

# Do Judges Have a Meaningful Role in Legal Education?

by the Honorable Walter S. Felton Jr.  
Conclave 2012 Reporter



Walter S. Felton Jr. was elected to the Court of Appeals of Virginia in September 2002, and has served as chief judge since April 2006. Judge Felton served as a Captain in the United States Army Judge Advocate General Corps 1969–73, at which time he began his law practice in Suffolk, Virginia. In 1982, Judge Felton was appointed to the faculty of the William & Mary Law School, where he subsequently attained the rank of professor of law, and served as Legislative Counsel for the college. He also served as administrator of the Commonwealth's Attorneys Council, the state agency responsible for training the commonwealth's prosecutors. In 1994, he was appointed as deputy attorney general of Virginia, heading the Intergovernmental Affairs Division, and in 1995 was appointed as senior counsel to the attorney general. He served as counsel to the governor for four years. He is a member of the Judicial Council of Virginia, the executive committee of the Judicial Conference of Virginia, and the State/Federal Judicial Conference.

The Honorable Gerald Bruce Lee of the U.S. District Court, Eastern District, introduced the forth panel made up of the Honorable Cynthia D. Kinser, Chief Justice, Supreme Court of Virginia; Hugh M. Fain III, president, Virginia Bar Association; Monica Taylor Monday, of Gentry Locke Rakes & Moore; and the Honorable Michael F. Urbanski, U.S. District Court, Western District.

Judge Lee noted that the judiciary plays a major role in the education of lawyers, and those who desire to become lawyers. Before turning to the panel for the views of each on the role of judges in the education of lawyers, he commented that those who wear the robe of judicial authority teach continually throughout the course of litigation from pretrial through final judgment. He noted that judges have a special responsibility in teaching about the law, not only in courtroom settings, but by participating in activities outside that setting in law school courses, participating in trial advocacy and appellate advocacy classes, in moot court competitions, and in continuing legal education programs for lawyers and other judges.

## Presentations

Chief Justice Kinser emphasized that the role of the judiciary in the education of lawyers begins with judges setting the bar of what is expected of lawyers by being timely and well-prepared, by conducting themselves professionally and civilly throughout the course of litigation, and by

demanding those same characteristics of attorneys who come before the courts.

It is the role of the Supreme Court to determine the ethical standards that lawyers are required to obey when practicing law in Virginia. Those ethical standards represent the minimum required to obtain and maintain the license and privilege to practice law in the commonwealth. The Supreme Court continues to review and alter those standards as the practice of law changes, including the impact of the rapid advancement of technology, to ensure that standards for licensure keep pace with the practice of law.

Judges have a responsibility to impress upon lawyers that the license to practice law in Virginia requires more than simply abiding by minimum ethical standards. The oath of office taken by each lawyer includes the pledge “to act courteously and professionally demean oneself” in the practice of law. Judges have the ongoing responsibility to remind attorneys, and each other, of the requirement to conduct themselves courteously and professionally in matters coming before the courts.

The Supreme Court also sets requirements imposed on lawyers who seek to practice law in Virginia through reciprocity, when those individuals have not successfully completed the Virginia Bar Exam, have not attended the mandatory professionalism course required as a condition of the license to practice law in Virginia, or completed a similar course in the state of their licensure.

Chief Justice Kinser reminded that being a judge is very isolating, and that being an appellate judge is even more isolating. As a result, lawyers may be hesitant to ask judges for feedback on how they are doing. Judges have a responsibility to break that barrier and let lawyers know that members of the judiciary are willing to discuss matters of performance in and out of the courtroom, and are willing to participate in continuing



Panel IV examined the rule of judges in the education of lawyers. Panelists (left to right) were the Honorable Michael F. Urbanski, U.S. District Court, Western District; Monica Taylor Monday, of Gentry Locke Rakes & Moore LLP; Hugh M. Fain III, of Spotts Fain PC and president of The Virginia Bar Association; and the Honorable Cynthia D. Kinser, Chief Justice, Supreme Court of Virginia. The moderator was the Honorable Gerald Bruce Lee of the U.S. District Court, Eastern District.

legal education programs. And in those settings, whether formally or informally, judges should give feedback to attorneys, not case specific, but generally, regarding effective and persuasive legal writing, oral communications, and the importance of being prepared. Judges should engage lawyers appearing before their courts in conversations regarding the application of particular statutes, rulings on motions, and in other matters that impact their effectiveness in the courts.

Mr. Fain said local and statewide bench/bar relationships and regular bench/bar meetings are particularly important in the continuing education of lawyers. Formalized bench/bar meetings, often accompanied by a meal in an informal setting, go a long way in the continuing education of lawyers, and the development of professional relationship between the bench and the bar. Those periodic gatherings of lawyers and judges are important not only for the social discourse, but equally important for the educational conversations and presentations made during those gatherings. Bench/bar meetings where judges are invited to discuss ongoing issues as well as developing issues tend to be well attended both

because of the educational value to the attendees as well as the opportunity to exchange ideas. Area judges invited to host a table at these events facilitate informal discussions regarding developments in the law, best practices in particular courts, as well as other matters of local concern. Sadly, in many of the more rural areas, the travel distance often makes bench/bar gatherings more difficult, if not unworkable.

Mr. Fain emphasized the need for the bar to speak out to the bench about what the lawyers believe are matters that they need to be educated

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about. Bar leadership needs to be more active in making an outreach to the bench, particularly to

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provide guidance in how to deal with the new world of electronic discovery, the impact of technology on the preparation of litigation for trial, and the use of technology in the trial of cases.

In her remarks, Ms. Monday expressed the continuing need of judges to police the occasional unprofessional conduct and statements in litigation practice, including ad hominem attacks on opposing counsel and parties in both trial briefs and appellate briefs.

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Recently, there have been and continue to be increasing reports of a lack of civility and professionalism in the manner lawyers speak to each other both at the trial and the appellate levels. Judges are increasingly asked to consider charges of deceit, unprofessional and unethical behavior in cases before the courts. Yet, for whatever reason, motions seeking sanctions frequently are not filed, thereby encouraging that conduct to continue. Often, it is difficult for the courts to address the issue when there is no clear breach of the Code of Professional Responsibility.

Ms. Monday provided some examples of statements in pleadings or briefs gathered from various courts. Somehow opposing counsel's representations are not just wrong anymore, they are "absurd," "ridiculous," "disingenuous," and "myopic in our view of the world and prone to wild exaggeration." Instead of being incorrect, opposing counsel are "hopeless," they "engage in subterfuge," "obfuscate the facts," "employ a selective memory," and "try to pull the wool over the court's eyes."

She noted that when judges do intervene and impose sanctions and make disciplinary complaints, that intervention educates offenders of the unacceptability of the behavior and that such

behavior demeans our system of civilly resolving disputes between litigants.

Unfortunately, heavy court dockets at times do not allow a swift response by judges when informed of the unacceptable behavior and, when sanctions are imposed, concern arises that the intervening judge may have abandoned the role of impartial and unbiased decision-maker in resolving the legitimate dispute between the litigants.

At times, even judicial intervention in unprofessional behavior does not act as an impediment. Judges may be concerned about re-election by the General Assembly when the offending lawyer makes a complaint of being disciplined by a judge to local legislators, who are increasingly non-lawyers, and that concern often becomes an impediment to prompt sanctions being imposed, and creates some impunity on the part of the offending lawyers.

The Virginia Bar Association developed and advanced the *Principles of Professionalism* as guidelines for the practice of law. Those principles were approved by the Supreme Court of Virginia, further providing education for lawyers.

Having judges appear at Continuing Legal Education programs across the commonwealth to address unprofessional and uncivil behavior sends the important message that unprofessional and incivility will not be tolerated.

Having judges appearing at local bar association meetings to talk with lawyers about protecting their reputations while zealously representing their clients, and about what is not acceptable language in briefs and in oral presentations, is also an important part in the continuing education of lawyers by the judiciary. Judges educate lawyers by returning briefs for replacement when the documents contain *ad hominem* attacks or inappropriate language, or by taking recesses when a lawyer crosses the line of civility to deal with that behavior. Quiet teaching moments, as when judges open court with an announcement that professional demeanor and courteous behavior is expected, create educational moments that can go a long way toward maintaining appropriate decorum in the courtroom. Judges also educate by being patient, prepared, professional, and civil; by letting lawyers do their jobs; by listening carefully

to arguments presented, and promptly disposing of matters before the court.

Judges should encourage pro bono work by lawyers as places where honing legal skills under difficult circumstances can lead to more competent representation generally.

Judges should encourage involvement in mentoring activities for new lawyers, whether informally through the local bar association, within the law firm, or in connection with mentoring programs such as provided by local chapters of the American Inns of Court, or other mentoring programs, especially when that can be done in conjunction with a law school and involve educating law students.

Judge Urbanski noted that while the courts have a limited role in legal education, it is the role of the judge to ensure that the trial is conducted professionally and civilly.

Leading by example goes straight to the area of core competence and preparation. The judge sets the example of what is expected of lawyers by being competent, by being prepared, by not being rude, by letting the lawyers do their jobs, by listening to the lawyers, by letting them make their arguments, and by being patient in rulings from the bench.

The visible world of civility and professionalism by judges and lawyers is vitally important to public confidence in our system of justice. However, it is the invisible world of incivility and a lack of professionalism outside the courtroom that the court doesn't see. It is the lawyer who doesn't return phone calls, the lawyer who refuses to give deposition dates because the lawyer doesn't want the deposition taken. It is the lawyer who is just hard to deal with on a daily basis. It is this invisible world that judges need to tackle. Sanction motions triggered by the refusal of a lawyer to agree to a time and place of a deposition should send messages — that is educate — lawyers that such behavior will not be tolerated.

Judges educate by being open and accessible to settle litigation disputes that occur outside the courtroom.

Education by the law schools in core competency for those who want to be trial attorneys is important. Judges should participate in that educational process.

The ineffective assistance of counsel cases, both state and federal habeas cases, suggests that cases are being handled by lawyers who lack ability to try even simple criminal cases. Local bar associations, with the assistance of local judges, are capable of providing low-cost or no-cost training programs for those lawyers who want to represent indigents who are charged with criminal offenses, particularly those young lawyers who by economic necessity or by a sense of ethical duty want to be counsel in those cases, but are without the experience necessary to provide competent representation. Judges should encourage and participate in that training where possible.

Judge Urbanski also suggested that lawyers can obtain experience and training by doing pro bono work. Federal courts are encouraging lawyers to participate in §1983 cases, with local training of lawyers to handle those cases. Obtaining local training with judge participation increases the core competency of those who undergo that training and increases the availability of lawyers to do those cases, while lawyers gain valuable federal trial experience.

#### Discussion and Suggestions

Judge Lee said that among the lessons learned from the panel is that judges provide the best role model by themselves being prepared to make proper rulings on motions and by requiring that cases be tried with civility and professionalism.

Judges provide education for lawyers through participation in continuing legal education programs, by participating in local bar activities, by

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teaching courses in law schools, and through mentorships of beginning lawyers, and using law student interns and law clerks in their chambers. He called attention to various summer programs sponsored by the American Bar Association, such

as the Judicial Internship Opportunity Program where students work in state and federal judges' chambers. Other summer programs provide opportunities for judges to participate in programs for disadvantaged young people with the assistance of volunteer lawyers, where the participants come into court, do mock trials, see the judges as problem solvers and caring individuals.

In response to a question, Chief Justice Kinser said that appellate judges and justices are disconcerted when briefs are poorly written, or meritorious issues are not raised or not argued, but that appellate courts must walk a fine line in remaining impartial and not becoming advocates for one side or the other.

Taylor Reveley, conclave chair, said that the issue of legal writing permeated a good bit of the discussion during the conclave panels, and asked whether members of the judiciary would think it appropriate, quietly in chambers perhaps, to suggest to a lawyer that some legal writing instruction might be helpful to that person. Judge Lee responded that he would be very reluctant to do that, particularly if the lawyer in question thought

that he wrote well. He noted that clearly there are lawyers who are well known for writing well and with clarity, but often the written product, while well-written, after further review misstates case law or statutory authority. It is equally important that judges and opposing counsel can trust what is being written as being accurate, especially when reciting legal precedents in support of the writer's position in a case.

Chief Justice Kinser also suggested that while well-written briefs are invaluable in assisting the decision-maker, oral argument remains a tool for judges to ask counsel to clarify what is written in the brief. She encouraged the law schools to assist law students to find internships with judges, whether during the law school year, or in the summer, even if pro bono, to hone their writing skills. She also suggested that bench/bar meetings even in the smaller, more rural areas had potential to continue to educate those with legal writing problems, and the local judge could encourage the lawyer to attend a course in legal writing, either in person or remotely, or be assigned a mentor to help with legal writing.

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## The conclave is online.

For more coverage of the 20th Anniversary Conclave on the Education of Lawyers in Virginia, including transcripts, meeting materials, photos, and DVD availability, visit <http://www.vsb.org/site/members/20th-anniversary-conclave>.