Contributors


Burch


Clement


Golden


Greenwald


Hamm


Harris


Hirsch


Johnson


Keenan


Marston


Nelson


Nicholas


Metz


St. Ours


Simek


Wiegard

Kristan B. Burch is a partner in the Norfolk office of Kaufman & Canoles PC and is vice chair of the VSB Construction Law and Public Contracts Section. She has a bachelor's degree from the University of Virginia and a law degree from the College of William and Mary.

Whittington W. Clement, a partner in the Richmond office of Hunton & Williams LLP, is president of the Virginia Law Foundation. He served as president of the Virginia Bar Association in 1993 and as a member of the Virginia General Assembly from 1988 to 2002. He holds undergraduate and law degrees from the University of Virginia.

Sean M. Golden is an associate at Vandeventer Black LLP in Richmond. His practice focuses on professional liability defense, employment litigation, and securities litigation. He received a bachelor's degree from Wake Forest University and a law degree from the University of Richmond.

Nancy W. Greenwald is general counsel and chief financial officer of Greenwald Cassell Associates Inc., a McLean-based design-build and construction firm. An attorney since 1981, her construction law experience has included nuclear power plants and residential home construction and renovation. She is a member of the American Arbitration Association's Construction Industry Arbitration Panel. She has degrees from Brown University and Harvard Law School.

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

Robert Q. Harris has been director of the Commonwealth's Attorneys' Services Council for almost five years. Before that, he served in the Virginia Attorney General's Office for more than twenty years. He holds a bachelor's degree from the University of Richmond and a law degree from the College of William and Mary.

Brian M. Hirsch is a partner at Hirsch & Ehlenberger PC in Reston and practices exclusively in the area of family law. He is past president of the VSB Family Law Section and a fellow of the American Academy of Matrimonial Lawyers.

David J. Johnson practiced criminal defense law in private practice before he joined the Richmond Public Defender's Office in 1986. He was appointed executive director of the Virginia Indigent Defense Commission in 2006. In that role he actively participates in the training of public defenders. He has bachelor's and law degrees from the University of Richmond.

Barbara Milano Keenan is a judge on the Fourth U.S. Circuit Court of Appeals. She was a justice on the Supreme Court of Virginia for nineteen years and she served on the Fairfax County General District and Circuit Courts and the Virginia Court of Appeals before that. She has an undergraduate degree from Cornell University and a law degree from George Washington University.

K. Brett Marston is a partner with Gentry Locke Rakes & Moore LLP in Roanoke, with a practice in construction contracting and litigation. He is secretary of the VSB Construction Law and Public Contracts Section. He is a past president of the Roanoke Bar Association. He received a bachelor's degree from the University of Virginia and a law degree from George Mason University.

Sharon D. Nelson is president of the Fairfax company Sensei Enterprises Inc., which provides computer forensics and information technology services. She is chair of the Virginia State Bar's Unauthorized Practice of Law Committee and a member of the VSB Technology and the Practice of Law Committee and the VSB's governing council. She also is involved with practice management and technology groups of the American Bar Association. She has a law degree from Georgetown University Law Center.

Edward E. "Ned" Nicholas III is of counsel in the Richmond office of Vandeventer Black LLP, where he focuses on construction and other commercial disputes. He has bachelor's and law degrees from the University of Virginia.

Todd R. Metz is chair if the Virginia State Bar's Section on Construction Law and Public Contracts. He is a partner in the McLean office of Watt, Tieder, Hoffar & Fitzgerald LLP, a construction law firm. He represents clients on construction and procurement related issues. He received a law degree from the George Mason University School of Law.

Gregory T. St. Ours, immediate past chair of the VSB Construction Law and Public Contracts Section, is a partner at Wharton, Aldhizer & Weaver PLC in Harrisonburg. He has a civil practice that includes construction, zoning, commercial real estate, and errors-and-omissions and malpractice defense. He also is a licensed contractor. He is a longtime volunteer for the Virginia State Bar and the Virginia Bar Association, and several home builders associations. He has bachelor's and law degrees from the University of Virginia.

John W. Simek is vice president of Sensei Enterprises Inc. in Fairfax. He is an expert witness in computer forensics. He provides computer forensics, electronic discovery, and information technology support to almost six hundred businesses, including law firms. He has a degree in engineering from the U.S. Merchant Marine Academy and a master's in business administration from St. Joseph's University.

Spencer M. Wiegard is an associate with Gentry Locke Rakes & Moore LLP in Roanoke. He is a member of the VSB Construction Law and Public Contracts Section. He practices law that involves construction contracting, construction litigation, and commercial litigation. He received a bachelor's degree from the University of Virginia and a law degree from the College of William and Mary.

Annual VTLA Advocacy Seminar: Evidence for the Trial Lawyer
8:45 AM–4:45 PM on October 19 at the North Richmond Marriott Courtyard; October 21 at the Roanoke Higher Education Center; October 26 at the Norfolk Airport Marriott; and October 28 at the Hilton Garden Inn, Fairfax. Sponsor: Virginia Trial Lawyer Association. Details: Alison Love at (804) 343-1143, ext. 310, or alove@vtla.com

Annual VTLA Paralegal Seminar
8:30 AM–4:30 PM on November 16 at the Richmond Marriott Hotel. Details: Alison Love at (804) 343-1143, ext. 310, or alove@vtla.com

Introduction to Sentencing Guidelines
9:30 AM–5 PM on December 7 at the Henrico Training Center and December 15 at the National Center for State Courts in Williamsburg. Sponsor: Virginia Criminal Sentencing Commission. Details: (804) 225-4398, http://www.vcsc.virginia.gov/

Advanced Sentencing Guidelines Topics and Ethical Hypotheticals
9:30 AM–5 PM on October 21 at the Woodrow Wilson Rehabilitation Center in Fishersville. Sponsor: Virginia Criminal Sentencing Commission. Details: (804) 225-4398, http://www.vcsc.virginia.gov/

Virginia Lawyer publishes at no charge notices of continuing legal education programs sponsored by nonprofit bar associations and government agencies. The next issue will cover December 16, 2010–February 23, 2011. Send information by October 22 to chase@vsb.org. For other CLE opportunities, see "Current Virginia Approved Courses" at http://www.vsb.org/site/members/mcle-courses/ or the websites of commercial providers.

Letters

Send your letter to the editor to:
coggin@vsb.org; fax: (804) 775-0582; or mail to:
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Letters published in *Virginia Lawyer* may be edited for length and clarity and are subject to guidelines available at **http://www.vsb.org/site/publications/valawyer/**.

by Irving M. Blank

Speak Out to Defend Our Judiciary

HOW TIME FLIES when you are having fun! It hardly seems possible that one-fourth of my term as your president has expired.

I am enjoying serving as your president and delegate to the American Bar Association, as well as to the National Conference of Bar Presidents and the Southern Conference of Bar Presidents. There is a lot of travel and an enormous amount of time devoted to this office, but I think I speak for all of my predecessors when I say that it is well worth the effort.

In my initial report, I said that I would have no personal project except to keep your bar on the tracks and do all that I could to insure that it remains the best. Of the outstanding work of your bar staff, I can report to you that the Virginia State Bar is doing well. Executive Director Karen Gould continues to manage our daily affairs in an efficient and professional manner. She has kept our costs down (actually reduced them), while making certain that our services have not diminished. The much-talked-about dues increase that we expected five years ago has been avoided. We now have enough capital in reserves to begin to bring our technology into the twenty-first century. Our staff has still had no raises for three years and this needs to be addressed.

The backlog in the disciplinary process has been greatly reduced and the public-protection aspect of our mission statement is being met with fewer complaints. VSB Counsel Ned Davis has done a masterful job of this major function of managing the professional regulation department.

Our committee members are amazing. We had more than 115 applicants for fifteen volunteer positions, and most of the applicants are outstanding bar leaders. It will be a challenge, but we will be finding alternative ways of using their talent — especially that of the younger lawyers who have left the ranks of the Young Lawyers Conference. If you sit through any of that conference's meetings, you realize instantly that there is a level of competence and commitment that is remarkable.

Please contact your legislators to help restore funding for judgeships. This situation is becoming more serious every day. It is incumbent on all attorneys in Virginia to speak out in defense of the judiciary as the third branch of government. It is not just another agency. We are receiving anecdotal evidence of the impact that current vacancies are creating and of the serious problems that future mandated retirements will cause our citizens. It is imperative that you, as members of the legal profession, speak out on this issue.

While the details have not been announced, I can assure you that we are looking at ways to increase funding for the legal aid community. Your mandatory bar and the Virginia Bar Association have been working together on ways to generate more funds for legal aid, and I hope to be able to report details in my next message. The level of cooperation and coordination between the VSB and the VBA has never been greater. Strengthening that relationship remains a very high priority for me and the officers of the VSB.

As always, I remind you that this is your bar. We can offer you administration, education, advice, and help in many other ways, but we need to hear from you. We are here to serve the thousands of lawyers in Virginia. To do that, we need to know what you need. So, let us hear from you.

It is incumbent on all attorneys in Virginia to speak out in defense of the judiciary as the third branch of government.

Executive Director's Message

by Karen A. Gould

News You Will Use from the VSB

FY 2010 Financial Results
Financial information for fiscal year 2010, which ended June 30, has been finalized. We are pleased to report that revenue exceeded expenses by $1,336,216 and that this amount has been added to the bar's reserve. The Virginia State Bar's reserve as of June 30, 2010, is $5,026,916. The reserve is a healthy 40.9 percent of the amount budgeted for expenditures in FY 2011 — $12,286,235 — which includes a 3 percent one-time bonus for all employees.

Legal Ethics Hotline
The VSB Ethics Hotline is a confidential consultation service for members of the Virginia State Bar. Nonlawyers may submit only unauthorized practice of law questions. Questions can be submitted to the hotline by calling (804) 775-0564 or by clicking on the blue "E-mail Your Ethics Question" box on the Ethics Questions and Opinions web page (http://www.vsb.org/site/regulation/ethics/). See screen capture on page 13.

Depending on the complexity of the question, the response will be provided by either an e-mail or a return phone call. The ethics staff strives to respond to inquiries the day they are received. We have been getting very positive responses to the e-mail hotline. One member commented on the fast response and that the new e-mail system is an improvement on playing phone tag.

MCLE Regulatory Changes Delayed
The Mandatory Continuing Legal Education Board decided on July 21, 2010, to defer until November 1, 2011, the implementation of amended regulations, including a requirement that Virginia lawyers must earn at least four hours of MCLE credit through live, interactive programs, which include traditional live classes, live telephone seminars, live webcasts, and prerecorded programs during which the speaker is available to answer questions. The MCLE Board decided that more time is needed so that lawyers and MCLE providers have an opportunity to clearly understand the regulations before they go into effect.

Supreme Court Forms
The Supreme Court of Virginia's Forms for Bar Members project has been completed, and the forms are available through the limited-access "Member Login" area of the VSB website at http://www.vsb.org/site/members/. The forms are ones that are not placed on the Court's public website and to which lawyers have indicated they would like to have online access.

VSB/VBA Corporate Counsel Pro Bono Task Force
The Joint Virginia State Bar/Virginia Bar Association Corporate Counsel Pro Bono Task Force met on July 20, 2010, to draft a revised corporate counsel pro bono rule. A report on the proposed changes will be sent to the Supreme Court with a request for guidance on what further action the task force should take.

Permanent Bar Cards Update
Due to concerns raised by administrative law judges, a decision was made to issue permanent bar cards to active judicial members in December 2010. Associate members received their newly designed permanent card when they paid their 2011 dues this summer.

Active members in good standing were sent a temporary card, and will be sent a permanent card with a new design in December. Although the Virginia State Bar had extensively advertised plans for the change, we received many calls about the 12/31/2010 expiration date on the temporary card.

Paragraph 17 Task Force
The Paragraph 17 Task Force, chaired by Howard W. Martin Jr., met July 8, 2010, and recommended changes that would give the VSB Council oversight over the MCLE Board.

Under the current procedures, the MCLE Board adopts regulations without any oversight by the council — the elected representatives of Virginia's twenty-nine thousand active lawyers. The board has twelve members, but regulations or amendments can be adopted by a majority of a quorum of five members, although this has never been known to occur.

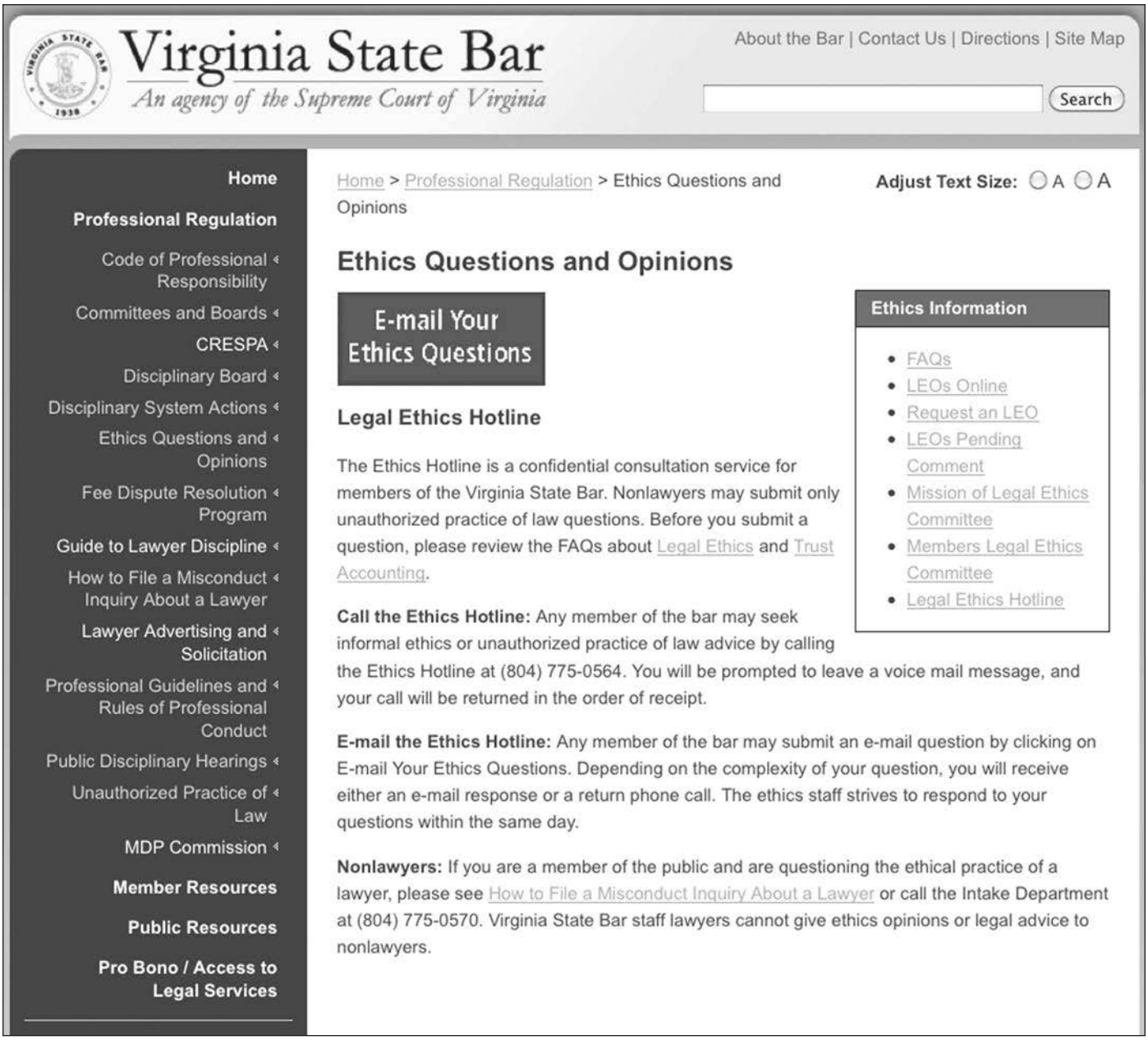
The proposed changes would require the MCLE Board (1) to:

- approve new regulations or amendments by a majority of the full twelve-member board;
- submit proposed changes to regulations or new regulations to the council for advice and comment prior to being adopted by the MCLE Board; and
- permit the council to reject any board-approved regulations or amendments by a two-thirds vote of those members of the council present and voting.

Clients' Protection Fund

The VSB's Clients' Protection Fund is supported by Virginia lawyers to help clients who have been victims of attorney dishonesty. The fund is a commitment by the profession to the integrity of its name. For an example of how the CPF Board worked quickly to relieve bankruptcy clients whose attorney took their money and provided little or no service, see the story "Making Clients Whole" on page 17.

Below is a screen shot that shows access to the Ethics Hotline at http://www.vsb.org/site/regulation/ethics/.



Making Clients Whole

Clients' Protection Fund Is Investment in Lawyers' Good Name

by Dawn Chase

In September 2009, the Virginia State Bar shut down the bankruptcy practice of Roanoke attorney Ann Marie Miller and revoked her law license a month later.

At the time, three hundred clients claimed she owed them $214,335 in fees for services she had not performed. The individual claims ranged from $200 to $2,810, for representation in Chapter 7 and Chapter 13 bankruptcies. The court-appointed receiver who took over Miller's practice was able to recover only enough assets to refund less than 20 cents on the dollar to the clients.

In most other consumer transactions, the clients would have been left holding the bag for the balance.

But the victims of Miller's practice mismanagement are likely to get full refunds, thanks to the Virginia State Bar's Clients' Protection Fund (CPF), established by Virginia lawyers to help victims recover their losses from dishonest attorney conduct.

As of August 23, 2010, Miller's former clients have submitted 156 claims totaling $139,278.21 to the Clients' Protection Fund, said Jane A. Fletcher, VSB counsel to the fund. The board that administers it is processing the claims now; $34,620.21 in claim checks have been written so far.

A VSB assistant bar counsel, an attorney for the Bankruptcy Court for the Western District of Virginia, and Roanoke City Circuit Judge Clifford R. Weckstein moved quickly to protect the interests of Miller's clients after the bar received complaints that she was not communicating with them or working on their cases.

"The receivership was approved less than one year ago, and was able nearly to complete its process of winding down Ms. Miller's practice and distribute available funds to clients in a relatively short period of time," Fletcher said. "The Clients' Protection Fund Board also has worked very hard to investigate a lot of claims in a relatively brief period, to try to get money to Ms. Miller's bankruptcy clients so they can pay new lawyers to continue their cases."

This is a typical result for the Clients' Protection Fund, which pays claims against lawyers after other payment sources — bonds, insurance, and the lawyers themselves — have been exhausted or are not available.

During a meeting in September, the CPF Board awarded $1,500 — a refund of fees — to a woman who claimed she had not received services from her attorney. His law license subsequently was suspended for impairment. A board member investigated the client's claim and reported he found "no evidence of any time spent on the case" by the lawyer.

The claimant rose to thank the board. The decision, she said, had "turned my faith around in the system — in the legal system, in the justice system."

After she left, board Chair Cary A. Ralston said, "We are the face of the bar."

Clients' protection funds began in the early twentieth century in the English commonwealth countries. In the United States, the funds — administered by the state bars or supreme courts of states — receive money through mandatory assessments on lawyers, legislative budget appropriations, and voluntary contributions. Virginia was the fourth state to offer this opportunity for clients to obtain redress.

In Virginia, the fund is underwritten not by taxpayers, but by an annual $25 assessment on Virginia lawyers. The fund is administered through the VSB by a fourteen-person board of volunteer lawyers and laypersons, with support from Fletcher and other bar staff. Board members investigate claims, determine whether claims meet the fund's criteria, and make the awards.

For a claim to qualify under Clients' Protection Fund rules, the lawyer can no longer be practicing and the loss must be caused by dishonest conduct that arises from legal or fiduciary services provided to the client.

Awards have been made in cases in which the lawyer:

- stole or embezzled money or property earmarked for a client or for a payment on the client's behalf;
- could not refund, or refused to refund, the portion of a client's fee that the lawyer had not earned;
- did sham work that did not advance the client's goals; and
- performed work that was fraudulent or unethical, such as preparing documents with information the lawyer knows to be false.

Individual awards from the Clients' Protection Fund are limited to $50,000 per client petitioner. The cumulative cap on awards for any one lawyer is 10 percent of the net worth of the fund when the first claim is made. In August 2010 the fund contained $4.5 million.

On occasion, a case involving lawyer dishonesty is so large that, because of the balance of the fund and the number of victims, only a portion of the losses can be restored. A recent example is the case

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of Woodbridge lawyer Stephen Thomas Conrad, who settled personal injury claims, failed to inform the clients that their cases had settled, and stole all or a portion of the proceeds. Conrad's law license is now revoked and he is serving a federal prison sentence.

The Conrad case was one of the biggest in the fund's history. Conrad's clients filed almost $3.7 million in claims. The fund's maximum aggregate payout was capped at $411,165, which was divided among 140 petitioners.

But big-money fraudulent operations such Conrad's are rare. Most claims on the Clients' Protection Fund are within the fund's capacity to cover.

Since the fund paid its first claims in 1978, it has awarded $4.5 million to satisfy 1,160 claims. While some of those claims were the result of outright theft, many were due to a lawyer's death, impairment, or abandonment of practice. Paying back the fund is a condition of license reinstatement, and collection action is brought against an attorney or his estate, but the fund rarely recoups payouts.

"The Clients' Protection Fund is a very effective public protection tool after clients have suffered losses in the rare instances of lawyer dishonesty," said Karen A. Gould, executive director of the Virginia State Bar. "Virginia lawyers should be commended for this tangible investment in the good name of their profession."

The fund had by far its biggest year in fiscal 2010, when it paid 218 claims that totaled $900,560 — many of them related to Conrad. Those claims in 2010 were against only seventeen attorneys — a miniscule portion of the twenty-nine thousand lawyers in active practice in Virginia.

"The fund is a low-risk, high-yield investment in the legal profession," Gould said.

SAVE THE DATE

Virginia State Bar 73rd Annual Meeting

June 16–19, 2011

Virginia Beach, VA

Virginia State Bar Card Revised

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

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

Associate members were sent a permanent bar card after they paid dues for 2010–11.

Temporary cards with an expiration date of December 31, 2010, were sent to active, active/VCC, active/MLAA, and emeritus members when they paid their 2010–11 dues. In December, the bar will send them permanent cards with no expiration date.

No temporary cards will be sent to judicial members. They will be issued permanent cards in December.

Retired and disabled members no longer will be issued bar cards.

A member who changes status to active, associate, judicial, 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 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 or (804) 775-0530.

In the Matter of a Virginia Lawyer

Perspectives on the Disciplinary System

The Virginia State Bar's Disciplinary Conference — an annual gathering that brings together the volunteers who sit on district disciplinary committees and the Disciplinary Board — met in Lexington July 15 and 16, 2010.

Among the volunteers and bar prosecutors were two attorneys with considerable experience representing lawyers who face disciplinary charges. In a panel discussion with prosecutors and the chair of the VSB Disciplinary Board, Craig S. Cooley of Richmond and Bernard J. "Ben" DiMuro of Alexandria described the defense side of professional regulation.

"Representing a lawyer can be quite maddening," Cooley said. "Getting them to focus on this case — they don't want to do it. They go into denial. They stick their heads in the sand."

Some respondent lawyers apply the behaviors that got them in trouble with the bar to their relationship with their defense lawyers. They don't communicate. They procrastinate.

"I try to get my client in," Cooley said. "I make them cut their cell phone off. I cut my cell phone off. I don't let them ramble for two hours. I try to make them focus. I make them bring their file." As they talk, Cooley assesses the case. Is the complaint fabricated? Should his lawyer client capitulate? Or "is this a case we'll have to go to war on?"

Cooley tries to help the respondent set a tone of candor and cooperation and to "stipulate what you can." "You need to get the client to avoid sarcasm," he advised. With credibility established, the respondent then can challenge and negotiate the contested charges and the sanctions.

"So many of these circumstances I don't perceive as being adversarial," Cooley said.

Left–right: William E. Glover, chair of the VSB Disciplinary Board; VSB Counsel Edward L. "Ned" Davis; defense lawyers Craig S. Cooley of Richmond and Bernard J. DiMuro of Alexandria; and Harry M. Hirsch, deputy bar counsel and panel moderator.

DiMuro agreed with the civil approach. "Hat-in-hand goes a long way to resolving issues," he said.

DiMuro has worked on both sides of the VSB disciplinary system. He remembers that, as a former chair of the Disciplinary Board, "it's not particularly fun to sit in judgment of your colleagues." As a former VSB president, he was a strong advocate for lawyer self-regulation, which he said "rides on the back of a very under-resourced staff," as well as volunteers.

Most respondent lawyers practice in solo or small firms and are "generally good people who lack skills in law office management," he said. District committee and board members should keep in mind the difficulties of practicing law, he told the conference attendees.

As a defense lawyer, DiMuro said, he has a quibble with the system: He would like his clients to be able to challenge the bar's evidence before a subcommittee decides whether to set the matter for hearing.

A disciplinary subcommittee acts as a grand jury, in that it can refer a case to a district disciplinary committee or the Disciplinary Board for hearing. A subcommittee's meetings are closed to the public and attended only by its members and bar prosecutors. A subcommittee also can dismiss a case or impose minor private or public sanctions.

Disciplinary Board Chair William E. Glover of Fredericksburg told the volunteers that the administrative process for disciplining lawyers is different from what they might expect based on their experience with the criminal justice process. The bar has "very few of the resources available to them of the ordinary sheriff's office," he said. "It is not possible … for bar counsel to be delivering to you a perfect case."

Glover describes the subcommittee as an impartial, quasi-judicial arbiter that winnows out cases that should not be prosecuted or that merit only minimal sanctions.

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Bar Counsel Edward L. Davis emphasized the time line of bar cases and the pressure the prosecutors are under to identify, from about four thousand complaints or "inquiries" received in a year, the cases that suggest a serious violation of professional rules and a threat to the public; to investigate and present their findings to the district subcommittees; and to prosecute the cases that are referred for full hearings.

Glover said the success of the discipline system is essential to legal profession's privilege of self-regulation, and he feels the process is functioning well. "It's public. It's reasonably efficient. It's conducted by people who understand what is required to protect the public," he said.

Keep Up with the VSB — Read the E-News

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

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

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

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

If you didn't get yours, check your spam filter for October 1 and see if it's in there.

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

Notice to Members: MCLE Compliance Deadline Is Oct. 31

Your compliance deadline for mandatory continuing legal education is October 31, 2010. Go to https://member.vsb.org/vsbportal/ and log in to review your MCLE record and certify your attendance.

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.

The MCLE End of Year Report (Form 1) will be mailed in early November. Please review the report and, if incomplete, amend as instructed. Amended reports must be received by the bar no later than 4:45 pm on December 15, 2010.

A new limitation on prerecorded MCLE programs has been postponed until the compliance year ending October 31, 2012. See the current regulations and other MCLE compliance information at http://www.vsb.org/site/members/mcle-courses/.

In Memoriam

John Andrew Basham
Virginia Beach
September 1968–March 2010

William R. Blandford Jr.
Powhatan
December 1946–July 2010

Michael Ivan Coe
Washington, D.C.
January 1971–January 2010

William M. Cohen
Arlington
December 1939–March 2010

Charles Jasper Cooper
Arlington
March 1929–November 2009

J. Albert Ellett
Roanoke
August 1924–July 2010

Robert Epstein
Virginia Beach
April 1930–April 2010

Dominick Jack Esposito
Glen Allen
April 1926–July 2010

Raymond Vincent Ford Jr.
Hamilton
January 1944–December 2009

Harry Walker Garrett Jr.
Bedford
January 1936–June 2010

James A. Glascock Jr.
Richmond
March 1918–January 2010

Cornelius J. Husar
Herndon
December 1931–October 2009

Alfred N. King
McLean
August 1931–July 2007

James Roland Kuhn
Houston, Texas
November 1945–October 2009

George B. Little
Richmond
September 1925–July 2010

Jo Desha Lucas
Chicago, Illinois
November 1921–May 2010

Gerard Robert McConnell
Alexandria
June 1955–March 2010

Dennis Gerald Merrill
Ashland, New Hampshire
November 1941–July 2010

Walter H. Morse
Amherst
February 1920–June 2010

Kelly Combs Necessary
Tazewell
January 1968–February 2010

David W. Parrish Jr.
Charlottesville
February 1923–July 2010

Kirby Hugh Porter
Mechanicsville
May 1960–July 2010

Joseph C. Redmond Jr.
Ashburn
June 1924–November 2009

Edward H. Rountree
Gwynn
December 1924–August 2010

Paul N. Sameth
Timonium, Maryland
August 1937–April 2010

John Rogers Sims Jr.
Nellysford
April 1924–August 2010

Kristen Michelle Smith
Virginia Beach
January 1972–February 2010

Hon. Reid M. Spencer
Norfolk
March 1924–June 2010

Hon. Irvin Douglas Sugg
Hampton
August 1918–July 2010

Bobby Wayne Tucker
Chesterfield
March 1938–August 2010

John M. Wilson Jr.
Sarasota, Florida
July 1915–July 2010

William R. Yates
Richmond
January 1921–April 2010

Cynthia D. Kinser Elected Virginia's Chief Justice

Cynthia Dinah Fannon Kinser, a justice of the Supreme Court of Virginia for thirteen years, has been elected by her fellow justices to serve a four-year term as Chief Justice.

She will be the first woman to serve as Chief Justice.

She will assume the administrative post on February 1, 2011, succeeding Leroy Rountree Hassell Sr., who served two terms. Investiture details are not final.

Throughout her career, Kinser has lived in Southwest Virginia's Lee County, where she plays organ at the First United Methodist Church in Pennington Gap and helps run a family cattle farm.

Kinser was appointed to the Court in 1997 by Gov. George Allen. A 1977 graduate of the University of Virginia School of Law, she was law clerk to U.S. District Judge Glen M. Williams of the Western District of Virginia. She went into private practice, was elected Lee County's commonwealth's attorney in 1980 and served as a Chapters 7 and 13 bankruptcy trustee. From 1990 until her appointment to the Supreme Court, she was a U.S. magistrate judge.

She has been president of the Lee County Bar Association, a member of the Virginia Trial Lawyers Association, treasurer of the Lee County Arts Association, and a member of the board of directors of the Holston Conference of the United Methodist Church Foundation Inc. She served on the Virginia State Bar's Ninth District disciplinary committee.

A former 4-H All Star, she served on the Virginia 4-H Foundation's initial board of directors from 1987 through 1990.

Reminder:

Amended Virginia Appellate Rules Are in Effect

Amendments to Parts 5 and 5A of the Rules of the Supreme Court of Virginia are among rule changes that went into effect July 1, 2010. The amendments affect appellate procedure in the Supreme Court of Virginia and the Virginia Court of Appeals. The current rules are posted on the Virginia's Judicial System website at http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf.

Local and Specialty Bar Elections

Hispanic Bar Association of Virginia
Juan Ever Milanes, President
Grace Morse Brumagin, Vice President
Kristina Aurelia-Magraner Cruz, Secretary

Peninsula Bar Association
Artisha Khadilah Todd, President
Adrienne Rachelle Mauney, Vice President
Kenyetta Aduma Twine, Secretary
Brian James Smalls, Treasurer

Impact of Divorce on Children Described in New DVD

The Virginia State Bar Family Law Section, with funding from the Virginia Law Foundation, has updated *Spare the Child*, a production that advises parents on how to minimize the long-lasting damage of divorce on children.

Spare the Child will be available on DVD and can be viewed on the section's website, http://www.vsb.org/site/sections/family/, beginning this fall. The program is available in English and Spanish, with subtitles in both languages for hearing-impaired persons.

The production replaces a popular video that the section released in 1997. The update includes more diversity; addresses break-ups of cohabiting as well as married parents, and describes collaborative family law and other dispute resolution approaches that are now available.

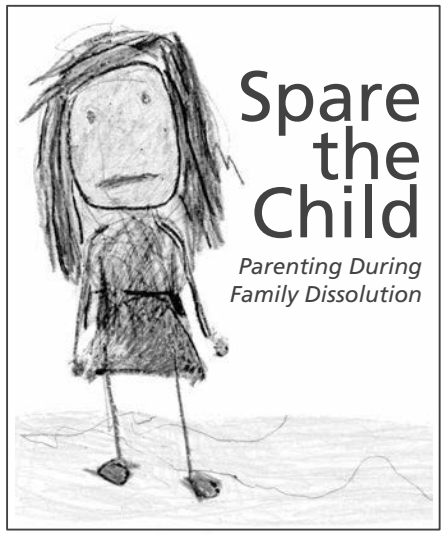
In the program, former Virginia First Lady Anne B. Holton, a former juvenile and domestic relations judge; sitting judges; attorneys; and counselors describe the effects of divorce on children, what will happen in the courtroom, and alternatives to court for resolving family law disputes.

Adult children of divorce recall their pain at parental conflict and losing contact with extended family members as well as a parent.

Regent University Professor and section board of governors member Lynn Marie Kohm, who chaired the subcommittee that developed the program over the past three years, called the new production "timeless."

Spare the Child will be used in court-ordered parental education and by mediators and family law attorneys. "I use it in my law school classroom," she said. "It's going to be widely viewed."

Production costs were supported by a $44,500 VLF grant.



For questions about obtaining the program, contact Shannon Quarles at quarles@vsb.org or (804) 775-0512.

Lawyers Helping Lawyers Celebrates 25 Years

For twenty-five years now, Virginia's Lawyers Helping Lawyers has been providing confidential assistance to members of the legal profession impaired by substance abuse and mental health problems.

The nonprofit organization, which operates on a shoestring with a two-person paid staff and a statewide network of dedicated volunteers, celebrated its anniversary September 24 and 25, beginning with a dinner and followed the next morning by a volunteer training session and continuing legal education program and other activities.

The featured dinner speaker was Don H. Major, a Kentucky lawyer who has been in recovery from alcoholism and drug addiction since 1981. He now serves on the Kentucky Bar Ethics Committee, works with Kentucky's Ethics Hotline, volunteers with the Kentucky Lawyer's Assistance Program, and travels nationally as a speaker and trainer at Alcoholics Anonymous conferences.

A DVD about the history of Virginia's Lawyers Helping Lawyers program was debuted. Copies can be obtained by contacting LHL Executive Director Jim Leffler at JLeffler@VaLHL.org or (804) 644-3212.

Lawyers Helping Lawyers

Confidential help for substance abuse problems and mental health issues.

For more information, call toll free: (877) LHL-INVA (545-4682), or visit http://www.valhl.org.

Virginia Law Foundation Promotes Rule of Law, Access to Justice, and Law Education

by Whittington W. Clement
President, Virginia Law Foundation

The Virginia Law Foundation (VLF), founded in 1974, is the nonprofit organization that best represents the charitable interests of the legal profession in Virginia. The foundation offers the opportunity to affect the lives of those who benefit from projects funded through our grant-making process and, at the same time, to improve the image of our profession.

The foundation has been well-served by the appointment of individuals — lawyers and laypersons — nominated by the Virginia State Bar and the Virginia Bar Association to serve on its board of directors. These individuals consistently bring to the board dedication and experience that have contributed to the foundation's success.

The board's principal responsibility is the thoughtful stewardship of the almost $10 million endowment that resulted from the Supreme Court of Virginia's decision to authorize the foundation to administer Interest on Lawyers Trust Accounts funds collected from practicing attorneys in the 1980s and '90s. The VLF's financial resources are supplemented each year by generous contributions from attorneys and others throughout the state. Over the last five years, for example, more than $330,700 in donations was received. Our grants have supported projects that fall generally within these broad categories:

- providing civil legal services to the poor,
- promoting improvements in the administration of justice,
- educating the public about law and the legal profession, and
- supporting public service internships for Virginia law students.

Just as the legal profession has changed dramatically over the years, so too has the direction of the foundation. Starting in 2007 under the leadership of John A.C. Keith of Fairfax, a former VSB president, we on the board of directors have reevaluated how we can become more effective stewards of foundation funds and how we can truly become *the* charitable arm of the legal profession in the commonwealth. Through that reevaluation, we sharpened our mission to focus upon three callings:

- to promote the rule of law,
- to provide greater access to justice, and
- to pursue law-related education.

We have also shifted our focus from a variety of relatively low-dollar but worthwhile projects to those that create a larger impact in fulfilling our mission. The most prominent example of that new direction is our $100,000 grant toward replicating the Nuremberg Courtroom at the Virginia Holocaust Museum in Richmond. That historic judicial proceeding, in which Nazi leaders were granted a fair trial with protections of due process, is a remarkable example of the rule of law at work in the twentieth century. The Virginia Law Foundation has received many accolades for the partnership with the museum. For the last three years, the foundation has held a public Law Day Conference at the museum on topics related to the rule of law.

The foundation also provided seed money to the Virginia Bar Association in 2008 for a Rule of Law Project initiated by G. Michael Pace Jr. of Roanoke, then VBA president and now a member of the VLF board. As Mike best describes the project, its purpose "is to better educate middle school students about the importance of the rule of law as the basis for the freedoms we enjoy and improve the likelihood that they will become informed and active citizens of the world." (VBA NEWS JOURNAL, Vol. XXXIV, June/July 2008) We have now spent or committed $125,000 toward this undertaking, most recently by allocating grant funds to local bar associations to administer the program in middle schools in their communities.

And the foundation provided $44,513 for the Virginia State Bar to produce an update of *Spare the Child*, a program that helps parents understand the potential harm of uncivil behavior on children in divorce, custody, and child-support battles. See story, page 23. The program is court-ordered in some Virginia localities. More than thirty thousand parents will see the program annually.

The foundation also was established to recognize excellence in the practice of law and public service. That objective is met by the Fellows Program, for which individuals are selected annually. Almost four hundred individuals from all corners of Virginia have been so honored; they represent about 2 percent of the

active members of the legal profession in the commonwealth.

Although the foundation is blessed with a large endowment from which our gifts can be made, we nevertheless have worked to increase our development efforts. Not surprisingly, the fellows have led the way in their annual giving. In fact, the newest class of fellows helped to underwrite the cost of the foundation's public service internship program this summer.

To bring the fellows even closer to the work and activities of the foundation, we recently converted the Fellows Council into a committee of the foundation. We hope that lawyers recognized as fellows will feel more inspired to participate in the charitable activities of the foundation.

Finally, the board of directors is considering hiring a full- or part-time chief executive officer who ideally would be a senior member of our profession. That person would serve as our ambassador and liaison to law firms and bar organizations throughout Virginia. The board will continue to consider other ways in which we can promote the rule of law, access to justice, and law-related education and, at the same time, help promote the image of the legal profession in Virginia.

On behalf of the VLF board, I hope you will support, financially and otherwise, the ongoing efforts of the Virginia Law Foundation as it works to broaden its reach as the leading philanthropic organization for the legal profession in Virginia.

Virginia Law Foundation Donation Form

Name _____

Address _____

_____

City _____ State _____ Zip+4 _____

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The enclosed contribution is

in memory of _____, or

in honor of _____

If you would like an acknowledgement card sent, please include the name and address of the recipient below.

Name _____

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Please make checks payable to Virginia Law Foundation, 600 East Main Street, Suite 2040, Richmond, VA 23219.

Donations may also be made online via PayPal, by visiting our website at www.virginialawfoundation.org.

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    - ❑ Liberty University School of Law (Lynchburg)
    - ❑ Regent University School of Law (Virginia Beach)
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    - ❑ University of Virginia School of Law (Charlotesville)
    - ❑ Washington & Lee School of Law (Lexington)
    - ❑ William and Mary School of Law (Williamsburg)
  - ❑ Rule of Law Programming
  - ❑ Oliver Hill PSI Fund

The Virginia Law Foundation is a 501(c)3 organization. Donations are tax deductible to the extent allowed by law. The Foundation is registered as a charitable entity with the Commonwealth of Virginia. A financial statement is available upon written request from the Office of Consumer Affairs.

Federal Act Provides Loan Repayment Funds for Public Defenders and Prosecutors

by David J. Johnson and Robert Harris

The integrity of our criminal justice system is strengthened and upheld when good lawyers can afford to choose public service. By becoming prosecutors and public defenders, they preserve the rule of law, protect our communities, and safeguard the rights of all citizens.

The challenge for prosecutor and public defender offices is the recruitment and retention of qualified lawyers. That effort has become harder as law students finish school with educational debt roughly equivalent to home mortgages and prosecutor and public defender salaries remain stagnant.

The cost of law school education continues to skyrocket. According to the American Bar Association, the average annual cost of tuition and fees in 2000 was $21,790. By 2008, the cost was $34,298. Graduates left law school with an average loan burden of nearly $100,000 in 2008. The economic downturn has brought steady increases to the costs of law school and a corresponding amount of student loan debt.

Virginia's public defenders and prosecutors have been severely affected. The entry level salary for a public defender in Virginia is $48,163. An assistant commonwealth's attorney salary starts at $45,385 in jurisdictions without local salary supplements. Even in booming economic times public sector salaries increase slowly. Like other state employees, public defenders have not received raises in more than three years, and recent budget cuts required some commonwealth's attorneys to lay off prosecutors.

The math is simple: a $100,000 student loan debt precludes a long-term commitment to public service at current salary scales. Many qualified attorneys are priced out of public service and seek more lucrative private sector opportunities just to manage their student loan debt. By a wide margin, departing prosecutors and public defenders cite low pay and high student loan debt as the number one reason for leaving public service. For prosecutor and public defender offices, the exodus of lawyers from public service results in consistently higher turnover, with less-experienced attorneys handling increasingly unmanageable caseloads.

The John R. Justice Act

After many years of effort, the John R. Justice Prosecutors and Defenders Incentive Act has been passed and funded by Congress. The John R. Justice Student Loan Repayment Program provides loan repayment assistance for state and federal public defenders and state prosecutors who agree to remain employed as public defenders and prosecutors for at least three years. Although the amount of money available in the first year is modest, passage and implementation of the act is unquestionably a significant first step.

The $10 million authorized by Congress in the first year has been apportioned among the states based on population. Virginia's share totals $223,000. Funding for loan repayment must be allocated equally between prosecutors and public defenders. The act allows for up to 15 percent of the funds to be used to help defray the costs of administering the program. This year, Virginia prosecutors and public defenders will equally share approximately $190,000.

Attorneys receiving student loan relief agree to work in a public defender or prosecutor office for a minimum of three years. Qualifying loans include loans under the Federal Family Education Loan Program, William D. Ford Federal Direct Loans, Federal Perkins Loans, and Federal Consolidation and Federal Direct Consolidation Loans. Once fully funded, the act will allow attorneys to receive up to $10,000 per year for a maximum of $60,000 in student loan debt relief during their careers as public defenders or prosecutors.

Governor Robert F. McDonnell designated the Department of Criminal Justice Services as Virginia's managing agency. In the first year, available funds allow nineteen public defenders and nineteen prosecutors to each receive approximately $5,000 in debt reduction awards. The department has developed an applicant review process designed to ensure that awards are need-based by focusing on the applicants' qualified law school loan debts relative to their incomes. The department will announce details for interested applicants in the near future. Prosecutors and public defenders will receive additional information through the Virginia Commonwealth's Attorneys' Services Council and the Virginia Indigent Defense Commission.

Although the amount of money available in the first year is modest, passage and implementation of the act is unquestionably a significant first step.

Non-Virginia Military Lawyers Now Can Provide Limited Legal Assistance to Service Members in Virginia

Two Texas attorneys have been sworn in to practice before Virginia courts through a new Virginia State Bar membership category for military lawyers who help low-income service members with civil matters.

A lawyer with active/military legal assistance attorney (MLAA) status is limited to representing clients who are eligible for services through the military's Expanded Legal Assistance Program (ELAP).

The program assists service members who do not qualify for legal aid but who do not earn enough to hire counsel without incurring financial hardship.

Certification as a military legal assistance attorney is governed by Rule 1A:6 of the Rules of the Virginia Supreme Court and 10 U.S. Code § 1044.

The attorney must be a member of the armed services, stationed in Virginia, and licensed and in good standing with another United States state or territory. The application must be approved by the Virginia Board of Bar Examiners.

Military legal assistance attorneys are subject to regulation by the VSB. They must complete the Professionalism Course and continuing legal education obligations required of all active-status Virginia lawyers.

VSB dues are waived for the first two years of MLAA certification.

The military legal assistance attorney may represent a qualified service member in matters involving family law, landlord-tenant disputes, estate matters, consumer issues such as breach of contract and repossession, and enforcement of rights under the Soldiers' and Sailors' Civil Relief Act and the Uniformed Reemployment Rights Act.

"These service members are unique in that all move every three to four years, and some are fresh from boot camp without family support or life experience to guide them," according to a press release from the Naval Legal Service Office Mid-Atlantic.

"The military attorneys champion service members who are frequent targets of exploitation. Unscrupulous lenders and landlords often find service members' steady paychecks and inexperienced youth tempting for unfair practices.

"The primary focus of the ELAP practice will be consumer litigation, with the first cases being against automobile dealerships that went out of business without fulfilling contracts and paying off service members' trade-ins."

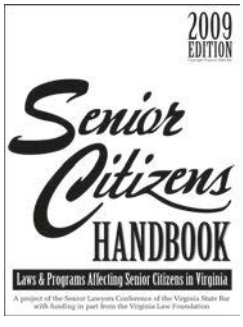
Virginia's first two military legal assistance attorneys — U.S. Navy Lieutenants James Rhadbane and Lauren Mayo — were sworn in June 7, 2010, by Virginia Chief Justice Leroy R. Hassell Sr.

Free and Low-Cost Pro Bono Training

Join National Efforts to Celebrate Pro Bono in October

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

Visit the American Bar Association's website for National Pro Bono Celebration activities. http://www.probono.net/celebrateprobono/



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

Has Chinese Drywall Affected the Economic Loss Rule?

by Kristan B. Burch

Starting in 2009, Virginia courts have seen a wave of construction cases related to the installation of drywall manufactured in China (Chinese drywall) in homes. Similar to the exterior insulation and finishing system (EIFS) cases that proceeded Chinese drywall, decisions in recent Chinese drywall cases continue to shape Virginia's application of the economic loss rule to construction disputes.

Brief History of Chinese Drywall

In December 2008, the U.S. Consumer Product Safety Commission (CPSC) started receiving complaints from homeowners about Chinese drywall.[1] Since that time, the CPSC has received thousands of complaints. While most of the complaints have been filed by Florida and Louisiana residents, complaints by Virginia residents ranked fifth on the CPSC's list of states with complaints.[2]

With such complaints also comes litigation, and Virginia state and federal courts have seen a flood of Chinese drywall filings since 2009. Homeowners are filing many of these lawsuits while others are filed by insurance coverage. Some of the Virginia federal cases have been transferred to the U.S. Judicial Panel of Multidistrict Litigation in Louisiana for coordinated pretrial proceedings[3], with insurance coverage disputes and state court actions remaining in Virginia courts. (Cases before the panel are referred to as Chinese Drywall MDL.)

Some similarity exists in the complaints made by homeowners with Chinese drywall.[4] They have complained of a "rotten egg" or sulfur smell in their homes, and they have reported that metal components of their homes have blackened and corroded. Homeowners have complained that they frequently have had to replace components of their air conditioning units. Homeowners also have complained about problems with electronics and appliances and damage to other personal property. Some homeowners also have alleged that they have experienced health issues while living in homes with Chinese drywall.

There also is some similarity in the types of claims filed by homeowners with Chinese drywall and the types of defendants named. Homeowners are filing lawsuits that include claims for breach of contract, breach of express and implied warranties, negligence, and violation of the Virginia Consumer Protection Act. Homeowners are naming builders, suppliers, and manufacturers as defendants.

History of Economic Loss Rule

When addressing whether the economic loss rule applies to a particular case, many courts cite a unanimous 1986 decision by the U.S. Supreme Court in *East River S.S. Corp. v. Transamerica Delaval Inc.,* 476 U.S. 858 (1986). In *East River*, the Court answered in the negative the question of whether a cause of action in tort is stated when a defective product malfunctions and injures only the product itself and causes purely economic loss.[5] The Court indicated that products liability came from a concept that people need more protection from dangerous products than that provided by warranty law, but the Court cautioned that if this development "were allowed to progress too far, contract law would drown in a sea of tort."[6]

In *East River*, the Supreme Court concluded that when a product injures only itself, the reasons to impose a tort duty are weak, and reasons for leaving the party to its contractual remedies are strong.[7] The manufacturer owes no duty under a products liability theory based on negligence to avoid causing purely economic damage.[8]

The Supreme Court of Virginia relied on *East River* in its 1988 decision in *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*[9] In *Sensenbrenner,* plaintiffs claimed that a negligent design by the architect and negligent construction by the contractor caused a swimming pool to settle and water pipes to break. Water from the broken water pipes eroded the soil under the pool and part of the foundation of the home.[10] Citing *East River* regarding when a product injures only itself

because one of its components is defective, the Supreme Court of Virginia ruled that no tort claim will lie for a purely economic loss sustained by the owner of the product.[11] Because the damages were economic losses, not injuries to property, the home purchasers could not recover against the architect or pool contractor for damages to the swimming pool and the foundation of the house caused by the leaking pool, where the architect and pool contractor were not in privity of contract with the home purchasers.[12]

The Court concluded that the effect of the substandard parts was a diminution in value, measured by the cost of repair. Thus, the effect is a purely economic loss for which the law of contracts provides the sole remedy.[13] Recovery in tort is available only when there is a breach of duty to take care of the safety of the person or property of another. The Court concluded that the architect and pool contractor assumed no duty to the home purchasers by contract, and no breach of a duty imposed by law had been alleged. [14]

Applying the economic loss rule in construction cases since *Sensenbrenner*, Virginia courts have dismissed negligence claims in which plaintiffs have sought to recover for only economic loss from parties with which plaintiffs were not in privity of contract.[15] Only when plaintiffs have sought to recover for bodily harm or damaged property has a tort claim been permitted to lie absent a contract. [16]

Similar results have been seen in EIFS cases in which homeowners or homeowner associations pled negligence claims against EIFS suppliers and manufacturers. Circuit courts applied the economic loss rule to EIFS claims, dismissing negligence claims in which plaintiffs were not in privity of contract with defendants and failed to allege an injury to person or property.[17] In the EIFS cases, plaintiffs argued that the EIFS allowed water infiltration into the structure and the water damaged "other property" such as doors, so the economic loss rule did not apply. Such arguments were rejected by most courts. The Virginia Beach Circuit Court, for example held that a negligence claim against the EIFS manufacturer was barred:

> Lesner Pointe contracted with the builders for the construction of condominiums that included the installation of EIFS. Water intrusion damaged the EIFS and caused wood rot and other structural damages. Although the plaintiff claims that the recovery is sought for damages to the component parts, the plaintiff's negligence action attempts to recover in tort for damage to the condominiums, the subject of the contract. Although plaintiff attempts to save this cause of action by alleging the jeopardized health of the individual condominium owners due to the accumulation of mold, the plaintiff has not provided this Court with any specific allegations of actual injury to persons to support a negligence action.[18]

Applying the Economic Loss Rule to Chinese Drywall Cases

Similar to the EIFS cases, defendant suppliers and manufacturers are raising the economic loss rule as a defense to negligence claims filed by Chinese drywall homeowners. But unlike the EIFS cases, courts are denying such motions and permitting homeowners to pursue negligence claims against suppliers and manufacturers.

In the Chinese Drywall MDL, U.S. District Court Judge Eldon E. Fallon ruled that plaintiffs' negligence claims against the suppliers and manufacturers were not barred by the economic loss rule because the economic loss rule has no relevance to products that pose "an unreasonable risk of harm to plaintiff's property and health, but do not fail to meet their intended purpose…. Moreover, the [economic loss rule] is not applicable where there are claims that the defective product caused personal injury."[19]

At least two similar results have been seen in Virginia circuit courts in Chinese drywall cases, with the courts denying demurrers to negligence claims. In a case brought by Chinese drywall homeowners in Virginia Beach, Virginia Beach Circuit Judge Patricia L. West denied defendants' demurrer to the negligence count, stating at the hearing that the Chinese drywall situation is "clearly different" from the EIFS situation. [20] In a decision issued in Norfolk in consolidated Chinese drywall cases, the Norfolk Circuit Court Judge Mary Jane Hall overruled demurrers filed by defendants to a negligence claim for reasons similar to those outlined by Judge Fallon in the Chinese Drywall MDL. [21]

Similar to the EIFS cases, defendant suppliers and manufacturers are raising the economic loss rule as a defense to negligence claims filed by Chinese drywall homeowners.

In the Norfolk cases consolidated before Hall, the defendants cited *Sensenbrenner* and argued that the economic loss rule bars plaintiffs from recovering economic damages such as costs to repair the drywall and repair damage to their homes. At oral argument, some of the defendants conceded that the plaintiffs may sue in negligence for personal injury and for damage to property that was not part of the home itself, but the defendants argued the remaining damages are barred by the economic loss rule. Judge Hall disagreed with the defendants and declined to find that the negligence claim was barred by the economic loss rule. She relied on an asbestos fireproofing case issued by the Fourth U.S. Circuit Court of Appeals, [22] which applied South Carolina law in indicating that Chinese drywall is similar to asbestos fireproofing, as both products served their intended purpose but presented a potential to cause damages and personal injury. [23]

Courts are walking a fine line in Chinese drywall cases as they attempt to distinguish Chinese drywall from EIFS. The case law in *East River* and *Sensenbrenner* provides grounds for maintaining the portion of negligence claims based on alleged personal injury and damage to property that is not a part of the home. Whereas *Sensenbrenner* and earlier EIFS cases struck negligence claims seeking to recover damage to the product, the courts in Chinese drywall cases are permitting such claims to proceed against suppliers and manufacturers based on the alleged "unreasonable risk of harm to plaintiff's property" and an alleged duty owed by suppliers and manufacturers. Only time will tell the long-term effects of this wave of Chinese drywall cases on the economic loss rule. ⚖

Endnotes:

1 http://www.cpsc.gov/info/drywall/where.html
2 *Id.*
3 http://www.laed.uscourts.gov/drywall/drywall.htm
4 http://www.cpsc.gov/info/drywall/where.html
5 476 U.S. at 859.
6 *Id.* at 866.
7 *Id.* at 871.
8 *Id.* at 876.
9 236 Va. 419, 374 S.E.2d 55 (1988).
10 *Id.* at 422, 374 S.E.2d at 56.
11 *Id.* at 424, 374 S.E.2d at 57.
12 *Id.* at 424, 374 S.E.2d at 58.
13 *Id.*
14 *Id. See also Kamlar Corp. v. Haley*, 224 Va. 699, 706, 299 S.E.2d 514, 517 (1983) ("Damages are awarded in tort actions to compensate the plaintiff for all losses suffered by reason of the defendant's breach of some duty imposed by law to protect the broad interests of social policy….Damages for breach of contract, on the other hand, are subject to the overriding principle of compensation….They are limited to those losses which are reasonably foreseeable when the contract is made. These limitations have led to the 'more or less inevitable efforts of lawyers to turn every breach of contract into a tort.'") (citation omitted); *Filak v. George*, 267 Va. 612, 618, 594 S.E.2d 610, 613 (2004) ("The law of torts provides redress only for the violation of certain common law and statutory duties involving the safety of persons and property, which are imposed to protect the broad interests of society.").
15 *Genito Glenn L.P. v. Nat'l Hous. Bldg. Corp.,* 50 Va. Cir. 71 (Va. Beach 1999) (sustaining demurrers to negligence claims because damages sought by the plaintiffs were purely economic losses); *see also Metro Panel Sys. Inc. v. Sordoni Skanska Constr. Co.,* 56 Va. Cir. 399 (Va. Beach 2001) (awarding summary judgment to defendants not in privity with the plaintiff when the plaintiff only was seeking to recover economic losses); *City of Portsmouth v. Cederquist Rodriuez Ripley PC,* 72 Va. Cir. 405 (Portsmouth 2007) (holding that allegations contained in complaint were firmly grounded in contract, not tort, when the relationship between parties are all based upon written contracts).
16 *Travelers Prop. Cas. Co. of Am. a/s/o Covenant Woods v. Premier Project Mgmt. Grp. LLC*, 78 Va. Cir. 315, 318 (Hanover County 2009) ("If PPMG claimed that the defendants caused bodily harm, or damaged PPMG property, a cause of action in tort could lie. In a claim for purely economic damages, however, no duty of care or skill may be imposed absent a contract, and so there is no tort cause of action.") (citations omitted); *Commonwealth Park Suites Hotel v. Armada/Hoffler Constr. Co.,* 34 Va. Cir. 393, 396 (Richmond 1994) ("my ruling is based on my belief that *Sensenbrenner* and the other *Sensenbrenner*-type cases, while appropriately fashioning a rule to address the normal dichotomy between cases involving injury to persons or property on the one hand, and those which do not involve such injury on the other, simply do not apply to cases such as this one where toxic contamination of a landowner's air is alleged.").
17 *Lesner Pointe Condo. Ass'n Inc. v. Harbour Point Bldg. Corp.,* 61 Va. Cir. 609 (Va. Beach 2002) (dismissing the negligence claim against Dryvit based on economic loss rule); *Stoney v. Franklin,* 54 Va. Cir. 591(Suffolk 2001) (dismissing the negligence claim against manufacturers and supplier based on economic loss rule); *MacConkey v. F.J. Matter Design Inc.,* 54 Va. Cir. 1, 6-7 (Va. Beach 2000) ("[General contractor] FJ Matter fails to distinguish the injury allegedly caused by EIFS in this case from the damage that resulted in the *Sensenbrenner* or *Cincinnati Ins. Co.* cases. Plaintiffs in those cases sought damages not only for injury to the product itself but for damages to the foundation of their nearby home and actual damage to the collapsed building, respectively. FJ Matter has suffered no loss itself. Its losses are those of the MacConkeys, who, like the plaintiffs in *Sensenbrenner* purchased a package deal for a new home. The failure of one of the component parts in that package caused a diminution in the value of the home and necessitated repair work. The loss is disappointed economic expectations."); *Bay Point Condo. Ass'n Inc. v. RML Corp.,* 52 Va. Cir. 432 (Norfolk 2000) (dismissing negligence claim against EIFS manufacturer).
18 *Lesner Pointe*, 61 Va. Cir. at 613.
19 *In re: Chinese Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047.
20 *Proto v. The Futura Group LLC*, Case No. CL09-2455 (Va. Beach). The order was entered by Judge West on February 5, 2010.
21 *In re: All Pending Chinese Drywall Cases*, Civil Action Nos. CL09-3105; CL09-5127 (Norfolk March 29, 2010) (other civil action numbers excluded from footnote).
22 *City of Greenville v. W.R. Grace & Co.,* 827 F.2d 975, 977-78 (4th Cir. 1987) ("By contrast, the injury that resulted from the installation of Monokote in this case is the contamination of the Greenville City Hall with asbestos fibers, which endanger the lives and health of the building's occupants. In our opinion, this is not the type of risk that is normally allocated between the parties to a contract by agreement, unlike the risk of malfunctioning turbines at issue in *East River* or the risk of faulty roofing shingles involved in *Watermark.*").
23 *In re: All Pending Chinese Drywall Cases.*

An Assault on the *Spearin* Doctrine:
How AIA A201-2007 Shifts the Risks for Design Defects to the Contractor

by Nancy W. Greenwald

Who should pay when extra costs result from defects or inconsistencies in plans and specifications — the architect who prepares them, the contractor whose job it is to construct the project properly, or the owner for whose benefit the work is required? In the most widely used system of form contracts created by the American Institute of Architects (AIA), allocating the risks in construction projects, including the risk of design defects, is typically accomplished through a disconnected series of inflexible contracts. The owner has one contract with the architect and a separate contract with the contractor. There is no direct contract between the contractor and the architect. The potential for ambiguity and gaps in responsibility between the parties is obvious. Consequently, allocating risks among the parties in design and construction contracts sometimes resembles a game of hot potato.

The AIA has published standard contract forms for participants in the construction industry since 1888. AIA A201, "General Conditions of the Contract for Construction," is the keystone of the AIA Contract Documents[1] and it is incorporated by reference into many of its other contract forms.[2] Among its primary functions is the allocation of risks and responsibilities between the owner and the contractor.[3] Even though the architect is not a party to A201, certain of the architect's rights and obligations, and therefore his or her exposures to risk, are embedded in A201, which is now incorporated by reference into the standard AIA contract agreement between the architect and the owner.[4]

The latest revision to AIA A201 was published in 2007,[5] and for the first time in fifty years, the Associated General Contractors of America (AGC) refused to endorse the AIA General Conditions, AIA A201-2007. This rejection was fueled by concern that the changes greatly increase contractors' potential liability for costs resulting from defects in plans and specifications and, in so doing, deviate from established common law principles.[6]

Spearin Doctrine: Owner's Implied Warranty

For almost a hundred years, the *Spearin*[7] doctrine has given contractors some measure of comfort that they would not be held responsible for costs resulting from defects in plans and specifications. In *Spearin,* the U.S. Supreme Court held that when the federal government provides a contractor with design specifications and the contractor is contractually bound to build according to the specifications, the contract carries an implied warranty that the specifications are free from design defects. The Court held that general disclaimers requiring the contractor to check plans do not shift the risk of design flaws to contractors who follow the specifications.[8]

For almost a hundred years, the Spearin[7] *doctrine has given contractors some measure of comfort that they would not be held responsible for costs resulting from defects in plans and specifications.*

While it is not without limitations,[9] the *Spearin* doctrine is very much alive today. It has been consistently applied to construction contracts with the federal government,[10] as well as to other government contracts for procurement of goods or services.[11] Both federal and state courts have applied the *Spearin* doctrine to private as well as public construction contracts. *Spearin* has

been the basis of the common law in Virginia since the 1919 case of *Adams v. Tri-City Amusement Co.*[12]

Mind the Gap

There is gap between the duty of care the architect owes to the owner and the duty of care the owner owes to the contractor. The gap is related to the accuracy of plans and specifications. Under the prevailing case law in Virginia, the architect "must possess and exercise the care of those ordinarily skilled in the business, and in the absence of a special agreement, he is not liable for fault in construction resulting from defects in the plans because he does not imply or guaranty a perfect plan or a satisfactory result."[13] A similar standard is now incorporated in the AIA's standard owner/architect agreement.[14] So, on the one hand, the architect *does not* warrant the accuracy of her plans to the owner. On the other hand, under the *Spearin* doctrine, the owner *does* warrant to the contractor that the plans and specifications are accurate, correct, and suited for their intended purpose. The result is that the owner, rather than the architect who prepared the plans, is liable to the contractor for extra costs resulting from errors in the plans and specifications. Owners, caught between architect and contractor, understandably object to paying for these extra costs.

There is gap between the duty of care the architect owes to the owner and the duty of care the owner owes to the contractor.

How the 2007 AIA General Conditions Shift Liability to the Contractor

The 2007 version of AIA A201 tries to close the gap by shifting significant liability for the costs of correcting design defects from the owner to the contractor and by further insulating the architect from potential liability for design defects. This shift is not the result of a change in any single provision. It is the result of the combined effect of existing and new language. The changes effect this shift of responsibility most powerfully in clauses that describe the purpose of and the relationship between the contract documents that broaden the contractor's duty to review and compare the contract documents and to take field measurements before proceeding with any portion of the work, that expand the contractor's duty to report errors, and that increase the contractor's liability for extra costs ascribed to the failure to perform any of these design review functions.

The description of the AIA Contract Documents is significant because it sets the standards for their interpretation. The AIA language is notable for what it does not say. It does not say that the contract documents "include all items necessary for the proper execution and completion of the work by the contractor"; the language merely recites that this is the "intent" of the contract documents. The contractor is required to perform work specified in the contract documents and any work "reasonably inferable from them as being necessary to produce the indicated results."[15] Subsequent contract sections require the contractor to conduct an independent review. For example, "before starting each portion of the Work," the contractor is to "carefully study and compare the various Contract Documents" as well as information provided by the owner relating to a particular portion of the work, "to take field measurements of any existing conditions related to that portion of the Work," and to "observe any conditions at the site affecting it."[16] While acknowledging that the contractor is not a design professional and reciting that the contractor's review is "for the purpose of facilitating coordination and construction" by the contractor and not for the purpose of discovering errors and omissions, the General Conditions impose on the contractor a continuing obligation to report promptly errors or deficiencies discovered — or (in newly added language) "made known to" the contractor.[17]

The heightened obligation to measure, check, and report design defects gains added significance because it is accompanied by an increase in the consequences if a contractor fails to report errors. If the contractor fails to carefully review the documents, to take proper field measurements, or to report errors, then "the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations."[18] Deleted portions of the 1997 version assigned liability to the contractor only when he "knowingly" failed to report a recognized error to the architect. In the 2007 version, if a design problem comes to light after construction is under-

way, the stage is set for argument about what the contractor should have known and when he should have known it.

The contract documents are deemed to be "complementary." Accordingly, the General Conditions do not contain a provision establishing precedence for resolving conflicts between the plans, specifications, and other design documents. Any defects or inconsistencies "discovered" or "made known" to the contractor are to be reported to and resolved by the architect (rather than the owner).[19] In fact, the owner and the contractor are not supposed to communicate directly; they are required to communicate with each other through the architect.[20] However, the contractor cannot rely even on the architect's written resolution of problems as a shield against liability. For example, an architect's response to a request for information to resolve a specific design issue does not by itself authorize deviations from the plans: "the Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract,"[21] and the architect shall "not be liable for results of interpretations or decisions rendered in good faith."[22]

Finally, the very broad indemnification provisions contained in § 3.18 require the contractor to "indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself)." While the language goes on to limit the indemnification "only to the extent caused by the negligent acts or omissions of the Contractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable," the indemnification applies "*regardless* of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder" (emphasis added.) This arguably imposes a separate liability on the contractor for injuries and other subsequent claims resulting from design defects.

The AIA contract language is dramatically different where the contractor provides design information, such as shop drawings. In such instances, being "the Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy."[23] So, while the contractor has to check, measure, and report any discrepancies he finds in the architect's and owner's plans and specifications, and fails to do so at his peril, the architect and the owner have the protection of a provision that sounds a lot like the *Spearin* doctrine.

Contractors Beware: Virginia Courts Enforce the Contract as Written

Strict enforcement of contract language is a long-standing principle of Virginia law. "In a breach of contract claim, the parties' contract becomes the law governing the case unless it is repugnant to some rule of law or public policy. … The Court must enforce the contract as written."[24] Even indemnification provisions calling for one party to indemnify the second against the second party's own negligence have recently been enforced in Virginia courts under this principle, even though a number of other states have held such provisions unenforceable as against public policy.[25]

A 2006 Fairfax County Circuit Court decision should give pause to any contractor asked to incorporate AIA A201-2007 as a contract document. In *Modern Cont'l South v. Fairfax County Water Auth.*[26] the court dismissed a contractor's claim against the Fairfax County Water Authority (FCWA), despite the contractor's argument that the *Spearin* doctrine protected it from liability for consequences arising from defects in plans and specifications provided by the FCWA. Citing contract provisions requiring the contractor to verify details shown on the drawings received from the engineer and to notify him of all errors, omissions, conflicts, and discrepancies, the court held that the contractor breached the contract by failing to properly notify the FCWA about alleged errors and conflicts in the contract documents and drawings prior to proceeding with the work.

To protect themselves, contractors and their attorneys should negotiate changes to the language of AIA A201-2007, should consider using their own contract forms, or should consider using alternative form contracts — for example ConsensusDOCS.[27]

IPD, BIM and Transactional Mediation

The game of shifting risk for design defects between parties has serious negative consequences. The typical inflexible contract approach to risk allocation creates an adversarial relationship from the beginning of the project, decreasing efficiency, setting the stage for disputes, and effectively raising the costs to all concerned.

A number of approaches have emerged that address in novel ways the issue of risk allocation for design defects. For example, design-build agreements are, as the name implies, agreements in which the project owner enters into a contract for design and construction services with a single entity.[28] The interests of the design and construction professionals are realigned and the owner can look to a single entity for the proper design and construction of the project. Integrated Project Delivery (IPD) takes this concept a step further and involves all of the major participants — owner, architect, and contractor, in a collaborative process, beginning with the design phase.[29] Technical innovations have appeared that by their nature combine the parties' efforts early in the life of a project. Building Information Modeling (BIM) is a computer-based three-dimensional modeling technology that improves communication, integrates information, and operates to reduce design errors.[30] Each of these approaches has the capability to identify design flaws much earlier in the process, before changes to design become expensive to fix.

Greater agreement among professional organizations on appropriate methods of risk allocation may seem like a pipe dream, but there is a history of such cooperation in Virginia. In 1991, a Joint Cooperative Committee of the Virginia Society of the American Institute of Architects, Associated General Contractors of Virginia Inc., American Council of Engineering Companies Virginia Inc., and Virginia Society of Professional Engineers worked together to produce the *Virginia Construction Industry Guidelines*, which was designed to provide "tested guidelines to avoiding common industry related problems." They are also designed to acquaint the owner, the design professional, and the construction contractor with what are considered to be "fair and equitable practices in the construction process."[31]

Finally, nascent areas of dispute systems design, such as transactional mediation, hold promise for addressing risk allocation in construction projects. The role of a transactional mediator is to assist the parties to identify, analyze, shape, treat, and price risks for a specific project, and to help them agree in advance on a formula for allocating the possible extra costs. Transactional mediation also is an approach to handling disputes for identifiable risks. The goal is to increase the cooperation of the parties from the beginning of the project and reduce costly disputes.

The severe recession of the last few years has shifted the balance of power away from the contractor and toward the owner and the owner's architect. But it is not in society's interest to shift responsibility for design defects away from licensed professionals either to owners or to contractors. Confronting risk factors, increasing communication, raising the parties' level of security, and clarifying agreements ahead of time appear to be a much more fruitful approach than the old game of hot potato embodied in the AIA contract forms. ⚖

Endnotes:

1 American Institute of Architects, AIA Document Synopses: Conventional (A201) Family, available at http://www.aia.org/contractdocs/AIAS076694 (last visited July 5, 2010).

2 AIA Document A201-2007 is adopted by reference in owner/contractor and contractor/subcontractor agreements in the Conventional (A201) Family of documents.

3 "The AIA designed the latest iteration of the A201 Family to define and control the responsibilities of the various parties involved in a typical design-bid-build construction project." James C. Jankowski, FAIA; Suzanne H. Harness, Esq., AIA; and Michael B. Bomba, Esq., *AIA 2007 Update: How Does it Affect Architects?* American Institute of Architects, Articles About AIA Documents, available at http://www.aia.org/contractdocs/aiab081437 (last accessed July 2, 2010). According to the website, the articles were authored by members of the AIA Documents Committee, staff of the AIA and industry experts.

4 AIA B101-2007 "Standard Form of Agreement Between Owner and Architect," § 3.6.1.1.

5 The AIA publishes revisions in its forms about every ten years. The prior version was published in 1997.

6 "The 600-member AGC Board of Directors unanimously voted not to endorse the new A201on October 6, 2007. AGC's decision was based upon the substantial shift of risk to contractors and other parties outside the design profession as well as a fundamental disagreement with the authoritative role of architect and mandated linear process." Association of General Contractors, AGC of America Preliminary A201Commentary — November 12, 2007; Revised July 8, 2009, available at http://www.agc.org/galleries/contracts/Preliminary_a201_guide_finalrevised_072009.pdf (last accessed June 30, 2010).

7 *United States v. Spearin,* 248 U.S. 132 (1918). Spearin was a construction contractor who entered into a fixed-price contract with the government to build a dry dock according to plans and specifications prepared by the government. The plans contained a provision requiring relocation of a section of sewer. After relocation of the sewer, a storm caused build up in internal pressure in the relocated sewer section and flooding of the dry dock excavation site. The Court held that the provision requiring relocation of the sewer created an implied warranty by the government that if the specifications were complied with, the sewer would be adequate. Because the sewer was inadequate, the Court held that the government had breached its implied warranty. *Spearin,* at 138.

8 *Id.* at 137; *see also Al Johnson Constr. Co. v. United States,* 854 F.2d 467, 468 (Fed.Cir.1988) ("The implied warranty is not overcome by the customary self-protective clauses the government inserts in its contracts.").

9 The implied warranty does not apply to performance specifications that establish an objective without specifying the method of achieving the objective. *Spearin,* 248 U.S. at 136. It does not eliminate the contractor's duty to investigate, inquire about, or report a patent ambiguity, inconsistency, or mistake. *Blount Bros. Constr. Co. v. United States,* 348 F.2d 471, 172 Ct. Cl. 1 (1965). It does not protect one who materially deviates from the specifications. *Al Johnson Constr. Co. v. United States*, 854 F.2d 467, 468 (Fed.Cir.1988). It does not shield the contractor from third party claims. *Hercules, Inc. v. United States*, 516 U.S. 417 (1996); *Rick's Mushroom Serv., Inc. v. U.S.*, 521 F.3d 1338 (Fed. Cir. 2008).

Spearin continued on page 48

Key Points to Consider in Filing and Challenging a Mechanic's Lien

by K. Brett Marston and Spencer M. Wiegard

Filling out a simple form on a few sheets of paper: that's all a mechanic's lien is, right? Not quite.

Even the most basic of mechanic's lien situations have challenges that require analysis of statutes, case law, calendars, invoices, chains of contract, and much more. There have been many excellent articles and presentations by Virginia State Bar Construction Law and Public Contracts Section members on the minefield of mechanic's lien law. This article consolidates many key points from existing literature and our experience. These points cover not only the statutory mandates required to perfect and enforce a mechanic's lien in Virginia, but also some practical considerations. The ideas presented will assist in challenging mechanic's liens.

These are not all of the issues you may encounter. Consult the statutes, read the case law and seminar materials, and discuss issues with other practitioners.[1]

Initial Steps and Considerations

Involve the client. The chances of success increase when you involve the client and obtain the information to address the points set out in this list. An intake form is helpful. Also involve the client as your lien preparation proceeds.

Explain the process and the challenges to the client. Information that neither of you knows now could be fatal to the lien later. Consider these questions:

- Has the client signed lien waivers for any of the amounts it seeks either in its contract or in lien waiver forms?
- Is the lien for "repairs or improvement," and thus unlikely to have priority over a preexisting deed of trust?

Consider whether filing a mechanic's lien is the best or only option. Is pursuing the owner under Virginia Code § 43-11 an option? Is there a payment bond posted on the project?

Read the mechanic's lien portions of Title 43 of the Code of Virginia. It is absolutely imperative that you review the most recent edition of the Code, every time, before you begin your evaluation of a lien claim. Start with the supplement, so you have the most up-to-date statutes. Use the annotated version of the Code so you get the benefit of the case law annotations.

Critical Issues of Timing

Immediately check for the worst-case scenario as to the deadline for filing. Virginia Code § 43-4 provides a 90-day window for filing the memorandum of lien, running from the last day of the month in which the claimant last performed work or supplied materials; this window closes no later than 90 days from the completion of the project or termination of the general contract. The tricky part can be determining when that 90-day period begins to run. Key considerations include:

- When was the last day the client did substantive work on the project? Was it within 90 days? (Not three months. Ninety days.[2])
- If not, does the client get the benefit of starting that 90 days running from the last day of the month in which it last did work?[3]
- As a last resort, can you extend the start of the 90-day period by including punch-list work? ***Defense point:*** Warranty work cannot be used to extend the 90-day period.[4]
- Is your client a material supplier on an open account, or is there a single contract in place? That can affect when the 90 days begins to run.[5]
- Get out the calendar and analyze the dates, then do it again. Do you have time to get the lien properly prepared? Discuss that with the client.

Determine how much of what your client is owed can be claimed in the memorandum of lien pursuant to the 150-day look-back provision of Virginia Code § 43-4. The look-back provision limits the amount a claimant may include in a mechanic's lien memorandum to amounts for work or materials provided within the 150 days prior to the last day the claimant last performed work or provided materials.

- Remember that the 150-day look-back starts on the last day the client performed labor or furnished materials. It does not start from the date of filing.[6]

- Use the most conservative date for starting the look-back period. Go to the last day of any punch-list work, even if after substantial completion. You can file a separate lien for any amounts performed or materials provided more than 150 days before the date of substantial completion.

- Inclusion of amounts more than 150 days back can be fatal to the entire lien.[7] Examine the paperwork carefully. Pull together invoices, job cost reports, daily logs, and meeting minutes. Don't rely just upon the client's invoices for this analysis. You may need to determine when the work was actually done or the materials delivered, rather than when they were invoiced. A general contractor may need to obtain additional details from subcontractors about when work was actually performed or materials delivered. ***Defense point:*** Seek all of this information in discovery and analyze whether work being charged for was performed prior to the 150-day period. If the lien is overinclusive, it is subject to dismissal under the *Carolina Builders* line of cases.[8]

- You can include retainage that falls outside of the 150-day look-back period, up to 10 percent of the total contract price.[9]

What Role Did the Client Play in the Project? Does It Have Lien Rights?

Analyze and determine the chain of contract. Where your client is located in the chain and the identities or roles of others in the chain matter greatly. Your client's status as a lien claimant is determined by the chain of contract starting with the property owner.[10]

- Don't rely just on what the client tells you. Look at the project documents, research on the Internet, make phone calls, and look at building permits, for example.

- Check Virginia State Corporation Commission records, Virginia Department of Professional and Occupational Regulation information, and other liens that have been filed, to verify information about the other participants in the project.

- Examine the definitions in Virginia Code § 43-1. The definitions that apply do not necessarily track with how an entity might be described on the construction project, and they can affect the chain of contract analysis.

- Realize that the "general contractor" is defined under Title 43 of the Virginia Code as the person or entity "who contract[ed] directly with the owner."[11] Consider that a construction manager may be involved, or there may be more than one "general contractor."[12] The owner of the property could have set up a separate limited liability company to develop the property. This could extend the chain of contract and affect your client's right to file a mechanic's lien.

- Draw the chain of contract on a sheet of paper and identify the unknown and questionable areas. ***Defense point:*** Virginia Code §§ 43-4, 43-7, and 43-9 limit who can file a mechanic's lien to those who supply labor or materials to a subcontractor. If the filing entity is further down the chain, challenge its right to file a lien.

Is your client afforded lien rights *at all* under Title 43 of the Virginia Code?

- Not all entities connected with a construction project can file a lien. In some situations a design professional may be entitled to a lien (consider on-site construction administration work), and in other situations may not be (consider pure design work, especially if the project is never built).[13]

- Virginia Code § 43-2 lists certain materials and services that are considered to be "furnished for the improvement of such building or structure and permanently annexed to the freehold," and are thus subject to lien.[14]

Property Identity and Allocation Issues

Identify the property, the owner, and the building or structure that is subject to lien. Also, what interest in the property is subject to lien?

- Who contracted for the construction work to be performed? If it was not the owner, then is the project one for work on an existing structure, and did the owner or its agent order or authorize the work?[15]

- Is the lien limited to a claim on the tenancy or on an easement?

- A tenant cannot subject a landlord's interest in a structure to a mechanic's lien.[16] The claimant may assert a claim only against the lessee's leasehold interest. The lessor's interest may be subject to a mechanic's lien claim if the lessee contracted for improvements to the structure while acting as the lessor's agent, or the lessor subsequently ratified the lessee's actions.[17]

- Who owns the property? Is it the person who contracted to have the work performed? For example, did the landowner set up a separate limited liability company to contract for the construction work on the project? If so, does that change the chain of contract and thus narrow who can file a lien?

- A lien cannot be filed against public property.[18] In that instance, check your client's payment bond rights. (Note: Consider still filing in an instance in which a public entity

has leased to a private entity, or turned property over for private use.[19]

- Obtain the property address and consider just using that on the lien memorandum as the property description. Better practice is to analyze and understand the property location and more fully describe it in the lien. Remember that Virginia Code § 43-15 provides a savings provision if the property has not been adequately described, so long as it can be "reasonably identified" from the memorandum of lien.

- Identify the "building" or "structure" on which the work was performed or for which materials were supplied. If it was not for or on a building, then consult Virginia Code § 43-2 to determine what else is considered to be a "structure." For example, is digging a trench for a drainage pipe subject to lien?

- Is the building a condominium or a subdivision? If so, consider unique issues under Virginia Code § 43-3 (see below). Did your client's work involve the individual units or the common elements? Look at condominium documents and the construction drawings to determine the division between the individual units and the common elements.

- If the building is a condominium and the claimant performed work on common areas, consider preparing a single lien that encumbers all units to which the common areas pertain. Pay close attention to the apportionment and release requirements in Virginia Code §§ 43-3 and 55-79.83(D).

- If the property is a time-share, consider the particular notice and owner identification issues in Virginia Code § 43-7.

- To analyze these issues, creatively employ Internet mapping tools, city and county geographic information systems and tax records, property association and condominium filed declarations, and on-site visits, as well as traditional title information.

- Virginia Code § 43-3(B) provides the limitations applicable to apportioning lien claims among multiple parcels.[20]

    - If the client's work includes work related to site development, streets, stormwater facilities, sewers, or water lines, the client may perfect a lien against the lots served by the work, as apportioned pursuant to Virginia Code § 43-3(B).

    - Apportion the lien claim against the lots in the development so that you don't overburden each lot.[21]

- Determine whether it is necessary to file a disclosure statement to have a valid lien prior to the sale of an affected lot.[22]

- Did the client work on structures on separate but adjacent parcels as part of the same project? If so, apportionment is required, except in a limited instance in which the following factors are all present:

    - the claimant performs work or provides materials for multiple structures on multiple lots pursuant to a single lump-sum contract between the owner and the claimant;[23]

    - the claimant is unable to specify the amount of labor or materials supplied to each separate lot;[24] and

    - there are not other liens on the property and at issue are only the owner's rights and the claimant's rights.

Calculation of Amounts to Lien

Analyze the amounts owed to include in the lien.

- Beyond the 150-day look-back analysis above, analyze the client's documents to limit claims to work performed or materials provided that were incorporated into that particular site.

- Reasonable rental value and use value of equipment can be included in the lien.[25]

- Include a claim for interest in the memorandum of lien, if the underlying contract provides for interest on unpaid amounts. If in doubt, consider filing a separate lien for interest, or just include a claim for interest in the complaint to enforce the mechanic's lien.[26]

- Exclude claims for attorney's fees from the lien itself.[27] If permitted by contract, consider including a claim for attorney's fees in the complaint to enforce the mechanic's lien.

- Exclude "claim" type damages from the lien if they do not pertain to something provided that added value to the property. Again, consider filing a separate lien and including the damages in separate counts of the complaint.

- Consider the issues of stored materials and whether materials have actually been incorporated into the site, as discussed above, and are appropriately included in the amount of the mechanic's lien. ***Defense point:*** Consider whether a material supplier that has only delivered materials to the site but whose materials have not been incorporated into the structure is entitled to a lien, or a lien to the extent claimed.

- Discuss with the client that ultimately the amount of the lien is limited by amounts owed in the chain of contract above the claimant. ***Defense point:*** Under Virginia Code § 43-7, in a suit to enforce a subcontractor's lien, it is an affirmative defense, in whole or in part, that the owner is not indebted to the general contractor or is indebted to the general contractor for less than the amount claimed by the subcontractor.[28] Likewise, the

sub-subcontractor or supplier to the subcontractor, under Virginia Code § 43-9, is limited to the amount for which the subcontractor could file a lien.[29]

- As long as the claimant does not violate the 150-day rule, the amount claimed does not have to exactly match the amount ultimately proved. The lien will not be enforced for more than the lien amount.

Compiling and Filing the Lien Form

Use the appropriate form. Virginia Code §§ 43-5, 43-8, or 43-10 provide forms that can be used as a starting point.

- Refer to the discussion above about the importance of properly identifying the entities in the chain of contract.[30]

- In preparing the description of materials and services, obtain information from the client, but be sure that it tracks with provisions of Virginia Code §§ 43-2 and 43-3 in terms of materials and labor that can constitute a lien.

- Include the mandatory statement that "It is the intent of the claimant to claim the benefit of a lien."[31]

- Don't gloss over the important issue of "who" can sign the lien under oath for the claimant. The memorandum (and accompanying affidavit) must specify that the signatory is an "authorized agent" of the claimant.[32] Identify the title of the officer, director, or manager signing for a corporation. Avoid having persons not in one of these positions sign for the corporation. As the claimant's attorney, you should avoid signing, if possible. If you sign, you could become a witness. If it is necessary for you to sign, do so as "attorney and authorized agent."

- Accurately complete the affidavit that is a part of the lien memorandum form.

- Consider filing multiple liens, as allowed for under § 43-4, to address timing concerns such as:

    - certain amounts are inside or outside of the 150-day look-back period;

    - part of the services or materials may not be subject to lien;

    - part of the amount claimed is arguably outside of the most conservatively calculated time frames (either the 90-day filing deadline or the 150-day look-back period);

    - some of the materials were stored and not incorporated into the work; or

    - there are questions about the chain of contract (does the landowner have a contract with the construction manager, which in turn hired the prime contractor, or is the construction manager not in the chain of contract at all?, for example).

- Indicate in the lien that the liens are intended to be complementary and not to charge the property or subject it to lien more than once for the same work.

Determine what certifications and notices must be provided. The type of notice required depends upon where your client falls in the chain of contract.

- A "general contractor" (as defined by Virginia Code § 43-1) asserting a claim under § 43-4 must file with the memorandum a certification of mailing of a copy of the memorandum of lien on the owner to the owner's last known address.[33]

- A "subcontractor" (as defined by Virginia Code § 43-1) asserting a claim under § 43-7 must give written notice to the "owner" of the amount and character of its claim.[34]

- A claimant under Virginia Code § 43-9 must give written notice to the owner and general contractor of the amount and character of its claim.[35]

- If the client has performed work on a one- or two-family residential dwelling structure, check to see if the owner designated a mechanic's lien agent on the building permit for receipt of notice, pursuant to Virginia Code § 43-4.01. If so, provide the notice per this Code section.

Note that, for residential projects for which a mechanic's lien agent has been designated, an initial notice is required within the first 30 days of providing labor or materials, or a later-filed lien will be invalid.[36]

Update the title search for the property just before filing the lien to ensure that nothing has changed.

Filing the Complaint to Enforce a Mechanic's Lien

Update the title search for the property just before filing your complaint. This will ensure that nothing has changed or that you can address any changes.

When filing a complaint to enforce the lien, consider some of the items that can cause a problem.

- Timing: The suit must be filed within the latter of either 6 months from the date the lien memorandum was recorded, or 60 days after completion or termination of the project.[37]

- In the complaint to enforce the client's lien rights, plead compliance with the requirements of Title 43 of the Virginia Code, including compliance with the timing elements of lien perfection and the enforcement action.[38]

- Attach a copy of the filed lien memorandum and an itemized statement of account. Virginia Code § 43-22 provides the elements of the statement of account, which must be "verified" by the claimant.

- Include all "necessary parties" as defendants in the complaint. Err on the side of caution. Check the cases on this, but consider including all of these: any beneficiaries and trustees of deeds of trust and judgment liens on the property; the owner, other mechanic's lien claimants; and others in the chain of contract above your client.[39]

In determining "necessary parties," also consider that:

- recently, some lien claimants have begun including the commonwealth or a locality where there may be a lien for unpaid taxes, and

- consider the implication for who is to be named in the suit if the lien has been "bonded off" under Virginia Code §§ 43-70 or 43-71.[40]

Responding to the Complaint

Defense points in responding to the suit:

- Is there an arbitration provision in the underlying contract? If so, consider having the complaint stayed while the arbitration is completed.

- Is there a pending bankruptcy case that may impact the prosecution of the lien enforcement suit?[41]

- Is the claimant required to be licensed in Virginia? If so, is it licensed? Is it authorized through the State Corporation Commission to do business in Virginia?[42]

- Has the claimant materially breached the underlying contract? Is there some complete bar or set-off to the claim? Is there a counterclaim?

- Does the subject lien have priority over other liens? This is an issue that claimants should be aware of prior to filing a lien. Resolution might ultimately occur in the lien enforcement litigation. Virginia Code § 43-21 provides the applicable priority scheme.

Note: Pay close attention to the interplay of deeds of trust existing prior to construction. As a part of this, realize that a mechanic's lien for "repair or improvement" does not have priority over the existing deed of trust, though a lien for new construction will have priority to the extent it has added value to the original value of the unimproved land.[43]

- Analyze each of the steps in this article. Has the claimant complied?

- Consider filing a petition under Virginia Code § 43-17.1 to challenge the validity of the lien prior to the filing of a complaint to enforce if earlier determination is necessary.

Conclusion

Filing a mechanic's lien, especially on a large, multi-party construction project, is no easy task. Though the memorandum that you file is often only a few sheets of paper, there is intense and meticulous analysis that must be undertaken to ensure that the lien is as correct as possible and in compliance with the requirements of Title 43 of the Virginia Code. Even then, there are issues about which you and your client may not be aware, such as the facts related to a payment defense, which could derail the efficacy of the lien.

When defending against a mechanic's lien claim, it is essential to apply reverse engineering to the lien. Initially, this can be based upon all information available to you. There is much information you will not know, though, until you conduct discovery and obtain the underlying invoices and other details.

We hope this list will help you identify the major issues involved in your lien case. Realize, though, that each lien case is different and that your analysis may require consideration of issues not discussed above, or not yet encountered in the reported cases. ⚖

Endnotes:

1 We commend as resources the articles and seminar materials that James L. Windsor, James R. Hart, and Robert K. Richardson prepared previously for the VSB Construction Law and Public Contracts Section. In addition, we thank Shannon Briglia, James Hart and Timothy R. Hughes for their valuable input into the preparation of this article.

2 *See A.E. Tate Lumber Co. v. First Gen. Serv. of Richmond Inc.,* 12 Va. Cir. 135 (Chesterfield 1988).

3 *See* Va. Code § 43-4.

4 *See Rountree Construction Co. V. Hillpoint Mo. Ltd.,* Ch. Nos. 94-371-94-375(Suffolk Cir. Ct. Feb 9, 1999).

5 *See United Savings Ass'n v. Jim Carpenter Co.,* 252 Va. 252, 475 S.E. 2d 788 (1996).

6 *See* 1986-87 Report of the Attorney General 228.

7 *See Carolina Builders Corp. v. Cenit Equity Co.*, 257 Va. 405 , 512 S.E.2d 550 (1999).

8 *See Id.*

9 *See* Va. Code § 43-4.

10 *See West Alexandria Props. Inc. v. First Va. Mortgage & Real Estate Inv. Trust,* 221 Va. 134, 267 S.E.2d 149 (1980).

11 Virginia Code § 43-1.

12 *See Northern Va. Sav. & Loan Ass'n v. J.B. Kendall Co.*, 205 Va. 136, 135 S.E.2d 178 (1964).

13 *See Cain v. Rea,* 159 Va. 446, 166 S.E. 478 (1932).

14 *See* Va. Code § 43-2.

Mechanic's Lien continued on page 56

The Economic-Loss and Source-of-Duty Rules and the Wall between Tort and Contract in Virginia

by Edward E. "Ned" Nicholas III and Sean M. Golden

As the Supreme Court of Virginia has repeatedly observed, it is inevitable that lawyers representing aggrieved parties will try to find ways to make tort claims out of contractual disputes.[1] In response to these efforts, Virginia courts have developed a series of doctrines designed to maintain a wall of separation between the realms of contract and tort law. For example, Virginia law prohibits the recovery of punitive damages in contract cases[2] and makes the violation of the obligation of contracting parties to act in good faith a contract rather than a tort claim.[3]

This article explores the origin and development of two doctrines — the economic loss and source-of-duty rules — that help form the wall between the realms of tort and contract. Each of these rules has wide application in the construction industry. The economic loss rule developed in response to attempts to use negligence claims to recover from construction project participants with whom the plaintiff had no direct contractual relationship. The source of duty rule developed where project participants sued their contractual privies in tort instead of contract. Both rules are designed to keep contract disputes on the contract side of the contract-tort divide.

Contract vs. Tort

Contract and tort law developed to serve different functions. The law of contracts developed to enforce the intent of contracting parties as reflected in their agreements.[4] Tort law, by contrast, generally deals with situations where there is no agreement between the parties. Specifically, the negligence cause of action evolved to provide a remedy for personal injury and property damage caused by careless behavior and arises out of a duty imposed by society to act reasonably.[5]

Contract law is not based on what is objectively reasonable. Instead, contract disputes are governed by the terms agreed on by the parties. In the construction industry, these agreements are often extremely detailed. For example, construction industry contracts often include time limits for giving notice of claims,[6] limitations on damages,[7] and provisions defining the scope of the parties' obligations.[8]

Where such contract provisions threaten to limit or prohibit a contract claim, tort law can become very attractive to the claimant.

The damages available in tort claims also make them more attractive than contract claims. Consequential damages are always available in negligence actions, but are available in contract actions only if the special circumstances causing them were within the contemplation of both contracting parties at the time they executed the contract.[9] In addition, punitive damages are sometimes available in tort claims but, as mentioned above, are not available in contract actions.

The Economic Loss Rule

Troublesome contract provisions (particularly a "no damage for delay" clause) provided the backdrop to *Blake Construction Co. Inc. v. Alley,*[10] in which the Supreme Court of Virginia first clearly articulated the economic loss rule. In *Blake Construction*, a general contractor asserted a claim for professional negligence against the project architect, with whom the contractor did not have a contract, claiming economic losses.[11] To prevail on a contract claim against the owner, the contractor would have had to overcome the "no damage for delay" clause, so the negligence claim seemed more promising. But the trial court granted the architect's demurrer, and, in affirming, the Supreme Court reasoned that

> The architect's duties both to owner and contractor arise from and are governed by the contracts related to the construction project. While such a duty may be imposed by contract, no common-law duty requires an architect to protect the contractor from purely economic loss. There can be no actionable negligence where there is no breach of a duty "to take care for the safety of the person or property of another."[12]

The Court also emphasized the importance of enforcing the terms of the applicable contract, noting that those involved in construction projects "resort to contracts and contract law to protect their economic interests" and that the contracts they enter define their rights and duties.[13] The court added that the negligence law standard of care is out of place where the loss claimed must be "defined by reference to [the standard of quality] which the parties have agreed upon."[14] Based on this reasoning, the Court concluded that "[u]nder the common law there could be no recovery by [the contractor from the architect] in tort for only economic loss in the absence of privity."[15]

The Court returned to this theme in *Sensenbrenner v. Rust, Orling & Neale, Architects Inc.*, holding that homeowners could not recover their "purely economic losses" in negligence from an architect and a subcontractor, with whom the plaintiffs had no direct contractual relationship.[16] The Court observed that "[t]he controlling policy consideration underlying the law of contracts is the protection of expectations bargained for" and concluded that because the plaintiffs suffered only "disappointed economic expectations" (the failure of some of the work "to meet the bargained-for level of quality") contract law must govern the dispute.[17]

The lesson of *Blake Construction* and *Sensenbrenner* is that a plaintiff involved in a web of contractual relationships may not recover purely economic losses in a negligence claim against a party with whom it has not contracted. This is Virginia's economic loss rule.[18]

The Limitations of the Economic Loss Rule

Despite the sweeping language in the early economic loss rule cases, the rule developed with significant limitations. The primary limitations are threefold. First, it has been unclear since the Supreme Court articulated the rule whether it applies where the plaintiff and defendant are in privity. Second, the rule has generally been interpreted to apply only to negligence and constructive (negligent or innocent) fraud. Third, as the name of the rule suggests, it is limited to claims for purely economic loss.

The privity question arises because a central issue in *Blake Construction* was whether the Virginia statute abolishing the lack of privity defense in some cases[19] applied to allow a claim by a general contractor against an architect for purely economic losses. The Court held that because the anti-privity statute refers only to "injury to person or to property," it did not eliminate the privity requirement in economic loss cases.[20] As observed above, the Court also emphasized broader themes of duty and the enforcement of contracts, but the lack of privity between the parties played a key role in the Court's decision.

In an accounting malpractice case,[21] the Supreme Court suggested that economic losses may be recovered in negligence as long as the parties are in privity.[22] The Court suggested, in other words, that the economic loss rule applies only where the parties are not in privity and that the rule is essentially just another name for what is left of the privity doctrine.

Subsequent opinions of the Court have not resolved the privity question. In *Acordia of Va. Ins. Agency Inc. v. Genito Green LP*, the Court held, by implication, that where a plaintiff and defendant are in privity, the plaintiff may recover purely economic losses for negligent performance of a contract.[23] The Court cited the early economic loss rule cases and a later case,[24] but did not explain why purely economic losses were recoverable under a negligence theory where the parties are in privity. Two years after deciding *Acordia*, the Court applied the economic loss rule in *Filak v. George* to bar a constructive fraud claim where the parties were in privity.[25] Citing *Blake Construction* and *Sensenbrenner*, but not *Acordia*, the Court explained that "when a plaintiff alleges and proves nothing more than disappointed eco-

The lesson of* Blake Construction *and* Sensenbrenner *is that a plaintiff involved in a web of contractual relationships may not recover purely economic losses in a negligence claim against a party with whom it has not contracted. This is Virginia's economic loss rule.

nomic expectations assumed only by agreement, the law of contracts, not the law of torts, provides the remedy for such economic losses."[26] Courts have continued to come down on both sides of the privity question since the court decided *Filak v. George*.[27]

Like the possible privity limitation, the rule's inapplicability to intentional torts may arise out of the rule's connection to Virginia's anti-privity statute, which applies only to negligence claims.[28] Although courts often substitute the word "tort" for "negligence" when describing the economic loss rule,[29] it has been applied almost exclusively to negligence claims.[30] While the rule has been applied to dismiss constructive fraud claims, this is because such claims are for negligent or innocent misrepresentations.[31]

The Court's decision in RMA is not based on the economic loss rule and cites none of the economic loss rule cases.

The limit on the economic loss rule's application to claims for purely economic loss is suggested by the name of the rule. This limitation also owes its origin to the rule's connection to the anti-privity statute, which only eliminates the privity requirement in personal injury and property damage claims.[32] As applied, this limitation excludes from the rule's scope all claims involving personal injury, but not all claims involving physical damage to property.[33]

Enter the Source of Duty Rule

The unresolved privity issue and the economic loss rule's limitation to negligence claims led to the evolution of another rule regarding the distinction between tort and contract claims. The Supreme Court first articulated the new rule in *Richmond Metropolitan Authority v. McDevitt Street Bovis Inc.* (*RMA*),[34] which involved claims for actual and constructive fraud. In *RMA*, the owner entered into an agreement with a contractor for the construction of a baseball stadium. More than ten years after the completion of the stadium, the owner discovered that the contractor had failed to comply with various specifications set forth in the agreement and had physically concealed the area in which the work should have been performed, despite having represented under oath in pay applications and a certificate of substantial completion that its work had been completed in accordance with the agreement.[35] The owner initiated suit against the contractor. When the case arrived at the Supreme Court, it involved only the owner's claims for actual and constructive fraud.

The Court explained that to determine "whether a cause of action sounds in contract or tort, the source of the duty must be ascertained."[36] To maintain a tort action, the Court continued, the duty breached "must be a common law duty, not one existing between the parties solely by virtue of the contract."[37] The Court concluded that because a contract between the parties was the source of the duty allegedly breached by the general contractor in *RMA*, the claims for actual and constructive fraud were inappropriate.[38]

The Court's decision in *RMA* is not based on the economic loss rule and cites none of the economic loss rule cases. Indeed, as support for its holding the court cites a decision involving personal injuries.[39] Moreover, the claims in *RMA* do not fit into the typical mold of many of the economic loss cases: instead of attempting to sue a remote party, the plaintiff asserted its fraud claims against the contractor, with whom it did have a contract. The source of duty rule, however, is related to the economic loss rule in that both rules reflect the Supreme Court's often-stated interest in maintaining the wall between tort and contract principles.

The Scope of the Source of Duty Rule

Unlike Virginia's economic loss rule, which addresses non-privity situations, the source of duty rule applies where the plaintiff and defendant are in direct contractual privity. As a result, the source of duty rule moots the question concerning privity and the economic loss rule. Thus, when a plaintiff asserts a negligence claim against its contractual privy for purely economic loss, if the court does not dismiss the claim under the economic loss rule, then it should do so under the source of duty rule. Indeed, the Court could have based its ruling in *Filak v. George* on the source of duty rule instead of, or in addition to, the economic loss rule.[40]

Moreover, the application of the source of duty rule is much broader than the application of the economic loss rule. In particular, unlike the economic loss rule, the source of duty rule is not

limited to negligence claims. Thus, although the source of duty rule applies to negligence claims,[41] it also applies to intentional tort claims and has been applied to claims for fraud,[42] breach of fiduciary duty,[43] conversion,[44] intentional interference with contractual relations,[45] and for an alleged violation of North Carolina's unfair and deceptive trade practices act.[46]

The source of duty rule generally does not apply to fraudulent inducement claims because such claims do not arise from the contract between the parties, but from representations made before contract formation.[47] Imaginative attorneys have attempted to extend the fraudulent inducement concept to include postcontract misrepresentations made specifically to induce payment for defective work, but the Supreme Court recently rejected this argument.[48]

The source of duty rule may apply to claims for property damages as long as the damage arises out of the breach of a duty assumed by contract. Indeed, application of the source of duty rule in such cases should eliminate the need for courts to attempt to fit claims involving property loss under the economic loss rule umbrella. So, for example, the Fourth Circuit would not have had to rely on the economic loss rule in holding that the owner of a coin collection could not recover in negligence for the loss of the collection, as the court did in *Redman v. John D. Brush and Company*.[49] In *Redman*, the owner asserted a negligence claim against the manufacturer of the safe in which he had stored the collection. The court cited *Sensenbrenner* in ruling that the theft of a coin collection from a home safe was a purely economic loss.[50] With the emergence of the source of duty rule, there is no need to try to fit claims involving the loss of or harm to property into the economic loss rule because the source of duty rule applies to such losses as long as they arise out of a duty created solely by virtue of a contract.[51]

It is unclear whether the source of duty rule applies to claims for personal injury. Well before the *RMA* decision, the Supreme Court affirmed the dismissal of negligence claims for personal injuries because the plaintiffs sought "to establish a tort action based solely on the negligent breach of a contractual duty with no corresponding common law duty."[52] Then, after the *RMA* decision, the Supreme Court cited *RMA* in affirming the dismissal of a claim for personal injuries allegedly caused by fraud.[53] There has not, however, been widespread application of the rule to bar personal injury claims.[54]

A recent Supreme Court opinion illustrates the broad application of the source of duty concept. In *Station #2 LLC v. Lynch*,[55] the Court relied on the source of duty idea and cited *RMA* and other source of duty cases in holding that a conspiracy to breach a contract cannot constitute the "unlawful act" required to support a claim under Virginia's business conspiracy statute.[56] In explaining its ruling, the Court observed that the duty to perform as promised "springs solely from the agreement; the duty is not imposed extrinsically by statute, whether criminal or civil, or independently by common law."[57]

Conclusion

Virginia's economic-loss and source-of-duty rules help maintain the wall between tort and contract law. The economic loss rule applies where the claim asserted is negligence and the parties are not in privity. The source of duty rule applies to negligence and many other tort claims where the parties are in privity. Together, the two rules may be evolving into a more comprehensive rule simply requiring that claims arising out of agreements be resolved pursuant to contract rather than tort law. Such a rule might be called the "contract loss rule" and would apply whether the controlling agreement is between the plaintiff and the defendant or between the plaintiff and another party. ⚖

The authors thank Timothy W.A. Boykin for his assistance with research for this article. Mr. Boykin was a 2010 summer associate at Vandeventer Black, and he is a candidate for law and master's of business administration degrees from the University of Richmond.

Endnotes:

1 *See e.g. Kamlar Corp. v. Haley*, 224 Va. 699, 706, 299 S.E.2d 514, 517 (1983). In *Kamlar*, the court commented that limitations on contract damages "have led to the 'more or less inevitable efforts of lawyers to turn every breach of contract into a tort.'" (*quoting* W. Prosser, HANDBOOK ON THE LAW OF TORTS, § 92 at p. 614 (4th Ed. 1971).

2 Punitive damages are available in a contract action only if the plaintiff proves "an independent, willful tort, beyond the breach of a duty imposed by contract." *Kamlar*, 224 Va. at 706, 299 S.E.2d at 517.

3 *See Charles E. Brauer Co. v. NationsBank of Va., N.A.*, 251 Va. 28, 33, 466 S.E.2d 382, 385 (1996).

4 *See First Security Federal Savings Bank v. McQuilken*, 253 Va. 110, 113, 480 S.E.2d 485 (1997) ("The scope of a release agreement, like the terms of any contract, is generally governed by the

expressed intention of the parties."). This fundamental principle is reflected in many rules of contract construction.

5 Fowler v. Harper et al., THE LAW OF TORTS 110-114 (2d ed. 1986).

6 *See e.g. TC Midatlantic Development Inc. v. Commonwealth,* 280 Va. 204, 695 S.E.2d 543, 545 (2010).

7 *See e.g. Nichols Construction Corp. v. Virginia Machine Tool Co.,* 276 Va. 81, 661 S.E.2d 467 (2008) (consequential damages waiver) and *Blue Cross of Southwestern Virginia v. McDevitt & Street Co.,* 234 Va. 191, 360 S.E.2d 825 (1987) (waiver of subrogation rights).

8 *See D.C. McClain Inc. v. Arlington County,* 249 Va. 131,136-41, 452 S.E.2d 659 (1995).

9 *NAJLA Associates Inc. v. William L. Griffith & Co.,* 253 Va. 83, 85, 480 S.E.2d 492 (1997).

10 233 Va. 31, 353 S.E.2d 724 (1987). The "no damage for delay" clause is not mentioned in the opinion, but one of the authors of this article was involved in the case and is familiar with the contract between Blake Construction and the owner.

11 *Id.* at 32-33, 353 S.E.2d at 725. Both the general contractor and the architect had contracted with the owner, the Commonwealth of Virginia, in a typical design-bid-build arrangement.

12 *Id.* at 34, 353 S.E.2d at 726.

13 *Id.* at 35, 353 S.E.2d at 727 (1987).

14 *Id.* (*quoting Crowder v. Vandendeale,* 564 S.W.2d 879, 882 (Mo. 1978)).

15 233 Va. at 36, 353 S.E.2d at 727. The court held that Virginia's "anti-privity" statute, Va. Code § 8.01-223, "did not eliminate the requirement of privity in a tort action for economic loss alone."

16 236 Va. 419, 374 S.E.2d 55 (1988).

17 *Id.* at 425, 374 S.E.2d at 58.

18 As discussed in the next section of this article, the rule may extend to negligence claims against contractual privies. For a more extensive discussion of the rule see Edward E. Nicholas III, *The Economic Loss Rule in Virginia*, 12 J. OF CIV. LITIG. 391 (2000-01).

19 VA. CODE § 8.01-223 provides: "In cases not provided for in § 8.2-318 where recovery of damages for injury to person, including death, or to property resulting from negligence is sought, lack of privity between the parties shall be no defense."

20 233 Va. at 34, 36.

21 *Ward v. Ernst & Young*, 246 Va. 317, 435 S.E.2d 628 (1993).

22 *Id.* at 326, n. 3. After referring to comments in two of its previous cases, the court stated that "when privity exists, economic losses may be recovered under a negligence theory."

23 263 Va. 377, 560 S.E.2d 246 (2002). Applying agency principles in holding that the parties were in privity, the court rejected the defendant insurance broker's argument that the trial court erred in allowing the plaintiff "to recover economic losses in a tort action" where the broker and the plaintiff were not in privity. 263 at 377, 560 S.E.2d at 249.

24 *Gerald M. Moore & Son Inc. v. Drewry,* 251 Va. 277, 280, 467 S.E.2d 811, 813 (1996). The *Acordia* court cited the following sentence: "[I]n the absence of privity, a person cannot be held liable for economic loss damages caused by [the] negligent performance of contract." The question raised in the *Acordia* opinion is whether the rule ought to be that, where there is privity and economic losses therefore are recoverable, they are recoverable only in a *contract* action.

25 267 Va. 612, 594 S.E.2d 610 (2004). Virginia courts generally treat constructive fraud claims as negligence claims when considering whether the economic loss rule applies to such claims. For a discussion of constructive fraud claims in the professional liability context, see David E. Boelzner & Edward E. Nicholas III, *Professional Negligence Claims and Constructive Fraud Principles Do Not Mix*, 10 J. OF CIV. LITIG. 3 (1998).

26 *Id.* at 618.

27 *Compare McGlen v. Barrett,* 2009 WL 1032932 (Fairfax County 2009) (in applying the economic loss rule to dismiss a negligence claim in a non-privity situation, the court stated that "[w]ithout privity of contract, Plaintiff may not recover her economic losses against [the non-privity defendants] based on a theory of tort.") and *Waytec Electronics Corp. v. Rohm and Haas Electronic Materials, LLC*, 459 F.Supp.2d 480, 491-92 (W.D.Va. 2006) (the court cited *Filak* in dismissing constructive fraud claim based on the economic loss rule despite privity).

28 *See* n. 19, *supra*.

29 The use of the word "tort" instead of the word "negligence" goes back to *Blake Construction*, in which the court construed Virginia's general anti-privity statute, Va. Code § 8.01-223. Then and now, however, the statute applies only to recovery sought "from negligence." *Id.* The statute is set out in n. 19, *supra*. In *Ward*, 246 Va. at 326, 435 S.E.2d at 632, the court, in commenting on one of its sweeping statements about the economic loss rule, noted that the statement "cannot fairly be interpreted to mean that economic losses are never recoverable in tort" and mentioned, by way of example, fraud, business conspiracy, and tortious interference with contract as torts not precluded by the rule. *Accord Pre-Fab Steel Erectors Inc. v. Stephens,* WL 891828 (W.D.Va. 2009) (holding that the economic-loss rule does not apply to a claim that defendants defrauded plaintiff by concealing unauthorized distributions from plaintiff's account while performing services pursuant to a contract).

30 *See Ward,* 246 Va. at 326, n. 2, 435 S.E.2d at 632, n. 2 (1993). For a discussion of this point and some of the intentional tort theories that have been asserted in the construction context, *see* Stan Barnhill, *Intentional Tort Liability and the Economic Loss Rule: Novel Theories to Recover Damages Incurred on the Construction Project*, VIRGINIA LAWYER, Oct. 1995, at 22.

31 *See e.g. RMA Lumber, Inc. v. Pioneer Machinery LLC*, 2009 WL 3172806 (W.D. Va. 2009) (dismissing a constructive fraud claim based on the rule and noting that allegations of constructive fraud will not support a fraudulent inducement claim).

32 *See* n. 19, *supra*.

33 For example, *Sensenbrenner* involved physical damage to property but the court concluded that the damage constituted "economic loss" because it arose out of "nothing more than disappointed expectations." 236 Va. at 425, 374 S.E.2d at 58.

34 256 Va. 553, 507 S.E.2d 344 (1998).

35 *Id.* at 555-56, 507 S.E.2d at 345.

36 *Id.* at 558, 507 S.E.2d at 347.

37 *Id.* (quoting *Foreign Mission Board v. Wade,* 242 Va. 234, 241, 409 S.E.2d 144 (1991)).

38 256 Va. at 558, 507 S.E.2d at 347.

39 *Id.*, citing *Foreign Mission Board*, 242 Va. at 241, 409 S.E.2d at 145. In *Foreign Mission Board*, a missionary, on behalf of her children, alleged that the board failed to fulfill its contractual obligation to provide for the health and welfare of her children. The plaintiff alleged that the board knew that her husband, another missionary, had molested one of their children and failed to secure medical care for the child to prevent further molestation. The court held that the terms of the contract did not extend to protection from the father's criminal acts. The plaintiff also claimed that the board negligently failed to use ordinary care to protect the children from their father but the court rejected the claim, holding that it was "based solely on the negligent breach of a contractual duty, with no corresponding common law duty." 242 Va. at 241.

40 The Court noted in *Filak v. George* that "whatever duties [the defendant] may have assumed arise solely from the parties' alleged contract." 267 Va. at 619, 594 S.E.2d at 614. This is source of duty rule language.

41 *See e.g. Rossman v. Lazarus*, 2008 WL 4550791 at *5 (E.D.Va. 2008), *VA Timberline LLC v. Land Management Group, Inc.,* 471

F.Supp.2d 630, 633-34 (E.D.Va. 2006) (applying the source of duty rule to dismiss a claim for "professional negligence").

42 As discussed above, *RMA* involved fraud claims. *See also Dunn Construction Co. v. Cloney,* 278 Va. 260, 682 S.E.2d 943 (2009). *But cf. Pre-Fab Steel Erectors Inc. v. Stephens,* WL 891828 (W.D.Va. 2009) (holding that the source of duty rule does not apply to a claim that defendants defrauded plaintiff by concealing unauthorized distributions from plaintiff's account while performing services pursuant to a contract).

43 *See Augusta Mutual Ins. Co. v. Mason,* 274 Va. 199, 207-08, 645 S.E.2d 290, 295 (2007). *But see Combined Insurance Co. of America v. Wiest,* 578 F.Supp.2d 822 (W.D.Va. 2008) (ruling that the source of duty rule did not require dismissal of an employer's breach of fiduciary duty claim against an ex-employee and asserting that the defendant in *Augusta Mutual* was an independent contractor rather than an employee). The real source of friction between these opinions may be differing ideas about the source of an employee or independent contractor's fiduciary duty. In *Augusta Mutual*, the Supreme Court mentioned that the fiduciary obligation arises from the employment contract, 274 Va. at 206-07, 645 S.E.2d at 294-95, but the District Court in *Combined Insurance* emphasized that an employee's fiduciary obligation arises from "the common law." 578 F.Supp.2d at 832. *See also Williams v. Dominion Technology Partners, L.L.C.*, 265 Va. 280, 576 S.E.2d 752 (2003) (judgment for plaintiff for breach of employee's fiduciary duty reversed without discussing the source of duty rule).

44 *See e.g. Wachovia Bank, N.A. v. Ranson Tyler Chevrolet* LLC, 73 Va. Cir. 143, 2007 WL 6013146 (Roanoke City 2007) (source of duty rule requires dismissal of claim for conversion of keys and paperwork from automobile dealership) and *McDougald v. Homecomings Financial Network Inc.,* 2005 WL 2009291 (E.D.Va. 2005) (dismissing borrowers' claim against lender for allegedly withholding funds due borrowers after foreclosure sale). *But cf. Pre-Fab Steel Erectors Inc. v. Stephens,* 2009 WL 891828 (W.D.Va. 2009) (holding that the source of duty rule does not apply to a claim that defendants stole from plaintiff while performing services pursuant to a contract).

45 *Princeton Woods LLC v. PNC Bank N.A.*, 2009 WL 3614983 (E.D.Va. 2009). *But cf. Stone Castle Financial Inc. v. Friedman, Billings, Ramsey & Co.,* 191 F.Supp.2d 652, 660-61 (E.D.Va. 2002) (rejecting the source of duty defense to a claim for intentional interference with prospective business advantage in which the plaintiff alleged that an investment banker caused a potential merger to fail by revealing confidential business information).

46 *See Old Dominion Freight Inc. v. Standard Security Life Ins. Co. of New York,* 73 Va. Cir. 441, 445-46 (Richmond County 2007). *But see Abi-Najm v. Concord Condominium LLC*, No. 091546, slip op. at 13-14 (Va. Sept. 16, 2010) (reversing the trial court's dismissal of plaintiffs' Virginia Consumer Protection Act claims against a condominium developer and holding that a statutory duty under the act exists "independent of the Contracts entered into by the parties.")

47 *RMA*, 256 Va. 561, 507 S.E.2d 348. *See also Abi-Najm v. Concord Condomiinium LLC*, No. 091546, slip op. at 17. (Va. Sept. 16, 2010) *But see Augusta Mutual,* 274 Va. at 206, 645 S.E.2d at 294, in which the court applied the source of duty rule in affirming the dismissal of a fraudulent inducement claim where the party who allegedly committed the fraud already had a contractual relationship with the plaintiff when he made the statement in question.

48 *Dunn Construction,* 278 Va. at 268, 682 S.E.2d at 947.

49 111 F.3d 1174, 1182-83 (4th Cir. 1997).

50 *Id.* at 1183.

51 Other opinions addressing claims for physical damage to property other than the subject of the contract include *Loverde v. Building Management Inc.,* 71 Va. Cir. 204 (Fairfax County 2006), *Ratliff v. S&ME Inc.,* 2005 WL 1923109 (W.D.Va. 2005) and *School Board of Norfolk v. International Truck and Engine Corp.,* 62 Va. Cir. 466 (Norfolk 2003). Each of these opinions discusses whether the economic loss rule applies to such claims, but the source of duty rule seems to supply what should have been the controlling principle: claims for losses arising out of a breach of a duty assumed by contract should be decided under contract law.

52 *Foreign Mission Board,* 242 Va. at 241, 409 S.E.2d at 148.

53 *Yuzefovsky v. St. John's Wood Apartments,* 261 Va. 97, 540 S.E.2d 134 (2001). The plaintiff asserted negligence and fraud claims against his landlord seeking to recover for personal injuries he suffered while being criminally assaulted "by a third party" while at his apartment complex. The court affirmed the dismissal of the negligence claim on grounds unrelated to the source of duty rule. 242 Va. at 110, 409 S.E.2d at 141. Regarding the fraud claim, the court held that the alleged misrepresentations were made too long before the attack to have constituted a proximate cause of the attacks. 242 Va. at 111-12, 409 S.E.2d at 142-43. The court also quoted *RMA* and observed that '[i]t is clear that the duty to refrain from making these statements relates to the contract [the tenant] was induced to sign, and not from a common law duty." 242 Va. at 112, 409 S.E.2d at 142. In *McKesson Medical-Surgical Inc. v Kearney,* 271 F.Supp.2d 827 (E.D.Va. 2003), which did not involve a claim for personal injury, the court characterized the part of *Yuzefovsky* mentioned above as "musings" and "dicta … apparently added as a *note bene* … inasmuch as it reaches beyond the argument of trial counsel." 271 F.Supp.2d at 829.

54 *See Meng v. The Drees Co.,* 77 Va. Cir. 442, 443-44 (Loudoun County 2009) (in rejecting a motion to set aside a jury verdict for personal injury and other damages, the court held that the home-builder had a common law duty to exercise reasonable care in building plaintiffs' home "to avoid physical harm to persons and tangible things."), *Gonella v. Lumbermens Mutual Casualty Co.*, 64 Va. Cir. 229 (Fairfax County 2004) (rejecting the source of duty defense to a negligence claim for personal injuries and other damages allegedly suffered in connection with allegedly defective construction work on plaintiffs' home) and *Haga v. L.A.P. Care Services, Inc.,* 2002 WL 1754485 at *4 (W.D.Va. 2002) (rejecting defendant's motion to dismiss wrongful death negligence claim against nursing home, holding that the defendant owed its residents a "separate legal duty … to exercise ordinary care for the safety of its residents."). *But cf. Wert v. Jefferds Corp.,* 325 Fed.Appx. 175 (4th Cir. 2009) (citing *RMA*, the Fourth Circuit affirmed the trial court's dismissal of plaintiff's claim that lessor of forklift negligently caused his personal injuries because the only duty possibly breached by the lessor arose from the contract between the lessor and the plaintiff's employer and not from common law).

55 280 Va. 166, 695 S.E.2d 537 (2010).

56 280 Va. at 174, 695 S.E.2d at 541.

57 *Id.*

Spearin continued from page 36

10 *E.g., White v. Edsall Constr. Co. Inc.* 296 F.3d 1081, 1086 (Fed. Cir. 2002); *Poorvu v. United States*, 420 F.2d 993, 999, 190 Ct. Cl. 640 (1970); *Luria Bros. & Co. v. United States*, 369 F.2d 701, 708, 177 Ct. Cl. 676 (1966).

11 *E.g., USA Petroleum Corp. v. United States*, 821 F.2d 622 (Fed. Cir.1987), *Essex Electro Eng'rs v. Danzig, 224 F.3d 1283, 1289-90* (Fed. Cir. 2000).

12 *Adams v.Tri-City Amusement Co.*, 124 Va. 473, 476, 98 S.E. 647, 648 (1919); *accord, Southgate v. Sanford & Brooks Co.,* 147 Va. 554, 561, 137 S.E. 485, 487 (1927); *See also, Chantilly Const. Corp. v. Com. Dept. of Highways and Transp,* 6 Va. App. 282, 369 S.E.2d 438 (1988); *Worley Bros. Co. v. Marus Marble & Tile Co*., 209 Va. 136,161 S.E. 2d 796 (1968); *Greater Richmond Civic Recreation, Inc. v. A.H. Ewings's Sons Inc.*, 200 Va. 593, 106 S.E.2d 595 (1959).

13 *Surf Realty Corp. v. Standing*, 195 Va. 431, 442-443, 78 S.E.2d 901, 907 (1953).

14 This language appeared for the first time in the 2007 version of AIA B101- 2007, § 2.2.

15 AIA A201- 2007 § 1.2.

16 *Id.* § 3.2.2.

17 *Id.*

18 *Id.* § 3.2.4.

19 *Id.* § 3.2.3.

20 *Id.* § 4.2.4

21 *Id.* § 3.1.3

22 *Id.* § 4.2.12. By contrast, the general conditions grant the architect a right to enforce its rights against the contractor. *Id.,* § 1.1.2.

23 *Id.* § 3.1.2.

24 *Palmer & Palmer Company LLC v. Waterfront Marine Const.*, 276 Va. 285, 289, 662 S.E.2d 77, 80 (2008); s*ee also, L. White & Co. v. Culpeper Mem'l Hosp.* (Berry, J.) No. 2008-L-50, April 28, 2010; Culpeper County Cir. Ct.; VLW 010-8-079, 5 pp. (sustaining plea in bar, ruling that the submission of a dispute to the architect and informal mediation under AIA contract terms was condition precedent to filing); *W.O. Grubb Steel Erection Inc. v. 515 Granby LLC* (Martin, J.) No. CL08-3278, Oct. 16, 2009; Norfolk Cir. Ct.; VLW 009-8-233, 5 pp. (enforcing a "pay-when-paid" clause); *Comer v. Goudie,* (Thacher, J.) CL 2008-2110; December 11, 2008; Fairfax Cir. Ct.; VLW 009-8-007; (holding that nonsignatory defendants were entitled to enforce an arbitration clause where plaintiff sought to enforce contract terms against the defendants).

25 *Estes Exp. Lines v. Chopper Exp*., 273 Va. 358, 641 S.E.2d 476 (2007); *W.R. Hall & Hampton Roads Sanitation Dist.*, 273 Va. 350, 641 S.E.2d 472 (2007).

26 *Modern Cont'l South v. Fairfax County Water Auth.,* 72Va. Cir. 268, 2006 WL 3775938 (Fairfax Cir. Ct 2006).

27 ConsensusDOCS were created and endorsed by twenty-four member organizations, including, for example, the Associated General Contractors of America (AGC); the Construction Owner's Association of America (COAA); the National Association of State Facilities Administrators (NASFA); the National Association of Surety Bond Producers (NASBP) and the Surety and Fidelity Association of America (SFAA). ConsensusDOCS, Endorsing Organizations, available from http://consensusdocs.org/about/endorsing-organizations/ (last accessed July 5, 2010).

28 According to the Design-Build Institute of America, design-build agreements have increased their market share for non-residential construction in the United States from about 5 percent in 1985 to about 40 percent in 2005. Design-Build Institute of America, Graph of Non-Residential Design and Construction in the United States, available at http://www.dbia.org/about/designbuild/ (last accessed July 9, 2010).

29 Both the AIA and ConsensusDOCS have developed specialized contracts for the IPD approach. ConsensusDOC 300: Tri-Party Agreement for Collaborative Project Delivery); A195–2008, Standard Form of Agreement Between Owner and Contractor for Integrated Project Delivery, which has its own set of general conditions, A295–2008, General Conditions of the Contract for Integrated Project Delivery.

30 AGC has embraced BIM; however, some have expressed concern that BIM may increase architects' liability for design defects. "With the electronic sharing of information, the ability of contractors to claim detrimental reliance on the design has increased." The AIA Trust: Insurance and Financial Programs for AIA Members and Components: Building Information Modeling and the Transition to Integrated Project Delivery, available at http://www.theaiatrust.com/newsletter/2009/07/bim-and-transition-to-ipd/ (Last accessed July 11, 2010).

31 Sheldon J. Leavitt, AIA, P.E., editor and co-author, "*Virginia Construction Industry Guidelines*" published by the Joint Cooperative Committee of the Virginia Society, American Institute of Architects, Associated General Contractors of Virginia Inc., American Council of Engineering Companies Virginia Inc., and Virginia Society of Professional Engineers (1991), p. 3, available at http://www.vspe.org/PDFs/VA%20Construction%20Industry%20Guidelines.pdf (last accessed July 12, 2010).

by John H. Tate Jr., Chair

Senior Lawyers Past and Present

I AM HONORED to be the chair of the Senior Lawyers Conference this year, and I invite any member of the bar to contact us with issues you believe are important or should be addressed by the conference — especially elder issues and related matters.

As you know from the reports by previous chairs, the conference is responsible for conducting the fifty-year honors presentation for our brothers and sisters who have traveled that long and arduous road as members of the Virginia State Bar. It was a great pleasure to participate in ceremony on June 19, 2010, in Virginia Beach, when VSB Immediate Past President Jon D. Huddleston presented fifty-year certificates to qualifying members of the bar.

Also at the annual meeting, in cooperation with the General Practice and Trusts and Estates Sections, the Senior Lawyers Conference presented a continuing legal education program, "The Basics of Administration." This program, which was very well received, was presented by John M. Oakey Jr. and other members of the conference. This program reviewed issues that arise in estate administration, including working with courts and the commissioner of accounts when closing an estate. The program was enjoyable, illuminating, and interactive.

Because large law firms have estate specialists, the annual meeting program was more directed to small firms and solo practitioners who must deal with estate issues that are new to their practices. It is usually a difficult time for a client, as most are dealing with a personal loss in their lives at the time they seek the advice of an attorney in an estate. The CLE program could be very helpful to the general membership of the bar. I suggest that this format and the program content be considered for an expanded CLE program.

During the 2010 General Assembly, an important revision was passed to the laws that govern durable powers of attorney. This new legislation, a comprehensive revision of the law regarding a power of attorney, is particularly important to senior lawyers and seniors in general. This new statutory enactment is in Chapter 7 of Title 26 of the Code of Virginia and is titled the new "Uniform Power of Attorney Act." The revision is in twenty-four pages in the supplement to Volume 5A, Title 26 of the Code (if you still use books, as some senior lawyers do in my part of the state). This act is a comprehensive guideline for the drafting of power of attorney, the use of the document, and new statutory rules applicable to the agent and the principal. All of us who deal with senior issues or a durable power of attorney in our general practices need to acquaint ourselves with the new statutory requirements.

All of us who deal with senior issues or a durable power of attorney in our general practices need to acquaint ourselves with the new statutory requirements.

Frank O. Brown Jr., whose service to the bar has been mentioned in this column on many occasions, is available for a one-hour local bar association CLE program on planning for the disability and death of an attorney. William T. "Bill" Wilson chairs the SLC's Senior Law Day Program, and he and Paulette J. Davidson, our VSB liaison, are happy to assist any bar association or other group of lawyers with presenting a Senior Law Day Program. Frank Brown can be reached at lawinorder@aol.com, Bill Wilson at WTW1130@aol.com, and Paulette Davidson at davidson@vsb.org.

John G. Mizell Jr. was an excellent leader of the conference for the past year and made its work proceed smoothly. During the year, Patricia A. Sliger, our longtime VSB liaison, retired, and I join all the other members in thanking her for her years of dedicated service to the conference and to the bar. We all look forward to the work of Paulette Davidson, who has begun her service with great enthusiasm, and was very organized for the functions of the conference at the annual meeting.

We look forward to another successful year in the conference and thank all of the members who have retired from the board for their dedicated service.

This Land's Not My Land? Eminent Domain Research in Virginia

by Marie Summerlin Hamm

The U.S. Supreme Court in 2005 held in *Kelo v. City of New London* that economic redevelopment constitutes a permissible public use under the Fifth Amendment takings clause. Reaction to *Kelo* was swift and unprecedented. Virginia and more than forty other states enacted eminent domain reform legislation. This article does not delve into the complex and controversial substance of eminent domain, but seeks to introduce basic research tools to those unfamiliar with the topic.

Primary Resources

The ease with which the law of eminent domain is summarized contrasts sharply with the difficulty of application. The takings clause of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, states that "private property [shall not] be taken for public use without just compensation." Article I, Section 11 of the Virginia Constitution declares that "no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation." The section charges the General Assembly with the task of defining "public uses." Newly enacted Va. Code Ann. § 1-219.1, "Limitations on Eminent Domain," sets out six qualifying public uses—and that is where simplicity ends. The question of whether a taking is indeed for a public use is, of course, a judicial question. From a research perspective, locating Virginia's major eminent domain cases is as simple as using an annotated code. Gleaning a clear picture of the complexities of eminent domain directly from those cases would be difficult at best.

Secondary Resources

That's where the advice offered countless times by law librarians comes into play: Start with secondary sources. Written by experts, secondary sources in print and online usually include a table of contents that provides an immediate overview of the subject area, as well as an extensive index for ease of access.

Michie's Jurisprudence provides a relatively comprehensive discussion of eminent domain, complete with extensive footnotes referencing both primary authority and relevant articles published in Virginia law reviews. The *Virginia Law Practice Handbook, Eminent Domain: State and Federal*, by Hugo A. Blankingship and Paul B. Terpak, remains an excellent resource for an introduction to the topic. *Nichols on Eminent Domain* is a combined treatise and practice guide that provides in-depth analysis of all aspects of condemnation practice and procedure, including discovery, jury instructions, and examination of experts. It explores the origins, nature, and extent of the eminent domain power and considers issues related to valuation and damages. Publisher Matthew Bender offers *Nichols* on LexisNexis, in CD format and a print multivolume treatise , which is updated quarterly. Special alerts are issued as necessary to ensure currency. In May 2010, *Special Alert: Responses to* Kelo — *Eminent Domain Reform Legislation and Select Recent Cases* was published. A handful of other relevant treatises are available, including *The Law of Property Rights Protection* by Jan Laitos (Aspen) and John Martinez's *Government Takings* (West).

Continuing legal education publications offer quick immersion and a practical approach. The most current treatment of the topic is included in the 2010 supplement to *The Virginia Lawyer: A Deskbook for Practitioners (3rd ed.)*. Chapter 12 is devoted entirely to eminent domain. Co-authors Henry E. Howell III and Paul B. Terpak provide a concise history of eminent domain power and limitations; offer an excellent overview of procedure under Title 25.1; address the Virginia Depatment of Transportation distinctions, including the "quick-take" power; discuss the role of redevelopment and housing authorities; and consider valuation.

Another CLE publication, *Eminent Domain Updated* (Sept. 22, 2006) focuses on litigation. The course material includes a wealth of litigation tips and techniques from the perspectives of both condemnor and property owner. Researchers are cautioned, however, to update the aging material.

In April 2010, Virginia hosted CLE International's Fourth Annual Eminent Domain Institute. The faculty for the program included many of the most recognizable names in Virginia eminent domain practice. The course material, *Eminent Domain: Condemnation, Compensation, and the Constitution*, is available for purchase on the CLE International website, http://www.cle.com/.

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The Virtual Lawyer Stampede

by Sharon D. Nelson and John W. Simek

Intriguing news from the American Bar Association's 2010 *Legal Technology Survey Report*: 14 percent of lawyers reported that they ran a virtual law office, working with clients over the Internet and rarely meeting them in person. We think that statistic is amazing.

Though the term virtual law office (VLO) has been around for a while, the definition has been morphing. In fact, as we went to research the definition, we found a wide range of definitions — many at odds with one another.

After comparing what we found, we settled on a definition proffered by virtual lawyer Stephanie L. Kimbro, who says that a virtual law office is a professional law practice that exists online through a secure portal and is accessible to the client and the attorney anywhere the parties can access the Internet. A VLO provides attorneys and clients with the ability to securely discuss matters online, download and upload documents for review, and to transact other business in a secure digital environment. Recently, Kimbro has updated her definition to note that a VLO can be integrated into a traditional law practice to expand the firm's market — something we imagine will happen more and often.

The tendency of lawyers is to go where the clients are. Without any question, the clients are now online in droves.

If you do the math, you can certainly understand the appeal of the VLO. Subtract almost all the traditional overhead, add a tiny charge for technology to enable the VLO, put that in the hopper with the increased revenues from working and marketing online, and you've got a winning proposition. A VLO might be a perfect situation for a parent staying at home with young children or taking care of an elderly parent. The low overhead might allow a young lawyer to slowly nurture a practice without the financial risks of setting up a traditional law office.

The flexibility of a VLO appeals to many. We have a friend who runs a VLO from a log cabin overlooking the Blue Ridge. If work comes in, he deals with it via computer. This business method leaves him a great deal of time to ramble in the forest or gaze at nature's majesty. We're pretty sure our friend is smarter than we are in his working arrangements. VLOs can provide a terrific work-life balance solution.

On the downside, it is hard to nurture the old-fashioned sort of client relationship over the Internet. The online fast and relatively impersonal transaction is just not as conducive to creating a loyal and lifetime relationship with a client. Generally, you can't stroll down the hall to consult with a colleague, and while you can replace a portion of this online, the depth and character of the encounters are not quite the same.

That said, VLOs are very well suited for high volume, low customization work. As a friend of ours is fond of saying, a well-run VLO can make you money while you sleep.

The ABA has suggested that there are minimum requirements for delivering services online — notably, ensuring client confidentiality. Is your data backed up? If you are using Software as a Service (SaaS), is your data stored locally as well as offsite? Is it encrypted in transport and in storage? Is it stored in a data center? If so, where? Are there any cross-border issues? What is the data center's physical security? Are there redundant power sources?

Have you read the service level agreement with your service providers? Our experience is that the customary answer is "no." What happens if the provider bellies up? What if you want to leave with your data? What's the process and charge?

The ABA also reminds lawyers that they still need to do conflict checks, to have a disclaimer that states where they are licensed to practice, to use a retainer agreement, to delineate website terms and conditions, and to make sure, if they are accepting payments online, that they are mindful of payment card industry compliance.

So what tools are these lawyers using? Two we hear about frequently are Clio (http://www.goclio.com/) and Rocket Matter (http://www.rocketmatter.com/), which both provide web-based law practice management services. In addition, VLOTech (http://www.vlotech.com/) is a very well-regarded platform for VLOs. Their pricing varies with the size of the law firm.

Another contender is an online dashboard furnished by DirectLaw http://www.directlaw.com/. Clients can purchase legal documents bundled with legal advice for a fixed fee. These documents include state-specific forms that generate first drafts for customization by attorneys. The dashboard also offers file sharing, calendar function, electronic invoicing and voice-recognition software. There's also a secure site for client communication. Monthly fees vary with what you want for services; they are plainly spelled out on the website. Though we don't have current figures, more than sixty law firms were subscribed in late 2009.

The transformation of the practice of law, long predicted by such visionaries as Richard Susskind, seems to be taking place very quickly. Just a few years ago, we marveled at lawyers using what were then cutting-edge services such as Legal Typist or Ruby Receptionist. While such

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services are still valuable, the modern VLO is to the early VLO as the space shuttle is to the Mercury spacecraft. We expect the transformation to continue over the next decade, so fasten those seat belts and prepare for warp speed.

Mechanic's Lien continued from page 41

15 *See* Va. Code § 43-3.
16 *See* Va. Code § 43-20.
17 *See Atlas Portland Cement Co. v. Main Line Realty Corp.*, 112 Va. 7, 70 S.E. 536 (1911), and *Carter v. Keeton*, 112 Va. 307, 71 S.E. 554 (1911).
18 *See Bowers v. Town of Martinsville*, 156 Va. 497, 159 S.E. 196 (1931).
19 *See TQY Invs. v. Rogers Co.,* 26 Va. Cir. 40 (Fairfax 1991).
20 For a more detailed explanation of these limitations, *see* JAMES L. WINDSOR, THE VIRGINIA CONSTRUCTION LAW DESKBOOK ¶ 18.304 (RICHARD F. SMITH ed., 2008).
21 *See* Virginia Code § 43-3(B).
22 *See Id.*
23 *See Sergent v. Denby*, 87 Va. 206, 12 S.E. 402 (1980).
24 *See Weaver v. Harland Corp.* 176 Va. 224, 10 S.E.2d 547 (1940) (*but see Addington-Beamman Lumber Co. v. Lincoln Savings & Loan Association,* 241 Va. 436, 403 S.E.2d 688 (1991)).
25 *See* Va. Code § 43-3; *See also Dean Steel Erection Co. v. Chelsea GCA Realty Partnership*, 50 Va. Cir. 311 (Loudon 1999).
26 *See American Standard Homes Corp. v. Reinecke,* 245 Va. 113, 425 S.E.2d 515 (1993).
27 *See Id.*
28 *See also Knight v. Ferrante*, 202 Va. 243, 117 S.E.2d 283 (1960).
29 *See* Va. Code § 43-9.
30 *See Davenport Insulation of Harrisonburg Inc. v. Aliff,* 50 Va. Cir. 314 (Rockingham County 1999.
31 *See* Va. Code § 43-4.
32 *See Clement v. Adams Brothers– Payne Co.*, 113 Va. 547, 75 S.E. 294 (1912)
33 *See* Va. Code § 43-4. For a standard format for the certification of mailing, *see* Virginia Code § 43-5.
34 *See* Va. Code § 43-7. For a standard format for this notice, *see* Virginia Code § 43-8.
35 *See* Va. Code § 43-9. For a standard format for this notice, *see* Virginia Code § 43-10.
36 *See* Va. Code § 43-4.01.
37 *See* Va. Code § 43-17.
38 *See Savings Bank v. Powhatan Clay Manufacturing Company,* 102 Va 274, 46 S.E. 294 (1904).
39 *See Walt Robbins Inc. v. Damon Corp.*, 232 Va. 43, 348 S.E.2d 223 (1986); *Mendenhall v. Douglas L. Cooper Inc.*, 239 Va. 71, 387 S.E.2d 469 (1990); *James T. Bush Construction Co. v. Patel,* 243 Va. 84, 412 S.E.2d 703 (1992); and *Finkel Outdoor Products Inc. v. Bell*, 205 Va. 927, 140 S.E.2d 695 (1965)).
40 *See George W. Kane Inc. v. NuScope Inc.* 243, Va. 503 (416 S.E.2d 701 (1992).
41 *See* 11 U.S.C. § 108(c); *and In Re Terry*, 262 BR. 657 (Bankr. E.D. Va. 2001).
42 In *All American Contractors Inc. v. Betonti*, 53 Va Cir. 24 (Fairfax County 2000), the Fairfax County Circuit Court invalidated a claimant's lien because the claimant exceeded the scope of its contractor's license on the basis that it could not maintain a valid contract to do work in excess of the limits of its license.
43 *See* Va. Code § 43-21*; and Federal Land Bank v. Clinchfield Lumber & Supply Co.*, 171 Va. 118, 198 S.E. 437 (1938).

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Internet Resources

The Internet offers myriad new resources on eminent domain. Blogs focusing exclusively on the subject abound. The *New York Times* website includes a page dedicated to eminent domain articles, feeds, and resources. (http://topics.nytimes.com/topics/reference/timestopics/subjects/e/eminent_domain/index.html) Even YouTube has gotten in on the act. In terms of Virginia-specific information, *The Fee Simple*, (http://www.vsb.org/sections/rp/newsletters.htm), the newsletter of the Real Property Section of the Virginia State Bar, regularly publishes eminent-domain-related articles, including several recent articles by members of the eminent domain subcommittee.

Conclusion

Kelo has sparked renewed interest in the legal, theoretical, political, and economic issues relating to eminent domain. For researchers, this translates into a wealth of new material to peruse and ponder.

Brian L. Buniva has joined the Richmond office of Eckert Seamans Cherin and Mellott LLC as a member in its environmental and litigation practices. He previously was a shareholder with LeClairRyan.

Kim E. Choate and **Kevin A. Mittler** have joined the Washington, D.C., office of Roetzel & Andress LPA. Both are intellectual property attorneys. Choate's practice includes complex litigation involving electrical, mechanical, and chemical technologies. Mittler represents clients in patent infringement lawsuits.

Stewart L. Gitler, a registered patent attorney, has joined the Alexandria firm Welsh, Flaxman & Gitler LLC as a partner. He formerly practiced with Hoffman, Wasson & Gitler PC. He has a background in chemical engineering.

Gregory O. Harbison has opened **The Harbison Law Firm PLLC**, which focuses on representing injured workers before the Virginia Workers' Compensation Commission and Court of Appeals of Virginia. 2501 Monument Avenue, Richmond, Virginia 23220; phone (804) 888-8000; e-mail gharbison@harbisonlaw.net

Timothy M. Kaine, chair of the Democratic National Committee and a former Virginia governor, is teaching "The Future of Equality in American Constitutional Law" at the University of Richmond School of law for the fall semester. Also at the university, **Graham B. Strong** of Pacific Pallisades, California, is a visiting professor teaching professional responsibility and a seminar on evidence. Strong is an associate member of the Virginia State Bar.

MH2 Technology Law Group LLP has merged with Latimer IP Law to create a full-service intellectual property practice. The new firm, which keeps the MH2 name, is based in Tysons Corner.

Michelle A. Mulligan has joined the Richmond office of MercerTrigiani LLP. She practices civil litigation with a focus on legal and malpractice defense, insurance coverage, commercial litigation, and community association law. She previously was a partner with McSweeney, Crump, Childress & Temple PC.

Nicholas J. Pace II has been elected executive vice president, general counsel, and secretary of Amerigroup Corporation in Virginia Beach. He joined the company four years ago after serving as assistant general counsel for CarMax Inc.

Julie S. Palmer has been named a partner at Harman, Claytor, Corrigan and Wellman PC in Richmond. She concentrates her practice in professional liability, products liability, premises liability, and commercial litigation. Also, **Russell N. Kruse** has joined the firm as an associate. He will concentrate his practice in general civil litigation, including motor vehicle, premises, and products liability.

Marc E. Purintun and **Kendal A. Sibley** have been promoted to counsel status at Hunton & Williams LLP. Both are members of the tax and Employee Income Retirement Security Act practice in the firm's Richmond office. Also at Hunton & Williams, **Shannon E. Daily** has joined as an associate in the Richmond office. She practices on the firm's litigation and intellectual property teams. She received her undergraduate and law degrees from the College of William and Mary.

Leon Radomsky has joined as a partner the Marbury Law Group PLLC in Reston. He previously practiced at Foley Lardner LLP, where he was a partner in the intellectual property practice and founder and chair of its nanotechnology industry team. Also joining the Marbury Law Group is **Martin S. Sulsky**, who previously was a senior associate in the patent practice group of Pillsbury Winthrop Shaw Pitman LLP.

Mark E. Rubin, who served as counsel to Governor Timothy M. Kaine, is now executive director of government relations at Virginia Commonwealth University. He also will teach legislative advocacy as the A.L. Philpott adjunct chair in law at the University of Richmond School of Law.

Anusce Sanai has opened **Anusce Sanai LLC.** Her practice focuses on family law, estate planning, and immigration law. 2121 Eisenhower Avenue, Suite 200, Alexandria, Virginia; phone: (703) 518-4332; www.anuscesanailaw.com

Mark B. Sandground Sr. has opened a family law practice, **Sandground Law**, and is of counsel to the West Law Group. He previously practiced with Sandground New & Lowinger PC. His new firm's address is 8000 Towers Crescent Drive, Suite 600, Vienna, VA 22182; phone (804) 564-4600.

Richmond attorney **Kirk T. Schroder** was honored for his advocacy of the Virginia movie and television industry by the Virginia Film Office at a reception in New York City in June. Schroder is in the second year of a two-year term as chair of the American Bar Association's Entertainment and Sports Law Section. He is founding partner of Schroder, Fidlow, Titley and Davis PLC, which represents clients in entertainment and intellectual property law.

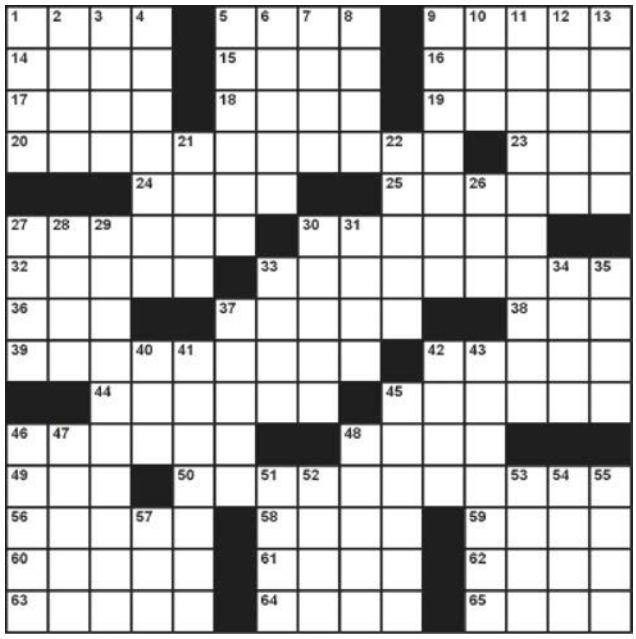
Suzanne Benvenuto Simpson, owner of Simpson Law PA in Spencerville, Maryland, has been named to the Leadership Montgomery Class of 2011 and elected vice president of the Howard County, Maryland, Women's Bar Association. Her practice focuses on estate planning in Virginia, Maryland, and Washington, D.C.

Graham B. Strong, an associate member of the Virginia bar from Pacific Palisades, California, is in his second year as a visiting professor of law at the University of Richmond School of Law.

John Tarley Jr. of the Williamsburg firm Tarley Robinson PLC received the 2010-11 St. George Tucker Adjunct Professor of Law Award for outstanding service from the College of William and Mary School of Law.

Two Thumbs Up!

by Brett A. Spain



Crossword answers on page 59

Across

1. Ishmael's boss
5. Fitzgerald's forte
9. "Be prepared," e.g.
14. *Double Indemnity*'s style
15. Bigwig at Lloyd's
16. Community character
17. Extinct bird
18. Ron Howard role
19. Place for a fight
20. JAG classic
23. Zone (out)
24. Bastogne reply
25. Stick
27. Putsch
30. Nighttime shower
32. Wan
33. *The Rime of the Ancient Mariner* poet
36. Ruby or Sandra
37. Ruth chaser
38. Actor McKellen
39. Lawyers, often
42. Legendary Castilian hero
44. Shutters
45. Cavern
46. Find
48. Deli option
49. Pirates sch.
50. McConaughey legal thriller
56. Laker Pau
58. Geddy Lee's band
59. Spirit type?
60. Coeur d' _____
61. *The Wedding Crashers* actress Fisher
62. Arabian Peninsula sultanate
63. Worked as a stevedore
64. Alteration concern
65. Vociferate

Down

1. FDA drug submission
2. Equine foot
3. Assistant
4. Dessert option
5. Haughty
6. Guitar gadgets
7. Among
8. Bustle
9. Roam
10. Trucking cat.
11. Paul Newman legal classic
12. Printer need
13. Kentucky Indian tribe
21. "Peter _____" (detective series)
22. Devoured
26. _____ polloi
27. DUI group
28. Addict
29. Jodie Foster legal drama
30. Customs
31. North Carolina university
33. Appeared
34. Carriage
35. Exo opposite
37. Plus
40. ORL locale
41. Destroyed completely
42. Therefore
43. Seek
45. Commissioner Gordon's bailiwick
46. Licit
47. City in 40-down
48. Electromagnetism pioneer
51. Eye part
52. Inspiration
53. Cook Rombauer
54. Tight, moneywise
55. Advanced
57. Metallica hit

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

Crossword answers.

Just Be Quiet

by Brian M. Hirsch

This essay is part of Reflections*, a collection of essays by and about Virginia lawyers that was solicited by Immediate Past President Jon D. Huddleston as part of his* Virginia Is for Good Lawyers *initiative. http://www.vsb.org/site/about/va-good-lawyers/*

Now when Job's three friends heard of all this evil that was come upon him, they came every one from his own place; Eliphaz the Temanite, and Bildad the Shuhite, and Zophar the Naamathite: for they had made an appointment together to come to mourn with him and to comfort him. . . . So they sat down with him upon the ground seven days and seven nights, and none spake a word unto him: for they saw that his grief was very great.

The events of the Book of Job are all too familiar to divorce lawyers, whether or not we have ever read the story or believe that the events actually occurred. We see people living it every day. People who had genuinely wonderful lives by anyone's yardstick — a spouse, kids, a great career, travel, a lavish home, maybe a beach house, and perhaps much more. Then they divorce and that great life begins to fade, and what remains is often just a flicker. They are devastated that their spouse betrayed them. They come home to a house empty of their children. Their career begins to suffer due to personal distractions and days spent with lawyers, therapists, real estate agents, and accountants. They are possibly at the lowest point of their once-great lives.

This is the context — the setting — for most divorce lawyers' cases. Our training tells us to spring into action — to "win" custody battles, support hearings, and equitable distribution trials. Often we are successful, sometimes not. Even after all of our hard work and dedication, our clients are not what anyone would call happy. We try to tell them that things are looking up; that tomorrow's going to be a better day; that everything's going to be all right. But, you know what? The reality is that it's not going to be for a long time, and it certainly won't be like it was. We are only telling them this since it is hard for us to see them in such pain. We are only trying to make ourselves feel better.

I have always found this hard to deal with — working hard and still not having a happy client. I would chat away trying to cheer them up. Things became a little easier one day when I thought about the two simple things that Job's companions did for him — they sat down with him, and they did not speak a word to him, "for they saw his grief was very great". They didn't try to fill the empty space with words of comfort, since Job was probably inconsolable at that point. They just sat quietly with him. So, I tried doing that. Not long periods of silence. Usually less than a minute, when the client started tearing up or was in obvious pain.

I discovered that it was a sign of respect for their pain, a way of saying I'm here. I'm not your best friend or your therapist, but I'm here. It may just be thirty or forty-five seconds, while they sit there staring out the window or down at their feet in shock or sadness, or with a tear streaming down their face. No platitudes or verbal hand patting that everything is going to be just fine. Especially not saying that you know how they must feel, because you really don't. Each client's pain is unique, their own.

After the time lapses and the pain seems to abate, we go on. I continue to be their lawyer, and just their lawyer, but maybe just a little more connected.

I have always found this hard to deal with — working hard and still not having a happy client.

Construction Law and Public Contracts

by Todd R. Metz and Gregory T. St. Ours

The practice of construction law and public contracts includes representation of clients big and small, from large public entities, international contractors, and engineering companies to small subcontractors and suppliers, to families trying to build their first home. Cases are heard across the spectrum of forums, from general district courts and public administrative boards to the highest federal and state courts. The practice also includes counseling, transactions, risk management, regulation, and licensing. Further, the types of projects and legal issues are ever-changing with our culture (for example, green building) and our volatile economy (such as liens and public-private partnerships). This array of interests is the province of the Virginia State Bar Construction Law and Public Contracts Section, which attracts seasoned leadership and new members who are energetically dedicated to the mission of researching and disseminating up-to-date know-how in the field.

The following articles in this issue of the *Virginia Lawyer* are among the many ways that section member deliver the section's mission and serve its members and their clients:

- "Has Chinese Drywall Affected the Economic Loss Rule?," by Kristan B. Burch, delves into application of the economic loss rule in defending Chinese drywall negligence claims;
- "An Assault on the Spearin Doctrine: How AIA A201-2007 Shifts the Risks for Design Defects to the Contractor," by Nancy W. Greenwald, examines the impact of requiring contractors to measure, check, and report design defects and the consequences, at odds with owner duties under *Spearin*, if the contractor does not report design errors;
- "Key Points to Consider in Filing and Challenging a Mechanic's Lien," by K. Brett Marston and Spencer M. Wiegard, provides a practical and easy-to-use guide to mechanic's liens;
- "The Economic-Loss and Source-of-Duty Rules and the Wall between Tort and Contract in Virginia," by Edward E. "Ned" Nicholas III and Sean M. Golden, explores the economic-loss rule in response to tort claims against a defendant not in privity with plaintiff and the source-of-duty rule in response to tort claims against a defendant in privity with plaintiff.

The section publishes semiannual newsletters and an annual *Construction Handbook* for members on the section's website http://www.vsb.org/site/sections/construction/. The section produces a continuing legal education program at the VSB Annual Meeting in Virginia Beach and a flagship one and one-half day fall CLE conference. This year's conference will be held on Friday and Saturday, November 5 and 6, at the Boar's Head in Charlottesville. The conference fulfills the Virginia's annual requirement (twelve hours, including two hours in ethics) for CLE credit.

The section enjoys participation from attorneys with all levels of experience. Many active board members and officers are recognized in Virginia and nationally as leaders in the field. To a person, they serve on section committees that produce relevant, valuable materials such as articles in the *Virginia Lawyer* and section newsletter, courses at the Fall Conference and annual summer program, and case summaries updated annually in the *Construction Handbook*. Board members and officers also mentor younger section members, who are just as active. The section is well-positioned for many years to come.

Opportunities for involvement and contribution in the section are abundant, and your participation will open doors and support professionalism among the tight-knit construction bar. We invite interested lawyers to contact Dolly C. Shaffner, the VSB section liaison, at (804) 775-0518 or shaffner@vsb.org for more information.

by Nancy M. Reed, Chair

Conference of Local Bars Brings Bar Association and State Bar Together

I AM PLEASED AND HONORED to be writing my first column as chair of the Conference of Local Bar Associations (CLBA). I am a member of the Page County Bar Association in the Shenandoah Valley, and I practice in a firm of two attorneys. Our bar currently has thirteen members, so every member eventually has the opportunity to serve as a local bar leader.

The CLBA is a conference of the Virginia State Bar that serves the needs of approximately 132 local and specialty bar associations in Virginia. The mission of the CLBA is to establish and maintain a mutually beneficial working relationship by building communication between the VSB and the bar associations. The CLBA receives input from the associations on issues that affect the legal profession and informs the associations about the VSB's activities and policies. The CLBA also facilitates cooperation between local and specialty bars and the VSB to improve the public's understanding and appreciation of the law and the legal profession. Finally, the CLBA presents high-quality education programs for bar association leaders. The CLBA Executive Committee, elected by the members of the conference at the Virginia State Bar Annual Meeting, works diligently to carry out its responsibilities.

Most of these local and specialty bars serve a specific geographic area, but some are statewide. This year, the conference's executive committee hopes to improve with our member bar associations and increase their participation in VSB activities and programs, including those sponsored by the CLBA. The CLBA Executive Committee wants Virginia's local and specialty bars to know that the CLBA will provide them with information about the VSB's services, and the committee will communicate the associations' input to the Virginia State Bar. The CLBA also wants to do everything possible to help bar associations improve the public's understanding of the legal profession. Our goal is to be the point of contact for our member bar associations when they need information and resources from the Virginia State Bar.

As part of this effort, the CLBA will present a Bar Leaders Institute on October 22, 2010, at the Roanoke Higher Education Center and on March 7, 2011, at the University of Richmond School of Law. In Roanoke, the keynote speaker will be Judge G. Steven Agee of the Fourth U.S. District Court of Appeals. Panels will discuss resources and programs for bar associations and issues related to leading during a bad economy. A representative of the American College of Trial Lawyers will talk about the college's Code of Pretrial and Trial Conduct. VSB Assistant Ethics Counsel Leslie A.T. Haley will discuss the ethics of social networking in a session that carries one hour of ethics credit. Members of the VSB Committee on Bench-Bar Relations will talk about maintaining communications between bench and bar; the panel will include Roanoke City Circuit Judge Clifford R. Weckstein; Jacqueline F. Ward-Talevi, chief judge of the Roanoke County General District Court; and Timothy J. Heaphy, U.S. attorney for the Western District of Virginia. Registration details are available at http://www.vsb.org/site/conferences/clba-calendar/vsb-bar-leaders-institute/.

On November 1, 2010, the CLBA will present a Solo & Small-Firm Practitioner Forum at the Workforce Development Center at Eastern Shore Community College in Melfa. Sharon D. Nelson and John W. Simek of Sensei Enterprises will present engaging programs on legal technology for solos and small firms and on disaster recovery in the electronics age. They also will offer "Sixty Law Office Management Tips in Sixty Minutes." VSB Ethics Counsel James M. McCauley will teach a two-hour ethics session, "Talk Is Cheap Until You Hire a Lawyer — Financial and Business Arrangements with Your Clients." Frank O. Brown Jr., a past chair of the VSB Senior Lawyers Conference, will present "Protecting Your Clients in the Event of Death or Disability," a one-hour ethics program. The forum is free, lunch is included, and attendees will receive six hours of continuing legal education, including three hours of ethics.

We hope to see VSB members at all of these outstanding programs. Let us know what we can do for you and your bar association.

by Carson H. Sullivan, President

The YLC: A Brief Overview

AS I WAS DECIDING what to write about in my first *Virginia Lawyer* column, I thought it might be nice to give an overview of the Virginia State Bar Young Lawyers Conference for those of you who are not familiar with us. A lot of this information is on our website and appears in our *Docket Call* newsletters, but it is worth repeating here for a larger audience. Below are a few facts about our conference and an introduction to our 2010–11 board members.

Lots of Lawyers. In November 2010, when our newest lawyers are admitted, the YLC will have more than ten thousand members. That's a huge number! If you are aged thirty-six and under or have been practicing three years or fewer, you are automatically a YLC member.

Board of Governors. The YLC board is made up of nineteen lawyers from across the commonwealth. Board members serve for up to four years; ten represent the VSB's districts and five serve at large. We also have four officers, including me as president for this bar year. Board members serve as liaisons for all of the YLC's programs. I am incredibly proud of their work, and I want to thank them for their support and their many contributions. Our 2010–11 board members are:

Jennifer B. Shupert of Virginia Beach — first district;
Megan Bradshaw of Norfolk — second district;
Mollie C. Barton of Richmond — third district;
Demian J. McGarry of Alexandria — fourth district;
Maureen E. Danker of McLean — fifth district;
Nathan J. Dougles Veldhuis of Fredericksburg — sixth district;
Kenneth L. Alger II of Woodstock — seventh district;
Brooke C. Rosen of Roanoke — eighth district;
Rachael A. Sanford of Danville — ninth district;
Gerald E. Mabe II of Wytheville — tenth district;
Andrew G. Geyer of Richmond — at large;
Macel H. Janoschka of Roanoke — at large;
Trevor A. Moe of Danville and Washington, D.C. — at large;
Nathan J. Olson of Fairfax — at large;
Glen H. Sturtevant Jr. of Richmond — at large;
Christy E. Kiely of Richmond — president-elect;
Brian R. Charville of Arlington — secretary; and
Lesley Pate Marlin of Arlington — immediate past president.

Please do not hesitate to reach out to any of these individuals. If you know them from practice or from school, or if they are in your area, I know they would love to hear from you and provide you with information about our programs. Their contact information is at http://www.vsb.org/site/conferences/ylc/view/board-of-governors/.

Our Programs. The YLC has almost twenty programs. Emergency Legal Services, No Bills Nights, the Oliver Hill/Samuel Tucker Prelaw Institute, the Professional Development Conference, and Wills for Heroes are just a few. Each program is led by a chair or cochairs, with assistance from dedicated volunteers from all over the commonwealth. We also have circuit representatives, who are nominated by local bar presidents in each of Virginia's thirty-one judicial circuits. Our program chairs and circuit representatives are all listed on our website as well.

Our Mission. The goal of the YLC is service — to our members, the bar, and the community. Please visit our website, http://www.vayounglawyers.org/, and read about our programs, projects, and initiatives. We are always looking for new volunteers and leaders. If you want to get involved, please contact me at (202) 551-1809 or carsonsullivan@paulhastings.com, or contact our membership chair, Nathan Olson, at (703) 934-1480 or nolson@cgglawyers.com.

As I hope to highlight this year in my upcoming columns, Virginia's young lawyers are incredibly dedicated — not just to their practices, but also to the bar and their communities. The YLC is looking forward to a great year, and I am looking forward to reporting back to you on our successes.

Where will you make your mark?

Will it be on the mind of a child who decides to pursue law after attending the Oliver Hill/Samuel Tucker Prelaw Institute?
Will it be on the heart of a family who gains some peace of mind from Wills for Heroes?
Will it be on the comfort of a cancer survivor facing legal difficulties?

Through the Young Lawyers Conference, you have the opportunity to make a difference in your profession and community, but chances are the difference you will feel will be within yourself.

Young lawyers are making a difference. **It's rewarding, it's a great way to get to know people, and it's fun. Join your fellow young lawyers today and make *your* mark.**

HELP WANTED:
We need your help. The Virginia State Bar Young Lawyers Conference (YLC) needs circuit representatives, program and commission chairs, and committee members and other volunteers for many of its programs in the 2010–11 bar year.

Becoming a circuit representative, program or commission chair, or committee member or other volunteer is an excellent way to get involved in the YLC and to serve the profession and the public. If you are interested in any of the leadership positions or volunteer opportunities listed below, please contact:

- Nathan Olson at (703) 934-1480 or nolson@cgglawyers.com, or
- Carson Sullivan at (202) 551-1809 or carsonsullivan@paulhastings.com.

More information about each of these opportunities may be found on the YLC's website at http://www.vayounglawyers.org/.

The YLC seeks circuit representatives for the following circuits:
4th Circuit (Norfolk)
6th Circuit (Emporia and Hopewell; Prince George, Surry, Sussex, Greenville and Brunswick Counties)
8th Circuit (Hampton)
21st Circuit (Martinsville; Patrick and Henry Counties)
28th Circuit (Bristol; Smyth and Washington Counties)

The YLC seeks chairs for the following program and commissions:
Community Law Week
Children and the Law Commission
Health and the Law Commission

The YLC seeks regional chairs for the No Bills Night program in the following areas:
Abingdon
Charlottesville
Fredericksburg
Lexington / Staunton
Lynchburg
Tidewater

The YLC seeks committee members and other volunteers for all of its programs and commissions. A complete list of programs and commissions and their respective chairs is at http://www.vsb.org/site/conferences/ylc/view/programs/.

Get involved now:
- View committee descriptions at http://www.vsb.org/docs/conferences/young-lawyers/Cmte_Descriptions.pdf.
- Mail in the volunteer form at http://www.vsb.org/docs/conferences/young-lawyers/VolunteerForm.pdf.

Bench and Bar Should Appreciate Each Others' Challenges

by Judge Barbara Milano Keenan
Fourth U.S. Circuit Court of Appeals

Editor's Note: This is the first in a series of columns by the judges and lawyers of the Virginia State Bar Special Committee on Bench-Bar Relations.

As members of the bench and bar, we are jointly committed to the pursuit of justice. We do important work in which we help people, face exciting intellectual challenges, and have a major role in dealing with critical issues confronting individuals and businesses in our society.

Why, then, do lawyers and judges often encounter problems in dealing with one another in our professional roles? My best answer is that these difficulties often result from the isolation of judges within the legal profession and from the lack of understanding that many lawyers and judges show toward one another.

When I became a judge, I was confident that I would not beome isolated but would remain connected to my fellow lawyers without many changes in our relationships. After all, I would still be a lawyer — just one serving the public in a different role.

Nevertheless, during my first months as a general district judge in Fairfax, I experienced big changes in my contacts with fellow lawyers. To begin with, I no longer had a first name. All my jokes were funny. Lawyers thought I wanted to hear about all their former cases. Overnight, I had become a different person to everyone but a few close friends.

I felt somewhat isolated in my new professional role. I had to guard myself against showing emotion, even in the face of hearing difficult testimony. I had to suppress my personality and present a neutral "public face," irrespective of the events that were occurring before me.

This sense of isolation that judges face is compounded further by the physical design of our newer courthouses, in which judges move through separate hallways from the lawyers and the public. As a result, judges lose the opportunity to experience the sense of community enjoyed by others in a courthouse environment.

In addition, judges and lawyers often appear not to appreciate the particular burdens of their differing roles. Lawyers face tremendous pressures from clients and from the organizational and financial realities of conducting a busy law practice. Judges, on the other hand, have to deal daily with all different kinds of cases, problems, and personalities under the watchful scrutiny of the bar and the public.

What, then, can we do to improve the relationships between the bench and the bar? I think that the answer is simple. We need to have more contact with one other outside the courtroom setting. This contact will emphasize our common bonds and increase our genuine regard for one other.

I have had a lot of fun over the years playing on various sports teams sponsored by the bar. In these kinds of casual settings, we all can abandon our professional titles and simply enjoy each other's company. Other informal social events can accomplish the same result in ways that a formal bench-bar dinner cannot.

On a more substantive level, judges and lawyers can increase their joint participation in bar and community projects. We can work together teaching elementary and secondary school students about the importance of the rule of law in our society.

Lawyers and judges also can benefit from participating together in mentoring efforts for newer lawyers. With the increasing specialization of law practices, many lawyers have little contact with those who practice in different subject areas. By joining with judges in small, informal group settings, such as lunches or workshops, lawyers and judges can enjoy one another's company and advance the professional skills of our newer lawyers. One by one, these personal relationships that are established will add to the collective strength of our profession.

I am sure that every judge can relate stories about how, when they were lawyers, they received help and encouragement from various judges. To this day, I remember with appreciation the special advice and informal mentoring that Fairfax Judges Arthur Sinclair and Lewis Hall Griffith gave me. If I was in one of their offices getting an order entered, I would be told, "Have a seat, and tell me how things are going." I would then receive gentle suggestions such as, "You make a strong closing argument, but you don't need to repeat your best points several times." Judges today need to make sure that this great mentoring tradition is not lost.

In these and other ways, we need to promote and protect the special character of the work that defines us as a profession, rather than as a mere occupation. In doing so, we will not only enjoy ourselves, but will contribute a proud legacy for future generations.

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E-mail your news to **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.**

Crossword answers.

A	H	A	B	■	S	C	A	T	■	M	O	T	T	O
N	O	I	R	■	N	A	M	E	■	E	T	H	O	S
D	O	D	O	■	O	P	I	E	■	A	R	E	N	A
A	F	E	W	G	O	O	D	M	E	N	■	V	E	G
■	■	■	N	U	T	S	■	■	A	D	H	E	R	E
M	U	T	I	N	Y	■	M	E	T	E	O	R	■	■
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POSITIONS AVAILABLE

LEGAL SERVICES EXECUTIVE DIRECTOR: Rappahannock Legal Services, Inc. (RLS) seeks a new executive director to succeed William L. Botts III, who after 26 years is retiring from that position on January 1, 2011. RLS is an unrestricted Virginia legal services program established in 1973 with offices currently in Fredericksburg, Culpeper, and Tappahannock. RLS has been rated as an "exceptional" program by its funders. It provides community-based field services to 16 counties and the City of Fredericksburg in the Rappahannock River watershed stretching from the Blue Ridge Mountains to the Chesapeake Bay. Its staff of 17, including eight lawyers, with pro bono assistance, handles approximately 3,250 cases a year. The current RLS annual budget is $949,022, supported by revenue derived from 43 sources. RLS represents eligible clients in a variety of civil disputes, with a focus in the areas of family, domestic violence, housing, income maintenance and health, and immigration. RLS administers an innovative housing program utilizing CDBG, HPRP, HomeShare, and VISTA grants. Applicants must be licensed, or eligible to be licensed, to practice in Virginia, with demonstrated leadership and administrative experience. Salary is negotiable, depending on experience and qualifications. Health, disability, retirement, and other benefits are available. This position entails overall supervision of program policies and procedures and litigation activity; community outreach; liaison and education; employee recruiting and training; and grievance, budget and fundraising functions. Please send cover letter, résumé, references, and writing sample, postmarked by October 15, to: Search Committee, Rappahannock Legal Services, Inc., 618 Kenmore Avenue, Suite 1-A, Fredericksburg, Virginia 22401. RLS is an EEO Affirmative Action employer.

VSB Staff Directory

Frequently requested bar contact information is available online at **www.vsb.org/site/about/bar-staff**.

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More information and complete media kits are available online at **http://www.vsb.org/site/publications/valawyer**, or you can contact Nancy Brizendine at (804) 775-0594 or **brizendine@vsb.org**.

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