

## Inside This Issue

Photo Recap, Recent Events, pg. 2  
Bar Council Report, pg. 3  
PWCBA Board Meeting, pg. 4  
CLE Up Date, pg. 4

### Special Issue- Legislative Summaries

Bankruptcy, pg. 5  
Business Law, pg. 7  
Criminal Law, pg. 10  
Litigation, pg. 11  
Local Government, pg. 12  
Real Property, pg. 13  
Trusts & Estates, pg. 14

PWCBA Listserv, pg. 6

### Inserts

"Minnesota Lawyers Mutual and  
VSB Disciplinary Committee  
ETHICS" CLE registration flyer.

# Hear Ye! Hear Ye!

*News from the Prince William County Bar Association*

Volume IX Issue VII

August 2004

## Presidents Message

*By Scott Bailey*

It's July, it's hot, and I just got perhaps the shortest haircut of my life. The word "short" apparently has different meanings to different people. To me, it means "not long". To my barber, it meant "make sure lots of white skin shows through." Luckily, I'm about to leave town for two weeks as I'm writing this, so by the time the column appears, I should be back to normal.

For those of you who missed our July luncheon, you missed a frank discussion and appraisal of the recent session of our legislature from three of our delegates, all of whom figured prominently in the budget debates. Delegates Parrish, Marshall and Frederick were able to join us, and bravely fielded questions from the membership after their prepared remarks. This was a rare opportunity, or at least only an annual one, and I encourage you all to take advantage of it next year when they hopefully return.

A reminder that in August Kim Peele will be presenting the annual update on legislation affecting DUI cases. This is always a great presentation, and is, of course, an opportunity for a FREE CLE with only the cost of the lunch. Please plan to attend, and PLEASE RSVP if you are coming. This presentation is always crowded, and we need to plan accordingly.

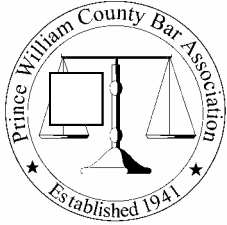
Finally, those of you who read the comics know that when an artist takes vacation, various "guests" fill in, ala Little Billy in Family Circus. So, because I'm lazy and am feeling a breeze on my head where none has been felt to these many years, I present legal wisdom from my own guests:

**President Taft:** Lawyers are necessary in a community. Some of you ... take a different view; but as I am a member of that legal profession, or was at one time, and have only lost standing in it to become a politician, I still retain the pride of the profession. And I still insist that it is the law and the lawyer that make popular government under a written constitution and written statutes possible.

**Erasmus:** Amongst the learned the lawyers claim first place, the most self-satisfied class of people, as they roll their rock of Sisyphus and string together six hundred laws in the same breath, no matter whether relevant or not, piling up opinion on opinion and gloss on gloss to make their profession seem the most difficult of all. Anything which causes trouble has special merit in their eyes.

**Jonathan Swift:** It is a maxim among these lawyers, that whatever hath been done before, may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind.

*Continued, Page 3*



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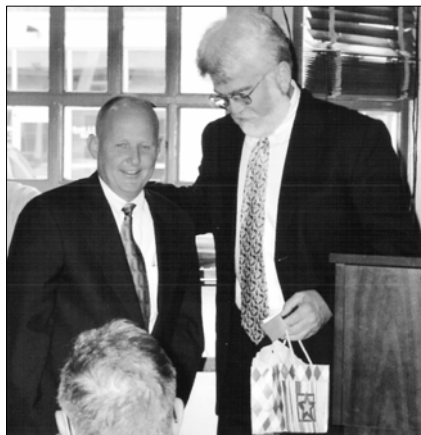
John D. Whittington  
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*In one of his final duties as a regular member of the PWCBA, Judge Elect Craig Johnston accepts two Award of Merit plaques on behalf of our Bar, at the Virginia State Bar's Annual Meeting on June 18, 2004. The PWCBA received an Award of Merit for the Circuit and General District Court Time Savers Manuals, and for the new "Guardian ad litem for Children" public education brochure. Pictured with Craig left to right are: Jeannie P. Dahnk, 2003-04 President of the VSB, and Judith L. Rosenblatt, 2003-04 Director CLBA.*



*Pictured: Senator's Colgan and O'Brien addressed the membership at June luncheon meeting. Delegate's Parrish, Marshall and Frederick addressed the membership at the July luncheon meeting. The state budget impasse was discussed from multiple viewpoints, as well as other legislation passed during the 2004 session of the Virginia General Assembly.*



*Allen Newcomb is presented with the Legal Services Of Northern Virginia, Harry L. Carrico, Pro bono attorney of the year award. Russell Hatchl, pictured on right, is the new pro bono coordinator for LSNV.*

## Bar Council Report

By John D. Whittington

The Virginia State Bar Council is responsible for establishing policy for the Virginia State Bar. Members are elected by their fellow lawyers in all 31 Judicial Districts of Virginia. In addition to the elected Council Members, the Supreme Court appoints nine (9) at large members. The President of the Young Lawyers Conference, the Chair of the Senior Lawyers Conference and the Chair of the Conference of Local Bar Associations serve as ex-officio Members of Council. Including the President of the Virginia State Bar, President Elect and immediate past President, who serve as members, the Council at present consists of seventy-two (72) members. I am proud to be the elected member from the 31<sup>st</sup> Judicial District.

I recently had the opportunity to attend the Bar Council Meeting on June 17, 2004 at the Virginia State Bar 66<sup>th</sup> Annual Meeting in Virginia Beach. I sat along side Craig Johnston at his last official meeting. In observing Craig at that meeting as well as speaking with his fellow council members both before and after, it became clear to me that Craig has earned a great deal of respect for both himself and the 31<sup>st</sup> Judicial District during his six (6) year tenure as our representative. It is my hope to continue that tradition.

During my time at the Bar Meeting I was able to spend time with our immediate past President, Jeannie P. Dahnk as well as introduce myself to our current Bar President, David P. Bobzien. At the time this report was dictated I had yet to be assigned by Mr. Bobzien to a committee post, but I expect that to occur within the next 2 to 3 weeks. Soon I will report my specific committee assignment and its responsibilities.

In the meantime, should any member of this Circuit have any questions regarding the Virginia State Bar and its administration, whether it be on the topic of bar dues, the unauthorized practice of law, availability of legal services to all citizens of the Commonwealth or the disciplinary process I would encourage you to call, write or email me your concerns, and I will see that they are addressed in a timely fashion.

The next Bar Council Meeting takes place on October 14 – 15, 2004 in Charlottesville, Virginia. While I will certainly report to the Bar after that meeting I expect to report information as it becomes available to me on a monthly basis in this newsletter.

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### *President's Message, Continued*

**Abraham Lincoln:** There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal.

And finally, what compendium would be complete without the vaunted wisdom and spirited debate which characterize our elected government and the men who make and enforce our national laws, known as the GFY philosophy, recently cited on the floor of the United States Senate:

**VP Cheney:** Go #@#% Yourself!!

So, there you have it, a pocket collection of legal wit and wisdom through the ages. And, for those of you who thought last month's column was, as I believe it was put, "a little thin," well, Good For You.

### 2004

#### Standing Committee Chairs

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Helen E. Marmol  
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Kristina Keech Spitler  
Membership & Mentoring  
(703) 369-4738

Amy Ashworth  
Nominations  
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Rusty von Keller  
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## **Prince William County Bar Association, Inc.**

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The PWCBA Office is located on the lower level of the Judicial Center in Circuit Court Archives.

Information about many of the Bar Association's programs and services is available through our web site at [www.pwcba.org](http://www.pwcba.org).

### **Guidelines for Submissions to Hear Ye! Hear Ye!**

Submissions should be directed to the attention of Alissa N. Hudson, Executive Director, PWCBA via email to [info@pwcba.org](mailto:info@pwcba.org), or fax to (703) 331-5683, or may be mailed to her c/o Prince William County Bar Association, Inc., P.O. Box 31, Manassas, VA 20108. All submissions are due by 5:00 PM on the 10<sup>th</sup> of the month preceding publication and must include a contact name and phone number.

"Letters to the Editor" may be submitted for publication by members in good standing of the PWC Bar, and must not exceed 500 words in length. "Letters" may be edited for clarity or space conformity. All submissions must have a contact name and phone number, and will include the author's name in the newsletter.

For inquiries regarding classified or display advertising, contact the PWCBA office at (703) 393-2306, to request a copy of the most recent rate card, or visit the bar on line at [www.pwcba.org](http://www.pwcba.org) under "About the Bar", "Advertising and Sponsorships".

This newsletter is printed by Battlefield Kwik Kopy.

## **PWCBA Board Meeting Summary**

*By W. Michael Phipps*

The Prince William County Bar Association's Board of Directors meeting was held on June 25, 2004 at Jake's Seafood Restaurant. The meeting was chaired by President-Elect Tracy Hudson.

It was reported that plans for the investiture of Judge Farris and Craig Johnston are proceeding and the event is scheduled for July 30, 2004 at 3:00 p.m. Plans are also proceeding to acknowledge the retirement of Judge Whisenant to honor him for his years of service.

The Board was reminded that the Legislative Issues Forum is scheduled for October 7<sup>th</sup> at George Mason University, Prince William Campus.

Tracy Hudson reported that the PWC Bar e-mail listserv is up and running. Members may subscribe by e-mailing a request to be added to the list to [admin@pwcba.org](mailto:admin@pwcba.org). *Editor's note: as of July 15, 30 members of the bar have subscribed to the Bar's listserv.*

The Board approved a measure making the Association's newsletter a benefit of membership. No paid subscriptions are available.

### **CLE Up Date**

*By Catherine S. Croft*

No CLEs sponsored by the Prince William County Bar Association are planned for the summer month of August this year, except for the August 6 luncheon CLE featuring the new ASAP related legislation.

**September 15, 2004:** This has become an annual CLE and is presented by the Uncontested Divorce Project and is expected to feature speaker Julie Savage, Esq. and speakers from the McCammon Mediation Group. This CLE will offer 2 ethics credits. This CLE is offered free of charge to the bar members in exchange for a commitment to handle a set number of uncontested divorces through the Uncontested Divorce Project during the following calendar year.

**October 15, 2004:** Prince William County we will participate in a Multi-jurisdictional CLE on General District Court Practice to be held at the Fairfax Government Center.

**October 22, 2004:** Casey Stevens will present what has become the annual DUI CLE.

**I would like to apologize for not including in the July newsletter thanks to the following people who presented CLEs through June 4, 2004:**

**The Hon. Mary Grace O'Brien, Scott Bailey, Esq. and Robert Coleman Esq.** for their presentation in February on the new Drug Court.

**In addition, I would like to thank Charlie Maddox for administering the Bankruptcy CLE held in January.**

*As always, I invite each of you to commit to the presentation of CLEs or to offer ideas for interesting topics for future CLEs. Please call me with your offer of time and creativity: **Cathy Croft, 703-335-9390.***

# SPECIAL ISSUE

## LEGISLATIVE SUMMARIES

The legislative updates reported in this section were provided by the PWCBA Liaisons to their respective VSB Practice Sections. Updates are presented this month in the areas of bankruptcy, business law, criminal law, litigation, real property, trusts & estates and local government law. The updates provided here do not represent all the new legislation enacted during the 2004 Session of the Virginia General Assembly, nor are the summaries comprehensive as to the content of the new bills passed. This information is provided as a service to the membership of the Bar, to alert you to changes in the law that may impact your practice.

For a complete listing of new Virginia State legislation, you may visit "The Division of Legislative Services" web site at [dls.state.va.us](http://dls.state.va.us). Go to <publications>, then <Digest of the Acts of Assembly>, then <2004>, then <Table of Contents by Title> and search for new legislation that may impact your practice.

**Thank you to all the new and returning 2004-2005 PWCBA Section Liaisons for providing these updates!** Updates from the family law section will be provided as soon as a new liaison volunteers.

### Bankruptcy Law

By Raymond R. Pring, Jr.

Bankruptcy is a creature of federal law. While it's true that state statutes and state courts can have a dramatic impact on the treatment and fortunes of debtors and creditors before, during and after a bankruptcy is filed (consider state exemption laws for example), bankruptcy nonetheless remains a fundamentally federal matter. As a result, I attempted to limit the scope of my update – this time – to changes in federal bankruptcy law.

Having established those parameters, I can faithfully report that the only significant aspect of legislative change in bankruptcy law during the past year is the astonishing absence of any change. In July 2002, Congress enacted the Sarbanes-Oxley Act of 2002. As part of that legislation, Congress added 11 U.S.C. § 523(a)(19) to the Bankruptcy Code, thereby making certain obligations incurred in connection with violations of securities laws non-dischargeable in individual chapter 7 and chapter 11 cases.

The only subsequent changes to the Bankruptcy Code have since been undone by the passage of time. To be precise, chapter 12 of the Bankruptcy Code – a chapter that provides specific relief for family farmers – was originally enacted with a sunset provision providing that it would expire in 1998 unless Congress took action. Congress extended the chapter 12 expiration date on several occasions, most recently in August 2003, but chapter 12 expired on January 1, 2004. Cases pending at that time remain unaffected, but no new cases may be filed unless and until Congress further extends chapter 12.

For a number of years, Congress has debated sweeping bankruptcy reform legislation that would, at least in theory, require most bankruptcy debtors to either make payments to creditors or justify their inability to make such payments. However, the bankruptcy reform legislation has been mired in politics, and most pundits don't believe that any action will be taken prior to the end of this year. It appears that even

### *Trusts and Estates, Continued*

The action shall survive the grantor's death, shall accrue upon completion of the representation in which the malpractice occurred and shall be brought within five (5) years in the case of a written contract for legal services, or three (3) years in the case of an unwritten contract. No action may be maintained where damages reasonably may be avoided or result form a change of law subsequent to the engagement in which the damages were sustained. The legislation contains a clause stating that it is declaratory of existing law. The legislation modifies the result of the Virginia Supreme Court's decision in Charles Rutter, Executor of the Estate of Mildred Duncan v. Jones, Blechman, Woltz & Kelly, PC, 264 Va. 310, 568 S.E.2d 693 (2002). In Rutter, plaintiff executor sought to assert a claim of legal malpractice concerning a revocable trust on the grounds that negligent drafting cost the estate more than \$600,000.00 in estate tax liability. The Supreme Court held that no cause of action could have accrued during the decedent's lifetime because damages were not sustained until after her death triggered the tax liability. Because no cause of action existed during the decedent's lifetime, § 8.01-25 of the Virginia Code directed that no cause of action survived her death. This 2004 Legislature intends for this legislation to prevent the Rutter opinion to extend to cases involving irrevocable trusts.

Powers of Attorney – Revocation. The 2004 Legislature also passed new legislation authorizing a court to revoke, suspend or otherwise limit the authority of an agent under a power of attorney the creator of which has become incapacitated at the request of, and based upon information provided by the guardian, conservator or committee for that incapacitated person, or by other interested parties.

## PWCBA Listserv Guidelines

You are encouraged to sign up for the newest benefit of membership in the PWCBA, the listserv.

**To subscribe**, send an email to [admin@pwcba.org](mailto:admin@pwcba.org) and you will be added to the list.

**To post a message**, send an e-mail to [list@pwcba.org](mailto:list@pwcba.org). Your message will be sent to everyone on the list.

**To reply to a message**, you can reply to the entire list by hitting reply, or just reply to the individual who sent the message by copying their email address in the "From" line and pasting it into a separate e-mail for a private response.

**To unsubscribe**, simply send a message to [list@pwcba.org](mailto:list@pwcba.org) with the word "unsubscribe" typed in the subject line. You will automatically be removed.

**Those choosing to use the service should keep a couple of points in mind:**

First, any e-mail message can be forwarded or copied to anyone else, member or non-member, friend or foe. Members should use good judgment and discretion in making postings. There should be no expectation of confidentiality in postings. Client identities should be protected and nothing of confidence should be revealed.

Second, users should reply privately to postings unless the nature of the issue would tend to be of benefit to the membership generally. The listserv should be viewed as a resource and not a chat room.

Finally, this is a new service. We are learning by doing. Please be patient and let Alissa know of any suggestions for improvement or concerns about the service by emailing her at [admin@pwcba.org](mailto:admin@pwcba.org)

## Bankruptcy Law Continued

chapter 12 fell victim to the political fracas. The Senate passed a one-page bill to extend chapter 12 beyond January 2004, but the House added its 500-plus pages of bankruptcy legislation to the proposed bill, and chapter 12 withered on the vine. For those that are interested, a number of online resources and publications, such as [www.abiworld.org](http://www.abiworld.org), provide detailed analysis of past and pending bankruptcy legislation.

Despite the lack of any legislative change, practitioners should nonetheless be aware that a number of Bankruptcy statutes contain provisions that change automatically every three years to keep up with inflation. By way of example, as of April 1, 2004, the maximum secured and unsecured claim amounts used to determine chapter 13 eligibility increased to \$922,975 and \$307,675 respectively. See 11 U.S.C. § 109(e). A partial listing of similar automatic changes effective on April 1 is as follows:

| <u>Statute</u>  | <u>Modification</u>   |
|-----------------|---|
| 109(e)          | Maximum secured and unsecured claim limitations for Chapter 13 eligibility increased to \$922,975 and \$307,675 respectively. |
| 303(b)          | Minimum claim amount for creditor to initiate an involuntary bankruptcy increased to \$11,625.                                |
| 507(a)(3)       | Priority claim for wages increased to \$4,925.  |
| 507(a)(4)(B)(i) | Priority claim for employee benefit plan increased to \$4,925.  |
| 507(a)(5)       | Priority claim for certain grain growers increased to \$4,925.  |
| 507(a)(6)       | Priority claim for consumer deposits increased to \$2,225.  |
| 523(a)(2)(C)    | Presumption threshold for non-dischargeable consumer "luxury goods or services" increased to \$1,225.                         |

Similarly, a number of miscellaneous filing fees were also increased as of November 1, 2003, including the fees for: (i) a chapter 7 case (\$209); (ii) a chapter 11 case (\$839); (iii) a chapter 13 case (\$194); (iv) a notice of appeal (\$255); and (v) a motion for relief from stay (\$150). In addition, the local bankruptcy judges amended and modified a number of the local rules and standing orders governing bankruptcy practice in the Eastern District of Virginia. Most of these changes were technical in nature to correct clerical errors or provide clarification of rules. However, Congress has recognized that because bankruptcy cases are filed and maintained in an electronic format available to the general public over the internet, the detailed personal information in those documents represent an easy target for theft and abuse. Accordingly, the Local Rules and standing orders now require that pleadings (including the petition and related documents) should not include: (i) the full social security number of debtors and other individuals; (ii) the names of minor children; (iii) the dates of birth of a debtor or minor children; or (iv) full financial account numbers. The rules now require debtors to submit their social security number in a separate document that will not be available to the general public.

Finally, practitioners should also be aware that the Bankruptcy Court no longer requires submission of copies and envelopes along with proposed orders, and that proposed orders should now be presented on disc in Court, or by email using the "BOPS" system. Detailed information regarding BOPS and all of the foregoing amendments can be found on the Court's website at [www.vaeb.uscourts.gov](http://www.vaeb.uscourts.gov).

## Business Law

By Mark S. Weiss

The following information, concerning changes to the Virginia Code affecting the representation of businesses, is summarized from the Virginia General Assembly Legislative Information System website at [www.lig1.state.va.us](http://www.lig1.state.va.us). This summary does not represent all legislative changes potentially within the broad category of "business law," but only those that I deemed most important to practitioners representing businesses.

6.1-330.53, 6.1-330.54 and 8.01-382: Amendments to these sections lower the legal and judgment interest rates from the current rates of eight and nine percent respectively to a single rate of six percent. Also clarifies that when a contract or instrument is silent, and the court or jury has not set the interest rate, the same rate is applied for pre-judgment and post-judgment interest.

6.1-453, 6.1-459, and 6.1-461 amended: Requires "payday" lenders to retain their borrowers' checks. The bill prohibits application of post-maturity interest to loan fees and limits borrowers' right to make partial payments to the period prior to loan maturity. Payday lenders are required to return paid loan agreements to borrowers marked "paid" or "canceled" and to keep copies of such agreements. The measure also provides that the Payday Loan Act's provisions exclusively control the


post-judgment interest and other charges and expenses payday lenders may recover from borrowers.

6.1-472 and 6.1-473 added: Asset-Backed Securities Facilitation Act. Provides that any property, assets, or rights purported to be transferred in a securitization transaction shall be deemed to no longer be the property, assets, or rights of the transferor. A transferor in a securitization transaction, its creditors or a bankruptcy trustee, receiver, debtor, debtor in possession, or similar person shall have no rights to reacquire, reclaim, recover, repudiate, disaffirm, redeem, or re-characterize as property of the transferor any property, assets, or rights purported to be transferred by the transferor. In a bankruptcy, receivership, or other insolvency proceeding governed by the laws of the Commonwealth, the property, assets, and rights shall not be deemed to be part of the transferor's property, assets, rights, or estate.

13.1-750 and 13.1-912 amended: Specifies the classes of persons entitled to receive payments when a corporation divests itself of all of its assets. The bill also makes technical amendments relating to articles of termination of corporate existence of stock and non-stock corporations.

*Continued, Page 8*

# Electronic Evidence: Find the Digital Smoking Gun!



## Sensei Enterprises, Inc.

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Principals: Sharon D. Nelson, Esq. and John W. Simek -  
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Member - High Technology Crime Investigation Association

8.1A-201, 8.2-103, 8.2-310, 8.2-323, 8.2-401, 8.2-503, 8.2-505, 8.2-506, 8.2-509, 8.2-605, 8.2-705, 8.4-104, 8.4-208, 8.7-102, 8.7-103, 8.7-104, 8.7-202, 8.7-203, 8.7-204, 8.7-205, 8.7-206, 8.7-208, 8.7-209, 8.7-210, 8.7-301, 8.7-302, 8.7-303, 8.7-305, 8.7-307, 8.7-309, 8.7-401, 8.7-402, 8.7-403, 8.7-404, 8.7-501, 8.7-502, 8.7-503, 8.7-505, 8.7-506, 8.7-507, 8.7-509, 8.7-601, 8.7-602, and 8.7-603 amended; 8.7-105.1 and 8.7-106 added; 8.7-105 repealed: Uniform Commercial Code; Article 7 Documents of Title. Updates provisions of Article 7 of the Uniform Commercial Code to acknowledge the development of electronic documents of title. Specific measures authorize the re-issuance of electronic documents of title in a tangible medium, address when a person has control of an electronic document of title, and address the interaction of Title 7 with the Electronic Signatures in Global and National Commerce Act and the Uniform Electronic Transactions Act.

13.1-754, 13.1-916, 13.1-1008, 13.1-1009, 13.1-1019, 13.1-1022, 13.1-1023.1, 13.1-1024, 13.1-1048, 13.1-1050.1, 13.1-1059, 13.1-1064, 13.1-1070, 13.1-1239, 13.1-1254, 50-73.69, 50-73.83, 50-73.132, 50-73.134, and 50-73.137:1 amended; 13.1-1041.1, 13.1-1049.1, 50-73.46:1, 50-73.52:1, and 50-73.137:2 added; and 13.1-1041 and 50-73.46 repealed: Clarifies that liabilities incurred by a corporation, limited partnership, limited liability company, business trust, or limited liability partnership, or its member, officer, director or other agent, after an administrative termination of existence and before the entity's reinstatement shall be determined as if the termination of the entity's existence had not occurred. The changes also (i) authorize limited liability company operating agreements to provide for contractual appraisal rights, arbitration and exclusive jurisdiction, and multiple classes of members and managers; (ii) clarify the ability of limited liability companies to indemnify members, managers, and other agents; (iii) permit limited liability companies to engage in any business, purpose, or activity, regardless of whether the activity constitutes a business; and (iv) conform charging order provisions of the limited liability company, limited partnership, and partnership statutes. Also makes other technical changes to the limited liability company, partnership, and limited partnership acts.

13.1-1.11 and 13.1-1015 Amended: Permits a member or manager of a limited liability company that is a member or manager of a new or existing limited liability company to be the registered agent for the limited liability company. This provision is consistent with similar provisions applicable to limited partnerships, registered limited liability partnerships, and business trusts.

40.1-29 amended: Eliminates the requirement that payments of wages by prepaid debit cards be deposited into a trust account. Payments of wages by credit to prepaid debit cards or card accounts are specifically authorized, provided the employee affirmatively consents and the employer discloses any applicable fees.

43-32 amended: Mechanic's lien; keeper of garage, hanger or marina. Increases the maximum lien for repairs or alterations made at the request of the owner of the boat, aircraft, or vehicle that the keeper of the garage, hanger or marina shall have from \$625 to \$800.

51.1-1103 amended: Clarifies that an employee is ineligible to participate in the Virginia Sickness and Disability Program during any period of nonpay status due to suspension pending investigation or outcome of employment-related court action.

51.1-1110 amended: Precludes payment of short-term disability benefits for elective medical procedures, including surgery, during an initial six-month probationary period without approval of the employer. The employee shall give reasonable advance notice to his immediate supervisor and the employer shall not unreasonably withhold authorization for such medically necessary absences. Current law provides such coverage beginning the first day of employment. The provisions do not apply to short-term disability benefits for which payment began prior to July 1, 2004.

51.1-1112 amended: Requires employees, as a condition to receiving long-term disability benefits under the Virginia Sickness and Disability Program, to apply for Social Security disability benefits unless they are otherwise directed.

54.1-1101 amended: Grants an exemption from licensure to any person who performs or supervises repair or improvement of residential dwelling units owned by him that are subject to the Virginia Residential Landlord Tenant Act. The bill further provides that such person and certain persons enumerated in the bill who are exempted from licensure shall comply with the Uniform Statewide Building Code. The bill contains technical amendments.

54.1-1115 amended: Adds a prohibition for any person contracting for, or bidding upon the construction, removal, repair or improvements to or upon real property owned, controlled or leased by another person without the proper class of license as defined in 54.1-1100 (i.e. Class A, B, or C license) for the value of work to be performed. Currently, a person is prohibited from contracting for, or bidding upon the construction, removal, repair or improvements to or upon real property owned, controlled or leased by another person without a license or certificate. The bill also provides that any person undertaking such work without the proper class of license (i.e., Class A, B, or C license) shall be fined an amount not to exceed \$500 per day for each day that such person is in violation, in addition to the authorized penalties for the commission of a Class 1 misdemeanor.

59.1-198 and 59.1-204 amended: Virginia Consumer Protection Act; admissibility of cure offers. Permits a supplier to introduce a cure offer into evidence in a proceeding for damages under the Consumer Protection Act if the cure offer is delivered prior to the filing of the supplier's initial responsive pleading. If the

*Business Law Continued*

damages awarded in the proceeding do not exceed the value of the cure offer, the supplier will not be liable for the person's attorneys' fees and court costs. A cure offer is an offer to remedy a loss claimed to be suffered as a result of a consumer transaction, which includes an additional amount of at least 10 percent of \$500, whichever is greater; however, the minimum additional amount need not exceed \$4,000.

59.1-200 amended; 59.1-525 through 59.1-529 added: Price gouging. Prohibits suppliers from selling, leasing, or licensing necessary goods and services during times of disaster at an unconscionable price. To determine whether a price increase is unconscionable, the court must consider, amount other factors, whether the price charged by the supplier during the time of disaster grossly exceeded the price at which the same or similar goods or services were readily obtainable in the trade area during the 10 days prior to the time of disaster. A violation constitutes a prohibited practice under the Virginia Consumer Protection Act, though aggrieved persons will not be able to bring a private cause of action.

59.1-443 and 59.1-444 amended; 59.1-443.1 added: Personal Information Privacy Act; date of birth on checks. Prohibits a person who accepts checks in the transaction of business from recording, or requesting, or requiring a person to record, a date of birth upon the check as a condition of accepting the check. The section does not affect collection of a birth date for reasons unrelated to accepting the check, nor does it block a requirement that the payor provide his year of birth.

65.2-309-311: Amendments to these sections provide that an employer's payment of worker's compensation benefits creates not only a subrogation interest, but an actual lien against any proceeds obtained by verdict or settlement from a third-party or recovered pursuant to the uninsured or underinsured motorist provisions of a motor vehicle insurance policy carried by the employer. Prior to this amendment, the employer had a subrogation interest in a recovery by the employee against a third party that it had to enforce independently or perfect prior to a verdict.

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## Criminal Law

By Daniel J. Morissette

In terms of quantity, most changes in both substantive and procedural criminal statutes passed this year by the legislature were of the “housekeeping” variety. Qualitatively, however, there were a few amendments and some new provisions that are significant and will impact criminal practice. The changes to DUI statutes will probably have the most day-to-day impact and have already been covered by Kim Peele of ASAP. I will review some of the significant statutory changes in other areas of criminal law.

The major area of focus by the legislature in passing new criminal law statutes this year was in organized crime from the street level to the “boss” level. At the street gang level, § 18.2-46 was amended to permit venue in the county or city where the crime happened or where a victim was taken from, as opposed to the *circuit court* of such county or city. This permits mob crime prosecutions to be initiated and conducted in the manner of most other prosecutions. Several statutes in §§ 18.2-46.1 *et seq.* were amended and added to enhance punishment of street gang activity, particularly recruiting. Juveniles are now subject to prosecution for recruitment, although they can only be convicted of a Class 1 misdemeanor (for a first or second offense). The use of threats or force to induce gang participation constitutes a Class 6 felony. A third or subsequent conviction for gang activity, including recruiting, is a Class 3 felony (5 to 20 years). A forfeiture provision has also been added. The obstruction of justice statute (§18.2-460) was amended to add gang crime prosecutions to those for which obstruction is a Class 5 felony. Of course, gang members retain the protection of the law accorded all citizens who obstruct justice merely by harassing or threatening only defense attorneys (and town and city attorneys). Section 18.2-55.1 has been added to prohibit hazing of gang members. So, to recap, OK for gang members to haze defense attorneys, not OK to haze gang members.

The other major legislative initiative on organized crime was the addition of a state RICO statute, codified at § 18.2-511 *et seq.* The law has a potentially very broad reach. “Racketeering activity” is defined as to committing, attempting to commit, conspiring to commit, or inducing another (in a variety of ways) to commit two or more offenses of just about any crime a person can think of committing in the Commonwealth, including even crimes involving waste management, abuse and neglect of incapacitated adults, and possession of unstamped cigarettes. “Enterprises” (primarily formal business entities, informal criminal organizations of three or more persons, and street gangs) and enterprise bosses (“organizer, supervisor, or manager of an enterprise”) are subject to prosecution for benefitting from racketeering activity in either of two ways: first, it is a crime for an enterprise or boss to receive an aggregate of \$10,000 or more from racketeering activity and invest it to obtain an interest in real property or an enterprise; second, it is a crime for an

enterprise or boss to use racketeering activity to acquire an interest in or control an enterprise or real property. A first conviction carries a penalty of five to forty years and a million dollar fine. Any subsequent conviction is a Class 2 felony and a two million dollar fine.

A new section, 18.2-32.2, has been added to the murder article making it a separate crime to “kill” a fetus with criminal intent. The statute does seem to require proof of knowledge of the fetus and the specific intent to “kill” the fetus, in that the act must be willful and deliberate. Without getting into the politico-religious issue of when life begins, it seems that the legislature has already determined, in § 18.2-32.1, that a pregnancy can be terminated criminally “without a live birth”. If premeditated, the offense is a Class 2 felony. Without premeditation, it carries five to forty years.

There were several significant amendments to Title 19.2 this year. In line with the substantive crackdown on street gangs, participating in or soliciting a juvenile for a street gang has been added to the list of accusations which create a rebuttable presumption against bond (§ 19.2-120).

An Indigent Defense Commission has been established (§§ 19.2-263.01 *et seq.*) To replace the Public Defender Commission. The new commission will oversee the public defender and capital defender offices and monitor the qualifications of court appointed counsel. Qualifications for court appointed counsel have been established but go into effect July 1, 2005, if funded.

The “rule on witnesses” (§ 19.2-265.1), used to help assure the defendant receives a fair trial, has been amended to permit many alleged victim witnesses to be exempt from the rule as long as their presence in the courtroom does not impair the conduct of a fair trial.

Section 19.2-265.4 was sensibly amended to provide the same discovery on appeal in circuit court that a misdemeanor defendant is entitled to in general district court.

In conclusion, another positive development was the enactment of a provision providing a one-time petition to the Court of Appeals by a convicted felon for a writ of actual innocence based on after-discovered *non*-biological evidence. The procedure is available only to those convicted after a not-guilty plea. Although no right to counsel attaches in the initial petition stage, if the petition is not summarily dismissed, counsel is provided to assist in further proceedings.

## Litigation

By J. Scott Krein

I encourage you to take the time to follow the directions to the Division of Legislative Services web site referenced at the beginning of this section, and to review the Titles 8.01 and 19.2 for brief descriptions of legislative activity in civil and criminal procedures and the various substantive titles of interest to you. As always, go to the full statutes because the summaries aren't always adequately descriptive of the changes. If you don't, at least be aware of the following, relatively, interesting civil changes:

§ 8.01-6: specifically adds that notice of the institution of the action to a party's agent within the limitations period can support relation back of an amended pleading;

§ 8.01-15.2: a new "Service members Civil Relief Act" for Virginia that will, at minimum, require affidavits concerning defendants' military status for default judgments.

§ 8.01-27.4: a new statutory cause of action for health care providers to recover from insureds who receive payment from their insurers for professional services and fail to forward it to their providers, subject to limits stated in the statute.

§ 8.01-184.1: specifically grants Circuit Courts jurisdiction to issue declaratory judgments regarding the liability of specified business entities "to collect sales or use taxes for" specified state or political subdivisions.

§ 8.01-262: amended permissible venue to where "the defendant regularly conducts substantial business activity" (from regularly conducts affairs or business activity).

§ 8.01-380: extends from 5 to 7 days before trial the time within which noticing a nonsuit of right subjects movant to liability for witness and expert expenses.


§§ 8.01-407, 8.01-413, 16.1-89, and 16.1-265: eliminates the mandatory requirement that attorney issued subpoenas be issued at least 5 days before trial (but specifically gives the court discretion not to enforce them "after considering all of the circumstances...for lack of adequate notice."

§ 8.01-413: specifically includes a patient's executor or administrator as entitled to copies of patient's medical records where the patient would have been entitled.

§ 8.01-417: thought subsection B was worth reprinting in full – "When one party to a civil proceeding subpoenas documents concerning another party, the subpoenaing party, upon receipt of the subpoenaed documents, shall, if requested, provide true and full copies of the same to any other party or to the attorney for any other party, provided the other party or attorney for the other party pays the reasonable cost of copying or reproducing the subpoenaed documents. This provision does not apply where the subpoenaed documents are returnable to and maintained by the clerk of court in which the action is pending."

§ 8.01-513: actually defines "managing employee" for the purposes of service of process in garnishment proceedings.

*Continued, Page 12*



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## *Litigation, Continued*

§ 8.01-581.17: extends the confidential privileges in quality assurance or peer review committees, however “Oral communications regarding a specific medical incident involving patient care, made to a quality assurance or peer review committee established pursuant to clause (iii), shall be privileged only to the extent made more than 24 hours after the occurrence of the medical incident.”

§ 8.01-676.1: the amount of appeal bonds limited to \$25 million except where an appellant shows “by a preponderance of the evidence” an appellee “is purposefully dissipating its assets or diverting assets outside the jurisdiction of the United States courts for the purpose of evading the judgment.”

## **Local Government**

*By Curt G. Spear*

FOIA/Consistency with HIPAA - §§ **2.2-3705, 8.01-413, 16.1-266, 16.1-343, 32.1-127.1:03, 38.2-608**, and several sections of **Title 37.1** were amended to make statutes relating to FOIA, civil procedure, denial of access to health records, juvenile and domestic relations court proceedings, health records privacy, involuntary commitment, court-appointed guardians and conservators, release of mental health information, and health insurance information consistent with the Health Insurance Portability and Accountability Act (HIPAA) of 1996.

FOIA/Reorganization of Record Exemptions – Several sections of **Title 2.2** were added, amended or repealed, and §§ **23-50.16:32, 32.1-283.1, 32.1-283.2, 44-146.18, 44-146.22, 52-8.3, 54.1-2517, 54.1-2523, and 56-575.4** were amended to reorganize the records exemptions from FOIA into new, shorter sections grouped by general purpose. The change is intended to make individual exemptions easier to find. Previously, all records exemptions (more than 90 of them) had been located in § 2.2-3705, and were not organized by general purpose.

Land Use Proceedings/Disclosures in Fairfax County – Those who handle land use matters in Fairfax County should note that the provisions of § **15.2-852** requiring certain disclosures in land use proceedings in any county with the urban county executive form of government (Fairfax County) were amended to lower the current \$200 gift-reporting threshold to gifts over \$100.

Water Saving Ordinances During Droughts - § **15.2-923** was amended to permit localities to restrict the nonessential use of ground water during declared water shortages or water emergencies.

Home Ownership Grants by Localities for Assistance to School Board Employees - § **15.2-958.2** was added permitting localities, by ordinance, to provide for the use of funds, other than state funds, for grants of up to \$5,000 to assist employees of the locality to purchase residences in such locality.

Prohibition of Disclosure of Localities’ Cable Television Business Plans - § **15.2-2108.11** was amended to provide that the parts of a locality’s cable television business plan that reveal its marketing strategies shall not be subject to FOIA and shall not be disclosed by the Auditor of Public Accounts as a result of his audits.

Regulation of Storm water Billing Charges - § **15.2-2114** was amended to allow a locality to combine the billings for storm water charges with billings for water or sewer charges, real property tax assessments, or other billings, and to establish by ordinance the order in which payments will be applied to different charges.

Notice for Planning/Zoning Actions Near Military Bases - §§ **15.2-2204, 15.2-2223 and 15.2-2283** were amended to require provision of written notice to the commander of any military base or military airport that is within 3,000 feet of a proposed comprehensive plan or zoning change. Military installations were added to the list of items that a locality may include in its comprehensive plan, and protection against encroachment on such installations was added as a purpose of zoning ordinances.

Notice of Zoning Amendments - § **15.2-2204** was amended to require written notice of any zoning text amendment that decreases the allowed dwelling unit density of any parcel of land, to be provided by the local planning commission, or its representative, to the owner or owners of parcels affected. Previously, such notice was required only if 25 or more lots were affected by the zoning text amendment.

Transportation Infrastructure Provisions in Comprehensive Plan - § **15.2-2223** was amended to require that the comprehensive plan include a transportation element that designates a system of transportation infrastructure needs and recommendations as appropriate for roadways, bicycle and pedestrian accommodations, railways, bridges, waterways, airports, ports, and public transportation facilities.

Dedication of Easement for Cable Television - § **15.2-2241** was amended to require local subdivision ordinances to provide that cable TV easements shall be conveyed by the sub-divider in any final subdivision.

Removal of Abandoned Billboards or Signs - § **15.2-2307** was amended to provide that any locality may, by ordinance, require certain abandoned nonconforming signs to be removed by the owner of the property on which the signs are located, if notified by the locality to do so. If the business was not in operation for a two-year period and the locality has made a reasonable attempt to notify the property owner, the locality may enter the property upon which the sign is located and remove any such sign whenever the owner has refused to do so. The cost of such removal shall be chargeable to the owner of the property.

*Continued, Page 13*

Building Code/Inspection of Rental Property - § 36-105 was amended and § 36-105.1:1 was added to clarify the inspection authority of local building officials for existing commercial and residential buildings or structures, including the authority of a local governing body to adopt and enforce an ordinance calling for inspection of residential units rented to tenants.

Real Estate Tax/Asset Amounts of Elderly or Disabled - § 58.1-3211 was amended to change the financial criteria that localities may use in determining eligibility for real estate tax exemptions or deferrals for the elderly or disabled, and to increase the maximum number of acres a locality may exclude from one to 10.

Parties in Collection Proceedings for Delinquent Taxes - § 58.1-3967 was amended to provide that anyone who acquires an interest in real estate that is the subject of an action to collect delinquent taxes after the filing of a suit and a lis pendens, shall not be deemed a necessary party, but shall be permitted to intervene in the proceedings to file his claim. Failure to file such a claim shall bar any such claim.

## Real Property

By Christian P. Maimone

The following is a summary of some of the new legislation, including amendments to existing sections, passed by the Virginia General Assembly during the 2004 Session. These summaries are quite brief and intended to highlight select bills which may be of particular interest to real estate practitioners in Prince William County. These summaries do not reflect all of the changes in the law affecting real estate or the various headings hereinafter set forth.

**§§ 6.1-2.25 and 6.1-2.27 amended. Consumer Real Estate Settlement Protection Act; summonses and subpoenas; orders have force and effect of circuit court decrees.** Authorizes licensing authorities to issue summonses and subpoenas and issue orders restraining a person from engaging in an act or practice, and gives orders of the licensing authorities imposing penalties or requiring restitution the force and effect of circuit court decrees.

**§ 25.1-107 added. Condemnation of lands within adopted conservation or redevelopment plans.** Provides that after the adoption of a conservation or redevelopment plan, should any property located within the area of the conservation or redevelopment plan be down-zoned without the expressed consent of the property owner, and should the locality initiate condemnation proceedings against that owner after any such down-zoning, the date of valuation shall be the date of adoption of the conservation or redevelopment plan.

**§ 43-3 amended. Mechanic's lien; attachment to easement.** Clarifies that any mechanic's lien associated with work or materials furnished relative to an easement shall attach only to that easement and not to fee simple title to the real estate.

**§ 55-59.1 amended. Notice of sale by trustee; instrument of appointment.** Provides that the Trustee's notice of sale must include, in addition to the time, date and place of any proposed sale, the instrument number or deed book and page numbers of the appointment for the trustee or substitute trustee, or contain a copy of the appointment.

**§ 55-60 amended. Purchase money trusts.** Provides that any deed of trust that secures a loan is deemed a purchase money deed of trust if the borrower uses proceeds to acquire the secured real property.

**§ 55-66.3 amended. Release of deed of trust or other lien.** Allows a lien creditor to directly file a certificate of satisfaction with the clerk unless he receives notice from a settlement agent to deliver the certificate to such settlement agent.

**§§ 55-79.84 and 55-516 amended. Condominium Act and Property Owners' Association Acts; non-judicial foreclosure.** Clarifies that a unit or lot sold in a non-judicial foreclosure proceeding shall be sold subject to prior liens. The bill reverses the Supreme Court holding in *Wachovia vs. Colchester Towne*, which required lien holders to be paid by the sale proceeds. The bill also extends from 24 to 36 months the time for initiating foreclosure proceedings to enforce a lien.

**§§ 55-222, 55-248.4, and 55-248.37 amended; § 55-248.7:2 added. Landlord and tenant law; termination of tenancies; security deposit.** Amends the Landlord Tenant Act to make it consistent with the Residential Landlord Tenant Act concerning termination of month-to-month tenancies. The bill clarifies that a landlord may purchase commercial insurance for damage coverage in lieu of all or part of a security deposit and grants the landlord the authority to purchase renter's insurance coverage for a tenant and caps the amount of the security deposit and insurance premiums combined at two months' rent that can be collected from a tenant up front.

**§§ 55-248.13 and 55-248.16 amended; § 55-248.11:2 added. Virginia Residential Landlord Tenant Act; disclosure of mold in dwelling unit.** Provides that as part of the move-in inspection, the landlord shall disclose any visible evidence of mold in the dwelling unit. If the landlord states that there is no visible evidence of mold, this record shall be deemed correct unless the tenant objects in writing within five days.

If the landlord states that there is visible evidence of mold, the tenant shall have the option to terminate the tenancy or to accept the dwelling unit in "as is" condition. The bill puts an obligation on the landlord to use reasonable efforts to prevent the accumulation of moisture and the growth of mold and to promptly respond to any written notices from a tenant. The bill also obliges a tenant to use reasonable efforts to prevent accumulation of moisture and the growth of mold and to promptly notify the landlord in writing of any moisture accumulation that occurs or of any visible evidence of mold discovered by him.

**§ 55-248.18 amended. Virginia Residential Landlord Tenant Act; access by landlord to correct non-emergency property condition.** Authorizes a landlord, upon the determination of the existence of a non-emergency property condition in a dwelling unit, to temporarily relocate the tenant from the unit in order to alleviate the condition. The total costs for making the repairs to alleviate the condition shall be at the expense of the landlord and the relocation of the tenant must be to a comparable dwelling unit, at no expense to the tenant and for a period not to exceed 30 days.

**§ 55-248.31 amended. Virginia Residential Landlord and Tenant Act; noncompliance of rental agreement; award of attorneys' fees.** Provides that if the rental agreement provides for the payment of reasonable attorneys' fees in the event of a breach of the agreement and the tenant fails to prove by a preponderance of the evidence that the failure to pay rent or vacate the premises was due to (i) the breach of the lease by the landlord, or (ii) unlawful actions on the part of the landlord, the court shall award such reasonable attorneys' fees.

**§ 55-510 amended. Property Owners' Association Act; access to association records.** Provides that except for certain topics, draft minutes of the board of directors shall be open for inspection and copying (i) within 60 days from the conclusion of the meeting to which such minutes appertain or (ii) when such minutes are distributed to board members as part of an agenda package for the next meeting of the board of directors, whichever occurs first.

**§ 55-510.1 amended. Property Owners' Association Act; board of directors; access to committee and subcommittee meetings.** Provides that meetings of any subcommittee or other committee of the board of directors of a property owners association shall be open to members of record of the association.

**§ 58.1-807 amended. Recordation tax; leases.** Provides that the tax on the recordation of leases of oil and gas rights and of outdoor advertising signs owned by a person in the business of outdoor advertising shall equal \$25. The bill sets a tax of \$50 on the recordation of leases of coal and other mineral rights. The bill also provides that the tax on the recordation of a lease of a communications tower or a communications tower site shall be \$75. The tax on the recordation of each lease to affix communications equipment or antenna to any such tower or other structure shall be at a rate of \$15.

**§ 58.1-811 amended. State recordation taxes; exemptions.** Exempts the recordation of contracts related to real or personal property to the same extent as deeds are exempt, and exempts conveyances from the United States from the grantor's tax.

**§§ 58.1-811 and 58.1-3606 amended. Churches; recordation taxes on incorporated churches or religious bodies.** The bill exempts from state and local recordation taxes deeds conveying real estate to an incorporated church or religious body, deeds of trust or mortgages given by an incorporated church or religious body, and deeds conveying real estate from an incorporated church or religious body.

**§ 58.1-812 amended; § 58.1-817 added. Deed recordation fee for open-space preservation.** Imposes a \$1 fee on every deed admitted to record as of July 1, 2004, in those jurisdictions where open-space easements are held by the Virginia Outdoors Foundation.

## Trusts and Estates

*By David B Wilks*

As usual, the 2004 legislative session did not offer any particularly earth shattering new legislation affecting the insular world of wills, trusts and estates. Nevertheless, there are a couple of new items of note:

Recordation of Instruments – Social Security Numbers. For those of us who used to recite social security numbers in our Powers of Attorney, which the Legislature previously had authorized court clerks to refuse to combat the mounting problem of identity theft, the 2004 Legislature now will require the attorney or party submitting the instrument for recordation to undertake whatever steps the court clerk may require to remove the social security number from the instrument before it can be recorded.

Health Records Privacy. The Legislature continues to navigate through the legislative quagmire that is the Health Insurance Portability and Accountability Act of 1996 (“HIPPA”). In its latest efforts to provide we practitioners with some semblance of comfort in advising our clients of when and how they will be able to access either their own medical records or those of another, the 2004 Legislature has revised the Virginia patient privacy provision to comply more closely to the federal HIPPA regulations relating to health records. Aside from making some technical changes in terminology, definitions and syntax to conformer more closely to the federal HIPPA statute, the most significant revision that the Legislature has promulgated is a revision to the standard by which a patient can be denied access to his records to require the treating physician or clinical psychologist to find that a review of the individual’s health records would be likely to endanger the life or physical safety of the individual or another person, or that a reference in the health records to another person would be reasonably likely to cause substantial harm to that person. The patient may designate a reviewing physician or clinical psychologist at his own expense or the health care facility denying access to the health record will designate a reviewing physician or clinical psychologist at its expense. The designated physician or clinical psychologist then will decide whether or not the health care record should be made available to the patient using the above standard.

Legal Malpractice. Perhaps the most significant piece of legislation promulgated relates to the nasty issue of when and whether a claim for legal malpractice matures from an estate planning engagement. The 2004 Legislature clarifies that a grantor, or after his death, a personal representative or trustee, may maintain an action, including tax liability, resulting from legal malpractice associated with an irrevocable trust.



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**August 16, 17 & 18**, GDC Fall Judicial Conference, set no cases, clerk's offices open.

**August 16 & 17**, J & DR District Court Fall Judicial Conference, set no cases, clerk's offices open.

**August 27**, 4:00 pm, PWCBA board meeting, Jake's Seafood Restaurant.

**September 6**, all three courts closed in observation of Labor Day.

**September 10**, 12:30 pm, General Membership Luncheon meeting at Jake's Seafood Restaurant. Program: FREE CLE on Ethics presented by Minnesota Lawyers Mutual and Elizabeth von Keller. See flyer this newsletter.



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