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Whither Civility?

“What profit a man if he gain the whole world but lose his own soul?”

This past January I heard the Chief Justice of Virginia deliver an address at the conclusion of the Virginia State Bar Professionalism Course. His talk—on professionalism—was absolutely outstanding and at my request he kindly agreed to allow us to publish it in our Journal.

I said to the Chief Justice that the timing of our discussion was remarkable because I had planned in this issue to address the question of civility. Coincidentally, the lead article in the Fall 1994 Litigation magazine published by the American Bar Association was also devoted to civility. Apparently the subject is on the minds of many of us. Can that come as any surprise?

For example, would you conduct a deposition in this manner?

Attorney A: You don’t run this deposition, you understand?
Attorney B: Neither do you, Joe.
Attorney A: You watch and see. You watch and see who does, big boy. And don’t be telling other lawyers to shut up. This isn’t your g—d—job, fat boy.
Attorney B: Well, that’s not your job, Mr. Hairpiece.
Witness: As I said before, you have an incipient...
Attorney A: What do you want to do about it, a—h—?
Attorney B: You’re not going to bully this guy.
Attorney A: Oh, you big tub of s—, sit down.
Attorney B: I don’t care how many of you come up against me.
Attorney A: Oh, you big fat tub of s—, sit down. Sit down, you fat tub of s—.

Nice talk, don’t you think? A great day at the office.

By way of another example, would you disagree—in print—with a judicial colleague of yours in this fashion?

Justice A: Justice B cannot be serious: “This is not a rational argument.” As to Justice B’s use of a quotation: “How misleading.”

Justice B: “The license Justice A takes” with the Court’s holding, “is only one symptom of his inability to accept” the Court’s First Amendment jurisprudence. Justice A is “as blind to history as to precedent.”

Justice A: Justice C’s concurring opinion is “less a legal analysis than a manifesto of secularism.”

Justices A, B, and C sit on the same court. The quotes are interspersed from a recent opinion.

Sadly enough these examples are not made up. They represent real lawyers and real justices. And I submit they set abjectly poor examples for any of us in our effort to resolve peaceably—and civilly—disputes among the citizens of our land.

Should we be at all surprised that lawyers and judges act this way? Let’s look at our society overall. Cynicism, avarice, hostility and intolerance appear to be the reigning mores. An overriding and consistent emphasis on immediate self gratification, self promotion, or self aggrandizement at the expense of anything and everything else dominates—or at least appears to dominate—our culture.

I frankly am still astounded by the irony that whenever one of our citizens is called to task for some particularly egregious overreaching—for example white collar crime, bank, securities or commercial fraud, virtually every crime of passion, certainly, though remarkably, murder, and more recently mass killings or bombings—the fault always ultimately lies with someone other than the perpetrator. It is always “me first” until caught and then it is “it wasn’t really me after all” because: (a) I didn’t do it; or (b) if I did do it I’m not responsible because I’m a “victim” of something or other. In either case it’s certainly not my fault, much less my responsibility.

Think about it. How often does anyone upon being caught red-handed ever step up and say “I did it because I thought I could get away with it. It was a risk I was willing to take even though I knew at the time that it was completely wrong. I am now ready to accept the punishment which I so fully deserve.” Just when was the last time you heard or read anything along those lines?
Perhaps we shouldn’t be so surprised at this continuing breakdown—if not collapse—in our morals and values. All one has to do is look around—read the newspaper, watch television, listen to the radio—to enjoy a virtually unceasing panoply of consistently hostile, avaricious, violent, and, in many cases, bizarre behavior which constitutes life surrounding us today.

Our dear land is the most violent western civilized society in the world, in which some neighborhoods alone in major United States cities have higher murder rates than entire European countries. Recently, some otherwise responsible persons have earnestly contended that it is perfectly proper to murder a person who performs abortions in order to stop that practice. (Regardless of one’s views concerning abortion, murder is not the way to resolve—much less address—that issue.)

Only last year in California the time honored practice of high school basketball teams shaking hands before a game was abolished because it was resulting in too many fights.

It is estimated that every day in America 165,000 guns are taken to schools and in more and more of those schools metal detectors are now placed at the entrances.

Now we even have the spectacle of motorists shooting at each other—not only in California but even in our beloved Virginia—because of driving disagreements. Observe the jarring frequency of people shooting at their employers, or former employers, or fellow workers, or their lawyers, or former lawyers, or for apparently no reason whatsoever whomever in public places. The most recent tragedy in Oklahoma City is simply too stupifyingly horrific to even suggest reasoned comment. The World Trade Center bombing and Long Island train shooting fall easily into the same category as well. And there is more.

Look at our regularly exalted role models—overpaid professional athletes who routinely set horrendously bad examples to us and our children with poor sportsmanship and obscene language—not even to mention greed—which is becoming more the norm than the rarity. Notice the routine, almost de riguer, obscenities attendant upon any nationally broadcast music awards show or even the Academy Awards Presentation for that matter. What about our mainstream television channels—or better yet cable or movies—whose routine fare consists of violence and sex, or sex and violence, or sometimes, just for a change, violence alone?

Of course, we have no monopoly on any of this in the United States. Consider our international friends:

Look at the political disintegration in eastern Europe. One would have thought with the collapse of the Soviet Union that the peoples of these newly freed countries would be deliriously happy and eager for some western style living. To the contrary, the internecine conflicts in what used to be Yugoslavia, in Romania, Georgia, and the political division in what was briefly Czechoslovakia are unending. While it is true that much of this is rooted in tribal, ethnic, and religious division, shouldn’t our world by the year 1995 have grown beyond that? What about Rwanda, Burundi, and Somalia?

Exactly where are we going—here or elsewhere—apparently without compass or guidepost, much less lodestar, to chart a civil course? Do we simply give up, or can we find our way home? Is there really no longer “a shining city on the hill”—a paradigm of democracy and peace? Are we to be reduced to virulent name calling, in your face insults, unendingly idiotic, abrasive, and abusive talk radio, and finally, to our minds, mindless, cruelly blind violence?

In the last Journal I wrote of my abiding belief in the necessity for a “positive translation of the faiths of a free society” into the fabric of our daily lives. Also as important, it remains my conviction that only by an aggressive reclaiming of the higher ground of decency, integrity, and, yes, civility, do we have a chance of so doing.

How often has any one of us nostalgically looked back to what we memorably envision as “the good old days” when all seemed calmer, life was simpler, people were nicer, and we had a sense of optimism and certitude that with hard work and good behavior we could make for ourselves, our children, our families and our friends a better life and, indeed, a better world.

Where have things gone wrong? Why are we amiss? What exactly, is happening or seemingly coming apart?

You will have to look to many others to find the answer to those questions, but I believe at least one critical contributing factor has been the substitution of the win-at-all-costs mentality in lieu of respect for the integrity of the process of achievement and not simply the achievement itself. In other words, it is no longer how you play the game; but rather whether you win or lose. It is my belief that until we reverse that order back to its proper priority, we will continue to claw mercilessly at
one another until only the most unscrupulous or brutal is left standing. Does any one of us really want a world like that?

There is a wonderful vignette in R. F. Delderfield's "To Serve Them All My Days," which struck me when I first read it and has stayed with me since. In the book it is used as a metaphor for the aspirations of an English public school headmaster for the type of person he hoped his school would produce. The scene is this: The retiring headmaster is concluding his remarks at a dinner in his honor attended by all students and faculty.

"But let me close with a final anecdote... It concerned two boys, Petherick and 'Chuff' Rodgers, who accompanied me by train. It was Christmas time, of course, and the train was very full.

We finally secured seats in a compartment where a young woman was nursing a baby. Within minutes of starting out the baby was dramatically sick... I remember poor Petherick's expression well, as he took refuge behind my copy of The Times. Upside down it was, but a thing like that wouldn't bother Petherick. He was one of our sky-rockets, and went on to become president of a famous insurance company, and collect the O.B.E., or whatever they give the cream of insurance brokers.

But I wasn't thinking so much of Petherick but of Chuff. Always unlucky, he had been sitting alongside the mother, and was thus on the receiving end of the business. I didn't know what to do but Chuff did. He whipped out a handkerchief—the only clean handkerchief I'd ever seen him sport—leaned across, wiped the baby's face and then the mother's lap. And when I say 'wiped' I mean wiped. It wasn't a dab. It was more of a general tidy-up, all round. After that we had a tolerably uneventful journey, with Rodgers making soothing noises all the way to the junction.

Now some of you might think that is a very damp squib to conclude... but it isn't, you know. It's very relevant, to me at any rate... For Chuff Rodgers, bless his thick skull, never won a prize or a race in his life. Neither did he find time to do the only thing he was embarrassed to, and that was to raise a family. He was killed at First Ypres, but I still remember him. Rather better than I remember Petherick. As a matter of fact, when I came across his name this morning, I thought of him as one of our outstanding successes."

Is there one of us who ultimately doesn't wish for just something of that gentle spirit for our children? Of course, we want for them to be smart and able, successful and prosperous, and surely permitted to enjoy the best this world has to offer. But ultimately isn't it far more important that they become good and happy people, caring and compassionate people who not only leave the world better than they found it but make it better when they are a part of it?

Now, how could any of this possibly apply to lawyers whose work consists so much of conflict and division—trials, depositions—differences of opinion and disagreement—corporate transactions, real estate transfers? Isn't the very nature of a lawyer's work antithetical with the concept of considerate, courteous, and, heaven forbid, even friendly behavior? I don't think so.

Yet even before thinking of lawyers, consider just for a moment the heroes of your childhood. Might they have been—as for me—Robert E. Lee, Robin Hood, Horatio Hornblower or Abraham Lincoln? Look at what all of these had in common—they were great strivers, fierce competitors, people dedicated to their beliefs or goals and taking whatever steps necessary to achieve them. But look at something else. History or literature has shown us that these were decent and gracious persons, magnanimous in victory and stoic in defeat.

Which one of us did not learn growing up that "It's not whether you win or lose but how you play the game." Can you remember seeing even a passing reference to those words in the sports pages—or anywhere else for that matter—in recent years? I cannot.

In our society today, though we may not be admirals or generals, in some respects we are more than any other group are constantly involved with the resolution of disputes among our citizens. We do so as licensed attorneys at law who the minute we take our oath serve as officers of the court.

As lawyers we have to be not only advocates but also examples, indeed true witnesses for that which is right and just. If we, who are not only officers of the Court but also part of the fabric of the resolution of disputes and administration of justice in this country do not do so, then how can we expect anyone else to either? If we permit aggressive anarchy to govern the resolution of disputes, can we be surprised that our fellow citizens don't do the same—and take it even further?

Unless and until we aggressively reclaim the higher ground—by matching insult with dignity, obscenity with decency, bullying with character, greed with compassion, and cynicism with hope—we permit the further debasement of our collective and individual values.

As officers of the court—the last best mechanism for the peaceful resolution of any and all differences—we must, by example, reflect "the better angels of our nature" to not only our friends and families, our judges and juries, our clients and colleagues, but to our citizenry itself for whom we should inspire and lead by all that we do in our daily lives. Given this great opportunity we have to represent and, in a sense, thereby stand as examples for others, can we truly and faithfully do any less? And if we—those who are charged with bringing order out of strife—do not do so then who will?

Having started with St. Matthew I'll end with Isaiah: "Whom shall I send, and who will go for us? Send me."

Send us. [Signature]
The Pursuit of Professionalism

IT IS MY real pleasure to join you this afternoon as you complete the Virginia State Bar’s mandatory course on professionalism. I hope you have enjoyed the course and profited from the experience. I thank you for attending. I also thank all those who have participated in planning and conducting the sessions. By their unselfish contributions of time and talent, they have themselves displayed a keen sense of professionalism in the very best tradition of the Virginia Bar.

The purpose of the undertaking, of course, is to instill in you, as new Virginia attorneys, the same sense of professionalism. But, you may ask, why all the talk about professionalism? What’s going on that necessitates this much attention to so esoteric a subject?

Well, only someone completely out of touch with reality would be unaware that in recent years the legal profession has suffered a severe loss of public respect. As a result public confidence in the legal profession is at a shockingly low ebb, as demonstrated by an article appearing in a recent issue of the ABA Journal. Reporting on a survey commissioned by the ABA, the article states that substantial majorities of the persons surveyed think today’s lawyer is no longer “a leader in the community..., a defender of the underdog..., and a seeker of justice.” A mere 22% think the phrase “honest and ethical” describes lawyers today. And only 40% give lawyers a favorable rating overall, ranking them third from the bottom among the nine “professions” listed and placing them 16 percentage points behind bankers, 12 points ahead of stockbrokers, and 19 points ahead of politicians, who came in last.

I maintain that public confidence in the legal profession is absolutely essential to its continued existence as an independent, self-policing activity. And I submit that we must not take our independent status for granted.

Why do I say this? Because there have been efforts in Congress to give the Federal Trade Commission authority to regulate the legal profession. So far, these efforts have been unsuccessful, but I have not the slightest doubt that those who favor the legislation are waiting for the opportune moment to introduce it again. And I assure you that the very worst thing that could possibly happen to the legal profession would be its regulation by a federal bureaucratic agency. And the worst can happen unless the public is sympathetic to our position and supportive of our efforts to remain independent.

It is imperative, therefore, that we restore the legal profession to a position of public respect. But what caused the loss of respect to begin with? Perhaps, if we knew the answer to that question, we might know better how to turn things around.

The simple answer is that the practice of law is fast becoming a trade, rather than a profession. And this transformation stems from lawyers forgetting there is a fundamental difference between the two. Justice O’Connor, dissenting in the 1988 case of Shapero v. Kentucky Bar Association, eloquently expounded upon the quality differentiating a profession from other employment when she wrote:

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one’s selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market.

Unfortunately, members of the bar have lost sight of the “distinguishing feature” mentioned by Justice O’Connor. As a result, far too many lawyers have become completely preoccupied with making money, to the utter neglect of their professional responsibilities. And we must recognize that the fault rests entirely on our own doorstep. Oh, we can blame the Supreme Court decisions permitting lawyer advertising and solicitation. We can accuse the law schools of not putting greater emphasis on the ethical aspects of the practice of law. And we can claim that the great increase in the number of practicing lawyers necessitates the sort of competitive practices we hear about these days.

But at the root of the problem lies the loss of a sense of professionalism amongst attorneys. And why has this loss occurred? Merely because many practitioners have turned their backs on the basic truism former Chief Justice Warren E. Burger expressed in one of his speeches to the American Bar Association. He said that

[i]n the past, the professional standards and traditions of the Bar served to restrain members of the profession from practices and customs common and acceptable in the rough-and-tumble of the marketplace. Historically, honorable lawyers complied with the traditions of the Bar and refrained from doing all that the laws or the Constitution allowed them to do. Specifically, they did not advertise and they did not solicit.

I cannot deny the right of lawyers to advertise and solicit. The Supreme Court has said in several decisions that the Constitution guarantees this right and, of course, lawyers can exercise the right if they choose. But I can deplore the unseemly aspects of commercialism those decisions have imposed upon our profession, exemplified by media ads for $99 divorces and two-for-the-price-of-one wills. And I can tell you with some certainty that such practices have seriously eroded public respect for the legal profession. Indeed, comments of participants in the recent ABA survey “suggest that lawyer advertising on television may be the most significant contributor to the public [aversion] toward lawyers.”
Moreover, while it may be permissible for lawyers to advertise and solicit, nothing compels them to engage in either practice, and I maintain it is in their best interest to engage in neither. We must convince the bar as a whole that building a stable practice depends not at all upon the ability to write attractive ads or to drum up business at cocktail parties, but, rather, upon establishing a reputation for competent performance, fair dealing, and ethical conduct.

Speaking of the need for competent performance, I note that the author of the recent article in the *ABA Journal* concludes that the problem of competency of lawyers, “if it ever existed...is not an issue.” To prove his point, the author somehow takes comfort in one survey statistic showing that “[n]early two-thirds of the public view lawyers as smart and knowledgeable” and another statistic showing that “just less than one-third say that solving problems describes attorneys ‘well’.”

I do not agree with the author’s conclusion. To me, being “smart and knowledgeable” does not necessarily equate with being competent. And if only one-third of the people think lawyers are good at solving problems, we really are in deep trouble with the public.

Furthermore, while I would not hazard a guess about what percentage of lawyers perform poorly, I do believe lawyer incompetence is a problem, and a serious one at that.

The existence of incompetence in the bar is one of the compelling reasons to restore professionalism to the practice of law. Competence is one of the bedrocks of professionalism. Lawyers who fail to act with competence not only serve their clients badly but undermine respect for the rest of the profession as well.

We need desperately, therefore, to instill in the members of the legal profession the necessity and the desire, not just to be “smart and knowledgeable,” but to pursue excellence in the performance of all the responsibilities they undertake for their clients. This, however, is only one step on the road back to professionalism. Let me read you the opening paragraph from an article in *Trial* magazine:

> What ever happened to civility? If you’re under 50, you’re probably running for the dictionary. If you are young enough to think Beatles are little bugs that come from under ground rather than musicians from Liverpool, you’ve probably never even heard of civility.

How sad! “Civility” is one of the gentlest words in the English language, yet it has been all but banished from the lexicon of the legal profession. We are told in a report prepared for the Seventh Circuit Court of Appeals that “[a]torneys are now more than ever developing and employing rude, disrespectful and generally ill-mannered tactics in dealing with opposing counsel[as well as litigants, witnesses, judges, and court personnel].”

We need a rebirth of civility, and to fill the need should be the solemn obligation of every lawyer. I hope that each of you in this room will leave here determined to help improve the way lawyers act toward one another, toward the courts, and toward everyone else with whom they have professional contact. But this is only another small step along the way back to professionalism.

Let me read you something someone else wrote:

>[T]he morals of the marketplace are not enough for the practice of law. We...have to adhere to a different honor, a very punctilious honor, and that needs to be inculcated in all of us....

A different honor! That’s another vital component of professionalism. Somehow, we must convince every member of the bar that the sort of conduct we see in other undertakings is simply not acceptable in the practice of law. In some way, we must see to it that each lawyer joins a return to principle, so that he or she can say in truth and with pride, “my word is my bond.”
In short, we need to make certain the practice of all lawyers is as open as a book so the public can see that they perform with competence and ability and that they conduct themselves with unquestionable integrity, with consummate fairness and courtesy, and with an abiding sense of responsibility. But, even if we accomplish all this, we would still only be part way on the journey back to professionalism.

I say this because restoring competence, civility, and integrity to the practice of law is simply not enough, either to re-establish professionalism or to regain the public’s respect. Lacking is a most essential ingredient—a sense that the oath we take as attorneys involves a commitment to public duty.

To illustrate my point, I quote again from Justice O’Connor’s dissent in Shapero v. Kentucky Bar Association:

There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professionalism. But the special privileges incident to membership and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service.

I also borrow something from Chief Justice Burger’s ABA speech. Near the end of his speech, the Chief Justice said that “when we see our standing in public esteem falling, something is wrong,” and he asked the question: “Who is responsible?” The answer must be, he said, “We are. I am. You are.” Then he asserted that

[the entire legal profession — lawyers, judges, law teachers — have become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers — healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?

Why, indeed, my friends, should lawyers not be healers? Rather, why should they not again be healers? For, there once was a time when a brass sign outside a lawyer’s door bore the title of “Attorney and Counselor at Law,” and the same inscription appeared on almost every lawyer’s stationery. For some reason or other, the word “counselor” has virtually disappeared from legal nomenclature, and I, for one, regret this phenomenon because I feel it indicates an unconscious change in direction for the legal profession.

To me, the word “counselor” means someone who does more than merely give advice or try cases in court. The word signifies a devotion to public service. It also imports a sense of helpfulness, an idea of giving solace, a notion of conciliation rather than confrontation.

I think this is the sort of healing Chief Justice Burger had in mind when he urged that lawyers make themselves “healers of conflicts.” And I am sure it is an example of the “sound reasons” Justice O’Connor spoke of when she said public service is the goal that transcends the accumulation of wealth.

As one dedicated to public service, a lawyer need not sacrifice the opportunity to achieve material success. To the contrary, it is my belief that any lawyer who dedicates himself or herself to the pursuit of professionalism can reach even greater heights of financial success than one who follows a different course. I think the vast majority of people are decent and honest, and they are naturally attracted to lawyers who have reputations for decency and honesty in the way they practice law.

In the healing atmosphere I picture for the bar, a lawyer would exhibit professionalism by elevating the client’s interest above the lawyer’s concern for financial reward and subordinating both to the good of the public as a whole. This, of course, will require a complete reversal of attitude and direction.

Now, I labor under no misapprehension about the difficulty in bringing about the change in attitude and direction for which I argue. Many lawyers have become so obsessed with billable hours as the method of charging clients that they are not likely to surrender easily what they perceive as the fast track to the bank.

In my view, the use of billable hours is the most serious manifestation of commercialism in the legal profession today. I also think that the use of time alone as a basis for billing clients has contributed more than anything else to the bar’s loss of professionalism.

I know, of course, that good firms, reputable firms, use billable hours. But the system is not carved in stone and can easily be changed. In the altered situation I perceive, the amount of a lawyer’s fee would depend more upon what is accomplished for the client than upon the number of hours shown on a time sheet. Not that I consider time irrelevant. I just happen to think it is the ultimate insult to charge a client as much for losing as for winning a case.

But I see a dim ray of hope shining above the horizon. There is some evidence that the bar has begun to reassess its position on billable hours and may be willing to change its way of billing clients.

And accomplish a change we must. As billable hours quotas continue to grow and produce both an ever-upward compensation spiral and an acceleration of pressure to advertise and solicit, the public’s trust and esteem for the legal profession decline in direct proportion.

Having said all this, I hope you will not perceive me as the voice of doom and gloom, committed to the belief that nothing is right with the legal profession. Rather, I am convinced there is much that is right. I have sufficient faith in the bar of this country to believe that most members, once reminded how far their profession has strayed from traditional values, will strive to reverse the findings of the ABA survey and to restore the public’s perception of a lawyer as “a leader in the community..., a defender of the underdog..., and a seeker of justice.”

It is because I possess this faith, yet have had it shaken in recent years, that I have felt compelled to speak out, even critically, in hopes of rekindling the idealistic commitment I think most people make when they first decide to study law. I can better express this commitment if you will permit me to para-
Virginia Joins National Trend in Protecting Environmental Audits and Encouraging Voluntary Remediation of Contaminated Sites

Introduction

The influence of environmental law is now so pervasive that unaffected entities are rare. Superfund’s sweeping liability in particular has educated regulators, legislators and significant segments of the public to the fact that not all environmental problems may be blamed on evil polluters. Indeed, significant numbers of Superfund sites are former municipal landfills where homeowners dropped their trash daily. Thus, environmental law has made small businesses and ordinary landowners increasingly the focus of regulatory and law enforcement efforts. As a result, small businesses now find themselves having to operate and litigate under statutory schemes that they never dreamed would affect them. Cries for regulatory reform, once dismissed as the pleadings of special interests, have now drawn favor from a wider spectrum of business interests, and legislators — both state and federal — are paying attention.

This debate over procedural and substantive aspects of environmental regulation is being played out in Congress and state legislatures across the country. Virginia made its contributions when the 1995 Session of the General Assembly enacted two measures designed to encourage landowners and businesses to take voluntary, proactive action to discover and remedy environmental violations and contaminated sites. The first measure combines a statutory privilege for voluntary environmental audits with civil and administrative immunity for voluntary disclosure and prompt correction of environmental violations.1 The second measure codifies a voluntary remediation program that is designed to encourage landowners to clean up contaminated real estate voluntarily.2 While environmentalists and businesses continue to debate the merits of these new statutes, in general they create greater incentives than ever before for self-policing, and, on the whole, provide practitioners with new tools to assist their clients.

Audit Privilege Statute

The newly-enacted audit privilege statute protects voluntary environmental audits in two ways: it protects information collected, generated, or developed in the course of an environmental audit, and it shields those who voluntarily disclose and diligently correct violations of environmental laws. This new statute is akin to pre-existing Virginia and federal legislation providing a self-critical analysis privilege in the context of health care peer reviews.3 Environmental audits are management tools used to assess a company’s compliance with federal, state, and local environmental laws, regulations, and ordinances, as well as internal company policies. Ideally, such audits are conducted on a periodic basis, rather than one-time events. Environmental “assessments,” a type of environmental audit, are typically risk-based analyses of environmental problems and the potential cost of remediation. Environmental assessments are generally performed as part of a corporate or real estate transaction to comply with due diligence requirements for innocent purchasers, as defined in CERCLA § 107(b)(3).4 Audits, on the other hand, are fact-based investigations which are designed to compare the actual with the ideal.

A well-designed environmental audit should search for potential air, water, hazardous materials, and solid waste violations and should also consider the efficiency of the facility under review. Many corporations explore efficiency in the use of energy, raw materials, and water; solid waste issues (reduction, reuse, recycling, transportation, and disposal); noise (both within and outside the site); occupational safety requirements; and product design and packaging. A properly conducted audit will also assess environmental accident prevention strategies, contingency plans and procedures, and staff training. The ultimate product should be a management tool that provides decisionmakers with a better understanding of the facility’s compliance with environmental laws, its potential exposure to enforcement actions, and the proper corrective measures to remedy the situation.

To accomplish all of these goals requires a searching inquiry into the company’s operations, often requiring access to proprietary information. Employee interviews, document reviews, training sessions and data collection all play an important role in discerning an accurate state of affairs. Limiting access to employees or records is self-defeating and diminishes the audit’s efficacy.

The decision whether to conduct an audit, then, must be based at least in part on the inherent risk of disclosure. Commercial or proprietary information may be at risk. Government agencies or private parties may attempt to obtain the audit and utilize any potentially incriminating evidence in enforcement and/or cleanup or cost recovery proceedings. Discovery of potential environmental liabilities may trigger a disclosure requirement under securities laws.5 To address these concerns, companies have sometimes sought protection for audits under the attorney-
client privilege or work product doctrine. These common law doctrines do not always provide a safe harbor from audit disclosure. As a result, many states, now including Virginia, have enacted precisely-written audit privileges into law.

Under the new Virginia statute, information collected, generated, or developed during the course of an environmental audit is privileged from public disclosure under most circumstances. The audit may be conducted by the owner or operator of a facility or by an independent contractor at the request of the owner or operator. No person who possesses or helps to prepare an audit document may be compelled to disclose the document, information about its contents, or the details of its preparation. Absent written consent of the owner or operator, the information is not admissible in an administrative or judicial proceeding. The statute specifically protects “documents,” which are defined as:

... information collected, generated or developed in the course of, or resulting from, an environmental assessment, including but not limited to field notes, records of observation, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, videotape, computer-generated or electronically recorded information, maps, charts, graphs and surveys. “Document” does not mean information generated or developed before the commencement of a voluntary environmental assessment showing noncompliance with environmental laws or regulations or demonstrating a clear, imminent and substantial danger to the public health or environment.

Despite the breadth of the audit privilege, disclosure of audit documents or information may be compelled in four circumstances: (1) when information is uncovered that demonstrates a clear, imminent and substantial danger to the public health or the environment; (2) when information contained in the audit is already required by law to be disclosed, i.e., as a condition of an environmental permit or pre-existing consent order; (3) when information contained in the audit was prepared independently of the voluntary environmental audit; and (4) when audit documents or portions thereof are collected, generated or developed in bad faith. One who asserts the privilege has the burden of proving a prima facie case that the privilege applies. The elements of a prima facie case are that the audit (1) was conducted by or on behalf of the facility owner or operator; (2) was voluntary; and (3) was designed to identify areas of environmental noncompliance with law or identify opportunities for improved efficiency or pollution prevention. Once this burden has been carried, the burden shifts to the party seeking disclosure of the information to prove, based upon independent knowledge, that a statutory exception to the privilege exists.

If the party seeking disclosure demonstrates probable cause to believe that an exception applies, a hearing officer or court may have access to the relevant portion of the document to conduct an in camera review for the sole purpose of determining whether an exception applies. The court or hearing examiner may have access to the relevant portion of a document under such conditions as may be necessary to protect its confidentiality. A moving party who obtains access to the document or information may not divulge any information from the document or other information except as specifically allowed by the hearing examiner or the court.

A second feature of the legislation is a statutory immunity from administrative or civil penalties for voluntarily disclosed violations. The statute states that, to the extent consistent with requirements imposed by federal law, any person making a “voluntary” disclosure of information to a state or local regulatory agency regarding a violation of an environmental statute, regulation, permit or administrative order is immune from administrative or civil penalties authorized thereunder. A disclosure is “voluntary” if (1) it is not otherwise required by law, regulation, permit or administrative order, (2) it is made promptly after knowledge of the violation is obtained through a voluntary environmental audit, and (3) the person making the disclosure corrects the violation in a diligent manner in accordance with a compliance schedule submitted to the appropriate state or local regulatory agencies. Persons who make a voluntary disclosure in bad faith may not invoke the immunity.

Whether the statute will apply in federal courts is an open question. Under the Federal Rules of Evidence, the state law privilege may not apply to federal enforcement actions or to citizen suits or private cost recovery actions brought under federal law. The United States Environmental Protection Agency and the Department of Justice have maintained policies favoring environmental self-audits for several years. Unlike the Virginia statute, these policies offer few guarantees of protection against prosecution, and have been inconsistently applied. EPA has recently indicated its opposition to state audit privileges and raised the possibility of increased federal enforcement if the state laws frustrate environmental protection.

Two bills introduced in the 104th Congress would enact a federal privilege and borrow heavily from the two major state law schemes. EPA recently announced and requested comment on an interim policy which does not differ markedly from its earlier policies. President Clinton has also announced a policy to create incentives for voluntary self-audits. Until Congress acts, the regulated community must rely on the use of the attorney-client privilege, the work product doctrine, or the newly-recognized “self-critical analysis” privilege to protect audits.

Federal courts have protected environmental audits from disclosure to varying degrees under each of these three theories. In Olen Properties Corp. v. Sheldahl, Inc., the Magistrate Judge ruled that environmental audit memoranda prepared by an expert to assist the defendant’s attorneys in evaluating compliance with environmental laws were “prepared for the purpose of securing an opinion of law” and therefore protected under the attorney-client privilege. The Magistrate Judge also ruled that the expert’s notes, prepared for counsel to assist in the defense of the pending action, were entitled to the work product doctrine’s limited immunity from discovery.

In Reichhold Chemicals v. City of Pensacola, the court held that the self-critical analysis privilege afforded the landown-
er defendant a qualified privilege for *post hoc* analyses of "past conduct, practices, and occurrences, and the resulting environmental consequences." The court limited the privilege to reports prepared for "candid self-evaluation" and analysis of the cause and effect of pollution, where the reports were created with the expectation of confidentiality and have in fact been kept confidential. The Court noted:

... it is self-evident that pollution poses a serious public health risk, and that there is a strong public interest in promoting the voluntary identification and remediation of industrial pollution. The public interest in allowing individuals and corporations to candidly assess their compliance with environmental regulations "promotes sufficiently important interests to outweigh" the interest of the opposing private litigants in discovering this potentially highly prejudicial, but minimally relevant evidence. I view the self-critical analysis privilege as analogous to the rule on subsequent remedial measures [Fed.R.Evid. 407], and have no difficulty concluding in the abstract that an entity's retrospective self-assessment of its compliance with environmental regulations should be privileged in appropriate cases."

The Court further held that parties seeking to assert the privilege must demonstrate: (1) that the information must result from a critical self-analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free flow of the type of information sought; (3) the information must be of a type whose flow would be curtailed if discovery was allowed; and (4) the privileged document must have been prepared with the expectation that it would be kept confidential and has, in fact, been kept confidential. Applying the *Reichhold Chemical* factors to the statutory environmental privilege enacted in Virginia could result in the protection of audit documents from disclosure in federal court actions brought under federal environmental statutes.

### Voluntary Remediation

It is universally recognized that the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA" or "Superfund") needs reform. Amendments proffered in the 103rd Congress would have mitigated CERCLA's harsh liability scheme for so-called "de minimis" or "de micromis" parties, i.e., those who contribute only very small amounts of the hazardous substances released at a contaminated site. In addition, the proposed legislation sought to accelerate cleanups. Most significantly, the legislation sought to implement risk-based cleanup goals. Determinations of cleanup goals would be based upon site-specific determinations focusing upon surrounding uses, the proposed future use of the site, and the characteristics of the waste at the site. However, Superfund reform legislation became a casualty of election year posturing and despite broad bipartisan support was not voted upon by the last Congress.

Recognizing the need to create incentives for landowners to voluntarily remediate contaminated sites, the Virginia Department of Environmental Quality (DEQ) implemented an informal Voluntary Remediation Program (VRP) administratively in 1993, under the auspices of the Waste Management Board's general authority. The regulated community initially expressed great interest in the informal program. However, bureaucratic requirements, inadequate staffing, and little appreciation for site-specific solutions ultimately discouraged companies from utilizing the VRP. In fact, in its two-year history, not one entity signed the DEQ-proffered consent order due, in part, to its inflexibility.

In response, the 1995 General Assembly enacted a statutory VRP designed to reduce and hopefully eliminate any need for DEQ enforcement actions or cleanups. The legislation offers incentives to owners or operators to undertake proactive measures that benefit both the environment and the owner/operator of the contaminated facility.

The legislation requires the Waste Management Board to promulgate regulations implementing the program by July 1, 1997. During the interim, DEQ is directed to administer a voluntary remediation program on a case-by-case basis consistent with the criteria set forth in the statute.
Under the statute, persons who own, operate, have a security interest in or enter into a contract for the purchase of contaminated property are eligible to participate in the program. Sites are eligible so long as remediation has not clearly been mandated by EPA, DEQ, or court order pursuant to CERCLA, RCRA, the Virginia Waste Management Act, the State Water Control Law, or other applicable statutory or common law. Cleanup of releases of hazardous substances, hazardous wastes, solid wastes or petroleum are eligible under the VRP.

Among the hallmarks of the new VRP is the requirement that DEQ establish methodologies to determine site-specific, risk-based remediation standards. In the past, regulators have employed “cookie-cutter” approaches to determining cleanup levels, sometimes requiring contaminated sites to be “cleaner” than surrounding parcels which were not deemed to be contaminated enough to warrant attention. DEQ must consider protection of public health and the environment and future industrial, commercial, residential, or other uses of the property to be remediated and the surrounding properties. The Department will evaluate reasonably available and effective remediation technology and analytical quantitation technology, the availability of relatively less expensive institutional or engineering controls, and natural background levels for hazardous constituents when considering cleanup goals. By law, the remediation standards can be no more stringent than applicable or appropriate relevant federal standards (ARARs). DEQ is also to establish procedures that minimize the delay and expense of remediation, both on the part of the party undertaking the remediation and by the Department in processing submissions and overseeing remediation. The streamlined process will include waivers or expedited issuance of any required permits.

The key benefit of participating in the VRP is the issuance of “no further action” letters at the program’s conclusion. When a voluntary cleanup achieves applicable cleanup standards or DEQ determines that no further action is required, DEQ will issue certifications of satisfactory completion of remediation, based on then-present conditions and available information. Certification also provides immunity from enforcement actions under the Waste Management Act, the State Water Control Law, the Virginia Air Pollution Control Law, or other applicable law. Such a certification signals potential purchasers, lenders and others that the site is “clean” and that the risk of future liability is minimized.

Lack of adequate staffing was one impediment to the success of the informal VRP. The new statute seeks to correct this by establishing registration fees to fund the program. The fees are to be used to defray DEQ’S actual, reasonable costs expended at the site and may not exceed $5,000 or one percent of the cost of the remediation, whichever is less.

The statute also recognizes that contamination does not respect property boundaries, and that the cooperation of adjacent landowners is often necessary to effect a cleanup. The statute authorizes DEQ, at the request of the person volunteering to remediate the site, to seek temporary access to private or public property where necessary to conduct the remediation. A property owner who denies DEQ access creates a rebuttable presumption that the owner waives his rights, claims and causes of action against the person volunteering to perform the remediation. The presumption may be rebutted by showing good cause for the denial or that the person requesting access acted in bad faith.

Although regulations implementing the VRP are not likely until July 1, 1997, DEQ officials are anxious to receive proposals to implement the new program prior to that date. DEQ is expected to encourage proactive behavior by owner/operators, to minimize staff micro-management, and to focus on establishing a site-specific remediation plan based upon a fair assessment of the risks that the contamination poses to nearby residents or the environment. In addition, DEQ officials are investigating ways to eliminate red tape and minimize delays in cleanup implementation.

Landowners and businesses should be aware of these new opportunities to receive fair treatment from DEQ regulators. Cleanup goals derived from appropriate site specific risk assessments and cleanup proposals made prior to promulgation of the regulations could become the prototype for the regulations that will be adopted in 1997. A good faith analysis and, if warrant- ed, cleanup by an owner/operator has a higher likelihood than ever before of being rewarded with a “no further action” letter issued by the DEQ. Such a letter could make once contaminated property marketable again and minimize any liability to EPA and third parties the facility owner/operator may otherwise have.
As with the new environmental audit privilege, there are limitations to the VRP. Companies should be careful to conduct the remediation in a way that minimizes the potential for future CERCLA liability and preserves opportunities to recover costs from other potentially responsible parties to the maximum extent possible. Nevertheless, both of these statutes provide companies with new tools to manage environmental liability effectively. New protection for environmental audit information, as well as an improved VRP, alter the mix of factors that should be included in the business decision whether to conduct a self-audit. Many companies are finding that environmental audits provide benefits in addition to minimizing environmental liability. Some discover new and more efficient ways of operating and draw public acclaim for their environmental consciousness. Add to that mix better assurances that a good faith environmental assessment will not draw enforcement actions, and the net result is promising for both the bottom line and the environment.

Footnotes
6. "Environmental assessment" means a voluntary evaluation of activities or facilities or of management systems related to such activities or facilities that is designed to identify noncompliance with environmental laws and regulations, promote compliance with environmental laws and regulations, or identify opportunities for improved efficiency or pollution prevention.” Va. Code Ann. § 10.1-1193(A).
7. Nor must the information be produced as a result of an information request by the Department of Environmental Quality or other agency of the Commonwealth or political subdivision. Id. § 10.1-1193(B).
8. Id. § 10.1-1193(A).
9. The person attempting to compel disclosure must be a party to an informal fact-finding proceeding held pursuant to § 9-6.14:11 at which a hearing officer is present, a formal hearing pursuant to § 9-6.14:12, or a judicial proceeding. Id. § 10.1-1193(C).
10. The statute does not bar a civil action against an owner or operator claiming compensation for injury to persons or property. Id. § 10.1-1194.
11. Id.
12. Fed.R. Evid. 501 provides that privileges in federal courts are governed by the Constitution, federal statutes, Rules of the Supreme Court, and common law principles as interpreted by federal courts, except in civil actions where state law provides the rule of decision.
For its part, the new Virginia statute provides that it does not "alter, limit, waive or abrogate any other statutory or common law privilege." Va. Code Ann. § 10.1-1193(B). To the extent that the Virginia audit privilege statute is viewed as conferring a substantive versus a procedural right, federal courts may honor the privilege and prohibit disclosure of audit documents.

The Pursuit of Professionalism
(Continued from page 7)
phrase an ancient allegory that is a favorite of mine. With amendment, it goes like this:

It was the boast of the emperor Augustus that he found Rome of brick and left it of marble. But how much nobler will be the boast of lawyers when they shall have it to say that they found the law dear, and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence.

This, then, is my idea of what professionalism is all about. If the idea is to prevail, we must not sit passively by and allow the meaning of professionalism to be consumed by private, short-term, profit-maximizing goals. For if our nation's bar continues on that course, we will not have the spiritual strength or intellectual capacity to solve the legal problems of the twenty-first century.

I am firmly convinced, therefore, that a new pursuit of professionalism must begin, and soon. There is no better time than the present and no better place than right here at this meeting. The only reward I can offer is the pure joy of practicing as a professional, with the assurance that the public will judge your worth as a lawyer and, indeed, as a person, more by the quality of your work than the profitability of your practice. For me, this would be reward enough, and I hope it will suffice for you as well. I wish you luck in your pursuit of professionalism and in everything you do.
Foreclosure Following Filing: Can This Sale Be Saved?

I. Hypothetical

It's 9:00 a.m. You are on the steps of the Circuit Court with your client, Catherine Creditor, waiting for a foreclosure sale to start. The owner of the property, Donald Debtor, missed several payments on a Note held by Ms. Creditor's employer, The Bank. The Bank accelerated the Note—secured by a Deed of Trust on Mr. Debtor's home—and properly noticed and advertised the foreclosure sale. The sale is scheduled to take place at 9:15.

At 9:10, the Substitute Trustee telephones the bankruptcy court clerk's office to see if Mr. Debtor filed for bankruptcy. After being told that Mr. Debtor had not filed, at exactly 9:15 the Substitute Trustee conducts the sale. Ms. Creditor is the highest (and, in fact, the only) bidder.

When you return to your office, you already have a message to call Ms. Creditor. You return the call and learn that Mr. Debtor filed for bankruptcy at 9:14 a.m. Ms. Creditor asks you if the Bank must reverse the sale, seek relief from stay, then conduct another foreclosure sale. What advice do you give her?

Ordinarily you would advise Ms. Creditor that the sale violated the automatic stay imposed by the Bankruptcy Code and, therefore, is void. In addition, you probably would tell her that, if the Bank does not voluntarily reverse the sale, a bankruptcy court will order the Bank to reverse the sale and may impose sanctions against the Bank for knowingly violating the automatic stay.

A recent decision issued by a district court in the Eastern District of Virginia will allow you to give somewhat more optimistic advice to Ms. Creditor. The court in Bahram Khozai v. Resolution Trust Corporation, 177 B.R. 524 (E.D. VA., 1995), examined a fact pattern similar to the one posed in this hypothetical. Since this court validated a foreclosure sale that took place after the owner of the property filed for bankruptcy (i.e., a post-petition sale), you can now tell Ms. Creditor that there is a good chance that the Bank will not be ordered to conduct another foreclosure sale.

II. Discussion

A. Post-Petition Foreclosure Sales and the Automatic Stay

The fact pattern in Bahram Khozai v. Resolution Trust Corporation is a familiar one. On March 24, 1994—the day before his property was scheduled to be sold at a foreclosure sale—the debtor filed a petition for protection under Chapter 11 of the Bankruptcy Code. The debtor failed to give the RTC, who had scheduled the foreclosure sale, notice of the bankruptcy filing. As a result, the foreclosure sale proceeded, as scheduled, on March 25, 1994. After learning that the debtor filed for bankruptcy, the RTC filed a motion in bankruptcy court seeking relief from the automatic stay in order to validate the prior sale.

The post-petition foreclosure sale clearly violated the automatic stay imposed by 11 U.S.C § 362 because the purpose of the sale was to obtain possession of a debtor's property. Section 362 provides that the filing of a bankruptcy petition operates to stay a number of events, including:

any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate...

By preventing creditors from obtaining possession of, or control over, debtors' property, the automatic stay gives debtors a "breathing spell" from collection efforts. In re Strumpf, 37 F.3d 155, 159 (4th Cir. 1994). In turn, by giving debtors time to organize their affairs, the stay also protects creditors from the "race-to-the-courthouse" by ensuring that the bankruptcy procedure operates to provide an orderly resolution of competing creditor claims.

A creditor cannot take any action that is stayed by a bankruptcy filing unless it files a motion with the court for relief from the automatic stay. Code Section 362(d) provides that

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay...such as by terminating, annulling, modifying, or conditioning such stay...

In Khozai, the RTC asked the bankruptcy court to "annul" the stay, to make that relief retroactive, and to validate the foreclosure sale. The bankruptcy court granted the RTC's motion for relief from stay and ruled that the relief would be retroactive to March 23, 1994, the day before the debtor filed for bankruptcy. The court then ruled that the foreclosure sale was valid, because it was deemed to have occurred two days after the stay was lifted. The debtor appealed the bankruptcy court's ruling to the district court.

The district court agreed that the bankruptcy court had the authority to validate a post-petition foreclosure sale by granting retroactive relief from the automatic stay. Because the Fourth Circuit had yet to address this issue, the district court relied heavily on cases from other federal circuit courts of appeal. Since the facts in In re Siciliano, 13 F.3d 748 (3d Cir. 1994), were similar to those facing the Khozai court, the district court discussed this case at length.

The debtor in In re Siciliano filed his first bankruptcy petition three days before a scheduled date of a foreclosure sale. Since the creditor received notice of this filing, it canceled the sale. The bankruptcy court then dismissed the first filing because the debtor failed to make payments required by his Chapter 13 plan. After the creditor scheduled another foreclosure sale, the debtor filed another bankruptcy petition—again three days
before the scheduled sale. Because neither the creditor nor the sheriff conducting the sale had knowledge of the second filing, the sale proceeded as scheduled. After the creditor discovered the debtor had again filed for bankruptcy, it moved for retroactive relief from the automatic stay in order to validate the foreclosure sale.

Both the bankruptcy and district courts ruled against the creditor, holding that a foreclosure sale that violates the automatic stay is void. For this reason, both courts refused to validate the sale. The Third Circuit disagreed and, in reversing the district court, stated that

the bankruptcy court erred when it dismissed [the creditor's] motion on the basis that the foreclosure sale was void, not merely voidable. While the court correctly articulated the general principle that any creditor action taken in violation of the automatic stay is void ab initio...we find that the instant case falls within an exception to that rule.

13 F.3d at 750. The Third Circuit held that, since the bankruptcy court had the authority to annul the automatic stay, it could retroactively validate proceedings "that would otherwise be void ab initio." Id. at 751.

Although the courts in Khozai, Siciliano, and other circuits validated certain post-petition acts by retroactively annuling the stay, the courts reached different conclusions as to whether to characterize the acts as "voidable" or "void". While at least two federal circuit courts concluded that post-petition acts that violate the automatic stay are voidable, courts in the Eastern and Western districts of Virginia, as well as at least six federal circuit courts, have held that the acts are void. Courts who concluded that the acts were "void" generally refused to retroactively annul the stay based on their belief that a void action is incapable of being ratified.

In order to decide whether to annul the automatic stay, however, a court does not need to decide whether to characterize an invalid act as either "void" or merely "voidable." If the court lifts the automatic stay retroactive to a date preceding the occurrence of the void or voidable act, the act is neither void nor voidable because the stay is deemed never to have been in effect. As the Third Circuit observed in In re Siciliano, by including the term "annulling" as one of the types of relief authorized under the Code, Congress specifically gave bankruptcy courts the authority to "apply certain types of relief retroactively and validate proceedings that would otherwise be void ab initio." 13 F.3d at 751. Because "annulling" the stay deprives "it of all force and operation, either ab initio or prospectively as to future transactions," there would be no stay for the sale to violate. Black's Law Dictionary 83 (5th ed. 1979). Thus, when the stay is "annulled"

parties who secure such relief will have their previous actions, which may have violated the automatic stay at the time, validated after the fact.


A. Mechele Dickerson will be an Assistant Professor of Law at the Marshall-Wythe School of Law starting this fall and will teach bankruptcy and federal civil procedure. She previously was an associate in the Norfolk office of Hunton & Williams where she practiced in the areas of bankruptcy and commercial litigation. She graduated from Harvard-Radcliffe Colleges in 1984 and Harvard Law School in 1988. She is a member of the Executive Committee of the Young Lawyers Division of The Virginia Bar Association and is a member of the Tidewater Bankruptcy Bar Association.

B. Equitable Principles and the Automatic Stay

The fact pattern presented in our Hypothetical and in Khozai is a familiar one to real estate, bankruptcy and collections attorneys. Borrowers frequently file for bankruptcy the day before, or the morning of, a scheduled foreclosure sale. Although the Code permits these last minute filings, it does not require the debtor to give notice to the lender or creditor who noticed the foreclosure sale. While creditors should not be encouraged to violate the automatic stay, courts should apply equitable principles to prevent creditors from being subjected to the inconvenience and expense of conducting multiple foreclosure sales simply because the debtor failed to give the creditor notice of the filing. Nothing is gained by forcing a creditor who did not have notice of the stay to reverse a sale, obtain relief from stay, then re-notice, re-advertise, and conduct another sale. It is especially unfair and inequitable to place this burden on the creditor when the debtor could have prevented the sale simply by providing notice of the filing.

Because the RTC never received notice of the filing, the Khozai court refused to penalize the RTC by forcing it to reverse
the prior sale and conduct another one. By retroactively annulling the stay because of the debtor’s action, the Khozai court accepted an interpretation of Section 362 that focuses on equitable principles. It does not appear that any federal court in Virginia has retroactively annulled the stay based solely on equitable principles. Indeed, at first blush, the holding in Khozai appears to be in conflict with another relatively recent opinion in the Eastern District of Virginia.

The creditor in In re Burns, 112 B.R. 763 (Bkrtcy. E.D. Va. 1990), moved for relief from stay and asked the court to allow the substitute trustee to complete the post-petition foreclosure sale so that the creditor would “not be required to incur the additional expenses of re-noticing and re-advertising the foreclosure.” 112 B.R. at 765. Although the court granted the creditor’s motion for relief from the automatic stay, it refused to retroactively validate the sale because of the “importance of the automatic stay to the bankruptcy process” and because the substitute trustee received notice of the filing one day before the sale took place. Id. Therefore, while the court refused to retroactively annul the stay, the Burns court did not face the equitable considerations raised in Khozai because the creditor in Burns knowingly violated the automatic stay.

When a creditor unknowingly conducts a post-petition foreclosure sale then seeks retroactive relief from stay to validate the sale, the bankruptcy court should consider whether equitable principles warrant retroactively annulling the sale. Retroactively annulling the stay does not reward a violation of the stay but recognizes that equitable factors require the annulment of the stay to avoid an unfair result.

In re Bresler, 119 B.R. 400, 404 (Bkrtcy. E.D.N.Y. 1990). Although the Code recognizes that a debtor needs time to organize its financially troubled affairs, the Code does not require—and it should not encourage—debtors to use the stay to avoid an unfavorable result that the debtor either caused or could have prevented. While few courts have listed which factors warrant retroactively annuling the stay, several courts have considered various equitable principles when deciding either to retroactively annul the automatic stay or to prevent a debtor from using the stay to insulate its unreasonable behavior.

1. Equitable Reasons to Validate Post-Petition Foreclosure Sales

A court should annul the stay if “the debtor is guilty of some inequitable conduct, such as abusive and/or repetitive bankruptcy filings.” In re Siciliano, 167 B.R. 999, 1008 (Bkrtcy. E.D. Pa. 1994). For example, the creditor in In re Albany Partners, Ltd., 749 F.2d 670 (11th Cir. 1984), filed an action in state court to obtain possession of a hotel after a default under the terms of two notes, each secured by deeds on the hotel. In the state court possessory action, the record owner alleged that it had conveyed the hotel to a third-party. The third-party did not, however, move to intervene in the state court action. The state court ultimately ruled in favor of the creditor and granted the creditor possession of the hotel.

After the creditor scheduled the foreclosure sale, the third-party filed for bankruptcy and notified the creditor of the filing. Despite receiving notice, the foreclosure sale proceeded as scheduled. The debtor then moved to have the creditor held in contempt for violating the automatic stay and sought to have the foreclosure set aside. 749 F.2d at 672. The bankruptcy court refused to grant the debtor’s motion and annulled the automatic stay so as to allow the state court proceedings to continue “as if this Chapter 11 case had never been filed.”

Id. at 673. On appeal, the Eleventh Circuit recognized “the important congressional policy behind the automatic stay” and cautioned that courts should “be especially hesitant to validate acts committed during the pendency of the stay.” 749 F.2d at 675. Because, however, the debtor chose not to participate in the state court possessory action, and because the court concluded that the debtor did not file the petition in good faith, the Eleventh Circuit affirmed the bankruptcy court’s decision to retroactively annul the stay.

2. Equitable Reasons to Retroactively Validate Post-Petition Judgments

A court also should annul the stay when the debtor either encourages a creditor to proceed notwithstanding the stay or lies in wait for the outcome of an action by one of its creditors and only asserts its status as a bankruptcy debtor after an unsatisfactory outcome becomes known.

In re Siciliano, 167 B.R. at 1008. The debtor in In re Calder, 907 F.2d 953 (10th Cir. 1990), urged the court to reject a creditor’s claim because it was based on a post-petition state court judgment which the debtor claimed was void because it violated the automatic stay. While the court agreed that the state court judgment was entered after the debtor filed for bankruptcy, the court noted that the debtor “actively litigated the state court action and did not provide notice of the pending Chapter 13 proceeding until just before the state court was to enter a final judgment.” 907 F.2d at 956. In refusing to declare the judgment void, the court observed that the debtor “must bear some responsibility for his unreasonable delay in asserting his rights under section 362(a)” because To hold otherwise and permit the automatic stay provision to be used as a trump card played after an unfavorable result was reached in state court, would be inconsistent with the underlying purpose of the automatic stay.

Id. at 956-957.

Similarly, the court in Matthews v. Rosene, 739 F.2d 249 (7th Cir. 1984), held that the equitable doctrine of laches barred a debtor’s attempt to nullify a state court judgment. The debtor filed for bankruptcy, notified the creditor of the filing, then sued the creditor in state court. The creditor filed a proof of claim in the bankruptcy court and a counterclaim in the state court. After the state court granted judgment for the creditor, the creditor instituted collection activities to collect the judgment.
The debtor then filed a motion seeking to have the creditor held in contempt for violating the automatic stay.

Although the order clearly violated the automatic stay, the Seventh Circuit observed that a bankruptcy court, "as a court of equity, nevertheless must be guided by equitable principles in exercising its jurisdiction." 739 F.2d at 251. The bankruptcy court, district court, and Seventh Circuit all agreed that the debtor could not use the automatic stay to void a judgment rendered almost 33 months before he sought relief in the bankruptcy court. The Seventh Circuit noted that its refusal to void the state court order and its decision to allow equitable considerations to override the stay rested in large measure on the fact that the debtor instituted the state court proceedings. Id. at 252. Because the court felt that the debtor "unreasonably and inexcusably delayed asserting his claim against state court jurisdiction to the bankruptcy court" and because that delay "contributed to the creditor's plight," the court ruled that the debtor was not entitled to benefit from the protections of the automatic stay. Id. at 251.

Finally, the court in In Re Smith Corset Shops, Inc., 696 F.2d 971 (lst Cir. 1982), also ruled that a debtor's dilatory conduct forfeited its right to benefit from the protections of the automatic stay. After the tenant, the debtor in the bankruptcy case, failed to pay rent and refused to vacate the leased premises, the landlord brought an action for trespass and ejectment. The tenant received notice of the trespass/ejectment hearing, but failed to appear. As a result, the state court entered a default judgment against the tenant and ordered the tenant's eviction. In the presence of an employee of the tenant, a state constable removed the tenant's property from the leased premises. Neither the landlord nor the constable realized that, four days before the property was removed, the tenant had filed for bankruptcy.

The tenant/debtor then sued the landlord for conversion. Although the First Circuit noted that orders issued in violation of the automatic stay ordinarily are void, it cautioned that "equitable and due process considerations apply in the exercise of bankruptcy jurisdiction." 696 F.2d at 976. Because the debtor had advance notice of the proposed eviction, had an agent at the leased premises when the property was removed, yet made no effort to notify the landlord, constable or state court of the bankruptcy filing, the First Circuit concluded that it would be inequitable to allow the debtor to "misuse" the automatic stay. Id. at 977.

III. Conclusion

Khozai carves out a narrow exception to the broad principle that acts that violate the automatic stay are null and void. Although the Code gives debtors the right to file for bankruptcy to prevent a foreclosure sale, courts should consider equitable principles when deciding whether to validate post-petition foreclosure sales. By recognizing and applying equitable principles, the Khozai court acknowledged that creditors should not be forced to reverse a foreclosure sale that could have been prevented had the debtor simply given the creditor notice of the bankruptcy filing.

Although Khozai relies on the fact that the RTC did not have notice of the filing, its application should not be limited just to situations involving the lack of notice. Even if the creditor has notice of the filing, the court should not allow the debtor to hide behind the protections of the automatic stay if the debtor has engaged in acts that caused the creditor to violate the automatic stay. In short, by applying equitable principles, courts can fairly balance a debtor's right to have a temporary reprieve from creditor collection activities and a creditor's desire to avoid the time and expense of multiple foreclosure sales.

FOOTNOTES

6. See Bronson v. United States, 46 F. 3d 1573 (Fed. Cir. 1995); Rexnord Holdings, Inc. v. Biedermann, 21 F.3d 522, 527 (2d Cir. 1994); Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n, 997 F.2d 581, 586 (9th Cir. 1993); In Re Calder, 907 F.2d 953, 956 (10th Cir. 1990); Matthews v. Rosene, 739 F.2d 249, 251 (7th Cir. 1984); In re Smith Corset Shops, Inc., 696 F.2d 971, 976 (1st Cir. 1982).

Virginia Joins National Trend...

(Continued from page 12)

18. Id. at 526.
19. Id.
23. Id. §62.1-44.2 et seq.
24. "Applicable requirements" and "relevant and appropriate requirements" are terms of art and defined in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. pt. 300. Known collectively by the acronym ARARs, these are standards under federal or state law which specifically address a hazardous substance, pollutant, or circumstance at a CERCLA site or which are sufficiently similar to supply a standard for the cleanup. Id. § 300.5. The NCP requires identification of ARARs for cleanups under CERCLA. Id. §§ 300.400(g), 300.700(c).
25. State law standards must be more stringent than federal requirements in order to be "applicable" or "relevant and appropriate" under the NCP and CERCLA. Id. § 300.5. The VRP statute provides that site-specific risk-based remediation standards may not be more stringent than federal standards. Va. Code Ann. § 10.1-1429(A).
27. Id.
28. Id. § 10.1-1400 et seq.
29. Id. § 62.1-44.2 et seq.
30. Id. § 10.1-1300 et seq.
31. Id. § 10.1-1429.2.
32. Id. § 10.1-1429.3.
The Summer Meeting
The Summer Meeting

One Hundred and Fifth Summer Meeting
The Virginia Bar Association
July 27-30, 1995
The Greenbrier

THURSDAY, JULY 27, 1995
12:30 p.m.-4:30 p.m.
Executive Committee Meeting and Luncheon
Courtesy of: Lawyers Printing Co., Inc.
2:00 p.m.-6:00 p.m.
Registration
6:00 p.m.-9:30 p.m.
Casual Buffet
Courtesy of: Commonwealth Land Title Insurance Company
Featuring: Tammy and The Greenbrier Mountain Boys

FRIDAY, JULY 28, 1995
8:30 a.m.-9:30 a.m.
Continental Breakfast
Courtesy of: Virginia Lawyers Diary and Manual
8:30 a.m.-6:00 p.m.
Registration
9:00 a.m.-12:00 noon
CLE Programs (see next page for listing)
9:00 a.m.-10:30 a.m.
Spouse/Guest Program
Culinary Demonstration “Seafood Made Simple”
(separate registration required)
12:30 p.m.-5:00 p.m.
Recreational Tournaments
Courtesy of: Jefferson National Bank
5:00 p.m.-6:00 p.m.
Friends of Bill W.
6:30 p.m.-7:30 p.m.
Reception (black tie)
Courtesy of: CSX Corporation and Norfolk Southern Corporation
7:30 p.m.-10:00 p.m.
Banquet (black tie)
Recognition of VBA’s 1995 Life Members
Speaker: Jeffrey K. MacNelly

Banquet Speaker
We are delighted to have Jeffrey K. MacNelly as this year’s banquet speaker. Mr. MacNelly, a Virginian, is a Pulitzer Prize winning editorial cartoonist. Well known for creating the nationally syndicated “Shoe” cartoon strip, his more recent work includes the popular “Pluggers” cartoons.

General Session
Our General Session Program, “The O. J. Simpson Prosecution Experts—Insights and Observations,” will be presented by DecisionQuest, a consulting firm used in preparation for the nationally televised Simpson double murder trial.

Offering two hours CLE credit and presented in the aggregate for reasons of confidentiality, this program will review general research findings as well as provide an appraisal of the actual pool of potential jurors. In addition, DecisionQuest’s computerized approach to the questionnaire analysis and how it can benefit clients in large-scale litigation will be discussed at length. Finally, a description will be furnished on the approach taken in the preparation of demonstrative exhibits, as specific examples will be discussed.

Children’s Programs
A special program is being planned for children ages 3-12 during the formal Friday evening reception and banquet. For only $5 per child, from 6:00 P.M. to midnight, children will be entertained with indoor and outdoor activities to include a movie. Dinner will also be provided.

Spouse/Guest Programs
Culinary demonstrations will be conducted Friday and Saturday mornings from 9:00-10:30 a.m. by one of The Greenbrier’s chefs. Friday morning’s program will be “Seafood Made Simple” and Saturday will feature “Light and Luscious Desserts.” The cost is $20 for each class and registration is in advance at the VBA Registration Desk.
SATURDAY, JULY 28, 1995

8:00 a.m.-9:00 a.m.  Past Presidents' Breakfast

8:00 a.m.-9:30 a.m.  YLD Executive Committee/Council Breakfast Meeting

8:30 a.m.-1:00 p.m.  Registration

9:00 a.m.-10:30 a.m.  Spouse/Guest Program
  Culinary Demonstration
  "Light and Luscious Desserts"
  (separate registration required)

9:00 a.m.-9:30 a.m.  Section and Committee Business Meetings

9:30 a.m.-11:30 a.m.  General Session (2 Hrs. CLE Credit)
  "The O.J. Simpson Prosecution Experts—Insights and Observations."

12:30 p.m.-1:30 p.m.  CLE Program

12:30 p.m.-5:00 p.m.  Recreational Tournaments
  Courtesy of: Jefferson National Bank and Lawyers Printing Co., Inc.

5:00 p.m.-6:00 p.m.  Friends of Bill W.

6:30 p.m.-7:30 p.m.  Reception (black tie optional)
  Honoring The Virginia Bar Association Journal, its Editors and Editorial Board
  Courtesy of: The Michie Company

9:30 p.m.-1:00 a.m.  Dance Honoring Young Lawyers
  Performance by: The Gentlemen and Their Lady
  Courtesy of: DeJarnette & Paul—L/lps

Continuing Legal Education Programs

FRIDAY, JULY 28, 1995

9:00 a.m.-10:30 a.m.  Business Law Section (1.5 Credits)
  "The Changing Landscape of Securities Litigation: A Level Field or Just Altered Terrain?"

9:00 a.m.-10:30 a.m.  Law Practice Management Section and Small Firm Task Force (1.5 Credits)
  "Automated Case Management: Getting Organized for Profit."

9:00 a.m.-10:00 a.m.  Videotape Presentation (1 Credit/1 Ethics)
  Compliments of VA CLE
  "Common Ethical Pitfalls in Domestic Relations Cases and How to Avoid Them." From the 12th Annual Family Law Seminar, "Evidentiary Issues and Domestic Relations Cases"

9:00 a.m.-10:30 a.m.  Wills, Trusts & Estates (1.5 Credits/1.5 Ethics)

10:30 a.m.-12:00 noon  Civil Litigation Section (1.5 Credits)
  "Tort Reform—Does It Pass the Tests of Common Sense and Fairness?"

10:30 a.m.-12:00 noon  Law Practice Management Section and Small Firm Task Force (1.5 Credits)
  "Automated Case Management: Getting Organized for Profit."

10:30 a.m.-12:00 noon  Real Estate Section (1.5 Credits)
  "Modernization of Survey Records: Can We Bring Survey Records Into the New Century?"

10:30 a.m.-11:30 a.m.  First Replay of Videotape Presentation
  (1 Credit/1 Ethics)
  Compliments of VA CLE

SATURDAY, JULY 29, 1995

9:30 a.m.-11:30 a.m.  General Session (2 Credits)
  "The O.J. Simpson Prosecution Experts—Insights and Observations."

12:30 p.m.-1:30 p.m.  Second Replay of Videotape Presentation
  (1 Credit/1 Ethics)
  Compliments of VA CLE

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Virginia Lawyers Diary and Manual  
Newark, N.J.
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(As of 6-1-95)
The Lawyers Helping Lawyers Program

To many outside the legal profession, the notion of attorneys being concerned for other attorneys and their families and friends may seem foreign, even oxymoronic. Fortunately, The Virginia Bar Association’s Lawyers Helping Lawyers Program is neither a paradox nor a passing trend. For over ten years, a group of lawyers and other volunteers has worked to prevent substance abuse by members of the Virginia Bar and to assist in the rehabilitation of those attorneys committed to their own recovery.

The story begins in 1985, when a group of Virginia attorneys decided to combat the pervasive and devastating consequences of attorney substance abuse. Recognizing that the legal profession was hardly immune to the professional and personal consequences of alcohol and drug abuse, these lawyers resolved to assist impaired attorneys before their impairment caused further damage to the attorney, his clients and his family. Then, as now, the Lawyers Helping Lawyers Program remains acutely aware of the nexus between substance abuse and the incidence of disciplinary complaints and malpractice claims against attorneys. According to Lawyers Helping Lawyers consultant, Tom Casselton, current national data reflects that approximately sixty percent of all disciplinary complaints filed with state bars may involve attorneys allegedly engaged in substance abuse.

Motivated by the success of substance abuse programs for lawyers in other states and by the desire to assist affected attorneys and prevent further damage to clients, the community, and the Bar, this group worked closely both with The Virginia Bar Association and the Virginia State Bar to create an effective statewide program of substance abuse prevention, education, and rehabilitation for attorneys. What emerged is Lawyers Helping Lawyers, a confidential, non-disciplinary program administered by a statewide network of volunteers and health care professionals trained to assist in the prevention of substance abuse and in intervention and rehabilitation in respect to affected attorneys. Lawyers Helping Lawyers is not affiliated with any health care or treatment organizations and encourages participation by all interested attorneys.

The First Annual Lawyers Helping Lawyers Conference

Among the primary concerns of Lawyers Helping Lawyers is the education of the legal profession on the clinical, legal and ethical implications of attorney substance abuse. If attorneys and other members of the legal community are to succeed in the war on alcohol and drug abuse, then Lawyers Helping Lawyers believes that certain basic information and training must be shared, including the ability to recognize the symptoms of alcohol and drug abuse, to intervene effectively with affected attorneys, to assist in the rehabilitation process, and to appreciate the ethical and disciplinary implications of substance abuse.

On September 29 and 30, 1995, The Virginia Bar Association’s Substance Abuse Committee will address these very issues during its First Annual Lawyers Helping Lawyers Conference at the Sheraton Inn in Fredericksburg, Virginia. Marking the tenth anniversary of the founding of the program, the conference will address a broad range of practical concerns facing members of the bar, the bench, and other members of the legal community and their families.

Scheduled from 11:00 am to 9:30 pm on Friday and 8:00 am to 12:30 pm on Saturday, the conference will offer up to six hours of CLE credits as well as ethics credits for members of the bar. After registration and a brief introductory session, conference guests may attend a panel discussion presented by professional health care clinicians on the symptoms and characteristics of substance abuse. Following this clinical overview of alcoholism and drug abuse, individuals may attend one of three seminars on Friday afternoon, with topics ranging from the ethical and disciplinary implications of substance abuse to intervention. Conference activities on Friday will culminate in a banquet featuring Father Joseph C. Martin as the keynote speaker. Author of the famous “Chalk Talks,” Father Martin is a leading national authority on treatment for the chemical-ly dependent and their family and friends. He is the founder of the Ashley Treatment Center in Havre de Grace, Maryland, and a renowned speaker on the problems of substance abuse and chemical dependency.

On Saturday, September 30, the conference will offer several additional seminars for CLE credit on topics ranging from intervention and relapse prevention to a judicial perspective on substance abuse. Several distinguished members of the bench and bar will participate in the conference, including Virginia Supreme Court Chief Justice Harry L. Carrico, Judge Richard B. Potter, and Judge Wilford Taylor, Jr. Finally, for those individuals interested in volunteering in the Lawyers Helping Lawyers Program, a certification in intervention program also will be offered.

To register or obtain more information about the conference or Lawyers Helping Lawyers, please call Sandy Thompson at The Virginia Bar Association office at (804) 644-0041.
Things Are Not Always What They Appear

BEWARE! This article contains truths, half-truths, and outright lies, and not necessarily will they appear in this order. Quite simply, things are not always what they appear at first glance.

I hope by now you have had an opportunity to meet my charming wife, Liz, and our two mischievous daughters, Casey and Abby. Without them, my life would be void of many comical (and stress-relieving) occurrences, as the next two stories reveal.

The mild winter of 1995 was about to come to an end as Liz and I were spooning into our children the last few doses of Dimetapp, Amoxicillin, and a sundry of other apothecary items. Stuffy noses, sleepless nights, and lack of daylight in which to communicate were slowly coming to an end.

One morning, I awoke to find Liz already out of bed and sitting in a wicker chair across the room, staring at me. "What's up?" I said. "You realize this is a special day?" "Of course, I do," I quipped. I bounded out of bed and made haste to my bathroom where I shaved, showered and searched for the answer to WHAT IS SPECIAL ABOUT TODAY? I had no idea! Nevertheless, I could not reveal my obvious absent-mindedness and insensitivity to such a special occasion. A lot had been on my mind and I must have simply forgotten.

Until I could remember, I had to avoid any real communication with Liz. Therefore, I hurried off to work without even eating breakfast. Unfortunately, going to the office was no help. I could not stop thinking about why this was a special day. Around lunch time, I gave up. To be on the safe side, I contacted our local florist and sent Liz a dozen red roses and a card which simply said "I love you." When I was sure the flowers had reached her office, I contacted her receptionist and asked whether the flowers had arrived. She replied that they had and I asked her whether Liz had told her what was going on, to which she replied, "No, but it must be something very special.

At that point, I was desperate. I told the receptionist to let Liz know that I would arrange for a baby sitter and get dinner reservations at Carlos', one of our favorite restaurants in Roanoke. It was my day to pick up the kids; so I told the receptionist to advise Liz that I would deliver the children to the sitter and meet her at the restaurant at 6:00.

When I picked up the kids (ages 5 and 2), I interrogated them at length concerning why this day might be special to their mother. They were clueless.

A complete failure, I arrived at the restaurant at approximately ten minutes until six and ordered a chilled bottle of their finest sweet, white wine. Liz arrived sharply at 6:00 and we had a fabulous candlelight dinner. As I handed the signed Visa slip to the waiter, Liz reached over and softly took my hand, and with the grin of a vixen, she said, "This is the best Groundhog Day I have ever had."

Another morning, I awoke to remember a promise I had made to Casey to take her fishing at Smith Mountain Lake. It was a beautiful Indian Summer day and perfect for a father-daughter outing. We borrowed a friend's canoe and headed for the crystal blue water of the lake. We had been fishing about three minutes when Casey became bored and decided it would be more fun to paddle around the perimeter of the lake. Casey navigated, and I paddled... and paddled... and paddled...! Finally, she directed us into a nice, quiet little cove where I stopped paddling and collapsed quietly in the back of the canoe. I relaxed for at least 20 to 30 seconds before Casey noticed a frantic squirrel running back and forth across a branch which extended out over the water. "Daddy, what is that squirrel doing?" I had no idea, but being a knowledgeable father, I offered my sage wisdom and replied, "He's exercising!" To which Casey quipped, "Oh, Dad!"

We watched the squirrel for quite awhile when we finally noticed a large nut on a rock out in the water. The squirrel had noticed the nut and was running back and forth across the branch above, trying to figure out a way to retrieve the small treasure. Finally, the squirrel dove off the branch down onto the rock. Casey was elated. And, the squirrel seemed very proud of himself as he cracked the nut open and devoured its meager contents. As the squirrel ate the last morsel, the pieces of shell slipped off the rock and disappeared into the water. Now, squirrels are a lot like cats. They have no desire to swim. But this squirrel had no choice. Casey giggled as the squirrel ran around and around the rock trying to decide what to do. Finally, the squirrel jumped as hard as he could towards the land, making it only about one-fifth of the way there. The tiny creature was swimming his heart out when suddenly the water bubbled and he disappeared below the surface as if he were sucked under by some aquatic monster.

Both Casey and I watched in amazement as the ripples in the water faded. We were both speechless. Then, we could not believe our eyes as we witnessed a large fish surface and place another nut onto the rock.

And, so, as I previously indicated, things are not always what they appear. This axiom certainly stands true with regard to the Young Lawyers Division of The Virginia Bar Association. The title of our group, standing alone, gives one little idea of the diverse nature of our group and the incredible contribution our members make to both the public and the profession.

Since the beginning of the year, Ran Randolph, Chair-Elect, John Walker, Secretary-Treasurer, and I have met numerous times to discuss YLD projects and plans for the future. We are always amazed at the dedication and hard work of young lawyers across Virginia. The following will give you a better
understanding of the various Committees of the YLD and who is responsible for the smooth operation of each one:

**ABA Award of Achievement**
Chair Melissa Amos Young is currently putting together the ABA Award of Achievement Applications. She is working hard to assure that our projects and services receive appropriate recognition throughout the United States.

**Bridge-the-Gap**
Chair Ted Fauls and his committee have successfully coordinated another round of seminars in October. Plans are underway for two more seminars in 1995. The seminars are a mammoth undertaking given the fact that they are simultaneously conducted in numerous jurisdictions, including Charlottesville, McLean, Norfolk, Richmond and Roanoke. Ted is looking for ways to expand interest in the program, including an exploratory investigation of making the seminar mandatory for all new admittees.

**Communications**
Chair Susan Meyer is off to a running start this year. She plans to prepare articles and submissions for each issue of News & Views and the VBA Journal. She will also be soliciting articles from young lawyers across Virginia. Her goal is to better publicize committee meetings with articles and photographs, and coordinate the dissemination of information to local news editors in Richmond, Roanoke, Hampton Roads and Northern Virginia.

**Community Law Week & Law Day**
Chair Heather Lewis did an excellent job with the Community Law Week & Law Day in 1994. For 1995, Heather is doing an in-depth study of the Committee and its areas of activity and will report to the Executive Council at our next meeting.

**Disaster Legal Assistance**
Chair Pete Johnson has had a remarkable year moving this Committee along. He has worked hard with the Virginia State Bar, and we now have a joint disaster plan. Training sessions are beginning this summer.

**John Marshall Foundation**
Chair Brian Otero is doing an excellent job with the Foundation. In 1995 he will be spending a significant amount of time helping the Board of the John Marshall Foundation with a new fund raising campaign which could expand the applicant pool for the annual teachers' awards. These awards are a great opportunity for the teachers as well as The Virginia Bar Association.

**Law School Liaison**
Chair Vaughan Gibson is continuing her efforts in 1995 to organize and conduct programs related to recruiting in the six Virginia law schools. She conducted a highly successful recruiting Roundtable at the winter meeting in Williamsburg.

**Lawyers for Literacy**
Co-Chairs Mike Quinan and Melissa Robinson have done a first-rate job developing this Committee. They will soon complete the first year of the Youth Haven Project in Roanoke, Virginia, which has received excellent reviews from the director of Youth Haven, as well as from participants. The project helps high-school-aged girls by providing positive role models and educational support. The Committee is currently contemplating plans to expand its work to Youth Haven I for boys. In addition, the Committee continues to offer pro bono legal services to literacy support groups.

**Lawyers for the Arts**
Chair Kimberlee Ramsey and her Committee have been busy planning an update to the directory of lawyers who are available to represent artists. The Committee hopes to re-publish copies of the directory in the near future.

**Lawyers Helping Lawyers**
(The Substance Abuse Committee)
Chair Charlie Meyer recently took over this Committee and has done an outstanding job. His Committee recently made presentations at both George Mason University and Washington & Lee University Schools of Law. He is currently helping to coordinate and promote the first annual Lawyers Helping Lawyers Conference which will be conducted at the Sheraton in Fredericksburg, Virginia on September 29 and 30, 1995.

**Legal Services to the Public**
Co-Chairs Kyle Johnson and Jeff Stredler are new members of the YLD Executive Council. They have gotten off to an excellent start. They are currently planning a volunteer prosecutor project in Norfolk which will help take some of the
workload off paid prosecutors, who are often unable to prosecute less egregious crimes. Kyle and Jeff will have this new program in place by the fall of 1995.

Long Range Planning
Chair-Elect Ran Randolph is currently shepherding some of the suggestions made in the 1994 report of the Long Range Planning Committee. Ran serves as the “watchdog” to ensure that actions of the YLD are consistent with the goals and objectives established in the Long Range Planning Committee Report. He is giving particular attention to adding to the “value” of belonging to The Virginia Bar Association and particularly the YLD. He is also working to assure the continuation of firm sponsorship of YLD activities while balancing the competition for Young Lawyers’ time.

Member Services
Chair David Dallas is currently working with Cheryl Watson Smith, Executive Committee member, to formulate a value added handbook for distribution to Virginia Bar Association members. This is a mammoth undertaking and both Dave and Cheryl are working closely with the Senior Executive Committee, as well as with the State Bar to assure they have given this project ample ethical consideration. If appropriate, the Committee intends to develop a handbook which will give all VBA members a valuable resource. The handbook would contain a referral list for the various legal specialty areas. Bar Association members who volunteer to be involved would agree to 15 minute consultations with other Bar Association members on various topics within their specialty area. The concept has generated significant interest within the Bar Association and we hope this project will be particularly inviting to the smaller firms.

Membership
Co-Chairs Mary Hoge Ackerly and Neil Keesee are spending a substantial portion of their time working with the VBA Membership Committee to improve new member recruitment and retention. In addition, they are currently planning their annual hospitality program in connection with the summer bar exam. This program has been a huge success in the past and has helped heighten awareness of the contributions made by The Virginia Bar Association.

Mentor Program - Hampton Roads
Co-Chairs Tim Murphy and Colleen Dickerson are currently assigning participating attorneys to the fourth grade classrooms in the five schools in which they are involved. This program has been well received and Tim and Colleen are currently working to expand the program to additional public schools.

Mentor Program - Northern Va.
Chair Vaughan Gibson never ceases to amaze me. She pulls double duty with this program and the Law School Liaison Program. She does an excellent job at both. The Northern Virginia Mentor Program is currently in full swing and Vaughan is working with the Alexandria school system to arrange additional schools in which to place mentors.

Mentor Program - Richmond
Co-Chairs E.B. Stutts and Montia Givens are currently making plans for the upcoming school year. Mentor recruitment and training will be an ongoing process through September, 1995. Their “kick-off” meetings between the mentors and their new classes will be in October, 1995.

Mentor Program-Roanoke
Chair Chris Floyd has hit the ground running this year as the new head of the Committee. The Committee members are currently planning an end-of-the-school-year social gathering for teachers, mentors and resource speakers. In addition, they have developed an evaluation process to determine what changes need to be made to the current program. This information will be digested over the next few months and put into place next year. Currently, the Roanoke Mentor Program is involved with 43 classrooms. Five additional classrooms have requested mentors. Chris hopes to expand the program to middle schools next year.

Minority Recruitment
Chair Wyatt Beazley has ably taken over the helm from John Walker who was the founding father of the Minority Recruitment Committee. Wyatt has continued the efforts to mentor minority high school and college students through the legal process. This Committee recently enjoyed two incredible successes. The first success was the graduation of their very first minority student from the University of Richmond. John Walker was present at her graduation to present her with a special VBA honor - a framed copy of the VBA Creed. The Committee recently learned that another student has been accepted at Harvard Law School. Wyatt hopes to expand this Committee to other parts of the state and is currently looking for people to help him with this very worthwhile program.

Model Judiciary Program
Chair Attison Barnes successfully completed this Committee’s 20th annual Model Court. Attison will continue to coordinate jury trials in both Virginia public and private high schools, as well as work with high school students in appellate rounds before the Virginia Court of Appeals and Model Supreme Court. His goal is to promote an understanding and awareness of the Virginia Judicial system.

National Moot Court
Co-Chairs Tom Smith and Steve Helm are currently engaged in final preparations for the National Moot Court Competition for Region IV which includes Law Schools from Virginia, Kentucky, West Virginia and North Carolina. This Committee has been run beautifully for many years and Tom and Steve are continuing in this tradition.

Nominating Committee
Chair Jim Ingold will soon be meeting with his Committee which includes Matt Broughton, Chair; Ran Randolph, Chair-
Pre-Law Counseling

Co-Chairs Chip Casola and Wayne Haig are currently organizing panel discussions at Virginia colleges and universities with the aim of providing a forum in which students who are contemplating a legal career can ask attorneys questions about the practice of law, law school and the admission process. The Committee is making a special effort to encourage the participation of women and minorities on both the Committee itself and the panels. During the last year, the Committee has been very active holding panel discussions in Southwest and Central Virginia, as well as in the Tidewater Region.

Pro Bono - Southside
Chair Andrew Weaver has recently agreed to start a pro bono hotline in the Southside area. This is a new project of the VBA and everyone is looking forward to the establishment of a new hotline program in this area.

Pro Bono Hotline - Harrisonburg
Ann Walker, Chair of the Richmond Pro Bono Hotline, has graciously agreed to foster a pro bono hotline in the Harrisonburg area. She is currently working with the Harrisonburg Legal Aid Office to determine the specific needs for such activities. Then, she will locate the appropriate person(s) to chair the Committee and begin operation.

Pro Bono Hotline - Northern Va
Co-Chairs Mary Zinsner and Cynthia Foulk are currently recruiting volunteers for their hotline. Their training session will be held in September and the new session will begin October 1, 1995. These individuals are doing an excellent job.

Pro Bono Hotline - Peninsula
Chair Jamie Shoemaker is doing a fine job with the Peninsula Pro Bono Hotline. Last year they closed more cases for Peninsula Legal Aid than any of their other service groups. The total number of Hotline cases closed since its inception in February of 1993 is approaching 1,000. Their goal is to make the same gain this year that they saw last year. They are in the process of recruiting recent admittees to the Virginia State Bar. They will be conducting a training class in June.

Pro Bono Hotline - Richmond (Central Virginia)
Co-Chairs Anne Walker and Jim Taylor are doing an exemplary job in Richmond. Their hotline is operating smoothly and they are currently recruiting new volunteers for July, August and September. Training for volunteers will occur in September.

Pro Bono Hotline - Roanoke
Co-Chairs Kevin Oddo and Nick Conte are working together to continue the success of this hotline. The Roanoke hotline operates one day per week and they are considering expanding the scope of the hotline in the near future.

Pro Bono Hotline - Tidewater
Co-Chairs Christian Connell and Michael Wojcik are continuing to expand the scope of the Tidewater Pro Bono Hotline. They are currently training additional volunteers and providing written manuals for new members of the Tidewater Pro Bono Hotline. They are working closely with the Tidewater Legal Aid Society and Pro Bono Hotlines in other regions of the state.

Project Development
John Walker has eagerly taken over this Committee this year. He is currently evaluating the possibility of an NCAA project for high school students. In addition, he plans to attend the American Bar Association Projects Meeting which will be held in San Antonio in June. This will give him an opportunity to examine other projects for their potential expansion to Virginia.

Senior Division Liaison
Chair David Anthony has recently burned the midnight oil to assure liaison assignments to all Senior Committees and Sections. He did a great job. However, there is regular turnover among the liaison assignments. Anyone interested in being a liaison to a Senior Committee or Section should contact David.

The Virginia Lawyer
Chair Sharon Lorah and her Committee are currently updating The Virginia Lawyer. The update will be completed in time for the Bridge-the-Gap Seminar in October. This Committee has been a huge success in past years and Sharon is continuing that tradition.

Tolerance Education
Chair George Marget recently took over this Committee and is currently working with the YLD Officers to plot the best course of action for this Committee. At this point, George believes the VBA should move away from the idea of “tolerance” and towards the ideas of “inclusion” and “acceptance.”

Town Hall Meeting - Hampton Roads
Chair Allan Parrot and his Committee plan to present the issue of parole reform/truth in sentencing at a forum in Virginia Beach or Norfolk in late September or early October of this year. In light of the General Assembly elections to be held in November, the Committee believes that the political perspective on this issue will be particularly interesting and lively. Delegate William Robinson and State Senator Kenneth Stolle have committed to participate on the panel. Cox Cable has agreed to air the program. This will be excellent exposure for The Virginia Bar Association.

Town Hall Meeting - Richmond
Chair Tom Stark and his Committee are currently working on producing a fall meeting on the subject of youth violence in the city of Richmond. They believe this subject is particularly timely and they plan to video tape the meeting for a replay in local schools.
Town Hall Meetings - Roanoke
Chair Phil Parker has set an incredible pace for himself. He has chaired this Committee for several years and each year has produced not one but two Town Hall Meetings. 1995 will be no exception. Phil recently held an incredibly successful forum entitled “Drugs, Alcohol and Youth: Can Our Kids Just Say No?” at Christiansburg High School auditorium. The program was aired live on WVTF 89.1 public radio and was taped by Cox Cable for broadcast on cable television. Phil is currently working on the subject of the next forum which will also be live on WVTF.

Upward Bound
Chair Monica Taylor has taken this program from its infancy to a model program which we hope to expand throughout the state. She is currently working with homeless and at-risk teenagers by giving them paying jobs in law firms. The objective is to expose them to positive role models and stable surroundings while allowing them to earn a modest income.

Virginia Model Law Book Project
Chair T.J. Edlich has recently completed this project. It was an immense success. Thousands of volumes of books were collected throughout Virginia and are currently in use in Eastern Europe. The entire program was a monumental undertaking which has received national attention. We are all proud of the efforts of T.J. and his Committee which worked very well and in tandem with the VSB/YLC.

Thus, as you can see, the VBA/YLD is very busy. I am extremely proud of the accomplishments and efforts of the Chairs of our Committees. I am immensely pleased with the eagerness with which Virginia lawyers volunteer their time for the worthwhile projects of the Association. As evidenced above, the contributions we make to the public and the Bar are both valuable and rewarding.

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If 80% of your Virginia lawyers are members of The Virginia Bar Association, the VBA wants to recognize your firm as a Sponsor of the Association. 1995 Sponsors will receive special recognition for their support of the Association in the VBA Journal and at the Summer Meeting.

No additional cost is required—but all 1995 membership dues must be paid in full.

To apply, submit the accompanying application certifying that 80% of your firm’s Virginia lawyers are members in good standing.

Mail to: 1995 SPONSORS PROGRAM, The Virginia Bar Association, 701 E. Franklin Street, Suite 1120 Richmond, Virginia 23219

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Number of Virginia Lawyers in Firm: ________________
Number of Lawyers Who Are Members of the Association: ________________

(Attach List of Names)
Our firm wants to be a Sponsor of The Virginia Bar Association. I hereby certify that our firm has _______ Virginia lawyers, 80% or more of whom are members in good standing of the Association.

Name (please print or type)
Position
Date Signature
The Virginia Bar Association Creed

Preamble: The practice of law is and must remain a profession. As members of an honored profession, lawyers are expected to exhibit the highest standards of honesty and integrity. In addition, lawyers must strive to achieve a sense of personal honor which should be manifested, in part, by a vigorous devotion to civility in the courts, to clients and to other lawyers. Courtesy is neither a relic of the past nor a sign of less than fully committed advocacy. Courtesy is simply the mechanism by which lawyers can deal with daily conflict without damaging their relationships with their fellow lawyers and their own well-being. Toward that end, lawyers should aspire to the following Principles of Professionalism:

As to the Courts and Other Tribunals
As a professional, I should always:

1. Avoid non-essential litigation and nonessential pleading in litigation.
2. Communicate with opposing counsel in an effort to avoid litigation and to attempt to resolve the litigation that has commenced.
3. Attempt to resolve by non-coerced agreement my objections to matters contained in my opponent’s pleadings and discovery requests.
4. Prevent misuses of court time by verifying the availability of key participants for scheduled appearances before the court.
5. Stipulate to facts in civil matters as to which there is no dispute.
6. Speak or write courteously and respectfully in all communications with a court or tribunal and show my respect by my attire and demeanor.
7. Exercise candor with the court at all times and act with complete honesty.

As to Opposing Parties and Their Counsel and Other Colleagues in the Practice of Law
As a professional, I should always:

1. Attempt to determine compatible dates with opposing counsel before scheduling motions, meetings and depositions.
2. Avoid serving motions or pleadings in such a manner or at such a time as to harass opposing counsel or preclude an opportunity for a competent response.
3. Attempt to resolve any dispute with opposing counsel prior to filing any notice or scheduling any hearing.
4. Exercise courtesy and civility in all communications and avoid rudeness and other acts of disrespect in all meetings including depositions and negotiations.
5. Identify clearly all changes made in documents submitted to opposing counsel for review.
6. Respect the commitments of others by striving to always be punctual.
7. Remember that the conflict is between the clients and not the lawyers.
8. Respond promptly to all requests by opposing counsel.
9. Avoid personal criticism of another lawyer.
10. Set a good example for and assist newer members of the bar.

As to Clients and the Public
As a professional, I should always:

1. Remember that my responsibilities as a lawyer include a devotion to the public good, respect for the civil rights and sensibilities of others and a willingness to provide pro bono or reduced fee services where appropriate.
2. Counsel clients about alternative forms of dispute resolution where appropriate and available.
3. Counsel clients about the value of cooperation and compromise in the resolution of disputes.
4. Advise clients against pursuing litigation or other actions that are without merits or intended merely to harass, delay or exhaust the financial resources of the opposing party.
5. Reach clear agreements, preferably in writing, with clients concerning the nature of the representation and the fees to be charged.
6. Keep clients advised as to the progress of their case or other matters being handled and communicate promptly and clearly with clients.
7. Strive to achieve my client’s goals expeditiously and at a reasonable fee.
8. Consider the effect of my conduct and deportment on the image of lawyers and the system of justice.
9. Recognize that uncivil conduct does not advance and may compromise the rights of my clients.
Memorials

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

The Honorable Bernard G. Barrow ................................................ 1937-1995
Judicial

Henry A. Dudley ............................................................................. 1914-1995
Life Member

The Honorable Albertis S. Harrison ............................................. 1906-1995
Life Member

Joseph Smith ................................................................................... 1918-1994
Life Member

The Honorable Francis E. Thomas, Jr. ........................................... 1928-1994
Judicial

Robert J. Watkins ............................................................................ 1901-1994
Life Member