

The VSB Committee on Access to Legal Services Invites you to

The 12th Annual VSB Pro Bono Conference

Wed. & Thurs., May 15–16, 2002

The Marshall-Wythe School of Law, College of William & Mary, Williamsburg

PUBLIC SERVICE FAST FORWARD: THE ENTREPRENEUR FACTOR

up to 7.5 MCLE credit hours, including 1.5 hours of ethics*

Agenda-at-a-glance

- Wed., 1:30–3:30 P.M., May 15, 2002, “Court Room of the Future” Pre-conf. Demo (CLE)
- Wed., 7:30–9:30 P.M., May 15, 2002, Powell Award Ceremony & Reception
- Thurs., 9:00 A.M.–4:30 P.M., May 16, 2002, CLEs all day

Wednesday, May 15, 2002

1:30–3:30 P.M.

“Court Room of the Future” Demonstration
by Frederic Lederer, Chancellor Professor of Law and Director,
Courtroom 21, followed by a panel on technology applications
moderated by John M. Levy, Chancellor Professor of Law and
Director of W&M Clinical Law Program

7:30–9:30 P.M.

Lewis F. Powell, Jr. Pro Bono Award Ceremony &
Reception, honoring Donald T. Floyd, Esq., and
the student recipient of the Oliver W. Hill Award

Thursday, May 16, 2002

- 8:30–9:00 A.M. Registration
- 9:00–10:30 A.M. General Session: Pro Bono **Ethics** in the Civic Emergency Context
- 11:00–12:15 P.M. Civil Rights & Civil Liberties: Child Detainee & Foreign Student Clients
- 11:00–12:15 P.M. Indigent Criminal Defense: The DNA Innocence Projects
- 12:15–1:15 P.M. RSVP Box Lunch or BYO Brown Bag
- 1:15–2:30 P.M. Attracting Young Lawyers to Rural Practice and Special Assignments
- 1:15–2:30 P.M. Innovative Programs in Economic Development and Affordable Housing: Historic Preservation as a Magnet
- 3:00–4:30 P.M. Emerging Fed. Bankruptcy Regulations
- 3:00–4:30 P.M. Consumer Class Actions: Private Bar Attorneys Fees & Cy Pres Awards to Benefit Nonprofits

Hotel: A limited number of rooms are available at the reduced rate of \$99 (plus tax) Single/Double occupancy at the *Williamsburg Hospitality House* near the Historic District and W&M. Reservations (with deposits) must be made prior to April 15, 2002. Call (757) 229-4020. **Please inform the hotel that you are attending the Pro Bono Conference to receive a special rate.**

Check the VSB Web site (www.vsb.org/probono) for updates and for registration forms or complete the request, below, to have a brochure faxed or mailed to you. Call (804) 775-0548 or e-mail petrini@vsb.org for other conference info.

Please send me a Conference Brochure:

Name: _____

Firm or Business: _____

Mailing address: _____

Fax #: (_____) _____

FAX or mail this page to: (804) 775-0582

Virginia State Bar, Attn: Maureen Petrini, 707 E. Main St., Suite 1500, Richmond, VA 23219

*The conference registration fee of \$35 covers text materials for Wednesday/Thursday. Optional box lunches (Thursday only) are an additional \$11.

Donald Floyd to Receive Powell Award

On May 15, 2002, the Virginia State Bar will present its Lewis F. Powell, Jr., Pro Bono Award to Donald Taft Floyd recognizing his eight years and thousands of hours of pro bono service in representation of legal aid clients.

Mr. Floyd worked about 20 hours a week as a *pro bono* lawyer on the staff of Central Virginia Legal Aid Society from 1994 until he and Judith McKee Floyd, his wife of 39 years, moved from Richmond to Bethlehem, Pennsylvania, in 2002.

Mr. Floyd's *pro bono* legal aid work was his third career. He served in active duty with the United States Air Force from 1954 to 1958 and nine additional years in Reserve units, retiring in 1968 with the rank of major. Completing a career in insurance that began in 1958, he retired in 1989 as president of Bailey & Haskell Associates, an insurance agency in Oneida, New York. He had served on the boards of directors of the Oneida Valley National Bank and the Presbyterian Home of Central New York and as chairman of the City of Oneida Housing Authority, an agency responsible for planning and construction of senior citizen housing.

After retiring from his career in insurance, Mr. Floyd earned his law degree at T.C. Williams School of Law at the University of Richmond and was licensed to practice law in Virginia. In 1994, he volunteered to work at Central Virginia Legal Aid Society to make a *pro bono* contribution and to obtain experience as a lawyer while considering his choices for entry into private practice. Within a relatively short time after beginning *pro bono* legal aid work, he decided to forego private practice. With the exception of the few times he and his wife traveled abroad, he was a *pro bono* lawyer year-round at legal aid, contributing about 20 hours a week for eight years.

It is common practice in legal aid offices to assign miscellaneous cases to veteran lawyers on staff, who typically view such intake as a necessary chore because it is difficult to develop a specialty in such cases. When handling miscellaneous cases, a legal aid lawyer usually scrambles from case to case, often in unfamiliar

territory. Because of Mr. Floyd's extraordinarily generous spirit, he took on a regular weekly intake of miscellaneous cases for most of his eight years as *pro bono* lawyer on the legal aid staff. In one notable case, he represented a client who had been sued for a \$60,000 hospital bill. Drawing on his prior experience in insurance, he persuaded the client's health insurer to pay the claim.

In addition to miscellaneous cases, Mr. Floyd co-counseled in many cases in which legal aid represented clients seeking to avoid foreclosures of their homes. He routinely assumed responsibility to seek relevant documents from opposing parties in those cases.

Mr. Floyd also helped back up the *pro bono* hotline at the Central Virginia Legal Aid Society sponsored by The Virginia Bar Association. He provided telephone legal advice to legal aid clients when VBA lawyers were unable to do so because of conflicts of interest. In 1997, James W. Speer, then managing attorney at the Richmond legal aid office, wrote of Mr. Floyd's back-up *pro bono* hotline work: "Although we usually are unable to give him any advance notice that we need a substitute, Don has never turned down a request for assistance with the hotline—even though he has to put aside other work he is doing for us."

The board of directors of the Bar Association of the City of Richmond unanimously chose Mr. Floyd for the association's 1997 *Pro Bono Publico* Award.

Legal aid staff members often remarked on the unassuming way in which Mr. Floyd carried out difficult *pro bono* responsibilities. Because of his dedication, competence, zeal and personal modesty, he was a daily role model for the staff of Central Virginia Legal Aid Society, who unanimously expressed their sense of privilege to have worked with him in a letter to the Virginia State Bar supporting his nomination for the Powell Award.

Mr. Floyd's eight years of *pro bono* service for legal aid in Virginia set a sterling example of personal testimony to the high ideals of the legal profession. ⚖️

VSB Offers Confidential Law Practice Management Reviews to Solos and Small Firms*

If you are concerned about being a competent professional and want your practices and procedures to reflect this, consider having a half-day confidential review of your law practice management systems for the low cost of \$150 per attorney. The VSB's risk management program covers the remainder of the cost associated with these reviews. Since the number of reviews that can be conducted each year is limited, please don't delay in writing to or calling Janean S. Johnston, J.D., in order to receive an application form.

Johnston is a licensed attorney in Minnesota, and she has conducted legal risk management and ethics audits and reviews nationwide since 1987. She has recently returned to Virginia and has been retained by the VSB Malpractice Insurance Committee to assist with its overall risk management efforts on behalf of Virginia lawyers. You may reach her at 250 South Reynolds Street, #710, Alexandria, VA 22304, or at (703) 567-0088.

Take advantage of this limited offer and gain peace of mind as a result of improved practices and procedures that can reduce your exposure to both malpractice claims and ethics complaints.

*(law firms with a maximum of five attorneys)



USERRA and Virginia Law The Employment Rights of Military Reservists in Virginia

by Michael P. Oates and Michael L. Walton

In response to the events of September 11, 2001, the United States has called to active duty thousands of members of the National Guard and Reserve Forces. As these military reservists answer their country's call, it becomes incumbent upon their employers to understand and abide by the federal and state laws that protect employees called to, and returning from, military service.

Federal Law: USERRA

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4301 *et seq.*, is a comprehensive federal law addressing employment and reemployment issues of those who serve in the uniformed services. USERRA affords protection to employees entering military service voluntarily or involuntarily. It applies to both public and private employers and, unlike other federal employment discrimination laws, there is no minimum employee requirement for coverage.

Treatment during Military Service

Under USERRA, an employee must provide an employer with advance notice of military service, except where military necessity makes such notice impossible or unreasonable. The notice can be verbal or written.

Equivalent to a Leave of Absence

USERRA requires an employer to treat an employee called to military duty as if he or she was on a leave of absence. Thus, a military reservist is entitled to the same rights and benefits granted to an employee on leave of absence for a non-military reason. While many companies have pledged to bridge the compensation gap created by a call to military service, USERRA does not require an employer to do so. Only if an employer pays employees for nonmilitary leaves of absence must that employer continue to pay employees called to military service.

Health Benefits

USERRA requires an employer to maintain health insurance for an employee called to military service, if the employee so desires. The maximum period of health insurance coverage is the lesser of 18 months or the day after the date on which the employee fails to apply for, or return to, a position of civilian employment. If an employee elects to continue health care coverage during military service, the employer cannot charge him or her any more than 102% of the full premium. In the event the employee serves for 30 days or less, he or she can be required to pay only the employee share of the premium.

Treatment upon Return from Military Service

Reapplication by the Employee

USERRA places the burden of reapplication on the employee. The time within which an individual must reapply for employment varies, depending on the length of military service:

- **service period of 1–30 days**—employee must report for first scheduled work day falling 8 hours after the end of the day when service ends;
- **service period of 31–180 days**—employee must submit application for reemployment within 14 days after completion of military service; or
- **service period of 180 days or more**—employee must submit application for reemployment within 90 days after completion of military service.

If an employee has been on military leave for more than 30 days, USERRA permits the employer to request certain documentation from the employee, including proof that the application for reemployment is timely, that the cumulative military leave has not exceeded five years and that the employee was honorably discharged. An employer may not deny reinstatement on the grounds of missing documentation, however, if the documentation either does not exist or is not readily available at the time of the employer's request.

Reinstatement by the Employer

Upon proper reapplication, USERRA requires an employer to reinstate an employee returning from military service, unless one of three narrow exceptions exists:

- the employer's circumstances have changed to the point that reemployment is impossible or unreasonable;
- reemployment would impose an undue hardship on the employer; or

- the employment that the employee left was of such a brief, non-recurrent nature that there is no reasonable expectation that such employment would continue for a significant period.

The Escalator Principle

Under USERRA, an employee returning from military service must be treated as though he or she had been employed continuously during the period of military service. Thus, if it is reasonably certain that an employee would have received a seniority-based promotion during the time that he or she was in the military, then the employee is entitled to reinstatement at this elevated position upon return to work. If the elevated position is not available, the employee must be placed in a position of like seniority, status, and pay, assuming he or she is qualified to perform such position. USERRA also requires an employer to make reasonable efforts to qualify or requalify a returning employee for his or her position. “Reasonable efforts” include training that does not place an undue hardship on an employer.

For Cause Termination

USERRA protects an employee returning from military service from termination “without cause” for a certain period of time. For military service in excess of 180 days, the protected period extends for one year from the date of reemployment. For military service between 30 and 180 days, the protected period extends for 180 days from the date of reemployment.

Pension Benefits

USERRA requires an employer to maintain the continuity of an employee’s pension for vesting and benefit accrual purposes while that person is serving in the military. Upon reemployment, the employee can repay any employee contributions missed.

Prohibition against Discrimination

USERRA prohibits discrimination against an employee called to, or returning from, military service with respect to initial employment, reemployment, retention, promotion, or any other benefit of employment. The Act also prohibits retaliation against an employee for acting on any of the rights established under USERRA. The Act provides that an employer is liable for discrim-

ination if an employee’s military status is a “motivating factor” in the employer’s action. An employer may avoid liability by proving that the adverse action would have been taken in the absence of an employee’s military status.

Virginia Law

USERRA does not preempt state laws addressing the employment and reemployment rights of military reservists. In contrast to a number of states having comprehensive laws that must be read in tandem with USERRA, Virginia law says very little on this subject. Accordingly, USERRA takes on primary importance for Virginia employers. The Virginia Code does contain a provision prohibiting interference with the employment of members of the United States Reserve, National Guard, and Naval Militia. *See* Va. Code § 44-98. This statute makes it a crime to deprive such individuals of employment, obstruct or annoy them at their trade, business, or employment or dissuade them from military service by threat or injury to their employment, trade or business. The Virginia Code also contains a USERRA-like provision creating leaves of absence for state employees on all days during which they are engaged in federally funded military duty. *See* Va. Code § 44-93. Unlike USERRA, this statute guarantees that state employees will suffer no loss of pay during the leaves of absence, so long as the federally funded military duty does not exceed 15 workdays per federal fiscal year. [↗](#)

Michael Oates is a partner and **Michael Walton** is an associate on the labor and employment team in Hunton & Williams’ Richmond office. Their practice focuses on representing employers in the full range of traditional labor and employment law issues before the United States Circuit Courts of Appeals, the United States District Courts, the Courts of the Commonwealth of Virginia, and the National Labor Relations Board. Oates received his J.D. degree, magna cum laude, from Washington and Lee University. Walton received his J.D. degree from Vanderbilt University School of Law, where he served as a managing editor of the *Vanderbilt Law Review*.

Providing Pro Bono Representation Before the U.S. Court of Appeals for Veterans Claims

Two-thirds of all veterans appealing their cases to the new U.S. Court of Appeals for Veterans Claims in Washington cannot afford a lawyer. In each case, the government is represented by a lawyer. The Veterans Consortium Pro Bono Program is seeking volunteer attorneys. Each attorney agreeing to accept one case will receive free training, a comprehensive veterans law manual, pre-screened cases and ongoing access to veterans law experts as mentoring attorneys.

The next all-day veterans law training will be held at the D.C. Bar on Friday, April 26, 2002. There is an at-home videotape option in limited circumstances. CLE credits are available and malpractice coverage is provided for those not already covered. Court-awarded fees are possible in some cases.

Call the Veterans Consortium at 202-265-8305, extension 126, to register, or extension 109 for more information.



VIRGINIA LEGAL AID AWARD

Since 1992 at the Virginia State Bar's Annual Meeting in Virginia Beach, an outstanding legal aid attorney has received the Virginia Legal Aid Award. Established by the bar's Special Committee on Access to Legal Services, the award is presented at a luncheon for interested members of the legal aid and pro bono communities.

While there is no official form to complete, the Access Committee asks that nominations be in writing and include a description of how the nominee exhibits the following qualities in his or her work: 1) Innovation and creativity in advocacy; 2) Experience and excellence in service; and 3) Impact beyond his or her own program's service area. The nominee must be a member of the VSB and an employee of a legal aid society that is licensed by the VSB to operate in the Commonwealth of Virginia.

Nomination Deadline: May 1, 2002

Please submit all nominations to:
Access to Legal Services Committee
c/o Maureen Petrini, Access to Legal Services Director
Virginia State Bar
707 East Main Street, Suite 1500
Richmond, Virginia 23219-2800
Phone: (804) 775-0522, Fax: (804) 775-0582,
e-mail: petrini@vsb.org



PRO BONO Opportunities

CTLP Seeks Volunteer Attorneys

The Community Tax Law Project provides free legal advice and representation to low-income Virginia residents in tax disputes with federal, state and local tax agencies. The Project assists the indigent and the working poor. Taxpayers with income at or below 250% of the federal poverty level (approximately \$45,000 for a family of four) are eligible for *pro bono* services. Founded nearly a decade ago as a Virginia 501(c)(3) organization, The Community Tax Law Project (CTLP) was the first independent program of its kind in the nation.

CTLP relies heavily on the efforts of volunteer attorneys willing to provide *pro bono* services to clients. It seeks volunteer attorneys from all areas of the state with a special need in the greater Richmond area. Additionally, it is recruiting Spanish-speaking attorneys or attorneys with support staff who are willing to interpret for an increasing number of Hispanic clients.

CTLP staff provide in-house technical assistance to *pro bono* attorneys. The Project also offers practice aids as well as CLE programs in areas of low-income tax practice that are also relevant to volunteers' private practices. CTLP provides malpractice insurance coverage to all members of its *pro bono* panel.

The Project plans to expand the reach of current initiatives, which include: informing new workers, including participants in welfare-to-work programs, about tax issues related to their employment status; educating U.S. newcomers about their tax obligations and representing them in contested tax matters; and assisting victims of domestic abuse in matters involving collection of joint tax debts, innocent spouse relief and re-entering the tax system after many years of not working.

To learn more or to volunteer, contact Elaine Javonovich at (804) 358-5855 or e-mail ej@ctlp.org.

Visit the Pro Bono page on the VSB Web site
for **pro bono training and opportunities**
listed at www.vsb.org/probono/.