Senior Lawyer News

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The Merits of the Boyd-Graves Proposal to Merge Law and Equity

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[This article appears courtesy of the VSB Litigation Section.]

In the Winter 2003 issue of *Litigation News*, Samuel W. Meekins, Jr., commented on the proposal of the Boyd-Graves Conference that the law and equity distinction under Virginia civil practice be replaced by a uniform set of procedural rules. He posed a good question: "Is this a good idea?" He asked for the thoughts and input of the members of the bar on this issue "so that this [Litigation] section can be heard as regards to the ultimate resolution of the unified proposal system."

Let me state unequivocally that a change from a dual to a unified system, or one form of action, is a good idea for many reasons, but in my opinion, the overriding reason is that a unified system is in the best interests of the public—it will promote a better, more efficient and more economical civil justice system.

I would like to give a short summary of my background. I have been practicing for over 38 years, primarily in business and commercial litigation. I am a past chairman of the Litigation Section of the Virginia State Bar. I have served as chairman of the Boyd-Graves Conference and have been a member of the Conference for over 20 years. I served as chairman of the original Boyd-Graves Committee on the merger of law and equity. I participated in several presentations to the members of the conference where the proposal to merge, or unify, our civil procedural system has been debated. The Conference has always, almost unanimously, endorsed (and re-endorsed) the proposal. I have taught Virginia Law and Procedure at Washington & Lee Law School for over 23 years. Third-year students become glassy-eyed when they are introduced to our law-equity dichotomy in our procedural system. I include in my materials cases where the parties expended unnecessary time, money and energy in the litigation only because the lawyers and the court could not agree on which side of the court the case should be tried. In one case, the parties litigated for over five years, only to have the Supreme Court reverse the trial court, because the case had been tried on the wrong side of the court. The parties, who could not have been very pleased with this outcome, had to start

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The Story Behind the Photo

C. Glasgow Butts is the senior member of the Senior Lawyers Conference Board of Governors, on which he is completing his second term. He has been a member of the Virginia State Bar for more than 60 years. At 87 years of age, he is engaged in the full time practice of law in the firm of Butts and Butts in South Hill. He is a proud husband, father, grandfather, and graduate of Wake Forest University. His wisdom, graciousness and personal example have contributed greatly to our efforts to encourage and to maintain civility among members of the Virginia State Bar.

[Photo courtesy of Susan Vaughan Brown]

Frank O. Brown Jr., left, and C. Glasgow Butts, right, share a moment of collegiality at a Senior Lawyers Conference Board of Governors meeting in Charlottesville.

Message from the Chair

Patricia A. Barton

Almost three years ago, when the Senior Lawyers Section became the Senior Lawyers Conference, increasing our membership from 325 to 7500, we ceased sending out a quarterly newsletter because of the cost involved in sending out so many issues, and began carrying our newsletter on the Web site at **www.vsb.org/slc** under Attorney Resources. Since all members of the Virginia State Bar who are in good standing and are 55 years of age or older are automatically members of the Senior Lawyers Conference (without application and without payment of any additional dues), our numbers are increasing continuously and will soon be over 9,000.

We warmly welcome all new members to our conference and encourage your participation in conference activities! The bar recently mailed a survey to ten percent of its members to determine how satisfied members are with bar leadership and staff assistance. The returns showed an overwhelming preference for printed material rather than website communication. Therefore, the SLC board voted to mail at least one newsletter per year to our members, and this is our first!

Another result of our conversion to conference status was inclusion of the SLC chair on bar council, and this year, on the bar's executive committee. As SLC's delegate to both council and executive committee, I wish to report on several important issues.

As you may already know, Legal Services Corporation of Virginia (LSCV), which has been funded in large part by the voluntary IOLTA program (Interest on Lawyers Trust Accounts) is in dire financial straits, partly due to low interest rates. LSCV offices are facing reductions in staff to unacceptable levels, as well as possible closing of offices altogether. LSCV approached council with the possibililty of including a voluntary checkoff line on the yearly dues statement whereby an attorney could direct $50 (or less) to LSCV on this dues invoice. Debate in council was vigorous; whereas support for LSCV was firm, there were strong objections on various grounds. The matter was tabled. Then a bill was introduced in this year's legislative session (House Bill No. 1173) which would have required the bar to include such a dues checkoff; that bill was carried over to 2005 in the Senate Courts of Justice Committee. In the interim, bar leaders are hopeful that a mail solicitation can be developed, giving bar members the opportunity to make voluntary contributions to support LSCV. If you receive such a letter, I urge you to send in a generous contribution, because it is vitally needed.

SLC has joined with the Young Lawyers Conference to draft an amendment to Supreme Court rules allowing retired attorneys, under an "emeritus" status, to work under legal aid supervising attorneys to provide pro bono assistance to low income persons. Bar dues will not have to be paid under emeritus status, but CLE hour requirements will have to be met. A task force has been set up by council to develop guidelines for receivers appointed by courts to wind up practices of disabled, deceased, or disbarred attorneys who made no arrangements for the conclusion of their practices. I am a member of this task force, and we are studying the issues involved with receiverships, including the preparation of a handbook to be used by receivers. Currently the bar is expending large sums to protect the public in such situations. To reduce this expenditure, we are encouraging everyone to prepare for such an eventuality, no matter what your age, either by making an arrangement with a colleague on an informal basis, or by entering into a written arrangement spelling out particulars. Special power of attorney, an agreement and last will and testament provisions for this purpose can be found on our SLC Web site at **www.vsb.org/slc** under Attorney Resources.

The *Senior Citizens Handbook* is being revised and should be available by the June bar meeting in Virginia Beach. This effort is a joint one, traditionally, with the Young Lawyers Conference. The project is ably headed by Overton P. Pollard who recently retired as executive director of Virginia's Public Defender Commission. It is the most requested publication the bar offers, and is also available on our Web site in English and Spanish. It is frequently downloaded in its entirety! ■

VSB Annual Meeting Highlights of the SLC

CLE WORKSHOPS

The Senior Lawyers Conference will co-sponsor the following CLE workshops at the VSB Annual Meeting on June 18, 2004, in Virginia Beach:

With the Trusts and Estates Section—"Talking With Clients About Charitable Giving"—Cavalier Oceanfront, 11 a.m. (1.5 credits).

With the Health Law Section—"Do You Know Where Your Parents Are? Quality of Care Litigation Involving Nursing Homes And Hospitals"—Location TBA, 2 p.m. (1.5 credits).

FIFTY YEAR AWARDS LUNCHEON

The Senior Lawyers Conference is pleased to host a special luncheon in honor of all those members who have completed fifty years of service as members of the Virginia State Bar and who will receive their special fifty year recognition certificates at the general session of the VSB Annual Meeting on June 19, 2004.

This event is by special invitation only to the fifty year honorees and will be at 12:45 p.m. at the Cavalier Oceanfront.

—*A Remembrance*—

Douglas Wayne Conner

Doug Conner died unexpectedly on August 27, 2003. He was only 67 years old. He was my friend and, for decades, a respected colleague in the field of tax, trusts and estates law. He loved his wife, Carole, his children and his grandchildren. He was happiest when he was surrounded by his family and friends, sharing his hospitality and the fruits of his considerable cooking skills. Doug was a man of many talents, but he was a modest man nonetheless. To paraphrase Rudyard Kipling, he could walk with kings, but not lose the common touch. He was a trusted advisor and a friend to his clients. He was an exemplary model of professionalism and civility.

Born in Halifax County, Virginia, Doug earned his bachelors and law degrees from the University of Richmond. He also received his Masters of Law and Taxation from the College of William and Mary, and practiced law continuously in Richmond from 1962 until the time of his death. Doug was a Fellow of the American College of Trust and Estate Counsel, and many other professional organizations.

He was generous in his sharing with his colleagues, and had a career-long interest in advancing the professional skills and education of those practicing in the fields of estate planning and estate administration. Doug and I were the co-founders of the University of Richmond Estate Planning Seminar, which has been held annually at the University since 1973. Thanks to funding provided by friends and colleagues of Doug, the university will have a special speaker, called the Douglas W. Conner speaker, at each future annual seminar. Doug was a founder of the Advanced Estate Planning and Administration Seminar held annually at the Tides Inn, and served as its only chair from 1980 until his death. Ironically and fittingly, he had just completed the planning for the Silver Anniversary Seminar (2004) immediately before his death. In Doug's honor, Virginia CLE has named the seminar The Douglas W. Conner Annual Advanced Estate Planning and Administration Seminar.

Doug loved Richmond's Monument Avenue, where he had his home and office in a stately Bottomley house that he and Carole had carefully preserved and restored, and where they raised their family. He was active in the Monument Avenue Association and had a vision for preserving this beautiful central gem of Richmond. When he died, his funeral service and the interment of his ashes were at St. James's Episcopal Church, within easy walking distance of his home. At his funeral, the minister prayed: "Grant that, increasing in knowledge and love of Thee, he may go from strength to strength in the life of perfect service in Thy heavenly kingdom." We know that his strength here has been passed on to his family, friends, community and profession and, although he is gone, he and his generous spirit will never be forgotten.

—Frank Overton Brown Jr.

The Promise of Inclusion—Oliver W. Hill Sr.

Frank O. Brown, Jr.

On April 2, 2004, my wife, Susan, and I attended the Leadership Metro Richmond Luncheon, which celebrated the fiftieth anniversary year of the *Brown* decision and paid tribute to Oliver W. Hill with an inspirational encomium by Judge Roger Gregory of the United States Fourth Circuit Court, who recognized how Oliver W. Hill had prepared the way for him and others. In his brief remarks, Oliver W. Hill, just one month short of his 97th birthday, seated in his wheelchair and speaking in a soft voice, gave thanks for the tribute and, continuing his vision, appealed for a "Renaissance in the twenty-first century," asking that we bring our developments in human relations to the same high levels which we have reached in science and technology.

Oliver W. Hill, who is a current member of the Virginia State Bar Senior Lawyers Conference and was a member of the Board of Governors of the former Senior Lawyers Section, was born in Richmond, Virginia, on May 1, 1907, just 12 years after Homer Plessy sat down in a train car reserved for whites and was arrested. In Plessy's case, the U.S. Supreme Court stated that the 14th Amendment, with its equal protection declaration, "could not have been intended to abolish distinctions based upon color . . . or a co-mingling of the races . . ." This decision (*Plessy v. Ferguson*, 163 U.S. 537 (1896)) shaped race relations and public policy in this country for more than half a century. Many of us have long forgotten the eloquent dissent of the Great Dissenter, Justice John Marshall Harlan, a man ahead of his time, in which he wrote: " . . . in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind . . . The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of hate to be planted under the sanction of law . . ." Oliver Hill learned and remembered well Justice Harlan's words.

Sanctioning discrimination on trains, the *Plessy* doctrine was then applied to a host of other areas: to public accommodations, to education and to housing. Although the Supreme Court never used the precise term, "separate but equal" in *Plessy*, the phrase entered the legal lexicon and everyday language. Segregation laws were passed in 21 states under the protection of *Plessy*. This was the world in which Oliver Hill spent his formative years in Richmond and Roanoke, Virginia, and in Washington, D.C., where he graduated from Dunbar High School. He earned his undergraduate degree from Howard University in Washington, D.C., in 1931, and his law degree from there in 1933, when he also passed the

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Boyd-Graves—

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all over again. *See Stanardsville Volunteer Fire Co. v. Berry*, 229 Va. 578, 331, S.E.2d 466 (1985). This debacle would not have happened under a unified procedural system. I have litigated cases where counsel for the parties, as well as the court, struggled with the issue on which side of the court the case should be tried. *See, e.g., Love v. Hammersley Motor Co*, 263 Va. 45, 556 S.E. 2d 769 (2002). Cases brought on the right side of the court have been dismissed, causing our Supreme Court of reverse. *See, e.g., Wright v. Castles*, 232 Va. 218, 349 S.E.2d 125 (1986); *Packett v. Herbert*, 237 Va. 422, 377 S.E. 2d 438 (1989). These cases are prime examples of the inefficiencies of our civil procedural system, causing the expenditure of unnecessary attorneys' fees and costs, a waste of judicial time and resources, and certainly client frustration.

Many model acts passed by our General Assembly, such as the Uniform Commercial Code, do not contemplate a divided system of law and equity, and have not been altered to reflect a divided system. Professor Kent Sinclair has recently observed, in an article printed in the June 16, 2003 edition of *Lawyers Weekly*: "[P]ractitioners generally know on which side of the court to file common claims . . . But there are dozens of less [known] common causes of action recognized in Virginia, arising from common law and from statutory rights . . . [T]he research staff of the Supreme Court developed a list of causes of action for which there was no clear indication of the correct side of the court . . . Lawyers guessing wrong can inadvertently lose a case." This is a minefield over which lawyers, judges and clients should not have to traverse.

I have read Judge Kelsey's article that appeared in the Boyd-Graves materials for the 2002 conference. *See* Law & Equity in Virginia, 28 *VBA News Journal* No. 8 at 6–10 (Dec. 2002) (**www.vba.org/dec02.htm**). I support and subscribe to his analysis and conclusions. There is no question in my mind that the citizens of Virginia will have a "better system," where their disputes would be presented to the court and resolved without either the lawyers or the judge having to fret whether the case was on "the right side of the court."

Mr. Meekins seems to question whether we ***will*** have a better system if we unify law and equity. He states that there are clearly some advantages to the current system, one of which is the necessity to focus on and appreciate the equity practice, as strategies are developed and pleadings prepared based on the initial determination regarding the remedies the parties seek. I am not aware of any evidence that lawyers practicing in our federal courts or other state courts with "unified" systems are unable to seek and, where appropriate, obtain those remedies their clients desire. Rather than a benefit of our current system, I see the division of law and equity as an unnecessary impediment to parties who come to court to get their legal problems resolved as promptly and inexpensively as possible. The cases mentioned herein patently illustrate my point of view that our current system "needs fixing."

If we adopt a unified system, a party may ask for equitable relief and legal relief, arising out of a common and connected set of facts, without having to elect to file on one side of the court or the other. It does not make any sense in today's commercial business world for a party that seeks an injunction, together with money damages, to have to file first in equity for an injunction, then file a second suit at law for money damages if the injured party desires a jury trial. *See, e.g., Worrie v. Boze*, 198 Va. 533, 95 S.E.2d 192 (1956).

Nearly all of the states have merged law and equity into one procedural system. The proposal to do the same in Virginia certainly is not a novel or new idea. Nearly all attorneys study the *Federal Rules of Civil Procedure* in law school, and a merger would not require any great shifting of trial preparation and practice. In sum, I believe the merger of law and equity would promote efficiency and decrease the transaction cost of litigation. I have yet to hear a single objection to merger that is anything more than a worrisome speculation, one easily dismissed by a survey of the success of merger in the majority of the states and in the federal courts.

For these reasons, I strongly recommend that the Litigation Section of the Virginia State Bar endorse the Boyd-Graves proposal. ■

*[**Editor's Note:** As of the date of publication of this newsletter, it is the Editor's understanding that there is no consensus of the Litigation Section regarding the Boyd-Graves proposal.]*

Oliver Hill—

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Virginia bar exam. Scarcely a year after his graduation from law school, in 1934, Oliver Hill and a group of little known black lawyers began to document the inequalities between black and white life in America, and to work to eliminate these inequalities. Some of these other lawyers were: Charles Hamilton Houston (who died in 1950), Thurgood Marshall (who died in 1993), Samuel W. Tucker (who died in 1990) and William Hastie (who died in 1976). The crucial victory in their gradual and two decades long campaign came with the landmark 1954 United States Supreme Court decision in *Brown v. Board of Education* (347 U.S. 483 (1954)). Oliver Hill argued the case of *Davis v. County School Board of Prince Edward County, Virginia*, one of the five *Brown* companion cases.

Oliver Hill practiced law in Richmond, Virginia, from 1939 until his retirement in 1998. The City of Richmond's juvenile court building is named the Oliver W. Hill Courts Building.

On August 11, 1999, the President of the United States awarded Oliver Hill the Presidential Medal of Freedom. The citation says:

> **"OLIVER WHITE HILL**
>
> A courageous civil rights advocate, Oliver Hill has devoted his life to building a more just and inclusive America. As a trial lawyer, he won landmark cases that secured equal rights for African Americans in education, employment, housing, voting, and jury selection. Successfully litigating one of the school desegregation cases later decided by the Supreme Court in Brown v. Board of Education, he played a key role in overturning the 'separate but equal' doctrine. For his unyielding efforts to improve the lives of his fellow Americans and his unwavering dedication to justice for all, our Nation honors Oliver Hill."

Oliver Hill is a role model of professionalism, civility, courage and dedication. I am honored to be in his company. ■

BOOK REVIEW —

Coercing Virtue

The Worldwide Rule of Judges

by Robert H. Bork

(Book review by Richard Cocke, Past Chair, Senior Lawyers Section, Virginia State Bar
and current member of the Board of Governors of the Senior Lawyers Conference of the Virginia State Bar)

The importance and timeliness of this book are underscored by Supreme Court Justice Sandra Day O'Connor in a recent address she delivered at the Southern Center for International Studies in which she noted that "[n]o institution of government can afford any longer to ignore the rest of the world." And she went on to observe that "conclusions reached by other countries and by the international community, although not formally binding upon our decisions, should at times constitute persuasive authority in American courts." This is precisely the type of application of a world view into domestic issues that Judge Bork cautions against in his book.

No light reading this. Replete with footnotes and index, Judge Bork has provided us with an in depth discussion of the advancing tide that threatens to undermine our system of representative government. John Grisham is more likely to keep you reading late into the night, but Bork demonstrates emphatically that he does not back away from controversial subjects.

Judge Bork accepts as fact that there is a cultural war being waged in America as well as other western countries, and he believes that judicial activism is a major weapon in this war. In describing who is at the heart of this movement, he shuns the usual labels such as "elite", "left", "intellectuals" or "liberals" and coins his own term "New Class." He purposely avoids any term that would imply that the class should enjoy an elevated status or lend credence to their views or methods.

Bork uses the term "New Class" to refer to the driving force behind the dramatic changes going on in our society as spearheaded by our judges at all levels. Of this "New Class" he says ". . . their defining characteristic is that they traffic . . . in ideas, words or images and have at best meager practical experience of the subjects on which they expound." He points out that the "New Class" is a vocal and influential minority whose ideas lose when exposed to the ballot box, and socialism is their ruling passion. He distinguishes between the values of the business class and those of the New Class and points out that bourgeois values are anathema to the New Class.

He gives numerous examples to support his observation that activist judges are those who decide cases in ways that have no plausible connection to the law they purport to be applying or who stretch or even contradict the meaning of that law. They arrive at results by announcing principles that were never contemplated by those who wrote and voted for the law.

For example, the Alien Tort Claims Act was enacted by congress in 1789 at a time when the fledgling U.S. could hardly be considered a world power. What the legislators who enacted the law intended is far from clear. What is clear is that they could not possibly have intended the interpretations that modern judges have recently ascribed to the law. That law, which lay dormant for two hundred years, provides: "The district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." The law has been used to allow U.S. courts to hear tort cases involving foreign nationals and activities that occurred in foreign countries. His point is that this type case is not brought for recompense, but rather for propaganda purposes to bolster a moral argument.

He makes a compelling case for the principle that activist judges who make rulings which overturn laws passed by legislatures undermine the democratic process by making autocratic decisions to override legislative decisions. In this way the politics of coercion replaces the politics of compromise and persuasion resulting in an embittered political atmosphere. A classic case in point is that polls show that some 70% of the American population oppose gay marriage and yet a Massachusetts judge has recently decreed that recognition of gay marriage is mandated under an equal rights clause of the Massachusetts constitution.

He uses the recent VMI case as an example of how court decisions have the effect of undermining the will of the people. Only a few years ago, the radical feminists had pushed hard for an amendment to the U.S. constitution which would have declared equal gender rights. This ERA amendment was rejected at the polls, and yet VMI, which had lived at peace with the equal rights clause for some 128 years, was suddenly forced by an activist court to recruit and admit women into its military ranks.

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The Health Insurance Portability Accountability Act of 1996 (HIPPA) and Advance Medical Directives

Robert A. Cox Jr.

Member and Treasurer of the Board of Governors of the Senior Lawyers Conference of the Virginia State Bar

HIPAA (Public Law 104-191), the requirements of which took effect in 2003, has the intended purpose of ensuring the privacy of a patient's medical records and health information; however, it may cause some problems for family members and other health care agents in gaining access to that information, unless health care powers of attorney, general powers of attorney, and advance medical directives contain explicit enough language to satisfy HIPAA requirements. The following language has been suggested by the ABA Senior Lawyers Division Elder Law Committee, as contained in *Practicing Senior Lawyer*, Winter 2004:

"I authorize any physician, health care professional, dentist, health plan, hospital, clinic, laboratory, pharmacy, or other covered health care provider, any insurance company and the Medical Information Bureau, Inc., or other health care clearinghouse that has provided treatment or services to me or that has paid for or is seeking payment from me for such services, to give, disclose, and release to my agent, without restriction, all of my individually identifiable health information and medical records regarding any past, present or future medical or mental health condition, including all information relating to the diagnosis and treatment of HIV/AIDS, sexually transmitted diseases, mental illness, and drug or alcohol abuse. [**Editor's Note:** *Lawyers may wish to consider the appropriateness of some of the underlined language in their particular clients' situations*].

a. The authority given to my agent shall supersede any prior agreement that I may have made with my health care providers to restrict access to or disclosure of my individually identifiable health information.

b. The authority given to my agent has no expiration date and shall expire only in the event that I revoke the authority in writing and deliver it to my health care provider.

In addition to the other powers granted by this document, I grant to my agent the power and authority to serve as my personal representative for all purposes of the Health Insurance Portability and Accountability Act of 1996, as amended from time to time, and its regulations (HIPAA) during any time that my agent (hereinafter referred to in subsequent clauses of this paragraph as my "HIPAA personal representative") is exercising power under this document.

a. Pursuant to HIPAA, I specifically authorize my HIPAA personal representative: to request, receive and review any information regarding my physical or mental health, including without limitation all HIPAA-protected health information, medical and hospital records; to execute on my behalf any authorizations, releases, or other documents that may be required in order to obtain this information and to consent to the disclosure of this information. I further authorize my HIPAA personal representative to execute on my behalf any documents necessary or desirable to implement the health care decisions that my HIPAA personal representative is authorized to make under this document.

b. By signing this document, I specifically authorize my physician, hospital or health care provider to release any and all medical records to my HIPAA personal representative or to my representative's designee."

For your reference, the Office for Civil Rights of the United States Department of Health & Human Services maintains an extensive Web site devoted to HIPAA, the regulations thereunder, and other materials. These may be found at **www.hhs.gov/ocr/hipaa/**. ■

Calling All Senior Lawyers: Pro Bono Services Needed!

The experience, knowledge and wisdom of Senior Lawyers are needed to help provide pro bono services. To locate a licensed legal aid society through which you can volunteer in your area, go to **www.vsb.org/probono/las_map.pdf**.

For background regarding Chief Justice Hassell's initiative on the use of attorney volunteers in certain types of child custody cases, go to **http://www.vsb.org/clba/lbc_su03.pdf**. House Bill No. 69 allows attorneys who provide pro bono custody and visitation legal services to eligible indigent persons pursuant to a program approved by the Supreme Court of Virginia or the Virginia State Bar to be covered by the commonwealth's risk management program for claims arising from their provision of legal services in such programs. The bill provides that the cost of such coverage shall be paid by the Virginia Supreme Court for approved programs of the Supreme Court and the Virginia State Bar. This bill passed and has been signed into law by the Governor (see 2004 Acts of Assembly, Chapter 121, effective July 1, 2004). Watch for reports of developments in this area.

To volunteer to provide legal assistance to military personnel, go to **www.vsb.org/probono/lamp_form.pdf**.

For a reference guide to legal and public services programs sponsored by Virginia local and speciality bar associations, go to **http://www.vsb.org/publications/brochure/legally_informed.pdf**.

To get more information about participating in the Virginia Bar Association's Community Service Program, as a Community Servant or as a Pro Bono Servant, go to **http://www.vba.org/comserprog.htm**, or go to page 12 of *The Virginia Bar Association News Journal*, February/March 2004 Issue.

If you do not find an appropriate way in which to volunteer from the foregoing links, please call Maureen Petrini (804-775-0522) at the Virginia State Bar.

Book Review—

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Quoting from Henry Kissinger in 2001 "In less than a decade, an unprecedented concept has emerged to submit international politics to judicial procedures. It has spread with extraordinary speed and has not been subject to systematic debate, partly because of the intimidating passion of its advocates. The danger is that it is being pushed to extremes which risk substituting the tyranny of judges for that of governments; historically the dictatorship of the virtuous has often led inquisitions and even witch hunts."

Bork explains that so called international law is really international politics, and points out the distinction between "law" and "morality." The U.S. does not accept the jurisdiction of the International Court of Justice (World Court) and the decisions of the ICJ therefore cannot be enforced, but this does not mean that those decisions are meaningless. Those decisions do have certain moral force and are argued as such in international organizations for political purposes, frequently to undermine the moral suasion of the U.S.

The world has experienced endless examples of aggressive use of force by one country against another. Some of these instances were eminently justified on moral grounds, but none of them had a clear legal warrant. On the other hand, it is difficult to find an example a nation that has refrained from the aggressive use of force out of respect for international law. Certainly Germany and Japan did not allow the Kellogg-Briand Pact of 1928, which condemned "recourse to war for the solution to international controversies." to restrain them from wars of conquest shortly thereafter. Bork's conclusion is that it is folly to think that we can end war by legislation. He asserts that there can be no authentic rule of law among nations unless they have a common morality or are under a common sovereignty.

Judge Bork also examines the comparisons of judicial activism in Canada to show just how much change has occurred in such a short period of time and in Israel to show just how far it can go.

He argues that the rule of law is central to democratic governments of western civilization. To him it is ominous that the rule of law has become confused with the rule of judges. Judicial activism elevates the objectives of a dominant minority above the democratic process. The activist judiciary who are not elected by the people are circumventing the will of the people. He points out that the New Class heartily dislikes bourgeois culture; and hence the activist judges displace traditional moralities with cultural socialism.

This book serves as a wakeup call for those who believe in the constitutional democratic process and an American culture of traditional values. ■

[***Editor's Note:*** *Robert H. Bork, former circuit judge of the U.S. Court of Appeals for the District of Columbia, solicitor general and acting attorney general under Presidents Richard Nixon and Gerald Ford, and author of two New York Times bestsellers about American society and law, will join the faculty of the University of Richmond's T.C. Williams School of Law in the fall of 2004.*

As Distinguished Professor of American Law and Culture, Judge Bork will teach a fall course in constitutional law theory for law students and undergraduates. In spring 2005, he will team with law dean Rodney A. Smolla to teach "Constitutional Conversations," offered evenings to law students and the general public covering a variety of topics related to American constitutional law and culture.]

Senior Justice Carrico Joins University of Richmond Faculty

Senior Justice Harry Carrico, a member of the Senior Lawyers Conference, has joined the University of Richmond faculty as Visiting Professor of Law and Civic Engagement. He has already presented the following free programs open to the public: "John Marshall as the Exemplar of the Citizen-Lawyer;" "The Role of Pro Bono Service in the Life of the Legal Profession;" "How Do We Restore and Maintain Traditions of the Bar to the Practice of Law?" "An Evening with Justice Carrico—A Memoir" will be presented in the fall of 2004. For information on this and other programs to be presented by Justice Carrico, please call the University of Richmond at (804) 289-8740.

LAW DAY

May 1, 2004

The founder of Law Day, Charles S. Rhyne, died in 2003. He was 91. As president of the ABA almost half a century ago, he introduced the concept of a day especially set aside to honor the rule of law and to demonstrate that"respect for the rule of law is the key to individual freedom and justice."

In 1958, Charles Rhyne established the first Law Day and presented a draft of of the first presidential proclamation in support of Law Day. President Eisenhower issued that Law Day proclamation—and every President has issued one since.

Charles Rhyne felt that Law Day could help Americans understand and appreciate the blessing of liberty under law.

He wrote:

> "From the birth of our nation to the present day we as a people have glorified law rather than men. The phrase 'Equal Justice Under Law' is our creed and birthright. Our Constitution guarantees every citizen equal protection under the law. Not some protection, but equal protection. And this means equal justice under the law to the poor and to the rich, to the weak and powerful alike."

The Senior Lawyers Conference encourages its members to participate in Law Day activities on May 1, 2004, and to celebrate the freedoms which our profession helps to guarantee.

Risks in Informal Consultations

Thomas P. Sukowicz

Director of Lawyers Risk Management Services, Hinshaw Culbertson

There are risks involved in informal communications with persons about their legal matters. If a person reasonably believes that a lawyer is providing legal advice, or if the lawyer possesses confidential information from a person seeking legal advice, the law may recognize that person as a client of the lawyer, at least for certain purposes. If the lawyer has given legal advice, the lawyer could be liable for malpractice if it turns out that the advice was wrong. If the lawyer has received confidential information from a person who was seeking legal advice, the lawyer may be precluded from representing someone adverse to that person in a matter related to that which was the subject of the confidential information. If the lawyer reveals or uses such confidential information, he may be sued for breach of fiduciary duty.

The Attorney-Client Relationship

A "client," for many purposes, is not just a person whom the lawyer believes he or she represents, but anyone who claims to have sought out the lawyer to obtain professional advice or who claims to have provided confidential information to a lawyer in connection with seeking such advice or assistance, unless the lawyer can prove otherwise.

The existence of an attorney-client relationship may be inferred by the parties' conduct and surrounding circumstances. *Rallis v. Cassady*, 100 Cal.Rptr.2d 763 (Cal.App. 2000). Generally, the test for determining whether an attorney-client relationship was created is that of the client's "reasonable belief."

The individual's belief that he is consulting a lawyer in his legal capacity may be subjective, as long as it is reasonable and is coupled with a manifestation of his intention to seek professional legal advice. *Bartholomew v. Bartholomew*, 611 So.2d 85 (Fla.App. 1992). Thus, the two indicia of a reasonable belief that there is an attorney-client relationship are that the putative client believes he is consulting a lawyer and provides confidential information that will be protected by the attorney-client privilege.

Rejected Prospective Clients

A lawyer who declines to represent an individual who has provided the lawyer with confidential information may be considered to be the individual's attorney, at least for purposes of conflicts of interest or disqualification, although actual employment does not result. *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.*, 980 P.2d 371 (Cal. 1999).

The receipt of confidential information from a prospective client means that the lawyer may not, thereafter, represent a party adverse to the rejected prospective client in the same or substantially related legal matter. The conflict of interest created by that situation could also result in the loss of legal fees.

If a lawyer declines to represent a prospective client, but gives gratuitous advice that turns out to be wrong, the lawyer can be liable for the damage caused by reliance on his erroneous advice. For example, in *Togstad v. Vessely*, 291 N.W.2d 686 (Minn. 1980), a lawyer, after consulting with a prospective client, declined to take a case, but added that he did not think the case was worth pursuing. He did not tell the prospective client to obtain the opinion of another lawyer or that, if she wanted to pursue the claim, he must do it before the statute of limitations expires. The client relied on the lawyer's opinion that the case was not worth pursuing, and did nothing for several months. When she eventually consulted another attorney, she was informed that the case was worth pursuing but that the statute of limitations had expired (after her consultation with the first lawyer). In the subsequent legal malpractice case, the jury also agreed that the case had merit and rendered a verdict against the lawyer in the amount of $649,500.

Sometimes, however, meeting with a prospective client to discuss possible representation creates a duty on the part of the lawyer to provide critical information such as the imminent expiration of the statute of limitations. In *Miller v. Metzinger*, 91 Cal.App.3d, 154 Cal.Rptr. 22 (1979), the plaintiff had consulted the attorney shortly before the statute ran. Although it was disputed that Metzinger notified the plaintiff of the firm's decision to decline the case prior to the expiration of the statute of limitations, the court held that it would be a breach of duty to fail to inform the client of the statute issue and of the need to protect the case by filing within the prescribed time.

Unrepresented Parties

An unrepresented party to a transaction, even if adverse to the lawyer's actual client, may sometimes claim, after something has gone wrong, that he believed the lawyer who represented another party was also representing him. He may have a reasonable basis for that belief because the lawyer has provided legal advice to him, or has done or said thing to lead him to form that belief. Under the Model Rule 4.3 and the rules of most jurisdictions, if there is any ambiguity as to whether there is an attorney-client relationship, it always devolves on the lawyer clarify the relationship.

An illustration of the problems that arise when the identity of the client is not clear is the case of *Kotzur, v. Kelly*, 791 S.W.2d 254 (Tex. App. 1990), in which an attorney was retained by a man who was selling land to his two sons. The sons did not retain another attorney. When they later learned of a lien on the property, they sued the lawyer for malpractice. One of the sons testified that he believed the lawyer was also representing them "as far as getting the papers legally fixed up." Although the lawyer asserted that he was not their attorney, he testified, "I didn't feel I was dealing with two different parties here," and admitted that he prepared the transaction documents on a "family-type basis." He also received from the sons $750 as attorneys fees. The court found that he was the sons' attorney.

When an officer, director or other constituent of the corporation believes that the lawyer also represents his interests, the lawyer may be subject to a suit for malpractice if the individual does not believe his interests were properly protected. Again, however, the belief must be a reasonable one. In *Bartholomew v. Bartholomew*, 611 So.2d 85 (Fla.App. 1992), the attorney represented a corporation and one of the two shareholders, the wife of the other shareholder. The husband claimed that the attorney also represented him because he had spoken with the attorney "several times on the golf course," during which time he "felt . . . freely [*sic*] to talk just business in general." Although the court applied the "reasonable belief" test, it found that the husband did not have a reasonable belief that the attorney represented him. The lawyer could have avoided having to defend himself if he had taken steps to clarify who was, and who was not, his client.

Informal Contacts

Lawyers are frequently approached at family gatherings and other social events by someone asking if he or she can "run something by" the lawyer. If the lawyer listens to the story, an attorney-client relationship may have been created. As noted above, one of the indicia of a reasonable belief that there is an attorney-client relationship is that the putative client believes he is consulting a lawyer. In the social setting, the putative client went to a non-legal setting for a social event, not to a place where he expected to receive legal services such as a law office. On the other hand, he probably did approach the lawyer knowing that the person was a lawyer.

The second indicia of a reasonable belief that there is an attorney-client relationship is that the putative client provides confidential information that will be protected by the attorney-client privilege. In a social setting, with many other people around, there is probably no reasonable expectation that any information is intended to be confidential, unless the lawyer and the guest go off to a private place to discuss the matter. Whether an attorney-client relationship has been created may depend on the specific facts of the case, but the risk is there.

A telephone conversation may be sufficient to create an attorney-client relationship if the prospective client provides confidential information. If the conversation is brief, the prospective client provides only general information and the lawyer gives only his mental impressions without having been called upon to formulate a legal strategy, it is unlikely that a court will find that an attorney-client relationship was formed. *In re Marriage of Zimmerman*, 20 Cal.Rptr.2d 132 (Cal.App. 1993).

Web sites and e-mail communications may be used to establish an attorney-client relationship when the two indicia of such a relationship may be met. The prospective client may go to the web site because it is that of a lawyer. If the Web site invites people to send legal inquiries by e-mail, that invitation may create a reasonable belief that the lawyer will respond. the prospective client may provide confidential information, expecting a legal opinion. The risk is there.

Risk Management Solutions

The basic risk management principle that may best assist in avoiding claims from informal consultations is to make it a point never to give advice unless you have already agreed to accept the representation. Do not provide specific advice about the statute of limitations, but only state that claims may become time-barred, so it is important to seek the advice of another lawyer immediately.

Avoid listening to confidential information about a person's legal matter at a social event. When approached by someone in such a setting, consider declining to listen at all, and asking that person to call your office to make an appointment. Explain that all legal matters are taken seriously, and you do not give "off-the-cuff" legal advice. Make it clear that you do not create attorney-client relationships outside of the office.

When you have consulted with a prospective client and have declined to represent him or her, consider making a record of the declination by sending a non-engagement letter. Such a letter should clearly and unambiguously state that you are not representing that person and that you are not expressing an opinion about the merits of her case.

If you have received confidential information from a person you declined to represent, place that person's name in your conflict of interest data base. If a party adverse to that person seeks your representation in the matter that was the subject of the confidential information, you may be precluded from representing that adverse party.

If you have a web site, do not invite inquiries about legal issues. Consider adding a disclaimer that the web site is not intended to form an attorney-client relationship and that no such relationship will be formed until you perform a conflicts check and agree to the representation. State that no confidential information should be provided until you agree to represent the prospective client.

Taking these precautions may help you avoid a claim by someone you never thought was your client.

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Visit the SLC Web Site at www.vsb.org/slc

The Senior Lawyers Conference Web site contains a wealth of access to practice materials and links to other sites of interest to seniors and senior lawyers, including the Senior Citizens Handbook in English and Spanish. Please visit: **www.vsb.org/slc.**

Educating the Public About Health Care Decision-Making

HEALTH CARE DECISION-MAKING: A way in which lawyers can render a valuable pro bono public service is in educating the public about making and implementing health care decisions. The SLC serves as the state-wide coordinator for National Health Care Decisions Week (which is scheduled for October of each year, but its activities may be done at any time throughout the year), working with the Conference of Local Bar Associations and other interested bar groups on local programs to be held throughout Virginia to educate the public about planning for end-of-life health care decisions. Primarily, this involves programs explaining health care advance directives and organ and tissue donations, and pro bono activities assisting members of the public in executing documents to carry out their wishes in this regard. National Health Care Decisions Week was initiated in 2000 through the American Bar Association, and funded by grant support from the United States Department of Health and Human Services. Cosponsors include the American Medical Association and numerous ABA sections.

The SLC encourages individual lawyers and local bar groups to participate in this program, and provides resource materials. **After having been educated about the features of health care advance directives, more than 90% of members of the public wish to avail themselves of this important decision making document, and members of the bar can help to provide this education.**

The SLC provides local bar groups and individual lawyers with information regarding this program, which is a "win-win" event for the public, for lawyers, and for the medical community. The program, which is in the spirit of public service, gives opportunities for professionals to provide community service which is visible, meaningful, focused, and greatly appreciated by the public. Significant professional good will is also generated in the community. Information on the National Health Care Decisions program is available through Paulette Davidson at the VSB at (804) 775-0521.

THE IMPORTANCE OF HAVING A LAST WILL AND TESTAMENT: The 2003 Annual Survey by the legal We bsite FindLaw (**www.findlaw.com**) disclosed that 57 percent of eligible Americans do not have a last will and testament. Obviously, the public in general and senior citizens in particular are in need of education and encouragement by members of the bar regarding the disadvantages of dying intestate and the benefits of doing proper planning and having a valid last will and testament prepared by an attorney. The VSB Speakers Bureau needs volunteer attorneys to speak to the public about this and other subjects. Call Dawn Chase at (804) 775-0586 for more information. In addition, an individual attorney or local bar association can sponsor a program on this subject. ■

Professionalism/Civility from the Judicial Point of View

At the recent Bar Leaders Institutes sponsored by the Conference of Local Bar Associations, and held in Richmond and Abingdon on March 8 and March 19, 2004, respectively, panels of judges discussed among themselves and with the audiences some important aspects of professionalism and civility. The Senior Lawyers Conference's direct interest in civility springs from two sources: our individual responsibilities as legal professionals, and our Senior Lawyers Conference Bylaws, approved by Virginia State Bar Council, in which two of our charges are " . . . to uphold the honor of the profession of law . . . [and] to encourage cordial discourse and interaction among members of the Virginia State Bar . . ."

Accordingly, we present some of the points covered by the judges at the Bar Leaders Institutes, hoping that they will be helpful reminders. The points are presented in a concise manner.

1. Civility is a fundamental component of professionalism. "Civility" is generally defined as "politeness" or "courtesy." Politeness is accepted as "conduct marked by consideration for others," and courtesy is accepted as "behavior characterized by graciousness and consideration toward others."

2. Civility is really the "Golden Rule": "Do Unto Others As You Would Have Others Do Unto You."

3. While civility requires that we pay attention to the human nature aspects of our profession, we must also always pay attention to being prepared and knowing the facts and law regarding the matters on which we are working for clients. Being civil does not excuse poor preparation.

4. Learn the art of the graceful apology when warranted.

5. Lack of civility on the part of attorneys and their clients makes the job of the judge harder in deciding cases on their merits. Negative behavior antagonizes the decision maker.

6. Judges are charged by law with maintaining decorum in the courtroom. Judges have a supervisory responsibility and role in promoting civility and professionalism among members of the Bar. Judges should meet those responsibilities, and lawyers should help them to do so.

7. Depositions should be conducted as if the judge were in the room at the time that depositions are being taken.

8. Two often overlooked important components of professionalism are: a lawyer being aware of the state of the lawyer's own health and the health of other members of the Bar, particularly when health problems have an adverse impact on professional conduct; a lawyer planning for the lawyer's own death or disability, and being willing to assist other lawyers in such planning. Not doing so is harmful to the profession and the public.

9. Tardiness, rudeness, and lack of preparation are forms of incivility.

10. Disrespectful, deliberately provocative behavior, and invectives should never be part of a professional's conduct.

11. The behavior of individual attorneys provides the basis for members of the public generalizing about the legal profession as a whole.

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Medicare Prescription Drug Improvement and Modernization Act of 2003: What Does it Mean for You?

Usha Koduru

Young Lawyers Conference Liaison to Senior Lawyers Conference

Significant changes to Medicare were signed into law by President Bush on December 8, 2003. These changes include new prescription drug and preventive benefits, and provide additional support to people with low incomes while maintaining the ability for Medicare recipients to choose their doctors, hospitals and pharmacies. This is a summary of changes to the Medicare prescription drug program.

Medicare Approved Drug Discount Cards

Medicare will contract with private companies to offer drug discount cards for prescriptive medications. For a small enrollment fee of up to $30, the cards offer a discount on the retail price of prescriptions, possibly up to 10-15% on total outpatient prescription drug costs and up to 25% on other prescriptions. A list of the discounted drugs will be provided by the sponsors of the drug discount cards. Sponsors may choose to waive the enrollment fees. The drugs that are covered and their prices may vary among the sponsors and from month to month. Enrollment in the program begins in May, 2004 and ends on December 31, 2005. The voluntary drug discount card program is effective from May 1, 2004, until December 31, 2005.

There are 71 sponsors who will offer Medicare approved drug discount cards; 28 general sponsors will provide drug discount cards to any eligible applicant and 43 exclusive sponsors will offer cards solely to their plan members. Any member whose plan offers a drug discount card may choose only that card; however, if your plan does not offer a drug discount card, you may choose any Medicare approved drug discount card offered by your state. Anyone with outpatient drug coverage through Medicaid may not enroll in the drug discount card program.

The program offers a $600 credit to assist qualified recipients in paying for prescriptive medications. Qualification depends on income. A single person with an income up to $12,569 and a married couple with an income up to $16,862 may qualify for a $600 credit. This credit will be applied to a Medicare approved drug discount card. Anyone with outpatient drug coverage from Medicaid, TRICARE for Life or an employer group health plan is ineligible for the $600 credit.

For the purposes of calculating income to qualify for the $600 credit, the following should be included: employee compensation (salary, wages, tips, bonuses, awards, etc.); Unemployment compensation; pensions and annuities; social security benefits; railroad retirement benefits; veterans affairs benefits; military and government disability pensions; armed forces; public health service (PHS); National Oceanic and Atmospheric Administration (NOAA); foreign service (based on date pension began, combat-related pension, etc.); individual retirement account (IRA) distributions; interest (from savings accounts, checking accounts, etc.); ordinary dividends (stocks, bonds, etc.); refunds; credits; or offsets of state and local income taxes; alimony received; business income; capital gains; farm income; rental real estate; royalties; partnerships; trusts; other gains (sale or exchange of business property) and other income (lottery winnings, awards, prizes, raffles, etc.). The following should NOT be included: Inheritances and gifts (for amounts taxed to the estate or giver that are above the limits allowed for an exemption); interest on state and local government obligations (e.g., bonds); worker compensation payments; Federal Employees Compensation Act payments; Supplemental Security Income (SSI) benefits; income from national senior service corps programs; public welfare and other public assistance benefits; proceeds from sale of a home; lump sum life insurance benefits paid upon death of insured; life insurance benefits paid in installments; accelerated life insurance death benefit payments (e.g., terminal illness and chronic illness); medical savings accounts (MSA) withdrawals for medical expenses, payments from long-term care insurance policies (subject to limitation); accident or health insurance policy benefits; accident compensatory damages; child support payments received; most foster care provider payments received; disaster relief grants; and disability payments as the result of a terrorist attack.

Anyone who qualifies for the $600 credit may apply for the full amount at any time in 2004 and will automatically receive another $600 credit for prescriptions in 2005. The amount of the credit varies depending on when you apply in 2005. Those who join between January 1 and March 31, 2005, will receive a $600 credit, between April 1 and June 30, 2005 will receive $450, between July 1 and September 30, 2005, will receive $300, and between October 1 and December 31, 2005, will receive a $150 credit.

Comprehensive Prescription Drug Benefits

Everyone with Medicare may enroll in various plans to cover prescription drugs in 2006. In general, each plan has a $35 monthly premium and a $250 deductible. Medicare will then pay 75% of prescription drug costs between $250 and $2,250 in drug spending and you must pay for the other 25% of drug costs. You are responsible for 100% of the drug costs above $2,250 to $3,600. Medicare will cover 95% of prescription drug costs after you have spent $3,600 out of pocket. Additional assistance such as a decrease in or an elimination of monthly premiums or deductibles is available for people with low incomes who qualify. Medicare will establish income guidelines in 2005.

Therapy services and Preventive benefits

Medicare changes effective on December 8, 2003 remove annual limits on payments for medically necessary outpatient occupational therapy, physical therapy, and speech language therapy services. You pay the coinsurance and Medicare will pay its portion for covered services. Beginning on January 1, 2005, Medicare will cover one initial physical exam within 6 months of enrollment in Medicare Part B. The program will allow for tests to screen for diabetes for people at risk and tests to screen for cardiovascular disease.

(Information gathered from **http://www.medicare.gov***) For more information call 1-800-MEDICARE (1-800-633-4227).* ■

Professionalism/Civility—

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12. Lawyers have an obligation to control not only their own conduct, but also that of their clients. Clients must understand that most courtroom television shows are not good examples of proper conduct.

13. All members of the Bar have the responsibility and the opportunity to have a positive influence on other members of the Bar. Senior lawyers in particular should set the example. ■

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