The Ethics Issue

plus

Winning Closing Arguments
Lawyer Wellness: Getting Out of the Office
The Importance of Lawyer Independence
The Professionalism Course: First in the Nation
THE TOP 5 CYBER SECURITY TIPS

1. Keep hardware and software as current as possible.
   You don’t need to be first in line for the latest and greatest, but don’t be the last in line either. Once software becomes unsupported, it is unethical to use it because it is no longer receiving security updates and is vulnerable to hackers. Apply patches as soon as they are available to reduce vulnerability to an attack or compromise.

2. Backup all data.
   Don’t forget to periodically conduct a test restore of the backup and make sure your backups are impervious to ransomware – either backed up in the cloud or agent-based. Talk to your IT provider to learn more. Backups should be encrypted with a user-defined encryption key, whether on-site, off-site or stored in the cloud. If using a cloud vendor, the vendor should not have access to the decryption key.

3. Develop a password policy.
   The policy should mandate the use of strong passwords (14 characters or more with upper and lower case, numbers, and special characters) and require that passwords be changed on a regular basis. The use of a password manager can make this task quite easy. Consider enabling two-factor-authentication (2FA) when available.

4. Mandate that all work-related internet sessions be encrypted.
   Prohibit the use of public computers and unsecured open public Wi-Fi networks. Access to the office network must always occur through the use of a VPN, MiFi, smartphone hotspot or some other type of encrypted connection.

5. Provide mandatory social engineering awareness training to everyone at the firm at least once a year.
   Technology alone cannot protect your data. The greatest vulnerability comes from the folks who use your network. Cyber attacks are successful because someone did something stupid like clicking on a link, opening an e-mail attachment, or verifying an ID and password when they shouldn’t have.

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Correction
Hugh F. O’Donnell’s letter regarding self-represented litigants in the October issue included a reference to “551” that should have read “SSI,” for Supplemental Security Income. We regret the error.

Letters
Send your letter to the editor to: norman@vsb.org or Virginia State Bar, Virginia Lawyer Magazine, 1111 E Main St., Suite 700, Richmond VA 23219-0026

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Jest Is For All by Arnie Glick

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President’s Message
by Leonard C. Heath Jr.

Coming Soon: Virginia’s New JLAP

“The way to get started is to quit talking and begin doing.” — Walt Disney

For years, we have watched Lawyers Helping Lawyers (LHL) provide desperately needed service and assistance to impaired lawyers, all on a wholly insufficient budget. As a 501(c)(3) private organization, LHL has been a critical part of the solution to the wellness crises in the legal profession. Yet, over the years it has been severely underfunded and, as a result, understaffed. Last year with only one full-time and one part-time employee, LHL opened 107 new cases, while trying to service the more than 32,000 active members of the Virginia State Bar.

Many have debated how best to fund LHL. I am pleased to report that talk has now moved to action. In September of this year, a 25-member committee appointed by the Supreme Court, and led by Justice William Mims, issued a landmark report that, among other things, recommended that VSB bar dues be increased to provide a reliable, appropriate, and permanent source of funding for LHL. That report has now been adopted by the full Supreme Court of Virginia and efforts are being made to bring the report’s recommendations to life.

In summary, Virginia will soon have a fully functioning judge/lawyer assistance program, otherwise known as a JLAP. That program, operated through LHL, will serve not only judges and lawyers, but also Virginia law students. You may recall that recent surveys showed that adverse mental health effects in the profession begin as early as the second year of law school, thus demonstrating the need to open the JLAP to law students. For Virginia, this means that the public will now be afforded greater protection by increased education of legal practitioners and earlier and more efficient and effective intervention for impaired judges, lawyers, and law students.

The current estimate of the increase in dues to fund the JLAP is $30.00 per member. This expense will be offset by an additional recommendation that the Educational Services Department of the Office of the Executive Secretary (OES), in conjunction with Virginia CLE and other state agencies, develop online professional health initiative programs in 30-minute and one-hour modules that will qualify for MCLE credit and be available to Virginia lawyers free of charge. In effect, multiple MCLE opportunities addressing health and well-being will be made available for the relatively low increase in annual dues.

Two additional recommendations from the report are noteworthy. First, the committee recommended the appointment of an advisory board to advise OES regarding all aspects of the comprehensive well-being initiatives in Virginia. This will be a multi-disciplinary advisory board composed of volunteer members, including representatives from LHL. Moreover, the MCLE Rule of Court will soon be amended to require lawyers to disclose on their MCLE forms whether they have taken at least one hour of professional health initiatives education or training within the past three years. This is a voluntary reporting requirement for now. However, the message is clear: lawyers must seek education on lawyer well-being issues in order for our profession to address the wellness crises.

Change is never easy and additional dues are rarely welcome. However, we must never lose sight of the fact that these new initiatives are designed to protect the public. The first two paragraphs of the September report summarize this best:

The well-being of lawyers, judges and law students in Virginia is integral to professional competence. A competent bench and bar in Virginia is essential to ensuring the protection of the public we serve.

As members of a self-regulated profession, we are devoted to client protection as a fundamental duty. To achieve this, the legal profession must support education and training that will ensure professional competency. Further, the legal profession as a whole must provide the resources necessary to ensure intervention, assessment, and referral services for at-risk and impaired lawyers, judges, and law students.

The leadership of the Virginia State Bar stands in full support of the recommendations made by the Committee on Lawyer Well-Being of the Supreme Court of Virginia, which has now been adopted by the full Supreme Court. I ask that we all throw our support behind this long-awaited initiative.
The Virginia Law Foundation and Lawyers Helping Lawyers invite you to attend the

First Annual Virginia Law Student Wellness Summit

February 5, 2019
12:00 noon – 5:00 p.m.
University of Virginia School of Law

Studies have documented the prevalence of dysfunction, at-risk behaviors, and impairment in the legal profession.

Among those particularly at risk are law students.

Please join us as the following stakeholders discuss strategies to promote law student well-being and how others in the legal community can help:

• Supreme Court of Virginia Chief Justice Donald W. Lemons
• Justice William C. Mims
• Other members of the Court
• All eight Virginia Law School Deans and faculty
• Members of the Virginia Board of Bar Examiners
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Are Trial Lawyers Troublemakers?

by Karen A. Gould and James C. Bodie, intake counsel

Most trial lawyers are responsible persons who comply with the Rules of Professional Conduct. So why does the Virginia State Bar receive so many disciplinary complaints related to the defense or prosecution of lawsuits? By the very nature of the litigation process, trial lawyers are in adversarial relationships with their client’s opponents and their attorneys. Unfortunately, the adversarial relationship tends to generate hostility and hostility causes animosity, and animosity leads to … You see where this goes.

Though the majority of bar complaints arise from criminal litigation, for this article we will examine the complaints that stem from civil litigation. In FY2018, the bar received 1,185 bar complaints related to all sorts of matters commonly referred to as “civil litigation.” That was 37.5 percent of the total number of bar complaints received last year.

Overall, 34 percent of all civil litigation bar complaints closed by Intake without investigation were complaints filed against opposing counsel. Almost all of these complaints involve a litigant’s belief that opposing counsel owes him or her an ethical obligation to be polite and respectful of their side of the story. Many complainants believe that the opposing counsel knew their client was lying from the witness stand. Many believe that if opposing counsel were fair and nice, they could be convinced that their client was on the wrong side of justice. Curiously, many of these same folks claim that their own lawyers were too nice, too lenient on the opposing party, and must secretly be working for the other side. Without corroborating evidence of attorney misconduct, the bar does not investigate such claims.

More than 80 percent of these bar complaints were evaluated and dismissed by Intake Counsel who determined that the allegations did not implicate the Rules of Professional Conduct. Typically, these complaints were “result oriented” complaints — the client believed he or she lost the case because the lawyer’s trial strategy was poor; the lawyer failed to call certain witnesses or ask the right questions of witnesses; the lawyer did not argue more forcefully to the judge or jury; the lawyer charged too much for losing the case and should be required by the bar to issue a refund; or, opposing counsel was rude or misrepresented the evidence to the court.

Many of civil litigation bar complaints concern divorce, including child custody and support cases. The bar received a total of 550 such complaints: 89 were assigned to bar counsel (i.e., prosecutors) for investigation; 57 were handled by Intake through an informal investigation; 404 were evaluated and closed by Intake without communicating with the accused lawyer. Nearly 29 percent of these 404 bar complaints (116) were filed against opposing counsel, while only 13 percent of the complaints involved the client’s dissatisfaction with their own lawyer’s trial strategy and 8 percent who complained that the lawyer’s bill was excessive.

Approximately 13 percent of the civil litigation bar complaints involved minor allegations of attorney misconduct requiring intake lawyers to proactively address the issues with respondents, which then resulted in resolution of the underlying matter and dismissal of the bar complaint. Typically, these matters involved the lawyer’s failure to provide the client with a copy of the case file post-termination of representation, failure to communicate the current file status, or failure to provide an adequate accounting of the advance paid fee.

The remaining 17 percent of civil litigation complaints were assigned to bar counsel for preliminary investigation. These cases typically involve a trial lawyer making false statements to the court, failing to appear at hearings or trials, refusing to return unearned advance paid fees, misappropriating unearned advance paid fees or failure to deposit such in trust, abandonment of the client, repeatedly ignoring client phone calls, letters, or emails, committing criminal acts, or engaging in fraudulent behavior, etc.

The bar received 261 complaints involving general civil litigation matters dealing with contract disputes, employment issues, defamation, consumer disputes, etc. Fifty of these complaints were assigned to bar counsel for preliminary investigation. Intake informally investigated and closed, without discipline imposed, 23 bar complaints involving general civil litigation. Another 188 cases were evaluated and closed without investigation...
Executive Director’s Message

by intake because these complaints did not implicate the Rules of Professional Conduct.

Last year the bar received 108 bar complaints against personal injury lawyers: 49 of these were closed by intake counsel because the complaints did not invoke ethics rules; 35 of these complaints were resolved by an informal investigation. Most of these cases dealt with the client’s request for the status of payment or the resolution of medical liens. Twenty-four cases were assigned for preliminary investigation to bar counsel. Typically, these cases involved the lawyer’s misappropriation of settlement proceeds or failure to distribute proceeds without providing the client with any explanation, failure to honor medical liens, or falsely advising the client about a pending settlement when in fact the case was never filed and is now time-barred.

In FY2018, the bar received 47 complaints regarding bankruptcy practice, of which 23 were closed in intake, most often because the client believed that the lawyer failed to save their home from foreclosure. Fourteen cases were resolved by Intake through informal investigations — typically file return issues or questions concerning the fee. Ten cases were assigned to bar counsel for preliminary investigation. These complaints typically involved the respondent’s failure to explain the consequences of filing bankruptcy as it relates to secured debt and arrearages, permitting non-lawyers to prepare bankruptcy petitions without supervision, failing to deposit client fees into the trust account, and creditor’s counsel intentionally violating the automatic stay provisions of the bankruptcy code.

Thus, of the 1,185 civil litigation bar complaints filed in FY2018, 195 were referred to the Office of Bar Counsel for prosecution, of which 83 cases were concluded and resulted in sanctions against seven attorneys. Not all of the complaints referred for prosecution were resolved in FY2018, however, and 112 are still pending.

The adversarial nature of litigation can lead to frustration and anger, and those can lead to a disproportionate number of bar complaints against lawyers who litigate. Hopefully, the numbers discussed here will not only inform, but will reassure lawyers that the bar works to protect the public while sifting through the issues and the facts associated with each and every complaint.

Endnote:
1 FY2018 refers to the bar’s fiscal year, July 1, 2017 through June 30, 2018.

Civil Litigation Disciplinary Complaints

This chart represents the array of practice areas that comprise civil litigation bar complaints, with the largest percentage by far originating in the family courts.
The Principles of Professionalism and the Rules of Professional Conduct: When Does Uncivil Behavior Cross the Line of Unethical Conduct?

In 2008, the Virginia Bar Association Commission on Professionalism created the Principles of Professionalism for Virginia Lawyers (“Principles”). The intent was to promote “…standards of civility to which all Virginia lawyers should aspire…” This extensive project included a lengthy study and review by the statewide bars of the commonwealth, which approved the proposals unanimously. This year marks the tenth anniversary of the Supreme Court of Virginia’s endorsement of the Principles on June 2, 2008.

The Principles clearly state that the intent is not to form the basis for disciplinary action or civil liability. Instead, they provide several aspirational goals for attorneys in their relations with all persons with whom they interact, such as clients, courts, other institutions and opposing counsel. “Lawyers help their clients, the institutions with which they deal and themselves when they treat everyone with respect and courtesy.” As set forth in the Preamble, Virginia can take pride in the important role that its lawyers played in Virginia history, epitomizing the highest ideals of the profession. The common theme throughout the Principles is the value and propriety of treating others professionally and courteously.

The Rules of Professional Conduct on the other hand regulate attorney behavior. Can failure to adhere to the Principles of Professionalism subject an attorney to disciplinary action? There is always the possibility in extreme cases of uncivil behavior crossing the line of unethical behavior. The Preamble to the Virginia Rules of Professional Conduct provides that “A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.” Similarly, the Code of Virginia provides that “The courts and judges may issue attachments of contempt...[for]: (1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice... and (3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court...”

In 2005 the Supreme Court of Virginia affirmed the Virginia State Bar Disciplinary Board’s three-year suspension of a lawyer’s license for “harassing ad hominem attacks on opposing counsel” during a divorce proceeding. While representing himself, the attorney addressed opposing counsel by questioning her faith, calling her inept, accusing her of violating the word of God, and insisting on calling her by her former married name although she had long been divorced. The attorney testified that he did not believe opposing counsel had the right to change her name based upon his religious beliefs, and that addressing her by her former husband’s name was a way to honor her former husband. In other correspondence, he said, “Please pass on to your client the fact that it has not escaped my notice the irony that my wife, who just weeks ago was feigning contempt for the feminism of her friends, has retained one of the worst examples of ‘Christian’ feminism ever to pollute the campus of [their law school],” and “You are inept...I beg you to start zealously representing your client with competence and stop wasting her money and time.”

In affirming the disciplinary action, the Supreme Court of Virginia held that the attorney’s statements to opposing counsel did not address the legal issues in the divorce action, but personally attacked her and were meant only to harass her, in violation of Rule 3.4(j) of the Virginia Rules of Professional Conduct.
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Legal Aid
by Stephen Dickinson

Legal Aid Cannot Do It Alone

There are countless reasons why representing poor people for free in civil cases is incredibly valuable and important work. Beyond the patriotic reasons of preserving the American ideal of “liberty and justice for all,” beyond the ethical aspirations of our profession, even beyond the practical purposes of making our legal system work a little more fairly and efficiently, the positive reasons for doing pro bono work cover almost all aspects of public and private life. Yet, recent studies show that only a tiny fraction of lawyers seem to do this work. For those of us in legal aid, that is a disappointing and frustrating result.

For those who regularly or even occasionally accept referrals from your local legal aid program, thank you very much. Your work is much appreciated, and you understand the benefit of it. However, this column is not for those who are already doing pro bono work. Instead I wish to direct the following to those who haven’t yet gotten involved.

If you’ve read the news, you are well aware that the need is great — that 80 percent of folks who need an attorney but cannot afford one will not be represented and that this is primarily due to limited resources. You also know that in recent years, new applications have been built to better connect clients with willing volunteers through technology, making it easier than ever to find the work that’s tailored to your time and comfort level. Additionally, you may know that legal aid programs and the private bar, in some communities, have organized virtual volunteer law firms to provide support and management of pro bono cases to increase participation of solo and small firm lawyers. In this column I wish to inspire you to take that final step of accepting a pro bono case, especially if you never have before. The best inspiration I can think of to give you are examples of successful cases already taken by your colleagues.

In the first example, three clients who all lived in the same apartment complex came to legal aid regarding the poor conditions of each of their apartments. The clients either had no heat or water or had been injured by falling plaster. The cases were referred to a private attorney in a large firm who accepted all three clients. The attorney filed Tenant’s Assertions to address the needed repairs to the clients’ homes. When he appeared in court, he discovered dozens of other cases brought by other tenants of this same apartment complex. He also discovered that many of those tenants had similar claims of very poor conditions and much needed repairs. The attorney and legal aid then held a public meeting with all of the tenants to inform them of their rights, to assess their claims, and to strategize on a solution. The attorney won his first few cases for the clients and had the apartment complex held in contempt for failing to make the court-ordered repairs to the building. The court, seeing the large number of clients, set a special docket day devoted to all of the cases involving the apartment complex. The court advised the attorney that all tenants of this apartment complex coming before the court would be referred to his office for advocacy. Cases against the apartment complex are ongoing.

In a second example, the client is a school teacher who had been separated from her husband for 18 months. Their separation had been rocky, and the client was upset that her husband usually left their children with a sitter. One day the husband came to pick up their children. He was already angry because our client had petitioned the court to amend the current custody arrangement because of adverse living arrangements. Her husband pushed her down, came into her home, and as-

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saulted her. Our client called the police and went to hospital. The police would not press charges against her husband because they had conflicting stories. So, the client filed charges with the magistrate on her own and the husband filed a cross warrant. Legal aid referred the case to our pro bono domestic violence panel. A volunteer attorney from a small firm appeared with the client in Court on the criminal case against her. The criminal charges against our client were dropped and her husband was found guilty. In the civil matter, the Court granted a two-year Permanent Protective Order — an order necessary to protect her from her abusive husband.

In a final example, a working client was being garnished the maximum amount by law for debts dating back more than a decade. Most of the debt was medical bills for her and her daughter. The garnishments prevented her from paying current bills and she was threatened with losing her home, car, and job. This case was referred to a private attorney for a no asset Chapter 7 bankruptcy. The attorney represented the client in bankruptcy court and obtained a full release of more than $35,000 in debt, freeing the client from the garnishment, saving her apartment, her car, and her job.

In all of the examples above, the volunteer attorney helped a needy client in a desperate situation. In all of these cases, the work the attorney did had a profound effect on the client and his or her family. Talk to any lawyer who does pro bono work, and you will hear only positive things about the experience. Time and time again, lawyers who do pro bono continue to do pro bono. The reason they do so is because giving your time and talent to someone who needs it feels good. Doing pro bono work makes us better lawyers and people. By its very nature pro bono is a good act and improves our community and society. Isn't that enough reason to get started?

To help, please visit: www.vsb.org/site/pro_bono

Stephen Dickinson is the executive director of Central Virginia Legal Aid Society, with offices in Richmond, Petersburg, and Charlottesville.

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Bar Counsel continued from page 14

Professional Conduct. In reaching this decision, the Court stated that it agreed with the Supreme Court of Kansas that “[a]ttorneys are required to act with common courtesy and civility at all times in their dealings with those concerned with the legal process…An attorney who exhibits the lack of civility, good manners and common courtesy…tarnished the entire image of what the bar stands for.”

Courts of the commonwealth also have the inherent authority to supervise the conduct of attorneys practicing before them and to impose discipline for misconduct committed before them. In bringing a contract action against the Christian Coalition of America (CCA), an attorney filed more than 90 pleadings and wrote letters that the opposing party complained were “unprofessional and intended to intimidate and harass the CCA.” The attorney also sent an email to his colleagues in which he disparaged the integrity of the judge and stated his belief that opposing counsel was “demonically empowered.” For this and other misconduct, the circuit court revoked the attorney’s right to practice before that court. The attorney appealed the decision to the Supreme Court of Virginia, which affirmed. Bar disciplinary proceedings followed, and the attorney opted to have his misconduct charges heard by a three-judge circuit court, which suspended his license to practice law for six months.

The Supreme Court of Virginia affirmed this decision as well. The misconduct in these cases represents aberrant behavior not typical of Virginia practitioners. The Principles of Professionalism remind all lawyers to take pride in their professionalism and civility.

Endnotes:
2 Id, at Preface.
3 Id, at Preamble.
4 Rules of Supreme Court of Virginia, Part 6, §II, Virginia Rules of Professional Conduct, Preamble: A Lawyer’s Responsibilities.
5 §18.2-456 of the Code of Virginia (1950), as Amended.
7 Id, at 380.
8 Rule 3.4(j) provides that a lawyer shall not file a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial or take other action on behalf of a client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
11 Id, at 588. The attorney also said in an email to colleagues that the sanctions awarded against him were “an absurd decision from a whacko judge.”
13 Moseley v. Virginia State Bar, id, at 590.
Closing argument is surely one of the highlights of any trial lawyer’s practice. While closing argument is undoubtedly thrilling, it is also very challenging. This article will introduce you to the most important aspects of giving a closing argument and provide sufficient information to give you confidence to do your first closing argument and give you a rudimentary framework upon which you may build your own confident and winning style of summation for future trials.

Do Closings Matter?
Many trial observers today believe that closings don’t matter because the jury decides the case shortly after the opening statement. So, the preliminary consideration is: Do closing arguments matter? There can be little doubt that closing argument is every bit as important as any other component of the trial. This is because the outcome of a trial is always in doubt until the final verdict is in. Everything that happens in a trial is potentially outcome determinative. In the immortal words of Yogi Berra: “It ain’t over till it’s over.”

This is not to exaggerate the importance of closing argument. If you haven’t done the preliminary work up until that point in the trial, your closing is not likely to save it. Poor closings can spoil winning cases; good closings will preserve the narrow margin of victory and can even turn the tide in your favor in close cases.
Closing Arguments and Closing Pitchers

For me, the closing argument is like a closing pitcher in baseball. A closing pitcher is brought in at the end of a close game to get the last three outs and preserve the win for his team. There is something magical in the lore of baseball about a ballplayer who can consistently do this, and the sport recognizes this special talent with a separate statistical category called “saves.” A save has a technical definition, but what it boils down to is credit given to a pitcher for preserving his team’s narrow lead in the late innings of the game. In a sport heavily influenced by folklore and superstition, a dominant closer often takes on mythical proportions among players and the fans.

For the World Champion New York Yankees that heroic figure was Mariano Rivera, the Yankees’ closer for 17 seasons. A thirteen-time All-Star and five-time World Series champion, he is Major League Baseball’s career leader in saves (652). In the 1999 World Series, Rivera recorded a win and two saves out of the four games that were played. His second save clinched the championship, and for his performance he received the World Series MVP Award.

Closing arguments at trial are like closing pitchers in baseball. A closing pitcher only comes in during the late innings after most of the game has been played. Closing argument comes only after days, weeks, or even months of intense struggle at trial. A closing pitcher only comes in when the game is on the line. Similarly, closing argument is made while the outcome of the trial is still in doubt. Finally, a closer is of little use and will not come into a game that is not close at the end. Likewise, a closing argument is no good if what has gone before is not sound. To be a winner in baseball, you must have an effective closing pitcher. To be a winner at trial, you must have an effective closing argument. So the next time you’re wondering whether your closing argument is worth the effort, think Mariano Rivera.

From the outset, you have to develop themes and labels you want to use in the case. Themes are emotional anchors and images for the jury to take back with them to the jury room. Labels are convenient identifiers of the parties. It is critical for you to develop and settle upon a theme for your case early on. If you do nothing else in your closing argument, you should communicate a theme to the jury. There are as many potential themes as there are ways of looking at life. A theme may be as simple as “corporate greed” or “an accident waiting to happen” or more sophisticated themes such as “the jury system is the only equalizer that we have.”

Equally important, you must develop your theory of the case. The theory of the case is the factual story most favorable to your side based upon the facts established at trial. It must be consistent with the undisputed evidence as well as your version of the disputed facts. It must explain why the people in the story acted the way they did. If you do not present a clear and simple story of what happened to the jury, it will construct one without you — or worse, accept your opponent’s theory.

Create a trial notebook with a section devoted to the closing argument. In it, put anything that you think might be useful in closing. This will include themes and labels and your theory of the case, as well as analogies, stories, exhibits, and ideas for video or demonstrative aids. Thereafter, outline your closing argument and then periodically update and adjust it to the additional facts as they become known.

Next, get a good scouting report on the judge. Does she have any standing orders with respect to closing arguments? How does she handle jury instructions? And what rules of closing argument does she observe? Find out her views on other technical matters, such as where you should stand during closing, how you may use exhibits and demonstrative aids in your closing, etc.

At the bench conference after the evidence is in, ask the judge about anything that was not included in your scouting report. Know exactly which jury instructions the judge will use and exactly what she is going to permit you to say about the instructions. Clarify what the time limit will be on your closing argument.

Finally, I can’t emphasize enough the fact that you need to rehearse your argument. You need to actually say and hear the words coming out of your mouth. Rehearse in front of a

A closing pitcher only comes in when the game is on the line. Similarly, closing argument is made while the outcome of the trial is still in doubt.
mirror, friends or family members, or your colleagues at work. In especially important trials, you will rehearse your closing before a mock jury.

**Organization**

Organizing your closing argument is every bit as important as deciding what themes and substance to include in it. Keep in mind that a trial is the re-creation of reality. So, when you sit down to organize your closing argument, remember to tell a story. Primacy and recency should also govern the construction of the closing. Information presented at the beginning and the end of your argument tends to be retained better than information presented in the middle. Make a point to start strong and end strong.

*A Bold Introduction.* Begin with a striking introduction to your closing argument. The attention span of the average juror is short, so you must use the opening moments of closing argument effectively. Put together a short executive summary of the closing that is to follow. Write it out in its entirety (but do not read it to the jury). Communicate your theme, why you should win and your enthusiasm for the case. Deliver that summary without notes, making as much eye contact with the jurors as possible. It will get you off to a strong start — one the jurors are likely to remember. Let’s take a look at a classic introduction given by Thomas Moore, taken from Joel J. Seidemann, *In the Interest of Justice: Great Opening and Closing Arguments of the Last 100 Years* 292 (2004):

> Allow me to borrow a statement made a long time ago by Edmund Burke, an Irish statesman and orator .... Burke said, “Something has happened upon which it is difficult to speak and impossible to be silent.”

Ladies and gentlemen of the jury, you have seen unfold in this courtroom events that would make Edmund Burke’s words as applicable today as they were over 200 years ago. It is not only that this child was damaged through negligence and carelessness .... It is not that they had chance after chance that went begging time and time again to save him, and they did not.

As horrible and terrible as that is, what’s difficult to speak upon, yet impossible to remain silent is that in this courtroom ... there was a deliberate, orchestrated, fraudulent effort to deprive this child of justice.

**Burden of Proof.** Discuss the burden of proof. You will probably need to disabuse the jury of the reasonable doubt standard, the one most jurors have heard about before coming to court as a juror. You should develop a boilerplate burden of proof discussion to use in all your closing arguments.

**Review the Evidence.** The distinguishing feature of closing argument is argument. Present your case to the jury as a cohesive, logical, and understandable story. Marshal the evidence for the jury and draw inferences and conclusions from the facts; talk about witnesses’ credibility, motivation, or demeanor while testifying; explain the significance of the evidence; and discuss why an event occurred the way it did. Take the patchwork of testimony, documents, and other evidence, and weave it into something the jury can understand.

**Deal with Your Weaknesses.** In addition to developing your own themes and telling your own story, you’ll also have to deal with the facts against your case. Do not make the mistake of thinking that you can ignore difficult evidence and hope that the jury will not notice. Your job is to neutralize bad facts in closing. At the least, you want to raise your weaknesses before your opponent does.

**Anticipate and Attack Your Opponent’s Case.** Anticipate your opponent’s case and force him to argue his weaknesses. You must also attack your opponent’s case. Orienting the jury to your theory of the case should always be your first objective. But once you’ve argued the positives of your case, you must attack the strengths of your opponent’s case.

**Jury Instructions.** Perhaps the weakest link in a common law trial is the court’s jury instructions. Jurors are routinely expected to comprehend complex legal principles like proximate cause, burden of proof, preponderance of the evidence, etc., after one brief discussion by the trial judge. Talk to the jury about the instructions they will hear and create boilerplate explanations of these instructions.

**Verdict Form.** Show the jury how you want them to fill out the verdict form. Do not risk a hung jury because it did not properly understand how to fill out a seemingly uncomplicated verdict form.

**The Law of Closing Argument**

As you craft your closing, you need to remember that there are some things that you cannot do or say. Most prohibitions are matters of common sense or courtesy, but I will mention a few highlights. Don’t misstate the law or the evidence. Don’t argue facts “off the record,” such as jury awards in similar cases. The prohibition against arguing off the record does not mean the lawyer is limited to what is in evidence and nothing else. It is permissible to argue common sense, general knowledge, and common understanding. Don’t state personal beliefs or vouch
for a witness’ credibility. Don’t appeal to passion or prejudice. Finally, do not urge irrelevant use of the evidence introduced.

Presentation
During the actual presentation of your argument to the jury, keep these performance-enhancing tips in mind. Educate the jury as to what the trial is about. Simple things like the fact that the defendant in a civil case will not go to jail often needs to be explained. Use the themes and labels that you have developed during the trial. Make sure the jury understands your theory of the case. Tell the jury your theory of what actually happened based upon the facts that they have seen in the trial. Use exhibits and visual aids during your closing.

Analogies and stories are time-honored methods of communicating with the jury. Using commonly shared experiences or relying on a story that everyone knows or can readily appreciate allows you to show the jury what you mean. Never underestimate the power of understatement. All of us think that the best ideas are the ones that we thought of ourselves; ergo, the views the jurors will defend most vigorously, and the ones they are least likely to abandon, are the ones they believe they figured out for themselves. Also, empower the jury. Jurors should harbor no doubts that, under our system of justice, they are authorized to give you the verdict you seek.

You can spend hours crafting a perfect closing argument, but if it is delivered in a monotone, with your face in your script, and your feet bolted to the floor, all of your efforts will have been wasted. To be persuasive you must be interesting and use all of the tools at your disposal. Do not read from a script. Instead, work from an outline that will enable you to establish eye contact with the jurors.

Pace your delivery. Lower the pitch, moderate the tone and volume, and vary the tempo of your voice. Stand directly in front of, but not too close to, the jury. Maintain an open stance that enhances your believability with the jurors. Move around as much as the court permits and be conversational — like a friendly neighbor giving advice on a serious matter over the backyard fence.

The conclusion of your argument will be the last words that the jury hears from you — make them count. Write the conclusion out word for word. Leave the jurors with something stirring and ringing in their ears. Let’s look at the conclusion from a recent closing argument by Patrick Malone:

[You are] here to render justice that will value a human life and that will say that, no matter if a person is of modest means and no matter if he is in the twilight decade of his life … you will say in your verdict and in your speaking of the truth that his life is precious and his independence and his productivity and his mobility and his dignity cannot be taken away from him without a heavy value being placed on what he has lost.

Conclusion
If you enjoy being a trial lawyer, you love to give closing arguments. For when all is said and done, your job as a trial lawyer is to argue your clients’ case. Closing argument is your last, best opportunity to do just that. You owe it to yourself to give it your best. So, when you stand up to give your closing argument, craft and deliver it with the skill and artistry of Mariano Rivera throwing strikes where they can’t hit ‘em. Little else that we do compares with how you will feel when the jury returns its verdict in the case in which you have just delivered the winning closing argument.

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Litigators are notorious for maintaining checklists — checklists for discovery, dispositive motions, pre-trial, trial, and even post-trial. Checklists should include identifying the evidence necessary to win and steps for preserving all issues related to that evidence for post-trial motions, a new trial, or appellate review. Preserving excluded evidence that may substantially affect your case is a critical part of ongoing analysis throughout litigation, not just something to think about the day after trial.

The trial court’s ability to admit or exclude evidence is perhaps one of the broadest discretions enjoyed by trial judges. That said, when confronted with a ruling barring key evidence, there are several steps lawyers should take during a civil trial to preserve issues on the record and, if necessary, make an effective offer of proof. When done properly, the offer of proof should preserve the substance of improperly excluded evidence into the record for post-trial motions or appellate review.

In Virginia, it is well-established that it is the duty of counsel to preserve a record sufficient to permit review of errors assigned on appeal. To avoid waiving the right to raise error post-trial or the right to a new trial or appeal based on a trial court’s erroneous exclusion of evidence, the party who offered the excluded evidence must make an “offer of proof,” or a proffer, that explains the substance, purpose and relevance of the excluded evidence. Offers of proof must be made outside the presence of a jury, and the proffer must be specific, based
on admissible evidence, and on the record. It is not enough to simply object and state the facts or issues you believe the excluded evidence will address. The proffer must explicitly reference the substance, the purpose, and relevance of the excluded evidence to your theory of the case.

For example, perhaps in an insurance coverage action you seek to introduce evidence related to the insurer’s handling of other similar claims; evidence that you believe is particularly critical to your case. Opposing counsel, predictably, objects on the basis of relevance. The judge sustains opposing counsel’s objection. In this scenario, an offer of proof is paramount and litigators should do three things:

First, challenge the improper exclusion of evidence. Make sure the judge understands your challenge and can reconsider her initial ruling. If the judge stands on her ruling to exclude your evidence or testimony, request to make an offer of proof. The judge may ask you to proceed with the bench or she may take a short recess, to excuse the jury, and permit you to make your proffer. In some instances, the judge may ask if your proffer can wait until a scheduled break or until after the witness is finished testifying.

Second, clearly state the basis of your challenge. Once you are permitted to make your offer, state what the evidence will show; why the evidence is relevant, and why it should be admitted. Continuing with the example above, your colloquy about evidence of other similar claims could be:

Your Honor, if this evidence is admitted it will show that ABC Insurance Company previously interpreted the policy language at issue in favor of coverage.

This is relevant because it shows that ABC’s interpretation of the policy language in this case is inconsistent with its prior practice or, at minimum, shows that the language is ambiguous.

This evidence is admissible. In Plaintiff v. Defendant case, this court found evidence of how an insurer handled other similar claims relevant to aid in the interpretation of what it considered to be ambiguous policy language. The court should do the same here.

A similar colloquy can be used to make an offer of proof about witness testimony that is erroneously excluded. If the proffer pertains to an exhibit, it is imperative that the exhibit is marked and identified for purposes of post-trial motions or appellate review — even if not admitted. If the proffer pertains to a witness, the judge may request that you proceed with questioning the witness outside of the jury to elicit with particularity what the witness would testify to if permitted.

Third, ensure that the judge rules on the objection. With counsels’ back and forth, the judge may neglect to issue a specific ruling. Returning to the example referenced earlier, imagine that opposing counsel objected to your evidence of other similar claims, which resulted in a back and forth between you and opposing counsel. Opposing counsel objects and argues that the evidence is irrelevant and vague because there is no effective way for the court to determine if the other similar claims are truly similar to your client’s claim. You argue that the evidence is relevant and goes to the insurer’s unfounded refusal to pay your client’s claim. Instead of ruling on the objection, the judge asks you to move on; the parties can discuss the evidence of other similar claims at break. It is imperative that you remember to raise the issue again. Be certain to obtain the court’s ruling for the purpose of preserving the issue for potential arguments during post-trial briefing or on appeal. If the court admits or excludes evidence subject to objection and forgets to rule on it later, there can be no assignment of error for appellate review. An appellate court generally cannot review a trial court’s failure to do something it was not asked to do. You must obtain a ruling on the objection.

The act of preserving evidence on the record is only half the battle. Equally as important is understanding what evidence is critical to win your case; the evidence that will likely be the subject of an offer of proof. Many litigators may ignore issue preservation during the motions stage of litigation. This is a mistake. Motions practice (particularly motions for summary judgment), including trial briefs, objections to exhibit lists or deposition testimony designations, and motions in limine, are instructive as to the evidence opposing counsel will try to later exclude at trial. Use this information to plan ahead. Analyze and evaluate opposing counsel’s claims, defenses, and legal theories. Research key legal questions and create a specific plan for raising and reiterating key legal questions to preserve them on the record. If you have a jury trial, refine proposed instructions. Make sure the verdict form aligns with key issues you believe must be preserved. Examine the potential exclusion issues and prepare offers of proof for use during trial in advance, including identifying any relevant documents such as designat-
ed deposition testimony or intended exhibits. Also important is reviewing and understanding state and local court rules that address the preservation of claims of evidentiary errors.

Another common mistake some litigators may make with issue preservation is not placing enough emphasis on motions in limine. Instead of looking at motions in limine as just one more thing on your pre-trial checklist, motions in limine should be considered opportunities to narrow issues, address the conduct of trial, and provide a great way to preserve specific issues on the record. For this reason, it is vital that you spend the time necessary to fully develop motions in limine, including having a court reporter at motions in limine hearings. If the court does not issue a definitive ruling on your motions in limine (which is not uncommon), renew your objections at trial. This guarantees the appellate court will have a clear record of the specific issues and know the issues were the subject of the court’s respective rulings, as opposed to another ancillary issue.

Finally, during trial, litigators should not forget the basics. Ensure the transcript is intelligible by obtaining clear, audible answers from witnesses, verbally record visual presentations, and use words to describe what is happening in court if it would not otherwise be reflected in the transcript. Ensure all exhibits are properly marked and identified. Ask the court to clarify any ambiguous rulings on the record and review trial transcripts to confirm they do not contain any errors that would impact potential appellate review.

Not even the sharpest legal mind or best rhetoric can resurrect a great argument that was not properly preserved on the record. Good litigators take time throughout their case to evaluate and prepare offers of proof in advance so they are ready to object to the erroneous exclusion of evidence and make an adequate proffer to preserve critical evidence for post-trial motions, a new trial, or appellate review so they are not left with their hands tied the day after trial.

Endnotes:
3 White v. Morano, 249 Va. 27, 30, 452 S.E.2d 856, 858 (1995) (“[T]he onus is upon the appellant to provide the reviewing court with a sufficient record from which it can be determined whether the trial court erred as the appellant alleges. If an insufficient record is furnished, the judgment appealed from will be affirmed.”).
4 Whittaker v. Com., 217 Va. 966, 234 S.E.2d 79 (1977) (holding that the Supreme Court of Virginia will not consider an error assigned to rejection of testimony unless such testimony has been given in absence of jury and made a part of record in manner prescribed by the rules of court).
6 White, 249 Va. at 30, 452 S.E.2d at 858.
7 Id.
Who can forget the lone, stoic figure of Gregory Peck packing his briefcase and walking out of the empty courtroom in the 1963 adaption of Harper Lee’s novel *To Kill a Mockingbird*? Peck’s character, Atticus Finch, an impressive lawyer in a 1932 small southern town had just lost an unwinnable case of defending, before a jury of all white men, a black man accused of raping a white woman.

Finch accepts the case in spite of economic adversity, ostracism by the community, and criticism from within his own family. Derogatory comments about his representation bleed over to the elementary schoolyard, affecting his children. One friend even questions Finch’s judgment in accepting the case, stating: “You’ve got everything to lose from this, Atticus. I mean everything.”

“Miss Jean Louise, stand up. Your father’s passin’.”

Atticus Finch, Emerging Technology, and the American Lawyer

by Leonard C. Heath Jr.

Lawyer Independence:

Gregory Peck as Atticus Finch
At the conclusion of the trial, Finch’s client is inevitably found guilty in spite of the client’s innocence. As a sign of respect for one independent lawyer, “who would stand for truth as more precious than life itself,” the black community sitting in the balcony of the courthouse silently stands as Atticus walks by. Peck won an Academy Award for his portrayal of Atticus Finch, and he inspired generations of us to study the law.

Finch is the epitome of the independent lawyer, one who takes on the difficult case in spite of personal consequences. But with the advent of technology, should the rules that ensure lawyer independence and the exercise of independent judgment, that prohibit fee-sharing and non-lawyer ownership of law firms, be changed or abolished altogether? Well-respected members of our profession believe that, as technology evolves, attorney professional rules must also evolve. This sounds good, but I am skeptical. I am particularly skeptical when special interest groups seek to impose change on an entire profession, especially a profession as critical to American society as the legal profession. Some of us participated in the recent debate when business entrepreneurs developed online attorney-client matching services (ACMSs). We were told that these products were designed to increase legal access to underserved markets. While some of the ACMS models complied with the Model Rules of Professional Conduct (MRPC), many did not. As a result, some of the noncompliant ACMS business models became the subject of legal ethics opinions across the nation that properly identified the MRPC violations and instructed lawyers that they could not participate in those specific business models. The Virginia State Bar weighed in with LEO 1885, which agreed with the vast majority of the states that have addressed MRPC-violative ACMSs. In June of this year, AVVO, the owner of the ACMS described in LEO 1885, announced the discontinuance of that ACMS model effective the end of July 2018.

So, what is really going on here? As a graduate of business school, I am particularly intrigued by the business models associated with the practice of law. We all know that the practice of law can be a lucrative business. However, the legal profession is more than a business. Lawyers are required, for the most part, to attend a three-year ABA-approved law school, pass the Multi-State Professional Responsibility Exam, pass a bar exam, and be vetted by a character and fitness process. Yet, this does not complete the process. Lawyers must also comply with their own state’s Rules of Professional Conduct (RPC) or equivalent. It is no wonder that there are those in the free-market economy who want to participate in the business of the practice of law, without being obligated to the ethical requirements of the profession.

These entrepreneurs understand what students in business school understand: if you control the business of a profession, you control the profession. And you accomplish this with subtle changes in business models, especially with changes in the income and ownership elements of those business models. In examining one of the ACMS models that has been resoundingly criticized, the Supreme Court of Ohio found that the ACMS, not the lawyer, “controls nearly every aspect of the attorney-client relationship, from beginning to end,” and thus the lawyer’s exercise of independent judgment is “eviscerated.” While it appears, at the time I write this article, the most recent confrontation with non-MRPC-compliant ACMSs has resulted in those companies reevaluating their positions and complying with bar regulators, our profession must be ever vigilant in protecting the core principles of our profession.

Make no mistake, the MRPC is not a tool to protect attorney remuneration. Instead, as one commentator stated, the MRPC is our clients’ Bill of Rights. It protects our clients by promoting certain core professional values, including loyalty, independence, and confidentiality. Over the past two years, I have had occasion to delve deeply into the core values of our profession that had to be addressed in LEO 1885. Here is what I have come away with, particularly with regard to the importance of preserving attorney independence and independent judgment.

American lawyers have different societal responsibilities than other lawyers in the world. Like the Galapagos Islands, where species of animals evolved without influence of foreign conditions or competitors, our great American experience grew and flourished in the rarified air of the “New World.” The vast expanse of the Atlantic Ocean required that our forefathers take matters into their own hands, not only when it came to such fundamental aspects as food and shelter, but also with other more generational-changing concepts such as the relationship of an individual to government. Concepts born of the Magna Carta flourished in America to heights never seen before in human experience. John Locke’s theories relative to natural law, while important in Europe, had an unquestionably profound impact on our Founding Fathers. We know that these revolutionary ideas were taught to, and seared into the hearts of, prominent attorneys of the Virginia Colony like Patrick Henry, Thomas Jefferson, and James Madison. The concept of “individual rights” took root and, as a result, great societal testaments such as the Declaration of Independence and the U.S. Constitution were drafted by men of extraordinary vision.
Stated succinctly, as Americans, we are an independent bunch. As a result, our legal system has assigned to lawyers special obligations generally not seen elsewhere.

De Tocqueville, the famous French observer of early American life, wrote that the legal profession in America “is qualified by its attributes and even its faults, to neutralize the vices inherent in popular government. When the American people are intoxicated by passion or carried away by the impetuosity of their ideas, they are checked and stopped by the almost invisible influence of their legal counsellors…” As a result, American lawyers, particularly those from Virginia, have played critical roles in all three branches of our government.

However, the influence of lawyers goes much deeper than just government institutions. The profession’s influence is evident throughout our society. As an example, one only need look at the exceptional institutions of higher learning in our commonwealth to observe the critical influence of attorneys. Thomas Jefferson founded the University of Virginia. In more recent times, Phillip C. Stone, a past-president of the Virginia Bar Association and seventh president of Bridgewater College, was enlisted in 2015 to save Sweet Briar College. Turning to my hometown, Paul Trible, another Virginia attorney, rebuilt Christopher Newport University from the ground up to become one of the most respected liberal arts institutions in the South.

Just as importantly, our society has assigned to lawyers the special and exclusive role of protecting individual rights. In the criminal context, lawyers are the guardians of individual rights. We are the best measure of leveling the playing field in contests between individuals and the government. As Justice Hugo Black stated in Gideon v. Wainwright, it is “an obvious truth” that any person hauled into court cannot be assured a fair trial unless they have legal counsel. Justice Lewis F. Powell in a video produced as part of the Harry L. Carrico Professionalism Course stated the following: “Lawyers have the responsibility with judges to preserve the Constitution of the United States. They have that responsibility and more so even than legislative branches or the President.”

Add to this the fact that in our American system lawyers are crucial to maintaining the independence of the judicial branch of our government. De Tocqueville noted that while American judges are vested with “immense political power,” they are unable to exercise this power until a case is brought before the court. It is lawyers who select the cases to be filed in court, present evidence, create a record on which the court can render a decision, submit arguments for the applicable laws and how those laws should be changed, publicly defend the judiciary when the judiciary is unfairly criticized, serve as the defenders of the Rule of Law, and ensure that access to justice is provided.

To carry out our functions as lawyers, we must be as free as possible from outside influences and forces. Those outside forces will always be there, constantly wanting to erode our professional principles so that they can acquire even the smallest of footholds in the business of law, so that they can ultimately participate fully in the business of the practice of law. Their suggested improvements to our profession are often presented under the theory of improving access to justice or increasing capitalization for law firms, usually by advocating some form of legal fee-sharing or ownership in law firms by non-lawyers.

This is not a new phenomenon. We saw this with the debate in the 1990s about allowing multi-disciplinary practice (MDP). Thankfully, there have always been attorneys that have taken leadership roles in preserving attorney independence and protecting our client’s rights under Rule 5.4. One such person is Professor Lawrence J. Fox, visiting lecturer in law at Yale law School, who also practices in the private sector in the areas of professional responsibility and corporate governance. He is a former member and chair of the ABA Standing Committee on Ethics and Professional Responsibility. In 1999, he appeared before the ABA House of Delegates to speak in opposition to a proposal to adopt MDP. In a speech he described “as the most important I have ever delivered,” Mr. Fox stated:

The issue before you is the independence of our profession. Though this critical value finds its expression in Rule 5.4’s prohibition of sharing fees with non lawyers, an interdiction that sounds strangely as if it is designed to protect our profession’s turf, the rule in fact embodies the only prohibition that is likely to be effective in maintaining our professional independence. If for President Clinton it was “It’s the economy, stupid,” for our profession the watch word is “It’s the money.” Follow the money and you’ll follow the power. Follow the power and you’ll know who’s in control. And as soon as the power rests with non-lawyers not trained in, not dedicated to, and not subject to discipline for our ethical principles, you will see the independence of the profession fall away.

Before I appeared before your Commission, I had always defended our Model Rules and particularly Rule 5.4 in the name of clients. And I remain convinced that client protection alone provides more than enough justification for our present regulatory framework. Not one of the ethical rules I have discussed is designed to protect lawyers. We would all be far better off economically if each of them was discarded. But it is for the clients that they were crafted and it is for clients that they should remain in place.

There is another important argument, however, which deserves great weight. The independence of our profession has significant institutional value for our American society. Whatever may be the role of lawyers in these other countries where the Big 5 [Accounting Firms] have swallowed law firms with nary a whimper, our profession in America is different. Each of us is an officer of the court, each of us is licensed with power to start law suits,
Members of the Commission, you have a golden opportunity to reaffirm our professional values and assure that the profession does not simultaneously lose both its independence and its soul.  

Because of Professor Fox’s speech, and others like it, the MDP proposal was defeated. However, within a decade, the same arguments were raised in a discussion over alternative business structures (ABS’s) and recently we saw the nationwide debate over allowing fee-sharing in the ACMS context.  

While AVVO has withdrawn its ACMS model, the debate continues. In August of this year, I attended an ABA conference where one speaker, who believes that the MRPC must be rebuilt to accommodate technology companies by letting them share and perhaps control legal fees, took issue with the word “nonlawyer,” which he found “disrespectful,” preferring instead the term “allied professionals.” When you see this type of wordsmithing, you know that the political wheels are turning. At each stage of these attempted incursions into attorney independence, the crafting of the message may change, but the goal is the same… nonlawyers must be allowed to participate in the practice of law, by sharing fees and owning law firms. These advocates claim that the MRPC must be modernized to increase our client’s access to justice and to better serve underserved portions of the community. Over the past decades, while America resisted the impulse to “modernize,” countries like England and Australia bought the argument, hook, line and sinker. Both countries now allow nonlawyers to own law firms. In England, insurance companies own plaintiffs’ personal injury firms in order to diversify their portfolios. Unfortunately, when you elect this course, it is irreversible. Not surprisingly, in England, there is no evidence that the original reason for allowing non-lawyers to own law firms — increasing access to justice — has in fact increased access to justice. Instead, outside investors have invested in the most lucrative area of practice, the field of personal injury. As a student of business models, I have the same reaction that my children have to self-evident truths: “Well, duh, no kidding.” Investors will always put their money where they can actually make money. There is nothing wrong with that; it is just good business.

In Australia, another country that “modernized” its system, an early example of the ABS movement was the law firm Slater & Gordon. Slater & Gordon went public in 2007 and saw several years of rapid expansion where it acquired numerous other law firms. A class action was brought against Slater & Gordon by its own shareholders after its disastrous acquisition of Quindell’s Professional Services. Slater & Gordon, while still afloat, has been forced to downsize and will now focus on its “bread and butter personal injury business.”

So, in the recent debates over whether fee-sharing should be allowed in the ACMS context, when one ACMS provider stated at a Bar Council meeting that the Virginia State Bar needed to change Virginia’s RPC or else it would end up on the same track as England and Australia, I was not swayed. The results of their experiments in changing lawyer professional guidelines have not been impressive, at least not by American standards.

In the great symphony of the American legal system, while it is the court that ultimately calls the final tune through judicial review, it is the lawyer who plays maestro and makes sure that each instrument of the orchestra is in place at precisely the right time so that the right tune is available to be played.

I recently went to lunch with Paul Marcus, a professor at the Marshall-Wythe School of Law and a longtime friend. Joining us were two Australian lawyers here on the specific mission of observing the American legal system. For about an hour, they asked me questions about my practice. At the end, I asked them what was the biggest difference they saw between our system and theirs. They did not miss a beat. They responded, “Americans have this concept of individual rights.” I was shocked and looked over at Paul. Paul was amused by my
surprise. I then asked our Aussie friends what to stop their
government from taking away certain fundamental freedoms
that we hold dear. Their response was “the next election.”
Again, we are different. In England and Australia, Parliament is
viewed as the guardian of individual rights. For Americans, the
protectors of individual rights are lawyers.

Our American system has one additional unique charac-
teristic that requires an independent legal profession:
American judicial review. Our system, unlike most systems
around the world, allows our courts to determine if laws
passed by our elected officials comply with Constitutional re-
quirements and strike them down if they do not. This is a con-
cept designed to protect, among other things, individual rights.
The concept was born of Marbury v. Madison, a case authored
by a Virginia lawyer, John Marshall. That case also stands for
the proposition that it is the duty of courts “to say what the
law is.” Stated succinctly, “when a federal or state law violates
the Constitution, the American Doctrine of Judicial Review
requires [a court] to enforce the Constitution.” American
judicial review provides a powerful mechanism to “withdraw
certain subjects from the vicissitudes of political controversy”
and to place them beyond the reach of majorities and govern-
ment officials.

So here is why I am so passionate about preserving the in-
dependence of our profession and what I believe Justice Powell
was alluding to in the professionalism video. In the great
symphony of the American legal system, while it is the court
that ultimately calls the final tune through judicial review,
it is the lawyer who plays maestro and makes sure that each
instrument of the orchestra is in place at precisely the right
time so that the right tune is available to be played. Herein lies
the true need of an independent legal profession, and simulta-
neously the reason our independence must be protected. The
combination of the concepts of individual rights and American
judicial review is unique in American jurisprudence and has
a profound synergistic impact on our legal system. One good
lawyer with one good case in front of one good court can liter-
ally change American society. As an example, think about how
Brown v. Board of Education changed our culture. Because of
this, lawyers must be unfettered by business models’ influence
or controlled by businesses not bound by the MRPC or the
ethical obligations of our profession, so that we may pursue
cases that may be unpopular at the time, but visionary in the
rear-view mirror of tomorrow. Thus, lawyer independence is
vital to the American legal system.

I am a firm believer that our ethical principles must be
reexamined from time to time. We must learn to integrate
technology into the practice of law in compliance with our
core professional mandates. However, our core professional
principles should not be changed merely because technology
evolves. As the current generation of Virginia lawyers, we must
fulfill our obligations to protect our clients’ Bill of Rights as set
forth in Virginia’s RPC. We also must be ever mindful that, as
a result of our unique environment and evolution, in order for
our democratic republic to flourish, lawyers must be inde-
pendent. Because of this, any attempt to modify Rule 5.4 of
Virginia’s RPC must be critically reviewed. Any benefit of the
doubt must be resolved in favor of preserving attorney inde-
pendence. And if we allow our place in American society to be
demoted from the level of esteemed profession to just another
business, we will never again deserve the respect shown to
Atticus Finch by Reverend Sykes and his congregation. It is just
that important.

Endnotes:
1 Reverend Sykes’ statement to Atticus Finch’s daughter, Jean Louise, who
is better known as Scout. Harper Lee, To Kill a Mockingbird, 242
2 Id. at 166.
3 Timothy Hoff, Influences on Harper Lee: An Introduction to the
4 Ethics committees in the following states found that the AVVO Legal
Services part of the AVVO website violated Rules of Professional
Conduct: Indiana, New Jersey, New York, Ohio, Pennsylvania, South
Carolina, and Utah.
5 Va. State Bar Standing Comm. on Legal Ethics, Legal Ethics Opinion
1885 (2017) (The opinion concluded that a lawyer cannot participate in
the described ACMS because participation under the facts presented was
violative of the RPC rules governing fee sharing with nonlawyers, paying
for referrals, and safeguarding client funds.). LEO 1885 was approved by
the Supreme Court of Virginia with only a few minor modifications on
November 8, 2018.
6 The Supreme Court of Ohio: Board of Professional Conduct, Opinion
No. 2016-3, 3 (June 3, 2016).
7 ABA Commission on Multidisciplinary Practice, House of Delegates
Annual Meeting 7/11/00 Transcript, https://www.americanbar.org/
groups/professional_responsibility/commission_multidisciplinary_prac-
tice/mdp_bod_transc.html.
8 Alexis De Tocqueville, Democracy in America 233 (Francis Bowen
10 Harry L. Carrico Professionalism video, Justice Powell’s full quote is as
follows: Lawyers have played a critical role in the United States of America
from the day it was formed. Of the 55 members of the Constitutional
Convention, 35 of them were lawyers. Lawyers have the responsibility
with judges to preserve the Constitution of the United States. They have
that responsibility and more so even than the legislative branches or the
President. I have always been proud of being a member of the profession
that has helped with judges to preserve and strengthen the rule of law
in the United States of America.
11 De Tocqueville, supra note 8, at 73.
12 Some argue that fee-sharing ACMSs, like the one in LEO 1885, promote
access to justice; however, this is a false premise. The fee-generating,
fee-sharing portion of the LEO 1885 ACMS was never designed to

Leonard C. Heath Jr. is the 80th president of the Virginia State Bar. He
would like to acknowledge the valuable assistance of his son, Jordan C.
Heath, in the research, editing, and overall preparation of this and other
articles submitted this year to the Virginia Lawyer magazine. Jordan Heath is
currently a third-year student at Regent Law School, where he serves as the
notes and comments editor for the Regent University Law Review.

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improve access to justice; it was designed to make money. Lawyer information is readily available on the Internet, including through RPC compliant ACMSs and the non-fee generating portion of AVVO’s own website. As of May 30, 2018, AVVO boasted that it has 25,654 “AVVO attorneys” who offer free consultations. In addition, users can post legal questions that attorneys answer for free.

The access to justice argument was successfully used in England where nonlawyer ownership is now allowed. Nick Robinson, When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism, 29 Geo. J. Legal Ethics 1, 18-19 (2016). However, the supposed access benefits are “questionable” with most investment going into personal injury firms. Id. at 20-21. The access benefits may also not be as significant for the poor and moderate income who have the greatest need for legal services. Id. at 61-62. Additionally, a 2014 report commissioned by the Ontario Trial Lawyers Association concluded after a survey of available secondary sources that “There is a dearth of empirical evidence to support any of the contentions made by proponents that NLO [non-lawyer ownership] leads, directly or indirectly, to an increase in access to justice.” Alternative Business Structures & Access to Justice: Memorandum from Jasminka Kalajdzic to Linda Langston, Ontario Trial Law. Ass’n, on ABS Research 14 (Dec. 1, 2014), http://otlablog.com/wp-content/uploads/2015/01/Dr-Kalajdzic-Study-on-NLO.pdf.


Lawrence Fox, Written Remarks of Lawrence J. Fox: You’ve Got the Soul of the Profession in Your Hands, Written Testimony before the ABA Commission on Multidisciplinary Practice (Feb. 4, 1999), http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/fox1.html [http://perma.cc/6M4L-ECUJ].


17 Id. at 20-21.


19 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).


This year marks the thirtieth anniversary of the Virginia State Bar’s Harry L. Carrico Professionalism Course. The full-day program, which all new Virginia attorneys must attend, emanated from the perceived need to address inappropriate lawyer behavior. The course was groundbreaking when introduced in 1988, laying the foundation to educate Virginia attorneys about the importance of attorney comportment in a self-regulated industry. The goals of the course have not changed over time: to instruct attorneys that professionalism goes beyond mandated ethical behavior and, more broadly, to improve legal professionalism throughout the commonwealth. The Professionalism Course undeniably has been successful, and it has served as the model for many similar courses that subsequently sprang up in other states. Three decades after its introduction, it is clear that the course has significantly and positively affected the way law is practiced in Virginia and throughout the country.

In the mid-1980s, with the number of Virginia attorneys surpassing 23,000, then-Virginia Supreme Court Chief Justice Harry Carrico recognized the need to maintain a high level of attorney professionalism amid the public’s declining respect for the legal profession. The belief at the time was that due to the rising number of attorneys, new lawyers lacked the opportunity their predecessors had to observe and learn from legal role models. Chief Justice Carrico believed that professionalism requires striving for excellence in ethical conduct and performance, devotion to the traditions of the bar, daily practice of the rules that govern the bar, and commitment to the value that the legal profession is a service profession. He appointed a task force to investigate the need to train attorneys on these issues, which led to creation of the Professionalism Course. The aim of the course was, and continues to be, to impart upon new Virginia attorneys not only the requirements of the Rules of Professional Responsibility — the ethics rules — but also the higher ambitions of professionalism.

The structure of the Professionalism Course has remained fundamentally unchanged since its formation. The course starts with an introductory video that profiles several prominent Virginia judges and lawyers and their thoughts regarding professionalism. The course presents four different lectures, that focus on attorney relationships that implicate professionalism: relationships (1) with clients; (2) with the Virginia State Bar (VSB) disciplinary process; (3) with judges; and (4) with other attorneys, the profession, and the community. The most important elements of the course arguably are the two breakout workshops, one focusing on general issues confronting all attorneys and the other concentrating on issues specific to distinct areas of the law. During the workshops, participants are presented hypothetical situations that involve the practical application of both ethics rules and relevant aspirational professionalism standards. The highly select course faculty is composed of Virginia judges and lawyers recognized for their reputation as paragons of professionalism and their dedication to the course’s underlying objectives.

While ethics rules establish the minimum level of acceptable conduct below which attorneys are subject to formal discipline, professionalism requires a commitment to higher principles. Several years ago, the Supreme Court of Virginia endorsed aspirational Principles of Professionalism to reinforce the importance — and expectation — of attorney professionalism. Then-Chief Justice Leroy Hassell noted that “the Principles articulate standards of civility to which all Virginia lawyers should aspire.” The Principles point out that “[i]n their first professional act, all Virginia lawyers pledge to demean themselves ‘professionally and courteously,’” and the Principles then enumerate recommended civil conduct toward clients, the court, and opposing counsel. Consistent with the Principles, the Professionalism Course video highlights an excerpt from U.S. Supreme Court Associate Justice Anthony Kennedy’s 1997 address to the American Bar Association:

Civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in
itself. Civility has deep roots in the idea of respect for the individual. We are civil to each other because we respect one another’s human aspirations and equal standing in a democratic society. We must restore civility to every part of our legal system and public discourse. Civility defines our common cause in advancing the rule of law. Freedom may be born in protest, but it survives in civility.

To this end, the course recommends that lawyers spend time with one another through bar association participation and active civic engagement, as familiarity breeds civility.

Professionalism is difficult to define. As the Professionalism Course video points out, the term includes, among other things, civility, courtesy, character, honor, and trustworthiness. Author James R. Ball perhaps summarizes the concept best: “Professionalism is about having a lifetime dedication and commitment to higher standards and ideals, honorable values, and continuous self-improvement. Professionalism is a built-in guidance system for always doing the best that you can do, always doing the right thing, and always standing tall for what you believe.”

As former VSB President Kevin Martingayle noted, the VSB, as the regulatory body for Virginia lawyers, “does not control matters of style nor mandate good taste.” That is why lawyers need to practice aspirational professionalism—eliminating discovery abuse, avoiding ad hominem attacks, drafting communications that would not embarrass their mothers, fighting negative lawyer stereotypes, providing pro bono legal services, volunteering in their communities, disdaining lawyer jokes, treating others as they would want to be treated, and, more generally, doing what they know deep down is right.

The Professionalism Course unquestionably has positively influenced the practice of law in Virginia and beyond. The course was the first of its kind in the United States and, since its inception, more than half of the states have adopted similar programs. More than 40,000 Virginia attorneys have attended the training, and in excess of 800 judges and lawyers have served as faculty members. Over the past three decades, the number of registered Virginia lawyers has almost doubled to over 45,000, so the founding need for the course remains.

Many graduates have noted that, based on personal experience, the course has positively affected the practice of law. They notice a marked contrast between the practice of law in other jurisdictions and in Virginia. They also observe a difference in the attitudes of, and their relationships with, those attorneys who began practicing law before the Professionalism Course became mandatory and those attorneys who have taken the course; the overwhelming majority of those who attended the training are more mindful of professionalism in their legal practice, which translates into better relationships with their clients, with judges, and with other attorneys.

Since 2000, the VSB has offered students at Virginia law schools a condensed version of the Professionalism Course. The hope is that inculcating professionalism as an integral part of formal legal education will introduce a prism through which these future Virginia lawyers will view the profession they soon will enter. The course is designed to complement the substantive law curriculum traditionally offered at law school. As then-VSB President J. Jay Corson IV noted in 1988, “[Attorneys] learned in law school, hopefully, how lawyers should think. This course addresses[s] how lawyers should act.”

Mere adherence to ethics rules is insufficient to ensure that Virginia attorneys will uphold the exacting standards necessary to preserve the right to call themselves professionals. Professionalism is aspirational, not regulatory. Although the Harry L. Carrico Professionalism Course has succeeded, and will continue to succeed, in placing new Virginia attorneys on the desired path of professionalism, it is up to each of us to stay true to the trail by implementing the course tenets on a daily basis.

As Virginia Supreme Court Chief Justice Donald Lemons notes in the Professionalism Course video, “The practice of law is a noble profession. All of us must work together to keep it that way.”

While ethics rules establish the minimum level of acceptable conduct below which attorneys are subject to formal discipline, professionalism requires a commitment to higher principles.

Judge Lannetti is a Norfolk Circuit Court judge. He also is chair of the VSB Standing Committee on Professionalism, where he oversees implementation of the Harry L. Carrico Professionalism Course to all new Virginia attorneys. Prior to taking the bench, he was a member of the Virginia State Bar Council and the Executive Committee of the VSB Conference of Local and Specialty Bar Associations. The views advanced in this article represent commentary “concerning the law, the legal system, and the administration of justice” as authorized by Virginia Canon of Judicial Conduct 4(B) and should not be mistaken for the official views of the Norfolk Circuit Court or the Court’s opinion in the context of any specific case.
When was the last time you did something, anything, (except breathe, perhaps) for over 33 straight hours? For most people, the answer is never. For Courtney Moates Paulk, president of the Richmond-based law firm, Hirschler, it would be October 10–12, 2017, when she swam a double Catalina Channel crossing, 42 miles in distance, wearing only a bathing suit, goggles, and a cap.

To say she is tough would be a sweeping minimization: She is one of only five people in the world to have completed two “Triple Crowns” of open water swimming by traversing the English Channel, the Catalina Channel, and swimming around Manhattan. She is the first person ever to swim doubles of two of those iconic crossings — meaning she swam back and forth across the Catalina Channel, which took 33 hours and 13 minutes, and then swam around the island of Manhattan twice, which took 20 hours and 15 minutes.

And though even surfers wear wetsuits during far shorter time in the ocean, the rules of open water swimming do not allow for wetsuits because no such thing existed in 1875 when Captain Matthew Webb swam from Dover to Calais, becoming the first recorded person to successfully swim the English Channel with no outside aids. Like the law, open water swimming has a governing body and a long set of rules to make sure that each recorded swim is certified, safe, and equal in scope to the other certified swims.

The World Open Water Swimming Association has 21 rules governing channel crossings, including rule 17.3 that states: “Athletes shall use no swim aids other than goggles, ear plugs, one non-neoprene, non-bubble swim cap, one porous, non-neoprene swimsuit and illumination for night swims. No flotation devices, propulsive aids, protective swimwear, or full-length swimwear is permitted.”

There is nothing about Paulk’s exterior appearance that would suggest the interior strength it would take to muster this kind of stamina and perseverance, much less to do so while balancing a full-time legal career. Smiling and compact, Paulk manages a busy construction law practice as well as her role as the newly-elected president of Hirschler, formerly Hirschler Fleischer, the first woman to hold the position at the firm, which was founded in 1946 and has offices in Richmond, Tysons, and Fredericksburg.

The collegiality and camaraderie of the firm has impacted Paulk’s life professionally and personally — her construction law specialty and her open water swimming are both the result of interactions she had with her colleagues.

In her early career, Paulk worked as a social security disability paralegal before deciding to attend the University of Richmond law school where she never took a construction law class. She had been on the job less than two months at Hirschler when partner R. Webb Moore, a licensed professional engineer, looked down a long empty hallway and saw Paulk standing there. “He said, ‘You just got here. You don’t have anything to do. Come with me,’” Paulk recalls. And her career as a construction lawyer was born.
When you’re hiking 15 miles a day, there’s a lot of time to think about what you’re carrying.

“I don’t think there was a hiker out there who didn’t look at their pack every day and think, how can I get it lighter?” says Bruce Matson, the Richmond-based LeClairRyan partner who completed an Appalachian Trail thru-hike in September.

But his 35-pound pack wasn’t the only thing on his mind. Matson, 61, says the hike afforded him invaluable time to reflect on a successful career, feel gratitude for his health and privileges, and plan for the years ahead.

“Any kind of exercise is important for wellness,” he says. “But I do think longer hikes bring in a mental dimension, a spiritual dimension, that is harder to capture in a 30-minute workout.”

Summiting Maine’s Mt. Katahdin at the northern end of the 2,190-mile long trail was the culmination of a life-long dream for Matson. Though he never lost a youthful interest in outdoor activities like backpacking and canoeing, it became harder to find time as career and family took over.

“The weeklong trips turn into weekend trips, which turn into day trips,” he says.

The turning point came about five years ago, when LeClairRyan offered him the position of chief legal officer, a demanding job. Matson accepted, but used the opportunity to negotiate a yearly sabbatical and six months off for this hike after five years. “I’m much more interested in time than money.”

Matson hopes to inspire others, especially lawyers, to make the time for journeys like his. A bankruptcy lawyer, he notes that, as in other types of law, you don’t always deal with people in their calmest, happiest state. And the job gets adversarial.

“I’m as guilty as anybody who’s gotten into that rat race and been more competitive, angrier than I should’ve been,” Matson says.

Long periods on one’s feet and in nature, he says, separate him from that adversarial world and help give perspective. Matson wonders if a lack of those things have contributed to increased polarization and a decline of civil discourse.

“Too many people are looking for a black or white answer,” he says. “But an awful lot of life is in the gray. It takes time to get into the gray, to see nuance and complexity. …In order to appreciate where the truth ends and uncertainty begins, I think it requires some honest, deep thinking, and I think we don’t give ourselves enough opportunity to do that.”

As for that pack he carried, it included an iPad, where daily journaling helped him remember people, places, and things along the hike that he later posted in weekly blogs. Through the difficult White Mountains in New Hampshire and scary moments descending slippery rock, Matson lightened his mental load with writing. He also lost 47 pounds.

A lawyer-heavy network of friends helped Matson raise over $130,000 for the Appalachian Trail Conservancy, which helps preserve and manage the long, skinny national park that hosts around 2–3 million hikers a year.

“There’s something special about the Appalachian Trail,” says Matson. “It’s the granddaddy of all trails.”

Blogs from Matson’s adventure and a link to his ongoing fundraiser is at returningtokatahdin.com.

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Bruce Matson Lightens his Load

by Jackie Kruszewski
In their basement offices in downtown Richmond, Tim Carroll and James Leffler get a call from a lawyer.

“I’m drunk at work,” the voice says. “And I have to be in court tomorrow.”

Leffler, a certified professional counselor, says it’s important to strike while the iron is hot when people reach out for help.

He drives out to meet the lawyer, evaluates her needs, and recommends treatment plans — outpatient, in-patient, detox. With her permission, Leffler will talk with her firm or staff, or, if she’s a solo, with local volunteer lawyers that are part of the Virginia Lawyers Helping Lawyers network, to help cover cases and workload. “And if we have a relationship with the judge, we’ll contact the court, let them know that she is working with us and she’s not going to be there tomorrow,” Leffler says.

Calls like this put Leffler and Carroll on the front line of lawyers’ first step to wellness — developing a game plan for therapy with an eye toward the specific demands of the legal profession. They opened 107 cases last year.

Lawyers Helping Lawyers’ (LHL) tireless efforts were recently buoyed by a Supreme Court of Virginia committee report, “A Profession at Risk,” released in September.1 Spurred by recent studies showing dramatically higher percentages of alcohol and drug abuse, depression and anxiety, and attempted and completed suicides among attorneys and law students, the report includes recommendations for the judiciary, law schools, the private sector, and the public sector — as well as structural and funding changes to the legal profession as a whole.

Though they see their work as the proactive component of maintaining a competent legal profession in Virginia, LHL’s work is very separate from any disciplinary work at the VSB.

“If a lawyer’s getting help with us and discipline issues do arise, [the bar is] going to be happy that the person is getting the help that they need,” Leffler says. “So, we can be an advocate for that person with the bar as well.”

Of course, most cases aren’t quite so dire as a lawyer who is not sober at work, Leffler and Carroll say. Sometimes lawyers are looking for a local marriage counselor or therapist. LHL maintains an active list of vetted counselors who work well with lawyers. (Apparently, some counselors find lawyers’ training as professional arguers to be daunting in a therapy situation, Leffler says. “You have to send a lawyer to somebody who’s a seasoned therapist.”)

They also have a network of hundreds of lawyers across the commonwealth — most of whom have their own...
experience with mental health crises or substance abuse. Carroll calls that volunteer network their “secret sauce” — critical to their ability to reach as many lawyers as they do with a staff of two. And more funding would, among other things, allow for better maintenance and cultivation of the volunteer network and lawyer-centric support groups.

“We try to match lawyers pretty closely,” Leffler says. “If somebody calls us from a small firm and they have a problem with opiates, we may hook them up with one volunteer lawyer that works for a small law firm and another one who has a problem with opiates.” He says they also try their best to match gender, age, and type of practice.

It’s important that lawyers struggling with mental health or addiction interact with other lawyers in recovery — so they can see a way forward as a healthy lawyer. “Especially in recovery from addiction, lawyers will go to a 12-step meeting and think they’re the smartest person in the room and, you know, in a lot of places they might be,” says Leffler. “But if they’re sitting in a room with a bunch of other attorneys who have been sober for three or four years and are functioning much better than they were before, and suddenly have jobs that are pretty impressive to the addicted lawyer, there’s an equalization that’s really good for them to get — to become humbler and more accepting.”

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**“A Profession at Risk”**

The September report by the Committee on Lawyer Well-being of the Supreme Court of Virginia emphasizes that the wellness crisis threatens the integrity of the profession and members of the public, as behavioral health and substance use disorders are often a factor in disciplinary actions against lawyers. “[T]he proposals in this report are conceived from a profound conviction that the personal health and wellness of legal professionals are inseparable from the duty of such professionals to provide competent services to the public and ensure its protection.”

Steps taken by the Court and the VSB:

- The Court approved changes effective Jan. 1, 2019, to the bar’s disciplinary procedure:
  - allowing the office of bar counsel to furnish confidential information to an approved lawyer assistance program like LHL to accelerate help to lawyers who need it, and
  - allowing disciplinary procedure transfer to the disabled and retired class of membership in lieu of an impairment suspension.
- The Court has also approved Legal Ethics Opinions 1886 and 1887, which discuss lawyers’ obligations when dealing with impaired lawyers.
- Most recently, the Court added Comment 7 to Rule 1.1, identifying well-being as part of competence.
- The MCLE Board of the VSB amended its Opinion 19 to encourage CLE credit for courses that educate lawyers on the many issues concerning well-being and mental health.

Further recommendations of the report include: creating a position within the Office of the Executive Secretary of the Supreme Court, providing adequate funding to LHL, and developing continuing legal education on a wide range of wellness topics. Carroll describes the report as encouraging and sees it as a path forward toward full funding of LHL’s operations.

See page 10 for VSB President Len Heath’s column about Lawyers Helping Lawyers and Virginia’s judicial lawyer assistance program.

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Endnotes:
1 Read the full report at bit.ly/professionatrisk.
Her first case was an arbitration over a very large leaking baptismal font at a church. Hirschler represented the general contractor in the suit. The arbitration actually took place at the church with some testimony inside the baptismal font, and opposing parties, counsel and witnesses all standing inside the font. Paulk won the case, and her interest in construction law was cemented (pardon the pun): “I got to try the whole thing by myself, and I thought, ‘How cool is this that you’re layering the law on top of the complexity of a construction issue and the procedural issues on top of all of that?’ And it just made the law so much more interesting to me. I really liked working with Webb and I liked the clients.”

Paulk’s open water swimming career also began at Hirschler. Though she swam competitively as a child, she stopped before high school and did not swim at all during college at the University of Mary Washington, nor in law school. Yet in 2003, when she had been at Hirschler for about a year, two of her fellow attorneys suggested they train to swim the Great Chesapeake Bay Swim, a 4.4-mile event that starts near Annapolis and ends on Kent Island, while raising money for the March of Dimes.

Paulk’s first year as a lawyer had been stressful. “I was a really busy and I thought: ‘If I don’t find something to train for, I’m not going to take time for myself or force myself to leave the office and get up early and train. I’m just going to become a captive to this job. And so, when I set that goal, I had to go swim, I got out of the office, and I met that goal.” After training for six months, at times in the Rappahannock River, Paulk completed that first open water swim and the obsession began.

Paulk explains her many swimming accomplishments by saying simply that she is “very goal-oriented,” a vast understatement, but one that has driven her to swim through smacks of giant jellyfish, herds of sea lions, pods of dolphins, and even a school of flying fish. Whales and sharks are always a risk, as are giant swells and hypothermia. Paulk says that she maintains extra weight just to help keep her warm during swims that take place in water that is usually in the low 60s.

Four of the five people who have swum double Triple Crowns are women, a fact Paulk suggests could be because, “We have more body fat and we are tougher at the five, six, seventh hour of pain, maybe because we have babies? We have learned over time how to put the pain in a pain locker, and that’s what I have learned how to do.” Paulk says her swims involve not just pain and cold, but often vomiting, as well as tongue swelling and burning lips caused by too much salt. Factor in that the swims are long, grueling and often in total darkness, and it is not surprising to learn that in her longest swim she began to hallucinate, thinking that she saw a walrus riding in her guide boat.

An only child, Paulk is married to an only child. Her husband Matt (also an attorney) is her biggest supporter, riding in the boat not only as she trains in the Rappahannock, but as she competes in open water swimming contests from Cape Cod to California to Europe. Paulk says that in addition to her support from home, Hirschler has a long-standing tradition of supporting the idea that rest and outside interests are necessary for lawyer well-being. She recalls her early days at the firm when she was working long hours preparing for an upcoming trial. The day before court, the case settled, and she returned to her office thinking, “I’ve got to get a jump on all this other stuff.” The partner in charge of the case, Rick Witthoefft, stopped by her office and said, “Go home. And don’t come in tomorrow. We would have been in court and now we are not. This is your opportunity to clear your head and take a break.”

Paulk was just recently elected president of the firm, which adds to her plate in that she must lead her firm and continue to make it a place where people want to work and where clients get the work they want. She says she was not elected to the role because she is a woman. Yet the topic of women in the law and finding parity with men at the highest levels of the profession is something Paulk takes seriously saying, “So we’re trying very hard to figure that out. In fact, I spent three hours yesterday in two different meetings trying to work through how we make sure that we’re creating opportunities for women to advance in the legal profession.”

When it comes to lawyer well-being and balancing the demands of her career with the demands of her open water swimming, Paulk says, “It’s like on the airplane when they tell you to put your mask on yourself before you put the mask on and help others. If I’m not taking care of myself, and if I’m not healthy and balanced within myself, then I’m not going to do as good a job being president of the firm.”
As I move into my 30th year of employment at the Virginia State Bar (VSB), I am given an opportunity to reflect on the significant changes in the Rules of Professional Conduct (RPC) and our regulation of the practice of law in Virginia — and how volunteer lawyers have served to shape these changes.

When I started at the VSB in 1989, we were governed by the former Code of Professional Responsibility (Code) with its Disciplinary Rules and Ethical Considerations. The Supreme Court of Virginia adopted the ABA Model Rules format on January 1, 2000, after a five-year study by a special committee, chaired first by Donald Lemons, now Chief Justice of the Supreme Court of Virginia, and succeeded by the late Dennis (“Denny”) W. Dohnal who took the task of drafting the new rules to completion. In comparing the Code to the ABA Model Rules, the special committee found itself keeping some of the old Code rules and language but adopting much more of the new Model Rule language. To this day, there remain some substantial differences between the Virginia Rules of Professional Conduct and the ABA Model Rules. Given a project of considerable scope and importance, the special committee obviously considered each rule before adopting language from the ABA Model Rules, or incorporating language from the former Code, or developing its own language for a particular rule.

The Model Rules adopted by the Court filled several gaps left in the former Code, including Rules 1.2 (scope of representation), 1.13 (organizational clients), 1.14 (clients with diminished capacity), 1.17 (sale of a law practice) and a set of rules for lawyer serving as third party neutrals in alternative dispute resolution (Rules 2.3, 2.10 and 2.11). The former Code also had no counterpart for Rules 4.4 (respect for rights of third persons), 5.1 and 5.3 (requiring supervision of subordinate lawyers and nonlawyer employees or agents), 6.3 (membership in legal services organizations), and 8.2 (criticism of judges). Virginia did not adopt some of the ABA Model Rules, for example, Rule 3.2 (expediting litigation), Rule 3.9 (advocate in non-adjudicative proceedings), Rule 5.2 (duties of subordinate lawyer), Rule 5.7 (responsibilities regarding law-related services), and Rule 6.4 (law reform activities affecting client interests).

After the Court adopted the Virginia Rules of Professional Conduct effective January 1, 2000, the Standing Committee on Legal Ethics (Ethics Committee) was charged with the responsibility of reviewing and recommending any further proposed changes to the RPC. However, any proposals to amend the RPC may originate from other committees, sections, or constituencies of the bar, followed by review and recommendation by the Ethics Committee. Since the RPC are rules of the Supreme Court of Virginia, presumably the Court could adopt a new rule or amend a rule on its own initiative. Although the Court has never done that during my tenure, it has made modifications to rule amendments proposed by the VSB and has occasionally rejected rule amendment proposals submitted to the Court by the VSB.

After a 1998 California case\(^1\) ruled that some New York lawyers committed unauthorized practice of law (UPL) in assisting a client in an arbitration in California, including work performed by the lawyers at their New York offices, state bar regulators began to study their own UPL rules in the early to mid-2000s. The VSB created task forces for corporate counsel, chaired by the late W. Scott Street III, and multijurisdictional practice, chaired by Marni E. Byrum, to study these issues and recommend changes to the RPC. Based on their work product, the Court adopted a Corporate Counsel rule to authorize out-of-state lawyers to serve their employers in Virginia and do pro bono work; and amended Rule 5.5 to allow out-of-state lawyers to engage in temporary practice in Virginia subject to certain conditions. These amendments, adopted in most other states, have given lawyers greater mobility and flexibility in multijurisdictional practice, without the necessity of seeking reciprocity or admission by examination into another state’s bar.

In more recent times, the VSB discontinued its Advertising and UPL committees, finding that the work of both committees could be handled by staff under the supervision of the Ethics Department and the Standing Committee on Legal Ethics. New rules were added to the RPC, including Rule 1.18, which addresses conflicts created by discussions with prospective clients and allows screening to avoid imputation, and Rule 5.8 that sets out rules for notification to clients when a lawyer leaves a law firm.
HOW VIRGINIA LAWYERS SELF-REGULATE

There were significant changes in the manner that the VSB and the Court promulgate new rules, amendments to the RPCs, and Legal Ethics Opinions (LEOs). When I started as ethics counsel, in 1995, LEOs were issued by the Standing Committee on Legal Ethics, and they were effective when issued, although they were non-binding and advisory only. There was no opportunity for public comment, except in rare instances where the particular LEO was sent to the VSB Council and the Court for approval. Now, all LEOs must be reviewed and approved by Council and the Court before they become effective. Once the Court adopts a LEO, it has the effect of a decision of the Court. The Committee releases a proposed LEO and publishes it for public comment to start the promulgation process. This same procedure is required for new rules added to the RPC or rule amendments. This enables the committee to consider comments that have been made before submitting the proposed LEO or rule amendments. This process slows down the pace of the rule-making and LEO promulgation, but it results in a more deliberate and thoroughly vetted rule or LEO.

A more recent and noteworthy change is a national movement that focuses on lawyer well-being. This movement grew out of two studies published in 2016 revealing that lawyers and law students are 2–3 times more likely to suffer from anxiety, depression, substance abuse, and suicide than the general population. Based on these studies, the Ethics Committee issued two LEOs, 1886 and 1887, which discuss a lawyer’s ethical obligations when faced with a lawyer that appears to have impairment. A national task force on lawyer well-being issued a report2 in August 2017 urging a call to action by all stakeholders in our legal system — regulators, insurers, law schools, lawyers’ assistance programs, judges, public and private employers, admissions officials — to address what might be described as a “wellness crisis” for the legal profession. Our Chief Justice Donald Lemons and Katie Uston, assistant bar counsel, sat on that national task force, so Virginia is playing an active role in this movement. Our Supreme Court appointed a Committee on Lawyer Well-Being chaired by Justice Mims which issued its report3 in September 2018 recommending changes designed to improve lawyer well-being. The most significant change is a call for increased funding of Lawyers Helping Lawyers, a Virginia non-profit organization whose clinician, executive director, and 150 lawyer volunteers throughout the state help lawyers with mental health and substance abuse issues get assessments, referrals, support, treatment, and counselling. Another important recommendation is mandatory continuing education to improve lawyers’ awareness and knowledge of wellness, and to learn how to reach out and be proactive when we see a colleague at risk. To this end the VSB is amending its MCLE rules and regulations to enable lawyers to earn MCLE

Most importantly, the overhaul of the lawyer advertising rules rebalances the VSB’s interest in policing advertising that is false and misleading with the lawyer’s right of commercial speech, by removing technical and unnecessary requirements that do not advance an important regulatory objective.

to read. Their work product, if adopted by the Court, will produce a more user-friendly regulatory document for judges, lawyers, and members of the public to follow. The proposal may be studied here: www.vsb.org/docs/prop-UPL-050318.pdf

The VSB currently has four full-time lawyers and an executive assistant working the Ethics Hotline and serving several committees and task forces. The Ethics Department is now a separate operation that reports to the executive director and is no longer a part of the Professional Regulation Department. The Ethics Department resides on a different floor and has separate, restricted servers to maintain the confidentiality of all its data. On average, the Ethics Hotline gets 25–30 inquiries per day by telephone or email (ethicshotline@vsb.org). Lawyers can access the hotline at the VSB website here: www.vsb.org/site/regulation/ethics. Lawyers may expect a response within hours of their inquiry and generally on the same day.

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credit for courses that focus on lawyer wellness issues. The Ethics Committee had already embraced a recommendation of the national task force to amend Rule 1.1 (competence) to call attention to the fact that well-being is an aspect of providing competent representation to clients; and the fact that lawyers must be aware of the role of well-being in maintaining competence to practice law. The proposed amendment was submitted to the Court in June 2018.

As I grow closer to the end of my career at the VSB, I am extremely grateful to all the volunteers that have served the VSB as members of its many different committees and task forces. The Ethics Committee, though, has enjoyed most of my time and attention. The Ethics Committee, currently chaired by Eric Page, struggles with some of the most difficult questions on a regular basis. All the easy questions have been asked and answered. The “black and white” situations do not go to the Ethics Committee. The committee’s composition changes regularly but the VSB has kept diversity in the forefront. Every volunteer that has served on the committee and has shared their opinion with me has said that serving on the committee was by far the most fulfilling and intellectually stimulating experience of all their service to the bar. That committee has the important responsibility and privilege of drawing the ethical boundaries in which lawyers practice law by interpreting and applying the RPC to a given factual scenario and by recommending changes to the rules when necessary.

The ability of members of the bar to write and enforce the rules by which they are governed is a unique privilege, especially when compared to how other occupations and professions are regulated. But the privilege of self-regulation has its price — the sacrifice of the time, hard work, and talent of the many wonderful volunteers who contribute to maintaining public confidence in our bar as a profession, not a business. The price of self-regulation also demands that we advance the availability and quality of legal services provided to the people of Virginia; and to assist in improving the legal profession and the judicial system.

I look forward to a few more years working with the Ethics Committee and my hard-working, talented and energetic colleagues: Kristi Hall, Emily Hedrick, Barbara Saunders, and Seth Guggenheim. Each of them, in addition to handling the Ethics Hotline, wear other special hats in serving other committees, task forces, and sections within the VSB. In addition, they all write articles, teach CLE seminars, draft opinions, and provide resources on legal ethics to the VSB website. Kristi Hall, our executive assistant, coordinates, supports and interacts with all of our VSB staff internally and with our lawyer volunteers externally; and she keeps our operation running smoothly and effectively. They do all of this consistently with enthusiasm and professionalism. I am grateful for their support, comradery, and friendship.

Endnotes:
1 Birbrower, Montalbano, Condon & Frank v. Superior Court, 2 Cal.3d 535, 543, 86 Cal.Rptr. 673, 469 P.2d 353 (1998)
2 www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf
3 www.vsb.org/docs/A_Profession_At_Risk_Report.pdf
4 See page 67 for a committee preference form. President-elect Marni E. Byrum seeks volunteers to serve on committees, including legal ethics.
Who Is the Client?
Ethical Obligations When a Third Party Pays the Client’s Legal Fees or Attempts to Influence Representation of the Client

by Seth M. Guggenheim, assistant ethics counsel for the Virginia State Bar

A scenario:
Angel, 17 years old, was charged with fraudulently obtaining food “from a restaurant or other eating house” in violation of Section 18.2-188 of the Virginia Code. He was observed running out of Celestial Pizza with two other boys without paying for food and beverages. Angel tripped and fell in front of a police car stopped at a traffic light just outside the restaurant. The two others kept running and were not apprehended. The restaurant manager, in hot pursuit of the trio, alerted the police officer in the cruiser to the situation. Angel was arrested.

Faith, Angel’s mom, picked him up at the police station. He told her that he was grabbing a bite at Celestial Pizza with two boys whom he had just met that day after school. He told his mom that one of them, nicknamed Pinky, left the table with the check, stating that he was “treating,” and was going to the cashier to pay. Pinky returned in five minutes and said “We’re good! Let’s go!” Angel told his mom that they left the restaurant and ran across the intersection because the light was about to change.

Faith called Sy Anara, a lawyer who defends high-end traffic and low-end criminal charges. He had represented her husband in a DUI and was the only lawyer’s name she had handy. Faith relayed what Angel had told her about the matter and made an appointment for Angel. Faith took Angel to the appointment, and Sy asked her to wait in the lobby so that he could speak to Angel privately. Faith demurred, exclaiming “I’m his mother!” and was insistent that this was a “family matter.” She further observed that if she was going to pay Sy for representing Angel, Sy should “get with the program” and allow her to join her son in Sy’s office for the interview.

Sy remembered having attended a CLE with a segment entitled “Who’s the Client?” and thought that there might be ethical considerations in play if he permitted Faith to sit in and participate in a consultation with Angel. Sy asked Angel and Faith to wait for him in the lobby. He went into his office and called the Virginia State Bar Ethics Hotline. After describing the situation to the ethics counsel staffing the Hotline, Sy was invited to look at three Rules of Professional Conduct:

RULE 1.6 Confidentiality of Information
(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

RULE 1.8 Conflict of Interest: Prohibited Transactions
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client consents after consultation;
(2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6.

RULE 5.4 Professional Independence Of A Lawyer
(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.

Ethics counsel observed that in this situation Angel would be the client, that the attorney-client privilege should be preserved, and that Angel should have the privacy and confidentiality necessary for him to feel comfortable telling Sy the truth, without his mother’s interference, coaching, or insistence that a particular course be taken in the representation of her son. Sy was also told that Angel, being 17 years old, was not by reason of his minority a “client with impairment” calling for protective action authorized under Rule 1.14. ‘Ethics counsel recommended that Sy state to Faith and Angel that he spoke with the Ethics Hotline and was told that he should meet with Angel privately, after which time the decision could be made as to whether Faith might join them.

Sy followed ethics counsel’s recommendation. Faith was indignant and stated that she found it “reprehensible” that any lawyer would deny her the “right” to participate fully in determining what was best for her son and how he should be represented. She told Sy that he had wasted Angel’s and her
time, and she abruptly left Sy’s office with Angel in tow. Sy Anara said goodbye as they were leaving.

Through a close friend and confidant, Faith obtained the name of another lawyer, Mort Gorboduc. She called Mort and relayed the “facts” of Angel’s case. Without naming names, Faith told Mort that she had just had a bad experience with another lawyer who would not even let her in the room where her son would be interviewed. She asked, point blank: “You would not force me to sit outside while you talked to Angel, would you?” Mort said that of course he would not, and an appointment was scheduled.

During Angel’s and Faith’s conference with Mort, Angel was invited to relay what happened which led to his arrest. The version of events Angel gave Mort was the same one he had given to his mother. When questioned by Mort, Angel stated that he made no statements of any kind to the police or the store manager which might be interpreted as a confession of wrongdoing. Mort confirmed from Angel and his mother that Angel had no criminal record.

Mort then told Faith and Angel that he would “investigate” by contacting the restaurant manager to see what he had to say. Faith intervened abruptly, stating “My son is telling the truth!” and that she didn’t care what the restaurant manager might say because it would be a “pack of lies” which he would come up with so that he wouldn’t be sued for having had his son falsely arrested. Faith told Mort that Angel was a top student, and Mort asked Angel to come by in the next few days with a copy of his recent report cards, so that he could show them to the prosecutor in an effort to get the charges dropped based on this “regrettable misunderstanding.”

Mort promised Faith that if the prosecutor would not drop the charges voluntarily, and if there were to be a trial, her son’s plea would be “not guilty” and that Angel would tell his story, under oath, to the judge. Faith wrote a check to Mort for his $1,500 fixed fee, and she and Angel left the office.

Several days later, Angel appeared by himself in the lobby of Mort’s office. He told the secretary that he had come with the requested report cards but would also like to see Mr. Gorboduc if he could. Mort was free at that time, and he asked Angel to come in, close his office door, and sit down. Angel turned over his report cards, which indeed disclosed that he was a fine student. Angel then, haltingly, told Mort that he hadn’t slept a wink since the last appointment and was worried about the prospect of a trial where he would testify. Mort said that he would try his best to avoid having a trial, but that there would be no guarantees. Angel then said, “Mr. Gorboduc, please tell me that if I tell you the truth about what happened, you won’t breathe a word of it to my mother.” Mort promised that he wouldn’t and that the conversation they were about to have would be held in strict confidence.

Angel then told Mort that he was with his good friends Danny and Bob after school and that, between them, they only had $8.00, but were “dying” for a pizza and some Cokes. They decided that they would find a table close to an exit door at Celestial Pizza, order what they wanted, and then make a quick break before the check came. That was exactly what they did. Angel said that when he fell down in the intersection, he blurted out to the manager that he was sorry, tried to give the manager the $3.00 he had in his pocket, and begged not to be arrested, claiming that he would return with the full amount of the bill if he were let go. Angel said that he was mortified, and still is, that his mother would find out the truth, and that he had lied to Mort on his last visit because he had already lied to his mother and he couldn’t tell the truth with his mother sitting right there.

Gorboduc felt stuck. He thanked Angel for his candor and stated that he would have to think about next steps. He told Angel that he would be in further touch with him and suggested that Angel provide his cell phone number so that they could have a further private conversation. After Angel left his office, Mort called the Hotline and explained the situation. Ethics counsel invited Mort’s attention to the three Rules of Professional Conduct set forth above. Mort quickly realized that he had not complied with Rules 1.8(f) and 5.4(c).

Mort learned from the Hotline what he already knew: he could not have Angel testify to his original false version of events in violation of Rules 1.2(c), 3.3(a), and 8.4(c), and Mort himself could not make false statements to prosecutors or others in violation of Rule 4.1(a). Mort was also told that Rule 1.6(a) prohibited him from revealing to Faith the “truth,” which Angel had specifically requested be held inviolate.

After speaking with ethics counsel, Mort concluded that his continued representation of Angel would have to be governed by Angel’s own stated objectives and decisions and Mort’s independent professional judgment. If Angel insisted on a course of action which would require that Mort violate a Rule of Professional Conduct, Mort would have no choice but to withdraw from representation under Rule 1.16(a)(1), but Mort would be prohibited from revealing to Faith the reasons why he must withdraw.

The foregoing scenario, while hypothetical, represents the ethical trap lawyers may fall into in other contexts: the adult child who takes her elderly mother to a lawyer for a will or power of attorney, and informs the lawyer of what “mom wants”; the employer who generously offers to pay a favored employee’s legal fees charged by the employer’s lawyer to defend an “unfair and untrue” criminal charge; and, a sibling who takes her sister to, and sits in on, the sister’s consultation regarding a custody dispute based on “outrageous allegations” which can lead to well-taken allegations made by the sister’s husband concerning an extramarital affair.

Aside from questions which may arise in some contexts as to whom the client is — which can lead to well-taken allegations of conflicts of interest — the lawyer who cedes control of his or her independent professional judgment, and subordinates control of the client’s legal interests to a non-client, commits ethical misconduct. Even when a written engagement agreement is not required by the Rules of Professional Conduct, the prudent lawyer will have one. When a non-client is paying for the lawyer’s services to the client, the agreement should be signed by the client and the non-client, identify...
Confidentiality and Conflicts

by Barbara B. Saunders, assistant ethics counsel for the Virginia State Bar

One of the most, if not the most, common ethical dilemmas that lawyers face is how to identify and address conflicts in the representation of clients. And one of the most common bases for a conflict is the lawyer’s duty to preserve and protect the confidentiality of a client’s information. Situations that highlight these particular conflicts are those involving representation of a current or prospective client who is or may be adverse in some manner to a former client, and those involving two current clients becoming adverse to one another, as in the case of one client wanting or needing to testify against or provide information adverse to another current client.

With regard to a conflict with a former client, Rule 1.9 of the Rules of Professional Conduct will control. There are two prongs to the analysis under Rule 1.9. The first is outlined in paragraph (a)1 of the rule and involves determining whether a new representation involves the same or a substantially related matter as the representation of a former client, and whether the interests of the new client are directly adverse to the former client. Another way of thinking of this is: Does the new representation involve the lawyer switching sides in the same case? If the answer to any of these questions is “yes,” then the lawyer has a conflict and cannot undertake the new representation unless consent from both clients involved can be obtained.

The second prong of the analysis under Rule 1.9 is application of paragraph (c),2 which operates independently of paragraph (a) and any consideration of whether the matters are the same or substantially related or whether the former client is adverse to the new client. Under Rule 1.9 (c) a lawyer has a conflict with a former client if the lawyer would have to “use” or “reveal” confidential information of a former client to the former client’s detriment in order to carry out the representation of the new client. In other words, the confidential information that the lawyer learned while representing the former client is information essential to the representation of the new client and to not use it or to reveal it impairs the representation of the new client. In such a situation, the lawyer cannot take on the new representation. Protection of client confidential information is always the priority.

The other common situation in which protecting client confidential information may create a conflict is when two current clients become adverse. One example that frequently occurs is when a lawyer is representing two criminal clients in unrelated matters and Client A tells the lawyer that he has information that can be used against Client B and Client A would like to provide this information to law enforcement or prosecutors in order to benefit himself in his own case. Legal Ethics Opinion 1882 addressed the conflicts that arise in this situation and how and whether the conflicts can be resolved:

There is no doubt that the lawyer has a conflict in this scenario when A expresses his desire to offer incriminating information against B, and cannot continue to represent both A and B. The lawyer is unable to advise A on this topic because any advice that would further A’s interests would be detrimental to B’s interests.3 Meanwhile, the lawyer cannot satisfy his duty of communication to B because he cannot reveal the important information that A is attempting to offer evidence against B, since that information was learned in the course of the lawyer’s representation of A and is therefore confidential. The conflict cannot be cured, both because the lawyer could not provide competent and diligent representation to both clients and because the lawyer could not disclose the information necessary to obtain informed consent from both clients without revealing information that is detrimental to one or both clients.

The more difficult question is whether the lawyer may continue to represent either A or B after withdrawing from representation of the other. According to Comment 4 to Rule 1.7, when a conflict develops between two clients, “whether the lawyer may continue to represent any of the clients is determined by Rule 1.9.” In this hypothetical, where A’s information involves the matter in which the lawyer is representing B, withdrawing from client A’s case does not cure the conflict. The lawyer will still have information from A that he would otherwise be required by Rule 1.4 to communicate to B, but which is confidential as to A, so his ability to fulfill his obligations to B is “materially limited” by his duties to A. The lawyer’s duty of confidentiality to A under Rule 1.9 (c) will also likely render him unable to cross-examine A if A does ultimately become a witness against B. At first blush, it appears that withdrawing from representation of B, and continuing to represent A, may cure the conflict because, as Comment 4 to Rule 1.7 explains, B would become a “former client” and the conflict would therefore be analyzed under Rule 1.9, which does permit some instances of adversity between a current client and a former client, rather than Rule 1.7. In this hypothetical, though, there would still be a conflict even if B were a former client, because A’s offered information involves the same matter in which the lawyer represented B, and Rule 1.9 (a) prohibits the lawyer from taking action adverse to B in the same matter in which he previously represented him.

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Representing Clients with Diminished Capacity

by Emily F. Hedrick, assistant ethics counsel for the Virginia State Bar

It is not uncommon for lawyers to find themselves representing clients with mental health issues and possibly diminished capacity. Sometimes that diminished capacity is the subject matter of the proceeding, such as in a guardianship matter, and sometimes it becomes relevant in an otherwise-unrelated legal matter when it becomes clear that the client may lack the capacity to make decisions or enter into agreements. Or a client, with or without known mental health issues, may tell her lawyer that she intends to attempt suicide. (A client may also lack the capacity to make decisions or enter into contracts because she is a minor under the age of 18, but the issues of representing children are beyond the scope of this article.) In all of these situations, lawyers might feel confused about their roles — does the duty of confidentiality prevent the lawyer from disclosing a client’s suicide threat? Does it prevent a lawyer from telling medical providers, family members, or even the court that the client may not be competent to make her own decisions? Is the lawyer required to abide by the client’s instructions even if they appear to be harmful to the client?

Rule 1.14 provides some guidance to lawyers who are dealing with these issues. The first paragraph of the rule provides that the lawyer shall maintain a normal client-lawyer relationship with a client with diminished capacity as far as reasonably possible. On the other hand, paragraph (b) establishes that if the client with diminished capacity is “at risk of substantial physical, financial or other harm” unless action is taken, and the client is unable to act in her own interest, the lawyer may take “reasonably necessary protective action” and, per paragraph (c), may disclose confidential information as reasonably necessary to protect the client’s interests.

The rule does not attempt to specifically define when a client has diminished capacity that is significant enough to trigger the rule, nor does it dictate what protective actions will be appropriate in a particular case. The rule intentionally leaves those specifics to the lawyer’s judgment, as the lawyer is the one best positioned to evaluate the client’s issues in the context of the matter the lawyer is handling, as well as what actions will best serve to protect the client’s interests if necessary. It can often be difficult to distinguish between a client making poor decisions, or decisions that the lawyer does not agree with, and a client who lacks the capacity to act in her own interest. This is a matter for the lawyer’s best judgment, with due consideration to the stakes of the matter and of disclosure of the lawyer’s concerns.

Once the lawyer decides that protective action is necessary and appropriate, the question becomes what actions are called for? The lawyer has to consider both what is appropriate within the context of the client’s matter — for example, moving directly to a petition for guardianship may be appropriate when a large financial transaction is involved and the client is clearly not competent to handle it, while a more incremental approach may be best when the stakes are lower and there is time to gradually talk to family and friends, and try to persuade the client to get help — and what options are realistically available. While a frequent first step is to talk to supportive family members or friends or try to convince the client to authorize communications with medical providers, that option is obviously not going to be available if the client has no such friends or family (or the lawyer doesn’t know who they are) and is not under the care of any professionals.

The lawyer has to evaluate what options actually are available, and from there determine what will best serve to protect the client’s interests, keeping in mind that he should generally choose the least restrictive option available. Even action that is necessary to protect a client’s interests will involve disclosures that may be embarrassing to the client and may involve or lead to actions that restrict the client’s autonomy, including involuntary commitment and loss of financial and legal decision-making. The lawyer must proceed carefully and with thorough consideration of the costs of any protective action when making the decision to intervene.

Two specific situations that occur frequently are when a client expresses the intent to commit suicide, and when a client shows signs of being incompetent to stand trial in the course of a criminal proceeding. Rule 1.14 allows the lawyer to take necessary protective actions in both cases. For the suicidal client, those protective actions will depend on the immediacy of the threat and the resources available to the client — this could include contacting mental health providers and/or friends or family in less urgent cases or contacting the police or other authorities if immediate intervention seems necessary. When the situation involves a possibly incompetent client in a criminal matter, the lawyer undoubtedly can and should bring the matter to the court’s attention and request a competency evaluation for the client. If a competency evaluation is ordered, the lawyer may disclose relevant information to assist the evaluator, even though that information would otherwise be confidential.

Another common situation is when the client may need a guardian appointed — whether the lawyer decides on her own that this is a necessary protective action, or a family member or other concerned party asks the lawyer to pursue a guardianship for the client. As LEO 1769 explained, Rule 1.14(b) allows the lawyer to serve as petitioner herself when a guardianship is a reasonably necessary protective action, but the lawyer cannot represent a third party as petitioner against a current

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Diminished Capacity continued from page 45

client. Rule 1.14(b) essentially creates an exception to the ordinary rule that a lawyer cannot take any action adverse to her current client, but that exception does not extend to representing third parties who are adverse to the client. If the allegedly incapacitated person is a former client, the lawyer must apply Rule 1.9 to determine whether there is a conflict to represent a third party petitioning for guardianship over the former client.

Confidentiality continued from page 44

In a different situation in which A’s information about B is completely unrelated to the matter in which the lawyer represents B, continued representation might be permissible under Rule 1.9 (a), but the lawyer would have to carefully analyze any confidential information obtained from B during the course of the representation; if any of that information were relevant to the lawyer’s continued representation of A, there would be a conflict under Rule 1.9 (c) notwithstanding the fact that the subject matter of the representation is different. For example, if the lawyer represented A in a robbery matter and B in an unrelated drug matter, and A had information regarding an uncharged homicide committed by B, A’s information would be unrelated to the lawyer’s representation of B, and therefore would not implicate Rule 1.9 (a) if the lawyer withdrew from representation of B on the drug offense and continued to represent A in his robbery matter, including offering information about B’s involvement in the homicide. The lawyer would still have to apply Rule 1.9 (c) to determine whether his duties of confidentiality to B would limit his ability to continue to represent A.

Conflicts such as these are challenging and, when they arise, must be addressed and resolved in accordance with Rules 1.7 and 1.9, even if this means the lawyer must withdraw from representation of all clients involved. If withdrawal is necessary, the lawyer must advise the client/s, but likely will only be able to say that a conflict has arisen that requires the lawyer to withdraw. By the very nature of the conflict, the lawyer cannot disclose the details because to do so would require disclosure of confidential information. The same is true for the content of any motion to withdraw filed with the court. The lawyer cannot disclose confidential information relating to the conflicts even to the court. The lawyer still has the duty of confidentiality and must present the matter to the court in as neutral language as possible. When a lawyer files a motion to withdraw, and before the matter gets before the court, there is no exception under Rule 1.6 to allow disclosure of confidential information without the consent of the client. If, when hearing the motion, the court demands more information and a lawyer’s argument to preserve confidentiality is not accepted, then the lawyer can disclose, as necessary, confidential information to comply with the court’s order. (Rule 1.6 (b)(1)).

Endnotes:

1. A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.
2. A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
   1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
   2) reveal information related to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.
3. See, e.g., Hoffman v. Leake, 903 F.2d 280, 286 (4th Cir. 1990) (“It is difficult for us to understand, and indeed we do not, how advising one client to give a statement and testify to the essential elements of a crime allegedly committed by a second client is not a conflict of interest.”)

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the lawyer’s ethical duties to the client, and should specify whether any unearned fees refundable at the termination of the attorney-client relationship are to be remitted to the client or to the third party who advanced them. ☜

Endnotes:

Pro Bono Awards Celebration Honors Volunteer Legal Service

Over 200 attendees, including several members of the judiciary and the executive directors of various Virginia legal aid organizations, attended the Pro Bono Awards dinner and ceremony on October 17 at the Waterside Marriott in Norfolk.

The Virginia Poverty Law Center co-sponsored the evening, which followed a day of legal aid-related seminars and CLEs. The Virginia State Bar’s Access to Legal Services Committee organizes the annual dinner to honor extraordinary contributions by Virginians to pro bono legal service in their communities.

Andy Nea of Williams Mullen was awarded the Lewis F. Powell Jr. Pro Bono Award for his dedicated years of service at the firm — and in his retirement. And the Prince William County Bar Association received the Frankie Muse Freeman Organizational Pro Bono Award.

Brad Marshall, the 2017 president, accepted the award on behalf of the association, lauding members’ dedication to the bar’s many pro bono and low-bono programs. Nea spoke of finding success developing clinics and opportunities for lawyers to simply and comfortably volunteer their expertise.

Eve Runyon, president and CEO of the Pro Bono Institute, gave the keynote speech, sharing wisdom and best practices from her years as a leader in access to justice initiatives.

“No matter how diverse the stories, we are united around principles of due process, equal access, and justice for all,” said Runyon. “We are all in this together, and though our challenges may be great, the efforts of our collective are cause for celebration.”

Learn more and see more photos at bit.ly/PBawards.
At its meeting on October 26, 2018, in Newport News, the Virginia State Bar Council heard the following significant reports and took the following actions.

**Rule 1.10, Imputed Disqualification: General Rule**
The council unanimously approved proposed amendments to Rule 1.10 which provides that a conflict is not imputed to other lawyers in a firm when the conflict arises from a personal interest of the affected lawyer and does not present a significant risk of materially limiting the representation by other lawyers in the firm. The proposed revision also adds Comment 3, an ABA Model Comment that gives examples of the types of personal interest conflicts that might or might not affect other lawyers’ ability to represent a client. Under the proposed rule, a lawyer’s personal relationship with a witness involved in a case, for example, would not create a conflict for other lawyers in that firm unless those lawyers’ relationship with the conflicted lawyer would materially limit their own representation of the client. The proposed amendments also add Comment 4, an ABA Model Comment that is unrelated to the proposed change to Rule 1.10(a). This comment explains the imputation rules for nonlawyers in a firm and provides helpful guidance that is consistent with existing LEO 1800. The proposed changes will be presented to the Supreme Court of Virginia for approval.

**Rule 1.8, Conflict of Interest: Prohibited Transactions**
The council unanimously approved proposed amendments to Rule 1.8 to say that: (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter, and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. The proposed amendment, allowing the advancement of costs and expenses to be contingent on the outcome of the matter, would bring Virginia’s rule in line with at least 47 other states that have adopted the ABA Model Rule on this topic. The proposal also adds Comment 10, an ABA Model Comment that explains the rationale for the prohibition on providing financial assistance as well as the permissible exceptions. The proposed changes will be presented to the Supreme Court of Virginia for approval.

**Statutory Amendments Regarding the Judicial Candidate Evaluation Committee**
The council unanimously approved proposed amendments to the Virginia Code creating narrow exemptions that preserve the confidentiality envisioned by the current and proposed JCEC Procedures and Policies. Such confidentiality is necessary for the JCEC to conduct full, frank, and fair investigations, interviews, and deliberative assessments of each candidate for judicial office. The JCEC’s executive summaries remain subject to disclosure. The proposal is subject to approval by the Supreme Court of Virginia before forwarding to the Virginia legislature for consideration.

**Rules of the Supreme Court of Virginia Part 6, § IV concerning the VLRS**
By a vote of 54-2, the council approved an amended proposal to codify and revise the existing rules of the Virginia Lawyer Referral Service (VLRS) at Part 6, § IV of the Rules of the Supreme Court of Virginia. The proposal of the Special Committee on Lawyer Referral recommended changing the VLRS fee structure to a “percentage fee” program. Council amended the proposal to waive the percentage fee on fees of $499 or less collected by panel members from clients. The proposed changes will be presented to the Supreme Court of Virginia for approval.

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Please make sure you are getting our monthly VSB News and annual member compliance messages by adding vsbnews@vsb.org and MCLE@vsb.org to your email contacts.

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Diversity Conference Hosts First Annual Forum

“By being inclusive ... we say to every citizen of Virginia that we see you, we hear you, and, in the words of Langston Hughes, we acknowledge that you, too, sing America,” said Supreme Court of Virginia Justice Cleo E. Powell at the University of Richmond School of Law on November 9.

Powell kicked off a day of panels about diversity in the legal profession, the Diversity Conference’s first annual forum and CLE. More than 60 lawyers learned about the changing demographics in Virginia, diversity in hiring, patriotism, and other topics. Keith and Dana Cutler, trial lawyers from Kansas City and stars of Couples Court with the Cutlers, headlined with a presentation about implicit bias and the language of inclusion.

1: Supreme Court of Virginia Justice Cleo E. Powell speaks on the impact of diversity in the administration of justice while VSB President Len Heath looks on.
2: VSB Diversity Conference Chair Luis A. Perez welcomes guests.
3: Keith and Dana Cutler lead the crowd in an exercise in understanding implicit bias.
On October 15th, the Virginia Holocaust Museum (VHM) and the Virginia Law Foundation co-hosted a luncheon at which the 2018 Rule of Law Award and Civility in the Law Award were given to Michael W. Smith of Christian Barton and the Honorable Jane Marum Roush (ret).

A central lesson of the Holocaust is the criticality of the Rule of Law in the preservation of civil societies. This program, established by the VHM’s Nuremberg Courtroom Committee and the Virginia Law Foundation, honors individuals whose life and work emulate the highest ideals enshrined in the principals of the Nuremberg Military Tribunal and later the International Court of Justice.

As Former VSB President Irving M. Blank noted, “This annual event recognizes individuals who have made extraordinary contributions to the concept of the rule of law and who demonstrated the importance of civility in the law.”

The honor was conferred upon Mike Smith for his years of leadership at the bar and his defense of the independence of the judiciary. With respect to the Honorable Jane Marum Roush, Blank noted that her “…entire career has been the embodiment of civility.” An enthusiastic audience agreed.

Blank applauded Roush’s many achievements, recounting that her performance in the Malvo sniper trial, the dissolution of the family business that owned the Kyanite Mining Corporation and the Cavalier Hotel, as well as other high-profile cases, earned her rave reviews from the defense attorneys, plaintiffs’ attorneys, and most of the litigants who appeared in her court.

W. David Harless, a former president of the VSB and Smith’s law partner, introduced Smith. Harless noted Smith’s actions in defending our judiciary and judicial system through a public comment that was published nationally in August 2016 by a number of news services. Smith wrote an article entitled Intimidating Judges Puts the Rule of Law at Risk for All of Us, when he served as the president of the American College of Trial Lawyers.

In his article, Smith recounted his time as a law clerk for United States District Judge Robert R. Merhige Jr. in 1969 in Richmond. It was a time of much turmoil surrounding the desegregation of the Richmond area schools, which Judge Merhige proposed and later ordered.

Opposition was fierce: Judge Merhige was attacked publicly and burned in effigy. The Merhiges received death threats. Threats to abduct their young son were commonplace; the family dog was shot in their yard; and, an arsonist burned a portion of their property. Smith and his fellow law clerks hid pennies on Judge Mehrige’s car each morning and checked them each afternoon to make sure that the car had not been tampered with.

As for the current relevance of these events, he observed:

“The assault on judicial independence that reared its ugly head with the desegregation cases was extreme. However, there are many examples that are more subtle. … Intimidation may show its face in the form of those who hold positions of power in government, and are unhappy with a court’s decision, quietly manipulating the legislature or others in a way not advantageous to the court system. Lately, we have observed what seems to be an increase in manipulative activity from politicians and leaders. We have seen it come to bear openly and with hostility during judicial elections, and in efforts to cut salaries and courts’ authority.”

In his acceptance remarks, Smith reminded the audience that it was Justice Robert Jackson, the chief prosecutor at the Nuremberg trials, who defined the Rule of Law simply, saying: “The Rule of Law is our most important principle. Patriots should always defend the Rule of Law, even when it is not in their immediate self-interest to do so.”

Rule of Law Award continued on page 52
Edward L. “Ned” Davis remembers his first day at the Virginia State Bar very well — in December of 1993. His new position as assistant bar counsel had been vacant for some time, and there were only seven discipline lawyers in the state — with more cases than there are now.

“I’ll just never forget — there were these lateral files sitting in several credenzas with red dots at the corner and dust on the top,” he says. They were open cases of the highest priority. “It was just an immediate sense of urgency,” he says. “That in a nutshell is what I remember: When the concrete on my eyelids got so heavy that I couldn’t keep them open, I walked down to the street to go home,” he says. “It was like that for several weeks.”

After 25 years, Davis is retiring from the VSB as bar counsel, the head of the department of professional regulation, at the end of December.

Early on, Davis prosecuted many high-profile cases involving receiverships and other complex matters. He was promoted to the position of bar counsel in 2008, and the volume of open cases was steadily reduced during his tenure, despite a reduction of staff.

“We’re so grateful to Ned for his years of service at the bar,” says Executive Director Karen Gould. “It’s been an honor to work with him.”

The department of professional regulation investigates and prosecutes lawyers in professional misconduct matters and oversees the regulation of legal ethics, lawyer advertising and solicitation, and the unauthorized practice of law.

Asked what he wishes Virginia lawyers understood about his department’s work, Davis is quick to reply. “We don’t look for ways to punish lawyers,” he says. “We don’t. We really want lawyers who are reported to the bar to become better lawyers.”

Cases are evaluated objectively, he adds. And the department takes its guidance from the Standing Committee on Lawyer Discipline and the Supreme Court of Virginia. “There are some people that just have to go because they’re thieves,” Davis says. “Or they display an absolute, conscious disregard for the needs of their clients.”

But the department looks for ways to work with lawyers that come to their attention.

“I believe in taking care of people,” Davis says. “I believe in devoting 99 percent of my time to working cases to ensure that they are processed properly. And if you take care of people and instill the same ethic in them to move cases properly and protect the public, the rest has a way of taking care of itself.”

Before coming to the bar, Davis was deputy commonwealth’s attorney for York County and the City of Poquoson and practiced criminal defense and domestic relations in a Richmond law firm. He also served six years on active duty in the U.S. Army Judge Advocate General’s Corps, and he transferred to the Retired Reserve when he became bar counsel. He retired from the U.S. Army in 2013. Davis is grateful for a state policy that allowed for military leave, so he could continue his service to his country.

Davis, 65, says he doesn’t have any grand plans for retirement — he’s looking forward to spending more time with his wife and family, enjoying the last few years of two of their five kids living at home. He will continue to teach Sunday school, as he has for 20 years, and he hopes to do pro bono work — for military veterans and, after a required waiting period, for lawyers defending themselves against a bar complaint.

“I would get a tremendous amount of satisfaction out of helping somebody who doesn’t know where to turn and doesn’t have the money to hire a top-flight attorney,” he says.

But he doesn’t plan to return to private practice, “because if I do, I’ll like it too much, and then I may as well not be retired.”

Davis’ replacement will have to be approved by bar council and the attorney general of Virginia. Kathryn Montgomery, deputy bar counsel, will serve as interim bar counsel until a decision has been made and approved.

“We just have a great group of people here,” Davis says of his staff. “It’s never been better.”

“He will be a tough act to follow,” says Gould. “But his successor will thank him for the great shape the dockets are in and for the wonderful employees and prosecutors in the professional regulation and intake departments.”
But he offered a striking warning about the frailty of the Rule of Law:
• It is frail because we too often take its protections for granted;
• Frail because there is no standing army at its call to protect it against a would-be despot;
• Frail because it can exercise no power of the purse;
• Frail because it cannot speak and has no method of persuasion; and,
• Frail because history tells us that its constraints are subject to being hijacked and changed by those seeking to unilaterally overcome them to gain power for themselves.

Important words, which clearly struck home with the attendees at the ceremony.

Sharon D. Nelson is the president of Sensei Enterprises Inc., a legal technology, cybersecurity, and digital forensics firm based in Fairfax.
Jacqueline Guess Epps

Richmond attorney Jacqueline “Jackie” G. Epps passed away on September 14 at the age of 71.

Epps attended Howard University before receiving her law degree from Rutgers University in 1972. A native of Buffalo, New York, Epps was the first African American woman to serve in the United States Air Force as a JAG officer, serving in Japan and at Langley. Epps also worked for the U.S. Department of Justice early in her legal career.

In 1978, Epps became the first woman and the first African American to be hired in the Newport News Commonwealth’s Attorney’s office. In 1982, she became a senior assistant attorney general under Virginia Attorney General Gerald L. Baliles, specializing in the prosecution of rape cases.

A long-time campaigner for the Democratic party, Epps helped to raise money for Lawrence Douglas (Doug) Wilder, the first elected African American governor of a U.S. state, who named her the chair of the Virginia Retirement System after he was elected governor in 1990.

Epps ran for Congress in 1992 in the 3rd Congressional District, losing in the primary to Robert Cortez Scott, who still holds the seat. Epps worked for almost 30 years in private practice, mostly for the Richmond firm of Morris & Morris, before opening her own arbitration practice.

In addition to her law practice, Epps was a dedicated volunteer, serving in roles at the American Bar Association, the Richmond Bar Association, and the Old Dominion Bar, and as a Fellow of the ABA Foundation. At the Virginia State Bar, Epps served as a member-at-large on Council, on the Board of Governors of the Litigation Section, and as Chair of the Special Committee to Study Consistency of Decision-Making Within the Disciplinary System.

Robert Eastwood Glenn

Robert “Bob” Eastwood Glenn of Roanoke died on October 18 at the age of 89. He served on the board of the Virginia Board of Bar Examiners for over 30 years, the last 21 of which in the role of president. In this capacity, Glenn was responsible for writing exam test questions and the preparing, administering, and grading of over 50,000 bar exams.

Born in Catlettsburg, Kentucky, Glenn received his undergraduate and law degrees from Washington & Lee University. He served in the United States Air Force as a judge advocate in Texas and in Germany before retiring as a lieutenant colonel in the reserves. He returned to Virginia and in 1957 joined a law firm in Roanoke founded by Linwood Holton, who would go on to be the 61st governor of Virginia. Today, the firm is known as Glenn Feldmann Darby & Goodlatte.

An avid volunteer, Glenn was president of the Roanoke Kiwanis Club and on the Board of Visitors of Radford University. According to his obituary, he also served as Chairman of the Roanoke Valley Chapter of the American Red Cross, member of the State Council of Higher Education, President of the Roanoke Regional Chamber of Commerce, member of the Virginia Foundation for the Humanities, and as Director of the United Way of Roanoke and the Roanoke Symphony Society.

In his legal volunteer work, Glenn was a president of the Roanoke Bar Association, a Fellow of the American Bar Association, and involved with the Virginia Law Foundation. At the Virginia State Bar, Glenn served on the Board of Governors of the Section on the Education of Lawyers.
Be a leader at the bar.
Join a board or committee.
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Disciplinary Board Chair Lisa A. Wilson

Must Love Underdogs.
Virginia pro bono lawyers do.
Do Pro Bono. Do Good.

For more information on how to be a pro bono hero, contact Crista Gantz at cgantz@vsb.org.
Local and Specialty Bar Elections

Hampton Roads Chapter, Federal Bar Association
Vera Kathleen Dougherty, President
Lauren Tallent Rogers, Vice President
Cameron Michael Rountree, Secretary
Suzanne Victoria Suher Katchmar, Treasurer

Northern Virginia Bankruptcy Bar Association
John Tucker Farnum, President
Bradford Frost Englander, President-elect
David William Gaffey, Vice President
Thomas John McKee Jr., Secretary
Donald Francis King, Treasurer

Northern Virginia Chapter, Federal Bar Association
William Boyle Porter, President
Tara Lynn Renee Zurawski, President-elect
Robert Richardson Vieth, Vice President
Daniel Duane Mauler, Secretary
Carla Denette Brown, Treasurer
Kathleen Joanna Lynch Holmes, National Delegate

Richmond Chapter, Federal Bar Association
Nichole Buck Vanderslice, President
Alison Ross Wickizer Toepp, President-elect
Timothy James St. George, Vice President
Jeremy Shane Williams, Treasurer
Elizabeth Leigh Gunn, National Delegate
Laura Anne Kuykendall, Membership Secretary
Lindsay Lankford Rollins, Recording Secretary

Northern Virginia Bankruptcy Bar Association
John Tucker Farnum, President
Bradford Frost Englander, President-elect
David William Gaffey, Vice President
Thomas John McKee Jr., Secretary
Donald Francis King, Treasurer

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Elizabeth Leigh Gunn, National Delegate
Laura Anne Kuykendall, Membership Secretary
Lindsay Lankford Rollins, Recording Secretary

Shenandoah County Bar Association
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Chad Arthur Logan, Vice President
Jeremy Daniel McCleary, Secretary-Treasurer

Warren County Bar, Inc.
Kimberly Beth Wilkins Emerson, President
Daryl Lee Funk, Vice President
Daniel Nichols Whitten, Secretary
Bridget Ellen Grady Madden, Treasurer
Stephen Louis Jerome, Director

Solo & Small-Firm Practitioner Forum

The Solo & Small-Firm Practitioner Forum focuses on issues that confront attorneys who practice alone or in small firms. Law office management and ethics are among several topics covered at these CLEs.

These CLEs are free, include lunch, and are available on a first-come, first-served basis. Registration and an agenda will be posted at http://bit.ly/CLSBAcalendar

March 26, 2019
Hilton Garden Inn, Suffolk Riverfront

May 8, 2019
Fredericksburg Hospitality House & Conference Center

2019 Bar Leaders Institute

APRIL 12
Lewis Ginter Botanical Garden, Richmond

The Bar Leaders Institute (BLI) is a one-day program sponsored by the Conference of Local and Specialty Bar Associations to train and provide resources to current and prospective local and specialty bar leaders. Details will be posted on the CLSBA Calendar as soon as they are available at http://bit.ly/CLSBAcalendar.
Avoiding Ethics Complaints: Finding the Rules and LEOs

by Joyce Manna Janto

One nightmare shared by all lawyers is the prospect of a letter from the standing committee on lawyer discipline informing them of a complaint. Prudent lawyers avoid this by becoming familiar with the ethical rules and standards of their jurisdiction. Because, as many a lawyer has learned, ignorance of the rules is no excuse.

The obvious starting place is the Virginia lawyer's Manual of Professional Conduct. The current edition has a chapter on researching ethical issues. It serves as a finding aid and includes detailed instructions for using a variety of resources. It also contains annotations on the sources mentioned.

The Code of Virginia is the source for ethical rules and opinions. The bar is under the jurisdiction of the Supreme Court, so the Virginia Rules of Professional Conduct (Rules) are in the Rules of the Supreme Court of Virginia, Volume 1. The rules are annotated; along with the text of the Rules are the comments, its history, and interpretative cases. Legal Ethical Opinions (LEOs) issued by the Virginia State Bar (VSB) are provided as unnumbered volumes of the Code. These opinions have no precedential value but provide guidance on how the disciplinary committees might interpret a rule. Sections 54.1-3900 through 54.1-3944 of the Code also limit lawyer activity. Unlike the Rules, they focus on the business of law. They define the practice of law and the corporate structure of law offices. They also outline the procedures for the disciplining and licensing of lawyers.

The ABA/BNA Lawyer's Manual of Professional Conduct provides information for those seeking a broader interpretation of a rule. Arranged in rule number order, the Manual has ethics opinions from the ABA, state, and local bar associations. In addition, the Manual contains a current awareness newsletter. The newsletter summarizes recent opinions issued by courts or bar associations along with articles, written by practitioners, on current ethical issues.

Online, the starting place is the website of the VSB. Here you will find proposed, adopted, and rejected amendments to the Rules, along with LEOs and disciplinary actions. There are two options to find LEOs on this page. The first is a link to a page maintained by the Virginia Law Foundation. Here, you can find LEOs by number or by subject. A subject search allows the use of Boolean connectors and limitation by date. The other option is a page maintained by McGuireWoods. Their database contains summaries of LEOs and formal opinions issued by the ABA. There is a top index and the database supports keyword searching. If you can't find a LEO dealing with your specific concern, you can request one via email from the VSB’s webpage. This service is confidential. Ethics Counsel for the VSB cannot disclose the contents of any discussion about the email without the express consent of the person posing the question.

What about traditional legal research platforms? Both Lexis and Westlaw have the ABA ethics materials: the Model Rules and the formal and informal LEOs. Lexis has the Virginia LEOs. Westlaw has the Virginia disciplinary orders. Each service has a collection of secondary sources. Westlaw has a greater number of treatises. Lexis also arranges its ethical materials in a "Legal Ethics" library that collects in one place the relevant databases. Lexis also has a separate "Ethics Law - Emerging Issues" database dealing with hot topics and the ABA/BNA Lawyer's Manual on Professional Conduct. Fastcase does not have the Rules or LEOs, but disciplinary orders are available.

Finally, don't overlook Google. Using the advanced search option improves your results. At the bottom of the search page, click "Settings" and select "advanced search." This allows you to conduct Boolean searches and limit results. The search internet advertising ethics opinions garners twenty three million hits. An advanced search internet advertising ethics opinions site:org yields six thousand hits, all from reliable sources.

A lawyer's life can be stressful; using the resources outlined in this article can relieve the stress of wondering if your behavior is conforming to the ethical standards of the Virginia State Bar.

Endnotes:

2 art Six, Integration of the State Bar, Section II, Rules of Professional Conduct.
3 www.vsb.org
4 http://www.vacle.org/leoslegallinks-pg107.aspx
5 http://leo.mcguirewoods.com/
6 http://www.fastcase.com/

Joyce Manna Janto was appointed deputy director of the University of Richmond Muse Law Library in July 1991. Prior to this, she served as acquisitions librarian (1982-89) then as associate director for Collection Development (1989–1991). She teaches Legal Research & II, Virginia Legal Research, and Professional Responsibility. Janto holds a BS Ed. from Clarion State University of Pennsylvania, an MLS from the University of Pittsburgh, and a JD from the University of Richmond.
Education and Vigilance are the Best Defense to Phishing Attacks

by Erin Williams Hapgood

There is nothing new about phishing emails; the Virginia State Bar has been trying to keep attorneys advised of these scams for many years. Early phishing scams were fairly obvious and generally “spoofed” websites of financial institutions and legitimate companies. As the public became increasingly savvy in avoiding those traps, the scammers improved their efforts. Law firms make good targets for such scams because they possess sensitive information and often handle large payments for settlements or real estate closings. There is no magic trick to avoiding such attacks; vigilance, common sense, and education are the best defenses for lawyers and law firms.

Law firms are popular targets for scammers. In in 2016, the New York Attorney General issued a consumer alert about an email scam targeting lawyers by purporting to show a client complaint that had been filed against them. This type of scam plays on the recipient’s fears, inducing a click from an otherwise attentive lawyer. In January of this year the Virginia State Bar issued a notification about a spam email from “director@vsbgov.org.” In addition to sending emails to a specified group, such as bar members, scammers will also target specific individuals based on information gleaned from publicly available information like business websites, organizational charts, and LinkedIn groups. They use this information to tailor fraud attempts in what is after referred to as “spear phishing” or “CEO spoofing.” These targeted attacks hope to convince the recipient that they have been authorized to reveal confidential information or authorize a payment.

There are a few easy red-flags to identify in a questionable email. First, attachments are always a risk, and no one in your office should open any attachment from an unknown sender. The sender’s email addresses can be viewed by hovering your cursor over the address (without clicking!). Strange or unusual addresses or unexpected domain names are an easy clue to train yourself to notice. Unusual header information, such as a date written in the European form (day/month/year) or a generic “to” field are another clue. The greatest threat, however, can come from links. Hovering your cursor over the hyperlink (without clicking!) should reveal the true destination of the link; if it does not match the text of link, it is likely malicious.

The two examples of lawyer-specific scams given above are excellent examples of how vigilance and education will avoid problems. For example, the email purportedly from the Virginia State Bar had showed a domain name that is not the one actually used by the organization; the proper domain is “vsb.org” and the scam showed “vsbgov.org.” Similarly, the New York scam showed the email as being from “The Office of The State Attorney Complaint” (a non-existent department) and the email address ended in the rather non-governmental domain “outlook.com.”

This is not new information. The steps above are the most common-sense, straightforward ways to protect yourself and your firm. Nonetheless, it is important to remind yourself and your staff to remain vigilant when viewing emails. The greatest threat comes from that moment of inattention by a busy lawyer or a member of her staff. Developing the habit of looking critically at an email, especially one with an attachment or link, will go a long way to protecting your law firm.

Educating yourself and your staff about likely email scams is not optional. Rule 1.1 of the Rules of Professional Conduct mandates we educate ourselves about the risks of technology, and scam emails are certainly a risk associated with technology. The Virginia State Bar and other organizations try and publicize when an email scam is circulating, and there is even cyber-liability insurance available to lawyers now. When it comes to protecting your firm and your clients, however, there is no substitute for vigilance.

Endnotes:

Erin Williams Hapgood is the assistant commonwealth’s attorney in Northumberland County and a member of the Virginia State Bar Special Committee on Technology and the Practice of Law. The views and opinions expressed in this column are solely those of Ms. Hapgood.
I am convinced there are some real, basic structural problems with our system, and that fixing, or at least addressing, these problems is the only sure way to boost the public’s confidence.¹

The law indeed can be a jealous mistress, but sacrificing personal wellness is not required.²

At the Virginia State Bar (VSB) Annual Meeting held in June 2013, I became president-elect of the VSB. The next month, I traveled with other VSB representatives to Missoula, Montana to attend a series of educational presentations sponsored by our endorsed professional malpractice carrier, ALPS. One of the presentations was focused on the newly-created “Limited License Legal Technician” (LLLT) program in the state of Washington.³ Basically, in an effort to improve access to justice, the Washington Supreme Court enacted a new rule and created structures to allow for limited-scope legal representation to be performed by non-lawyers possessing certain specialized training and qualifications.⁴

As I sat there listening to the presentation on the LLLT initiative, two things occurred to me. First, circumstances and needs vary greatly from state to state. There are states such as Washington with populations that are spread out across huge geographic areas and that have only one or two law schools within the state. In some of these states, there are no lawyers and no legal services available for many miles in any direction. By contrast, states such as Virginia have law schools scattered throughout, and virtually no areas are lacking in legal resources. While the cost of legal representation is a problem for low-income individuals in every state, the mere presence of lawyers is not a significant problem in Virginia. So, I was skeptical that a program like the Washington LLLT would ever be needed or welcomed in Virginia.

The second thing I realized during my trip to Montana is that our profession is evolving quickly, and “that’s the way we’ve always done it” will not suffice as a justification for maintaining the status quo indefinitely. Change is coming, and we can either play a role in shaping our future or others will do it for us.

Soon after I became president of the VSB in June 2014, I established a study committee that eventually became the “Special Committee on the Future of Law Practice” (SCFLP). More than any other factor, the LLLT presentation I heard in Montana convinced me that we need to get serious about studying the current state of affairs in the legal profession, national and international changes and trends, and ideas for moving forward more efficiently, intelligently, and justly.

In the several years since the birth of the SCFLP, an enormous amount of information has been received, reviewed, discussed, and debated. This has resulted in some specific recommendations for changes and improvements, with more recommendations on the horizon. Subjects under discussion include non-lawyer ownership of law firms, benefits and risks associated with technology, and potentially necessary revisions to ethics rules as methods of providing services continue to evolve.

All of this is a long explanation and historical background as I turn toward what I did not contemplate when I saw the need to study the future of our profession. What I initially failed to think about in any serious way is actually the most critical and basic piece of the puzzle: us. The professionals. The human lawyers who provide advice, guidance and advocacy, as well as the law students who become our colleagues, and the judges who decide our cases.

Soon after my VSB presidency ended, I was asked to serve on the board of Lawyers Helping Lawyers. I agreed to do so primarily because I felt that there was an opportunity to improve awareness of the valuable services rendered by LHL, especially for two groups eligible to receive services but who have been reluctant to ask for help: law students and judges. Because I teach as an adjunct law professor at William & Mary Law School and have represented judges in Judicial Inquiry and Review Commission proceedings, I have seen first-hand the struggles and pressures that both groups face, which are similar to challenges practicing lawyers must handle, but not identical. Law students fear that they will be deemed unworthy of admission to the Bar if they confess to having any mental or substance abuse problems, and judges worry that they will encounter opposition during the re-appointment process if they seek help. As I became more involved with LHL, it was obvious to me that we need to address physical and mental health concerns if we care about protecting the public and improving our profession.

In recent years, as the SCFLP has churned through its work and contemplated the best way to regulate lawyers, increase access to justice, and advance the profession, the SCFLP has also reviewed a number of studies, articles, and columns on the subject of lawyer well-being.⁵ Although members of the SCFLP do not all claim to be experts on mental health or substance abuse, the committee recognizes that if we focus exclusively on laws, rules and procedures — but ignore the pressures and problems encountered by the humans who serve the public — we will never come close to fulfilling our mission.
As I thought about the connections between the future of law practice and lawyer well-being, I decided to go back through the archives of columns written by past presidents of the VSB. For many years, presidents have written about the heavy responsibility associated with self-regulation, the clear need to improve access to justice as funding for legal aid encounters new challenges and threats, ideas for promoting professionalism within our ranks and creating a better public perception of lawyers and the legal system, and so on. However, the recent focus on lawyer well-being is relatively new, and currently being championed by Chief Justice Donald W. Lemons, Justice William C. Mims, and VSB President Leonard C. Heath Jr.

Law students, lawyers, and judges now have a wealth of resources and information at their disposal, and the involvement of leaders of the judiciary and VSB should send a clear signal that ignoring and hiding from problems is unnecessary and unwise.

While we contemplate where we are as a profession and where we are going, we must pay attention to the humans in the process who serve the humans that make up the general public. The stated mission of the VSB is “to regulate the legal profession of Virginia; to advance the availability and quality of legal services provided to the people of Virginia; and to assist in improving the legal profession and the judicial system.” Doing these things requires flexible and creative thinking, a willingness to change with the times and technology, and perhaps most importantly, a renewed commitment to improving the lives and capabilities of the people who make up the profession.

Kevin E. Martingayle served as the 2014–15 president of the Virginia State Bar. He has served on the VSB Council, Executive Committee, Standing Committee on Legal Ethics, Professionalism Faculty for new lawyers and law students, Special Committee on the Future of Law Practice, Education of Lawyers Section Board of Governors, American Bar Association Standing Committee on Professionalism, Virginia Trial Lawyers Association Ethics and Professionalism Committee, and the Lawyers Helping Lawyers Board of Directors. In addition to maintaining a busy trial and appellate practice at Bischoff Martingayle PC, Martingayle is an adjunct law professor at William & Mary Law School. He lives in Virginia Beach with his wife, Elisabeth. They have 3 children, two of whom are college student-athletes and one of whom is a senior student-athlete in high school.

Endnotes:
The Importance of Learning to Say No
by Mark Bassingthwaighte

Some people seem to view having to say no as requiring them to be confrontational, and for these folks, confrontations are difficult things to get through. Others view saying no as being rude. Now, certainly how a “no” is delivered can be rude, but the act of saying no in and of itself isn’t. Regardless of the reason or situation in which one might struggle with saying no, it’s a valuable skill to learn. In fact, in the context of a law practice, the ability to say no can be a life saver, because we’re talking about quality of life issues here.

When visiting law firms around the country, I often ask a few questions about firm culture in an attempt to understand the environment in which everyone is working. For example, is the setting conducive to allowing staff and attorneys to maintain a healthy balance between their personal and professional lives? If yes, that’s great! If no, I become concerned. The risk of a malpractice claim is now higher, because missteps happen more readily when our batteries are running low.

When things are out of balance, it is common to find that work hours for some are beyond reasonable. I am not trying to suggest that working long hours is a direct cause of malpractice claims. It is not. In fact, I have met a number of attorneys and staff who work incredibly long hours and remain quite happy and content. However, these individuals also often play hard when they are not working. Most importantly, they have found ways to stay refreshed and sharp during the time they devote to their personal lives.

My focus is really directed toward those individuals who feel that their own work circumstances are burdensome. When pressed, I often hear: “I really don’t know how to turn down clients, so I have taken on more than I had planned,” or “This client has been a client of mine for many years and I can’t risk saying no to the additional work even though the work isn’t something I am comfortable handling.” Others have shared: “While I knew I shouldn’t have taken this client’s matter on, I didn’t know when the next prospective client might come through the door and I do have bills to pay.” I have even heard: “Making these kinds of personal sacrifices is one of the costs that come with being an attorney.”

The inability or refusal of an attorney to say no to taking on more clients than she should, to willingly take on additional work that is beyond her comfort zone, or to agreeing to work with a recognized problem client requesting her services can readily evolve into a serious problem. While the occasional sacrifice is often fine, for the attorney who habitually struggles with saying no, the work environment can quickly be experienced as a huge burden, resulting in feelings of being overwhelmed and/or out of control. This isn’t good, from both a quality of life and risk management perspective. If left unattended for any length of time, burnout and/or depression often follow.

This is why it’s important to learn to say no. It can be done creatively, respectfully, and non-confrontationally. A respectful way to say no might be: “At present, due to the number of pending cases here at our firm, we are not able to represent you in this case. Please understand that it is our policy to decline representation on any matter where we do not feel confident that we can invest all of the time and energy necessary to do the best possible job for our client.” Or: “While I greatly appreciate your continued loyalty, my legal judgment tells me that you are best served by my assisting you in finding an attorney with the level of experience this particular matter calls for.”

If your practice is going to be truly full for a period of time, consider instructing staff to inform all potential clients that you currently are not accepting any new clients for X number of months and that they are free to check back at that time. All of these approaches are examples of ways to say no in a non-confrontational and respectful way.

So, go ahead, take control, and say no when necessary. It really is ok.

Mark Bassingthwaighte, ALPS risk manager, has conducted more than 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. His webinar on Best Practices for Client Selection in the ALPS CLE library is at http://alps.inreachce.com. He can be contacted at: mbass@alpsnet.com.

Each month, the staff of the Virginia Lawyer Referral Service create a list from the vetted potential clients who call looking for consultations — and who are turned away for lack of member lawyers. Please consider joining the VLRS and helping provide legal services to potential clients, building your practice while helping Virginians with legal issues.


Virginia lawyers interested in joining the VLRS panel can learn more and download an application today. For more information on becoming a VLRS lawyer panel member, please see bit.ly/vlrslawyers or contact Toni Dunson at (804) 775-0591.
Virginia CLE Calendar
Virginia CLE will sponsor the following continuing legal education courses. For details, see www.vacle.org/seminars.htm.

January 5–10
38th Annual National Trial Advocacy College 2019
Live — Charlottesville

January 8
Live — Charlottesville/Webcast/Telephone
11 AM–1 PM

January 9
Adult Guardianship Law and Mediation
Webcast/Telephone
Noon–2 PM

January 23
Representation of Children as a Guardian Ad Litem — 2018 Qualifying Course
Video — Abingdon, Alexandria, Charlottesville, Norfolk, Richmond, Roanoke
8:30 AM–5:15 PM (Richmond video begins at 9 AM)

January 24
Representation of Children as a Guardian Ad Litem — 2018 Qualifying Course
Video — Tysons
8:30 AM–5:15 PM

Webcast/Telephone
1–3 PM

January 30
Representation of Incapacitated Persons as a Guardian Ad Litem — 2018 Qualifying Course
Video — Abingdon, Alexandria, Charlottesville, Norfolk, Richmond, Roanoke
9 AM–4:05 PM

February 1
49th Annual Criminal Law Seminar 2019
Live — Williamsburg
TBD

February 8
49th Annual Criminal Law Seminar 2019
Live — Williamsburg
TBD

Virginia State Bar
Harry L. Carrico Professionalism Course

April 8, 2019
Greater Richmond Convention Center

Early Registration (before March 10) — $115
Late Registration (March 10 or after) — $130

Registration fee includes Wi-Fi, continental breakfast, lunch, and coffee breaks, as well as CLE credit. Total possible CLE credits = 7 hours, which includes up to 4 hours of Ethics (pending), depending on which sessions you attend.


Virginia CLE will sponsor the following continuing legal education courses. For details, see www.vacle.org/seminars.htm.
LEROY ROUNTREE HASSELL SR.

INDIGENT CRIMINAL DEFENSE SEMINAR
ADVANCED SKILLS FOR THE EXPERIENCED PRACTITIONER

SAVE THE DATE:
FRIDAY, MAY 3, 2019

NEW LOCATION
IN BLUE RIDGE

A DAY-LONG ADVANCED TRIAL SKILLS CLE

RICHMOND CONVENTION CENTER (LIVE PROGRAM)

NEW LOCATION AT
HOTEL MADISON & SHENANDOAH VALLEY CONFERENCE CENTER, HARRISONBURG (WEBCAST)
AND
WYTHEVILLE MEETING CENTER, WYTHEVILLE (WEBCAST)

Registration information and details will be available in early January at www.vsb.org/special-events/indigent-defense.

FORTY-NINTH ANNUAL

CRIMINAL LAW SEMINAR

FEBRUARY 1, 2019
DoubleTree by Hilton, Charlottesville

FEBRUARY 8, 2019
DoubleTree by Hilton, Williamsburg

Video Replays in 12 Locations on Five Different Dates
7.0 MCLE Credits (including 1.5 ethics credit) approved

www.vsb.org/site/sections/criminal

VIRGINIA STATE BAR AND VIRGINIA CLE®
DISCIPLINARY SUMMARIES

The following are summaries of disciplinary actions for violations of the Virginia Rules of Professional Conduct (RPC) (Rules of the Virginia Supreme Court Part 6, ¶ II, eff. Jan. 1, 2000) or another of the Supreme Court Rules.

Copies of disciplinary orders are available at the link provided with each summary or by contacting the Virginia State Bar Clerk's Office at (804) 775-0539 or clerk@vsb.org. VSB docket numbers are provided.

SUPREME COURT OF VIRGINIA

Thomas Hunt Roberts
Richmond, Virginia
16-031-106233
On September 26, 2018, the Supreme Court of Virginia affirmed the decision of the Virginia State Bar Disciplinary Board and the Third District Committee, Section I, to issue a public reprimand to Thomas Hunt Roberts for violating professional rules that govern the safekeeping of property. RPC 1.15 (a)(3)(ii), (b)(5)
www.vsb.org/docs/Roberts-100418.pdf
www.vsb.org/docs/Roberts2-100418.pdf

CIRCUIT COURT

Franklin Clemmer Coyner
Stuarts Draft, Virginia
17-080-107192 and 18-080-110496
Circuit Court Case No. CL18000413-00
Effective September 21, 2018, the Circuit Court for the City of Staunton issued a public reprimand with terms to Franklin Clemmer Coyner for violating professional rules that govern the safekeeping of property. This was an agreed disposition of misconduct charges. RPC 1.15 (a)(1), (b)(3), (c)(1-3), (d)(2-3); 8.4 (a), (b), (c)
www.vsb.org/docs/Coyner-111418.pdf

DISCIPLINARY BOARD

Sonya Borgaonkar Costanzo
Fredericksburg, Virginia
17-060-109265 and 18-060-109936
On September 27, 2018, the Virginia State Bar Disciplinary Board revoked Sonya Borgaonkar Costanzo's license to practice law based on her affidavit consenting to the revocation. By tendering her consent to revocation at a time when allegations of misconduct are pending, Costanzo acknowledges that the material facts upon which the allegations of misconduct pending are true. Rules of Court Part 6, § IV, ¶ 13-28. RPC 1.1; 1.3 (a), (b); 1.16 (d), (c); 8.1 (c)
www.vsb.org/docs/Costanzo-100118.pdf

George Ernest Marzloff
Stafford, Virginia
18-060-109931, 18-060-111021 and 18-060-111186
Effective December 7, 2018, the Virginia State Bar Disciplinary Board suspended George Ernest Marzloff's license to practice law in the Commonwealth of Virginia for three years for violating professional rules that govern diligence, communication, the safekeeping of property, and misconduct. This was an agreed disposition of misconduct charges. RPC 1.3 (a); 1.4 (a), (b); 1.15 (a), (b)(4-5), (c), (d)(2-3); 8.4 (b), (c)
www.vsb.org/docs/Marzloff-110518.pdf

Brian Kraig Telfair
Richmond, Virginia
17-032-108498
Effective September 28, 2018, the Virginia State Bar Disciplinary Board suspended Brian Kraig Telfair's license to practice law in the Commonwealth of Virginia for 90 days for violating professional rules that govern misconduct. RPC 8.4 (a), (b), (c)
www.vsb.org/docs/Telfair-101518.pdf

Bryan James Waldron
Oakton, Virginia
17-051-106968, 18-051-109817, 18-051-111305 and 18-051-111321
Effective September 28, 2018, the Virginia State Bar Disciplinary Board revoked Bryan James Waldron's license to practice law in the Commonwealth of Virginia based on violations of the rules of professional conduct governing competence, diligence, communication, safekeeping of property, truthfulness in statements to others, the unauthorized practice of law – multijurisdictional practice of law, bar admission and disciplinary matters, and misconduct. RPC 1.1; 1.3; 1.4; 1.15 (a)(1), (b)(5); 4.1 (a); 5.5; 8.1 (a); 8.4 (b), (c)
www.vsb.org/docs/Waldron-101518.pdf

DISTRICT COMMITTEES

Keith Hamner Waldrop
Goochland, Virginia
18-70-112160
On October 24, 2018, a Virginia State Bar Seventh District Subcommittee issued a public reprimand without terms to Keith Hamner Waldrop for violating professional rules that govern the unauthorized practice of law. This was an agreed disposition of misconduct charges. RPC 5.5 (c)
www.vsb.org/docs/Waldrop-111318.pdf
DISCIPLINARY PROCEEDINGS

Suspension – Failure to Pay Disciplinary Costs

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<td>Michael Anthony Lormand</td>
<td>Glen Allen, VA</td>
<td>October 30, 2018</td>
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<td>Jejomar Guarin Untalan</td>
<td>Sterling, VA</td>
<td>September 18, 2018</td>
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<td>Scott Alan Webber</td>
<td>Roanoke, VA</td>
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Suspension – Failure to Comply with Subpoena

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<td>Jason Michael Breneman</td>
<td>Ashland, VA</td>
<td>October 18, 2018</td>
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<td>John James Good, Jr.</td>
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<td>Robert Edward Howard</td>
<td>Alexandria, VA</td>
<td>October 24, 2018</td>
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<td>Jason Allen Spitler</td>
<td>Luray, VA</td>
<td>October 30, 2018</td>
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<td>Travis Joseph Tisinger</td>
<td>Berryville, VA</td>
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NOTICES TO MEMBERS

SUPREME COURT OF VIRGINIA APPROVES LEOS 1885 AND 1889
Effective immediately, the Supreme Court of Virginia has approved Legal Ethics Opinions 1885 and 1889. www.vsb.org/site/news/item/SCOVA_approves_leos_1885_and_1889

SUPREME COURT OF VIRGINIA APPROVES AMENDED RULES IN BID TO ENCOURAGE LAWYER WELLNESS
As part of an ongoing effort to encourage wellness in the legal profession, on October 31, 2018, the Supreme Court of Virginia approved proposed rule amendments that govern competence, lawyer assistance programs, changes in membership for impaired attorneys, and guardian ad litem costs and fees. www.vsb.org/site/news/item/scova_approves_amendments

SUPREME COURT OF VIRGINIA AMENDS RULES OF COURT
On October 31, 2018, the Supreme Court of Virginia amended rules of court governing counsel and appearing without counsel, computation of response dates, service of papers after the initial process, general provisions of discovery, the production by parties of documents at trial, transcript record on appeal, and petition for appeal. www.vsb.org/site/news/item/scova_amends_rules

SUPREME COURT OF VIRGINIA AMENDS RULE 5:6A
Effective immediately, the Supreme Court of Virginia has amended Rule 5:6A that pertains to the procedures for citing supplemental authorities. www.vsb.org/site/news/item/SCOVA_amends_rule_56a

MCLE BOARD ENCOURAGES LAWYER WELL-BEING CLES
The MLCE Board has amended an opinion on substance abuse, mental health disorders, stress, and work/life balance topics to encourage the creation of CLEs on those topics and more. www.vsb.org/site/news/item/cle_well_being

JOIN THE DISCIPLINARY SYSTEM
The Standing Committee on Lawyer Discipline seeks lawyers and non-lawyers for disciplinary district committee vacancies to be filled by Bar Council in June. The 17 committees review complaints and investigations against attorneys in their jurisdiction and determine what the appropriate disposition on the complaint is. Applications in the form of a résumé and short statement of interest are due February 28, 2019. Go online for more information and a list of vacancies by judicial circuit. www.vsb.org/site/news/item/join_the_disciplinary_system

CALL TO SERVE: PRESIDENT-ELECT SEEKS APPLICANTS TO COMMITTEES
Marni E. Byrum, president-elect of the VSB, seeks Virginia lawyers willing to serve on special and standing committees in 2019. Applications in the form of a résumé and short statement of interest are due February 15, 2019. Please see page 67 for the preference form and more information about applying. www.vsb.org/site/news/item/call_to_serve

VOLUNTEERS SOUGHT FOR BAR COMMITTEE AND BOARD VACANCIES
Rounding out the ways to be involved in the self-governance of the VSB beginning in 2019, Bar Council is looking for volunteers to serve on the council’s Executive Committee, the Clients’ Protection DISCIPLINARY PROCEEDINGS
Fund Board, and the Judicial Candidate Evaluation Committee. Applications in the form of a résumé and short statement of interest are due March 29, 2019. Go online for more information about vacancies. www.vsb.org/site/news/item/vsb_needs_you

BRIAN L. BUNIVA WILL BE VSB PRESIDENT FOR 2020–21

FAQ PAGE FOR RESPONDENTS ADDED TO VSB WEBSITE
Lawyers who receive correspondence from the bar about a complaint filed against them now have a resource at www.vsb.org/site/regulation/faqs_bar_complaint

AWARDS
The Family Law Section is seeking nominations for two awards: The Betty A. Thompson Lifetime Achievement Award and the Family Law Service Award. The nomination deadline for both awards is January 18, 2019. The awards will be presented at the annual Family Law Seminar in April 2019 at the Jefferson Hotel in Richmond. www.vsb.org/site/sections/family

The General Practice Section is seeking nominations for the Tradition of Excellence Award. This award recognizes attorneys who have devoted significant amounts of time, efforts, and/or funds to activities that benefit their community. The nomination deadline is April 29, 2019. www.vsb.org/site/sections/generalpractice

Got an Ethics Question?
The VSB Ethics Hotline is a confidential consultation service for members of the Virginia State Bar. Non-lawyers 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 “Email Your Ethics Question” link on the Ethics Questions and Opinions web page at www.vsb.org/site/regulation/ethics/.

You’re retiring, but your law degree doesn’t have to.
Transition into emeritus status and practice only pro bono.

For questions about the program, contact the VSB Pro Bono / Access to Legal Services department at (804) 775-0522.
To start the application process toward emeritus status, call the membership department at (804) 775-0530.
President-elect Byrum Seeks Members for Virginia State Bar Committees With Terms Commencing July 1, 2019

To: Members of the Bar
From: Marni E. Byrum, President-elect

As you know, much of the work of the Virginia State Bar is done through its committees, and we need members willing to serve. Appointments will generally be for a three-year term, running from July 1, 2019, to June 30, 2022, with the possibility of another three-year term to follow. The work of the committees is time consuming and in most cases requires committee members to set aside substantial time to fulfill the requirements of the job.

To encourage participation — and recognizing the time commitments — members are generally limited to serving on only one committee. The number of available positions is quite limited, but I will attempt to accommodate as many people as possible.

The committees are as follows:

**Standing Committees:**
- Budget & Finance
- Lawyer Discipline**
- Legal Ethics
- Professionalism

**Special Committees:**
- Access to Legal Services
- Bench-Bar Relations
- Better Annual Meeting
- Future of Law Practice
- Lawyer Insurance
- Lawyer Referral
- Resolution of Fee Disputes
- Technology and the Practice of Law

*Lawyer member vacancies on Standing Committees are limited due to requirements for a specific number of Executive Committee and Council members to serve on each committee.

**It is preferred that members of the Committee on Lawyer Discipline have served on a local disciplinary district committee. Go to http://bit.ly/joinDDC for more information.

If you would like to be considered for appointment to any of the VSB committees listed, please complete this form and return it with a brief resume by February 15, 2019, by mail or email to Asha B. Holloman, Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, VA 23219-0026 or committees@vsb.org.

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**VSB Committee Preference Form (term commencing July 1, 2019)**

Please complete this form and return it with a brief resume by February 15, 2019.

Name: ___________________________ VSB Attorney No.: ___________________________

Address: ___________________________

City/State/Zip: ___________________________ Phone: ___________________________ Email: ___________________________

Choice Committee Name Have you ever served on this committee? Length of Service

1st Choice ___________________________ Yes No ___________________________

2nd Choice ___________________________ Yes No ___________________________

3rd Choice ___________________________ Yes No ___________________________

☐ Check here if you have never served on a VSB committee.

To assist us in the committee selection process, please provide the following information:

☐ Private Practice

☐ Government attorney

☐ Corporate Counsel

☐ Primary area of practice: ___________________________ City/County

☐ Other

☐ Commonwealth

☐ Federal
The Arlington Bar Association has awarded DNA pioneer Helen F. Fahey with the William L. Winston Award. Fahey prosecuted the notorious Southside Strangler case, the first capital murder case in the nation to use DNA evidence to prove guilt. She was also the first woman to be elected Commonwealth Attorney of a major Virginia jurisdiction. President Clinton appointed Fahey to the role of US Attorney for the Eastern District. She was later appointed Chair of the Virginia Parole Board by Governor Mark Warner.

The Honorable Douglas O. Tice Jr received the Richmond Bar Association’s Hunter W. Martin Professionalism Award, given annually to lawyers who have best exemplified the conduct and high ideals embodied in the Bar’s Principles of Professionalism. Judge Tice was appointed to the bankruptcy bench by the 4th U.S. Circuit Court of Appeals, serving from 1987-2013. He is a member of the American College of Bankruptcy attorneys, and Court procedures and practices implemented during his decades on the bench continue to be utilized today in the courts.

Fallon D’Ippolito has joined the Norfolk firm of Commander Law, Attorneys & Mediators as an associate. Her primary area of practice is family law.

William B. Porter, managing principal of the law firm of Blankingship & Keith, P.C., is the new president of the Northern Virginia chapter of the Federal Bar Association for 2018-19. He has been on the board of directors of the chapter since 2013. Porter is a past member of the faculty of the VSB Harry L. Carrico Professionalism Course and a former bar council representative for 19th Judicial Circuit.

Aneta Nikolic has joined the Fairfax firm of Blankingship & Keith, P.C. Her practice focuses primarily on civil litigation and legal malpractice defense. Before joining Blankingship & Keith she clerked for the Honorable Daniel Ortiz of the Fairfax County Circuit Court.

Gentry Locke is pleased to announce that Caley A. DeGroote has joined the firm’s Roanoke office as an associate on the Personal Injury and Medical Malpractice teams and will assist with complex litigation matters. Before joining Gentry Locke, DeGroote clerked for the 23rd Judicial Circuit Court, and interned at the U.S. District Court for the District of South Carolina, as well as the U.S. Attorney’s Office for the District of South Carolina.

Gentry Locke also added David R. Berry to the firm’s Roanoke office as an associate. Berry will practice on the Commercial Litigation team, helping clients to resolve complex business disputes. Before joining Gentry Locke, Berry clerked for the Honorable Donald W. Lemons, Chief Justice of the Supreme Court of Virginia. He has also held roles in the United States Attorney’s Office and Office of the Attorney General of Virginia.

Belkowitz Law PLCC in Fairfax has added two new attorneys. Melissa Waugh exclusively practices special education law. Waugh represents parents at IEP meetings, in mediation, with state and federal litigation, in due process hearings, and in federal appeals. She will be based in Lynchburg.

Emily Haslebacher also joined Belkowitz Law. Haslebacher represents families in special education law matters arising under the Individuals with Disabilities Education Act (IDEA), the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation

Shenandoah Valley Attorneys Recognized For Pro Bono Work

Ten attorneys were recognized for pro bono work for Blue Ridge Legal Services (BRLS), the Shenandoah Valley’s non-profit legal aid society. The attorneys donated 20 hours or more in pro bono work for legal aid clients of BRLS. The lawyers honored were Richard Baugh, Laura Evick, Grant Penrod, and Jacob Penrod of Hoover Penrod; Quinton Callahan and David Nahm of Clark & Bradshaw; Dana Cornett; Shelly James of John Edlidge & Associates; Grant Richardson; and Michael Sharp of Botkin Rose.

The Shenandoah Valley’s non-profit legal aid society. The attorneys donated 20 hours or more in pro bono work for legal aid clients of BRLS. The lawyers honored were Richard Baugh, Laura Evick, Grant Penrod, and Jacob Penrod of Hoover Penrod; Quinton Callahan and David Nahm of Clark & Bradshaw; Dana Cornett; Shelly James of John Edlidge & Associates; Grant Richardson; and Michael Sharp of Botkin Rose.

Belkowitz Law PLCC in Fairfax has added two new attorneys. Melissa Waugh exclusively practices special education law. Waugh represents parents at IEP meetings, in mediation, with state and federal litigation, in due process hearings, and in federal appeals. She will be based in Lynchburg.

Emily Haslebacher also joined Belkowitz Law. Haslebacher represents families in special education law matters arising under the Individuals with Disabilities Education Act (IDEA), the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act of 1973.
Act, including eligibility, placement, IEP, and due process proceedings.

Megan K. Dhillon has joined Carlton Fields’s growing Health Care practice in Washington, D.C. Dhillon is the fifth health care attorney to join Carlton Fields in 2018. Dhillon regularly advises a range of healthcare providers, including hospitals, long term care facilities, and physician practices. In addition to her private practice, Dhillon worked in the appeals division of the Department of Medical Assistance Services and served as a fellow in the health services section of the Office of the Attorney General of Virginia.

Blankingship & Keith, P.C. has elected Jessica L. Sura, Michael Kim and Thomas M. Cusick as principals of the firm. The promotions will become effective on January 1, 2019.

Sura has a litigation practice with a special emphasis in medical malpractice defense. She represents physicians, hospitals and other healthcare providers in cases alleging medical negligence.

Kim represents corporate and individual clients in a wide range of complex litigation matters. He regularly appears in the state courts of Northern Virginia and the United States District Court for the Eastern District of Virginia.

Cusick’s practice encompasses all areas of family law. Before entering private practice, he served as a law clerk for the 23rd Judicial Circuit of Virginia, working with the Circuit Court judges in Roanoke City, Roanoke County and the City of Salem.

Sarah M. Collie has joined Harman Claytor Corrigan & Wellman as an associate in Richmond. Collie will focus her practice on the defense of civil litigation matters.

Hunton Andrews Kurth LLP has appointed Laura Colombell Marshall to lead its white-collar defense and internal investigations practice. She succeeds Tim Heaphy, who was appointed university counsel at the University of Virginia. Before joining Hunton Andrews Kurth, Marshall spent 15 years as an Assistant United States Attorney in the Eastern District of Virginia. She also served as a JAG officer in the United States Army Reserve.

Levi D. Mauldin has become associated with Jones, King, Downs & Peel, PC, a Bristol, Virginia/Tennessee boutique firm that focuses on trusts and estates, including estate planning, estate and trust administration, charitable planning and administration, business planning, and fiduciary litigation.

The Halperin Law Center has promoted Andrew Lucchetti to Partner. Lucchetti represents individuals who have been seriously injured by the negligent conduct of others, as well as the families of wrongful death victims. His practice areas include motor vehicle accidents, product liability cases, premises liability cases, and claims involving violations of federal civil rights.

National Veterans Legal Services Program (NVLSP) has added two Virginia lawyers to its staff to help veterans receive the benefits they deserve. Katherine McDermott Ebbesson joins NVLSP as a staff attorney. Prior to joining NVLSP, Ebbesson worked as an attorney for Vietnam Veterans of America.

Helen Chong is the new Training Associate for NVLSP. As a former magistrate and trial attorney, she uses her past experience in conducting judicial hearings and legal advocacy to help NVLSP provide the best training programs for attorneys and veteran service officers. Chong was the Young Lawyer of the Year of the Virginia State Bar in 2015.

Chad Gilbert has joined Arrington Schelin’s Bristol location. The firm focuses in the areas of Personal Injury, Social Security Disability, and Worker’s Compensation, and Gilbert will serve clients in the states of Virginia and Tennessee.

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Up Next

Coming in the February issue of Virginia Lawyer: Health Law followed by Intellectual Property Law in April.

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SAVE THE DATE

Wednesday, May 22, 2019
5:30 pm – 7:30 pm
George Mason University
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