Docket Call

Vol. 24 No. 4
Spring 2008
Meghan Cloud, Ed.

The newsletter of the Young Lawyers Conference of the Virginia State Bar

in this issue

2008: A Landmark Year for Mental Health Law Reform in the Commonwealth

Demian J. "Dem" McGarry

One year ago, the Spring 2007 issue of *Docket Call* featured an article titled "Chief Justice Hassell Creates Commission to Reform Mental Health Laws." The initiative was an acknowledgement by Chief Justice Hassell and others involved in the intersection of mental health and the law that the system then in place was deficient. It is eerily ironic that Chief Justice Hassell created the commission in October 2006, six months prior to the massacre at Virginia Tech on April 16, 2007, perpetrated by a mentally ill student. It is impressive that, just one year after the tragedy, the results of the commission's work—which will be the subject of the YLC's showcase CLE at the annual Virginia State Bar Meeting in Virginia Beach on June 20—are in.

The Commission on Mental Health Law Reform had the important task of presenting the 2008 General Assembly with an omnibus mental health law reform package. On December 21, 2007, the Commission released a preliminary report. It called for much needed investment in community mental health services and recommended several major changes to the laws governing involuntary commitment.

The Commission's single most important recommendation was to make Virginia's standard for involuntary commitment both clearer and less stringent. Under the existing standard, which will continue in effect until July 1, 2008, a person must be shown to be an "imminent danger" to himself or others before a court can order his involuntary commitment. The Commission recommended that the law be changed to subject a person to involuntary commitment if: i) there is a substantial likelihood that, in the near future, he or she will cause serious physical harm to himself or herself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm; or ii) there is a substantial likelihood that, in the near future, he or she will suffer serious harm due to substantial deterioration of his or her capacity to protect himself or herself from such harm or to provide for his or her basic human needs.

The Commission's recommendation was adopted *in toto* by House Bill 499, sponsored by Delegate Phillip A. Hamilton (R-Newport News). HB 499 also provides that, where appropriate, a person who meets the criteria for involuntary commitment may be ordered to mandatory outpatient treatment instead. HB 499 was passed unanimously by both the House of Delegates and the Senate, and Governor Kaine, who made mental health law reform a top priority for the 2008 legislative session, ceremonially signed the bill on April 9, 2008. The law will take effect on July 1, 2008.

▲ Governor Kaine announces mental health law initiatives.

Unanimous passage of HB 499 reflects the fact that mental health law reform in Virginia has been a bipartisan success story. As Attorney General Bob McDonnell told *Docket Call*, "The Governor and the General Assembly deserve great credit for an immediate and positive response to the determination that deficiencies existed in our mental health laws and policies. I was pleased that our office could play an important role in this effort, and I know we have made Virginia safer through our work." HB 499 was in fact part of the Attorney General's 2008 Legislative Initiative. House Bill 815, sponsored by Delegates David B. Albo (R-Springfield) and H. Morgan Griffith (R-Salem) and another one of the Attorney General's legislative initiatives, codified Governor Kaine's Executive Order 50, which required information regarding involuntary admission to a facility for mandatory outpatient treatment to be forwarded to the Central Criminal Records Exchange for purposes of determining an individual's eligibility to possess, purchase, or transfer a firearm. The bill also makes it illegal for persons involuntarily committed, found incompetent to stand trial and

continued on page 6

criminal corner

Stephen P. Pfeiffer

Wiretapping: Risks for Clients—and Private Practitioners

"Curiosity kills the cat." This old saying is a perfect example of what can happen when a person's suspicions and inquisitive nature get out of control. With modern technology's prevalence and ease of use, more and more people are using technology to investigate their suspicions. In particular, people are beginning to use recording devices to listen in on telephone conversations. It is imperative that every criminal practitioner become familiar with the potential criminal liability that accompanies the use of recording devices. Additionally, criminal defense attorneys must be aware of the ethical implications that attach when counseling a client regarding the use of recording devices.

The Virginia Wiretapping Statute, Va. Code § 19.2-62, makes it unlawful for any person to intentionally intercept, use or disclose; attempt to intercept, use or disclose; or get another person to intercept or use any wire, electronic, or oral communication (activities that this article will refer to collectively as "wiretapping"). The statute includes two notable exceptions. The first occurs when the person performing the wiretapping is a party to the recorded conversation. The second occurs when the party performing the wiretap, though not a participant in the call himself, has the consent of one of the parties to the conversation.

Violations of § 19.2-62 are punishable as Class 6 felonies. But the curious wiretapper needs to worry about more than just criminal penalties. Va. Code § 19.2-69 creates a civil cause of action with "presumed damages" against a party who is found to have engaged in illegal wiretapping. Additionally, the statute provides for the recovery of punitive damages. It also requires the wiretapper to pay the opposing party's attorneys' fees and court costs.

When advising a client regarding wiretapping, the private criminal practitioner must tread carefully. "Recordation, by a lawyer *or by his authorization*, of conversations between third persons, to which he is not a party, without the consent or prior knowledge of each party to the conversation, is 'conduct involving dishonesty, fraud, [or] deceit' . . . [and] a departure from the standards of fairness and candor which characterize the traditions of professionalism." *Gunter v. Virginia State Bar*, 238 Va. 617, 622 (1989) (emphasis added). The *Gunter* case stands for the general proposition that the mere fact that particular conduct is not illegal does not mean that such conduct is ethical. *See also* Legal Ethics Op. 1738 (2003). Nor may a lawyer's assistants and investigators ethically record a telephone conversation without the knowledge and consent of all parties to that conversation. *United States v. Smallwood,* 365 F. Supp. 2d 689, 699 (E.D. Va. 2005). Thus, Virginia lawyers should think twice before engaging in or advising another to engage in wiretapping, regardless of whether the particular act of wiretapping at issue may be legal under § 19.2-62.

Despite the *Gunter* decision, there is good news for a select group of criminal practitioners; not all attorneys are prohibited from engaging in, or authorizing, legal wiretaps. Unfortunately for defense attorneys, only those attorneys in law enforcement are immune from the *Gunter* decision. Virginia Legal Ethics Opinions have identified three exceptions to the *Gunter* decision regarding a lawyer's ethical obligations and wiretapping. For the purposes of this article, I will focus only on the first exception, which is afforded to attorneys working in law enforcement. *Attorney Participation in Electronic Recording*, Legal Ethics Op. 1738 (2000). The "law enforcement" exception is deemed necessary because such recording is a "legitimate and effective" investigative practice, one that is "legal, long-established, and widely used for socially desirable ends." Furthermore, according to the standing Legal Ethics Opinions, if government lawyers were not able to authorize and oversee wiretapping activities by investigators and law enforcement officers, there would be a chilling effect on needed supervision. *Whether an Attorney Working for a Federal Intelligence Agency*, Legal Ethics Op. 1765 (2003).

The moral of this story is three-fold. First, as criminal practitioners, we must know and understand § 19.2-62 in order to better represent our clients. Second, generally speaking, private criminal practitioners should never engage in wiretapping themselves or advise others to do so, whether or not the specific activity at issue is legal under § 19.2-62. Such acts are deemed deceitful and violations of the professional rules. Third, if you are a government attorney, you may properly engage in, and advise others to engage in, wiretapping. For those in law enforcement, concerns about dishonesty and fraud that might otherwise apply apparently give way to the greater good.

Criminal practitioners, do not despair; recently, the Council of the Virginia State Bar approved a proposed amendment to Rule 8.4 of the Virginia Rules of Professional Conduct, and the Supreme Court of Virginia is now considering the proposed amendment. The amendment would permit the undisclosed recording of a communication or event by a lawyer or an agent under the lawyer's supervision if the recording: a) is lawful; b) is consented to by one of the parties to the transaction; c) is in furtherance of an investigation on behalf of a client; d) is not effectuated by means of any misrepresentations; and if e) the means by which the communication or event was recorded and the use of the recording do not violate the legal rights of another. We will wait with bated breath for the Supreme Court's decision on this very important change.

Stephen Pfeiffer practices civil litigation and criminal litigation with Wolcott Rivers Gates in Virginia Beach. You can reach him at pfeiffer@wolriv.com.

message from the president

Daniel L. Gray

No offense to anyone, but I always wondered why our immediate past presidents tended to disappear off the face of the Earth at the end of their terms. Having been through almost a year at the helm of this wonderful organization, I'm ready to disappear, too. Not because it's been particularly challenging. Instead, I now realize that this Conference pretty much runs itself. Past presidents don't do much because there isn't much for them to do.

That's a testament to the members of the Conference board, our committee chairmen, and our circuit representatives. Like past presidents, the president doesn't do much because other people are doing all the hard work. Our Immediate Past President, Maya Eckstein, whom I've quoted before, once said that all she had to do was step out of the freight train's way (or words to that effect), and that's exactly what my year has been like. So many people have worked so hard, and they deserve a little recognition.

First, a well-deserved thank you to our departing board members, **Josh David**, **Rita Davis**, **Kelly Ashby**, **Brad Dalton**, **Jackie McClenney**, and **Maya Eckstein**. Their individual accomplishments for the YLC are too numerous to mention. But their collective ideas, enthusiasm, hard work, and—in a couple of cases, especially—good humor made our bi-monthly board meetings a pleasure and a privilege to attend.

For the past several years, Admission and Orientation Ceremony Chairman **Francie Scott** has done a superb job organizing a very important day in the lives of Virginia's young lawyers. Her husband, **Bryan Scott**, has been known to pitch in on the big days as well. In October 2007, Francie organized the largest A&O Ceremony ever.

Each June, the YLC gets the chance to shine at the VSB annual meeting, largely due to the efforts of **Dem McGarry**, our Annual Meeting CLE Chairman, and **Maureen Danker**, our Annual Meeting Athletics Chairman. For the past three years, Dem has put together superlative CLE presentations for the Conference, twice having been chosen by the bar for the CLE Spotlight Presentation. Also for the past three years, Maureen has done a tremendous amount of work ensuring that our 5K Run and Volleyball Tournament come off flawlessly. I've never actually seen someone have to re-invent a wheel—until Maureen came along. She took over a program with very little guidance on how to proceed, and she figured it out, with great success. Thanks also to **Len Danker**, who has been known to get up very early after late nights in Virginia Beach to hand out donuts and water to runners.

All these folks have rendered me largely superfluous this year.

Alana Malick and **Mollie Barton** put together a very special night in Richmond last October that honored newly-appointed women and minority judges. Their hard work on the Bench-Bar Celebration Dinner turned a happy event into an extraordinarily moving one. It was our best-attended Dinner—in terms of both honorees and guests—in years. Mollie also gets kudos for her work as chairman of the YLC's Commission on Women & Minorities in the Profession.

Ken Alger took a good idea—the Domestic Violence Safety Project—and turned it into a roving project that has reached almost every corner of the state this year. Ken single-handedly organized domestic violence CLEs in Rockingham, Winchester, and Virginia Beach, and he has more planned for the future. Ken is one of those people you just wind up and watch—he can make you feel that you waste a lot of your free time.

Another YLC member has the same effect—**Hugo Valverde**, our Immigrant Outreach Committee Chairman. At a time when immigration is a very controversial issue, Hugo has waded in neck-deep and made service to our immigrant population a focus of the Conference. Hugo's committee has prepared immigration presentations for the statewide Juvenile and Domestic Relations District Court Judges Conference, and he just finished pulling off a sold-out CLE in Fairfax focusing on the immigration consequences of criminal convictions.

One of our most important projects, the Northern Virginia Minority Pre-Law Conference, has been headed by **Samantha Ahuja** for the past several years. The Conference has served hundreds of Virginia's minority undergraduates during Samantha's tenure, and it's just not possible to overstate the amount of work and level of commitment she brings to the project. In Southern Virginia, **Brooke Rosen** took over the Conference at W&L Law School and did an outstanding job organizing the program there.

Each summer, the Conference holds the Oliver Hill/Samuel Tucker Law Institute for minority high school students. There wouldn't be an OHI without the efforts of **Rasheeda Creighton** and **Yvette Ayala**. Again, one of those events requiring work beyond the ability of most mortals.

You're reading what occupies the time of our *Docket Call* editor, **Meghan Cloud**. I can't even imagine how she manages to publish our newsletter. Forget coming up with content or dealing with layout. How does she get articles out of lawyers? And on time? Her tireless efforts result in the one really tangible thing you get out of your YLC membership.

And finally, our fearless advocate, keeper of knowledge, stern enforcer, and friend—**Maureen Stengel**. If there is one member of the VSB staff that has the very best interests of the Commonwealth's young lawyers at heart, it's our liaison, Maureen. She and **Catherine Huband** plan our meetings, answer our dumb questions, explain (for the millionth time) the reimbursement policies, process our paperwork, and generally make our lives easier.

All these folks have rendered me largely superfluous this year. If all continues to go right,

Daniel Gray is a principal practicing family law in the firm of Cooper Ginsberg Gray, PLLC, in Fairfax, Virginia.

legal ethics corner

Jeffrey Hamilton Geiger

You Make the Call

Q *While waiting for the civil motions docket to be heard in general district court, lawyers Bill Early and Ann Offen watched as a criminal defendant, who was represented by counsel, was very mildly sentenced for a very mild offense—much to the consternation of the prosecutor. When the judge asked if she had any questions, the defendant inquired about her right to appeal to circuit court. At that point, the prosecutor jumped out of his chair, exclaiming that if the defendant appealed, she would be tried by a jury. He requested that the clerk so note his demand on the warrant. Early and Offen muttered to themselves about whether the prosecutor could make those statements; as everyone knows, the only kind of jury found in this county is a hanging jury. The defendant would be all but guaranteed a harsher sentence. Despite the fact that it would be very unusual for a prosecutor to request a jury trial on such a mild offense, the defendant—not surprisingly—chose not to exercise her right of appeal.*

A If the prosecutor was seeking to intimidate the defendant with the threat of a jury trial, it worked. The larger question, perceived by Early and Offen, is whether in doing so the prosecutor violated the Virginia Rules of Professional Conduct.

Before answering that specific query, it is important to recognize the unique role that a prosecutor fills. As Justice Douglas intoned in *Donnelly v. DeChristiforo*, 416 U.S. 637, 648–49 (1974): "The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial."

Recognizing that "a prosecutor has the responsibility of a minister of justice and not simply that of an advocate," Rule 3.8 sets forth "additional responsibilities of a prosecutor," such as disclosing evidence that may tend to negate guilt and not making or proceeding with a charge that he knows is not supported by probable cause. The restrictions on the activities of a prosecutor do not, however, address statements made in court as to his intent to request a jury trial, should the matter be appealed. In Legal Ethics Opinion 1768, the Standing Committee on Legal Ethics resolved the issue from a still broader perspective, concluding that nothing in the more general rules governing lawyer communications prohibited the prosecutor from making such remarks in the presence of a represented defendant.

Jeff Geiger is a shareholder in the Richmond office of Sands Anderson Marks & Miller, P.C. You may reach him at jgeiger@sandsanderson.com.

The Registration of Juvenile Sex Offenders

Kenneth L. Alger II

The criminal justice system has taken many steps to control violent crimes. One visible and familiar example of this is the listing of sex offenders on public notification registries. Sex offender registries were created to promote community awareness and increase public safety. With the advent of the Internet, private citizens can immediately and easily identify those sex offenders who live or work within a certain zip code. In Virginia, such records are maintained by the state police, on the Sex Offender and Crimes against Minors Registry.[1]

Less familiar than the registries themselves is the fact that some of the listed offenders committed their crimes when they were juveniles. While Va. Code § 9.1-902(G) expressly provides that juvenile sex offenders "shall not be required to register," the court may, in its discretion, find that "the circumstances of the offense require offender registration."

In order to qualify for registration, the juvenile offender must be at least 14 years old at the time of the offense, have been adjudicated delinquent on or after July 1, 2005, and have committed a qualifying offense.[2] The Commonwealth must then make a motion that the juvenile offender be registered and offer proper notice to the defendant.

Section 9.1-902 provides that the court should weigh the following factors when considering whether to require registration of a juvenile:

(i) the degree to which the delinquent act was committed with the use of force, threat, or intimidation;
(ii) the age and maturity of the complaining witness;
(iii) the age and maturity of the offender;
(iv) the difference in the ages of the complaining witness and the offender;
(v) the nature of the relationship between the complaining witness and the offender;
(vi) the offender's prior criminal history; and
(vii) any other aggravating or mitigating factors relevant to the case.

The Code provides no instructions on application of these guidelines. Furthermore, as the Juvenile Court is not a court of record, there is no way to determine how the guidelines have been applied by individual courts on a case-by-case basis.

Once the Court orders registration of a juvenile sex offender under § 9.1-902(G), the juvenile must follow the same rules that apply to adults. He must register within three days of his release from confinement or, if no jail time is served, within three days of the date of disposition. The offender must also complete and return to the state police an address verification form, and he will be required to re-register periodically—anywhere from once every 90 days, if the offense was sexually violent, to once every 180 days. Failure to register or re-register in a timely manner may lead to further criminal punishments, as provided in Va. Code § 18.2-472.1.[3]

While some of the individuals listed on Virginia's sex offender registry committed their crimes as juveniles, you will not find offenders listed there who are still under the age of majority. Juveniles are not included in the public registry until they reach 18 years old. Thus, a juvenile may commit an offense when he is 14 years old, not appear on the public listing for four years (despite having formally and timely registered, in compliance with the rules), and then be listed on his 18th birthday. A petition to remove his name and information from the registry may be filed with the applicable circuit court ten years after the date of the initial

Sex Offenders continued next page

Sex Offenders continued from previous page

registration, unless the conviction was for (i) a sexually violent offense, as defined by § 9.1-902; (ii) two or more offenses for which registration is required, (iii) a violation of former § 18.2-67.2:1, which related to marital sexual assault; or (iv) murder. *See* Va. Code § 9.1-910. Individuals whose convictions fall into one or more of those four categories have a continuing duty to register for life. *See* Va. Code § 9.1-908.

As a result, requiring a juvenile offender to register is less a short-term solution than a decision whose repercussions can last at least a decade—and possibly a lifetime. Unfortunately, a large segment of juveniles who have been required to register under § 9.1-902(G) have been convicted of a "sexually violent offense." This category is broad and covers many behaviors, some of which are relatively innocuous.[4] At one end of the spectrum is rape; at the other, touching the breast of another minor. Thus, a juvenile may have a lifelong duty to register as a result of a *de minimis* act. Of course, one might assume that such outcomes are unusual because § 9.1-902(G) requires consideration of such factors as the degree of force used and the nature of the relationship between the perpetrator and victim before registration is ordered. Yet, some national studies have found that juveniles convicted of what are in reality very minor offenses have been required to register.[5] If the purpose of the sex offender registry is to promote awareness and community safety, inclusion of certain juvenile sex offenders could thwart that goal by making it difficult to distinguish between the dangerousness of the sex offenders listed.

An additional problem is that few defense attorneys seem to understand the long-term implications of registration. It is not uncommon for a defense attorney to concede registration in order to obtain no jail time for his client. However, that may or may not be a fair trade. Some registered sex offenders have been harassed to the point of having difficulty maintaining employment and fearing for their safety. Minors could be subjected to even more social harassment and isolation. For example, one juvenile sex offender was escorted off the football field during a high school game because he had just turned 18—and was now a publicly registered sex offender.

The registration of juvenile sex offenders is particularly controversial because of the juvenile correctional system's special emphasis on rehabilitation. The lifetime registration of an adult for crimes committed while a minor would seem to go against this concept. Again, as the law stands, a 14-year-old offender can be required to register, exhibit no problems for the next four years, and still be placed on the registry at 18 years old. Furthermore, although juveniles can be subject to the same registration requirements and long-term effects as adults, they are not afforded the same procedural safeguards under our system of criminal justice.

By providing for the registration of juvenile sex offenders, § 9.1-902(G) is not the only provision in the Code that applies adult consequences to juvenile actions. An adult is forbidden from possessing or transporting a firearm if he has a juvenile felony conviction, for example, but the prohibition applies only until the offender reaches the age of 30. *See* Va. § 18.2-308.2. Because of its potentially lifelong effect, juvenile sex offender registration is unusually severe.

While registration of juvenile sex offenders poses unique problems, registration of severe juvenile sex offenders may be appropriate. However, proper training for defense attorneys, the responsible exercise of prosecutorial and judicial discretion, and a thorough understanding by all parties of the implications of such decisions needs to exist.

Endnotes:

[1] For a complete listing of those offenses requiring registration, see Va. Code § 9.1-902. The Virginia Sex Offender Registry can be found on the Virginia State Police Web site, www.virginiatrooper.org.

[2] Va. Code § 9.1-902 defines "offense for which registration is required" as murder, criminal homicide, a sexually violent offense, or one of a wide range of felonies of a sexual nature.

[3] A first offense is a misdemeanor. A second offense is a Class 6 felony. Once convicted for failure to register or re-register, an offender is required to re-register every 30 days.

[4] Va. Code § 9.1-902 defines "sexually violent offense" to include abduction, indecent liberties with a minor, child pornography offenses, and completed and attempted acts of rape, forcible sodomy, object sexual penetration, and aggravated sexual battery.

[5] Lisa Trivits and N. Dickson Repucci, *Application of Megan's Law to Juveniles,* 57 American Psychologist 692 (2002).

Ken Alger is with the Shenandoah County Commonwealth's Attorney's office in Woodstock. If you have questions regarding the guidelines, please e-mail him at kenalger@shentel.net.

Immigrant Outreach Committee's Latest CLE a Rousing Success

Hugo Raúl Valverde

A sure test of a successful all-day CLE is whether attendees return after the lunch break. The YLC's Immigrant Outreach Committee's CLE on the immigration consequences of criminal convictions passed this test with flying colors—even though it took place on a Friday.

On April 4, 2008, more than 105 people traveled to the Fairfax County Juvenile and Domestic Relations Court to learn more about the connection between criminal law and immigration law. They included public defenders, criminal defense attorneys, and public interest lawyers, and they heard about the effect of criminal convictions on immigration status from three nationally recognized experts: Dan Kesselbrenner, director of the National Immigration Project and co-author of the treatise *Immigration Law and Crimes* (available from West); Mary Holper, Supervising Attorney for the Boston College Immigration and Asylum Project and author of a comprehensive analysis of the immigration consequences of crimes enumerated in the Virginia Code (available at the national immigration project website: http://www.nationalimmigrationproject.org/CrimPage/CrimPage.html; and Ofelia Calderón, a founding member of Calderón and Derwin in Arlington, Virginia, and a veteran immigration practitioner. Participants received answers to many confusing questions, such as:

- What is an immigration detainer? What can be done if my client has one?
- What Virginia offenses make my client deportable?
- When is a misdemeanor considered an "aggravated felony" for immigration purposes?

The response from attendees was positive; several commented that it was one of the best CLEs they had ever attended, and everyone was very appreciative of the Immigration Committee's efforts. For those who could not attend but are interested in the subject matter, the Fairfax Bar Association plans to make a taped copy of the CLE available at its library. The YLC is also exploring the possibility of making it available as a podcast.

Hugo Valverde is a principal with Valverde & Rowell, PC, in Virginia Beach. Those interested in receiving copies of the CLE materials may contact him at (757) 422-8472 or hugo@valverderowell.com.

corporate corner

Russell T. Schundler

Issues of Interest for Virginia Transactional Attorneys

Form D Goes Digital

The Securities Act of 1933 generally requires that companies register securities before making any offer to sell them. There are a number of exceptions to this general rule. Among the most commonly used are the exemption for limited offerings under Section 3(b) and the exemption for non-public offerings under Section 4(2). Typically, issuers that take advantage of these exemptions structure their offerings to fall within the safe harbor of Regulation D, which requires—among other things—the filing of a Form D with the Securities and Exchange Commission.

The SEC has recently adopted new regulations that will allow (beginning September 15, 2008) and ultimately require (beginning March 16, 2009) the electronic filing of Form D. In addition to the electronic filing requirement, there are a number of additional changes to the Form D requirements in the new regulations.

First, the new regulations will change some of the information to be included on Form D. For instance, the new Form D will require issuers to provide the date of first sale. This disclosure will likely have little effect at the federal level, as the failure to file Form D in a timely manner—within fifteen days of the date of first sale—will not affect an issuer's eligibility for an exemption under the Regulation D safe harbor. However, it may cause states to become more vigilant about enforcing their own regulations regarding the timely filing of Form D, because whether an issuer has complied with the applicable rules will be clear from the face of the form. The result could be more frequent penalty assessments at the state level. At present, very few states require that issuers disclose the date of first sale.

In addition, the new Form D will require issuers (i) to specify any claimed exemption under the Investment Company Act of 1940, (ii) to disclose their industry classification rather than include a written description of their business, and (iii) to disclose certain financial data (although issuers will have the option to decline to provide financial data). The new Form D will also eliminate the requirement that issuers list their "beneficial owners"—a change that will be welcome, given the fact that Form Ds will become much more accessible, and some investors may not want their investment holdings to become public knowledge.

Second, issuers will now be required to file amendments with the SEC if (i) there is a material mistake of fact in the Form D, (ii) if there is a change to any of the information on the Form D (subject to certain exceptions), or (iii) on an annual basis, if the offer remains open for more than one year. The annual filing requirement is a significant change from the current rules and will require issuers to remain mindful of their filing obligations if an offering is to remain open.

Third, although issuers will continue to have some ability to clarify responses on Form D through free writing, the electronic form will not permit clarification of some items and will limit the number of characters that may be used in a clarification. Thus, issuers will have much less flexibility in how they respond to questions on Form D in the future.

Finally, while it is anticipated that at some future date the electronic filing system used by the SEC will be integrated with new state electronic filing systems to allow for "one-stop" filing, state electronic filing systems do not yet exist, and they are not expected to be in place by the time the SEC's electronic filing requirement takes effect. As a result, it is not yet clear how state filing requirements will be satisfied. Some states may simply continue to require a paper filing of the old Form D. Others may require notice filings through some alternative method.

If a "one-stop" filing system eventually is developed, the amendments to Regulation D may greatly simplify the filing process for offerings that take advantage of its safe harbors. In the meantime, issuers will need to be aware of the new requirements—in advance of the date of first sale.

Rusty Schundler is an associate in the Capital Markets section of McGuireWoods LLP in Charlottesville. You can reach him at rschundler@mcguirewoods.com.

Mental Health Law Reform, con't from front page

ordered to mental health treatment, or subject to temporary detention orders to possess or purchase firearms.

Two other pieces of mental health legislation were passed by both the House of Delegates and the Senate and signed into law by Governor Kaine. HB 583, sponsored by Delegate David W. Marsden (D-Burke), allows the period of emergency custody to be extended from four hours to six hours, if the extra time is necessary to complete required mental health and medical examinations and to locate an appropriate placement for the individual in need of services. And HB 560, sponsored by Delegate Robert B. Bell (D-Charlottesville), adds to the responsibilities of the Community Services Boards (CSBs)—which, along with the Behavioral Health Authorities (BHAs), are the local agencies that have responsibility for many of the clinical and administrative aspects of the involuntary commitment process. The CSB is often the first point of contact a mentally ill person has with the system, and its gatekeeper and oversight role is absolutely critical. HB 560 requires that a CSB representative be present, either in person or through a two-way electronic audio/video or telephonic communication system, at every civil commitment hearing.

Two other bills also affect the duties of the CSBs. HB 256, which was also signed into law by the Governor, requires a CSB, within five days after an order for involuntary outpatient treatment is entered, to determine whether the person has complied with the order, and to identify and take all reasonable steps to resolve issues that may have caused any noncompliance. SB 64, not yet signed by the Governor, was referred to the Commission after passing in the Senate Committee on Education and Health. This bill would add crisis stabilization, outpatient, respite, in-home, and residential and housing services to the list of core services required to be provided by CSBs.

It remains to be seen how these additional obligations will affect the CSBs and their ability to meet the needs of those with mental illness. One thing is certain: funding will be vital to ensure effective implementation of the mental health law reforms. According to Delegate Hamilton, "As important as these policy changes are, the critical component to any policy is funding." This year, the General Assembly appropriated $41.7 million to address the projected costs in implementing the reforms, a step that he views as "a positive first step to what, hopefully, will become a long-term commitment to addressing the community-

continued next page

see you in court

Robert E. Byrne, Jr.

News and Practice Tips for Virginia Litigators

The Don'ts of Closing Arguments

All litigators understand that jury trial practice is part art and part science, especially during closing arguments. The classic philosopher Aristotle captured the essence of this dichotomy by claiming that a truly persuasive argument has three crucial components: *ethos*, the speaker's perceived character and credibility; *pathos*, the emotional appeal of the argument; and *logos*, the force of the argument's logical reasoning. When employed in proper measure, these rhetorical devices alchemize art and science into effective legal argument.

Unlike Aristotle's era, our Constitutional system takes great pains to ensure that a jury's decision is based on the evidence, and not on which lawyer better whips the jury into a frenzied mob. Don't get me wrong—Virginia jurisprudence extends a long leash when it comes to arguments. *See, e.g., S. Ry. Co. v. Simmons*, 105 Va. 651, 666–67 (1906) ("Great latitude is allowed in arguments before juries . . . ."). But this leash tightens when an attorney takes too much liberty with the *ethos* and *pathos* components of arguments. Here are a few examples.

Do Not "Do Unto . . . " As preschoolers, we're taught the Golden Rule: "Do unto others as you'd have them do unto you." Though arguably the greatest ideal ever pronounced, it has no place in closing arguments, where juries are to decide cases "according to the evidence, not according to how its members might wish to be treated." *Velocity Express Mid-Atlantic v. Hugen*, 266 Va. 188, 201 (2003). Do not invite jurors to put themselves in your client's shoes.

Do Not Discuss Irrelevant Economic Considerations. To compensate a plaintiff fairly, the law requires that the wrongdoer provide compensation only for the injuries proximately caused by his negligent conduct. Avoid trouble by arguing only for damages that are a part of the record. *Id.* at 200.

Also, if you are requesting noneconomic compensatory damages, do not base your request on an arbitrary, fixed amount. *See Reid v. Baumgardner*, 217 Va. 769, 772 (1977) ("Verdicts must be based upon the evidence in the case rather than the speculative calculations of counsel."). Courts view requests based on arbitrary numbers to be "unnecessarily suggestive." *Id.*

Do Not "Insure" your Statements. Raising the topic of insurance in a civil trial is tantamount to a criminal prosecutor arguing, "If the Defendant has nothing to hide, why didn't he just testify and tell you the truth?" The deliberate mention of insurance coverage during closing argument constitutes reversible error.

At least one rare situation does allow plaintiff's attorneys to wade into the area of insurance coverage, however: to establish the bias, interest, or prejudice of a witness. *See Lombard v. Rohrbaugh*, 262 Va. 484, 494 (2001) ("The facts tending to show the interest or bias of the witness cannot be admitted without establishing the fact that the defendant carried liability insurance.").

Do Not Stir Passions and Prejudices. Emotional appeals to a jury are undoubtedly an effective tool, as Aristotle recognized. But *pathos*-laden arguments stray too far when an attorney "urge[s] a decision which is favorable to his client by arousing sympathy, exciting prejudice, or [by urging a decision] upon any ground which is illegal." *Atl. Coast Realty Co. v. Robertson's Ex'r*, 135 Va. 247, 263 (1923).

Do Not Offer Personal Commentary. Offering personal commentary during argument causes problems on a number of levels. At best, such commentary is flatly irrelevant. At worst, it injects facts and ideas that are prejudicial or misleading. This is especially problematic if the speaker's *ethos* has established a strong rapport with the jury; in such situations, the risk that an attorney's opinion of the evidence can appear to be evidence itself is unacceptably high.

Though Aristotle would feel rhetorically hogtied in a Virginia court, he'd probably agree that our system is well positioned to cut through the rhetoric to reach the truth. Nevertheless, if utilized properly, Aristotle's techniques of *ethos*, *pathos*, and *logos* can be used to form an effective argument. Just be careful to follow the rules—and never, ever let your argument spiral into *bathos*.

Robert E. Byrne, Jr., is a litigation associate at Martin & Raynor, P.C., in Charlottesville. You can reach him at bbyrne@mrlaw.com.

Mental Health Law Reform, con't from previous page

based infrastructure needs of Virginia's mental health system." Those funds will be used in part to hire new case managers, therapists, and clinicians; improve and expand emergency services; and provide for more accountability in the system.

In addition to SB 65, another bill—SB 18, sponsored by Senator John S. Edwards (D-Roanoke)—has been continued to 2009. If passed, SB 18 would create a pilot program of "mental health courts" for nonviolent offenders with serious mental illnesses. While a nearly identical bill, also sponsored by Senator Edwards, died in the Finance Committee three years ago, the Virginia Tech shootings have caused legislators to take another look at such a measure. At this point one can only speculate about how exactly such courts would function, but one Virginia jurisdiction—the Circuit Court for the City of Norfolk—has had success with a separate mental health docket, which could provide a model. Established in 2004, Norfolk's Mental Health Court shares many of the goals of the Commission, including reducing the potential for recidivism through appropriate treatment and follow-up and improved interaction between the criminal justice and mental health systems generally. The program is available to criminal defendants who, among other requirements, have been diagnosed with a serious mental illness that contributed to their offense. Referrals may be made by anyone—even the defendant. Individuals who have been charged with violent offenses, sex offenses, or driving under the influence, or who have a prior record of such violations, are not eligible.

The new laws have yet to go into effect, and there is no objective way to predict their efficacy. There is, however, an unqualified commitment across the three branches of government to improve the legal system's response to those with mental illness and, in so doing, to better serve the public at large. That's at least one key ingredient in any recipe for success. For more information, please join your colleagues at the YLC's CLE on June 20.

Dem McGarry is an associate with the Carlberg Law Firm in Alexandria. You can reach him at dmcgarry@carlberglaw.com.

Upcoming Events

06/19–22 | VSB 70th Annual Meeting
Virginia Beach, VA
06/20 | VSB YLC-sponsored Annual Meeting Showcase CLE:
"Initiatives in Mental Health Reform in the Aftermath of the Virginia Tech Shootings: The Legal, Policy and Administrative Implications"
YLC Business Meeting to follow CLE
06/20 | VSB YLC Reception & Meeting at the Annual Meeting
07/17–20 | 117th VBA Summer Meeting
07/20–25 | VSB/YLC Oliver Hill-Samuel Tucker Law Institute
07/21 | VSB Solo & Small-Firm Practitioner Forum
07/23 | VSB Professionalism Course
07/24 | VSB Professionalism Course
11/14–19 | VSB 35th Annual Midyear Legal Seminar
The Ritz-Carlton - San Juan, Puerto Rico

For a complete, up-to-date list of events, please visit: http://www.vsb.org/site/events/

Address Change?

If you have moved or changed your address, please see the VSB Membership Department's page on the Web for an address update form at www.vsb.org/site/members/.

Docket Call

A quarterly publication of the Young Lawyers Conference of the Virginia State Bar.

Editor:
Meghan Cloud

Board Liaison:
Brian R. Charville

Design & Production:
Madonna G. Dersch

Docket Call welcomes contributions from members of the YLC.

Send submissions to:
Meghan Cloud
McGuireWoods LLP
Suite 300
310 Fourth Street, NE
Charlottesville, VA 22902
mcloud@mcguirewoods.com

Sign up!

YLC's listserv at www.vayounglawyers.com

Docket Call

Virginia State Bar Young Lawyers Conference
707 East Main Street, Suite 1500
Richmond, VA 23219-2800

PRESORTED
STANDARD
U.S. POSTAGE PAID
RICHMOND, VA
PERMIT NO. 709