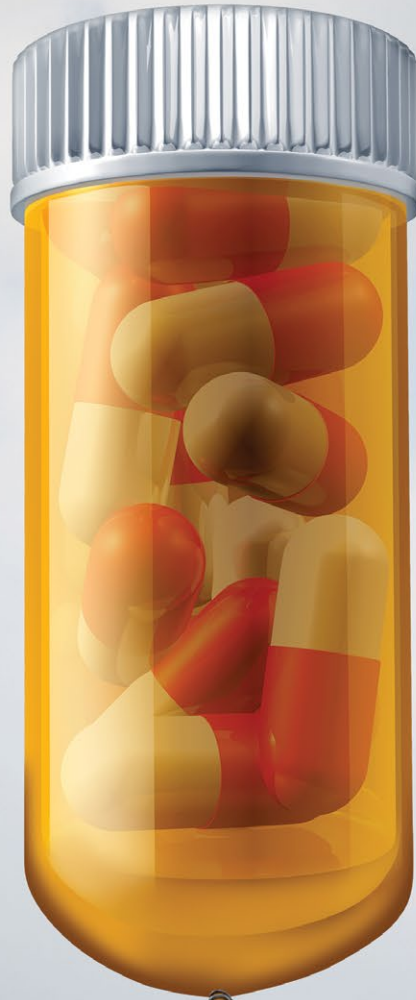


Virginia Lawyer

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VIRGINIA LAWYER REGISTER

The Official Publication of the Virginia State Bar



Health Law

Taking Aim at Virginia's Opioid Crisis through Changes in Public Health Law

False Claims Act Liability

Exceptions in Healthcare Contracting

The Clients' Protection Fund Steps In

What I learned from Justice Cynthia D. Kinser About Being a Lawyer

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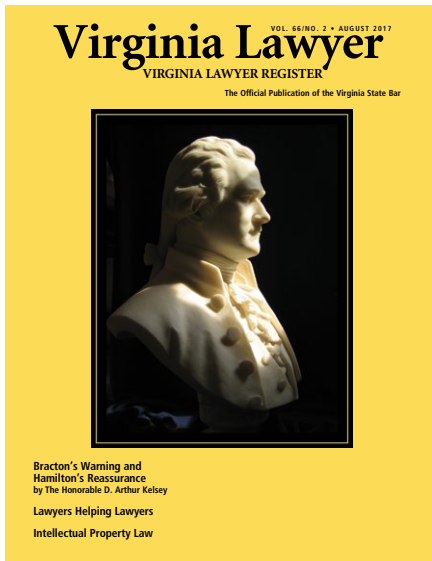
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Incorrect on Chief Justice Taney

The defense of originalist theory by Justice D. Arthur Kelsey appearing in the August edition (“Bracton’s Warning and Hamilton’s Reassurance”) deserves a lot of praise. It was persuasive and timely. But the judge is incorrect in his criticism of the opinion of Chief Justice Taney in *Scott v Sanford*. His criticism suggests that the Supreme Court’s ruling is based on the political opinions of a majority of the justices rather than on authentic constitutional underpinnings. To fit within that narrative, Justice Kelsey describes Taney and the majority as being “pro-slavery.” The Chief Justice emancipated the cadre of slaves that he inherited from his family and was opposed to slavery on moral and religious grounds. In spite of his personal views, he felt compelled to do exactly as Justice Kelsey argues that all judges should do in connection with constitutional litigation: attempt to determine whether the founding fathers intended to treat African Americans as citizens. This he did in a masterful study of constitutional history. I challenge anyone to read the opinion and point out a logical or intellectual flaw. Justice Kelsey believes that the majority members of Taney’s court “got their politics wrong.” It’s almost as

if we are reading different cases. There is absolutely no hint of political commentary in the opinion, and its conclusions concerning the intent of the founders are all but indisputable. The same goes for the Court’s ruling that Congress had no authority to prohibit the expansion of slavery into new territories. The Constitution very clearly treated political decisions about such questions as what species of property could be legally owned by citizens as being within the competence of the citizens of a state or territory, and not that of the federal government.

Taney was a superb lawyer and a distinguished public servant in several capacities. The modern tendency to treat him and the *Dred Scott* opinion as suffering from “an appalling stench” is unfair and unjustified.

Thomas Dugan
Hilliard, Ohio

Justice Kelsey Responds

I respectfully disagree with Mr. Dugan’s defense of *Dred Scott*.

Instead, I share Professor Amar’s view that Chief Justice Taney’s opinion in *Dred Scott* belongs in the “lowest circle of constitutional Hell.” AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 270 (2012). The opinion was a “preposterous garbling of the Constitution as that document was publicly understood when ratified” and was “harshly criticized on precisely these grounds by notable contemporaries.” *Id.* at 271. One of them, President Abraham Lincoln, openly challenged the reasoning of *Dred Scott* as influenced by “apparent partisan bias” and “based upon assumed historical facts which are not really true.” ² *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 401 (Roy P. Basler ed., 1953). Justice Scalia agreed,

Letter continued on page 8

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describing *Dred Scott* as a patently “erroneous” opinion that “covered” the Court “with dishonor and deprived [it] of legitimacy.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., dissenting).

Aside from its flawed reasoning, *Dred Scott* suffered from several other improprieties, including the “covert efforts of President Buchanan to influence the decision,” Taney’s refusal “to allow the dissenters to have a copy of the opinion,” and Taney’s “secret revisions” to the majority opinion after the decision was announced — which added 18 pages of additional text to the opinion according to Justice Curtis. Daniel A. Farber, Symposium, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 PEPP. L. REV. 13, 39–40 (2011); see also EARL M. MALTZ, *SLAVERY AND THE SUPREME COURT, 1825–1861*, at 240–44, 268–69 (2009).

As for Chief Justice Taney, I pass no judgment upon him personally. I instead take issue with the “extreme proslavery position in his opinion,” Timothy S. Huebner, *Roger B. Taney and the Slavery Issue: Looking Beyond — and Before — Dred Scott*, 97 J. AM. HIST. 17, 17 (2010), which rested not on sound legal reasoning, but on the view that African Americans were “beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.” *Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

In short, I believe that *Dred Scott* justly deserves its “unique place of infamy in American constitutional law.” Farber, *supra*, at 15.

D. Arthur Kelsey
Supreme Court of Virginia



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President's Message

by Doris Henderson Causey



Legalcare and Legalaid

THIS ISSUE OF *Virginia Lawyer* focuses on health law, and with all the news concerning the overhaul of the Affordable Healthcare Act I began to think about the concept of creating legal insurance for everyone — legal insurance similar to medical insurance. I'm thinking about legal insurance programs that are federally and state sponsored and supported by federal and state funding — similar to Medicare and Medicaid. Private legal insurance would be available as well, creating a new legal marketplace. Most importantly, this would also significantly reduce the justice gap.

It is disheartening to see citizens of Virginia facing evictions, writs of *feri facias*, warrants in debts, foreclosure, garnishments, bankruptcy, etc., without any legal representation. Across the commonwealth, many lawyers are working very hard on closing the justice gap. While people have a right to an attorney in criminal cases, they don't in civil cases, and many citizens in Virginia cannot afford an attorney in civil cases. This population of clients that cannot afford an attorney certainly deserves the same level and quality of representation as those who can afford to pay an experienced attorney. Additionally, when a person has legal representation, the probability of receiving a favorable outcome increases. How can we accomplish the goals of providing legal representation to all in civil cases and eliminating the justice gap? These persons could have legal insurance similar to Medicare and Medicaid.

Let's have Legalcare and Legalaid. Legalaid would be a jointly funded federal-state legal insurance program for low-income and needy people. Legalcare would be a federal program that provided legal coverage if you are 65 or older, or have a severe disability. Legalcare and Legalaid are just an idea that could possibly help.

How would this model work? Legal aid programs (similar to federally funded health care centers) would continue to assist those households that have gross incomes below 125 percent of the federal poverty guidelines and up to 200 percent in certain cases. However, legal aid programs could also charge according to a sliding fee scale. Fees would be based on the gross household income that is above the 125 percent of the federal poverty guidelines. For example, if a person fell within 126 percent to 200 percent of the poverty guideline they would pay a rate of \$50/hour and the rate would increase along the scale.

Thus, attorneys could all receive some federal or state reimbursement based on the number served in a particular category. It would be an opt-in program for every legal provider. Currently, every medical provider does not accept federal or state insurance and legal providers should have the same option. Every service provider, including legal aids, could accept private legal insurance. This idea does not advocate for the end of pro bono services. As we have seen with the medical models, pro bono will still be greatly needed.

Thus, the need for more attorneys to do pro bono. Many attorneys do low bono cases after completing a minimum number of pro bono cases, which is similar to medical providers. The Access Now program is a local program where doctors/specialists provide a fixed number of free services to the uninsured or underinsured. This program could also work with legal services. Firms, as well as general and solo practitioners, would donate representation for a fixed number of cases for individuals that are legally uninsured or underinsured. However, they would continue to represent others accordingly. This insured representation would only apply to individuals — not companies.

There are a few firms throughout the country that have begun to model this thought. The firms represent individuals that fall below the poverty guidelines for a reduced rate, and increase the rate as the household income increases. Open Legal Services in Utah is an example of a program with income-based fees. Thus, prepaid legal services has modeled the health insurance marketplace for years.

The benefits of legal insurance would be great. Legal insurance would assist the community, attorneys, and the courts. Many of the alternative legal service providers/insurance providers are doing very well financially. The market for affordable legal services is huge — and the benefits of such a market immeasurable. It would

Legalcare and Legalaid continued on page 12



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President's Message

Legalcare and Legalaid *continued from page 10*

assist in law students having jobs upon completion of law school and passing the bar. Individual citizens would have a variety of places to receive services. The courts would have more represented litigants. On the other hand, many would think before filing lawsuits if the other side was also represented. They would do the right thing.

The legal need will still be great. Medicare, Medicaid, and the Affordable

Care Act (Obamacare) were all created to assist with medical needs. They have not solved the medical needs or insurance gaps. Moreover, legal insurance will not solve all the legal needs. Your help is still greatly needed. Until everyone is entitled to an attorney in both civil and criminal cases, we must live up to Rule 6.1.

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Lawyers' Well-Being: A Laudable Goal

THE NATIONAL TASK FORCE on Lawyer Well-Being¹ has issued a report on how to improve well-being in the legal profession. It is directed to law firms, legal employers, bar regulators, Supreme Courts, admission officials, and others. It has a very simple premise: "To be a good lawyer, one has to be a healthy lawyer." It states that between 21 percent and 36 percent of lawyers qualify as problem drinkers, and that approximately 28 percent struggle with some level of depression, 19 percent suffer from anxiety, and 23 percent are dealing with stress symptoms. It advocates for change accompanied by a "wide-eyed and candid assessment of our members' state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer." The report's authors advocate for a holistic approach to giving lawyers a chance to enjoy life more. The Well-Being Report is a thoughtful amalgam of findings, recommendations, and resources. You can read the report by accessing this link on the VSB website: http://www.vsb.org/site/news/item/lawyer_well_being.

One lawyer commentator has posted helpful suggestions for law firms to carry out the recommendations of the Well-Being Report's recommendations:²

Form a Lawyer Well-Being Committee
Lawyers love to form committees but surprisingly, many law firms don't have a well-being committee. This is an obvious place to start. If your firm doesn't have a well-being committee, start one!

From the report, "...legal employers should launch a well-being initiative by forming a Lawyer Well-Being Committee or appointing a Well-Being Advocate."

Assess Lawyers' Well-Being

Gathering data should be a cornerstone of any well-being programs. Measure the impact of well-being programs.

Some suggestions for assessment:

- an anonymous survey conducted to measure lawyer and staff attitudes and beliefs about well-being
- stressors in the firm that significantly affect well-being
- organizational support for improving well-being in the workplace.

Monitor For Signs of Work Addiction and Poor Self-Care

Burnout, chronic stress, and anxiety is sadly the reality for too many lawyers in law firms. The report suggests establishing policies and practices to support lawyer well-being.

Numerous health and relationship problems, including depression, anger, anxiety, sleep problems, weight gain, high blood pressure, low self-esteem, low life satisfaction, work burnout, and family conflict can develop from work addiction.

Another suggestion is to de-emphasize alcohol at law firm social events. This is a topic that comes up frequently in my conversations on planning wellness events.

My advice is to not eliminate alcohol but rather offer alternatives

and have events that do not involve alcohol.

For example:

- Offer a non-alcoholic signature drink
- Use drink coupons to reduce excess consumption
- Have morning yoga, meditation, fun run/walk the morning after a social event involving alcohol

Actively Combat Social Isolation and Encourage Interconnectivity

One of the most common thing I hear from lawyers who are struggling from chronic stress/anxiety, depression, alcohol/substance abuse is this — the feeling of isolation perpetuates the problem.

As discussed in the report, "Social support from colleagues is an important factor for coping with stress and preventing negative consequences like burnout."

Work on creating a work environment where it's safe to talk about personal struggles. For example, it would be acceptable to talk about your struggles with cancer at the office, right? Similarly, it should be okay to talk about mental health issues.

Recommendations

The report has specific recommendations for a regulatory bar such as the Virginia State Bar. Those recommendations are listed below with the VSB's response or stated intention:

Leaders Should Demonstrate a Personal Commitment to Well-Being

The officers of the VSB support the

core values and well-being concepts set forth in the Well-Being Report.

A Lawyer Well-Being Committee Should Be Created

The Supreme Court of Virginia has created a Lawyer Well-Being Committee, with Justice Mims chairing it. Len Heath, VSB president-elect, has been appointed to the SCV committee.

Provide High-Quality Educational Programs about Lawyer Distress and Well-Being

The VSB's support of Lawyers Helping Lawyers (LHL), Virginia's lawyer assistance program, is well known. The Bar has provided financial assistance to LHL since approximately 1995. The VSB is now the primary funding source for LHL at \$150,000, *just over one-half of its current budget. The Lawyer Well-Being Report recommends that all stakeholders ensure a stable and sufficient funding source. A recent informal survey of lawyer assistance programs serving similarly sized bar populations supports LHL's position that it is underfunded.*

The VSB also has several employees who serve on the LHL Board: Renu Brennan, deputy executive director, and Jim McCauley, ethics counsel.

The August 2017 *Virginia Lawyer* has two featured articles on LHL, including a discussion of LHL's lighthouse plan. The articles are consistent with, and implement, core suggestions in the Well-Being Report about educating lawyers about lawyer distress and well-being, and support of LHL programs.

LEO 1886, approved by the Court effective December 15, 2016, is currently a centerpiece of LHL CLEs. LEO 1886 covers the ethical duty of partners and supervisory lawyers in a law firm when another lawyer in the firm suffers from significant impairment. VSB Ethics Counsel Jim McCauley appeared at the February 2017 VBA meeting and talked extensively on LEO 1886 during the LHL CLE. VSB Deputy Executive

Director Renu Brennan went to the July VBA meeting to accomplish the same goal. LHL presented panels on September 12 to JIRC and on September 20 at the VSB Solo & Small-Firm CLE. Also, LEO 1887, approved by the Court effective August 30, 2017, is another way the VSB has been proactive in addressing and assisting lawyers with substance abuse issues. It deals with the duty of oversight of lawyers with substance abuse issues who do not practice in a firm setting.

Recommendation to De-Emphasize Alcohol at Social Events

The report recommends that alcohol be de-emphasized at social events. One suggestion is to have a broad selection of non-alcoholic beverages. Do our members think that there is too much emphasis on alcohol at VSB events? What should be done about it?

Recommendation 20.1: Adopt Regulatory Objectives³ that Prioritize Lawyer Well-Being

The Department of Professional Regulation has been asked to craft regulatory objectives, including a lawyer well-being objective. Currently, no such objective exists. The Study Committee revising the UPL rules is also drafting regulatory objectives. The Future of Law Practice Committee is also looking at regulatory objectives.

Recommendation 20.2: Modify the Rules of Professional Conduct to Endorse Well-Being as Part of a Lawyer's Duty of Competence

The Standing Committee on Legal Ethics will consider the issue of amending Rule 1.1 to include a well-being component at its next meeting in September.

Recommendation 20.3: Expand Continuing Education Requirements to Include Well-Being Topics.

The MCLE Board briefly discussed the issue of whether the MCLE rule should be amended to include a well-being requirement at its meeting on August 21, 2017. No decision was reached. To date, Virginia does not require that any of its MCLE hours be limited to any one particular area, except for the two hours required for ethics/professionalism. The MCLE Board is going to amend MCLE Opinion #19, which deals with approval of courses dealing with substance abuse, mental health disorders, stress, and work/life balance topics to specifically address and clarify that well-being topics will be approvable. There will be more discussion by the MCLE Board on the topic of well-being.

Recommendation 22.1: Implement Proactive Management-Based Programs (PMBP) that Include Lawyer Well-Being Components

The Department of Professional Regulation is surveying what other disciplinary agencies have proposed or adopted for proactive management-based regulation. The Future of Law Practice Committee is also looking at proactive management-based regulation as part of its study of the future of law practice.

Recommendation 22.2: Adopt a Centralized Grievance Intake System to Promptly Identify Well-Being Concerns

The VSB has a centralized grievance intake system that identifies well-being concerns.

Recommendation 22.3: Modify Confidentiality Rules to Allow One-Way Sharing of Lawyer Well-Being Related Information from Regulators to Lawyer Assistance Programs

The Standing Committee on Lawyer Discipline will consider a recommendation from the VSB Department of Professional Regulation that Paragraph

Well-Being continued on page 17



Legal Ethics Committee Concludes that Lawyers May Not Participate In Avvo Legal Services

ON SEPTEMBER 13, 2017, the Standing Committee on Legal Ethics voted to present Legal Ethics Opinion 1885 (LEO 1885) to the Council of the Virginia State Bar (VSB) for approval at its next meeting on October 27, 2017. If Council approves the opinion, the VSB will petition the Supreme Court of Virginia to adopt LEO 1885. LEO 1885 holds that a lawyer may not pay the current marketing fee to participate in Avvo Legal Services (ALS) because the marketing fee payment is an improper sharing of legal fees with a nonlawyer entity and an improper payment for recommendation of employment. See Virginia Rules of Professional Conduct, Rules 5.4(a) and Rule 7.3(d). Although the opinion does not mention ALS anywhere, the business model described in the opinion obviously applies to ALS.

On March 23, 2017, the VSB published a proposed draft of LEO 1885 for comment. At its next meeting on May 17, 2017, after discussion of some of the comments received, the committee voted not to submit the proposed LEO to Council at its June meeting, in order to study further the issues raised by the comments. The current proposed draft differs very little from the draft previously published for comment. So far, five states have issued ethics opinions¹ holding that lawyer participation in Avvo Legal Services is unethical and violates their Rules of Professional Conduct: Ohio, South Carolina, Pennsylvania, New Jersey, and New York. One state, North Carolina, has issued a proposed

opinion for comment going the other direction, holding that lawyers may participate in an online platform for finding and employing lawyers if certain requirements are met.²

Avvo Legal Services is operated by a privately owned corporation that describes itself as an online legal services marketplace. ALS disputes the characterization in some ethics opinions that it is a “lawyer referral service.” Proposed LEO 1885 does not reach that conclusion nor is it necessary, although Virginia lawyers currently may not participate in a for-profit lawyer referral service. Rule 7.3(d)(2).

ALS allows a consumer to choose a fixed-fee, limited-scope service that could include, for example, legal advice for matters such as immigration, divorce, custody, employment, real estate, landlord-tenant; document review services; document preparation (wills, trusts, powers of attorney lease agreements, eviction notices, employment contracts, contracts and documents for starting up a business); or start to finish support for legal services such as, for example, an uncontested divorce, which ALS advertises for \$995. Once the customer has chosen a legal service, she selects a lawyer in the selected area of practice and locale, purchases the legal service or elects to “have a lawyer call me now.” Once the consumer has selected a lawyer (or opted for “have a lawyer call me now”), the consumer clicks on a button that says “buy now,” makes a credit card payment for the desired legal service and the lawyer then contacts the client.

Avvo insists that it does not “recommend” the participating lawyer but rather allows the consumer to choose from a list of lawyers that offer the desired legal service in the particular location. At the beginning of each month, Avvo pays each participating lawyer all of the legal fees generated by that lawyer in the preceding month and separately charges a “marketing fee,” the amount of which is tethered to the specific fixed fee charged for each type of legal service. As the price of the legal service increases, so does the “marketing fee.” The range starts as low as a \$10 marketing fee for a \$39 service (i.e., a 15 minute telephone consult) up to a \$400 marketing fee for a \$2,995 service. The marketing fee for the uncontested divorce priced at \$995, is \$200.

Proposed LEO 1885 concludes that the business model used by ALS is one in which lawyers are ceding control of the delivery of legal services to a nonlawyer because the company sets the legal fees, not the lawyer, and the company collects and holds the legal fees and disburses earned fees to the participating lawyer after the service is completed. In so doing, the participating lawyer is circumventing Rule 1.15’s requirements to hold advance fees in the lawyer’s trust account. The Rules of Conduct also require that the lawyer and the client agree on the scope of the representation. Rule 1.2(a). A third party intermediary, such as ALS, interferes with that process by prescribing a legal service that may not be suited to the consumer’s needs and the fee for

which may not be reasonable. See Rule 1.5 (a lawyer's fee shall be reasonable and adequately explained to the client). Some are concerned whether the ALS website informs a consumer accurately of all the necessary expenses and fees associated with all of the fixed-fee limited-scope services it advertises on its website. Lawyers have an obligation to advertise and explain their fees accurately and not make any misleading statements about the fees they charge for legal services. Rule 7.1.

Under the current rules, the "marketing fee" charged by ALS cannot be construed as a reasonable and usual payment for advertising and marketing, but rather an improper sharing of legal fees with a nonlawyer and an improper payment for a recommendation of

employment. Nevertheless, the questions and concerns raised by ALS have generated an extensive and vigorous policy debate over whether these Rules of Professional Conduct unreasonably stifle innovative methods of delivering legal services, and that alternative business methods such as ALS fill a legal need or "gap" that more traditional methods of marketing and providing legal services have left unfulfilled. On the other hand, a business model such as ALS raises traditional and fundamental concerns that nonlawyer entities should not control or manage the delivery of legal services or interfere with the lawyer-client relationship and a lawyer's professional judgment and independence. See Cmt. [1], Rule 5.4.

Endnotes:

- 1 Supreme Court of Ohio, Bd. Of Prof. Conduct, Ethics Op. 2016-3 (June 3, 2016); South Carolina Bar Ethics Op. 16-06 (July 14, 2016; Pennsylvania Bar Assoc. Legal Ethics & Prof. Resp. Comm. Op. 2016-200 (September 2016). A joint opinion issued by three committees appointed by the Supreme Court of New Jersey, ACPE Joint Opinion 732 (June 21, 2017) accompanied by an alert to all bar members, warned that it is impermissible for lawyers to participate in Avvo Legal Services, Legal Zoom, Rocket Lawyer, and other similar online companies. The latest opinion issued by the New York State Bar Association on August 8, 2017 holds that a lawyer may not pay the current marketing fee to Avvo Legal Services without violating New York's Rules of Professional Conduct. New York State Bar Ass'n Comm. on Prof. Ethics, Op. 1132 (August 8, 2017)
- 2 North Carolina State Bar. Proposed 2017 Formal Eth. Op 6 (July 27, 2017)

Well-Being *continued from page 15*

13 be amended to provide for one-way communication of confidential information to LHL in certain circumstances.

Recommendation 22.4: Adopt Diversion Programs and Other Alternatives to Discipline that are Proven Successful in Promoting Well-Being

The Department of Professional Regulation is studying what other states have done regarding diversion programs and other disciplinary alternatives. The question is whether a rule change can be fashioned allowing certain complaints to be closed with no disciplinary record if the affected lawyer complies with terms and conditions that address the lawyer's well-being. This is a significant step beyond the abbreviated investigation ("proactive investigation") process that Intake uses now.

Please review the Well-Being Report in full and give us your

thoughts and comments on its recommendations. The well-being of Virginia's lawyers is important to the profession and public protection, which is integral to the VSB's mission. As always, you can contact me at gould@vsb.org.

Endnotes:

- 1 The Task Force was chaired by Bree Buchanan, Texas State Bar Lawyers Assistance Program Director, and James C. Coyle, Attorney Regulation Counsel for the Colorado Supreme Court. Members were Chief Justice Donald Lemons; Anne Brafford; Donald D. Campbell; Josh Camson; Charles Gruber; Terry L. Harrell; David Jaffee; Tracy Kepler; Patrick R. Krill; Saray Myers; Chris Newbold; Jayne Reardon; Judge David Shaheed; Lynda Shely and William Slease.
- 2 <http://jeenacho.com/2017/08/20/can-law-firms-promote-well-suggestions-national-task-force-lawyer-well/>.
- 3 Regulatory objectives are a statement of the goals you attempt to achieve through regulation.

VSB Seeks Representative for the ABA House of Delegates

The Virginia State Bar is seeking a representative to immediately fill a two-year term as a representative in the ABA House of Delegates. The current representative had to step down as a VSB delegate after being elected to represent Virginia as its State Delegate. In addition, the Virginia State Bar is recruiting members interested in serving as alternates in the ABA House of Delegates in the event any of its regular delegates are unable to attend a meeting. Such an appointment would need to be made with very little notice. Persons interested in either position should submit their letters of interest and resumes by November 1, 2017, to Karen A. Gould, Executive Director, Virginia State Bar, 1111 E. Main St., Suite 700, Richmond VA, 23219-0026, or e-mail to nominations@vsb.org.



VLAS Serving Some of the Poorest Areas in the State

SARAH'S DAUGHTER WAS A freshman in high school when her ongoing anxiety became disabling, preventing her from functioning in school. The school responded with a Section 504 plan, which provided some limited accommodations for the girl.

The plan wasn't working. Sarah (whose name has been changed to protect her family's privacy) pleaded for an Individualized Education Program, which provides special instruction or services for the student. "They told me she was too smart," Sarah said. "It didn't matter that she couldn't stay in the classroom because her hands were shaking so bad she couldn't hold a pencil."

Desperate, the parents turned to Virginia Legal Aid Society. A VLAS attorney persuaded the school to do an extensive evaluation of the student. As a result, the school reconsidered and determined the student was eligible for special education services.

Sarah is convinced that if it weren't for the efforts of VLAS, "my daughter might not even be here now. My daughter needed more, and could do more, and they helped make it a reality. They're amazing."

Virginia Legal Aid Society, which is celebrating its 40th anniversary in 2017, uses legal skills to solve the most critical problems of low-income people in a six-city, twenty-county region that covers Central, Southside, and Western Tidewater Virginia. With fifteen full-time lawyers and eight paralegals operating from four offices, plus 170 pro bono volunteer lawyers,

VLAS closes about 3,000 cases each year, helping more than 6,600 people on issues related to housing, consumer protection, income and benefit protection, education, and other family concerns.

The area we serve offers three particular challenges. The first is that it includes some of the poorest parts of Virginia. Twelve of the twenty-six cities and counties we serve have poverty rates of at least 20 percent, nearly double the statewide average of 11.2 percent. The rest of the state combined, served by eight other legal aid societies, has only twenty jurisdictions with poverty this high.

The second challenge is that much of our service area is sparsely populated, creating obstacles for connecting applicants with lawyers; and the third is that less than a third of the lawyers in our area take part in our pro bono program.

VLAS has always sought to increase efficiency through new technology. In the 1980s, we adopted computers for all staff and a Telephone Access Project that moved the application process for rural clients from in-person to a telephone line staffed by a paralegal.

In 2001, we created a statewide toll-free phone line, 866-LEGL-AID, connecting callers to their local legal aid programs, and in 2005, we created LawLine, an intake and advice hotline staffed by six paralegals and two lawyers.

We now receive 18,000 calls per year from new applicants. Our LawLine triage system determines via

computer whether VLAS or another provider is best source of help for the caller's needs, sends the caller to the correct system, and then provides the most appropriate help for the caller. People can also apply on our website, www.vlas.org, where they are given a code that allows them to complete the application by phone while moving their case to the front of the phone queue. Every eligible caller receives some form of assistance, from legal advice, to materials that can help callers help themselves, to representation by a lawyer, to referrals, to additional resources.

To increase pro bono engagement, VLAS has launched a three-part project to work with local bar associations, operate a clinical program with the Liberty University School of Law, and help connect all Virginia legal aid programs with a planned statewide online pro bono portal.

Every five years, VLAS re-examines our entire operation, from client outreach and interaction to our practice's areas of emphasis. We distribute surveys on paper and online, hold focus group discussions in our four offices, and conduct community forums in almost every county and city we serve. The collected information is the heart of our strategic planning process, which guides the types of cases we focus on, the technology we use and the grants we pursue. As this article goes to press, we are approaching the completion of this year-long process to create our plan for 2018–22.

David Neumeyer is the executive director of the Virginia Legal Aid Society.



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Answer 15 questions or more on Virginia.freelegalanswers.org
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Virginia.freelegalanswers.org — A national ABA-sponsored program bringing legal answers
to people who cannot afford an attorney.

Questions? Contact Karl Doss at doss@vsb.org or (804) 775-0522.

Do Pro Bono. Do Good.

Senior Citizens HANDBOOK

What Seniors Need to Know.

The *Senior Citizens Handbook* is an invaluable resource with just about everything a senior would want to know about the law and a compendium of community-service organizations that provide senior services.

For more information, or to order copies of the *Senior Citizens Handbook*, please e-mail Stephanie Blanton at blanton@vsb.org or call (804) 775-0576.

Laws & Programs Affecting Senior Citizens in Virginia

A project of the Senior Lawyers Conference of the Virginia State Bar

CALL FOR NOMINATIONS
William R. Rakes Leadership in Education Award

The Section on the Education of Lawyers in Virginia
Virginia State Bar

The Section on the Education of Lawyers in Virginia has established an award to honor William R. Rakes, of Gentry Locke, for his longstanding and dedicated efforts in the field of legal education, both in Virginia and nationally. The inaugural award was presented to Mr. Rakes in conjunction with the 20th Anniversary Conclave on the Education of Lawyers in Virginia sponsored by the Virginia State Bar's Section on the Education of Lawyers in April 2012.

2017 Recipient — James E. Moliterno

2016 Recipient — Hon. Donald W. Lemons

2015 Recipient — Hon. B. Waugh Crigler

2014 Recipient — Hon. Elizabeth B. Lacy

2013 Recipient — W. Taylor Reveley III

2012 Inaugural Recipient — William R. Rakes

Criteria

This award recognizes an individual from the bench, the practicing bar, or the academy who has:

- (1) demonstrated exceptional leadership and vision in developing and implementing innovative concepts to improve and enhance the state of legal education, and in enhancing relationships and professionalism among members of the academy, the bench, and the bar within the legal profession in Virginia.
- (2) made a significant contribution (a) to improving the state of legal education in Virginia, both in law school and throughout a lawyer's career; and (b) to enhancing communication, cooperation, and meaningful collaboration among the three constituencies of the legal profession.

Nomination Process

Nominations will be invited annually by the Section on the Education of Lawyers. A selection committee appointed by the section's board of governors will meet annually to discuss possible nominations. The selection committee will include five members: at least three members of the Section on the Education of Lawyers, with one each from the bench, the practicing bar, and the academy, including the chair of the section; and at least one former award winner. The award may only be made from time to time at the discretion of the selection committee.

When a nominee is selected, the award will be presented at a special event to include a reception for the honoree and his/her family, friends and colleagues; past award recipients; and special guests. The law firm of Gentry Locke has agreed to underwrite the award and the special event to honor award recipients on an ongoing basis. Please submit the nomination form below, together with a letter describing specifically the manner in which your nominee meets the criteria established for the award. Nominations should be addressed to **John M. Bredehoff**, chair, Section on the Education of Lawyers, and submitted with your nomination letter to the Virginia State Bar: 1111 East Main Street, Suite 700, Richmond, VA 23219-0026.

Nominations must be received no later than December 8, 2017. For questions about the nomination process, please contact Maureen D. Stengel, Director of Bar Services: stengel@vsb.org (804) 775-0517.

**WILLIAM R. RAKES LEADERSHIP IN EDUCATION AWARD
NOMINATION FORM**

Please complete this form and return it with your nomination letter to the Virginia State Bar: 1111 East Main Street, Suite 700, Richmond, VA 23219-0026. **Nominations must be received no later than December 8, 2017.**

Name of Nominee: _____

Profession: _____

Employer/Affiliation (Law Firm, Law School, Court): _____

Address of Nominee: _____

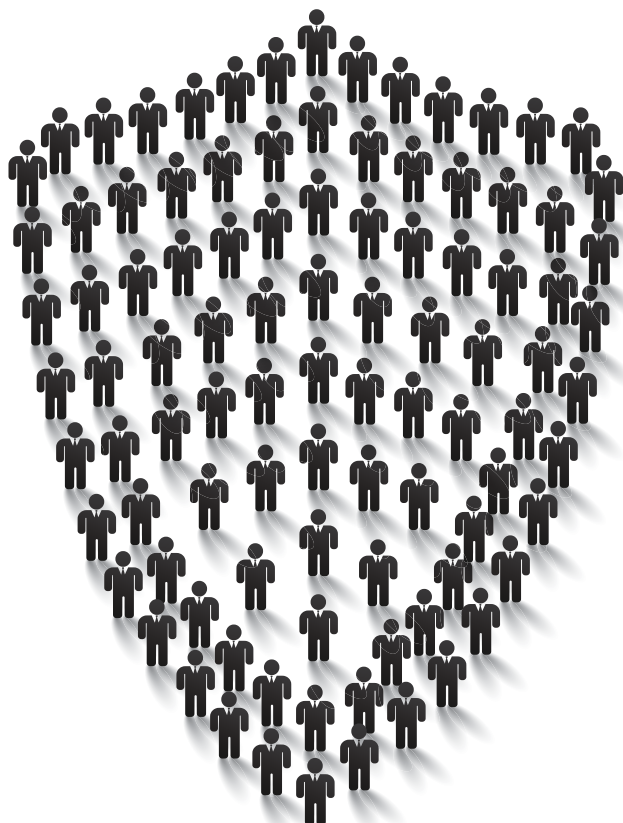
City: _____ State: _____ Zip: _____

Name of Nominator: _____ Telephone: _____

Email: _____ Signature: _____

The Clients' Protection Fund Steps In

by Gordon Hickey



The yearly fees that lawyers pay to the Virginia State Bar support numerous civic activities and professional improvements, but perhaps nothing does more to enhance the profession than the small fee paid to the Clients' Protection Fund (CPF).

The fund, which is supported by an annual fee of \$25 paid by Virginia lawyers — \$10 starting in July 2018 — reimburses people who have suffered a financial loss because of the dishonest conduct of a Virginia lawyer.

In most cases, the offending lawyer has been disciplined by the bar for unethical behavior and the lawyer's license has been revoked or suspended. In a few cases, the lawyer involved has died and the clients are left with no other way to get their money back.

The bar has long recognized that while discipline protects the public from any future misconduct by the lawyer, it doesn't reverse the lawyer's previous conduct. The bar must sometimes act to make right the damage done by dishonest lawyers.

One case, which was investigated by current VSB President Doris Henderson Causey, involved a lawyer, Darryl A. Parker, who was

The bar must sometimes act to make right the damage done by dishonest lawyers.

hired by a woman who doesn't speak English to represent her disabled son with a lawsuit filed against a public school system. The boy's arm was broken while he was at school and the school system had taken responsibility.

The client had agreed to a one-third contingency fee. Parker worked out a settlement through the school's insurance carrier for \$60,000.

Parker received the check and had the client endorse it. He then deposited the money in his trust account and promised to send the client her son's share. Despite repeated calls to Parker, the client was never able to collect any money. Instead, Parker spent the money on personal and other expenses.

After getting nowhere with Parker, the client eventually filed a bar complaint. On August 28, 2015, Parker's license was revoked by the Virginia State Bar Disciplinary Board.

While that action advanced the bar's mission of protecting the public and regulating the profession, the disciplinary system is not set up to reimburse clients for the dishonest conduct of their lawyer. That's where the CPF steps in.

... the disciplinary system is not set up to reimburse clients for the dishonest conduct of their lawyer. That's where the CPF steps in.

The client's petition to the CPF for reimbursement was assigned to Causey, who was a member of the CPF board at the time. "Everything that was done on the case was done in English, and they couldn't speak English," Causey said. "The family desperately needed the money to take care" of the boy. After her investigation, Causey recommended the board pay the client \$50,000, which was the maximum allowed at the time. That limit has since been increased to \$75,000.

The files of the CPF contain many cases like the one involving Parker where people of modest means were taken advantage of by a dishonest lawyer.

In another case, lawyer Tawana Shephard was hired to represent a client in a loan modification case. The client reported that Shephard promised results within two months for fees totaling \$10,500, which the client paid. The CPF investigator found that

other than a phone call from an employee of Shephard's law firm indicating negotiations were going to start, no work was performed.

Eventually, the client went to the law firm office and found that it was closed.

Shephard's license was revoked by the VSB Disciplinary Board on November 20, 2015. Her client in this matter was ultimately reimbursed the entire \$10,500 by the CPF.

One more representative case involved a woman's dispute with a used car dealer. The woman had agreed to trade in her car and pay \$1,500 for another used car. When the deal fell through, the dealer refused to return the trade-in or the \$1,500.

The woman hired Jean Jerome Dandy Ngando Ekwalla's firm, the Ngando Law Firm, which filed suit. The client paid the firm \$2,850 and several other fees during the course of the case, which was to go to arbitration. The client paid all the fees, which totaled \$8,423.70, but Ekwalla never paid the arbitration fee and later refused to refund the money to the client.

On October 29, 2015, Ekwalla's license was revoked by the VSB Disciplinary Board.

The CPF paid the client \$8,423.70 to reimburse her for her losses to Ekwalla. To date, the CPF has paid more than \$150,000 in claims to Ekwalla's clients. He has been convicted of eight counts of writing bad checks and is awaiting sentencing.

While too often the CPF is asked to deal with cases involving people who desperately need the money reimbursed, desperation is not a defining criterion.

Margaret Nelson, the immediate past chair of the CPF board, describes a case where a family was defrauded by a trusted longtime friend. The lawyer represented an elderly couple, and when one of them died he assisted the executor of the estate and took control of the couple's assets. "After the second spouse died, the family discovered that all the money was gone," Nelson said.

The family had no inkling anything was wrong because the second spouse had been well taken care of. "This was a family that had loved and taken care of their parents. They were mortified that this lawyer did this to them," Nelson said.

The lawyer was convicted of embezzlement and was disbarred, but none of the family's money could be recovered. The CPF granted the beneficiaries \$50,000 each, the maximum allowed at the time. Had the limit

been what it is now, the petitioners would have been eligible for \$75,000 each.

During the last fiscal year, the Clients' Protection Fund distributed more than \$343,000 to clients who suffered financial losses because of the dishonest conduct of a Virginia lawyer whose license was suspended or revoked, or who had died. The payments, which involved thirteen lawyers, were made between July 1, 2016, and June 30, 2017.

The Virginia State Bar takes its fiscal duty to its members extremely seriously and recognizes that even a \$25 per annum fee must serve an important purpose. By allowing the VSB to make whole those who have suffered financial losses as the result of corrupt behavior by Virginia lawyers, the Clients' Protection Fund elevates the reputation of the entire profession and ensures that the bad behavior of a few lawyers does not leave innocent clients with no course of restitution.

The Virginia Clients' Protection Fund paid its first claim in 1978. The fund is underwritten by an annual fee paid by Virginia lawyers. No taxpayer money is used. A fourteen-member board of volunteer lawyers and laypeople administers the fund. Board members investigate all claims on the fund and decide on the amount of any awards.

For claims to qualify, the lawyer named in the claim can no longer be practicing and the loss must be caused by dishonest conduct. The fund is considered an avenue of last resort after other possible payment sources such as insurance and the accused lawyer have already been exhausted or are not available.

Awards have been made in cases where the lawyer:

- stole or embezzled money or property from a client
- could not refund, or refused to refund, the portion of the client's fee that the lawyer had not earned
- did sham work that did not advance the client's goal
- performed work that was fraudulent or unethical, such as preparing documents with information the lawyer knew to be false.



SAVE THE DATE

Bar Leaders Institute

Lewis Ginter
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March 9, 2018

For more information, please visit:
www.vsb.org/site/conferences/clba
or contact Paulette Davidson
at davidson@vsb.org.



SAVE THE DATE

The only thing changing faster than the law is technology ... and staying technologically competent not only benefits your practice, it is a key part of the Rules of the Supreme Court of Virginia.

April 23, 2018

Greater Richmond Convention Center, Richmond

The Reverse Triangular Merger is the Favorite, and Often Wrong, Option

by Joel Nied



A frequently used merger technique is the reverse triangular merger. Despite its popularity, it is a fairly convoluted process. Some even call it awkward.¹ The reverse triangular merger uses three companies, some obscure terms like “transitory subsidiary” and a little bit of “corporate magic.”²

The reverse triangular merger is accomplished by a multi-step process starting with an acquiring corporation forming a subsidiary. The acquirer then funds the subsidiary with securities or cash. Next, the subsidiary is merged into the acquired (target) corporation. The plan of merger states that the target survives the merger and that its shareholders receive the cash or securities of the parent in exchange for their target stock. As a result, the target corporation becomes the subsidiary of the parent/acquirer.

Mergers are used for a variety of reasons instead of asset or stock purchases. Reverse triangular mergers, however, are typically used for the same reasons other forms of mergers are used, plus one other goal: to ensure that the acquired entity is, legally, the same entity it was immediately prior to the merger.

Under most states' laws, the consideration the shareholders of a target receive in a merger, including a reverse triangular merger, can be cash.³ In other words, despite the convoluted process of the acquirer forming a subsidiary, merging the target into the subsidiary, and sprinkling the whole procedure with a little corporate magic, the ultimate goal is to put cash into the hands of the shareholders of the target. A merger resulting in the shareholders of the target receiving cash is often called a "cash-out merger."

Reverse triangular mergers are popular for a variety of reasons. One of those reasons, however, has nothing to do with a tax benefit, efficiency, or liability reduction. Rather, it is simply a knee-jerk reaction of many practitioners. Like all reflexive actions, it has its origin in utility. People are accustomed to implementing reverse triangular mergers because that complex process is often the only way in many states to effectuate the three goals of 1) a merger 2) that results in the survival of the target entity and 3) provides cash to the target shareholders.

In Delaware, the reverse triangular merger is often the single manner available to accomplish all three goals. Because so many corporations around the country are formed in Delaware, attorneys throughout the nation are well-schooled in the limited merger techniques afforded by the Delaware statute governing corporations — the Delaware General Corporation Law.⁴ Through repeated use of the reverse triangular merger, many attorneys have developed a reflex to use that process even in states whose merger statutes afford a more efficient method.

The Share Exchange

Virginia is one of those states that has a better way to accomplish those goals. It has often been noted by legal scholars that Virginia corporation law is superior to Delaware corporation law.⁵ The merger statutes are no exception. While the instinct may be to reach for the reverse triangular merger out of habit, Virginia corporations have a better option: the share exchange.

Someone unfamiliar with the Virginia mergers and acquisitions statutes may think that share exchanges are only useful when an acquirer exchanges shares with the shareholders of a target. Such a person would be guilty of skimming the relevant passages of the Virginia Stock Corporation Act, regardless as to how well they are organized. The share exchange provides much more flexibility. Va. Code Ann. § 13.1-717.A.1. spells out, in simple-to-understand language, the elegant share exchange procedure:

A domestic corporation may acquire all of the shares of one or more classes or series of shares of another domestic or foreign corporation, or all of the eligible interests of one or more classes or series of eligible interests of a domestic or foreign eligible entity, as well as rights to acquire any such shares or eligible interests, in exchange for shares or other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash, other property or any combination of the foregoing, pursuant to a plan of share exchange.

The process is simple and flexible: a corporation acquires the shares of another corporation. In exchange for those shares, the acquirer can provide consideration to the shareholders of the target corporation in the form of, among other things, cash.

It seems so much simpler than the reverse triangular merger. There is a reason for that. It is simpler. In fact, the share exchange is simpler than any form of merger. Not only is it simpler, it is arguably the only way to perform a "cash-out merger" in Virginia. In *Barris Industries, Inc. v. Bryan*,⁶ the plaintiffs sought to perform a reverse triangular merger: "As reverse triangular mergers are typically explained, Media General as the target is the acquired entity, while one of the plaintiffs will be the acquiring entity."⁷ In exchange for their

Merger continued on page 31

Future-Proofing Your Law Practice

by Sharon D. Nelson and John W. Simek
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As we travel around the commonwealth lecturing to lawyers on technology and security topics, we've met a lot of lawyers worrying about the future of their practices. Some are resigned. It is not uncommon to hear, "I just want to hang on for a couple more years. Then I'll retire." The younger lawyers don't have that option. They are inclined to ask, "What can I do? How will I survive?"

VSB Executive Director Karen A. Gould wrote a column in the last issue of *Virginia Lawyer* (August 2017) in which she laid out all of the competition today's lawyer faces, from LegalZoom, Avvo and a host of alternative legal services providers. We are sure some of you found it dismal reading.

But take heart, there are ways to compete — and not only to survive, but thrive.

It's a Digital World

There is no way of getting around the need to educate yourself on the digital world. You don't need to be a technologist, but you do need a fundamental knowledge of the technology you are (and should be) using. Not only do ethical rules require that, it just makes sense. There are lots of CLE courses to assist you.

If you haven't gone paperless, it is way past time. Lawyers waste interminable amounts of otherwise billable time searching for files. You can't compete if you refuse to take advantage of tools to keep everything organized electronically.

If you haven't started to automate your practice yet, it is also past time. Incorporate as many efficiencies as you can into your practice. However, as one of our friends points out, many law firms have terrible processes. He advises "decrapifying your legal processes

before you automate them.” Memorable and excellent advice.

Outlook is not a case management system. You will improve your efficiency and your client services by using a bona fide case management system. You should also be using a time and billing software product. A best practice would be to implement a practice management system that includes managing matter information and billing/accounting.

Maybe it is time to explore a client portal, where clients can securely access documents, look at their invoices, etc. Many case management systems include secure client portals these days. Attorneys are flocking to client portals and clients love them. You want your clients to love their lawyer, right?

Remember, law practices are all about clients. Please them and you will reap referrals. Lawyers are beginning to understand that having emotional intelligence is critical to their success. If you don't know that term, Google it for stories of how it helps lawyers get and keep clients. One example? Clients today want to pay less for more — making your practice more efficient can accomplish that. Now you can more readily compete with alternative legal providers. And, by sympathizing and responding to your clients' needs, you have the perfect occasion to demonstrate the extent of your emotional intelligence, providing a win-win scenario.

Fish Where the Fish Are

This is an old saying of boat captains — and good advice for the modern lawyer. Where are your prospective clients today? Online. So make sure your website is easy to use, modern in appearance and kept up-to-date. Make sure it loads quickly and that it is mobile phone friendly. More than 50 percent of our own website traffic comes from smartphones, which is also why you need to be running Google Analytics reports on your website each month — learn where your traffic is coming from. These reports will also help you see whether improvements you've made on your website are bearing fruit.

Get to understand the effective use of online marketing tools such as blogs and social media sites. Reporters follow Twitter and scan for subject matter experts across social media. If your name is out there and your material is good, you'll get calls. One of the best forms of advertising is being quoted in major publications.

Cybersecurity — Getting to Good

No law firm cybersecurity is perfect. And perfect is not the goal. “Getting to good” is a start. As we often say in our CLEs, law firms have data on many individuals and businesses; hence, they are especially valued targets. And they hold a lot of PII (personally identifiable data) as well as a lot of regulated data (SOX, HIPAA, Graham-Leach-Bliley, etc.) Fines and penalties for not adequately securing data can be stiff. Public shaming in the press can lead to clients beating a path to the exit door.

Recognizing that an advanced hacker with sufficient skill and funding WILL get into to your network, you need to have systems in place to detect a breach. You need to have an Incident Response Plan because no one thinks clearly in a crisis. You need to have your backups engineered so they are impervious to ransomware. At least one backup should always be unconnected to your network. Yes, cloud backups are fine, but you need at least two backup sets. Develop cybersecurity policies — and enforce them. Train your employees in cybersecurity at least annually and form a “cybersecurity culture” where everyone is mindful of security and trained in the “See something? Say something.” way of thinking.

If you are not in a large firm (over 500 employees), become familiar with the NIST Cybersecurity Framework standards. By the time you read this, a new version 1.1 will probably have been adopted. As that hasn't happened as we write, just Google it.

Think Outside the Box

This is not your grandmother's or grandfather's law practice. Clients want greater availability — they don't want to have to take

Get to understand the effective use of online marketing tools such as blogs and social media sites.

time off from work to see you. Offer extended hours. There's a reason that major stores sometimes have law offices in them — you may be better located in a strip mall than in a

Future-Proofing continued on page 30

What I Learned from Justice Cynthia D. Kinser About Being a Lawyer

by John P. O'Herron



For more than 50 years, the VBA has commissioned portraits of each new justice of the Supreme Court of Virginia and donated it to the commonwealth. When justices leave the bench, the portraits are hung in the courtroom. Left: Chief Justice Kinser, her husband, and grandchildren at the Supreme Court of Virginia. Photo by Marilyn Shaw/The Virginia Bar Association. Center: Portrait of Cynthia D. Kinser, retired chief justice of the Supreme Court of Virginia. Right: John O'Herron spoke at the ceremony that marked the hanging of her portrait in the court. Photo by Marilyn Shaw/The Virginia Bar Association.

It's not every day you are asked to give remarks at a ceremony honoring a former chief justice of the Supreme Court of Virginia. This past June, I was blessed with this incredible opportunity on the occasion of the portrait hanging ceremony for Justice Cynthia D. Kinser. After clerking for Justice Kinser for five years, four of which coincided with her tenure as chief justice, I was honored even to be invited to the ceremony. But the ability to share some of what I learned from Justice Kinser as her law clerk was a true once-in-a-lifetime honor.

Justice Kinser has influenced so many people throughout her career, and her list of admirers stretches from 9th and Franklin in Richmond, all the way to Lee County in the great Southwest of Virginia. Participating in the ceremony allowed me to both share a side of Justice Kinser that many were not familiar with, and to reflect on how working for her has shaped my legal career.

There are so many things I could say about Justice Kinser and my time clerking for her, but I want to highlight the three things I learned from working for her that have shaped my approach to the practice of law.

Be Humble

Anyone who has met Justice Kinser knows of her striking humility. Most people know, and I knew prior to working for her, that Justice Kinser is a cattle farmer. As someone

with farmers in my family, that fact alone was important: being rooted to a patch of earth, working with animals and the land, relying on the weather — these all have a way of eliminating even the semblance of arrogance. But as a law clerk, you never *really* know your boss until, for the first time, you have to drive her somewhere. . . . in your 1997, stick-shift Honda Civic, with several doors that do not work and the ceiling fabric drooping down. As I shamefully apologized for the state of my vehicle, she truly could not have cared less. This was a microcosm of who she was: Justice Kinser never put on airs, did not feel like she deserved royal treatment, and was as down to earth as you can be at the pinnacle of your profession.

In a profession not generally known for its humility, Justice Kinser's down-to-earth humanity was a constant example to her law clerks. Both personally and intellectually, she approached everything with humility and with that rare gift of listening. She always solicited and valued the ideas and input of her clerks, and not simply to confirm what she already believed about an issue. She never acted as if she had all the answers, and she approached every complex question with an earnest desire to get it right. This, I believe, is the distinct hallmark of a good judge. These simple lessons have served and will continue to serve me well in the practice of law. Whether it is working with a client, interacting with colleagues or opposing counsel, or trying to persuade a judge, approaching these responsibilities with humility is a must — by listening and learning from others, we can truly excel in the practice of law. Justice Kinser never told me to approach the practice of law with humility; she just lived it and taught all of us in the process.

Prepare

In case you were wondering: being a justice on the Supreme Court of Virginia is a *lot* of work. Preparing for merits cases and writing opinions would be plenty to keep a justice busy, but when you add the approximately 30 cases every seven weeks that appear on the writ panels, the “to-read-and-research pile” stacks up. Factoring in the enormous responsibilities of also being the chief justice, Justice Kinser's workload was intense to say the least. (And yes, at the risk of piling on, she also regularly commuted approximately six hours from her home in Pennington Gap to Richmond).

No matter how heavy the workload, though, Justice Kinser always put in the time to be prepared. From when those briefs arrived at the office, to the final edits of an opinion, no stone was left unturned. This took on many forms: making sure the research was thorough; ensuring the clearest analysis to decide a case and inform the bar; knowing what questions should be asked; poking possible holes in the arguments, and more. I learned immediately that whether it was the weightiest case drawing public scrutiny, or a petition for appeal seemingly destined for refusal, every case warranted the same quality of work.

This is something that my fellow clerks and I carried from our clerkships into our legal practices. From our most significant cases and clients to the least, every matter deserves our best preparation. Providing the best service to clients, and more importantly being the best attorneys that we can be, is the surest way to both success and fulfillment in our careers.

Prioritize Family and Community

Finally, and I believe most importantly, Justice Kinser showed me how prioritizing family and community make one a better attorney. As the eighth of nine children, family has always been of primary importance to me, and it was a true joy to clerk for someone who shared that belief. To Justice Kinser, time with family was not fleeting, or simply an add-on: it was part of her everyday life. Whether it was interrupting her day to care for her parents or play with her grandkids, playing the organ on her weekends, or speaking to a local organization, Justice Kinser always took the time to be with those she loves. And she expected me to do the same. Nearly every conversation began

In a profession not generally known for its humility, Justice Kinser's down-to-earth humanity was a constant example to her law clerks.

with “How is the family?” and she was always interested to hear what my wife and children were up to. Justice Kinser also made sure that I structured my work schedule around any family needs that arose, and she was always willing to make sacrifices herself to accommodate them.

Although Justice Kinser was devoted to her family and those of her clerks, to me there was also a larger lesson: Not only did success and excellence as an attorney not have to come at the price of family, but life outside the law enriched a legal career. By spending time with family, putting aside our interests to serve others, and being present to loved ones, we can live a life of purpose. In doing so, our work takes on added significance and we can bring additional focus and efficiency to our jobs. A refreshed spirit and healthy relationships make us better lawyers. I hope to continue following Justice Kinser's example throughout my career.

I could go on. In so many ways that I already see, and countless more I'm sure to realize down the road, clerking for Justice Kinser has shaped my career and approach to being a lawyer. I am immeasurably blessed for having had the opportunity to work at the Supreme Court of Virginia, and

to clerk for Justice Kinser. And it will be a continuing honor to practice in the courtroom that displays her portrait and reminds me of those lessons.



John P. O'Herron is an associate at *ThompsonMcMullan PC*, where he practices civil and appellate litigation in both state and federal court. He represents business, government, and individual clients in a wide variety of areas, including insurance defense, constitutional and civil rights law, and trusts and estates. Prior to joining *ThompsonMcMullan*, he clerked for Justice Kinser from 2009 until her retirement in 2014.

Future-Proofing *continued from page 27*

traditional law office. Rotate shifts with other lawyers. Keep asking yourself what clients want.

Set aside quiet time to figure out how you can distinguish yourself from your colleagues and how to make your skills known. Speak, write, network with other lawyers, etc. And yes, networking is still key — so cultivate those personal relationships.

Make a plan for the future and follow up on the plan. If you practice law the way it was practiced 20 years ago, you are going to get run over by technology and alternative legal providers. Instead of being afraid that you will lose your job to artificial intelligence, figure out what new opportunities exist. As an example, we have certainly seen a marked increase in the number of lawyers handling data breaches and privacy law matters. “Sniffing the air” for emerging opportunities is a great way to make sure there is viable legal work for you to do.

Finally, remember that many current lawyer functions — drafting wills, contract review, e-discovery review, business formation, legal research, etc. — are automated already or will be shortly. Some of this work is automated through expert systems and some through artificial intelligence — it really doesn't matter which. Just as we were writing this article, a news story was published saying that the number of patents filed within the category “legal services and handling legal documents” has risen 484 percent in the last five years according to an analysis by Thomson Reuters of data from the World Intellectual Property Organization. There is little

point in bemoaning the work that will be lost to lawyers — but there is plenty of work out there for those who are energized enough to strategize for the future.



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John W. Simek is vice president of Sensei Enterprises Inc. He has a national reputation as a digital forensics technologist and has testified as an expert witness throughout the United States. He provides information technology support to hundreds of Washington, DC, area law firms, legal entities, and corporations.

Merger continued from page 25

shares, the shareholders of Media General Inc. (the target) were to receive \$61.50 per share.⁸

The court, however, ignored the fact that the company controlled by the plaintiffs formed a new subsidiary, planned to fund that subsidiary with cash and merge the target into the subsidiary and then, finally, give all the shareholders of the target cash, thereby removing them all as shareholders of record of the target. Despite the intricate form of the transaction, the court boiled it down to its basic elements. The court stated that Virginia's share exchange statute, not the merger statute, governed: "Any 'cash-out' merger which by its terms forces all shareholders to exchange their shares for other corporate securities or for cash, effects or constitutes a 'share exchange' within the meaning of Article 12 of the Virginia Stock Corporation Act."⁹ In other words, regardless as to what the parties call the transaction or which statutes they cite in the articles of merger, the courts will view a cash-out merger as a share exchange pursuant to Va. Code Ann. § 13.1-717.

There is an argument, admittedly a weak one, that the share exchange statute (§ 13.1-717) does not provide the same post-closing certainty as the merger statute (§ 13.1-716). A casual observer comparing Va. Code Ann. § 13.1-721.A.(8) (which describes some of the effects of a merger) to 13.1-721.B. (which describes the effects of a share exchange), may think that the merger statute states the limitations on the rights of the target's former stockholders while the share exchange statute does not. As described below, that interpretation is not only incorrect, it is irrelevant in the case of a cash out merger.

Rights

To the detriment of an acquirer, and contrary to the frail argument above, a merger provides *more* rights to the former shareholders than does a share exchange. Under both a merger and share exchange, the target shares' rights "are entitled only to the rights provided to them in the [plan of share exchange/plan of merger] or to any rights they may have under Article 15 (§ 13.1-729 et seq.)"¹⁰ Under a merger, however, the target shares and shareholders are also entitled to additional rights that are not granted in the case of a share exchange: those granted by "the organic law of the eligible entity."¹¹ The target's shareholders' rights, ultimately, are irrelevant in the case of a cash-out merger (whether it is a reverse triangular merger or a share exchange) because, at the end of the transaction, the target shareholders will no longer be shareholders. They will be simply cash-holders. With regard to the amount of cash they are entitled to receive, Va. Code Ann. § 13.1-741.1.A. puts the same limitations on a shareholder's remedies for both mergers and share exchanges.

By all accounts, a share exchange is superior to a reverse triangular merger: it is simpler and it arguably affords more protection to the acquirer than a merger. In addition, regard-

less of how the parties to a transaction structure the deal, courts applying Virginia law to a cash-out merger will likely consider it a share exchange. As one observer stated, a share exchange "is subject to the same safeguards as a statutory merger, such as shareholder approval and dissenters' rights. It is a procedure whereby one entity may become the subsidiary of another without the awkward process of a reverse triangular merger."¹²

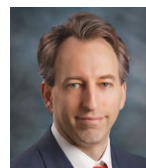
Attorneys advising Delaware corporations may have no choice but to recommend the awkward reverse triangular merger. Attorneys advising Virginia corporations, however, would be remiss to not advise their clients of the availability of a share exchange when the goal is to cash out the target shareholders. Mergers and acquisition attorneys should fight the mechan-

ical habit of resorting to the reverse triangular mergers when Virginia corporations are involved. Instead, they should opt for the simpler and more elegant share exchange.

It has often been noted by legal scholars that Virginia corporation law is superior to Delaware corporation law.

Endnotes:

- 1 See *Murphy, The New Virginia Stock Corporation Act: A Primer*, 20 *U.Rich.L.Rev.* 67, 121 (1985).
- 2 *The Portable MBA in Finance and Accounting*, Theodore Grossman, John Leslie Livingstone, John Wiley & Sons, Oct 8, 2009, p. 207. "Through an example of corporate magic known as the reverse triangular merger, the newly formed subsidiary of the acquirer may disappear into ... the target corporation"
- 3 See, e.g. DEL. CODE ANN. tit. 8, § 251(b)(5).
- 4 DEL. CODE ANN. tit. 8, § 101 et seq.
- 5 See, e.g., *Wheaton and Nied, Virginia or Delaware? No Reason to Leave the Old Dominion*, *Virginia Lawyer* magazine — June/July 2003, p. 21.
- 6 *Barris Industries, Inc. v. Bryan*, 686 F. Supp. 125 (E.D. Va. 1988).
- 7 *Id.* at 131.
- 8 *Id.* at 126.
- 9 *Id.* at 132.
- 10 Va. Code Ann. §§ 13.1-721.A.(8) and 13.1-721.B.
- 11 *Id.*
- 12 *Murphy, supra*, 20 *U.Rich.L.Rev.* 67, at 121 (1985).



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CALL FOR NOMINATIONS

HARRY L. CARRICO PROFESSIONALISM AWARD

VSb Section on Criminal Law

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

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

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

Prior Recipients

The Honorable Harry L. Carrico	1992	Overton P. Pollard, Esquire	2005
James C. Roberts, Esquire	1993	Hon. Paul B. Ebert	2006
Oliver W. Hill, Esquire	1995	Rodney G. Leffler	2007
Hon. Robert F. Horan	1996	Prof. Ronald J. Bacigal	2008
Reno S. Harp III, Esquire	1997	Hon. Jere M.H. Willis Jr.	2010
Hon. Richard H. Poff	1998	Melinda Douglas	2012
Hon. Dennis W. Dohnal	1999	Claire G. Cardwell	2013
Hon. Paul F. Sheridan	2000	Gerald T. Zerkin	2014
Hon. Donald H. Kent	2001	Hon. Jerrauld C. Jones	2015
Craig S. Cooley, Esquire	2002	Hon. Michael N. Herring	2016
Prof. Robert E. Shepherd	2003	Philip J. Hirschkop	2017
Richard Brydges, Esquire	2004		

Criteria

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

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

Submission of Nomination

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

Nominations should be addressed to Timothy J. Heaphy, Esq., Chair, Criminal Law Section, and mailed to the Virginia State Bar Office: 1111 East Main Street, Suite 700, Richmond, VA 23219-0026. **Nominations must be received no later than December 4, 2017.** Please be sure to include your name and the full name, address, and phone number of the nominee.

If you have questions about the nomination process, please call Maureen D. Stengel, Director of Bar Services, Virginia State Bar, at (804) 775-0517.

HARRY L. CARRICO PROFESSIONALISM AWARD

NOMINATION FORM

Please complete this form and return it to the Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, VA 23219-0026. **Nominations must be received no later than December 4, 2017.**

Name of Nominee: _____

Profession: _____

Employer/Firm/Affiliation: _____

Address of Nominee: _____

City _____ State _____ Zip _____

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

E-mail _____ Signature _____

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



Health Law

Probably no other enterprise in the United States is as regulated as health care. Health-care lawyers must pilot their clients through treacherous regulatory waters avoiding the often hidden and deceptive administrative, civil, and criminal penalties lurking like so many icebergs.

One of the most financially significant hazards is a False Claims Act violation. In the wake of the 2016 United States Supreme Court decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, Robert Vogel brings proof requirements for False Claims Act litigation up to date in his article, “False Claims Act Liability Has a New Implied Certification Standard, or Does It?” He points out that while the “implied certification” theory is now unequivocally valid, defining “materiality” remains an elusive goal.

In addition to federal concerns such as the False Claims Act, there are also both state and federal laws imposing penalties for improper relationships (e.g., Stark and anti-kick-back statutes) between health care providers and entities, all in an effort to ensure that the tax dollars of the citizenry are not wasted or misused. Andrew Wampler outlines the haz-

ards facing providers and their counsel as they form business entities and relationships in his article, “Navigating Harbors and Exceptions in Healthcare Contracting.”

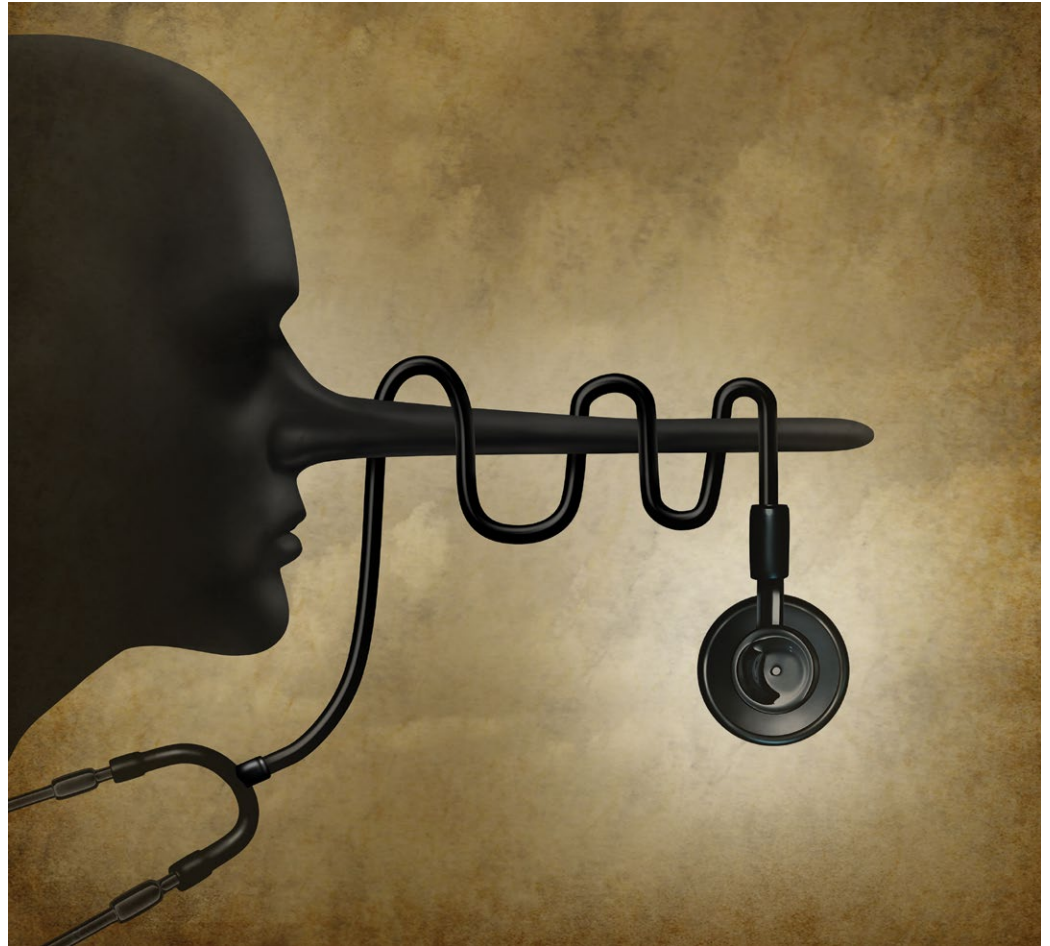
Misuse, albeit of medications, not money, is also the underlying cause of the changes in public health law highlighted by the Office of Attorney General (OAG) in its article, “Taking Aim at Virginia’s Opioid Crisis Through Changes in Public Health Law.” The OAG describes the devastating toll of prescription drug overdoses in Virginia and recent legislative efforts to tighten up prescribing practices as well as make reversal agents widely available.



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False Claims Act Liability Has a New Implied Certification Standard, or Does It?

by Robert B. Vogel



Suppose a law school wishes to ensure compliance with a school policy that prohibits students from cheating on final exams. As a means of compliance, the law school instructs each student to sign an affidavit at the end of an exam stating that the student did not give or receive help. By signing, the student has *expressly* attested to his honesty. But what if the law school's student handbook states that there shall be no cheating on final exams? Doesn't the law student then,

merely by handing in an exam, *impliedly* attest to all of the rules applicable to exam-taking that are found in the handbook?¹

This vignette exposes one of the central questions that has plagued analysis of the False Claims Act (FCA) in recent years. To succeed in an FCA action, the plaintiff must show by a preponderance of the evidence that the defendant knowingly made a claim that was false or fraudulent while seeking payment or approval from the United States government.² Circuit courts have split over whether so-called "implied certification" is a valid means of proving whether a claim is "false or fraudulent." Does

a government contractor impliedly certify compliance with any law or regulation that pertains to the claim that was submitted, just as the law student attests to all the rules in the handbook?

Circuit Courts were split over whether a contractor does impliedly certify compliance with the voluminous statutes and regulations that pertain to his claim. If the court did accept implied certification as a legal theory, then it had to decide how to apply it. One of the critical points of analysis on which the circuits split was whether the false certification was “material” to the government’s decision to pay the claim. On June 16, 2016, the United States Supreme Court issued a unanimous decision in *Universal Health Services, Inc. v. United States ex rel. Escobar* upholding the implied certification theory, while imposing what was thought to be a new standard of so-called “materiality.”³ Now that we are a year out from the *Escobar* decision, it is instructive to see how the Circuit Courts of Appeal have applied the *Escobar* standards.

Facts of Escobar

In *Escobar*, a patient, who was a Massachusetts Medicaid beneficiary, received counseling services from a mental health facility owned by Universal Health Services Inc. After the patient died from an adverse reaction to a medication prescribed at the facility, her parents discovered that many of the counselors that had cared for their daughter were unlicensed and unauthorized to prescribe medication without appropriate supervision, which did not exist.⁴

The lawsuit, filed in a district court in the First Circuit, claimed, in part, that submission of claims for the mental health counseling of the patient violated the FCA under implied certification theory. The plaintiffs argued that Universal’s submission of Medicaid claims was “false or fraudulent” because utilizing improperly licensed counselors impliedly violated the government’s conditions of payment. Despite the fact that the First Circuit had previously recognized implied certification theory and the “conditions of payment” materiality standard, the district court granted Universal’s motion to dismiss, finding none of the cited violations as preconditions of payment.⁵

On appeal, the First Circuit reversed the lower court, broadening its own interpretation of materiality and stating: “[O]ur case

law makes clear that a healthcare provider’s noncompliance with conditions of payment is sufficient to establish the falsity of a claim for reimbursement” Universal appealed to the Supreme Court.⁶

What is Materiality?

Prior to *Escobar*, if the given circuit accepted implied certification theory, there were generally two standards that were used to assess “materiality”: the so-called “prerequisite to payment” test⁷ and the “natural tendency to influence” test.⁸ The “prerequisite to payment” (or “condition of payment”) test made materiality dependent on whether the underlying statute or regulation itself expressly stated that compliance was a condition of payment with which the contractor must comply in order to be paid. Other circuit courts followed the “natural tendency to influence” test employing language from the Fraud Enforcement and Recovery Act of 2009 (FERA), signed by President Obama as an amendment to the FCA, which defined “materiality” as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”⁹ One of the questions now being asked is whether the *Escobar* materiality standard is more well-defined and will be more uniformly applied than the “natural tendency” language of FERA.

What Standard for Materiality Did the Supreme Court Set in Escobar?

In *Escobar*, the Supreme Court validated the existence of the implied certification theory as a whole and attempted to define a “materiality” standard. The Court stated that the “materiality” standard requires that at least two conditions must be satisfied for implied certification theory to apply: “[F]irst, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant’s failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths [that were material to the government’s payment decision].”¹⁰

The Court said that it is relevant, although not dispositive, for the noncompliance to technically be a “condition of payment” or have given the government the option to withhold the payment.¹¹ The Court explained that it would be evidence of materiality if

the contractor knows that the government routinely fails to pay claims when the given provision is violated.¹² Therefore, it seemed from the plain language of the opinion that the misrepresentation must be outcome determinative; if the government had paid earlier claims on the same contract knowing of the noncompliance, then it would be “very strong evidence” that the misrepresentation was not material.¹³

The Court concluded that the First Circuit’s view that any statutory, regulatory, or contractual violation is material so long as the defendant knows that the government would be entitled to refuse payment were it aware of the violation was far too expansive. The Court makes clear that, in order to be material to the government’s decision to pay a claim, the violation must be caused by a nondisclosure that lead to it being a half-truth or at least misleading. The case was remanded to the First Circuit for a ruling in keeping with this new standard.¹⁴

In the immediate aftermath of the *Escobar* decision, there was reason for both FCA plaintiffs and defendants to feel emboldened: implied certification had been upheld as a valid legal theory, but it seemed as if the materiality requirement had been stringently narrowed. Indeed, the Court said that “[t]he materiality standard is demanding” and should be rigorously applied.¹⁵ Noncompliance is not material, said the Court, where it is “minor or insubstantial.”¹⁶

Cases that Have Been Decided Applying the *Escobar* Standard

Not surprisingly perhaps, interpretations of the Supreme Court’s decision in *Escobar* have yielded disparate results, with the district and appeals courts in some cases following *Escobar* and in others continuing to forge their own path.

The most anticipated ruling post-*Escobar* was the First Circuit’s decision on the *Escobar* remand. They were now again ruling on the district court’s motion to dismiss. A panel of the First Circuit used what they called a “holistic approach” to answer the question of whether the government’s decision to pay Universal for mental health counseling from allegedly unqualified individuals was material.¹⁷ The First Circuit said that the plaintiffs had adequately pleaded materiality for the purposes of surviving a motion to dismiss because complying with the regulation in question was, in their opinion, a “condition of payment,” and while recognizing that this was not dispositive, it was strong evidence of materiality and the qualifications of the counselors was at the core of the program expectations.¹⁸ These findings are in keeping with the Supreme Court’s opinion in *Escobar* and reiterated the First Circuit’s own previous decision. The most controversial finding of the First Circuit in this remand was with respect to the “knowledge” that the government must have of the noncompliance before paying a claim. They determined that there was a difference between the knowledge of “the entity paying [the claim]” and other state regulators. The Supreme Court opinion failed to make this distinction, only recognizing the “government’s” knowledge more generally.¹⁹ In this case, the court found that there was no evidence that the paying entity, MassHealth, had paid claims despite being aware of violations, but it was clear that other

regulators in the state government were aware and did not seek to recoup payment. The court did say that if, upon discovery, it is found that MassHealth knew about the violations and paid, the matter could be reheard in light of this evidence.²⁰

In January 2017, the Ninth Circuit affirmed a district court ruling granting summary judgment to a government contractor, SERCO, who was alleged to have violated the FCA by failing to comply with statutory and regulatory law regarding the filing of monthly cost reports.²¹ The Ninth Circuit used a straightforward reading of *Escobar* to find that on both prongs the relator had, in the first instance, failed to show that SERCO had impliedly certified “specific representations” about its performance and, secondly, failed to show that compliance with the specific regulation at issue was material to payment and that the government did not rely on the cost reports in deciding whether to pay. The Ninth Circuit concluded that a mere request for payment does not contain representations specific enough to satisfy the pleading requirements in an implied certification case.²²

Setting up a potential new circuit split, the Fourth Circuit broke ranks with the straightforward reading of *Escobar* by the Ninth Circuit with regard to what a “specific representation” is. In May 2017, the Fourth Circuit found in the case of *United States ex rel. Badr v. Triple Canopy, Inc.*, upon remand from the Supreme Court, that in order to satisfy the first prong of *Escobar*, the defendant was required to disclose its contractual noncompliance in its requests for payments from the government.²³ Triple Canopy had argued that it made no specific representations regarding the marksmanship skill of the guards that it supplied to the government, as was required in its contract, when it requested payment.²⁴ The question remains open about whether the Fourth Circuit would adopt the First Circuit’s approach and reconsider the materiality if the government knew about the poor marksmanship and paid anyway.

Other circuit courts that have decided FCA implied certification cases since *Escobar* included the Seventh Circuit, which had previously rejected the concept of implied certification. In the case before it, a former employee alleged that a for-profit college had violated Title IV Higher Education Act requirements involving recruitment and retention policy. The Seventh Circuit, relying on *Escobar*, decided that the government’s decision to pay the college would not have been different had it known of the alleged noncompliance.²⁵

The Eighth Circuit decided that if the government had known that a for-profit college was not keeping accurate student records it would not have supplied financial aid funds to the college. Noting that the government had previously terminated colleges from receiving financial aid funds for falsifying records, the Court found that the college’s promise to maintain accurate grade and attendance records influenced the government’s decision to enter into a contractual relationship with the college.²⁶

Conclusion

Relators and the government may now argue that the *Escobar* decision did little to change the definition of “material” as

it was already defined by the FCA under FERA as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”²⁷ As expected, the relators and the government will encourage a “holistic approach” that utilizes the materiality factors discussed in *Escobar* as merely guidelines for an overall materiality approach. We can expect defense attorneys to attempt to defeat materiality by submitting evidence that the government knew about the presumed violation and paid anyway. After *Escobar*, we now know that implied certification is here to stay as an FCA theory, and, despite the fact that we have Supreme Court guidelines, how materiality will be proven is still an open question.

Endnotes:

- 1 This hypothetical is modeled after the one discussed in *United States v. Kellogg Brown & Root Services, Inc.* See *U.S. v. Kellogg Brown & Root Servs., Inc.*, 800 F. Supp. 2d 143, 154-55 (D.D.C. 2011). It is also found in my law review article that was published in the LIBERTY UNIVERSITY LAW REVIEW in the Spring of 2014. At that time, there was a debate about whether the concepts of express and implied certification should be dropped and enveloped into a “materiality” assessment. See Robert B. Vogel, M.D., *Implied Certification and Materiality Should be Distinct Elements when Assessing False Claims Act Liability* 8, LIBERTY U. L. REV. 449 (2014); see also Monica P. Navarro, *Materiality: A Needed Return to Basics in False Claims Act Liability*, 43 U. MEM. L. REV. 105 (2012).
- 2 31 U.S.C. § 3729(a)(1)(A)-(G). 31 U.S.C. § 3729(a)(1)(A) says, “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” and § 3729(a)(1)(B) says, “knowingly makes, uses or causes to be made or used, a false . . . or fraudulent claim.” 31 U.S.C. § 3729(a)(1)(A-B).
- 3 *Universal Health Servs., Inc. v. U.S. ex. rel. Escobar*, 136 S. Ct. 1989, 2003-04 (2016).
- 4 *Id.* at 1997.
- 5 *Id.* at 1997-98. The Supreme Court opinion cites *United States ex rel. Hutcheson v. Blackstone Medical, Inc.*, 647 F.3d 377, 385-87 (1st Cir. 2011) as an example of the First Circuit’s evaluation of materiality prior to *Escobar*. *Id.* at 1998.
- 6 *U.S. ex rel. Escobar v. Universal Health Servs.*, 780 F.3d 504, 517 (1st Cir. 2015).
- 7 This article will not attempt to break down the nuances of the circuit split over the materiality analysis prior to *Escobar*. The “prerequisite to payment” test is best seen in *United States ex rel. Mikes v. Strauss*, 274 F.3d 687 (2d. Cir. 2001). In *Mikes*, the Second Circuit said, “Specifically, implied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies expressly states the provider must comply in order to be paid. *Mikes*, 274 F.3d at 700 (emphasis in original). The Court went on to say that “[i]ability under the Act may properly be found therefore when a defendant submits a claim for reimbursement while knowing – as that term is defined by the Act — that payment expressly is precluded because of some noncompliance by the defendant.” *Id.* (citation omitted).
- 8 31 U.S.C. § 3729(b)(4) (2012).
- 9 It seems that Congress meant to undercut the strict standard for materiality that circuit courts and the Supreme Court were imposing on the materiality standard in the wake of *Mikes*. See *supra* note 7. The Supreme Court had tightened the standard of

materiality when it decided *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008). In *Allison*, the Supreme Court said, “What § 3729(a)(2) demands is not proof that the defendant caused a false record or statement to be presented or submitted to the Government but that the defendant made a false record or statement for the purpose of getting ‘a false or fraudulent claim paid or approved by the Government.’” *Id.* at 2130. Therefore, a subcontractor violates § 3729(a)(2) if the subcontractor submits a false statement to the prime contractor intending for the statement to be used by the prime contractor to get the Government to pay its claim. *Id.* In announcing the *Escobar* standard, the Supreme Court did little to compare that standard to the standard in *Allison Engine*.

- 10 *Escobar*, 136 S. Ct. at 2001.
- 11 *Id.* at 2003-04. “A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant’s noncompliance.” *Id.* at 2003.
- 12 *Id.* at 2003.
- 13 *Id.*
- 14 *Id.* at 2004
- 15 *Id.* at 2003
- 16 *Id.*
- 17 *U.S. ex rel. Escobar v. Universal Health*, 842 F.3d 103, 109 (1st Cir. 2016).
- 18 *Id.* at 110-11.
- 19 *Id.* at 111-12.
- 20 *Id.* at 112.
- 21 *U.S. ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 328-29 (9th Cir. 2017)
- 22 *Id.* at 334-35.
- 23 *U.S. ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174, 178-79 (4th Cir. 2017)
- 24 *Id.* at 178.
- 25 *U.S. ex rel. Nelson v. Sanford-Brown*, 840 F.3d 445, 447-48 (7th Cir. 2016).
- 26 *U.S. ex rel. Miller v. Weston Educ.*, 840 F.3d 494, 503-05 (8th Cir. 2016).
- 27 31 U.S.C. § 3729(b)(4) (2012).



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Navigating Harbors and Exceptions in Healthcare Contracting

by Andrew T. Wampler



Lawyers are well versed in contracts. Offer, acceptance, and consideration are usually straightforward. However, there can be many industry-specific issues, particularly in health care. Several laws place restrictions on arrangements between healthcare providers, some of which seem counterintuitive.

Providers face increasing difficulty structuring practices. There is a push to deliver quality care with decreasing reimbursement. As the largest payer of services, the government applies intense scrutiny.¹ Providers who treat Medicare or Medicaid patients have an obligation to prevent unnecessary billing.

Regulators seek to ensure care based on medical decision-making rather than financial.

Myriad Restrictions

The maze of laws to prevent healthcare fraud creates traps for the unwary for what appear to be appropriate business decisions. When healthcare clients call, it is important to understand compliance hazards. Prohibited relationships are those that create incentives to bill services that should not be billed or pay for patient referrals.

Courts recognize the complexity providers face. In an appeal upholding a multi-million-dollar judgment, Judge Wynn of the Fourth Circuit wrote: “It seems as if, even for well-intentioned health-care providers, the Stark Law has become a booby trap rigged with strict liability and potentially ruinous exposure — especially when coupled with the False Claims Act.”²

The following federal laws impact providers: Physician Self-Referral Law (“Stark”), Anti-Kickback Statute (AKS), False Claims Act (FCA), Civil Monetary Penalties Law (CMPL), and Exclusion Authorities. Virginia has complimentary laws: Virginia Fee-Splitting Act, Virginia Practitioner Self-Referral Act, and Virginia Anti-Kickback Statute. This article does not discuss nuances of applicable laws, outline all exceptions and safe harbors to illegal relationships, or discuss all agreement types. There are treatises that do that. This article provides basic overview of some common situations to help practitioners spot issues and minimize risk.

Stark

The physician self-referral law, or Stark Law, prohibits referrals for designated health services (DHS) payable by Medicare to an entity with which the physician (or immediate family) has a financial relationship.³ The statute prohibits DHS-furnishing entities from filing claims with Medicare for services referred by that physician. Financial relationships include direct or indirect ownership, investment, or compensation for services. The government is prohibited from paying claims that violate Stark. The law allows commercially reasonable arrangements when physicians are paid market value without considering value or volume of referrals.⁴ Specific exceptions outline relationships deemed not to pose a risk to payment programs.

DHS includes many services patients need. When in question, providers can generally assume that services are included.⁵ Originally, the law applied to laboratory services, but the legislature expanded to DHS and included Medicaid. Changes and phases of adoption require constant evaluation of current regulations and enforcement efforts.

Stark was created to provide “bright line” rules to “ensure compliance and minimize . . . costs.”⁶ It has provided anything but bright lines. Stark has strict liability, thus intent does not matter, and there is no defense for technical violations.

Anti-Kickback Statute

AKS is a criminal statute, prohibiting one from offering something of value to influence the referral of business.⁷ Both parties can be liable, and conviction can include significant fines and imprisonment. AKS applies to

anyone who “knowingly and willfully offers, pays, solicits, or receives remuneration in order to induce business reimbursed under the Medicare or Medicaid programs.”⁸ Induce referrals need be only one purpose of a transaction.

Safe harbors describe practices that are not treated as kickbacks. Regulations specify allowable “safe” financial relationships. Safe harbors exist for numerous arrangements, both common and uncommon, such as employment agreements, leases, electronic prescribing, warranties, investment interests, recruitment, and discount programs. Under AKS, transactions that do not have specific safe harbors are not automatically violations but are reviewed case-by-case for their effect on payment programs.⁹

False Claims Act

FCA imposes liability on those who “knowingly present[], or cause[] to be presented, a false or fraudulent claim for payment or approval.”¹⁰ Knowingly involves actual knowledge of falsity, deliberate ignorance, or reckless disregard.¹¹ This scienter requirement avoids punishing “honest mistakes” or “mere negligence.”¹² One defense is good faith reliance on the advice of counsel.¹³

FCA’s purpose is to indemnify the government against fraud. FCA is often a vehicle to assert Stark and AKS violations.

Civil Monetary Penalties Law & Exclusion Authorities

CMPL creates civil monetary penalties for fraud. Many acts can constitute violations from presenting a claim to including false statements on program applications to violating Medicare assignment provisions. The Office of Inspector General (OIG) has mandatory and permissive authority to exclude from program participation. The authorities arise under the Social Security Act.¹⁴ CMPL is interconnected with the web of federal restrictions and used in conjunction with other laws. The OIG seeks different penalties depending on the conduct and which laws are implicated.

Virginia Laws

The Virginia Fee-Splitting Statute prohibits physicians from sharing “any professional fee received for the provision of health services . . . to a patient with another physician licensed to practice medicine . . . in return for such other

physician's making a referral ... or [accepting] any portion of a professional fee paid to another physician"¹⁵

The Virginia Physician Self-Referral Statute prohibits patient referral to an entity outside the practitioner's practice if the practitioner (or immediate family) is an investor.¹⁶ The statute applies to all services and all patients, whether the government is a payer. Virginia enforces the statute in a manner consistent with Stark. The Department of Health Professions provides advisory opinions on arrangements and maintains them on its website along with regulations.¹⁷

The Virginia Anti-Kickback Statute states that any person who "knowingly and willfully solicits or received any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in-kind" for a referral or for "purchasing, leasing or ordering any goods, facility, service or item for which payment may be made in whole or in part under medical assistance" commits a felony.¹⁸ Interpreted to be consistent with AKS, the statute does not prohibit disclosed discounts, bona-fide employment, or other AKS-permitted conduct.

Contract Compliance

Federal rules and regulations address arrangements that are deemed legal under the various restrictions. Many exceptions and safe harbors include specific drafting or procedure requirements. They differ from one type of arrangement to another. But there are general principles to keep in mind. Basic rules are that all payments be fair market value and services actually be needed and medically necessary. The question is whether payments are consistent with comparable arm's-length transactions and are commercially reasonable.

Of the many agreement types, service agreements and leases are two of the most common; while there is not room to discuss all provider arrangements, this article lists exceptions and safe harbors for these forms of agreements. Service agreements include employment and independent contractor agreements. Leases can cover space, equipment, or personnel.

Service Agreements

For employment agreements, Stark has an Employment exception. This exception requires fair market value compensation set in advance, but allows referrals in certain circumstances.¹⁹ Productivity payments are based on personally performed services and cannot take into account facility fees.²⁰ For employees, there is also an In-Office Ancillary Services exception.

For Independent contractors, Stark has Personal Service Arrangement and Fair Market Value exceptions.²¹ These exceptions apply to medical director, call coverage, professional service, and management services agreements. These agreements must be for a year or longer, and if terminated in the first year, a new agreement cannot be executed for the same services. They must pay fair market value and not take into account referrals or business between the parties.

For services agreements, AKS may also be implicated because AKS applies when one purpose of a payment could

be to induce referrals. For employees, the OIG has established an Employee safe harbor which simply requires a bona-fide employment agreement.²² OIG has more rigorous safe harbors such as Management Contracts and Personal Services, requiring aggregate compensation in a fixed amount.²³ Unlike strict compliance under Stark, the AKS analysis is intent based. Therefore, providers can aim to meet the majority of requirements since failure to comply completely does not establish a *per se* violation.

Leases

Stark has a Rental of Office Space exception, which requires a written arrangement with a one-year term.²⁴ There can be shared common areas, but clinical space must be exclusive. Rent must be fair market value set in advance, not based on business between the parties.

For equipment, Stark has Rental of Equipment and Fair Market Value exceptions.²⁵ There are documentation, term length, and fair market value requirements. The Rental exception requires exclusive use, and both prohibit percentage-based or per-unit payments.

Both Equipment and Space lease safe harbors require part-time use to be scheduled in advance and aggregate compensation to be set in advance.²⁶ As with other safe harbors, failure to meet all requirements does not necessarily indicate a violation.

Changes in 2016

Because enforcement, implementation, and interpretation of Stark has been fluid, proposed arrangements require review of current regulations. With the complexities and the possibility of running afoul of requirements, providers have called for more flexibility. As of 2016, a new Final Rule relaxes some Stark requirements.²⁷

Historically, time-share leases have been extremely complicated. Under a new Time-Share License exception, a provider can use an office, including personnel, equipment, and furnishings, on a periodic, fluctuating basis. Exclusive use is required, but the license is flexible. Unlike a lease that transfers control, a license offers the privilege to access. This license must be signed, specifying location and services.

The rule also relaxed standards for a writing under various exceptions. Several exceptions now use the term "arrangement" rather than "agreement" or "contract." Document collections can show course of conduct to establish an arrangement.²⁸ Board minutes, communications, fee schedules, and time sheets are examples. Documents must be contemporaneous, and there is no grace period. Centers for Medicare and Medicaid Services (CMS) still states that "the surest and most straightforward means" to be compliant is to have a single writing.

The rule outlines a 90-day window to obtain signatures and relaxes some one-year-term requirements, provided the arrangement lasts for a year.

Suggestions

Many arrangements create some level of risk. These risks can be managed by an understanding of the concepts underlying the prohibitions. There are few strategies that help:

1. Be wary. Request prior legal reviews.
2. Identify pertinent aspects of the arrangement.
3. Consider fair market value.
4. Consider commercial reasonableness.
5. Document fair market value/commercial reasonableness.²⁹ Specific nature of relationship matters, not business in general.
6. Review all party arrangements. Aggregation can cause issues.
7. Specify services and compensation. Don't change them retroactively.
8. Check family members.
9. Get signed agreements, even if not mandatory. They provide the best protection.
10. Ensure services are necessary and performed. Conduct matters.

Healthcare contracting raises unique concerns that require care. Compliance with Stark and AKS is necessary, but numerous other issues need attention as well, from government audit requests to hazardous substance management to accrediting body standards to protected health information. Asking questions with a critical eye to regulations is an important first step representing providers who come calling for contract advice.

Endnotes:

- 1 Government has "strong interest" in preventing fraud because "[f]raudulent claims make the administration of Medicare more difficult, and widespread fraud would undermine public confidence in the system." *United States ex rel Drakeford v. Tuomey d/b/a Tuomey Healthcare System, Inc.*, No. 13-2219, 792 F.3d 364 (4th Cir. 2015).
- 2 *Id.* at 395 (Wynn, J., concurring).
- 3 42 U.S.C. § 1395nn.
- 4 42 C.F.R. § 411.357(p).
- 5 Following are DHS:
 1. Clinical laboratory services.
 2. Physical therapy services.
 3. Occupational therapy services.
 4. Outpatient speech-language pathology services.
 5. Radiology and certain other imaging services.
 6. Radiation therapy services and supplies.

7. Durable medical equipment and supplies.
8. Parenteral and enteral nutrients, equipment, and supplies.
9. Prosthetics, orthotics, and prosthetic devices and supplies.
10. Home health services.
11. Outpatient prescription drugs.
12. Inpatient and outpatient hospital services.
- 6 66 F.R. 856, 860 (Jan. 4, 2001).
- 7 42 U.S.C. § 1320a-7b.
- 8 Section 1128B(b), Social Security Act.
- 9 OIG Dept. HHS, Fact Sheet Nov. 1999, *Federal Anti-Kickback Laws and Regulatory Safe Harbors*.
- 10 31 U.S.C. § 3729(a)(1)(A).
- 11 *Id.* § 3729(b)(1).
- 12 *United States v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 728 (4th Cir. 2010).
- 13 *United States v. Newport News Shipbuilding, Inc.*, 276 F. Supp. 2d 539, 565 (E.D. Va. 2003).
- 14 42 U.S.C. § 1320a-7. See <https://oig.hhs.gov/exclusions/authorities.asp> (accessed July 23, 2017).
- 15 Va. Code § 54.1-29.62.
- 16 Va. Code § 54.1-2411.
- 17 https://www.dhp.virginia.gov/bhp/bhp_PSR.htm (accessed July 23, 2017). Application procedure: <http://law.lis.virginia.gov/admincode/title18/agency75/chapter20/section60> (accessed July 23, 2017). See 18 VAC 75-20-10 *et seq.*
- 18 Va. Code § 32.1-315.
- 19 42 C.F.R. § 411.354(d).
- 20 42 C.F.R. § 411.357(c).
- 21 42 C.F.R. § 411.355(b).
- 22 42 C.F.R. § 1001.952(i).
- 23 42 C.F.R. § 1.952(d).
- 24 42 C.F.R. § 411.357(a).
- 25 *Id.*
- 26 42 C.F.R. § 1001.952(b), (c).
- 27 80 F.R. 220 (Nov. 16, 2015).
- 28 *Id.* at 71314.
- 29 66 F.R. 856, 944-45 (Jan. 4, 2001). Cost attestations, price lists, and compensation surveys are options. Best practice is to obtain an independent valuation. Reports should be updated every two years.



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Taking Aim at Virginia's Opioid Crisis through Changes in Public Health Law

by Health Services Section, Office of the Attorney General



Health Services Section of the Office of the Attorney General staff: Front row from left to right: Karen A. Taylor, Allyson K. Tysinger, Erin L. Barrett, Amanda L. Lavin; Middle row from left to right: Pamela B. Beckner, Robin V. Kurz, Charis A. Mitchell; Back row from left to right: Sean J. Murphy, Braden J. Curtis, James E. Rutkowski.

What is the leading cause of both unnatural death and accidental death in Virginia? Surprisingly, it is not motor vehicle accidents or guns. The answer is drug overdose.¹ The number of individuals who die from drug overdose has been on the rise every year since 2012, with the most recent data showing a 38.9 percent increase in the number of drug overdose deaths from 2015 to 2016.² Opioids, including both prescription opioids and illicitly produced opioids such as heroin and fentanyl, account for approximately 75 percent of all fatal drug overdoses annually in Virginia.³ From 2015 to 2016, the number of fatal opioid

overdoses increased by 40.3 percent.⁴ According to the Virginia Department of Health (VDH), on average three Virginians die of drug overdose and over two dozen are treated in emergency departments for drug overdose each day.⁵ The opioid epidemic that Virginia is experiencing is not merely a criminal justice problem; it is a matter of public health. In fact, State Health Commissioner Dr. Marissa Levine declared opioid addiction to be a public health emergency on November 21, 2016.⁶ Discussed below are recent legislative and regulatory public health efforts Virginia has undertaken to address the crisis.

Access to Prescription Opioids

Until 2015, the leading category of drugs causing or contributing to death in Virginia was prescription opioids.⁷ As a result of the declaration of a public health emergency by the State Health Commissioner, the Virginia Board of Medicine began drafting emergency regulations governing the prescribing of opioid medications in December 2016.⁸ After receiving extensive input from practitioners, patients, and the general public, the regulations, adopted in March 2017, establish requirements for practitioners prescribing opioids for both acute pain and chronic pain treatment. Those requirements include opting for non-opioid treatment where possible,⁹ limits on dosage amounts,¹⁰ and other measures aimed at preventing misuse of the medication.¹¹ Since the Board of Medicine adopted its emergency regulations, the Committee of the Joint Boards of Nursing and Medicine, the Board of Dentistry, and the Board of Veterinary Medicine have also adopted similar emergency regulations regarding opioid prescribing. Each of these boards' emergency regulations are similar to the emergency regulations of the Board of Medicine with some differences due to the specific scope of practice of the practitioners that each board regulates.

During its 2017 session, the General Assembly passed legislation directing the Boards of Medicine and Dentistry to adopt permanent regulations governing the prescribing of opioids that include guidelines for treatment of acute and chronic pain. That legislation was codified at Virginia Code §§ 54.1-2708.4 and 54.1-2928.2, and requires the permanent regulations to address the same areas that the boards addressed in their emergency regulations.¹² Each board that adopted emergency regulations is in the process of adopting permanent regulations.

In addition to the regulations that govern the prescribing of opioids, the Board of Pharmacy has adopted regulations, effective September 7, 2017, that allow a patient or prescriber to request a prescription for a Schedule II drug to be filled in a partial quantity. This allowance enables a patient or prescriber to avoid the possibility of the receipt of more medication than the patient ultimately needs.¹³ This action brings the commonwealth into conformity with a recently enacted federal law, the Comprehensive Addiction and Recovery Act of 2016.¹⁴

Also during the 2017 legislative session, the General Assembly amended Virginia Code § 54.1-2522.1 related to prescribers' usage of the Prescription Monitoring Program (PMP).¹⁵ The PMP, which is maintained and administered by the director of the Department of Health Professions (DHP), monitors the dispensing of certain covered substances, including opioids.¹⁶ Under the 2017 amendment, prescribers must query the PMP if the prescription of opioids is anticipated to last more than seven consecutive days.¹⁷ Requiring PMP queries enables prescribers to be aware of all current and recent prescriptions for a patient, potentially preventing the patient from going to different practitioners in order to receive opioids. Every board that has adopted emergency regulations governing opioid prescribing has required its licensees to consult the PMP at regular intervals during opioid treatment.¹⁸

In 2016, the General Assembly amended Virginia Code § 54.1-2523.1 to direct the PMP to develop a method to analyze the data it collected to identify unusual patterns of prescribing or dispensing of covered substances by individual prescribers or dispensers or potential misuse of a covered substance by a recipient.¹⁹ The director of DHP was given the authority to disclose information regarding unusual prescribing or dispensing to the Enforcement Division of DHP for potential administrative investigation that could lead to disciplinary action.²⁰ The director of DHP was also permitted to disclose information about a specific recipient who may be misusing a covered substance to his prescribers to prevent misuse or to certain law enforcement agents for the purpose of an investigation into possible drug diversion.²¹ In 2017, the General Assembly further directed the PMP to annually provide a report to the Joint Commission on Health Care on the prescribing of opioids that includes data on reporting of unusual patterns of prescribing or dispensing.²²

Decreasing Overdose Fatalities

Naloxone is an opioid antagonist drug that reverses the effects that opioids have in the brain. When a person overdoses on opioids, the opioid overwhelms the brain, resulting in decreased respiration and heart rate until the heart stops altogether. Naloxone allows a person's body to resume respiration.²³ Naloxone was previously available only by prescription, but Virginia law now authorizes

the State Health Commissioner, as well as other prescribers, to issue a standing order that permits an individual to purchase naloxone from a pharmacy and possess and administer it to someone who appears to be experiencing an opioid overdose.²⁴ Commissioner Levine issued a statewide standing order for naloxone at the time she declared a public health emergency, enabling the purchase of naloxone at any pharmacy in the commonwealth.²⁵

Under protocols established by the Board of Pharmacy in consultation with the Board of Medicine and VDH pursuant to Virginia Code § 54.1-3408(X), the pharmacist must provide a recipient of naloxone with counseling in opioid overdose prevention, recognition, and response, and the administration of naloxone.²⁶ This counseling cannot be waived by the recipient unless the pharmacist verifies that the recipient has completed the REVIVE! training program.²⁷ The Department of Behavioral Health and Developmental Services (DBHDS), in collaboration with VDH, DHP, and community recovery organizations, developed and implements REVIVE!, the commonwealth's Opioid Overdose and Naloxone Education Program. The REVIVE! program began as a pilot project in 2013 under authority set forth in 2013 Va. Acts ch. 267, and is now a statewide program. REVIVE! provides training to lay rescuers and others such as law enforcement officers and firefighters on how to recognize and respond to an opioid overdose emergency with the administration of naloxone. Virginia Code § 54.1-3408(X) also specifically permits law-enforcement officers, firefighters, and employees of the Department of Forensic Science, the Office of the Chief Medical Examiner, and the Division of Consolidated Laboratory Services who have completed a REVIVE! training program to possess and administer naloxone.²⁸

In addition to training lay rescuers, REVIVE! has a second component that trains individuals to lead REVIVE! lay rescuer trainings. Developing trainers will ensure that REVIVE! programs are available in communities throughout Virginia. Under Virginia Code § 54.1-3408(Y), a person who is autho-

rized by DBHDS to lead REVIVE! trainings, is acting on behalf of an organization that provides services to individuals at risk of experiencing an opioid overdose or training in administration of naloxone for overdose reversal, and obtains a controlled substances registration may also dispense naloxone without charge to an individual who has completed a REVIVE! training program.²⁹

Virginia law provides liability protection for those involved in the naloxone effort. If a person in good faith prescribes, dispenses, or administers naloxone to an individual who is believed to be experiencing or about to experience a life-threatening opiate overdose, the person shall not be liable for civil damages for ordinary negligence if acting within the authority described in the preceding paragraphs.³⁰

In addition to championing the laws discussed above that enhance access to naloxone, the Attorney General's Office proposed and supported a safe reporting law in 2015.³¹ This law establishes an affirmative defense to prosecution of an individual for certain drug charges if the individual seeks or obtains emergency medical attention for an overdose for himself or another individual by reporting the overdose to a firefighter, emergency medical services personnel, a law enforcement officer, or an emergency 911 system and the individual remains at the scene until a law enforcement officer arrives.³²

Other Health Issues Associated with Opioid Use
Reported cases of hepatitis C, especially among individuals aged 18 to 30, have been increasing since 2013.³³ Concern regarding the spread of hepatitis C and HIV from

injection drug use led to the enactment of a cutting edge law that authorizes VDH to operate a safe syringe program. Passed in 2017, the law permits the State Health Commissioner to establish and operate local or regional comprehensive harm reduction programs during a declared public health emergency.³⁴ Such programs shall be located in communities where data indicate a risk of transmission of, or increases in the transmission of, HIV, viral hepatitis, or other blood-borne disease as a result of injection drug use.³⁵ Through the program, the



This is a societal issue blurring traditional public health and criminal justice lines that we must all address together.

commissioner may authorize persons to dispense or distribute hypodermic needles and syringes.³⁶ VDH is currently developing the required protocols that will address provision and disposal of needles and syringes, security of program sites, education materials on prevention and treatment, individual counseling, access to overdose prevention kits, and verification that supplies distributed were obtained from the program.

Treatment

Although this article has intentionally focused on the regulatory and legislative actions taken by Virginia to address the opioid crisis, the necessity of available treatment for substance use must be recognized. DBHDS is expediting the licensing process for new substance use treatment services. Ninety-three new substance use treatment services were licensed in the past year. Also, effective April 1, 2017, the Department of Medical Assistance Services implemented an enhanced substance use disorder benefit known as the Addiction Recovery Treatment Services (ARTS) program. The increase in Medicaid rates under the ARTS program is increasing the number of addiction treatment providers who participate in Medicaid. In addition, the ARTS program is utilizing the evidence-based criteria of care developed by the American Society of Addiction Medicine (ASAM), and DBHDS is funding provider training in the ASAM criteria to standardize care across the system.

Conclusion

Virginia's state officials and policy makers have been forward-thinking in treating this epidemic as a public health crisis and enacting laws and regulations that together create a coordinated public health approach intended to reduce access to prescription opioids, prevent overdose deaths and other health issues, and increase treatment availability. Continued collaboration amongst all stakeholders, including health care providers, law enforcement personnel, first responders, legislators, state and local public officials, and advocacy organizations will be needed to halt the sharp increases in annual fatal opioid overdoses that Virginia has been experiencing. This is a societal issue blurring traditional public health and criminal justice lines that we must all address together.

The Health Services Section of the Office of the Attorney General

includes Erin L. Barrett, Pamela B. Beckner, Braden J. Curtis, Robin V. Kurz, Amanda L. Lavin, Charis A. Mitchell, Sean J. Murphy, James E. Rutkowski, Karen A. Taylor, and Allyson K. Tysinger. The Section represents the Virginia Department of Health and its 35 local health districts, the Department of Behavioral Health and Developmental Services, the Department of Health Professions and its 14 health regulatory boards, the Department for Aging and Rehabilitative Services, the Department for the Blind and Vision Impaired, and the Department for the Deaf and Hard of Hearing. Collectively the team has over 80 years of service to the Commonwealth with the Office of the Attorney General.

Endnotes:

- 1 Fatal Drug Overdose Quarterly Report, 1st Quarter, 2017, Edition 2017.1 published July 2017, found at http://www.vdh.virginia.gov/content/uploads/sites/18/2016/04/Fatal-Drug-Overdoses-Quarterly-Report-Q1-2017_Updated.pdf.
- 2 *Id.*
- 3 *Id.*
- 4 *Id.*
- 5 Remarks delivered by State Health Commissioner Dr. Marissa Levine, Nov. 21, 2016, found at <http://www.vdh.virginia.gov/blog/2017/06/01/state-health-commissioner-comments-on-opioid-addiction-declaration/>.
- 6 Declaration of Public Health Emergency, Nov. 21, 2016, found at <http://www.vdh.virginia.gov/commissioner/opioid-addiction-in-virginia/declaration-of-public-health-emergency/>.
- 7 Fatal Drug Overdose Quarterly Report, *supra*.
- 8 Vol. 33, Iss. 16 Va. Reg. Regs. 1928-32 (Apr. 3, 2017) (18VAC85-21-10 *et seq.*).
- 9 *Id.* at 1929-1930 (18VAC85-21-30(A); 18VAC85-21-70(A)).
- 10 *Id.* (18VAC85-21-40; 18VAC85-21-70).
- 11 *Id.* at 1928-31 (18VAC85-21-30(B); 18VAC85-21-60(A); 18VAC85-21-80; 18VAC85-21-90; 18VAC85-21-100; 18VAC85-21-110; 18VAC85-21-120).
- 12 2017 Va. Acts ch. 291, codified at Va. Code Ann. §§ 54.1-2708.4 and 54.1-2928.2.
- 13 Vol. 33, Iss. 24 Va. Reg. Regs. 2718-20 (July 24, 2017) (18VAC110-20-310(E)).
- 14 Pub. L. No. 114-198, § 702 (2016).
- 15 2017 Va. Acts ch. 249.
- 16 Va. Code Ann. § 54.1-2520(A).
- 17 2017 Va. Acts ch. 249, codified at Va. Code Ann. § 54.1-2522.1.
- 18 Vol. 33, Iss. 16 Va. Reg. Regs. 1928-32 (18VAC85-21-30(B); 18VAC85-21-60(A)(7); 18VAC85-21-100(C); 18VAC85-21-140(A); 18VAC85-21-150(E), (H)); Vol. 33, Iss. 24 Va. Reg. Regs. 2266-2268 (May 29, 2017) (18VAC90-40-150(C); 18VAC90-40-180(B)(7); 18VAC90-40-220(C); 18VAC90-40-260(A)); Vol. 33, Iss. 19 Va. Reg. Regs. 2112-13 (May 15, 2017) (18VAC60-21-102; 18VAC60-21-103).
- 19 2016 Va. Acts ch. 98.
- 20 *Id.*
- 21 *Id.*
- 22 2017 Va. Acts ch. 291.
- 23 REVIVE! Opioid Overdose and Naloxone Education for Virginia, June 2015, found at <http://www.dbhds.virginia.gov/library/substance%20abuse%20services/revive%20pharmacy%20dispensing%20brochure%20v10.pdf>.
- 24 Va. Code Ann. § 54.1-3408(X).
- 25 Virginia Statewide Standing Order for Naloxone, Nov. 21, 2016, found at <http://www.vdh.virginia.gov/content/uploads/sites/4/2016/11/Standing-Order-w-o-DEA-FINAL.pdf>.
- 26 Protocol for the Prescribing and Dispensing of Naloxone, Nov. 10, 2016, found at <http://www.vdh.virginia.gov/content/uploads/sites/4/2016/11/NaloxoneProtocolForPharmacists-11-10-16-CURRENT-version.pdf>.
- 27 *Id.*
- 28 Va. Code Ann. § 54.1-3408(X).
- 29 Va. Code Ann. § 54.1-3408(Y).
- 30 Va. Code Ann. § 8.01-225(A)(18).
- 31 2015 Va. Acts ch. 436.
- 32 Va. Code Ann. § 18.2-251.03.
- 33 Opioid Overdose Data Quarterly Report, 4th Quarter 2016, found at http://www.vdh.virginia.gov/content/uploads/sites/13/2016/09/Opioid-Overdose-Data-Quarterly-Report-Q4-2016_013117.pdf.
- 34 Va. Code Ann. § 32.1-45.4.
- 35 *Id.*
- 36 *Id.*

Celebrate! October Is Pro Bono Month

October 23–28, 2017, marks the ninth annual National Celebration of Pro Bono. The American Bar Association’s Standing Committee on Pro Bono and Public Service established the weeklong celebration to develop a “nationally coordinated strategy for recognizing pro bono across the country” and to raise the profile of local pro bono projects during the timeframe.¹ In a letter dated October 30, 2009, recognizing the celebration, President Barack Obama wrote, “Pro bono lawyers work tirelessly to break down barriers to opportunity and justice, volunteering countless hours to provide critical legal services to our most vulnerable citizens.”²

Since its inception, 49 states, Puerto Rico, the District of Columbia, and Canada have held thousands of Celebrate Pro Bono events that “provide a format for showcasing the incredible difference that pro bono lawyers make to our nation, to our system of justice, to our communities, and, most of all, to the clients they serve.”³ The governors or judiciaries of a number of states, including Alabama,⁴ Massachusetts,⁵ Michigan,⁶ Missouri,⁷ Tennessee,⁸ Washington,⁹ and West Virginia,¹⁰ have issued “Pro Bono Week” or “Pro Bono Month” proclamations during October to bring attention to the importance of attorney pro bono.

In recent years, the VSB Access to Legal Services Committee has unofficially celebrated October as “Pro Bono Month” by hosting the Pro Bono Conference, offering free pro bono trainings, and recognizing outstanding pro bono service by attorneys with the presentation of the Lewis F. Powell Jr. Pro Bono Award. In 2016, the committee established the Frankie Muse Freeman Organizational Pro Bono Award as a second means of recognizing exemplary pro bono service. This year, Governor Terry McAuliffe has issued a Certificate of Recognition that designates October as Pro Bono Month in Virginia.¹¹

In comments marking the 2017 National Celebration of Pro Bono, ABA



President Hilarie Bass urged “all bar associations, law firms, corporate legal departments, law schools and others to organize programs during the celebration that recognize the critical value of pro bono to our profession and to our communities” Furthermore, she encouraged all lawyers “to participate in

the celebration by volunteering for pro bono events that provide counsel, advice, and representation to low income individuals and the organizations that serve them.”¹²

A number of Virginia Pro Bono Month events are scheduled for October including:

- **Legal Aid Society of Eastern Virginia Pro Bono Celebration and Recognition Program**, Thursday, October 5, 2017, 3:30 – 5:00 p.m., Norfolk Circuit Court Rotunda, 150 St. Paul’s Boulevard, Norfolk. LASEVA will recognize its volunteers for their pro bono efforts and share updates about their access to justice programs. Justice S. Bernard Goodwyn, Supreme Court of Virginia, will provide comments, and light hors d’oeuvres and beverages will be served. For more information please contact Tameeka M. Williams, director of Pro Bono and Private Attorney Involvement. LASEVA, tameekaw@laseva.org. FREE but RSVP is required.
- **The Virginia State Bar Pro Bono Conference**, Wednesday, October 18, 2017, 9:00 a.m. – 5:30 p.m., DoubleTree by Hilton Hotel, 990 Hilton Heights Road, Charlottesville. Program includes a business meeting of the VSB Special Committee on Access to Legal Services and Continuing Legal Education sessions on *Providing Pro Bono Representation to Justice-Involved Veterans; Basic Life Planning Documents; Simple Wills, Advanced Medical Directives and Powers of Attorney*; and *Update on JusticeServer 2.0*, and a Networking Reception with attendees of the Statewide Legal Aid Conference. <http://bit.ly/2xIUzhu>. FREE.
- **The Virginia State Bar Pro Bono Awards Dinner**, Wednesday, October 18, 2017, 6:30 – 8:30 p.m., DoubleTree by Hilton Hotel, 990 Hilton Heights Road, Charlottesville. The VSB will honor Fairfax immigration lawyer Ofelia Calderón, recipient of the 2017 Lewis F. Powell Jr. Pro Bono Award, and McGuireWoods LLP, recipient of the 2017 Frankie Muse Freeman Organizational Pro Bono Award. Anita Earls, executive director of the Southern Coalition for Social Justice, will be the keynote speaker. <http://bit.ly/2y7mwRb>. \$20.00.
- **The Statewide Legal Aid Conference**, Wednesday, October 18, 2017, 1:30 p.m. – Friday, October 20, 2017, 12:45 p.m., DoubleTree by Hilton Hotel, 990 Hilton Heights Road, Charlottesville. This educational conference is hosted

by Virginia Poverty Law Center and Virginia’s legal aid programs. This year’s event offers more than 30 educational sessions including more than 20 CLE sessions and is open to those outside Virginia’s legal aid community, including sessions for professionals in management, administrative staff, community advocates, and others, <http://bit.ly/2xE4pR8>. \$275.00 plus meals.

- **Pro Bono Webinar: The Nuts and Bolts of Handling Pro Bono Uncontested Divorce Cases**, Monday, October 23, 2017, 1:00 – 2:30 p.m. Many legal aid offices are overwhelmed with applications for assistance with uncontested divorces and are in need of pro bono lawyers to help with these cases. This FREE webinar is a collaboration among the VSB Special Committee on Access to Legal Services, the VSB Young Lawyers Conference, Legal Services of Northern Virginia, and Kelly, Byrnes & Danker PLLC, and will train attorneys to represent clients in uncontested divorce proceedings in any jurisdiction in Virginia. The CLE will cover both procedural and substantive aspects of these type of cases. <http://bit.ly/2fOqZNN>.
- **Greater Richmond Bar Foundation Triage Launch and Annual Pro Bono Celebration**, Wednesday, October 25, 2017, 3:00 – 8:00 p.m., McGuire Woods LLP, 800 East Canal Street, Richmond. This event will launch the GRBF Triage Project, the country’s first effort to create a second ring around legal aid, with private attorneys taking on all matters in twelve practice areas so that legal aid offices can concentrate their limited resources on core specialties. This event will include a plenary session on the Triage strategy and breakout CLE sessions covering the outsourced practice areas. The program concludes with a cocktail reception and presentation of the annual GRBF Benjamin Rice Lacy, IV Volunteer of the Year Award and the George H. Hettrick Leadership Award. Visit <http://bit.ly/2xvHad4>. FREE.
- **Stop the Violence/Attorney of the Day Pro Bono CLE**, Thursday, October 26, 2017, 12:30 – 4:30 p.m., Fairfax County Courthouse, 4110 Chain Bridge Road, Fairfax. Legal Services

of Northern Virginia celebrates the 10th Anniversary of its Attorney of the Day program with a luncheon and CLE program for attorneys providing pro bono legal assistance to protective order petitioners in cases involving intimate partner violence. <http://bit.ly/2wfgmco>. FREE.

Additionally, several organizations as well as state, local, and specialty bar associations will be hosting pro bono service projects and other events to encourage and support attorney pro bono and access to justice in Virginia. Please visit the Virginia State Bar Access to Legal Services Facebook page for up-to-date information about Pro Bono Celebration events in Virginia, <http://bit.ly/2wUMFNO> or the events page on the Celebrate Pro Bono website, <http://bit.ly/2hxmLKu>.

Endnotes:

- 1 Overview of the National Celebration of Pro Bono, <https://www.probono.net/celebrateprobono/events/location.2017-10-01>
- 2 About the National Pro Bono Celebration, <https://www.probono.net/celebrateprobono/about/>
- 3 *Id.*
- 4 <https://www.alabar.org/assets/uploads/2016/09/Pro-Bono-Month-Proclamation-2016-Locals.pdf>
- 5 <http://www.mass.gov/governor/constituent-services/recognition/issued-proclamations/2016/pro-bono-month.html>
- 6 http://www.michigan.gov/snyder/0,4668,7-277-57577_59874_75291-394689--,00.html
- 7 <http://www.mobar.org/pdf/pro-bono-proclamation.pdf>
- 8 http://www.tba.org/sites/default/files/proclamation_2011.pdf
- 9 <http://www.courts.wa.gov/content/WSBA%20pro%20bono%20week%20proclamation.pdf>
- 10 http://www.courtswv.gov/court-administration/access-to-justice/Pro_Bono_Week_Proclamation.pdf
- 11 <http://governor.virginia.gov/newsroom/proclamations/proclamation/2017-pro-bono-month/>
- 12 ABA President Hilarie Bass welcomes you to the National Celebration of Pro Bono!, <https://www.youtube.com/watch?v=XSPwlfqTMOM&feature=youtu.be>

Immigration Lawyer Receives 2017 VSB Pro Bono Award

The 2017 Lewis F. Powell Jr. Pro Bono Award has been awarded to Ofelia Calderón.

Calderón, a founding partner in Calderón Seguin PLC in Fairfax, was nominated for the award by Christine Lockhart Poarch, of Poarch Law, and endorsed by Simon Y. Sandoval-Moshenberg, of the Legal Aid Justice Center in Falls Church.

In her nomination, Poarch wrote of Calderón, “She is the standard-bearer among the private bar for what pro bono service looks like, or she should be, and for someone who is at the top of her field with a busy practice of her own, she still finds the time to nonetheless serve as model and mentor to countless fellow attorneys.”

Poarch cited Calderón’s involvement over the years in the Board of

Immigration Appeals Screening Project, the Legal Aid Justice Center, Tahirih Justice Center, CAIR Coalition Referrals of Pro Bono Cases, and most recently the Dulles Justice Project, which is working to address claims of those negatively impacted by federal travel bans in 2017.

Sandoval-Moshenberg said of Calderón that, in addition to running a busy private practice, she has taken on many pro bono cases including “at least six cases from the Legal Aid Justice Center” and “...has also devoted much of her time to public service with the National Immigration Project, Capital Area Immigrants’ Rights Coalition, the Virginia Women Attorneys Association, and as president of the Hispanic Bar Association of Virginia.”



The Powell Award was established by the Special Committee on Access to Legal Services of the Virginia State Bar to honor attorneys and attorney groups that have made outstanding pro bono contributions. This year’s award will be presented October 18 during the Virginia State Bar Pro Bono Conference and Celebration in Charlottesville.

The Virginia State Bar Access to Legal Services Committee invites you to the

2017 VSB Pro Bono Conference and Celebration

Wednesday, October 18, 2017

DoubleTree by Hilton Hotel Charlottesville



Free Continuing Legal Education Sessions (4.0 hours MCLE credits pending)* and Reception

Joint Legal Aid Conference/Pro Bono Conference Reception

Pro Bono Awards Dinner and Ceremony (\$20.00 fee) with keynote speech by Anita Earls, Executive Director, Southern Coalition for Social Justice.

Find more info and register now at <http://bit.ly/2wEwBQE>.

Please contact Karl A. Doss at (804) 775-0522 or doss@vsb.org for more information.

McGuireWoods Receives Frankie Muse Freeman Pro Bono Award

The Virginia State Bar Access to Legal Services Committee has awarded McGuireWoods LLP the 2017 Frankie Muse Freeman Organizational Pro Bono Award, which is named for the famed civil rights leader who is the first woman appointed to the US Commission on Civil Rights.

McGuireWoods attorneys have donated 18,834 pro bono hours over the past 19 months, just from their Virginia offices, in areas ranging from uncontested divorce cases in southwestern and central Virginia, to refugee children in Special Immigrant Juvenile cases, to youth tried as adults in serious juvenile offender cases, to non-profit organizations in Charlottesville. They've also represented thousands of individuals whose drivers licenses were suspended for unpaid court costs and fines. McGuireWoods was nominated by Legal Aid Justice Center Executive Director Mary Bauer. She noted that the firm, by assisting the Legal Aid Justice Center on its Drive Down the Debt Campaign by handling litigation that challenges the suspension of driver's licenses of poor people who lack the means to pay fines and court costs, has committed significant organizational resources to dismantling systems that disproportionately impact and penalize poor people.

"This is pro bono leadership," she wrote in her nominating letter. "Not just a few hours here, or a few hours there, fulfilling the commitment to access to justice in its most hollow form. But recognizing a systemic injustice that devastates the lives of hundreds of thousands of low-income people and their families using the resources, influence, and legal prowess of the firm to make it right."

Additionally, a team of McGuireWoods attorneys supervises

Right: McGuireWoods Richmond partner Tennille Checkovich (center) with then-University of Virginia School of Law students Katrina Callsen (left) and Shannon Parker. The students assisted the firm on pro bono matters referred by Legal Aid Justice Center's JustChildren Program.

Below: McGuireWoods Richmond partner Tennille Checkovich (center) with McGuireWoods lawyers in 2014 who were associates she supervised in handling numerous serious offender review cases referred to the firm by JustChildren. From left: former McGuireWoods lawyer Jeffrey McMahan, Washington counsel Matthew Reynolds, Richmond associates Jonathan Wolfson and Michael Baudinet, former firm lawyer Chadwick Welch, Checkovich, Richmond partner Beth Sieg, former firm lawyer Myra Chapman, and Richmond associates Andriana Shultz and Stanley Roberts.



UVA law students on a variety of pro bono cases. The firm also provides leadership, along with the Greater Richmond Bar Foundation and Central Virginia Legal Aid Society, to help expand the access to legal services to clients with issues in "non-core" legal aid cases through the Greater Richmond Bar Foundation Triage Project.

The Frankie Muse Freeman Organizational Pro Bono Award will be presented at the Pro Bono Awards

Dinner during the VSB Pro Bono Conference on Wednesday, October 18, 2017, at the DoubleTree by Hilton Hotel in Charlottesville.

In Memoriam

Richard A. Bartl

Alexandria
May 1935 – August 2017

Thomas Joseph Casey

Stamford, Connecticut
February 1952 – May 2017

Barbara Rose Cohen

Arlington
August 1942 – June 2017

Rose Marie Crellin

Etowah, North Carolina
November 1944 – February 2017

John Engel

Washington, DC
March 1943 – January 2017

Gary Joseph Funderlich

West Middlesex, Pennsylvania
November 1961 – March 2017

Jennifer Elizabeth Gladieux

Alexandria
November 1968 – January 2017

John Michael Gray

Fairbanks, Alaska
March 1953 – June 2017

Gregory Wayne Hair

McLean
March 1963 – July 2017

Brenda Lee Hoffman

Falls Church
August 1965 – June 2017

Charles Bernard Miller

Winston-Salem, North Carolina
September 1947 – April 2017

S. Lee Miller

Barrington, Rhode Island
September 1932 – May 2017

Lewis S. Minter

Richmond
March 1926 – August 2017

Frank N. Perkinson Jr.

Roanoke
January 1927 – June 2017

John Charles Reid

Arlington
January 1969 – March 2017

Anne Wilson Scott

Midlothian
March 1946 – April 2017

Wilson E. Sheridan

Richmond
July 1933 – July 2017

Robert Lee Stephens Jr.

Irrington
January 1958 – August 2017

Peter T. Straub

Alexandria
March 1939 – July 2017

Calvin Herritage Thigpen

Petersburg
January 1924 – January 2017

Cyrus P. Trowbridge

Stuart, Florida
August 1928 – May 2017

Harry Benjamin Vincent

Emporia
December 1932 – April 2017

Mary Ann Walker

Alexandria
August 1953 – February 2017

Thomas Jennings Winans

McLean
July 1933 – August 2017

Grover C. Wright Jr.

Virginia Beach
May 1933 – June 2017

NOTICE: Check Your MCLE Hours Online Now

The Mandatory Continuing Legal Education compliance deadline is October 31, 2017. Go to <https://member.vsb.org/vsbportal/> to review your MCLE record.

Now is the time to check your online record and plan your MCLE compliance. Please apply for any non-approved courses now to avoid a late application fee for applications received over 90 days after course attendance.

Reminder: Of the 12.0 CLE hours required each year, 2.0 must be in ethics and 4.0 must be from live, interactive programs. If you have any questions, please contact the MCLE Department at (804) 775-0577 or mcle@vsb.org.

William L. Schmidt

William L. Schmidt, a pillar of the Virginia State Bar who was admired equally for his work as a lawyer and for his service to the community, died October 1.

Bill Schmidt served three terms on the VSB Council beginning in 2001. Additionally, he served two terms on the Virginia Law Foundation, was a member of the Harry L. Carrico Professionalism Course faculty, and was a regular attendee of the Bar's Annual Meeting and Midyear Legal Seminar.

Schmidt, who was born in Pittsburgh, was the founder and president of William L. Schmidt & Associates PC in Fairfax.

Schmidt was widely known for his long service to the Salvation Army, and was once featured in USA Today for his devotion to bell-ringing and fundraising for the organization. In 2012, he was the recipient of the Tradition of Excellence Award given by the Virginia State Bar's General Practice Section.

At the time Schmidt won the award, former Bar President Jon D. Huddleston noted: "For more than 20 years, starting on the first Saturday after Thanksgiving through the Christmas Holiday, Bill has rung the bell for the Salvation Army as a greeter.... His selfless dedication to this charity has helped raise thousands upon thousands of dollars to provide food for the hungry and toys and gifts for the less fortunate."

Manuel A. Capsalis, another former president of the Bar, wrote of Schmidt: "Bill personifies professional leadership and community service, and always with a sense of humility and purpose."



Edward L. Weiner, also a former president, wrote that Schmidt "... genuinely believes that being a lawyer is a privilege. He believes having that privilege demands a concern for the common man and empathy for the 'human struggle.'"

Schmidt was also an enthusiastic advocate for the City of Fairfax Band, of which he has served as a member of the board of directors and as chair of the board.

He received his law degree from American University Washington College of Law in 1972. He is survived by his wife Pat, four children, and a number of grandchildren.

Local and Specialty Bar Elections

Hampton Roads Chapter, VWAA

Rose Ellen Coley, President
Carmelou G. Aloupas, President-elect
Michelle Casale Anderson, Secretary
Karen Beth Elligers, Treasurer

Hill Tucker Bar Association

Christina Tandra Parrish, President
Veronica Dionne Brown-Moseley,
Vice President
Jontille Dionne Ray, Secretary
Makiba Anastasia Jackson, Treasurer

Local Government Attorneys of Virginia

Tara Ann McGee, President
Roderick Benedict Williams,
Vice President
Lola Rodriguez Perkins, Secretary
Timothy Ross Spencer, Treasurer

Metropolitan Richmond Women's Bar Association

Elizabeth Wilson Hanes, President
Joanna Lee Suyes, President-elect
Joley LaBelle Steffens, Vice President
Michele Lynn Satterlund, Secretary
Candace Stinson Mundy, Treasurer

Powhatan Bar Association

Robert Ceaser Cerullo, President
Michael Glendon Henkle, Vice President
Gretchen Hutt Brown, Secretary
Philip Leroy McDaniel, Treasurer

Tazewell County Bar Association

Andrew Thurman Scruggs, President
William Taylor Corbett, Vice President
Chase Duane Collins,
Secretary-Treasurer

Medicare and Medicaid: Getting Your Grounding and Staying up to Date

by Frederick W. Dingley

Medicare and Medicaid are two of the best-known government programs in the United States. They have appeared in the news quite a bit recently, often mentioned during discussions about the Affordable Care Act. Numerous Virginians rely on these medical-assistance programs. Out of roughly 8.4 million residents of the commonwealth, over 1.3 million are enrolled in Medicare, and at least another 1.3 million in Medicaid.¹ With so many people affected by these programs, an attorney may find a client asking for help with them. Happily, there are several resources lawyers can use to get an orientation in this area of law.

Medicare and Medicaid are often discussed together, but they are actually two separate programs. Medicare, mainly designed to assist elderly people and people with disabilities, is run by the federal government. Medicaid, primarily intended to help people with low income, is jointly operated by the federal and state governments. Some of the resources listed here cover both programs, while others focus on one or the other. If your office does not have access to the resources listed here, your local academic or public law library may have them.

Medicare + Medicaid

The attorney who wants one source that covers both programs has a couple of options. The *CCH Medicare and Medicaid Guide*, available through the CCH Internet Research Network or as a print looseleaf set, offers detailed descriptions, analysis of Medicare and state-by-state Medicaid laws, and gets updated with new cases and adminis-

trative rulings. Harvey L. McCormick's *Medicare and Medicaid Claims and Procedures* (4th ed. 2005, updated annually, available in print or on Westlaw) describes both programs and discusses the law in extensive detail.

Medicare

The Library of Congress's nonpartisan Congressional Research Service (CRS) is known for its well-regarded reports summarizing important political and legal issues. CRS's *Medicare Primer* (CRS no. R40425, 2017, available at <https://fas.org/sgp/crs/misc/R40425.pdf> or <https://perma.cc/ACA6-658N>) is an excellent nutshell of Medicare's history, coverage, financing, and administrative organization. CCH's *Medicare Explained* (published annually) is akin to a deskbook for Medicare law, similar to the company's annual *Master Tax Guide* — a detailed look at Medicare designed for a lawyer or beneficiary to quickly look up answers to their questions. The official federal government website, [Medicare.gov](http://www.Medicare.gov), is a useful resource with sections explaining benefits and describing how to file claims and appeals. The website also provides links to useful forms and publications with more detailed explanations.

Medicaid

A CRS produced report titled *Medicaid: An Overview* (CRS No. R43357, 2014, available at <https://fas.org/sgp/crs/misc/R43357.pdf> or <https://perma.cc/Y5QE-VDV7>) summarizes eligibility requirements, financing, and payment provisions for the program in a nutshell. The report also discusses how the Affordable Care Act changed Medicaid (although

this paper was published in 2014, so some things may have changed). Virginia CLE does not have any publications solely focused on Medicaid, but its treatise *Elder Law in Virginia* (3d ed. 2017) has a chapter devoted to Medicaid practice. *Drafting Special Needs Trusts and Medicaid Planning Seminar Materials* (Va. CLE 2015) has a section that focuses on how to arrange the assets of elderly clients who may soon need Medicaid assistance with paying for long-term care. The website for Virginia's Department of Medical Assistance Services, www.dmas.virginia.gov/, is also an excellent resource for information on Medicaid in Virginia which includes rules for eligibility and for covered services, as well as a section explaining how the ACA has changed Medicaid in the commonwealth.

Keeping up to date

Once you've learned the basics of Medicare and Medicaid, there are several resources to help keep you informed of new events. BloombergBNA has a number of daily and weekly newsletters that discuss Medicare and Medicaid: *Health Care Daily*, *Health Care Policy Report*, *State Health Care Regulatory Alert*, *Health Insurance Report*, and *Health Law Reporter*. The Center for Medicare & Medicaid Service's free weekly *MLNConnects* newsletter <https://www.cms.gov/Outreach-and-Education/Outreach/FFSProvPartProg/> discusses new developments. Virginia CLE's *Annual Advanced Elder Law Update Seminar* often has a section discussing Medicaid.

Medicare and Medicaid continued on page 54

Virginia Code § 18.2-152.7:1: When “Facebook Beef” Becomes a Crime (and When It Doesn’t)

by Erin W. Hapgood

The variety of comments and information people post about each other on public forums such as Facebook is quite staggering. Personal information, including mental or physical health, untrue gossip and comments about one’s physical appearance or political views are all likely in what is commonly referred to as “Facebook beef.” The short title for Virginia Code § 18.2-152.7:1, “harassment by computer,” sometimes leads members of the public to assume it applies to someone who publicly airs one’s dirty laundry, or makes statements that are critical, insulting, disgusting, untrue, or even defamatory. The statute states that it is a Class 1 misdemeanor to use a computer to “communicate obscene, vulgar, profane, lewd, lascivious, or indecent language[,]”¹ a definition that seems to cover the vast majority of this type of content. However, a review of the case law reveals that the statute is more limited than a plain reading indicates.

The problem is compounded because people are able to obtain a warrant for violation of § 18.2-152.7:1 from a magistrate; because those involved in Facebook beef rarely have clean hands, cross-warrants are not uncommon. The prosecution of these citizen complaints for computer harassment presents difficulties for a commonwealth’s attorney. If she decides not to participate in the case, the victim can feel angry and frustrated and the harasser feel empowered by vindication.

It behooves attorneys in many areas of the law to be able to articulate the requirements of the crime when advising a client dealing with an online nemesis, especially as swearing out a warrant

with no chance of a conviction can leave a person vulnerable to a civil claim. It is critical to understand that, although the language of the statute seems to criminalize “profane,” “vulgar,” and “indecent” comments, Virginia courts have limited its application so as to protect First Amendment speech.

The Virginia Court of Appeals ruled in 2004 that the definition of obscenity found in Virginia Code § 18.2-372 applied to an alleged violation of Virginia Code § 18.2-427 (harassment by telephone or public airwaves).² In order to be obscene, a comment must “appeal to the prurient interest in sex,” going substantially beyond customary candor. It is common, even indispensable, for Facebook beef to include the use of explicit words, but when the explicit words are used to express anger or contempt rather than to appeal to the prurient interest in sex, they are not “obscene” for purposes of the crime.³

A conviction for a violation of § 18.2-152.7:1 also requires the intent to coerce, intimidate, or harass, which is almost universally present in these cases. But intent to harass and the resulting feeling of harassment are simply insufficient to obtain a conviction for “harassment by computer.” People feel harassed by any number of actions, many of which are morally wrong or may even give rise to civil liability. When a client comes to talk with you about her options to stop or punish the harassment, remember that to be convicted of a crime, the perpetrator must have used language that is threatening or “obscene” as defined in the Virginia Code. Otherwise, it is just Facebook beef.

Endnotes:

- 1 The Code also criminalizes using a computer to “make any suggestion or proposal of an obscene nature” or (3) “threaten any illegal or immoral act[,]” but these disjunctive elements do not cause confusion like that associated with the first portion of statute and so are not discussed in detail here.
- 2 To be obscene, when “considered as a whole, [the statement] has as its dominant theme or purpose an appeal to the prurient interest in sex...and [2] which goes substantially beyond the customary limits of candor in description or representation of such matters and [3] which, taken as a whole, does not have serious literary, artistic, political or scientific value.” Virginia Code § 18.2-372, quoted in *Allman v. Commonwealth*, 43 Va. App. 104 (Va. App. 2004). The Court of Appeals regularly applied this definition until *Barson v. Commonwealth*, 58 Va. App. 451, 461–64 (2011), when the court overruled *Allman* and applied a dictionary definition. The Virginia Supreme Court reinstated use of the statutory definition of obscenity in *Barson v. Commonwealth*, 284 Va. 67 (2012).
- 3 *Barson, supra* (citing *Lofgren v. Commonwealth*, 55 Va. App. 116 (2009); *Airhart v. Commonwealth*, Record No. 1219–05–2 (Va. App. Jan. 16, 2007) (unpublished); *Allman, supra*).



Erin W. Hapgood is the assistant commonwealth’s attorney in Northumberland County, Virginia. The views and opinions expressed in this column are solely hers.

Endnotes:

1 U.S. Centers for Medicare & Medicaid Services, *MDCR ENROLL AB 2 — Total Medicare Enrollment: Total, Original Medicare, and Medicare Advantage and Other Health Plan Enrollment and Resident Population, by Area of Residence, Calendar Year 2015*, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/CMSProgramStatistics/2015/>

Downloads/MDCR_ENROLL_AB/2015_CPS_MDCR_ENROLL_AB_2.pdf [<https://perma.cc/M8PE-G359>] (last visited Aug. 1, 2017); Virginia Department of Medical Assistance Services, *2017 Medicaid at a Glance*, http://www.dmas.virginia.gov/Content_atchs/atchs/MAG%20FINAL_1_13_17_.pdf [<https://perma.cc/9PS8-YWPU>] (last visited Aug. 1, 2017).



Frederick W. Dingley is a senior reference librarian at Wolf Law Library at William & Mary Law School. He is a former president of the Virginia Association of Law Libraries.



Got an Ethics Question?

The VSB Ethics Hotline is a confidential consultation service for members of the Virginia State Bar. Non-lawyers may submit only unauthorized practice of law questions. Questions can be submitted to the hotline by calling (804) 775-0564 or by clicking on the “E-mail Your Ethics Question” link on the Ethics Questions and Opinions web page at www.vsb.org/site/regulation/ethics/.

F O R T Y - E I G H T H A N N U A L

CRIMINAL LAW SEMINAR 2018

FEBRUARY 2, 2018

DoubleTree by Hilton, Charlottesville

FEBRUARY 9, 2018

DoubleTree by Hilton, Williamsburg

Video Replays in Several Locations in March and April

VIRGINIA STATE BAR AND VIRGINIA CLE®

Sentencing Guidelines Knowledge & Skills Evaluation (Including Ethics Issues)

Five hours — Approved for 5 CLE (1 Ethics) October 19, Williamsburg, National Center for State Courts, 300 Newport Avenue. The evaluation course is designed for the experienced user of Virginia's Sentencing Guidelines. Attendees will complete a knowledge and skills exercise that will determine the topics covered in this seminar. Attendees will participate in a discussion-oriented workshop addressing common errors and complex scoring issues. Ethics Counsel with the Virginia State Bar will lead the discussion and answer questions related to ethical responsibilities relating to the Sentencing Guidelines. Register by completing the form and submit to the Commission. Cost \$100 (Paralegals \$50), Purchase manual separately. (Fee waived for

judges, commonwealth's attorneys, P&P, public defenders and staff. Limited scholarships are available for attorneys.) Details: www.vcsc.virginia.gov/training.html

Introduction to Sentencing Guidelines

Six hours — Approved for 6 CLE
December 5, Portsmouth, Department of Social Services, 1701 High Street;
December 7, Roanoke Higher Education Center, 108 N. Jefferson Street;
December 12, Henrico Police & Fire Training Center, 7701 E. Parham Street. The introduction seminar is designed for the attorney or criminal justice professional who is new to Virginia's Sentencing Guidelines. The seminar will begin with general background information and progress to detailed information on scoring each of the guidelines factors to include changes beginning July 1, 2017. Register by completing the

form and submit to the commission. Cost \$125 (Paralegals \$62.50). Purchase manual separately. (Fee waived for judges, commonwealth's attorneys, public defenders, P&P and staff. Limited scholarships are available for attorneys.) Details: www.vcsc.virginia.gov/training.html

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 December 16, 2017, through February 16, 2018. Send information by October 30 to hickey@vsb.org. For other CLE opportunities, see Virginia CLE calendar and "Current Virginia Approved Courses" at www.vsb.org/site/members/mcle-courses/ or the websites of commercial providers.*

Virginia CLE Calendar

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

October 16

Tom Spahn on Confidentiality: Non-clients' Misconduct

Webcast/Telephone NOON–2 PM

October 16

Cyber Insurance: What You Need to Know to Advise Your Clients

Live — Charlottesville/Webcast/Telephone 3–5 PM

October 17

Writing to Win

Live — Richmond 9 AM–4:15 PM

October 17

Ethics Update for Virginia Lawyers 2017

Webcast/Telephone 3–5 PM

October 17

18th Annual Virginia Information Technology Legal Institute 2017

Video — Alexandria, Charlottesville, Richmond, Roanoke, Virginia Beach 8 AM–4:20 PM (RICHMOND VIDEO BEGINS AT 9 AM)

October 18

Writing to Win

Live — Fairfax 9 AM–4:15 PM

October 18

18th Annual Virginia Information Technology Legal Institute 2017

Video — Tysons 8 AM–4:20 PM

October 18

43rd Annual Recent Developments in the Law: News from the Courts and General Assembly

Video — Alexandria, Charlottesville, Norfolk, Richmond, Roanoke 9 AM–4:25 PM

October 19

36th Annual Trusts and Estates Seminar 2017

Live — Roanoke 9 AM–4:15 PM

October 19

What's New at the Virginia Supreme Court? An Overview of Recent Civil Decisions 2017

Webcast/Telephone 5–6:30 PM

October 19

Depositions Done Right AND Attacking the Liar's "I Don't Remember"

Video — Alexandria, Charlottesville, Norfolk, Richmond, Tysons 8:30 AM–3:45 PM (RICHMOND VIDEO BEGINS AT 9 AM)

October 20

Limited Liability Companies in Virginia

Webcast/Telephone 9–11 AM

October 20

Improving Your Results in Bodily Injury Claims Handling

Live — Charlottesville/Webcast/Telephone NOON–2 PM

October 20

Depositions Done Right AND Attacking the Liar's "I Don't Remember"

Video — Harrisonburg, Roanoke 8:30 AM–3:45 PM

October 23
36th Annual Trusts and Estates Seminar 2017
Live — Fairfax 9 AM–4:15 PM

October 23
Education Law 101: A Survey of the Issues in Education Law That All Attorneys Need to Know
Webcast/Telephone 10 AM–1:10 PM

October 23
Mastering Crucial Moments in Separation and Divorce
Live — Charlottesville/Webcast 2–5:15 PM

October 24
The Survivor's Guide to Expert Witnesses: From Selection Through Trial
Live — Fairfax 9 AM–1:15 PM

October 24
Renewable Energy in Virginia
Webcast/Telephone 9–11 AM

October 24
26th Annual Employment Law Update Seminar
Video — Abingdon, Alexandria, Charlottesville, Norfolk, Richmond
8 AM–4:45 PM (RICHMOND VIDEO BEGINS AT 9 AM)

October 24
43rd Annual Recent Developments in the Law: News from the Courts and General Assembly
Video — Tysons 9 AM–4:25 PM

October 25
Civility in the Practice of Law
Live — Richmond 10 AM–NOON

October 25
Ethics Update for Virginia Lawyers 2017
Webcast/Telephone NOON–2 PM

October 25
26th Annual Employment Law Update Seminar
Video — Tysons 8 AM–4:45 PM

October 25
Attorneys and Technology: Surviving the Legal Ethics Jungle
Video — Williamsburg 9 AM–12:15 PM

October 25
36th Annual Family Law Seminar 2017
Video — Abingdon, Alexandria, Charlottesville, Norfolk, Richmond, Roanoke 9 AM–4:30 PM

October 26
How to Say “No” and Preserve the Relationship
Live — Richmond 9 AM–4:15 PM

October 26
Tom Spahn on Confidentiality: Non-clients' Misconduct
Webcast/Telephone NOON–2 PM

October 26
36th Annual Family Law Seminar 2017
Video — Fredericksburg, Harrisonburg, Tysons 9 AM–4:30 PM

October 26
Attorneys and Technology: Surviving the Legal Ethics Jungle
Video — Alexandria, Charlottesville, Hampton, Richmond, Roanoke
9 AM–12:15 PM

October 27
How to Say “No” and Preserve the Relationship
Live — Fairfax 9 AM–4:15 PM

October 27
35 Questions About Employment Law Every Practitioner Should Know
Webcast/Telephone 9 AM–12:15 PM

October 27
Government Affairs Compliance in a Busy Political Time
Live — Charlottesville/Webcast/Telephone 2–4 PM

October 27
Attorneys and Technology: Surviving the Legal Ethics Jungle
Video — Norfolk, Tysons, Warrenton
9 AM–12:15 PM

October 30
Trials of the Century III
Live — Fairfax 8:25 AM–3:45 PM

October 30
Essentials of Bankruptcy Law in Virginia
Webcast/Telephone 9–11 AM

October 30
Improving Your Results in Bodily Injury Claims Handling
Webcast/Telephone NOON–2 PM

October 30
Cybersecurity Highlights: Secure Computing on the Road, and Encryption Made Simple
Webcast/Telephone 3–5 PM

October 30
Defending Serious Traffic Cases: Strategies and Tactics in Representing Clients
Video — Abingdon, Alexandria, Charlottesville, Danville, Fredericksburg, Norfolk, Richmond, Roanoke
8:25 AM–3:50 PM (RICHMOND VIDEO BEGINS AT 9 AM)

October 31
Trials of the Century III
Live — Richmond 8:25 AM–3:45 PM

October 31
36th Annual Trusts and Estates Seminar 2017
Live — Williamsburg 9 AM–4:15 PM

October 31
The Most Common Legal Malpractice Errors, and How to Avoid Them
Telephone 10 AM–NOON

October 31
Defending Serious Traffic Cases: Strategies and Tactics in Representing Clients
Video — Hampton, Tysons, Warrenton, Winchester 8:25 AM–3:50 PM

November 2
Professional Advocacy in General District Court
 Webcast/Telephone 10–11:30 AM

November 3–4
38th Annual Construction and Public Contracts Law Seminar
 Live — Charlottesville
 FRIDAY: 8:15 AM–5:25 PM;
 SATURDAY: 8 AM–12:20 PM

November 3–10
International Destination CLE: Florence
 Live — Florence, Italy

November 7
Debt Collection: Starting a Collection Practice, or Refining Your Existing One
 Webcast/Telephone 10 AM–1:15 PM

November 8
How to Close, Sell, or Buy a Law Practice
 Live — Charlottesville/Webcast/
 Telephone 10 AM–1:15 PM

November 9
Assisted Reproductive Technology Law: The New World of Family Formation
 Live — Charlottesville/Webcast/
 Telephone 11 AM–1 PM

November 13
Reading and Understanding a Driving Record and Compliance Summary
 Live — Charlottesville/Webcast/
 Telephone NOON–1:30 PM

November 14
Mastering Crucial Moments in Separation and Divorce
 Webcast 10 AM –1:15 PM

November 15
Cyber Insurance: What You Need to Know to Advise Your Clients
 Webcast/Telephone NOON–2 PM

November 15
36th Annual Trusts and Estates Seminar 2017
 Video — Alexandria, Charlottesville, Fredericksburg, Leesburg, Norfolk, Richmond, Roanoke 9 AM –4:15 PM

November 16
Government Affairs Compliance in a Busy Political Time
 Live — Charlottesville/Webcast/
 Telephone 11 AM–1 PM

November 16
36th Annual Trusts and Estates Seminar 2017
 Video — Warrenton, Winchester
 9 AM –4:15 PM

November 29
Government Contract Claims — Preserving the Value of Your Client’s Federal Contracts
 Live — Charlottesville/Webcast/
 Telephone NOON–1 PM

December 4
Assisted Reproductive Technology Law: The New World of Family Formation
 Webcast/Telephone 1–3 PM

December 5
How to Close, Sell, or Buy a Law Practice
 Webcast/Telephone 10 AM–1:15 PM

December 6
Trying Cases in the Western District of Virginia
 Live — Roanoke/Telephone
 8:55 AM–1:25 PM

December 6
Tom Spahn on Confidentiality: Non-clients’ Misconduct
 Webcast/Telephone NOON–2 PM

December 7
Trying Cases in the Western District of Virginia
 Live — Staunton/Telephone
 8:55 AM–1:25 PM

December 7
Ethics Update for Virginia Lawyers 2017
 Webcast/Telephone NOON–2 PM

December 8
Reading and Understanding a Driving Record and Compliance Summary
 Webcast/Telephone NOON–1:30 PM

December 12
Trials of the Century III
 Video — Alexandria, Charlottesville, Danville, Norfolk, Richmond
 8:25 AM–3:45 PM (RICHMOND VIDEO BEGINS AT 9 AM)

December 13
Trials of the Century III
 Video — Dulles 8:25 AM–3:45 PM

December 13
43rd Annual Recent Developments in the Law: News from the Courts and General Assembly
 Video — Charlottesville, Tysons
 9 AM–4:25 PM

December 14
Trials of the Century III
 Video — Tysons 8:25 AM–3:45 PM

Virginia State Bar Harry L. Carrico Professionalism Course

December 7, 2017, Richmond

January 10, 2018, Alexandria

March 8, 2018, Alexandria

April 18, 2018, Charlottesville

See the most current dates and registration information at www.vsb.org/site/members/new.

DISCIPLINARY SUMMARIES

The following are summaries of disciplinary actions for violations of the Virginia Rules of Professional Conduct (RPC) (Rules of the Virginia Supreme Court Part 6, § II, eff. Jan. 1, 2000) or another of the Supreme Court Rules.

Copies of disciplinary orders are available at the Web link provided with each summary or by contacting the Virginia State Bar Clerk's Office at (804) 775-0539 or clerk@vsb.org. VSB docket numbers are provided.

DISCIPLINARY BOARD

Wayne Richard Hartke

Reston, Virginia
17-051-107328

On August 25, 2017, the Virginia State Bar Disciplinary Board suspended Wayne Richard Hartke's license to practice law for five years effective October 27, 2019, for violating professional rules that govern candor toward the tribunal. The suspension will be consecutive to a three-year suspension issued on October 27, 2016. RPC 3.3 (a) (1)
www.vsb.org/docs/Hartke-091917.pdf

Christopher DeCoy Parrott

Manassas, Virginia
17-000-108869

Effective August 22, 2018, the Virginia State Bar Disciplinary Board suspended Christopher DeCoy Parrott's license to practice law for an additional six months for failing to comply with the terms on a twenty-one month suspension issued November 21, 2016. Rules Part Six, § IV, ¶ 13-29
www.vsb.org/docs/Parrott-061917.pdf

DISTRICT COMMITTEES

Karl Leonard Larson

Arlington, Texas
17-090-107631

On September 1, 2017, the Ninth District Subcommittee of the Virginia State Bar issued a public reprimand to Karl Leonard Larson for violating professional rules that govern safekeeping property. This was an agreed disposition of misconduct charges. RPC 8.5 USPTO RPC 37 C.F.R. Section 11.115
www.vsb.org/docs/Larsen-091917.pdf

DISCIPLINARY PROCEEDINGS

Suspension – Failure to Pay Disciplinary Costs

Sonya Borgaonkar Costanzo

Jean Jerome Dandy Ngando Ekwalla

William Peter Wittig

Stephen John Weisbrod

Fredericksburg, VA

Woodbridge, VA

Arlington, VA

Yorktown, VA

Effective Date

September 1, 2017

August 30, 2017

August 8, 2017

September 1, 2017

Lifted

September 7, 2017

NOTICES TO MEMBERS

VSB'S STANDING COMMITTEE ON LEGAL ETHICS SEEKING PUBLIC COMMENT ON LEOS

The Virginia State Bar's Standing Committee on Legal Ethics is seeking public comment on proposed advisory Legal Ethics Opinion 1888: *Prosecutor's duty to disclose evidence that tends to negate the guilt of the accused*; and on revisions to LEO 1750: *Advertising Issues*. Comment deadline: November 3, 2017.
www.vsb.org/site/news/item/public_comment_leos_1888_1750

CLIENTS' PROTECTION FUND

The Virginia State Bar Clients' Protection Fund Board is seeking comments on proposed changes to the sunset provision of Va. Code Section 54.1-3913.1, Clients' Protection Fund. Specifically, the proposal is to extend the sunset provision from July 1, 2020, to July 1, 2023. The CPF Board intends to seek approval from Council and the Supreme Court of Virginia to ask the General Assembly of Virginia to adopt this proposed change at its 2018 session. Comment deadline is October 15.
www.vsb.org/site/news/item/comments_sought_on_proposed_changes_to_the_CPF_sunset_provision

PRO BONO CONFERENCE

Save the date: the Special Committee on Access to Legal Services will hold its annual Pro Bono Conference and Celebration on Wednesday, October 18, at the Double Tree by Hilton Hotel in Charlottesville. www.vsb.org/site/pro_bono/pro_bono-calendar/pro_bono_conference_2017

PROFESSIONAL DEVELOPMENT CONFERENCE

Registration is open for the YLC Professional Development Conference CLE "Foundations for Your Future" on October 20 in Roanoke. www.vsb.org/site/conferences/ylc

MCLE DISCONTINUES MAILING INTERIM REPORT

In the interest of cost savings, the MCLE Department will discontinue mailing the MCLE Interim Report. Now is the time to check your online record and plan your MCLE compliance. Apply now for any non-approved course that you have attended. The MCLE compliance deadline is October 31, 2017.

CRIMINAL LAW SEMINAR

Save the date for the 48th Annual Criminal Law Seminar, sponsored by the VSB Criminal Law Section and Virginia CLE, February 2 in Charlottesville and February 9 in Williamsburg. www.vsb.org/site/sections/criminal/annual-seminar

VSb DISCIPLINARY BOARD TO HEAR ANNE MARSTON LYNCH WILBER'S REINSTATEMENT PETITION ON DECEMBER 8, 2017

Deadline for comment: November 27, 2017

On February 9, 2017, **Anne Marston Lynch Wilber** petitioned the Supreme Court of Virginia for reinstatement of her license to practice law pursuant to Part 6, § IV, ¶ 13-25.E of the Rules of the Supreme Court of Virginia. On February 17, 2017, the Clerk of the Virginia State Bar Disciplinary Board certified that the requirements of Part 6, § IV, ¶ 13-25.F were met. Accordingly, the Virginia State Bar Disciplinary Board will hear the Petition for Reinstatement on December 8, 2017, at 9:00 a.m. at the Workers Compensation Commission, 1000 DMV Drive, Richmond, Virginia 23220. After hearing evidence and oral argument, the Disciplinary Board will make factual findings and recommend to the Supreme Court whether the petition should be granted or denied.

The Disciplinary Board seeks information about Ms. Lynch Wilber's fitness to practice law. Written comments or requests to testify at the hearing should be submitted to DaVida M. Davis, Clerk of the Disciplinary System, 1111 East Main Street, 7th Floor, Richmond, Virginia, 23219 or by e-mail to clerk@vsb.org, no later than November 27, 2017. Comments will become a matter of public record. Copies of the May 2009 Order of Suspension, the December 2009 Order of Revocation, and the Petition for Reinstatement are available to the public by contacting Ms. Davis at clerk@vsb.org or by calling the clerk's office at (804) 775-0539.

Ms. Lynch Wilber was licensed to practice law in Virginia on October 6, 2000. On May 15, 2009, the Virginia State Bar Disciplinary Board entered an order suspending Ms. Lynch Wilber's license to practice law for one year based on misconduct in five cases involving lack of diligence, failure to communicate, and failure to respond to a lawful demand for information by a disciplinary authority.

On August 26, 2009, Ms. Lynch Wilber was indicted in the Circuit Court for the City of Suffolk for felony embezzlement in violation of Virginia Code Sections 18.2-111 and 18.2-95. On or about October 13, 2006, Ms. Lynch Wilber embezzled \$40,000 from a church where she served as treasurer. Ms. Lynch Wilber gave the embezzled funds to a client and falsely represented that the funds were the client's settlement proceeds from a personal injury suit. In fact, Ms. Lynch Wilber had nonsuited the client's case and had failed to refile the case within the statutory time period,

thus barring the client from recovery. Ms. Lynch Wilber repaid the church after her theft was discovered by a subsequent treasurer.

Ms. Lynch Wilber entered into a plea agreement on the embezzlement charges, which required her to consent to a revocation of her law license. On December 3, 2009, the Virginia State Bar Disciplinary Board accepted her Affidavit Consenting to Revocation and entered an order revoking her law license effective December 4, 2009. On December 2, 2009, pursuant to the plea agreement, Ms. Lynch Wilber was found guilty of embezzlement of an amount less than \$200, a lesser included misdemeanor. The court took the matter under advisement for three years and ordered that Ms. Lynch Wilber maintain good behavior and be placed on supervised probation. Ms. Lynch Wilber completed supervised probation without incident. On December 4, 2012, the court sentenced Ms. Lynch Wilber to twelve months in jail, all suspended on the condition of continued good behavior.

In her Petition for Reinstatement, Ms. Lynch Wilber acknowledges that it is her burden to establish to the Virginia State Bar Disciplinary Board that she is a person of honest demeanor and good moral character. Ms. Lynch Wilber states that her misconduct resulted from an element of impairment that affected her coping skills and judgment and that she has been under the care of a forensic psychologist since February 2009. Ms. Lynch Wilber submits that she has kept current with the law, has completed at least seventy credit hours of continuing legal education, including eighteen hours in ethics, all of which have been approved by the Virginia State Bar. She further provided proof that she took the Multistate Professional Responsibility Examination on November 7, 2015, and received a scaled score of ninety-six. The Virginia State Bar's Client Protection Fund has not paid out any money due to Ms. Lynch Wilber's misconduct.

Ms. Lynch Wilber's law license was placed under a Cost Suspension on September 16, 2009, for failure to pay costs associated with the five misconduct cases that resulted in a year suspension. On March 18, 2016, Ms. Lynch Wilber paid all outstanding costs and the Cost Suspension was lifted. Presently, Ms. Lynch Wilber does not owe the Virginia State Bar any costs or fees associated from any complaints against her.

From 2009 to the present, Ms. Lynch Wilber has worked as a paralegal for her father, Virginia lawyer Benjamin P. Lynch. Ms. Lynch Wilber has also been active in community service projects through the Portsmouth Service League and has been a volunteer at Bishop Sullivan Catholic High School. In 2015, Ms. Lynch Wilber completed the Vann H. Lefcoe Leadership Development Course. In 2016, Ms. Lynch Wilber was a member of the Campaign Steering Committee for the John Rowe for Mayor Campaign.

DISCIPLINARY PROCEEDINGS

Suspension – Failure to Comply with Subpoena		Effective Date	Lifted
Robert Lyman Isaac Shearer, Jr.	Fairfax, VA	September 14, 2017	
Impairment			
Shelly Renee Collette	Winchester, VA	September 14, 2017	
Reinstatement Petition of License to Practice Law			
Anne Marston Lynch Wilbur (formerly Anne Marston Lynch)	Portsmouth, VA	February 9, 2017	

Professional Notices

Rich Gross, formerly of FH+H PLLC in McLean, has joined Janus Global Operations LLC as its general counsel.

Robert P. Hodous, of Payne & Hodous LLP, has graduated from Piedmont Virginia Community College with a career studies certificate in cybersecurity. He has also received the CompTIA Security+ professional certification. With this background, he will work with businesses and professionals regarding various aspects of law and related cybersecurity matters.

C. Scott Meyers has joined the business law firm Connors Morgan, PLLC, in Greensboro, NC, as Of Counsel. Meyers brings in-depth experience in bankruptcy cases as well as superior litigation skills developed during his tenure at some of the area's largest law firms, where he led teams representing both local and national clients through complex business litigation issues.



Meyers

Henry C. Su, formerly a senior trial lawyer with the US Federal Trade Commission and a senior competition advisor to two commissioners, has joined Constantine Cannon LLP as a partner in its Washington, DC, and San Francisco offices. Su is a member of the firm's antitrust litigation and counseling practice, and he focuses on representing clients in the healthcare, pharmaceutical, retail, and technology sectors in the courts and before government agencies, legislators, and other policymakers.

Sandra M. Workman, former deputy commonwealth attorney for Salem, has joined Poarch Law, where she will assist in managing the firm's cases involving removal, criminal consequences of immigration, and other litigation practice areas.



Workman

Professional Notices

E-mail your news and high-resolution professional portrait to hickey@vsb.org for publication in *Virginia Lawyer*. Professional notices are free to VSB members and may be edited for length and clarity.

Letters

Send your letter to the editor to: hickey@vsb.org or Virginia State Bar, *Virginia Lawyer Magazine*, 1111 E Main Ste 700, Richmond VA 23219-0026

Letters published in *Virginia Lawyer* may be edited for length and clarity and are subject to guidelines available at <http://www.vsb.org/site/publications/valawyer/>.

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Get it for free in the iTunes store.



Positions Available

CITY ATTORNEY (CITY OF HOPEWELL)

The historic City of Hopewell, located at the confluence of the Appomattox and James Rivers is seeking applications for the position of City Attorney. Minimum qualifications include graduation from an accredited law school, with admission to the Virginia State Bar and five to ten years of increasingly responsible experience in the practice of law. Past local government experience is desirable. Per the City Charter, the City Attorney shall be the chief legal advisor of the council and the chief administrative officer. As designated by council, the city attorney also shall serve as the chief legal advisor to other departments, boards, commissions, and agencies of the city in all matters affecting the interests of the city. The successful applicant must demonstrate a broad range of experience and knowledge of Virginia law, and a high level of knowledge and performance in local government, including Roberts Rules of Order. Membership in local government organizations and attendance of continuing education seminars specializing in local government is required of the successful candidate—all dues and fees related thereto will be reimbursed. The salary for the position is negotiable. Benefits include participation in the Virginia Retirement System, vacation and sick leave, group life insurance, and medical insurance. Residency within the City is required within a negotiated period of time. Please submit a letter of application, detailed resume with salary history, and three work-related references to the Hopewell City Clerk at city_attorney@hopewellva.com.

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