FAIRFAX BAR ASSOCIATION
Serving the Northern Virginia Legal Community

JOURNAL

Newsletter of the Fairfax Bar Association www.fairfaxbar.org April 2010

As Time Goes By

A Bench Bar Dinner Dance for the Ages

by Sharon Nelson & Albert Bonin

Casablanca (1942), featuring Humphrey Bogart and Ingrid Bergman, is the ultimate movie classic because it has something for everyone. In true *Casablanca* style, over 500 Fairfax Bar members and guests experienced an evening that tantalized every one of their senses.

Upon arrival at the annual Bench Bar Dinner Dance held at the newly renovated Fairfax Park Marriott, guests were treated to an open bar reception and free flowing champagne. New to the Saturday night festivities was a wine tasting, featuring an array of delicious handcrafted Spanish wines, courtesy of The Wine House, located in Old Town Village Fairfax (http://www.winehouseonline.com/).

Many guests took the theme to heart with men donning spats and white dinner jackets and women dressed in elegant period-style gowns. Members of the Fairfax Law Foundation matched their elegant attire with running shoes to promote their 5k Run for Justice on May 2nd—all money raised will go to the Fairfax Law Foundation and its many wonderful programs. On a more somber note, before dinner, Fairfax Bar President Corinne Lockett, asked for a brief moment of silence to honor our friend and colleague, Edward Walinsky, who recently lost his fight with lung cancer.

The silent auction was missing this year after the Foundation Board determined that the profits didn't justify all the work putting an auction together. This seemed to provide more relaxed time to socialize, as did having the band start after dinner rather than during dinner. An incredible eight-piece ensemble called "The Mustangs Band," including a strong brass section, began with the classic, *As Time Goes By*. A roundup of the usual suspects could be found dancing to classic and contemporary music late into the night.

Another added attraction this year was FBA member Tom Koerner and Debra Sternberg, the dynamic dance team from GottaSwing. As the Mustangs Band went into their first break, Tom and Debra thrilled the crowd with their high energy, swing dance style, complete with flips and twists. The GottaSwing team offered lessons to the enthusiastic attendees during the band break, which was quite entertaining. The lessons were an added bonus, and, we are happy to report, no one got hurt!

Once again, this event could not have been possible without the fine work of Corinne Lockett, Team FBA, and the many sponsors at all levels. All in all, *As Time Goes By*, an affair to remember with a near-perfect balance of music, food, wine, and good company. Mark your calendars for the Bench Bar Dinner Dance March 5, 2011. Until then, *Here's Looking at You, Kid*. ■

See sponsor list page 4

President's Column

by Corinne N. Lockett

LAW DAY REFLECTIONS

As spring slowly makes its appearance and wipes away the cold dreary days of winter, I slowly come out of my cocoon and get back into the swing of things. I find myself with more daylight hours and increased energy, and look forward to getting involved again in my surroundings.

It seems that I am not alone in this. With the spring also comes a surge in legal and community activities. One sure sign that spring has arrived is receiving an invitation for the Annual Law Day Weiner Roast organized each year by Ed Weiner to commemorate Law Day. Spring has arrived!

Our nation has been celebrating Law Day for over 50 years. For decades our legal community has come together on the first day of every May to celebrate our legal heritage and reflect on the role our legal system plays in all of our lives. It is time for lawyers to rally together and spend the day celebrating their profession by reconnecting with their community. In 1958, President Dwight D. Eisenhower proclaimed that May 1 would be known as Law Day each year. Its observance was later codified into law on April 7, 196l:

> Law Day, U.S.A., is a special day of celebration by the people of the United States-
>
> (1) in appreciation of their liberties and the reaffirmation of their loyalty to the United States and of their rededication to the ideals of equality and justice under law in their relations with each other and with other countries; and
>
> (2) for the cultivation of the respect for law that is so vital to the democratic way of life.
>
> 36 U.S.C. § 113 (1998)

Historically, the Fairfax Bar Association has celebrated Law Day by holding luncheons to honor worthy legal scholars or to dedicate the portraits of retiring judges. In the 2000s, the FBA held community events such as "Free Law Day" including sessions where residents could consult for free with a lawyer or attend Community Legal Learning Fairs. Law Day was an all-day community event.

For a myriad of reasons (with the exclusion of the now famous Law Day Weiner Roast, to be discussed later), the spirit of community and our individual contributions to "the ideals of equality and justice" related to Law Day have all but disappeared from our radar screens. It is my hope that we can revitalize the spirit of Law Day by adding to the charitable endeavors of the Weiner Roast and make May 1 a prominent day in our legal community once again.

On the first day of each and every May since 2001, Ed Weiner has thrown a patriotic party extraordinaire, appropriately titled the "Annual Law Day Weiner Roast." Last year, weiners were grilled up to the tunes of the GMU Jazz Ensemble. In the name of charity, attendees purchased shoe-shines, feasted on popcorn and cotton candy, and washed it all down with sodas and beverages of their choice. In an attempt to add on to a good thing and to revitalize Law Day back to that of our humble beginnings, this year's Law Day will be commemorated with an entire weekend of law-related community events throughout Fairfax (see Weiner Roast article, page 3).

Festivities begin at 4:00 PM on Friday, April 30, 2010, with a portrait dedication ceremony for recently-retired Judges Michael P. McWeeny and Gaylord L. Finch, Jr. The dedications will take place in the ceremonial courtroom at the Fairfax County Courthouse, and will be followed by an Open House sponsored by the FBA Law Library Committee in

continued on page 14

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APPLICATIONS FOR THE FBA VICE PRESIDENT AND BOARD OF DIRECTORS ARE BEING ACCEPTED

The Nominating Committee is currently accepting applications for the positions of Vice President and members of the Board of Directors of the Fairfax Bar Association. Interested candidates should return their applications to the FBA by 4:00 PM on April 14, 2010. Applications may be found on the FBA's home page or in the FBA office.

Anyone who would like to be considered for Vice President or Director must meet the following requirements:

- Vice President—Minimum of two (2) years service on the FBA Board;
- Director—Minimum of two (2) years active participation in a Bar activity, section, committee, or other project.

Interested candidates must submit a completed application, photograph, a bio, CV or resumé. Candidate applications and photos will be posted online on the FBA's Web Site. ■

Law Day Weiner Roast May 1

On Law Day, Saturday, May 1, 2010, Weiner, Rohrstaff & Spivey, PLC will be hosting the 10th Annual Law Day Weiner Roast to benefit the Fairfax Law Foundation from 1:00 - 5:00 PM. The Law Day Weiner Roast has received awards from both the Virginia State Bar and the American Bar Association. Last year approximately 700 people attended, including judges from Fairfax, Arlington, Alexandria, the Eastern District, and the Court of Appeals; local and state legislators; other civic dignitaries; and folks who love to have fun, while supporting a great cause.

Over the years, the Law Day Weiner Roast has raised more than $100,000 for the Fairfax Law Foundation. The Fairfax Law Foundation provides an array of educational and charitable services that benefit the Northern Virginia community. Programs include education for area youth about the adverse legal and medical effects of drug and alcohol abuse; courthouse tours with education about the judicial system for middle students in Fairfax County; and the *pro bono* program, providing legal services for Fairfax County residents who cannot afford legal services. Additionally, the Fairfax Law Foundation provides programs for victims of domestic violenceand teen safe driver programs.

Featured highlights are the honor guard presenting colors, musical performances by the 20-piece George Mason University Jazz Ensemble, the Irish Band "Edsall Road," and performers from the award-winning Boyle School of Irish Dance.

Also featured is an old fashioned shoe-shine stand, providing professional shoe-shines. The Fairfax City Police send "Mr. Law," a 12-foot inflatable police officer, to "mingle" with the crowd.

The party is outdoors and very casual. It's a Weiner Roast, and that means five varieties of hot dogs and brats. No burgers...no chicken...just weiners. There is an "ol' time" feel to the whole event: root beer floats, popcorn, cotton candy, and olde tyme amusements. We hope you will join in helping to support this meaningful day filled with great music and food for a worthy cause! ■

FBA EXECUTIVE DIRECTOR EARNS CERTIFIED ASSOCIATION EXECUTIVE CREDENTIAL

The American Society of Association Executives has announced that **YVONNE C. McGHEE**, Executive Director of the Fairfax Bar Association has earned the Certified Association Executive (CAE™) credential. The CAE is the highest professional credential in the association industry. Less than five percent of all association professionals have earned the CAE.

To be designated as a Certified Association Executive, an applicant must have a minimum of three years experience in nonprofit organization management, complete a minimum of 75 hours of specialized professional development, pass a stringent examination in association management, and pledge to uphold a code of ethics. To maintain the certification, individuals must undertake ongoing professional development and activities in association and nonprofit management. More than 3,600 association professionals currently hold the CAE credentials. 2010 marks the 50th anniversary of the CAE program.

The American Society of Association Executives (ASAE) is a membership organization of more than 22,000 association executives and industry partners representing more than 11,000 organizations. ■

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AMERICAN BAR ASSOCIATION (ABA) MEETING RECAP

by Jay P. Myerson, Esq.

The ABA held its annual Mid-Year Meeting in Orlando, FL. The Fairfax Bar Association is one of approximately 80 local bar organizations from around the country to have a delegate in the ABA's House of Delegates, the ABA's governing body.

Several matters were considered by the House of Delegates that might be of interest to members of the FBA: consideration and partial revision of ABA membership dues for some categories of members; the *U.S. News and World Report* ranking of law firms; and the need of young lawyers and law students for relief from crushing student loan debt.

ABA Membership Dues. As the largest professional organization of its kind with over 392,000 members, the ABA remains committed to providing value to its members consistent with, or exceeding, the cost of membership. As part of this effort, the ABA has conducted a pricing review, overseen by Dr. Jean-Pierre Dube. Dr. Dube is a pricing expert at the University of Chicago Booth School of Business. The ABA also conducted a survey involving over 9,000 individual responses from all membership ages and practice areas.

As a result of this analysis, the House of Delegates concluded that the cost of ABA membership needs to be reduced, particularly in light of the economy. Some changes will take effect for ABA fiscal year 2010-2011; other changes have been deferred for final review and action at the ABA House of Delegates' annual meeting in August, hopefully to become effective in 2012.

The reductions that will take place in 2010-2011 are for lawyers employed by any federal, state, local, territorial or tribal government, lawyers employed by non-profit legal services programs, judges, and solo practitioners.

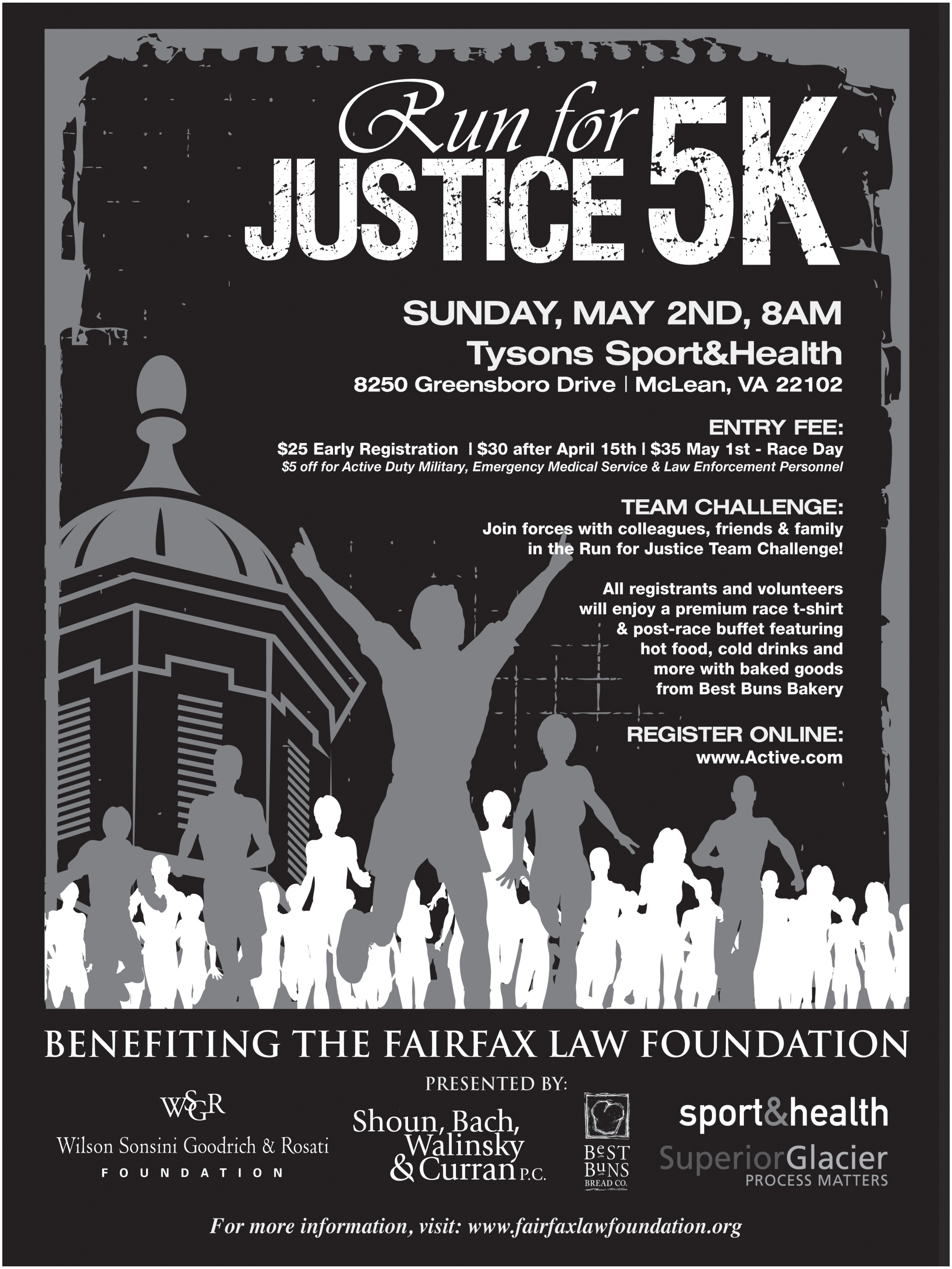
The new membership dues for fiscal year 2010-2011 and thereafter for attorneys employed in those categories are as follows:

$0 if admitted to the bar less than one year;
$100 if admitted to the bar one year but less than four years;
$125 if admitted to the bar four years but less than six years;
$145 if admitted to the bar six years but less than 10 years;
$225 if admitted to the bar 10 years or more.

Further review of ABA membership dues for other categories of members is expected to occur at the August 2010 Annual Meeting.

***U.S. News and World Report* Ranking of Law Firms**. Starting this fall, the *U.S. News and World Report* will be ranking (as distinguished from rating) law firms, apparently by areas. Concerns included the criteria to be used, the reliability of information obtained, law firms' reputations that might be harmed by overly low ratings, and harm to the public from misinformation to consumers. This proved to be perhaps the most contentious issue to be considered by the House of Delegates at this year's meeting. On a close vote, the House voted to urge the ABA President to examine the efforts of the *U.S. News and*

continued on page 8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For more information, visit: www.fairfaxlawfoundation.org

Fairfax Law Foundation (FLF)

Run for JUSTICE 5K

The Fairfax Law Foundation will host the inaugural Run4Justice on Sunday, May 2, at Tysons Corner. The race will start and finish at the Tysons Sport and Health (one of our great supporters!). Race starts at 8:00 AM.

The Law Foundation's *pro bono* missions of providing legal and other assistance to the indigent and those with special needs, providing law-related community education programs including the popular Fairfax County Court Tour program, and promoting access to, and improvements in, the justice system, has been in need of some fresh fundraising ideas for some time. After a lot of back and forth and a couple years of throwing the idea around, the FLF Board of Directors (with an assist from the Young Lawyers Section) is proud to present a new signature event on the local calendar.

So come join fellow runners and walkers for a fantastic new race and a great cause. You might even see some local celebrities out there! Or sign up a whole team from your firm and challenge other local firms on the road. Registration is now open at www.active.com (search "Fairfax Law Foundation") or through the Foundation's website (www.fairfaxlawfoundation.org).

For sponsorship information, please contact Christie Leary (cal@greenspunlaw.com) or Gerry Stegmaier (gstegmaier@wsgr.com). Special thanks to Shoun, Bach, Walinsky & Curran, PC, Sensei Enterprises, and Wilson, Sonsini, Goodrich & Rosati, PC for the early sponsorships which have enabled this event to really take off!

If you or your firm would like to help by volunteering on race day, please contact Todd Davis (todd.davis@unisys.com). ■

Attorney Advertising!

Pursuant to a resolution passed by the FBA Board of Directors, attorneys can now advertise their services in the *FBA Journal*. All ads must comply with the Virginia State Bar regulations governing attorney advertising as set forth in the VA Rules of Professional Conduct.

Please call or email for rates and advertising information.

Ann Thornton • 703-743-9375 • rodangraf@aol.com

Christine Lee • 703-246-2734 • clee@fairfaxbar.org (classifieds)

We look forward to hearing from you!

Continuing Legal Education Committee

Update

by Cary Z. Cucinelli, Esq.

I have had the good fortune of serving as the Chair of the Association's Continuing Legal Education Committee this year and I am happy to report that we have had great success in planning informative and timely programs for our members. The Committee already has surpassed our expected income for live CLE programming by over 30 percent, and we have several excellent upcoming programs scheduled for this spring.

The monthly *Technology in Fairfax Courtrooms: Come Kick Our Tires!* programs have been very popular and, due to the limited number of spots available for each session, the FBA staff has been taking names of Association members who are interested in attending future sessions. We plan to continue offering this program until attorneys who want, and need to be trained on the technology tools available in the Fairfax County Courthouse, have had the opportunity to do so.

One of our most successful events this year was the criminal law CLE held in mid-October. The CLE was organized by new CLE Committee member McGennis Williams and provided an overview of major 2009 legislative developments affecting criminal law, including the effect of the *Melendez-Diaz* decision. Over 100 attorneys attended the October program, and similar numbers attended the FBA's annual DUI CLE held in January. The annual DUI presentation is organized by Association member Michael I. Rieger and always proves to be a popular event.

This spring we are looking forward to a diverse selection of CLE topics. Kate Untiedt has planned the *Hot Topics in Juvenile & Domestic Relations* CLE scheduled for March. April will bring *Topics in Business Representation: Successor Liability in Business Transactions*, a CLE organized by Wayne Travell and being held at Maggiano's Little Italy in Tysons. Betsy Sue Scott has spearheaded the planning of a CLE focused on intellectual property law to be held in late May; specifically, the program will focus on the impact of the Supreme Court's *Bilski* decision. We will wrap up the FBA's year with the Young Lawyers Sections' *Your First Time in Court: What to Expect and What the Bench Expects of You* CLE, and the *2010 Circuit Court Manual* CLE in late June.

Look for CLEs on personal injury law and technology in early fall and another free ethics CLE that will be presented this October.

Our Committee strives to serve the needs of the FBA membership, so please let us know what programming ideas you have. We invite you to tell us how we can do our job better. Please send me an email at ccucinelli@ruddylawfirm or come visit a monthly committee meeting. We meet on the second Tuesday of the month in Suite 115 in the Law Library. Feel free to join us! ■

Don't forget about our online CLEs, which are available 24/7! We offer over 140 online and podcast CLEs. As an added benefit, we are currently offering one free online CLE! To take advantage of this offer and to view our full catalog of online CLEs, please visit www.fairfaxbar.org.

ABA MEETING RECAP

continued from page 4

World Report to publish its ranking of law firms. Further update should be available after the August 2010 Annual Meeting.

Crushing Student Loans. By contrast, there was unanimous concern for law students and young attorneys who have accumulated crushing amounts of student loan debt and now are experiencing extreme financial hardship due to deferred or lack of employment. The House of Delegates called on the Executive Branch, Congress, and Creditors to provide relief for these students and young lawyers in three basic ways: "extending federal student loan repayment terms and federal student loan programs to those who used alternative sources of credit from commercial lenders; making repayment terms in federal law school loans as beneficial to the borrower as possible to allow as many law students and graduates as possible to qualify for such programs as income-based repayment, consolidation, and other forms of loan repayment assistance; and, authorizing the use of TARP or other federal funds to provide such individuals with temporary assistance to meet their obligations to lenders with a corresponding obligation to repay such assistance." Report 301 to the House of Delegates at page 1.

The House of Delegates also adopted a number of resolutions on a wide range of policy matters involving juvenile law, criminal law, veteran rights and needs, and the adjudication of immigration cases.

A summary of the actions taken by the ABA House of Delegates at the 2010 Mid-Year Meeting can be found at http://www.abanow.org/2010/02/aba-house-of-delegates-adopts-policies-on-issues-including-immigration-criminal-justice-equal-pay-veterans-services-student-debt/.

Please let me know if you have any questions concerning the Mid-Year Meeting or the ABA in general. ■

Capital Campaign
DONOR RECEPTION

The Fairfax Law Foundation (FLF), the charitable arm of the Fairfax Bar Association, hosted a reception on January 25, 2010 at the office of Cameron/McEvoy for those who contributed to the Capital Campaign, a fundraising initiative that helps support the wide range of programs offered by the FLF. About 40 attendees enjoyed the evening's music, catering, and socialization.

The evening, more importantly, honored the generosity of the donors who enable the Foundation's work to continue.

The Capital Campaign's goal is to create, fund, and sustain programs that support the citizens of Fairfax County. Funds raised help to provide legal support to the poor; support the Fairfax Public Law Library; provide educational programs to students (including courthouse tours, mock trials, and drug and alcohol programs); and support the Conciliation Program, which assists in resolving motions in the J&DR and Circuit Courts.

The donors include:

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IN MEMORIAM
EDWARD J. WALINSKY

It is with great sadness that we share the news of the death of our friend and colleague, Edward J. Walinsky. Ed passed away on February 28, 2010, after a long battle with cancer.

Ed Walinsky was well known and well respected in the Fairfax Bar, and dedicated years of service to the Bar. Among other contributions, he was a past member of the Fairfax Bar Association Board of Directors, most recently serving on the Judicial Screening Committee. He was a partner in the firm of Shoun, Bach, Walinsky & Curran, P.C., and despite his illness, served as the managing partner of the firm during 2009.

Mr. Walinsky received his undergraduate degree from the College of William ad Mary in 1976, and his law degree from Vanderbilt University in 1979. After graduating from law school, Mr. Walinsky served as a Captain in the Judge Advocate General's Corps, U.S. Army, and thereafter as a judicial law clerk for the United States Court of Appeals for the Fourth Circuit. Mr. Walinsky was recognized by the publication "Best Lawyers in America," and was consistently recognized by *Washingtonian Magazine* as one of the area's "Top Divorce Lawyers."

To those who knew him, however, Ed Walinsky's life, energy, and sense of humor cannot be summarized by simply listing his professional credentials. Mike Holleran, Esq., a long-time friend, stated that "You only needed to spend about five minutes with Ed to learn that not only was he a great attorney, but he loved his profession. In those five minutes you also learned that he had an overwhelming love for Fran and his children, a passion for sports, and a great sense of humor."

Ed's positive disposition, even after being diagnosed with a terminal disease, was inspiring to all. "He told me that he had been dealt high cards his whole life, and so he could not complain" about his diagnosis, remembers his former co-worker, Joan MacLeod. Despite his diagnosis, he continued to live life to the fullest and remained thankful for his many blessings, especially his wife, Fran, and their three children, Lauren, Edward, and Sarah.

Ed Walinsky was admired and respected by both his peers and the court. Judge Stanley P. Klein noted that "He was a pleasure; there is no other way to describe him. He always took the high road, and as a result, usually his clients ended up on the high road with him. He worked to find the right resolution for families in distress, and judges appreciated him as a result."

Jon Huddleston, Esq., President of the Virginia State Bar, remembers Ed Walinsky in a similar way: "Ed Walinsky was the consummate professional. I never met anyone who understood and respected the process more than Ed. It was so vitally important to Ed that a court arrive at the correct decision irrespective of either side's positions. It was a privilege to be involved in a case with Ed."

That sentiment was echoed by Leslie Weber Hoffman, Esq., who commented that "Even in the most acrimonious case, he was a pleasure to have on the other side of a case, due to his professionalsim and wry sense of humor."

Notes Mike Holleran, "Ed was an outstanding lawyer; he was devoid of ego and represented his clients with dignity and professionalism. Despite his numerous accomplishments, he remained humble and self-effacing."

"The Virginia State bar was enriched by his membership and the courts of this Commonwealth greatly benefitted from his service to the profession. He will be greatly missed," observed Jon Huddleston.

Ed Walinsky was active in his church, St. Alban's, and shared his love for music through participation in their choir. He was an avid reader, history and trivia buff, and sports fan, dedicating many a Sunday to cheering on the Redskins.

Funeral services were held at St. Alban's Church in Annandale on March 27, 2010.

For those so inclined to remember/honor Ed in some way, there are three options Ed's family has suggested.

Ed was very involved in his church: St. Alban's Church, 6800 Columbia Pike, Annandale, VA 22003-3431. Please note his name on the check

Ed's Daughter, Lauren, participates in the American Cancer Society's Relay for Life. Her website is: http://main.acsevents.org/goto/laurenwalinsky.

Music was very important to Ed, and his daughter Lauren sings in the National Master Chorale. Their website is: http://www.nationalmasterchorale.org/support/. Again, please note that your gift is in honor of Ed Walinsky. ■

Estate Planning Issues

Affecting Parents of Young Children

by Kathi L. Ayers, Esq.

The biggest task facing parents of young children with respect to estate planning is to ensure (as best as possible) that their children will be taken care of if both parents die prematurely. Parents must be concerned not only with *who* will take care of the children, but also with *how* the children's many needs will be met. Consequently, in working with parents of young children, estate planning attorneys should encourage their clients to think about who they would like to raise their children if they were unable to do so, as well as the way in which they would like to structure the distribution of their assets. Basic estate planning gives parents some degree of control over situations in which they would otherwise have no control, as well as peace of mind that they are prepared should the worst happen.

I. PHYSICAL CUSTODY OF CHILDREN

A. Designating the Guardian

The subject of guardianship is what first prompts many parents of young children to see an estate planning attorney. The biggest issue that arises in connection with guardianship is deciding who the right individuals are to serve. Many clients struggle with this decision because it is hard to imagine other people raising their children.

There are several factors to consider when choosing a guardian, including age, experience, temperament, values, religious beliefs, relationship with the children, and whether the guardian has his or her own children. Clients must decide whether it is preferable to name family members or friends. They may choose to name one person or a couple to serve, and may wish to specify that a couple be married in order to serve. Because guardians act as substitute parents for the children, some clients may be more comfortable naming a couple so that the children are raised in a two-parent home. Conversely, some clients may feel most comfortable with a specific person as the guardian, regardless of his or her marital status.

Logistical concerns may also be a factor. Although individuals nominated or appointed as guardian do not have to be Virginia residents,[1] clients may want to name a local guardian so that to the extent possible, the children can remain in their current schools and activities. Clients should name a primary guardian, as well as successor guardians in case the primary guardian is unable to serve. Clients should also make sure that potential guardians are willing to accept the role.

In discussing the guardianship issue with parents of young children, it is important for clients to know what would happen to their children if there was no will designating a guardian. In such case, the court will appoint a guardian of the person of the minor (physical custody). If the minor is under the age of fourteen, the court nominates and appoints the guardian, but if the minor is fourteen or older, he or she may nominate his or her own guardian.[2] Non-relatives of a minor are not permitted to be appointed as guardian by the court until family members have been able to petition the court for appointment.[3] Upon the death of a guardian, the guardianship ends and the court must appoint a new guardian.[4]

If there is a surviving parent, he or she is automatically entitled to custody of the person of the minor unless he or she is considered by the court to be unfit.[5] This is true even if the parents were divorced and the deceased parent had sole custody of the children.[6] Many custodial parents do not understand this point of law and often wish to prepare wills naming other guardians for their children. Since the presumption that it is in the best interest of a child for the surviving parent to have custody can only be overcome with evidence that the surviving parent is unfit to have custody of the child, a custodial parent may wish to put a statement in his or her will explaining why a surviving parent is unfit to be awarded custody.

There are difficult questions, however, thinking through the issues and selecting guardians is much more beneficial to children than doing nothing. Once a plan is in place, clients will have the peace of mind of knowing that their children will be taken care of.

B. Providing for the Guardian

Another question that clients should consider when thinking about potential guardians is whether the guardian could afford to care for their children in the manner that they would like their children to be raised without creating a financial hardship. While guardians are entitled to reasonable compensation (which is not clearly defined) as a fiduciary under Virginia law,[7] such compensation may not be adequate. In many cases, potential guardians have children of their own to care for, and adding one or more additional children to the household could create a significant burden. For example, what if a potential guardian lives in a house that is too small to accommodate the children? Or what if a potential guardian owns a car that is too small to transport the children?

Assets that parents leave for their children, whether held in trust or otherwise, are to be used directly for the *children's* benefit, and while using a portion to make an addition onto the guardian's house or to buy a larger vehicle may *indirectly* benefit the children (or may benefit them in the short term), it primarily benefits the guardian because the guardian is the owner of the property and could potentially enjoy the use of the property after the guardianship ends.

One possible estate planning solution to this problem is a trust for the benefit of the guardian. A guardians' trust could be funded with a set amount of money (or percentage of the Trust Fund) set aside for the benefit of the guardian. The beneficiaries of the guardians' trust would be the individuals selected by the court as the guardians of the client's children *during such time that they are acting as guardians*. Naming the beneficiary in this manner would allow the beneficiary of the guardians' trust to change if the guardian changes. Distributions from the guardians' trust would be made by the trustee for the guardians' support and maintenance, with the intent being to provide sufficient funds to enable the guardian to raise the clients' children according to the clients' wishes or standard of living without incurring personal financial burden. The guardians' trust would terminate when the guardianship ends and upon termination, any leftover funds distributed to (or held in trust for the benefit of) the children. The use of a guardians' trust gives parents the peace of mind that their children will not be a financial burden upon the guardians.

II. DISTRIBUTION OF ASSETS

The other major concern parents often have when thinking about estate planning is deciding the best way to distribute assets to their children. The goal in distribution planning is to maximize control over the management and distribution of assets. Parents of minor children need to decide the best method for distributing the assets to the minor child as well as the best person to control those assets.

continued on next page

A. Distribution of Assets

1. Outright Distributions

When minor children are the outright beneficiaries of assets, either because they are named as beneficiaries of life insurance policies, retirement accounts, or other assets, or because they inherit property in a will that does not keep the money in trust or does not provide for distribution to a custodian under the Uniform Transfers to Minors Act, then it will be necessary for the court to appoint a guardian of the estate (property) of the minor.[8] In most cases, a payor of benefits or assets will only distribute the benefits or assets to a court-appointed guardian (even if a parent is the guardian of the person of minor).[9]

Guardians of the estate of a minor appointed by the court must give bond in the amount equal to the value of the minor's estate, and provide surety on that bond, unless surety is waived by statute because the amount is less than $15,000,[10] or in the case of guardians named in a will, surety is waived in the will.[11] The guardian of a minor's estate must file an inventory with the commissioner of accounts which details the minor's property within four months of becoming the guardian, and must file an accounting with the commissioner of accounts within six months, and then on an annual basis.[12] The fees associated with filing accountings with the Commissioner of Accounts under the State of Virginia voluntary fee guidelines range from $116 to a maximum of $5,016 per year and are based on the value of the minor's estate.[13] It is easy to see how the expenses related to preparing and filing the accounting could erode the value of the assets being held for the minor over time.

Another complicating factor with court-appointed guardianships is that guardians of the estate of a minor are limited in their ability to make distributions from the minor's estate for the support of the minor when the child has a living parent (even if the living parent is the guardian).[14] This is because a parent has a legal obligation to support his or her minor child.[15] Under Virginia law, the guardian of the estate can make a distribution to a minor with a living parent only if (a) the parent is unable to fulfill that duty of support; (b) the parent is not required to provide the support; or (c) the distribution is beyond the scope of the parental duty.[16] Even if a request for a distribution meets these guidelines, the guardian must first seek Court authorization before any distribution can be made.[17] The only exception to this rule is that distributions of up to $3,000 per year will be allowed without court approval provided that the distributions meet the same criteria for Court authorization.[18] Thus, naming a minor child as the outright beneficiary of an asset can severely limit the guardian's ability to use such funds for the child when the child has a living parent, and such a result could completely frustrate the donor's intent for naming the minor child as the beneficiary.

2. Uniform Transfers to Minors Act

Under the Virginia Uniform Transfers to Minors Act (UTMA), property is transferred to a custodian who holds and administers the property for the benefit of a minor.[19] The nomination of a custodian can be made in a will, trust, deed, or instrument exercising a power of appointment, or in a beneficiary designation.[20] A custodian is nominated by naming the custodian followed by the phrase "as custodian for (minor) under the Virginia Uniform Transfers to Minors Act."[21] If desired, the custodianship can be extended until age twenty-one (21) by adding "(21)" after the phrase "Virginia Uniform Transfers to Minors Act."[22] Transfers can only be made for a single beneficiary and there can only be a single custodian.[23]

The benefits of an UTMA custodianship are numerous: (1) any type of property can be transferred;[24] (2) the custodian does not have to post bond,[25] does not have to file accountings unless mandated by the court,[26] and does not have to file fiduciary income tax returns; and (3) the termination of a Virginia UTMA custodianship can be extended to twenty-one (21) years rather than eighteen (18) as long as the proper designation is made.[27]

One disadvantage to an UTMA custodianship is that property must be distributed completely at twenty-one (21) years. Although there are exceptions, many parents would not feel comfortable with a twenty-one (21) year-old having complete control of assets. Another disadvantage to an UTMA custodianship is the potential income tax consequences in a situation in which a surviving parent is the custodian. If the income from the custodial property is used to discharge a support obligation (which is permitted in Virginia),[28] then the parent is subject to taxation on that income.[29] For this reason, it is advisable to nominate as custodian someone who does not have a legal obligation to support the minor.

3. Trust Under Will

Parents could also distribute assets to children by creating trusts under will, but there are several drawbacks to doing so. First, trusts under will require probate, which can delay the distribution of the assets because the assets must first go through the probate process (fiduciary qualification, notification to creditors, and filing of inventories and accountings) before the trust can be funded. Second, the probate process will reduce the amount of assets available to take care of the child because of probate taxes, fees, and expenses. Third, trusts under will only go into effect upon client's death (and not incapacity), so that assets are not necessarily available to provide for children in case of a parent's incapacity, and finally, trustees of trusts under will must file annual accountings with the Commissioner of accounts (in addition to probate fees) unless the will waives the accounting requirement.[30] The fees associated with filing accountings for trusts under will are similar to those for estates and are based on the value of the property held in trust.[31]

4. Revocable Trust

A revocable trust (whether individual or joint) offers much more flexibility in the distribution of assets than outright distributions, UTMA custodianships, and trusts under will. First, assets in a revocable trust do not have to go through the probate process, so assets are more readily available to the child. Second, assets do not have to be distributed to children at eighteen (18) [or twenty-one (21)] when they likely do not have the maturity to handle the money—rather, parents can specify that assets are to be distributed to children at older ages [such as thirty (30) or forty (40)] with periodic distributions of principal. The key is that parents are able to customize the distribution scheme to suit their preferences.

Through the revocable trust structure, parents establish rules for how and when their children receive assets, thereby maintaining as much control as possible. For example, in an age forty (40) trust, the trustee would provide discretionary income and principal to the child for his or her needs, and would distribute portions of the principal at ages thirty (30) and thirty-five (35), and the balance at age forty (40).

Revocable trusts can also provide a flexible way for divorced clients to handle incomplete property settlement agreements. Many property settlement agreements require an ex-spouse to maintain a certain level of life insurance for minor children. The property settlement agreement usually has a vague requirement that the beneficiary of the life insurance policy proceeds be the former spouse as "trustee" for the children. Yet, in many cases no trust agreement actually exists, and so the terms of the trust regarding how the former spouse can use such funds, when the trust terminates, and what happens to the remaining funds when the trust terminates, do not exist.

One estate planning solution to this problem is to direct the trustee of the divorced client's revocable living trust to place the required life

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insurance death benefit into a sub-trust called the "property settlement trust," with the ex-spouse as Trustee. The property settlement trust would fill in the missing terms from the property settlement agreement in a manner consistent with the intent of the property settlement agreement. For instance, the trustee would be able to use the trust assets for the support and maintenance of the children. The trust termination date would be when the minor children reach the age specified in the property settlement agreement, or when the ex-spouse (Trustee) dies. Upon the termination, the trust would direct that any leftover funds be distributed in a manner consistent with the client's overall estate plan.

B. Control of Assets

With regard to the management and control of assets, it is important for parents to think about whether they feel comfortable with the person who has the custody of the child also having control of the child's assets. There is no right or wrong answer, but there are many things to consider. In many cases it will depend on the personality and temperament of the person chosen as guardian. Because the role of guardian is that of a substitute parent and care giver, clients must decide whether the guardian (who will handle the day-to-day affairs of the children, as well as manage their education, extra-curricular activities, and religious upbringing) is best suited to handle the financial aspect of managing the child's assets. Clients must decide whether tasking the same person with both jobs will be overwhelming, and whether they are comfortable with there being less oversight involved if the guardian also controls the child's assets. On the other hand, if one person has custody of the child and one person has control of the financial assets, clients must be absolutely certain that the two can work together to provide for the child's needs.

Ensuring the care and well-being of children is the primary responsibility of parents. Part of that responsibility includes planning for situations in which parents may be unable to provide for themselves. It is critical that parents think about these difficult issues and make decisions so that a plan is in place in case the unexpected happens.

Kathi L. Ayers is an associate with the firm of Vaughan, Fincher & Sotelo, PC, in Vienna, VA. Ms. Ayers assists clients with the planning and preparation of estate planning documents, including trusts, wills, powers of attorney, and advance medical directives. She is a member of the Virginia State Bar, the Wills, Trusts and Estates Section of the Fairfax County Bar Association, and the Northern Virginia Estate Planning Council.

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[1] Va. Code § 26-59
[2] Va. Code § 31-4
[3] *Id.*
[4] Va. Code § 31-9
[5] Va. Code § 31-2
[6] *Judd v. Van Horn*, 195 Va. 988, 81 S.E.2d 432 (1954)
[7] Va. Code § 26-30
[8] Va. Code § 31-4
[9] 8.202(C)(1)-Estate Planning in Virginia, Third Edition, Volume II (2009 Supplement)
[10] Va. Code § 26-4
[11] Va. Code § 31-6
[12] Va. Code § 26-12(B); Va. Code § 26-17.4(A) and (B)
[13] http://www.fairfaxcommissionerofaccounts.org/open/docs/resource.comfee.guardfees.pdf
[14] Va. Code § 38-8-1
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Va. Code § 38-8.2
[19] Va. Code § 31-38
[20] Va. Code § 31-39
[21] *Id.*
[22] Va. Code § 31-45(D)
[23] Va. Code § 31-46
[24] Va. Code § 31-45
[25] Va. Code § 31-51
[26] Va. Code § 31-55
[27] Va. Code § 32-45(D)
[28] Va. Code § 31-50
[29] Rev. Rul. 56-484, 1956-2 C.B. 23
[30] Va. Code § 26-17.6
[31] http://wwwfairfaxcommissionerofaccounts.org/open/docs/resource.comfee.guardfees.pdf

UPCOMING CLEs

TOPICS IN BUSINESS REPRESENTATION CLE
April 26, 2010
1:00-3:30 PM
2.0 MCLE Credits
Location: Maggiano's Little Italy
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$120.00 Attorney Non-Members

10th ANNUAL SPRING
GOLF TOURNAMENT
May 10, 2010
Location: Westfields Golf Club

YOUR FIRST IN COURT: WHAT TO EXPECT AND WHAT THE BENCH EXPECTS OF YOU CLE
May 26, 2010
5:00-7:00 PM
2.0 MCLE Credits
Location: Fairfax County Courthouse, Room 404
$60.00 FBA Young Lawyers and Attorney Members
$75.00 Attorney Non-Members

INTELLECTUAL PROPERTY: THE IMPACT OF THE SUPREME COURT'S *BILSKI* DECISION CLE
May 27,2010
5:00-6:30 PM
1.5 CLE Credits
$70.00 FBA Attorney Members
$`100 Attorney Non-Members
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ANNOUNCEMENTS

AOUN & STANFORD, P.C. is pleased to announce that **CAROLINE D. LaFORGE** has become associated with the firm. Ms. LaForge attended Clemson University and obtained her law degree from Creighton University School of Law. Ms. LaForge is licensed to practice in Virginia and Washington, DC. She is a member of the Fairfax and Arlington Bar Associations, and concentrates her practice primarily on family law, wills and estate planning, and civil litigation.

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PRESIDENT'S COLUMN

continued from page 2

the Fairfax Public Law Library. Attendees can check out the library facility while enjoying hors d'oeuvres and listening to the melodies of Judge Marcus Williams and Penny Welke. Tours of the newly-launched Law Library Computer Training Room will be conducted by the Director of the Law Library, Tom Pulver. Both events are open to the public and RSVPs are requested to Courtnie Norris at cnorris@fairfaxbar.org.

On Saturday, May 1, from 1:00 - 5:00 PM, Weiner, Rohrstaff & Spivey will be holding the 10th Annual Weiner Roast at 10605 Judicial Drive in Fairfax City. This year activities will include music, weiners root beer floats, cotton candy, shoe-shines, and entertainment. Attendees can make a charitable donation at the door or purchase a shoe-shine. Donations benefit the charities of the Fairfax Law Foundation.

Finally, on Sunday, May 2, at 8:00 AM, the Fairfax Law Foundation will be holding its Inaugural "Run For Justice" 5k race at Tysons Corner. Proceeds from the race will go to the Fairfax Law Foundation. This event is also open to the public and all runners and charitable donations encouraged.

Law Day is an important part of our connection to the local community, but recently we have lost touch with its roots. Help us revitalize the true meaning of Law Day by attending some, or all, of the events planned. By becoming an integral part of the legal and local community, you can keep the spirit of Law Day alive. ■

Subleasing: THERE IS MORE TO IT THAN YOU MAY THINK

by Dorothea W. Dickerman, Partner, McGuire Woods LLP

Clients or fellow attorneys from other practice areas often come to us commercial real estate practitioners and request assistance with a sublease. They invariably say: "Can you just look at this sublease quickly. Please don't spend a lot of time on it. It's just a sublease.

Just a sublease. We try to break the news gently: adequate legal advice on a sublease does not mean a "shorter" or "less serious" review than the advice we (or any other practitioner) might give on a direct lease. In fact, adequate legal advice on a sublease, whether on behalf of the proposed subtenant, prime tenant/sublandlord or landlord, can often be more complex and require more time than a lease review. In the current market, space available for sublet is increasing as sublessors (prime tenants) look to shed excess space and some businesses (potential subtenants) are seeking shorter terms and lower rents in what they hope will be better space than what they could afford a year ago.

We discuss below a few of the many reasons why it pays to have complete professional review of a sublease.

1. **The Prime Lease**. For a subtenant, the most important legal service a lawyer can provide is review of not only the sublease, but also of the prime lease between its immediate landlord (the prime tenant) and the landlord. A subtenant has no contract with the landlord enabling the subtanant to occupy its space. A subtenant's rights to the space are only as good as its sublandlord's rights to that space. Therefore, reading the sublease alone is never adequate. The prime lease may contain time restrictions, use restrictions, or form estoppels that are unworkable for the subtenant, and let's not even mention the prime lease that terminates by its terms if the space is sublet!

2. **Landlord's Right to Approve**. Most leases require a tenant obtain written consent from its landlord before subleasing any portion of the tenant's space. The landlord's review right may be in its "sole and absolute discretion" (which translates as "arbitrary" or "no reason"), or "reasonable discretion" or "conditioned" upon various specified conditions. But no matter what, a landlord's review always takes time. For a subtenant, it is critical to know (i) how much time a landlord has to review the proposed sublease (is it 15 days? 30 days? a reasonable period? unspecified?), and (ii) whether there are specific materials that the landlord will require to complete its review, such as written materials demonstrating the financial strength of the subtenant, or a description of the subtenant's proposed use, or a requirement that the initial tenant remain liable on the lease, to name a few.

No subtenant wants to be surprised at the end of a 30-day or 45-day waiting period with rejection by a landlord that is well within its rights for a reason that was not specified in the sublease, but was rather plainly stated in the lease!

3. **Financial Conditions of the Sublessor**. While a sublessor in financial straits with too much space may be willing to offer bargain prices on rental rates just to lower its losses, the subtenant should consider the sublessor's financial condition carefully. In a bankruptcy, a lease is an asset to the bankrupt estate. A bankrupt sublessor will have two lease assets: one lease up stream to its lessor and one lease down stream to its sublessee. Both of these leases are subject to special treatment in the sublessor's bankruptcy—not addressed here. Importantly, though, it bears repeating that a bankrupt sublessor spells complications for both the landlord and the subtenant.

4. **Three-Way Conversation**. While it may appear that the landlord can just approve or disapprove a sublease, the lease may contain a pass-through for legal fees the landlord can charge for review of a sublease. Some of these fees can be substantial; others are capped. Or it may be that the language of the lease is more favorable to a sublease and prohibits an assignment of lease. Or the sublease may specifically limit the actions or remedies of the subtenant in the premises to what is permitted under the prime lease. The sublessor may not be able to compel the landlord to cure its default under the sublease. A performing subtenant without a documented non-disturbance with the landlord (or its lender) may find itself dispossessed of its space if the prime tenant defaults on the lease (or the landlord on its loan). Any of these circumstances could require the sublessor to intermediate between its landlord and its proposed subtenant during negotiation of the sublease, conveying messages and positions of those parties as all three parties negotiate to a conclusion.

Despite the pressure to create a simple and straightforward sublease document quickly and cheaply, these are only a few of the reasons it is always wise to engage a knowledgeable commercial leasing attorney to check the prime lease and to tailor the sublease to meet the specific needs of the parties. Despite everyone's fondest wishes, a sublease takes more time and thought to produce properly than most people initially think. ■

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April 30, 2010	**Judicial Portrait Presentations: Judges Finch and McWeeny; Followed by Law Library Open House Reception**
May 1, 2010	**Law Day Weiner Roast**
May 2, 2010	**Fairfax Law Foundation "Run4Justice" 5k**
May 10, 2010	**10th Annual Spring Gold Tournament**
May 21, 2010	**Investiture of the Honorable Brett A. Kassabian**
May 26, 2010	**Your First Time in Court: What to Expect and What the Bench Expects of You CLE**
May 27, 2010	**Intellectual Property: The Impact of the Supreme Court *Bilski* Decision CLE**
June 9, 2010	**FBA Annual Meeting Luncheon (Note: New Date)**
June 25, 2010	**7th Edition Fairfax Circuit Court Practice Manual CLE**
June 25, 2010	**Judicial Portrait Presentations: Judges Klein and Stitt**

For more information on Upcoming Events/Programs, please visit www.fairfaxbar.org or call 703-246-2740