Dahlia Lithwick is a senior editor at Slate, and in that capacity, writes the “Supreme Court Dispatches” and “Jurisprudence” columns. Her work has appeared in the New York Times, Harper’s, The New Yorker, The Washington Post, and Commentary, among other places. She won a 2013 National Magazine Award for her columns on the Affordable Care Act. She has been twice awarded an Online Journalism Award for her legal commentary and was the first online journalist invited to be on the Reporters Committee for the Freedom of the Press. Ms. Lithwick has testified before Congress about access to justice in the era of the Roberts Court. She has appeared on CNN, ABC, The Colbert Report, and is a frequent guest on The Rachel Maddow Show. Ms. Lithwick earned her BA from Yale University and her JD degree from Stanford University. She is currently working on a book about the four women justices of the United States Supreme Court.

Stuart Raphael is the Solicitor General of Virginia, the Commonwealth’s chief appellate advocate who also assists the Attorney General in advising the Governor. Before joining the Office of Attorney General, Mr. Raphael was a partner in the McLean office of Hunton & Williams, where he worked since 1989. Mr. Raphael graduated in 1989 from the University of Virginia School of Law and in 1986 from Harvard University. When he is not in Richmond, he lives in Arlington with his family. His wife Abby is a former Assistant Commonwealth’s Attorney and a current member of the Arlington County School Board.
Virginia State Bar
45th Annual Criminal Law Seminar

FEBRUARY 6, 2015 • Doubletree Hotel • CHARLOTTESVILLE
FEBRUARY 13, 2015 • Doubletree Hotel • WILLIAMSBURG

8:00  Late Registration and Exhibits
8:15  Welcome and Opening Remarks
8:30-9:30  Recent Developments in Criminal Law and Procedure
   Prof. Ronald J. Bacigal – School of Law, University of Richmond
9:30-9:45  Coffee Break
9:45-10:45  Tips from the Bench—Effective Appellate Advocacy
   Hon. Marla G. Decker, Court of Appeals of Virginia
   Hon. Robert J. Humphreys, Court of Appeals of Virginia
   Hon. William G. Petty, Court of Appeals of Virginia
10:45-12:00  DNA Evidence — Interpretation and Indexes
   Dr. J. Thomas McClintock – Professor of Biology and Director of Forensic Science, Liberty University, Lynchburg. Founder, DNA Diagnostics, Inc.
12:15-1:30  Luncheon Presentations
   Dahlia Lithwick — Senior Editor, Slate (Charlottesville)
   Stuart Raphael, Esq — Solicitor General of Virginia (Williamsburg)
1:30-2:45  Ethical Issues in the Practice of Criminal Law
   Rodney G. Leffler – Leffler & Mosley PC, Fairfax
   Hon. Jane Marum Roush – Circuit Court of Fairfax County
2:45-5:00  Interviews and Interrogations—Understanding Best Practices
   Interviewing Witnesses Exposed to Trauma
   Russell W. Strand – Chief, Behavioral Sciences, Education & Training Division, U.S. Army Military Police School, Fort Leonard Wood, MO
   Police Interrogation and the Reid Technique
   James L. Trainum – Private Consultant and Former Detective, Metropolitan DC Police Department; Expert on interrogation techniques and false confessions.
5:00  Closing Remarks and Adjournment

MCLE Credit: 7, including 1.5 Ethics (pending)

Look for seminar brochure and registration information in mid-December
http://www.vsb.org/site/sections/criminal/annual-seminar
Chair’s Column
Joel R. Branscom

As chairman of the Criminal Law Section of the Virginia State Bar, one periodically receives an email from Professor Ronald J. Bacigal from the University of Richmond Law School, who also serves as Newsletter Editor for this section. The purpose of this email is to spur the chairman into action to put together a Chair’s Column for the next Newsletter. While this email usually has unconscionable deadlines, Professor Bacigal also kindly provides suggested topics.

Professor Bacigal’s first suggestion for this column is that I discuss the upcoming 45th Annual Criminal Law Seminar. Vice-chair of the Section, Andrea Moseley, has been working on the program for months and has put together an excellent line-up.

“Tips From the Bench – Effective Appellate Advocacy” will feature three judges from the Virginia Court of Appeals. The Honorable Robert J. Humphreys, former Commonwealth’s Attorney for Virginia Beach, and the Honorable William G. Petty, former Commonwealth’s Attorney for Lynchburg were, in their previous jobs, frequent presenters for training offered by the Commonwealth’s Attorney’s Service Council. Both were renowned for providing important insight in a compelling manner. Add to that mix the always entertaining, insightful and Honorable Marla Decker, and you have must-see CLE.

A DNA match between the defendant and the crime scene is significant evidence in any case. Beyond accepting the numbers, what can the practitioner do to enhance or test the validity of the numeric results? Dr. J. Thomas McClintock is a professor at Liberty University and founder of DNA Diagnostics, Inc. He has provided training to prosecutors, law enforcement and defense attorneys in the methods and tests used to identify human DNA, as well as the usefulness and limitations of this evidence. His presentation on “DNA Evidence – Interpretation and Index” will provide a basis for the prosecutor, defense attorney, and trier of fact to understand the significance of the DNA test results.

Rod Leffler, for the twenty-second time, and Judge Roush, for the third time, are back to help lawyers in Virginia keep their license for another year. Lawyers have to have the ethics credits, but more importantly, lawyers have to have the ethics. Through the fact scenarios and resulting questions, Leffler and Roush require criminal practitioners to consider the inevitable ethical pitfalls of representing criminal clients or prosecuting criminal cases. Their stated goal is “a greater awareness of and appreciation for the Rules of Professional Conduct as the base from which we aspire to higher ground benefitting the Bar, our clients, and society as a whole.” The good thing about this presentation is that it is always enjoyable because of the humor and wit of the presenters. The bad thing about this presentation is that it is the last time you can see it. Mr. Leffler and Judge Roush have announced that this will be their swan-song presentation.

Russell Strand spoke at the Commonwealth’s Attorneys 2014 Spring Institute. His multi-media presentation will change the way you view, and hear witnesses and victims who have been subjected to trauma. “Interviews and Interrogations – Understanding Best Practices” will also include former Washington D.C. Detective James Trainum. Trainum is an expert on false confessions who is dedicated to promoting interrogation methods that ensure “that every confession holds water and every conviction be rightfully earned.”

In Williamsburg, the Section is proud to announce the luncheon speaker will be Stuart Rafael, Solicitor General of Virginia. If you attend the Charlottesville session, the luncheon speaker will be Dahlia Lithwick. Lithwick, Senior Editor, Slate, once wrote an article for Slate entitled, “I Need a Hero – Seeking a bomb throwing, passionate, visionary, liberal Scalia for a seat on the Supreme Court.” Should be fun.
For more than a quarter of a century, no Criminal Law Seminar has been complete without Ron Bacigal’s presentation “Recent Developments in Criminal Law and Procedures.” Professor Bacigal knows of what he speaks. He is a reporter of Criminal Decisions for the Court of Appeals of Virginia and has authored or co-authored over a dozen books, including treatises on criminal law, criminal procedures, criminal procedure forms, evidence and jury instructions. He has twice received the University of Richmond’s Distinguished Educator Award as well as the State Council of Higher Educations Outstanding Faculty Award. In 2008, this section presented him with the Henry L. Carrico Professionalism Award. His outline for the seminar is gold to the practitioner in criminal law.

Professor Bacigal’s second suggestion to me as a topic for the column was the need to increase his compensation. He was joking, but I assure you, we cannot afford to pay him what he is worth.

FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

U.S. v. Stephens, F.3d (4th Cir. 8/19). The warrantless use of a GPS on defendant’s vehicle was an unconstitutional search under U.S. v. Jones, 132 S.Ct. 945, but the exclusionary rule did not apply because the police acted in good faith. I.e., they reasonably relied on pre-Jones precedent indicating that there was no reasonable expectation of privacy in the public movements of a vehicle.

VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Sarafin v. Commonwealth, Va., S.E.2d (10/31). Driving under the influence, Code §18.2-266, does not require that the vehicle be “operated” on a highway.

Farhoumand v. Commonwealth, Va., S.E.2d, (10/31). “The word “expose,” as it is used in Code §18.2-370, requires a visual display where the genitalia are seen.”

Blake v. Commonwealth, Va., S.E.2d (10/31). “The requirement that a parent, guardian, or person having control or charge of a minor “send” that child to school requires that such child be enrolled in a school program fulfilling the requirements of Code §22.1-254(A), including that the program meet for as many days and hours each year as the public school year….. While enrollment necessarily contemplates general attendance, the statute cannot be used to prosecute instances of tardiness.”
Brown v. Commonwealth, Va., S.E.2d (10/31).
“Brown’s continuance request was deficient, as a matter of law, because, when made, he established no factual predicate for seeking substitution of other counsel in place of his court-appointed counsel under the authority of the Sixth Amendment.”

Hawkins v. Commonwealth, Va., S.E.2d (10/31).
“Hawkins was shown to possess counterfeit currency having a facial value of $360, in eighteen $20 bills. He had taken it to a pool hall, where frequent cash transactions could be anticipated. The record is silent as to whether Hawkins had any genuine currency with him when he was arrested, but if he did it was obviously segregated from the counterfeit bills he threw to the floor. We hold these circumstances sufficient to support an inference that Hawkins had the requisite intent to utter the counterfeit money in his possession.”

Grimes v. Commonwealth, Va., S.E.2d (10/31). For purposes of a burglary conviction, a crawl space “is structurally part of the house. It is physically contained within the four exterior walls, i.e., the vertical plane of the house; it is under the same roof; and it contains integral utilities, such as plumbing and ductwork, that are needed in a dwelling house. … when an area of a house is ‘functionally interconnected with and immediately contiguous to other portions of the house,’ it constitutes part of the dwelling house.”

VIRGINIA COURT APPEALS
CRIMINAL LAW AND
PROCEDURE DECISIONS

Fountain v. Commonwealth, Va. App., S.E.2d (11/4). Code 18.2-429(B) punishes misuse of the 9-1-1 system by any person who acts with “intent to annoy, harass, hinder or delay emergency personnel … [by causing] a telephone to ring.” Defendant’s conviction reversed because the Code “requires that the intent be present when a person ‘causes a telephone to ring.’ An intent to ‘annoy, harass, hinder or delay’ that arises during the call, i.e., after the 9-1-1 telephone has been caused to ring, does not fall within the scope of the statutory prohibition.”

Brown v. Commonwealth, Va. App., S.E.2d (11/4). In a non-threatening manner, a woman with defendant’s “party,” approached a juror, M.B., and informed her that she recognized her and that her grandparents live down the street from M.B. M.B. informed the judge that “it just worries me that someone knows where I live.” The Court of Appeals held: “The trial court acted within its discretion when it replaced M.B. with the alternate juror. … The trial court reasonably questioned M.B.’s ability to remain impartial and whether M.B. may consider ‘things other than the law and evidence.’” The Court also held that “the ‘ancient rule’ that ‘any reasonable doubt as to a juror’s qualifications must be resolved in favor of the accused,’ does not give an accused the final say as to whether a potentially biased juror is removed, but rather, it requires that juror’s dismissal.”

“A presumption of regularity attends appellant’s prior convictions for failing to reregister as a sex offender as every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. Appellant did not challenge his previous convictions for failing to reregister as a sex offender and cannot collaterally attack those convictions in this appeal.”
Butler v. Commonwealth, Va. App. , S.E.2d (10/28). Apprendi, 530 U.S. 466 and Alleyne, 133 S.Ct. 2151 were decided “in the context of the Sixth Amendment’s right to have a jury determine all the factual elements of the offense. In this Commonwealth, the jury determines both guilt and punishment and therefore the jury does decide enhanced factors for sentencing. Moreover, the case at hand does not involve the failure of a jury to decide an aggravating factor for enhanced sentencing, as appellant waived his right to a jury trial and was tried by the court.”

Blevins v. Commonwealth, 63 Va. App. 628, 762 S.E.2d 396 (2014). “The plain language of Code §46.2-869, the only statute that addresses improper driving, is … unambiguous and simply does not allow the jury in any circumstances to reduce a charge of reckless driving to a conviction for improper driving. … Therefore, the trial court correctly interpreted the law and did not abuse its discretion by refusing to instruct the jury on improper driving.”

Robinson v. Commonwealth, 63 Va. App. 715, 762 S.E.2d 806 (2014). “While the Commonwealth conceded the procedural defect in this case, and the trial court plainly failed to comply with the recording requirements set forth in Code §19.2-215.9, the failure to record the grand jury proceedings and provide a transcript to defense counsel did not prejudice appellant in any way that denied him due process.”

Mark your Calendar

- Nominations for the section’s Harry L. Carrico Professionalism Award are due on December 5, 2014. See attached form.
- The 2015 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 supplement to the Capital Case Trial Manual will be published in February 2015. Orders will be placed through Virginia CLE.
- In conjunction with the 77th Annual Meeting of the Virginia State Bar, plans are underway for a CLE program on the Legal Implications of Changing Marijuana Laws Across the US. The program will be cosponsored by the Bankruptcy, Corporate Counsel, Family Law and Health Law Sections on Friday, June 19, 2015, at the Sheraton Oceanfront in Virginia Beach.

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. To post your email address, visit the VSB’s website at https://member.vsb.org/vsbportal/
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Username: criminallylawmember
Password: Khp7302

This site is available only to Section members
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 memory of the Honorable Harry L. Carrico, former Chief Justice of the Supreme Court of Virginia, who exemplified 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.

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  Orton P. Pollard, Esquire 2005
The Honorable Robert F. Horan 1996  The Honorable Paul B. Ebert 2006
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  Gerald T. Zerkin 2014

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 Joel R. Brantscom, Chair, Criminal Law Section, and mailed to the Virginia State Bar Office: 1111 East Main Street, Suite 700, Richmond, VA 23219-3565. Nominations must be received no later than December 5, 2014.

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.

**HARRY L. CARRICO PROFESSIONALISM AWARD**

**NOMINATION FORM**

Please complete this form and return it to the Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, VA 23219-3565. Nominations must be received no later than December 5, 2014.

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.)
Virginia State Bar Criminal Law Section
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