

# Highlights of the Virginia State Bar Council Meeting

October 16, 2009

At its meeting on October 16, 2009, in Williamsburg, the Virginia State Bar Council heard the following significant reports and took the following actions:

## Permanent Bar Cards

The Membership Task Force is discussing replacing the annual VSB membership card with a permanent card, at the request of President-elect Irving M. Blank.

## UPL Felony Legislation

Sharon D. Nelson, chair of the Standing Committee on the Unauthorized Practice of Law, reported that the committee has decided on the advice of a legislator not to pursue legislation in 2010 that would make certain types of UPL a felony.

## Proposals Approved by Council

The council approved the following proposals, which have been sent to the Supreme Court for approval:

- **PAYEE NOTIFICATION**— This legislation would require insurers that pay liability claims to notify claimants when they disburse settlement proceeds of \$5,000 or more to claimants' attorneys. Approved 39 to 25. <http://www.vsb.org/site/public/payee-notification-proposal>
- **NEW RULE 1.18**— This would define a prospective client to whom the duty of confidentiality is owed, and distinguish that prospective client from someone who unilaterally communicates with a lawyer with no reasonable expectation of forming an attorney-client relationship. The proposed amendment also would allow a law firm to screen the lawyer who discussed the possibility of employment by a prospective client to avoid imputation of a conflict to other lawyers in the firm. Approved 67 to 1.

<http://www.vsb.org/site/regulation/prop-rule-118>

- **RULE 4.2 AMENDMENT**— This would clarify that a commonwealth's attorney may advise a law enforcement officer regarding the legality of an interrogation or other investigative conduct when a defendant in custody, formerly charged, and represented by counsel waives his *Miranda* rights and wants to give a statement without his or her counsel present. Approved unanimously. <http://www.vsb.org/site/regulation/rule-4-2>
- **PARAGRAPH 10 AMENDMENTS**— These amendments would update Rules of the Supreme Court Part Six, § IV, ¶ 10. The amendments would eliminate redundancy in procedures for providing notice and soliciting public comment. They also would require the VSB to submit proposals that declare conduct to be UPL to the Attorney General's Office for analysis of any restraint of competition that might result. Approved 56-13. <http://www.vsb.org/site/regulation/part-six-sect-iv-par-10/>
- **PARAGRAPH 13 AMENDMENTS**— These amendments to Rules of the Supreme Court Part Six, § IV, ¶ 13 would clarify the term "charge of misconduct." Approved unanimously. <http://www.vsb.org/site/regulation/part-6-sect-iv-par-13-charge-misconduct>

## Professional Guidelines To Be Published Online in Searchable Format

The Virginia State Bar *Professional Guidelines* for the first time are being published online in a searchable HTML format that will allow users to quickly access the sections they are looking for without flipping through pages or waiting for PDFs to download.

Because the format will meet most VSB members' needs, print copies of the *Professional Guidelines* were not mailed with the October 2009 issue of *Virginia Lawyer*. A limited number of copies will be printed and provided to members on request.

The print version is published each fall and contains the rules and regulations of the bar, including the Rules of Professional Conduct, attorney trust account regulations, mandatory continuing legal education regulations and forms, Virginia Consumer Real Estate Settlement Protection Act regulations, and portions of the Rules of the Supreme Court that outline VSB governance and the procedure for disciplining attorneys.

The online HTML version will allow members to browse the Rules of Professional Conduct by using a table of contents with hot links. Previously, the *Professional Guidelines* were available on the VSB website only as PDF files.

The HTML version will be updated throughout the year to provide a current version at all times. The print version is updated once a year. Changes approved by the VSB Council and the Supreme Court of Virginia are published online as a supplement.

Watch your first-of-the-month VSB E-News for further details.

# MCLE Board Tentatively Approves Live Programming Requirement

by Michael L. Davis

Chair, Virginia MCLE Board

On October 19, 2009, the Mandatory Continuing Legal Education Board voted to tentatively approve amendments to the MCLE Regulations, pending public comment. The amendments affect course approval standards, responsibility of CLE course sponsors, and procedures pertaining to attorney compliance reporting.

The most significant recommended amendment would require that a portion of each attorney's MCLE credits derive from live interactive programs, as opposed to videotaped or archived seminars.

The board is unanimously committed and fully supports the proposition that all CLE programs be of high quality, convenient, and cost effective. Accordingly, Virginia was one of the first states to embrace distance course-delivery technology. The board recognizes the benefits of this technology for providing courses on very specialized or narrowly focused topics, as well as for making available nationally renowned speakers from outside Virginia.

Historically, the board has consistently emphasized the value of interactivity in course offerings and has opposed self-study to meet the minimum MCLE requirements. Under the current regulations, all distance-learning programs are required to have interactivity in order to be approved. However, research has found that the interactive component incorporated into archived online programs is minimal and rarely used by participants, to the extent that these programs could reasonably be considered self-study.

During the last several years, the board also has become increasingly concerned that attorneys are being bombarded with solicitations from national and regional aggregators offering “blanket programs” or “Virginia bundles” of archived programs in order to satisfy a member's entire annual MCLE credit requirement. Although many of these offerings are substantial, useful, educational, and in compliance with the current regulations, some programs contain topics, law, and discussions that do not focus on Virginia or federal law, or contain materials that lack practical application to a Virginia lawyer.

In connection with addressing these issues, during the past year the board has discussed the pros and cons of a “live and interactive” amendment. Some members believe that all MCLE credits should emanate from truly live, “in-person” programs. Others believe that there should be no requirement that a program be live or interactive. Still others are of the opinion that a portion of the annual MCLE requirement should derive from some type of live and interactive programs.

Those in favor of the proposed amendment point out that, with advancement in technology, human interaction among bar members has been in decline. This is not to say that those advocating this position are opposed to using modern technology. Many of these same people voted in favor of approving podcasts. However, at the time of that vote, some members expressed concern that the MCLE Board

also needed to preserve aspects of human interaction in order to maintain and enhance the high standards of civility to which Virginia lawyers have always aspired and which are specifically espoused by the Supreme Court of Virginia. It has also been suggested that attorneys learn more in an interactive group setting—in person or otherwise—rather than in a one-way stream of programming. Interactive discourse not only allows a dialogue with the instructor, but also promotes discourse and the exchange of ideas among attending bar members. Under the proposed amendment, any member of the bar may still obtain all of his or her annual MCLE credits through distance learning methods. All twelve hours may be completed at one's desk or computer, so long as at least four hours emanate from live interactive programs or seminars.

Those who oppose this amendment argue that there is no empirical evidence that a live interactive program delivers a better product or is more beneficial than a program that is pre-recorded and has no interaction component. Opponents assert that bar members, not the MCLE Board, should decide how they receive credit. In addition, the use of pre-recorded programs for credit allows a member to participate in CLEs at a convenient time and place and is not dependent on when the live class takes place.

After long and spirited discussions, the MCLE Board has recommended that not more than eight credit hours come

*MCLE continued on page 19*

## Huddleston's Virginia Is for Good Lawyers Project in National Spotlight

Virginia State Bar President Jon D. Huddleston will unveil his Virginia Is for Good Lawyers project to national audiences next year.

His first presentation will be at the National Conference of Bar Presidents (NCBP) Midyear Meeting in February in Orlando, Florida. In March, he will describe the project in Chicago at the NCBP's Bar Leadership Institute.

He will present the project's video component, *The Big Picture*, which can be viewed on YouTube at <http://www.youtube.com/virginiastatebar> and on

the VSB website at <http://www.vsb.org/site/about/va-good-lawyers/>. The videos were produced in-house by VSB staff.

The videos and other components of Virginia Is for Good Lawyers tell the stories of Virginia citizen lawyers, who exemplify service to and leadership in their communities. Huddleston led the VSB to tell lawyers' stories through new social media partly to convey a positive image of lawyers and partly to encourage all VSB members to aspire to become citizen lawyers.

Other elements of the project include the use of Twitter (<http://twitter.com/VA4GoodLawyers/>), a president's blog (<http://www.vsb.org/site/blog/>), and an essay project, *Reflections* (<http://www.vsb.org/site/about/va-good-lawyers/#reflections>).

At NCBP meetings, bar leaders present workshops about projects they have undertaken to promote their bars' missions. For more information about NCBP and the meeting, see <http://www.ncbp.org/>.

## Capsalis Wins Arlington's Winston Award

Manuel A. Capsalis (right), immediate past president of the Virginia State Bar, is presented with the Arlington County Bar Foundation's 2009 William L. Winston award from foundation Chair Charles E.K. Vasaly. The award, named for a retired Arlington circuit judge, honors promotion of democratic ideals and advancement of the rule of law. Capsalis was recognized in part for his advancement of diversity among the statewide bar during his presidency. His work led to the VSB Council recommending establishment of a diversity conference — a proposal now pending before the Supreme Court of Virginia.

"It would not have happened if it weren't for Manny Capsalis," said Arlington Circuit Judge Joanne F. Alper at the ceremony on November 17 at the Army Navy Country Club in Arlington. Capsalis is a former president of the Arlington County Bar



Association, which lays claim to having Virginia's first female bar association president (Betty A. Thompson) and first African American president (Clarence F. Stanback Jr.).

MCLE *continued from page 15*

from an archived source. Stated another way, at least four of the annual requirement of twelve credit hours should come from live interactive programming. Live and interactive programs include traditional classroom seminars, telephone seminars, and Webcasts with interactive components. The emphasis under the proposed amendment is that at least four credit hours of the annual MCLE requirement should come from programs that allow for contemporaneous discussion, questions, and discourse between the instructor and the attendees. Archived videotaped programs do not meet the definition of live interactive. The purpose of the change is to enhance the educational experience by providing that all members reap the benefits of both live and prerecorded programs.

Whatever one's viewpoint on the proposed amendment to the MCLE Regulations, one must keep in mind that it is the purpose of the MCLE program to enhance the professional skills of practicing lawyers, afford them periodic opportunities for professional self-evaluation, and improve the quality of legal services rendered to the public.

The full MCLE Board proposal can be found at <http://www.vsb.org/site/regulation/prop-amendments-mcle-regs>.

Comments on the proposal should be sent in writing to Gale Cartwright, MCLE Board, Virginia State Bar, 707 E. Main Street, Suite 1500, Richmond, VA 23219, no later than end of business on December 30, 2009.

(Note: The views expressed in this article are those of the author and do not necessarily represent a consensus of the members of the MCLE Board.)