

JOURNAL

Newsletter of the Fairfax Bar Association

www.fairfaxbar.org

February/March 2009

Now Boarding: Get Ready for the FBA's Annual Bench-Bar Dinner Dance

Every year, the Fairfax Bar Association invites all members of the bench and bar to enjoy an evening of fun and camaraderie. The FBA has taken its guests to tinsel town, the Wild West, and even managed to find that lost shaker of salt in Margaritaville. This year, guests can polish up their French, or at least their French accents, because this year's theme is "A Passport to Paris." The upcoming rendezvous will be held on Saturday, March 7, 2009, at the McLean Hilton. An open bar reception and silent auction will begin at 6:00 p.m., and dinner and dancing, with music provided by "Too Much Fun," featuring Grammy nominated singer and songwriter Bill Kirchen, will begin at 8:00 p.m.

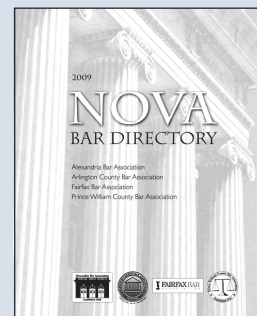
At its largest event of the year, the FBA will also pay tribute to judges who have impacted the Fairfax County Courthouse. The Fairfax Bar will present a portrait to Judge Robert W. Wooldridge, Jr., and will have a special commemoration to Honorable David T. Stitt.

"One of the biggest benefits of the FBA membership is the opportunity to spend time with judges and fellow attorneys outside the normal work environment, and the Bench-Bar Dinner Dance, as always, is the year's largest social gathering," noted FBA President Julie Heiden.

Again this year, the Silent Auction, which will benefit the charitable 501(c)(3) Fairfax Law Foundation, offers getaways, tickets to sporting events, golf outings, and special themed baskets donated by members of the local legal community. This year jewelry will be provided by *Julia's Fine Jewelry* located in Fairfax Corner. By bidding on these fabulous items, the Foundation is able to fund community based programs such as court tours for school children, and helping people find a means to justice through the *pro bono* programs.

Sponsorship opportunities are available. For more details, to register, or to sponsor the event, contact Courtne L. Norris at 703-246-2084; email: cnorris@fairfaxbar.org. ■

Grab Your Bar Directory Today!



The local bar associations are once again collaborating for a special project. The Alexandria, Arlington, Fairfax, and Prince William County Bar Associations have put together the NOVA Bar Directory. This one-of-a-kind directory contains the names, contact information, and photographs, when available, of the combined membership of the participating bar associations.

"Local bar association members want a membership directory—it gives the members a tangible benefit of membership. This directory is the only one I've seen where photos are combined with contact information," said Alissa Hudson, Executive Director for the Prince William County Bar.

The directory also contains information for the local courts, government attorneys, and related agencies for the 17th, 18th, 19th, and 31st Judicial Circuits.

A great amount of time and effort has been spent to ensure the accuracy of this project (listings are current as of October 1, 2008). To provide updates on a listing for use in future editions, please contact the Alexandria, Arlington, Fairfax, or Prince William County Bar Associations. ■

Copies of the NOVA Bar Directory can be found at: <http://www.fairfaxbar.org> and may be purchased for \$25.00, plus shipping. The Directories are also sold at the FBA office for \$25.00, plus tax. Portions of the proceeds will benefit your local bar association.

President's Column

by Julie H. Heiden

Although our membership has grown tremendously over the years, it is clear one thing continues to remain most important to our members—the opportunity to network and socialize with their peers and the judges. Recognizing this important aspect of bar membership, the Board has made efforts to increase opportunities for social and professional networking for our members.



We have enjoyed two evenings with remarkably talented musicians Judge Marcus Williams and Matt McConnell at our newly-developed Bench Bar Happy Hours. We hope to host similar gatherings throughout the year. Stay tuned for details!

At the FBA January luncheon we were fortunate to host Anthony Pitch, author of the newly-released book *"They Have Killed Papa Dead!": The Road to Ford's Theatre, Abraham Lincoln's Murder, and the Rage for Vengeance*. Since 2009 marks the 200th Anniversary of Abraham Lincoln's birthday, the bar was pleased to present this luncheon in his honor. A wonderful storyteller, Anthony Pitch brought Abraham Lincoln to life through his passionate recitation of various diaries, letters, and speeches written by the President. In a narrative free from notes, Mr. Pitch mesmerized us with his intimate historical knowledge of Abraham Lincoln and the copious details surrounding the fateful night at Ford's Theatre.

We were delighted folks were able to linger for a short while after Mr. Pitch's presentation. It is our hope future luncheons will also allow time for folks to catch up with old friends and to make new friends, as well.

Our next big event is the Bench-Bar Dinner Dance—"A Passport to Paris." Hopefully you'll be able to join us for this fun-filled evening. New this year is an open bar for the first two hours; so please come early for cocktails, conversation, and an opportunity to bid at the silent auction. Thanks to the help and connections of Judge Jonathan Thacher, we'll be entertained by the musical talents of Grammy nominated singer and songwriter, Bill Kirchen, and his band, "Too Much Fun."

If you have ideas on how the bar can foster additional opportunities for members to network with one another, to share ideas with one another, or to simply have fun with one another, please let us know. We are always welcome to new ideas and are hoping that by reaching out to our members we will be able to continue to enhance the benefits of being a member of the Fairfax Bar. ■

FAIRFAX BAR JOURNAL

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Save the Dates!

March 13, 2009

Judge David S. Schell Investiture

March 27, 2009

Judge Jan L. Brodie Investiture

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

**APPLICATIONS ARE NOW BEING ACCEPTED
for
FBA VICE PRESIDENT & BOARD OF DIRECTORS**

FBA Board

The Nominating Committee, chaired by Immediate Past President Daniel H. Ruttenberg, is 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 application to the FBA by **4:00 p.m. on Thursday, March 12, 2009.**

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.

Candidate applications will be posted on the FBA web site at:

<http://www.fairfaxbar.org/displaycommon.cfm?an=&subarticlenbr=281>

*****You MUST enclose a photo with your application*****

The application can be found at:

<http://www.fairfaxbar.org/associations/4650/files/VPApplication.doc>
as a Word document.

Judicial Screening

The Nominating Committee will also consider applications for the **FBA Judicial Screening Committee** and **Alternates**. The deadline is also **March 12, 2009.**

Interested persons can find the application at:

<http://fairfaxbar.org/associations/4650/files/CAApplication.doc>
as a Word document.

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Lawyer Referral & Information Service (LRIS)...A Snapshot

by Donna J. McBride, LRIS Director

For questions about LRIS or if you are interested in becoming a part of this service, call 703-246-3784 or email dmcbride@fairfaxbar.org.

"The (LRIS) service was exceptionally responsive..."

"I would definitely use this (LRIS) service again. I highly recommend it..."

"It (LRIS) is a good program...very fast, efficient, and helpful."

"Thank you! Best \$40 I've spent!"

Above are just a few of the comments received on a regular basis by the FBA Lawyer Referral & Information Service through its monthly client survey. We recognize that we are often among the first contacts that individuals have with the legal system and we strive not only to give callers a positive first impression but also to help them get the assistance they need as quickly as possible. Most often, the individuals who contact the LRIS have never had to meet with an attorney prior to their current situation and have no idea who to go to or even what type of legal assistance they need. Each phone call or email request to the LRIS often either begins or ends with, "I need help."

Callers are often afraid or frustrated, apprehensive, or even angry; but they are usually very appreciative of reaching "a real person" who is ready to listen and help. Attorney Edward Culbertson, an LRIS panel member since the late 1980s, recently said that he was "pleased and impressed by the LRIS staff's deliberate, careful treatment of the large number of essentially upset and stressed people" who contact the referral service for help. He also praised the effort made by referral service staff to "gather sufficient information from clients to identify unusual situations, such as when the client actually needs to speak with an attorney in another state." The LRIS provides an outlet for individuals to voice their concerns and serves as a conduit between the public and FBA attorneys, enabling individuals to quickly obtain the legal help they need.

HISTORY OF THE LRIS

The referral service dates to the early 1980s when a Rolodex file of attorneys was used by the Bar to assist with citizen queries. In March 1987, a \$250,000 grant was received from The Mark and Catherine Winkler Foundation to fund a five-year study on how to best serve the legal needs of lower income Fairfax County residents. This grant enabled administration of the LRIS by a sole attorney who provided information and answered basic legal questions. In the Fall of 1992, the LRIS staff attorney became the *pro bono* coordinator and *pro bono* services became separate from the LRIS. As a result, the LRIS began to target its client base to those with the ability to pay for legal services.

THE LRIS TODAY

From such modest beginnings, the LRIS of today has morphed into one of the country's premier referral services. In the past decade, the FBA LRIS has:

- Established an Internet presence, allowing the public to request referrals via the FBA website. Currently, 25 percent of referral requests received by the LRIS originate from the Internet.

- Received certification by the American Bar Association as meeting its standards for a referral service, something achieved by only a quarter of the referral services nationwide.
- Established subject matter panels in the areas of bankruptcy, criminal law, and family law whereby panel members are required to demonstrate and maintain certain levels of knowledge, experience, and CLE in that field. The Virginia State Bar has issued both an Award of Merit to the LRIS for its Criminal Law Subject Matter Panel and a Certificate of Achievement for the LRIS Family Law Subject Matter Panel.
- Won the American Bar Association's Cindy A. Raisch Award (2005), the highest award given by the ABA in recognition of public service oriented lawyer referral and information programs. The FBA LRIS is one of only 12 referral services, or four percent of referral services nationwide, to have received this honor.
- In conjunction with Legal Services of Northern Virginia, established a Modest Means Program to serve those clients who do not qualify for *pro bono* programs, yet are at the lower end of the financial spectrum.

The referral service continues to enjoy a stable, long-term partnership with its staff with individual service by the five part-time employees ranging from 2.5 to over 17 years. In any given fiscal year, 2,500 to 3,000 referrals are processed by LRIS employees and four to five times that number of phone calls or Internet requests are fielded by staff from individuals requesting general information and referrals to consumer, governmental, and other agencies.

The LRIS has an exceptionally low "no show" rate of 3-5 percent, largely as a result of the processing of consultation fees up front by LRIS staff. In a recent comparison of different, nationwide referral services, the percent of LRIS referrals resulting in attorneys being retained by the clients was at the upper end and ranged from 15-20 percent. In fiscal year 2008, LRIS referrals resulted in total income to member attorneys of over \$860,000.

The composition of membership in the LRIS ranges from attorneys in large law firms to those who are sole practitioners. While the vast majority of panel members have multiple years, if not decades, of experience, membership also includes those attorneys who are just beginning to establish and grow their practices. LRIS attorneys practice in over 100 areas of law and approximately 20 percent of the referral service attorneys speak a foreign language.

As the LRIS continues to strive to provide this vital public service, we appreciate the support of our members as well as those attorneys not a part of our service who use the LRIS as a resource to refer clients they are unable to assist. For those clients who need an attorney who practices in an area of law outside of your particular areas of expertise, please have them call us at 703-246-3780 or direct them to the FBA website at www.fairfaxbar.org. If you have questions about the LRIS or would like to become a part of this service, please call us at 703-246-3784 or email dmcbride@fairfaxbar.org. ■

TIRED OF PAYING BIG MONEY FOR E-DISCOVERY?

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Community Service Awards 2008

The FBA, with its Northern Virginia *Pro Bono* Law Center, is pleased to announce the winners of this year's *Pro Bono* Awards and the James Keith Public Service Award. These awards, given on December 2, 2008, honored those who gave their time and talents to the community through the FBA's *pro bono* program. Arlene Beckerman, Director of *Pro Bono* Services said, "During these difficult times, more people need our help and our services become even more important. These awards are a testament to those who are committed to making justice accessible and our community better."

The winners for outstanding *pro bono* work are:

Pro Bono Law Firm of the Year:

McGuire Woods and the Legal Department of AOL

Both McGuire Woods LLP and AOL LLC spent substantial amounts of time and energy working on their joint *pro bono* efforts in the Southgate community in Reston—a diverse low-income area.

The volunteer work began earlier this year and has continued. The legal Department of AOL LLC, along with the attorneys at McGuire Woods LLP, have attended sessions of Southgate seven times within the past year, serving approximately 73 clients, and spending about 120 attorney hours on intakes alone. Moreover, they have taken on a number of legal matters for further representation. They have assisted with all types of civil legal matters from family issues to immigration questions.

Pro Bono Lawyer of the Year: Penny Welke

Penny Welke has a long history of service to the community. In 2001, she began volunteering to work at different sites throughout the community, helping clients with a wide variety of legal problems. She has continued to serve, where needed, throughout the years.

Welke also has been a steadfast supporter and participant of Wills-on-Wheels, a program serving low-income seniors. There, she uses her expertise in elder law to draft end-of-life documents.

All of Welke's work has been marked by compassion and commitment. She recently attended a session at a homeless shelter and took the time and energy to unravel the difficult situation of a foreign family being faced with eviction. Without her, the family would have been in dire straits.

Pro Bono Paralegal of the Year: Monica Maldonado

Monica Maldonado was a lawyer in her home country and wanted to use her legal and Spanish language skills to serve her community. She eagerly began volunteering at the Herndon Neighborhood Resource Center. Maldonado assisted with communicating with clients, helping to put them at ease during a stressful time. She also supported lawyers by working with them on legal analysis and referrals.

James Keith Public Service Award: Robert B. "Bob" Walker

Since 1997, Bob Walker has provided assistance to 97 clients of Legal Services of Northern Virginia (LSNV) in the areas of domestic violence, uncontested divorces, wills, and the family law hotline. Since January 2001, Walker assisted 47 LSNV clients, contributing a total of 148.5 hours through his work alone. In addition, Walker has undertaken extensive and timely contested family law matters.

Walker has worked directly with clients in an individual capacity to help parents with contested custody issues, protect clients from abusive family members, terminate destructive relationships, prepare seniors for end-of-life decisions, and provide legal representation to many others in distress. He has helped to educate and entertain children through court tours and law-related educational plays. He has also given back to the legal community through his many services to the Bar.

"We congratulate all of our members who assist those in the community who do not have access to, or cannot afford, legal help. Their dedication and commitment serves as an example for all of us," said Yvonne McGhee, Executive Director for the FBA.

For more information on becoming an active participant with Northern Virginia *Pro Bono* Law Center, visit www.fairfaxbar.org. ■



FEATURED SECTION: ELDER LAW

Major Change in Life Estate Law

by Evan H. Farr, CELA; Co-Chair, FBA Elder Law Section

Life Estates in real estate have been used throughout Virginia history for many different purposes. Many estate planning and elder law attorneys have used life estate deeds for estate planning, probate avoidance, tax planning, and Medicaid asset protection planning. Historically, a life estate in real estate has always been treated as an exempt asset in Virginia for the purposes of Medicaid eligibility. The Virginia General Assembly recently passed legislation that instructs DMAS (Department of Medical Assistance Services, the agency that oversees the Virginia Medicaid program) to amend the State Medicaid Plan to count all life estates as resources in the determination of Medicaid eligibility. This means that in the near future (perhaps by the time you're reading this article), life estates will no longer be considered exempt assets when applying for Medicaid. This significant new change in the law, once implemented by DMAS, will reduce the number of ways that elderly clients may protect their homes from the devastating expenses of long-term care. However, life estates will continue to be valuable planning tools for Estate Planning and Elder Law Attorneys.

A Call to Action

Because DMAS has not yet amended the State Medicaid Plan, Medicaid still considers a life estates as exempt resources, until the State Medicaid Plan is amended. Once the State Medicaid Plan is amended, it is likely that life estates created prior to the effective date will continue to be exempt. If you have an elderly client who owns a home, or lives with a child in the child's home, and has been considering a life estate deed for Medicaid Asset Protection purposes, it is imperative that these clients act immediately, because their window of opportunity is closing. If your client is

going to engage in a life estate transaction for Medicaid Asset Protection purposes, be aware that the life expectancy calculations must be made pursuant to the Virginia Medicaid Manual.

How Are Life Estates Used in Estate Planning and Elder Law?

One strategy involves a parent purchasing a life estate in the home of a child. Medicaid currently allows this asset protection strategy so long as the parent actually resides in the home for at least a year after the transaction, but this strategy will presumably be eliminated once the State Medicaid Plan is amended. Another strategy involves the sale of real estate, coupled with the retention of a life estate. The most common strategy involves a gift of the real estate to an adult child, coupled with a retained life estate. Some advantages of this strategy over an outright gift of real estate are:

1. The parent, as owner of the life estate, continues to qualify for any property tax exemptions such as County senior citizen exemptions based on income;
2. The parents retains the legal right to live in the property, and may also retain the right to sell or rent the property;
3. The recipients of the property receive a stepped-up basis for capital gains tax purposes on the death of the parent.

Even with the Medicaid laws changing, a gift of real estate coupled with a retained life estate will still have many advantages over an outright gift of real estate. ■

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Interview with the Honorable Penney S. Azcarate

by Edward J. Walinsky, Esq.

Q. Where were you born?

A. I was born in Reno, Nevada. My dad was in the Air Force. We then moved to Germany and were stationed there for three years.

Q. Then where?

A. Then in Minnesota for a year. We ended up as a final station in Prince George, Virginia, at Fort Lee. My parents actually bought a house there and that is where my father retired. I grew up there starting from kindergarten.

Q. What schools did you attend there?

A. Prince George High School, and then I went to Old Dominion University on a ROTC scholarship.

Q. That must have been different, going from rural to urban.

A. I always say used to say the only traffic light in Prince George was on the driving range at the school. It was quite a different feeling, but it was nice. It was a great experience to go to a different area and branch out a little more, meeting all kinds of different people.

Q. Living in a fairly rural area, what kinds of things did you do as a child and in high school, like extra-curricular activities? What were your interests?

A. I played softball, so I was on a softball team all through high school. One thing we used to say about Prince George was, "What do you do when you are a teenager on a Friday night? You leave and go some place else." There were local hangouts where I went with my friends.

Q. How big was your family?

A. I have two older brothers and both of them are in the service. My Mom was in the service too—in the Navy when it was the Women Accepted for Volunteer Emergency Services, the WAVES. Now one brother lives in Georgia and one lives close to my Mom who still lives in Prince George.

Q. Why did you choose ODU?

A. I got the ROTC scholarship there for Naval ROTC, and it also offered a criminal justice degree. At the time there were not many colleges that offered a full four-year degree in criminal justice.

Q. What led you to criminal justice at such an early age?

A. I am not really sure. I always knew I wanted to do something in public service, but I really did not have law school on my mind at the time. Criminal justice was just something I was interested in. I am not sure why. I was also thinking about the Air Force Academy



but when the ROTC scholarship came up it was a good balance of both worlds where I could get the scholarship and commission.

Q. What did you do during undergrad in terms of activities?

A. Mostly I was heavily involved in ROTC, which took up most of my time, and I spent time with my friends. That is where I met my husband, who was in ROTC at college. I went all the way up the ranks and became a battalion commander my last semester at Old Dominion and really enjoyed it. I decided to go into the Marine Corps instead of the Navy. At the time, the Marines were much more open for women than the Navy. Back then in the Navy, women could not serve on the ships or subs or fly planes, but in the Marine Corps you could be assigned to any job that was not

infantry or artillery. I became a communications officer in the Marine Corps, which was much better, and provided more experience than I could have gotten in the Navy at the time.

Q. Where were you stationed?

A. I was stationed at Camp Pendleton in California. I was deployed during the first Gulf War to Saudi Arabia. I got out of active duty as a First Lieutenant and stayed in the reserves. I was active for four years, spent seven years in the reserves, and then resigned my commission.

Q. Why did you get out?

A. Because there were so many things going on. I stayed in the reserves during law school, but after I went to the prosecutor's office, it was just too much work with my job and my family.

Q. Did the law school idea pop up during those four years?

A. I thought maybe after I did my active duty time I might go to law school, but I was also thinking of the FBI. I actually had an interview and took the test for the FBI, and had a panel interview with three FBI agents. Then there was a hiring freeze on the FBI agents. For a year and a half, they froze all applicants and so I went to law school at George Mason.

Q. What brought you to this area?

A. My husband is from this area. He was born and grew up in Fairfax. By the time I got out of the Marine Corps, he had another year to go in the Marines, so we waited at Camp Pendleton for him to finish his term. During that time, we had our first child and moved back here to Virginia.

Q. You started law school then?

A. Right. I had two children before I started law school and during that interim time, I was trying to figure out what I wanted to do. I was

continued next page

a loss prevention officer at Neiman Marcus, I got my private investigator's license, and worked for some different firms. I applied to several local schools, but decided to attend George Mason as it was nearby.

Q. After law school you had two more children?

A. Right. I didn't have any more children until after I started my first job which was a staff attorney at American Prosecutor's Research Institute. When I worked there, as soon as I passed the bar, I had my third child. So I have a five-year break between my first two children and my second two children. I still have a second set of children that are eight years old and four years old, and I have my two teenagers who are sixteen and fourteen, so it is like I got remarried having two sets of children. I then practiced in the Fairfax County Office of the Commonwealth's Attorney.

Q. Was there any thought about doing anything other than prosecutorial work?

A. Not by that time. I think that once I went to law school, I had a criminal justice background. I enjoyed that aspect of it and the most fun I had in law school was the trial class where I could get my feet wet. I knew that was the route I wanted to take and I ended up working for the Commonwealth for a little under five years. I got great experience and very much enjoyed my time there.

Q. After prosecution, then what?

A. I went to Briglia & Hundley law office where I did criminal defense work and some civil litigation as well.

Q. Let's talk about the civil litigation first. Did you enjoy it?

A. What I realized early on is that in civil litigation your case is really tried way before you get to court.

Q. What kind of civil cases were they?

A. Mostly contract disputes, and some personal injury cases. I also did some collections.

Q. What percentage of your cases were civil versus criminal?

A. About 40% civil.

Q. In 60% of your cases you were on the other side than you usually were. How did that work out?

A. You realize that you are not in control as much as you used to be, and there are different aspects and approaches to the system in the various courts. I enjoyed going to the other jurisdictions in Arlington, Prince William, Loudoun, and Alexandria. I learned about client control, and how the process affects not only the client but their families as well. It really humanized the process for me.

Q. Besides juggling two families, what extra-curricular bar and other activities did you have time for?

A. I was on the Circuit Court Committee for several years and the General District Court Committee. I also conducted court tours with the kids and volunteered for some activities and CLEs for the Bar Association. I'm a runner, too, so I train for different events and run with the Fairfax Bar Association team.

Q. When did you decide to become a judge?

A. I think it happened when I was a prosecutor and saw different judges in different courts. It seemed like something I might be good at. I love public service and that was one thing I was having trouble with in the private practice. Since I was a little girl it was instilled in me about the importance of public service from my parents and so it seemed like a great way to serve the community.

Q. When did you first start thinking about "How do I apply?" and then actually becoming a judge?

A. When I went into the private sector, I knew I was starting to go down the judicial path. I was selected as a substitute judge while I was at Briglia and Hundley, which really helped.

Q. In your copious free time now, what do you do if you are home on a weekend?

A. It is a different life. I'm trying to make sure not to get isolated though because I don't want to go that route. I still try to make it to the bar functions and stay involved with different organizations, as well as helping out with law school competitions. Other than that, I'm spending more time with my family and actually seeing my children's soccer games this year.

Q. What sports teams do you follow or support?

A. We definitely support the Redskins. I have always been a Redskins fan and fan of the Nationals. We try to catch a few games as well, but other than that, we're just involved in our kids' sports. My daughter plays varsity soccer at Bishop O'Connell, so obviously I am her biggest fan.

Q. What, if anything, surprised you about being a judge?

A. Probably it was the isolation at the beginning. I knew it was going to be different but I did not know it would be that extreme. I came from private practice where I went non-stop, talked to people, contacted, and went places, and then everything almost came to a halt. I have to make a conscious effort to stay in contact with people and still have a girls' night out, or something along those lines. Speaking with other judges helps a lot, too, because they have all been through it.

Q. Which dockets do you like the most?

A. I think I like the small claims docket. The rules are liberal there. It is not as strict or constraining on litigants. They want to come in and tell their side of the story, which is nice. You never know what you are going to hear.

Q. I assume that dealing with attorneys in a trial setting is enjoyable.

A. It is. It is great when the legal issues come up and you see attorneys prepared to go forward. I have seen many civil and criminal trials already that I thought were superbly litigated.

Q. What else should anyone know about you?

A. I just enjoy what I do. I love going to court every day and being on the bench. That just about covers it all. We are very fortunate in Fairfax to have a fantastic bar. It is always a pleasure to serve. ■

UPDATES FROM THE YOUNG LAWYERS SECTION



Operation Care and Comfort

The Young Lawyers Section's Operation Care and Comfort was a huge success for the second year in a row. The section collected over 25 boxes of donations that were used to put together care packages for troops stationed in Iraq. The care packages included items such as favorite snacks, books, magazines, disposable cameras, and holiday cards thanking the soldiers for their service. Thanks to everyone who participated in this worthwhile cause.

Colors of Justice

On Saturday, February 28 from 10:00 AM to 1:00 PM, the Fairfax Bar Association Young Lawyers Section will host the annual "Colors of Justice Program." The event will take place on the Fifth Floor of the Fairfax County Courthouse.

Several judges from the area, including Judge Bruce Lee and Judge Stanley Klein, will generously donate their time to participate in this program.

The purpose of the Color of Justice Program is to encourage college-bound minority high school students to consider careers in the law as attorneys and judges. The program is specifically targeted toward minority students who are achievers and are interested in a career in law.

Dinner with Circuit Court Judges

Judge Brodie and Judge White of the Fairfax County Circuit Court have generously donated their time to have dinner with young lawyers in the community. The dinner will take place in February (date to be announced). Please email Kathleen Waldy at kwaldy@wtplaw.com for more details.

Another Successful Happy Hour with the Paralegal Section

On January 14, 2009, attorneys and paralegals came together for the second year in a row for a happy hour at the Tysons location of On The Border. There was a great turnout from both sections and the section is looking forward to making the get-together an annual event.

The section has more exciting events set for spring so stay tuned to the FBA's weekly blasts for more information. ■

FEATURED SECTION: EMPLOYMENT LAW *Are Your Clients Ready for the Employment Law Tsunami?*

*by Michael K. Wilson, Esq., Associate of the Welter Law Firm, P.C.,
and Acting Chair of the FBA Employment Law Section*

Employment litigation and the economy have traditionally maintained an inverse relationship, which makes sense. When the economy is good, jobs are plentiful. There is less disruption in the workplace, less disgruntled employees, and it is easier to find a job if you lose one. As a result, less ex-employees file suit in good times. When, as now, the economy is struggling, companies cut costs and layoffs take place. In a poor economy, employees who lose jobs cannot find replacement jobs easily. And what do these former employees do? They sue.

Today, all signs show a floundering U.S. economy. As companies cut jobs in the slowing economy, unemployment claims have jumped to a level not seen since just after 9/11. Even Fairfax County, with all its wealth, is susceptible to the effects of the downturn. Indeed, in March 2008, the *Washington Post* reported that unemployment had risen 25% from 2007. This increase in unemployment comes at a time when discrimination charges were already at an all-time high. (The most recent EEOC data from 2007 shows that employment discrimination filings rose 9% in 2006). The traditional inverse relationship clearly points to a significant increase in employment litigation in 2009. Even if you do not believe the effects of a poor economy on employment litigation, the Obama administration will surely boost the landscape of labor and employment law with such measures as the Lily Ledbetter Act (essentially eliminating the statute of limitations for pay discrimination claims) and the Employee Free Choice Act. Regardless of the proximate cause, the doors of employment litigation will be wide open in the coming year.

It is reasonable to believe that the anticipated increase in employment litigation in 2009 will be seen predominately in an increase in single-plaintiff matters. Complex litigation matters are not so directly related to the employment relationships of individuals as are single-plaintiff cases. For example, the most prevalent class actions in the employment field—wage and hour class actions—do not necessarily require any adverse employment action such as termination. Single-plaintiff litigation, however, generally hinges directly on an employer's actions in relation to the individual. Further, many individuals (who will receive a less generous severance in today's economy), will become unemployed. Individuals who become unemployed also become potential plaintiffs.

As a result, companies can plan on seeing a significant jump in litigation brought by former employees based on discrimination of all kinds under statutes like Title VII and the ADA. These relatively smaller stake, single-plaintiff cases, however, will extend beyond the discrimination context. For example, in times where jobs and resources are at a premium, non-competition litigation will be expanded. Former employees may be more willing to take a chance to breach their noncompete agreement and companies will be more willing to go after former employees to protect trade secrets.

Employers running into this potential storm of employment litigation should be applying basic risk management strategies now. Clients need to be informed about preventative measures that will support affirmative defenses in these types of cases. Anti-harassment policies, discrimination and harassment training, basic handbook policies and employee releases in reductions-in-force should be explored, analyzed, and implemented by employers. Employers should evaluate their options with respect to cost-effective counsel to handle these cases when they do arise. Just as individual employees are seeking to keep afloat in a poor economy, so are employers. Attorneys can earn client trust by exploring these risk management strategies with clients now. Hopefully, these preventative measures will mitigate the effects of the inevitable surge of employment litigation matters to come in the near future. Certainly the attorney that counsels a client to implement preventative measures now—and wins a summary judgment motion next year because of it—will have done the client a great service. ■



— FEATURED SECTION: ALTERNATIVE DISPUTE RESOLUTION —

SUPREME COURT LIMITS GROUNDS FOR VACATUR OF ARBITRATION AWARDS

by Carroll Dubuc, Esq., Chair, FBA ADR Section*

In reviewing a case in which the lower courts had vacated an arbitration award rendered pursuant to an arbitration agreement that included heightened grounds for judicial review, the U. S. Supreme Court held that the statutory grounds set forth in the Federal Arbitration Act (FAA) to vacate or modify an arbitration award were exclusive. *Hall Street Associates, L.L.C. v. Mattell, Inc.*, No. 06-989, 2008 WL 762537. The parties to a lease of a manufacturing site included provisions in the lease for arbitration of any disputes, adding to the statutory grounds for judicial review of any award: (1) where the arbitrator's finding of facts are not supported by the substantial evidence; and (2) where the arbitrator's conclusions of law are erroneous. There was a dispute on environmental contamination of the site, the lessee terminated the lease, the landlord filed suit, and the arbitration clause was implemented. The arbitrator's award was challenged on his finding of facts and conclusions law. In finding that the added grounds for judicial review went beyond the language and intent of the statute; the court reversed and remanded the case.

The court found that the provisions of Sections 10 and 11 of the FAA permitting *vacatur* of an arbitration award upon findings that it was preceded by: (1) corruption, fraud, or undue means; (2) there was evidence of partiality or corruption in an arbitrator; (3) the arbitrators were guilty of misconduct in refusing to postpone a hearing or refusing to hear material evidence, or other misbehavior which prejudices a party's rights; and (4) the arbitrators exceeded their powers or imperfectly executed them so that a mutual, final, and definite award was not made. In rejecting any other grounds for judicial review the court stated:

"The decision recognizes that the *sine qua non* of arbitration is speed, efficiency, and cost savings...the business decision whether to litigate or arbitrate is an either/or proposition; arbitration should not be an opportunity to combine the two."

The FAA is applicable to any arbitration dispute involving interstate commerce which is the case in most arbitrations. If there is a dispute that does not involve interstate commerce, then the parties could stipulate in their arbitration agreement that a state arbitration act governs the arbitration, and perhaps under some state arbitration statutes heightened grounds for judicial review such as errors of law or facts might be an additional ground for *vacatur*.

Indeed, the California Arbitration Act apparently contains some leeway for the parties to include heightened judicial review in their arbitration agreement. The California Supreme

Court in *Cable Connection, Inc. v. DIRECTV, Inc.*, No. S147767, 2008 WL 3891556 in an arbitration involving a dispute as to commissions and improper charges upheld the arbitrator's alleged errors of conclusions of law, noting that the California Arbitration Act allows parties to contract for heightened judicial review. The arbitration agreement in the *Cable Connection* case contained a provision that:

"The arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error."

The approach taken by the California Court would seem questionable under the Federal Pre-emption Doctrine unless the issues in the arbitration were all intrastate issues within California, an intriguing question considering that *DIRECTV* services cross many state lines. Nevertheless, the California Supreme Court referenced the *Hall Street* decision and found that pre-emption would be inimical to the FAA's primary purpose of enforcing private agreements to arbitrate. It may be interesting if there is a challenge to *Cable Connection* in the U.S. Supreme Court. California has adopted the Revised Uniform Arbitration Act enacted by several states so that the use of heightened ground for judicial review of arbitration awards may rely on that act.

However, Virginia has not adopted the Uniform Act and its Arbitration Act contains the same basic ground for *vacatur* of an arbitration award as the FAA; Sec. 8.01-581.010 in the *Virginia Code* provides: (1) the award may be vacated if procured by corruption, fraud, or other undue means; (2) evident partiality by an arbitrator or misconduct prejudicing the rights of any party; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing upon sufficient cause shown, or refused to hear evidence material to the controversy, or other failures as to the hearing process prejudicial to a party; or (5) there was no arbitration agreement. Therefore, a request for *vacatur* of an arbitration award in Virginia in cases involving interstate commerce issues (most cases) would be governed by the *Hall Street* doctrine whether the proceedings were in a state or federal court. The Virginia Arbitration Act does not provide for heightened judicial review, nor does it provide for agreement of the parties to expand the grounds for judicial review as was attempted in the *DIRECTV* case. ■

**Carroll Dubuc, Esq.—Advance Certification by the Supreme Court of Virginia for Civil and Family cases; Mediator, Conciliator, and Neutral Case Evaluator for Fairfax County Courts; Arbitrator for National Arbitration Forum and New York Stock Exchange; previously a trial lawyer for 35 years; and a 911 Victims Fund Hearing Officer.*

A LAWYER'S LIABILITY—The Risks Of Online Surfing And How To Protect Your Practice

by Lance Cottrell, Anonymiser, Inc.

Arguably, the most important parts of a lawyer's job are their obligation to protect the attorney-client privilege and the integrity of their case. The increased sophistication of online hackers makes these tasks daunting. Without proper protection, it is not a question of *if* a person or firm will become a victim, but *when*.

Analytic tools make it possible for any IT administrator to identify specific web addresses, domain names, and geographic locations of visitors and to follow visitor activity; analyzing individual surfing behavior, tracking the pages accessed, and the files downloaded. It is this aspect of functionality that can in turn be used to build a detailed psychographic profile based on purchases or online tracks.

All types of legal work can be affected by online predators. In litigation situations, a target may discover the opposition's strategy simply by looking at their recent Internet search history. Competitors can be tipped off about possible mergers and acquisitions from a firm's recent rise in web activity around industry valuation information.

Exposing an Internet Protocol (IP) address is as easy as visiting a website. A quick search on **WikiScanner** will show more than 90% of today's Fortune 500 banks have some of their IP addresses exposed as a result of employees who edited Wikipedia postings from their company workstation. A simple software program was able to extract their host IP address and post them for the general public and what they post to the Wiki is attributed to their company.

TYPES OF INTERNET COUNTER-INTELLIGENCE THREATS:

IP-Based Blocking—A process that blocks a law firm's access to specific Internet resources to prohibit, for example, a research team from viewing a website for intelligence and evidence gathering.

IP-Based Cloaking—A website can change its online content based on a user's IP address, identity, or geographic location. An organization that recognizes when an employee of a law firm is surfing their site may route them to a shadow page that displays incorrect information.

Personal Identity Leakage—Patterns of Internet usage may reveal the personal identity of a user through surfing history, cookies, and search patterns. This can lead to the leakage of confidential information, either accidentally or intentionally.

Corporate Information Leakage—When an employee of a law firm surfs the Internet and inadvertently gives out confidential information simply by downloading similar types of information from the Internet over a period of time. Such actions could give away the strategy of a particular case or business initiative.

Harvesting Risks—This process highlights when companies block a rival's ability to access its site by utilizing web harvesting tools to automatically gather and organize unstructured information from web pages. Doing so prevents the researcher from being able to develop a complete picture of the target in question.

Commercial Intelligence—Situations where Web administrators use tools to monitor and track what pages and objects are accessed on the website. An organization or individual can, for example, detect a large amount of traffic coming from a law firm's IP address and accurately conclude a case will be based, at least in part, on evidence from that page.

Cyber Vandalism—Websites attacking unwelcome visitors—including law firms—are growing, with hacking tools and expertise even more widespread than they were a decade ago. Reaching out to a possibly hostile website gives them a direct attack path back to the originator.

HOW TO COUNTER THESE THREATS

Smaller law firms or independent practices can take advantage of commercial, downloadable software solutions to protect their IP addresses so online snoops are unable to track the sites to an individual visit to build profiles on their Internet activities. By redirecting a person's web traffic through secure servers, the online identity is protected.

The most reliable of these types of services operate on a hosted subscription model, with servers armed with 128-bit Secure Sockets Layer (SSL) technology, similar to that of a bank. Robust anonymous surfing tools also protect attorneys and their employees from inadvertently visiting websites that are known to be phishing, pharming, or spyware sites.

Larger, nationwide firms with multiple offices will require enterprise-wide platforms to conduct anonymous surfing. Organizations looking for proven offerings should consider implementing one of two types of third-party, identity protecting and information assurance systems:

IP Rotation—Automatically changing a user's visible IP address on a regular basis ensures that target websites cannot build up any patterns of activity or identify the users as anything but typical visitors to the website. One advantage of IP rotation is that it can be implemented so as to be transparent to the end users. In a typical setup, a secure, Virtual Private Network (VPN) network router is attached to the enterprise network. All of the law firm's outbound Internet traffic is then rerouted to a platform that periodically changes the IP address used for the subscriber's network. A Network Access Translation module (NAT) dynamically controls what IP address is presented to the outside world.

IP Explosion—IP Explosion works by distributing the automated activity across a huge number of IP addresses. The key is to ensure that the traffic from any given source address is low enough to appear normal.

When using automated tools to gather large volumes of information—such as capturing competitive pricing information—it is not enough to simply hide the identity of the user. The simple pattern of generating such a large number of queries from a single address in a short time is enough to expose the activity, even if the user cannot be identified. IP Explosion prevents this pattern from occurring.

NEVER GET COMPLACENT

Computer identity is something many organizations take for granted each time an employee logs onto the Internet. The ease of accessing information on the web has created a false sense of security that can be exploited. Just as law firms woke up to the threat of viruses, cookies, and spyware a few years ago, these organizations must now become more aware of the threats imposed by Internet counter-intelligence. The only way to circumvent this threat is to completely protect user identities through anonymous web surfing systems, making this a new requirement while online. ■

About the author (see next page)

Training Session Held on the Foreclosure Crisis

Amid the current economic downturn, the Fairfax Bar Association's Northern Virginia *Pro Bono* Law Center held a training on the current foreclosure crisis co-sponsored by the Fairfax County Department of Housing and Community Development office, the Office of Public Private Partnerships, and Legal Services of Northern Virginia on December 10, 2008. The session entitled, "The Housing Crisis: Legal Training to Help Clients Facing Foreclosure," drew an unexpected crowd of 100 people. The goal of the training was to give legal professionals the necessary information to serve clients facing foreclosure and assist them in exploring viable alternatives.

The topics at the session included state laws related to foreclosure, foreclosure prevention strategies, practical solutions based on case studies, federal and common law defenses to foreclosure, and abusive mortgage lending practices.

The session was free in exchange for participation in two clinics to provide housing counseling to foreclosure clients. This will total at least 400 hours of expert advice from the legal community. Arlene Beckerman, Director of the Northern Virginia *Pro Bono* Law Center, said, "In these times of economic crises, many of the most vulnerable members of society are being faced with the devastating loss of their homes. The turnout for this event is a unified response from the legal community committing help in this time of need."

The participants earned 3.5 MCLE credits for attending. A replay of the training is available through Legal Services of Northern Virginia for those who missed the live program and would like to become involved. ■



L-R: Patricia Stevens, Director of the Fairfax County Office of Public Private Partnerships; Barbara Siberzahn, Director of Homeownership & Relocation Services; Arlene Beckerman, Director of Pro Bono Services; James Scruggs of LSNV; Kathy Jones, Housing Services Specialist, Homeownership & Relocation Services; Kristi Cahoon, LSNV; Paul Sherman, Housing Opportunities Made Equal of Virginia, Inc. (HOME); and Ron Jauregui, Fairfax County Office of Public Private Partnership.



NEW FBA MEMBERS

December 2008

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Leigh Coakley Walker

About the author:

Lance Cottrell is CTO of Anonymizer® Inc., an industry leader and pioneer in comprehensive online identity protection solutions for consumer, business, and government organizations. He can be reached at:

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FAIRFAX CITY—\$750 ea. OBO - Executive offices in the heart of Fairfax; 1st month free w/2 yr. lease. Rent a private, executive office and an

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continued next page

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ANNOUNCEMENTS

COOPER GINSBERG GRAY, PLLC is pleased to announce that **STEPHANIE J. ARNOLD** has become an associate with the firm. 10201 Fairfax Boulevard, Suite 520, Fairfax, VA 22030; 703-934-1480; Fax: 703-934-1479; www.cgglawyers.com.

UPCOMING EVENTS/CLES

CIVIL PRACTICE AND PROCEDURE IN NORTHERN VIRGINIA J&DR DISTRICT COURTS CLE

February 24, 2009

4:00-4:30 PM Registration

4:30-8:00 PM Program

3 MCLE Credits Pending

Location: Fairfax County Courthouse Cafeteria

PARALEGAL LITIGATION CLE

February 25, 2009

5:30-6:00 PM Social Reception

6:00-8:00 PM Program

2 NFPA Credits Pending

Location: Fairfax County Government Center

BENCH BAR DINNER DANCE & SILENT AUCTION "A PASSPORT TO PARIS"

March 7, 2009

6:00 PM Silent Auction

8:00 PM Dinner & Dancing

McLean Hilton, 7920 Jones Branch Drive, McLean, VA

\$125 Per Person [Black Tie Optional]

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703-246-2084 for available sponsorships

SHOW ME THE MONEY: HOW TO GET WHAT'S COMING TO YOU (A Primer on Collections) CLE

March 18, 2009

4:30-6:30 PM

2 MCLE Credits Pending

Location: Fairfax County Courthouse Cafeteria

Speakers: Cynthia Revesman, Michele Cumberland, Susan

Earnan, Marc Busman

HOW TO CREATE A VIRGINIA SELF-SETTLED ASSET PROTECTION TRUST CLE

April 28, 2009

5:00-7:00 PM

2 MCLE Credits Approved

Location: Fairfax Public Law Library

Speaker: Evan Farr, Esq.

MOTIONS PRACTICE IN THE LOCAL CIRCUIT COURTS: A COMPARATIVE ANALYSIS CLE

May 8, 2009

2:00-5:00 PM CLE

5:00-7:00 PM Cocktail Reception with Music

3.0 MCLE (1.0 Ethics) Credits Pending

Location: Fairfax County Government Center

In conjunction with the Alexandria, Arlington County, and Prince William County Bar Associations

FBA ANNUAL SPRING GOLF TOURNAMENT

May 11, 2009

Location: Westfields Golf Club

PREPARATION PITFALLS IN GENERAL DISTRICT COURT: HOW TO WIN YOUR CASE CLE

May 14, 2009

4:30-8:00 PM

3.5 MCLE (0.5 Ethics) Credits Pending

Location: Fairfax County Courthouse Cafeteria

YOUR FIRST TIME IN COURT CLE

June 3, 2009

Location: TBD

ANNUAL SUPPORT STAFF ORIENTATION

June 12, 2009

Location: TBD

CRIMINAL LAW HOT TOPICS CLE

June 23, 2009

4:30-7:30 PM

Location: TBD

SAVE THE DATE

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**Above prices valid through March 30, 2009.

Contact Sandra Marchenko at 703-246-2735 or email:

smarchenko@fairfaxbar.org.



THE "SECRET" BENEFIT OF MEDICAID ASSET PROTECTION

By Evan H. Farr, Certified Elder Law Attorney

Author of *The Virginia Nursing Home Survival Guide*

You've heard of Elder Law, but if you're like most attorneys you probably don't really understand how Elder Law can help your clients, and the parents of your clients, protect their assets while also getting better long-term care. Well, here's the secret . . . through the process of Medicaid Asset Protection, my firm and I can help clients get better long-term care by protecting their assets from forced liquidation so that the protected assets can then be used to pay for an enhanced level of care. For example, protected assets can be used to hire a private caregiver to supplement the basic level of care provided by a nursing home (which provides, on average, only about ninety minutes of care per day), or to purchase services or items for a nursing home resident that are not covered by Medicaid, such as special medical devices, upgraded wheel chairs, transportation services, entertainment, and other amenities that make life easier or more enjoyable. Is Medicaid Asset Protection ethical? Absolutely! It's no different from taking tax deductions to minimize income taxes, or structuring estate planning to minimize estate taxes. Everyone pays federal and state taxes that fund the Medicaid system. Why not also plan your estate to benefit from these taxes?

How much can we protect? Though this varies from client to client, we can typically protect all of the assets of a married couple and at least half of the assets of an unmarried client, even when planning is done at or near the time that the long-term care is needed. We can also help many clients obtain a special Veterans benefit that is available to help defray the cost of home care or assisted-living care for many war-time veterans. Medicaid laws are extremely complex and change frequently. Despite this complexity, and despite the fact that much of the Medicaid law was re-written in early 2006, numerous Medicaid Asset Protection strategies still exist, and we help clients work through these strategies every day. We handle the entire Medicaid Asset Protection process, from planning to implementation to filing the application.

As a Certified Elder Law Attorney, Certified Estate Advisor, and Virginia Super Lawyer, I welcome referrals from all over Virginia, and I'm always delighted to discuss a potential case with another attorney to determine if a referral is appropriate. If you think your clients might need an Elder Law specialist for themselves or their parents, please call me at 703-691-1888, or contact me by email at EvanFarr@FarrLawFirm.com or via our Web site, www.VirginiaElderLaw.com.

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Virginia has no procedure for approving certifying organizations.

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BENCH-BAR DINNER DANCE & SILENT AUCTION 2009

Saturday, March 7, 2009

6:00 PM Silent Auction

8:00 PM Dinner & Dancing by "Too Much Fun"
featuring Grammy nominated guitarist,
singer, and songwriter, Bill Kirchen

McLean Hilton

7920 Jones Branch Drive,
McLean, VA 22102

\$125 Per Person (Black Tie Optional)

\$100 FBA Young Lawyers' Section Members

(Discounted Fee Applies to YLS Spouses/Guests)

Get Your "Passport" Today by
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