THE VIRGINIA BAR ASSOCIATION
OFFICERS AND EXECUTIVE COMMITTEE

President
Jesse B. Wilson, III
4069 Chain Bridge Road
Fairfax, Virginia 22030

Past President
Edward R. Slaughter, Jr.
P.O. Box 1191
Charlottesville, Virginia 22902

President-Elect
L. Lee Bean
2045 15th Street, North
Arlington, Virginia 22201

Secretary-Treasurer
A. Ward Sims
P.O. Box 1029
Charlottesville, Virginia 22902

Chairman, Young Lawyers Section
David Craig Landin
P.O. Box 1191
Charlottesville, Virginia 22902

Chairman-Elect, Young Lawyers Section
Charles F. Midkiff
1200 Mutual Building
Richmond, Virginia 23219

Director of Committee Activities
John Ritchie
P.O. Box 5206
Charlottesville, Virginia 22905

Executive Committee
(Other than Ex-Officio Members)

Hugh L. Patterson, Chairman
1800 Virginia National Bank Bldg.
Norfolk, Virginia 23510

Kenneth S. White
P. O. Box 958
Lynchburg, Virginia 24505

Lewis M. Costello
Box 2760
Winchester, Virginia 22601

Robert P. Buford
707 East Main Street
11th Floor
Richmond, Virginia 23212

John F. Kay, Jr.
P. O. Box 1122
Richmond, Virginia 23208

Thomas R. Watkins
Tower Box 60
2101 Executive Drive
Hampton, Virginia 23666

Gerald L. Baliles
P. O. Box 1640
Richmond, Virginia 23213

John L. Walker, Jr.
P. O. Box 720
Roanoke, Virginia 24004

John C. Wood
P. O. Box 369
Fairfax, Virginia 22030
President's Page .................................................. 2
Jesse B. Wilson, III

The Effectiveness of Medical Malpractice Review Panels in Virginia: A View From a Trial Judge .... 4
James E. Sheffield

Murray J. Janus

Enforcement of Commercial Forum Selection Agreements ......................................................... 14
Howard C. McElroy

Tax Incentives and Pitfalls for the Potential Real Estate Investor ............................................... 19
Stephen D. Halliday

Book Reviews ....................................................... 27

Bar Association Proceedings
The Summer Meeting ........................................... 30
Special Notices ................................................... 33
Announcements .................................................... 35
Young Lawyers Section Chairman's Report ............. 37
Memorials .......................................................... 39

The Virginia Bar Association Journal is published quarterly by The Virginia Bar Association as a service to the profession. Contributions are welcome, but the right is reserved to select material to be published. Publication of any article or statement is not to be deemed an endorsement of the views expressed therein by the Association. The office of publication is located at 3849 W. Weyburn Road, Richmond, Virginia 23235.

Membership dues include the cost of one subscription to each member of the Association. Subscription price to others, $8.00 per year; single copies $2.50. Second-class postage paid at University of Richmond, Virginia 23173.

(ISSN 0360-3857) (USPS 093-110)
Audit of Trust Accounts

At its June meeting in Virginia Beach, the Council of the Virginia State Bar adopted, for recommendation to the Supreme Court of Virginia, a set of rules establishing minimum requirements for the maintenance of lawyers' trust accounts. It also adopted a budget which included a $50,000.00 contribution to the Client Security Fund.

These actions were taken at a place and in a time when the massive defalcations by two Virginia Beach lawyers of clients' money collected for disbursement in real estate closings was a topic of great interest and concern to the convening lawyers.

The trust account rules were a part of the proposal for the proper handling of trust funds recommended by the bar's Committee on Trust Account Standards. Not adopted by the Council was the final recommendation of the Committee which read as follows:

Inspection of Records and Confidentiality: The books and records required by this rule shall be made available without notice at any time during regular office hours to any authorized representative of the Virginia State Bar for inspection and audit. Information derived from such inspection and audit shall not be voluntarily disclosed except insofar as disclosure may be necessary in the enforcement of this rule.

Had this proposal been adopted, it would have subjected a lawyer's trust accounts to surprise, spot audits to determine compliance with the other rules.

Those who have made a thorough study of the matter have found that the greatest cause of the mishandling and loss of trust funds by lawyers is a failure to maintain proper accounts. While it may be argued that records of deliberate embezzlements would not be maintained and, thus such activity would not be discovered by audit, it is more probable that the prospect of spot audits will be not only an incentive to the honest lawyers to keep better records but also a deterrent to the lawyer who may be tempted to misuse a client's funds.

Not surprisingly, trust fund audits are found as a part of the provisions establishing Client Security Funds. While the primary motivation behind spot audits is the enforcement of the record keeping rules so as to preserve the integrity of trust accounts for the client's benefit, the reduction of claims against the Client Security Fund is also an objective which should be of interest to the lawyers who are funding it.

It is undoubtedly true that the vast majority of lawyers in Virginia maintain proper trust account records. Those who do not will be assisted by the proposed new rules. Thus, for most of us, the only disadvantage of an audit would be the temporary inconvenience involved. Such inconvenience is a
small price to pay for the benefits to the public and the
bar which will flow from a system of trust fund record
keeping which truly offers the prospect of reducing
defalcations.

There are strong indications that this issue will
again be before the State Bar Council. I hope that all
of you will become familiar with the matter and will
let your views be known to your Council representa-
tives.

A Changing of the Guard

As I announced at the summer meeting at The
Greenbrier, the Association is most pleased that Dean
Emerson Spies of the University of Virginia School of
Law has agreed to join the Association as its Director
of Committee Activities upon his retirement as Dean
in June, 1980. Dean Spies will be the second person to
hold this position, succeeding Dean John Ritchie who
retired from full-time activity as of August 31 of this
year.

Those of us who have had the opportunity to work
with “Jack” Ritchie, as members of committees or
otherwise, know firsthand the great contribution
which he has made to the Association’s effort to do
meaningful, effective work through its committees.
While we are blessed, by and large, by having commit-
tees chaired by, and comprised of, people who are both
well intentioned and conscientious, those people are
all extremely busy lawyers for whom the Association’s
work must, necessarily, come second. Thus, the per-
sonal characteristics of diligence, thoughtfulness, tact
and good humor which Dean Ritchie brought to his
job were invaluable to the success he had in helping
the committees to function effectively. We are grateful
that his wisdom and advice continue to be available to
us as a consultant to Ward Sims, our Secretary-
Treasurer, who will take on some of these functions of
the office until Dean Spies joins us next summer.

Association’s Committees Reorganizing

The annual job of reorganizing the Association’s
committees is now underway under the direction of
President-Elect Lee Bean and Secretary-Treasurer
Ward Sims.

A basic purpose of a bar association is to provide a
means for the individual lawyer-member to contribute
his or her effort to the improvement of the law and the
way it is practiced. Obviously, participation in com-
mittee work is the primary way to make this
contribution.

Our Association’s committees’ end product may
take one of the following four forms, or some combi-
nation thereof: (1) Legislative recommendations for
the General Assembly, (2) Programs for presentation
at our annual meetings, (3) Articles for publication in
this Journal, and (4) CLE programs or publications.

By and large, the work involved is interesting and
satisfying. Make-work projects are discouraged.

If you are not now assigned to a committee and
would like to be, contact our Director of Committee
Activities, c/o A. Ward Sims, P.O. Box 1029, Char-
lottesville, Virginia 22902. While considerations of the
practical working size may prevent an assignment to a
preferred committee this year, your expressions of
interest will be of considerable assistance to Lee and
Ward in their organizing efforts.
The Effectiveness of Medical Malpractice Review Panels in Virginia: A View from a Trial Judge

It is perhaps too early to completely and fairly evaluate the effectiveness of the Medical Malpractice Review Panel procedure in Virginia as a fair and expeditious diversion alternative to civil court litigation in the processing of disputes concerning medical malpractice and the elimination of the "battle of experts" usually attendant in the litigation of such claims, since they first became authorized on July 1, 1976, and for a cause of action which arose after that date. This is because of their relative newness and because the divergence of experience with them from circuit to circuit, throughout the Commonwealth of Virginia. There is, however, a sufficient record made of their use thus far to permit some personal observations concerning their use, which, I believe, generally gives some index of their effectiveness to date.

While the legislative history of Article 1 of Chapter 21.1 of Title 8.01-581, et seq. Code of Virginia, which authorized Medical Malpractice Review Panels in Virginia on July 1, 1976, and for a cause of action for medical malpractice arising after that date, is not available, the Statute had its genesis, in large part, in the medical malpractice insurance crisis: the need to seek new ways to deal with the resolution of malpractice claims; and a general dissatisfaction with the existing traditional in-court litigation procedure for handling medical malpractice cases. Two of the major points of dissatisfaction with the traditional post July 1, 1976 litigation in court civil procedure for processing medical malpractice disputes in Virginia, from the plaintiff's standpoint, were frequent long delays between the filing of a suit and its final disposition because of crowded court calendars, etc., resulting in unreasonable delays in the resolution of legitimate claims, and the difficulties encountered in obtaining required medical experts to assist in trial preparation and to testify in court against contemporaries in legitimate suits, and in the payment of fees for such experts.

No publication of empirical statistics has been found bearing upon the effectiveness of the Panels that have been convened to date by the Virginia Supreme Court, nor any data found which bears upon the effectiveness of the Panels such as: the time required to process a claim by Panels from the date of filing of a notice or claim against a health care provider to decision thereon by panels; the recurrence or non recurrence of the nature of the injuries involved; the occurrence and frequency of medical specialties involved; the percentage of resolved Panel's decisions in favor of the claimant and those resolved in favor of the health care provider; the number of claims which terminated with the decisions by the Panels and the number which were subsequently litigated in court, and a comparison of the result there obtained.

It is of note, therefore, to list here the first published data of any kind that I have found concerning the experience with Panels in Virginia.

Unaudited information graciously supplied by the Office of the Executive Secretary of the Supreme Court of Virginia indicates that between July 1, 1976, and March 22, 1979, a total of two hundred three Panels were convened by the Supreme Court of Virginia. The disposition status of those two hundred three Panels as of March 22, 1979, was as follows:
Number of Panels Withdrawn
(includes comprise settlements) .... 46
Number of Panels dismissed .......... 6
Number of Panels concluded ........ 73
Number of Panels still pending .... 78
Total Panels convened ............ 203

Of the seventy-three concluded Panels, fifty-seven were decided outright in favor of the health care provider, finding that the evidence did not support the conclusion that the health care provider failed to comply with the appropriate standard of care; eight of the seventy-three concluded Panels decided that the evidence supported the conclusion that the health care provider failed to comply with the appropriate standard of care and that such failure was a proximate cause of the alleged damages; four of the Panels concluded in favor of the health care provider and held that although the evidence supported the conclusion that the health care provider failed to comply with the appropriate standard of care, such failure was not a proximate cause of the alleged damages; and four of the panels concluded that there existed a material issue of fact, not requiring an expert opinion bearing on the liability of the health care provider for consideration of a court or jury.

A physical examination made of one hundred eighty-five copies of the total of two hundred three designations made by the Supreme Court, (supplied by the Executive Secretary's Office of the Supreme Court), indicates that Panels have been convened in every Judicial Circuit of the State.

Examination further reveals that of the one hundred eighty-five copies of designations examined, as to be expected, the urban areas of the Commonwealth utilized panels more often than other areas. The Fourth Judicial Circuit (Norfolk, Virginia) had the most experience with the use of Panels with 18, the Thirteenth Judicial Circuit (Richmond, Virginia) was second with 17; the Nineteenth Judicial Circuit (Fairfax, Virginia) was third with 15; and the Second Judicial Circuit (Onancock, Virginia and Virginia Beach, Virginia), was fourth with 13.

An examination of the time expired between the date of the filing of a written request for a review by a Medical Malpractice Review Panel with the Chief Justice of the Supreme Court of Virginia by the claimant or the health care provider, and the date of the Panel's decision in each of the two hundred three Panels convened as of March 22, 1979, would obviously have a better chance of producing reliable evidence as to how well Panels are accomplishing the General Assembly's objective of the speedy resolution of malpractice claims; however, such a detailed and needed examination is beyond the time and research commitment of this writer. The observation can, however, be generally made that Panels have shortened the time necessary to process such claims to a resolution. However, the nature of the Panel itself, and of its constituency, does portend for some built-in unnecessary delay.

Code § 8.01-581.3, provides that the Panel shall consist of three impartial attorneys and three impartial health care providers, licensed and actively practicing their professions in the State of Virginia, chosen by the Chief Justice of the Supreme Court of Virginia, from lists provided to the Chief Justice and a Circuit Court Judge. While it has been my experience that the members of the Bar and the health care providers designated to serve earnestly try to make themselves available for the work of the Panel, the nature of their
individual private responsibilities necessarily innately imputes a certain amount of delay in the initial convening of the Panel and in holding a hearing, where one is granted. Further, once dates for convening the Panel are agreed upon, continuances requested by the parties, their counsel, the members of the Panel, or the Court portend for further delay. The speed with which the claim is processed in large part depends upon the availability of participants and the Circuit Judge. The most critical factor, however, in the moving of the matter to an expedited decision by the Panel is the degree to which the Circuit Judge, who is Chairman of the panel, manages and gets involved in the timing and scheduling of the decisional-making process.

As many Judges differ in how they view their role in the time flow of a matter in Court, they likewise differ in how they view their role in the time flow of a claim before a Panel. While it is true that the attorneys representing the parties know best when a claim before the Panel is ripe for Panel action, it is the Circuit Judge, as Chairman of the Panel, who must set guidelines and perimeters as to the pace of resolution, as it is he who has not only the responsibility to see that all litigants have a fair Panel hearing, but, in addition, he has the responsibility to see that the Court’s overall docket proceeds as smoothly and as expeditiously as possible, and it is he who must protect the societal interest in the prompt resolution of disputes within the jurisdiction of the court.

While it is still too early to obtain any significant statistics concerning the number of claims that were submitted to Panels for resolution and decision rendered by a Panel which were subsequently litigated, it is my view that once convened, the Panel serves as an effective screening mechanism for the final resolution of medical malpractice claims. It exposes claims to the litigious test of credibility by a panel of experts in the law and in the field of medicine and offers at least the following further benefits.

First, the members of the Panels that I have been privileged to serve upon have approached the inquiry open-mindedly and objectively, and have energetically pursued their responsibilities.

Secondly, the use of the Panels has offered the claimant and the health care provider a place to assess the relative strengths and weaknesses of their respective positions, under fire, in a less costly and formal setting than that presented by a trial by jury in a courtroom.

Thirdly, the Panel offers to the plaintiff the availability of expert assistance that it might otherwise have to forego because of cost and non-availability and thereby its claim as well.

Fourthly, the Panel affords a forum containing three impartial attorneys and three impartial health care providers of the same speciality as the defendant health care provider, which has a more reasonable chance of making competent determinations of whether or not a health care provider is guilty of medical malpractice in the ever increasing complex nature of many malpractice cases.

Once a Panel has been convened, there is usually no difficulty experienced in the Panel reaching a decision after its review of the matter either with or without a hearing. The Panel’s written opinion is usually prepared by the presiding Circuit Judge and signed by all Panel members on the same day that the panel reaches its decision, or it is subsequently circulated by the judge for signatures by Panel members.

Once the opinion of the Panel is announced, then the crucial question bearing upon the overall effectiveness of the Panel as a mechanism for the final resolution of malpractice disputes depends on what impact that opinion has upon the subsequent actions of the litigants themselves. Since a losing claimant before the Panel may still file a subsequent action in a court of law, and since Code § 801-581.8 provides that the Panel’s opinion is admissible by either party as evidence in any action subsequently brought by the claimant in a court of law, and since the Panel’s opinion reflects its “expert” opinion upon the efficacy of the plaintiff’s claim, the impact of the Panel’s opinion upon the future actions of the litigants becomes of prime importance in the overall effectiveness of the Panel in the final termination of malpractice disputes.

The effectiveness of the Panel as a final dispute resolving mechanism will therefore depend upon the extent to which the future actions of the parties are guided to settlement of the claim or to a subsequent trial in a court of law. Further, where subsequent suits are filed, the effectiveness of the Panel as a mechanism for resolving the claim in the subsequent trials will depend upon the extent to which the Panel’s opinion impacts upon the decision of the trier of fact.

Whether or not claims are being finally resolved by the parties after their receipt of the Panel’s opinions, in greater numbers, without subsequent trials in a court of law, can only be ascertained by an examination of the subsequent history of the individual claims that have been decided by Panels to date.

Further, where subsequent suits are filed, it is unclear what impact the introduction of the Panel’s decision into evidence will have upon the decision of the trier of fact.

This uncertainty comes about for two reasons. First,
it may well be that the Panel's opinion will have absolutely no impact because Code § 8.01-581.8 which permits the introduction of the Panel's decision into evidence in the subsequent trial, although such opinion is not to be conclusive, may itself be unconstitutional. Therefore the Panel, as an effective mechanism for the resolution of medical malpractice disputes, may be constitutionally limited to the pre-trial stage of the resolution of the claim.

Code § 8.01-581.8 provides in pertinent part as follows:

* * *

Admissibility of opinion as evidence; appearance of panel members as witnesses; immunity from civil liability.—An opinion of the medical review panel shall be admissible as evidence in any action subsequently brought by the claimant in a court of law, but such opinion shall not be conclusive and either party shall have the right to call, at his cost, any member of the panel as a witness. If called, each witness shall be required to appear and testify. The panelists shall have absolute immunity from civil liability for all communications, findings, opinions and conclusions made in the course and scope of duties prescribed by this chapter.

* * *

The introduction of the Panel's extra-judicial opinion into the evidence of the subsequent malpractice trial severely alters existing rules of evidence and may so invade the province of the jury as to be violative of the right to civil jury trial as protected by Article 1, § 11 of the Virginia Constitution which provides in pertinent part as follows:

* * *

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

* * *

Secondly, the evidentiary role of the Panels' opinions in a subsequent trial is not clear. It has been argued by plaintiff's counsel in one law suit brought by plaintiff after a favorable Panel decision that the plaintiff was not required at trial to produce any *ore tenus* medical evidence establishing the standard of care to be adhered to by the defendant health care provider and a breach thereof proximately causing plaintiff's injuries, because all of those evidentiary questions had been previously resolved by the Panel and that therefore, all that plaintiff need do at trial to supply such evidence was the introduction of the Panel's decision as authorized by Code § 8.01-581.8.

Further, in at least one known instance, a jury returned a verdict for a health care provider in spite of the fact that the plaintiff introduced into evidence a Panel's decision which was adverse to the health care provider, and at trial the health care provider produced no favorable medical testimony other than his own.

While it is true that the impact that the Panel's opinion will have upon the minds of lay juries in law actions brought after a Panel's decision cannot be estimated, it is likely to be pivotal in most instances and as such counsel may desire to raise the constitutionality of its admissibility. On the other hand, without its admissibility plaintiff will probably, in most instances, at trial, be in the same position of facing costly litigation without expert evidence and assistance that it was in prior to the Panel's review.

Whether or not Medical Malpractice Review Panels can be effective in Virginia as an alternative to in-court litigation in an area of increasing need in the last analysis will depend upon many factors, chief among which is the continued existence of the present cooperation between the Bench, the Bar and the medical associations, for it has been correctly stated that such success lies with these professions themselves in the following terms:

The resolution to the medical malpractice crisis lies within the medical and legal professions themselves. A greater awareness and cooperation between the two professions will help to decrease malpractice actions in which attorneys with no medical expertise pass judgment on elements of diagnosis and treatment.

One method of providing cooperation between the two professions is through the use of review panels. Malpractice review panels are theoretically designed to use experts from both professions to eliminate frivolous actions and assist in trial preparation. If the legal profession recognizes the problems that confront review panels and makes a genuine effort to work with physicians to alleviate these problems, the panels may succeed in providing stop-gap relief to the medical malpractice crisis. However, review panels will not provide curative relief for the difficulties inherent within

(continued on page 13)
Tired? Run Down? Practice of law getting to you? I've got the answer. You're going to be a TV star in the future. You're going to change your pinstripe shirts for the pale blue, maybe a little powder makeup, because it's a-coming. On July 4, 1977 the Supreme Court of the State of Florida adopted a one year pilot project wherein they agreed to let the TV cameras roll into the courtroom, and they ran an experimental program for the one year period. We didn't hear a whole lot about it here in Virginia, and the rest of the country didn't pay particular attention until December of 1977 when there was a murder trial in Miami involving a young teenager by the name of Ronnie Zamorra. Ronnie Zamorra's trial was not only televised, but Ronnie Zamorra had an imaginative defense attorney, and I'd like to think that most defense attorneys are imaginative and bright and will pick up a defense if it's there. Be that as it may be, Mr. Ellis Rubin, who was representing this young man, decided that his defense for murdering the eighty-three-year-old sweet little old lady next door—and when you murder sweet little old ladies next door, you've got to be imaginative to come up with a defense sometimes—his defense was that Ronnie Zamorra was a victim of the tube. Kojac, by sublimation, had gotten inside of his mind and all of the other horror shoot-em-up serials that we see on TV have all affected this young man's way of life to the extent that that was the causation of the homicide.

Well, Mr. Rubin wasn't successful, but that's beside the point. The point was it became an unusual and interesting case, a case with sex appeal, if you will, and it was televised in its entirety, not just spots, and they estimated that. I believe, some sixty thousand people in the greater Miami area saw the entire trial, from the voir dire of the jury to the final verdict. In excess of 250,000 people saw some portion of the trial. There was a judge there in the Circuit Court of the State of Florida, a court of record, of course, by the name of Judge Baker. Judge Baker, by his own admission, was apprehensive going into the trial, but he filed a report at the conclusion of the case, as all Circuit Court judges in Florida were required to do for the one year period, and in his opinion, upon reflection, he deemed it a success. However, Judge Baker's report contained the caveat that there remains a need to protect the defendant's right to a fair and impartial trial. Well, came June 30, 1978, the year was up and the Florida Supreme Court agreed to renew the project in one form or another. I know that various organizations in the country asked leave to be heard in Florida, but is it still alive and what the ultimate disposition there will be, I don't know.¹

I know the State of Alabama has experimented with television in the courtrooms² and I am only going to address myself to criminal cases because I think there we're dealing with the fundamental rights of defendants and the ultimate issues that Judge Merhige and Mr. Abrams are going to talk to you about: the First Amendment rights, the Sixth Amendment rights, the Fifth Amendment rights. Still, this was Florida. It wasn't the Commonwealth of Virginia, but some of us were perhaps surprised to read in the newspaper last August, 1978, that at a meeting of the State Chief Justices in Burlington, Vermont they voted by 44 to 1, hardly a close vote, to allow studies and to allow in theory television to come into the courtroom and to televise criminal trials. Our State Supreme Court Justices are not known for their liberal approaches to similar problems. 44 to 1. There were several people that abstained, there was only one Chief Justice that voted against, so that's where we are.

The professors and the scholars in the field tell us that it is coming. Let's talk about what the pros and cons are. We're talking about, on the one hand, the First Amendment, freedom of the press; on the other hand, we're talking about the defendant's fundamental right under the Sixth Amendment to a fair trial. Of course, all of our Bill of Rights are important, but our Supreme Court has said that the Sixth Amendment right to a fair trial is the most fundamental—most—and I submit that it is. That where there are conflict-

¹

²
ing issues, where it’s a close case one way or the other, 
that we’ve got to be concerned first and foremost with 
that defendant’s right to his fair trial, an impartial 
jury, so forth and so on. Also in the Sixth Amend- 
ment—let’s not forget—there are another two words— 
his right to a public trial, but it’s his right to a public 
trial. The press enjoys its rights under the First 
Amendment, but the Sixth Amendment right to a 
public trial belongs to the defendant and the purpose 
of that, we remember from history, was because we 
wanted to open the doors of the courtroom so that we 
would not have the governmental persecution, we 
wouldn’t have the Star Chamber, we wouldn’t have 
the kangaroo courts: so it’s his right.

We’ve got to weigh and balance the right of the 
public to know and the right of the public to be edu-
cated against the rights of the poor little defendant 
who’s there. I guess ultimately there will be millions 
of words and pages written on this topic—and one of 
the reasons, the compelling reason that we want to 
have—that people want to have—television in the 
criminal court is education. The public has a right to 
know, unquestionably. That’s time worn. We all 
accept that, and the people that study such things tell 
us that a televised trial, from inception to conclusion, 
will educate more people than all the bar associations 
in this country can do in all of the thousands of May 
Day Law Day speeches we give at our various high 
schools and Rotary Clubs and Kiwanises, because on 
television you will really see the system work. Unques-
tionably, there’s a lot of truth to that. The public is 
going to be educated because now they don’t even 
know the first, foremost cornerstone of our founda-
tion, that someone is presumed to be innocent, that he 
doesn’t have to testify. You’d be amazed at how many 
of our fellow citizens that studied history back in the 
fourth grade either don’t know or have forgotten or 
frankly don’t care. How many members of the juries—
and I see this every week of every month—don’t know 
that a defendant doesn’t have to testify and really have 
forgotten that he’s presumed to be innocent? The pre-
sumption today in many cases, as a practical matter, is 
the other way around.

What is the primary function of a criminal court? 
One of the primary functions, in addition to giving 
the defendant his fair trial, is a search for the truth. 
Does television in the courtroom aid in the search for 
the truth? I submit not necessarily—probably not.

Let’s talk about four categories of persons that are 
going to be affected if this comes about: The defend-
ant. He’s entitled to a public trial, unquestionably. 
However, isn’t he entitled to a certain amount of pri-
vacy, also? Well, some scholars will tell us he gives up 
that right to privacy when he commits an offense and 
he’s charged with an offense, and certainly when he’s 
indicted and goes on trial, but these same scholars that 
study history have forgotten that he is presumed to be
innocent until that jury says, “We find him guilty”—or the Judge so finds. That presumption, as a practical matter, is gone if we’re saying he’s given up all rights he has to privacy once he’s charged by a Magistrate who says that there is probable cause that an offense has been committed. Yes, he’s entitled to a public trial, but he’s not entitled to be tried in a stadium or a coliseum. He’s entitled to an orderly courtroom and to due process.

Suppose we had the political case. We had the debacle that was Chicago a few years ago and all of us remember that. How much worse would it have been had those defendants and/or those lawyers who were interested in a public forum know that their every antic was being televised to millions of people? Bobby Scale’s shenanigans then would have been magnified, I submit, many times over. Granted, the judge would have still had the recourses that he did, but people that are going to use trials for political forums are going to take advantage of the television camera and it’s going to turn the orderly administration of justice into even more of a zoo than it becomes when you have these type trials now. And they’re the trials that are going to be televised. Every case is not going to be televised. It’s going to be the notorious cases, the political trials, the gory, bloody homicides. That’s what the public is going to be interested in and that’s what the TV stations are interested in. Why? Because unless you have the rare situation where it is on educational TV, you’re going to need a sponsor and a sponsor is not going to pay thousands and thousands of dollars for some nineteen-year-old kid from the ghetto breaking in a home or stealing a car. It’s going to be interested in the sensational mass murder, the love nest homicide, the gory rape—you know exactly what they’re going to be interested in. And what then is going to be the fate of that defendant, with the TV camera getting a closeup? And the camera wouldn’t be on wheels. I’m assuming for the purpose of my discussion that today’s technology is going to allow us to have a single immobile, unobtrusive camera, because that was the rule in Florida and hopefully that would be the rule in any court today. We’re not going to have spot lights. The rules were that there were no extraneous lights, just the lights in the courtroom. You’re going to have one camera and it’s going to be stationary. In Florida, they also had still photography, one photographer. The media gets together and they have pooling arrangements whereby all of the networks agree to share the film and all of the newspapers agree to use the one photographer. It’s not going to be obtrusive. You’re not going to have the circus that was Billy Sol Estes in 1962 in Texas where you had the huge mobile vans outside the courtroom, and you had the strobe lights. It literally was a circus and, of course, in 1965, the Supreme Court of the United States reversed in Estes v. State of Texas.

We’ll assume that no one is even going to see the little red light on the camera that goes on when it’s being activated, but everyone is going to know it’s there and the zoom lens is going to pan in on the defendant and his every gesture: or his selected gestures are going to be televised and it could destroy him literally and legally because you don’t have an editor there. The judge cannot be a producer and yet that’s what he’s going to be called upon to do. We might even have pre-trial conferences and I think you almost have to have pre-trial conferences with the press involved. One pre-trial conference would involve the press and the judge. What are the ground rules? Certainly we’d have statewide ground rules as they did in Florida and will in every other state.

But you’re going to have the defendant doing his thing. The defendant is also entitled under the Sixth Amendment to effective representation of counsel. How is this going to affect that constitutional right? And here I think you’ve got pluses and minuses. I think one ultimate result you’re going to have is that defense attorneys are going to be better prepared. I don’t agree at all with Chief Justice Burger in his remarks on the caliber of the defense bar and the trial bar in this country. Certainly it isn’t true in the vast, vast majority of cases I see in the State of Virginia, but I do see, as all of you see, instances where defense attorneys are not as prepared as they should be, trial lawyers aren’t as prepared as they should be, and I submit that if the lawyer knows that he’s going to be beamed out into homes across his state and across his city, then he’s going to do his homework. He’d better do his homework. But on the other hand, is that fact that he’s going to be on television going to affect his strategy? Is it going to cause him to be more of a “ham”? One of the results of the statistics in Florida was that—and this was from the judges—in their opinion, thirty percent of them felt that lawyers—which would include the prosecutor and the defense lawyer—were more flamboyant in the cases that were televised. A lawyer has to be conscious of it. How many times have we been in a court when we’ve seen a lawyer rant and rave, scream and yell and impress the vast majority of the laymen in the court, when you and the other good lawyer sitting next to you knew he wasn’t doing a damn thing for his client other than getting the judge mad and sending his client right on
down to Richmond. It's called Spring Street, 500. But
he's impressing everybody and somebody will go out
and say, "Gosh, if I ever get in trouble, I'm going to
get me that lawyer. He sure sticks up for his client."
Isn't that same type lawyer going to be aware of that
image that he's projecting out to the television
audience, whether it's closing argument or cross
examination? There is one thing I learned from—I
won't even say friend, I say my mentor—although he
is my friend—Judge Merhige, when I practiced under
him—not with him—I practiced under him, for
him—there was no doubt about that at the time,
Judge! Not a whole lot of doubt now, Judge. It was
knowing when not to ask the question, knowing
when to forget all of those things we learned in Char-
lottesville, Lexington, Williamsburg, Richmond,
wherever, knowing when to suck it up and shut up
and stand up and say, "No questions," and knowing
that you're winning your case that way.
But are we going to succumb to temptation? There's
the audience, a million people out there, and you're
the hot shot defense lawyer and you're dying to say
something and you want to show off a few extra spe-
cial things you've learned about. Is it going to be that
much harder to say, "No questions?" I submit that
very possibly, very probably it is. Mr. Chief Justice
Taft, in a case way back in 1927 discussing this issue
in Toomey v. State of Ohio, said, "The requirement of
due process of law in judicial procedure is not satisfied
by the argument that men of the highest honor and
the greatest self sacrifice could carry it on without
danger of injustice. Every procedure which would
offer a possible temptation to the average man to
forget," etc., etc. It's the possible temptation, and
that's what we're talking about because the defend-
ant's not going to have to show actual prejudice. It's
possible unfairness.
Mr. Justice Black, in a case called In Re: Murchison,
in 1955, talking about fair trials: "A fair trial and a fair
tribunal is a basic requirement of due process. Fair-
ness, of course, requires an absence of actual bias in
the trial of cases, but our system has always endeav-
ored to prevent even the probability of unfairness."
This one short paragraph is probably the most quoted
that we have on the likelihood of prejudice in all of
the articles that I've been able to read on televised
criminal trials.
Let's move on from the defense attorney and the
defendant. Let's talk about the victim of a crime, the
witnesses to the crime. Defendants certainly, it could
be argued, don't have a certain amount of privacy
because they've been charged, but how about victims
of rape? We've heard a lot about that in the last few
years, how that the victims of rape are put on trial.
Isn't that going to be all the more so now if this type of
trial were televised? We say well, that trial would not
be televised. Whose authority is that going to be? Is it
the trial judge? The press is going to raise holy cain
about that. "Judge, it's the rape case we want. How
can you tell us we can't have this rape case? You gave
us this dull breaking and entering last week. We're
entitled to a good rape trial this week. Our sponsors
want a rape case!" Of course, I'm being a little face-
tious, but I'm not being facetious when I tell you that
there is no authoritative answer as to who is going to
decide what cases are being tried. The victim of this
type of heinous offense, the sex offense, is going to be
embarrassed, not because of any improper questions,
but by the mere fact that it's an embarrassment to have
to go to court and have to go through the trauma that
is open court litigation.
The witnesses—we've got majorities and we've got
minorities. Isn't there going to be a temptation that
someone who's espousing the minority view that the
light was green when the other three people said it was
red is going to be tempted to give in to the majority
view, to be not quite so sure because they're aware
they're on television, because their friends and neigh-
bors are saying, "You dummy, how could you say it
was that way when the other three people on tele-
vision said it was the other way?" Of course, we separate
witnesses, but that doesn't mean that if a case goes
over a second day that everyone in the world is going
to know what the witnesses have said. We can seques-
ter juries. Can we do the same with witnesses? I submit
you'd almost have to if there's any chance that a wit-
ness is going to be recalled for rebuttal. Newspapers
some people read, but it is a small percentage com-
pared to those who watch the television or hear the
radio broadcasts every day and every night. So I sub-
mit that witnesses are going to be affected. The wit-
nesses don't see the camera. It's going to be maybe a
little dot in the wall, but they know it's there and
that's the important thing and it's going to affect their
mannerisms.
One of the—probably not one of the—probably the
most important is a third category, the jury. The Sixth
Amendment gives us the right to an impartial jury.
Fine, but the jury again is going to be aware that that
television camera is there. In the Zamorra trial, the
jurors asked Judge Baker if they could see themselves
on television. His answer, of course, was no, but jurors
go home and their friends and relatives will talk to
them. I submit that could be minimized because in
every televised criminal trial, you would have to sequester the jury. No question about it. Who's going to pay for that? Is the media going to pay for it? It should not be a cost to the taxpayers, but you would have to do it. Suppose there was a hung jury; you would almost have a mandatory change of venue. There could be no possible retrial of a well-publicized television trial. Suppose you've got a co-defendant. We all know that, if we try criminal cases, that certain evidence that's admissible against one defendant would not necessarily be admissible against a co-defendant. How could that co-defendant get a fair trial by jury in that same area? Juries, by the mere fact that they know that the case is being televised, and they would, have the normal case turned into a cause célèbre. It would have to be, by the mere fact that it is televised.

The fourth category—the prosecutors. We all know or rather we all would like to think that prosecutors are interested in fairness, in seeing that justice is done. There's a great motto that Mr. Justice Frankfurter coined about justice being done. That's the function of the prosecutor and yet we all know that that's idealistic. We all know that some of them keep score. We all know of them. They say that some of them even run for reelection. What is their attitude going to be? Are they going to use television in an election year as a forum? How hard is it going to be for a Commonwealth Attorney to be a big enough man to say, "Your Honor, I want to nol-pros this case. Justice has already been done"? How hard is it going to be for someone to stand up and say, "Judge, this man has gone through enough, he's got psychiatric problems, the defense attorney has shared these psychiatric reports with me, I recommend a suspended sentence" in this bad narcotic case, this bad rape case, whatever? It's going to be awfully difficult for him to overcome the temptation to play to his audience, the electorate.

The fifth category, and the final one because my time has just about run out, are judges. Well, judges are human beings—at least, state court judges are. Certainly they are a notch above us, but they are aware of the pressures that are involved when you have a televised trial. The Florida judges said—I believe 98% of them—they felt a certain tenseness when they knew that they were going to be on television. However, I submit that despite that, the effect on the judges is one of the goods that could come out of this. I submit you're going to get a more conscientious and better judiciary because of televised trials. If there is one thought I have as a criminal defense attorney, and I'm not objective in my thinking, my thinking is slanted from that point of view, it is we're going to put a stop to the intertempere judges, the judges that are either on the prosecutor, and unfortunately, that's not the way it works most of the time—the judges that are on the defense attorney and the defendant from the inception, and every one of you that have ever been in a criminal court know exactly what I'm talking about. They're the small minority of the judges, but they're there and they make life miserable for us, and hopefully, if that television camera is on them, it's going to be able to show things that that cold record, the stenotype, doesn't show. The stenotype does not show that the judge is yelling, it doesn't show that his face is livid, it doesn't show that he is sarcastic and demeaning, but, hopefully, with the television in the courtroom, we're going to get some judges shaping up. We're going to get some judges that are going to have to mind their P's and Q's because they're going to be aware of what their image is, and any inflection in their voice is going to be broadcast into the homes of the people across the city, the state, even across the nation.

Okay, well, are we making too big a deal out of this? The Zamorra trial was televised from beginning to end, but are we really talking about a ninety-second spot on the eleven o'clock news and that's all it's going to be, instead of the traditional television newscaster with the mike in front of the courtroom: "This is Joe Jones at Federal Courthouse in Richmond, Virginia. This is what happened"? And then you see that proverbial sketch of the lawyer inside because you have the sketch artist in there, and those people are not that good. They make me look short and fat sometimes. The TV people will tell you "Are we going to be more obtrusive than the fifteen people who are sketching and the charcoal that is going on the paper?" No, probably not, but that's not the point. The point is you're going to have selected spots. Who's going to decide which ninety-second spot goes on? Is it going to be the Commonwealth's witness? Is it going to be the weeping victim of the rape? And at seven thirty or eight o'clock you always see the flash: "Tune in to the eleven o'clock news." Are you going to see a flash then? "Tune in at eleven o'clock. See the weeping rape victim at the local trial. Tune in at eleven."

Of course, I'm exaggerating, but we don't know. What we do know is that it's not going to be up to the judge or the prosecutor or the defense attorney to select which ninety-second or three-minute segment goes on the tube. You're going to have editorializing there.

Well, we've got the First Amendment. Does the tele-
vision media have a right to come into the court? I submit they don't. They have First Amendment rights, of course, but that First Amendment right is satisfied when they're allowed to come into the public trial and report thereon. "Well, the newspapers have an advantage," they say. "The newspapermen get to write their stories and come in and yet we can't do our thing." Well, they have an argument there and whether it's a valid argument or not, only time will tell, but newspapers can give certain cases the proper perspective, give it the space, can control the size of the headline, whether or not pictures are used, the size of the story. A television set is a television set. "The Fonz" is as big as President Carter on the television set. The insignificant case is just as big a picture or just as small a picture as the large mammoth case.

On reflection, I don't know: but you are going to hear more and more of this subject. There will be sophistication in technology, there will be many discussions as to control, whether or not this is going to be education to the public. Perhaps the Judge's charge to the jury, the Judge's instructions. We don't know. The only purpose of my short introductory remarks, and they haven't been as short as I would have liked, is to make you aware that it's coming. It all started in 1935, Bruno Richard Hauptman in the case in New Jersey, the Lindbergh kidnapping. That was the first real fair trial, free press situation and that was what caused the ABA to form its first committee on the law and the media, of fair trial, free press, and we've come a long way since then. Estes v. The State of Texas is a good starting point for reading. That case, as you will remember, was by a five to four majority—it wasn't even a majority opinion, it was a plurality opinion because Mr. Justice Harland agreed with the result of Mr. Justice Clark, but not with the reasoning. Five to four—thirteen, fourteen years ago. Who's to say what would happen if the same case were taken up today?

In any event, it's interesting and it bears following.

---

The Effectiveness of Medical Malpractice Review Panels in Virginia . . .

(continued from page 7)

our anachronistic system of health care delivery that have manifested themselves through a malpractice crisis. In addition to the need for cooperation between the medical and legal professions, the medical profession itself will have to take an active role in self-regulation to insure that those physicians who practice in a careless manner are properly disciplined and not allowed to jeopardize the health of those who are in need of medical treatment. A successful campaign of self-regulation might preclude the need for damage-limiting statutes, countersuits and review panels.

(Washington and Lee Law Review, Fall, 1977, 1179, 1199-1200)

The continued and increase in the effectiveness of the Medical Malpractice Review Panel in Virginia is thus up to all of us.

Note: Acknowledgement and appreciation is noted to the Office of the Executive Secretary of the Supreme Court of Virginia and to the National Center For State Courts for information supplied.
Enforcement of Commercial Forum Selection Agreements

Enforcement by Federal Courts

In a landmark decision in 1972, Bremen v. Zapata Off-Shore Co., 3 the United States Supreme Court considered the enforceability of a forum selection clause in a contract by which a German corporation agreed to tow the off-shore drilling rig of an American corporation from Louisiana to the Adriatic Sea. The contract required that "[a]ny dispute arising must be treated before the London Court of Justice." 4 In its opinion, written by Chief Justice Burger, The Court held that the forum selection clause should be specifically enforced unless it clearly could be shown "that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." 5 The burden of showing that such a clause is unjust and unreasonable is on the party seeking to escape his contract. 6 To prevail, he must "show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." 7 Only Justice Douglas dissented, and he did so on grounds not relevant here. 8

A 1974 Supreme Court Decision, Scherk v. Alberto-Culver Co., 9 involved a contract between a Delaware corporation and a German citizen for the purchase of three business enterprises, including all rights held by the enterprises to trademarks in cosmetics manufactured by them. The contract contained an arbitration clause requiring that all claims arising from the contract be arbitrated before the International Chamber of Commerce in Paris, France. The clause also required that the laws of Illinois would govern contract interpretation and performance. Alberto-Culver brought suit in a federal district court in Illinois, alleging violations of federal securities law. Noting that an agreement to arbitrate before a specialized tribunal is a specialized forum selection clause, and relying on Bremen, the Court held that the arbitration agreement before it was to be enforced by federal courts pursuant to the Federal Arbitration Act. Referring to its holding in Bremen, the Court also explained that the fraudulent inclusion of a forum selection clause in a contract rendered the clause unenforceable. 10 Merely that a dispute arising from any transaction is based on an allegation of fraud is insufficient. 11

Although Bremen involved an international contract dispute before a district court sitting in admiralty, much of its reasoning applies equally well to domestic commercial activity. The court explained that:

For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. . . . The expansion of American business and industry
will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . [In an era of expanding world trade and commerce, to refuse enforcement of forum selection agreements has] little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans.

. . . The choice of that forum was made in an arm’s-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.

. . . In this case, for example, we are concerned with a far from routine transaction between companies of two different nations contemplating the tow of an extremely costly piece of equipment from Louisiana across the Gulf of Mexico and the Atlantic Ocean, through the Mediterranean Sea to its final destination in the Adriatic Sea. In the course of its voyage, it was to traverse the waters of many jurisdictions. . . . Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.

Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.14

Decisions of several federal district courts15 and the United States Courts of Appeals for the Third,16 Sixth,17 Seventh,18 and Ninth19 Circuits have extended, or suggested extension of the principles of Bremen to non-admiralty cases. Five of these decisions expressly acknowledged that Bremen arose in an international admiralty context, but concluded that the principles of Bremen were applicable.20

Especially significant for Virginia attorneys is a recent decision from the Western District of Virginia, Wellmore Coal Corp. v. Gates Learjet Corp.21 The parties in that case had signed an airplane purchase agreement that granted the courts of Arizona exclusive jurisdiction to decide all disputes arising under the agreement. In a memorandum opinion, the court ruled that the forum selection agreement was enforceable, whether enforceability was a matter of Arizona or federal law. The court found that the plaintiff had failed to meet its burden of showing that enforcement of the forum selection agreement would be unreasonable. The court granted the plaintiff’s motion that the case be transferred to the federal district court in Arizona.

Other authorities also support the enforcement of domestic commercial forum selection agreements. Such agreements substantially are enforced in other common law countries, including England.22 Noted scholars have urged their enforcement, and the proposition “accords with ancient concepts of freedom of contract.”23 The Restatement (Second) of Conflict of Laws § 80 (1971) provides that “[t]he parties’ agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable.” Also, Professor Leflar has advocated the extension of Bremen to interstate litigation.24
The Supreme Court noted in *Bremen* that forum selection agreements “have historically not been favored by American courts,”25 and that “this view apparently still has considerable acceptance.”26 Typical of this line of cases is a 1948 Fourth Circuit decision, *United Fuel Gas Co. v. Columbian Fuel Corp.*,27 stating in dictum “that parties cannot by contract oust the federal courts of their statutory jurisdiction.”28

Even before *Bremen*, however, the growing trend favored forum selection agreements.29 The *Bremen* Court answered the traditional opposition as follows:

> The argument that such clauses are improper because they tend to “oust” a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and thus little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. No one seriously contends in this case that the forum-selection clause “ousted” the District Court of jurisdiction over the plaintiff’s action. The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.30

**Enforcement Under Virginia Law**

There is no controlling Virginia law on the enforce- ment of commercial forum selection agreements.31 Yet, their validity under Virginia law can be supported by substantial authority. If the decision on this issue by a federal district court sitting in diversity is controlled by Virginia law, the court’s inquiry is as broad as that of the Virginia Supreme Court.32

In *Poole v. Perkins*,33 the Virginia Supreme Court ruled that the validity of a negotiable note executed in Tennessee was governed by Virginia law, because that was the parties’ intent. Interpreting other aspects of contracts, the court historically has refused to alter the intent of the parties, stating that it “cannot write a new contract for them.”34 Also, when it enacted the Uniform Commercial Code in 1964, Virginia’s General Assembly granted contracting parties broad freedom to fashion remedies that supplement or limit those provided by the Code.35

Especially persuasive is Virginia Code § 8.01-577.B (Repl. Vol. 1977), which provides that:

> Notwithstanding any other provision of law, the parties may enter into a written agreement to arbitrate which will be as binding as any other agreement. ... Neither party shall have the right to revoke an agreement to arbitrate except on a ground which would be good for revoking or annulling other agreements.

Virginia Code § 8.01-580 (Repl. Vol. 1977) narrowly limits the grounds for which a court may set aside an arbitration award. These Code sections change the holding of *Big Vein Pocahontas Co. v. Browning*36 that arbitration agreements requiring the resolution of the parties’ ultimate liability are revokable and will not bar an action on the original contract “because such a course is supposed to oust the courts of their jurisdiction.”37 Forum selection agreements, which merely select which court will resolve the parties’ dispute, should be less objectionable than arbitration agreements, which limit any court participation.

Finally, the numerous cases and other authorities cited under the preceding heading also support the enforcement of commercial forum selection agreements under Virginia law. In the *Wellmore Coal* case, the court noted that enforcement of the parties’ forum selection agreement under Arizona law would deprive the Virginia plaintiff of a forum in its own state.38 The court, however, ruled that the result would not violate Virginia public policy, which “favors enforcement of contract clauses bargained for in good faith between parties of equal strength.”39 The substantial influence that the reasoning of the *Bremen* opinion would exert on the Virginia Supreme Court cannot be underestimated.40

**Choice of Law in Federal Diversity Actions**

A federal district court, sitting in diversity, must consider whether state or federal law governs the enforceability of forum selection agreements.41 One court has acknowledged that this question is complex, but none has analyzed it.42 No consistent pattern emerges from the reported decisions. Two courts43 have held, and one court44 has assumed without discussion, that state law governs. One court45 has adopted the *Bremen* approach without reference to state law. While noting the similarity between state law and the federal rule, another court46 has ruled that the *Bremen* criteria control.

Logic would not preclude a ruling that the enforceability of forum selection agreements is a substantive question governed by state law. Such a ruling would seem to be strengthened if the disputed contract also contained a state law selection clause.47
However, to conclude without further analysis that enforceability is a matter of state law is to ignore competing federal interests. One commentator has suggested that the enforcement of forum selection agreements could be made a rule of federal courts law or a rule of federal common law.

In Nat'1 Equip. Rental, Ltd. v. Szukhent, the United States Supreme Court held that the contractual designation of an agent to accept service of process was permitted under Rule 4(d)(1) of the Federal Rules of Civil Procedure. The Bremen Court noted that its holding was "merely the other side of the proposition recognized by [it in Szukhent]." The principles of Szukhent and Bremen could be extended to make the enforcement of forum selection agreements a rule of federal courts law.

In Prima Paint Corp. v. Flood & Conklin Mfg. Co., the Supreme Court held that the arbitration clause of an interstate commercial contract was separable and valid. Although the holding in Prima Paint purportedly was based on the legislative history of the United States Arbitration Act, the Court arguably was creating a rule of federal common law based on a federal interest in the enforcement of arbitration contracts. Also, the rationale of Bremen applies to interstate commercial activity, exceeding that required to justify its decision regarding maritime matters alone. On the authority of Prima Paint and Bremen, the enforcement of forum selection agreements could be made a rule of federal common law based on a federal interest in the enforcement of such agreements to promote interstate commerce.

The issue of applicable law can be avoided, of course, if forum selection agreements were enforceable under state and federal law. This has been the approach taken by several courts, including the Western District of Virginia in the Wellmore Coal case.

Advice for Negotiating and Drafting

Counsel desiring to designate by contract a specific forum for resolving future commercial disputes can enhance the likelihood that such a designation will be enforced as intended. First, avoid such common but ambiguous forum designations as "courts in Virginia" and "courts of Virginia." Rather, specify state courts, federal courts, or both.

Second, designate a reasonable forum. Consider the forums in which the contract is to be executed, in which disputes are most likely to arise, and which have significant contact with the parties or the subject matter of the contract. Alternatively, consider forums that are neutral or that have special expertise in handling the disputes likely to arise. Also, consider the forum by whose law, if any, the parties have agreed to be bound.

Conclusion

Increasingly, courts are relying on Bremen to uphold reasonable commercial forum selection agreements. Enforcement of such agreements will promote commerce by eliminating one source of uncertainty in commercial dealings.

Footnotes

3. E.g., Annot., 56 A.L.R.2d 300 § 4 (1957). By contrast, most courts have enforced agreements selecting forums for resolving existing disputes. Id. § 8.
4. Id. § 5.
6. Id. at 2.
7. Id. at 15.
8. Id. at 15, 18.
9. Id. at 18.
10. Id. at 29-24.
12. Id. at 519 n.14.
13. Id.
16. See Copperweld Steel Co. v. Demag-Mannesmann-Bohler, 578 F.2d 953, 964-66 (3d Cir. 1978) (principles of Bremen recognized, but forum selection clause of international sales contract not enforced because it was unreasonable).
17. See In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 234 n.24 (6th Cir. 1972) (dictum) (suggesting forum selection agreement to preclude out of state litigation).
18. See Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 544 n.62 (7th Cir.) (agreement by Major Leagues and their clubs to be bound by decisions of Commissioner of Baseball and to waive judicial recourse held enforceable), cert. denied, --- U.S. ---- (1978).
19. See Republic Int'l Corp. v. Amco Eng'rs, Inc., 516 F.2d 161, 168 (9th Cir. 1975) (forum selection clause of international construction contract held enforceable).


23. Id. at 11.


25. 401 U.S. at 9.

26. Id. at 10.

27. 165 F.2d 746 (4th Cir. 1948).


30. 401 U.S. at 12.

31. Campbell v. Bhd. of Locomotive Firemen & Enginemen, 165 Va. 8, 181 S.E. 444 (1935), involved provisions of the constitution of a fraternal and mutual benefit association that made the association’s determination of a member’s benefits final. The Virginia Supreme Court held that the association’s constitution did not bar judicial relief. This holding, however, does not control the present discussion, because the court determined that the association’s agreement with its members was an insurance contract. Insureds are granted deference, not grantees to commercial parties. See, e.g., Chavez v. Continental Ins. Co., 218 Va. 76, 235 S.E.2d 335, 339 (1977) (total and permanent disability provisions should be liberally construed in favor of the insured). Further, another provision of the constitution involved in Campbell prohibited a member’s resort to a civil court until all association remedies had been exhausted. Thus, the constitution itself contemplated judicial review.


33. 126 Va. 331, 101 S.E. 240 (1919).


36. 137 Va. 34, 120 S.E. 247 (1923).

37. Id at 45, 120 S.E. at 251.

38. Slip. op. at 6 n. 2.

39. Id.


41. See e.g. Cruise v. Castleton, Inc., 449 F. Supp. at 568.

42. Id.


47. See Wellmore Coal Corp. v. Gates Learjet Corp., slip op. at 6.

48. See, e.g., Hart & Wechsler at 756-832; Wright § 60.


51. 407 U.S. at 10.

52. Maier at 392.


54. Id. at 407-25 (dissenting opinion by Black, J.); Maier at 392.


56. Maier at 398.


58. Slip op. at 5.
Tax Incentives and Pitfalls for the Potential Real Estate Investor

Historically, the real estate industry is volatile and reacts to the fluctuations in the economy such as changing interest rates and inflation. In addition, the tax aspects of real estate have a definite impact on potential real estate investors. When there is a slowdown in the construction industry, Congress may try to stimulate investment through tax incentives.

For example, the U.S. apartment industry is in a peculiar dilemma because there is a worsening shortage of new apartments and rents generally are not high enough to justify new construction. The apartment vacancy rate is at a seven-year low of 5.2 percent, yet, in 1976, the median rent for new apartments was $215 a month, only 13 percent higher than the $190 figure of 1973. In the same period, the overall cost of living rose 28 percent and apartment construction cost soared 32 percent according to the National Association of Homebuilders. Apartment starts were 268,000, 375,000, and 550,000 in 1975, 1976, and 1977 respectively. These figures indicate a marked decrease from 1972 when apartment units started totalled 1,047,500.1

There were 50,000 federally subsidized units started in 1976. In 1977, the number increased to 150,000 units with 106,000 units under the Federal Department of Housing and Urban Development’s Section 8 program.2 Even with an estimated expenditure of nearly $4 billion by HUD for the fiscal year ending September 30, 1978, the number of subsidized starts is far less than the need because it is estimated that there are 13.6 million Americans living in dilapidated housing.

With this background, Congress passed the Revenue Act of 1978 which departed from the tax reform nature of the Tax Reform Acts of 1969 and 1976 (TRA 76) and contained incentives designed to encourage savings and investment. Certain incentives apply to most investment opportunities but there are provisions specifically designed to encourage investment in real estate. The important sections for real estate investors are:

1. Reduction in the federal tax rate on net long-term capital gains;
2. Continued exclusion of “at risk” to real estate;
3. Extension of the investment tax credit to qualifying “rehabilitation expenditures” for 20-year-old non-residential buildings;
4. Deferral until 1980 of “carryover basis” rules;
5. Technical modifications to the section initially included in TRA 76 to encourage the preservation of “certified historic structures” by forming a tax shelter oriented syndication; and
6. Special exclusion of gain on sale of principal residence of individual over 55 and residential energy credits.

It should be pointed out, however, that the Internal Revenue Service does not share the idea of stimulating investment through tax breaks. For example, Jerome Kurtz, Commissioner of the Internal Revenue Service, is a strong tax reform advocate and supports the theory that special tax breaks in the form of credits and deductions (i.e. tax expenditures) are generally undesirable and not as effective in achieving their economic or social goals as direct government subsidies. When hearings were held in connection with TRA 1976, Mr. Kurtz testified against tax benefits for real estate tax shelters. It is possible, he felt, to have a fair tax system and nevertheless help the real estate industry

if we stop using the tax system to make expenditures for the real estate industry—and other industries as well. Certainly we should not turn to the tax system to make expenditures unless it can be demonstrated that our goals cannot be accomplished by direct programs because direct expenditure programs do not have the harmful side effect of distorting the tax system.3

His suggestions for ending real estate tax shelters went beyond the limitations that were finally enacted by Congress in TRA 76.

The Internal Revenue Service has revised its audit procedures to select certain tax shelter partnerships for
mandatory review and has directed examiners to look for red-flag items such as large net loss, negative capital account at year-end, or partnerships formed late in the year.4

This article will analyze the statutory investment incentives and discuss some of the problem areas presented in the current case law affecting real estate investors and partnerships.

The Revenue Act of 1978

Capital Gains

Traditional tax planning of converting ordinary income into capital gains has become more important under the Act due to the substantial decrease in the tax rates on capital gains. Investors in real estate tax shelters can deduct losses, primarily from depreciation and interest in excess of operating income, as ordinary losses and thereby offset income taxed at rates as high as 50 to 70 percent. Upon sale of the property the investor is taxed at lower capital gain rates except to the extent of recapture of depreciation as ordinary income (i.e. the excess of accelerated depreciation over straight line).

The Act lowered capital gain rates by allowing an individual to exclude 60 percent of net long-term capital gains from income as opposed to the previous exclusion of 50 percent. Since the maximum rate of tax on ordinary income is 70 percent, the overall maximum tax rate on net capital gains is 28 percent.

In addition, net long-term capital gains are no longer included as tax preferences for the 15 percent minimum tax and do not reduce personal service income in the calculation of the 50 percent maximum tax on earned income. Prior to the Act, an individual could pay up to 49 percent on long term capital gains based on the 50 percent exclusion and 15 percent minimum tax.

It should be noted that under the Act net long-term capital gains could be subject to a new alternative minimum tax. The alternative minimum tax applies to the sum of: (1) the taxpayer's taxable income; (2) 60 percent of his net capital gains; and (3) his excess itemized deductions. After a $20,000 exemption, the alternative tax is 10 percent of the first $40,000, 20 percent on the next $40,000, and 25 percent on the excess over $80,000. This alternative minimum tax applies only if it exceeds the regular tax plus the regular minimum tax (i.e. 15 percent tax on total tax preferences excluding net long-term capital gains and itemized deductions). Generally, the alternative minimum tax will only apply in situations where the individual has substantial capital gains and little regular income.

The investor in real estate can utilize the reduction in capital gains rates by generating ordinary tax losses which offset the highest marginal tax rate of the investor, often 50 to 70 percent, and on a sale of the property receive capital gain treatment at no more than 28 percent tax rate except for depreciation recapture as ordinary income. The investor should realize, however, that he has only deferred his taxes (see carryover basis discussion) assuming a sale or disposition at some point in the future. He has gained by the present value of tax dollars saved and by capital gain rates being lower than the bracket against which the losses were taken. For some investors their return will be reduced because excess depreciation is a tax preference item subject to 15 percent minimum tax to the extent that total tax preferences exceed the greater of $10,000 or one-half federal income taxes. Also, excess depreciation reduces the amount eligible for the 50 percent maximum tax on earned income on a dollar for dollar basis.

At Risk

A further tax advantage of real estate tax shelters is that the investor is allowed to write-off more than he is actually "at risk." For example, an investor might buy an apartment building exclusive of land for $500,000 financed 80 percent with non-recourse financing. The investor over the course of the useful life of the building can write-off $500,000 or five times his $100,000 investment.

Provisions were contained in TRA 76 to require certain investors to write-off only the amount that they had "at risk" or subject to personal liability. However, real estate and certain other areas were excluded from the "at risk" rules. The Act extended the "at risk" rules of Internal Revenue Code (IRC) Section 465 to all activities except the holding of real property. Thus real estate continues to be the sole tax shelter oriented investment where the investor can write-off more money than he has put "at risk."

Rehabilitation of Older Commercial Buildings

The Act extended investment credit to rehabilitation expenditures for all types of older commercial buildings (e.g. factory, warehouse, store) except those used for residential purposes. The building must have been in use at least 20 years and not have been rehabilitated for at least 20 years. A rehabilitation requires at least 75 percent of the external walls to be retained.
although they may be covered or strengthened by the rehabilitation. Reconstruction is allowed but not acquisition or enlargement costs. However, enlargement of the interior floor area qualifies so long as the total volume of the existing building is not expanded.9

The House Report includes as qualifying capital expenditures: replacement of plumbing, electrical wiring, flooring, permanent interior partitions and walls, and heating or air conditioning systems. Expenditures for the removal of existing interior walls or flooring would also qualify.10

This investment credit could be a substantial incentive for upgrading older buildings because it acts as a direct reduction of the taxpayer's tax without reducing his basis for depreciation.

Deferral of Carryover Basis

Before TRA 76, the basis of a decedent's property was stepped-up to its fair market value at the date of death. Thus, investors in real estate tax shelters who had taken tax losses in excess of their investment could avoid income from the excess of value of property at date of death over decedent's adjusted basis in the property.

The rules were altered by TRA 76 such that the basis of a decedent's property is "carried over" to the beneficiaries. There was a complex phase in rule for depreciable real estate prior to 1976. The basic impact of the law was to eliminate or reduce (i.e. in the case of phase in property) what was probably the best method to avoid phantom gain from losses in excess of investment.

Due to many problems with carryover basis the whole area was studied extensively. The Act postponed the effective date of the "carryover basis" provisions so that they will apply only to property acquired from decedents dying after 1979. If "carryover basis" is further postponed or some form of step-up in basis is allowed then real estate investors will retain a significant tax advantage.

Certified Historic Structure

The Act amended TRA 76 to allow an owner of a "certified historic structure" to deduct, for federal income tax purposes, the cost of certified rehabilitation improvements over a five year period as provided in IRC Section 191. This rapid amortization is permissible even though the actual useful life of the improvements exceeds five years. These rapid write-offs are in lieu of otherwise allowable depreciation and, in effect, allow the investor to write-off over a sixty-month period substantially more than he invested in the project because these transactions are usually highly leveraged.

Any structure designated as a "certified historic structure" by the Secretary of the Interior is covered by these provisions. In general, a "certified historic structure" is any structure, subject to depreciation which is either:

1. Listed individually in the National Register of Historic Places;
2. Located within and certified by the Secretary of
the Interior as being of historic significance to a district located in the National Register of Historic Places; or

3. Located within a historic district designated under a state or local statute that has been certified by the Secretary of the Interior.

A property not presently classified as a “certified historic structure,” but which is located in a historic district, may be nominated to the National Register through the submission of the appropriate application to the Department of the Interior. To certify a structure as one of historical significance within an already designated historic district, a taxpayer must obtain a Historic Preservation Certification Application from either the State History Preservation Office or the Technical Preservation Services Division of the National Park Service, Washington, D.C. 20240. However, structures not within any federal, state or local historic district may qualify for these special tax benefits but only after application has been made and the property has been accepted and listed in the National Register.

Before a taxpayer will be entitled to the special amortization rules, two separate certifications must be obtained. In addition to the aforementioned certification of historic significance, the taxpayer must obtain a certification of rehabilitation before any rehabilitation has begun. It is a certification which provides that the reported capital expenditures are in keeping with the structure’s historic character. A description of all proposed improvements must be provided for certification and must insure that all historic, architectural and cultural values are restored.

Amortizable basis of a “certified historic structure” consists of any otherwise depreciable additions to the capital account of the structure during the effective period of IRC Section 191. Amouts expended by the electing property directly for rehabilitation of existing historic structures other than new construction are part of amortizable basis. Architectural and engineering fees, real estate commissions, site survey fees, legal expenses, insurance premiums (including title insurance), developers’ fees, and other construction-related costs are part of amortizable basis. Structural modernizations of an existing historic structure in a certified rehabilitation are included such as the costs of modern plumbing and electrical wiring and fixtures, heating and air conditioning systems, elevators, escalators, and other improvements required by local building or fire codes. Carpeting, draperies, office equipment, furniture (even where it is built-in), and non-permanent walls or partitions are not a part of amortizable basis.

Expenditures will generally be considered attributable to rehabilitation if the foundation and outer walls of the existing building are retained and the costs are attributable to work done within that existing framework. Normally, any expansion of the existing structure will be considered new construction and not a part of amortizable basis. For example, the addition of a new story to an existing building is new construction. Likewise, related construction such as a garage, sidewalk, parking lot or landscaping will not be considered rehabilitation even though the related construction may be physically attached to the historic structure. Expenditures which do not qualify for rapid amortization will be deductible under regular depreciation sections of the Internal Revenue Code.

“Certified historic structures” can generate substantial tax losses in the first five years and can provide a very attractive tax shelter opportunity assuming there is a viable investment underneath. However, there is a disadvantage for certain investors because the excess of rapid amortization over straight line depreciation computed on the basis of actual useful life is an item of tax preference. Since the useful life of the restored building could be 25 years or more, this tax preference amount can be fairly large.

Exclusion and Sale of Home; Residential Energy Credits

Taxpayers aged 55 and older can elect, once, to exclude from income up to $100,000 in profits on the sale or exchange of a personal residence owned and occupied as such for at least three years out of five immediately preceding the sale. This replaces the rule allowing individuals 65 years old to exclude a gain on the sale of a residence with an adjusted sales price of under $35,000 or a portion of the gain if the sales price exceeded that amount. The new provision is applicable to only one sale or exchange by a taxpayer or his spouse. Therefore, once either has made the election with respect to the sale or exchange of a principal residence, neither can make any further election in the future. If a married couple is divorced after having made the election, no further election is available to either of them or any new spouse.

The residential energy credit is actually two separate credits: (1) a credit of up to $300 for expenditures on home insulation and other energy conserving property, such as storm windows; and (2) a credit of up to $2,200 for expenditures on solar heating and
cooling systems and other property using renewable energy sources, e.g. wind.14

Recent Tax Cases

Activities Not Engaged in for Profit

IRC Section 183 provides that no deduction is allowable to an individual for “activities not engaged in for profit.” An activity is presumed to be engaged in for profit if gross income for two of five taxable years exceeds the deductions attributable to such activity. If Section 183 is deemed to apply, a deduction is allowed for items such as interest and state and local property taxes because they may be deducted without regard to whether they are incurred in a trade or business or for the production of income. However, other deductions (e.g. depreciation) are allowed only to the extent that they do not exceed gross income derived from the activity reduced by the deductions that are allowable in any event.

In Arnold L. Ginsberg,15 lack of profit motive caused the Tax Court to disallow deductions from a tax shelter because the taxpayer expected no economic gain. The taxpayer invested $240,200 in a cattle-breeding program with a stop loss arrangement aimed at limiting his risk and profitability. This meant a net recovery to the taxpayer of $214,700 on resale of the herd to the operator unless there was a relatively significant upward market movement in the price of cattle. The court disallowed the deduction except to the extent of interest expense because it found that the taxpayer did not have a requisite profit motive. The prospectus shows that what a breeder-investor would be left with after participating in a five-year program would be noticeably less than the value of his original investments. The inference drawn therefrom is that any gain realized would be in the form of net tax savings which would exceed investment loss.16

On the other hand, a dual motive of profit and tax savings would appear to be satisfactory because the court indicated that, the mere fact that the taxpayer may have had a strong tax-avoidance purpose in entering into the cattle-breeding program is not determinative provided he also had the motive of deriving an economic profit aside from the tax benefits.17

Preopening Expenses

The preopening expense issue is whether or not, for purposes of the deduction for ordinary and necessary expenses, a limited partnership is deemed to be carrying on a trade or business during the construction period. The Service often contends that a limited partnership does not commerce carrying on a trade or business until it is capable of realizing rental income and no deduction should be allowed for amounts otherwise deductible as ordinary and necessary business expenses until such time. Real estate taxpayers argue that the trade or business has begun based on initial activities such as advertising, promotions, hiring of staff, and raising equity financing.

The leading case for the taxpayers' position is 379 Madison Ave., Inc.18 which held that a corporation organized to construct an office building and hold it for rental was engaged in a trade or business prior to the time in which the building was ready for occupancy as a result of the corporation having negotiated a leasehold and paid ground rents, interest, and taxes. However, the precedential value of this case has been questioned by several commentators.19 The Internal Revenue Service position is illustrated by the radio and television station cases,20 where the taxpayers have been unsuccessful in deducting costs incurred prior to the actual issuance of a federal license. The courts have usually pointed to the fact that without Federal Communications Commission approval, there is no certainty that the activities for which the entity was formed will ever be realized.

The deductibility of preopening expenses by a real estate apartment project was dealt a blow in the H. K. Francis case.21 There, the taxpayer started construction on apartments in 1972. The apartments were completed, occupied and producing income in June 1973. The Service contended that the taxpayer was not in the trade or business of operating the apartments until June 1973 and the preopening expenses taken on his 1972 and 1973 returns should be capitalized. The Tax Court agreed and ruled that certain expenditures must be considered as deemed for the development of a new business and cited Richmond Television Corp. The court found that by June 1973 the taxpayer was in the trade or business of operating the rental apartment complex and consequently distinguished certain expenses claimed in 1973 from those claimed in 1972. In 1972, only the property taxes were deductible, and the following expenses had to be capitalized: insurance, legal fees, maps, office supplies, auto expenses, books and periodicals, business travel, professional societies, and recording fees. In 1973, rental commissions, interest, maps, advertising, and utilities were allowed in full. Also seven-twelfths (i.e. June through December) of the following expenses were deductible in 1973: insurance, legal fees, auto expense, books and periodicals, business travel, professional societies, stenographic services, and bank charges. The status of the
disallowed expenses was not mentioned but arguably they should be capitalized and deducted over the useful life of the apartment project.

Guaranteed Payments

The issue is whether amounts paid to the general partners of the limited partnership constitute guaranteed payments deductible as ordinary and necessary business expenses or whether they must be capitalized and deducted over the life of the project. In Cagle v. Comm'r, a real estate partnership which developed an office-showroom for rental purposes was disallowed a deduction for a "guaranteed payment" to the managing partner for services connected with the development of the project (i.e. feasibility studies, arrangement of financing, working with architects, and coordination).

Section 707(c) which relates to guaranteed payments was amended by TRA 76 and now reflects the rationale of Cagle. The relevant Senate Finance Committee Report states that the amendment makes it clear that a deductible guaranteed payment must meet the ordinary and necessary expense test under Section 162(a).

In Comm'r v. Pratt, a partnership deducted payment of a yearly management fee to general partners of a limited partnership. The general partners, who were required by the partnership agreement to manage the operation of the partnership's shopping centers, were paid 5 percent of the gross rentals of the shopping center as a management fee. The partners relied on Section 707(a) to allow the partnership to deduct the general partner fees. However, the court determined that management fees, which would have been deductible if paid to a third party, were nondeductible business expenses since they were compensating the general partners for services they were required to render as general partners of the partnership. The court also held that Section 707(c) was inapplicable since the fees paid to the general partners were based on a percentage of gross rentals and, therefore, equivalent to basing the fees on partnership income. Another reason for the result in Pratt was that management fees accrued and deducted by the accrual-basis partnership were not reported by the cash-basis general partners as income.

As a result of Cagle and TRA 76, it is necessary to determine the reason for making the guaranteed payment. If the nature of the payment qualifies as an ordinary and necessary business expense under Section 162(a), it is deductible by the partnership as a guaranteed payment to the partner. If, on the other hand, the payment is a capital expenditure under Section 263, it must be capitalized even though it is designated as a guaranteed payment by the partnership agreement. Pratt placed the further limitations that guaranteed payments should not be determined with regard to the income of the partnership and should not be within the normal scope of duties of a general partner.

Interest

In analyzing the deductibility of points, commitment fees, loan origination fees, and other such charges the Service will look to see whether the payment was for the use of money (i.e. deductible interest) or for services rendered in connection with the loan (i.e. amortizable only if an ordinary and necessary business expense). Thus, regardless of how the taxpayer characterizes the fee, the Service will look to the substance of the transaction. In John N. Baird, one point was paid for the commitment of the permanent lender to hold funds available for six months until the expiration of the construction loan. In addition, the construction lender required a one-point transfer fee to compensate it for supplying funds to take over the construction loan from a prior construction lender for three months. Since the fees were not paid for the use of money beyond the end of the year in question and other lending institutions required payment of such fees for granting loans, the court held the fees were currently deductible.

The necessity for a careful analysis of the use of the fee was emphasized in Ulysses G. Trivett, Jr., where the taxpayer deducted a loan service fee, the FHA Inspection Fee, and the FHA Application and Commitment Fee in his initial tax return on the theory that the fees were paid for the use of money and were therefore interest. The court held that the fees were paid for services rendered (e.g. market analysis, site appraisal) in obtaining permanent financing rather than for the additional costs of borrowed money. Trivett also lost on his alternative argument that the costs incurred in meeting FHA requirements constituted deductible business expenses since he was in the business of building apartments and the payments enabled him to improve his cash flow by participating in the insurance program of the National Housing Act.

Another issue frequently raised by the Service is whether there are two loans (construction and permanent) or one long-term loan. If there is only a single loan, fees and expenses which are disallowed as immediate deductions would be amortizable over the period of that loan.
involved, all fees and expenses attributable to the construction period should be amortizable over the life of the construction loan.

The taxpayer's argument in favor of separate loans will have more substance when there are separate construction and permanent lenders. However, this does not necessarily guarantee success because in Francis,32 the taxpayer had a separate and distinct construction loan (3½ percent over prime) and a permanent loan (9-5/8 percent) with two different lenders. The taxpayer contended that the loan commitment fees for the construction and permanent loans should be amortized over the periods of their respective mortgages. The court followed the preopening expenditure theory, since the amortization of the fee paid for the construction loan fell within the construction period and required the amount amortized over the construction loan to be capitalized as a part of the construction.

In Lyndell E. Lay,33 the taxpayers were involved in an accrual-basis partnership which constructed and operated a Section 236 federally assisted apartment complex. The construction advances were funded over the seventeen-month construction period by Prudential Insurance Co. who withheld, on a pro rata basis, two and one-half points which the taxpayers and the Service agreed was interest. However, the taxpayers deducted the interest over the construction period, while the Service contended that the amount should be amortized over the forty-year life of the mortgage. After examining the loan documents, the court found that there was one single forty-year loan because the mortgage, interest rate, and loan documents were not altered at final closing. The fact that the mortgage note could be sold by the holder to FNMA in the secondary mortgage market had no bearing on the disposition of the first loan. The two and one-half points were held to be deductible only over the forty-year life of the mortgage.

The partnership in Lay had also deducted over the construction period a two percent financing fee paid to a mortgage banking firm. The court held that the fee was not interest since no money was advanced by the mortgage banker but, instead, was a charge for services rendered in obtaining a favorable loan package. With the previous finding of one loan, the fee was held to be amortizable over forty years.

The one loan-two loan argument was raised again in Donald L. Wilkerson.34 There, the construction money was furnished by the firm of Mason-McDuffie, who acquired the commitment of Government National Mortgage Association (GNMA) to purchase the promissory note and deed of trust following the completion of construction. Although Mason-McDuffie was not obligated to sell the promissory note to GNMA, it was their practice to do so. The taxpayer contended that Mason-McDuffie made only a construction loan and the purchase of notes by GNMA should be regarded as a separate permanent loan. Thus, the taxpayer concluded that the amount paid Mason-McDuffie was for services as a construction lender and deductible over that period. The court found, however, that

For services rendered by Mason-McDuffie, they (the partnership) received permanent financing over a period of approximately 42 years. FNMA and GNMA in purchasing the partnership notes held by Mason-McDuffie do not become new lenders. The partnership-borrowers continue to pay principal and interest payments under the terms of the original notes.

The two percent fee of Mason-McDuffie was determined to be composed of approximately $55,000 interest charge and $7,500 service fee. The interest was held to be deductible over the construction period to which it related, whereas the $7,500 was amortizable only over the forty-year life of the loan.

The taxpayer faced with a potential one loan-two loan argument should bolster his arguments with separate loan documents, lenders, and terms to the extent possible. Also, he should analyze various services performed during the construction period. In summary, a construction period "interest" deduction for the amount paid for construction financing fees and points requires an examination of the following questions:

1. Does the amount paid constitute an expenditure for the use of the money?

2. Does the amount relate to a separate construction loan?

3. Does the amount fall outside of the preopening expenditure problem?

Even if the construction interest hurdles these questions, the amount must be capitalized in the year paid or accrued and amortized over up to a ten-year period. There are separate transitional rules for nonresidential real estate, residential real estate, and government-subsidized housing.35

Conclusion

In addition to the normal economic considerations of real estate such as cost overruns, interest rates,
delays, building codes, rentals and inflation, the potential investor should be knowledgeable in other areas. The investor should understand the statutory tax incentives enacted by Congress in the Revenue Act of 1978, but be mindful of the anti-tax-shelter position of the Internal Revenue Service and that tax incentives are subject to change.

Furthermore, the investor should realize that analysis of potential investment return on real estate has become extremely complex. An understanding of front-end deductions, minimum and maximum taxes, recapture, and other such topics is essential. On a marginal analysis basis, the investor who is in the 70 percent tax bracket, has low earned income, few tax-preference items, and minimal excess investment interest will be in the best position to enjoy the tax advantages of real estate. On the other hand, a professional or executive with a large amount of earned income, tax preferences, and investment interest may find that his payback period will be lengthened and his cumulative benefits decreased.

FOOTNOTES
5. I.R.C. § 1202.
7. It has been suggested that a taxpayer with a marginal tax rate of 14 percent would require an after-tax return in excess of 107 percent before he would rationally use an accelerated depreciation method. At the other end of the tax scale, a 70 percent bracket taxpayer would require an after-tax return in excess of 20 percent to justify the use of an accelerated depreciation method. Willis & Raabe, “Imposition of Minimum Tax Eliminates Advantages of Accelerated Depreciation in Most Cases,” 55 Taxes 371 (1977).
8. Due to the particular tax calculation, any income which does not qualify for maximum tax treatment (i.e. unearned income) is subject to tax at the individual’s highest marginal rate. Thus, tax preference items cause earned income to become unearned income and increase the tax rate applicable to this income from 50 percent to the individual’s highest tax bracket. Furthermore, any income derived from the investment will probably not be earned income and thus not available for future maximum tax treatment.
9. I.R.C. § 48(g).
11. Reg. § 1.191-2(e)(1) and (4).
14. I.R.C. § 44 C.
16. Id. at 868.
18. 23 B.T.A. 20 (1931), rev’d on other grounds 60 F.2d 68 (2d Cir. 1932).
20. See, e.g., Richmond Television Corp. v. United States, 354 F.2d 410 (4th Cir. 1965), vacated on other issue 382 U.S. 68 (1965).
22. 539 F.2d 409 (5th Cir. 1975), aff’g 63 T.C. 86 (1974); see Rev. Rul. 75-214, 1975-1 C.B. 185. See also Parks v. United States, 434 F. Supp. 206 (N.D. Tex. 1977) (supervisory fee of $25,000 paid to general partner by the partnership for monitoring construction work to be done by general contractor incident to erecting apartment complex disallowed as a current deduction because similar to an architectural or engineering fee).
24. 550 F.2d 1023 (5th Cir. 1977), aff’g in part 64 T.C. 203 (1975).
25. If a partner engages in a transaction with a partnership other than in his capacity as a member of the partnership, the transaction is treated as if it occurred between the partnership and a nonpartner.
26. Guaranteed payments to a partner for services or for use of capital, to the extent determined without regard to the income of the partnership, are treated as if made to a nonpartner for purposes of gross income and trade or business expenses.
28. For example, the FNMA commitment fee of one percent constitutes interest. Rev. Rul. 74-395, 1974-2 C.B. 45.
32. T. C. Memo. 1977-170.
33. 69 T.C. No. 32 (1977).
34. 70 T.C. No. 22 (1978). The interest deduction was allowed to the taxpayer under pre-TRA 1976 law. Under present law, interest cannot be prepaid and would be required to be amortized over the period of the loan in question, which presumably the court would have determined to be forty years.
35. I.R.C. § 189.

Those who are familiar with the work of Professor Hamilton Bryson will not be surprised to discover that his latest work, Notes on Virginia Civil Procedure, promises to be of great practical value to Virginia’s practicing attorneys. Indeed, an excerpt from this book which appeared in the Spring 1979 issue of the Journal under the title Service of Process in Virginia has already been the subject of numerous and enthusiastic compliments from members of the Association.

In Notes on Virginia Civil Procedure, Professor Bryson deals not only with the intricacies of pleadings at law and in equity, but also with such related complexities as service of process, subject matter jurisdiction of the Virginia courts, venue, parties, discovery and the incidents of the trial itself, such as docket, continuances, impaneling the jury, motions at trial, jury instructions, argument, verdicts, and motions after verdict. Judgments and decrees, and attacks thereon, are also covered, as are payments of costs, and the bringing of appeals.

In covering this broad spectrum, Professor Bryson has utilized a narrative style which fleshes out the often-perplexing bare bones of the rules and statutes. These narrative explanations are of course footnoted to the applicable rules of court and code sections, and this is particularly helpful when a procedural point is governed (as so often occurs in Virginia) by both rules and statutes.

Case law is cited as well, and cross-references are provided to earlier works on Virginia procedure, e.g., Burks Pleading and Practice.

In his preface, Professor Bryson refers to the book as a “brief sketch” of the subject, but the book’s compactness makes it valuable as a ready reference for the attorney in need of quick assistance, and the extensive footnoting provides additional sources of information for anyone desiring to pursue a point in greater depth.

In short, this book appears to be a valuable contribution to the practitioner because of its compact size, its clear, straightforward style, and its authoritative footnoting. Those just beginning to practice in Virginia and more experienced lawyers desiring a ready reference for desk or courtroom use should find it equally helpful.


With this volume, Dr. Bryson has updated and enlarged his earlier work “Interrogatories and Depositions in Virginia,” first published in 1969. The new volume incorporates the major changes to Part Four of the Rules of Court made in 1972 and 1977. Thorough discussions of the production of documents and objects for inspection, and of physical and mental examinations as a discovery device, have also been added.

The book includes major sections on interrogatories, production of documents and things, depositions, physical and mental examinations, and discovery in criminal proceedings. The appendices include the full text of Part Four of the Rules and a chart comparing Virginia and Federal rules of discovery.

One of the most pleasing and helpful features of the book is the coverage of the legislative and judicial history of the rules. As Dr. Bryson points out, it requires “hindsight as well as foresight” to understand not only the present rules and their application, but also to predict future developments and to be prepared for them.

The author has purposely made no attempt to deal with tactical considerations in this work; Dr. Bryson emphasizes that the book is intended to familiarize the reader with what the law is; with what can be done, not with what should be done.

In this, the author has succeeded brilliantly, and the book will surely become a fixture in the law library of all Virginia practitioners who wish to utilize discovery procedures with maximum effectiveness.
Bar Association Proceedings

The Summer Meeting..........................30

Special Notices
Testamentary Organ Donations.............33
PR Committee Asks for Aid................34
The Virginia Bar Association
Calendar of Meetings.......................34

Announcements
CLE Programs Scheduled....................35
Training Program in Advocacy for
Children To Be Conducted.................35

YLS Chairman's Report.....................37

Memorials......................................39
The Summer Meeting of 1979 at the Greenbrier may be remembered as the one where it rained most of the time. It may also be remembered as the Summer Meeting at which Gloria Steinem made a brief appearance as a guest.

First things first.

The rain that sluiced down from the skies on the early arrivals among the more than 900 VBA members and their families turned out to be no more than a minor irritant. The Tournament Committee’s worst fears never really materialized, and Saturday night’s awards presentation at the banquet did not reflect the three days of high humidity and soaking rain.

This was a traditionally recreational event, of course. Still, careful planning of the two morning and one evening business sessions afforded VBA members opportunities for exposure to the ideas of specialists in three divergent fields of law. And, Saturday night, retired World Court Judge Hardy Cross Dillard, of Charlottesville, used his banquet address as the vehicle for a proposal unique in Virginia—perhaps in the nation.

After retiring President Jesse Wilson opened the formal business of the Summer Meeting Friday morning, early risers listened as three nationally-recognized experts in the field of negligence legislation argued the controversial question of “pure” versus “modified” forms of comparative negligence law.

Vanderbilt University Professor John W. Wade revealed that the ABA is expected to approve the “pure” form legislation drafted by the National Conference of Commissioners on Uniform State Laws. Under “pure” form legislation, the degree of the plaintiff’s fault, Wade said, would not bar recovery.

Fager gave strong support to the “modified” form under which a plaintiff whose negligence contributed to an accident can recover damages only if his negligence equaled or was less than the defendant’s.

Fager’s reservations about “pure” form legislation centered on the potential for a plaintiff who causes an accident to recover from a defendant whose own negligence may have been far less.

The discussion of comparative negligence law ended with a presentation by Professor Victor E. Schwartz, of the United States Department of Commerce. Schwartz dealt at length with the Department’s proposed Uniform Product Liability Law, among whose unique provisions is one that would permit insurance companies in the individual states to insure themselves.

With that to mull over during an afternoon of rain-spattered golf, tennis and promenading, VBA minds were ready to focus Friday evening on a panel—moderated by constitutional scholar A. E. Dick Howard, of the University of Virginia School of Law—dealing with the contemporary and controversial question of reverse discrimination.

Although Bakke was expected to be the funnel of the whirlpool, Friday night’s three speakers chose to focus on the more recent Webber decision. In Webber, the U.S. Supreme Court held that, in the words of panelist William Robinson, of EEOC, “Where it is found that there is racial imbalance in a job that was a traditionally segregated job, an employer could [voluntarily] adopt a reasonable affirmative action program that would not constitute unlawful reverse discrimination.”

The former head of the ACLU’s office in Washington, Charles R. Morgan, Jr., said Webber was “correct.”

Morgan told the evening audience: “I think a society ought to have its preferences with respect to those who need the most and those whom the society needs to provide an opportunity to the most.”

The third panelist, J. Stanley Pottinger, once the federal government’s top civil rights lawyer, suggested that Webber should now be used as the vehicle for resolving long-standing questions about reverse discrimination.

Among those in the Friday night audience was feminist Gloria Steinem, a guest of Porringer. Ms. Steinem smiled broadly when, in his closing remarks, Pottinger asserted that Webber should be viewed as a means of “removing the black stain of slavery with regard to women,” as well as Hispanics, blacks and white males.
With rain again discouraging outdoor activities on Saturday morning, the final panel, "Coping With Labor Pains: A Prescription For The General Practitioner," opened in Chesapeake Hall.

Richmond's Carter Younger moderated this early riser's panel, which included two Richmond businessmen well attuned to questions which frequently surface in labor-management relations. Wallace Stettinius, of the William Byrd Press, and Dale Wiley, of Reynolds Metals, presented a list of day-to-day dilemmas facing management in large and small businesses in their relationships with labor.

With Stettinius and Daley outlining management's concerns, National Law Journal columnist Jay S. Siegal, of Hartford, Connecticut, and Roanoke labor law specialist Bayard E. Harris put into perspective problems that ranged from mundane to exotic, and this final session should prove valuable to the general practitioner as well as the labor law specialist.

Saturday night was turned over to Judge Hardy Cross Dillard. The evening reception, for which (if you believe in omens) the sun finally shone, was in honor of the former World Court Judge and Dean of the University of Virginia School of Law. If the reception was dedicated to Judge Dillard, the banquet belonged to him.

It surprised no one—and delighted everyone—that Judge Dillard's early remarks were peppered with the kind of anecdotes for which he is famed and revered. His theme, however, was "The Battered Image of the Lawyer," and with it he coupled what he called "A Modest Proposal."

In brief, Judge Dillard would create a new form of resource for the beginning lawyer as well as his more experienced colleague in the form of the recorded wisdom, insights and imaginative qualities of practicing Virginia lawyers. Judge Dillard recommended that audio and video tapes be the prime vehicle for such recordings, with the results then transcribed in the form of extracts or monographs made available to the practicing bar. He called it a "great reservoir" that will be "irrevocably untouched" unless the profession does something about it.

His idea, said Judge Dillard in words that set the theme for the closing moments of the 1979 Summer Meeting, would "keep alive the image of the ideal lawyer," so that "we need not fear the future, but meet it with a heightened measure of confidence, good humor and good will."

—DON MURRAY

**Special Notices**

**Testamentary Organ Donations**

The Virginia Bar Association Committee on Wills, Trusts, and Estates, Edward S. Graves, Esquire, Chairman, has requested that the Journal bring to the attention of Virginia practitioners the option available to testators of including in their wills a provision for donation of one or more of the testator's organs for transplants at the time of the testator's death. The following is a memorandum prepared by Ms. Olivia Grayson, former Renal Unit Administrator, University of Virginia Hospital, for the Wills, Trusts and Estates Committee and provided by the Committee to the Journal:

**UNIVERSITY OF VIRGINIA HOSPITAL**

University Station
Charlottesville, Virginia 22903

April 3, 1979

Memo to: Wills, Trusts and Estates Committee of the Virginia Bar Association

A very quick background note: kidney failure means death; dialysis on the artificial kidney machine, (about 21 hours weekly) is a life-sustaining treatment; transplantation is a renewal of healthy life.

The latter phrase explains why many kidney patients seek transplantation; it is their ticket back to a normal life, with taking fewer medications, ability to travel, attend graduations, and schedule working hours not around the times one must be attached to the machine, but as other healthy people do, etc. It is not the panacea for every kidney patient, but there are at least 10,000 in the United States today who want a transplant. Perhaps 3,000 will have their wish granted.

For the 7,000 remaining persons, the reason they cannot have a transplant is simple, and sad. People do not know that their kidneys, surgically removed after death as an appendix is removed while the person is alive, can be transplanted. They do not know how many people need transplantation. They do not realize that they can be savers of lives, instead of wasters of a vital organ. While I am writing about kidneys, the same applies to eyes and to skin as well, I shall, at the end, explain about skin, since it is a fairly new addition to the life-saver group.

People often do not sign an organ donor transplant card, even when they do know about its existence because they are uncomfortable with the idea of death. But clients visiting attorneys with the specific intent of drawing up a will or setting up a trust have, to some extent, come to terms with the discomfort of their own death and are willing to discuss the future they will leave to others.

Therefore, it seems that a mention or two about organ donation to this group of people would, with little effort, realize their signa-
ture on the organ donor transplant card. While their desire can be incorporated into the will, that is unnecessary, since the card is a legal document under the Uniform Gift Act in all fifty states, and the reading of the will would be much too late for organ donation. The kidneys need to be removed within a half an hour after death; for eyes it is a few hours and for skin 24 hours.

There are about a dozen states today, including Virginia, who have made the organ donor transplant card a part of the driver's license, since January 1, 1977. Cards are available for those whose driver's license does not yet have the card, or who do not drive, from Southeastern Organ Procurement Foundation, from large hospitals, from the Renal Unit at the University of Virginia Hospital.

The enclosed brochures will answer some questions; I shall answer a few which are sometimes asked, and if there are others, please ask, and I shall give you what answers I best know.

Kidneys from patients who have cancer, infections, or are above a certain age (usually about sixty) are not used. If an elderly client wants to sign an organ donor transplant card, please do not deny them that privilege. I have had said to me, by someone with a quavering voice on the telephone, that she is so very happy to know that her death will cause others to continue to live, and I would not have wanted to change her joy. It is, or can be, of great emotional comfort to many to know that they can give a life to someone—especially through the simple expedient of removing something useless to them. A one cent donation costs a person more than the giving of an organ, since even the penny has a value while the organs would just crumble away, completely useless underground. Whilst above the ground, two people would have new kidneys, one or two persons could see again, and one or more burn victims might heal quickly enough to live.

At this time it is not practical to be both an organ donor and leave one's whole body to medicine. This may change, but one would have to advise clients to please choose between organ donation and whole body (excepting eyes, which can be removed and the body still embalmed for medical research).

If one becomes an organ donor, funerary arrangements are up to the family. If one leaves one's body, there is no funeral, but the family can have a memorial service, without the body, if it so wishes. Funerals are never at State expense.

While it is not necessary to inform anyone that one is an organ donor, it does make it much easier for the family and physician if others are aware of this action. Since the card is a legal document a doctor is bound to abide by it, but should there be a conflict with family members, it would depend upon that individual situation as to what the outcome would be.

Some individuals become organ donors because they see it as A Good Thing; others feel happily involved in death being not a complete end to life, but a giver of life as well. It is up to each attorney's feelings, as well as the general complexion of the client's personality which would indicate the approach to use, or the many other middle grounds open to discussion.

P.S. Skin used for burn patients is not actually grafted on, as this would be immediately rejected, but rather is used as a "bandage." Pig skin has been, and still is used, since the supply of human skin is inadequate (but skin, like eyes, and unlike kidneys, can be banked), but patients recover much more quickly and have a lower infection rate when human skin is used, and since with burn victims the time of healing is crucial, the human skin can literally be life-saving.

NOTE: The Southeastern Regional Organ Procurement Foundation has prepared a brochure on the subject of testamentary organ donation. The pamphlet is entitled "Leave Someone Tomorrow," and it includes an organ donor identification card which the testator can carry with his or her driver's license or other identification. Attorneys desiring brochure copies or donor cards may contact:

Southeastern Organ Procurement Foundation
2024 Monument Ave.
P. O. Box 5392
Richmond, Virginia 23220
Telephone (804) 353-7333

PR Committee Asks for Aid

The two public service announcements featuring the Section's "Model Court Program" and "Law Everyone Should Know" lecture series have been distributed to television stations throughout Virginia. The Committee solicits the help of section members in requesting that the public service spots be given frequent and suitable broadcast time in all various areas. If you have not yet seen either of these spots in your area, please contact James P. McElligott, Jr., Chairman of the Public Relations Committee, McGuire, Woods and Battle, 1400 Ross Building, Richmond, Virginia 23219.

THE VIRGINIA BAR ASSOCIATION CALENDAR OF MEETINGS

January 11-13, 1980
Annual Meeting ........ Williamsburg

July 17-20, 1980
Mid-Summer Meeting . The Homestead
CLE Programs Scheduled

Peter C. Manson, Director of Continuing Legal Education, announces the following CLE seminars for the fall:

10th Advanced Business Law Seminar
Location and Date:
Irvington (The Tides Inn) . November 1, 2, 3, 1979

Evidentiary Problems in Virginia Courts
Locations and Dates:
Abingdon ................. November 8, 1979
Roanoke ................... November 9, 1979
Tysons Corner ............ November 15, 1979
Richmond .................. November 16, 1979
Staunton ................... November 29, 1979
Norfolk .................... November 30, 1979

Program:
Basic Concepts
Testimonial Evidence
Expert Witnesses
Documentary Evidence
Hearsay

Federal Rules of Civil Procedure
Locations and Dates:
Roanoke ................... December 12, 1979
Alexandria ................ December 13, 1979
Richmond .................. December 14, 1979

In addition to offering seminars at various locations in the state, the Continuing Legal Education Committee distributes specialized pamphlets, handbooks, and audio cassettes for the use of practicing attorneys. The following items are currently available:

Handbooks
Landlord Tenant Law and Practice ........ $30.00
(1978—561 pages)
Advising Small Business Clients, Vol. 1 .... 20.00
(1978—410 pages)
Enforcement of Liens and Judgments in Virginia ........... 20.00
(1977 Edition—370 pages)
Sources of Proof in Preparing A Lawsuit ... 25.00
(1976 Edition—455 pages)

Defending Criminal Cases in Virginia .... 20.00
(1975 Edition—397 pages)
1977 Supplement to Defending Criminal Cases in Virginia .... 5.00
The Virginia Lawyer (includes 1977 Supplement) ........ 40.00
1977 Supplement to The Virginia Lawyer ... 15.00

Lecture Outline Pamphlets
Practicing Law Profitably II (1975) ........ 10.00
What Every Lawyer Should Know About Securities Law ........ 10.00
The Seller and Consumer in 1977:
  Pitfalls in Federal Regulations (1977) .......... 10.00
Estate Planning and Replanning
  (Under TRA 1976) (1977) ................. 10.00
Virginia Civil Procedure—
  1977 Changes to Title 8 (1977) ........ 10.00
Antitrust for Lawyers in General
  Practice (1977) ......................... 10.00
Liability Insurance (1977) ................. 10.00
Secured Transactions (1978) .............. 11.00
Administration of Estates Under the
  Tax Reform Act of 1976 (1978) .......... 11.00
Current Developments in Advising
  Small Businesses (1978) .............. 11.00
Mechanics’ Liens (1978) ................. 11.00
Cross Examination—The Law and
  The Art (1978) ......................... 11.00
Tax Opportunities in Real Estate
  Transactions (1978) ................. 11.00
Dissolving a Marriage (1978) ........... 11.00
Administrative Law Process (1979) ........ 12.00

Audiocassettes
The New Bankruptcy Reform Act
  (recorded May 1979 on three cassettes)
Cassettes and Lecture Outline Pamphlet .... 25.00
Cassettes Only .................. 15.00

These publications and cassettes may be obtained from Peter C. Manson, Director, Joint Committee on Continuing Legal Education, School of Law, University of Virginia, Charlottesville, Virginia 22901.

Training Program in Advocacy for Children To Be Conducted

WASHINGTON, D.C.—The Young Lawyers Division and the Section on Family Law of the American...
Bar Association is cosponsoring a two-day National Institute on "Advocating for Children in the Courts," the first program of its kind to be conducted by the ABA. Coordinated by the National Legal Resource Center for Child Advocacy and Protection, the Institute will be held November 16 and 17, 1979 at the National 4-H Conference Center located at 7100 Connecticut Avenue, Chevy Chase, Maryland.

A distinguished faculty of judges, law school professors, medical personnel, social workers, and attorneys will present an authoritative guide to successful court advocacy for children. The program will offer practical skills enhancement to the experienced child advocate as well as to individuals new in the field. Featuring lectures and small workshops, some of the topics include: How to Represent a Child, Parent or Agency in a Child Protective Proceeding; Ethical Considerations in the Representation of Children, Current Constitutional Issues in Child Welfare Related Court Proceedings; and Legislative Trends in Child Protection, Divorce, Guardianship and Other Court Proceedings Involving Children. A comprehensive manual expanding upon the oral presentations will be provided each participant.

Tuition for the Institute is $130.00 with special discounts for ABA members, legal services personnel, and students. For additional information on room accommodations at the National 4-H Conference Center and Institute registration, please contact the National Legal Resource Center for Child Advocacy and Protection at 1800 M. Street, NW, Washington, D.C. 20036 or call (202) 331-2250.
All lawyers are aware of the now bygone days in which the summer was an inactive time for the practicing attorney and in which August was the vacation term of the Court.

The activities of the YLS during the summer of 1979 have reflected the fact that summer is now an active time.

While the summer meeting of the Association which was held at the Greenbrier in July provided a pleasant respite from the real world for some, it was the culmination of many long hours spent by the Meetings Committee, chaired by Patricia M. Schwarzchild of McGuire, Woods & Battle. Her committee provided a trade show which included a number of exhibitors of law office systems and equipment. The panel on labor law, entitled “Labor Pains,” produced a uniformly good response from those in attendance and exhibited a format which may even be copied by the Senior Association for its future panels.

Moreover, no one can fault the hard work of Pat’s committee members in dealing with the rain and yet providing an enjoyable tennis tournament. Bill Hancock of Mays, Valentine, Davenport & Moore deserves much credit for his assistance. Stephen H. Watts, II, after having induced Fat Ammon’s band to return for a successful repeat performance, may be better known for his skill in booking bands than his competence as a member of the legal profession.

As reported in the last issue of the Journal, the Public Relations Committee, chaired by Jay McElligott, has successfully completed its production of two public service spots identifying activities of the YLS and the Virginia Bar Association which have appeared on television stations throughout the state.

It is impossible to calculate and appreciate all of the effort which goes into producing a volume such as The Virginia Lawyer. However, after realizing in the fall of 1978 that changes in the law had rendered the basic volume and its most recent revisions obsolete, it was decided that the herculean task of a complete and thorough revision of The Virginia Lawyer was essential. Accordingly, Joseph R. Mayes assembled a group of editors and contacted a number of practicing attorneys throughout the state who, with some prodding, have produced a new edition of The Virginia Lawyer which came off the presses at Michie/Bobbs-Merrill August 1. Joe’s task was further complicated by the fact that the revised format for the September Seminars, which are made up of the YLS Bridge-the-Gap Program and the Joint Committee on CLE’s Recent Developments in the Law tapes, needed to have the revised chapters in time to serve as lecture guides for the lecturers in the Bridge-the-Gap Program. Therefore, what might have been a leisurely and enjoyable task was reduced to a mad scramble which included many late nights and a number of telephone calls and meetings. The staff at Michie/Bobbs-Merrill cannot be thanked enough for their total cooperation and assistance in producing this new volume. It is with
great pride that the name of the Young Lawyers Section appears with the seal of the Virginia Bar Association on the frontispiece of the volume.

As you know, the Bridge-the-Gap or September Seminars were highlighted in the Joint Committee on CLE's July Bulletin and will be offered in Abingdon, Northern Virginia, Richmond, Roanoke, Danville, Winchester, Charlottesville and Norfolk. The September Seminars have been arranged by the YLS with the gracious and complete cooperation of the Joint Committee on CLE. Gregory N. Stillman of Hunton & Williams has been the Chairman of the Bridge-the-Gap Committee of the YLS, who also serves as a representative of the Association on the Joint Committee on CLE.

Historically, the Young Lawyers Section has sponsored and coordinated the regional Moot Court competition which is sponsored by the City Bar of New York nationally. Our region is large, going west as far as Kentucky, north to Maryland and south to North Carolina. Although other states in our region have Young Lawyers Sections, the Virginia Bar Association's YLS has been honored as the group on whom the City Bar of New York could consistently rely to conduct the competition well. Therefore, we are again hosting the regional Moot Court competition, which Mike Harman's committee has tentatively planned for the weekend of November 9-11, initial rounds being held at the T.C. Williams School of Law at the University of Richmond campus, the semi-final and final rounds of the competition to be held at the Courtroom of the U.S. Circuit Court of Appeals for the Fourth Circuit in Richmond.

Our efforts to educate the public about the law resulted in recognition by the American Bar Association Young Lawyers Division at the recent annual meeting in Dallas, Texas, where the YLS project on "Law Everyone Should Know," which was presented at virtually all of the community colleges in the state, took second place to a project of the Missouri Young Lawyers Section which was considered one of the most outstanding projects of all those presented in the various categories in the competition. Our YLS competes in the category of medium-sized states, with young lawyer populations of 3,000 to 8,000. The award confirms the hard work of Jay Wetsel and the members of his Legal Services to the Public Committee.

Whether in a footnote, as a full article or as a portion of an article, we continually report on the activities of the Disaster Legal Assistance Committee, chaired by Thurston Moore. Recognizing that disasters are unpredictable by definition, Thurston scheduled and held a training session for young lawyers to prepare them to act with the Virginia Office of Emergency and Energy Services. Thurston scheduled a training session which was held in Bristol in May of this year. Fortunately, Tommy Scott and Joe Bowman of the firm of Street, Street & McGlothlin in Grundy, attended that session because they were called upon by the Virginia Office of Emergency and Energy Services to assist on July 24, 25 and 26, 1979, as a result of the presidential disaster that was declared in the northern part of Buchanan County. Joe Bowman was admitted as a member of the Association at the summer meeting, Tommy Scott has been a member for several years. The Association should be justly proud of their work during this disaster.

The Young Lawyers Section was further honored by the Office of Emergency and Energy Services of the Commonwealth of Virginia when they presented a certificate of commendation to the Young Lawyers Section on May 11, 1979, "in recognition of service and cooperation given to the Office of Emergency and Energy Services."
Memorials

The Association notes with deepest regrets the passing of the following members:

Ralph A. Beeton ................... 1927 - 1979

Rutledge C. Clement (Life Member) ........... 1906 - 1979

Harrison S. Dey, Jr .................. 1932 - 1979

Dirk A. Kuyk .......................... 1898 - 1979

Charles B. Moss ..................... 1922 - 1978

Fielding L. Wilson ................... 1905 - 1979