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VBA Lawyers for Virginia Veterans:
Call to Action—To Serve Those Who Serve the Commonwealth
BY STEPHEN D. BUSCH

This President’s Page is dedicated to the thousands of men and women serving the Commonwealth through the Virginia National Guard and other branches of the military. They need our help, and I hope that you will join your colleagues in responding to this call to action to participate in the VBA Veterans Initiative. You can help in two ways: First, support a Veterans Day fundraiser as a volunteer or donor, and second, volunteer to provide legal services on a pro bono or reduced fee basis, through the Virginia National Guard Project.

BACKGROUND

The VBA Veteran’s Initiative grew out of a program presented by the VBA Committee on Special Issues of National and State Importance during our annual meeting in January 2009: “A Nation in Debt: Our Obligations to Servicemembers Returning From Combat—Iraq, Afghanistan and Beyond.” Two of the panelists were Maj. Joseph Geraci, and Col. Elspeth Ritchie of the U.S. Army. Maj. Geraci spoke about leading troops in combat, the death of close friends and the psychological effects of these experiences. Col. Ritchie is the lead psychiatrist at Walter Reed Hospital, and she reported the tragically high incidence of suicide and post-traumatic stress disorder in veterans of the Iraq and Afghanistan wars. One of the other panelists, who is mentioned below, was Mark Matthews, of the Veterans Benefit Clinic (“VBC”) at the William & Mary Law School.

This inspirational program gave rise to discussions with Maj. Gen. Robert Newman and other officers of the Virginia National Guard (“VNG”) about the legal problems that our fellow Virginians commonly face upon their return from military duty in Iraq and Afghanistan and the lack of any governmental assistance to help. Under the leadership of 2009 VBA president, John Epps of Hunton & Williams, with assistance by former VBA president Jim Meath of Williams Mullen and VBA member Bob Barrett, of Spotts Fain, a program was established encouraging lawyers from around the state to volunteer to provide pro bono legal services to returning VNG veterans from Iraq and Afghanistan. Thus far, over 100 lawyers have volunteered to provide pro bono or reduced fee services to VNG personnel returning from deployment.

Pressures Facing Veterans

On September 1 of this year, the VNG announced that soldiers from the 29th Infantry Division had received a mobilization order for active duty beginning on November 1, in Afghanistan. The soldiers will be part of the NATO-led International Security Assistance Force. A few weeks later, on September 22, Maj. Gen. Daniel E. Long, Jr., the VNG’s Adjutant General, announced that the 2nd Battalion, 224th Aviation Regiment had received a mobilization order for active duty in Iraq beginning February 25, 2011. The mobilization order calls for an active duty period not to exceed 400 days, unless extended by the Secretary of Defense based upon operational needs. Approximately 400 VNG soldiers will participate in training at Fort Hood, Texas for one to two months before deploying overseas. According to Maj. Gen. Long “even though the mission of United States military forces in Iraq has shifted away from combat operations, there is still important work to be done in Iraq.”

The reports of these planned deployments remind us of the incredible sacrifices made by the men and women of the VNG and other elements of the U.S. military. Can you imagine the changes in your life if you were ordered to leave your family, home...
and job for a year or more? How would you handle the anxiety caused by the separation from your ordinary routine and the security we feel from all that is familiar to us? Would your law practice survive your absence? How would you handle family problems from the other side of the globe while you are away? Similar questions face every servicemember that has received orders for active duty and deployments to Iraq, Afghanistan and elsewhere.

While there are no easy answers to the personal problems and challenges triggered by a servicemember’s deployment, there is something that each member of the Virginia Bar can do to help—right now. If you need any inspiration for responding to this call to action, consider the words of none other than America’s first president. After the passage of 200 years, a quote attributed to George Washington in 1789, remains highly relevant today:

“The willingness with which our young people are likely to serve in any war, no matter how justified shall be directly proportional to how they perceive the Veterans of earlier wars were treated and appreciated by their nation.”

VETERANS DAY EVENT

Bob Barrett and VBA member Matt Kapinos of McGuireWoods, have conceived a plan to assist Virginia’s veterans with their legal services needs by raising money to support the VBC, an existing program at William & Mary Law School which provides legal services to veterans. Bob and Matt are both graduates of the United States Military Academy and are combat veterans who served our country in the wars in Iraq and Afghanistan. Based on their personal experiences, they are eager to gain additional support for the VBC and to recruit additional volunteer attorneys to supplement the cadre of lawyers who have signed up to provide pro bono and reduced fee services through the VBA’s Virginia National Guard Project.

Through the Veterans Issues Task Force, Bob and Matt have organized an event to coincide with Veterans Day (November 11). The goal is to establish an annual Veterans Day Fundraiser that will be modeled after the VBA’s award-winning Legal Food Frenzy. The purpose of the Veterans Day Fundraiser is to raise funds for and awareness of the VBC.

The VBC offers students the opportunity to assist veterans by representing them during their discharge from active military service, as well as by filing claims and appealing adverse decisions on claims for disability compensation with the Department of Veterans Affairs. The VBC is managed by former officers of the U.S. Army’s Judge Advocate General’s Corps, Stacey-Rae Simcox and Mark Matthews. Under their supervision, students help veterans receive disability compensation and appropriate medical care. In working up the cases, they investigate the facts by interviewing the prospective clients and other potential witnesses, gather and analyze medical records, communicate with health care providers as necessary, and develop and implement strategy for each case. The VBC website notes that “these services can have life-changing effects on the veterans we serve.” See: http://law.wm.edu/academics/programs/jd/electives/clinics/veterans/index.php.

Dean Dave Douglas of the William & Mary Law School, a member of the Association’s Board of Governors, is justifiably pleased with this clinical program:

“William & Mary Law School is very proud of its Veterans Benefits Clinic. It is providing a much-needed service to many of our nation’s injured veterans, for whom the need for legal representation is great. The Clinic also provides a rich opportunity for our law students both to engage in an important service and to enhance their lawyering skills.”

Bob and Matt are mobilizing law firms, corporate counsel and other legal professionals throughout Virginia to garner support for this effort. The goal is to raise $50,000 to support the VBC. To accomplish the goal, the committee is encouraging firms to hold at least one fundraising event, which could be a “Jeans Day” on Friday, November 12th (the day after Veterans Day), or some other event that will engage lawyers and staff in Virginia law firms. (“Jeans Day” gives firm employees an opportunity to wear jeans to work for a day in exchange for a donation to the VBC.) Several law firms already have committed to making donations to supplement the gifts that will be made by their lawyers and staff.

A kick-off event will be held during the first week of November to capitalize on the approach of Veterans Day and to build excitement around these efforts. You can help by contacting Bob at 804-697-2017, bbarrett@spottsain.com, or Matt at 804-775-1191, mkapinos@mcguirewoods.com, to volunteer to organize an event in your law firm or to make a donation. Donations are tax-deductible and are being collected by the VBA Foundation, which in turn will transfer donations to the VBC. If you wish to make a direct contribution to the VBA Foundation, you may do so through the VBA website (www.vba.org), by calling the VBA office (804-644-0041), or mailing a check to the VBA Foundation, noting that it is for the benefit of the VBC (c/o The Virginia Bar Association, 701 E. Franklin Street, Suite 1120, Richmond, VA 23219).

Finally, please consider why this fundraising effort is so important. William & Mary Law School is a state institution. We are all aware of the sober budget restrictions facing the
"I could not love you any less."

Utter that phrase to a significant other. One of two things will happen: anger or happiness. When I once said these words to a girlfriend, expecting a smile, surprisingly I was confronted with anger. I thought, “How could she be angry?” I just told her that I couldn’t imagine a time when I was not as massively in love with her as I was at that moment. Unfortunately, she thought I was telling her I wasn’t really that into her. Luckily for me, this was an easy misunderstanding for me to correct, but my ambiguous (ahem—poor) choice of words resulted in an unintentionally tense moment.

As lawyers, we are wordsmiths. Clients pay us for the correct word choice, and lack of precision or ambiguity can have disastrous consequences. Some of you might remember the Peerless case. In that case, the buyer agreed to purchase bales of cotton arriving from Bombay upon the ship Peerless. Two ships named Peerless sailed from Bombay several months apart, both carrying cotton. Because there was a contractual ambiguity, and the contract did not state which ship was meant, the court held there was no binding contract.

What is the moral of this story? If we write fearless, we are haunted by Peerless? Not really, but kind of. Lawyers must strive for clarity, choosing each word carefully to ensure that each sentence conveys its intended meaning. One way of achieving this clarity (among many others) is to eliminate misplaced modifiers.

A misplaced modifier is a word, phrase, or clause that acts on something other than what the writer intended, usually because the word, phrase, or clause is placed too far from the noun or pronoun it describes. For example:

Abraham Lincoln wrote the Gettysburg address while traveling from Washington to Gettysburg on the back of an envelope.

Was this an early version of air mail? Or did Lincoln suddenly find himself with Harry Potter at Hogwarts? Although misplaced modifiers often lead to laughter, as legal writers, we do not aspire for comedy (in fact, misplaced modifiers can lead to malpractice lawyers having the last laugh). In the above example, the writer should have said, “Abraham Lincoln wrote the Gettysburg address on the back of an envelope while traveling from Washington to Gettysburg.” As “on the back of an envelope” purports to describe the method of inscription rather than the method of travel.

Fortunately, misplaced modifiers are easily corrected. To correct a misplaced modifier, follow these two simple steps:

1) Make sure that your modifier actually has something to modify; and
2) Move the modifier as close as possible to the word or phrase it is describing.

Let’s look at a few more examples. Several years ago, I was driving through the Dulles Greenway Toll Plaza and noticed this sign:

Please do not exit your vehicle for safety reasons!

To fix this sign (and hopefully convey its intended meaning), pair the modifying phrase as close as possible with the words the phrase is intended to modify. The result is much clearer, safer, and results in much less laughter:

For safety reasons, please do not exit your vehicle!

Here is another example:

Mark refused to service the car belonging to the man who insulted him with good reason.

The above sentence might be absolutely correct and unambiguous. Perhaps Mark had poor customer service skills, and the man was justified in insulting Mark, after which time Mark stubbornly refused to fix his car. More than likely, however, the sentence contains a misplaced modifier, as “with good reason” is meant to modify Mark’s refusal to service the car and not the propriety of the insult. To convey this meaning, the revised sentence should read as follows:

Mark refused with good reason to service the car belonging to the man who insulted him.

You are now getting the hang of it. Let’s move to a sentence that one might find in a legal document:

Being beyond any doubt insane, the court ordered the patient’s transfer to a state mental hospital.

One of the cardinal rules of legal writing is to remember your audience. If the above sentence appeared in a brief filed with a trial court as part of a motion for reconsideration, how might the trial court - the intended audience - react? To be a bit cheeky, such language might drive the court “crazy,” as the writer is saying that the court was insane when it ordered the patient’s transfer to a state mental hospital. As much as lawyers might sometimes disagree with a court, does calling the court “insane,” even as a result of bad writing, truly further a client’s cause?

What the writer should have written is:

Being beyond any doubt insane, the patient was transferred by court order to a state mental hospital.

It is after all better to call a patient “insane” than the court!

Finally, let’s look at one last example. Recently, I was wine tasting at a local Virginia winery and noticed this sentence on a flyer announcing an upcoming barrel tasting:

Join winery owner as he guides you through an intimate tasting of our reds while still in barrel.

Well, you get the picture! And, to reward myself for finishing this column, I get a glass of Virginia wine (try it - you will not be disappointed).

As always, questions, comments, or suggestions are welcomed (even encouraged).

Notes:

David H. Spratt is a professor at The American University, Washington College of Law, where he teaches Legal Rhetoric, Introduction to Advocacy, and Family Law Practice and Drafting. Professor Spratt practiced family law for 10 years and is a former chair of the VBA Domestic Relations Section.
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Commonwealth. The VBC faces tightening budget requirements at the very time when many veterans are in the highest need of legal services as they return from overseas deployment. The VBC is unique; it is the only institution in Virginia that has a sustained and dedicated law school organization to meet veteran’s needs.

VIRGINIA NATIONAL GUARD PROJECT

The second focus of the Veterans Issues Task Force’s work this year is to recruit additional volunteers for the VBA’s Virginia National Guard Project, through which legal assistance is provided to VNG personnel who are returning from service in Iraq and Afghanistan. Last year, the VBA agreed to create a statewide list of lawyers willing to provide pro bono or reduced fee legal assistance to VNG servicemembers returning from overseas deployments. Later this fall, a large number of VNG personnel who have been deployed, in some instances for more than a year, will be returning to the Commonwealth. Based upon past experience, many of these veterans will face the grim reality of legal problems that await their return.

To place this need in perspective, the VNG headquarters staff has provided the following information:

Since September 11, 2001, the VNG has mobilized 951 soldiers and 317 airmen in support of Operation Enduring Freedom in Afghanistan, and 4,644 soldiers and 558 airmen in support of Operation Iraqi Freedom. An additional 476 soldiers were deployed for duty in support of the Kosovo Force (KFOR) Peacekeeping Mission. Approximately 348 soldiers were ordered for duty in Bosnia and 373 for Air Expeditionary Force duty.

In total, approximately 12,026 soldiers and airmen, including 764 personnel on individual mobilizations all over the world, have been mobilized for federal active duty through the VNG. Our neighbors and fellow Virginians are deployed in multiple venues virtually around the world in the cause of freedom.

Lawyers from the VNG’s Judge Advocate General’s staff will screen VNG personnel seeking legal counsel. JAG lawyers will handle matters within the scope of the JAG officers’ duties and expertise. Other matters will be referred to volunteer lawyers on the VBA list and matched to the specialty practice where appropriate. The list is used when VNG personnel express an interest in obtaining legal help which is unavailable to them through the Guard.

Measured by the number of lawyers who have volunteered to date, the VNG Project has been successful, but more help is needed due to the scores of VNG personnel returning home this fall. As a part of the Veterans Day Fundraiser, VBA members and other Virginia lawyers will be recruited to volunteer their services by adding their names to the Volunteer Attorney list.

Fortunately, given the statewide makeup of VNG contingent, lawyers from all regions of the Commonwealth have volunteered. To this point, lawyers have volunteered to provide advice in bankruptcy, commercial litigation, construction, consumer issues, criminal law, domestic relations, education law, employment, business law, general civil litigation, health care, immigration, intellectual property, juvenile law, landlord-tenant, personal injury, real estate, social security, taxation, veterans disability claims, and wills, trusts and estates.

The entire VBA Executive Committee (Steve Busch, John Epps, Pia Trigiani, Hugh Fain and Henry Willett) has volunteered for this pro bono effort, and I hope that you will join us as a volunteer as well.

HOW TO VOLUNTEER

You can add your name to the VNG Project volunteer list by calling Branden Patrick at the VBA office (804-644-0041), or by sending an email to BrandenPatrick@vba.org. To join the list, we need your name and contact information, areas of law, geographic areas of the state that you are willing to serve, and whether you volunteering for pro bono and/or reduced fee services.

In conclusion, I would like to recognize and thank Jim Meath, Bob Barrett and Matt Kapinos for their many efforts through the Veterans Issues Task Force on behalf of the Association this year. Please join your colleagues in supporting the Veterans Day Fundraiser as a volunteer or donor, and also by enlisting as a volunteer for the Virginia National Guard Project.
The VBA Rule of Law Project Teaches Indonesian Students the Power of the Law

Legacy International invited the VBA Rule of Law Project to lead a discussion about the Project with a group of 30 Indonesian secondary school students and their teachers in July in Roanoke's Higher Education Center and was led by former VBA president Mike Pace and Project coordinator Tim Isaacs, hosted by Legacy International vice president for professionalism programs Marlene Ginsberg and vice president for training Shanti Thompson. Also attending was Sabrina Holly from the U.S. Department of State, Youth Programs Division.

The VBA representatives reviewed for the visiting students the history of the Project, provided a written summary of the Project and a sampling of the Rule of Law website, gave each attendee a blue "The Law Rules" wrist band, and showed part of "The Law Rules" video, followed by an explanation of what the rule of law concept means to Americans. They then engaged the students in a discussion of the rule of law from their perspective.

As a result of the presentation, the Legacy International staff invited the Project representatives to their Bedford campus to talk further with the teachers and to discuss mutual interests in educating all students about the rule of law. Isaacs provided an overview of the Project's website for Indonesian secondary school teachers with special emphasis on the teacher resource material available for download. Indonesian students are required to study 16 subjects each week, resulting in teachers having only 45 minutes during the week to meet with their students for instruction. This nationally mandated requirement frustrates the teachers and led them to ask Isaacs for suggestions regarding how to make the most of the limited time they had with their students. One teacher noted that with each time a definition of the rule of law is requested, a different answer is received. Isaacs explained that the rule of law is an elusive concept even for Americans, but that it should be thought of as an ideal that all humans should pursue in order to guarantee individual rights and freedoms and to protect the common good. Isaacs and Pace have been asked to come to Indonesia to help assist their teachers in the future.

At the conclusion of the day, the students raised their arms to show their blue wrist bands and shouted in unison, "The Law Rules!"
The Resurgent Role of Legal History in Modern U.S. Supreme Court Cases

BY HON. D. ARTHUR KELSEY

G.K. Chesterton once said "a man without history is almost in the literal sense half-witted" because he "does not know what half his own words mean, or what half his own actions signify." In recent years, jurists from various points on the ideological matrix have come to the same conclusion. Many of the most consequential legal issues recently addressed by the United States Supreme Court have been decided or decided based primarily on legal history—not the sometimes anfractuous reasoning of prior cases or the *ipse dixit* declarations of iconoclastic judges. The art of morphing *dicta* from prior opinions into future holdings, exaggerating or understating the scope of precedent, and moving law along the desired trajectory using case-by-case incrementalism—skills naturally acquired through a typical law school education and the tools of choice for some modern courts—has not been wholly abandoned. But, truth be told, it is a spent force rapidly losing whatever intellectual capital it once had.

Understandably so. It simply asks too much of us to be told that "[l]iberty finds no refuge in a jurisprudence of doubt" and then to learn that the jurisprudence of certitude considers liberty to be "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844, 851 (1992). Such reasoning would more than puzzle Thomas Jefferson who thought laws should be "construed by the ordinary rules of common sense" and not by "metaphysical subtleties, which may make anything mean everything or nothing," depending on the sophistical skills of jurists. To be sure, a worthy cynicism of such philosophical vapors has set in among many on the bench and in the academy—leading in part, I believe, to a resurgence of the role of legal history as a basis for judicial decisionmaking.

Take for example the Second Amendment's right to keep and bear arms. The Supreme Court in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), pointed out "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right." Because these rights predated the 1791 Bill of Rights, *Heller* looked to the historical background of these rights under English common law and American colonial jurisprudence as the best evidence of their scope and meaning. True to this premise, the majority and dissenting opinions in *Heller* engaged in rigorous historical analyses and offered over 300 citations to sources predating the 20th century. The text of these opinions includes:

- 17 citations to William Blackstone's *Commentaries on the Laws of England* originally published from 1765-69, as well as St. George Tucker's 1803 American edition;
- 14 citations to both popular and legal dictionaries (including the 1773 edition of Samuel Johnson's *A Dictionary of the English Language*, Timothy Cunningham's 1771 legal dictionary, and Noah Webster's famous 1828 *An American Dictionary of the English Language*);
- 18 references to the English Bill of Rights enacted in 1689 during the reign of William and Mary;
- 25 citations to the writings of leading Founding Fathers like Samuel Adams, James Wilson, Alexander Hamilton, and Thomas Jefferson (some appearing as *Federalist* and *Anti-Federalist Papers*);
- 46 citations to colonial charters, declarations of rights, and the constitutions of newly formed states, as well as statutes from the 17th, 18th, and 19th centuries;
- 30 citations to Jonathan Elliot's compendium of the state ratification debates and Francis Thorpe's collection of early state constitutions and statutes; and
- a discussion of the efforts of Stuart Kings Charles II and James II to disarm their political opponents between the Restoration and the Glorious Revolution.

None of these examples include footnotes, which by themselves offer 88 additional citations to various primary, secondary, and tertiary historical sources. Contrast this approach to the only other Supreme Court opinion attempting to unpack the meaning of the Second Amendment, *Crawford v. Miller*, 307 U.S. 174 (1939). Fairly or not, *Heller* summarily dismissed *Miller* as unreliable precedent because, among other things, the opinion "discusses none of the history of the Second Amendment."

Another striking example of the power of historical legal reasoning is *Crawford v. Washington*, 541 U.S. 36 (2004), a case that retooled the Confrontation Clause of the Sixth Amendment. Before *Crawford*, the pre-
vailing understanding of the right of confrontation came from *Ohio v. Roberts*, 448 U.S. 56 (1980), a case followed by scores of lower courts administering the criminal dockets of the nation. The legal analysis in *Crawford*, however, did not begin with *Roberts*. Instead, the Court in *Crawford* said it must first "turn to the historical background of the Clause to understand its meaning." 541 U.S. at 43. From there, the opinion cites *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 Va. J. Int'l L. 481 (1994), and then engages a wide array of historical sources including the 16th century bail and committal statutes under Queen Mary, the notorious trial of Sir Walter Raleigh in 1603, a library of English common law cases and treatises predating the American Revolution, the British use of civil law practices in colonial America, early state constitutions, ratification debates of state constitutional conventions, and a battery of 19th century state case law. In all, *Crawford* contains over 85 citations to historical sources predating the adoption of the Sixth Amendment in 1791. Only after this historical tour de force does *Crawford* address the *Roberts* line of cases and dismiss them as out of sync with the far deeper historical precedent stretching back to antiquity.

Another application of the historical approach to judicial decisionmaking is the politically charged case addressing whether the writ of habeas corpus extends to detainees held as enemy combatants at the U.S. Naval Station in Guantanamo Bay, Cuba. Finding the writ applied to detainees at Guantanamò, the Court in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), reviewed English common law authorities (including Bracton’s treatise, written in the 1200s, and the Magna Carta, executed by King John in 1215) and a battery of English cases determining the scope of the writ of habeas corpus throughout the British Empire prior to the American Revolution. Why was this extensive review of English legal history necessary? Because "[t]his history was known to the Framers," *Boumediene*, 128 S. Ct. at 2246, and they wrote the Constitution we now seek to interpret.

Lest you think these are aberrational examples, consider *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the case that ultimately led to the invalidation of the Federal Sentencing Guidelines. *Apprendi* did not rely on a clever cut-and-paste presentation from prior judicial opinions, but rather on Sir William Blackstone’s observation that under English common law in 1769 the right to a trial by jury required "the truth of every accusation . . . be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbours . . . ." 6 Justice Stevens’s majority opinion also relied upon the English common law described in scholarly tomes entitled *Pleading and Evidence in Criminal Cases* and *The English Criminal Trial Jury on the Eve of the French Revolution*, *In The Trial Jury in England, France, Germany* 1700-1900. A later case, *Blakely v. Washington*, 542 U.S. 296 (2004), accelerated the process of dismantling determinate sentencing schemes by emphasizing Blackstone’s discussion of the common law and quoting from John Adams’s diary, Thomas Jefferson’s private letters, and the Anti-Federalist Papers.7

Even this short list would be incomplete without mentioning *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), which involved a core issue silently embedded in our constitutional structure: legislative term limits. *Thornton* held state-imposed term limits on federal office holders are inconsistent with the Framers’ intent to "form a more perfect Union." 8 To inform its understanding of that intent, *Thornton* began with a discussion of *Powell v. McCormack*, 395 U.S. 486 (1969), a case that thoroughly traversed the parliamentary history of England (focusing on the infamous expulsion of John Wilkes from the House of Commons), primary source materials from the Philadelphia Constitutional Convention, private and public writings of many of the leaders of the Revolution, records from state ratification conventions, and selections from the Federalist and Anti-Federalist Papers.9

As these few examples demonstrate, the use of legal history is resurgent in modern United States Supreme Court opinions. The phenomenon is not limited to arcane disputes over the Rule in *Shelby’s Case*, the territorial boundaries of Blackacre, or other such legal curiosities. The historical model has instead influenced some of the most important issues of our times: the scope of the Bill of Rights, the modern reach of the ancient writ of habeas corpus, and even the structure of our constitutional republic. The impact, moreover, appears to be ideologically neutral. On various stormy issues, both the conservative and liberal factions of the United States Supreme Court have found safe harbor in historical reasoning.10 No case establishes this point more clearly than *Heller*. Both the majority and the dissent relied primarily on legal history, prompting many commentators to concede, "We are all originalists now."11

Along these same lines, take account of the splintered opinions in *Bilski v. Kappos*, 130 S. Ct. 3218 (2010). The plurality opinion in *Bilski* attempted to clarify whether business practices can be patented. Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, concurred in the result but "strongly disagree[d] with the Court’s disposition of this case."12 What provoked them was the plurality’s failure to see the case as an opportunity to "restore patent law to its historical and constitutional moorings."

Reviewing the subject from pre-Revolutionary English precedent, through the Industrial Revolution, and the Constitutional Convention, and tackling on for good measure a curious allusion to "the days of Assyrian merchants,"13 the concurring justices concluded "the historical clues converge on one conclusion: A business method is not a ‘process.’"14

What does all this mean for us? For the average lawyer it means quite a lot. It is a reminder that legal history can be (and often should be) incorporated into your advocacy model. Before you write this assertion off as relevant only to the tiny handful of lawyers litigating constitutional issues, consider that the Code of Virginia commands that the "common law of England, insofar as it is not repugnant to the principles of the Bill of Rights..."
mon law from the 1200s, and case reports interpreting the Magna Carta) to the later retrospective works of American legal scholars (e.g., the essays of Justice James Wilson, one of the principal authors of the Constitution, Justice Joseph Story's Commentaries on the Constitution of the United States, and the writings of Chancellor James Kent).

Law school graduates should be equipped with the knowledge to incorporate these materials into their future advocacy. By leaving untouched whole epochs of legal history and focusing so heavily on the latest judicial and academic pronouncements, modern law schools decouple their students from the collective wisdom of the past and immodestly trumpet false claims of intellectual novelty. This development stands in stark contrast to the traditional educational model for aspiring lawyers, which implicitly assumes the truth of Solomon's axiom: "What has been will be again, what has been done will be done again; there is nothing new under the sun." Ecclesiastes 1:9 (NIV).

Those who aspire to make history, Solomon understood, must first know it. And those who simply wish to make a point, Cicero would add, would better do so upon the realization that historical argument "is not only very entertaining, but adds a great deal of dignity and weight to what we say." 2 Marcus Tullius Cicero, On Oratory and Orators 291 (circa 55 B.C; 1808 trans. ed.).

"All that is necessary for a [law] student is access to a library," Jefferson agreed, "and directions in what order the books are to be read." He suggested three columns of books, selections from each to be read every day. The first column included, among others, Sir Edward Coke, Blackstone, Hawkins, and, of course, "Virginia laws," by which he no doubt meant statutes. The second column added several others, including Hale, Lord Bacon, John Locke, and Montesquieu. The third column added various history books by Voltaire, Burke, and others. If there was any time left for additional reading, Jefferson said no lawyer's training would be complete without reading books on grammar, rhetoric, and "the English poets for the sake of style also."

Over a century later, when asked for advice on "the best mode of obtaining a thorough knowledge of the law," Abraham Lincoln answered: "The mode is very simple, though laborious, and tedious. It is only to get the books, and read, and study them carefully. Begin with Blackstone's Commentaries, and after reading it carefully through,
say twice, take up [other historical texts] in succession. Work, work, work, is the main thing. All that seems to be left of that advice, at least in the modern academy, is work, work, work.

For judges, the resurgent role of legal history offers us an opportunity to reexamine our decisional philosophies. In one of the greatest of under-statements, Crawford observed that the "Constitution's text does not alone resolve this case. Well, then what does? James Madison answered the question this way:

I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. . . . If the meaning of the text be sought in the changeable government, it is evident that the shape and attributes of the government must partake of the changes to which the words and phrases of all living languages are constantly subject.

What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense! And that the language of our Constitution is already undergoing interpretations unknown to its founders, I believe, appear to all unbiased inquirers into the history of its origin and adoption.

Thomas Jefferson also thought the point equally inarguable:

On every question of construction [of the Constitution] let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.

So, too, did Chief Justice Marshall:

To say that the intention of the Constitution must prevail; that this intention must be collected from its words, that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers; -- is to repeat what has been already said more at large, and is all that can be necessary.

In short, the Father of the Constitution, the author of the Declaration of Independence, and the legendary Chief Justice (three of Virginia's favored sons) considered the point settled. To them, the only legitimate approach to interpreting the constitutional text is to ask what it meant to those who wrote it and voted it into law.

The historical approach, if employed with intellectual honesty, has the effect of squeezing political prejudices out of judicial decisionmaking. Political sentiments come and go. They lack the constancy necessary for a stable adjudicatory system. They also have the capacity to go very wrong. If you think I overstate the point, reread the Dred Scott decision, in which the highest court in the land declared there to be a constitutional right to enslave our countrymen, and on that basis, struck down the Missouri Compromise. After you read the majority opinion, look at the dissent of Justice Curtis. This is what you find:

So, too, did Chief Justice Marshall:

The historical model also diffuses the temptation a judge might have to think of himself as a "knight-errant" free to "innovate at pleasure" on social issues and to roam "at will in pursuit of his own ideal of beauty or of goodness." Benjamin N. Cardozo, The Nature of the Judicial Process 141 (1921). In the workshop of the law, we are artisans of the highest order. But in the temple of moral philosophy, "[j]udges are no better qualified than any of the rest of us to identify transcendent principles of right and wrong." Robert H. Bork, The Judge's Role in Law and Culture, 1 Ave Maria L. Rev. 19, 22 (2003). To be sure, arrogating such a power to the judiciary would blow a gale into the persistent charge that our Constitution is all sail and no anchor.

Like Chesterton, "I am not urging a lop-sided idolatry of the past; I am protesting against . . . [a] lop-sided idolatry of the present." My only point is a modest one: Like it or not, legal history is resurgent in modern judicial decisionmaking. The great debates of our times will pass us by if we are ill-equipped—as lawyers, law professors, or judges—to engage in historical legal research and reasoning. Even the lesser debates will find us flat-footed if we do not develop basic competencies in this area. How do we begin to ramp up the learning curve? Lincoln answered that question nearly 150 years ago: "Begin with Blackstone's Commentaries."

Notes:
*The views advanced in this essay represent commentary "concerning the law, the legal system, [and] the administration of justice" as authorized by Virginia Canon of Judicial Conduct 4(B) (permitting judges to "speak, write, lecture, teach" and otherwise participate in extrajudicial efforts to improve the legal system). These views, therefore, should not be mistaken for the official views of the Virginia Court of Appeals or my opinion as an appellate judge in the context of any specific case.


2. Letter of Thomas Jefferson To Justice William Johnson (June 12, 1823), reprinted in 15 WRITINGS OF THOMAS JEFFERSON 439, 449 (Andrew A. Lipscomb ed., 1904), also

Continued on page 16
1) Marshall Curtis and Blair Wimbush connect at the opening reception.
2) Governor Jerry Baliles and wife Robin check in at the registration desk.
3) Rhodes and Alana Ritenour dance at the President's Reception.
4) Webb King, YLD chair-elect and Audrey Burges, YLD Special Education Committee chair, at the President's Award Reception.
5) Editor of the Pulitzer Prize-winning Bristol Harold Courier, Carl Esposito (R) and reporter Daniel Gilbert (L) accept the first VBA Award for Excellence in Legal Journalism from VBA president Steve Busch (C).
6) VBA members attend a CLE program on developments and trends in civil litigation.
7) (L to R) Bikram and Nupur Bal, Angela and Derek Swanson enjoy the President's Reception.
8) VBA members and guests relax on The Homestead's porch following the banquet.
9) SunTrust sponsored golf clinics throughout the weekend for VBA members and guests.
10) (L to R) former VBA president Mike Pace, YLD chair Henry Willet, Brooke Rosen, James O'Keeffe, Kevin O'Neill and Cordell Parvin present “Helping Lawyers Create and Expand Client Relationships in a Challenging Market.”
11) (L to R) Prof. Hamilton Bryson, Prof. Patrick Baker and YLD Richmond Town Hall Commirree co-chair Ryan Boggs network between events.
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1) VBA Board of Governors chair Hugh Fain, president-elect Pia Trigiani, president Steve Busch and immediate past president John Epps (L to R front row) and other members of the Board pause for a photo before the banquet.

2) Meeting attendees learn the secrets to searing scallops from Homestead Executive Chef Mark Gallaudet.

3) (L to R) Politico correspondent Mike Allen, Former Virginia Attorney General Richard Cullen, former U.S. Attorney General William Barr and U.S. Attorney for the Eastern District of Virginia Neil MacBride hold a discussion on dealing with terrorists for the President’s Showcase.

4) VBA president Steve Busch greets Supreme Court of Virginia Justice Bill Mims at the reception held in Mims’ honor.

5) Dr. Lisa Stephens and Cyrus Dolph at the reception.

6) The VBA Executive Committee recognizes assistant executive director, Brenda Dillard, for her 20 years with the VBA.

7) (L to R) Jeff Schapiro, Chris LaGow, E.M. Miller, Delegate Bill Janis, Senator John Edwards and Delegate David Albo provide insights into the 2010 Virginia General Assembly session.

8) Past VBA presidents Jeannie Franklin and Ed Betts catch up between programs.
Continued from page 13


5. Id. at 2815 (emphasis in original).

6. Apprendi, 530 U.S. at 477 (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (omitting emphasis added by Apprendi)).


9. Id. at 787-795.


analysis with "the state of pre-founding English common law" and citing over 45 historical sources from the 16th to 19th centuries); Alden v. Maine, 527 U.S. 706, 715 (1999) (Kennedy, J.) (beginning analysis with English common law and documents from the ratification debates).


13. Id. at 3232.

14. Id. at 3249.

15. Id. at 3250.


COMMENTARIES ON AMERICAN LAW by
Blackstone was promulgated . . . Blackstone
United States, where no national legal
pal stock of knowledge of natural law,
interest in the law acquired their princi-
Blackstone as their manual. From
America, “America had only lawyers
900 cases, is the common law which began
18.

677, 519 S.E.2d 403, 406 (1999); Clark v.
(1797); Braxton v. Windsol, 1 Va. 31, 33
(1791); Wade v. Commonwealth, 56 Va.
S.E.2d 258, 260 (2010); Moses v. Commonwealth, 45 Va.
1, n.2, 611 S.E.2d 607, 609 n.2 (2005)
(running Chichester v. Vass, 5 Va. (1 Call) 83, 102
(1797), quoted in part by Wicks v. Charlottesvil
125 Va. 274, 276, 208 S.E.2d 752, 755 (1974));
44 Va. App. 149, 155, 604 S.E.2d 88, 91
Commonwealth, 22 Va. App. 673, 681-

18. Although “most Americans nowa-
days think of law as an enactment of a le-
actuality, actually the basis of American
law, still applied in countless
n cases, is the common law which began
to develop in England nine hundred
years ago,” RUSSELL KIRK, THE ROOTS OF

19. Id. at 373. In post-revolution
America, “America had only lawyers
without much formal instruction—and
Blackstone as their manual. From
Blackstone, most Americans with any
interest in the law acquired their prin-
cipal stock of knowledge of natural law,
common law, equity, and, the chartered
rights of Englishmen.” Id. at 368. “In the
United States, where no national legal
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COMMENTS ON AMERICAN LAW by
Chancellor James Kent, of New York.
Even after that, Blackstone was prefer-
fed for a time in some states and dis-

20. It is hardly an exaggeration to say
that what we actually took over from
England was simply Blackstone.”
ALFRED Z. REED, TRAINING FOR THE
PUBLIC PROFESSION OF THE LAW 111 (1921).

21. Paul D. Carrrington, The Revolutionary
Idea of University Legal Education, 31 WM.
HAMILTON BRYSON, LEGAL EDUCATION IN
VIRGINIA 1779-1979, at 23 (1982).

22. Carrrington, supra note 21, at 540.


25. 5 U.S. 137 (1803).

26. 60 U.S. 393 (1856).


edu/founders/ (last visited August 18, 2010); BRACONTON ONLINE, http://hlsll5.law.harvard.edu/bracton/index.htm (last visited August 18, 2010); MEDIEVAL LEGAL HISTORY: ENGLISH LAW, http://www.fordham.edu/halsall/sbook-law.html (English Law (last visited August 18, 2010),


31. Letter of Thomas Jefferson to John
Garland Jefferson, June 11, 1790, avail-
able at http://etext.virginia.edu/toc/modeng/public/JeffLett.html (entitled "Reading the Law"); see also Letter of
Thomas Jefferson to Thomas Turpin,
Feb. 5, 1769, available at http://etext.virgi-
nia.edu/toc/modeng/public/JeffLett.html
(entitled "The Study of Law").

32. Id.

33. Id.

34. Letter from Abraham Lincoln to John
M. Brockman (Sept. 25, 1860), in
ABRAHAM LINCOLN: SPEECHES AND
WRITINGS 1859-1865, at 180 (1899).

35. Crawford, 541 U.S. at 42.

36. 3 LETTERS & OTHER WRITINGS OF
JAMES MADISON 442-43 (Madison Letter
to Henry Lee, June 25, 1824), available at
http://www.archive.org/stream/streamletterswritings03madrich/page/442/mode/2up;
see also 5 DOCUMENTARY HISTORY OF THE
CONSTITUTION 332-34 (Madison Letter to
Andrew Stevenson) (March 25, 1826),
available at http://books.google.com (search "To Andrew
Stevenson Montpellier, March 25, 1826");

37. supra note 2.

Wheat.) 213, 332 (1827) (Marshall, C.J.,
dissenting).

39. Dred Scott v. Sandford, 60 U.S. 393,
1857 (Curtis, J., dissenting).

40. D. Arthur Kelsey, Law & Politics:
The Imperative of Judicial Self-Restraint,
28 VBA NEWS JOURNAL No. 6, at 8 (Sept.
section/judicial/publication.htm.

41. Letter from British parliamentarian
and historian T.B. Macaulay to H.S.
Randall, author of A LIFE OF THOMAS
JEFFERSON (May 23, 1857), available at
http://www.americanheritage.com/arti-


43. supra note 34. Particular attention
should be paid to the introductory chap-
ter on “The Nature of Laws in General”
which is by far “the most jurispruden-
tial” aspect of Blackstone’s
COMMENTS. Albert W. Alschuler,
Rediscovering Blackstone, 145 U. PA. L.

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Linkedin
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The Virginia Uniform Power of Attorney Act

BY ANDREW H. HOOK and STEPHEN E. TAYLOR

Durable Powers of Attorney ("DPAs") are rapidly emerging as a significant, if not essential, estate planning tool. DPAs are extremely complex, powerful, and flexible legal instruments that create significant legal authority, duties, and obligations. All fifty states and the District of Columbia have enacted DPA statutes, yet most of these statutes are limited in scope, non-uniform, and rely upon the common law of agency for the construction and interpretation of DPAs. In response to a multi-year project of The Virginia Bar Association’s ("VBA’s") Wills, Trusts, & Estates Section, the 2010 General Assembly enacted the Virginia Uniform Power of Attorney Act ("UPOAA") in order to significantly update and clarify existing Virginia laws related to DPAs and to make the same more uniform with that found in other jurisdictions.

The laws related to DPAs have largely evolved from the common law of agency and are steadily moving towards a uniform, statutory framework. The statutory law is moving from relatively short statutes amending agency law to a comprehensive statutory framework supplemented by the common law. The driving force behind this trend is the desire for increased acceptance and use of DPAs, and Virginia and the VBA have been at the forefront of the effort to unite the often divergent DPA statutes among the states.

**DPAs and the Evolution of the UPOAA**

Under the common law, a power of attorney became ineffective upon the principal’s incapacity. Therefore, it was not a useful tool to manage the affairs of an incapacitated principal since the principal’s loss of capacity terminated the agent’s actual authority. In 1954, Virginia led the way in the evolution of the DPA, becoming the first state to statutorily provide for the continuation of the agency relationship when the instrument expressly stated that it survived the principal’s incapacity. With the promulgation of the Uniform Probate Code ("UPC") in 1969 and the Uniform Durable Power of Attorney Act ("UDPAA") in 1979, the adoption of DPA statutes became widespread.

More recently, there has been an explosion in the use of DPAs and resulting litigation. States have responded by revising their state DPA statutes to address perceived problem areas. The American Law Institute adopted and promulgated the Restatement (Third) of Agency, which recognizes DPAs.

In 2002, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") conducted a national study comparing state DPA statutes. The study revealed that despite initial uniformity among state DPA statutes, there was a growing divergence. Specifically, the study found that a majority of states had begun to enact non-uniform provisions to deal with specific matters upon which the UDPAA was silent. These matters included execution requirements, successor agents, portability provisions and sanctions for third-party refusal to accept DPAs.

Responses to the NCCUSL survey demonstrated a high degree of consensus on the issues that need to be addressed, such as:

1) improving portability, (2) including safeguards, remedies, and sanctions for abuse by an agent, (3) protecting the reliance of other persons on a power of attorney, and (4) including remedies and sanctions for third-party refusal to honor a DPA.

As a result of the survey, NCCUSL adopted and promulgated the UPOAA in 2006. The UPOAA "codifies both state legislative trends and collective best practices, and strikes a balance between the need for flexibility and acceptance of an agent’s authority [by third parties] and the need to prevent and redress financial abuse."

The UPOAA is essentially "a set of default rules that preserve a principal’s freedom to choose both the extent of an agent’s authority and the rules that govern the agent’s conduct."

Where the UPOAA is silent the common law rules of agency apply. The UPOAA is similar to the Uniform Trust Code ("UTC") in that it is a comprehensive statute providing a few mandatory rules in addition to many default rules that can be altered by the draftsman. One significant feature of the UPOAA is the inclusion of an optional statutory form DPA, an attempt to add simplicity to the process of creating a DPA.

As of 2010, Virginia, Idaho, New Mexico, Nevada, Maine, Colorado, Maryland, Wisconsin and the U.S. Virgin Islands have adopted versions of the UPOAA. Minnesota, Ohio and West Virginia all introduced UPOAA bills to their state legislatures in 2010 while nine additional states—Alabama, Arkansas, Connecticut, Florida, Georgia, Iowa, Massachusetts, Michigan, Montana, Nebraska and North Carolina—are actively reviewing and considering enactment of the UPOAA.

**Enactment in Virginia**

Shortly after the UPOAA was developed, the VBA Wills, Trusts & Estates Section formed a subcommittee to study the UPOAA and assess the impact its enactment would have on existing Virginia law. The subcommittee met regularly to discuss the UPOAA and made revisions to the Act where it felt that Virginia law was superior.
Additionally, the subcommittee consulted with various organizations such as the Virginia Bankers Association and the AARP to solicit feedback on the UPOAA. The modified UPOAA was introduced into the House of Delegates during the 2008 session to give notice of the VBA’s intention to seek enactment. This bill was not pursued and was left in the House Commerce and Labor Committee. In the fall of 2008, the subcommittee again recommended the modified version of the UPOAA to the Virginia General Assembly for enactment. The Act was introduced in early 2009 in the Senate as Senate Bill 855. The Virginia Bankers Association and the AARP joined the VBA in recommending enactment of the UPOAA. The General Assembly enacted the bill with amendments made by the House of Delegates and subject to a re-enactment provision which provided: “The provisions of this Act shall not become effective unless reenacted by the 2010 Session of the General Assembly.” Subsequently, the UPOAA was reintroduced during the 2010 Session of the General Assembly in both the House of Delegates and the Senate. The Governor signed the bill on April 11, 2010, and it became effective on July 1, 2010.

The Virginia UPOAA and its Impact on the Bar

The Virginia UPOAA provides a modern set of default rules that, in turn, lead to the drafting of shorter and less-cumbosmerome powers of attorney. It is a valuable alternative to expensive and time-consuming guardianship proceedings. Alongside the existing statutory default rules for wills and trusts in Virginia, the UPOAA will provide valuable assistance in ensuring the seamless and continuous management of the property, finances, and personal affairs of the incapacitated.

Virginia’s UPOAA preserves powers of attorney as a low-cost, flexible, and private form of surrogate decision-making, while significantly improving the prior laws related to powers of attorney in Virginia. Other tangible benefits include:

Increased Efficiency. The UPOAA assists in the drafting of powers of attorney by providing modern definitions of authority that can be granted to an agent through incorporation by reference to descriptive terms. It also provides default provisions that can be customized to suit the individual principal.

Protections for the Principal. The UPOAA provides protection for principals with mandatory and default duties for the agent; liability for agent misconduct and broad standing for judicial review. It also requires that the principal include express language when granting certain authority that could dissipate the principal’s property or alter the principal’s estate plan.

Protectors for the Agent. The UPOAA recognizes that an agent who acts with care, competence, and diligence for the benefit of a principal should not be liable solely because the agent benefits from the act or has conflicting interests.

Protectors for Third Parties. The UPOAA encourages acceptance of powers of attorney by third parties by providing broad protection for good faith acceptance or refusal of an acknowledged power of attorney. It also provides sanctions for unreasonable refusal of an acknowledged power of attorney.

During the drafting process, the Virginia Bar also recognized that several existing provisions of the Virginia Code should be incorporated into Virginia’s UPOAA. First, the UPOAA retains the permissibility of discovery by third parties of the acts of the agent under a power of attorney. Second, the UPOAA serves Virginia’s so-called anti-casey statute, which allows for agents to make certain gifts which, while not expressly authorized under the power of attorney, are not inconsistent with the instrument’s express terms. Finally, existing Virginia law held that actual delivery of the power of attorney to the agent was not required for validity. The Virginia UPOAA retains this Virginia distinction.

The General Assembly did make one rather conspicuous omission from the UPOAA. As adopted by NCCUSL, Article 3 of the UPOAA includes a statutory short form power of attorney. This statutory form is designed to be understandable to lay persons while providing attorneys a foundation upon which any power of attorney under the UPOAA can be implemented. However, the Virginia Bar Association addressed concerns that the statutory short form may be susceptible to abuse when used by consumers without adequate legal representation by recommending its deletion from the UPOAA. The General Assembly agreed with this recommendation and deleted the statutory short form from the enacted bill, but reserved a section of the UPOAA for possible future adoption.

Andrew H. Hook, a partner, and Stephen E. Taylor work in the Virginia Beach office of Oast & Hook, P.C. Mr. Hook concentrates his practice in the areas of elder law, estate and trust administration, estate planning, long-term care planning, asset protection planning, special needs planning and personal injury settlement consulting. He is a past president of the Special Needs Alliance, a non-profit association of disability attorneys. Mr. Hook is a member of the VBA Wills, Trusts & Estates Section Council. Mr. Taylor is a May 2010 graduate of the University of Richmond School of Law where he served as Allen Chair Editor of the University of Richmond Law Review and was a member of the Moot Court Board and Trial Advocacy Board.

While the UPOAA is a useful tool, the Bar should recognize that there continues to be room for improvement. For example, in order to promote the acceptance of powers of attorney, the UPOAA places the risk that a power of attorney is invalid upon the principal rather than the third party asked to accept the document. Section 26-90(B) protects third parties who, in good faith, accept a purportedly acknowledged power of attorney. Virginia’s codification of this provision of the UPOAA is consistent with the current state of the common law, which places the risk of forgeries on third parties. The Virginia did not, however, amend section 26-90(C), which allows a third party to request and rely on, without further investigation, an agent’s certification under oath as to any factual matter concerning the principal, the agent, or the power of attorney. Thus, it appears under the Virginia UPOAA, a third party that accepts a power of attorney with an agent’s certification would be protected from liability under section 26-90(C), despite Virginia’s amendment of section 26-90(B). The interplay between these two provisions is unclear and should be clarified by the General Assembly.

Notes
2. Id. at A-1 to A-2.
5. RESTATEMENT (THIRD) OF AGENCY § 3.08(1) (2006).
6. See id.
10. See RESTATEMENT (THIRD) OF AGENCY § 3.08(2), cmts. b, c (2006).
11. See LINDA S. WHITTON, NAT’L CONFERENCE OF COM’RS ON UNIF. STATE LAWS, NATIONAL DURABLE POWER OF ATTORNEY SURVEY RESULTS AND ANALYSIS (Continued on page 22)
New Rules of The Supreme Court of Virginia

(Part one of a two-part series)

BY L. STEVEN EMMERT

In 1985, the Supreme Court of Virginia repealed Part 5 of the Rules of that court and replaced the previous provisions with a new Part 5. This followed the initial promulgation, less than a year earlier, of Part 5A, for the benefit of the brand-new Court of Appeals.

A generation later, after a comprehensive study by the Appellate Rules Advisory Committee (often referred to as the Lemons Commission, for its chair, Supreme Court Justice Donald Lemons), it was time for an overhaul. Effective July 1, 2010, the court rewrote the rules for both courts. This two-part essay will highlight some of the more important new rules and outline some of the new procedures that apply to proceedings in both courts. [The second part will appear in the next issue of the VBA News Journal.]

Part 5 - The Supreme Court

Rule 5:1—The revisions eliminate the distinction between the former terms "file with the clerk" and "file in the office of the clerk." The former required service on counsel of record, but the latter did not. Now, all documents that are to be filed must be served as well. The rule also includes a new subparagraph (f) that explains prior practice without changing it: Unpublished opinions may be cited in briefs to the court, but they will be considered as persuasive, not authoritative. The citer must usually provide a copy of the unpublished opinion along with the brief.

Rule 5:1A—This is an entirely new rule that establishes a procedure to deal with nonjurisdictional procedural defects. In the past, practitioners routinely feared that any default at all would be fatal. The new rule provides that in most instances, the court will issue an order giving the defaulting party a certain time within which to cure the error. (The new rules have been described as more user-friendly, and this provision is Exhibit A in that analysis.) The rule also describes previous practice, that a default that results in a dismissal may (note: not must) be reported by the court to the Virginia State Bar.

Rule 5:4—The new version of this rule contains a requirement borrowed from the Fourth Circuit's local rules. This salutary provision requires a statement in all motions that the movant has consulted with his or her opponent about the intended filing of the motion. It also requires an indication of whether the opponent has consented to the motion.

Rule 5:5—There's a small but important change to this rule, which governs timely filings of documents. In the past, when filing was done by mail, only certified mail through the US Postal Service was acceptable. Now, parties may use “a third-party commercial carrier for next-day delivery.” Numerous litigants were caught in the trap of overnighting a pleading or brief on the due date, only to find that they should have used the (often slower) mail. That trap has vanished. (It's still best to file early.)

Rule 5:6—Court reporters have long made condensed transcripts available, showing four transcript pages per sheet of paper. This arrangement saves the lives of countless trees and makes transcripts much more portable. As of July 1, it also explicitly violates the requirement for appendices. If you're going to file a transcript, it now needs to be full-sized. If you inadvertently use a condensed transcript, the clerk will require you to file a corrected appendix with full-sized pages.

Rule 5:8A—This rule is brand-new, and represents a significant change from prior practice. It "codifies" (and subtly changes) the common-law severable-interests rule, involving appeals from multiparty litigation. Previously, if a court dismissed Defendant A at an early stage of the litigation but left Defendant B to face the jury, the plaintiff had a choice, assuming the claims against the two defendants were distinct from one another: He could appeal the dismissal of A immediately, or else wait until the end of the case and appeal then. Now, that plaintiff may ask the trial court to enter a "partial final judgment" in order to trigger his right to appeal immediately. If the trial court agrees to enter such an order, the plaintiff must appeal the dismissal of A immediately, or not at all; he can’t change his mind and appeal at the end of the case. If the judge refuses to enter the partial final judgment, then the plaintiff has no choice but to wait; there is no appeal from a trial court's decision not to grant such a judgment.

Rule 5:11—This oft-cited rule gets two significant new provisions. First, it states that the appellee has the obligation to ensure that the record is sufficient to ensure that the Supreme Court can fully evaluate the assignments of cross-error. Previous caselaw placed the onus on the appellant to ensure that the record was complete, without addressing cross-error, which logically should be the appellee’s responsibility. Second, it provides a short window of grace for supplementation of a transcript. The previous 60-day deadline had always been regarded as mandatory and jurisdictional, with no exceptions; but the new rule gives the appellant an extra ten days in which the appendix may be "supplemented, corrected, or modified," with no questions asked. The final effect of the rule change, however, is the provision that even after the 70th day, the transcript can be corrected if two justices concur that there's good cause. This means that the deadline is no longer jurisdictional, though sensible litigants should always regard it as mandatory.

Rule 5:17—The first significant change to this rule requires appellants to indicate exactly where the appellate issue has been preserved in the trial court. This provision had been in the rulebook for the Court of Appeals, and its
appearance in the Supreme Court essentially requires sensible advocacy. The new rule also adds a filing-fee requirement, removes the obligation to cite to Southeastern Reporter, specifies procedures for the filing of Anders briefs, and, for the first time, explicitly excludes “the cover page, table of contents, table of authorities, and certificate” from the page limitations in the rules. The new rule allows appellants to comply with either a page limit or a word-count limit in the petition for appeal.

Rule 5:17A—This seldom-used rule gets one important change: For the first time, the court requires that petitions for review of the grant or denial of temporary injunctions must comply with the briefing requirements of ordinary petitions for appeal (Rule 5:17). That means that these petitions must contain things like assignments of error, tables, and a certificate.

Rule 5:18—If an appellee raises cross-error, he must state as much on the cover, so the justices don’t have to look inside the brief in order to discern whether cross-error is assigned. As with the petition for appeal, this brief may now comply with either a page limit or a word-count limit. The new rule also explains current practice, in that the court will only consider cross-error if it has already decided to grant a writ to the appellant.

Rule 5:19—The only changes to this rule relate to the length of the brief. Alternative word-count limits are inserted, and in the instance where an appellant responds only to assignment of cross-error, thus preserving the right to argue the petition orally, the limits are noticeably shorter.

Rule 5:20—There’s a new subsection (b), dealing with rehearings of original-jurisdiction petitions. In those cases (habeas-corpus, mandamus, prohibition, and actual-innocence petitions), the appellant may file a petition for rehearing within 30 days after the original refusal of the writ. Note that this window is twice the 15-day limit for rehearing petitions in ordinary appeals.

Rule 5:20A—Most petitions for rehearings filed by attorneys are governed by this rule, which gets one subtle but significant change. The old rule required that the petition be no more than 3,000 words. The new rule cuts that limit back sharply, to 1,750 words, although it does add an alternative 10-page maximum.

Rule 5:21—This rule, which once dealt exclusively with appeals from the State Corporation Commission, has been expanded to include attorney-discipline appeals. In both kinds of appeals, appellants must now serve the Attorney General. The new provisions for disciplinary appeals contain detailed requirements for perfection, briefing, and procedure, including provisions for a stay pending the appeal.

Rule 5:22—Review of death sentences is largely unchanged, but there are two liberalizations of the previous rule. Appellants now get 30 days, not 10, within which to file a list of assignments of error, and briefing limits, which once matched those for other briefs, are greatly expanded, to 100 pages or 17,500 words (and half that length for reply briefs).

Rule 5:25—The contemporaneous-objection rule gets a modest makeover, but the substance of the rule is unchanged. Despite the subtly different wording, expect all of the court’s prior caselaw interpreting the rule to survive intact.

Rule 5:26—This rule deals with briefs in a general sense, setting forth page limits at the merits stage. Those page limits are unchanged, but alternative word-count limits are added. New subparagraphs centralize previously scattered requirements for certificates of service and compliance with the length limits; forbid incorporating by reference arguments that were made elsewhere; and reassure practitioners that noncompliance with this rule won’t result in dismissal. (Instead, you have to resubmit the brief with the noncompliance corrected.)

Rules 5:27 and 5:28—These two rules, containing the provisions for principal briefs on the merits, are reorganized without much substantive change. The previous requirement for citation to Southeastern Reporter for Virginia cases has been deleted. Both rules require that the argument section include a statement of the standard of review for each issue appealed. Experienced appellate lawyers have long been voluntarily doing that; the new rule makes that sound practice mandatory.

Rule 5:30—The amicus-curiae rule gets only a modest change, clarifying that such a brief can be filed at the petition, merits, or rehearing stages of the appeal.

Rule 5:32—This rule now gives the appellant a choice between filing 15 printed copies of the appendix, or 10 printed copies and 10 electronic copies on CD-ROMs. (In cases involving large appendices, the CD-ROMs will be far less expensive.) It includes a new provision for filing sealed materials. There is a slight extension of time for designation of the contents of the appendix; the appellee now gets 15 days instead of 10 within which to separately designate. Briefs filed in lower courts are not to be included “unless they have independent relevance,” which won’t happen often. The new rule concludes by stating that if the appendix fails to comply with the requirements, the court may issue an order directing a correction within a specified time.

Rule 5:33—The old rule (which was designated Rule 5:35) provided that oral argument would not exceed 30 minutes per side, but the court’s practice for years has been to allow 15 minutes per side. The new rule now reflects the shorter period. Parties involved in exceptionally complicated appeals may still move the court for extra time, but in reality, such requests will very seldom be granted.

Rule 5:35—This rule contains the provisions of the old Rule 5:37, dealing with taxation of costs in the appellate court. One subtle change is that a bill of costs could previously be filed 10 days after the issuance of the opinion, with objections thereto due 14 days later. The new rule reverses those periods, so successful litigants now have 14 days to file a bill, with objections due 10 days later. The rule also refers the parties to Rule 1:1A, by which a party can get an award of attorneys’ fees in an appropriate case.

Rule 5:37—This rule condenses old Rules 5:39 and 5:39A, dealing with petitions for rehearings after a decision on the merits. The principal change is to shorten the permissible length for such petitions, from the old 15-page limit to a new limit of 10 pages or 1,750 words.

Rule 5:38—Only one small change appears to this provision, which deals with settlements pending appeal. While parties are still required to notify the Clerk promptly after reaching a settlement agreement, the new rule specifies that such notice must be in writing.
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12. Id. at 1; UNIF. POWER OF ATTORNEY ACT prefatory note, 8B U.L.A. 33 (Supp. 2010).

13. Id. at 1; UNIF. POWER OF ATTORNEY ACT prefatory note, 8B U.L.A. 33.

14. Id.

15. See id.

16. See id.

17. Id.

18. See id.

19. Id. § 121 cmt.


23. See id.


25. See id.


34. Id.; see, e.g., VA. CODE ANN. § 26-95 (Supp. 2010).


36. Id. § 26-88 (Supp. 2010).

37. Id. § 26-87 (Supp. 2010).

38. Id. §§ 26-85(B)(6) (Supp. 2010).

39. Id. § 26-85(D) (Supp. 2010).

40. See id. §§ 26-90, -91 (Supp. 2010).

41. Id. § 26-91(C) (Supp. 2010).

42. Id. § 26-85(I) (Supp. 2010).


44. See id. § 26-87(C) (Supp. 2010).


46. Id. § 26-77(E) (Supp. 2010).

47. See UNIF. POWER OF ATTORNEY ACT § 301 8B U.L.A. 33.


51. See VA. CODE ANN. § 26-90 (Supp. 2010).

52. Id. § 26-90(B) (Supp. 2010).

53. See Kern v. Barksdale Furniture Corp., 224 Va. 682, 685, 299 S.E.2d 363, 364 (1983) (“One who deals with an agent does so at his own peril and has the duty of ascertaining the agent’s authority. If the agent exceeds his authority, the principal is not bound by the agent’s act.” (citing Kern v. Freed Co., 224 Va. 678, 680, 299 S.E.2d 363, 364 (1983); Seergy v. Morris Realty Corp., 138 Va. 572, 577, 121 S.E. 900, 902 (1924)).


55. See id. §§ 26-90(B), (C) (Supp. 2010).

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VBA Corporate Counsel Section Launches Pro Bono Resource Center

The Corporate Counsel Section of The Virginia Bar Association has participated in efforts this year to draw attention to the need for pro bono legal representation. In particular, chair John Scheib represented the Section on a task force evaluating a proposed rule change to permit lawyers holding a Virginia Corporate Counsel Certificate to provide pro bono service in the Commonwealth. This proposal is a significant step forward that is needed to unleash a group of capable lawyers who can provide these valuable services.

Recognizing that it can be difficult to find pro bono opportunities that meet the interests and needs of in-house counsel and corporate counsel the Corporate Counsel Section has initiated a project to help in-house lawyers and corporate counsel find pro bono service providers. One criteria for being included is that the pro bono service provider must have malpractice insurance that will cover the volunteer lawyer. The "Corporate Counsel Pro Bono Resource Center," can be found on the Corporate Counsel Section webpage located on the VBA website www.vba.org.

If you can identify any qualifying pro bono opportunities, please let the VBA or section council members know so that it can be added to the Pro Bono Resource Center.

Have You Logged-in?

Earlier this year, the VBA launched a new website with a Members Only section. By using the Member Log-in on the VBA website's home page, you will be able to make changes to your Member Profile, see the latest issue of the VBA News Journal, register for upcoming VBA events, renew your VBA membership, access a new online VBA Membership Directory and take advantage of a number of members-only benefits, including discounts on publications, CLE courses, group and individual health, long-term care and other insurance, online legal research, clothing, audio and web conferencing and other valuable products and services.

To login for the first time, enter your user name (which is the email address which the VBA has on file for you) and the password “VBA” (case sensitive). You will immediately be prompted to change your password to a new, more secure password.

If you have any questions, would like to give us feedback or experience any technical difficulties, contact us at thevba@vba.org or (804) 644-0041.
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Gerard M. Stegmaier, an attorney in the Washington, D.C. office of Wilson Sonsini Goodrich & Rosati, P.C., has been elected President of the Fairfax Law Foundation. The Fairfax Law Foundation is the non-profit arm of the Fairfax Bar Association, the largest bar association in Virginia located in the suburbs of Washington, D.C. The foundation administers the pro bono and community outreach programs of the bar.

The VBA News Journal offers classified advertising. Categories available are as follows: positions available, positions wanted, books and software, office equipment/furnishings, office space, experts, consulting services, business services, vacation rentals, and educational opportunities. Rates are $1 per word for VBA members and $1.50 per word for non-members, with a $35 minimum, payable at the time of submission. The VBA News Journal reserves the right to review all copy before publication and to reject material deemed unsuitable. Professional announcements may be printed; the cost per announcement is $15 and text may be edited for style and space limitations. Deadlines are one month in advance of the date of publication. Information is available online at www.vba.org.

YLD wins big at ABA Annual Meeting

Continuing a long tradition of excellence in programming, The Virginia Bar Association Young Lawyers Division took home top honors when the American Bar Association presented its annual Awards of Achievement at the ABA Annual Meeting held in August in San Francisco.

The VBA YLD received First Place for its Comprehensive programming which includes such signature projects as the 2009 Virginia Lieutenant Gubernatorial Candidates Debate, the Jammin’ for Justice fundraiser for Legal Aid, the Robert E. Shepherd, Jr. Juvenile Law and Education Conference and the Annual Legal Food Frenzy. Additionally, the YLD received Second Place for its service to the bar through the Diversity Job Fair held in Richmond in August 2009 which provided an opportunity for Virginia employers to interview diverse law school candidates from around the country (more information regarding this year’s fair on facing page). The YLD also received Special Recognition for pro bono legal services provided by The Virginia Hispanic Chamber of Commerce Legal Aid Clinic.

Congratulations to the VBA YLD for earning national national recognition showcasing the hard work and success of the YLD in offering well-rounded and original projects that serve the public and the legal profession. For more information on getting involved in one of many YLD projects, visit www.vba.org.
YLD Hosts 4th Annual Diversity Job Fair

The VBA Young Lawyers Division’s Diversity Recruitment Committee hosted the VBA’s 4th Annual Diversity Job Fair on Saturday, August 21 at the Embassy Suites in Richmond. Approximately 100 students and 14 employers participated in the all day event.

The Diversity Job Fair, which was open to rising 2Ls and 3Ls, drew both Virginians and out-of-state students. Each employer reserved a suite for interviews, creating a relaxing atmosphere in which students and employers could converse about their mutual objectives. Registration and hospitality areas offered opportunities for informal conversation between appointments, as did a luncheon.

Co-Chairs of the VBA/YLD Diversity Recruitment Committee are Elaina L. Banks, Kaufman & Canoles; Dana A. Dews, Christian & Barton; Monica McCarroll, Williams Mullen; Karen R. Robinson, U.S. Department of Health and Human Services; and Nicole S. Terry, Office of the Montgomery County Commonwealth’s Attorney.
Irene C. Delcamp
Firm: Barnes & Diehl, P.C.
Chesterfield
VBA Member Since 2009
VBA Activities: Domestic Relations Section Council (YLD Representative); Chair, Henrico Juvenile Licensing Project
1. What is your favorite legal term? *Res ipsa loquitur*—Latin for "the thing speaks for itself."
   This is simply the most interesting phrase to me due to the colorful examples given to us in our Torts class years ago (flaming rats, barrels of flour shooting from windows, etc.).

2. What is the most rewarding aspect of the Henrico Juvenile Licensing Project? I value the ability to give back to the community by speaking to high school students about the privilege and great responsibility of having a driver’s license. It is an honor to speak with the juvenile court judges during the licensing ceremonies.

3. How were you able to determine the area of law you wanted to practice? I have been most interested in issues involving the family, specifically children. Taking part in the University of Richmond’s Juvenile Law Center clinic was a great experience which piqued my interest in family law. As a family law attorney, it is rewarding to have the ability to positively affect the lives of others in such a critical area of their lives.

4. What is one goal you would like to accomplish in your lifetime? Later in my career, I would like to teach a law skills class at the University of Richmond. While a student there, a great group of local practitioners taught the weekly law skills class where I learned practical knowledge I use frequently. This would be an excellent opportunity to give back to the law school.

5. Do you have any hidden talents? I really enjoy art and architecture. They have been passions of mine since my adolescence. I used to be quite good in primary and college art classes. I even won a couple of awards. At UVA, I majored in architecture prior to switching over to government. Now, when I have the time, I like to draw or paint.

Patrick C. Devine, Jr.
Firm: Williams Mullen
Norfolk
VBA Member Since 1983
VBA Activities: Health Law Section Council; member of the Administrative, Business and Tax Sections
1. What motivated you to get involved with the VBA Health Law Section Council? My friend, Brac McKee (Kaufman & Canoles, Norfolk), asked me to join the Council over a decade ago. The opportunity to regularly talk and work with a room full of very smart and affable attorneys from around the state is a special one. Also, I was raised by a few generations of physicians and trained by a few generations of attorneys who all considered it their privilege and obligation to be actively involved in their professional associations.

2. If you could give one piece of advice to the incoming fall new admittees, what would it be? Work hard, but do not forget to have some fun and make a lifetime of friends among your coworkers, clients and competitors.

3. What is your most memorable VBA experience? Among my most memorable were several occasions in the 80s at VBA winter meetings when I had the opportunity to sit around the fireplace in one of the historic homes in Williamsburg on snowy afternoons watching ACC basketball games with the likes of VBA legends Bill Spong, John Ryan, Frank Crenshaw and Alan Hofheimer. They drank whiskey, told bad jokes and made the young lawyers in the room feel welcome. On the other hand, I claim no current recollection of the infamous Willcox Savage keg parties which followed the VBA banquet in Williamsburg during those years.

4. Who is your favorite literary character? I probably should say Atticus Finch in *To Kill a Mockingbird* or Holden Caulfield in *Catcher in the Rye*, but I was never much of a reader. Except for law books, I usually read newspapers and magazines.

5. If you weren’t practicing law, what would you be doing? Playing soccer, golf or tennis. Probably still not reading any quality literature.
MISSION: The Virginia Bar Association is a voluntary organization of Virginia lawyers committed to serving the public and the legal profession by promoting the highest standards of integrity, professionalism, and excellence in the legal profession; working to improve the law and the administration of justice; and advancing collegial relations among lawyers.

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I understand that any member of The Virginia Bar Association whose license to practice law is suspended, revoked or surrendered will automatically be removed from membership.

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