



44th Annual Seminar Program and Speakers Confirmed

Steven D. Benjamin to Speak in Charlottesville
Hon. S. Bernard Goodwyn to Speak in Williamsburg



Steven D. Benjamin is an attorney in private practice with the Richmond, Virginia firm of Benjamin & DesPortes. He is the Immediate Past President of the National Association of Criminal Defense Lawyers, a Fellow of the American Board of Criminal Lawyers, and a Past President of the

Virginia Association of Criminal Defense Lawyers. He serves as Special Counsel to the Virginia Senate Courts of Justice (Judiciary) Committee, is a member of the Virginia Indigent Defense Commission, and served two terms as a member of the Virginia Board of Forensic Science.

Mr. Benjamin led the litigation and legislative effort to abolish Virginia's mandatory fee caps on compensation for court-appointed counsel. At the request of the Virginia Supreme Court, he helped establish and chair an annual Advanced Indigent Defense Training Seminar. He is a recipient of the Virginia State Bar's Lewis F. Powell Pro Bono Award in recognition of his years of indigent defense and efforts toward indigent defense reform.

Hon. S. Bernard Goodwyn is a Justice on the Supreme Court of Virginia. He joined the Court in October 2007. Before joining the Supreme Court of Virginia, he served as a state trial court judge for 12 years, during which he presided over a wide variety of civil and criminal cases in one of the busiest jurisdictions in

Virginia. Prior to going on the bench, he was a litigation partner at Willcox & Savage, a Norfolk, Virginia law firm where his practice concentrated on commercial, personal injury defense, and Section 1983 litigation. He was appointed to the full-time faculty of the University of Virginia School of Law for the 1994-95 academic year as a Research Associate Professor of Law. He is a graduate of Harvard University and the University of Virginia School of Law.



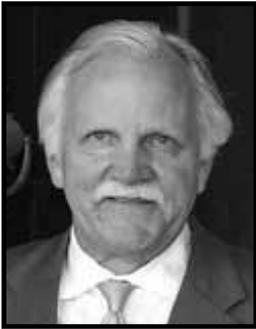
Virginia State Bar

44th Annual Criminal Law Seminar

FEBRUARY 7, 2014 • Doubletree Hotel • CHARLOTTESVILLE
FEBRUARY 14, 2014 • Doubletree Hotel • WILLIAMSBURG

- 8:00** **Late Registration and Exhibits**
- 8:15** **Welcome and Opening Remarks**
- 8:30** **Recent Developments in Criminal Law and Procedure**
 Back by popular demand, the annual comprehensive review of developments in substantive and procedural criminal law.
 • *Prof. Ronald J. Bacigal*
- 9:30** **Coffee Break and Exhibits**
- 9:45** **Immigration Issues: How to Avoid the Road Home**
 Tips on navigating the potential immigration consequences of a criminal case.
 • *Amy L. Austin, Esq.* • *David E. Gluckman, Esq.*
- 11:00** **Stress Management/Lawyers Helping Lawyers (Ethics)**
 What to do and where to go when the inevitable stress of shouldering other people's problems becomes too much for you or your colleague.
 • *James E. Leffler*
- 12:15** **Luncheon**
Steven D. Benjamin, Esq. — Benjamin & DesPortes, PC, Richmond, (Charlottesville)
Hon. S. Bernard Goodwyn — Justice, Supreme Court of Virginia, (Williamsburg)
- 1:30** **Ethical Issues in the Practice of Criminal Law**
 Judge Roush and Rod Leffler return to discuss the Virginia Rules of Professional Conduct in real-life scenarios.
 • *Rodney G. Leffler, Esq.* • *Hon. Jane Marum Roush*
- 2:45** **Revocations: Serving Your Suspended Sentence on the Installment Plan**
 In reality, a case is ultimately won or lost at a revocation hearing. This panel discusses the law and strategy involved in a revocation proceeding.
Charlottesville: *Albert LaFave*
 Elizabeth Murtagh, Esq.
 Areshini Pather, Esq.
Williamsburg: *William R. Blaine, Jr., Esq.*
 Tina Cashman
 David R. Lett, Esq.
- 3:45** **The Changing Landscape of Discovery**
 A look at the discovery rules in Virginia from the viewpoints of the prosecution, the defense and the bench.
Charlottesville: *Jonathan Shapiro, Esq.*
Williamsburg: *Jeffrey A. Swartz, Esq.*
Both Locations: *Hon. Raymond F. Morrogh and Hon. Charles S. Sharp*
- 5:00** **Closing Remarks and Adjournment**

Look for seminar brochure and registration information in mid-December
<http://www.vsb.org/site/sections/criminal/annual-seminar>



Chair's Column

Francis McQ. Lawrence

Joel Branscom, the Commonwealth's Attorney for Botetourt County, is the program chair and moderator for our February Seminar, our 44th. He has put together a great program, which includes tips on navigating the potential immigration consequences of a criminal case; another installment of Judge Jane Roush and Rod Leffler's lively presentation of ethical issues in the practice of criminal law; Ron Bacigal's vital discussion of recent developments in criminal law and procedure; a clinic on trying probation violations; and an update on the changing landscapes of discovery in Virginia. We are also offering a presentation from Lawyers Helping Lawyers dealing with stress management issues.

We have wonderful luncheon speakers with Steve Benjamin speaking in Charlottesville, and Justice S. Bernard Goodwyn of the Supreme Court speaking in Williamsburg.

In my first column as chair, I addressed the Virginia Death Penalty Assessment Team's recent report, noting that the study should be viewed as important for all areas of criminal law. I highlighted what the team considered appropriate procedures for eyewitness identification, the preservation of all interrogations and confessions, and minimal mandated discovery.

In this column, I report that the Virginia Supreme Court is currently in the process of appointing a committee to study discovery rules. According to a statement made by a court spokesperson, the creation of this new study panel was urged by prosecutors who argued that a prior study by a Bar task force was dominated by defense lawyers "seeking to tip the scales in their favor." The Supreme Court statement noted that the earlier study involved four years of discussion about suggestions for changes and that feelings run high on both sides of the

issue. There were some 90 pages of sharply divided remarks, and the Supreme Court statement noted that the recommendations of the committee had been "blasted" by prosecutors.

On the other hand, it is significant that ordinary citizens find it disturbing that, under Virginia's current discovery rules, a suspect could go to trial without his attorneys having a clue about who might testify against him. See, Editorial. *Charlottesville Daily Progress*, September 9, 2013. My understanding is that a number of jurisdictions in Virginia provide for an open file policy and a number do not. I am optimistic that we can find a middle ground that would permit the important fact gathering that defense counsel is required to do, including viewing prior witness statements.

While details on the size and makeup of the committee to further study Discovery are not yet available, I am confident that the Supreme Court is committed to forming a committee that will bring all the stakeholders to the table.

As you know, our Board of Governors is a diverse group that includes a number of judges representing both the trial and appellate level, members who serve as Commonwealth's Attorneys in a number of jurisdictions, some of which are large and some are small, as well as defense attorneys both in private practice and in public defender offices. I hope our Section, with its diverse membership, will actively involve itself in this undertaking to significantly improve our criminal justice system.



FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

U.S. v. Johnson, F.3d (4th Cir. 10/29). “While of the facts of *Innis* [4446 U.S. 291] led the Court to emphasize the possibility of a *Miranda* interrogation without express questioning, it made clear that the opposite is also possible.” Thus when defendant volunteered, “I can help you out ... I’ve got information for you,” the officer responded, “what do you mean?” The officer’s query was not interrogation because a reasonable officer could not anticipate that defendant would attempt to “extricate himself from a misdemeanor by implicating himself in a felony.”

U.S. v. Hashime, F.3d (4th Cir. 10/29). “Although a statement that the individual being interrogated is free to leave may be ‘highly probative of whether, in the totality of the circumstances, a reasonable person would have reason to believe he was ‘in custody,’ such a statement ‘is not talismanic or sufficient in and of itself to show a lack of custody.’ [here the totality of the circumstances established that the defendant was in custody]. The court also held that a suspect’s “tone and demeanor” during the interrogation are relevant to the question of voluntariness, but not to the question of custody. Defendant had told the police: “I want to help you, I love helping cops. I’ve always loved cops. I always wanted to be a cop.”



VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Amin v. Commonwealth, Va. , S.E.2d (10/31). “Once the Court of Appeals acquired appellate jurisdiction

over Amin’s appeal, it was required to review the merits of Amin’s argument that the conviction order he was appealing was void ab initio. *** This issue may be advanced ‘directly or collaterally by all persons, anywhere, at any time, or in any manner.’” The Court also stated that this principle of law implicates constitutional principles of due process and cannot be superseded by a rule of court [Rule 5:17] governing the effect of a failure to assign errors in the petition for appeal.

Virginia Broadcasting Corp v. Commonwealth, Va. , S.E.2d (10/31). A trial court’s initial determination whether to permit a camera in the courtroom “is made in the court’s sole discretion. There is no requirement that evidence be presented to the trial court to support the initial decision, and the trial court is not required to explain its reasons for denying a request.” However, “if a trial court permits coverage, then a party requesting further restriction or prohibition must demonstrate good cause for such further action.”

Burkeen v. Commonwealth, Va. , S.E.2d (10/31). “Under the circumstances, there was sufficient evidence of violence and brutality for the circuit court to find that, although Burkeen delivered only one blow with a closed fist, he acted with malice and he intended to maim Mayer.” *** “In the present case, the victim did nothing to provoke the attack, and he was hit with extreme force in a vulnerable area of his body while he was defenseless and not expecting such a blow. The blow resulted in serious and disfiguring injury. Burkeen bragged of his strength and training while taunting and cursing the victim after the first blow, indicating his intent to inflict such harm upon his victim. Additionally, Burkeen was poised to attach the victim further until Taylor intervened, at which time Taylor was attacked instead. In fact, Burkeen only discontinued his attack when he heard that the police had been called.”



VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Winslow v. Commonwealth, Va. App. (11/12). Midway through trial, the parties recited into the record the specific terms and condition of a pleas agreement they had just reached. On appeal, defendant argued that the trial court lacked jurisdiction to convict the defendant because the plea agreement had not been reduced to writing as required by Rule 3A:8(c)(2). The Court held that because the defendant “did not assert in the trial court that Rule 3A:8(c)(2) precluded the court from accepting his plea agreement and issuing a conviction order based upon it, he cannot raise this assertion for the first time on appeal. The conviction was not void *ab initio*, and the ends of justice exception does not excuse the procedural default.”

Bailey v. Commonwealth, Va. App. (11/05). Case of first impression. Defendant’s “decision to invoke his Fifth Amendment right not to testify did not render him unavailable to himself for purposes of the statement-against-penal-interest exception to Virginia’s hearsay rule.”

Patterson v. Commonwealth, Va. App. (11/05). The Court rejected defendant’s argument that police are required, “as a matter of law, to offer [an arrestee] a breath test before requesting that he take a blood test,” because the defendant here was arrested for “DUI-Drugs,” not alcohol.

Sarafin v. Commonwealth, Va. App. , S.E.2d (10/8) Upheld a DUI conviction for operating a vehicle in defendant’s driveway. “The Supreme Court’s use of the terminology ‘on a highway’ in *Enriquez* was merely a recitation of the facts of that case as *Enriquez* was located on a highway when he was operating the vehicle. Thus, the additional language of ‘on a public highway’ is non-binding *dictum*.”

Enriquez v. Commonwealth, 283 Va. 511, 517, 722

S.E.2d 252, 255 (2012) established “the rule that when an intoxicated person is seated behind the steering wheel of a motor vehicle on a public highway and the key is in the ignition switch, he is in actual physical control of the vehicle and, therefore, is guilty of operating the vehicle while under the influence of alcohol within the meaning of Code §18.2-266.”

Fauntleroy v. Commonwealth, Va. App. , S.E.2d (2013). The vehicle was properly impounded and inventoried because “the vehicle was ‘not drivable’ (due to its display of an invalid inspection sticker) and ... the vehicle was parked in ‘the middle of the road’ impeding traffic.”

MEMBER RESOURCES AREA

<http://www.vsb.org/site/sections/criminal/>

ELECTRONIC NEWSLETTERS FOR SECTION MEMBERS

Don’t miss the opportunity to receive your newsletters electronically. If you have provided your email address as part of your official address of record with the Virginia State Bar, you will receive future newsletters electronically. The newsletters will also be posted on the section’s website.

Visit the VSB’s website at <https://member.vsb.org/vsbportal/> to verify or change your address of record (home or business) and post your email address. You will be given the opportunity to limit the use of your email address on this site.

Access the section’s website for newsletters using this info:

Username: **criminallawmember**

Password: **48gLsj47**

*This site is available only to
Section members*

Chambliss v. Commonwealth, Va. App. , S.E.2d (11/22). Defendant entered into and acted upon a conspiracy to elude the police in Spotsylvania County. Defendant was ultimately apprehended after a car chase in Caroline County. Venue was proper in Caroline County because conspiracy is a continuing offense and where acts in further of the conspiracy run through “several jurisdictions, the offense is committed and cognizable in each.”

Holland v. Commonwealth, Va. App. , S.E.2d (11/22). “While a circuit court has *jurisdiction* to consider suspension or modification of a sentence for a defendant who has not yet been transferred to the custody of the DOC, [Code 19.2-303] is equally clear that no actual suspension or modification of a sentence may take place *until* the other statutory requirements have been met. ... I.e., (1) that suspending or modifying the unserved portion of the sentence would be compatible with the public interest, *and* (2) that there are circumstances in mitigation of the offense.” Although the court initially suspended sentence pending a hearing, the defendant was transferred to DOC before the hearing took place. At that point the court lost jurisdiction to suspend the sentence and the original unsuspended sentence was in effect.

Bonner v. Commonwealth, Va. App. , S.E.2d (2013) (en banc). Under the language of Code §18.2-311 [altering the serial number of a firearm] “the offense is complete once the person tampers with the serial number of the firearm.... Thus, the offense constitutes a discrete act rather than a continuing offense [like larceny].” Proper venue lies only where the alteration took place, not all localities into which the firearm was taken.

Farewell v. Commonwealth, Va. App. , S.E.2d (). There was some confusion as to if and when stand-by counsel evolved into counsel of record. But ultimately, “the trial court and [trial counsel] both reasonably believed that [trial counsel] was acting as counsel of record when he asked for a continuance in the case.” Thus appellant effectively tolled the provisions of the speedy trial statute.

Snowden v. Commonwealth, Va. App. 10/29). “Following a felony indictment, the district court certifies its records to the circuit court and the records become a part of the circuit court’s file. At the point when the records were certified to the circuit court, the circuit court became the court where the records were preserved.” Thus it is the circuit court that must certify the records, not the district court where the records originated.

Grimes v. Commonwealth, Va. App. 10/29). “The plain language of the applicable [burglary] statutes does not exclude from their scope any of the spaces that are encompassed within the walls of the dwelling house.” Thus entry of the crawl space was entry of the dwelling. The Court also held that the replacement value of the stolen copper pipes does not establish fair market value because there was no evidence of the deterioration of the pipes.



Mark your Calendar

- Nominations for the section’s Harry L. Carrico Professionalism Award are due December 3, 2013. See attached form.
- The 2014 Annual Seminar brochure will be mailed in early-mid December. Online registration also will be available through Virginia CLE’s website in early January.
- A 2014 supplement to the *Capital Case Trial Manual* will be published in February 2014. Orders will be placed through Virginia CLE.
- In conjunction with the 76th Annual Meeting of the Virginia State Bar, plans are underway for a CLE program on Electronic Evidence to be cosponsored by the Litigation and Corporate Counsel sections on Friday, June 13, 2014, at the Sheraton Oceanfront in Virginia Beach.

CALL FOR NOMINATIONS

HARRY L. CARRICO PROFESSIONALISM AWARD
VSB Section on Criminal Law

The Harry L. Carrico Professionalism Award was established in 1991 by the Section on Criminal Law of the Virginia State Bar to recognize an individual (judge, defense attorney, prosecutor, clerk, or other citizen) who has made a singular and unique contribution to the improvement of the criminal justice system in the Commonwealth of Virginia.

The award is made in honor of the Honorable Harry L. Carrico, a former Chief Justice of the Supreme Court of Virginia, who exemplifies the highest ideals and aspirations of professionalism in the administration of justice in Virginia. Chief Justice Carrico was the first recipient of the award, which was instituted at the 22nd Annual Criminal Law Seminar in February 1992.

Although the award will only be made from time to time at the discretion of the Board of Governors of the Criminal Law Section, the Board will invite nominations annually. Nominations will be reviewed by a selection committee consisting of former chairs of the section and Chief Justice Carrico.

Criteria

The award will recognize an individual who meets the following criteria:

- ◆ Demonstrates a deep commitment and dedication to the highest ideals of professionalism in the practice of law and the administration of justice in the Commonwealth of Virginia;
- ◆ Has made a singular and unique contribution to the improvement of the criminal justice system in Virginia, emphasizing professionalism as the basic tenet in the administration of justice;
- ◆ Represents dedication to excellence in the profession and “performs with competence and ability and conducts himself/herself with unquestionable integrity, with consummate fairness and courtesy, and with an abiding sense of responsibility.” (Remarks of Chief Justice Carrico, December 1990, Course on Professionalism.)

Submission of Nomination

Please submit your nomination on the form below, describing specifically the manner in which your nominee meets the criteria established for the award. If you prefer, nominations may be made by letter.

Nominations should be addressed to Francis M. Lawrence, Chair, Criminal Law Section, and mailed to the Virginia State Bar Office: Eighth and Main Building, Suite 1500, 707 East Main Street, Richmond, VA 23219. **Nominations must be received no later than December 3, 2013.** Please be sure to include your name and the full name, address, and phone number of the nominee.

If you have questions about the nomination process, please call Elizabeth L. Keller, Assistant Executive Director for Bar Services, Virginia State Bar, at (804) 775-0516.

Prior Recipients

The Honorable Harry L. Carrico	1992	Prof. Robert E. Shepherd	2003
James C. Roberts, Esquire	1993	Richard Brydges, Esquire	2004
Oliver W. Hill, Esquire	1995	Overton P. Pollard, Esquire	2005
The Honorable Robert F. Horan	1996	The Honorable Paul B. Ebert	2006
Reno S. Harp III, Esquire	1997	Rodney G. Leffler	2007
The Honorable Richard H. Poff	1998	Prof. Ronald J. Bacigal	2008
The Honorable Dennis W. Dohnal	1999	The Honorable Jere M.H. Willis Jr.	2010
The Honorable Paul F. Sheridan	2000	Melinda Douglas	2012
The Honorable Donald H. Kent	2001	Claire G. Cardwell	2013
Craig S. Cooley, Esquire	2002		

HARRY L. CARRICO PROFESSIONALISM AWARD
NOMINATION FORM

Please complete this form and return it to the Virginia State Bar, Eighth and Main Building, Suite 1500, 707 East Main Street, Richmond, VA 23219. **Nominations must be received no later than December 3, 2013.**

Name of Nominee: _____

Profession: _____

Employer/Firm/Affiliation: _____

Address of Nominee: _____

City _____ State _____ Zip _____

Name of person making nomination _____ Telephone _____
(Please print)

E-mail _____ Signature _____

(Please attach an additional sheet explaining how the nominee meets the criteria for the Harry L. Carrico Professionalism Award.)

Criminal Law NEWS



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