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Editor:
Rodney A. Coggin
(coggin@vsb.org)
Assistant Editor:
Gordon Hickey
(hickey@vsb.org)
Advertising:
Nancy Brizendine
(brizendine@vsb.org)

Graphic Design and Production:
Caryn B. Persinger
(persinger@vsb.org)

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To: Members of the Bar  
From: Sharon D. Nelson, President-elect

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ABOUT THE AUTHORS

Charles E. Friend is a former professor of law at George Mason Law School and at the University of Richmond Law School, where he also served as Acting Dean. He has lectured extensively on evidence throughout Virginia, including presentations on behalf of the Virginia Supreme Court. A former Editor-in-Chief of the William and Mary Law Review, he also served as Editor of the Virginia Bar Association Journal for more than 20 years. He has authored The Law of Evidence in Virginia since 1977.

Professor Kent Sinclair served as a United States Magistrate Judge for seven years and has taught at the University of Virginia School of Law for 30 years. He serves as Chair of the Advisory Committee on Rules of Court for the Commonwealth where he drafted the Virginia Rules of Evidence, and presided over the presentation of the Rules for approval by the Supreme Court of Virginia and the Virginia Code Commission. In this role, he was instrumental in the approval of the Rules by the General Assembly of Virginia in 2012. He authors several books on Virginia evidence and procedure, and is Editor and Reporter for the Virginia Model Jury Instructions.

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Letters to the Editor

It’s the Law
It was inappropriate to include “State of Electrocution” by Meghan Shapiro in the December 2012 Virginia Lawyer. This lopsided essay against the electric chair may appeal to a narrow advocacy group but provided little value to practitioners. While Ms. Shapiro is a spirited advocate against the death penalty, it is the law of the commonwealth—a law supported by the vast majority of Virginians. The Eighth Amendment does not guarantee a painless death, something even non-murderers cannot expect.

No doubt if Ms. Shapiro is successful in ending electrocutions, the death penalty itself will be her next target. Her article describes the execution of the murderer Frank Coppola. I suspect those who knew and loved Coppola’s victim, Muriel Hatchell, might not be so troubled by the events of his rough execution. Mrs. Hatchell was beaten and strangled with a cord. She asphyxiated on her own vomit. That some murderers choose to be electrocuted instead of choosing lethal injection should not be an issue that concerns the Virginia State Bar or the Supreme Court.

J. Christian Adams
Alexandria

A Matter of Fairness?
I was surprised by reading VSB President W. David Harless’s message, “A Matter of Fairness,” (Virginia Lawyer, December 2012). I could not agree more that salary is a matter of fairness, nor can I disagree with his argument of parity between the salaries of employees of the VSB and the Supreme Court of Virginia. However, as a Supreme Court employee myself, I was astonished to learn that others believe our salaries to be so high. Since magistrates were mentioned specifically in part of the article and magistrates are Supreme Court employees, I thought it was important to correct the impression that may have been given about magistrate salaries.

I am an attorney magistrate who makes almost exactly what Mr. Harless states is the salary for a legal secretary employed by the Supreme Court. None of the attorney magistrates make the $85,000 a year that he quotes as the midrange for attorney employees of the Supreme Court and most make about half that amount. Nonattorney magistrates make less than the quoted midrange salaries for the legal secretaries employed by the VSB. If achieving parity between VSB employee salaries and Supreme Court employee salaries is a matter of fairness, then achieving parity between magistrate salaries and the salaries of others employed by the Supreme Court is also a matter of fairness.

Virginia E. Bray
Richmond

Northern Virginia’s New Generation of Family Lawyers
Milestones and Defections Reshape the Region’s Tight-Knit Divorce Bar
She was a lioness of the Virginia divorce bar, for decades both a fearless litigator and distinctive personality. She practiced in Northern Virginia for 60 years. So when she died of a stroke in late September at age 88 — she never retired -- Betty A. Thompson left more than simply a void in the profession.

“In a way it feels like the end of an era – a long era,” said David Masterman, a Northern Virginia divorce lawyer who for years opposed Thompson. “And I think we’re starting a new one.”

In fact, the Northern Virginia divorce-law community — approaching 200 lawyers, by many estimates — has seen a cascade of change in recent years: Since 2008 prominent older lawyers have retired or scaled back their practices. One-time protégés have launched their own firms. And, with surging economic and population growth in the region, caseloads and court dockets have continued to soar. Divorce filings have more than doubled in Virginia’s four northern counties since 1985, to at least 4,000 divorces annually. And by all accounts the profession has grown even more competitive.

Continued...
Letters

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You have a client who is one of two men arrested for armed robbery, use of a firearm in the commission of a felony, and possession of a firearm by a convicted felon. The co-defendant was caught with the money immediately after the offense and confessed to the crime. He would not identify his associate out of fear. Your client escaped but was arrested later based on a general description given by the victims. Identification is an issue. You meet with the client who describes his arrest and release on bond. He also mentions that he knows the co-accused and knows about the co-accused’s involvement in the robbery. He wants to plead not guilty. You tell your client that you believe in his innocence. He tells you that is not necessarily what he meant to say — but that he thinks the commonwealth will not be able to prove the case. He wants to plead not guilty. You tell your client that you believe in his innocence. He tells you that is not necessarily what he meant to say — but that he thinks the commonwealth will not be able to prove the case. He wants to plead not guilty. You tell him that he cannot commit perjury. He insists on testifying. What do you do?

Afshin Farashahi, an experienced criminal law practitioner in Virginia Beach, writes that defense counsel might use the “narrative approach” as an acceptable solution when faced with a client who insists on taking the stand and committing perjury. See, Farashahi, “Avoiding Perjury (Or at Least Pretending To),” Virginia Lawyer (December 2012) at pp. 25-26. Under this approach, the defense counsel permits the accused to testify by a narrative without guidance through the lawyer’s questioning. In closing argument, defense counsel may not allude to or rely on any testimony by the accused that is perjurious. While some criminal defense practitioners believe this approach addresses the problem, Comments 13[a] and 13[b] to Virginia Rule 3.3 criticize the narrative approach as not fulfilling the lawyer’s ethical duty of candor to the court.

The bottom line answer is that, if a lawyer knows that her client intends to commit perjury, or has committed perjury, she must reveal the intention or perjury if she cannot persuade the client to abandon or correct it. This duty under Rule 3.3 also connects with the duties under Rule 1.6(c)(1) & (2) to reveal the intention of a client, as stated by the client, to commit perjury, and to move to withdraw after doing so, or to reveal the client’s past fraud upon a tribunal when the fraud is “clearly established.” Thus, there could be two possible situations: first, if the client expresses his intent to commit perjury before trial, and second, if the client testifies and then later reveals that his testimony was untruthful. Unlike ABA Model Rule 3.3 which says that the duty to rectify a fraud on the court terminates once the proceeding is concluded, Virginia’s Rule 3.3 has no such provision; therefore, the lawyer’s duty is ongoing even after the hearing or trial is over.

In the first situation, the lawyer must advise the client of the possible consequences of committing perjury, attempt to persuade him to change his mind, and advise the client that if he follows through with his plan, the lawyer is obligated to reveal the perjury and move to withdraw from the case. In the second situation, if the client has already testified and then later acknowledges to the lawyer that his testimony was untruthful, the lawyer should counsel the client to correct the testimony, and advise the client that if he will not correct it himself, the lawyer must do so.

In either situation, once the lawyer knows that the client has committed or is going to commit perjury, she may not withdraw without taking any additional action, and she may not permit the client to testify in narrative form in order to avoid directly eliciting the false testimony. As Comment 13[b] to Rule 3.3 makes clear, the lawyer must reveal the client’s perjury “if necessary to rectify the situation,” and the lawyer may not assist in the client’s perjury in any manner. Once the lawyer’s duties under Rules 1.6 and 3.3 arise as a result of the client’s acknowledgement of intended or committed perjury, she must correct it, either by persuading the client to abandon the plan and/or revealing the false testimony, or by correcting the testimony herself if her client refuses to do so.

... if a lawyer knows that her client intends to commit perjury, or has committed perjury, she must reveal the intention or perjury if she cannot persuade the client to abandon or correct it.
I appreciate the thoughtful and incisive comments of the Virginia State Bar office of ethics counsel, as presented by Assistant Ethics Counsel Emily F. Hedrick, in responding to my article in the December 2012 edition of *Virginia Lawyer*. Ethics Counsel James M. McCauley was gracious enough to call me in advance, and we had a robust discussion on this issue. After that discussion, I agree with the office of ethics counsel's response that the narrative approach does not comply with Comments 13[a] and 13[b] of Rule 3.3 of Virginia State Bar Rules of Professional Conduct. I suspect that many attorneys will be surprised to hear that the narrative method is inconsistent with their ethical duties when dealing with client perjury. (In fact, in one criminal law seminar last year, the attorneys were advised that this device would meet their ethical obligations in this situation.) While I agree with ethics counsel's correction of my article on this point, I do want to make several observations in support of the narrative approach.

At the outset, it is important to keep in mind that this issue arises only after attempts to dissuade the client from committing perjury fail and only after a motion to withdraw is denied. These two actions will certainly in some cases prevent counsel from having to deal with the problem at all.

If persuasion and a motion to withdraw fail, the narrative approach provides a more satisfactory solution than that called for by the Comments to Rule 3.3. Most importantly, the narrative method accomplishes exactly what Rules 3.3 and 1.6 tell counsel to do — advise the tribunal that the client has committed perjury. A defense counsel accomplishes this when she makes a failed motion to withdraw, presents the client's testimony in narrative form, and does not mention the client's testimony in closing argument. The judge will get it.

At the same time, the narrative approach avoids some of the problems that arise from the approach of Comments to Rule 3.3. Keep in mind that the comments tell the attorney to disclose client perjury after the attorney has made an unsuccessful motion to withdraw. What does counsel do after explicitly telling the judge that the client has committed perjury? Make another motion to withdraw? Does the judge declare a mistrial? Or do we just tell the jury that the defendant has committed perjury? These are just some of the problems that come up under the approach of Comments 13[a] and [b] of Rule 3.3. And they arise only because of the comments' rejection of the narrative approach, an approach that does exactly what the rules say to do: advise the tribunal when the client has committed perjury. The narrative method provides a satisfactory, albeit not perfect, solution to a very difficult situation for defense counsel.

Interestingly, the Comments to Rule 3.3 track the old version of the Model Rules of Professional Responsibility. The newer version of Rule 3.3 of the Model Rules is accompanied by comments that “no longer explicitly reject the narrative solution and now recognize that the narrative solution has been accepted by some jurisdictions.”

I respectfully suggest that the Virginia State Bar's Standing Committee on Legal Ethics and the Supreme Court of Virginia should take another look at the Comments to Rule 3.3 and consider having the commonwealth join those jurisdictions that allow the narrative approach.

Endnotes:
2 Crystal, supra note 1, at 1547; Model Rules 3.3 cmt. 7 (2002).
Chief Justice Harry L. Carrico was the longest-serving member of the Supreme Court of Virginia when he retired in 2003. He served more than fifty years on the Court, including twenty-two as Chief Justice. He was known for his courtesy and professionalism. He co-founded the bar’s mandatory course on professionalism and created the Commission on the Future of Virginia’s Judicial System, which helped transition the Court from one rooted in rural tradition to one that reflects the state’s diversity. He is remembered and admired as a distinguished jurist and gentleman.
THE ARTICLE, TITLED “You’re Out of Order! — Dealing With the Costs of Incivility in the Legal Profession,” chronicles recent attempts by courts to regulate and punish incivility by lawyers. Endeavoring to explain why incivility may be becoming a norm, the author contends that technology “is cited most often as the foundation for boorish behavior.” But then, the focus turns to new lawyers:

A close second and third place behind technology are just-licensed lawyers who perhaps watch too many rogue lawyers on TV and in movies. The labor market has forced many to hang their own shingles without mentoring they’d have through a traditional employer.

‘Young lawyers are hungry for information on the proper balance between advocacy and civility,’ says Jonathan Smaby, executive director for the Texas Center for Legal Ethics in Austin. ‘They get mixed messages from law school and the media, which portrays lawyers in movies, television and fiction — and sometimes in real life — as much more cutthroat and cutting corners than really goes on.

They want to do the right thing,’ he says, ‘but don’t know what the right thing is.’

This theme was prominent at the recent Legal Education Conclave. Consider these observations:

• New lawyers lack effective writing skills and business and financial literacy. Many communicate in text-messaging and social media format;

• Lacking life experiences that require them to interact with others in a variety of settings, graduates demonstrate inadequate problem-solving and client interaction skills and questionable judgment and discretion;

• Saddled with debt that averages approximately $85,000 for public education and $125,000 for private education, new graduates are entering a job market that annually is providing 10,000 fewer jobs nationwide than incoming candidates;

• Corporate clients refuse to compensate law firms for the time (and training) of young associates. Experienced lawyers, now carrying the burden of providing all billable work, have less time to train new lawyers; and

• 60–70 percent of new Virginia lawyers will work with solo or small firms serving 70–80 percent of the public.

During my recent meetings with Virginia judges and lawyers, they have described a recurring concern: newly admitted attorneys are inadequately trained in core competencies, practice management skills, and professionalism. I agree with this assessment. Also, I believe that these circumstances present public protection issues. How are we to respond?

Critics have directed the brunt of their criticism at law schools. To their credit, law schools are endeavoring to reform their curricula to require clinical and experiential training. However, law schools cannot teach students how to practice like a lawyer, manage their practices, and attain the foundational concepts of professionalism — integrity, competence, honor, trustworthiness, civility, respect, and public service. They are not the answer.

Justice Lemons observed at the Conclave that more training of new lawyers in context occurs after lawyers are out of school rather than in law school. Supervision and mentoring, he noted, are the primary sources of such training. However, these opportunities tend to be available primarily in urban areas rather than smaller communities, where new lawyers have solo or small firm practices.

Chief Justice Kinser echoed these observations. She reminded that judges also have a responsibility to let lawyers know that they are willing to discuss matters of performance in and out of the courtroom, and to provide formal and informal feedback to attorneys regarding effective and persuasive legal writing, oral advocacy, preparation, and demeanor. Additionally, she urged the bar to find better ways to overcome Virginia’s geographical barriers, from Lee County to the Eastern Shore, and find new ways to ensure that training is accessible and convenient to lawyers in areas where they represent 70 percent of Virginians.

Solutions are neither formulaic nor easy. The traditional training mod-
Bench-bar conferences are an effective method of providing a forum for new attorneys to meet experienced attorneys and judges, develop relationships, and gain practical advice in an informal setting. We hope this meeting will provide a template for bench-bar gatherings in other local bar associations and judicial circuits, particularly in rural locations.

New lawyers need continuing training; the bar must respond. Anticipated economic conditions and radical changes in practice models will surely complicate our task. However, young lawyers want to do the right thing, they simply “don’t know what the right thing is.” Let’s show them.

We must do more if we are to perpetuate practice competencies and professionalism in the next generation.

Endnotes:
3 Virginia judges, lawyers, and law professors gathered in April 2012 at the Conclave in Charlottesville to discuss legal education reform. A comprehensive summary of those deliberations was reported in the October 2012 issue of Virginia Lawyer.
4 According to the ABA, only 54.9 percent of 2011 law school graduates obtained full-time employment in jobs that required bar exam passage. “Bad News Gets Worse,” ABA Journal (September 2012).
5 For example, in the large firm context, recent trends suggest that new lawyers are increasingly “commoditized” rather than integrated into a law practice environment. Responding to a 2011 poll of 240 law firms nationally with 50 or more lawyers, 60 percent of law firm managers indicated that the increased use of contract lawyers will be a permanent trend, and 41 percent believed that outsourcing of legal work will be a permanent part of the “new” legal market.

President’s Message

els employing learning by observing an experienced lawyer or by performing supervised work are irreconcilable with the so-called “value innovations” of current law firm practice models. These trends present formidable barriers to providing training to new lawyers. How, for example, may an experienced lawyer instill professionalism in a contractor who is employed on a piecemeal basis in an isolated matter? If learning by experience is the goal, how can it be meaningful without supervision?

In Virginia, newly-admitted lawyers must attend the day-long VSB Professionalism Course, an excellent course that has provided superb instruction over two decades by hundreds of the commonwealth’s best judges and lawyers. However, many attendees will have scarce opportunity to observe experienced attorneys put such principles into practice or to seek their counsel. We must do more if we are to perpetuate practice competencies and professionalism in the next generation.

To that end, on April 26, 2013, the VSB’s Conference of Local Bar Associations will sponsor jointly with the Special Committee on Bench-Bar Relations and the bar associations of the 28th, 29th, and 30th circuits a regional bench-bar conference in Abingdon, Virginia. All judges and lawyers in these circuits have been invited to attend the conference at no cost. Attendees will receive day-long training in ethics, practice management procedures, and practical and clinical skills. The afternoon sessions will entail breakout CLE sessions for civil, family law, and criminal law practitioners in state and federal courts. Chief Justice Kinser will conclude the day by presiding over a town hall meeting.

Bench-bar conferences are an effective method of providing a forum for new attorneys to meet experienced attorneys and judges, develop relationships, and gain practical advice in an informal setting. We hope this meeting will provide a template for bench-bar
The Virginia State Bar publishes pamphlets and handbooks on law-related issues for Virginia’s lawyers and Virginia’s citizens. Please note that some are available in bulk quantities, and others only in single copies. All publications can also be found on the VSB website at http://www.vsb.org. You may email single copy orders to shall@vsb.org.

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Attending Thirty-one Arguments Opens a Door to the Supreme Court

The First Monday in October has a certain significance for most lawyers, as it marks the opening day of the term for the Supreme Court of the United States. October 1, 2012, had particular meaning for me because it marked the beginning of my sojourn as a Supreme Court Fellow with the National Association of Attorneys General (NAAG).

NAAG is based in Washington, D.C. and was founded in 1907 to provide a forum for state attorneys general to exchange views and experiences, to foster cooperation on legal issues between the states, as well as the federal government, and to offer training to state personnel. One of NAAG’s areas of concentration is appellate advocacy. The Supreme Court Project, headed by Dan Schweitzer, advises states on Supreme Court procedure, edits certiorari petitions, merits briefs, and amicus briefs filed by states, and conducts moot courts for state cases being argued at the Court. The project also publishes the Supreme Court Report, an online, biweekly summary of petitions granted and opinions issued by the Court.

As part of the Supreme Court Project, NAAG sponsors fellowships for state appellate attorneys to gain experience at the Supreme Court level by observing arguments, participating in moot courts, writing an amicus brief, and preparing entries for the Supreme Court Report. The fellowships are for three-month terms, starting in mid-September and ending in June, and two fellows serve in each term. I applied for a fellowship in April 2012 and was selected for the fall term.

Although I enjoyed every aspect of the fellowship, the highlight was attending arguments at the Supreme Court. Although court convened at 10 a.m., I usually arrived at the building by 8:15 a.m. to ensure I was guaranteed seating in the Supreme Court Bar section of the courtroom. Bar members are allowed to sit in a limited area near the front of the courtroom, directly behind arguing counsel, which affords a close-up view of the Court. (Additional seating is available in another room where the arguments may be heard via loudspeaker.) Attorneys sitting in the bar section must be properly dressed — coat and tie for men, comparable attire for women. The dress code apparently does not cover footwear, however, as once I saw a male attorney wearing white sneakers with his pinstripe suit.


Justice Breyer described the issue as being “like a rabbit-duck. You know, is it a rabbit or is it a duck?”

The length of the bar line varied depending upon the case being argued. The line was understandably long for Fisher v. University of Texas, in which the issue was whether UT’s use of race as a special factor in its undergraduate admissions process violates the Equal Protection Clause. Another case that surprisingly drew a large attorney contingent concerned insurance subrogation.

I heard thirty-one arguments between October and December. All of the cases were interesting, especially the ones that were outside my usual area of practice (criminal law). I learned about international child custody disputes under the Hague Convention and the intricacies of patent law pertaining to athletic shoes. The tenor of the arguments focused more on policy implications for future cases than on the particular facts of the case being argued. Opposing counsel referred to each other, without a hint of sarcasm, as “my friend,” and the Court sometimes used this same phrasing when questioning counsel. Most days, two cases were argued, and court adjourned shortly after noon.

Despite the solemn tone of the arguments, there were occasional moments of levity. During the argu-
detection dog, *Florida v. Harris*, Chief Justice Roberts asked the assistant solicitor general, who was arguing as an amicus on behalf of Florida, whether dogs were “good at sniffing things, or ... can they be good at bombs, but not good at methamphetamine?” Counsel replied that he did not know the specific answer to the question, but that “once a dog kind of chooses a major, that’s what they stick with.”

Being an NAAG fellow was a marvelous opportunity to observe the Supreme Court. I came to recognize the elite group of attorneys who argue regularly before the Court, as well as the Court’s staff and the reporters who occupied the press box. Too soon, my term ended and I had to cede my place to the next fellow.

**Kathleen B. Martin** has been with the Office of the Attorney General since being admitted to the bar in 1984. She has represented the commonwealth in the Criminal Litigation Section for twenty-two years. Martin has briefed and argued more than 500 criminal cases in the Virginia Court of Appeals and the Supreme Court of Virginia. She also handles post-conviction collateral cases in state and federal courts. Martin was asked to write about her experiences this fall serving a fellowship with the National Association of Attorneys General, which provides assistance to states in their cases in the Supreme Court of the United States.

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We’re as busy as ever at age fifty-five and over, and we face new challenges and opportunities, with little time to search them all out. How can anyone find out about them all and, with such an array of choices, how does anyone begin to make a selection?

Work is continuing on the exterior of the Supreme Court of Virginia building at Ninth and Franklin streets in Richmond. The project, budgeted at $3.4 million, is scheduled for completion in the first quarter of 2013. Work includes cleaning and repairing the exterior stone facades, recaulking and remortaring the exterior joints, repainting the windows and replacing flashings and gutters. The architects are SMBW Architects of Richmond and Wiss, Janney, Elstner Associates of Fairfax. The general contractor is The Christman Company of Reston.

Photo credit: Bill Dickinson
Some Practical Information on Construction Law

by K. Brett Marston

Finding topical and practical information on a legal issue would seem to be simple in this age of Internet access. A great deal of information is available in a few keystrokes. But information does not necessarily equal knowledge, and certainly not useful knowledge. In putting together these articles for *Virginia Lawyer*, the publications committee of the Virginia State Bar Construction and Public Contracts Law Section aimed to find topics that are timely and important, and discuss them in a manner that would provide practical, useful information. Job well done.

Thanks to committee members Randy Wintory, Hobie Andrews, and Steve Test, the section is pleased to provide you with a wide-ranging set of articles to assist you in your day-to-day practice whether you are a construction practitioner or not.

The article penned by Judges Stanley Klein and Arthur Vieregg allows us to peek behind the curtain and see what judges — whether sitting as mediators, arbitrators, or on the bench — think is important in presenting a case. Whether it is a construction case, a domestic relations case, or a criminal proceeding, much of what these experienced judges have to say resonates across the board.

Likewise, Steve Test and Monica McCarroll’s excellent piece on e-discovery is as applicable to an employment dispute or a UCC dispute, as to one involving construction. With all of the information swirling around this topic, it is difficult to get one’s arms around it. This article cuts through much of the noise and provides a straightforward look into how to handle a document-intensive case without letting it consume you or the client.

David Lannetti’s article on the interplay of construction law and bankruptcy provides a primer on how bankruptcy can impact most any area of commercial legal practice. While there are aspects of bankruptcy that specifically affect construction topics — such as the perfection of a mechanic’s lien — a review of this article would provide assistance and insight into many areas of the law. In these economic times, this is an article that should be kept nearby.

Finally, Randy Wintory’s article on how patent ambiguities in construction design documents are handled brings back many necessary and basic principles of contract interpretation. It also sets out an excellent analysis of the varying responsibilities borne by the cast of players on a complicated construction project.

The section hopes that these articles will help accomplish several of its goals. For one, we strive to provide educational opportunities for the entire Virginia bar. Like these articles, our annual seminar in Charlottesville each early November provides a day and a half of wide-ranging and practical education on construction-related topics for any member of the bar that wants to attend. Second, we strive to provide opportunities for discussion and education on important topics in this area of the law.

Finally, and probably most importantly, the section wants to help each member of the bar be the best he or she can be in providing practical, user-friendly information and service to their clients.

If you would like to be a part of this effort, and join a collegial and vibrant group, we’d love to have you. Just let me know at marston@gentrylocke.com. Otherwise, we hope that these articles will, at a minimum, provide some practical insight and help in assisting your clients.

K. Brett Marston chairs the Construction Law practice group at Gentry Locke. He has extensive experience in construction contract negotiations and preparation, payment disputes, mechanic’s liens, bond claims, construction defects, delay claims, insurance, and OSHA matters. He handles significant construction matters in federal and state courts, arbitration, and mediation for general contractors, subcontractors, owners, design professionals, and suppliers. He is chair of the VSB Construction Law and Public Contracts Section.
For more than twenty years each of us has presided over trials, mediations, and arbitrations. Often, as we observed the proceedings, we wanted to advise the lawyers what they could do, and on occasion should do, but we were ethically constrained from doing either. Based upon your invitation, we are now free to tell you some of what we have wanted to tell you for years. Here we go!

A. Planning your strategy – Always have a strategy fully planned before your trial for how you intend to succeed in a construction case trial. There generally will be hundreds of documents that may be relevant and multiple witnesses who can testify to some aspect of the project; do not use them all! Instead, take the time before trial to determine the documents and witnesses you really need to produce and how you are going to use them to present a clear and cohesive message to the trier of fact. Ultimately, less is generally more!

B. Language – Whether it is a jury trial or bench trial you must be careful to make sure that the trier of fact understands the language that you and your witnesses (especially experts) are speaking. Most jurors and judges do not know “construction language” and far too often attorneys forget that they must convince the fact-finder of the virtues of their case, not the other participants in the trial. Many attorneys appear to be more interested in showing how much they know by engaging the witnesses in “construction talk” and, as a result, they never connect with the jury or judge. This is particularly true with expert witnesses. As you know, in construction cases expert witnesses testify on myriad subjects, including construction, engineering, architecture, accounting, property and business valuations, as well as different science. It is simply impossible for jurors and judges to be conversant in all these and other fields of expertise. Avoid the temptation to show off for your client, opposing counsel, and the expert witness by engaging in a mode of questioning that may fly over the heads of the fact-finders.

C. Educating Fact-Finders – Studies have shown that people learn differently. Some learn best by listening, some by observing, and others by interacting with the speaker. To the extent that you can, attempt to introduce information for the fact-finders through all three methodologies. In jury trials, the only give and take between counsel and the jurors takes place during voir dire. Take the time to prepare your voir dire questions in a way where you are most likely to engage the jurors in a conversation, hopefully about topics that relate to your theory of the case. In bench trials, invite the judge to interrupt you and any witness if the judge does not understand your question or the witness’s answer. Some judges may decline your invitation but many others will gladly take you up on it. Whenever possible, include demonstrative aids in your presentation especially in opening statements. Make sure that you provide any such demonstrative exhibits to opposing counsel in advance and advise the trial judge that you have done so. If the fact-finders understand from the opening statement what will be presented during the trial, it will make it much easier for them to remain focused and appreciate the importance of the evidence as it is presented.

D. Winning Over Fact-Finders – Jurors and judges are human too! We are most likely to find a position convincing if it is presented by someone we respect and who makes our job as
fact-finders easier. In bench trials, always make sure that the judge has separate exhibit binders so that the judge may utilize the exhibits in the judge's note-taking. Similarly, before the day of trial, see if counsel can agree on the admissibility of the key exhibits (e.g. the contract, the change orders, etc.), and if so, discuss whether binders of these key exhibits can be given to each of the jurors so that they can more easily follow the testimony and arguments about these exhibits as they are presented at trial. Always ask the judge to allow the jurors to take notes and bring pads with you for all of the jurors so that it will be easier for them to truly remember the evidence during deliberations, which in many construction cases may be weeks after the trial begins. In a similar vein, do not overload the fact-finder with every document that may be relevant to your case. Too many attorneys simply “dump” on the judge or jury all of the documents that pertain to the construction job at issue. If they are not worthy of some questions of the witnesses during the trial, they probably do not need to be introduced in evidence. Fact-finders in trials have a responsibility to review the entirety of all documents that are in evidence and may resent having to take additional time to review documents that do not really aid them in the fact-finding process. Take a look at new Evidence Rule 1006 and see if a summary of voluminous documents might better serve the presentation of your case.

E. Closing Arguments– Synthesize the evidence for the fact-finders, do not just rehash it. Jurors and judges (just like you) have limited attention spans. Tie the evidence together for the fact-finder so that you make it easier for the fact-finder to accept your theory of the case.

In bench trials, if the amount in dispute warrants it, ask the judge whether it would be helpful to submit closing arguments in writing so that you can refer the judge to specific exhibits or transcript pages that are vital to an understanding and appreciation of your case. Then, invite the judge to ask for oral closing arguments, if the judge deems it necessary after reviewing the exhibits and the written arguments. When utilizing this procedure urge the judge to advise counsel of the specific issues that the judge would like to hear about in the oral arguments so that you can focus on them in your presentation.

Ultimately, in any construction trial, be prepared, be professional towards all participants in the trial process and be considerate of the fact-finder. You will be two steps ahead of your opponent if you are.

II. Mediation

A. Why not mediate! – Many cases wind up in trial or arbitration when mediation is actually a more effective way to resolve the dispute. In mediation, the parties themselves can choose the mediator and can provide the mediator with what is helpful to the process, whether admissible in evidence or not. Perhaps the most important reason to suggest mediation to your client however is that the parties themselves will remain the ultimate decision-makers instead of asking a stranger to the construction project to be the decision-maker. This empowerment of the parties themselves not only allows the parties to make their own business decisions about how to resolve the dispute but also significantly enhances the chances that the parties can work together on future projects.

It is not a message of failure by the attorney when you suggest mediation to your client.

It is not a message of failure by the attorney when you suggest mediation to your client. In many cases, a neutral can propose other avenues for the parties to find common ground. Also, in cases where the attorneys cannot settle because of unreasonable positions taken by their clients, upon learning from an experienced neutral that their attorneys’ advice has been entirely reasonable, the parties may then be able to come to closure.

B. Preparation – Always have the heart-to-heart conversation with your client before the day of the mediation so that your client comes to the mediation with realistic expectations about possible resolutions. Before you arrive, be prepared to make your first settlement proposal, whether you will be asked to get the negotiation
going or responding to the other side’s initial proposal. You can always tweak your client’s intended initial position based upon the other side’s opening settlement proposal.

C. **Participants** – Always make sure that you bring your client’s ultimate decision-maker to the mediation and require the other side to do the same absent unavoidable circumstances. The process that leads up to the proposed final settlement is often just as important as the final number. If the ultimate decision-maker has not participated in the process and does not appreciate the compromises which have taken place along the way, it significantly hampers the parties’ ability to find the common ground that should lead to a mediated settlement.

D. **Ex-Parte Contact** – Remember, in mediation you can have ex-parte contact with the mediator before, during and, if necessary, after the mediation. After an appropriate period of time has elapsed at the mediation, if the mediator feels that he or she has learned enough information, upon request of the parties, the mediator can morph from being solely facilitative to taking on a more evaluative role in the discussion. Should that occur, look for cues from the mediator because he or she should have some sense of what is going on in both rooms. The mediator can then be an attorney’s greatest asset in working with the attorney’s client. If you do not reach the finish line during the mediation itself, encourage the mediator to have continuing contact with both sides after the mediation session. Many cases settle shortly thereafter with the assistance of the mediator.

In mediation, be prepared, be patient and persevere. Contrary to a trial or an arbitration where there will always be at least one party that perceives itself as the loser, in a successful mediation, both clients leave knowing that they made their own deal and, as a result, they are much more likely to leave satisfied and often gratified.

III. **Arbitration**

A. **Preliminary Matters** – Many form construction contracts require that disputes between the parties be resolved by arbitration. In other cases where a construction contract dispute arises, the parties and their attorneys may conclude arbitration is faster, less expensive, and more adaptive to their specific needs than a jury or bench trial.

If there is one over-arching word of advice we would advance, it is that counsel should cooperate with one another before the actual arbitration to ensure that the arbitration meets the needs of both parties.

Such cooperation should begin even before an arbitrator is chosen. Such cooperative efforts should address (1) whether the case justifies one arbitrator or multiple arbitrators; (2) the identity of an available arbitrator or arbitrators, who are “right” for the parties’ case; (3) an agreed location for the arbitration; (4) the number of days necessary to conclude the arbitration; and (5) potential dates available for the parties, witnesses, and the attorneys. These issues will be addressed by the arbitrator in any event, but such “pre-first conference cooperation” will afford counsel the opportunity to discuss these and other issues before the arbitrator is involved.

i. **Discovery** – Discovery in arbitration runs the gamut from no discovery to discovery common in major litigation. Arbitrators will usually work with counsel to afford an opportunity for necessary discovery. Because extensive, needless discovery can defeat several primary benefits of arbitration — savings of time and legal fees — counsel should only seek to conduct discovery that is truly necessary. Counsel might also agree to exchange expert reports in lieu of pre-arbitration depositions. In some cases, counsel might agree to the submission of expert reports, deposition testimony, and interrogatories and responses thereto in lieu of live expert testimony at the arbitration hearing.

ii. **Stipulations** – Counsel should also cooperate to stipulate to undisputed facts. This will reduce the amount of necessary live testimony, will assist the arbitrator to focus on the evidence dispositive of the disputed issues, and should eliminate unnecessary costs to the par-
ties. An attorney’s resistance to stipulating undisputed facts is unlikely to impress the most impartial arbitrator.

iii. Time – The allotment of time between “the litigants” for opening statements, presentation of evidence, and argument should also be discussed with the arbitrator as early as possible in the process. This is especially important if counsel wish to limit the arbitration to an agreed number of hours or days. In that event, counsel might ask that a record be kept of the time taken by each side to present opening statements and evidence, and to argue the case. An extension of time for good cause shown to a later hearing date may also be appropriate if the case is not presented in the time agreed upon.

iv. Notebooks for the Hearing – It is recommended that counsel consult before the arbitration as to the submission of three ring binders for the arbitrator, counsel, and the witnesses. They should contain key exhibits and relevant portions of deposition transcripts. With the consent of the arbitrator, they should be highlighted to emphasize portions that are especially pertinent.

v. Pre-Hearing Briefs – In advance of the preliminary arbitration conference, counsel should also consider whether the arbitrator would benefit from pre-hearing briefs outlining each side’s case. Counsel should consider seeking permission to present such pre-hearing submissions even if not requested by the arbitrator. An informed arbitrator will be in a better position to follow the evidence and afford the parties a better decision.

B. The Arbitration Hearing/Evidence Presented – Construction cases often involve many players (owner, general contractor, subcontractors, design professionals, surety and insurance representatives, etc.). In medium to large construction cases, a core set of agreements, plans, insurance policies, etc., often will be dispositive of the arbitrator’s final decision. Counsel should plan how to present the evidence necessary to prove or disprove his or her claim or defense. Counsel should seek to present the most probative evidence and refrain from presenting superfluous evidence that often raises unnecessary issues. In the end, the arbitrator is likely to receive and analyze most of the evidence you present. However, filling the record with extensive cumulative documents or testimony will usually do little more than increase the cost of the proceeding. Furthermore, it may diminish the force of the most probative evidence you present.

C. The Award – Counsel should discuss what type of award is requested and inform the arbitrator(s) of counsels’ expectations as early as possible. In most cases, findings of fact and an award of a dollar amount will be sufficient. In major construction cases, however, extensive findings of fact, conclusions of law, and a detailed award may be sought. Equally important, the parties should inform the arbitrator how soon an arbitration award is needed by the parties.

IV. Conclusion

Although there is clearly some overlap in these different modes of dispute resolution, each presents potential advantages and disadvantages which should be fully considered and discussed with your client. Whichever mode you choose, there is simply no substitute for planning, strategizing, and preparation. And, whichever procedure you decide to utilize, being professional at all times will serve your client well.
When Construction and Bankruptcy Converge

by David W. Lannetti

The current prevalence of bankruptcy filings in the construction industry can create problems for unwary contractors. Understanding the impact of bankruptcy can help address the associated challenges and, in some cases, prevent such problems from ever occurring. The perception that creditors at best will be paid a small fraction of what they are owed by the debtor—the entity that filed the bankruptcy petition—unfortunately is true in most cases, although there are exceptions. As in other arenas, a better appreciation of existing substantive rights and the process by which to enforce those rights is critical to minimizing problems and maximizing recovery in bankruptcy.

Bankruptcy Fundamentals

A familiarity with some basic bankruptcy concepts makes it easier to understand what many creditors view as the “unfairness” of bankruptcy law. The filing of a bankruptcy petition serves to create an estate, which is composed of “all legal or equitable interests of the debtor in property as of the commencement of the case.” Key policies of the Bankruptcy Code (the Code) include: offering the debtor a “fresh start” through a discharge of its pre-petition debts and the benefit of certain exemptions; providing an “orderly process” through which the debtor can be liquidated or reorganized; and treating similarly situated creditors equitably. In support of these policies, the Code provides that filing a bankruptcy petition operates as a stay against both the commencement or continuance of civil litigation against the debtor and any act to obtain or possess estate property. This automatic stay is imposed instantaneously and automatically by operation of law, regardless of notice to others, to avoid the proverbial race to the courthouse by rival creditors competing for the same limited assets. In practice, the automatic stay provisions are broadly construed to protect the debtor and/or estate property, and a creditor needs to file a Motion for Relief from Stay and obtain bankruptcy court approval to take any action precluded by the stay. Stay violations, especially by those with knowledge of the bankruptcy, often are met with sanctions.

Contract Termination and/or Work Stoppage

The automatic stay generally operates to prohibit termination of any executory contracts to which the debtor is a party. An executory contract is one where performance still is due by both sides, i.e., “if the ‘obligations of both the [debtor] and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other.” A contractor therefore cannot terminate a construction contract, even if based on non-payment or some other pre-petition default by the debtor. Further, any provision in a contract indicating that the debtor’s bankruptcy filing constitutes an event of default resulting in contract termination is, in almost all cases, unenforceable. The debtor generally can elect to either assume or reject executory contracts. To assume a contract, the debtor must cure all defaults, including paying in full the contractor and any associated subcontractors and suppliers. The debtor also is required as a condition of assumption to provide adequate assurance of future performance under the contract, including making future contract payments. Rejection of a contract, on the other hand, results in termi-
nation and excuses the debtor from paying associated pre-petition debt.13

Reclaiming Goods Provided to the Debtor
The Code provides the right to reclaim goods received by the debtor provided that the goods were sold in the ordinary course of business, received by the debtor within forty-five days prior to the bankruptcy filing, and a written demand is filed no later than forty-five days after receipt of such goods by the debtor (or twenty days after filing if the forty-five-day period expires after the bankruptcy petition is filed).14 Of significant note, this right is subject to any prior interests of secured parties.15 Hence, if a secured lender has an all-asset or blanket lien on the debtor’s inventory, this right may be useless. Due to the subordinate right and the very restrictive notice requirement, this remedy often is unavailable from a practical perspective.

Administrative Expense Claim for the Value of Good Provided to the Debtor
As an alternative to reclamation, the Code provides for a 503(b)(9) administrative expense claim for the value of any goods received by the debtor within twenty days prior to the bankruptcy filing, even if there was no written reclamation demand.16 Although the claim does not apply to services contracts, the predominant purpose test applicable to hybrid goods/services contracts in Uniform Commercial Code cases applies in bankruptcy as well.17 Because this claim relates to the value of the goods and not the goods themselves, it can provide an avenue of relief unavailable via reclamation (e.g., if the goods were consumed or disposed of by the debtor). Administrative claims also provide a distinct advantage over a mere right to file a proof of claim for unsecured debt (discussed below) because they have an enhanced priority of payment; hence, it is not uncommon to receive full payment for administrative claims.18

Other Claims Against the Estate
Although bankruptcy estate distributions to unsecured creditors typically are at only a fractional amount of that owed, these creditors will receive nothing unless they file a proof of claim that is allowed.19 A contractor therefore should file a proof of claim prior to the claims bar date for any funds it is owed by the debtor. If the debtor is holding pass-through funds (e.g., retainage, progress payments for work already performed) at the time of bankruptcy filing, the contractor can argue that the debtor was holding these funds in a constructive trust for the contractor’s benefit, and that the funds therefore should pass to the contractor outside of the bankruptcy estate (i.e., the contractor should receive full payment instead of the partial payment via bankruptcy distribution).20 If the bankruptcy is a no-asset case, meaning there will be no distribution to unsecured creditors, the case commencement notice sent to all creditors will indicate there is no need to file proofs of claim.21

Mechanic’s Liens
A mechanic’s lien arguably is the most powerful tool contractors have to preserve their rights against a debtor, as it can elevate the contractor from an unsecured creditor to a secured creditor.22 Under Virginia law, the lien is perfected by filing a memorandum of lien in the clerk’s office of the appropriate city or county.23 Lien enforcement, however, is a separate action, normally pursued through a lawsuit.24 Because under Virginia law a mechanic’s lien relates back to when a contractor started work or a supplier began delivering materials, contractors and suppliers are permitted to file the memorandum of lien after the owner has filed for bankruptcy, notwithstanding the automatic stay.25 This means that the timeline for filing a mechanic’s lien is unaffected by the bankruptcy proceeding; the filing of a bankruptcy petition does not stay the normal time requirements, and the failure to meet those requirements can be fatal. Enforcement of the mechanic’s lien, on the other hand, is subject to the stay.26 Once the memorandum of lien is filed,

A mechanic’s lien arguably is the most powerful tool contractors have to preserve their rights against a debtor …

the contractor has two options in light of the bankruptcy: file a motion seeking relief from the automatic stay for the purpose of enforcing the lien; or serve the debtor (or, in some cases, the trustee for the bankruptcy estate) with a notice pursuant to the Code, which serves to continue the lien until the automatic stay is terminated.27 If the latter action is taken, the contractor needs to file suit to enforce the lien within thirty days, or the remaining portion of the six-month period provided by the mechanic’s lien statute if longer, after the stay is terminated.28
Preferences
One of the most difficult bankruptcy concepts for creditors to understand is preferences. Consider the following scenario. A contractor entered into a construction contract with a private owner and has been performing for the past year. The contractor in turn executed several subcontracts. Although the contractor had heard rumors that the owner had been having financial difficulties, until recently progress payments had been made on time. Payment pursuant to the contractor’s most recent pay application, which is substantial and includes payment requests for various subcontractors, was late. When payment finally arrived thirty days later than normal, the contractor considered itself fortunate, paid its subcontractors, and continued to work, albeit while seeking additional assurances from the owner that future payments would be made timely. Sixty days later, the owner files a Chapter 7 bankruptcy petition to liquidate her company. The contractor subsequently receives word that its contract has been rejected and that the construction project will not be completed. The contractor’s attorney advises that the contractor can file a proof of claim for unpaid funds (and possibly for lost future profit on the contract) informing the contractor that it likely will receive only pennies on the dollar. To make matters worse, several months later the contractor receives a letter from the bankruptcy trustee demanding that it return the last progress payment it received, including the funds that had been forwarded to its subcontractors. Surely even in the byzantine world of bankruptcy the contractor wouldn’t be required to return funds it received for work that was properly completed, invoiced, and paid — right? Wrong.

Preferential Payments
According to the Code, payments made by the debtor to creditors pursuant to a pre-existing debt within the ninety-day period prior to bankruptcy filing may be avoided, i.e., required to be returned to the bankruptcy estate. The debtor is presumed to be insolvent during this pre-petition period, and it is viewed as inequitable for the debtor to favor or prefer some creditors over others. This avoidance power serves to ensure each creditor of the same class receives an equivalent proportionate share of the debtor’s estate and discourage creditors from “attempting to outmaneuver each other in an effort to carve up a financially unstable debtor” while the debtor attempts to work through its financial difficulties “in an atmosphere conducive to cooperation.” Preferential payments brought back into the estate, like other estate property, are shared by the debtor’s general unsecured creditors on a pro rata basis (after payment of administrative and priority claims). Of note, the failure to comply with a legitimate demand to return preferential payments not only could expose the creditor to the bankruptcy court’s contempt power; the Code also provides that any proofs of claim filed by a non-complying creditor will be disallowed, precluding any estate distributions.

Affirmative Defenses
Many creditors simply comply with the letter they receive from the Chapter 7 liquidation trustee (or the “debtor-in-possession” in a Chapter 11 reorganization case) and return funds they received from the debtor during the ninety-day preference period. In some cases, this is because they are unaware that the Code also sets forth what amounts to affirmative defenses to such preference actions. The affirmative defenses most common in the construction bankruptcy context are that the transfer was a contemporaneous exchange for new value given to the debtor (the “contemporaneous exchange” defense), the transfer was made in the ordinary course of business of the debtor and creditor, or made according to ordinary business terms in the industry (the “ordinary course of business” defense), the creditor shipped additional inventory or extended additional credit subsequent to the preferential payment, for which the creditor is entitled to a credit (the “subsequent new value” defense), and the transfer was the fixing of a statutory lien not avoidable under the Code (the “statutory lien” defense). The burden of proof is on the preference defendant, i.e., the creditor, to demonstrate the existence of one of these affirmative defenses.

Post-Petition Debtor Obligations
Obligations incurred by the debtor after filing for bankruptcy are distinguished from pre-petition debt. The debtor is obligated to pay creditors, including contractors, for any obligations...
incurred post-petition. Further, the automatic stay does not prohibit the contractor from terminating work, pursuing judgment, and/or enforcing any judgment due to non-payment or other breach by the debtor of post-petition obligations; however, the contractor must be cautious in pursuing remedies — which must be targeted only at post-petition defaults — that may affect assets of the bankruptcy estate.

Recommendations to Minimize Problems and Maximize Recovery

In light of the above, there are both proactive and reactive ways for contractors to take advantage of available methods to elevate the priority of their claims and to minimize potential avoidance of received payments via available defenses.

1. Once aware of the possibility of an impending bankruptcy, insist on a cash on delivery payment scheme in order to satisfy a "contemporaneous exchange" defense to a preference action. Otherwise, attempt to maintain the payment terms and conditions previously used with the debtor in order to argue that any payments were made in the "ordinary course of business" (the late payment described in the above preference scenario likely would not qualify). Relatedly, although valid non-bankruptcy reasons exist to apply payments to the oldest invoice, this complicates an ordinary course of business argument; post-dated checks present a similar problem.

2. Ensure mechanic’s liens are timely and properly perfected — and provide notice in the bankruptcy case — to qualify for the "statutory lien" preference defense. Outside bankruptcy, a creditor's failure to perfect a mechanic's lien is of little consequence when the creditor receives payment notwithstanding its failure to perfect. Absent such perfection in bankruptcy, however, transfers within the preference period may not be shielded from avoidance. Even a timely perfected mechanic’s lien does not guarantee protection. For instance, if the value of the estate property against which a mechanic’s lien is asserted is not sufficient to fully secure the lien, any payment purportedly made in satisfaction of the lien is avoidable to the extent it exceeds the value.

3. Once a bankruptcy petition is filed, quickly evaluate any reclamation rights regarding goods received by the debtor during the forty-five-day pre-petition period in order to meet the short notice deadline. Determine the value of goods received by the debtor during the twenty-day pre-petition period and file a 503(b)(9) administrative expense claim for that amount. Assess whether the debtor is holding any owed pass-through funds for which a constructive trust might exist and, if so, file suit in bankruptcy court (an adversary proceeding) to seek such funds (the subcontractor pass-through funds in the above preference scenario likely would qualify). Finally, file a proof of claim for any remaining pre-petition debt in order to take advantage of any pro rata estate distribution.

Conclusion

There always is a risk that the entity with which a contractor contracts will file for bankruptcy. That said, there are ways to reduce exposure, and actions available after bankruptcy filing to improve recovery prospects. Some actions ensure the contractor becomes an unsecured creditor entitled to a pro rata share of any estate distribution, and other actions provide enhanced rights. Further, a proper understanding of preferences and their associated affirmative defenses will minimize the likelihood of having to return payments received during the preference period. In the end, maximizing recovery in bankruptcy requires more than a sedentary contractor; it requires a contractor who is both vigilant and active.

Endnotes:

7. Id. § 362(k).
8. Id. § 365.
10. Such “ipso facto” or “default-upon-filing” clauses have been held to violate public policy and therefore are unenforceable as a matter of law. See, e.g., Riggs Nat’l Bank of Wash., D.C. v. Perry (In re Perry), 729 F.2d 982, 985 (4th Cir. 1984).
12. Id.

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In the six years since Congress adopted the e-Discovery amendments to the Federal Rules of Civil Procedure, the volume of electronic data potentially at issue in even the most straightforward construction dispute has exploded. Many companies involved in the construction industry have a hodgepodge of systems and practices regarding their data. In addition to the standard office products such as Microsoft Word and Excel, and Adobe PDF, companies store financial records in databases that may be as simple as QuickBooks or as complex as an SAP or Oracle system. There are a myriad of CAD programs available today, as well as project management software and collaborative products such as SharePoint. Construction projects tend to generate a great deal of digital photographs and video and, of course, there are e-mail, text messages, and IMs.

While many companies generate the majority of their information in electronic form, they also maintain paper copies of some of this information, often in a manner that makes it difficult to determine whether the paper copy or the electronic version is the official record. Moreover, many construction companies supply their employees with laptops, smart phones, and tablets to enable them to access relevant information and generate new documents, drawings, change orders, etc., regardless of where they are. While this practice promotes efficiency and keeps customers happy, it also multiplies the number of possible locations that must be searched for potentially responsive information when a dispute arises.

The large volume of data generated for even the most basic project, coupled with the multiple locations where that data can reside, leads directly to significant costs when a company finds itself involved in litigation or arbitration.1

Unfortunately, these costs can force many companies, especially small and mid-size companies struggling to emerge from the recession, to resolve such disputes based solely on costs rather than the merits. It does not have to be this way.

Construction lawyers and their clients can become proactive, protect against such outcomes, and navigate the brave new world of litigation in the Information Age.

What Lawyers Can Do to Help Clients

Before you can help your clients ease the burdens of e-discovery, you first must understand what those burdens are. You owe your clients a duty of competence2 and that duty includes knowing and understanding the rules and emerging case law that govern discovery today.3 It is not enough, however, to know the rules and case law. You also must gain a working knowledge of the types of potentially relevant information your client may have and the multiple sources of that information (e.g., shared drives, local hard drives, e-mail archives, and cloud storage). Long gone are the days when you could instruct your client to send over “the Jones file” and reasonably assume that the box or file cabinet of documents identified by your client constituted the universe of potentially responsive information. Today, it is important for lawyers to speak to
records managers and IT staff to understand where, and how and for how long potentially responsive information is maintained. Unlike the good old days when discovery decisions could be deferred for months as the parties argued early motions, the nature of electronic information requires that these discussions happen early in a dispute to ensure that your clients are properly preserving potentially relevant information as soon as they reasonably anticipate litigation. Otherwise, they face the real possibility of a spoliation motion.5

While the preservation net needs to be wide and should be cast as early in a dispute as possible, there are a number of ways a lawyer can reasonably and defensibly narrow the scope of data within that net that will progress through discovery. One of the most important tools a lawyer can employ is cooperation.6 By working with opposing counsel and disclosing some of the specifics involving your client’s data, such as who the key custodians are, what types of potentially relevant data they have in their possession, where that information is stored, and how easy or difficult it may be to access that information, you can narrow the scope of discovery or at least identify areas of disagreement that you can then take to the court for resolution before incurring significant expense.7

While the parties in most construction disputes may not always be similarly situated in terms of size or cash flow, there is still an element of “mutually assured destruction” if one side does not want to cooperate in the discovery process and instead wants to play games or engage in extensive motions practice. Assuming the parties are willing to cooperate, the lawyers on both sides can narrowly target the documents or information that are critical to the dispute, and not default to seeking all documents relating to a contract or project.

To maximize the efficiency and minimize the costs of discovery, construction lawyers should consider adopting more innovative methods of review beyond lawyers flipping, or clicking, through documents. One relatively simple method for decreasing review costs is recognizing that documents that do not contain user-generated content should not be reviewed in the same manner as correspondence and e-mails. CAD drawings, pictures, and videos may be very important to a dispute, but they will not contain privileged information. Therefore, parties should be able to segregate those items by file type and produce to the other side in native format, foregoing some of the costs associated with a more traditional review.

As for items such as correspondence and e-mails, parties should consider employing sampling techniques, where a statistically significant random sample is generated, reviewed, and then disclosed so the parties can determine whether a particular custodian or data source is worth further exploration. For large cases where hundreds of thousands, if not millions, of documents may be at issue, parties may want to explore predictive coding or other advanced methods of technology assisted review.8

Many attorneys still default to using search terms, or key words, to try and narrow the scope of data that may potentially be responsive. While search terms are far from foolproof, there are ways to make them more effective. Foremost is to consult with the custodians whose data will be searched to determine how they refer to a specific project, as well as any nicknames, acronyms or other shorthand they may have used to discuss it. It also may be helpful to determine the universe of individuals on the opposing side with whom they may have discussed the project, as well as any third parties involved in the project with whom the custodian may have discussed the issues now in dispute.

Once you have conferred with the custodians, work with your internal litigation support resources or external vendor to understand what search tool you will be using and its syntax, so you can craft your terms to account for misspellings (through the use of wildcards) and variations of the same word (through the use of stemming). You will then want to test and tweak your terms against a subset of data. At this point, strongly consider sharing your terms and hit reports with your opponent to allow him to make any additional changes before proceeding. By sharing your terms and allowing the other side to weigh in on how you are proceeding, you can save your client time and money by preempting disputes. Construction lawyers will find that approaching e-discovery in a reasonable and

One of the most important tools a lawyer can employ is cooperation.
iterative manner, with costs and efforts proportional to the value of the case, will go a long way to helping ease the burdens of the process for their clients.

What Clients Can Do to Help Themselves

While lawyers can use these various tools and techniques to mitigate the costs of e-discovery in litigation, they cannot reduce the client’s volume of data or sources of information. The best way for a business to mitigate the risks and costs of e-discovery and maximize the overall efficiency of its employees is to implement a comprehensive Information Governance (IG) program. IG programs address why a company has the documents and data it has, not merely where those documents and data reside. IG recognizes the critical role of identifying and retaining records in a logical manner, including the proper disposition of both documents that are not records, as well as documents that are records but have exceeded both their utility and any legal or regulatory requirements.9

Many businesses, including construction companies, have taken a haphazard or ad hoc approach to governing their information. Companies may have a dated record retention policy that applies to paper documents only, and nothing that addresses electronically stored information. Even worse, they may have retention and destruction policies implemented solely by IT for storage purposes, e.g., auto-delete policies on e-mail accounts, that users are either unaware of or have no way of halting in the event of litigation.

While exploring the nuances of an effective Information Governance program is beyond the scope of this article, there are some big picture items that construction companies should consider, whether they are serial litigants or lucky enough to have never been sued.

Define your company’s records and where they are stored

One of the biggest cost-drivers in e-discovery is the need to review large volumes of documents that should never have been retained in the first place because they do not constitute a record.

This includes e-mail chit-chat, as well as long-discarded drafts of documents, along with multiple copies of the same document or e-mail, to name but a few. Defining your company’s records should be done outside of the litigation context to avoid allegations of spoliation. Defining the source of the record, e.g., a network share or designated folder, is important because it may help eliminate the need to collect data from individual devices and expenses related thereto.

Recognize the difference between record retention and disaster recovery

Many businesses retain multiple copies of ESI for long periods of time just in case they might need them. To the extent this means just in case a catastrophe happens, there are much easier and more cost-effective methods of preparing for a disaster, including ensuring critical data are stored in network locations and backed up in a secure manner with media stored in a secure location. Disaster recovery generally refers to getting your business up and running again after disaster strikes, whether natural or man-made. General record retention for completed projects is different. Look to the terms of your contract to see if there is a provision requiring a specific time limit. Also, see how records are defined — do you need to retain every e-mail communication and draft or just the final version of the contract documents? Generally, accounting records and contract documents should be retained at least five years from completion. As with any business, clean out your files, whether paper or electronic, before sending them to off-site storage or copying them to a hard drive.

Implement a Litigation Readiness Plan

If you wait until litigation commences to figure out how to respond, it is likely too late. Every construction company should consider how it will respond to litigation when — not if — it happens. You should designate a person or committee able to quickly respond to a complaint, arbitration demand, or government investigation; to ensure that any data potentially at issue are identified and preserved; and to make certain that key custodians are notified that a claim has been filed and that they know to preserve any potentially responsive data in their possession.

e-Discovery in Advance in Contracts

In addition to recognizing the need to govern information effectively outside of the litigation context, construction companies should decrease
the risks and costs of e-discovery by including provisions in material contracts that limit e-discovery obligations in the event of litigation or arbitration arising from a breach of such contracts. Jay Brudz and Jonathan M. Redgrave, e-discovery practitioners, advanced this groundbreaking proposal in the most recent e-discovery issue of the Richmond Journal of Law and Technology.10

As Brudz and Redgrave note, many contractual provisions that we consider boilerplate today modify the litigation process, including arbitration provisions, governing law provisions and jury trial waivers. Absent fraud, public policy concerns, or unconscionability, courts routinely enforce such provisions. Construction companies should consider one or more of the following limitations for their material contracts:

• Circumscribing the duty to preserve ESI until a notice or request to preserve is received (as opposed to the requirement that each party preserve once it reasonably anticipates litigation);

• Limiting the amount of discovery allowed, including what needs to be preserved (e.g., eliminating the duty to preserve backup tapes); and

• Limiting the application of sanctions for purported e-discovery failures (e.g., requiring evidence of malicious intent).

• Assuming both parties are similarly motivated, such contractual provisions can provide certainty and foreseeability should a dispute arise.11

Recommendations
Discovery in the Information Age can be daunting and expensive. Construction lawyers should help their clients avoid common e-discovery pitfalls by ensuring that they are familiar with the governing rules and case law, by committing themselves to cooperate with opposing counsel to facilitate the process and reduce costs, and by keeping up with the latest trends and technology regarding review options. By practicing e-discovery in a reasonable, iterative and proportional manner, construction lawyers will better serve their clients by ensuring that discovery is about finding the facts that support or refute a claim, and not a means to an end in and of itself, or even worse, a method to force settlement.

Construction companies can mitigate the risks and costs associated with modern discovery by governing their information effectively and efficiently before they become involved in litigation. They also should consider adopting provisions in material contracts to limit some of the uncertainty and potential expense of e-discovery.

Endnotes:
1 It does not matter whether the case is pending in federal or state court, as Virginia amended its rules to reflect the reality of e-discovery in 2009. Nor does it matter if the matter is slated for arbitration, as most arbitration rules, including AAA, look to the Federal Rules of Civil Procedure for guidance.

2 Model Rules of Professional Conduct 1.1.


4 Some resources to consider when delving into eDiscovery include The Sedona Conference® Working Group 1 publications and the annual eDiscovery issue of The Richmond Journal of Law and Technology, see, e.g., Bennett B. Borden, Monica McCarroll, Brian C. Vick & Lauren M. Wheeling, “Four Years Later: How the 2006 Amendments to the Federal Rules Have Reshaped the E-Discovery Landscape and are Revitalizing the Civil Justice System,” XVII RICH. J.L. & TECH. 10 (2011), http://jolt.richmond.edu/v17i3/article10.pdf


6 The Sedona Conference® Cooperation Proclamation, https://thesedonaconference.org/cooperation-proclamation


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13 Id. The creditor still would have the right to file a proof of claim for the unpaid pre-petition amount.
14 Id. § 546(c).
15 Id. § 546(c)(1); see also In re Advanced Mktg. Serv. Inc., 360 B.R. 421, 426 (Bankr. D. Del. 2007) ("[U]nder the express language of § 546(c)(1) of the Bankruptcy Code, [the lenders'] pre-petition and post-petition liens on the Debtors' inventory are superior to [the seller's] reclamation claim.").
18 See id. at 537.
20 See Mid-Atl. Supply, Inc. v. Three Rivers Aluminum Co. (In re Mid Atl. Supply Co.), 790 F.2d 1121, 1125 (4th Cir. 1986) ("[C]onstructive trusts recognized by state law may be imposed against specified assets in appropriate circumstances, and those assets do not become part of the [debtor's] estate.") (quoting In re Kennedy & Cohen, Inc., 612 F.2d 963, 966 (5th Cir. 1980)).
24 Pursuant to Virginia's statutory scheme, "creation, perfection and enforcement are distinctly different events. Id. at 639.
25 See 11 U.S.C. § 362(b)(3) (allowing creditors to file liens for the purpose of continuing the perfection of an existing lien); see also Concrete Structures, 261 B.R. at 641 ("Mechanics' lienholders have always been exempt from the automatic stay provision of § 362 if some action is required to perfect their interest in the property.""); In re Bair, 32 B.R. 58, 60 (W.D. Va. 1983) ("So long as state law permits a relation-back type of perfection which would defeat an intervening lien creditor, § 546(b) allows the creditor to perfect and allows the relation-back feature to defeat the rights of the bankruptcy trustee.").
26 See In re Richardson Builders, Inc., 123 B.R. 736, 739 (Bankr. W.D. Va. 1990) ("[I]n Virginia, the recording of a memorandum of lien does not violate the stay imposed by section 362(a), while the filing or prosecution of an enforcement action under Va. Code § 43-22 does do so.").
27 See 11 U.S.C. §§ 108(c), 546(b)(2); see also Concrete Structures, 261 B.R. at 642 (referring to the extension of time provided by Code section 108(c)).
29 11 U.S.C. § 547(b). Although probably not relevant in most construction cases, the preference look-back period where the transferee is an "insider," as defined in the Code, is one year. Id. § 547(b)(4)(B). The presumption of insolvency, however, goes back only 90 days pre-petition, regardless of insider status. Id. § 547(f).
30 Id.
33 Id. § 502(d).
34 Id. § 547(c).
35 Id. § 547(g).
37 See §§ 545, 547(c)(6) (discussing the avoidance powers related to statutory liens).
38 See, e.g., In re Globe Mfg. Corp., 367 F.3d 1291, 1297 (11th Cir. 2009) (finding that "even if [the creditor] had perfected a lien against [the debtor's] plant, there would have been no equity to which the lien could attach."). Perfecting mechanic's liens also can be at risk when, e.g., the bankruptcy court approves (1) post-petition debtor-in-possession financing that provides for lender "priming liens" on all estate assets and/or "superpriority" claim status over administrative claims pursuant to Code section 364 (c) and/or 364(d), or (2) the sale of estate property free and clear of all liens, including mechanic's liens, pursuant to Code section 363(f).
The Patent Ambiguity Doctrine: Clarifying the Duty to Inquire

by Randall H. Wintory

A client who has been a contractor for many years calls with an urgent problem on a public construction project. The client is adamant that the owner is responsible for the defects in the plans and specifications. The owner disagrees that there are defects in the plans and specifications, but even if there are, they should have been obvious to the contractor, but the contractor failed to inquire about them before bidding. Has the owner unfairly rejected your client’s claim? That depends on the plans and specifications and whether the client satisfied his duty to inquire.

Contract documents for construction of a project are an imperfect form of communication. An architect or engineer attempts to translate the owner’s needs into plans and specifications, which a contractor must interpret to bid on and build the project. Unfortunately, the architect/engineer does not “guarantee a perfect plan or a satisfactory result.” Inevitably, the plans and specifications contain ambiguities, conflicts, defects, discrepancies, errors, or inconsistencies, which can create doubt or uncertainty as to the true requirements of the contract. This can occur even when a contract contains clauses to help interpret the contract and avoid ambiguities. Under familiar rules of contract interpretation, where there is doubt about its meaning a contract may be construed against the owner as the provider of the documents (a.k.a. contra proferentem). Further, a contractor may be entitled to rely on the owner’s plans and specifications and not be responsible for any errors they may contain (a.k.a. the Spearin doctrine). These rules may make it appear as though the owner bears all of the risk for ambiguities in the plans and specifications.

But, does the contractor, who is the expert at bidding on and actually building the project, have a duty to inquire about any obvious ambiguities in the plans and specifications before submitting a bid?

The Patent Ambiguity Doctrine and the Duty to Inquire before Bidding: What the Duty is …

When there is an obvious or patent ambiguity in the plans and specifications that a reasonable contractor knew or should have known about, or if the contractor has any doubt or uncertainty as to the contract’s requirements, then the contractor has a duty to inquire to clarify the contract’s requirements before submitting a bid, no matter how reasonable the interpretation may be. This duty is known as the patent ambiguity doctrine. If the contractor fails to inquire, it cannot take advantage of the ambiguity, or rely on the contra proferentem rule or the Spearin doctrine. Instead, the contract will be construed against the contractor and any claims the contractor may have will be barred.

Virginia recognized long ago that a contractor has a duty to inquire before bidding on a contract if the contractor has any doubts or uncertainties after reviewing the plans and specifications. In Trinkle v. Commonwealth, a contractor bid on a state contract to build 1.3 miles of gravel road. According to the specifications, hauling gravel from a distance greater than one half mile was considered “overhaul.” The contractor knew before bidding that the state did not pay for overhaul, but did not know the location of the gravel pits. The contractor did not include the cost of overhaul in its bid because it assumed that...
gravel could be obtained along the right of way, so there would be no overhaul. The contractor learned after award that overhaul would be necessary and requested increased compensation for the overhaul. The state rejected the request because the contract did not indicate that gravel could be obtained along the right of way. If there were any doubts about the location of gravel, “the time to have taken this matter up would have been prior to bidding on the work.” The court likewise concluded it could not allow the contractor’s claim, reasoning that,

If this were done it would place a premium on ignorance, carelessness or lack of diligence on the part of contractors, and encourage those who lose on projects to assert such claims as the one asserted here, and there would be no stability in a written contract and the Commonwealth of Virginia would be in a constant state of jeopardy. The contractor should thoroughly satisfy himself in detail as to the specifications and plans … and if there be any doubt as to the interpretation or construction there should be a clarification before bids are submitted and contracts executed.

The patent ambiguity doctrine has been expressly incorporated into the VDOT Road and Bridge Specifications since 1970 or earlier, and to greater or lesser degrees into other standard form contracts. Even though the doctrine is an established common law duty, incorporating it into standard contracts has generated some criticism. The chief complaint is that obligating the contractor to review the plans and specifications and inquire about any ambiguities found unfairly shifts the risk of design defects from the owner to the contractor contrary to the Spearin doctrine. The criticisms, however, overlook the fact that a contractual duty to inquire does not impose a new duty. Moreover, requiring contractors to inquire about patent ambiguities is beneficial to both contractors and owners, and is a proper allocation of the risk involved.

The Duty to Inquire Is a Form of Preventive Hygiene
The duty to inquire has been called “a major device of preventive hygiene,” because requiring contractors to seek clarification of the contract before bidding helps avoid post-award claims and costly litigation. The duty falls upon the contractors because public construction contracts are awarded by competitive sealed bidding where the contract is awarded to the lowest bidder. Unlike a negotiated contract, there is no opportunity for the owner and the contractor to engage in discussions about the contract and reach a mutual understanding about its requirements before being contractually bound. The owner also has no opportunity or obligation to verify before accepting the low bid that the contractor read and understands the plans and specifications. An ambiguity may cause the contractor to exclude costs it should have included. This may well result in the contractor being the low bidder, but it will likely lead to claims and litigation. The only opportunity to avoid these problems is for contractors to inquire before submitting a bid.

The patent ambiguity doctrine also makes the bidding process fair to all bidders. Fair and open competition for public contracts is the goal of a competitive procurement system. A duty to inquire helps provide a level playing field, ensuring to the greatest extent possible that all bidders bid upon the basis of the same plans and specifications. As one court explained,

An essential element of the bidding process is a common standard of competition. To that end, the conditions and specifications must apply equally to all prospective bidders, thus permitting the contractors to prepare their bids on the same basis. … It is to assure a level playing field that contractors are urged in bid documents to examine the documents thoroughly, make site visits, attend pre-bid conferences, and raise questions about the drawings, specifications and conditions of bidding and performing the work. To every possible extent, such questions should be addressed before bid opening.

Fair and open competition for public contracts is the goal of a competitive procurement system.

Conner Bros v. United States is an example of why the duty to inquire is necessary to avoid needless claims and litigation. Conner involved a federal construction contract to renovate an HVAC duct system. The existing ductwork was located in the narrow space above the existing
ceilings, which was filled with wires and pipes such that Conner and its subcontractor were unable to see the ductwork. Conner bid on the contract without inquiring about the above-ceiling conditions. After award, Conner found that connecting to the duct system would require far more cost than Conner had included in its bid, leading to claims and litigation.

Knowing the above-ceiling conditions was critical to properly preparing a bid. Conner’s inability to see those conditions was a glaring inconsistency that it had a duty to inquire about before submitting its bid. The court concluded that it would be contrary to the letter and intent of the law to hold the government responsible for the alleged extra work where Conner waited until after the contract was awarded to raise the issue of the above-ceiling conditions.

A contractor that knows or should know about a patent ambiguity, but fails to inquire about it, deprives the owner of an opportunity to correct the ambiguity and avoid the resulting claims and costs. In Modern Cont’l S. v. Fairfax County Water Authority, a dispute arose over whether the contract required extension stems or torque tubes as the operating mechanism for butterfly valves. MCS claimed that replacing extension stems already installed with torque tubes was extra work and demanded payment of the costs incurred.

Although MCS was aware of conflicts in the drawings, it never verified the details and never notified the Authority about the conflict before it began installing extension stems. MCS argued it had no duty to inquire because there was no conflict — torque tubes were not in the specifications. The contractor’s interpretation, however, was inconsistent with the contract. The drawings called for torque tubes and showed details consistent with torque tubes but inconsistent with extension stems. The requirements in the drawings were deemed to be included in the specifications.

MCS also argued it was not responsible for errors in the Authority’s plans under the Spearin doctrine, which prohibited shifting the risk of design errors to MCS. That argument failed though, because the contract required MCS to review the plans and specifications for errors or ambiguities and to clarify any found before beginning work. Had MCS inquired about the obvious conflict between the drawings and the specifications, the Authority would have had the opportunity to clarify the contract, thereby avoiding the resulting claims and litigation.

MCS’s claim was based on the very type of error or ambiguity that the contract’s duty to inquire was intended to avoid. Even though MCS knew about the obvious errors or ambiguities, it failed to inquire about them, resulting in needless claims and litigation, and defeating the whole purpose of the duty to inquire.

**If the contractor fails to inquire before bidding, it will be barred from claiming that the omitted work is a change or extra.**

The Duty to Inquire Prevents a Contractor from Taking Advantage of Obvious Ambiguities

Another important purpose of the duty to inquire is that it prevents contractors from taking advantage of a known or obvious ambiguity. This can occur when a contractor interprets the contract as omitting work that the contractor knows is necessary for completion of the project. This allows the contractor to submit a lower bid by leaving out the cost of the omitted work with the expectation that, if awarded the contract, the contractor can claim that the omitted work is a “change” or “extra” for which it should be paid additional compensation. Trinkle is an example of how this can occur. The duty to inquire is the simplest way to prevent this type of advantage. If the contractor fails to inquire before bidding, it will be barred from claiming that the omitted work is a change or extra.

Another way contractors may take advantage of a patent ambiguity is by manipulating their bid prices. In Dugan Construction Co., Inc. v. New Jersey Turnpike Authority, the contractor claimed $9.5 million for work that was actually worth approximately $50,000, based on an obvious error regarding the quantity of wastewater to be removed. The contract estimate was 55 gallons, but the actual quantity turned out to be more than 200,000 gallons. The contractor did not inquire about the obvious error, and bid $50/gallon to remove less costly non-hazardous wastewater, while only bidding $4/gallon to remove more costly hazardous wastewater. While the duty to inquire would bar the claim, the court opted to reform the contract to pay the contractor the actual cost of the work, which prevented the contractor from taking advantage of the patent error. The same result could be
achieved using contractual provisions that allow for adjustment of unit prices.

... and What the Duty Is Not
A contractual duty to inquire is not an attempt by owners to eliminate the Spearin doctrine. First, the duty to inquire has been the law in Virginia since at least 1938. Incorporating that existing law into standard form contracts does not impose a new or expanded duty on contractors.

Second, assuming the Spearin doctrine applies to the commonwealth’s contracts (although the Supreme Court of Virginia has not yet ruled that it does), as adopted in Virginia it stands for the proposition that a contractor who is required to follow the owner’s plans and specifications, which are defective or insufficient, will not be responsible to the owner for loss or damage caused solely by the plans and specifications, provided there is no “negligence on the contractor’s part, or any express guarantee or warranty by him as to their being sufficient or free from defects.”

Thus, the Spearin doctrine does not relieve a contractor from its negligence in interpreting the plans and specifications. While the contractor is not expected to have the knowledge and training of an architect or engineer, the contractor is still an expert in its own right. The contractor is responsible for understanding the complexity, difficulties and requirements of the contract it is bidding on. Consequently, the contractor has a duty to review the plans and specifications with the care and skill of a reasonably prudent contractor, and to inquire about any obvious, patent ambiguities prior to bidding.

The patent ambiguity doctrine is not in conflict with Spearin doctrine in another respect. The duty to inquire only shifts the risk of patent ambiguities to the contractor. Contractors are not required to “ferret out” latent errors or ambiguities, or to eliminate every possible ambiguity prior to bidding.

How Does A Contractor Satisfy Its Duty To Inquire?
Contractors can easily satisfy their duty to inquire by following the Supreme Court of Virginia’s advice in *Trinkle*: contractors should thoroughly satisfy themselves as to the plans and specifications and, if there is any doubt as to their interpretation or requirements, there should be a clarification before bids are submitted. Contractors should not assume their interpretation is correct, particularly when the potential cost is significant. Certainly, contractors must not seek to take advantage of a perceived error. A project is unlikely to end well when a contractor is the low bidder because it underbid the job based on a misinterpretation of the plans and specifications, or planned on claiming that work required under the contract is a change or extra.

Contractors have ample opportunities to submit questions to the owner before submitting a bid. Questions can be submitted at pre-bid meetings that owners typically hold, via fax as instructed in the invitation for bids, or online for VDOT contracts.

As for the hypothetical client, the contractor is the architect of its own fate (forgive the cliché). If the ambiguity was obvious, but the contractor failed to inquire about it before bidding, then the contract should be construed against the contractor.

Endnotes:
The views expressed in this article are the author’s and should not be taken as the views of the Office of the Attorney General.

2 For the sake of brevity, these terms will all be referred to collectively as ambiguities. But note: the patent ambiguity doctrine is applied where there is an ambiguity, as well as where there are conflicts, discrepancies, inconsistencies, errors, omissions, or other differing interpretations of the contract. Phillip L. Bruner and Patrick J. O’Connor Jr., “Bruner and O’Connor on Construction Law” §§ 3:23, 6:29 (2002).
3 For example, order of precedence clauses dictate which parts of the contract take precedence over other parts; or complimentary clauses provide that requirements in one part of the contract are deemed to be required in all parts.
4 *Graham v. Commonwealth*, 206 Va. 431, 434-435, 143 S.E.2d 831, 834 (1965) (doubt about applicability of the provisions of the contract and specifications resolved in plaintiffs’ favor and against the defendant, the author of the documents).
5 Worley Bros. Co. v. Marus Marble & Tile Co., 209 Va. 136, 142, 161 S.E.2d 796, 801 (1968). (motion for reconsideration addressing Spearin argument). Note: the Supreme Court of Virginia has yet to apply the Spearin doctrine to the commonwealth’s contracts.
6 *Triax Pac. v. West*, 130 F.3d 1469, 1474-75 (Fed. Cir. 1997).
7 *Triax*, 130 F.3d at 1474-75. For a thorough review of the patent ambiguity doctrine in federal construction cases, see “Government Contracts: Law, Administration & Procedures” § 2.170 (Walter Wilson, gen. ed., Matthew Bender 2012); and
THE PATENT AMBIGUITY DOCTRINE


8 Triax, 130 F.3d at 1474-75; Beacon Constr. Co. v. United States, 161 Ct. Cl. 1, 6-7, 314 F.2d 501, 504 (Ct. Cl. 1963); PCL Constr. Servs., Inc. v. United States, 47 Fed. Cl. 745, 785-86 (Fed. Cl. 2000).

9 Id.

10 170 Va. 429,196 S.E. 652 (1938).

11 Id. at 433, 196 S.E. at 654.

12 Id.

13 Id. at 438-39, 196 S.E. at 656.

14 "VDOT Road and Bridge Specifications" (1938) § 105.04 ("The Contractor shall take no advantage of any apparent error or omission in the plans and specifications but the Engineer shall be permitted to make such corrections and interpretations as may be deemed necessary …"); "VDOT Road and Bridge Specifications" (1970) §§ 102.04 ¶ 3 ("If any person … contemplating the submission of a proposal for this contract is in doubt as to the true meaning of any part of the plans, specifications, or other contract documents, he may submit to the Contract Engineer a written request for an interpretation thereof."); 105.04 ¶ 2 ("The Contractor shall take no advantage of any apparent error or omission in the plans or specifications, he shall immediately notify the Engineer. The Engineer will then make such corrections and interpretations as may be deemed necessary for fulfilling the intent of the plans and specifications."); and "VDOT Road and Bridge Specifications" (2007) §§ 102.04(c), 105.12.

15 AIA A201 (1997 and 2007) § 3.2; ConsensusDocs 200 (2007) §§ 3.1.2, 3.3 and 14.2.2; EJCDC C-410 (2002) § 3.01(A), (F)-(J); Commonwealth’s Form CO-7A § 2 (Instructions to Bidders) and Form CO-7 § 23(b) (General Conditions).


17 Beacon, 161 Ct. Cl. at 6-7, 314 F.2d at 504; PCL, 47 Fed.Cl at 786; S.O.G. of Arkansas v. United States, 212 Ct. Cl. 125, 131, 546 F.2d 367, 370-71 (Ct. Cl. 1976).


20 Va. Code § 2-2-4300; Triax, 130 F.3d at 1475; and see Trinkle, 170 Va. at 438-39, 196 S.E. at 656.

21 PCL, 47 Fed. Cl. at 786.

22 D’annunzio Brothers, Inc., v. New Jersey Transit Corp., 245 N.J. Super. 527, 532-33, 586 A.2d 301, 304 (N.J. Super. Ct. App. Div. 1991) (citations omitted) (contractor’s claim barred where before bidding contractor discovered a discrepancy in bid documents, but did not clarify the meaning of the contract, and interpreted the contract to require a unit price for excavation and backfill in connection with installing concrete structures, which was wildly inconsistent with the estimated quantity of such work, when the true intent was that excavation and backfill were to be included in the unit price of installing concrete structures).

23 56 Fed.Cl. 657 (Fed.Cl. 2005).

24 Id., at 676-78, 683-86.

25 Id., 65 Fed.Cl. at 676.

26 Modern Cont’l South v. Fairfax Cty. Water Auth., 70 Va. Cir. 172 (Fairfax Cir.Ct., Feb. 9, 2006) ("MCS I") (resolving conflict in contract against contractor where contractor failed to verify details or notify owner of conflict); and Modern Cont’l S. v. Fairfax Cty. Water Auth., 72 Va. Cir. 268 (Fairfax Cir.Ct., Nov. 21, 2006) ("MCS II") (motion for reconsideration addressing Spearin argument).

Note: These cases address MCS’s contractual duty to inquire before beginning work rather than before bidding. However, much of the court’s analysis is equally applicable to the duty to inquire pre-bid.

27 MCS I, 70 Va. Cir. at 182.

28 MCS II, 72 Va. Cir. at 269.

29 Id.

30 Id. at 271-72 ("MCS at least implicitly warranted to the Authority that the drawings that MCS was contractually obligated to review for defects or ambiguities, were, in fact free from any such infirmities").

31 MCS I, 70 Va. Cir. at 184-85; MCS II, 72 Va. Cir. at 272.

32 MCS II, 72 Va. Cir. at 272.

33 S.O.G., 212 Ct. Cl. at 131,546 F.2d at 370-71.

34 Supra note 10. See also J.H. Berra Construction Co., Inc. v Missouri Highway & Trans. Comm’n, 14 S.W.3d 276, 281-82 (Mo. App. 2000) ($1 million claim for the cost of overhaul barred where contractor did not include the cost in its bid based on its assumption that the owner would pay for overhaul via a change order at additional cost, despite knowing before bidding that the owner did not pay for overhaul as a separate item — the cost had to be included in the bid); and Seal and Co., Inc. v. WMATA, 768 F. Supp. 1150, 1160-61 (E.D. Va. 1991) (low bidder’s bid rejected as non-responsive based on its failure to include a signed Buy America certificate with its bid, which would have allowed the bidder to manipulate the amount of its bid).

35 This is known as unbalanced bidding. Victory Const. Co., Inc. v. United States, 206 Ct. Cl. 274, 287, 510 F.2d 1379, 1387 (Ct. Cl. 1975) (defining
an unbalanced bid as “one in which the contractor allocates a disproportionate share of indirect costs and anticipated profit to the unit prices bid for those items on which he anticipates an overrun; the object being to reap overgenerous profits should the anticipated overruns materialize.”).


37 Id. at 239-242, 941 A.2d at 627-30.

38 Id.


40 MCS II, 72 Va. Cir. at 270-71, quoting Greater Richmond, 200 Va. at 595, 106 S.E.2d at 597 (emphasis omitted).

41 See MCS II, 72 Va. Cir. at 272 (rejecting contractor’s Spearin argument where contractor misinterpreted plans and specifications).


43 PCL, 47 Fed.Cl. at 799-800.

44 Conner, 65 Fed.Cl. at 683-86; see also MCS II, 72 Va. Cir. at 269-72 (Spearin doctrine did not relieve contractor of duty to verify the plans and clarify the apparent error); Kiska Constr. Corp., U.S.A. v. Washington Metro. Area Transit Auth., 321 F.3d 1151, 1162-64 (D.C. Cir., 2003) (relying on Spearin, contractor argued that WMATA impliedly warranted that the specified dewatering system would lower the groundwater table to the required level, which the court rejected because an ambiguity in dewatering requirements was sufficiently obvious that contractor should have inquired as to the true meaning of the contract and by failing to do so assumed the risk of an adverse interpretation).

45 Bruner and O’Connor on Construction Law § 3:23.


47 Beacon, 161 Ct. Cl. at 7.

48 See, e.g., D.C. McClain, Inc. v. Arlington, 249 Va. 131, 452 S.E.2d 659 (1995) (contractor terminated after failing to complete a bridge where prior to bidding the contractor failed to obtain an easement it knew it needed, failed to include the cost of the easement in its bid, and failed to inform the owner of either issue).
Volunteers are needed to serve the Virginia State Bar’s boards and committees. The Nominating Committee will refer nominees to the VSB Council for consideration at its June 2013 meeting.

Vacancies in 2013 are listed below. All appointments or elections will be for the terms specified, beginning on July 1, 2013.

EXECUTIVE COMMITTEE:
6 vacancies (of which 2 current members are not eligible for reappointment and 4 current members are eligible for reappointment). Filled from ranks of the council for 1-year terms, by council election.

CLIENTS’ PROTECTION FUND BOARD:
6 lawyer vacancies (1 current lawyer member from the Ninth disciplinary district who is not eligible for reelection; 4 current lawyer members from the First, Second, Fourth and Fifth disciplinary districts who are eligible for reelection; 1 current lawyer member-at-large who is eligible for reelection) and 1 nonlawyer vacancy (1 current lay member who is eligible for reelection). May serve 2 consecutive 3-year terms. Elected by VLF Board on recommendation of council.

VIRGINIA LAW FOUNDATION BOARD:
2 lawyer vacancies (of which 2 current lawyer members are eligible for reelection), and 1 lay member vacancy (of which 1 current lay member is eligible for reelection). May serve 2 consecutive 3-year terms. Elected by VLF Board on recommendation of council.

VIRGINIA CLE COMMITTEE:
6 lawyer vacancies (of which 6 lawyer members are eligible for reelection to 1-year terms). Elected by VLF Board on recommendation of council.

AMERICAN BAR ASSOCIATION DELEGATES:
3 vacancies (of which 3 present delegates are eligible for reelection). May serve 3 consecutive 2-year terms. Elected by council.

Nominations, along with a brief résumé, should be sent by March 30, 2013, to nominations@vsb.org or by mail to VSB Nominating Committee, c/o Asha Holloman, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, VA 23219-2800.

The VSB E-News
Have you been receiving the Virginia State Bar E-News? The E-News is a brief monthly summary of deadlines, programs, rule changes, and news about your regulatory bar. The E-News is emailed to all VSB members. If your Virginia State Bar E-News is being blocked by your spam filter, contact your email administrator and ask to have the VSB.org domain added to your permissions list.

Have You Moved?
To check or change your address of record with the Virginia State Bar, go to the VSB Member Login at https://member.vsb.org/vsbportal/. Go to “Membership Information,” where your current address of record is listed. To change, go to “Edit Official Address of Record,” click the appropriate box, then click “next.” You can type your new address, phone numbers, and email address on the form.

Contact the VSB Membership Department (membership@vsb.org or (804) 775-0530) with questions.
In Memoriam

Leroy E. Batchelor  
North Palm Beach, Florida  
June 1925 – March 2012

The Honorable Harry Lee Carrico  
Richmond  
September 1916 – January 2013

R. Harvey Chappell Jr.  
Richmond  
November 1926 – December 2012

Kenneth C. Crawford  
San Antonio, Texas  
October 1918 – November 2012

Stanford L. Fellers Jr.  
Roanoke  
May 1928 – August 2012

Everette Allan Felts  
Richmond  
July 1938 – October 2012

Bennie L. Fletcher Jr.  
Advance, North Carolina  
July 1923 – November 2011

Thomas Dew Gill  
Long Island, New York  
May 1934 – June 2012

Robert Fisher Gore  
Ocean Pines, Maryland  
November 1932 – July 2012

Michael Green  
Bethesda, Maryland  
November 1946 – December 2012

Michael Andrew Groot  
Buena Vista  
February 1966 – December 2012

William B. Hopkins  
Roanoke  
April 1922 – December 2012

Sheldon Lewis Ingram  
Norton  
December 1955 – October 2012

Murray J. Janus  
Richmond  
July 1938 – January 2013

Edward Stephen Jones  
Virginia Beach  
October 1977 – December 2012

Raymond Diercks Kline  
Alexandria  
October 1954 – December 2012

E. M. Kowal Jr.  
Huntington, West Virginia  
July 1952 – November 2012

Glenn Robert Lawrence  
Arlington  
November 1930 – August 2012

Bridget Elizabeth Leonard  
Richmond  
July 1974 – November 2009

Elisabeth Suzanne Lewis  
Valrico, Florida  
September 1971 – October 2012

Adrianna Karine Marks  
McLean  
March 1977 – March 2012

John Bradley Minnick  
Houston, Texas  
July 1913 – October 2012

Catherine Elizabeth Nash  
Lexington  
March 1955 – July 2012

Roger Dale Scott  
Fredericksburg  
April 1955 – November 2012

Anton Joseph Stelly  
Richmond  
September 1951 – January 2013

Baxley Trower Tankard  
Eastville  
June 1913 – January 2013

John H. Tate Jr.  
Marion  
June 1938 – December 2012

Roy Dale Turner  
Bridgewater  
October 1955 – November 2012

James Merrill Wiltshire Jr.  
Richmond  
September 1925 – November 2006

Local and Specialty Bar Elections

The Prince William County Bar Association, Inc.  
Mark Thomas Crossland, President  
Amy Nicole Tobias, President-elect  
Abigail Ann Miller, Secretary

Robert Paul Coleman, Treasurer  
Angela Lemmon Horan, Director  
Jonathan Stuart Rochkind, Director

John Donald Whittington, Director  
Arthur von Keller IV, Director  
2012–16  
2013–17
Trees for Virginia Project Continues

Virginians for generations to come will have John H. Tate Jr. to thank for that bit of shade they’ll be enjoying on those hot summer days.

Tate started the “Trees for Virginia” project in 2011 when he was chair of the Senior Lawyers Conference. The project is a cooperative effort by the conference and the Virginia Department of Forestry to solicit members of the Virginia State Bar, and others, to fund tree plantings.

The first year, the project delivered 2,600 trees to locations across the state. Last year that number jumped to 7,200, with trees planted from Danville, to Glade Spring, to Northumberland County, to more than thirty other locations.

Though John Tate died in December, his “Trees for Virginia” legacy lives on. The conference is again soliciting donations so that it can deliver a crop of trees this year. To donate, make checks payable to “Trees for Virginia” and mail to:

John M. Oakey Jr., Esquire
McGuireWoods, LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030

The conference also will plant a John Tate Tree in his hometown of Marion. Details on when that ceremony will take place are being developed.

The Virginia Law Foundation Inducts Fellows Class of 2013

The Virginia Law Foundation inducted seventeen Virginia lawyers at its 2013 Class of Fellows dinner ceremony on January 24 in Williamsburg during The Virginia Bar Association’s annual meeting. Induction as a Fellow of the Virginia Law Foundation is a special honor conferred by the VLF board on selected Virginia attorneys, law professors, and retired members of the judiciary who are deemed to be outstanding in their profession and in their community.

Class of 2013 Inductees

David N. Anthony (Richmond) – partner, Troutman Sanders
Jonathan Todd Blank (Charlottesville) – partner, McGuireWoods
Jack W. Burch Jr. (Richmond) – principal, Macaulay and Burch PC
Robert L. Calhoun (Alexandria) – Redmon, Peyton & Braswell
Clarence M. Dunnville Jr. (Midlothian) – solo practitioner
Thomas R. Frantz (Virginia Beach) – partner, Williams Mullen
Jacob Andrew Lutz III (Richmond) – practice group leader, Troutman Sanders
Albert M. Orgain IV (Richmond) – principal, Sands Anderson PC
J. Lee E. Osborne (Roanoke) – principal, Woods Rogers PLC
Don W. Piacentini (Henrico) – president and CFO, Parker, Pollard, Wilton & Peaden PC
Gregory B. Robertson (Richmond) – partner, Hunton & Williams LLP
Melissa Walker Robinson (Roanoke) – principal, Glenn Robinson & Cathey PLC
Bruce C. Stockburger (Roanoke) – partner, Gentry Locke Rakes & Moore LLP
John Tarley Jr. (Williamsburg) – managing member, Tarley Robinson PLC
Lucia Anna Trigiani (Alexandria) – principal, MercerTrigiani
J. Page Williams (Charlottesville) – member, Feil, Petit & Williams PLC

28th Annual Conference of Local Bar Associations

Awards of Merit Competition

This competition is designed to recognize outstanding projects and programs of Virginia bar associations; share successful programming ideas and resources with all bar associations; encourage greater service to the bench, bar and public; and inform the public about some of the excellent work of voluntary bars and the legal profession in general.

Entries must be postmarked no later than April 26, 2013. For more information see http://www.vsb.org/site/conferences/clba

18th Annual Conference of Local Bar Associations

Local Bar Leader of the Year Award

The award recognizes past and presently active leaders in their local bar associations who have continued to offer important service to the bench, bar and public. The award serves as a continuing monument to the dedication of local bar leaders. It also serves to emphasize the importance of close cooperation between the Virginia State Bar and local bar leaders.

Entries must be postmarked no later than April 26, 2013. For more information see http://www.vsb.org/site/conferences/clba
**Virginia Tech Offers Minor in Science, Engineering and the Law**

by Gordon Hickey

You don’t have to be in law school to get at least a little education in the law. Colleges and universities have always had classes that touched on the law in multiple programs including political science, history, journalism, and the sciences. Now, though, Virginia Tech is offering what might be a first — a minor degree that incorporates the law. The degree is in Science, Engineering and Law. Twenty students are enrolled in the minor, which was introduced this year.

“Obviously, we don’t have a law school,” said Anna-Marion Bieri, an instructor at Tech who is coordinator of the program. But, she knew students in engineering and the sciences would benefit from more legal education, so the program was expanded. The focus, she said, is intellectual property law and all that goes with it.

Abraham Lincoln once noted that the right of inventors and authors to royalties for patents and copyrights was one of the six great steps in the history of liberty, the Tech website points out. As commerce has become more global, intellectual property law has become more important. Again, as Tech says, “stem cell research, gene patents, clean technology, file sharing, digital libraries — every day we are faced with a new issue at the intersection of science, technology, and law.”

The Science, Technology and Law Program seeks to:

- Identify and discuss these issues, thereby fostering multi-disciplinary analysis and thinking;
- Equip students with a diversified skill set that enables them to succeed outside “traditional” career paths;
- Raise awareness of legal, societal and ethical challenges — on an academic, as well as professional, level;
- Provide a platform for the exchange of ideas on informed public policies on science, technology and law.

“There is obviously a need for (science and engineering students) to know a little about intellectual property law,” Bieri said.

The minor offers classes by Bieri and two IP attorneys. “We cover everything — a little bit about how the law works, legal writing, legal research, trademarks, trade secrets, copyrights, patent law,” she said. Courses include ethics, agriculture law, environmental law, real estate law, legal foundations of planning, and judicial process. She also said many students lack writing skills, and the program attempts to address that. “It is essential that they learn to express themselves.”

The minor is part of the Scienceering program and is open to all students, regardless of their major.

Bieri said the College of Science’s Science, Technology and Law program, which began in 2002, has four undergraduate courses, one graduate course, and now the the minor. Eighteen credits are required for the minor. The program’s focus is not limited to intellectual property law but includes other legal, policy, and ethical aspects at the intersection of science, technology, and law.

“It’s important for scientists to have some education in legal matters from patents that researchers develop and publishing that academics routinely take part in,” Bieri said.

“What we’re offering here is unique among undergraduate and graduate programs,” Bieri said. “There is no comparable program at other universities. Although similar programs may be found at law schools, the content is dramatically different. We tailor our topics specifically to the background of our students.”

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**Virginia State Bar**

**Harry L. Carrico**

**Professionalism Course**

See dates and registration information at http://www.vsb.org.

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(877) LHL-INVA

or visit http://www.valhl.org.
Bricks and Blogs: Using Social Media to Build Your Knowledge of Virginia Construction Law

by Marie Summerlin Hamm

These days it seems like with every innovation in technology, information becomes more prevalent and portable. Ironically, this information saturation can make it more difficult to keep current. Rather than parse through the clutter, some practitioners choose to unplug entirely, shunning all forms of social media. Others valiantly try to stay on the cutting edge, updating, following and connecting at a frenetic pace until what is often termed “disruptive technology” becomes . . . well, disruptive. This article focuses on the continued usefulness and relative simplicity of that most ancient of social media forms: the blog. At its heart, a blog is web-based communications forum that allows users to disseminate news and information, express opinions, share articles and links, establish dialogues, and build community.

For bloggers, it’s a bully pulpit. For practitioners, a frequently updated, thoughtfully written blog (or blawg, as legal blogs are sometimes affectionately dubbed) can be an ideal current awareness tool. Those interested in Virginia construction law-related topics are indeed in luck. The commonwealth is home to handful of blawgs that fit the bill:

**Construction Law Musings**  
http://constructionlawva.com  
Construction Law Musings is published by Christopher G. Hill, a Richmond-based construction attorney. Hill, a LEED AP, Supreme Court of Virginia certified General District Court mediator, is a member of the board of governors of the Virginia State Bar Construction Law and Public Contracts Section. Posts focus on mechanic’s liens, bond claims, alternative dispute resolution, and sustainable construction. The “Guest Post Fridays” series allows other contributors to offer their perspective on construction-related topics. If you explore construction law blogs, references and links to Musings abound.

**Virginia Construction Law News: Insights on Construction Law in Virginia**  
http://www.vaconstructionlawnews.com  
The stated purpose of this new blog is “to provide helpful information for stakeholders in the construction industry and for lawyers who deal with construction matters.” It is edited by Kenneth Brett Marston, Spencer M. Wiegard, and Joshua C. Johnson, the construction practice group at Gentry Locke Rakes & Moore LLP. Brett Marston is the current chair of the Virginia State Bar Construction and Public Contracts Law Section. Spencer Wiegard is a member of the board of governors for the Virginia State Bar Construction Law and Public Contracts Section. Josh Johnson is the president-elect of the Roanoke Chapter of the Federal Bar Association. Their blog covers a wide range of construction-related topics including: claims, mechanic’s liens, contract, design, and procurement issues.

**Virginia Construction Law News and Notes**  
http://virginiaconstructionlawnewsandnotes.blogspot.com  
Published by Vandeventer Black’s Construction and Public Contracts Department, this blog focuses on legal news of interest to the Virginia construction law community. Concise, cogent analysis is offered by Vandeventer Black partner Neil S. Lowenstein.

**Virginia Real Estate, Land Use & Construction Law Blog**  
http://www.valanduseconstructionlaw.com  
Published by the construction law team at Bean, Kinney & Korman, this blog “provides insight and commentary on real estate, land use and construction law in Virginia.” Timothy R. Hughes, LEED AP, is the construction editor of the blog. Heidi E. Meinzer, LEED AP, is the litigation editor and R. Tad Lunger, LEED AP, is the land use editor.

**Best Practices in Construction Law**  
http://www.bestpracticesconstructionlaw.com  
Although, technically not a Virginia-based blog, editor Matt DeVries is licensed in Virginia (as well as in Tennessee and D.C.). His popular blog quite literally focuses on best practices within the construction industry.

For additional resources, the ABA Journal Blawg Directory at http://www.abajournal.com/blawgs/topic/construction+law/ provides a fairly comprehensive list of construction and construction law-related blogs. Additionally, Justia’s Blawgsearch allows the user to quickly scan the headlines of recently updated blogs. Construction blogs can be found at: http://blawgsearch.justia.com/blogs/categories/construction-law

Make no mistake, law firm blogs are first and foremost a marketing tool, replete with information about services offered. But subject matter experts who blog tend to be both passionate about their area of law and pithy in their posts, creating a current awareness tool that provides news, analyses, legal commentary, and a good read to boot.

If you peruse any of the blogs above and find the information useful, consider subscribing. RSS feeds are much like subscriptions to a magazine or newspaper. New information is delivered as it becomes available, saving you the step of seeking out new posts. You can

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The World Turned Upside Down: HIPAA/HITECH Act Business Associates Subject to Federal Enforcement

by Alan S. Goldberg

The Health Insurance Portability and Accountability Act of 1996 and the Health Information Technology for Economic and Clinical Health Act (HITECH Act) enacted as part of the American Recovery and Reinvestment Act of 2009 combine to create challenging and complex health care privacy and security requirements that Virginia attorneys and many of our clients must understand and respect. Any attorney involved in health care matters who did not know about these requirements before must learn them now to avoid investigations and potential violations.

Since enactment in 1996 of HIPAA and the promulgation of many rules, the regulatory provisions have been amended and expanded several times. According to the Department of Health and Human Services (HHS), the HITECH Act and several new rules published in the Federal Register on January 25, 2013, will enhance standards and improve privacy protections and security safeguards for consumer health data. But for attorneys those new rules create potential liabilities involving direct enforcement by the federal government and the attorney general of Virginia.

HHS has strengthened the privacy and security protections for health information established under HIPAA by promulgating several final rules (collectively called the final omnibus rule) that provide people with new rights to obtain their health information, and exposes those entities covered by HIPAA to substantially increased financial penalties incident to civil enforcement. The final omnibus rule is based on statutory changes under the HITECH Act, enacted as part of the American Recovery and Reinvestment Act of 2009, and also under the Genetic Information Nondiscrimination Act of 2008 (GINA).

The rules reaffirm that genetic information is protected under the HIPAA Privacy Rule and that most health plans are prohibited from using or disclosing genetic information for underwriting purposes.

The new rules also increase compliance requirements by specifically adding HIPAA business associates and their subcontractors against whom enforcement can occur. It is imperative for attorneys and clients who are not aware of these changes to learn about them and to implement the new requirements.

“This final omnibus rule marks the most sweeping changes to the HIPAA Privacy and Security Rules since they were first implemented,” HHS Office for Civil Rights Director Leon Rodriguez said in a press release. “These changes not only greatly enhance a patient’s privacy rights and protections, but also strengthen the ability of my office to vigorously enforce the HIPAA privacy and security protections, regardless of whether the information is being held by a health plan, a health care provider, or one of their business associates.”

Historically, the HIPAA Privacy and Security Rules requirements directly affected only those classified as HIPAA covered entities: health care providers engaging in certain electronic health transactions; most health plans; and health care clearinghouses that assist in the electronic processing of health insurance claims and certain other transactions. HIPAA only indirectly affected those classified as business associates: those who assist covered entities in a manner involving individually identifiable health information, including attorneys.

Those who provide legal representation to HIPAA covered entities have had to advise their clients that HIPAA requires them to enter into written business associate agreements with their attorneys, if the legal representation involves individually identifiable health information. Enforcement for violations generally would involve efforts by the federal Office for Civil Rights or a state attorney general to impose penalties directly against the client that is a covered entity and not against the attorney who is a business associate. The client would be expected to enforce compliance by the attorney with the written business associate agreement requirements, many of which mirror the requirements directly applicable to the client that is the covered entity.

The new HIPAA/HITECH Act rules will permit direct enforcement by the federal government and state attorneys general against both business associates and subcontractors assisting business associates in matters involving individually identifiable health information (such as document shredding companies). Many important privacy rule and security rule requirements, including those relating to policies and procedures intended to protect patient information, and those relating to written agreements with subcontractors, will be applicable and enforceable against business associates and their subcontractors.

Under the new rules, the federal Office for Civil Rights or a state attorney general could seek to enforce certain requirements and to impose penalties against a HIPAA covered entity client, the client’s attorney who is a business associate, and that attorney’s subcontractors involved in assisting the client’s attorney. Criminal penalties against any of them can be

HIPAA/HITECH continued on page 50
choose to set up e-mail subscrip-
tions to individual blogs, or use
an RSS reader such as Google
Reader, Newsblur, FeedDemon, or
Feedly to manage
multiple feeds.

If you peruse any of the blogs
above and conclude “I could do
better,” consider publishing. Tools
like Wordpress and Blogger make
setting up and managing a blog
simple. From an SEO (search
engine optimization) perspective,
publishing a blog is an excellent
way to increase the rank of your
law firm website. From a market-
ing perspective, blogging is a cost-
effective way to create an online
presence and to build name
recognition with clients and legal
colleagues alike.

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sought by the U.S. Department of
Justice in more serious cases.

For Virginia attorneys, there
already are requirements applicable,
under the Rules of Professional
Conduct and statutory law, to confi-
dentiality and client secrets and
more generally to protecting health
information. But with federal
requirements increasingly affecting
the practice of law (examples include
Internal Revenue Service Circular
230, the Rules for Representation of
Others Before the United States
Patent and Trademark Office, and
the Securities and Exchange
Commission’s Attorney Conduct
Rule Under Sarbanes-Oxley Act)
the prior and new rules under the
HIPAA/HITECH Act relating to busi-
ness associates and those who assist
them create a need to heighten sensi-
tivity to what must be done now.

The effective date for the new
HIPAA/HITECH Act rules is March
26, 2013, but the actual enforcement
date is September 23, 2013. There is a
one-year grace period for updating
HIPAA business associate agreements
that generally will permit deferral
unless those agreements are amended
or renewed (other than by an ever-
green provision) during that period.
Although attorneys and other busi-
ness associates will not be required to
provide Notices of Privacy Practices
to anyone as do HIPAA covered enti-
ties, many HIPAA/HITECH Act
Privacy Rule, Security Rule, and Data
Breach Rule requirements will be
applicable to them.

Attorneys involved in health
care matters must understand terms
and concepts that include covered
entity, business associate, business
associate agreement, data use agree-
ment, designated record set, encryp-
tion, security incident, breach
notification, permitted and prohib-
ited uses and disclosure of health
information, de-identification, miti-
gation, minimally necessary, unsec-
cured protected health information,
and much more. Dictionary defini-
tions will not be helpful; only the
thousands of pages of statutory law,
regulatory preambles, rules, and
published judicial decisions can
help, along with a sense of humility
and much patience.

To paraphrase a distinguished
Virginia State Bar assistant ethics
counsel’s admonition: don’t dabble!
The growing and complex body of
law relating to health care privacy,
security, and breaches is not for ama-
teurs. The increased penalties and the
cost of mitigating and otherwise
addressing violations are great and
might not be insurable. Anyone
involved in health care matters today
must have the necessary knowledge
or should seek the guidance of oth-
ers who do. Now more than ever,
pro-active compliance planning and
oversight is needed. This article pre-
sents only a modest amount
of information, in the hope that it stim-
ulates a great amount of investiga-
tion, education, and action. Today is
a good day to begin protecting your-
self, and your clients, patients, and
families against HIPAA/HITECH Act
violations.

HIPAA/HITECH continued from page 49

Marie Summerlin Hamm is a past
president of the Virginia Association
of Law Libraries. She is assistant
director of collection development at
the Regent University Law Library.
She has a master’s degree in library
science from Syracuse University and
a law degree from Regent, where she
has taught courses in legal research
and writing.

HIPAA/HITECH continued from page 49

Alan S. Goldberg, of McLean, is a solo
practitioner and a past president and
inaugural fellow of the American Health
Lawyers Association, and chair of the
Law and Technology Committee, past
chair of the Health Law Section, and a
member of the Education of Lawyers
Section and the Virginia Mandatory
Continuing Legal Education Board of the
Virginia State Bar, and an adjunct profes-
sor of Health Law at George Mason
University School of Law and American
University Washington College of Law.
Duty to Supervise Nonlawyer Staff: Sloppy Oversight is No Excuse

by Wendy F. Inge

No Excuses
A lawyer in the District of Columbia was suspended for 180 days for violations of Rule 1.1 Competence and 5.3 Supervising Nonlawyers. The lawyer's secretary embezzled $47,000 from the estates of two incapacitated adults for whom the lawyer was acting as court-appointed guardian. Over a nine-month period, the secretary forged the lawyer's signature on thirty-six checks.

Although the banks sent the lawyer monthly statements, she did not discover the thefts for more than a year because, she said, she had delegated the task of reviewing the statements to her secretary and did not check the secretary's work. The lawyer also claimed that she had good reason to trust the secretary and that the stolen checks had been secured in a locked safe in her office.

Along with the suspension, the court concluded that, “a lawyer’s failure to supervise or review an employee’s work may contravene Rule 5.3(b) even if the lawyer does have reason to believe the employee is both honest and capable. ‘Reasonable efforts to ensure’ that an employee’s conduct is compatible with the lawyer’s professional obligations is a proactive standard that requires more than careful selection and appropriate training of the employee. As authoritative commentary to the Rule and case law make clear, proper supervision is necessary also.” (In re Cater, D.C., No. 03-BG-624, 11/23/05).

An Oklahoma lawyer was publicly reprimanded for facilitating his employee’s unauthorized practice of law by failing to supervise an employee hired to run a self-sustaining “research center” within the law office. The “research center” was intended to provide legal support services such as photocopying and organizing legal documents. According to the court, the nonlawyer told Martin, the lawyer, that he was on probation for committing a white-collar crime and needed a job as a condition of his probation. The lawyer admitted that the “research center” was set up under his name as the lawyer, and he never did a background check on the nonlawyer employee and never monitored the operation of the “research center.” Martin set up a separate bank account for the “research center” and allowed the nonlawyer employee to make all the deposits and write all the checks on that account.

The nonlawyer employee contacted an inmate and offered the lawyer’s services on post-conviction relief. The inmate’s parents agreed to pay the fee of $19,000 to hire the lawyer. The nonlawyer filed two pro se petitions on behalf of their son without the knowledge of the lawyer.

In finding a violation of Rule 5.3 (Supervision of a Nonlawyer) the judge stated “[t]he fact that the lawyer himself was victimized by the employee’s unauthorized practice does not reduce his culpability in law one iota. The gravity of the breach is treated the same as if the lawyer had committed the infractions himself.” The court also stated “all licensed lawyers are fully and absolutely accountable for all breaches of professional ethics committed not only by fellow lawyers in the law firm, but also by those persons who are unlicensed or lay employees of a lawyer or of an association of lawyers in a single firm, regardless of the firm’s name or of its precise legal entity.” State ex rel. Oklahoma Bar Ass’n v. Martin, Okla., No. SCBD-5518, 9/21/10.

A Florida lawyer was suspended for one year for allowing a paralegal to act on his behalf in dealing with an immigration matter, including handling all interaction with the clients, and preparing and filing pleadings on the clients’ behalf. The court noted “[i]n the present case, the record shows that even though Akbas (paralegal) worked as a paralegal at U.S. Entry, she actually was the person in control of the corporation’s day-to-day operations. She met with the clients, conducted the client interviews, and made the decisions as to the appropriate course of action for the clients.” “Abrams did not merely fail to supervise Akbas in the transmission of legal advice, but rather he provided no legal advice whatsoever. Instead, Akbas conducted client intake and formulated and dispensed legal advice.” Florida Bar v. Abrams, 919 So. 2d 425, 429, 430 (Fla. 2006).

Lawyer’s Responsibilities Regarding Nonlawyers
Lawyers have traditionally used the services of nonlawyers, such as secretaries, legal assistants, interns, bookkeepers, and investigators to help them provide legal services to their clients. Skilled assistants can be invaluable in a law practice. Lawyers should take care, however, not to become complacent about their supervisory responsibilities for their nonlawyer staff. The “it wasn’t me” defense often does not work.

Lawyers are obligated to make reasonable efforts to ensure that the nonlawyer employee’s conduct is compatible with the lawyer’s professional responsibilities as expressed in the ethics rules. Rule 5.3(a) requires that a law firm’s
partner “shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the [nonlawyer’s] conduct is compatible with the professional obligations of the lawyer.” Rule 5.3(b) similarly requires that a lawyer “having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.”

There are several ways lawyers can be held responsible for the misconduct of their nonlawyer staff. A lawyer’s responsibility for nonlawyer staff typically arises in the following contexts: ordering or ratifying misconduct; failing to educate nonlawyers to avoid disclosure of confidences and to screen for conflicts of interest; assisting in the unlawful practice of law; failing to safeguard client property; and failing to adequately train and supervise.

**Ordering or Ratifying Misconduct**

A lawyer can be disciplined for ordering or ratifying misconduct by an assistant. Rule 8.4(a) makes it a violation of the ethics rule for a lawyer to assist or induce another to do what the lawyer cannot. Since the lawyer has supervisory responsibility to make sure assistants do not violate the ethical rules then the lawyer certainly cannot ignore that responsibility and ask the assistant to engage in any conduct in which the lawyer cannot ethically undertake. Don’t tell an employee to do anything you are not ethically allowed to do yourself.

**Failing to Screen for Conflicts of Interest**

The conflicts rules that govern attorneys generally apply to assistants too. Nonlegal staff should receive training on what constitutes a conflict of interest. Nonlegal staff who will work on a matter should be included in the conflicts search. Staff should be encouraged to notify the lawyer if they feel they may have a conflict regarding a new or existing case. If a conflict is discovered then the nonlegal staff person should be screened from involvement in the matter. This is particularly important where the nonlegal assistant has worked at another law firm. For purposes of conflicts, treat the hiring of nonlegal staff as you would the hiring of an attorney. See Virginia LEO 1800 (2004). A two-member law firm hiring a secretary who until the previous week was the only secretary at another two-member law firm representing a litigation adversary will not be disqualified from the case, as long as the new firm: warns the secretary not to reveal or use any client confidences acquired at the old firm; advises all lawyers and staff not to discuss the matter with the new secretary; and screens the new secretary from the litigation matter (including the new firm’s files on the matter). Although not mandating any specific steps, the bar recommends that the new firm “develop a written policy statement” regarding such situations, and note the need for confidentiality “on the cover of the file in question.” See also Virginia LEO 1832 (2007).

**Confidentiality**

Nonlawyers should be instructed not to reveal, even to their closest friends and relatives, any information related to the representation of a client. The duty of confidentiality should be fully explained to nonlegal staff upon employment. It should also be made clear that the duty continues even if the employment relationship ends. Additionally, the nonlegal employee should be asked to agree to and sign a confidentiality statement regarding any information they learn while employed by the firm. See Virginia LEO 1832 (2007). Although not bound by lawyers’ ethics rules, law firms’ secretaries must maintain the confidentiality of information they learn. For an expanded discussion on this issue see A Basic Guide for Paralegals: Ethics, Confidentiality and Privilege by Tom Spahn, Esq., McGuireWoods LLP (10-2006).

**Unauthorized Practice of Law**

Nonlegal staff should be trained to appreciate what tasks if undertaken by a nonlawyer would constitute the unauthorized practice of law and they should be sensitive to avoiding such activities. Virginia’s Unauthorized Practice Rules can be found in the Rules of the Supreme Court of Virginia Part 6, § 1. The UPL Committee also adopted by recommendation the Virginia Alliance Paralegal Guidelines that address the ethical performance of services by legal assistants in Virginia. Both of these resources should be reviewed by all legal assistants and lawyers who have staff. Problems often include counseling clients about legal matters or providing a legal opinion in response to questions of the client. It is not uncommon to find “opinion creep” as the assistant becomes more experienced in an area of law. Remind employees what questions they can and cannot answer. Note what your staff discusses with clients on the phone. Sometimes the client assumes that the assistant is a lawyer. Such wrong impressions should be immediately corrected. Virginia UPL Opinion 191 (10/28/96) lists the following activities as impermissible: “[A] nonlawyer is not permitted to determine the validity of a claim, explain documents, fee agreements, the settlement of a claim, or negotiations with the adverse party or their insurer to a client. Each of these activities appears to directly involve the application of legal principles to facts, purposes or desires, and are therefore considered the practice of law and must be performed only by a licensed attorney.” UPL Opinion 191 describes the permitted activities as follows: “[A] nonlawyer employee working under the direct supervision of a Virginia attorney may participate in gathering information from a client during an initial interview — provided that this involves nothing more than the
gathering of factual data and the nonlawyer renders no legal advice . . . A nonlawyer employee may convey direct information from their supervising attorney to a client regarding the status of a case, or deliver documents with a request for some particular action.” See also Virginia UPL Opinions147 and 129.

Failing to Safeguard Client Property

Lawyers have a fiduciary duty to safeguard clients’ funds and property under Rule 1.15 Safekeeping Property. If nonlawyer staff will be involved in handling books and accounts involving client funds, the lawyer should ensure that staff is thoroughly trained and familiar with the requirements of Rule 1.15. A lawyer should never completely abrogate to one staff person all activities related to client escrow accounts as this makes commission of fraud easier. Appropriate accounting checks and balances should be in place to help prevent fraud. An annual audit can help check for ways to safeguard against fraud by lawyers and staff. For additional suggestions for preventing fraud in your practice, See articles: “Prevent fraud in your workplace,” by CBIA News, May 2007 – Vol. 85, No. 4 and “Thinking About the Unthinkable: How to Guard Against Fraud and Embezzlement in your Firm,” by David Debenham and Shelia Blackford, June 2009-Vol. 35, No. 4.

Marketing Activities

Nonlawyers who will be involved in the development of marketing materials for the firm need to be carefully trained and supervised to make sure they understand the ethics requirements as they relate to lawyer advertising. The lawyer needs to be responsible for the finale review of any information to be communicated for advertising purposes to ensure compliance with the ethics rules. A lawyer should not delegate in-person solicitation to a nonlawyer, even acting under the lawyer’s supervision. See Virginia LEO 1290 (1989). A law firm staff member may not solicit business for the firm even if the nonlawyer is to receive no additional compensation for the service (because the staff member would be compensated with a regular salary for recommending or securing employment for the law firm).

Failing to Adequately Train and Supervise

As may be obvious by now, most of the ethical problems resulting from nonlawyer staff conduct arise because lawyers have abdicated their training and supervisory responsibilities. While there are many appropriate uses for nonlegal assistant the ethical rules still require direct supervision and review by the lawyer. Rule 5.3(c) states:

…a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

• the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

• the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

The lawyer must give nonlegal assistants appropriate instruction and supervision concerning their work, and should be responsible for overseeing and reviewing their work product. See Virginia LEO 1600 (1994). A lawyer should not open up a branch office to be staffed entirely by nonlawyers (with the lawyer expecting to visit the branch office two days each month), because a lawyer’s supervision over non-lawyer staff “should be significant, rigorous and efficient.”

The Buck Stops Here

Ultimately, lawyers are obligated to make reasonable efforts to ensure that the nonlawyer employee’s conduct is compatible with the lawyer’s professional responsibilities as expressed in the ethics rules. It is the lawyer’s ongoing responsibility to educate and supervise nonlegal staff. Failure to do so is an ethical violation for which the lawyer can be disciplined. Lawyers may also be found liable for malpractice if they fail to adequately supervise and train paralegals. Musselman v. Willoughby Corp., 230 Va. 337, 337 S.E.2d 724 (1985) (finding that a lawyer had committed malpractice that arose out of actions taken by his nonlawyer staff in preparing documents and participating in the closing of a real estate transaction). As lawyers, the buck stops with us, so we need to remain vigilant in educating, training and supervising our staff. (Note, paralegals who engage in the unauthorized practice of law can be subject to criminal charges in most states, including Virginia where it is a Class I misdemeanor.)

Wendy Inge is the Virginia risk manager for Liability ALPS, the Virginia State Bar-endorsed legal liability insurer. She is available to answer risk management questions at no charge for all members of the VSB. She can be reached at (800) 367-2577.
Heavyweight Treatise on Evidence Reaches Peak Fighting Weight

by Lee Livingston

Virginia attorneys and judges reach for The Law of Evidence in Virginia to answer their questions about evidence. For decades this treatise has provided accurate, comprehensive coverage of this area of the law, and now includes 3,700 evidence decisions discussed in detail.

Lexis chose the same color and binding for the seventh edition. The only difference on the outside of the new edition is a new name on the binding. In small gold letters under Professor Charles E. Friend’s name, Professor Kent Sinclair is identified as a co-author.

Inside, this dream team of learned professors has overhauled the treatise — with perfect timing, Virginia has adopted rules of evidence, after twenty years of debate and discussion. Friend and Sinclair integrate the new rules seamlessly. Chapter 1 provides handy tables to match sections of the Virginia Code to applicable rules now located in Part Two of the Rules of Court.

Source notes to the Rules of Evidence as published in the Code Commission of Virginia are included in Appendix B. The General Assembly directed that no background be published in the Rules of Evidence themselves (they are codified in volume 11 of the Code of Virginia, the paperback volume, without history or source notes). So, having the background in Appendix B of the book provides another way to get detailed discussion; any case in the source notes can be found in the index, directing one to the section of the text where the case is explained in context.

The Virginia Rules of Evidence deal with presumptions at a high level of generality. Chapter 4 on “Presumptions” thus provides much-needed detail about their application and requirements, giving a complete synthesis of general principles and the operation of all recognized presumptions in the commonwealth.

Far from an update or minor supplement, the seventh edition skips or integrates entire chapters into other sections that were less useful. For example, the old edition Chapter 2 “Preparation for Trial” is pared. Few lawyers went to this treatise to find guidance about how to prepare for trial. Chapter 2 now consolidates Virginia principles and practice for admission of proof and the increasingly important “offers of proof” concept, starting with objections and continuing through the appeal of decisions admitting or excluding proof.

Under Sinclair’s complete rewriting of the treatise, the footnotes are now on the same page as the discussion (no more flipping to endnotes for the cases), and a clean and short style of footnotes allows more information per page and easier, faster access to the case law or statutes that supply the governing evidentiary principles on a given subject. Duplicate parentheticals in the notes have been eliminated and specific supporting case law highlighted.

Chapters that were ambiguous, and subheadings that did not tell the reader clearly the content of each section, are sharpened considerably. For example Chapter 1 was titled “In General” and contained a hodgepodge of topics on appeals, exhibits, and judicial estoppel. Chapter 1 in the seventh edition is titled “Evidence in Virginia” and is now subdivided into fourteen sections, replacing the prior ten. Duplicate subsections on the parole evidence rule such as “Introduction – The Rule Stated” and “Parole Evidence Generally” are combined into one section: “Operation – and Limits – of the Parole Evidence Rule.”

Throughout the text, checklists and bulleted lists are used for clear layout of examples in common illustrations of situations covered by the rules.

In addition to section headings, there are bold catch lines to highlight key topics of paragraphs within the sections of each chapter.

The final product weighs in at twenty-one in the earlier edition. Yet, reorganized subsections aid the reader in finding specific topics, such as: “DNA Evidence,” “Use of Learned Treatises With Experts,” “Confrontation Rights and the Hearsay Rule.” Important but complicated areas get new subheadings and are broken down intuitively. For example, “Party Admissions” are broken out into seven subcategories in Chapter 15.

Sinclair sees where litigators are swinging and handles those places like Ali on his favorite speed bag. For example, he notes that probably the most contentious issue in criminal practice (in Virginia and nationally) is use of prior crimes evidence — proof that a defendant committed another wrongful act, for which he is not now on trial. Section 8 – 4 includes not only the key Virginia examples, but also the roster of justifications for use of such evidence, and recognized grounds for excluding such proof. The special weighing of prejudice in “bad acts” proof situations (a different balancing than done under the basic probative value – prejudicial effect balance of Rule 2:403) is explained and illustrated.

Moreover, Sinclair, having been at the center of the enactment of the Virginia Rules of Evidence, recognizes where practitioners have expressed questions or even surprise about the new rules. For example, some litigators have asked about the compromise provision in Rule 2:408. Section 7–16 of the treatise gives the complete background and breaks down the components of how the rule distills former practice.

The Seventh Edition of The Law of Evidence in Virginia stands as a litigator’s most important partner for sifting over evidence in Virginia. When your volume arrives it might be best not to thoughtlessly shelve it. Savvy practitioners who wish to keep up would benefit from reading Chapter 1 and skimming the table of contents before their next trial.
Introduction to Virginia’s Sentencing Guidelines — Six-hour seminars, 9:30 a.m. to 5 p.m.

March 4, 2013 — Richmond/Henrico
Henrico County Training Center
7701 E. Parham Road

March 12, 2013 — Radford
Radford University
801 E. Main Street

March 14, 2013 — Portsmouth
Department of Social Services
1701 High Street

March 27, 2013 — Fairfax
Fairfax County Government Center
12000 Government Center Parkway

Virginia Lawyer publishes at no charge notices of continuing legal education programs sponsored by nonprofit bar associations and government agencies. The next issue will cover April 11, 2013, through July 16, 2013. Send information by March 12 to hickey@vsb.org. For other CLE opportunities, see Virginia CLE offerings below and “Current Virginia Approved Courses” at http://www.vsb.org/site/members/mcle-courses/ or the Web sites of commercial providers.
CLE Calendar

Virginia CLE Calendar
Virginia CLE will sponsor the following continuing legal education courses. For details, see http://www.vacle.org/seminars.htm.

February 21
Prepare to Succeed: How to Get Your Client Ready for Litigation
Telephone
10 AM–NOON

February 26
Hanging a Shingle: How to Start a Successful Law Practice
Video — Abingdon, Alexandria, Charlottesville, Richmond, Roanoke, Virginia Beach
9 AM–4:30 PM

February 27
What Every Virginia Lawyer Should Know About Health Law
Telephone
NOON–2:30 PM

February 28
Hanging a Shingle: How to Start a Successful Law Practice
Video — Dulles, Fredericksburg, Lynchburg, Winchester
9 AM–4:30 PM

March 1–2
Seventeenth Annual Advanced Real Estate Seminar
Live — Williamsburg
FRIDAY: NOON–5:20 PM; SATURDAY: 8:00 AM–12:20 PM

March 5
Medical Malpractice Case Screening: Knowing When to Keep the Case, and When to Refer It
Live — Charlottesville/Webcast/Telephone
NOON–2 PM

March 8
Substance Abuse and Mental Health Issues in the Law Office
Live —
Charlottesville/Webcast/Telephone
NOON–1 PM

March 12
Representation of Incapacitated Persons as a Guardian ad Litem — 2012 Qualifying Course
Video — Abingdon, Alexandria, Charlottesville, Richmond, Roanoke, Virginia Beach
9 AM–4:05 PM

March 13
Understanding Financial Statements
Live — Fairfax/Telephone
9 AM–1:15 PM

March 13
Representation of Incapacitated Persons as a Guardian ad Litem — 2012 Qualifying Course
Video — Tysons Corner
9 AM–4:05 PM

March 14
Forty-Third Annual Criminal Law Seminar 2013
Video — Alexandria, Charlottesville, Danville, Hampton, Richmond, Roanoke, Virginia Beach
8:15 AM–4 PM (RICHMOND VIDEO BEGINS AT 9 AM)

March 14
Substance Abuse and Mental Health Issues in the Law Office
Live —
Charlottesville/Webcast/Telephone
NOON–1 PM

March 15
The “Means Test” Form Under Chapter 7 and Chapter 13, and Other Nuts and Bolts of Consumer Bankruptcy Law
Live — Richmond
9 AM–4:30 PM

March 19
12th Annual Advanced Seminar for Guardians ad Litem for Children — 2012
Video — Abingdon, Alexandria, Charlottesville, Richmond, Roanoke, Virginia Beach
9 AM–4:30 PM

March 20
12th Annual Advanced Seminar for Guardians ad Litem for Children — 2012
Video — Tysons Corner
9 AM–4:30 PM

March 20
Intellectual Property and Information Technology Licensing for Transactional Attorneys
Live —
Charlottesville/Webcast/Telephone
NOON–2 PM

March 21
Forty-Third Annual Criminal Law Seminar 2013
Video — Lynchburg
8:15 AM–4 PM

March 21
Employment Law Ethics Update
Live —
Charlottesville/Webcast/Telephone
NOON–2 PM

March 26
Representation of Children as a Guardian ad Litem 2011
Video — Abingdon, Alexandria, Charlottesville, Richmond, Roanoke, Virginia Beach
8:30 AM–5:15 PM (RICHMOND VIDEO BEGINS AT 9 AM)

March 27
Forty-Third Annual Criminal Law Seminar 2013
Video — Winchester
8:15 AM–4 PM
For confidential toll-free consultation
available to all Virginia attorneys on questions related to
legal malpractice avoidance, claims repair, professional
liability insurance issues, and law office management,
call McLean lawyer, John J. Brandt, who acts under the
auspices of the Virginia State Bar at
1-800-215-7854.

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1-800-215-7854.

R. Edwin Burnette Jr.
Young Lawyer of the Year Award
Seeking Nominations

The Virginia State Bar Young Lawyers Conference is seeking nominations for the R. Edwin Burnette Jr. Young Lawyer of the Year Award.

This award honors an outstanding young Virginia lawyer who has demonstrated dedicated service to the YLC, the legal profession and the community.

The nomination deadline is April 1. Nominations should be sent to:

Christy E. Kiely
Hunton & Williams LLP
951 East Byrd Street, East Tower
Richmond, VA 23219-4074
Fax: 804-788-8218
ckiely@hunton.com

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Ryan Honored for Service to Richmond Community Organization

by Gordon Hickey

Ten years ago, James S. Crockett Jr., then a partner at Troutman Sanders, was about to move to Charleston, West Virginia, to join a firm there. But, before he did, he suggested to two fellow members of his First Presbyterian Church congregation that they might work well together.

One was Martha Rollins, who had recently started a company called Boaz and Ruth by opening a thrift store to help recently released inmates get their lives started over. The other was Crockett’s fellow Troutman lawyer James E. Ryan Jr. It turned into a long and very successful partnership.

Today, Jim Ryan is formally retired and winding down his practice with his remaining individual clients. On January 4, Boaz and Ruth honored him during a breakfast ceremony at the Troutman Sanders offices in downtown Richmond.

“Jim Ryan has provided stability and encouragement to me and to Boaz and Ruth with his readily available wisdom and sound legal support,” Rollins said. “The teammates he assembled to work with our varied needs included Tom Miller in real estate and Tevis Marshall in human resources.

“Jim is a caring and compassionate ‘translator’ between the languages of law and regulations and the language of daily operations. He and the Troutman team assisted us in maintaining compliance with laws and regulations so we could focus on our mission.”

John S. West, partner at Troutman, said Ryan “has really been the go-to person for them,” at the firm. Ryan has worked with Boaz and Ruth on a number of issues on his own and in other instances has directed the company to other lawyers in the firm for assistance. “He believes in the mission of that group.”

That mission is to reintegrate recently released offenders into the community. At the time Ryan became involved, Boaz and Ruth owned a thrift store in Richmond’s Highland Park neighborhood that took in, fixed up, and sold furniture. The workers were all former prison and jail inmates.

Ryan said that those former inmates need three things to get their lives back in order—a place to stay, a job, and a program to help them get back on the right track. Boaz and Ruth provides those things.

With pro bono help from Ryan and other lawyers at Troutman, the company has greatly expanded. The firm helped Rollins buy a half dozen Highland Park houses and the old Fire House 15 on Meadowbridge Road. It is now a restaurant and shops operated by former offenders. The firm worked to secure a real estate tax break from the city, helped it set up an affiliation with AmeriCorps, and helped with a number of personnel issues.

Ryan describes the assistance given to Boaz and Ruth as a team effort by Troutman lawyers. “I have been sort-of a gate keeper,” he said. “I did it because it’s a worthwhile thing to do. It’s a good mission. … Think about being an ex-offender and how many hurdles there are to reintegrating into the community. There are a lot of ways to reintegrate in negative way.”

Boaz and Ruth, with the help of Ryan and others at his firm, provides just as many positive ways.

Free and Low-Cost Pro Bono Training

Visit the Pro Bono page on the VSB website for free and low-cost pro bono training and volunteer opportunities: http://www.vsb.org/site/pro_bono/resources-for-attorneys
Pro Bono Celebration Features Downtown Richmond Sites

This year’s Virginia State Bar Pro Bono Award Celebration, on April 15, will include a visit to the federal courthouse in downtown Richmond that is named for two giants of the law, Spottswood W. Robinson III and Robert R. Merhige Jr. Events also will include a tour of the nearby Library of Virginia.

This year’s program will start in the morning with guided tours of the Library of Virginia Special Collections and Exhibit on Law and Justice in Virginia and of the courthouse. The afternoon CLE course at the library titled “Eradicating the Justice Gap: Rule 6.1 and Other Tools” will carry 2.5 credit hours for ethics, pending approval by the Virginia State Bar MCLE Board.

The Library of Virginia will be the site of the 7 p.m. ceremony to present the 2013 Lewis F. Powell Jr. Pro Bono Award. The recipient of the Oliver W. Hill Law Student Pro Bono Award also will be honored at the ceremony. VSB President W. David Harless will preside.

A reception for invitees will follow.

The program is open without charge to lawyers, judges, and affiliated professionals who are interested in access to justice issues, though space is limited for the tours. For registration and other details as they become available, go to http://www.vsb.org/site/pro_bono/PB-celebration.

The courthouse opened in its current location in 2008 on Broad Street between 7th and 8th streets. As Congressman Bobby Scott said when he sponsored legislation to name the building, “It is … fitting that we would name the new Federal Courthouse in our state’s capital after two distinguished jurists, Judge Spottswood W. Robinson III and Judge Robert R. Merhige Jr., whose exemplary careers under the law displayed the best ideals and principles of our Constitution and legal traditions.”

Robinson’s career included a long list of firsts. In 1964 he became the first African American to be appointed to the United States District Court for the District of Columbia; in 1966 President Lyndon B. Johnson appointed him the first African American to the United States Court of Appeals for the District of Columbia Circuit; on May 7, 1981, he became the first African American to serve as chief judge of the District of Columbia Circuit. Robinson served on the U.S. Commission on Civil Rights and as dean of the Howard University Law School. He was one of the lead attorneys with the NAACP Legal Defense and Education Fund from 1948 to 1960 and represented Virginia plaintiffs in the 1954 landmark U.S. Supreme Court case of Brown v. Board of Education.

Merhige was appointed U.S. District Court judge for the Eastern District of Virginia, Richmond Division, by President Johnson in 1967. He served there for thirty-one years and presided over some of the most important and complex litigation in U.S. history. He ordered the University of Virginia to admit women in 1970 and in 1972 he ordered the desegregation of dozens of Virginia school districts.

The Library of Virginia was created in 1823 and its first home was the top floor of the state capitol. In 1892, the General Assembly provided for a new State Library on Capitol Square in what is today known as the Oliver Hill Building. In 1940 it moved to what is today the Patrick Henry Executive Office Building. The library moved to its current location at 800 East Broad Street in 1997.
CALL FOR NOMINATIONS

Virginia Legal Aid Award

Sponsored by the VSB Special Committee on Access to Legal Services. The award is presented at a luncheon for interested members of the legal aid and pro bono communities during the VSB Annual Meeting on Friday, June 14.

Nomination Deadline:
April 1, 2013

For more information, see

The Virginia State Bar publishes pamphlets, handbooks, and a video on law-related issues for Virginia’s lawyers and Virginia’s citizens. All publications and an order form can be found on the VSB website at http://www.vsb.org.

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“Not in Good Standing” Search Available at VSB.org

The Virginia State Bar offers the ability to search active Virginia lawyers’ names to see if they are not eligible to practice because their licenses are suspended or revoked using the online Attorney Records Search at http://www.vsb.org/attSearch.asp.

The “Attorneys Not in Good Standing” search function was designed in conjunction with the VSB’s permanent bar cards. Lawyers are put on not-in-good-standing (NGS) status for administrative reasons — such as not paying dues or fulfilling continuing legal education requirements — and when their licenses are suspended or revoked for violating professional rules.

The NGS search can be used by the public with other attorney records searches — “Disciplined Attorneys” and “Attorneys without Malpractice Insurance” — to check on the status and disciplinary history of a lawyer.

Professional Notices

Email your news to hickey@vsb.org for publication in Virginia Lawyer. All professional notices are free to VSB members and may be edited for length and clarity.

VSB Staff Directory

Frequently requested bar contact information is available online at www.vsb.org/site/about/bar-staff.
Jack W. Burch Jr., founding partner of Macaulay & Burch PC, has been named to the 2013 Class of Fellows by the Virginia Law Foundation.

David A. Buzard, of counsel to Jeremiah A. Denton III PC, has been on assignment with the U.S. Department of State, Africa Bureau, Office of Regional and Security Affairs, and posted in Kinshasa, Democratic Republic of the Congo (the former Zaire). There, he is seconded to the European Union Security Sector Reform Advisory and Assistance Mission to the Congolese Armed Forces. He recently was promoted to the position of Strategic Counsel: Inspector General and Military Justice. Buzard retired from the U.S. Navy JAG Corps Reserve in December 2011, and graduated from the U.S. Army Inspector General School in November 2012. He may be contacted at david.buzard@eusec-rdc.eu.

Ashley R. Dobbs, an intellectual property and business attorney at Bean, Kinney & Korman PC, has been appointed to the U.S. board of directors for PetSmart Charities. She will serve a three-year term. Dobbs focuses her law practice on corporate formation, business transactions, and intellectual property.

William E. Evans has joined Bean, Kinney & Korman PC as an associate. He will practice in the areas of commercial litigation and creditor’s rights.

Juanita F. Ferguson has been named a shareholder of Bean, Kinney & Korman PC. She was previously an associate. She focuses her practice in the area of litigation. She has extensive experience in the areas of construction, real estate, title insurance, and business litigation.

Griffin “Bus” Garnett III has been awarded the William L. Winston Award, honoring both his service to the legal profession and to the broader community, by the Arlington County Bar Foundation.

Christopher M. Gill, Belinda D. Jones and David B. Lacy have been elected partners of Christian & Barton LLP. Gill focuses his legal practice on commercial real estate, finance and environmental matters. Jones is a commercial litigation attorney who represents clients in various contractual disputes, health care, products liability, intellectual property, and construction matters. Lacy is a litigation attorney who represents clients in a variety of employment and other commercial disputes, products liability and intellectual property matters.

Stephanie E. Grana of Cantor Stoneburner Ford Grana & Buckner PC in Richmond is the 2012 recipient of the Women of Achievement Award from the Metropolitan Richmond Women’s Bar Association. The honor recognizes an outstanding MRWBA member who not only excels in the legal arena but understands the importance of public service, mentorship and civic responsibility to the personal satisfaction and professional advancement of women in the legal profession.

Alicia A. Hilger, Kristi M. Caturano, and William D. Moore III have joined Glasser and Glasser PLC as associate attorneys. Hilger serves the firm’s creditors’ rights group. Caturano operates out of the firm’s Fairfax location, where her focus is on creditors’ rights and collections. Moore will also operate out of the firm’s Fairfax office, where his focus is on creditors’ rights, collections, commercial litigation, civil litigation, foreclosures, and landlord/tenant matters.

Lauren Jenkins is a partner in Holland & Knight’s Northern Virginia office. Jenkins, a member of the firm’s Business Law Section, focuses her practice on tax and estate planning, as well as trust and estate administration. She was formerly an associate.

Harry M. Johnson III of Hunton & Williams and Scott C. Oostdyk of McGuire Woods LLP are the joint recipients of the VBAs 2013 John C. Kenny Pro Bono Award. The award is given annually to individuals or law firms demonstrating dedication to furthering the delivery of pro bono legal services to the poor and underserved in the metro area.

Douglas K. Landau, of Abrams Landau Ltd., will be teaching on the American Association for Justice Social Security Success Seminar program in New Orleans, Louisiana. AAJ’s Social Security Success Seminar is intended to assist practitioners navigate the Social Security Administration’s complicated bureaucracy and disability claims process.

Kimberly L. Marshall has joined the Virginia Family Law Center PC as a partner. Her practice focuses on family law including divorce, custody, support and pre-nuptial agreements, general civil litigation, wills and living wills/advanced health care directives.

G. Michael Pace Jr., founder of what is now the Virginia Law Foundation & The Virginia Bar Association Rule of Law Project, will receive the VBAs Gerald L. Baliles Distinguished Service Award. The honor recognizes and appreciates exceptional service and contributions to the bar and public at large. Pace, the managing partner of Gentry Locke Rakes & Moore LLP, in Roanoke, will receive the honor at the banquet during the 2013 Annual Meeting in Williamsburg.

Edward A. Pennington, Stephanie D. Scruggs, Sid V. Pandit and John P. Moy have joined the Intellectual Property Practice of Smith, Gambrell & Russell in Washington, D.C.

Antigone Peyton and Marynelle Wilson have joined Berenzweig Leonard LLP as of counsel, where they will practice patent, trademark, and copyright law from the Tyson’s office.

Derek K. Prosser has become a member of Tyler, Bartl, Ramsdell & Counts PLC in Alexandria.

Jessica B. Summers has joined Paley Rothman, a full-service law firm in the Washington area, as an associate. She is a member of Paley Rothman’s Employee Benefits, Employment Law and Estate Planning practice groups.
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The Judicial Inquiry and Review Commission of Virginia seeks applicants for the position of Commission Counsel. The successful applicant will begin work for the Commission on September 3, 2013, and work with present Commission Counsel until January 1, 2014, when the latter will retire. The Commission is an independent judicial branch agency composed of seven members elected by the General Assembly. Counsel serves at the pleasure of the Commission and must be a member in good standing with the Virginia State Bar, with at least 10 years’ experience. Significant trial and appellate experience is preferred. Salary range is $142,329 to $158,134. Standard state employee benefits are provided.

Counsel’s duties are as follows: supervise Commission staff and day-to-day office functions; screen, investigate and evaluate complaints against Virginia judges alleging ethics violations; prepare monthly agendas for Commission meetings and advise Commission members regarding merits of such complaints; represent the Commission’s position at Commission hearings, in the Virginia Supreme Court and before the legislature; provide ethics advice to Virginia judges upon request; make presentations at judicial conferences regarding ethics issues. Counsel must have the skills needed to deal with the public and the three branches of state government. The Commission’s office is in Richmond and Counsel must reside in the Richmond area and be willing to travel within Virginia as necessary. Interested attorneys should send a one-page cover letter and a resume (not to exceed three pages) to: Donald R. Curry, Counsel Judicial Inquiry and Review Commission, P.O. Box 367, Richmond, VA 23218. Applications must be received no later than April 15, 2013. EOE

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Registration information and schedule of events will be available online in April at www.vsb.org.
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