

JOURNAL

Newsletter of the Fairfax Bar Association www.fairfaxbar.org October/November 2010

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See Details on Page 14



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2010-2011

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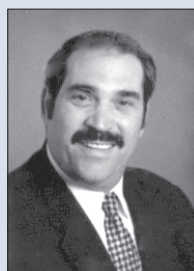
After receiving his B.A. from GMU, Gerry received his M.A. in History from Catholic University and his J.D. from George Mason University School of Law. He currently litigates on behalf of clients concerning public and private corporate governance, intellectual property and Internet issues. Aside from his contributions to the FLF, Gerry has served as Chair of the Annual Fund Committee of GMU and as Assistant Scout Master for his sons' scout troop.

Michael A. Minter, President Elect/VP — *Miles & Stockbridge, P.C.*



Michael graduated with a B.S. in Engineering from Cornell University and completed his J.D. at Georgetown University. Presently, he represents domestic and foreign companies in matters involving patent acquisitions, trademarks, copyrights, licensing, and other business matters that arise in the electromechanical, computer, Internet, information technology, bioinformatics, telecommunications, and biometrics fields. Aside from his work with the FLF, he has served on the FBA Board of Directors as a Director and General Counsel, as Chair of the Technology Committee, and as Co-Chair of the Law Practice Management Section.

Luis A. Perez, Secretary — *Luis A. Perez, P.C.*



Luis received his B.S. from the University of Puerto Rico and J.D. from the University of Puerto Rico's School of Law, and later received his LL.M. from Georgetown. He is a solo practitioner focusing on domestic, juvenile, and criminal matters. His other service includes being a Board Member for the Fairfax Partnership Against Youth Violence, Chair of the FBA Juvenile & Domestic Relations Committee, and Past-President of the Hispanic Bar Association.

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President's Column

by David J. Gogal, Esq.

LAW AND EDUCATION

Fairfax Bar Association Programs Supported by Fairfax Law Foundation



As most FBA members are aware, some of our most effective outreach programs involve working with children. Our FBA members, for example, serve in the Model Judiciary Program, guiding eleventh and twelfth grade students to participate in both the trial and appellate phases of legal proceedings, conducting their mock trials before our very own judges from the Fairfax County Circuit and District Courts. Currently, approximately 300 students from high schools throughout Fairfax County participate in the Model Judiciary Program. FBA members who participate in this Program often also serve as speakers within the schools.

Perhaps less well known, though no less important, is the Devonshire Program, in which FBA members participate in a one-hour discussion with a group of at-risk teenagers, part of the three-day Devonshire Youth Alcohol and Other Drug Intervention Seminars. The youth, both boys and girls, generally range in age from 14 to 17 years old, and often have pending court dates.

The education program that requires some special attention this year is our Court Tour Program. Each year over 50 of our fellow FBA members provide between 50 and 60 tours for over 2,200 eighth grade students from 26 middle schools in Fairfax County. The students are guided by an FBA attorney member, visiting each of our Courts, participating in a mock trial, viewing a Circuit Court trial, and speaking with judges and court personnel.

Last year, due to the recession, Fairfax County determined it could no longer afford to pay the cost of transporting the students from the schools to the courthouse and back. The Fairfax Law Foundation launched the "Adopt-A-School" project to pay for transportation to bring the children to the courthouse. Last year, the following contributors from both the law community and the business community donated \$1,000 each and adopted middle schools to keep this valuable program running at full speed:

Laurie L. Dolson, P.C. — **Carson Middle School**

Odin, Feldman & Pittleman, P.C. — **Cooper Middle School**

Greenspun, Shapiro, David & Leary, P.C. — **Franklin Middle School**

W. Bruce Jennings, Fairfax City Self Storage — **Frost Middle School**

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William L. Schmidt & Associates, P.C. — **Liberty Middle School**

Christina Ayiotis, Esq. — **Longfellow Middle School**

Weiner, Rohrstaff & Spivey, PLC — **Robinson Secondary School**

Sonya M. Duchak, Esq. — **Stone Middle School**

Sensei Enterprises, Inc. — **Thoreau Middle School**

I would like to thank them for their contributions. However, for this year, we need renewed sponsorship to fund the middle schools. Please help us keep this important program operating again this year.

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FAIRFAX BAR JOURNAL

*Official Newsletter of the
Fairfax Bar Association*

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*All articles or advertising submitted to the
Fairfax Bar Journal are subject to the
editor's approval. The editor reserves the
right to reject any submissions that,
in the opinion of the editor,
are inappropriate for the Journal.*

FOUNDATION OFFICERS

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Jeff W. Dick, Treasurer — *MainStreet Bank*



Jeff graduated from the University of North Dakota with a B.S.B.A. in accounting and management and earned his Executive M.B.A. from the University of London. Currently, he is the Chairman, CEO, and President of MainStreet Bank. He serves the community not only on the FLF Board of Directors, but on the Dulles Regional Chamber of Commerce, the Herndon Downtown Alliance, and the Herndon Visitors Center.

NEW FLF BOARD OF DIRECTORS

Bruce M. Blanchard — *Odin, Feldman & Pittleman, P.C.*



After receiving his B.A. from the University of Virginia, Bruce received his J.D. from the T.C. Williams School of Law. He has spent the majority of his legal career trying a broad range of complex civil and criminal cases. His professional involvement includes serving on the FBA's Board of Directors, the Judicial Screening Committee, and as Commissioner in Chancery for the Fairfax County Circuit Court. He also served on the Board of Directors for the Prince William Health Foundation.

Christie A. Leary — *Greenspun, Shapiro, Davis & Leary, P.C.*



Christie received her B.A. from the College of William and Mary, and then went to receive her J.D. from George Mason School of Law. Her primary practice focus is on criminal and traffic law, personal injury, medical malpractice, and civil litigation. She has served on the FBA's Board of Directors and is a Past-President of the FBA's Young Lawyers Section.

Joshua B. Isaacs — *SmolenPlevy P.C.* (FBA Young Lawyers Section Representative)



Joshua B. Isaacs practices general litigation with an emphasis in family law, divorce, and custody with SmolenPlevy P.C. Joshua earned his law degree from the Georgetown University Law Center and he received his Bachelor of Arts degree with a major in Political Science from Washington University in St. Louis. He currently serves as the President-Elect of the Board of Directors of the FBA's Young Lawyers Section.

Returning Members:

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Richard C. Sullivan, Jr.
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President's Column

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I also want to thank those FBA members who have participated in the Court Tour Program during the 2009-2010 school year. Your hard work and dedication is greatly appreciated not only by the Fairfax Law Foundation and the Fairfax Bar Association, but also by the entire community.

We thank the following court tour guides for participating in the court tours this past year:

Craig Anderson
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Richard Sullivan
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Bob Walker
Lauren Whitley

Q&A WITH HON. MICHAEL F. DEVINE



*Honorable Michael F. Devine
Fairfax County Circuit Court Judge*

Q. Let's start at the beginning...where were you born?

A. I was born on Long Island, New York, on the south shore in a little town called Massapequa.

Q. How did you make your way to Virginia?

A. I graduated from college with a degree in political science and I worked one semester with a U.S. Senator, and I really enjoyed it. So I wanted to come down to work on Capitol Hill. After I graduated from college, I looked for a job down here, finally got one, and moved. Actually, I moved before I had the job; got the job a few weeks after I moved. I worked on Capitol Hill for a couple of years. Then, looking at law schools, I only applied to Virginia schools.

Q. Going back a bit, what were some of your interests in high school or junior high?

A. I ran track since grade school, so I ran track all through junior high and high school. I ran just about every season—cross-country, winter, and spring. Really, between that and school work, that was pretty much everything. Then I came from a relatively big family, so we always did lots of things together.

Q. You already mentioned college—where did you go and why did you choose to go there?

A. That's an interesting story. I graduated from the State University of New York at Stony Brook. Actually, I started out in a smaller college within the SUNY system known as Oneonta. I stayed there for two years, and then came back to be closer to friends and family on Long Island, that's where Stony Brook is. Plus, my brother was already going there, and I wanted to graduate from a bigger university.

Q. What made you decide that you wanted to go to law school?

A. I think it was because I didn't think I'd be good at anything else. I had an interest in law because of working on Capitol Hill; you see how the law affects people. My original intent was to go to law school, and then go back to Capitol Hill with a more

substantive position. I decided to help people on a more individual basis, rather than working in the halls of Congress. But the real reason why I wanted to go to law school was because I thought I'd be fairly certain to get a job after graduate school.

Q. Every soon-to-be graduate has their "dream job." Did you have a "dream job" as you approached the end of your law school days and if so, what was it?

A. Oh sure, at the time, working for the Department of Justice, doing civil rights work, or high profile public corruption cases. I think that would have been the dream job. Never got close to it! Then after incurring a lot of debt, unfortunately, I had to take a job that began to pay some money, so I took a job with a big downtown firm in Washington.

Q. What did you learn from your first job and was there one thing that you took away from that job?

A. Yes, definitely. What I learned was that there's a big difference between being a litigator and being a trial attorney. I learned it's a lot more fun to be a trial attorney.

Q. Why is that?

A. I think because there's a bit more showmanship in being a trial attorney, and it's more exciting to put on the show than to do all the hard work necessary to put the show together, which is what litigators do. The best litigators don't go to court. For me, that was the most fun part.

Q. Your bio covered a lot of areas—corporate contracts, environmental liabilities, the Office of the Public Defender, just to name a few. What aspect did you enjoy the most?

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A. Working at Dickstein, I worked on a variety of civil matters, but there was very little trial work. I wanted to get that trial experience, so I took a huge pay cut, and took a job at the Public Defender's Office here in Fairfax. And I haven't left—been in Fairfax ever since!

There's no greater experience than successfully defending somebody you know to be innocent. I had that experience when I obtained a not guilty verdict in a murder case. After a great deal of investigation, I was convinced and so was the jury, that my client wasn't responsible for the victim's death.

What did you enjoy the least?

For me, it was being a junior associate on a huge document-intensive case where all we did was look for documents, organize documents, and read documents. This was before the age of computers.

Q. Trying to create a work-life balance, what extra-curricular activities did you enjoy or now enjoy?

A. I have two small children now, so everything is centered around them—we go to the park, the pool. Whatever they would find fun and engaging, is fun for us. Before they were born, I used to do a lot of bicycle riding around Central Virginia and hiking in the mountains.

Q. If you could go back through any point in your career and tell yourself something that you now know, what would that be?

A. Don't let your work define who you are. It is an important part of who you are, but not all there is.

Q. Keeping with the theme of reflecting on the past, what was the best piece of advice someone gave you?

A. The piece of advice that had the most influence on me was probably my father telling us all as children to settle problems with our words and not our fists. I've been doing that since I was a kid, and I think it has a lot to do with why I became a lawyer.

Q. What led you to the decision to become a judge?

A. It turned out to be a lot more interesting and challenging than I thought it would be. I became a substitute judge because I wanted to become a better lawyer, but I also came to appreciate how difficult and challenging being a judge could be. I thought that new type of challenge would keep me interested and invigorated for the next 20 years.

Q. What is the most surprising aspect of your new position so far?

A. I was surprised that I'd have so little time outside of court. I thought, for some reason, and I don't know why, that I'd have more time to prepare in advance and think and write after hearing a case, and there's none of that—except for nights and weekends.

Q. Is that just Fairfax County?

A. No, it's probably true for most judges in most places. Probably more true in other places than here. I'm not sure why I expected something different, but I did. It was just naive on my part.

continued on next page

The advertisement features a large, high-quality photograph of a modern, single-story house with a prominent arched front entrance supported by white columns. The house has a mix of brick and siding. In the bottom left corner, there is a logo consisting of a 3x3 grid of squares. The middle square contains the letters 'TCS' in a stylized font. The other squares contain various architectural details like columns, arches, and windows. Below the logo, the text 'Since 1981' is written. To the right of the logo, the website 'tcsbuilding.com' is listed. On the right side of the advertisement, the text 'Design-Build, Home Additions Kitchens & Bathrooms Home Renovations' is displayed in a large, bold font. Below this, a call to action reads 'Call us today and schedule your free design consultation! tel. 703-525-6888'.

HON. MICHAEL F. DEVINE INTERVIEW

continued from previous page

Q. Is there anything that you'd like our members to know?

A. I think being in court is the most fun thing that any lawyer can do and even though we're dealing with life or death issues sometimes, we can all enjoy and appreciate the process if we respect each other and treat each other professionally. Without those things, going to court could be the most miserable experience.

Q. For part two of that question, what would you like practicing attorneys to know, and especially the young attorneys?

A. Even the most junior attorney in court can win if they are prepared and have the confidence in themselves to stand up to the judge and their opponent. You always must do that in a professional manner. The other advice I would give generally, is that the lawyers in any case usually know more about the law and the facts than the judge will know. The focus should be on giving the judge those tools to rule in their favor, as opposed to settling scores or scoring points against an opponent. The lawyer needs to think about what will be important to the judge first.

Q. Last question. It starts with a story from the *Wall Street Journal*. There was an attorney who had a successful practice in New York and one day, he decided to quit and open his own balloon business. If you were to decide to leave the legal field all together—tomorrow—what would you do?

A. I'd open up a bar that would be a venue for local bands and we'd have everything from folk music to punk. A local CBGB's if you will. ■

ANNOUNCEMENT

MERCERTRIGIANI—NEW RICHMOND OFFICE. MERCERTRIGIANI is pleased to announce the relocation of the firm's downtown Richmond office. 11 South Twelfth Street, Suite 401, Richmond, VA 23219; 804-888-8800; fax: 804-888-8801.

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HUGE PROBLEM WITH REVERSE MORTGAGE INDUSTRY

by Evan H. Farr, Certified Elder Law Attorney; Elder Law Section Co-Chair

I Used to Like Reverse Mortgages.

I have, in the past, praised the use of Reverse Mortgages as a way for seniors to pay for Home Care so they don't have to leave their home and move into a long-term care facility. See, for example, my January 30, 2010 blog posting on this subject at:

<http://blog.virginiaelderlaw.com/2010/01/using-reverse-mortgages-to-pay-for-home-care/>

Now I Don't.

Unfortunately, I must now retract my praise, as we have lately been running into a huge problem with the reverse mortgage industry—most reverse mortgage lenders are now routinely second-guessing the legitimacy of every Power of Attorney document (POA) presented for use in connection with obtaining a reverse mortgage, creating an unnecessary and sometimes insurmountable roadblock for elderly clients who are incapacitated and need a reverse mortgage to be able to afford the home care or home modifications necessary to remain at home and age in place.

Here's Why.

Here's what's happened to two of my clients recently, using two different reverse mortgage lenders: when the Agent under POA tried to start the reverse mortgage process, the reverse mortgage lenders refused to honor the POA unless the Agent (1) obtained a letter from the applicant's doctor or former doctor stating that the

applicant was mentally competent when the POA was originally signed (i.e., a "competency letter"); and (2) a letter from the applicant's doctor stating that the applicant is not now mentally competent (i.e., an "incompetency letter").

Instead of honoring the well-established legal presumption that all adults are competent to sign legal and contractual documents unless proven otherwise (similar to the legal presumption in criminal law that all persons are innocent unless proven guilty), the leaders of the reverse mortgage industry are taking the law into their own hands and reversing the presumption of competence by essentially presuming that all reverse mortgage applicants were incompetent at the time of signing their Powers of Attorney, and forcing the families of these now-incompetent applicants to prove that these applicants were competent when they signed their Powers of Attorney, often years prior to ever applying for a reverse mortgage. Worse yet, the reverse mortgage lenders are acting as judge and jury for these applicants, as the lenders are deciding whether to accept the "competency letter" and the "incompetency letter" from the applicant's physician, assuming these letters can even be obtained.

When I questioned the loan offer in one of these cases, the reply was as follows: "We have discussed this issue with several of our lenders and they all require a doctor's letter if we are using a POA where someone is incompetent, no matter their age. They want to

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make sure the person was competent when they signed the POA, and that the person can no longer handle their financial affairs. I understand you would never allow someone to sign a legal document who wasn't competent but we sometimes run into POAs which were printed off the Internet."

I mentioned this travesty to other elder law attorneys around Virginia and around the country and it seems that this is a universal problem that many seniors across the country are running into. One attorney shared with me that she checked with a reverse mortgage loan officer who has worked for two different reverse mortgage companies, and was advised that this is the policy with both of these reverse mortgage lenders. According to this attorney, the loan officer acknowledged that this may take the reverse mortgage tool off the table for many seniors as: (1) obtaining the required letters is burdensome and may be costly; (2) doctors are much more willing to render an opinion regarding incompetency versus competency; and (3) the legal assumption is competency when signing contractual documents, unless there were red flags or actual knowledge to the contrary.

I first brought this problem to the attention of the public on May 5, 2010, via my blog (blog.VirginiaElderLaw.com). The mega-site *Elder Law Answers* then did some additional research on the issue and published its own article on July 20, 2010, as a follow-up to my blog posting. You can read their article at: <http://tinyurl.com/ElderLawAnswersRevMogArticle>.

Why Is This Such a Huge Problem?

How does this policy eliminate the reverse mortgage as a tool for many seniors? Let's look at a typical scenario—the type of situation I see every day. Let's say you're 85, you've just had a major stroke, and you're no longer able to care for yourself. You either need a live-in caregiver in order to remain in your home or you need to go into a nursing home. Before your stroke, you had made it clear to your children that, like most elders, you never wanted to go to a nursing home, but would prefer to live out your life at home with in-home care as needed. The problem is you can't afford a live-in caregiver because your only income is Social Security, and you have no assets other than the equity in your home.

Your daughter, acting as Agent under the POA you gave her three years before your stroke, has two options:

Option 1: Your daughter can sell your home and place you in a nursing home. This option would be quite simple. POAs are routinely accepted in connection with the sale of homes, without being questioned and second-guessed by title companies and settlement attorneys or the purchaser's mortgage lender, so your daughter would have no problem selling your home. As for admitting you to a nursing home, that's also no problem—POAs are used every day to sign admission documents to nursing homes and other long-term care facilities.

Option 2: Your daughter can take out a reverse mortgage and draw out the equity in your home each month to pay for a live-in caregiver. Your daughter and all your other children would all prefer to honor your wishes and allow you to remain at home with a live-in caregiver. But wait...your daughter tries to get a reverse mortgage and is met by obstacle after obstacle. Even though your daughter can easily sell your house and move you into a nursing home using your perfectly valid Power of Attorney, the reverse mortgage lender will NOT accept the POA unless your daughter (1) obtains a letter from your doctor or former doctor stating that you were mentally competent when the POA was originally signed

AND (2) obtains a letter from your current doctor stating that you are now incompetent. Unfortunately, your doctor from three years ago (when you signed the POA) died two years ago; no one took over his medical practice, and your old medical records are therefore not available, so there is no doctor who can write a letter stating that you were competent three years ago when you signed the POA. Or maybe you were so healthy that you hadn't been to a doctor for five years prior to your stroke (or maybe you'd never been to a doctor prior to your stroke), so there are no medical records from three years ago and therefore no doctor to write a letter stating that you were competent three years ago when you signed the POA.

The End Result?

Because of the arbitrary and capricious roadblocks imposed by the reverse mortgage lender in connection with use of your POA, your daughter is forced to choose Option 1—selling your home and placing you in a nursing home.

In my view, the reverse mortgage industry is effectively shooting itself in its collective foot with this unfair policy, as they are turning away the very people who need a reverse mortgage the most—those frail elders who are unable to care for themselves but wish to remain at home and age in place rather than being forced to sell their home and move into a long-term care facility.

Illegal Discrimination In Lending?

Additionally, in my view, this practice by the reverse mortgage industry constitutes illegal discrimination in lending, as the reverse mortgage industry is essentially discriminating against disabled and incapacitated adults by imposing obstacles that are not imposed on able, competent adults.

Discrimination in mortgage lending is prohibited by the federal Fair Housing act, and HUD's Office of Fair Housing and Equal Opportunity actively enforces those provisions of the law. According to HUD, The Fair Housing Act makes it unlawful for a mortgage lender to refuse to make a mortgage loan based on "handicap," defined as "a physical or mental impairment which substantially limits one or more of such person's major life activities."

What to Do? Urge Your Clients to File a Complaint If This Happens to Them.

If any of your clients have experienced this type of discrimination, I encourage you to have them visit HUD's Housing Discrimination Complaint Website at http://tinyurl.com/Housing_Complaint and file a "lending discrimination complaint"—either online, by phone, or via mail.

If HUD and the reverse mortgage industry start getting enough complaints about this issue, perhaps they will reverse their position so that the reverse mortgage can once again be a useful tool for the elders who need it most. ■

Evan H. Farr is the principal attorney of the Farr Law Firm, and is a nationally-renowned expert, author, and lecturer in the fields of Medicaid Planning, Estate Planning, Asset Protection, and Special Needs Planning.

THE BENEFITS OF A LAW OFFICE PRACTICE MANAGEMENT AUDIT AND REVIEW OUTWEIGH AND MORE THAN JUSTIFY THE COSTS

by Alfred L. Carr, Esq., and Kavita Knowles, Esq., Co-Chairs of the FBA Law Practice Management Section

As practicing attorneys, especially solo and small firm practitioners, we all have had an occasional feeling of dread that wakes us up in the middle of the night, asking—did I handle that transaction correctly pursuant to Rule of Professional Conduct 1.15 Safekeeping Property? Did I reconcile the IOLTA this month, quarter, or year? Did I return that phone call? Did I file that appeal before the deadline or the SOL lapsed? Do I have a conflict with this client, or did I properly terminate the attorney-client relationship? More than likely, it is a choice many of the readers of this article have not made. Even though solo and small firm practitioners have cumulative pressures of not only practicing law, but “making it rain,” they must take an active role in managing a law office to ensure that short cuts, although tempting, are avoided; otherwise they can potentially lead to serious consequences for the lawyer and the firm.

When the temptation for any attorney or law office manager is too great, and the idea that the use of a short cut or two won't hurt this time (or the next time or the next time) becomes overwhelming, short cuts can establish a pattern and practice of ignoring the proper law firm IOLTA accounting practices, as well as other proper law office policies and procedures. It is time to get a law office practice management review and audit of the law firm's accounting practices, hardware and software, and policies and procedures that govern client interactions and law firm business transactions.

Advice from an Assistant Bar Counsel for the Virginia State Bar (VSB) recommends that attorneys hire a law office consultant to come in and perform a review and audit their law firm is a remedy to resolve Bar complaints. The typical response from the attorney, particularly solo practitioners, is that the cost of a law office audit is too high given the current profitability of the firm. When the attorney hires a law office consultant, and the consultant completes the audit and review and submits a report with recommendations to the attorney, there usually is a gasp for breath. Once the attorney implements the law office consultant's recommendations, however, experience of the vast majority was all, with the exception of only one attorney, found that they were able to get back to the practice of law and earn money at the same time. They began to work smarter, not harder, and make a profit. One attorney discovered that the law office had accounts receivable in excess of \$200,000—what a great feeling! One attorney that refused to follow through with an audit was indicted for felonious embezzlement and obtaining money by false pretenses. Why did this attorney resist the law office audit? The answer may be obvious to the reader.

Not all law office consultants are created equal, of course, and the results mentioned above are not guaranteed. There are two primary ways in which to select a law office consultant. One way is by word of mouth and the other is by and through a direct referral from VSB Counsel. An attorney can always search the Internet for a law office consultant. Factors to consider and/or questions to ask before hiring a law office consultant are as follows:

- Who conducts the audit and review?
- Years of Experience
- References
- Financial Stability of Firm

As part of your Virginia State Bar (VSB) dues, the VSB offers a unique benefit to licensed attorneys in Virginia. So long as you or an attorney in your firm does not have a pending bar complaint, an attorney may receive, at a reduced rate, a quick and dirty review of their law office IOLTA accounting practices. For more information on this benefit provided by the VSB, go to: <http://www.vsb.org/site/members/your-risk-manager/>. This link will provide you with the VSB Risk Manager's contact information and sets forth the scope of the telephone consultation service provided. Most importantly, there are fifteen (15) tips and helpful hints to run your law firm, with additional links to even more helpful information.

continued on page 14

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USE OF JUDICIAL NOTICE AND COLLATERAL ESTOPPEL IN SUMMARY JUDGMENT: THE LEGAL THEORY AND PRACTICAL APPLICATIONS

by Shari L. Klevens, Esq., Randy Evans, Esq., and Alanna Clair, Esq.

PART ONE: THE LEGAL THEORY

This article presents a unique approach to an old problem facing practitioners in Fairfax County: how to overcome the Commonwealth's restrictive summary judgment rules. As Fairfax County practitioners know, in Virginia, the rules do not permit summary judgment based on discovery depositions unless all parties to the action agree that the deposition may be so used. In Part One, this article will describe how the doctrines of judicial notice and collateral estoppel can be used together to establish a factual record that would support a finding of summary judgment. Part Two will provide practical applications for this approach and guidance on how to use the applicable rules advantageously.

Summary Judgment in Virginia

In federal court and in many state jurisdictions, summary judgment is a cost-saving way to dispose of undisputed factual issues or time-intensive legal issues before trial. Summary judgment is a reward for thorough discovery: basically, the parties may rely on pleadings, affidavits, depositions, documents produced by parties, interrogatories, and other materials in moving for summary judgment. Fed. R. Civ. P. 56. In Virginia, however, the rules are quite different. Fairfax litigants are bound by Supreme Court Rule 3:20 and Va. Code Ann. § 8.01-420, which significantly restrict what the courts can consider in connection with a motion for summary judgment, limiting the parties to pleadings, orders, and "admissions," in supporting a motion for summary judgment. The Virginia authority also specifically prohibits movants from relying on depositions in support of summary judgment, absent consent from all parties: "No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions." *Id.* Within these confines, it is much more difficult for Virginia practitioners to establish an "undisputed" factual record.

Use of Judicial Notice

Judicial notice is an important tool to avoid litigation of well-known acts. In Virginia, statutes provide that a court may take judicial notice of official publications or laws of other jurisdictions. Va. Code §§ 8.01-386 and 8.01-388. Additionally, a "trial court may take judicial notice of those facts that are either (1) so 'generally known' within the jurisdiction; or (2) so 'easily ascertainable' by reference to reliable sources that reasonably informed people in the community would not regard them as reasonably subject to dispute." *Taylor v. Commonwealth*, 502 S.E.2d 113, 116 (Va. Ct. App. 1998) (citations omitted).

Based on these principles, courts have recognized that it is appropriate for a "trial court [to take] judicial notice of the records of [an] underlying action[], a procedure long recognized as appropriate by our jurisprudence." *Titan America, LLC v. Riverton Inv. Corp.*, 264 Va 292,305 (2002). An important corollary to this power is the rule that Virginia trial courts have discretion in determining the scope of judicial notice: "Judicial notice permits a court to determine the existence of a fact without formal evidence tending to support that fact." *Scafetta v. Arlington County*, 13 Va. App. 646, 648, 414 S.E.2d 438, 439, *aff'd on rehearing*, 14 Va. App. 834, 425 S.E.2d 807 (1992). To maximize the impact of

judicial notice, however, a Fairfax County practitioner should combine its tenets with the doctrine of collateral estoppel, as discussed herein.

Use of Collateral Estoppel

Virginia's collateral estoppel doctrine "serve[s] the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy, and of promoting judicial economy by preventing needless litigation." *Alderman v. Chrysler Corp.*, 480 F. Supp. 600, 604 (E.D. Va. 1979). To prove that collateral estoppel should apply, (a) the parties of the proceedings, or their privies, must be the same; (b) the factual issue sought to be litigated must have been litigated in the prior action and must have been essential to the prior judgment; and (c) the prior action must have resulted in a valid, final judgment against the party sought to be precluded in the present action. *Transdualles Ctr., Inc. v. Sharma*, 252 Va. 20, 22-23 (1996). Courts also must examine whether there is "mutuality, i.e., whether a party to a current litigation would have been bound by the prior litigation if the factual issues in the prior action reached the opposite result. *Id.* at 23; *Nero v. Ferris*, 222 Va. 807, 812 (1981). Litigants have some flexibility in what evidence they use in seeking the application of collateral estoppel, as the doctrine of collateral estoppel does not prevent a party from relying upon or using the same evidence in a subsequent proceeding to prove a fact other than that for which it was offered in a prior proceeding. [*Dorn v. Commonwealth*, 348 S.E.2d 412 (Va. Ct. App. 1986)].

Although successful application of these factors does require careful drafting and argument, the relevant case law makes it possible to establish collateral estoppel in Virginia state courts. For example, Virginia courts have discretion to determine "that a party's interest is so identical with another that representation by one party is representation of the other's legal right." *State Water Control Bd. v. Smithfield Foods, Inc.*, 261 Va. 209, 214 (2001) (recognizing that there is "no single fixed definition of privity") (internal citations omitted). The Virginia Supreme Court also has said that "the mutuality doctrine should not be mechanistically applied." *Bates v. Devers*, 214 Va. 667, 671 n.7 (1974). Accordingly, the doctrine of collateral estoppel can be a useful tool in the belt of a Virginia litigator. In Part Two, we will address how a Fairfax litigator can use the doctrines of judicial notice and collateral estoppel described here to obtain summary judgment. ■

Part Two of this article will be published in the December 2010/January 2011 edition of the Journal.

FBA PARALEGAL SECTION NEWS

Our 2010-2011 Executive Committee has been elected. Our new officers are as follows:

Jessica A. Mendez, Chair — *Colten, Cummins, Watson & Vincent, P.C.*
Janice L. Day, Vice-Chair and Legislative Liaison — *Shoun, Bach, Walinsky & Curran, P.C.*
Janet Lawson, Continuing Paralegal Education Coordinator (CPE) — *Blankingship & Keith, P.C.*
Tina M. Fewell, Secretary and Activities Coordinator — *Shoun, Bach, Walinsky & Curran, P.C.*

Complete information about our Section, including our goals and objectives, photo gallery, our several community outreach projects, and our full calendar of events may be viewed on the Bar's website, located at www.fairfaxbar.org. To be routed to our Section's page, select "Who We Are," then "Committees/Sections," and then scroll down and click on "Paralegal." Join us on Facebook by searching for "FBA Paralegal Section."

The FBA Paralegal Section, together with the Fairfax Law Foundation, extend our sincere thanks to those who generously contributed to our recent collaborative school supply drive benefiting Mondloch House II, the county's largest family-based homeless shelter (a 45-bed facility).

Monetary contributions totaled an incredible \$1,295.00, which were expended to furnish the shelter's school-age children (including those in its transitional programs) with their school supply needs, including backpacks, binders, combination locks, calculators, etc. Moreover, we received approximately \$100.00 in non-monetary supply donations.

Every child received supplies conforming to lists distributed by their respective schools, where possible, and a backpack tailored to his/her likes (Sponge Bob, etc.).

The backpacks and supplies were delivered courtesy of Lasership Couriers on Friday, August 27, in time for the shelter's Back-to-School picnic. In addition to the individual filled backpacks, a wealth of surplus supplies and a check for nearly \$150.00 were delivered to help meet additional needs of the shelter's residents, as needed. The children and their parents, as well as the shelter's administration, were tremendously grateful.

Once again the FBA Paralegal Section and the Fairfax Law Foundation extend our sincere thanks to those who contributed their time and resources to this very worthwhile community project!

The FBA Paralegal Section is pleased to announce that **Rosslyn "Shelly" Woods**, employed by William B. Reichhardt & Associates, P.C., is our 2009-2010 Paralegal Certification Scholarship recipient, in the amount of \$200.00.

Education and certification are important to our Section and the profession as a whole. We are grateful to have established an annual scholarship offering.

Shelly is eligible to take the National Federation of Paralegal Association, Inc.'s Paralegal Advanced Competency Exam (PACE). As part of our Section's scholarship eligibility requirements, Shelly must take the exam between now and the end of February 2011. There are 20 paralegals within the Commonwealth of Virginia, and more than 700 paralegals nationwide, who have successfully completed PACE, and who are thus entitled to use the professional designation "RP" or Registered Paralegal.

Shelly's dedication to the profession and her fellow man is very much appreciated. She attended the Foreclosure/Housing Crisis Training Workshop and the Foreclosure Clinic sponsored by Legal Services of Northern Virginia (LSNV), and has successfully assisted attorney volunteers in that regard on behalf of LSNV clients. Shelly is also a tireless advocate for the deaf community and personally travelled to, and assisted with, rebuilding efforts in New Orleans following Hurricane Katrina.



Congratulations Shelly! Your selflessness and dedication to others is nothing short of awe-inspiring. Thank you for all that you do. ■

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GET INVOLVED!

Highlight on the General District Court Committee

by John Kassabian, Esq., Chair, and David A. Hirsch, Esq., Vice-Chair

The General District Court Committee acts as a liaison among the General District Court, the Fairfax Bar Association, and the public. The Committee addresses legitimate policy issues, procedures and concerns of the General District Court. The Committee works closely with the bench, the clerk's office, and the court services unit, and its meetings are typically well attended by members of those offices, along with Fairfax Bar Association members, and representatives from the Office of the Commonwealth's Attorney, and the Office of the Public Defender.

Issues reviewed by this Committee include, but are not limited to, docket control; enhancements and updates of automated court information systems, including Internet and electronic filings, and electronic payments of fines; promoting legal services to courtusers; procedural impacts of new legislation; safeguarding electronic and paper records from degradation; preparation and presentation of informative continuing legal education seminars regarding recent case law and legislation and demonstration of the enhanced courtroom evidentiary technology equipment, among other topics; promotion of informative brochures and documents explaining Court functions and ensuring that they are posted and written in appropriate languages to assist all court users; and review of safety and security needs to ensure the public, court employees, and all personnel can operate in a safe environment.

Towards the end of the last fiscal year, the Committee began dealing with the issue of reforming DWI/DUI procedures in an effort to mitigate the impact of *Melendez-Diaz* on the docket. That effort generated significant, positive participation and discussion. It is expected that the Committee will revisit the topic in the first part of this new fiscal year.

This year, we will also consider updating the "Pre-Trial & Sentencing Programs Available for Fairfax County Circuit & General District Court Defendants" manual. This excellent resource was last updated in 2005-2006. Significant to our consideration will be how we would be able to produce an updated manual in the current fiscal environment.

The Committee meets at 2:30 PM on the second Thursday of each month. Meetings are usually held in Conference Room 106 adjacent to the Traffic Clerk's office on the first floor. All FBA members who have a significant practice, whether civil or criminal, in the General District Court are encouraged to become active members of the Committee. This year, the Committee is chaired by John A. Kassabian, Esq., Kassabian & Kassabian, P.L.C., 703-750-3622, john@kassabianlawyers.com; Vice Chair is David A. Hirsch, Esq., Culin, Sharp, Autry & Day, P.L.C., 703-934-2940, dhirsch@csadlawyers.com. ■

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4:30-6:30 PM

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October 7 - 9, 2010

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jgill@fairfaxbar.org for more information

October 12, 2010 (Tuesday)

TECHNOLOGY IN FAIRFAX COURTROOMS:

COME KICK OUR TIRES! CLE

5:00-7:00 PM

2.0 CLE Credits *Approved*

Location: Fairfax County Courthouse, Courtroom 5J

\$100.00 FBA Members

\$130.00 Non-Members

October 13, 2010 (Wednesday)

LEGISLATIVE RECEPTION & FORUM

See back cover for details

October 25, 2010 (Monday)

ANNUAL LAW & TECHNOLOGY CLE

2:30 - 7:30 PM

4.0 MCLE Credits *Pending*

Location: Fairfax County Courthouse, Courtroom 5J

\$140.00 FBA Attorney Members

\$200.00 Attorney Non-Members

October 28, 2010 (Thursday)

FBA ANNUAL CRIMINAL LAW CLE

3:00 - 7:30 PM

Location: Fairfax County Courthouse

4.0 MCLE Credits *Pending*

\$140.00 FBA Attorney Members

\$200.00 Attorney Non-Members

October 29, 2010 (Friday)

9th ANNUAL JAZZ 4 JUSTICE

8:00 PM

Location: George Mason University Center for the Arts,
Fairfax, VA

\$20.00 Adults

\$15.00 Students/Seniors

November 8, 2010 (Monday)

CIRCUIT COURT MANUAL UPDATE CLE

5:00 - 7:00 PM

Location: Fairfax County Courthouse, Courtroom 1E

2.0 MCLE Credits *Pending*

\$70.00 FBA Members; \$100.00 Non-Members

December 2, 2010 (Thursday)

ANNUAL STATE OF THE JUDICIARY LUNCHEON

Location: Country Club of Fairfax

5110 Ox Road, Fairfax, VA

\$30.00 Members

\$35.00 Non-Members

Contact: Courtne Norris at CNorris@fairfaxbar.org

or 703-246-2084

LAW OFFICE PRACTICE MANAGEMENT

continued from page 9

For more information beneficial to attorneys and non-attorneys that are responsible for the day-to-day management of the law office, the Fairfax Bar Association is presenting its **Annual Law and Technology CLE** on **October 25, 2010**. This CLE provides a wealth of practical information vital to the management of any law firm. The FBA also offers a monthly CLE titled **Technology in Fairfax Courtrooms: Come Kick Our Tires!** that teaches attorneys and non-attorneys how to use the newly installed visual and audio technology in the courthouse. A must-take CLE for practicing attorneys in state or federal courts. ■

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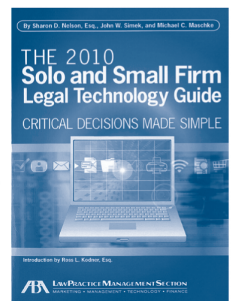
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Time: Reception 6:00-7:00 p.m.
Forum 7:00-8:00 p.m.

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Please RSVP by October 6, 2010 to
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