



SENIOR LAWYER NEWS

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Frank O. Brown Jr., Editor

Mentoring: A Two-Way Street

Jack W. Burtch Jr.

Attorney-at-Law and Member of the Board of Governors of the Senior Lawyers Conference

Not long ago I asked my assistant, Matt, to look up something in the Virginia Code. Matt, who has worked for me as a law clerk for three years, had just received his JD two days before. Matt said he would get on Lexis and find it right away. I stopped him and suggested that looking under “Appeal and Error” in the Michie’s Code index might be quicker. “What’s that?” Matt asked. I looked at him and said, “I can’t believe I get to give a brand-new JD his first look at the actual bound volumes of the Code of Virginia. Three years of law school and you’re telling me you’ve never looked up the Code in a book? I can’t wait to tell my buddies in the Senior Lawyers Conference about this. They’ll think it’s a hoot.”

Matt didn’t skip a beat. “I hope you can round up enough carrier pigeons. A lot of them can’t deal with e-mail.”

My encounter with Matt brought home the real joys of mentoring law students and new lawyers. If they have learned anything from me, I have learned more from them. Thanks to my student assistants, I have learned how to substitute e-mail for most letters, learned time-saving shortcuts in Microsoft Word, mastered the Palm Pilot, found more free Internet legal research sites than I can use, and opened my first—and last—IM (instant messaging) account.

I have also learned that this generation of lawyers looks at our profession differently than ours did. They face a completely different set of pressures. Many feel trapped by student loans which limit the employment choices they can make. Their anticipated “career path” resembles hopscotch more than it does a steady progression of accomplishment leading to a secure partnership in an established law firm.

Ironically, law students and new lawyers have much to teach us about how we approach our own careers in this changing legal environment. They understand that developing their skills and abilities is their career. They have looked at the attrition rates in large firms, the changing ratios of partners to associates and the increasing uncertainty of the “secure” position in any firm. Consciously or not, they make decisions which keep their options open as long as possible. This means they are always keeping an eye out for their next employment opportunity. Rather than fearing change, they expect it.

Although I don’t necessarily agree with everything they’ve taught me, I do pay attention to their observations and points of view. Many of the executives and lawyers I’ve represented over the years would have done well to pay more attention to these observations. Business and law practice today are quite different from the models which formed and informed senior lawyers. When we become involved as mentors to those entering our profession, we can pass on our best traditions: civility, integrity, effective advocacy, ethical practice and sound judgment. At the same time we learn new attitudes, new technologies and new ways of approaching the professional challenges of today.

Our becoming mentors to law students and new lawyers certainly benefits them, but often we gain even more. We can become renewed and re-energized in our own practice. Mentoring offers rewards for all involved. It’s not just another way to serve others. It’s a way to do something for ourselves. ■

Senior Lawyers Conference CLE



On May 10, 2005, Frank O. Brown Jr. of the Senior Lawyers Conference presented a two hour ethics CLE to the Alexandria Bar Association in the American Legion Hall in Alexandria. Pictured above are some of the attendees, each of whom received a copy of the *Senior Citizens Handbook*, in addition to the course materials. The program, “Protecting Your And Your Clients’ Interests In The Event Of Your Disability, Death Or Other Disaster,” may be presented either as a one hour or two hour CLE, and is approved for full ethics credit. This is an ongoing program of the SLC, as a service to the Bar. If your local bar association wishes to schedule this program, please call Pat Slinger, VSB SLC Liaison, at (804) 775-0576.

The Citizen/Lawyer of the Past, Present and Hopefully, the Future

Dennis W. Dohnal

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*(From an address delivered at the Virginia State Bar Pro Bono Awards Ceremony on May 12, 2005
at the University of Richmond Law School, on the conferring of the Lewis F. Powell Jr. Pro Bono Award on Joseph W. Gorrell, Esquire,
member of the Senior Lawyers Conference, and the Oliver White Hill Law Student Pro Bono Award on Amandeep Singh Sidhu, JD,
2005 graduate of the University of Richmond Law School)*

Good evening. I will be relatively brief. It has been a long, but hopefully meaningful day for you and I do not want to detract from it. The theme of my remarks is the role of the citizen/lawyer in our society, past, present, and, hopefully, in the future. I confess from the outset that I will be borrowing heavily from other sources, including the remarks of Dean Taylor Reveley, Dean of the George Wythe School of Law at William & Mary. Please remember that ours is the only profession in which plagiarism is referred to as research!

As to the citizen/lawyer of the past, it never ceases to amaze me to consider that crazy bunch of renegades—that band of brothers—who literally invented a new order, a fundamentally different form of representative government that distinguished our society at the time, if not still in certain respects, from all others throughout time. Of course, it would have been better if they had also enlisted the help of a band of sisters for the task. It probably would have been done quicker and in neater fashion. In any event, how did all that come about, culminating in the passage of the Constitution and its attendant Bill of Rights? Was it just a unique set of circumstances that converged and matured at just an opportune time? Was it just a group of unusually bright individuals who decided to train in the law and happened to make each other's acquaintance at some point?

To be sure, they were all that, and then some. Indeed, over one-half of the signers of the Declaration of Independence were lawyers. Thirty-one of the fifty-five geniuses who gathered in Philadelphia in 1787 and formulated the Constitution were trained in the law. But it wasn't just because of the specialized training that they had received that produced such results, there was much more to the picture.

The very concept that they espoused and lived—that of the citizen/lawyer was at the center of all that happened in those formative years. It was a concept that first emanated from nearby with George Wythe, Thomas Jefferson, and "the rest of the gang." The concept of the citizen/lawyer was the very basis of Jefferson's urging of the Board of Visitors of William & Mary when he was governor of Virginia to create a law school away from the then-traditional apprentice model of the not-so-merry old England. To quote from a lecture given recently by Dean Reveley:

"Jefferson wanted law students at William & Mary to learn not simply how to be skilled practitioners of law, but also how to be leaders for the common good at the community, state, and national levels;

Jefferson wanted William & Mary law students imbued with a sense of responsibility to lead for the common good, recognizing the comparative advantages that lawyers have for such leadership and the importance of law in American society."

So what was this new concept of citizen/lawyer? The citizen/lawyer (or lawyer statesman as it is sometimes called) was one who was possessed of practical wisdom and persuasive powers. He was devoted to the public good while being keenly aware of human frailties as well as political realities—what should be done, what could be done, what might be done in time. Quite significantly, the concept of citizen/lawyer was nurtured and promoted by a web of reinforcing professional attitudes and expectations. It was so important to our experiment in self-government that the citizen/lawyer assumed the role of leadership for all and that continued for at least some time to come. Over seventy percent of our presidents, vice-presidents, and cabinet members have been lawyers. Ours is the only profession with its own permanent cabinet position—that of Attorney General. Ours is the only profession with its own separate and equal (at least for the present) branch of government—the judiciary.

So what has happened over time if the citizen/lawyer was so central to our profession and our society? Why is the legal profession so ridiculed, if not despised? What other profession has so many jokes about it (have any of you heard any good CPA jokes lately?). I don't mean to suggest that it is anything new. Even Shakespeare couldn't persuade the masses—at least the uninformed ones. Remember the phrase from the play "first, kill the lawyers!" In fact, we are told by the Shakespearian aficionados that it was a compliment, meaning that the lawyers would be able to perceive the treachery first and therefore must be silenced.

Of course, there are practical reasons why we are the brunt and butt of such disdain. Consider that ours is the only profession based on conflict and adversity. If a client comes to you without a conflict or serious issue of concern—it's our job, or at least in our best interest, to create one. Remember too that we only see clients during what they surely think to be the worst times in their lives, including the business entity in the throes of some economic crisis. But this concept of the citizen/lawyer has seemingly lost its power to inspire. It had a ring to it for quite a while, but the concept seems to have shifted, lost focus.

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Message from the Chair



William B. Smith

When I began the general practice of law almost fifty years ago, as part of my practice, I would on occasion: write a simple will for an older client; act as court appointed attorney for an older person being involuntarily committed to a mental institution; prepare a power of attorney for an ailing senior citizen; and act as guardian ad litem for an older incompetent litigant. I did not realize then that I was practicing Elder Law, as there was no such term in those days. Over the years, through the dramatic growth in the sen-

ior population, increased life spans, new government programs for the elderly and the greater accumulation of family wealth, there has developed a legal specialty called Elder Law.

Elder Law includes preparation of wills and estate planning documents, powers of attorney, living wills and medical directives; advising regarding Medicaid planning; preparing petitions for guardianship and acting as guardian ad litem in such proceedings; representing parties in will contests and breach of fiduciary duty litigation and healthcare issues litigation; and advising the elderly regarding: homecare, housing, reverse mortgages, separation and divorce, probate and estate administration, funeral arrangements, age discrimination, grandparents' visitation rights, elder abuse and negligent care, charitable giving, retirement investments, healthcare plans, Social Security benefits and Veterans Affairs.

There is currently a great demand for legal services to the elderly, and this demand will continue to increase at a rapid pace. This will require more lawyers with knowledge and experience in Elder Law.

Even those lawyers who do not include Elder Law in their practice and are not anxious to develop this expertise, especially those in small general practice law firms, should develop a "working knowledge" of Elder Law issues in order to provide simple and less specialized services to the elderly and to be able to intelligently refer clients to another lawyer capable of providing the needed services when such a referral appears appropriate.

An invaluable source of Elder Law information is the *Senior Citizens Handbook* (SCH) published by the Senior Lawyers Conference (SLC) of the Virginia State Bar, in cooperation with the Young Lawyers Conference. The updated and revised edition is to be printed on June 9, 2005. Copies may be obtained upon request from Virginia State Bar Headquarters, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800. This publication of some one-hundred pages includes some information on just about every senior citizen issue and a list of numerous agencies and organizations in Virginia that provide services and programs for older citizens.

As Chair of the SLC, I am hopeful that this article will inspire many members of the Conference to set upon developing at least a working knowledge of Elder Law issues which will inure to the benefit of their clients, elderly friends and neighbors and themselves and their families. ■

The Virginia Uniform Trust Code

The Virginia Uniform Trust Code was first introduced in the 2004 session of the Virginia General Assembly as Senate Bill No. 506, which was carried over to the 2005 session, in order to permit its study and revision by a subcommittee of the Section on Wills, Trusts and Estates of the Virginia Bar Association. It was reintroduced in the 2005 session as Senate Bill No. 891, which, with Virginia modifications, was passed into law and signed by the Governor as 2005 Acts, ch. 935, which is generally effective on July 1, 2006, and a copy of which may be found by going to the Senior Lawyers Conference Web site at www.vsb.org/slc, then to Attorney Resources, then to Links, then to Government Resources, then to Virginia General Assembly's Web site, where you enter Bill No. sb891 and Full Text Search. The act adds Chapter 31 to Title 55 of the Code of Virginia, and the code section numbering is such that generally the last three digits of the Virginia Uniform Trust Code correspond to the first three digits of the official text of the NCCUSL Uniform Trust Code. So, by way of example, Va. Code §55-541.01 corresponds to UTC §101. Knowing this is helpful when you wish to look at the official explanatory Comments to the NCCUSL Uniform Trust Code, which are available at <http://www.utcproject.org>.

Louis A. Mezzullo, a member of the Senior Lawyers Conference, and Dana G. Fitzsimons Jr., both of McGuire Woods, have written an informative article titled, "The Virginia Uniform Trust Code: Selected Issues," which may be read in its entirety in the SLC on-line newsletter, which may be found at www.vsb.org/slc under Attorney Resources, then Publications, then Newsletters (Spring 2005).

Advance Medical Directives

Frank Overton Brown Jr.

Attorney at Law and Past Chair, Senior Lawyers Conference

As a result of the years-long, much-publicized and politicized, and anguishing case of Terri Schiavo, many Americans are aware of advance directives, and of the consequences of not having one. As practicing lawyers, we need to understand about advance directives (which clients often refer to as “living wills”), in order to be able to explain them to clients, and when desired by clients, to assist clients with this very personal part of their overall planning, which often also includes wills, trusts, and durable general and durable health care powers of attorney. The first step is to review carefully and to understand Va. Code §§ 54.1-2981 et. seq.

In accordance with Va. Code § 54.1-2983, any competent adult (“declarant”) may, at any time, make a written advance directive authorizing the providing, withholding, or withdrawal of life-prolonging procedures in the event that the declarant should have a terminal condition. In addition, a written advance directive may appoint an agent to make health care decisions for the declarant under the circumstances stated in the advance directive, if the declarant should be determined to be incapable of making an informed decision. The advance directive must be signed by the declarant in the presence of two subscribing witnesses. House Bill No. 2584 (2005 Acts, ch. 186) amended Va. Code § 54.1-2982 by eliminating the prohibition against a spouse or blood relative serving as a witness. An oral advance directive may be made by any competent adult who has been diagnosed by his or her attending physician as being in a terminal condition, provided that the oral advance directive is made in the presence of the attending physician and two witnesses.

The Code provides that a person shall not be required to make an advance directive or to consent to a durable do not resuscitate order as a condition for being insured for or receiving health care services. Va. Code § 54.1-2991.

Va. Code § 54.1-2984 provides a suggested (but not required) form of written advance directive. In addition, all of the relevant terms, such as “durable do not resuscitate order”, “incapable of making an informed decision”, “life-prolonging procedure”, “persistent vegetative state”, and “terminal condition”, are defined in Va. Code § 54.1-2982. The author recommends that an attorney incorporate the complete text of these definitions into his or her advance directive forms, so that the client and others may read and understand the meaning of the terms being used. In discussing and preparing an advance directive for a client, the attorney should not simply ask a question, such as “Do you want a living will?” and then to expect that one form with the exact same wording will meet the needs of every client. Instead, the attorney should discuss the subject with the client carefully, using a combination of non-directive and directive questioning to determine the client’s specific wishes, and then to prepare the advance directive accordingly.

Surveys have indicated that, 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. The author’s own experience in practice has borne this out.

After the client has executed an advance directive, the attorney should provide sufficient signed originals of the advance directive to the client, and should discuss and provide direction to the client about the distribution of the advance directive to the client’s: agent, if one is designated in the advance directive; attending physician; hospice, hospital or nursing home; religious advisor; and family members. A signed original should also be kept in the attorney’s file. To assist the client in making additional copies of the advance directive as needed in the future, the advance directive can state in its provisions: “A photocopy of this signed advance directive shall be as effective as an original.”

If an attending physician’s treatment decision is contrary to the terms of an advance directive, or to the treatment decision of a designated agent, or a durable do not resuscitate order, the attending physician is required to make a reasonable effort to inform the patient or the patient’s designated agent of the attending physician’s determination and the reasons therefor, and if the conflict remains unresolved, to make a reasonable effort to transfer the patient to another physician who is willing to comply with the terms of the advance directive. Va. Code § 54.1-2990.

An advance directive may be revoked at any time by the declarant: (1) by a signed dated writing; (2) by physical cancellation or destruction of the advance directive by the declarant, or by another person at the declarant’s direction; or, (3) by oral expression of the intent to revoke by the declarant. The revocation is effective when communicated to the declarant’s attending physician. Va. Code § 54.1-2985.

In the absence of an advance directive and if the patient is incapable of making an informed decision, Va. Code § 54.1-2986 provides that the attending physician may rely upon the authorization of any of the following persons, in the specified order of priority, if the physician is not aware of any available, willing and competent person in a higher class: (1) guardian or committee (the Code makes clear that the appointment of a guardian or committee is not required in order that a treatment decision be made under this section); (2) patient’s spouse, except where a divorce action has been filed and the divorce is not final; (3) patient’s adult child; (4) patient’s parent; (5) patient’s adult brother or sister; (6) patient’s other relative, in the descending order of blood relationship. It is important to note that Va. Code § 54.1-2984 provides that, if a declarant has designated an agent in an advance directive, then that agent has decision-making priority over any individuals listed in the foregoing portion of this paragraph.

Va. Code § 54.1-2989 provides that any person who wilfully and without authority conceals, cancels, defaces, obliterates, damages, falsifies, or forges the advance directive or revocation of advance directive of another shall be guilty of a felony.

Advance directives and what they represent to clients and their families are important and sensitive matters. Attorneys who advise clients in these matters should be well-informed and thorough in the help which they give. ■

—A Remembrance—

JAMES CLOPTON KNIBB

JAMES CLOPTON KNIBB, as active member of the Virginia State Bar for over 57 years and Goochland County's Commonwealth Attorney for 29 years, died April 29, 2005, at age 97.

Clopton was born in Lynchburg, Virginia, moving to Goochland County when he was 8 years old. He graduated from Lynchburg College where he met his beloved wife of 67 years, the late Margherite Chenault Knibb. While in college, Clopton lost almost all of his eyesight to a dying optic nerve. Undeterred, he pursued a career in law, and with Rita at his side taking class notes and reading cases to him, he graduated third in his class from The T.C. Williams School of Law of the University of Richmond in 1939. That year he began his general practice in Goochland where he served as the county's part-time prosecutor and, effectively, its county attorney, from 1947 to 1976. He drafted Goochland's first zoning and subdivision ordinances, which became a model for others; for years he also represented the Commonwealth in its Goochland condemnation cases. Clopton was Goochland's Commissioner of Accounts from 1979 to 1996. He was president of Goochland County Bar Association several years and was much respected by the bench and bar.

His role model was his father, Abner Clopton Knibb, a pastor who instilled in his son strong moral values grounded in faith. Clopton was a dedicated member of Hebron Presbyterian Church. He dearly loved Goochland and was a lifelong leader in county politics and civic groups. He enjoyed robust good health virtually his entire life, no doubt extended by daily exercise which included push-ups well into his nineties. He was also a gifted tenor who delighted in singing and listening to all music, especially opera.

Retired Louisa and Goochland Circuit Court Judge F. Ward Harkrader Jr. fondly recalled his friend and colleague of many years: "Although Clopton was blind, I know of no one who had deeper insights or longer or wider vision."

In 2004, Lynchburg College honored Clopton by creating an award in his name to be given to senior alumni reflecting a commitment to excellence and integrity. This year, before his unexpected passing, he was named recipient of the Dean's Distinguished Alumni Award given by The T.C. Williams School of Law. Dean Rodney A. Smolla wrote to Clopton's devoted daughters, Louise and Frances, regarding the presentation of the award, made posthumously at graduation exercises:

"At the commencement exercise, I told the story of your father's life to the graduates and the thousand family members and friends who were gathered to celebrate their achievement in receiving their law degrees from the University of Richmond. I described your father's wonderful career as a lawyer, and his spirit and dedication throughout his life to the world of law and his community. I told the audience how thrilled he was when I talked to him about receiving the award. I explained that he had passed away the weekend before.

"You should know that his story was received with a mix of poignant sadness at his passing and happy admiration for his long and wonderful life. After the ceremony, many students, faculty members, parents, and friends talked about what a moving and inspirational story this was.

"I hope you and the others in your father's family will take some comfort and pride in knowing that his life not only touched many people in positive ways while he was alive, but that even after his passing his story lived on as an inspiration and role model for a future generation of lawyers."

Amen.

By the Honorable Edward K. Carpenter
Judge of the 16th Judicial District of Virginia
and Member of the Senior Lawyers Conference

The Senior Lawyers Conference of the Virginia State Bar

The SLC of the Virginia State Bar (VSB) is comprised of all members of the VSB who are 55 years of age or older and are in good standing. No application is necessary, and there is no membership fee. The purpose of The SLC is to uphold the honor of the profession of law, to apply the knowledge and experience of the profession to the promotion of the public good, to encourage cordial discourse and interaction among the members of the VSB, and to pursue our Mission and Goals. We have a membership of approximately 9,600 lawyers. In pursuing our Mission and Goals, we focus on issues of interest to senior lawyers and promotion of the welfare of senior citizens. We have provided assistance

in the implementation of the revised guardianship laws for adults. We prepare and revise *The Senior Citizens Handbook* in cooperation with the Young Lawyers Conference. We provide education and encouragement to lawyers to do proper planning for their own disability or death. We are interested in receiving input from senior lawyers and senior citizens on issues of concern to them, in order to enable us to study issues, present programs and activities, produce publications of interest, and advocate appropriately. Our Web site at www.vsb.org/slc contains a wealth of valuable resources to assist members of the Bar and senior citizens. Please visit our Web site.

The Citizen Lawyer —

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Sure, there are still a few around and, indeed, we are blessed with the presence of two this very day in the persons of our award recipients. But such fine examples of the best of our profession no longer appear to command the continuing attention and respect of the whole profession, let alone those outside our ranks. The emphasis appears to be on the practical, the immediate reward, of self-satisfaction. Ah, “self,” the common prefix, be it self-indulgence, self-aggrandizement, but certainly not self-deprecation!

Surely times have changed dramatically since those early years for any number of reasons, some more obvious than others. Most notably, perhaps, is that we have been accelerated into the information age, thanks, of course, to Al Gore for inventing the Internet!

But is there any room left, let alone time, to resuscitate the concept of the citizen/lawyer? To motivate others, if not refocus the profession on the values that are exemplified by our two award recipients? I say yes, and so, let me suggest the essence of the citizen/lawyer for tomorrow and beyond. In fact, the citizen/lawyer for all time, be it yesterday, today and tomorrow.

The citizen/lawyer cares about the public good and is prepared to sacrifice self-worth, at least in a sense of placing one’s private objectives behind those of others. Enough of this “me first” stuff! But there must be more, an ability to marshal the talent and ability to espouse those very ideals. It requires a talent for discovering where the public good lies or where it should be found; a citizen/lawyer, for example, does not simply prepare the way for achieving objectives that others have already set; at the very least, if the goal is worthy and appropriate, the citizen/lawyer assists the traveler in reaching a better, fuller understanding of the objective’s worth as the best among various alternatives, so that achievement is even more meaningful.

A citizen/lawyer must have the temperament to go along with the talent. Just as you seldom, if ever, see the sports official change a call or ruling in the face of a raging player or coach, so must the citizen/lawyer pick his arena and method of delivery, remembering that there should be no pride of authorship in the sense of demanding credit for a job well done, as long as the goal is reached, remembering, as well, that success is more palpable and meaningful when those directly impacted have the sense of self-achievement.

Being a citizen/lawyer means that one is a devoted citizen, one who understands and appreciates our good fortune in being able to select our own leaders, to be judged by our peers in the most important issues of our lives and times. Being a citizen/lawyer means that, although we are governed and directed by the will of the majority, where, by definition, the extreme left or right is just that—outside the mainstream, the fact of the matter is that the citizen/lawyer understands that the median is defined in part by those parameters as well. Simply put, there is room for everyone and, again, by way of example, the citizen/lawyer respects everyone’s right to worship whatever higher authority they may sincerely believe in—a citizen/lawyer does not think they are better than another, other than having a better opportunity by whatever circumstance to be part of a profession that has the capacity, if not the mission, to commu-

nicate the same sense of community to all regardless of their circumstance of race, religion, gender, age or national origin.

In the end, a citizen/lawyer is a person of not only impeccable character, but a virtuous one as well, an individual to be admired for those strengths that others lack, an individual whose opinion and efforts are admired and accepted more because of who he or she is as much as what they may know.

So what can one do? Should we all join a legal aid office or go into public service? I suggest not, because it isn’t so much what you do in the profession, it’s how you do it. Practice our profession with integrity and civility, mentor others by setting an aspiring example, by saying no when that is the right answer, regardless of the pressures of the issue or the moment. Espouse what I call the Golden Rule of professionalism and life, the common thread of all true religions and our society—that is, that you treat others as you would be treated yourself.

Yes, as well, the citizen/lawyer will find time to donate those talents that he or she possesses to those who will reap a benefit far beyond whatever momentary satisfaction you may have achieved by using the same effort elsewhere. Above all, remember that being a lawyer in a society based on and defined by the rule of law as is ours is not simply something to do—it is something to do that matters, and it is therefore something worth doing well.

I began by reference to the Founding Fathers, let me conclude likewise by quoting the late citizen/lawyer, the Hon. Robert R. Merhige, Jr., who opined as follows in an op-ed piece in 2000:

“In this country, every day is a special day of celebration and appreciation of the dedication and brilliance of our Founders whose foresight afforded us so much. The privileges and liberties that most of us enjoy, however, are not to be taken for granted and require not only an appreciation of them, but affirmative action to protect the principles of equality and justice under the law that came about from the dedicated efforts of individuals of great vision who saw to the incorporation of those rights and privileges in our Bill of Rights. They require constant appreciation and vigilance. Though they regrettably have not come to all of our people; they are coming to near-fruitition by virtue of the courage and farsightedness of men and women of brilliance and belief.”

Let’s conclude by re-dedicating ourselves to carry on that mission—to re-ignite that concept of citizen/lawyer that served our profession, our country, and our fellow human beings so well for so long.

Goodnight and thank you. ■

**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.

Senior Citizens Law Day in Covington:

A Model Program for Service to Seniors

William T. Wilson

Attorney at Law and Chair-Elect, Senior Lawyers Conference

Senior Citizens have always been interested in wills, powers of attorney, medical directives, living wills and the issues they face as they get older, but the Schiavo case shed a light on that issue that made them focus for the first time on the real need for “immediacy” in dealing with such documents.

As part of an ongoing service to seniors, the Senior Lawyers Conference (SLC), in conjunction with the Young Lawyers Conference (YLC), both conferences of the Virginia State Bar, collaborated to create a handbook on senior citizens’ issues titled the *Senior Citizens Handbook*. The book has been distributed throughout Virginia and has been extremely well received. Since the Schiavo case, senior citizens have become even more interested in the book, and it is the intention of the two Virginia State Bar conferences to disseminate the book to as many people as possible. Recently, in what has been called a “pilot project,” the Alleghany, Bath, Highland Bar Association, in cooperation with the League of Older Americans (LOA), presented a Senior Citizens Law Day on Tuesday, May 24, 2005. The event had the full cooperation of the SLC and the YLC and was also supported by the Conference of Local Bar Associations (CLBA), another conference of the Virginia State Bar. The event was held at the Courthouse in Covington. The courtroom was full with 100 attentive attendees, to whom a panel of seven lawyers and one Judge took turns explaining the various chapters in the *Senior Citizens Handbook*. Mr. Bill Parks, President of the Alleghany, Bath, Highland Bar Association made opening remarks.

The event was covered live by both the Clifton Forge radio station (WXCF) and the Covington radio station (WKEY). In addition, Dabney S. Lancaster Community College (DSLCC) videotaped the event so that there will be available in the college library a videotape which can be distributed to citizens both young and old throughout the Alleghany Highlands. Television stations WDBJ Channel 7 and WSLS Channel 10 in Roanoke were also invited to cover the event.

Judge Malfourd Trumbo, Judge of the Circuit Court of Alleghany County, made the courtroom available for the occasion and a letter from him was read to the audience. Another letter from Bill Smith, Chair of the SLC, was also read. Ms. Barbara Allen, Director of the CLBA, was in attendance and made brief remarks. The panel members were: J. Gregory Mooney, Judge of the General District Court of Alleghany County; Edward K. Stein, Esquire, Commonwealth’s Attorney for Alleghany County; Russell W. Updike, Esquire; Jeffrey A. Crackel, Esquire; R. Meade Snyder, Esquire; Fletcher D. Watson, Esquire; Betty K. Cauley, Esquire; and Laura L. Dascher, Esquire. The panel members spoke on various sections in the *Senior Citizens Handbook* for about 10 minutes each, with audience questions following those presentations. The entire event took about two hours. Although the main focus of the panel discus-



Participating on the Senior Law Day panel were the Hon. J. Gregory Mooney of the 25th Judicial District, Clifton Forge attorney R. Meade Snyder and William T. Wilson of Covington

sion was on wills, powers of attorney, medical directives, living wills and general estate planning, there was also discussion about Medicare, Medicaid, Disability Pensions, Social Security Disability and Long Term Care (including nursing homes and assisted living facilities).

The LOA, led by its coordinator, Mrs. Ginger Leitch, was in charge of signing up the attendees and other organizational details. In addition, she coordinated five press releases in the *Virginian Review*, a newspaper of general circulation in the Alleghany Highlands area, whose editor, Mr. Horton Beirne, was most generous with his paper’s space and ran the articles as a public service.

I served as moderator for the panel. I believe that the Senior Citizens Law Day program can be a model for other similar meetings which might be organized by other bar associations throughout the Commonwealth. The interesting thing is that the entire event was organized at very little cost. The *Senior Citizen Handbooks* were furnished by the SLC and the YLC. The radio stations covered the event for minimal charges, and the copying costs regarding certain handouts, including medical directives, was low. It is truly a classic example of pro bono in action, and it is an event which was well received not only by senior citizens but the entire community. I hope that we can do it every year from now on, and I encourage other bar associations throughout the Commonwealth to do the same. ■

The Virginia Uniform Trust Code: Selected Issues

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INTRODUCTION.

The 2005 Virginia General Assembly adopted the Uniform Trust Code ("UTC"), with certain modifications, effective July 1, 2006. The UTC was adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2000. To date, the UTC has been adopted in approximately 11 states and is being considered by approximately 10 other states for possible adoption. The goal of the UTC is to provide a comprehensive set of rules dealing with the formation, operation and termination of trusts. While some states already have a comprehensive set of rules dealing with trusts, most states do not. Also, as more states adopt the UTC, the rules concerning trusts will become more uniform throughout the United States.

Although it is not intended to cover every possible issue involving trusts, the UTC does deal with such issues as the creation, validity, modification and termination of trusts, creditor's rights with respect to a beneficiary's interest in a trust, revocable trusts, the duties and powers of the trustee, the removal and resignation of trustees, the appointment of successor trustees, and virtual representation. As states began to consider the adoption of the UTC, a number of issues arose that caused some to believe that the UTC would provide less protection from creditors for beneficiaries of spendthrift trusts and could cause the assets in a trust to be included in the settlor's gross estate for federal estate tax purposes. In addition, it was feared that many settlors would find the requirement to provide beneficiaries with information concerning the trust highly objectionable. This study discusses these three issues as they relate to the Virginia version of the UTC.

CREDITOR'S RIGHTS.

In General.

Under the law of many states it is believed that a wholly discretionary trust is not subject to the creditors of a beneficiary of the trust. Because the beneficiary is not entitled to receive any distributions from a wholly discretionary trust, the courts would not allow a creditor of a beneficiary of a wholly discretionary trust to reach trust assets. On the other hand, under the law of many states it is believed that regardless of whether the trust had a so-called "spendthrift provision," if a beneficiary was entitled to receive distributions, the beneficiary's creditors could compel the trustee to satisfy the beneficiary's obligations to the extent the beneficiary was entitled to distributions. For example, if the beneficiary was entitled to the income from the trust or was entitled to distributions of income and principal based on a standard, such as the beneficiary's health, maintenance, support, and education, the beneficiary's creditor could reach the income or, in the case of distributions pursuant to a standard, whatever distributions the beneficiary would be entitled to receive if the trustee complied with the standard.

The comment following Section 504 (the corresponding Virginia provision is located at *Code of Virginia section 55-545.04*), dealing with discretionary trusts, states that the difference between discretionary and support trusts has been eliminated. While this statement has caused some commentators to worry that discretionary trusts will be less protected under the UTC, in reality the assets of either type of trust under the UTC are perhaps in many ways less susceptible to claims of creditors of a beneficiary than under common law. A support trust refers to a trust that either mandates or authorizes the trustee to make distributions to a beneficiary for a specific purpose, such as the beneficiary's health, support, or

education. A wholly discretionary trust does not contain a specific standard for making distributions. For most creditors, a support trust with a spendthrift provision is now treated the same as a wholly discretionary trust inasmuch as the creditor cannot compel distributions from either trust, except for mandatory distributions, unless the creditor is an exception creditor (discussed below).

Under Section 501 of the UTC (*Va. Code section 55-545.01*), to the extent a beneficiary's interest is not protected by a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. However, the court may limit the award to such relief as is appropriate under the circumstances. Note that this provision only gives the creditor or assignee the right to reach present or future distributions and not the actual assets in the trust. The comment makes this clear by stating that if a creditor obtains an order attaching the beneficiary's interest, the trustee will then pay to the creditor instead of to the beneficiary any payments the trustee would otherwise be required to make to the beneficiary, as well as any discretionary distributions the trustee decides to make.

Consequently, with respect to a trust without a spendthrift provision, a creditor of a beneficiary who is either entitled to receive distributions from the trust or a permissible recipient of discretionary distributions can reach such distributions in the same way as they could under common law or state statute. In a wholly discretionary trust, however, as long as the trustee does not exercise his or her discretion to make distributions to the beneficiary, the creditor will receive nothing.

Some commentators are concerned that, because a trustee under the UTC is required to administer the trust, even a wholly discretionary trust, in good faith and in accordance with its terms and purposes and the interests of the beneficiaries, a beneficiary may have a right to compel the trustee of a discretionary trust to make distributions. If so, the beneficiary's creditors may have the same right to compel the trustee to make distributions to the creditor that should have been made to the beneficiary had the trustee acted in good faith. However, the UTC makes it clear as a general rule that a creditor cannot compel a distribution from a spendthrift trust, even a support trust, and that a creditor's inability to compel distributions does not affect a beneficiary's right to do so. *Va. Code section 55-545.04(B)*. Limited exceptions are provided for claims based on child support orders where the trustee has not complied with a distribution standard or has abused discretion (*Va. Code section 55-545.04(C)*) and certain claims by the Commonwealth (or its agencies) for reimbursement for public assistance benefits with court approval (*Va. Code section 55-545.03:1*).

Spendthrift Trusts.

In the case of a spendthrift trust, a beneficiary may not transfer an interest in the spendthrift trust, and, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before it is received by the beneficiary. A spendthrift provision is valid only if it restrains both voluntary and involuntary transfers of a beneficiary's interest. *Va. Code section 55-545.02(A)*. A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust" or words of similar import, is sufficient to restrain both voluntary and involuntary transfers of the beneficiary's interest. *Va. Code section 55-545.02(B)*.

There are three exceptions to the protection provided to a beneficiary's interest in a spendthrift trust. *Va. Code section 55-545.03*. Creditors who can reach distributions from a spendthrift trust are referred to as exception creditors. A beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. *Va. Code section 55-545.03(B)*. In addition, a judgment creditor, such as an attorney, who has provided services for the protection of a beneficiary's interest in the trust may obtain a similar order. *Va. Code section 55-545.03(B)*. Finally, a spendthrift provision is unenforceable against the claims of the Commonwealth of Virginia (or a political subdivision of the Commonwealth) or the United States. *Va. Code section 55-545.01(C)*.

The last exception, that a spendthrift provision is unenforceable against a claim by the Commonwealth (or a political subdivision of the Commonwealth) or the United States, does not really change current law. The Virginia Legislature or the United States Congress can always enact laws that enable the state or federal governments to reach a beneficiary's interest in a trust, regardless of whether state trust law provides otherwise. Hence, Virginia's adoption of the UTC does not in this respect increase the Virginia or federal government's ability to reach the assets in a spendthrift trust. Even without a specific provision in the UTC, federal law would preempt state law and a state legislature could always pass legislation to reach the interest of a beneficiary of a spendthrift trust. The inclusion of such a provision in the UTC is consistent with the goal of codifying all the law that applies to trusts.

Unlike the NCCUSL version of the UTC, the Virginia version of the UTC does not treat spouses or former spouses as exception creditors.

Regardless of whether a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon the termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date. *Va. Code section 55-545.06*. Although the UTC does not currently have a definition of mandatory distribution, it is anticipated that it will be amended to provide such a definition.

The UTC provides that a creditor of a beneficiary who is also a trustee of a spendthrift trust may not reach the beneficiary's interest if the beneficiary-trustee's discretion to make distributions is limited by an ascertainable standard. *Va. Code section 55-545.04(E)*.

In addition, the Virginia version of the UTC varies from the NCCUSL version of the UTC by preserving the existing Virginia protection of "special needs trusts". *Va. Code section 55-545.03:1*.

Revocable Trusts.

Under the UTC, the creditors of a settlor of a revocable trust have the same rights to the trust assets as they have to the settlor's other assets, regardless of whether the trust terms contain a spendthrift provision. *Va. Code section 55-545.05(A)(1)*. In addition, a self-settled irrevocable trust where the trustee may make discretionary distributions to the settlor will remain subject to the settlor's creditors to the extent that distributions could be made to the settlor. *Va. Code section 55-545.05(A)(2)*.

Consequently, the UTC did not adopt the position taken by a few states that permit an individual to create a trust and remain a discretionary beneficiary and yet insulate all the trust assets from the individual's creditors.

A final provision dealing with creditor's rights involves the so-called Crummey withdrawal power. Familiar to many estate planning practitioners, such a right is frequently used to qualify contributions to a trust for the annual exclusion when the terms of the trust would not otherwise qualify the beneficiary's interest in the trust as a present interest. Under such a withdrawal power, the beneficiary has the right to withdraw from the trust part or all of a contribution for a period of time, such as 30 days. After the period ends, the beneficiary's right to withdraw with respect to that contribution lapses. During the period the beneficiary has the right to withdraw, the UTC treats the beneficiary as a settlor of a revocable trust to the extent of the amount he or she can withdraw. *Va. Code section 55-545.05(B)(1)*.

From a federal transfer tax standpoint, the beneficiary holding a withdrawal power is not treated as making a transfer to the trust upon the lapse of the power to the extent that the amount that lapses does not exceed the greater of 5% of the value of all assets with respect to which the beneficiary had a right to withdraw from any trust of which he or she was a beneficiary or \$5,000, determined on an annual basis. From a property law standpoint, after the power lapses, the beneficiary could be treated as having made a contribution to the trust of the amount he or she could have withdrawn. If the beneficiary continues to have an interest in the trust, creditors may have the right to reach such interest on the basis that, to extent of the beneficiary's continuing interest, the trust is a self-settled trust. The UTC, however, follows the approach of the federal transfer tax law. To the extent that the amount subject to the lapse of the right to withdraw does not exceed the 5% or \$5,000 amount, or the amount that qualifies for the annual exclusion (without taking into account gift splitting), the power holder will not be treated as having made a contribution to the trust. *Va. Code section 55-545.05(B)(2)*. The UTC's approach is actually broader than federal law because the amount of the annual exclusion, \$11,000 in 2005, can be greater than the 5% or \$5,000 amount.

TERMINATION OF TRUSTS.

Section 411 provides that a non-charitable irrevocable trust may be modified or terminated upon the consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. *Va. Code section 55-544.11*. In many cases, there will be minor, unborn, or legally incapacitated beneficiaries whose consent is required to modify or terminate the trust. Fortunately, Article 3 (*Va. Code sections 55-543.01, et seq.*) provides for representation of such beneficiaries in a number of situations.

The ability of the settlor and the beneficiaries to modify or terminate the trust while the settlor is alive has raised concerns by some that when the settlor dies the assets in the trust would be included in his or her estate under either IRC Sec. 2036(a) or 2038 because of a retained power. Many believe that this concern is not valid, based on the regulations under Sec. 2038, which provide that Sec. 2038 does not apply if the decedent's power could be exercised only with the consent of all parties having an interest (vested or contingent) in the transferred property, and if the power adds nothing to the rights of the parties under local law.

Although most states allow for the termination of a trust with the consent of the settlor and all the beneficiaries, apparently there are some states that require court approval. To ensure that the UTC was not changing existing law in this regard, the UTC was amended to add an alternate provision that would require court approval of such a modification. Virginia's version of the UTC includes the requirement of court approval. *Va. Code section 55-544.11*.

In an abundance of caution, the UTC was amended to add an optional provision that would prevent the settlor from representing a beneficiary for purposes of consenting to the modification or termination. Virginia's version of the UTC adopts this prohibition. *Va. Code section 55-543.01(D)*.

BENEFICIARY NOTIFICATION REQUIREMENTS.

Section 813 provides that a trustee must keep the qualified beneficiaries of a trust reasonably informed about the administration of the trust and of material facts necessary for them to protect their interests. *Va. Code section 55-548.13(A)*. In addition, unless unreasonable under the circumstances, a trustee must promptly respond to a beneficiary's request for information related to the administration of the trust. *Va. Code section 55-548.13(A)*. A trustee, upon request of the beneficiary, must also promptly furnish to the beneficiary a copy of the trust instrument. *Va. Code section 55-548.13(B)(1)*. Within 60 days after the trustee accepts a trusteeship, the trustee must notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number. *Va. Code section 55-548.13(B)(2)*. Within 60 days after the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires the knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, the trustee must notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report discussed below. *Va. Code section 55-548.13(B)(3)*. Finally, the trustee must notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation. *Va. Code section 55-548.13(B)(4)*.

A trustee must send to the distributees or permissible distributees of trust income or principal, and to other qualified or non-qualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. *Va. Code section 55-548.13(C)*. Upon a vacancy in a trusteeship, unless a trustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. *Va. Code section 55-548.13(C)*. A personal representative or conservator or guardian may send the qualified beneficiaries a report on behalf of the deceased or incapacitated trustee. *Va. Code section 55-548.13(C)*.

A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. With respect to future reports and other information, however, a beneficiary may withdraw a waiver previously given. *Va. Code section 55-548.13(D)*.

For purposes of the UTC, a beneficiary is a person who has a present or future interest in the trust, vested or contingent, or holds a power of appointment over trust property in a capacity other than that of a trustee. *Va. Code section 55-541.03*. A qualified beneficiary means a beneficiary who, on the date the beneficiary's qualification is determined, is a distributee or a permissible distributee of trust income or principal, would be a distributee or permissible distributee of trust income or principal if the interest of the current distributees terminated on that date, or would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date. *Va. Code section 55-541.03*. Consequently, vested remainder beneficiaries are qualified beneficiaries, but contingent remainder beneficiaries are not.

The UTC generally provides default rules that only apply in the event that the trust agreement does not contain a provision dealing with the particular issue. There are, however, a number of provisions that may

not be waived, not all of which have been incorporated into the Virginia version of the UTC. Those provisions not included in the Virginia version of the UTC include the following: (1) under Section 105 (b)(8), a settlor may not waive the trustee's duty to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports; and (2) under Section 105(b)(9), a settlor may not waive the duty of a trustee to respond to the request of a beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of the trust. While the first requirement applies only to qualified beneficiaries who are over age 25, the second requirement, responding to requests for the trustee's report and other information, applies to any beneficiary, regardless of whether the beneficiary is vested and regardless of the beneficiary's age.

There are at least two policy reasons for requiring that some beneficiaries be notified concerning the trust and their rights under the trust. First, if the trustee was not required to notify any beneficiary or other person who has an interest in the trust about the trust and its administration, there would be no one to ensure that the trustee was complying with the terms of the trust and the trustee's duties under the trust and the law. Second, if the trustee was prohibited by the trust agreement from reporting to anyone about the trust's administration, there would be no event that would commence the running of the statute of limitations with regard to the trustee's actions or inactions.

Many commentators have expressed concern about the notification provisions. Generally, the concerns have focused on the effect the knowledge of being a beneficiary of a trust, particularly one containing significant assets, would have on a younger beneficiary's incentive to lead a productive life or on an adult beneficiary with drug or alcoholic addiction. Consequently, many states that have adopted the UTC have modified the beneficiary notice requirement. While a few states have actually increased the trustee's duty to notify beneficiaries, most have limited the requirement. Some have provided that only current beneficiaries are entitled to notice. A few states have allowed the settlor to designate someone else to receive notice on behalf of a beneficiary. One state has added a reasonableness standard; that is, the trustee may withhold providing notice if the trustee believes it is reasonable to do so. A number of states have eliminated Sections 105(b)(8) and (b)(9) entirely. In response to these developments, the UTC was amended to make the notice requirements optional; a state may choose to delete Sections 105(b)(8) and (b)(9). Virginia's version of the UTC has deleted these optional provisions and allows the settlor to waive the notification requirements.

CONCLUSION.

The UTC certainly satisfies the goal of the Commissioners to produce a comprehensive trust code. While there are some controversial provisions, most of its provisions are a welcome codification of existing common law or a needed addition to common law where there has been no law on point. The Commissioners have demonstrated their willingness to amend the UTC to deal with issues that arise as the states consider its adoption. Although each state is free to alter the provisions of the UTC, most of the UTC will remain unchanged with the result that practitioners in a state that has adopted the UTC will be able to deal more comfortably with the trust law of another state that has also adopted the UTC. Most of the Virginia changes to the UTC in the areas covered in this article were made to retain desirable features of existing Virginia law. In addition, because the areas of difference are likely to be few and will also be fairly well-known, the lawyer will be able to discern the differences between the trust law of his or her state and the trust law of another state that has adopted the UTC. ■

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