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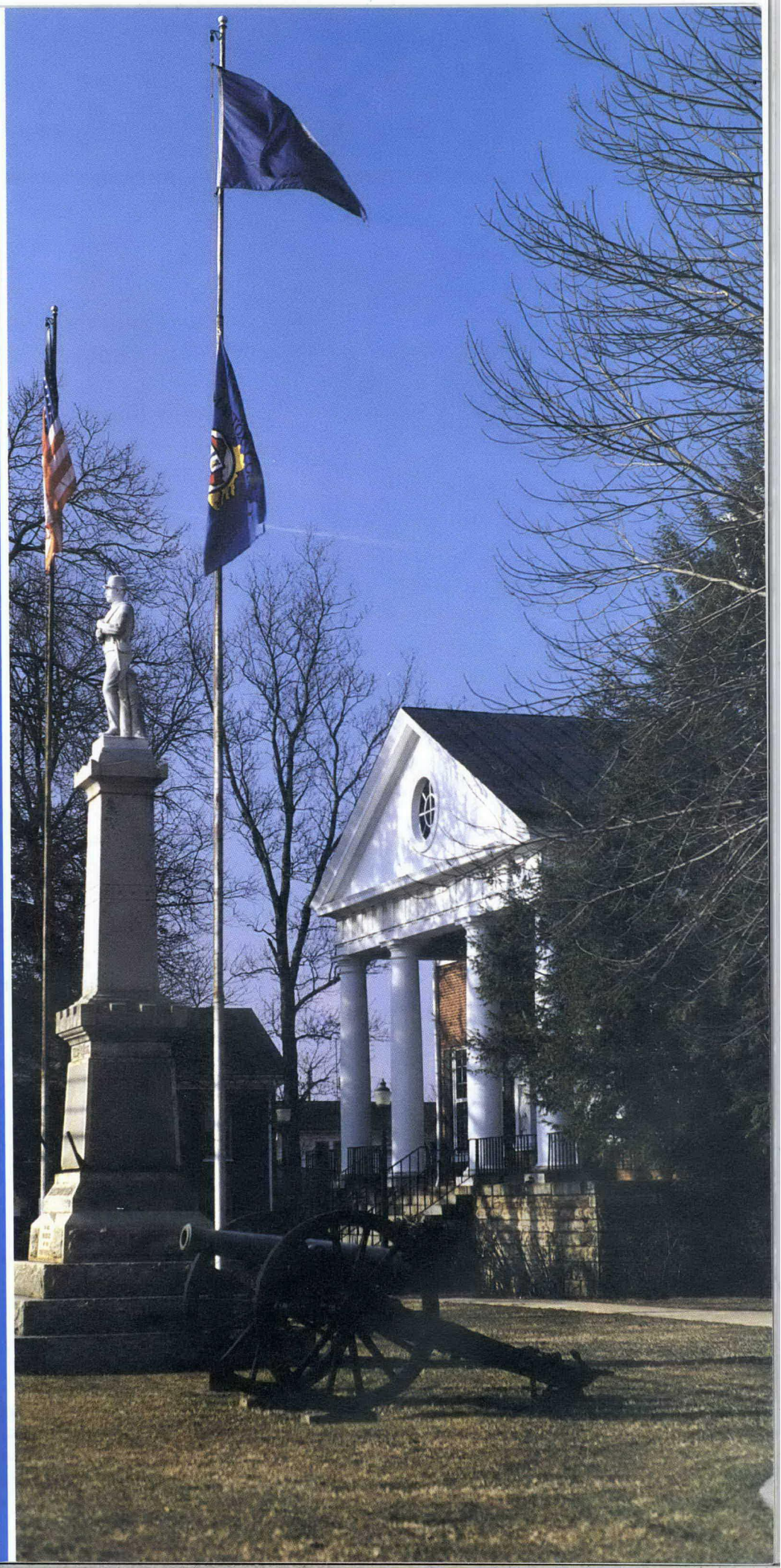

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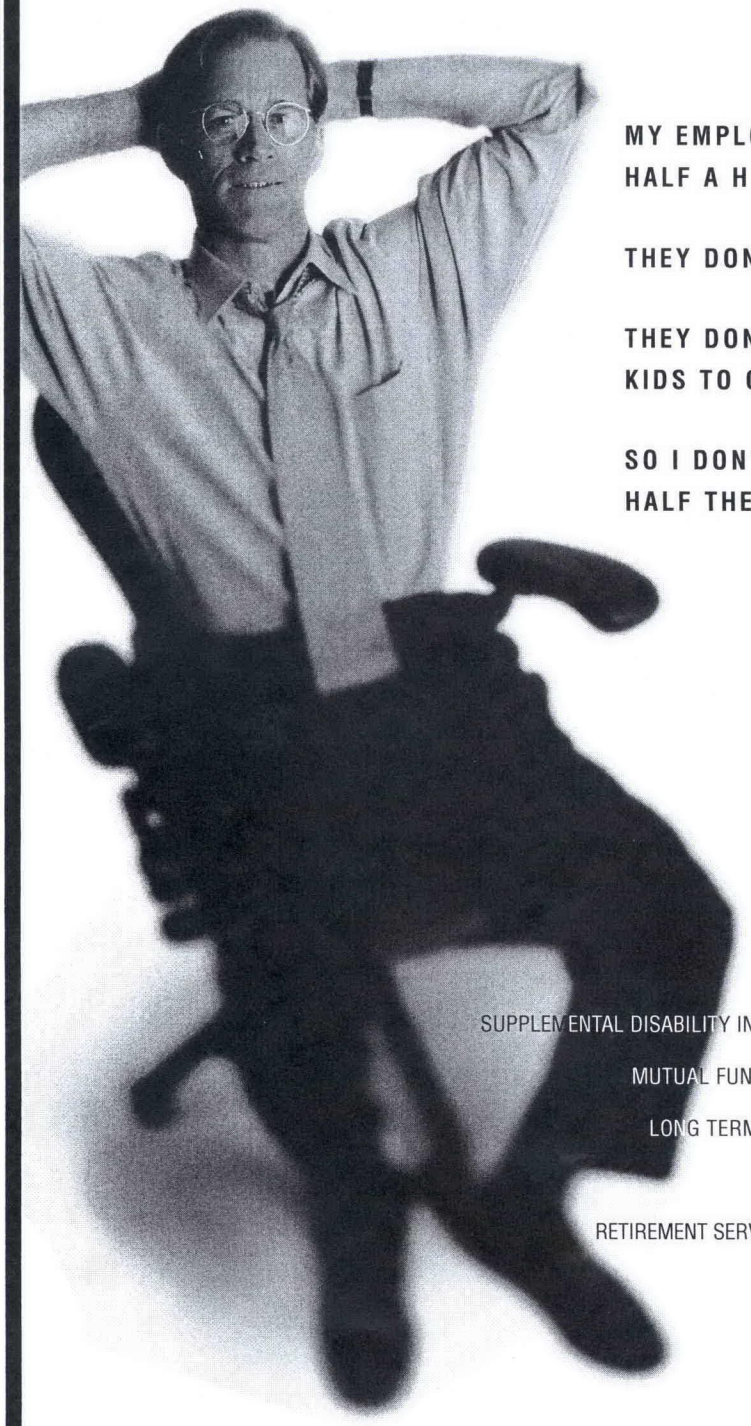

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Contents

4 • **President's Page:**
Judicial Independence Virginia-Style
J. Edward Betts

6 • **The Independent Judiciary:**
Law and Politics:
The Imperative of Judicial Self-Restraint
Hon. D. Arthur Kelsey

9 • **VBA Model Criteria for Judicial Selection and Retention**

10 • **The VBA's 112th Summer Meeting in Photos**

12 • **Legal Focus/Civil Litigation:**
Recovery of Lost Profits: An Improved Weapon in the War on Trade Secret Misappropriation
Attison L. Barnes III and Charles C. Lemley

16 • **Young Lawyers Division:**
Volunteers + Programs = Reaching More People!
Vaughan Gibson Aaronson

17 • **VBA Law Practice Management Division Book Program Announced!**

18 • **Across the Commonwealth**
New group for arts, entertainment & sports law
Rumsey receives Walker Award
VBA fall meetings announced
Two members named to Joint CLE Committee
Nominations sought for 2003 VBA/YLD leaders
Heather Mercer speaks at law firm luncheon
'Court End Society' celebrates Marshall birthday

21 • **VBA Law Practice Management Division Professional Skills Survey**

24 • **Calendar**

On the Cover

Photograph of the Appomattox County Courthouse (1892), by John O. Peters. One hundred forty such photographs are contained in *Virginia's Historic Courthouses*, written by John O. and Margaret T. Peters with a foreword by Justice Lewis F. Powell Jr.; photographs by John O. Peters; published by University Press of Charlottesville; and sponsored by The Virginia Bar Association. To order the book, call the VBA at (804) 644-0041 or 1-800-644-0987.

Judicial Independence Virginia-Style

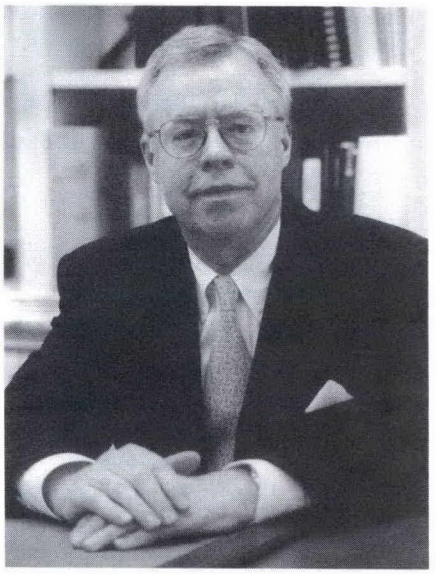
BY J. EDWARD BETTS

*[T]he Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not to the last degree important, that [a judge] should be rendered perfectly and completely independent...? I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary. Will you draw down this curse upon Virginia?**

Thanks to Chief Justice Marshall and those who have followed him, Virginia offers a workable Constitutional framework for preserving a Virginia judge's ability to think and rule independently. Various of the other states and the federal government have taken somewhat different approaches to preserving an independent and thus impartial judiciary, with some having greater success than others. But let us focus upon Virginia.

Our Constitution declares "That the legislative, executive and judicial departments of the Commonwealth should be separate and distinct...." Va. Const. Art. I, §5. Other Constitutional provisions prohibit sitting judges from being members of the General Assembly or officers in the Executive Branch. Va.Const. Art. IV, §4, and Art.VI, §11. These declarations of the separation of powers are essential to an independent judiciary.

Yet even though this doctrine appears to be a permanent fixture of American law, the functions of the three branches have often been blurred in our history. For example: "American state legislatures in the early days decreed divorces, granted discharges in bankruptcy and rendered a wide variety of decisions that we consider today to be reserved to the judiciary," L.L. Fuller, *Anatomy of the Law*, at 32. Thus, we must remain vigilant to assure that incursions on an independent judiciary do not occur in any form.



The occupants of the three branches of government must act with comity and deference towards each other to strike the balance that preserves the separation of powers, and particularly judicial independence.

Another important element of judges' independence is tenure in office. This was the issue that inspired Chief Justice Marshall to his oratorical heights quoted above. Some, like John Adams, believed in life tenure to maintain an independent judiciary so that judges were "subservient to none." D. McCullough, *John Adams*, at 103. This is the federal model. Some states hold popular elections for judges. Virginia has taken a middle ground. The General Assembly selects and renews the terms of our judges, with the Governor having limited appointment rights while the General Assembly is not in session. Va. Const. Art.VI, §7.

Economic security also fosters judicial independence. In Virginia, the General Assembly prescribes salaries, which can be supplemented from local funds. Va. Const. Art.VI, §9. Given the critical role of an independent judiciary in our free society, it is my personal hope that our General Assembly will always keep in mind how important an independent judiciary is when it prescribes judicial salaries. Virginia cannot afford to have only wealthy judges of impartial mind.

Although Virginia's Constitution provides a framework for the judiciary to maintain its independence, it is inevitable that tensions will arise among our three branches which could undermine this Constitutional intent. Thus, the occupants of the three branches must act with comity and deference towards each other to strike the balance that preserves the separation of powers, and particularly judicial independence. President Roosevelt's attempt to "pack" the United States Supreme Court is an example of an executive department's overreaching. Judge Kelsey's fine article on judicial self-restraint, published in this issue starting on page 6, demonstrates how the judiciary

*John Marshall, then Chief Justice of the United States, made these remarks in Virginia's Constitutional Convention of 1829-30, as a representative of the city of Richmond. Ex-Presidents James Madison and James Monroe also participated in the Convention. Marshall's efforts, directed to protect judicial tenure, were successful, and the Judiciary article was adopted substantially as he had written it. J.E.Smith, *John Marshall: Definer of a Nation*, at 504-06.

should not confuse its role with that of the legislative branch. Buttressing his article is The Virginia Bar Association Model Criteria for Judicial Selection and Retention (Model Criteria), published on page 9 of this issue. One of its criteria is the "Willingness to Follow the Law."

Of course, "following the law" does not inhibit a judge from construing a statute reasonably. That is the very essence of a judge's work. Indeed, a judge's ability to do so impartially demonstrates the importance of judicial independence. And a judge's right to make a reasonable construction of a statute imposes a concomitant responsibility on the General Assembly, that of deference to the judiciary.

In fact, an impartial judge is often in a better position to construe a statute than are the draftsmen. In one famous English debate, Lord Nottingham stated that he had reason to know the meaning of a given statute since he had drafted it. In response, it was stated "if Lord Nottingham drew it, he was the less qualified to construe it; the author of an act considering more what he privately intended than the meaning he has expressed." Fuller, *supra*, at 33-34. Moreover, restraint and deference must also be honored by the General Assembly as it engages in its selection and renewal process of judges, such that the latter remain free to render independent, impartial decisions.

The VBA, along with Virginia's Chief Justice, has constantly called for a merit selection and retention process for judges, and the General Assembly has moved in that direction in recent times. This is the reason for the VBA's Model Criteria. In the context of judicial independence, three of these criteria bear particular attention. Under the general heading of "Integrity," we set forth as criteria: "Free of Bias or Prejudice"; "Free of Favoritism"; and "Evenhandedness." Without comity and deference among our three branches of government, these criteria, and impartial justice, will never be realized. Nor will our Constitution be honored. Va. Const. Art. I, §15, states that in order to preserve a free government:

> ... all citizens [recognize] that they have duties as well as rights, and that such rights cannot be enjoyed save in a society where law is respected and due process is observed.

Without an independent judiciary, law will lack respect and due process will go unobserved. ◆

More on the subject: The American Bar Association has chosen "Independent Courts Protect Our Liberties" as the 2003 Law Day theme. The Constitution grants us rights, but without courts the Constitution might just be a quaint document on parchment. It is the courts that enforce the Constitution, protect our rights as Americans, and make the rule of law a reality. Law Day can help people understand that "independent" courts are fair, impartial, and dedicated to the rule of law. Through Law Day, we can stress the importance of courts and judges free from political interference. Every Law Day, we try to help Americans understand how our freedoms depend on our great system of law. On this next Law Day, let's help our fellow citizens appreciate that judicial independence is "the most essential characteristic of a free society." **In a democracy, no one — no matter how powerful — is above the law, as long as judges have the authority to apply the law impartially and fairly.** — *American Bar Association, 2002*

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V·B·A
The Virginia Bar Association

Suite 1120
701 East Franklin Street
Richmond, VA 23219
(804) 644-0041
FAX (804) 644-0052
E-mail: thevba@vba.org
Web: http://www.vba.org

OUR 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.

Law & Politics: The Imperative of Judicial Self-Restraint

BY HON. D. ARTHUR KELSEY

The following article is from a speech presented by Judge Kelsey before the Portsmouth Bar Association at its Law Day program on May 6, 2002.

Before I begin, I want to honor two of your favored sons. Like many of the lawyers here, I attended William and Mary Law School and studied law under Dean Bill Spong. I later went on to clerk for Judge John MacKenzie in the federal court. As I drove to Portsmouth today, I realized how deeply in debt I was to these two men.

But there is another man, one I never knew, who also left a lasting impression on me. He was an extraordinarily successful lawyer, a jurist of the first order, and a man of great influence and learning —he was also a man convicted for a capital offense and executed by the state. His name was Sir Thomas More. This man's story begins in England, in the early 1500s, at the time of King Henry VIII. As far as kings went, Henry VIII was an archetype of the worst sort. Though reasonably competent at governing others, Henry was quite incompetent at the art of self-government —a fatal flaw not at all unique to that time or that place.

Henry got to the throne entirely by an accident of fate. His older brother, Arthur, had been groomed for the job —so much so that he married Catherine of Aragon, a Spanish princess who would help ensure the continuity of the Anglo-Spanish alliance. But Arthur unexpectedly died before assuming the throne from his father. As the heir apparent, Henry decided to take his brother's widow as his own wife and, upon his father's death, to declare himself king. Henry's problem was that both England and Spain were Christian monarchies, and ecclesiastical law did not permit a man (even a king) to marry his brother's widow. Undeterred by this legal technicality, Henry waged an intense diplomatic campaign and ultimately secured from the Pope a special one-time waiver to the marriage law, applicable only to Henry.

Over time Queen Catherine lost favor in Henry's eyes. She developed a deep, abiding religious faith—something of a character quite foreign to Henry. Her strategic value to the kingdom also diminished when the Spanish alliance proved less profitable to England than Henry expected it to be. To make matters worse, Catherine of Aragon had given Henry a daughter, but had committed the ultimate royal sin of not giving the king a male heir to his throne. And, of course, there was one other reason for Henry's change of heart (one as common to kings as to peasants): there was another woman—Anne Boleyn.

Though the king was not known for his scholarship, somehow Henry's marital problems led him into a great deal of academic reflection on the reliability of ecclesiastical law. Much to his delight, Henry discovered that the Pope should have never granted Henry's earlier request for a special waiver of the marriage prohibition of papal law. So Henry advised the Pope that he was right all along, and that the king's marriage to Queen Catherine was in fact void *ab initio*. Not in the least amused, the Pope refused to annul the marriage and to permit Henry to marry his paramour.

Both outraged and in no small measure quite embarrassed, Henry began a hostile takeover of the ecclesiastical sphere of England. He appointed a political hack, Thomas Cranmer, to the high post of Archbishop of Canterbury, who repaid the deed by issuing the appropriate religious edict authorizing both the divorce of Catherine and the marriage to Anne Boleyn.

Now, while all this was going on, a highly gifted lawyer named Thomas More had become well known throughout the kingdom as a man of integrity and honor. And he was just the kind of man Henry needed to restore some intellectual and moral legitimacy to his reign. The king appointed More to the highest judicial post in the land, Lord Chancellor of England. This was a job More was uniquely qualified to perform. More had a profound understanding of law, a strong interest in legal scholarship, and an unimpeachably honest intellect.

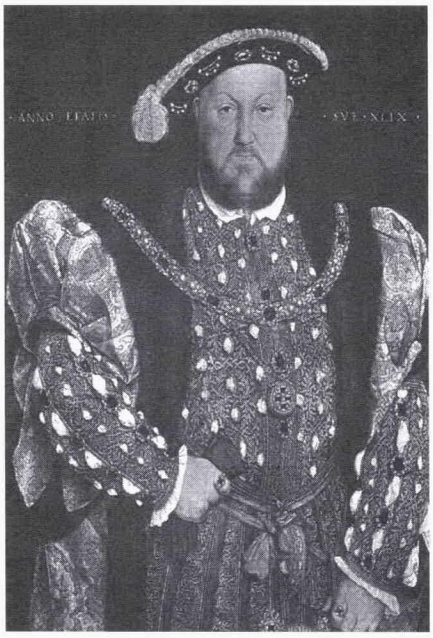
But Henry VIII needed More not for his legal skills, but for his reputational capital. Not long after More's appointment, Henry asked More to issue a public declaration of the legality of Henry's divorce and remarriage. More refused on the ground that it fell far outside his subject-matter jurisdiction and would, in any event, violate his conscience to meddle in such matters.

In the 1962 play *A Man For All Seasons*, the playwright Robert Bolt has a scene where More explains this to King Henry. More then asks the king, "Why does your Grace need my poor support?"

Henry replies:

> *Because you are honest. What's more to the purpose, you're known to be honest. There are those who follow me because I wear the crown, and there are those who follow me because they are jackals with sharp teeth and I am their lion, and there is a mass of men that follows me because it follows anything that moves —and then there is you.*
>
> Robert Bolt, *A Man For All Seasons* 31-32 (1962), original text paraphrased.

What Henry VIII wanted was not a judicial decision from the high judge of chancery, but a political decision that announced the Chancellor's personal opinion on the subject. This struck Sir Thomas More as a clear violation of his oath of office. He was being asked to use his judicial position for the sole purpose of promoting a political and personal agenda of the monarchy.



HANS HOLBEIN

THE KING: At his accession in 1509, Henry Tudor was described as the handsomest prince in Europe. Twenty-five years later, he had become a lusty and capricious tyrant obsessed with siring a male heir and willing to destroy anyone—wives, counselors, clergymen—who stood in his way.

After refusing the king's request, More resigned from the Chancery bench and went into what he hoped would be a quiet retirement. At no time, either before or after his resignation, did More once privately or publicly challenge the king or question his authority. Unable to serve his sovereign with a clear conscience, More simply withdrew from public life altogether.

Henry nonetheless issued orders for More's arrest and imprisoned him in the Tower of London. Henry then impaneled a special jury of his friends, which (as he expected) found More guilty of high treason. Henry issued the writ for More to be beheaded. Shortly before his death, More reportedly told the king: "Between you and me, Sire, there is only one thing —I die today, and you tomorrow."

The contest between King Henry VIII and Chancellor More was not just a brutish clash of wills, a brawl between two ambitious and powerful men. It was a clearly framed clash of ideas. To Henry, the law was as malleable and fleeting as his lusts. The law was what he wanted it to be, when he wanted it to be, and whatever he wanted it to be in order to serve his personal and political interests. In the plainest of terms, Henry VIII thought himself above the law.

On the other hand, Sir Thomas More—even though the highest judge in the land—viewed himself as a servant of the law. As a student of the Magna Carta, More believed the law governed everyone in the kingdom equally—from monarchs to plowboys. Equally clear to More was that no one, not even a king, should use the institution of the judiciary to promote his political and personal goals.

Does the story of King Henry VIII and Sir Thomas More have relevance today? I think so. We live in a time where many Americans are deeply suspicious about the role of politics and the courts. Sometimes this suspicion is terribly unfair, other times perhaps understandable. I do not believe the public's fears on this issue should go unaddressed. When judges interject their personal political philosophies into their judicial opinions, whether explicitly or implicitly, they arrogate a power to themselves that our tripartite system of government clearly denies them. The Constitution does not authorize the judiciary to write laws that the legislature failed to enact, or to repeal those that violate no recognizable constitutional principle, or to amend laws that are reasonably adequate but nonetheless can be improved upon. As Thomas Jefferson put it, a judiciary that pushes beyond these limits would place us all under the "despotism of an oligarchy" —one flatly at odds with the democratic principles of our republic.

In my view, we judges must constantly revisit these fundamental limitations on our power if we are to be faithful to our oath of office. When we are called upon to interpret the Constitution in order to adjudge a specific case or controversy, we must repress any political or philosophical view we hold that is inconsistent with the plain meaning of the constitutional text or its historical context. If we fail to exercise this form of intellectual self-discipline, we will bumble down a path that, in the words of Justice Scalia, "proceeds on the erroneous and all-too-common assumption that the Constitution means what we think it ought to mean. It does not; it means what it says." *Apprendi* v. *New Jersey*, 530 U.S. 466, 499 (2000) (Scalia, J., concurring).

This principle is not limited to constitutional jurisprudence. Every day in our courts we trial judges hear

HANS HOLBEIN

THE LAWYER: A learned man of formidable integrity, later canonized, Thomas More refused to compromise his conscience and the law in order to serve his sovereign's personal agenda. He once said of Henry, "If my head would win him a castle in France, it should not fail to go."

arguments relying on statutes and rules of court. And every day trial lawyers try to find clever ways to tempt us into expanding or contracting those laws depending on their potential impact on the case before us. We must, of course, resist this temptation. Our personal views on the ostensible wisdom of legislation or the alleged policy justification underlying it should play no role in our judicial reasoning.

Our task, actually, is quite simple: read the statute, read the rule—and do exactly what it says. Add nothing to it; subtract nothing from it. Some say this view is naively simplistic, that the law is much too complex for this. I couldn't disagree more. Quantum physics is complex. Game theory mathematics is complex. General and specific relativity is complex. Law is nothing of the kind. Vague, it often may well be —but don't confuse obscurity with complexity.

Few of you would say as much out loud, but many of you are probably thinking, "Really, now, what is the big deal?" Some of you may go even further and say to yourself: "Come to think of it, I kind of like some of the opinions that might be considered judicial excesses." Fair point, to be sure. But let me give you three reasons to reconsider your views.

ABOUT THE AUTHOR

Judge D. Arthur Kelsey sits on the bench of the Fifth Judicial Circuit in Suffolk and serves as a member of the VBA Civil Litigation Section Council. Before coming to the bench, Judge Kelsey was a partner at Hunton & Williams and a former law clerk to U.S. District Judge John A. MacKenzie.

First, the moment we become tolerant of judges imposing their own personal or political philosophies through judicial edicts —a tolerance, by the way, that we conveniently embrace only when we think the judges got the answer right—we compromise our ability to make a principled objection to this exercise of power when we think the judges got the answer wrong. If you think this point not that important, let me remind you of some painful history. Go back and 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, go to the dissent of Justice Curtis. This is what you find:

> Political reasons have not the requisite certainty to afford rules of [judicial] interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

Dred Scott v. *Sanford*, 60 U.S. (19 How.) 393, 620-21 (1857) (Curtis, J., dissenting).

It was only a few years after Justice Curtis issued this dissent that our nation took a violent free-fall into civil war. Consider this — is it possible that the course of history might have been different if the majority on the Court had heeded the warnings in Justice Curtis's dissent?

In the same league of error I would place the decision of *Korematsu* v. *United States*, 323 U.S. 214 (1944), a Supreme Court decision that permitted thousands of innocent U.S. citizens of Japanese heritage to be interned in detention camps on American soil. *Korematsu*, in so many words, told us that the high court reserved to itself the option of suspending constitutional liberties in time of war—a proposition you will find neither in the literal text nor the historical context of the Constitution.

Another example (less egregious, but equally erroneous) would be *Lochner* v. *New York*, 198 U.S. 45 (1905), in which an economically conservative Supreme Court used the substantive due process clause as a platform for repudiating any laws inconsistent with the *laissez-faire* market theories held by the Justices. Years later, the Court relied on *Lochner* over and over again in its effort to repeal FDR's New Deal legislation, an effort the Court ultimately abandoned when FDR refused to back down.

My point in marching this parade of horribles by you is not merely to condemn the political immorality of those times, but to show the common denominator to be the same in each: the judges went far outside the boundaries of any recognized legal precedent and entered the dangerous sphere of judicial lawmaking. The judicial process left the safe ground of legal analysis and wandered into the perilous ground of philosophical dialectic. It is not enough, therefore, for us to object to the results they reached in those cases. We must also understand, and then dismantle, the reasoning that led them to those results.

Second, even if the courts had plenary authority to make law, they are certainly ill equipped to do it. Truth be told, the institution of the judiciary is not at all nimble enough to engage the kind of social experimentation necessary to make good law. Once a court issues a ruling, the doctrine of *stare decisis* immediately encamps around it to stifle any later change or repudiation. That is not at all the situation with legislation, which can come and go as political power migrates from one set of interest groups to another. The systemic capacity for inertia that characterizes the judicial system makes it a poor laboratory for improvising on social policy.

This lack of flexibility means that even the best of social engineers, if he or she sits on the bench, cannot respond quickly to evolving societal trends and the vicissitudes of the public will.

My third and last reason for considering this issue important has to do with its effect on our democracy. Judicial lawmaking inoculates the political class from having to deal with the hard realities of governing a diverse, pluralistic society. When a polarizing social issue makes its way into the courts, you can almost hear legislators let out a collective sigh of relief.

Once the courts monopolize the issue, the legislative branch of government is relieved of the responsibility for articulating public policy with any degree of specificity. This has the effect of anesthetizing some citizens and alienating others. When we take the hard issues of the day out of the public square, we leave the ordinary citizen to believe that his or her view is no longer relevant. Worse still, we imply that our citizens are neither intellectually competent nor ethically capable of working out a just resolution of these issues. It would be very much to our disfavor if the great debates of our times are banished from the vast marketplace of ideas that we call America and restocked on the shelves of a single shop—owned, operated, and self-regulated by the judiciary. The egalitarian traditions of our people and their virtuous distrust of elites make these undemocratic consequences wholly unacceptable to me—and, I hope, to you as well.

Let me close with this one thought. Implicit in what I've been saying is that we judges must avoid the seduction of thinking ourselves too wise. A measured amount of institutional humility, I believe, would go a long way right about now. Let's face it: We are not philosopher-kings; we are not guardians in Plato's imaginary republic; we are not linear descendants of Solomon.

Along these lines, I like the response Justice Byron White gave at his Senate confirmation hearing when asked what he thought the role of the U.S. Supreme Court should be. He paused quietly and said, "To decide cases." I think that is exactly the response Sir Thomas More

might have given to that question.

In *A Man for All Seasons*, there is a scene where More's wife Alice, his daughter Margaret and his son-in-law William Roper argue with More because he refuses to have a certain man arrested. The scene ends with this exchange:

Margaret:
Father, that man's bad.
More:
There is no law against that.
Roper:
There is! God's law!
More:
Then God can arrest him.
* * * * * * * *
Roper:
Then you set man's law above God's!
More:
No, far below; but let me draw your attention to a fact —I'm not God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester. I doubt if there's a man alive who could follow me there, thank God...
Alice:
While you talk, he's gone [the man you should arrest]!
More:
And so he should, if he was the Devil himself, until he broke the law!
Roper:
So now you'd give the Devil benefit of law!
More:
Yes. What would you do? Cut a great road through the law to get after the Devil?
Roper:
I'd cut down every law in England to do that!
More:
Oh? And when the last law was down, and the Devil turn round on you— where would you hide, Roper, the law all being flat? This country's planted thick with laws from coast to coast— man's laws, not God's—and if you cut them down (and you're just the man to do it) d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

Well said, Sir Thomas. I would too. ◆

The Virginia Bar Association Model Criteria for Judicial Selection and Retention

INTRODUCTION

The judicial system is an important public service.
Public safety and individual liberty and life are at stake in criminal cases. Civil disputes are matters of enormous importance to the parties, e.g., custody, property division, compensation for personal injury, business contracts and government operations.

A judge's job is challenging.
Caseloads have risen steadily for many years as a result of the litigious nature of our society and high crime rates. Judges must competently and expeditiously, with a high degree of professionalism, handle a broad range of matters, many of them complex. Moreover, judges function with a great deal of autonomy, so high levels of self-motivation and self-management are required.

Use of the criteria.
The General Assembly and the Governor have selected good judges at all levels from a wide variety of backgrounds. Not all the criteria will apply in all circumstances, and the relative importance of the criteria is for the user to determine.

THE CRITERIA

1. Integrity
Honesty • Intellectual Honesty • Free of Bias or Prejudice • Free of Favoritism • Evenhandedness • Courage

2. Judicial Temperament
Courtesy • Patience • Firmness • Decisiveness • Thoroughness • Conscientiousness • Collegiality • Public Service Commitment

3. Judgment
Substantive • Procedural • Evidentiary • Sound and Moderate Exercise of Discretion (e.g., sentencing, domestic relations, bench trials) • Common Sense • Willingness to Follow the Law

4. Legal Skills
Knowledge: Substantive, Procedural, Evidentiary • Analysis • Writing • Speech

5. Management Skills
Docket Control • Disposition Time • Requiring Civility • Pretrial Management • Trial Management • Facilitating Settlement • Alternative Dispute Resolution (ADR)

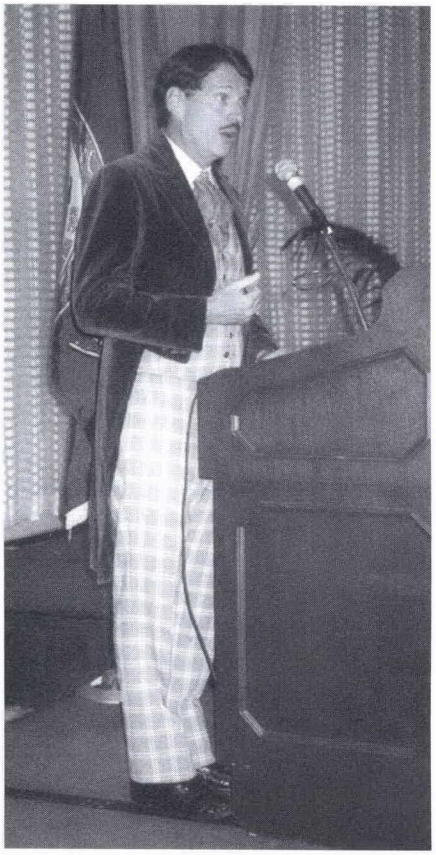
6. Work Ethic
Effort • Efficiency • Productivity

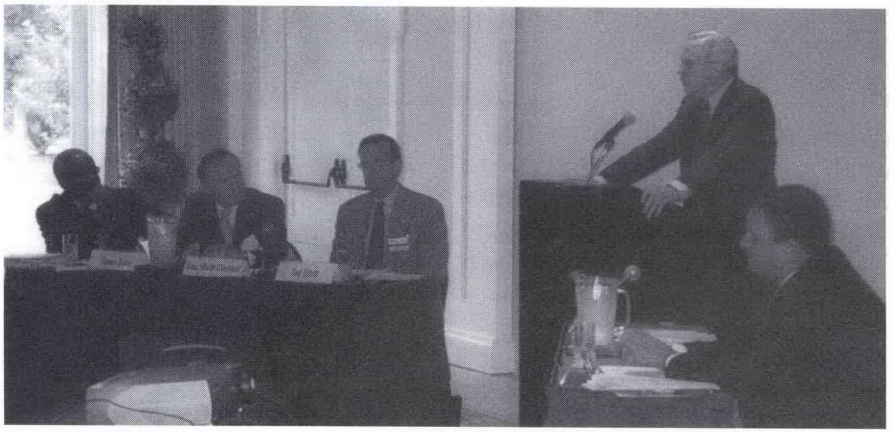
7. Experience
Legal • Other Relevant

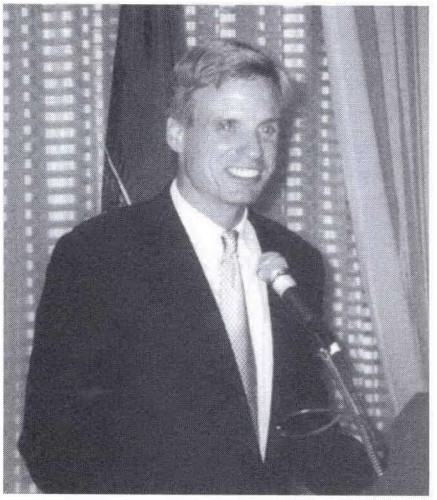
8. Continuous Improvement
Continuing Legal Education • Personal • Management • Judicial System

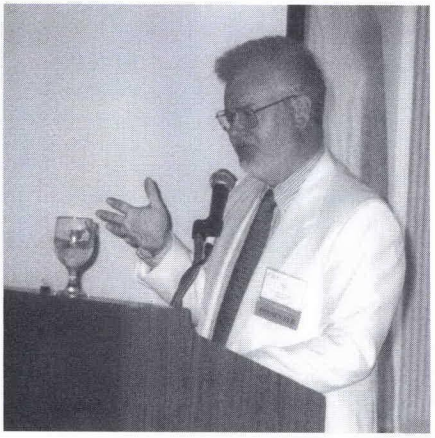
9. Health

The 112th VBA Summer Meeting

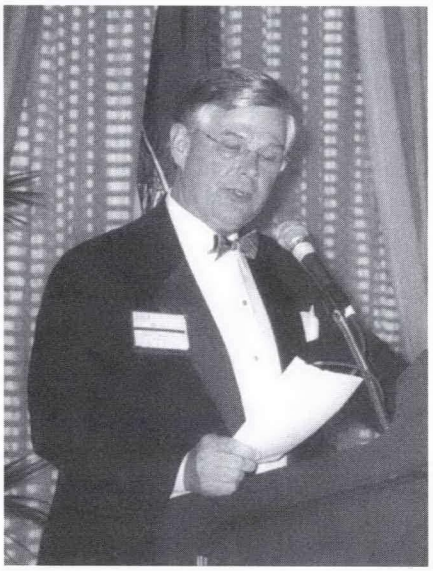


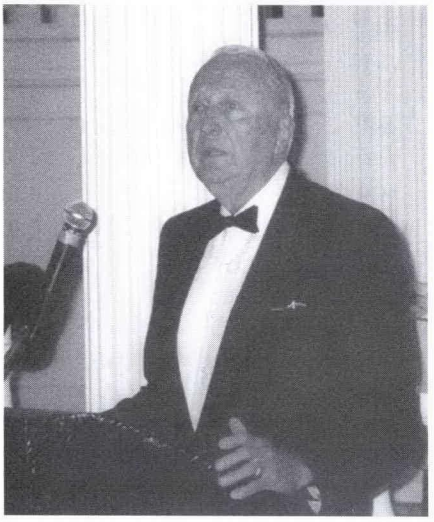


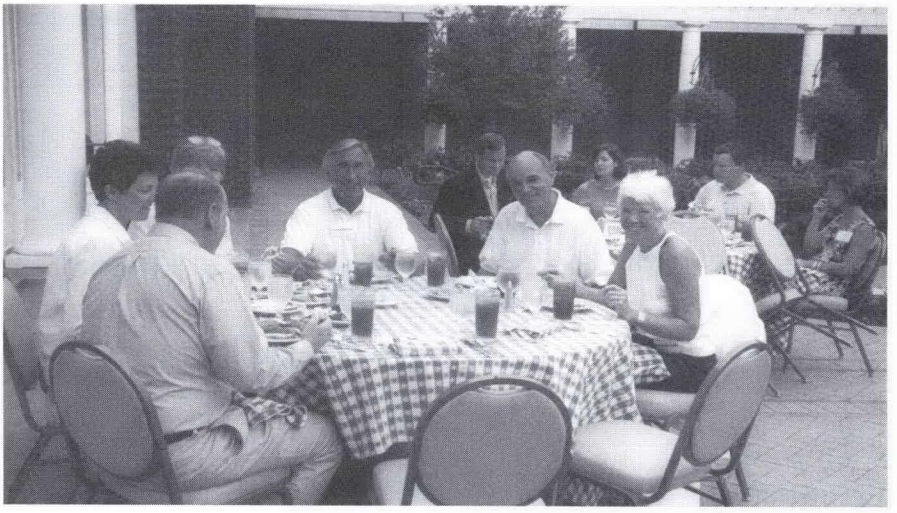


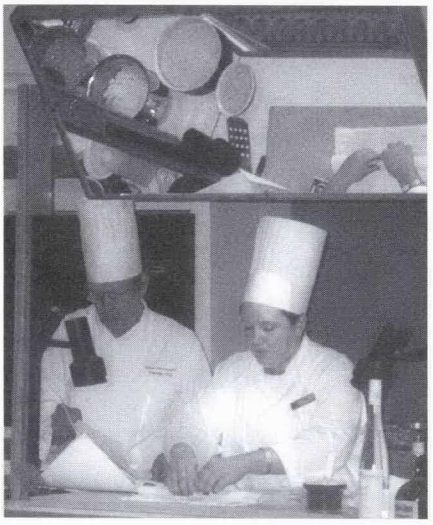


July 11-14, 2002 • The Homestead









FACING PAGE, CLOCKWISE: Dr. Elliot Engel, wearing a replica of the suit worn by Charles Dickens while touring America in 1842, entertained the banquet audience. "The Highway or No Way: The 2002 Transportation Referenda" drew a capacity crowd for a spirited discussion of upcoming ballot issues. The Special Issues Committee's well-attended general session focused on current areas of concern in education. Gov. Mark Warner and Atty. Gen. Jerry Kilgore brought greetings to banquet attendees. VBA Young Lawyers Division leaders gathered for a working breakfast to present their fall plans. Dr. James Kelly of the Virginia Historical Society spoke of "Thomas Jefferson: His Friends and Foes" to a packed room during the Legacy Series luncheon. VBA Business Law Section Chair David Greenberg listened as Randy Parks presented key points of the 2002 Virginia Business Trust Act. **THIS PAGE, CLOCKWISE:** Dexter Rumsey, recipient of the Walker Award of Merit, addressed the banquet audience (more, page 19). Panelists for "9/11 Today," led by Sen. John Warner (top right), flanked by images of the World Trade Center (center right), discussed legal ramifications of the terrorist attacks before an audience of more than 300. The Saturday luncheon drew a jovial crowd for burgers, dogs, barbecue and great tunes. Chef Albert Schnarwyler and his apprentice demonstrated culinary arts (and doable dishes) for VBA spouses and guests. Former Army Secretary and Congressman Jack Marsh was the guest of honor at the Saturday reception sponsored by LexisNexis.

Recovery of Lost Profits: An Improved Weapon in the War on Trade Secret Misappropriation

BY ATTISON L. BARNES III AND CHARLES C. LEMLEY

A high-level executive abruptly departs from your client, a promising new venture, to exploit the company's trade secrets on her own. You immediately advise the client to consider emergency injunctive relief, but soon you discover that the former executive has already hit the market with the production. The cat is out of the bag, and your client is furious. Despite the misappropriation of your client's corporate opportunities, you remember the "new business rule" from your legal training: a new or unestablished business may not recover lost profits. Now, however, a majority of states, including most recently Virginia as of July 1, 2002,[1] provide some relief to new businesses by abandoning the new business rule and permitting recovery of lost profits upon proper proof.[2]

The basic rationale behind the once-prevalent "new business rule" was that an award of lost profits to an unestablished business is inequitable because any such estimation is overly speculative.[3] Today, the predominant view is to permit recovery for new or unestablished businesses, provided that the plaintiffs establish their damages to a "reasonable certainty."[4] Although Virginia's new statute brings the Commonwealth in line with the current law of a majority of states, a plaintiff attempting to obtain an award of lost-profit damages must still elicit "proper proof"[5] to establish that lost profits are not "uncertain, speculative, or remote."[6] This standard of proof may be insurmountable for many high-tech companies, as the pioneering nature of many of these companies—including Internet start-ups, software manufacturers, etc.—prevents a reasonable basis from which a plaintiff may establish lost profits. Nevertheless, the new statute will have consequences for all involved.

This Article will introduce the "new business rule" in Virginia and its disproportionate impact on high-tech businesses. It will also explore Virginia's new statute and forecast its impact on these same companies, illustrating the benefits and pitfalls of the new rule.

Brief History of New Business Rule in Virginia

What is an Unestablished Business?

The unestablished business definition includes a much wider group of enterprises than one may first suspect. Besides a newly formed company yet to engage in business, unestablished businesses consist of: (1) businesses that have opened and operated for a short period of time; (2) an existing business engaged in a new, previously unexplored, venture; or (3) a new branch of an existing franchise.[7] In the past, these companies faced a greater degree of risk when embarking on a new venture in Virginia as compared to other states as a result of the Virginia law exclusion of lost profits recovery.[8]

Principal New Business Rule Cases in Virginia

The new business rule in Virginia has long prevented lost profits recovery for unestablished businesses.[9] In *Mullen* v. *Brantley*,[10] the Virginia Supreme Court prohibited recovery for a plaintiff who established both the existence of a contract and its subsequent unlawful repudiation.[11] The court stated, "[w]here a new business or enterprise is involved ... [profits depend on] too many... contingencies to furnish a safeguard in fixing the measure of damages."[12] In *Pennsylvania State Shopping Plazas, Inc.* v. *Olive*,[13] the Virginia Supreme Court also refused recovery of lost profits damages. There, the Plaintiff sold the defendant, a shopping center, a parcel of land on which the Defendant promised to construct a shopping center for its own use and a service station for Plaintiff. The Defendant subsequently failed to obtain the land or necessary permits, and the Plaintiff, unable to open his service station, sued for lost profits. On appeal, the Virginia Supreme Court set aside a jury's award for lost profit damages on the grounds that the court considered these damages to be too speculative.[14]

Relevance to High-Tech Companies

The new business rule has always been particularly oppressive to innovative high-tech companies. The Internet's exceptional growth exacerbates this problem:

> This difficulty exists to a greater extent on the Internet, as it pertains to new businesses. It is difficult to determine how many people will visit the site per day and how many of those people would purchase something from those stores. This, coupled with the worldwide presence makes it even more difficult to gauge lost profits.[15]

The new business rule's dramatic impact on Internet startups is exemplified by an opinion by the Circuit Court for the City of Alexandria in *CigarCafe, L.C.* v. *America Online, Inc.*[16] There, the plaintiff was a startup company that contracted with AOL to provide advertising and online services for its new business venture. AOL allegedly breached its agreement with the plaintiff shortly after the new business venture began operations. The court granted summary judgment in favor of the defendant, ruling that the new business rule prohibited the plaintiff from recovering damages for lost profits, despite the fact that the plaintiff presented profit projections prepared in consultation with and approved by AOL.[17]

Any innovative business, by definition, has no past earnings history from which a court can estimate lost profits. Consequently, upon the introduction of new, potentially profitable ventures, high-tech companies would forego any chance

of recovering profits lost to unscrupulous competitors, partners, and others.

New Statute

Inequities of the New Business Rule

Two years ago, the Virginia Supreme Court seemed to recognize the inequity of the old rule without abandoning it. In *Lockheed Information Mgt. Sys. Co.* v. *Maximus, Inc.*,[18] the court found that the lower court did not err in permitting recovery of lost profits for a plaintiff's unestablished business while still proclaiming to follow the new business rule.[19] The court distinguished this situation from other new business rule cases on the grounds that the plaintiff's evidence of previous success in nearly identical ventures, coupled with the intentional nature of the defendant's actions, offered sufficient evidence to allow a reasonable estimate of the plaintiff's lost profits.[20] Echoing the equitable reasons that compelled other states to abandon the new business rule as an absolute bar to recovery of lost profits, the court stated that such an absolute bar would permit "anybody . . . [to] lie, cheat, and steal to deprive any new business . . . with complete civil impunity."[21] The new business rule was beginning to lose its teeth.

The new business rule has given way, in many states, to a rule permitting unestablished businesses to recover lost profits damages. This reasoning has led to the establishment of a majority rule permitting unestablished businesses lost profits recovery when plaintiffs prove damages to a "reasonable certainty."[22]

New Statute

Absent an expression of purpose in legislative history, one can only speculate that the General Assembly reacted to calls of inequity.[23] With the exception of a specific exclusion prohibiting recovery in a wrongful death or personal injury action other than defamation,[24] Virginia's recent amendment permits the recovery of lost profits for unestablished businesses upon proper proof. The legislature apparently was, as were the courts of other jurisdictions, substituting a more equitable evidentiary standard for a complete prohibition on recovery.[25]

The Recovery Standard: Proof to a Reasonable Certainty

The phrase "reasonable certainty" is an amorphous standard that provides little to no guidance for practitioners. Some direction, however, may be found in case law from other states that have abandoned the new business rule, and in Virginia cases interpreting the phrase under other circumstances. In *Clark* v. *Scott*,[26] the Virginia Supreme Court offered plaintiffs some direction by stating what is not required—mathematical precision.[27] Courts require the plaintiff to put forth their "best available proof," as lost profits damages are not capable of exact measurement; assuming compliance, a court should permit recovery.[28]

Defendants may claim that the new rule is unfair to them in that it would permit recovery of lost profits that are speculative or difficult to measure. Courts, however, have rejected such arguments on the grounds that "[t]he wrongdoer has created the problem . . . therefore, he cannot now complain that the damages cannot be measured exactly."[29]

What this Means for the Parties

The requirement of "best available proof," is a double-edged sword.[30] Plaintiffs may recover lost profits damages so long as they produce the best evidence of lost profits available. Defendants, conversely, may also use this evidentiary requirement to their advantage. If a defendant convinces a court that superior evidence exists, which the plaintiff failed to present, a court may deny recovery.[31]

Not all jurisdictions, however, follow this "best available proof" standard. Virginia courts may well follow courts that have rejected that standard of proof for a new business's lost profits in favor of evidence that permits a "reasonable basis for computation of damages," regardless of whether it is the best (or only) evidence available.[32] The General Assembly provided no guidance on the issue of "proper proof." *See* Va. Code § 8.02-221.1.

New Law Applied to High-Tech Businesses

Unestablished Business Damages in High-Tech Cases

At the time this article was written, Virginia courts had yet to apply the new statute (effective July 1, 2002) to a case involving a high-tech company seeking lost profits. A review of cases from other jurisdictions provides a helpful guide. In those cases, high-tech startups have succeeded in recovering lost profits primarily through three types of evidence: (1) prior successful experience in business other than the new venture; (2) similarity to other business ventures; and (3) expert testimony.

Prior Successful Experience in a Business other than the New Venture

In those states operating without the "new business" rule, many courts have applied a standard of recovery similar to that used under the new business rule.[33] In *Kids' Universe*, the California Appellate Division denied lost profits damages to a high-tech business owner suing over the failure of an Internet start up project. The plaintiff in *Kids' Universe* was an early developer of retail websites for children's toys who had negotiated a placement contract with a high traffic Internet service provider. Following these preparatory actions, the defendants accidentally flooded the plaintiff's store, effectively preventing the launch of its website. After the plaintiff completed the necessary repairs, a significant amount of time had passed and it was unable to consummate its pre-existing plans.

Despite the court's statement that the defendant may not object to the uncertainty of lost profits, "as he made it impossible [for their realization],"[34] the court denied damages as being too speculative. This result is particularly worrisome for high-tech unestablished business plaintiffs — and conversely comforting for defendants — because the court observed that this was a well-organized plaintiff. The court drew inferences that the plaintiff's site was "state-of-the-art," placed on "highly trafficked" web sites likely allowing it to attract a "very high number of wealthy potential customers," and prepared to meet a high number of orders.[35] Nevertheless, the court refused to award damages as the plaintiff had never operated his website as a "profit making venture."[36]

Why did the court deny lost profits for such a promising new business? The court emphasized the fact that the "market [defendant was operating in]. . . was not an established one."[37] It ignored the profit record of the plaintiff's physical toy store, apparently on the grounds that an extrapolation of profitability would be much too uncertain.[38] *Kids' Universe* demonstrates that a difficult burden remains for a plaintiff seeking lost profits damages for a new business even in the absence of the new business rule. In order

ABOUT THE AUTHORS

Charles C. Lemley is an associate in Wiley Rein & Fielding's Washington, D.C., office and a member of the firm's Employment & Labor, Health Care and Litigation Practices. He provides litigation and counseling solutions to clients on matters related to labor arbitration, employment discrimination and commercial disputes, and has significant experience in highly complex product liability litigation. A member of the District of Columbia and Florida bars, Mr. Lemley received his B.A. degree *summa cum laude* from the University of North Florida and his J.D. degree *magna cum laude* from the Georgetown University Law Center. He is an adjunct professor at the George Mason University School of Law, and also coached the school's undefeated mock trial team in national competition. **Attison L. Barnes III** is a partner in Wiley Rein & Fielding's Washington, D.C., office and a member of the firm's Employment & Labor, Intellectual Property, and Litigation Practices. Among other things, Mr. Barnes counsels companies who seek to protect intellectual property rights and trade secrets from former employees and other entities. A member of the District of Columbia and Virginia bars, Mr. Barnes is a graduate of the University of Virginia and the T.C. Williams School of Law, where he serves on the board of the Law School Association. A longtime VBA volunteer and the recipient of the 1996 Emerson J. Spies Award and the 1999 Fellows Award, he currently serves on the VBA Civil Litigation Section Council.

to prevail on such a claim, the plaintiff must give the court some reasonable basis from which it may estimate damages.

DSC v. *Next Level*[39] illustrates such a reasonable basis. In *DSC*, the defendants, founders of *Next Level*, were DSC employees that developed a new type of communications technology. The defendants left DSC and formed their own corporation, Next Level, focusing on the continued development of their new technology. DSC sued the defendants for breach of contract, diversion of corporate opportunity, and misappropriation of trade secrets, seeking damages for lost profits it would have earned from the new business venture.

The court disagreed with the argument that the "newness" of the technology led to speculative, uncertain damages. In rejecting these challenges, the court took notice of: (1) the early success of the new technology; (2) the history — past profitability — of DSC; and (3) the intensive market research plaintiffs presented, suggesting the future profitability of the technology.[40] Based on these three factors, the court affirmed the trial court's lost profits award.

DSC demonstrates that courts may look beyond the uncertainty surrounding a future market, especially where a successful existing business seeks lost profits related to a new business venture. Counsel should focus on evidence of past profitability and avoid the uncertainties prompted in *Kids' Universe*—where the plaintiff was asking the court to estimate not only the profitability of the website, but also the profits that a possible IPO would produce.

Similarity to Other Businesses

In *Milex Products, Inc.* v. *ALRA Labs, Inc.*,[41] the plaintiff, a drug company, sued defendants for breach of contract — failing to manufacture their new drug. The defendant previously represented to the plaintiffs that it would be able to manufacture up to two million of the plaintiff's pills. Only later, when the plaintiffs requested that the defendant begin production, did the defendant state that it would be unable to do so. As a result of this delay, the plaintiffs sued for lost profits following from interruption of an existing business.

In its holding, the court noted that Illinois law does not proscribe an award of damages to a new business as long as it is able to establish lost profits to a reasonable certainty. The court concluded that lost profits were ascertainable here, as the product market was already established — despite the newness of the product — and awarded damages.

Morgan v. *Microsoft*,[42] also illustrates what is necessary to succeed on a "similar to other businesses" claim. In *Morgan*, the court denied recovery on the plaintiff's tortious interference claim as the plaintiff, a software manufacturer, failed to establish lost profits to a "reasonable certainty." The court stated that Washington law does not prohibit recovery for unestablished businesses, and evidence of "'identical or similar businesses'... operating under 'substantially the same conditions," provides a method by which a court can make a reasonable estimation of an appropriate award.[43] The court then denied plaintiff's attempt at recovery because his evidence was not focused narrowly enough on products similar to his own.[44]

Both *Milex* and *Morgan* demonstrate that in order for plaintiffs to succeed on a similar business claim, they must show that the unestablished business is the near equivalent to other operating companies. A defendant, alternatively, can rebut such claims by pointing out inconsistencies in the plaintiff's analogy.

Expert Testimony

Both plaintiffs and defendants can utilize expert testimony to prove the past profitability of the plaintiff's business, the similarities to other businesses, and the likelihood of future profitability. Accordingly, expert testimony can be critical to the success of an action for an unestablished business's lost profit damages.[45] In *DSC*, for example, the court upheld a damages award based upon a complex model estimating the plaintiff's lost profits. The model relied upon estimates of what the plaintiff's market share would have been had the defendants not formed their own company as compared to what that market share would be in light of the new company's existence, *all for a product market that had not even been established*.[46] The court upheld the damages model because it was "adequately supported" by "data obtained from respected sources in the telecommunications market."[47] This expert testimony would have been properly excluded under Virginia's former new business rule.[48]

Conclusion

Virginia law is now more amenable to a claim for profits lost to former employees misappropriating trade secrets, as well as other situations involving unestablished businesses. The new law still imposes a heavy evidentiary burden on the plaintiff in such a case, but has lifted the absolute bar to recovery. The secret to success on such a claim is to focus on evidence that reduces the speculation in the damages equation, specifically evidence of prior success in business, success of similar businesses, and expert testimony supported by reliable data from respected sources. With the right evidence, solid lost profit awards can be obtained even with respect to new business ventures that never got off the ground. ◆

NOTES

1. Va.Code Ann. §8.01-221.1 (2002) ("Damages for lost profits of a new or unestablished business may be recoverable upon proper proof. A party shall not be deemed to have failed to prove lost profits because the new or unestablished business has no history of profits. Such damages for a new or unestablished business shall not be recoverable in wrongful death or personal injury actions other than actions for defamation.")
2. John P. Fishwick Jr., "Virginia's New Business Rule: Time for a Change," *The Journal of the Virginia Trial Lawyers Association,* Spring 2001, at 8, 12.
3. *Pennsylvania State Shopping Plazas, Inc.* v. *Olive,* 202 Va. 862, 869 (1961).
4. Howard O. Hunter, *Modern Law of Contracts,* §14.21 (revised ed. 1993).
5. Va.Code Ann. §8.01-221.1.
6. Walter D. Kelley Jr., "Recovery of Lost Profits in Virginia," *Litigation News,* Vol. IV, No. 3 at 3 (1997) (citations omitted).
7. Robert L. Dunn, Recovery of Damages for Lost Profits §§ 4.6-4.13 (5th ed. 1998); *see also CigarCafe, L.C.* v. *America Online, Inc.,* 50 Va.Cir. 146, 160 (Alex. Cir. Ct. 1999) (Virginia new business rule encompasses businesses not yet in operation and those operating only a short time).
8. Virginia courts often avoided the new business rule by being slow to characterize a venture as a "new business." *See, e.g., Beden* v. *Optimum Choice, Inc.* 38 Va.Cir. 239, 246 (Fairfax Cir. Ct. 1995) (discussing reluctance of Virginia courts to identify ventures as new businesses for these purposes).
9. The new business rule retained its validity in Virginia to the end. Just last year, the Fourth Circuit upheld the district court's decision to exclude expert testimony of lost profits for a new golf course venture based upon the new business rule. *Perry* v. *Scruggs,* 2001 WL 929873 at *4 (4th Cir. 2001).
10. 213 Va. 765 (1973).
11. The court rejected recovery despite strong evidence of the new pizza parlor's potential for profit — the plaintiff offered evidence of average profits for this pizza franchise and profits of several franchises in the vicinity. *Mullen,* 213 Va. at 768. Moreover, the plaintiff owned some of the other franchises and had a track record of running them successfully. *Id.*
12. Id. at 768 (citing Pennsylvania State Shopping Plazas, Inc. v. Olive, 202 Va. 862 (1961)). *See also duPont Co.* v. *Univ. Moulded Prod.,* 191 Va. 525, 573 (1950); *Whitehead* v. *Cape Henry Syndicate,* 111 Va., 193, 197 (1910); *Sinclair Refining Co.* v. *Hamilton & Dotson,* 164 Va. 203, 211 (1935)).
13. 202 Va. 862 (1961).
14. *Id.* at 870.
15. Morgan Stewart, "Commercial Access Contracts and the Internet: Does the Uniform Computer Information Transactions Act Clear the Air with Regard to Liabilities when an Online Access System Fails?" 27 Pepp.L.Rev. 597, 611 (2000) (citation omitted); *see also Skywizard.com LLC* v. *Computer Personalities Sys., Inc.,* 2000 WL 1186263, at *3 n.2. (D.Me. 2000) ("The sheer newness of the enterprise is a factor that has been observed to make it difficult (although not impossible) for a plaintiff business to prove lost profits with reasonable certainty.").
16. 50 Va.Cir. 146 (Alex.Cir.Ct. 1999).
17. Conversely, in *Interactive Return Service* v. *Virginia Polytechnic Inst.,* 52 Va.Cir. 161 (Richmond Cir. Ct. 2000), the court refused to grant the defendant summary judgment based upon the new business rule despite the fact that any lost profits would have arisen out of an invention that was never even developed or specifically contemplated. This ruling was hardly a resounding rejection of the new business rule; rather, it simply relied upon *Lockheed Information Mgt. Sys. Co.* v. *Maximus, Inc.,* 259 Va. 92 (2000), for the proposition that the new business rule was not absolute, and permitted the plaintiff to present its evidence at trial.
18. 259 Va. at 110.
19. *Id.* at 108-10.
20. Defendants sued prior to the effective date of § 8.01-221.1 should not be overly concerned with *Lockheed;* the facts of that case were exceptional and courts are likely to confine its holding to its facts.
21. *Lockheed,* 259 Va. at 109; *see also Central Telecomm., Inc.* v. *TCI Cablevision, Inc.,* 800 F. 2d 711, 729 (8th Cir. 1986) (stating that a court's refusal to award lost profit damages to an unestablished business would "immunize a defendant from the consequences of his unlawful acts.") (citations omitted).
22. *See Fera* v. *Village Plaza, Inc.,* 396 Mich. 639 (1976); *Cifone* v. *City of Poughkeepsie,* 650 N.Y.S. 2d 797 (App.Div. 1996); *Texas Instruments, Inc.* v. *Teletron Energy Mgt., Inc.,* 877 S.W.2d 276 (Tex. 1994); *Restatement (Second) of Contracts* §352, cmt. a (1981); UCC §2-708, cmt. 2 ("It is not necessary to recovery of 'profit' to show a history of earnings, *especially if a new venture is involved.*") (emphasis added); *Recovery of Anticipated Lost Profits of New Business: Post-1965 Cases,* 55 A.L.R. 4th 507 (1987) (discussing the many state courts refusing to follow the new business rule).
23. *See* Fishwick, *supra* note 2.
24. Va.Code Ann. § 8.01-221.1.
25. An unestablished business may pursue lost profits under either tort or contract theories. The standard of proof under either avenue is essentially the same. When evaluating a lost profits contract claim for an existing business, the Virginia Supreme Court stated that recovery will be permitted so long as lost profits can be ascertained to a "reasonable certainty." *Boggs* v. *Duncan,* 202 Va. 877, 883 (1961). Virginia courts have applied a similar standard in tort cases. Kelley, *supra* note 6, at 3 ("In Virginia, loss of future profits proximately caused by wrongful conduct... may be recovered from a tort feasor, provided the lost profits are capable of reasonable ascertainment and are not uncertain, speculative or remote.") (citing *Hop In Food Stores, Inc.* v. *Serve-N-Save, Inc.,* 247 Va. 187, 190 (1994)); *see also Lockheed,* 259 Va. at 110 (addressing the defendant's argument that awarding lost profits to the plaintiff would be too speculative without mentioning any distinction between the plaintiff's theories of recovery, tortious interference, and other contract claims).
26. 258 Va. 296 (1999).
27. *Id.* at 303; *see also* Kelley, *supra* note 6, at 3-4 (quoting *Commercial Business Sys., Inc.* v. *BellSouth Serv., Inc.,* 249 Va.39, 49-50 (1995)).
28. Dunn, *supra* note 7, at 388.
29. *Id.* at 385; *see also Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 563 (1931) ("[I]t would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his act.... The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.")
30. Dunn, *supra* note 7, at 389.
31. *See Martin Motor Sales, Inc.* v. *Saab-Scania of Amer., Inc.,* 452 F.Supp 1047, 1053 (S.D.N.Y. 1978) (denying profits because the plaintiff did not present probative evidence that was readily available at little to no cost); *S.C. Anderson, Inc.* v. *Bank of Amer.,* 24 Cal.App.4th 529, 528 (1994); *Oyster Creek Financial Corp.* v. *Richwood Inv. II, Inc.,* 957 S.W.2d 640, 649 (Tex.App. 1997).
32. *See Dunn, supra* note 7, at 390 (citing *Graphic Directions, Inc.* v. *Bush,* 862 P.2d 1020 (Colo.App.1993) (disapproving of the "best available evidence" standard and requirinf a contrary level of proof).
33. *See, e.g., Kids' Universe* v. *In2Labs,* 95 Cal.App.4th 870 (2002).
34. *Id.* at 884.
35. *Id.* at 886.
36. *Id.* at 887.
37. *Id.*
38. *See id.* at 887 (discussing its hesitation to estimate damages as the website was too dissimilar to plaintiff's physical store); *see also Texas Instruments, Inc.* v. *Teletron, Inc.,* 877 S.W.2d 276, 280-81 (Tex.1994) (refusing to award damages to a plaintiff suing a defendant that was unable to produce a microprocessor necessary for plaintiff's state-of-the-art thermostat. In *Texas Instruments,* the defendant made several attempts at producing the necessary hardware, finally giving up after two years of failure. The court distinguished precedent permitting recovery with a new product, noting that here the market was completely "unestablished" and, more importantly, the product never existed.); *Resort Video, Ltd.* v. *Laser Video,* 35 Cal.App.4th 1679, 1698 (1995) (noting that there may be an award if the "owners have experience in the business they are seeking to establish, and where the business is in an established market.").
39. 107 F.3d 322 (5th Cir. 1997).
40. *Id.* at 329.
41. 327 Ill.App.3d 177 (1992).
42. 2001 WL 78758 (Wash.App.Div. July 9, 2001).
43. *Id.* at #4.
44. *Id.* at #5.
45. *See DSC* v. *Next Level,* 107 F.3d at 329 (permitting recovery in part because of the plaintiff's expert testimony); *see also Resort Video,* 35 Cal.App.4th at 1699 (refusing recovery in part because of plaintiff's lack of substantive market research).
46. DSC, 107 F.3d at 329.
47. *Id.* at 330.
48. *See Perry* v. *Scruggs,* 2001 WL 929873, at *4 (4th Cir. 2001).

Volunteers + Programs = Reaching More People!

BY VAUGHAN GIBSON AARONSON

Late summer conjures up images of many things — dwindling beach days, the approach of Labor Day weekend, the start of school — but to the VBA Young Lawyers Division, it also marks the halfway point of our year. Since the "official" bar year began in January, our many volunteers have worked hard in their dedication to ongoing VBA/YLD projects and new initiatives through donating countless volunteer hours to our bar and our communities. Yet just because we are in the middle of our bar year does not mean that we don't need new faces and new energy. Our committees and projects are in constant need of additional assistance. It is simple: the more volunteers we have, the more people we can help.

So as summer ends and fall approaches, I encourage you to think of the new "school year" as a new opportunity to get involved. Our many ongoing projects provide endless opportunities to serve. For example:

- Our Pro Bono Hotlines all over the state are always looking for new volunteers;
- Our Domestic Violence Projects in Northern Virginia and Richmond are in need of additional attorneys to represent victims;
- Immigration attorneys are needed to help produce a handbook on immigrants' rights;
- Our Lawyers for the Arts Committee is seeking volunteers to staff clinics where artists can obtain legal advice on a number of issues;
- Our Mentor Programs are in search of volunteers to work with at-risk fourth- and fifth-graders in public schools in Richmond, Roanoke and Lynchburg;
- Our National Moot Court Committee is in the midst of planning this year's competition and has put out a call for volunteer judges; and
- Our DMV Projects in Richmond and Roanoke are looking for attorneys to work with local judges to present brief programs to young people as they obtain their driver's licenses.

The list goes on and on. Again, the more volunteers, the more people reached!

In addition to these ongoing projects, the VBA/YLD has been working this year on a number of new initiatives aimed at helping victims of child abuse, offering *pro bono* legal services to nonprofit organizations, assisting working parents in finding suitable child care, and providing guidance to first-year attorneys as they make the adjustment from student to practicing lawyer. You will hear more about these exciting new programs in the coming months.

One project which we are "rolling out" right now, however, is our *Special Education Handbook*. This project began during the term of my predecessor David Anthony and Committee Chair Ashley Taylor has been collaborating with the Attorney General's office over the past year to produce this convenient handbook that summarizes Virginia's special education procedural safeguard requirements. This handbook will be an invaluable resource for parents of children needing special education in that it explains what educational services are available to them and how to access those services. If you or someone you know has a child with special needs, I strongly recommend you obtain a copy. They are available through the VBA office and we welcome your ideas for distributing them to organizations and individuals that can benefit from this handbook.

For a complete list of our VBA/YLD projects and service opportunities, please visit the Division's page on the VBA website at www.vba.org or contact Regina Moss, our staff liaison, at (804) 644-0041 or me directly at (804) 697-1316. We need you! ◆

Nominations are sought for VBA/YLD leadership positions in the 2003 bar year. For details, please turn to page 20 of this issue or visit the VBA/YLD web page.

More about the VBA/YLD *Special Education Handbook*

The VBA Young Lawyers Division's *Special Education Handbook* is a summary of Virginia's special education procedural safeguard requirements. It includes a discussion of, among other things, the due process procedures designed to protect both parents and students, IDEA disciplinary procedures and confidentiality concerns. The *Handbook* is a useful tool to assist parents in understanding what services are available and how to access those services. While there are several publications on this topic, many are not user-friendly and can be intimidating, particularly for a family that is unfamilar with the process. The *Handbook* is the product of the volunteer efforts of lawyers across the Commonwealth, most of whom have had some degree of personal involvement with the special education services offered in Virginia. Copies can be obtained by contacting Regina Moss at the VBA office, (804) 644-0041, or the Virginia Department of Education at (804) 225-2020. *—Ashley Taylor, VBA/YLD Special Education Handbook Chair*

books@vba.org

Today's successful law firm has to be client-focused, organized and efficient in order to compete and be profitable. All that takes good management. The key to improving your practice and achieving your goals is to find resources you can trust containing information you can use. That can sometimes be difficult, but The Virginia Bar Association Law Practice Management Division is dedicated to bringing lawyers fresh ideas, new perspectives and creative ways to manage every aspect of your practice.

The VBA Law Practice Management Division has established an agreement with the American Bar Association to sell ABA books to all members of the VBA/LPMD — that is, all members of The Virginia Bar Association — at a *20 percent discount.* You will be able to go to the VBA website at **www.vba.org,** click on a link to the Book Program **(www.vba.org/books.htm)**, peruse a list of available books with pricing information, and print out an order form to send to the VBA office with your payment. Other arrangements will be offered to VBA members who do not have Internet access. The Book Program will be promoted in VBA publications, our website and at our meetings.

These books will provide you with everything you need to compete in today's legal world. Whether you are looking for information on technology, marketing or management — or books on a specific area of practice — there will be something for you. And think of the money you'll save!

Resources you can trust. Information you can use. At prices you can handle.
On the Internet at www.vba.org. On the phone at (804) 644-0041.

The VBA Book Program

Sponsored by the Law Practice Management Division of The Virginia Bar Association

LPM
Law Practice Management
your practice & our profession

New VBA group forming for arts, entertainment & sports lawyers

The Virginia Bar Association is determining interest within the general membership in establishing a new group on arts, entertainment and sports law. The group's broad mission would be to provide a forum for VBA members to explore legislative, legal and business issues which relate to the arts, entertainment, sports and media fields whether commercial or nonprofit, amateur or professional.

If your practice or interests include representation of clients in such fields as visual or performing arts, music, media and broadcasting, cultural activities, entertainment and sports, you may be interested in joining this group.

If you would like to participate in the new group as a member or leader, please contact one of the following Steering Committee members:

Jim Meath, (804) 783-6412, jmeath@williamsmullen.com;

Jeff Cohen, (703) 243-6333, cohen@mwzb.com;

Victor Cardwell, (540) 983-7529, cardwell@woodsrogers.com;

Philip Goodpasture, (804) 697-4117, pgoodpasture@cblaw.com, or

Breck Arrington at the VBA office, (804) 644-0041, cbarrington@vba.org.

Watch for more details!

VBA Labor Relations & Employment Law Conference meets at Kingsmill this month

The 32nd Annual Conference on Labor Relations and Employment Law, sponsored by the VBA Labor Relations and Employment Law Section, will be held September 27-28, 2002, at Kingsmill on the James in Williamsburg.

The conference will begin with a full day of CLE programs on Friday, followed by an evening reception. Attendees will reconvene Saturday morning for more CLE programs and adjourn at midday. Nine hours of CLE credit, including 1 Ethics credit, will be available to conference participants.

The conference will feature the following program topics:

- "What's Next: Hot Issues in Employment Law on the Supreme Court's Docket for the 2002-03 Term";
- "Does Virginia Need a Whistleblower Protection Act? The General Assembly Wants to Know, and the Bar Struggles with the Legal and Public Policy Issues";
- "Use and Abuse of Statistics in Employment Litigation: An Expert Statistician's Tutorial on Developing and Using Statistical Evidence to Your Client's Advantage";
- "Choosing Your Battles: Effective Appellate Advocacy and the Role of Amicus Curiae";
- "Pay Equity: Detecting, Correcting and Defending Compensation Disparities";
- "Waiting for the 'Bush Board': Prospects and Advocacy at the NLRB";
- "How Disabled Has the ADA Become? Practice Pointers and Litigation Strategies in Light of Recent ADA Developments";
- "Putting on the White Hat: Tips for Fulfilling the State Bar's New Pro Bono Publico Requirements and Avoiding Positional Conflicts with Billable Clients";
- "The ABCs of H-1Bs—What Employment Lawyers Need to Know about Immigration Enforcement After 9/11";
- "Successful Tips for Negotiating Executive Employment and Stock Option Agreements and Handling the Litigation that Often Follows";
- "Home Cooking: Trends in the Fourth Circuit, Virginia Supreme Court, and Federal District Courts in Virginia";
- "Virginia Point and Counterpoint — 2002: Friendly Adversaries Exchange Fire on Current Litigation Strategies";
- "Dealing with the Incumbent Plaintiff: A Case Study in Keeping the Peace at Work While Doing Battle in Court";
- "Legislative Developments in Virginia: Bounty Hunters and Whistleblowers Under the 'Fraud Against Taxpayers Act' and Other Assorted Suspects"; and
- "Reading the Tea Leaves: Practical Considerations for Plaintiff and Defense Counsel in Investigating and Evaluating Employment Claims."

A full list of conference speakers, including Prof. Samuel Estreicher of New York University, Virginia Lieutenant Governor Tim Kaine, Hon. Diana Gribbon Motz of the U.S. Court of Appeals for the Fourth Circuit, Chief Judge Anne B. Holton of the Richmond Juvenile & Domestic Relations Court, Dr. Joan Haworth of Economic Research Services, former National Labor Relations Board member J. Robert Brame, and a host of other well-known and knowledgeable figures in labor and employment law, is available on the Section's activities page on the VBA website, along with registration details.

Anne Gordon Greever of Richmond, a partner in the law firm of Hunton & Williams, chairs the VBA Labor Relations and Employment Law Section.

Hotel reservations should be made directly with Kingsmill on the James at 1-800-832-5665.

Two VBA members will fill new committee spots

Two VBA members have been nominated by VBA President Ed Betts to fill newly created positions on the Joint Continuing Legal Education Committee in the 2002-03 year.

Aubrey J. Rosser Jr. of Altavista and E. Ford Stephens (Christian & Barton LLP) of Richmond have been nominated for initial and renewable one-year terms on the Joint CLE Committee expiring in June 2003.

They will join fellow VBA representatives J. Lee E. Osborne of Roanoke (Carter, Brown & Osborne, PC), Elaine R. Jordan of Richmond (Sands, Anderson, Marks & Miller), Neil S. Lowenstein of Norfolk (Vandeventer Black LLP), Paul B. Terpak of Fairfax (Blankingship & Keith PC) and VBA/YLD representative Valerie W. Long of Charlottesville (McGuireWoods LLP).

Capital Defense Workshop planned for November 21-22

The 10th Annual Capital Defense Workshop will be held November 21-22 at the Richmond Marriott. The program is sponsored by the VBA Criminal Law Section and financially assisted by the Virginia Law Foundation.

Because of changes made to the standards for attorneys in capital cases as of January 1, 2002, the workshop will again provide the necessary forensic training to comply with the requirements of § 19.2-163.8 of the Virginia Code. The application of *Ring* v. *Arizona*, decided June 24, 2002, in Virginia will be discussed. There will also be a session on the effects of *Atkins* v. *Virginia*, decided June 20, 2002, in which the Supreme Court barred execution of the mentally retarded.

The Workshop Committee is in the process of assembling an outstanding program with excellent presenters, and it will be offered with only a nominal charge for attorneys who agree to accept appointment in capital cases. Brochures will be mailed later this fall and the schedule and registration details will be posted on www.vba.org as soon as they are available.

October conference details announced by VBA

The **VBA Corporate Counsel Section's Annual Fall Forum** will be held on October 10 at The Jefferson Hotel in Richmond. The one-day event will be similar to previous forums, with prominent speakers, opportunities for networking and discussion, and a focus on current issues in corporate law.

On October 25, the VBA Taxation Section will convene its annual **Virginia Tax Practitioners' Roundtable** at Farmington in Charlottesville, featuring current interests of tax practitioners in the Commonwealth during the half-day program.

Both meetings will offer continuing legal education credit to attendees. Schedules and registration information for both events, under final discussion at press time, will be mailed to members of the respective sections and will be posted on the VBA website at www.vba.org.

Lawyers Helping Lawyers Conference will be September 27-28 in Richmond

"Join the Voices of Recovery... Calling the Legal Profession to Action" will be the theme of the biennial Lawyers Helping Lawyers Conference, September 27-28 at the Omni Richmond. The theme echoes that for National Recovery Month, which is observed during September.

Keynote speakers will include Gary A. Tennis, chief of legislation for the Philadelphia district attorney's office, who will present "A 'Law and Order' Prosecutor's Case for Drug and Alcohol Treatment: A Wake-Up Call for the Legal Profession" on Friday morning, and Dr. Raymond M. Pomm, medical director for the Physicians Recovery Network/Impaired Practitioners Program of Florida, whose subject will be "Looking at the Big Picture: Improving the Prognosis for Recovery."

Other speakers scheduled to appear during the conference are Hon. Harry L. Carrico, chief justice of Virginia; Dr. Jitendra Desai, president of Avenues to Recovery, Inc., of Roanoke; Dr. Peter R. Coleman of Commonwealth Addiction Treatment Center in Richmond; LHL Program Director Susan D. Pauley; and 96-year-old James Houck, known as the "great life changer," who is the only living person who has firsthand knowledge of the material used by Bill W. and others to write the book *Alcoholics Anonymous*.

In addition to informative sessions, the conference will feature a luncheon, social and banquet on Friday and exhibits and networking opportunities throughout the event.

Lawyers Helping Lawyers provides confidential, non-disciplinary assistance to members of the legal profession in Virginia who experience professional impairment as a result of substance abuse. Lawyers Helping Lawyers is administered by the VBA and endorsed by the Virginia State Bar. Policies and guidelines are established by the VBA Substance Abuse Committee.

Charles G. Meyer III of Richmond, a partner in the law firm of LeClair Ryan PC, chairs the VBA Substance Abuse Committee.

More details are available at www.vba.org/lhl.htm.

Dexter Rumsey receives Walker Award

Dexter C. Rumsey III of Irvington, a partner in the law firm of Rumsey and Bugg, received the VBA's Walker Award of Merit on July 12 during the 112th VBA Summer Meeting at The Homestead in Hot Springs.

The Walker Award is named in honor of the late John L. Walker Sr., and John L. Walker Jr., both former VBA presidents and Roanoke residents, and is presented in recognition and appreciation of exceptional leadership within the organized bar and the VBA in particular.

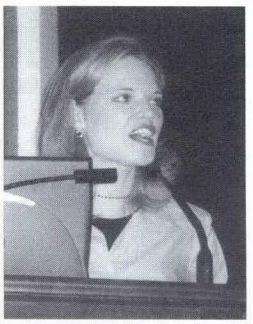
Born in Charleston, S.C., Rumsey is a graduate of the University of North Carolina and the University of Virginia School of Law. He served in the U.S. Marine Corps (1964-68), achieving the rank of Captain.

Rumsey joined the VBA in 1974. He has served as a member of the VBA Executive Committee from 1994 to 1997, and as VBA Secretary in 1996-97. He has served on the VBA Wills, Trusts and Estates Section Council and its legislative committee.

Since 1997, he has chaired the Virginia Law Foundation Joint Continuing Legal Education Committee, on which he has served for more than a decade as a VBA representative. He is a Fellow of the Virginia Law Foundation and has served as president of the Northern Neck Bar Association, chaired the Virginia State Bar Trusts and Estates Section and been elected to membership in the American College of Trust and Estate Counsel, among other professional and civic activities.

Mercer shares story at July event

Heather Mercer (right), one of the two American aid workers in Afghanistan who were imprisoned by the Taliban for several months in 2001, shared her story at a luncheon sponsored by Troutman Sanders LLP at Richmond's Bolling Haxall House on July 23. Her uncle, David Mercer, is a partner in the law firm and a former chair of the VBA Substance Abuse Committee.



During her talk, Mercer shared photos and tales of her work and daily life in Afghanistan, her imprisonment on charges of spreading Christianity among Afghan Muslims, and the dramatic rescue of the aid workers by U.S. Special Forces. She told the audience that she hopes to return to Afghanistan to continue her work there, as she feels a great love for the Afghan people and a desire to serve them.

Mercer and her colleague Dayna Curry have co-authored an account of their experiences, *Prisoners of Hope: The Story of Our Captivity and Freedom in Afghanistan.* Proceeds from book sales go to the foundation the women have started to help the people of Afghanistan.

VBA/YLD seeks nominations for '03 Secretary/Treasurer, 4 EC posts

The nomination process for selecting the 2003 VBA Young Lawyers Division Secretary/Treasurer and new members of the Executive Committee has begun with the appointment of the VBA/YLD Nominating Committee:

King Tower, *Chair*, Williams Mullen, Richmond; ktower@williamsmullen.com, (804) 783-6438.

Monica Taylor Monday, Gentry Locke Rakes & Moore LLP, Roanoke; monica_monday@gentrylocke.com, (540) 983-9405;

Erica Beardsley, Watt, Tieder, Hoffar & Fitzgerald, McLean; ebeardsl@wthf.com, (703) 749-1068;

Steve Otero, Troutman Sanders LLP, Richmond; steve.otero@troutmansanders.com, (804) 697-1200;

Stacy Colvin (non-voting), Hunton & Williams, Richmond; scolvin@hunton.com, (804) 788-8379; and

Vaughan Gibson Aaronson, Troutman Sanders LLP, Richmond; vaughan.aaronson@troutmansanders.com, (804) 697-1316.

VBA/YLD members interested in being considered for nomination as an officer or Executive Committee member (at this point, four Executive Committee positions will need to be filled), should contact the Nominating Committee members. All VBA/YLD members are encouraged to seriously consider these positions.

The Nominating Committee plans to complete the nomination process by the September 27-28 VBA/YLD meeting in Charlottesville. Interested nominees should contact the committee as soon as possible.

VBA/YLD honored with national awards

During the recent ABA Awards of Achievement presentation at the ABA Young Lawyers Division Annual Meeting in Washington, D.C., the VBA Young Lawyers Division received a first place for Service to the Bar, for its program on lifestyle balance, co-sponsored with the VBA Professionalism Working Groups at the 2002 VBA Annual Meeting; a second place for Service to the Public, for the regional Town Hall Meetings in 2001; and a second place in the Comprehensive category, all in Division IC competition. Nicole C. Daniel of Hunton & Williams in Richmond, chair of the VBA/YLD Awards of Achievement Committee, prepared the entries for the competition.

'Court End Society' fête planned for John Marshall's birthday Sept. 22

The John Marshall House, located at 818 East Marshall Street in downtown Richmond, will present "Court End Society" in honor of John Marshall's 248th birthday on Sunday, September 22, from noon to 4 p.m.

Court End, just north of Capitol Square, became a fashionable residential neighborhood in the late 1700s. John Marshall built his home in 1790 and lived there until his death in 1835. After his appointment to the Supreme Court in 1801, he was Richmond's most prominent citizen. "Court End Society" will celebrate the contributions he made to Richmond and its lifestyle in the Federal era.

Rita Bagby, well-known Richmond tour guide, will talk on early Richmond history, Court End residents and their homes. An exhibit will feature maps, copies of watercolor paintings by Benjamin Latrobe, and old photographs of some Court End homes. Lifestyles of early residents will be portrayed by living history interpreters, and with music and dances of the early 19th century. Refreshments will be served. Crafts will be demonstrated in the newly refurbished garden, and items by local artists will be on sale in the Cellar Gift Shop.

Regular admission ($5 for adults, $4 for seniors, $3 for students through college) will be charged. AAA, AARP and active military discounts are available. For additional information, call (804) 648-7998.

Classified ads now available

The *VBA News Journal* now 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. Ad costs must be paid in advance. The *VBA News Journal* reserves the right to review all ad copy before publication and to reject material deemed unsuitable. Deadlines will be one month in advance of the date of publication (November 1 for December, etc.). Information is available online at www.vba.org, or call for details at (804) 644-0041.

The Virginia Bar Association Law Practice Management Division Professional Skills Committee Survey

This survey is intended to solicit your thoughts and sentiments regarding professional skills (non-CLE) that are most important to your practice of law. You can answer this survey in less than 8 minutes. Your responses will contribute significantly to the direction of the Professional Skills Program being developed by our Committee for the January 2003 VBA Annual Meeting. Across the VBA we have substantial variance in what our attorneys want and need in terms of their professional skills development. This survey will help better define the nature of those needs and assist us in addressing them. Thank you for your time and contribution to this most important effort. ***Your input is important, confidential and anonymous.***

Before You Start: Biographical Background

Total number of attorneys within your firm or organization *(circle category)*: **1-5** **6-49** **50-99** **100-249** **250+**

 # years practicing law *(circle category)*: **Less than 5** **5-10** **11-20** **21+**

Management/Leadership Position within firm or organization *(circle category)*: **Yes** **No**

The first section of our survey will ask you to rate the relative importance of each topic or skill area in terms of its comparative importance to you in your practice of law. The second section is open-ended so as to allow you the opportunity to comment on any particular topic, theme, skill area or subject regarding professional skills development.

Section I: Importance Rating Scale *(Check answer)*

	Not Important	Slightly Important	Important	Very Important	Most Important
Business Valuations					
Case Management					
Client Budgeting					
Client Counseling					
Client Development Skills					
Client Relations Skills					
Dealing with Difficult People					
Delegating					
Emotional Intelligence					
Evaluating Performance & Providing Feedback					
Formal Presentations					
Government & Corporate Structures					
How to be a "Virginia Lawyer"					
Interpersonal Skills & their Relationship to Success					
Knowledge Management					
Leadership Development & Leading Attorneys					
Managing Support Staff					
Mentoring					
Negotiations					
Networking					
Personal Practice Management					
Public & Media Relations					
The Art of the Informal Presentation					
Team Building within Law Firms					
Time Management					
Understanding Financial Statements					
Use of Technology					

(Please turn over to Section II)

Section II: Open-Ended Questions

What is the most important Professional Skill that you would like to develop?

What is the most important developmental need for a Professional Skill that you believe is required by members of your firm, office or organization?

Does your firm or organization have a mentoring program? *(Please circle answer)* ***Yes*** ***No***
(Please comment or describe)

Do you feel that professional skills training (Non-CLE) is an important tool for attorney development?
(Please circle answer) ***Yes*** ***No*** *(Please elaborate)*

How do young associates learn about the business side of law?

What can the Professional Skills Committee of the Law Practice Management Division of the VBA do "down the road" to benefit the practice of law and your firm specifically?

What message or theme would you like to share with the VBA in terms of professional skills development?

Please return this survey to Dr. Robert R. Begland, c/o The Virginia Bar Association, 701 East Franklin Street, Suite 1120, Richmond, VA 23219. Thank you!

A Tribute to The Honorable Harry Lee Carrico
Chief Justice of Virginia

In Celebration of his Illustrious and Distinguished Tenure
As the Leader of Virginia's Judicial System

Reception and Dinner
Thursday, December 5, 2002, 6:00 P.M.
The Jefferson Hotel, Richmond, Virginia

Sponsored by

Virginia State Bar
Old Dominion Bar Association
Virginia Association of Defense Attorneys
The Virginia Bar Association
Virginia Trial Lawyers Association
Virginia Women Attorneys Association
The Bar Association of the City of Richmond

Space for this event is limited. Individual reservations will be confirmed on a first-come, first-served basis. In order to confirm your tickets, please return the form below, together with your check, as soon as possible. Your cancelled check will serve as your receipt; confirmation of your reservation will be sent to the email address provided below.

Business Attire

RESERVATION FORM

Please reserve (_____) individual tickets ***at $125 each*** for the dinner in honor of Chief Justice Carrico on Thursday evening, December 5th.

NAME _____
(Last) (First) (Middle I.)

FIRM/AFFILIATION _____

ADDRESS _____ CITY _____ STATE _____ ZIP _____

TELEPHONE (_____)_____ EMAIL _____ (for confirmation)

NAMES OF OTHER GUESTS IN MY PARTY:
(Names must be provided; please print)

Guest 1 _____
Guest 2 _____
Guest 3 _____

❑ Please charge my credit card $_____.
❑ Visa ❑ MasterCard ❑ AMEX
Card #: _____ Exp. Date: _____
Signature: _____

Enclosed is my check in the amount of $_____. Please make your check ***payable*** to ***The Virginia Bar Association*** and mail it with this form to The Virginia Bar Association, 701 East Franklin St.,Suite 1120, Richmond, VA 23219. For questions concerning reservations or other aspects of the event, please call **Elizabeth (Bet) Keller at the Virginia State Bar (804) 775-0516, or Brenda Dillard at The Virginia Bar Association, (804) 644-0041. Law firms and bar groups interested in sponsoring a patron table should contact Bet or Brenda.**

Calendar

September 26-28, 2002
VBA Labor Relations & Employment Law Conference
Kingsmill, Williamsburg

September 27-28, 2002
Lawyers Helping Lawyers Conference
Omni Richmond

September 27-28, 2002
VBA/YLD Executive Committee & Council Meeting
Boar's Head Inn, Charlottesville

October 10, 2002
VBA Corporate Counsel Fall Forum
The Jefferson Hotel, Richmond

October 18-20, 2002
VBA Board of Governors Meeting
Capon Springs, West Virginia

October 25, 2002
VBA Virginia Tax Practitioners Roundtable
Farmington, Charlottesville

October 25-26, 2002
Boyd-Graves Conference
Norfolk Waterside Marriott

November 6, 2002
Pro Bono Hotline Roundtable
Holiday Inn Hotel and Suites, Bristol

November 14-16, 2002
National Moot Court Competition, Region IV
U.S. Courthouse, Richmond

November 19, 2002
VBA Legislative Workday
The Berkeley Hotel, Richmond

November 21-22, 2002
VBA Capital Defense Workshop
Richmond Marriott

January 16-19, 2003
VBA 113th Annual Meeting
Williamsburg Lodge & Conference Center

July 10-13, 2003
VBA 113th Summer Meeting
The Greenbrier, White Sulphur Springs, W.Va.

For more information about any of these events, please call the VBA office at ***(804) 644-0041****, or visit* ***www.vba.org.***

Many Thanks to Our Summer Meeting Sponsors!

American National Lawyers Insurance Reciprocal and The Reciprocal Insurance Agency, Ltd. (Members of The Reciprocal Group) • CSX Corporation • Dominion Virginia Power • The Homestead • Hunton & Williams • Lawyer's Staffing, Inc. • LexisNexis • Norfolk Southern Corporation • Troutman Sanders LLP

V·B·A

The Virginia Bar Association
701 East Franklin Street, Suite 1120
Richmond, VA 23219
(804) 644-0041