he plans to keep speaking out about the moratorium on filling judicial vacancies and encouraging other lawyers to do the same. The VSB’s governing Council voted in February to express its concern about the proposal. But Blank said the bar agency is circumspect about any advocacy before the General Assembly, and he respects that.

“My challenge is separating my personal being from my institutional being. I’ve done that before, but that’s not easy to do,” he said. “Irving Blank,

lawyer. Irving Blank, citizen.’ I’ve got to make certain that doesn’t get blurred over.”

At his inauguration, daughter Lisa delivered the invocation and son Jonathan swore him in. Irv Blank’s affection is clear in the photos on the cover and on pages 69–70.

Lisa chose as a text Isaiah 1:17:

Learn to do right!  
Seek justice,  
encourage the oppressed.  
Defend the cause of the fatherless,  
plead the cause of the widow.  
(New International Version)

“When people tell me ‘He’s such a good lawyer!’, I tell them that he’s one of the best lawyers I’ve ever met, but he’s a much better dad,” Jonathan said.

# Local Bar Associations Provide Opportunities for Pro Bono Service



ON APRIL 27, 2010, the Virginia Bar Association hosted the First Chief Justice's Pro Bono Summit. This summit, which was attended by many lawyers from around the commonwealth, was the result of the Chief Justice's call to the bar to improve the provision of pro bono services to the public. The program featured reports about pro bono efforts in the state. Reports were given by legal aid officers and lawyers in private practice from Richmond, Roanoke/Shenandoah Valley, Southwest, Hampton Roads, Danville, and Northern and Central Virginia. The reports highlighted the critical role local bar associations play in facilitating pro bono services.

It was noted during the summit that busy lawyers usually just need to be asked to provide pro bono service. Local bar associations ask lawyers to provide pro bono service, and match talented lawyers with the needs of clients who cannot afford to pay. Local bar associations provide structure for pro bono projects in the areas of divorce, wills, and protective orders. The clients deserve access to the judicial system. Local bar associations provide a means for Virginia lawyers to fulfill their ethical obligation under Rules of Professional Conduct 6.1(a) to provide at least 2 percent per year of their time for pro bono work.

There is a critical need for pro bono service that local bar associations are instrumental in filling. According to studies presented at the summit<sup>1</sup>, there is a consistent unmet need for legal services for approximately 80 percent of low-income Virginians. The studies further show that, while the overall population per Virginia attorney is 283,

the poverty population per Virginia legal aid attorney is 5,212. The studies also show that Federal Legal Services Corporation funding has declined steadily since the early 1980s. Interest on Lawyers' Trust Accounts revenue (a primary source of funding for legal aid) has declined from a high of \$4.6 million in 2007 to a projected \$600,000 for the fiscal ending June 30, 2010. Only about 3 percent of Virginia attorneys participated in legal-aid-related pro bono work in fiscal 2009, according to the studies. Through their pro bono programs, local bar associations provide an important alternative to legal aid for addressing the great unmet need for pro bono assistance to Virginia's poor.

Providing legal services to the poor is not just a matter of political correctness. By providing a mechanism for pro bono service, local bar associations make substantial contributions to the fair administration of justice. The studies presented at the summit also showed what we all know empirically: that a poor litigant is more than twice as likely to lose a case if he or she is not represented. Local bar association pro bono programs, therefore, better the odds for poor litigants. In so doing, the local bar association programs also promote confidence that Virginia's judicial system serves the poor and wealthy alike.

If your local bar association has implemented pro bono programs, I urge you to get involved. If your local bar association has not implemented pro bono programs, please consider developing them. The Conference of Local Bar Associations (CLBA) can help. It can direct your local bar associ-

ation to materials about proven, successful pro bono programs that can be tailored to your community.

The subject of resources and programs for local bar associations is but one of the topics that will be addressed at an upcoming Bar Leaders Institute sponsored by the CLBA. Other topics include how to lead your bar association during a bad economy, communicating with members of the bar through social media, involving judges in the bar, and the basics of local bar leadership. The keynote speaker will be Judge G. Steven Agee of the Fourth U.S. Circuit Court of Appeals. Continuing legal education credit will be offered. The Bar Leaders Institute will be on October 22, 2010, at the Roanoke Higher Education Center. Details will be posted at [www.vsb.org](http://www.vsb.org). Mark your calendars. I look forward to seeing you there.

This is my last article as chair of the conference. It has been a good and productive year for the CLBA. I have enjoyed my service immensely. As of June 18, your new chair is Nancy M. Reed. Nancy has served well on the CLBA Executive Committee for many years and has the experience and skills to do a fantastic job.

Endnote:

- 1 J.E. Whitfield, Executive Director, Blue Ridge Legal Services, *Materials Documenting the Compelling Need for Increased Pro Bono Assistance in Virginia*. (VBA Pro Bono Summit 2010)

# Young Lawyers Conference

by Lesley Pate Marlin, President



## Service Accomplished

WATER THE SEEDS, NOT THE WEEDS. Those are the words that come to mind, as I reflect upon the Young Lawyers Conference in the past twelve months. Perhaps it is because that's the motto I adopted almost four years ago when I faced an unexpected life challenge. Or perhaps it is because that's what I have seen the YLC do through its many leaders and volunteers. The YLC has continued its legacy of service in the 2009–10 bar year, serving our communities, the bar, and our members.

The YLC has served the communities of Virginia. This past year, we partnered with the Legal Information Network for Cancer (LINC) and created a *Legal Handbook for Cancer Survivors*. Thanks to Kristi N. Cahoon for chairing the project. She facilitated the partnership with LINC, recruited authors, editors, and contributors, and then coordinated the drafting and editing process. The handbook discusses paying for medical care (including health insurance issues), financial matters, employment issues, and how to plan for health care, financial, and other important decisions. It contains an appendix of sample documents and a resource list. Eight thousand copies of the handbook have been printed and will be distributed by the YLC and LINC in the coming months.

We have helped Virginia's citizens with legal issues. This year, for example, we provided wills to first responders in Arlington, Prince William County, Fredericksburg, and Roanoke. Thanks to Andrew G. Geyer for his efforts as our Wills for Heroes chair. We also offered free legal advice through No Bills Nights in Danville,

Richmond, Roanoke, and Warrenton. Particularly noteworthy is Roanoke's No Bills Night, during which approximately 240 telephone calls were answered in two hours—a fraction of the 3,500 people who tried to get through. Thanks to W. Wirt Brock for serving as the statewide chair of No Bills Night and to Travis J. Graham and Leigh R. Strelka for chairing Roanoke's No Bills Night.

We have taught about the legal profession through the Oliver Hill/Samuel Tucker Pre-Law Institute for high school students and Pre-Law Conferences for college students. The institute took place July 19–July 24, 2009, at the University of Richmond. The institute received not only a record number of applicants, but also rave reviews from the high school students who participated. Highlights included a field trip to the White House to visit with Melody Barnes, a graduate of Richmond Public Schools, and to U.S. Senator Mark Warner's office on Capitol Hill. Another highlight was U.S. Court of Appeals Judge Roger L. Gregory's keynote address at the closing banquet. Thanks to Yvette A. Ayala and Rasheeda Matthews for their efforts as the cochairs of the Oliver Hill Law Institute. A Pre-Law Conference occurred on September 12, 2009, at Washington and Lee University School of Law. Thanks to Christen C. Church and Lindsey A. Waters for serving as cochairs of that conference. Nearly seventy students attended the program. Kaplan donated free Law School Admission Test preparation courses to be raffled off to the attendees.

The YLC has served the bar through the Bench-Bar Celebration

Dinner, Virginia State Bar Annual Meeting programs, and other continuing legal education programs. On January 25, 2010, we hosted the Bench-Bar Celebration Dinner at the Bull and Bear Club in Richmond. Thanks to Sarah E. Bruscia for organizing the dinner. More than one hundred lawyers and judges attended the event, during which eleven newly appointed women and minority judges in Virginia were honored. Then-Virginia Justice Barbara Milano Keenan delivered the keynote address. The YLC appreciates the incredible support of the judges from the Virginia Court of Appeals, most of whom were in attendance. With regard to our other bar service programs, we thank Marie E. Washington for organizing a CLE program on Immigration and Customs Enforcement and Jennifer A. Haberlin for organizing a class at the VSB Annual Meeting on the legal issues facing cancer survivors. We also thank Andrew R. Tank for chairing the athletic programs at the annual meeting.

The YLC has served its members—approximately ten thousand young lawyers in Virginia—through our quarterly newsletter, the *Docket Call*, and e-mails with program information and volunteer opportunity announcements. Thanks to Joanna L. Faust for serving as the editor-in-chief of *Docket Call*. Not only has she overseen this year's transition to predominantly distributing the newsletter electronically, but she also has creatively added new features to the newsletter. We also hosted our Professional Development Conference on September 25, 2009, at

YLC continued on page 60

# Senior Lawyers Advise End-of-Practice Planning



AS I WRITE THIS FINAL ARTICLE for the 2009–10 year, I want to express my deep appreciation for the opportunity to serve over the past year. It has truly been a wonderful experience.

I have worked with the excellent board of the Senior Lawyers Conference, which included current and retired members of the state judiciary, former members of the Virginia General Assembly, commissioners of accounts, and many outstanding attorneys. This group is a reservoir of knowledge and wisdom about our legal system and society. They consistently work together on worthwhile projects with a fine sense of collegiality.

It has also been my privilege and pleasure to work with Jon D. Huddleston, 2009–10 president of the Virginia State Bar, and to support his effort to emphasize the contributions of Virginia lawyers — not only in their law practices, but also in their communities.

The fall meeting of the Virginia State Bar committee and conference chairs, held in Richmond on September 29, 2009, was extremely helpful and educational. This workshop allowed leaders to network and share their group's work and their plans for the coming year, including programs for the bar's annual meeting. It was also very helpful to meet and hear presentations made by state bar staff, who work diligently and conscientiously on our behalf.

It was my pleasure to attend meetings of the VSB Executive Committee and Council and to participate in a strategic planning conference with the Executive Committee. These attorneys volunteer their time and expertise to

improve the professionalism of attorneys and to protect their clients. Spirited debates are conducted in a civil and respectful forum.

I attended Senior Citizens Law Day programs in Tappahannock and Charlottesville. The first one was on October 24, 2009, and was the third sponsored by a Northern Neck bar association. F. Warren Haynie Jr. was the catalyst for this effort. On May 4, 2010, I observed an excellent program in Charlottesville, sponsored by the Charlottesville Albemarle Bar Association. This session was videotaped and later broadcast on public television. Joseph W. "Rick" Richmond Jr. spearheaded the Charlottesville program. Earlier this year, Frank O. Brown Jr. and his son Matthew headed up a Senior Law Day program before 350 individuals at First Baptist Church in Richmond. As a part of these programs, the sponsoring group distributed the *Senior Citizens Handbook*.

At the suggestion of VSB Executive Director Karen A. Gould, the Senior Lawyers Conference launched a project to develop a checklist for closing a law practice. Frank Brown has drafted a document that is now being reviewed by a committee. We hope that this publication will help prevent costly and time-consuming receiverships. Frank Brown also continues to offer continuing legal education program, "Protecting Your and Your Clients' Interests in the Event of Your Disability, Death, or Other Disaster."

As I prepare this article, we are looking forward to two excellent projects at the 2010 Annual Meeting of the Virginia State Bar in Virginia Beach. John M. Oakey Jr. leads our plans for a

workshop on "Basic Estate Administration for the General Practitioner," which will feature four panelists and will be cosponsored by the VSB General Practice and Trust and Estates sections. The senior lawyers will once again host a brunch at the annual meeting to recognize and honor fifty-year members of the bar.

I cannot summarize the year's efforts without mentioning the tremendous contributions made by both Patricia A. Sliger and Paulette J. Davidson. In December, we bid farewell to Pat Sliger in her retirement from the VSB staff after many years of service, including more than fourteen years working with the Senior Lawyers Conference and its predecessor section. She was truly a major force in helping maintain the conference projects. Since January, Paulette Davidson has admirably assumed the staff liaison role and has been tremendously helpful in carrying on the work of the Senior Lawyers Conference.

As I move to the position of immediate past chair for the conference, I do so with the assurance that it has an excellent slate of officers for the coming year, led by John H. Tate Jr., whose warm and personable style of leadership will serve us well. I also salute the incoming Virginia State Bar president, Irving M. Blank, who will admirably lead this important agency.

I urge each of us to exhibit civility in all areas of the law and to take seriously the concept of making an orderly transition plan for our own law practices because our clients and the public deserve nothing less.

# Consumer Bankruptcy Law Research Primer

by Lara Dresser

JAMES WILSON, appointed to the U.S. Supreme Court by George Washington and signer of the Declaration of Independence and the Constitution, was “hunted like a wild beast” by creditors and twice sent to debtor’s prison while riding circuit for the Court. Historically, bankrupt debtors could be locked up, sold, tortured, and even put to death. Today, bankruptcy is an equitable, not criminal, process in which debtors are given a fresh start and the playing field is leveled for creditors. This is good news for the nearly 1.5 million individuals who file for bankruptcy every year. For attorneys entering the consumer bankruptcy quagmire for the first time, here’s a primer to get you started.

Bankruptcy cases are filed in U.S. bankruptcy courts and are governed both procedurally and substantively by federal law. State law comes into play, however, when determining property rights, such as validity of liens or types of property that are exempt from creditors.

## Primary Sources

### Statutes

The uniform federal law that governs all bankruptcy cases is found in the Bankruptcy Code, Title 11 of the U.S. Code (11 U.S.C. 101 et. seq.). Chapters 7, 9, 11, 12, and 13 of the code govern different types of bankruptcy proceedings. Chapters 1, 3, and 5 contain general provisions that, with some exceptions, apply to all bankruptcy proceedings. The majority of consumer bankruptcies are filed under Chapter 7 (liquidation) or Chapter 13 (wage earner repayment plan).

### Procedure and Forms

The Federal Rules of Bankruptcy Procedure (Bankruptcy Rules), the Official Bankruptcy Forms, and the local rules of each bankruptcy court govern the procedural aspects of bankruptcy.

The Bankruptcy Rules and the Official Bankruptcy Forms can be found in U.S.C. Title 11A, an appendix to Title 11. Free online access is available at the Government Printing Office site, GPO Access.gov (at <http://www.gpoaccess.gov/uscode/index.html>) or through Cornell University’s Legal Information Institute at <http://www4.law.cornell.edu/uscode/>. The Official Bankruptcy Forms appear on the website for the U.S. Courts, at <http://www.uscourts.gov/bkforms/index.html>.

Links to local rules for all jurisdictions are at <http://www.uscourts.gov/rules/bk-localrules.html>. Local Rules for the United States Bankruptcy Courts of Virginia are at <http://www.vaeb.uscourts.gov/files/Rules020510.pdf> (for the Eastern District) and <http://www.vawb.uscourts.gov/Local%20Rules%202009%20Final.pdf> (for the Western District).

### Case Law

*West’s Bankruptcy Reporter* and *West’s Bankruptcy Digest* — Full text and headnotes from decisions of the U.S. bankruptcy courts and cases that deal with bankruptcy matters from the U.S. district courts, U.S. courts of appeals, and the U.S. Supreme Court.

*Collier Bankruptcy Cases* (Lexis Publishing) — Full text of key cases decided under the Bankruptcy Code and Rules, including summaries, head notes, and cross-references to *Collier on Bankruptcy*. A less expensive option is *Collier Bankruptcy Case Update*, which provides concise summaries of current bankruptcy law cases organized by Bankruptcy Code section and Bankruptcy Rule number, available in e-mail or print.

### Secondary Sources

When new to an area of the law, legal research pathfinders are indispensable. *Researching Bankruptcy Law: A*

*Pathfinder*, by George Jackson, is one of the most comprehensive (see <http://www.tc.umn.edu/~g-jack/ALR/Bankruptcy.doc>).

*The Small but Essential Handbook of Basic Bankruptcy Law*, by Thomas W. Coffey, Scott J. Kelly, and Krista L. Kaleps (Casemaker Print Publishing) is an introductory guide for the nonspecialist that provides an overview of bankruptcy law, selected statutes and rules, and bankruptcy websites.

*Collier on Bankruptcy* (Lexis Publishing) and *Norton Bankruptcy Law and Practice* (West Publishing) are comprehensive and authoritative, albeit costly, sources. They provide detailed coverage of legal and procedural issues, forms, and full text of the Bankruptcy Code, Bankruptcy Rules and other primary sources.

*Collier Bankruptcy Manual* (Lexis Publishing) is a less costly alternative better suited to nonspecialists. This is an abridged, four-volume version of *Collier on Bankruptcy* that provides a section-by-section analysis of the Bankruptcy Code and covers all aspects of bankruptcy practice.

*Ginsberg and Martin on Bankruptcy* (Aspen Publishers) is a practitioner-oriented resource by two federal bankruptcy judges that analyzes case strategies from the debtor’s and creditor’s perspective. Contains detailed explanations of changes under the Bankruptcy Abuse Prevention and Consumer Protection Act and more than four hundred model forms with expert commentary.

Several excellent Virginia continuing legal education programs that cover different aspects of bankruptcy practice are available in print, on CD-ROM, or for

**Research** continued on page 60



# “Cloud Computing” in Discovery

## How We Deal with Electronically Stored Information

by Charles B. Molster III and Elizabeth H. Erickson

“CLOUD COMPUTING” is an e-discovery buzzword. In all likelihood, you and your clients are already using it, whether you know it or not. Cloud computing, sometimes referred to as Software as a Service (SaaS) or Platforms as a Service (PaaS), allows a company to store its data and software platforms or services in a third-party-owned and maintained “cloud.”

By providing access to tools and applications through cloud computing, users can share resources that are independent of the user’s hardware or physical location. There are a number of advantages and disadvantages to cloud computing, but the implications for e-discovery and the handling of electronically stored information (ESI) are numerous and should be considered and discussed by law firms and their clients.

### Types of Clouds

There are two main types of clouds. The first is created when a client moves its infrastructure off-site to be hosted and operated by a third-party service provider. The second exists when applications are accessed through the Internet instead of being locally hosted and run. In this second instance, all data is stored in a third-party cloud. Cloud users do not have to download applications and software to their computers or mobile devices. Instead, they access the necessary services and information via the Internet.

Google is a widely used example of Internet-accessed cloud computing service. Google users all over the world use the company’s online productivity tools and applications, such as e-mail, word processing, and calendars. Through Google, all of these tools are accessed for free.

Cloud computing allows users to access their data and services from virtually any computer with an Internet connection. This access often reduces costs

because it takes clients out of the business of hosting infrastructure and shifts that job to an expert with pooled resources and advanced hosting skills.

However, the security of data located in the cloud continues to be debated. Skeptics — who generally lack confidence in the security of the Internet, likely due to the prevalence of cyber identity theft — question the reliability of clouds and whether confidentiality can truly be maintained in a virtual world. Those security concerns, however, are quickly being overcome or pushed aside in favor of the obvious cost and ease-of-use benefits of cloud computing.

### Implications for E-discovery

Even at their simplest, clouds expand physical and virtual locations where electronically stored information might be found. This expansion may present a significant challenge during discovery. Because data is being stored off-site by a third party, cloud computing raises a number of questions about how e-discovery and data management are implemented.

A key consideration is who owns, manages, and accesses the ESI that resides in the cloud and is hosted by a third party. Rule 34 of the Federal Rules of Civil Procedure allows a party to serve a request for the production of documents and ESI that are in the responding party’s “possession, custody, or control.” In order to determine one’s duties under Rule 34, one must first determine who owns and controls the data in the cloud — your client or the third-party service provider. Not surprisingly, most courts are likely to find that data in the cloud is within your client’s control, despite the involvement of a third-party provider.<sup>1</sup> Clear ownership boundaries should be placed in the service contract to govern the relationship between your client and the third-party vendor.

When contracting with a cloud vendor, it is critical to ensure that the terms of the contract make clear that your client owns its data in the cloud; your client has the authority to manage its data; your client has the ability to access its data at any time; and your client’s data is protected from inappropriate disclosure. With these issues clearly resolved in the contract, you should be able to prevent a vendor from hindering your discovery efforts by refusing to allow the necessary access and processing of ESI in the cloud.

Once you have resolved the “possession, custody, or control” issue, you need to determine how to satisfy your discovery obligations regarding such data. Unfortunately, cloud computing technologies are far ahead of e-discovery software developers. Many e-discovery vendors offer cloud solutions for hosting and reviewing data. However, the industry has not yet developed tools for conducting e-discovery against the cloud, including tools to easily perform preservation, search, retrieval, culling, and early case assessment against cloud infrastructures. But as more clients use clouds in their daily business, thorough, defensible discovery in the cloud will be needed. Clients will demand solutions that efficiently and effectively preserve, gather, and process data for discovery purposes.

Ultimately, the buzz around cloud computing is expected to continue, as new platforms arise and clients’ confidence and usage evolve. Information technology and legal industries will need to respond with solutions that meet clients’ operational needs, while simultaneously addressing the increasing demands of e-discovery in the cloud.

Tech continued on page 60

the State Capitol in Richmond. Thanks for Robert E. Byrne Jr. and Monica A. Walker for organizing the conference. They recruited top-notch speakers for the CLE programs and arranged for then-Virginia Attorney General William C. Mims to address the attendees during lunch. A handful of attendees took advantage of the hardship discounts and scholarships that we offered to those who have been adversely affected by the economic crisis.

Behind so much of the great work done by the YLC is the Virginia State Bar staff, particularly Maureen D. Stengel and Catherine D. Huband. I thank them for their countless efforts and unwavering support of the YLC. Finally, to the outgoing YLC Board of Governors—Carson H. Sullivan, Christy E. Kiely, Jennifer L. McClellan, Kenneth L. Alger, Mollie C. Barton, Megan Bradshaw, Brian R. Charville, Maureen E. Danker, J. Barrett Lucy, Gerald E. Mabe II, Demian J. McGarry, Trevor A. Moe, Richelle D. Moore, Nathan J. Olson, Sarah Louppe Petcher, Rachael A. Sanford, Jennifer B. Shupert, and Nathan J.D. Veldhuis—many thanks for your leadership and efforts on behalf of the YLC.

I am grateful for the opportunity to have served as the YLC president, and delighted to turn over the leadership reins. I will, however, remain a young lawyer for several more years. During that time, I look forward to helping the YLC continue to water seeds and plant trees through its service to young lawyers, the bar, and Virginia's communities.

Endnote:

1 Few courts have specifically commented on discovery obligations within the context of cloud computing. However, in situations in which possession and control were similarly split between a party to litigation and a third-party service provider, a number of courts have found that sufficient control existed to impose obligations on the litigating party. See, e.g., *Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008) (finding that defendant had sufficient control over text messages held by third-party service provider); *Tomlinson v. El Paso Corp.*, 245 F.R.D. 474 (D. Colo. 2007) (where third-party vendor had possession, custody and control of the electronic data, defendants could not delegate their statutory obligations to preserve and maintain data and avoid discovery); *In re NTL Inc. Sec. Litig.*, 244 F.R.D. 179 (S.D.N.Y. 2007) (finding that defendant had the practical ability to obtain any documents it needed from a third-party corporation); *Zynga Game Networ, Inc. v. McEachern*, No. 09-1557, 2009 WL 1138668 (N.D. Cal. Apr. 24, 2009) (where defendant was sanctioned and ordered to cause a computer rental vendor to relinquish control of previously rented servers).

**Research** continued from page 58

available in print, on CD-ROM, or for immediate download. See [http://www.vacle.org/pub\\_practice.htm](http://www.vacle.org/pub_practice.htm). *Bankruptcy Practice in Virginia* (Kevin R. Huennekens and H. David Cox, editors, Virginia CLE 2008), provides the most comprehensive coverage, including historical background, practice information, forms, and relevant state property rights law.

**Conclusion**

Consumer bankruptcy law is complicated and evolving, which leads to confusion for both the experienced and nonspecialist practitioner. Fortunately, highly qualified experts have created numerous excellent resources to light the way for us all.

was amended to change the procedure for a show cause hearing after a guilty plea or adjudication of a crime.

Still pending before the Supreme Court is the proposal for an Emergency Legal Services rule which would, if adopted, set up a system for the provision of emergency legal services in the event of a disaster. The Supreme Court would first have to declare an emergency to trigger the rule coming into play. Out-of-state lawyers could provide pro bono legal services to Virginia citizens within certain constraints, and displaced out-of-state lawyers could provide legal services in Virginia on a temporary basis if those services were reasonably related to the lawyer's practice in the affected jurisdiction. The proposal was unanimously approved by the VSB Council on June 19, 2008, and has been pending with the Court since July 11, 2008.

Also still pending is a proposed amendment to Rule of Professional Conduct 4.2, which would clarify that a commonwealth's attorney may advise a law enforcement officer regarding the legality of an interrogation or other investigative conduct when a defendant in custody, formally charged, and represented by counsel waives *Miranda* rights and wants to give a statement without his or her counsel present. The amendment was unanimously approved by the VSB Council on October 16, 2009.

New Rule of Professional Conduct 1.18 was approved by the VSB Council on October 16, 2009, by a vote of 67 to 1, and is pending before the Supreme Court. New Rule 1.18 would define a prospective client to whom the duty of confidentiality is owed, and distinguish that prospective client from someone who unilaterally communicates with a lawyer with no reasonable expectation of forming an attorney-client relationship. The proposed amendment also would allow a law firm to screen the lawyer who discussed the possibility of employment by a prospective client to avoid imputation of a conflict to other lawyers in the firm.

# Former Bar Exec Edmonds Travels Far for Rule of Law

by Dawn Chase

After Thomas A. Edmonds retired as executive director of the Virginia State Bar in 2008, he took up a project familiar to him — helping law schools and legal communities improve the education of lawyers and foster the rule of law.

Edmonds knows the subject well. He spent twelve years as a law school dean — at the universities of Richmond and Mississippi — and for more than thirty years he has been a member of teams that conduct site reviews of schools seeking American Bar Association accreditation of their law programs.

Many times, he has dealt with questions of building and maintaining a strong faculty, student-teacher ratios, efficient use of resources, adequacy of libraries, and equal educational opportunities for women and minorities. As a former president of the National Association of Bar Executives, he is conversant with the roles of bar associations in continuing education, advocating for the profession, and promoting justice.

Since 2008, Edmonds has been considering these questions in a different context. He has been part of delegations that traveled to the Middle East and North Africa through the ABA Rule of Law Initiative.

The way Edmonds describes it, the visitors' task is to describe how the American legal system addresses issues here and to help their hosts explore ideas for developing a legal framework to safeguard human and property rights in their own countries.

Edmonds was part of the initiative's first international law school assessment, which took place at the only law school in Qatar, a desert peninsula that juts into the Persian Gulf from eastern Saudi Arabia.

He also brainstormed with bar association leaders in Rabat, Morocco, about continuing legal education and other services for their members. And at a

seminar in Istanbul, Turkey, he listened to the challenges faced by Iranian lawyers who are trying to build bar associations in a country whose government distrusts such organizations.

In shadows of minarets and earshot of five-times-a-day prayer calls, Edmonds was presented with administrative challenges he never experienced here.

At the University of Qatar's College of Law, for example, building a stable faculty is difficult. Qatar, once a British protectorate, became independent in 1971. "There is no preexisting legal profession," Edmonds said. "Most people who are experienced lawyers were educated in England, France, and the United States."

Most faculty members are imported, and they are subject to the country's guest worker policy: they can't stay longer than three years, and they can't become Qatari citizens. Most are on loan from tenured positions at law schools in other Muslim countries, such as Jordan.

Add to the lack of institutional and professorial longevity another challenge: Men and women students, who attend the law school in equal numbers, are taught separately. Each course is taught twice, resulting in "teaching loads double what you'd find in this country." Never mind that, when Edmonds visited the Qatari Ministry of Justice, he saw young graduates of the school, "men and women, working side-by-side."

What would happen if the school integrated the classes by gender? Edmonds asked the university president, a Qatari woman who wore a head scarf and business suit, contrasted with the traditional dress required of female students. Fathers would stop sending their daughters here, she responded. Edmonds concluded, "Parents expect it. It's religiously grounded and culturally reinforced, so it is unlikely to change in the near term."



In Morocco, Edmonds's team met with the board of the Rabat Bar Association. Half were female and many were young, he said. And there was a familiar character — the "old bull," perturbed by the younger lawyers' insistence on instituting continuing legal education and incorporating modern technology into their association's work. With every new idea, he would interject, "I feel that I must respond!"

The Moroccans were intrigued by the role of American bar associations in providing CLE. "They couldn't figure out how to get started," Edmonds said. "Who would be the teacher? How do you teach the teachers how teachers to teach? How can you use technology to deliver it in a cost-efficient way?"

The Iranian lawyers who attended the seminar in Istanbul reported that a bill was moving through their parliament that would strip the associations of all their authority, leaving the profession with no organizational structure or ability to advocate for law reform or improvements in the legal system. "The 'church' is out to do the bar in," Edmonds said, using American terminology.

Individual lawyers there already face many restrictions. "The idea is to keep the profession servile and under con-

**Travel** continued on page 62

trol,” he said. As in Morocco and Qatar, authority derives from the head of state and clerical leaders. The emir (in Qatar), king (in Morocco), or supreme leader (in Iran) can refuse to accept laws passed by their legislators, and no veto override exists. “If we were to advance a claim against the government on behalf of a citizen of this country, they’d take our law license,” an Iranian lawyer told Edmonds.

Of the Iranian lawyers, Edmonds said, “It’s hard for them, given the pervasive influence of the religious leadership in their lives, to imagine practicing in a society such as ours.”

Edmonds said his hosts, “unfailingly polite and hospitable people,”

engaged him with probing questions about American life. Of particular interest was United States support of Israel. And an Iranian lawyer asked, “Is it true that all American lawyers smell of money?”

“I told them what legal aid lawyers, public defenders, and many solo and small-firm practitioners make in this country,” Edmonds said.

As he watches lawyers from Qatar, Morocco, and Iran finding ways to strengthen their profession despite impediments, Edmonds has confidence that the legal environments will change for the better.

In Qatar, “Between my five-star hotel and the university, I counted 125 construction cranes.” The country is building world-class architecture, with

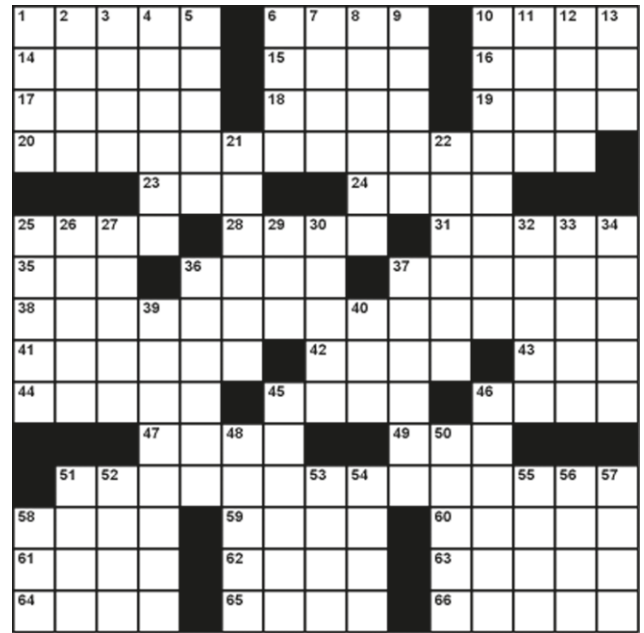
hopes of luring international commerce and financial institutions.

But investors want assurance that their business is protected, that the society is stable, and that they have recourse to resolve disputes. “If you don’t have a rule of law, it’s pretty hard to have a stable and prosperous economy,” Edmonds said.

Even in Iran, with its oppressive government, access to information through cell phones and the Internet fuels creative ideas. “It’s the young people who are going to change those things,” Edmonds said. “These things will change.”

# OWH!!

by Brett A. Spain



## Across

- Requires attention, perhaps
- Comment of despair
- Drive-through alts.
- Frequent midwest stopover
- Exposed
- Trinity* author
- Morn
- Yahoo competitor
- Use a colander
- Beginning of Oliver Wendell Holmes quip from the bench
- \_\_\_\_\_ chi
- Shakespeare's tragic king
- Roosters' old ladies
- Engage in one of the three r's
- Common court sight
- Give the pink slip to
- "Runaround Sue" singer
- Lazy man's shed
- Second part of quip
- Places of sacrifice
- Frame filler
- Michael Stipe's group
- One way to approach a castle
- Dispatch
- His partner
- Fit
- Rules for regs.
- End of quip
- Groundhog day groundhog
- Feverish fit
- Rose oil
- Express mild road rage
- Littlest of the litter
- Deceive
- Steve Spurrier's first eleven
- It may be hard to get them to meet
- Associate assignments, often

## Down

- Ellen or Regis
- Transcript no-no?
- Indian princess
- They may pour over or skip
- Shade of brown
- "Take a Chance on Me" group
- Secular
- Gary Coleman role
- Transition
- Schwarzenegger, originally
- Rush, e.g.
- Vex
- Speedy flier
- D.J. Stern's current home
- Colts' successors
- Hall of Fame Bears' coach
- Honor
- Green
- Long time for a drama queen
- Viewpoint
- Sleep soundly
- Flounder's rush chairman
- Gads about
- Top floor window often
- Ed Wood* Oscar winner
- Temple topper
- Tom, Dick and Harry
- Former Japanese military bigwig
- Vivian's best supporting actress
- Gawk
- Sunday reading
- \_\_\_\_\_ En-lai
- Babe comment
- Bankroll
- Rex Ryan's team
- Couple in the gossip column
- Roman Censor
- Cupid's counterpart
- Grad. program

Crossword answers on page 63

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](mailto:bspain@wilsav.com).



Crossword answers.

H	U	R	T	S		A	L	A	S		A	T	M	S
O	H	A	R	E		B	A	R	E		U	R	I	S
S	U	N	U	P		B	I	N	G		S	I	F	T
T	H	I	S	I	S	A	C	O	U	R	T	O	F	
			T	A	I			L	E	A	R			
H	E	N	S		R	E	A	D		V	I	S	O	R
A	X	E			D	I	O	N		L	E	A	N	T
L	A	W	Y	O	U	N	G	M	A	N	N	O	T	A
A	L	T	A	R	S		L	E	N	S		R	E	M
S	T	O	R	M		S	E	N	D		H	E	R	S
			M	E	S	H			A	P	A			
			C	O	U	R	T	O	F	J	U	S	T	I
P	H	I	L		A	G	U	E		A	T	T	A	R
H	O	N	K		R	U	N	T		L	I	E	T	O
D	U	K	E		E	N	D	S		M	E	M	O	S

# Persuading Congress

By Joseph Gibson  
TheCapitol.Net Inc.  
Alexandria, 2010  
\$27.00, paperback

Reviewed by Dawn Chase

For people whose impressions of Congress come from tabloid newscasts and comedy shows, Joseph H. Gibson's *Persuading Congress* offers a change of pace — an easy-to-read, down-to-earth primer on how to get business done on Capitol Hill.

Virginia lawyer Gibson, formerly chief minority counsel to the House Judiciary Committee, now has an antitrust, intellectual property, and governmental relations practice with Constantine Cannon LLP in Washington, D.C.

The book largely focuses on people — the roles of members of Congress, their staffs, and the federal agency employees who influence the lawmaking process.

He describes outside influences — the president, the courts, the lobbyists, the media, the public. And he outlines the process.

The book is exquisitely organized, with bulleted summaries preceding the brief chapters.

The gist of Gibson's message: To persuade Congress, use your human relations skills. Know who does what. Be honest, fair, persistent, and patient. Build long-term relationships. Present your idea in a manner that will convince your audience that it is to his or her advantage. Establish alliances. Make sure the legislator gets credit for successes.

*Persuading Congress* could be a text for a civics class as well as a manual for advocates.

A Practical Guide to Parlaying an Understanding of Congressional Folkways and Dynamics into Successful Advocacy on Capitol Hill

How to Spend Less and Get More from Congress: Candid Advice for Executives

By Joseph Gibson



## Persuading Congress

 TheCapitol.Net

Members of the Virginia State Bar who have recently published books may request a review by contacting Dawn Chase at [chase@vsb.org](mailto:chase@vsb.org).

**John L. Brownlee** has been appointed cochair of the white-collar defense team for Holland & Knight LLP, where he is a partner in the McLean and Washington, D.C., offices. He is a former U.S. Attorney for the Western District of Virginia.

**Angela A. Ciolfi**, legal director of the Legal Aid Justice Center's JustChildren Program, will receive a National Child Advocacy Award from the Young Lawyers Division of the American Bar Association. The award will be presented at the ABA meeting in San Francisco in August. Her work includes representing individual clients, advocating for children before state government and the General Assembly, and developing manuals on juvenile law and education law practice. Ciolfi received the Virginia State Bar's Oliver White Hill Pro Bono Award in 2003.

Hirschler Fleischer has hired three associate attorneys: **Franklin R. Cragle III** in the litigation section of the Richmond office; **Karen E. "Kerry" Loughman** in the real estate section in the Richmond office; and **Angela R. Matney** in the business section in the Fredericksburg office.

**Matthew J. Fay** has been promoted to commander in the U.S. Coast Guard. He is staff judge advocate of the Joint Interagency Task Force-South, a national counter-illicit-trafficking command with headquarters in Key West, Florida.

**Arthur G. House** of Chevy Chase, Maryland, has been certified as an international mediator and named to the panel of mediators of the International Mediation Institute in The Hague, Netherlands. House practices with Haley Rothman. He is a member of the Virginia State Bar.

**William R. "Bill" Janis** has opened **Bill Janis PLLC**, which focuses on criminal and civil litigation, traffic tickets, and negotiated settlements. 5219 Hickory Park Drive, Suite A, No. 102, Glen Allen,

Virginia 23059; phone (804) 308-0912; [www.billjanislaw.com](http://www.billjanislaw.com).

**Robert D. McClain** has joined Chadwick, Washington, Moriarty, Elmore & Bunn PC as an associate in the Fairfax office.

Spotts Fain PC in Richmond has announced promotions and a new hire: **M.F. "Connell" Mullins Jr.** has been elected a shareholder. He practices commercial and intellectual property litigation and products liability defense, and he has been a director at the firm for two years. **Deborah N. Fourness** has been elected a director of the firm. She represents real estate and commercial financing transactions, land use, and development. She joined SpottsFain as of counsel in 2008. **Robert J. "Bob" Barrett** has joined the intellectual property team. He is a registered patent attorney with a focus on litigation and previously was an associate at Hunton & Williams LLP.

**Catherine M. Reese**, owner of Reese Law Office in Fairfax, has been inducted into the American Academy of Matrimonial Lawyers as an academy fellow for the Virginia chapter.

**Leslie Ann Shaner** of Barnes & Diehl PC in Richmond has written a book, *Divorce in the Golden Years: Estate Planning, Spousal Support, and Retirement Issues for Clients at Midlife and Beyond*, published by the American Bar Association Family Law Section.

The Community Associations Institute presented **Lucia Anna "Pia" Trigiani** with its Award of Excellence in Designations during the organization's annual volunteer awards ceremony on April 30. The award recognizes an individual who has made significant contributions in advancing the association's designation programs and ethical standards. Trigiani, of Richmond, is a principal with MercerTrigiani.

**Vicki O. Tucker**, who practices in the business group of Hunton & Williams LLP in Richmond, has been inducted as

a fellow of the American College of Commercial Finance Lawyers.

**Nichole Buck Vanderslice** has been promoted to of counsel at Christian & Barton LLP in Richmond. She is a litigator with a focus on intellectual property, employment and complex commercial disputes. She joined the firm in 2004.

**Craig B. Young** has joined the Washington, D.C., office of Kutak Rock LLP as of counsel. His practice includes bankruptcy law, creditors' rights, corporate reorganization, and secured transactions.

E-mail your news to [chase@vsb.org](mailto:chase@vsb.org) for publication in *Virginia Lawyer*. All professional notices are free to VSB members and may be edited for length and clarity.

### Virginia State Bar Harry L. Carrico Professionalism Course

See dates and registration information at <http://www.vsb.org>.

### CONSULTANTS & EXAMINERS

**ECONOMIST:** Lost income for personal injury, wrongful death, employment and discrimination cases. Valuation of small businesses, pensions and securities for divorce and contract disputes. University professor with extensive experience. Dr. Richard B. Edelman, 8515 Whittier Boulevard, Bethesda, MD 20817. Telephone (301) 469-9575 or (800) 257-8626. Refs and Vita on request. VISA/MC. Please visit at [www.economic-analysis.com](http://www.economic-analysis.com).

**MED-MAL EXPERTS, INC.** — We have thousands of practicing, board certified physician expert witnesses in all specialties. Flat rate referrals. Your satisfaction GUARANTEED. Case reviews too, low flat rate. [www.medmalExperts.com](http://www.medmalExperts.com) (888) 521-3601

**QDRO DRAFTING & LITIGATION:** Reduce your malpractice liability by referring your client directly to me. Flat-rate. Now admitted in Virginia. Call Raymond S.

Dietrich, Esquire at 800-272-5053. Mr. Dietrich is author of the new LexisNexis practice guide entitled Qualified Domestic Relations Orders: Strategy and Liability for the Family law Attorney. Visit [www.qdrotrack.net](http://www.qdrotrack.net).

### SERVICES

**LIFE SETTLEMENTS:** Sell life insurance policies that are no longer needed: \$250,000+ face amount, insured age 65 or older, policy in force for at least 2 years. Contact Steve Watson at VSPI, [swatson@vspi.com](mailto:swatson@vspi.com) or (804) 740-3900. [www.vspi.com](http://www.vspi.com).

### OFFICE SPACE

**MIDLOTHIAN/CHESTERFIELD TOWNE CENTER OFFICE SHARE:** Established lawyer has an office available. Includes the use of 2 copiers and scanner, fax machine, 2 conference rooms, Internet access and phone system. Call (804) 419-1271 for more information.

### RENTALS

**ENJOIX ST. CROIX — 15% LAWYERS DISCOUNT!!** U.S. Virgin Islands. Completely Renovated Villa! New furniture, new windows, new doors — new everything! Even Air Conditioning in the bedrooms! Our agent will greet you at the airport and take you to our spectacular villa, “The Islander,” with breathtaking Caribbean views, located in the most desirable and prestigious east island location. Our unique architecturally designed home includes three MBR suites, private pool, all amenities. Walk to gorgeous sandy beach, snorkeling, Tennis, golf, sport fishing and scuba dive five minutes away. We will provide you with everything you need to know and do on our island in the sun to make your vacation perfect! Owner gives lawyers 15% discount! Call Terese Colling, (202) 347-8000 or email me at [Colling@CollingSwiftHynes.com](mailto:Colling@CollingSwiftHynes.com) Check out the website for the villa at [stcroixvacations.com](http://stcroixvacations.com).

**HISTORIC OXFORD MD (EASTERN SHORE) WEEKEND/WEEK/MONTH RENTAL.** Enjoy beautiful sunsets on back deck of Single family home (3BR, 2BA) steps from water, use of deep water boat slip. Two couples or family. Sailing, crabbing, swimming, relaxation. (202) 309-1305 or [bktbarlow@yahoo.com](mailto:bktbarlow@yahoo.com).

# There are 42,000 lawyers in Virginia.

Only one magazine reaches them all.

## Virginia Lawyer

The Official Publication of the Virginia State Bar

For advertising opportunities, contact Nancy Brizendine at (804) 775-0594 or [brizendine@vsb.org](mailto:brizendine@vsb.org).



## 72nd Annual Meeting Virginia Beach, Virginia June 17–20, 2010

At the Virginia State Bar’s Seventy-second Annual Meeting, Irving M. Blank of Richmond was sworn in as president of the VSB, succeeding Jon D. Huddleston of Leesburg. George Warren Shanks of Luray became president-elect.

The program included a showcase continuing legal education program, “Chasing the Internet — Is the Law Keeping Up?” sponsored by the Litigation Section and the Bench-Bar Relations Committee.

Other programs included “The Paper Chase of the Twenty-first Century — A Town Hall Meeting,” sponsored by the Section on the Education of Lawyers in Virginia, and “Law & (Dis) Order — Help for the Organizationally Challenged,” featuring a professional organizer.

Special events at this year’s Lawyers Expo included family bingo and book sales by Fountain Books and Prince Booksellers.

And VSB groups honored Virginia lawyers, including attorneys who are in their fiftieth year of practice (see page 67).



Irving M. Blank of Richmond (center) assumed the role of VSB president, succeeding Jon D. Huddleston of Leesburg (left), who led during the 2009–10 bar year. George Warren Shanks (right) is now president-elect and will become president in 2011.



1



2



3



4



5

Photo courtesy of Alan Cooper

Photo courtesy of Alan Cooper

1. At a Saturday brunch sponsored by the Senior Lawyers Conference, the Virginia State Bar honored lawyers who have been members in good standing for fifty years.

2. Janet James, a member of the Virginia State Bar Committee on Access to Legal Services, introduced award honorees Robert J. Poggenklass (left) (Oliver W. Hill Law Student Pro Bono Award), William B. Reichhardt (Lewis F. Powell Jr. Pro Bono Award), and Kathryn L. Pryor (right) (Virginia Legal Aid Award).

3. The Local Bar Leader of the Year Award was presented to Raymond B. Benzinger (center) by outgoing VSB President Jon D. Huddleston and Conference of Local Bar Association President Gifford R. Hampshire.

The weekend activities included an array of athletic activities, including golf, tennis, volleyball, a 5K Run in the Sun, and, for the first time this year, early morning yoga on the beach. Run in the Sun winners were (Photo 4, left–right) Nathan J. Olson, second place; Thomas K. Kirui, first place; and Stefan M. Calos, third place. The race was sponsored by Virginia Lawyers Media. In Photo 5, former VSB president Jeannie P. Dahnk is on the left.



1. Dean Rodney A. Smolla of Washington and Lee University School of Law moderated a panel at a continuing legal education program, “Chasing the Internet—Is the Law Keeping Up?,” sponsored by the VSB Litigation Section and Bench-Bar Relations Committee. Shown (from left) are Smolla, Justice S. Bernard Goodwyn, Supreme Court of Virginia; Prof. James Gibson, University of Richmond School of Law; Thomas E. Albro; Dean John G. Douglass, University of Richmond School of Law; Magistrate Judge B. Waugh Crigler, U.S. District Court for the Western District of Virginia; David P. Baugh, capital defender, Indigent Defense Commission; Hampton Circuit Judge Wilford R. Taylor Jr.; Timothy J. Heaphy, U.S. Attorney for the Western District of Virginia; Dean Davison M. Douglas, College of William and Mary School of Law; Leanne M. Shank, general counsel, Washington and Lee University School of Law; Mary Lynn Tate, Virginia Board of Bar Examiners; and Karen A. Gould, executive director, Virginia State Bar.

2. “The Paper Chase of the Twenty-first Century—A Town Hall Meeting” was sponsored by the VSB Section on the Education of Lawyers in Virginia. On the panel were (from left) unidentified student; Prof. Scott E. Thompson, Liberty University School of Law; unidentified student; Prof. James E. Moliterno and Assistant Dean and Professor Mary Z. Natkin, both of Washington and Lee University School of Law; Dean Clinton W. “Wes” Shinn, Appalachian School of Law; William R. Rakes, former president, Virginia State Bar; Dean Davison M. Douglas, William and Mary School of Law; Associate Dean and Professor M. Elizabeth Magill, University of Virginia School of Law; Dean John G. Douglass, University of Richmond School of Law; Dean Jeffrey A. Brauch, Regent University School of Law; Judge Robert W. Wooldridge Jr., George Mason University School of Law; and Magistrate Judge B. Waugh Crigler, U.S. District Court for the Western District of Virginia.



1. The VSB General Practice Section’s Tradition of Excellence Award was presented to V.R. “Shack” Shackelford III (center). Shown (left–right) are outgoing VSB President Jon D. Huddleston, section chair Elizabeth K. Dillon, Shackelford, Gail S. Marshall, and incoming VSB President Irving M. Blank.

2. Attending the annual meeting from the Young Lawyers Conference were (front) past YLC president Jennifer L. McClellan, YLC President-elect Carson H. Sullivan, YLC President Lesley Pate Marlin; (back row from left) YLC past president Daniel L. Gray, and Judge R. Edwin Burnette Jr, a past president of the YLC and VSB.

3. Irving M. Blank was administered the presidential oath of office by his son, attorney Jonathan T. Blank, managing partner of McGuireWoods LLP in Charlottesville.

4. Robert E. “Bob” Byrne (center) of Charlottesville, winner of the 2010 R. Edwin Burnette Jr. Young Lawyer of the Year Award, with Virginia Court of Appeals Judge D. Arthur Kelsey (left) and Judge Burnette, who sits in Lynchburg General District Court. Burnette is a former president of the Young Lawyers Conference, which bestows the award. Byrne clerked for Kelsey.





1. The Lawyers Expo, sponsored by the VSB General Practice Section, featured the latest in law office technology and related products and services.
2. VSB President Irving M. Blank and his wife, Rhona, at the Lawyers Expo reception and raffle.
3. Virginia Law Foundation Immediate Past President Mary Ann Delano at the Expo.
4. Activities for children included a sand castle contest, family bingo, a children's dinner, and camps provided by beach hotels. The sand castle contest was sponsored by Minnesota Lawyers Mutual Insurance Company.
5. Attending the annual meeting were VSB past president David P. Bobzien and past VSB Council member James W. Korman.

Mark your calendar for the  
VSB 73rd Annual Meeting  
June 15–19, 2011