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This is the last of three columns stressing the importance of bar associations, in light of some firms curtailing the payment of dues for, and the activities of their lawyers in, these associations. In the previous two columns, I pointed out that The Virginia Bar Association originated as part of a reform movement in the United States to lead the legal profession out of what Dean Roscoe Pound called “an era of decadence.” I also suggested that the vehicle of bar associations was successfully used to accomplish this end by the time I began the practice of law.

Moreover, I attempted to demonstrate how the VBA continues in this worthy tradition and helps us maintain our professionalism, in a fashion which could not be achieved by law firms or lawyers acting alone. Finally, I proposed that without full support of the VBA and other bar associations, we risk another “era of decadence” and also the consequence of endangering our privilege of self-regulation. In this final column, I express my belief that we owe the continuing vitality of bar associations to our young lawyers and that we can do so at moderate cost.

Compared to my own law school days, the number of young lawyers beginning practice in Virginia each year has grown exponentially. Of those who choose private practice, some end up in our megafirms, some in more moderately sized firms and some hang out their shingles. However, regardless of their professional setting, certain characteristics are true of all of them: When they begin the practice of law, they are the most idealistic, enthusiastic and impressionable they will ever be. As soon as they begin practice, they will look to their legal environment to help them determine what kind of lawyers they can and should be. They need exposure to the great people and work of the VBA’s Young Lawyers Division. Since associations like the VBA promote the highest traditions of our profession, it would be tragic if, through the diminishment of their vitality, our younger lawyers lack a vehicle to help them fulfill their lofty aspirations.

In my opinion, we have the obligation to pass on the best of our profession to these young lawyers. By this I mean that lawyers are not engaged in “a mere private, moneymaking occupation” (as Dean Pound said we were in the mid-19th century), but rather lawyers are part of a noble profession, with all of the privileges and obligations that entails. In listing the essential functions of the great lawyer, former New Jersey Chief Justice Arthur T. Vanderbilt included “improving his profession, the courts and the law, [and] leadership in molding public opinion....” He concluded: “This is practicing law in the grand manner — the only way it is worth practicing.”

In my first of these three columns, I mentioned the impact the leaders and work of the bar had on me as a beginning lawyer. Young lawyers need role models and I had great ones. I know they inspired me to work harder for our profession than I would have done otherwise. Looking back from my present more mellow perspective, I can share Justice Holmes’ sentiments about his work on the Supreme Judicial Court of Massachusetts: “We cannot live our dreams. We are lucky enough if we can give a sample of our best, and if in our hearts we can feel that it has been nobly done.” Nevertheless, to have practiced our profession nobly is a goal to which we should all aspire; a goal that should begin with the zeal of youth and continue throughout our careers.

One of the ironies of studying history is to learn how fast we forget it. If the bar associations should diminish, so that they are not there to help fulfill the aspirations of young lawyers, it will not take long before we return to the abyss of the mid-19th century. And we will have failed to pass on the great legacy we were given.

Truly, much is at stake. Yet the cost of maintaining the continued vitality of bar associations is moderate. As the
managing partner of my firm, I understand the importance of cost controls. However, cutting expenses must be balanced against the value also being cut. Thus, let’s examine the cost/value relationship insofar as the VBA is concerned.

Initially, as I mentioned in the first of these columns, it has been my experience that leaders of the bar regularly lead their firms as well. They are often among the most profitable lawyers. Thus, supporting the bar can enhance law firm profitability.

Second, the annual dues for membership in the VBA are $150. Many of us have spent this amount or more for a dinner for two at a fine restaurant. Even if one is not overly active in the VBA, because of what it does for the profession and for all of us as part of that profession, I believe that firms and individual lawyers are being “penny wise and pound foolish” not to make this investment. This is true for young lawyers as well. If your firms won’t pay your VBA dues, you should pay them yourselves.

Third, I cannot support firms financing “boondoggles,” masked as bar association meetings. But if a lawyer wants to become active in bar work, for the reasons I have described earlier in these columns, I believe firms should encourage their participation. They will become better and more profitable lawyers and their work will help us maintain the law as a worthy, self-regulated profession.

In sum, I am not asking you to exercise the judgment of a Pollyanna, but rather that of a practical altruist. This is hardly a radical suggestion, as I believe the best lawyers have always been practical altruists. As I have tried to demonstrate, we have much to gain by keeping our bar associations vibrant, particularly the VBA. We can do so at moderate cost. Quite simply, this is the right thing to do.

As Mark Twain said, “Always do right. It will gratify some people and astonish the rest.”

**Nominations for the Board of Governors Class of 2003**

VBA President J. Edward Betts has recommended, and the Board of Governors has approved, the following members of the Ad Hoc Committee on Nominations: President-elect Frank A. Thomas III, Board of Governors Chair E. Tazewell Ellett, Prof. Jayne W. Barnard, Howard C. McElroy, Nancy Newton Rogers and Immediate Past President Jeanne F. Franklin, Chair. Thomas, Ellett and Franklin serve ex officio; Barnard, McElroy and Rogers are appointees.

Nominations are sought for the VBA Board of Governors Class of 2003, which will consist of one member from the Southwest Region (Judicial Circuits 23, 27, 28, 29 and 30), one member from the Potomac Region (Judicial Circuits 17, 18, 19 and 31), and two at-large members. In considering potential nominees, suggested criteria include leadership track record and potential; professional standing; Association involvement, including section/committee/division work, CLE participation, public service activity and membership status; legislative interest and potential; collegiality and “people skills”; and financial acumen. Diversity of all types, whether personal, geographic or by practice type/size, is encouraged.

Nominations may be sent to Jeanne F. Franklin, Nominations Committee Chair, The Virginia Bar Association, 701 East Franklin Street, Suite 1120, Richmond, VA 23219.

**A Preview of the VBA Summer Meeting**

**Full schedule and registration information**

**Former Army Secretary is LexisNexis honoree**

Former Secretary of the Army and Seventh District Congressman John O. Marsh Jr. will be the guest of honor at a reception sponsored by LexisNexis at The Homestead on Saturday, July 13, during the VBA Summer Meeting.

Marsh, a Winchester native, received his law degree in 1951 from Washington and Lee University and began his practice of law in Strasburg. He was elected to four terms in Congress from the Seventh District of Virginia (1963-71), and served on the House Appropriations Committee. Choosing not to seek a fifth term, he resumed the practice of law.
In March 1973, he returned to federal service as Assistant Secretary of Defense for Legislative Affairs. In January 1974, he became Assistant for National Security Affairs to Vice President Ford, and in August 1974 became Counselor, with Cabinet rank, to President Ford.

Sworn in as Secretary of the Army in 1981, his tenure until August 1989 was the longest of any Secretary of the Army or Secretary of War in American history. During 1988, he served concurrently as Assistant Secretary of Defense; from 1989 to 1994, he chaired the Reserve Forces Policy Board.

Marsh has been awarded the Department of Defense Distinguished Public Service Award on six occasions, has been decorated by the governments of France and Brazil, and holds the Presidential Citizens Medal.

A VBA member since 1990, he most recently served as an active chair of the Subcommittee on National Security for the VBA Committee on Special Issues of National and State Importance. 

Education, ethics and life after 9/11 featured in VBA Summer Meeting general sessions
The VBA Summer Meeting will offer timely and topical continuing legal education programs that you won't want to miss, including three general sessions.

The first (Friday, 10:30 a.m.-noon, 1.5 credits) is "Building Without Mortar? The Intersection Now of Youth, Culture, Education and the Law," focusing on current issues and crises in education, sponsored by the VBA Committee on Special Issues of National and State Importance.

The second, "Lawyer Marketing and Ethics Guide—What Crosses the Line?" (Friday, 2-4 p.m., 2 credits/2 Ethics), will be an interactive ethics presentation by Thomas E. Spahn of McGuireWoods LLP on behalf of the VBA Law Practice Management Division.


Friday’s schedule includes the following concurrent sessions, available credit and sponsors: “The Virginia Business Trust Act: A New Form for a New Era,” 1.5 credits, VBA Business Law Section; the fourth annual “Review of Civil Decisions of the Virginia Supreme Court,” 1.5 credits, VBA Civil Litigation Section; and “Workplace Security Issues Since September 11 and Other Recent Developments in Labor and Employment Law,” 1.5 credits, VBA Labor Relations and Employment Section. All concurrent programs will be held from 9 to 10:25 a.m.

Saturday morning choices include “Lawyers and Substance Abuse Prevention: A Guide for Action.” 1.5 credits, VBA Substance Abuse Committee; Second Annual “Review of Criminal Law Decisions of the Virginia Supreme Court.” 1.5 credits, VBA Criminal Law Section; and “The Highway or No Way: The 2002 Transportation Referenda,” 1.5 credits, VBA Taxation, Transportation Law and Environment, Natural Resources & Energy Law Sections. As on Friday, all concurrent programs will be held from 9 to 10:25 a.m.

Political cartoons spark Legacy Series program
"Thomas Jefferson: His Friends and Foes," the program for the VBA Legacy Series luncheon on Friday, July 12, is a talk illustrated with slides by Dr. James C. Kelly, director of museums at the Virginia Historical Society.

The focus will be on contemporary political cartoons (1793-1809) that feature Mr. Jefferson. This will be a revealing program that portrays, through caricatures, just how controversial our third president was even in his own day.

Members and guests are invited to attend; separate registration and a $25 per person registration fee for lunch are required.

Make reservations for fun before you arrive
Want to enjoy your leisure hours to the fullest during your visit to The Homestead? Make reservations before you arrive, particularly for golf, spa appointments, babysitting services and dinner seating. The Activities Reservation
Fresh Picks of Summer

What are YOU doing on your summer vacation? Looking to go where you’ve never gone before for a day trip? Planning to taste-test every variation of Virginia barbecue or homemade ice cream? We informally polled a collection of VBA leaders and staff and came up with the following recommendations. Some may be tried-and-true, others may be offbeat. But in the summer, anything goes! So read on, and enjoy the all-too-brief delights of summer.

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<td>Brock’s, Chesterfield</td>
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<td>King’s, Kinston, N.C.</td>
<td>The Best-Loved Poems of Jacqueline Kennedy Onassis</td>
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<td>A hole in the wall in Pittsburg, Texas</td>
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<td>Ridgewood Restaurant, Bluff City, Tenn.</td>
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<td>Montgomery Inn, Cincinnati, Ohio</td>
<td>Anything you’re too embarrassed to be seen reading in public</td>
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<td>Daytona Beach, Fla.</td>
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<td>Virginia Beach</td>
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<td>Chincoteague</td>
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<td>Bethany Beach, Del.</td>
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<td>Sanibel and Captiva Islands, Fla.</td>
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<td>The Sum of All Fears</td>
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<td>Cherokee Restaurant, Abingdon</td>
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<td>The Burger King Whopper</td>
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<td>Steak ’n Shake, if you can find one</td>
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<td>The kind you grill yourself at home</td>
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<th>Best Current Film</th>
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<td>Divine Secrets of the Ya-Ya Sisterhood</td>
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<td>The Sum of All Fears</td>
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<td>Spider-Man</td>
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<td>Fredericksburg</td>
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<td>Tangier Island in the Chesapeake Bay</td>
<td>Best Video/DVD Rental</td>
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<td>Hiking in the Blue Ridge</td>
<td>Crouching Tiger, Hidden Dragon</td>
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<td>Lexington</td>
<td>Chocolat</td>
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<td>Hollywood Cemetery, Richmond</td>
<td>O Brother, Where Art Thou?</td>
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<td>Following Civil War trails in Central and Southside Virginia</td>
<td>Any surf-bunny movie from the 1960s</td>
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<td>Monticello and Ash Lawn, Charlottesville</td>
<td>An old classic you haven’t seen lately</td>
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<td>Montpelier, Orange</td>
<td>Best Way to Celebrate July Fourth</td>
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<tr>
<td>Antiquing in Clarksville and touring Prestwould</td>
<td>Visit the D-Day Memorial at Bedford</td>
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<tr>
<td>Lexington</td>
<td>Baseball and fireworks</td>
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<td>Hollywood Cemetery, Richmond</td>
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Click here to access The Homestead's website.
Animal Court

If you’d practiced law in medieval Europe, you might have represented a rat, sentenced a sow or debated the civil rights of caterpillars

Richard A. Repp

Ever found yourself representing someone whom you considered to be a rat? A REAL rat?

You enter court with your client. “Sshhh,” you whisper absent-mindedly, “quiet as a church . . . .” Holy smoke; the judge is a cleric!

A coyote, swathed in bandages, and his lawyer are at the bench arguing a legal point with counsel for the defendant, Acme Company. The docket shows that the next case is an action by a chap named Fudd seeking relief for B. Bunny having eaten more than his fair share of Fudd’s carrots. Did you unknowingly follow a rabbit down a hole recently?

No, it’s not a time warp, but publicity surrounding the spate of recent cases involving owners’ criminal and civil liability for the vicious acts of their animals invites comparison with an earlier day when lawless wildlife were subject to the jurisdiction of ecclesiastical courts or civil courts, depending on whether the animals were truly wild or domesticated.

In the Middle Ages, the European ecclesiastical courts of the Roman Catholic Church rivaled in secular power their temporal contemporaries, and were unique in their “jurisdiction” over wild animals. No defendants were allowed to appear pro se, either. Defense counsel always was appointed.

Civil courts had jurisdiction over domesticated animals long before the common law rule that “every dog was entitled to one bite” as a condition precedent to owner liability. Domesticated animals, not their owners, were prosecuted for animals’ wrongful acts.
Legal actions against offending animals may seem strange to us today, but it was not at all odd in an era where people frequently shared food and lodging with their fowl, mammals, and beasts of burden. Was Jesus, after all, not born among them in an animal feeding trough? And as a society much closer to animals than are modern peoples, who tend to see them merely as part of the food chain, Medieval Europeans probably treated them with a good deal more respect, too. The fact that animals were accorded trials indicates, arguendo, that they were viewed as having a special role in God’s creative scheme.

But as God’s creatures, domesticated animals should not be held to higher behavioral standards than undomesticated ones. The spiritual role of the ecclesiastical courts, therefore, included eliminating any such disparity, and holding undomesticated animals to similar legal standards of behavior. They functioned, in a sense, as courts of equity. Wild animals, after all, were created by God even before humans, and are essential to His kingdom. Accordingly they were in all respects considered amenable to the laws and to the jurisdiction of the ecclesiastical courts, even if living in a state of Nature. Punishment by the ecclesiastical courts for violating those standards generally was banishment and death by exorcism and excommunication.

Lest you scoff, it must be emphasized that these remedies were not taken lightly or facetiously. Did not Saint Patrick, for example, exorcise Ireland’s snakes into the sea? And Saint Bernard was reputed to have excommunicated flies from an entire district of France.

Rarely was mercy shown to animals, although condemned animals sometimes were offered pardons. In the 1457 civil prosecution of a sow and her piglets (see illustration) for having murdered and partly devoured a child, for example, the sow was sentenced to death, but the piglets were acquitted on account of their extreme youth and of their mother’s having set a bad example.

Cases typically were initiated in ecclesiastical courts by inhabitants of an area who, being annoyed by certain animals ranging from insects to carnivores, would complain, and the courts would appoint experts to report upon the damage committed. An advocate then was appointed to defend the accused animals, and to show cause why the putative defendant beasts, insects, or vermin should not be summoned.

Summonses were served by an officer of the court, reading them at the places the animals were believed to frequent and posting them in such places. The accused, however, were inclined to ignore such formalities, so that most ecclesiastical court judgments were taken by default in absentia.

There was but one legal disparity between the law applicable to wild animals and that applicable to domesticated ones. The ecclesiastical courts were bound by a holy writ that decreed that all creatures “be fruitful and multiply.” Ergo, wild animals could not be taken to task for excessive breeding. Nor could wild animals be summoned merely for partaking of subsistence, for according to Scripture, they had been given the green herbage of the earth for nourishment. Only excessive food consumption by wild animals was punishable.

An animal’s status in God’s kingdom, however, governed its eligibility to breed and to consume in much the same way that we distinguish between the rights of legal and illegal aliens.

Thus, in a 1579 case, field mice, a species apparently judicially determined to have been aboard Noah’s Ark, were held liable only for greedy and disproportionate food consumption, whereas in 1478 caterpillars, charged with consuming an inordinate amount of cabbage, were held not to have booked Ark passage. Having survived the flood notwithstanding created an irrefutable presumption that they could have done so only with the aid of Satan. Therefore, caterpillars were held to be illegal aliens in God’s kingdom with no right to breed or to eat! Status, accordingly, could be interposed by counsel as an initial defense to a proceeding against an animal.

On occasion, animals were tried with human beings, often in cases that commingled superstition with witchcraft and bestiality, and in which the animals were tried as accessories. Carnal knowledge of animals was thought to be an attribute of witchcraft, and an act capable of producing monsters. Biblical injunctions against these acts abound, too, in Exodus and Leviticus.

This incomplete account of the judiciary’s role in assuring animals’ compliance with the law would be deficient, however, were not one of the most celebrated of known wild animal cases reviewed, and the appointed counselor, one
Bartholomé Chassenée, accorded his due.

Chassenée, a Frenchman whose records of animal trials were published in 1531, was appointed to represent an unspecified number of rats who were being prosecuted for feloniously having eaten and destroyed local barley. The summonses, technically written, and read and posted by a court officer, described the accused rodents as “dirty animals in the form of rats, of a greyish color and living in holes.” Notwithstanding this graphic description, however, no rats appeared on the first return date.

Chassenée argued the summonses’ inadequacy, asserting that it was too local in nature, and that as all rats in the diocese had an interest in the case’s outcome, all should have been summoned. The court agreed, and the curate of every parish in the diocese was instructed to summon every rat to appear on a future court date.

Incredibly, however, that day arrived but no rats did! Undeterred, Chassenée pointed out that, as all of his clients were summoned, including young and old, sick and healthy, great preparations had to be made. He begged for and obtained an extension of time to another fixed date in order for his clients to make necessary travel arrangements, but the appointed date arrived with the rats now potentially in contempt.

However, Chassenée appears to have prepared for this exigency, too. The seemingly imperturbable counselor argued that although his clients were most anxious to comply with the court’s order, they dared not stir out of their holes because the plaintiffs were known to have a number of ill-disposed cats. This risk to his clients could be mitigated, he claimed, only by the court placing large monetary bonds upon the plaintiffs that their cats should not molest the rats, either coming to or returning from court. The court concurred, but the plaintiffs, objecting to such bonds, declined to prosecute the case further, and it was adjourned sine die. Chassenée’s legal acumen in this case helped assure his fame as a criminal lawyer. Return to Top

About the Author: Richard A. Repp is a VBA member, lawyer, writer and professor. He is a graduate of the University of Michigan and the Marshall-Wythe School of Law of the College of William and Mary, and received a Master of Humanities degree from the University of Richmond. When not teaching legal writing at Virginia Commonwealth University, he travels the world and renovates a house in Richmond’s Fan District.

Legal Focus/Administrative Law:
Beyond Notice and Comment: An Examination of the Rulemaking Process in Florida
Stephen T. Maher

Virginia is in the process of considering changes to its administrative process. It is looking at the experience of other states, especially in the area of administrative rulemaking. Florida is a logical candidate for consideration because it has a unique approach to rulemaking that has stood the test of 30 years of practice.

Today, much of the day-to-day work of government is done by the bureaucracy. The Florida Administrative Procedure Act defines much of the way that citizens interact with their state government. The APA specifies what procedures the bureaucracy must follow in making individual determinations and broader policy decisions. It creates a process that is largely uniform across the state government.

The kinds of concerns that tend to arise in the relationship between the individual and the bureaucracy and the kinds of decisions that must be made about the procedure that will be employed to govern decision-making in that relationship are not hard to anticipate. There will be concerns about maintaining efficiency in the decision making process while at the same time guaranteeing that agency decisions that affect individual interests will be made fairly and accurately and will be recognized as legitimate. To assure fairness in a system of agency decision making, some ground rules must be established to specify the type of procedure that agencies must use to reach their decisions. The procedure used in making individual decisions may differ from that used in making agency rules, but, even if different procedures are established, the same issues must be confronted and resolved in establishing each set of procedures. What agency decision making will be open to participation? Who will be permitted to participate in the decision making process? What degree of participation will be permitted? Answers to these questions must be clear and detailed enough so that both the agencies and the public will be able to properly order their affairs. The procedures created should reflect a
reasonably balance of competing concerns if the underlying principles of efficiency, accuracy, and acceptability are all to be adequately served by the procedural scheme.

The federal and state governments have wrestled with these questions for years and, over time, have adopted administrative procedure acts that reflect what they believe is a proper balance between competing interests. In Florida, we have given different answers to the basic questions of administrative procedure than have other jurisdictions. Our APA is more concerned with limiting agency power and protecting individual interests than is the 1981 Model State Administrative Procedure Act (1981 MSAPA). Our statutory rulemaking procedure provides more opportunities to prevent agency encroachment on legislative prerogatives than does any other American administrative procedure act because, both in rule making and after rules have been adopted, rule challenges decided by independent hearing officers are available to test the legality of rules against the claim that they exceed delegated legislative authority. In individual adjudications in Florida, with some exceptions, formal proceedings before independent hearing officers are guaranteed every time an agency affects an individual’s substantial interests if a material issue of fact is in dispute. This approach provides more protection for the substantial interests of the citizenry than do most other APAs. In cases where no facts are in dispute, informal proceedings are guaranteed. This bifurcated approach protects substantial interests while preserving flexibility. The 1981 MSAPA follows the Florida approach in this regard and provides for “several classes of adjudication of descending degrees of formality and complexity.” The Florida APA thus contains powerful rights designed to protect the public against illegal or arbitrary agency action, and these are the remedies the legislature has determined are necessary to protect individual interests against unwarranted intrusion by government. These somewhat different answers to traditional questions of administrative procedure reflect a distrust of administrative government that is uncharacteristic of other administrative procedure acts, but it is a distrust born of our experience.

The present Florida APA was not the state’s first. The legislature enacted Florida’s first comprehensive administrative procedure act in 1961 (the “1961 act”). A partial revision was attempted in 1973, but Governor Askew vetoed it, believing that the Law Revision Council should conduct a comprehensive review of the act. The Director of the Center for Administrative Justice, created in 1972 by the American Bar Association, agreed to organize an ad hoc task force to assist in preparing a draft of a new act. The task force met in September 1973 and prepared extensive drafts incorporating recent judicial and proposed statutory concepts dealing with administrative fairness, many of which had never before been given such specific legislative drafting attention. These drafts also devoted attention to expanding the procedures by which decisions of adjudication and rule-making could be made in order to provide agencies with greater flexibility to conduct their affairs and the public with a greater ability to be heard effectively in such proceedings.

Reporter Arthur England drew upon these early drafts in preparing a comprehensive initial draft, followed by four more drafts which he prepared and annotated with the assistance of Professor Harold Levinson. The Council presented the Reporter’s Final Draft to the Legislature as a new administrative procedure act, accompanied by extensive annotations commonly known as the Reporter’s Comments.

The Law Revision Council held public hearings on the draft proposals at various locations throughout Florida. At the same time, parallel efforts were undertaken by the Government Operations Committee of the Florida House of Representatives. A bill reflecting the work of both the Law Revision Council and the House Government Operations Committee quickly passed the House. Meanwhile, the Senate passed a completely different bill designed to subject agency rule-making to more stringent legislative control. The rule challenge provisions of the Florida Act came from the Senate bill. These provisions allow proposed, existing and emergency rules to be challenged as an invalid exercise of delegated legislative authority before an Administrative Law Judge at the Division of Administrative Hearings and to be invalidated by the ALJ on that basis. The conference committee bill incorporated most features of both the House and Senate versions.

To expand the effectiveness of the public’s voice in rule-making, the new act provided three different proceedings that persons with an appropriate level of interest could request during rule-making. The Florida APA authorizes each proceeding under separate subsections. Section 120.54(3)(c) grants persons an opportunity to “present evidence and argument on all issues” appropriate to inform the agency of that person’s contentions and allows written comments to be filed up until the date set for a hearing, if one is requested. If requested by any affected person, a hearing must be held. Section 120.54(3)(c) permits that evidentiary opportunity to be drawn out into a more formal proceeding, in order to resolve factual and policy disputes in a more traditionally evidentiary forum and develop a record for judicial review of those disputes. Section 120.56 provides an administrative remedy for invalidating a proposed rule before it
becomes effective. These provisions reflect the conviction that strong yet flexible procedure is essential to protecting the interests of the public in connection with rulemaking. The Reporter’s Comments state:

[A]gency proceedings frequently affect individual rights and create general policy at the same time, so that they partake of adjudication and rule-making at the same time. A failure of agencies to recognize this fact, and the reluctance of Florida courts to depart from analysis in terms of “judicial” and “legislative” decision-making, has created rigidity in the [1961 APA], unwarranted exemptions, and unreviewable agency discretion which defeats due process.28

Before the Legislature adopted the present APA, rulemaking was generally a matter of agency prerogative, and agencies frequently promulgated rules without the participation of the public or the persons affected. Under the 1961 act, circuit courts reviewed rules by declaratory proceedings, while district courts of appeal reviewed by certiorari the final orders from adjudicative proceedings.29

The 1961 act characterized rulemaking as “quasi-legislative,” a characterization used to restrict public input into the process. In Daniel v. Florida State Turnpike Authority,30 for example, the Supreme Court of Florida stated:

[I]t cannot be doubted that the power to promulgate rules and regulations to effectuate the general public purpose of the statute is an administrative function that is quasi-legislative in nature, rather than quasi-judicial. This being so, a hearing before the administrative body is not necessarily a sine qua non to the validity of rules and regulations adopted by it pursuant to legislative authority.31

Similarly, in Bay National Bank & Trust Co. v. Dickinson,32 the court used the quasi-legislative characterization as a basis for concluding that the State banking commissioner did not violate due process by issuing without a public hearing a certificate of authorization to engage in the banking business.33 Thus, the court employed the characterization of rulemaking proceedings as “quasi-legislative” in order to limit the opportunity to present evidence and argument afforded those whose substantial interests were affected by the agency action.

The Reporter’s Comments indicate that the Law Revision Council sought “to rid existing law of the anachronisms” the “quasi-judicial,” “quasi-legislative,” and “quasi-executive” characterizations had produced.34 The Reporter’s Comments note:

A major feature of the proposed act is to eliminate these anachronisms (i) by focusing attention on the rights affected rather than the labels given a particular process, (ii) by allowing total rule-making flexibility for fact-finding in rule-making proceedings and policymaking in individual cases, and (ii) [sic] by authorizing informality whenever it is possible to exercise it without affecting rights unfairly.35

The Law Revision Council sought to reduce the power of characterizations such as “quasi-legislative” in determining the type of procedures required. The Reporter’s Comments expressly cautioned against the continued use of such characterizations, explaining the damage they caused under the old act and explicitly indicating the Legislature’s intent to “overrule cases making the distinction, such as Bay National Bank and Dickinson v. Judges of the District Court of Appeal. . . .36

The Florida APA’s rejection of the “quasi-legislative” concept is significant. As Professor Martin Shapiro has noted, “[i]f rulemaking is “quasi-legislative,” it is quasi-arbitrary. . . .”37 A legislator’s “factual assumptions, whether correct or absurd, need be based on no evidence of record; his policy choices, whether statesmanlike or deplorable, are not limited to any pleadings or points raised in argument.”38 There was a time long ago when agency rules were treated as presumptively correct39 upheld if not “arbitrary and capricious.”40 This standard of judicial review of rules in the federal courts was “extremely deferential, perhaps close to the `minimum rationality’ test for the validity of statutes under substantive due process.”41

The Florida APA rejected this approach during the 1970s, recognizing instead a new standard for minimum fairness exceeding the degree of fairness guaranteed by the Federal Constitution. The Reporter’s Comments state that in Florida, “[t]he notions of basic fairness which should surround all governmental activity, [includes rulemaking and] the right to present viewpoints and to challenge the view of others, the right to develop a record which is capable of court
review, . . . and the right to know the factual bases and policy reasons for agency action. . . . “42 The Legislature intended the Florida APA to check all arbitrary agency action through its procedural requirements. By guaranteeing certain persons the opportunity to participate in agency decision making, even in rulemaking, the Legislature sought to ensure agency responsiveness to fact and reason, thereby enhancing the accuracy and legitimacy of agency decisions, and rendering those decisions more acceptable to the public.

In short, the approach to rulemaking incorporated in the Florida APA is very different from the deference characterizing the early federal cases, such as Pacific States Box & Basket Co. v. White.43 The act also breaks with the traditional Florida understanding of procedural protection by focusing attention “away from labels and toward the effects of agency decision-making.”44 and makes clear that “rule-making can involve substantial individual interests, and that procedures suitable for adjudication may be needed in the course of rule-making in order to protect these interests.45 Florida does not try to determine, in advance, when more extensive protections will be required either by the subject matter of the rule or by the number of the statute pursuant to which the rule is being adopted. It allows these protections to be demanded in virtually any rulemaking where the people whose substantial interests are affected think they would help protect their interests.

This shift in approach may be thought to threaten the efficiency of the decision making process.46 The Florida APA seeks to address efficiency concerns through its emphasis on flexibility. The agency’s duty to respond is limited to those cases in which substantially affected persons actually take advantage of opportunities to discover and challenge the fact or policy choices incorporated in the rule. Where affected persons do not take appropriate action to protect their substantial interests, the agency need not defend its choices.

This approach permits opportunities for significant participation by affected persons while not unduly compromising efficiency. The decision to make significant procedural protections available, but only as needed, encourages prompt and vigorous participation by substantially affected persons, while freeing decision makers from the unnecessary formality of explaining and supporting every decision. This approach has worked in Florida for 30 years, so the argument that it is too inefficient is advance to defend using real world experience.

Against this general background, it is worth examining more specifically the innovations the Florida APA brings to the rulemaking process. Other state administrative procedure acts commonly make some provision through which interested persons may submit their views on proposed rules.47 Federal law also requires that agencies “give interested persons an opportunity to participate in the rule-making through the submission of written data, views, or arguments with or without opportunity for oral presentation” in most circumstances.48 The federal provision has generally been construed to require “notice and comment” rulemaking and to permit agencies to limit participation in rulemaking to written submissions, although the courts have regulated the comment process in an attempt to improve its effectiveness.49 The language of the rulemaking provisions of the Revised Model Act is similar to the language in the federal provision and unlike the Florida APA.50 The extent and intended effect of the Florida APA’s departures from the federal and state models is clearly apparent in the procedures mandated by sections 120.54(3) and Section 120.54(3)(c)2.

Section 120.54(3)(c)1. provides in relevant part:

If the intended action concerns any rule other than one relating exclusively to procedure or practice, the agency shall, on the request of any affected person received within 21 days after the date of publication of the notice of intended agency action, give affected persons an opportunity to present evidence and argument on all issues under consideration.51

The language of section 120.54(3) differs significantly from the language commonly used in such provisions. For example, section 120.54(3)(a) of the Florida APA guarantees each affected person an opportunity to present evidence and argument on all issues under consideration appropriate to inform the agency of the participants’ contentions, except in the case of rules that relate exclusively to organization, procedure, or practice.52 Neither the federal act nor the model state acts guarantees individuals the opportunity to present “evidence and argument.”

The decision to allow evidence and argument rather than to require only notice and an opportunity to comment was a considered judgment. The language “present evidence and argument on all issues” appears in the Reporter’s First Draft, although not in the rulemaking section.54 Only when the House Government Operations Committee prepared a bill
Based on the Reporter’s Final Draft were the words “opportunity to present evidence and argument” added to the rulemaking section of the Florida APA. The Legislature deliberately chose language traditionally associated with adjudication to describe the rulemaking hearing guaranteed by the new APA. This decision to incorporate adjudicatory language in the rulemaking section comports with the decision to focus “attention on the rights affected rather than the labels given a particular process,” but differs from the language suggested by the Law Revision Council. Section 120.54(3) does not require a hearing every time a rule is proposed. Rather, pursuant to the principle of “total flexibility” and “informality whenever it is possible to exercise it without affecting rights unfairly,” it varies the actual process, case by case, depending upon the degree to which affected persons participate in the rulemaking process. If no one requests a hearing, none is required. If an individual wants merely to comment in writing, that comment is to be made a part of the record. However, if even a single affected person requests a public hearing one must be held. Whether an affected person wants to use that opportunity to appear and comment orally or to present evidence and argument is a matter to be decided by that participant, not the agency.

Thus, section 120.54(3) was adopted to guarantee affected persons broad participation in the rule creation process. This opportunity differs from the participation opportunities guaranteed in other jurisdictions. In sum, section 120.54(3) reflects a legislative decision to favor citizen input during rulemaking and to discount concerns about the loss of efficiency these additional opportunities threaten to create. The legislature recognized the value of input of affected persons. By providing information that provides their understanding of, perspective on and views about the proposed rule, through comment, evidence and/or argument, affected persons can help the agency better understand its proposal and the proposal’s possible effects on regulated individuals. The legislature also recognized the value of permitting affected persons to participate in the process by organizing and delivering an evidentiary presentation. The Florida APA empowers affected persons to protect their own interests in rulemaking where it appears to them that an agency is acting without full knowledge of the facts or a proper understanding of policy. The legislature chose the evidentiary presentation as the proper vehicle for educating agencies and affected persons alike.

The rulemaking hearing, when combined as needed with the two other remedies discussed, the draw-out and the rule challenge, guarantees that substantially affected individuals will, through their own diligent participation, be fully heard before being adversely affected by a proposed rule and, that where rules do not generate controversy, their adoption will not be unduly delayed by unneeded procedural requirements.

NOTES
1. Efficiency, accuracy, and acceptability have been identified as the three normative requirements usually identified in administrative procedure. Roger Crampton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 Va.L.Rev. 585, 592-93 (1972).
3. Id.
11. The Law Revision Council was created to examine State law, discover defects and anachronisms. Fla. Stat. § 13.96 (1989). In the 1970s it proposed reforms designed to modernize Florida law in many areas.
12. A. England & L. Levinson, supra note 9, §1.02(b), at 3. The Council established a committee chaired by Professor Harold Levinson and contracted with Arthur England to be the Reporter. England subsequently served as Chief Justice of the Supreme Court of Florida. Id.
13. For a discussion about the Center, see Carrow, Administrative Law Comes of Age, 60 A.B.A.J. 1396 (1974).
17. See Levinson, supra note 15.
18. “The Reporter’s Comments, submitted to the Florida Law Revision Council by its reporter in March 1974 to accompany the Council’s final draft of the APA, have been recognized in a number of court decisions as a primary source of legislative intent.” A. England & L. Levinson, supra note 9, § 1.05(a), at 12-13.

19. Id. 1.02(b), at 4.

20. Id. Its efforts included circulating a questionnaire to all administrative agencies of the State. Id.

21. Id.

22. Id.


24. This standard is defined in Fla. Stat. §120.52(8) (2001).

25. A. England & L. Levinson, supra note 9, §1.02(b), at 4.

26. An opportunity to present evidence and argument on all issues appropriate to inform the agency of the contentions of “affected persons” is authorized by section Fla. Stat. §120.54(3)(c) (2001). A “draw out” of that rulemaking hearing by those who timely assert that their “substantial interests” will be affected in the proceedings authorized by section Fla. Stat. §120.54(3)(c)2 (2001). Finally, “[a]ny substantially affected person” may seek an administrative determination of a proposed rule pursuant to Fla. Stat. §120.56(1) (2001). Rules may also be challenged after adoption using a similar procedure.

27. This procedure has never been used. Instead, agencies have allowed broader evidentiary presentations during rulemaking hearings. Balino v. Department of Health and Rehabilitative Services, 362 So.2d 21 (Fla. 1st DCA 1978).

28. Reporter’s Comments, supra note 9, at 6.

29. A. England & L. Levinson, supra note 9, § 1.02(a)

30. 213 So.2d 585 (Fla. 1968)

31. Id. at 586

32. 213 So.2d 585 (Fla. 1968).

33. The court found: “[i]n passing upon such an application the Commissioner performs a purely quasi-legislative or quasi-executive function. His consideration of the application does not constitute an adjudication of rights vested in any person or corporation, but is an administrative determination as to whether a requested right shall be granted.” Id. at 304.

34. Reporter’s Comments, supra note 9 at 5.

35. Id. at 6-7.

36. Id. at 18 (citation omitted). They also explain that “the discretionary determinations of many governmental agencies and officers which have been characterized as ‘quasi-judicial,’ ‘quasi-legislative’ or ‘quasi-executive,’ or have otherwise been exempted from the operation of administrative procedure laws, are now brought under the minimum fairness provisions of the proposed act.” Id.


39. “[W]here the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches . . . .” Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935).

40. “With the wisdom of such a regulation, we have, of course, no concern. We may enquire only whether it is arbitrary or capricious.” Id. at 182.

41. A. Bonfield & M. Asimow, State and Federal Administrative Law 621 (1989) (emphasis in original). It has also been suggested that this arbitrary and capricious standard “bore a strong family resemblance to the test employed by appellate review of jury verdicts.” Shapiro, Administrative Discretion: The Next Stage, 92 Yale L.J. 1487, 1492 (1983).

42. Reporter’s Comments, supra note 9, at 5 (emphasis added).

43. 296 U.S. 176 (1935). The more recent federal cases have also moved away from this early federal approach. For a more detailed discussion of those developments, see infra notes 256-63 and accompanying text.

44. Reporter’s Comments, supra note 9, at 18.

45. Id.

46. Efficiency is one of three normative requirements usually identified in administrative procedure. The other two are accuracy and acceptability. Cramton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 48 Va. L. Rev. 585, 592-92 (1972); Verkuil, The Emerging Concept of Administrative Procedure, 78 Colum. L. Rev. 258, 279-80 (1978) (using slightly different terminology).

47. Patricia A. Dore, Access to Florida Administrative Proceedings, 13 Fla. St. U.L. Rev. 967, 998 (1986). Professor Dore notes that a majority of states have adopted requirements based upon the RMA, which requires agencies to afford interested parties “reasonable” opportunity to submit data, views, or arguments, orally or in writing.” Id. at 998-99.


49. For a more detailed explanation of federal law in this area, see Stephen T. Maher, We’re No Angels: Rulemaking and Judicial Review in Florida, 18 Fla. St. U. L. Rev. 767 at notes 280-97 and accompanying text.

50. Section 3 of the RMA also requires a notice and comment procedure for the adoption of rules. 1961 Model Act, supra note 10, § 6:8, at 481, at 167. It provides that the agency shall “afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing.” Id. § 3(a)(2), at 168. Section 3-104 of the 1981 MSAPA, which Professor Bonfield suggests “modifies and extends” the RMA provision in a number of respects and goes beyond the federal act, provides for an opportunity for written submissions concerning the proposed rule. A. Bonfield, State Administrative Rulemaking 187 (1986). However, even the expanded citizen participation in the 1981 MSAPA provides for less participation than the Florida APA allows. 1981 Model Act, supra note 4, § 3-104(a), at 36. The RMA and the 1981 MSAPA both provide that in the case of substantive rules, an oral hearing must be granted only when requested by 25 persons, a governmental subdivision or agency, or an association having not less than 25 members. 1961 Model Act, supra note 12, § 3(a)(2), at 167-68; 1981 Model Act, supra note 4 § 3-104(a)(2), at 36-37. One affected person can activate this requirement in Florida. Section 3-104 “does not create a right to a trial-type or evidentiary hearing in rule making ‘only an argument-style oral proceeding’” without confrontation or cross-examination. A. Bonfield, supra, at 198. In Florida, an evidentiary proceeding is always available. For a further comparison of the RMA, the 1981 MSAPA and the federal act on these points, see A. Bonfield, supra, at 187-207.

51. Fla. Stat. §120.54(3)(c)(2001)

52. The public hearing authorized by this section can be invoked by “affected” persons. The remedies authorized by sections 120.56 and 120.54 (3)(c)2. can be invoked only by “substantially affected” persons. Although the act defines neither category, the logical conclusion that the
“affected person” standard is less difficult to satisfy than the “substantially affected” standard, has been confirmed by the case law that has developed to define these terms. For a detailed discussion of the level of interest necessary to invoke this and other administrative proceedings authorized by the act, see generally Dore, supra note 47.

53. Fla. Stat. § 120.54(3) (1989). As defined in section 944.02(5), Florida Statutes, prisoners “may be limited by the Department of Corrections to an opportunity to submit written statements . . . .”

54. Reporter’s Draft No. 1 (on file with the author). This language appeared in section 0120.6, titled “Adjudication; in general” and it listed the “source” of this language as “F.S. 120.22; RMA 9(a).” Id. at 14. Section 120.22, Florida Statutes, was titled “Administrative Adjudication Procedure,” in Part II of chapter 120. Section 9 of the RMA provided the procedure applicable in “contested cases.” 1961 Model Act, supra note 10, § 207-08. The term “contested case” was defined in section 1 of the RMA to mean “a proceeding . . . in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing . . . .” Id § 1(2), at 148. Thus, both of the source sections pertained to adjudication. Section 9 of the RMA provided that parties may “present evidence and argument on all issues involved.” Id. § 9(c), at 207. The Reporter’s Final Draft retained that language in section 0120.6, but did not include that language in the section that governed rulemaking. Section 0120.4 provided only for “an opportunity for such public hearing as may be appropriate to inform it of the contentions of interested persons.” Reporter’s Final Draft (Mar. 1, 1974), in A. England & L. Levinson, supra note 9, 4 at app. B [hereinafter Reporter’s Final Draft]. This language was the same as the language in the first draft of that section. Reporter’s Draft No. 1.

55. Fla. CS for SB 892 at 956 (1974). This language was also retained in section 120.57.

56. Reporter’s Comments, supra note 9, at 6. I recognize that the view I express here conflicts with the view expressed by one of the principal drafters of the APA shortly after it was enacted. Professor Levinson stated: “The new Florida Act establishes, by this provision, the type of rulemaking which is generally known in the literature of administrative law as ‘notice-and-comment,’ or ‘informal’ rulemaking. . . . This type of proceeding is also found in the federal APA . . . .” Levinson, supra note 17, at 639 (footnotes omitted). Levinson’s description failed to take into account the changes that had been made to the rulemaking provisions of the act in the House Government Operations Committee and has not been followed. I do not believe that the Florida provision can fairly be construed as either “informal” rulemaking or “notice and comment” rulemaking, in light of its language and legislative history. Prof. Levinson supported his analysis with extensive citation to federal materials: Claggert, Informal Action – Adjudication – Rule Making: Some Recent Developments in Federal Administrative Law, 1971 Duke L. J. 51; Fitzgerald, Mobile Oil Corp. v. Federal Power Commission and the Flexibility of the Administrative Procedure Act, 26 Ad. L. Rev. 287 (1974); Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185 (1975); Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 Cornell L. Rev. 375 (1974); Wright, Court of Appeals Review of Federal Regulatory Agency Rulemaking, 26 Admin. L. Rev. 199 (1974).

Id. at 639 n.122. Because of the differences in the statutes and their legislative history, which are further discussed in We’re No Angels, supra note 49. I suggest that such reliance on federal authority in interpreting the Florida APA is inappropriate, although it has occurred on occasion during the last 30 years.

57. Reporter’s Comments, supra note 18, at 6-7.

58. Professor Dore notes that “no state other than Florida permits a single ‘affected person’ to require the convening of a public hearing on a proposed rule at which ‘affected persons’ may submit their views to the agency.” Dore, supra note 47, at 1000.

59. Who better than the affected person can provide this information? By permitting evidentiary presentations, the APA not only obtains the views of such persons, it also solicits the raw material from which those persons have drawn their views, thereby providing the agency with a depth of information sufficient to allow exploration beyond the conclusions a participant might draw from that raw material.

60. Individuals who prepare an evidentiary presentation are likely to be more familiar with the broad spectrum of concerns that the proposed rule is designed to address than individuals who are only prepared to comment. Preparation of an effective evidentiary presentation requires that the participants develop a theory of the case being presented, analyze and sift through the available evidence, and take account of contrary evidence and argument. Participants concerned about the effectiveness of their presentation will commonly modify their case theory during the last 30 years.

61. Like section 120.54(3) proceedings, notice and comment rulemaking procedures were intended “for the education of the administrator, especially on questions of policy. . . .” Nathanson, Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes, 75 Colum. L. Rev. 721, 755 (1975), Section 120.54(3) proceedings, however, can provide an even better education.

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Legal Focus/Administrative Law:
Time for a change? The Eighth Annual Administrative Law Conference
Ashley C. Beuttel

More than 125 people joined together for the Eighth Annual Administrative Law Conference at the Omni Richmond on May 16, 2002, to ask the question “Virginia Administrative Law: Is it Time for a Change?” Co-sponsored by The Virginia Bar Association Administrative Law Section and the Administrative Law Advisory Committee, this annual event brought together practitioners, employees of state agencies and academics to analyze and discuss the administrative law of the Commonwealth.
After a welcome from VBA President J. Edward Betts, VBA Administrative Law Section Chair John M. “Jay” Holloway III greeted the participants and explained that the goal of the conference was to consider Virginia’s Administrative Procedure Act (APA) and areas for potential reform. He recognized the members of the Administrative Law Advisory Committee, commonly referred to as “ALAC,” and expressed his thanks to them for all of their hard work over the last few years. ALAC was created by the General Assembly in 1994 to assist the Code Commission with its responsibilities for the APA and the Virginia Regulatory Act.

Thomas O. Sargentich, professor of law at American University Washington College of Law and co-chair of an ABA committee focusing on constitutional law and separation of powers, presented the keynote address. He discussed the major issues in administrative law facing practitioners and state agencies alike, reminding the audience that the vast majority of the government’s work is done through its agencies.

According to Professor Sargentich, the principles by which administrative law and procedure should be governed are (1) clarity, predictability and consistency; (2) individual fairness with unbiased judgments and actors who can interact in response to individual needs; (3) managerial efficiency and (4) real bureaucratic accountability. In his conclusion, Professor Sargentich urged stakeholders to retain perspective in efforts to reform, and to likewise retain enthusiasm for the process of reform.

Next, a panel including Professor Sargentich, Professor John L. Gedid of Widener University School of Law, Stephen T. Maher of Shutts & Bowen, Virginia State Senator Frank W. Wagner (R-Virginia Beach), and moderated by B. Paige Holloway of McCandlish Holton, compared the experiences of other states undergoing administrative law reform to those in the Commonwealth. Senator Wagner patroned the establishment of the Joint Commission on Administrative Rules (SB337) in the Commonwealth which will review existing state agency rules and regulations and agency rules and regulations during the promulgation and final adoption process (2002 Acts of Assembly Chap. 677). In addition, the Joint Commission will have the power to suspend rules until the following session of the General Assembly. Professor Gedid discussed Pennsylvania’s experiences with very complicated procedures while Stephen Maher described the streamlined manner in which proposed rules gain approval in Florida.

Participants next received an update on ALAC’s 2001 rulemaking report and legislative recommendations from Senior Assistant Attorney General Roger L. Chaffe; Kathy Frahm, senior policy analyst and director of legislative affairs at the Virginia Department of Environmental Quality; and Stewart J. Lagarde Jr., senior analyst at the Virginia Department of Planning and Budget. Roger Chaffe outlined the progress achieved by ALAC in the last year, inviting interested persons to view their reports at ALAC’s website: http://legis.state.va.us/codecomm/valac/welcome.htm. Kathy Frahm suggested that Virginia’s Internet town hall, http://www.townhall.state.va.us, should be considered as a more efficient forum for promulgating regulations, that agencies might benefit from enhanced training for regulatory administrators and the Commonwealth should consider adopting a fast-track rule making process. Stewart Lagarde explained the function of the lesser-known petition for rulemaking and Roger Chaffe discussed H.B. 726 (2002 Acts of Assembly Chapter 391) which clarifies agency obligations when a regulation being promulgated in accordance with the Administrative Process Act is withdrawn or suspended.

William H. Chambliss, general counsel to the State Corporation Commission, delivered the lunch address. He described the practices and procedures utilized by the State Corporation Commission as a comparison to the APA.

Following lunch, David H. Hallock, assistant to the Governor for policy and deputy counselor, presented Governor Warner’s view on administrative law and process. He explained that Governor Warner will revise the Executive Order on Regulatory Policy by late June. According to Hallock, Governor Warner is considering periodic reviews of state agencies and a mechanism for the governor’s office to direct a review of specific regulations. Hallock expressed the Governor’s support for Virginia’s Regulatory Town Hall, the Town Hall’s e-mail notification system, and suggested the posting of public body minutes and internal “guidance” documents on the Town Hall website.

The conference next addressed the issue of judicial review of the administrative process. Brian Goodman, an Assistant Attorney General and lead counsel for the Commonwealth in Virginia Retirement System v. Avery, discussed the implications of Avery. Charles H. Koch Jr., Woodbridge Professor of Law at the College of William and Mary, addressed the standards of deference that courts apply in different situations to the actions and decisions of state and federal administrative agencies. Kay Slaughter, senior counsel for the Southern Environmental Law Center, discussed the evolution of Virginia’s standing law in an environmental context.
The final presenter of the afternoon was former Virginia Attorney General Stephen D. Rosenthal of Troutman Sanders LLP, who discussed a variety of ethical dilemmas associated with an administrative law practice, focusing particularly on the role of an assistant attorney general representing a variety of state agencies. Rosenthal engaged the audience in a variety of interesting hypothetical questions and updated the participants on relatively recent changes resulting from Virginia’s adoption of the Rules of Professional Conduct in 2000.

Special thanks go out to Brenda Dillard and Bess Hodges for their hard work and planning that made the Eighth Annual Administrative Law Conference a tremendous success. Return to Top

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Perspective/Administrative Law:
Electric Deregulation: Still Critically Important
Edward L. Flippen

Electric deregulation appears to have lost some steam, and in some quarters, what little accomplishment there has been is being rolled back or stalled. Certainly not every state jumped on the train. States such as Idaho, Wyoming, Kentucky, Tennessee, Utah, and West Virginia have had little incentive to deregulate. The average price their citizens pay for electricity is in the range of $0.05/kWh or less compared to prices 80-100 percent higher in California, Massachusetts, Rhode Island, Maine, Vermont, Connecticut, New Jersey, New York, and New Hampshire. But even in states with economic and policy incentives to spur deregulation, much has happened in the last few years to stifle it.

The California energy crisis left many state legislators and regulators with grave concerns about whether deregulation even works much less whether it will produce consumer benefits. Rates for customers of San Diego Gas and Electric increased 100 to 200 percent in 2000, and Pacific Gas & Electric and Southern California Edison had to pay for wholesale purchases of electricity at prices that were up to five times greater than what they were able to recover from their retail customers. All in all, a California deregulation plan that took five years to develop took only months to collapse. And now, the state of California (through its Department of Water Resources) owes billions for long-term obligations it incurred to purchase electricity for its residents when California utilities were unable to meet their obligations.

In addition, the collapse of Enron only further weakened enthusiasm for deregulation. The “poster child” of electric deregulation, Enron promoted greater competition in electric power and battled state regulators that opposed deregulation. However, the company overstated profits with allegedly fraudulent, certainly dubious accounting practices such as booking the entire value of energy future trades as revenue. (Trading firms typically only book the spread between purchases and sales, not the whole trade.) The result was artificially inflated values that in conjunction with loose accounting practices ultimately led to its demise.

Take into consideration the reluctance of low cost states to engage in deregulation, the California debacle, and the collapse of Enron, and it would be easy to conclude that electric deregulation is doomed. Yet just the opposite should be the case. Not a single customer has been without electric service because of Enron. And the lessons from the California crisis tell us how better to model deregulation. For certain, states must critically evaluate the pending balance in the supply and demand for electricity at the time of deregulation (California had no net increase in generating facilities over a 10-year period in which demand increased by approximately 11 percent). Equally important, states must allow retail electric distribution utilities to enter into long-term supply arrangements with deregulated generation plants. (California encouraged its incumbent electric utilities to divest their generation, capped their retail rates, and prohibited them from entering into long-term supply contracts). The net result was that the incumbents were exposed to spot market volatility and squeezed to the point of insolvency.

Regardless of California and Enron, we know from the Australian and United Kingdom electric deregulation
experience, as well as the U.S. telecommunications experience, that deregulation drives prices down. We also know from the U.S. telecommunications experience that deregulation produces quantum leaps in technological advances. And we know from our experience with airline, trucking, and railroad deregulation that competition reduces cost and increases efficiencies.

Deregulation of anything faces “bumps in the road.” But when the “bumps” are smoothed over, prices tend to drop and services improve, as a general rule. The only uncertainty is whether policymakers can take the inevitable heat created in such controversy. If they can, electric deregulation will ultimately produce lower prices, better service, and strengthen the global competitive position of U.S. firms. If they can’t, the continued confusion and uncertainty in the electric power industry will weaken the U.S. economy. Then everyone will lose.

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Young Lawyers Division

VBA/YLD Minority Recruitment Program thrives in Roanoke

Jimmy F. Robinson Jr.

The Virginia Bar Association Young Lawyers Division began its Minority Recruitment Program in Richmond about 10 years ago. The program recruits minority students with an interest in pursuing a legal career, and pairs each student with a practicing minority attorney. The attorney serves as a mentor for the student, advising him or her on any number of issues, including course selection, preparation for LSATs, law school applications, law school exams, the bar exam, summer associate internships, job searches, as well as the daily practice of law. The Richmond program has met with impressive success over the past decade, with students going on to such universities as Harvard and Yale.

The Roanoke program began about four years ago and immediately faced several hurdles. We had trouble reaching our target audience of minority students at local colleges and universities. Second, there are a finite number of minority attorneys to serve as mentors, and as expected, those attorneys are called upon constantly to serve in this role for other groups. We have overcome these obstacles with good contacts at a number of local colleges, including Virginia Tech, Radford, Roanoke, Liberty, Hollins, Lynchburg and Randolph-Macon. We have also recruited enough minority attorneys to serve as mentors.

This year, the Roanoke program aspired to include two new components, in addition to establishing relationships between mentors and mentees: one-week paid internships and a “Preparing for Law School Workshop.” Despite initial setbacks, the new features were kicked off at a VBA-sponsored dinner at which program participants could get to know each other.

Four internships were secured from local firms and three firms are considering sponsorship of interns. The committee’s goal is to provide interns with exposure to the daily practice of law, by assigning them to attend trials, depositions, conferences and/or hearings with attorneys. Whenever possible, they can complete appropriate assignments for attorneys. The proposed set salary for an intern is based loosely on a starting paralegal salary. Firms also agree to provide some form of housing (if needed), either by hosting interns or paying for lodging, and to offer working lunches and home-cooked evening meals to interns.

Participating firms include Gentry Locke Rakes & Moore, Woods Rogers & Hazlegrove, and Frith Anderson & Peake. In soliciting law firms, we remind them that Roanoke is a difficult location for attracting minority lawyers, compared with other cities’ larger minority lawyer populations and higher salaries. We suggest that participation in the program benefits a law firm, by allowing lawyers to know qualified and interested minority students and letting the students get to know the firms. Having connections to the Roanoke area can make all the difference to any law student searching for a job!

Jimmy Robinson is an associate in the law firm of Woods Rogers & Hazlegrove, PLC, and chairs the VBA/YLD Minority Recruitment Project in Roanoke.
Coming to the VBA Summer Meeting at The Homestead? In addition to the great CLE programs and networking opportunities being offered, the VBA/YLD Executive Council will hold its summer business meeting over breakfast on Saturday, July 13. Beginning at 9 p.m. on Saturday, July 13, there will be a social event for VBA/YLD meeting attendees in the Division officers’ suite. Details will be available onsite at The Homestead. Don’t miss this great meeting!

Click here for the VBA/YLD page and current volunteer opportunities.

Across the Commonwealth

President Betts names VBA members to fill board and committee slots

Seven VBA members have been elected to positions on the Virginia Law Foundation Board of Directors and the Joint Continuing Legal Education Committee in the 2002-03 year. They were nominated by VBA President Ed Betts and elected by the VLF Board and its nominations committee in Virginia Beach last month.

For the VLF Board, the VBA nominees are W. David Harless of Richmond (Christian & Barton LLP), to serve an initial three-year term expiring in June 2005, replacing Nancy N. Rogers of Richmond (Troutman Sanders LLP), and Melissa Amos Young of Roanoke (Gentry Locke Rakes & Moore LLP), to serve an initial three-year term expiring in June 2005, replacing William R. Van Buren III of Norfolk (Kaufman & Canoles, PC). Rogers will remain on the VLF Board for one additional year as immediate past president.

For the Joint CLE Committee, incumbents J. Lee E. Osborne of Roanoke (Carter, Brown & Osborne, PC), Elaine R. Jordan of Richmond (Sands, Anderson, Marks & Miller) and Neil S. Lowenstein of Norfolk (Vandeventer Black LLP) have been nominated for reappointment to additional one-year terms expiring in June 2003.

Paul B. Terpak of Fairfax (Blankingship & Keith PC) and Valerie W. Long, of Charlottesville (McGuireWoods LLP) have been nominated to initial one-year terms expiring in June 2003. Long will represent the VBA Young Lawyers Division on the Committee. Return to Top

VBA members honored by Virginia State Bar

Four VBA members were honored during the Virginia State Bar’s 64th Annual Meeting, June 12-16 in Virginia Beach.

Benjamin C. Ackerly of Richmond, a partner in the firm of Hunton and Williams, received the Gardener G. DeMallie Jr. Continuing Legal Education Award from Virginia CLE. The award recognizes an individual who has contributed outstanding service to continuing legal education in Virginia.

Ackerly, who received his undergraduate and law degrees from the University of Virginia, has been a lecturer in law at UVA since 1992, in addition to maintaining a law practice and a number of professional involvements.

Alexander F. Dillard Jr. of Tappahannock received the Tradition of Excellence Award. The award is presented annually by the VSB General Practice Section to an outstanding general practice lawyer who has made significant contributions to the profession and to the public.

Dillard, a graduate of Hampden-Sydney College and the University of Richmond, has practiced law in Tappahannock since 1966. He has chaired the Essex County Board of Supervisors and the board of directors of the Bank of Essex, and is a past president of the Northern Neck Bar Association.

Jennifer L. McClellan of Richmond, an associate at Hunton & Williams, received the R. Edwin Burnette Jr. Young Lawyer of the Year Award. The award is given annually to a young attorney for service to the conference, the legal profession and the community.

In addition to numerous VSB activities, McClellan is co-chair of the VBA/YLD Lawyers for the Arts and Nonprofits
Committee and is involved with a number of Richmond civic organizations.

Thomas E. Spahn of McLean, former chair of the VBA Professionalism Task Force and a partner in the firm of McGuireWoods, LLP, received a resolution of appreciation for his outstanding and many-numbered contributions to lawyer professionalism and ethics in Virginia.

He received his undergraduate and law degrees from Yale University. **Return to Top**

**Fall conference details will soon be available**

Plans are underway for the VBA’s lineup of fall conferences. Although agenda details are still under discussion, dates and locations have been set as follows:

- VBA Labor Relations and Employment Law Conference, September 26-28, Kingsmill, Williamsburg;
- Lawyers Helping Lawyers Conference, September 27-28, Omni Richmond;
- VBA Virginia Tax Practitioners Roundtable, October 25, Farmington, Charlottesville;
- Boyd-Graves Conference, October 25-26, Norfolk Waterside Marriott; and

More information on each conference will be available later this summer. Members of relevant VBA groups will receive mailings with agenda and registration information, and details will be published in the VBA News Journal and on the VBA website at www.vba.org.

Additional events, including CLE programs and volunteer training sessions sponsored by VBA/YLD committees, will be announced at later dates as more details are finalized.

Persons interested in making room reservations for the September conferences should call the following numbers:
- For the Labor Relations and Employment Law Conference, 1-800-832-5665;
- For the Lawyers Helping Lawyers Conference, (804) 344-7000. **Return to Top**

**Classified ads, announcements start in September**

The *VBA News Journal* will offer classified advertising beginning with the September 2002 issue. Categories available will be as follows:

- Positions available
- Positions wanted
- Books and software
- Office equipment/furnishings
- Office space
- Experts
- Consulting services
- Business services
- Vacation rentals
- Educational opportunities

Rates will be $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 (August 1 for September, etc.).

The *VBA News Journal* will print professional announcements (text-only, no display ads) for $15 per announcement, payable in advance. Announcements will be subject to editing for space limitations and VBA style. **Return to Top**

**Nominations for VLF Fellows Class of '03 due Sept. 4**
The Virginia Law Foundation Fellows seek nominations for the Fellows Class of 2003, to be accepted through September 4, 2002. The 2003 Class of Fellows will be inducted at a dinner on January 16, 2003, during the VBA Annual Meeting in Williamsburg.

A candidate must be an active or associate member of the Virginia State Bar for at least 10 years; be a resident of Virginia; be a person of integrity and character; have maintained and upheld the highest standards of the profession; be outstanding in the community; and be distinguished in the practice of law. Retired and senior-status judges are eligible. Sitting full-time judges and constitutional office holders are not eligible during their tenures.

Nominations must include a resume or biographical sketch of the nominee and must be received by September 4.

Please send nominations to VLF Fellows Council, c/o Nominations, 701 East Franklin Street, Suite 708, Richmond, VA 23219. Return to Top

Gifts are welcomed by VBA Foundation and Chapple Fund

If you are planning your charitable gifts for 2002, keep The Virginia Bar Association Foundation in mind. The Foundation is a 501(c)(3) corporation which underwrites many of the public service projects of the VBA. Your contributions are welcomed, as they strengthen our Association’s resources for positive action.

Persons with a particular interest in the Lawyers Helping Lawyers Program may contribute to The Stephen C. Chapple Recovery Assistance Fund, which assists attorneys with the expense of treatment for alcohol or drug addiction or with similar expenses related to rehabilitation agreements. The Fund is housed in the VBA Foundation and contributions are tax-deductible.

For more details about the VBA Foundation and Chapple Fund, please call the VBA office at (804) 644-0041. Return to Top

News in Brief

Thomas E. Spahn, a partner in the Tysons Corner office of McGuireWoods LLP and former chair of the VBA Professionalism Task Force, is the recipient of a 2002 Burton Award for Legal Achievement. The Burton Foundation annually selects 15 attorneys from the top 500 firms nationwide to receive the award, which honors excellence in legal writing. Spahn won the award for his article “Virginia Corporate Directors’ Duties,” published in the Fall 2000 issue of The Journal of Civil Litigation.

Virginia Secretary of Natural Resources W. Tayloe Murphy Jr. and his wife, Helen Turner Murphy, recently received the Massie Medal for Distinguished Achievement, the highest honor presented by The Garden Club of Virginia, at the GCV annual meeting. Helen Murphy is a former GCV president who has served the organization in numerous capacities; during his tenure in the House of Delegates, Tayloe Murphy was a strong advocate for the environment.

Former VBA Executive Committee member Virginia W. Powell of Richmond, a partner in the Richmond office of Hunton & Williams, was selected as an Outstanding Woman for 2002 by the YWCA of Richmond. Ten Richmond-area women, each representing outstanding achievement in her field and noteworthy contributions to the metropolitan community, are selected annually for the honor.

The Virginia Lawyer was first published in 1966 by the VBA Young Lawyers Division. In 2000, Virginia CLE and the VBA/YLD joined in a cooperative effort to produce a new two-volume guide for practitioners designed to assist attorneys in dealing with unfamiliar areas. Details are available on the Internet at http://www.vacle.org/wn111.htm#valawyer. Return to Top
By contrast, defective altruism is "by the admission of its proponents" an approach that not only unjustifiably claims the moral high ground in giving decisions, but also implements this bold claim by weighing causes and beneficiaries against one another. In this, it is not moral, but rather, moralistic in the worst sense of the word. International Urology and Nephrology volume 47, pages 1515–1517 (2015) Cite this article. 82 Accesses. 1 Citations. Cite this article. Bastani, B., Fry-Revere, S. A practical solution that bypasses the altruism versus incentives debate. Int Urol Nephrol 47, 1515–1517 (2015). https://doi.org/10.1007/s11255-015-1061-6. Download citation. A Policy of Practical Altruism - Volume 3 Issue 3 - Janice Creveling Hepworth. 7 Speech of His Excellency José Batlle y Ordóñez, President of Uruguay, at the banquet given by him to Mr. Root at the Government House, August 11, 1906, South American Speeches . . ., p. 105. 8 Minister Beaupré to the Secretary of State, Buenos Aires, September 6, 1906, House Documents, 1906, Vol. I, Pt. Abstract views reflect the number of visits to the article landing page. Total abstract views: 0 *.