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From the Nation's Oldest Law School

THE COLONIAL LAWYER:

A Journal of Virginia Law and Public Policy

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NUMBER 1

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A STUDENT PUBLICATION OF
THE MARSHALL-WYTHE SCHOOL OF LAW
COLLEGE OF WILLIAM AND MARY

EDITOR'S BRIEF

In this issue of *The Colonial Lawyer: A Journal of Virginia Law and Public Policy*, six authors present insightful commentary on a number of diverse and changing areas of Virginia law.

On the subject of the sanctioning of lawyers, Keith Finch's article explores the purposes and effects of Federal Rule of Civil Procedure 11 and the equivalent provision, _ 8.01-271.1, of the Virginia Code. Additionally, Mr. Finch reports and analyzes the results of a survey conducted by *The Colonial Lawyer* of general district court and circuit court judges in Virginia regarding their respective views on the implementation of _ 8.01-271.1.

On the medical-legal front, Deborah Ryan addresses whether the Natural Death Act of Virginia, __ 54-325.8:1-13 of the Virginia Code, is useful to individuals existing in a persistent vegetative state. She explores the right of both the patient in this condition and the surrogate decisionmaker acting on behalf of the patient to discontinue treatment. Ms. Ryan concludes that the Natural Death Act should be amended to categorize persons in a persistent vegetative state as legally dead or to guarantee the patient in a persistent vegetative state the right to deny treatment by expanding the living will doctrine.

Anne Bowling examines recent developments in the law on the subject of AIDS (Acquired Immune Deficiency Syndrome) and discrimination in the workplace. She surveys statutory and case law both on the federal and state level, and concludes that in order to prevent workplace discrimination, employers must take steps to educate themselves and their employees about the disease.

Michael Grattan discusses the effect of the Supreme Court's decision in Lyng v. Northwest Indian Cemetery Protective Association on government regulation of religious institutions under the free exercise clause of the first amendment. He examines the zoning power of governments and the impact of Lyng on different states' treatment of religious use property in the zoning context. Mr. Grattan then discusses how Virginia, which has never squarely addressed the role of federal or state free exercise clauses in the zoning context, should merge its existing zoning law with the free exercise jurisprudence after Lyng. He concludes that as long as Virginia lawmakers act reasonably and consider religious beliefs when making zoning decisions, they should be able to zone religious facilities almost without constraint.

In our final article, *The Practitioner's Guide*, Peter Jordan and Steve Nachman, the Research Editors for the publication, provide a general overview on the subject of lawyer advertising and solicitation in Virginia. Following the article is an interview with Phillip B. Morris, President of the Virginia State Bar Association, regarding efforts of the Bar Association to further regulate solicitation by lawyers in Virginia.

As the year comes to an end, I would like to introduce the new Editrix-in-Chief of the publication for 1990-1991 academic year, Lisa J. Entress. I wish you all the best in the

coming year. I wish also to express my gratitude to my editors and staff for a job well done. Your commitment has made this year a success.

The Editors and the Staff of *The Colonial Lawyer: A Journal of Virginia Law and Public Policy* hope that you, the practitioner and the scholar, find the articles of Volume 19, Number 1, insightful and stimulating. Your suggestions, comments, and criticisms are welcomed.

Thomas Paul Sotelo
Editor-in-Chief

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VIRGINIA'S NEW RULE 11 "CLONE" -- AN EMPIRICAL STUDY

Keith Finch

INTRODUCTION

Introduced in 1983 to "discourage dilatory or abusive tactics and help to streamline the litigation process,"¹ the amendments to Rule 11 of the Federal Rules of Civil Procedure have generated a storm of controversy throughout their relatively brief childhood. The seven years since the amendments' promulgation have seen an explosion in the number of cases involving Rule 11,² prompting considerable study by representatives of the bar, the bench and the scholarly community.³ Although it appears that district judges predominantly favor the new Rule,⁴ the legal community's support for the amendments is hardly unanimous. Commentators have expressed concern that Rule 11 may now be aggravating the very problems it was supposed to solve,⁵ and the absence of truly uniform standards has led many practicing attorneys to join the ranks

¹ Amendments to Rules, Advisory Committee Note, 97 F.R.D. 165, 198 (1983) (hereinafter Advisory Committee Note).

² Almost 700 district court and circuit court decisions analyzing Rule 11 were published in the period between the Rule's August 1, 1983 effective date and December 15, 1987. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 234 (1988). By comparison, researchers have uncovered only 40 Rule 11 cases decided in the eight years prior to the amendments. Nelken, *Sanctions Under Amended Federal Rule 11 -- Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1315 n.18 (1986) (citing 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1332-34 (1983 Supp.)).

³ *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir. 1986).

⁴ Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1014 (1988).

⁵ See, e.g., Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 34 (1984) ("The more insidious danger lies in the possibility of a casual and unconsidered debilitation of the adversary system through the overzealous pursuit of the very end we seek to achieve -- the swift, efficient, and fair resolution of lawsuits.").

of the Rule's most bitter critics.⁶ As one commentator put it, "little has been gained,"⁷ and the future of Rule 11 remains very much in question.

The Commonwealth of Virginia strode boldly into this whirlwind three years ago, when the General Assembly overwhelmingly approved⁸ an amendment to the Virginia Code which virtually duplicates the language of Rule 11. This new statute is § 8.01-271.1, which became effective on July 1, 1987.⁹ Virginia's judges have now had almost two and a half years to apply and interpret the new rule, and their views could very well be a matter of great concern for every attorney practicing civil law in Virginia. Yet no coherent body of jurisprudence has developed surrounding § 8.01-271.1, for neither the Virginia Supreme Court nor the Virginia Court of Appeals has yet made any significant rulings on the new statute. Indeed, only three reported opinions have even mentioned § 8.01-271.1, and none of these provides the slightest hint of how the new rule is being applied.¹⁰

In an effort to bridge this information gap, *The Colonial Lawyer: A Journal of Virginia Law and Public Policy* asked all Virginia's circuit court and general district court judges to participate in an anonymous mail survey designed to gauge their

⁶ Joseph, *The Trouble With Rule 11: Uncertain Standards and Mandatory Sanctions*, A.B.A. J., August 1987, at 87, 89 ("Practicing under Rule 11 is like negotiating a minefield. You know there will be an explosion if you step on a mine. The trouble is, you don't know where the mines are.").

⁷ Shaffer, *Introduction to SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION, SANCTIONS: RULE 11 AND OTHER POWERS* at 15 (1988).

⁸ JOURNALS OF THE SENATE OF VIRGINIA, 1987 REGULAR SESSION, at 752 (two dissenting votes); JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA, 1987 REGULAR SESSION, at 1092-93 (two dissenting votes).

⁹ VA. CODE ANN. § 8.01-271.1 (Supp. 1989). Refer to note 73 *infra*.

¹⁰ The three opinions are: *Vance v. Aetna Life Ins. Co.*, 714 F. Supp. 203, 206 (E.D. Va. 1989) (section 8.01-271.1 could not be applied because federal law preempted state law); *Lannon v. Lee Conner Realty Corp.*, 238 Va. 590, 594, 385 S.E.2d 380, 382-83 (1989) (fees could not be awarded because § 8.01-271.1 was not in effect at the time of entry of the final decree); *Vaughn v. McGrew*, 12 Va. Cir. 125, 126 (1988) (motion for costs denied because demurrer and motion for summary judgment had been denied).

attitudes toward § 8.01-271.1. Before reporting the results of the survey, however, this article will briefly describe (1) the major currents in Federal Rule 11 jurisprudence, (2) other states' solutions to the problem of frivolous lawsuits, and (3) Virginia law prior to the passage of § 8.01-271.1.

FEDERAL RULE 11

The Amendments

Rule 11 was amended in 1983 for the express purpose of improving its effectiveness as a deterrent to abusive litigation tactics.¹¹ The old Rule 11,¹² which had not been changed since 1938, was considered to have generated too much confusion about the circumstances triggering its operation, the standard of conduct it expected of

¹¹ Advisory Committee Note, *supra* note 1, at 198. The pertinent text of the amended Rule 11 is as follows:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

¹² The original version of Rule 11 required parties to sign their pleadings and treated each attorney's signature as a certificate that "he ha[d] read the pleading; that to the best of his knowledge, information and belief there [was] good ground to support it; and that it [was] not interposed for delay." Pleadings which violated the rule could be "stricken as sham and false," and attorneys could be subject to "appropriate disciplinary action" for "willful violation" of the rule. 28 U.S.C. app. 540-41 (1982).

attorneys, and the range of sanctions it authorized judges to impose.¹³ The amended Rule sought to solve these problems by reducing "the reluctance of courts to impose sanctions" and by "emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions."¹⁴ To accomplish these objectives, the amendments established several new standards:

1. An attorney must make a reasonable inquiry into both fact and law before filing any paper with the court.
2. The paper must be well-grounded in fact.
3. The paper must be supported by law, or by a good faith argument for a change in the law.
4. The paper must not be interposed for any improper purpose, such as to harass or to cause delay.
5. Sanctions are mandatory once a violation is proven.
6. Payment of the opposing party's attorney's fees is explicitly established as a legitimate sanction.
7. Clients, as well as their attorneys, are subject to sanctions.
8. The court may impose sanctions either upon motion or upon its own initiative.¹⁵

The Standard of Objective Reasonableness

It is now settled that subjective good faith, which was enough to protect an attorney from sanctions under the old Rule 11, is no longer a safe harbor.¹⁶ Though the old Rule limited its scope to punishment of "willful violations," under the amended

¹³ Advisory Committee Note, *supra* note 1, at 198.

¹⁴ *Id.*

¹⁵ FED. R. CIV. P. 11. Refer to note 11 *supra*.

¹⁶ Shaffer, *supra* note 7, at 2.

Rule 11 "[i]nexperience, incompetence, willfulness or deliberate choice may all contribute to a violation."¹⁷ The amended Rule requires attorneys to make a prefiling inquiry into both fact and law, and their investigative efforts are to be judged according to an objective standard of reasonableness under the circumstances.¹⁸ This means that an attorney does not violate the rule if a "reasonable attorney" in an identical situation would believe his actions to be legally and factually justified.¹⁹ The practical effect of this objective standard is "to eliminate the defense of personal ignorance of defects in a paper challenged as unmeritorious."²⁰ In other words, "[a]n empty head but a pure heart is no defense."²¹ Of course, a party which files papers for an improper purpose is still subject to sanctions, and federal courts have not hesitated to apply Rule 11 to parties who have acted in bad faith.²²

Reasonable Factual Inquiry

Whether an inquiry is "reasonable" or not depends upon the circumstances of each case,²³ and courts have considered many factors in determining whether an attorney

¹⁷ Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987).

¹⁸ Advisory Committee Note, *supra* note 1, at 198.

¹⁹ Cabell, 810 F.2d at 466. *See also* Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986) ("The 'reasonable man' against which conduct is tested is a competent attorney admitted to practice before the district court.").

²⁰ Zaldivar, 780 F.2d at 830.

²¹ Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir.), *cert. denied* 479 U.S. 851 (1986).

²² *See, e.g.,* Chu by Chu v. Griffith, 771 F.2d 79 (4th Cir. 1985) (suit filed against judge in attempt to force him to recuse himself from a divorce proceeding was brought for an "improper purpose"); Hudson v. Moore Business Forms, Inc., 827 F.2d 450 (9th Cir.), *aff'd in part, vacated in part and remanded*, 836 F.2d 1156 (9th Cir. 1987) (\$4.2 million counterclaim was frivolous, filed to harass the plaintiff and to deter similar actions from being brought).

²³ Thomas v. Capital Sec. Servs., 812 F.2d 984, 988 (5th Cir.), *reh'g granted*, 822 F.2d 511 (5th Cir. 1987), *aff'd in part, vacated in part and remanded*, 836 F.2d 866 (5th Cir. 1988).

has made an adequate factual and legal investigation before filing a pleading. Whether a factual inquiry is sufficient may depend upon factors such as the amount of time available for investigation, the degree to which the attorney must rely upon his client for factual information, whether the attorney accepted the case from another member of the bar, and the need for discovery to develop the factual circumstances underlying the claim.²⁴ Courts have thus sanctioned attorneys for, among other things, failing to contact a client at least once before filing a pleading,²⁵ neglecting to check readily available medical records,²⁶ and failing to inspect state records to see if a defendant was a subsidiary or a corporation.²⁷ Extended inquiry alone will not save a meritless claim from the penalty of sanctions,²⁸ and attorneys are naturally required to act upon the information their investigations uncover.²⁹ Courts and commentators disagree, however, over whether attorneys are under a continuing obligation to evaluate the reasonableness of their claims³⁰ or whether Rule 11 limits the scope of sanctionable behavior to the pre-filing period.³¹

²⁴ *Id.*

²⁵ *Unioil, Inc. v. E.F. Hutton*, 809 F.2d 548, 557-58 (9th Cir. 1986) (as amended by subsequent order 1987).

²⁶ *Van Berkel v. Fox Farm and Road Machinery*, 581 F. Supp. 1248, 1250 (D. Minn. 1984).

²⁷ *Fuji Photo Film U.S.A., Inc. v. Aero Mayflower Transit Co.*, 112 F.R.D. 664, 668 (S.D.N.Y. 1986).

²⁸ *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986).

²⁹ *Fahrenz v. Meadow Farm Partnership*, 850 F.2d 207, 210 (4th Cir. 1988) (once three key witnesses had been deposed and had repudiated the accusations forming the basis for the complaint, plaintiff's counsel acted unreasonably in filing a brief in opposition to a motion for summary judgment).

³⁰ *See Nelken, supra* note 2, at 1331 ("Imposing such a continuing duty properly requires the parties to use information gained in discovery to refine and narrow the issues and claims on which they intend to go forward. In addition, it discourages the use of litigation to coerce settlement for purely economic reasons.").

³¹ *See, e.g., Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 874 (5th Cir. 1988) ("Like a snapshot, Rule 11 review focuses upon the instant when the picture is taken -- when the signature is placed on the document.") (reversing earlier

Reasonable Legal Inquiry

In determining whether a party's legal investigation is objectively reasonable, courts consider factors such as the amount of time the party had to prepare the document, whether the document contains a plausible view of the law, whether the paper is filed by an attorney or by a *pro se* litigant, and the complexity of the legal and factual issues in question.³² Courts are generally unwilling to sanction litigants who are merely guilty of trying to stretch some "arguably" relevant legal principle,³³ but parties who advance "wacky" legal theories may violate the Rule.³⁴ Courts have imposed sanctions on parties who neglected to determine whether jurisdiction existed,³⁵ who failed to investigate whether a contractual relationship existed,³⁶ and who completely ignored firmly established precedent.³⁷ Although Rule 11 permits parties to make "a

application of continuing obligation requirement). For a list of cases on both sides of the "continuing obligation" debate, see Comment Note, *General Principles Regarding Imposition of Sanctions Under Rule 11, Federal Rules of Civil Procedure*, 95 A.L.R. FED. 107, 127-32 (1989).

³² *Thomas v. Capital Sec. Servs.*, 812 F.2d 984, 988 (5th Cir.), *reh'g granted*, 822 F.2d 511 (5th Cir. 1987), *aff'd in part, vacated in part and remanded*, 836 F.2d 866 (5th Cir. 1988).

³³ *Vairo*, *supra* note 2, at 214-15.

³⁴ *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988). See, e.g., *Pawlowske v. Chrysler Corp.*, 623 F.Supp. 569, 572-73 (N.D. Ill. 1985), *aff'd*, 799 F.2d 753 (7th Cir. 1986) (plaintiff argued that employer's removal of \$568.37 from her wages, in compliance with IRS levy, was a violation of due process; court granted defendant summary judgment and sanctioned plaintiff).

³⁵ *Continental Air Lines, Inc. v. Group Systems International*, 109 F.R.D. 594, 597 (C.D. Cal. 1986) (sanctions imposed on attorney who filed motion to dismiss for lack of personal jurisdiction without researching relevant facts or their legal significance).

³⁶ *Medical Emergency Serv. Assocs. (MESA) S.C. v. Foulke*, 633 F.Supp. 156 (N.D. Ill. 1986), *aff'd*, 844 F.2d 391 (7th Cir. 1988).

³⁷ *Szabo*, 823 F.2d at 1082 ("When counsel represent that something cleanly rejected by the Supreme Court is governing law, then it is appropriate to conclude that counsel are not engaged in trying to change the law; counsel either are trying to buffalo the court or have not done their homework. Either way, Rule 11 requires the court to impose a sanction.").

good faith argument for the extension, modification or reversal of existing law,"³⁸ a pleader whose arguments are not clearly supported by existing law would be well advised to inform the court that she is seeking a change in the law.³⁹

Sanctions

Sanctions are a mandatory consequence of a Rule 11 violation,⁴⁰ regardless of whether the violator has prevailed on the merits of the case.⁴¹ Even voluntary dismissal does not always relieve a party of responsibility for Rule 11 violations.⁴²

An award of attorney's fees is merely the "preferred" means of response to a violation,⁴³ and a district court "has discretion to tailor sanctions to the particular facts of the case."⁴⁴ For example, a court may award an amount less than the aggrieved party's actual expenses and attorney's fees,⁴⁵ or simply issue a reprimand to the offending attorney.⁴⁶ Other solutions might include recommending that the state bar take disciplinary action,⁴⁷ directing an attorney to attend continuing legal education courses,⁴⁸

³⁸ FED. R. CIV. P. 11. Refer to note 11 *supra*.

³⁹ Shaffer, *supra* note 7, at 5.

⁴⁰ *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 757 (1st Cir. 1988) ("by using the phrase 'shall impose . . . an appropriate sanction,' the new rule *mandates* the imposition of sanctions whenever an objective violation of its tenets is found.") (emphasis in original).

⁴¹ *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988).

⁴² *See, e.g., Id.* at 1079. (plaintiff filed suit and voluntarily dismissed the action three days later; court required plaintiff to pay for round-the-clock work done by the defendant's counsel during the intervening period).

⁴³ S. KASSIM, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 5 (1985).

⁴⁴ Advisory Committee Note, *supra* note 1, at 200.

⁴⁵ *Fahrenz v. Meadow Farm Partnership*, 850 F.2d 207, 211 (4th Cir. 1988).

⁴⁶ *Cabell v. Petty*, 810 F.2d 463, 467 n.5 (4th Cir. 1987) (citing Schwarzer, *Sanctions Under the New Federal Rule 11: A Closer Look*, 104 F.R.D. 181, 201).

⁴⁷ *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 125, (2d Cir.), *cert. denied*, 484 U.S. 918 (1987).

⁴⁸ *Id.*

or requiring her to circulate a report of her misconduct throughout her law firm's offices.⁴⁹

The Purpose of Sanctions: Deterrence, Compensation or Punishment?

Although federal courts have overwhelmingly recognized the deterrence rationale underlying Rule 11,⁵⁰ at least two other conceptions of Rule 11's primary function have emerged. One emphasizes the Rule's cost-shifting or compensatory function, while the other stresses the punitive purpose of sanctions.⁵¹ Professor Arthur Miller, reporter to the Civil Rules Advisory Committee, champions the compensatory view. He views the Rule primarily as an alteration of the traditional American approach to costs (in which each party pays its own expenses) intended to bring it closer to the British system (in which the loser pays).⁵² The Rule itself lends some support to Professor Miller's view in its explicit provision for "reasonable expenses incurred because of the filing of the . . . paper, including a reasonable attorney's fee."⁵³ But Miller's critics have pointed out that Rule 11 is far from being a true cost-shifting provision, and that a purely

⁴⁹ *Heuttig & Schromm, Inc. v. Landscape Contractors Council*, 582 F. Supp. 1519, 1522-23 (N.D. Cal. 1984) (court required that copy of the memorandum opinion and order be delivered to every partner and associate of the sanctioned firm), *aff'd*, 790 F.2d 1421 (9th Cir. 1986).

⁵⁰ *See, e.g.,* *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 157 (3rd Cir. 1986); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 257 (4th Cir. 1987); *Herron v. Jupiter Transp. Co.*, 858 F.2d 332, 335 (6th Cir. 1988); *Kurkowski v. Volcker*, 819 F.2d 201, 204 (8th Cir. 1987); *Cotner v. Hopkins*, 795 F.2d 900, 903 (10th Cir. 1986); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987).

⁵¹ Nelken, *supra* note 2, at 1323.

⁵² Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, Nat'l L.J., Nov. 28, 1983, at 24, 25, *quoted in* Nelken, *supra* note 2, at 1323-24.

⁵³ FED. R. CIV. P. 11. Refer to note 11 *supra*.

compensatory philosophy ignores the Rule's emphasis on attorney competence.⁵⁴ Courts have agreed, refusing to view Rule 11 merely as a fee-shifting device.⁵⁵

The Advisory Committee Notes also support a view of sanctions as a punitive measure: "[t]he detection and *punishment* of a violation of the signing requirement, encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation."⁵⁶ Courts which prefer this punitive view may be more likely to impose nonmonetary sanctions, such as public reprimands, than courts which favor compensation.⁵⁷ The resulting impact upon attorneys' personal reputations and community standing furthers Rule 11's deterrence function and is more effective than a simple cost-shifting device.⁵⁸ It seems, therefore, that a compensatory approach is less likely to achieve the Rule's purpose of deterring abusive litigation than a punitive philosophy.

⁵⁴ Nelken, *supra* note 2, at 1324.

⁵⁵ See, e.g., *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 95 A.L.R. Fed. 93 (3rd Cir. 1987), in which the court reasoned as follows:

The Rules Enabling Act, 28 U.S.C. § 2072, bars enactment of substantive provisions masked as rulemaking. The Advisory Committee, aware of this limitation, consequently did not intend to effect a major change in the American Rule in the guise of expansive Rule 11 sanctions. . . . The goal of Rule 11, therefore, is not wholesale fee shifting but correction of litigation abuse.

Id. at 483, A.L.R. Fed. at 101-02 (citation omitted).

⁵⁶ Advisory Committee Note, *supra* note 1, at 200 (emphasis supplied).

⁵⁷ Comment, *The Horizon of Rule 11: Toward a Guided Approach to Sanctions*, 26 Hous. L. Rev. 535, 567-68 (1989).

⁵⁸ See Nelken, *supra* note 2, at 1325. ("Cost shifting itself, however, is likely to be effective as a deterrent only to the extent that the costs incurred happen to outweigh the benefits derived In all other cases, we must assume that sanctions will be accepted as a cost of litigation and that the conduct will continue.)

RULE 11 AND STATE LAW

By April 1990, at least nineteen states (including Virginia) had amended their rules of civil procedure to include a provision essentially identical to the new Federal Rule 11.⁵⁹ Yet this does not necessarily mean that Rule 11 has met with widespread approval. Many states appear to believe that the Rule's requirements are too harsh, and have adopted provisions which mimic Rule 11's language but which nonetheless differ in vital respects.⁶⁰ California, apparently wary of adopting a tough sanctions law without testing it first, has taken a unique approach. It has adopted a "Rule 11 clone" but limited its application to two counties in the Los Angeles area.⁶¹ This experimental rule will only be in effect from July 1, 1988 to January 1, 1991, at which time the California Legislature will receive a report on whether the rule has achieved its goal of reducing court congestion.⁶² Because Federal Rule 11 has attracted so much criticism

⁵⁹ ARIZ. R. CIV. P. 11(a); CAL. CIV. PROC. CODE § 447 (West Supp. 1990); COLO. R. CIV. P. 11; DEL. R. CIV. P. 11; IDAHO R. CIV. P. 11(a)(1); ILL. CODE CIV. P. § 2-611; IOWA R. CIV. P. 80; KAN. CIV. PROC. CODE § 60-211 (West 1990); LA. CODE CIV. PROC. ANN. art. 863 (West Supp. 1990); MICH. CT. R. 2.114; MONT. R. CIV. P. 11; NEV. R. CIV. P. 11; N.D. R. CIV. P. 11; OR. R. CIV. P. 17; S.D. CODIFIED LAWS ANN. § 15-6-11 (Supp. 1989); UTAH R. CIV. P. 11; VA. CODE ANN. § 8.01-271.1; WASH. CIV. R. 11; WYO. R. CIV. P. 11.

⁶⁰ See Miss. R. Civ. P. 11 (establishes attorney's fees as legitimate sanction, but violations must be "willful" and sanctions are not mandatory); NEB. REV. STAT. § 25-824 (1989) (does not require a reasonable inquiry); S.C. R. Civ. P. 11(a) (does not require a reasonable inquiry or mandate sanctions, but does require an affirmation that the parties have made a good faith attempt to settle); Wis. R. Civ. P. 802.05 (sanctions are not mandatory).

⁶¹ CAL. CIV. PROC. CODE § 447 (West Supp. 1990) ("This section shall apply only in Riverside County and San Bernadino County. The Legislature finds and declares that, in order to assess the impact of this section on a limited basis before making it applicable on a statewide basis, it is necessary for this section to be applicable for a limited period of time in those counties.").

⁶² *Id.* The legislature has expressly charged the judicial council with determining whether the rule accomplishes the goals of (1) reducing caseload by 20%, (2) reducing frivolous actions by 20%, and (3) increasing the early settlement of cases by 20%. *Id.*, historical note.

for "unpredictability" and the spawning of excessive "satellite litigation,"⁶³ such caution on the part of California and other states is understandable. It may even be somewhat disconcerting, in light of other states' wariness, that the Virginia General Assembly was willing to jump on the Rule 11 bandwagon with so little debate and so little dissent.

SANCTIONS IN VIRGINIA BEFORE § 8.01-271.1

Before the adoption of Virginia's "Rule 11 clone," § 8.01-271.1, trial judges had relatively little power to impose sanctions for dilatory or abusive behavior. Federal courts had long possessed such power, even before Rule 11 was amended, because of the equitable doctrine (resting upon the inherent powers of the court) which allowed them to sanction litigants who "acted in bad faith, vexatiously, wantonly or for oppressive reasons."⁶⁴ This principle functioned as an exception to the "American Rule," permitting courts to award expenses and attorney's fees to any litigant whose opponent acted in bad faith.⁶⁵ Virginia explicitly rejected the federal doctrine, adhering closely to the "American Rule" principle that "attorney's fees are not recoverable by a prevailing litigant in the absence of a specific contractual or statutory provision to the contrary."⁶⁶ Unlike their federal counterparts, Virginia judges were unable to impose monetary penalties upon parties who filed frivolous or abusive claims.

Other means of deterring frivolous behavior existed before the passage of § 8.01-271.1, including suits for malicious prosecution⁶⁷ and abuse of process⁶⁸ as well as

⁶³ See generally Schwarzer, *supra* note 4.

⁶⁴ Lannon v. Lee Conner Realty Corp., 238 Va. 590, 594, 385 S.E.2d 380, 382-83 (1989).

⁶⁵ Advisory Committee Note, *supra* note 1, at 198.

⁶⁶ Lannon v. Lee Conner Realty Corp., 238 Va. 590, 594, 385 S.E.2d 380, 383 (1989).

⁶⁷ A plaintiff claiming malicious prosecution in Virginia has the burden of proving (1) that the prosecution was set on foot by the defendant and that it terminated in a matter not unfavorable to the plaintiff; (2) that it was instituted by the defendant, or procured by his cooperation; (3) that it was without probable cause;

disciplinary action under the Virginia Code of Professional Responsibility.⁶⁹ These remedies, however, did not give judges the power to deal with improper behavior on their own authority. Instead, sanctioning decisions were made by a third party -- either the District Committee (in the case of ethics complaints)⁷⁰ or the aggrieved party itself (which decided whether to sue for abuse of process or malicious prosecution). Furthermore, none of these remedies could be used to penalize a party who filed a frivolous suit in good faith. A litigant could not be liable in tort if his actions were not either "malicious" or born of an "ulterior motive,"⁷¹ and an attorney could not be guilty of ethical misconduct unless she "knowingly" advanced an unwarranted or malicious claim.⁷² Only subjective bad faith exposed attorneys to liability or discipline, allowing them to file unwarranted documents with little reason to fear punishment -- provided, of course, that they remained blissfully ignorant of their mistakes.

and (4) that it was malicious. *Cramer v. Crutchfield*, 496 F. Supp. 949, 953 (E.D. Va. 1980), *aff'd*, 648 F.2d 943 (4th Cir. 1981).

⁶⁸ A plaintiff claiming abuse of process in Virginia has the burden of proving (1) the existence of an ulterior motive on the part of the defendant and (2) an act in the use of the process not proper in the regular prosecution of the proceeding. *Id.* at 954.

⁶⁹ R. SUP. CT. VA., part 6, § II. DR 7-102(A) provides, in part:

In representation of his client, a lawyer shall not:

(1) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

⁷⁰ See generally R. SUP. CT. VA., part 6, § IV, ¶ 13 ("Authority and Duties of the Council, the Standing Committee, District Committees and Bar Counsel. Investigation and Prosecution of Charges of Misconduct.").

⁷¹ *Cramer v. Crutchfield*, 496 F.Supp. 949, 953-54 (E.D. Va. 1980), *aff'd*, 648 F.2d 943 (4th Cir. 1981). Refer to notes 67 and 68, *supra*.

⁷² Virginia Code of Professional Responsibility, R. SUP. CT. VA., part 6, § II, DR 7-102(A)(2). Refer to note 69 *supra*.

The passage of § 8.01-271.1, nearly identical to Federal Rule 11, brought a dramatic change to this body of law.⁷³ If applied as vigorously in Virginia as Rule 11 has been applied in the federal courts, the new § 8.01-271.1 could very easily revolutionize litigation in Virginia as well. Yet because no Virginia appellate decision has interpreted § 8.01-271.1, an analysis of case literature yields little information about judicial attitudes toward the new rule.⁷⁴ It is for this reason that an analysis of § 8.01-271.1 must be based upon empirical research.

⁷³ VA. CODE ANN. § 8.01-271.1 (Supp. 1989). The section differs from Rule 11 in some minor respects: it applies to oral motions as well as written ones (presumably because the general district courts and juvenile and domestic relations courts are not courts of record), and it requires that a pleader state his or her address only on the first pleading filed with the court. The text of the rule is as follows:

§ 8.01-271.1. Signing of pleadings, motions, and other papers; oral motions; sanctions. -- Every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, and the attorney's address shall be stated on the first pleading filed by that attorney in the action. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address.

The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

An oral motion made by an attorney or a party in any court of the Commonwealth constitutes a representation by him that (i) to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.

⁷⁴ Refer to notes 8, 9 and 10 *supra* and accompanying text.

THE SURVEY

Method

In February of 1990, *The Colonial Lawyer: A Journal of Virginia Law and Public Policy* asked all Virginia's circuit court and general district court judges to participate in an anonymous mail survey. Every judge received a questionnaire describing two hypothetical fact situations, each culminating in a party's request for sanctions under § 8.01-271.1. In each case the judges were asked to indicate whether they believed the plaintiff's attorney violated § 8.01-271.1, whether they would grant the defendant's request for attorney's fees, what sort of other sanctions they might impose, and whether their responses would have been different under the law as it stood before § 8.01-271.1 came into effect. Judges were also asked to respond to additional questions addressing two broader issues -- their views on the purpose of § 8.01-271.1 (whether they believed the primary function of the rule was compensation, deterrence or punishment), and their recent sanctioning activity (the number of motions they had encountered, the number they had granted and the number of times they had imposed sanctions on their own initiative). Each questionnaire was accompanied by a letter explaining the purpose of the survey, as well as a copy of § 8.01-271.1.⁷⁵

⁷⁵ The questionnaire and cover letter are reprinted in an appendix to this article. The survey design and analysis was based partly upon the approach described in S. KASSIM, *supra* note 43 (analyzing a Federal Judicial Center mail survey of district court judges' attitudes toward federal Rule 11). Responses to four of the survey questions -- those asking judges to predict their colleagues' reactions (questions 3 and 9) and to choose a monetary sanction (questions 4 and 10) -- are not analyzed in this article because the insufficient rate of response did not permit the establishment of statistically valid conclusions.

Sample Size

Of Virginia's 228 circuit court and general district court judges, 137 returned the questionnaire. This sample, representing 60.1% of the target population, is considered an acceptable rate of response for a mail survey.⁷⁶

Objective Reasonableness vs. Subjective Bad Faith

The first part of the questionnaire was designed to test judges' opinions on the most substantial change effected by Rule 11 and § 8.01-271.1 -- the elimination of subjective bad faith as a requirement for imposing sanctions. Judges were asked to read two hypothetical fact situations and to indicate in each case (1) whether they believed the plaintiff's attorney's action was in violation of § 8.01-271.1, and (2) whether they would grant the defendant's request for attorney's fees if they were the judge in the case. Intended to present the judges with a suit interposed for an "improper purpose," the first hypothetical situation⁷⁷ involved an attorney who filed a "strike suit"⁷⁸ in an attempt to force a settlement.⁷⁹ In response to this clear example of subjective bad

⁷⁶ E. BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 335 (1979).

⁷⁷ FED. R. CIV. P. 11. Refer to note 11 *supra*.

⁷⁸ The United States Supreme Court has defined "strike suits" as suits filed by parties "interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them." *Suowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 371, *reh'g denied*, 384 U.S. 915 (1966).

⁷⁹ The questionnaire's first hypothetical factual situation read as follows:

Plaintiff sued Defendant Corporation for fraud. The complaint, signed and filed by Plaintiff's Attorney, alleged the elements of fraud in only the most general terms. Plaintiff's Attorney wrote Defendant to suggest a settlement, but Defendant refused to negotiate and later prevailed on a motion for summary judgment.

Defendant Corporation then brought a motion seeking an award of attorney's fees pursuant to Va. Code § 8.01-271.1. At the hearing, Defendant introduced as evidence the letter which Plaintiff's Attorney had written while seeking a settlement offer. The letter read, in part: "I realize, of course, that the merit of this suit is questionable at best. But I also realize that it will cost you far more to try this case than it will cost you to settle it."

faith, 122 judges (93.9%) said they believed the attorney's actions violated § 8.01-271.1, and 116 judges (89.2%) said they would grant the defendant's request for attorney's fees.⁸⁰

No such general consensus appeared in judges' reactions to the second hypothetical situation, which was intended to test their views on whether "the absence of deliberate harassment"⁸¹ is a factor in determining a violation. The second situation involved an attorney who filed a claim after the statute of limitations had run, relying upon his client's statements about the date of the accident rather than upon a firsthand investigation of medical records. Even after the defendant's counsel informed him of this mistake, the plaintiff's attorney refused to nonsuit the action.⁸² Only sixty-four

⁸⁰ Some judges did not respond to every question, and analyses of each set of responses are therefore based on slightly different sample sizes.

⁸¹ *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987).

⁸² The second hypothetical situation, based upon the facts of *Van Berkel v. Fox Farm and Road Machinery*, 581 F. Supp. 1248 (D. Minn. 1984), read as follows:

Plaintiff, a farmer, brought a products liability action against Defendant, a manufacturer of farm machinery, on theories of negligence and strict liability. The complaint, signed by Plaintiff's Attorney, alleged that the accident took place on September 6, 1987. In actuality, the accident occurred on September 6, 1986, and when the suit was filed on September 2, 1989, the two-year statute of limitations had already run.

Defendant filed its answer, alleging that the claims were barred by the statute of limitations. Defendant's Attorney served a demand for medical disclosure, and Plaintiff's Attorney complied. Defendant's Attorney then telephoned Plaintiff's Attorney and asked him to nonsuit the case, referring to proof in Plaintiff's medical records that the accident had taken place in 1986, not 1987, and that the action was therefore time-barred. Defendant's Attorney confirmed this call by letter, also providing Plaintiff's Attorney with a copy of a 1986 newspaper reporting that the accident took place on September 6 of that year. Plaintiff's Attorney did not respond to the requests for dismissal, and Defendant's Attorney filed a motion for summary judgment (attaching copies of the letter and newspaper) and for recovery of attorney's fees under Va. Code § 8.01-271.1.

At the hearing, Plaintiff's Attorney offered a personal affidavit stating that his client had told him that the accident had occurred on September 6, 1987, that he had found no reason to believe otherwise, and that he had acted in good faith. When asked what inquiry he had made before filing the suit, Plaintiff's Attorney said he had talked to Plaintiff and his family members and had inspected copies of the

judges (48.9%) believed the plaintiff's attorney had violated § 8.01-271.1, and only sixty-one judges (46.6%) said they would grant the defendant's request for attorney's fees. Judges were thus much more willing to impose sanctions upon an attorney who acted in bad faith than upon an attorney who acted in good faith but who failed to conduct a reasonable pre-filing inquiry. This result suggests that many Virginia judges do not apply the objective standard of reasonableness established by the federal courts, but instead evaluate litigants' behavior according to a "subjective bad faith" test.

Mandatory Imposition of Sanctions

Judges' responses to the first two questions also helped gauge their attitudes toward another aspect of § 8.01-271.1: the rule's requirement that the courts "shall impose . . . an appropriate sanction" upon parties and counsel who commit violations. The federal courts have interpreted the same language in Rule 11 to mean that every violation must result in a sanction of some sort, whether this be an award of attorney's fees or merely a verbal warning.⁸³ Virginia's judges appear to agree; of the judges who found violations in the two hypothetical situations, only six (4.9%) and three (4.7%) said they would not impose any sanctions in the first and second hypotheticals, respectively. This suggests that most Virginia judges view the words "shall impose" as requiring the imposition of sanctions upon every violator of § 8.01-271.1.

Sanctions Other Than Attorney's Fees

Like Rule 11, § 8.01-271.1 accords Virginia's judges the power to craft "an appropriate sanction" which "may" include an award of attorney's fees. Survey

machine's owner's manual. When asked why he had refused to nonsuit the action, Plaintiff's Attorney said that he had "a duty to protect the interests of my client."

In *Van Berkel*, the plaintiff's attorney was sanctioned and ordered to pay \$2,894.62 to cover the defendant's costs, expenses and attorney's fees. *Id.* at 1251.

⁸³ Refer to notes 40-49 *supra* and accompanying text.

respondents who believed violations had occurred in a hypothetical situation were therefore invited to describe any sanctions, in addition to or instead of attorney's fees, which they would impose upon the plaintiff or his attorney if they were the judge in the case. Of the 116 judges who imposed sanctions in the first hypothetical situation, eighteen (15.5%) recommended additional sanctions. (No judges recommended nonmonetary sanctions "instead of" attorney's fees.) Their suggested remedies included verbal warnings, lectures on legal ethics and public admonishments in court. Ten judges (8.6% of those imposing sanctions) said they would report the plaintiff's attorney to the State Bar District Committee, and two judges indicated that their complaints would be due to the attorney's violation of DR 7-102(A)(1) of the Virginia Code of Professional Responsibility.⁸⁴ Two judges said they would impose sanctions upon both the plaintiff and his attorney in this case.

Of the sixty-one judges who imposed sanctions in the second hypothetical situation, fourteen (22.9%) recommended additional sanctions. (No judges recommended nonmonetary sanctions "instead of" attorney's fees.) Their suggested remedies included requiring the plaintiff's attorney to attend a continuing legal education class on professional responsibility, making certain that the attorney had read and understood § 8.01-271.1, a "public chewing-out in court" and an in-chambers lecture on "the courtesy and respect due to opposing counsel." Six judges (9.8% of those imposing sanctions) said they believed the plaintiff's attorney should be reported to the District Bar Committee, and one of these judges indicated that such a complaint would be based upon the attorney's violation of DR 7-102(A)(2) of the Virginia Code of Professional Responsibility.⁸⁵ No judges said they would impose sanctions upon the plaintiff himself in this case.

⁸⁴ R. SUP. CT. VA., part 6, § II. Refer to note 69 *supra*.

⁸⁵ *Id.* Refer to note 69 *supra*.

Would Responses Have Differed Under Prior Law?

In connection with their reactions to the two hypothetical situations, judges were also asked whether they would have imposed sanctions under Virginia law as it stood before § 8.01-271.1 came into effect on July 1, 1987. Comparing the respondents' decisions under the old law with their decisions under the new rule helps show whether they believe § 8.01-271.1 has really changed the face of Virginia law. Based upon their reactions to each of the two hypothetical situations, respondents were divided into two groups: judges believing § 8.01-271.1 has changed the law (those who would have decided a different way under prior law) and judges believing the law has not changed (those who said they would have decided the same way under both new and prior law). Table 1 presents a breakdown of responses to these questions:

TABLE 1
Number and percentage of judges believing
§ 8.01-271.1 has changed the law

Judge's response	First situation ("bad faith")	Second situation ("incompetence")
Law has changed	87 (79.1%)	42 (38.2%)
Law has not changed	23 (20.9%)	68 (61.8%)

Note: the respondents identified as believing the law has changed included only judges who would have imposed sanctions under § 8.01-271.1 but not under prior law. No judges said they would have imposed sanctions under prior law but not under § 8.01-271.1.

These data suggest two separate conclusions. First, many more judges believe that § 8.01-271.1 has changed law with respect to "bad faith" than with respect to mere incompetence. This implies that many Virginia judges do not believe § 8.01-271.1 has effected the same kinds of momentous changes that Rule 11 has produced in the federal court system. This belief could be due to many factors, such as unfamiliarity with § 8.01-271.1, an unwillingness to blindly adopt federal standards, a reluctance to

abandon the bad-faith requirements of earlier remedies or a belief that prior law accorded judges extensive sanctioning powers.

Second, the high percentage of judges who believe the law has changed with respect to "bad faith" suggests that most judges believe § 8.01-271.1 has significantly expanded their powers. Under prior law, parties who brought frivolous or abusive actions were usually penalized by someone other than the judge.⁸⁶ Section 8.01-271.1 altered this situation by providing judges with explicit authority to impose sanctions, eliminating any confusion as to the propriety of imposing sanctions on an attorney personally and establishing the shifting of expenses as a legitimate means of response. The data suggest that even judges who continue to apply a "subjective bad faith" standard recognize the significance of these broad new powers and are willing to take immediate and decisive action instead of relying upon others to implement rarely-used remedies. Even though § 8.01-271.1 may not have changed these judges' views of what is "frivolous" and what is not, they are now far more willing to impose sanctions for such behavior than they were before.

Recent Sanctioning Activity

In addition to the questions about the two hypothetical situations, judges were also asked to indicate (1) how many times in the last twelve months they had been confronted with a motion for sanctions under § 8.01-271.1, (2) how many of these motions they had granted, and (3) how many times in the last twelve months they had imposed sanctions on their own initiative. One hundred and twenty-nine judges responded to the first of these questions, and analysis of their estimates shows that the average respondent received 3.1 requests under § 8.01-271.1 in the past year. Out of all respondents, forty-three (33.3%) said they had not received any motions, seventeen (13.2%) had received one motion and sixty-nine (53.5%) had received two or more

⁸⁶ See notes 67-70 *supra* and accompanying text.

motions. Seven judges reported having received at least ten motions, and one judge estimated his number of requests at approximately twenty-five.

In response to the second question, judges who had encountered at least one motion indicated that they had granted a total of 112 requests under § 8.01-271.1 in the past year, for an average of 1.3 awards per judge. A comparison of the number of motions each judge had received with the number he or she had granted showed that these judges granted an average of 33.8% of all the motions they encountered.

Only eleven judges (8% of the entire sample) reported having imposed sanctions on their own initiative at some point during the past twelve months. Ten of these judges had imposed sanctions once; only one judge reported having done so twice.

The Rationale Behind the Rule

To determine what rationales guide judges' attitudes toward § 8.01-271.1, the respondents were asked to indicate whether they believed the primary function of the new rule was (1) to compensate the aggrieved party, (2) to penalize the offending party, or (3) to deter future actions of a similar nature. Of the 127 judges who responded to this question, eighty-two (64.5%) expressed a belief that deterrence is the most important purpose of sanctions. Thirty-four judges (26.8%) believed compensation was the rule's primary function, while only eleven (8.7%) chose the punishment rationale.

The Relationship Between Sanctioning Activity and Rationale

Having found that most respondents favor a deterrence rationale, it was possible to explore the question of whether judges' rationales are related to their rulings on motions under § 8.01-271.1. For this analysis, each judge who had encountered at least one motion for sanctions was placed in one of two groups: "frequent sanctioners" (those who have granted 50% or more of the motions they have received in the last twelve months) and "infrequent sanctioners" (those who have granted less than 50% of the

motions they have received). These judges were also assigned to one of two groups according to whether they favored a deterrence or a compensation rationale.⁸⁷ The comparison of these two groupings is summarized in Table 2:

TABLE 2
Comparison between judges' sanctioning
activity and stated rationale

Preferred rationale	"Frequent" sanctioners	"Infrequent" sanctioners
Deterrence	20	36
Compensation	16	11

These figures show that 59.3% of judges favoring a compensation rationale, compared with only 35.7% of those favoring deterrence, are frequent sanctioners, a difference which is statistically significant.⁸⁸ Judges who view § 8.01-271.1 as a fee-shifting device therefore seem more likely to impose sanctions than those who believe the rule should be used primarily to discourage frivolous or abusive tactics. This result makes sense. Judges with a compensatory philosophy need only certify that the rule has been violated, causing some degree of hardship to the aggrieved party, in order to impose a sanction. The range of circumstances triggering sanctions under this standard is thus broader than that arising out of a deterrence philosophy, which would require some indication that an award might help prevent future violations. Judges who seek to deter abusive behavior might also be more sensitive to the danger of discouraging attorney creativity, and they would thus impose sanctions only when they were certain to avoid creating a "chilling effect." In other words, judges favoring compensation need only determine whether the case before them demands a remedy, while judges favoring

⁸⁷ The group of 11 judges favoring the punishment rationale was too small for the establishment of statistically valid conclusions and was therefore excluded from consideration in this analysis.

⁸⁸ Chi-square = 4.11, $p < .05$.

deterrence must also consider the effect sanctions might have on future litigation. It follows that compensation-oriented judges are more likely to grant requests for attorney's fees under § 8.01-271.1.⁸⁹

The Relationship Between Judicial Attitudes and Experience

Thus far, analysis of the survey data has shown that many Virginia judges do not apply Rule 11 standards when interpreting § 8.01-271.1. Yet who exactly are these judges? Are they primarily those who have had little experience with litigation under § 8.01-271.1? In an attempt to answer these questions, the respondents were divided into two categories: "more experienced" (judges who have encountered two or more motions under § 8.01-271.1 in the last twelve months) and "less experienced" (judges who have received either one motion or none at all). To determine which of these judges agreed with Federal Rule 11 standards, each respondent was also placed in one of two other categories: those who had recommended sanctions in both hypothetical sanctions, and those who had not recommended sanctions in both situations. The results of this analysis are summarized in Table 3:

TABLE 3
Comparison between judges' experience with § 8.01-271.1
and their decisions in hypothetical situations

Imposing sanctions in:	"more experienced" judges	"less experienced" judges
both situations	36	19
one or neither situation	33	41

These figures show that 52.2% of "more experienced" judges said they would impose sanctions in both hypothetical situations, compared with only 31.7% of "less

⁸⁹ Professor Nelkin has also recognized that a compensatory philosophy can make sanctions more palatable and therefore more likely to occur. *See* Nelkin, *supra* note 2, at 1324.

experienced" judges, a difference which is statistically significant.⁹⁰ Because federal courts' interpretations of Rule 11 would dictate the imposition of sanctions in both the "bad faith" situation *and* the "inadequate inquiry" situation, these data suggest that Virginia judges who have had more experience with § 8.01-271.1 are more familiar with federal standards and are more likely to apply them in deciding whether to award sanctions. This is a logical conclusion. Section 8.01-271.1 mimics the wording of Federal Rule 11, and it would be natural for attorneys to cite federal authority while arguing a motion for sanctions before a Virginia judge. Judges who have entertained many such motions are thus more likely to apply § 8.01-271.1 according to federal standards instead of according to their own personal interpretations. In other words, judges who encounter motions under § 8.01-271.1 learn more about federal interpretations and are more willing to follow them.

This conclusion is supported by another look at the importance of judicial experience, this time in relation to judges' preferred sanctioning rationales. This analysis divided judges into two categories based upon their view of § 8.01-271.1's primary function: all judges who believed deterrence was most important were placed in one group, and all judges who favored the compensation or punishment rationales were placed in another. These categories were compared to determine how many judges in each group were "more experienced" and "less experienced," and the results of this comparison are summarized in Table 4:

TABLE 4
Comparison of judges' experience with
their sanctioning philosophy

Preferred rationale	"more experienced" judges	"less experienced" judges
Deterrence	51	31
Compensation or punishment	18	29

⁹⁰ Chi-square = 5.52, $p < .025$.

These figures show that 73.9% of "more experienced" judges believe deterrence is the most important function of § 8.01-271.1, compared with only 51.7% of "less experienced" judges, a difference which is statistically significant.⁹¹ Because deterrence is the only rationale expressly articulated by the federal rules themselves,⁹² and because the federal courts have overwhelmingly recognized Rule 11's deterrence function,⁹³ Virginia judges who prefer a deterrence view of § 8.01-271.1 are agreeing with the great weight of federal authority. Because so many "more experienced" judges have adopted a deterrence philosophy, it is logical to conclude that Virginia judges who encounter more motions are more likely to hear and accept arguments based upon the rationales adopted by the federal courts. In other words, judges who encounter more motions learn more.

This inference, coupled with the tendency of experienced judges to impose sanctions in both hypothetical situations (see Table 3), leads to yet another conclusion: as time passes, more and more Virginia judges will come to apply Federal Rule 11 standards when dealing with § 8.01-271.1. Nearly a third of the judges responding to the survey have never encountered a motion for sanctions, and it is probable that many nonrespondents have also been relatively unexposed to the issues surrounding § 8.01-271.1. Because judges who have encountered motions for sanctions tend to agree with Federal Rule 11 standards, many judges who currently appear to disagree with federal interpretations may very well change their minds after dealing with a few more requests for attorney's fees. Eventually most Virginia judges will probably adhere to a relatively uniform sanctioning standard, which will probably be a mirror image of the one developed by the federal courts.

⁹¹ Chi-square = 6.86, $p < .001$.

⁹² Advisory Committee Note, *supra* note 1, at 199.

⁹³ See cases cited *supra* note 50.

CONCLUSION: HOW TO AVOID SANCTIONS

Although the state of Virginia law with respect to § 8.01-271.1 is still uncertain, the results of this survey suggest that many judges already treat motions under the new rule in much the same way that federal judges treat motions under Rule 11. Furthermore, it appears that Virginia judges will be invoking Federal Rule 11 standards with greater and greater frequency in the years to come. It is in consideration of these conclusions that we offer the following suggestions which may be helpful to attorneys practicing civil law in Virginia:

1. Before filing any pleading, recognize that your own subjective good faith will not protect you from sanctions.
2. Realize that most judges believe § 8.01-271.1 has changed the law, and that even judges who continue to evaluate your acts according to a "subjective bad faith" standard are more likely to sanction you.
3. Before filing any document, confirm that its purpose is not merely to harass, delay, or injure the opposing party.
4. If your client asks you to file documents for some improper purpose, inform your client that she, too, is subject to sanctions, both monetary and otherwise.
5. Conduct a personal investigation into facts of your case before filing any document. Be sure to confirm your client's version of the facts through other sources, if possible.
6. Conduct a thorough investigation of the legal issues involved. If you hope to make an argument for the reversal or extension of existing law, be sure to inform the court of your intention.
7. Recognize that the court may sanction you either upon motion *or* on its own initiative.

8. If you are forced to file hurriedly in order to avoid a time bar, perform the steps described above immediately after filing your document.
9. Realize that the judge may not yet have encountered a motion under § 8.01-271.1 and may not know how its federal counterpart, Rule 11, has been applied. (This could be to your disadvantage; for example, if the judge views § 8.01-271.1 primarily as a cost-shifting device, she is more likely to sanction you.) If you want the judge to apply federal standards, be sure to educate her.

APPENDIX

Date, 1990

The Honorable _____, Judge
Address

Dear Judge _____:

The Colonial Lawyer: A Journal of Virginia Law and Public Policy published by the students of William and Mary law school, is conducting a study of judges' views and practices regarding Va. Code § 8.01-271.1, which became effective on July 1, 1987. Interest in abuses of the litigation process has intensified over recent years, and the new § 8.01-271.1 may very well represent Virginia's response to these concerns. In order to gauge the effect which this provision has had upon litigation in the Commonwealth over the past two and a half years, *The Colonial Lawyer* would like to request your assistance as a participant in this study -- participation which should not require more than minutes of your time.

Enclosed is a questionnaire describing two hypothetical cases. Each case culminates in a party's request for sanctions under Code § 8.01-271.1. The questionnaire asks you to react to these situations and to answer some additional questions regarding your views on the new Code provision. For your convenience, we have also attached a copy of the statute.

Inevitably, descriptions of situations such as these cannot provide all the details that might be needed for making conclusive judgments. We have, therefore, tried to express our questions more tentatively, asking for your views, inclinations and opinions in light of the facts presented.

Please return the completed questionnaire in the enclosed envelope at your earliest convenience. All responses will be anonymous; the questionnaires are neither numbered nor marked, and the published article will make no reference to the opinions of any individual judge or court.

It would be very helpful if you would return your questionnaire within two weeks. Thank you for your time and consideration.

Sincerely,

VA. CODE ANN. SECTION 8.01-271.1
(Cum. Supp.1989)

§ 8.01-271.1. Signing of pleadings, motions, and other papers; oral motions; sanctions.-- Every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, and the attorney's address shall be stated on the first pleading filed by that attorney in the action. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address.

The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

An oral motion made by an attorney or a party in any court of the Commonwealth constitutes a representation by him that (i) to the best of his knowledge, information and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a pleading, motion or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.

QUESTIONNAIRE

First Hypothetical Situation: Plaintiff sued Defendant Corporation for fraud. The complaint, signed and filed by Plaintiff's Attorney, alleged the elements of fraud in only the most general terms. Plaintiff's Attorney wrote Defendant to suggest a settlement, but Defendant refused to negotiate and later prevailed on a motion for summary judgment.

Defendant Corporation then brought a motion seeking an award of attorney's fees pursuant to Va. Code § 8.01-271.1. At the hearing, Defendant introduced as evidence the letter which Plaintiff's Attorney had written while seeking a settlement offer. The letter read, in part: "I realize, of course, that the merit of this suit is questionable at best. But I also realize that it will cost you far more to try this case than it will cost you to settle it."

Questions:

1. Do you think Plaintiff's Attorney's action is in violation of Va. Code § 8.01-271.1? (Circle one)

YES

NO

2. If you were the judge in this case, would you grant Defendant's request for attorney's fees?

YES

NO

3. In this case, approximately what percentage of judges in your district (if you are a General District Judge) or circuit (if you are a Circuit Judge) do you think would grant Defendant's request for attorney's fees?

_____ %

4. If you answered YES to question 2, how much would you be inclined to order Plaintiff's Attorney to pay Defendant in this case? (check one)

___ an amount less than all reasonable expenses and attorney's fees

___ all reasonable expenses and attorney's fees

___ all reasonable expenses and attorney's fees, plus some form of supplemental damages

5. In addition to or instead of expenses and attorney's fees, would you impose any other sanctions against Plaintiff or Plaintiff's Attorney, and if so, what would they be? (please explain)

6. Would you have imposed any sanctions on Plaintiff's Attorney under the law as it stood before § 8.01-271.1 came into effect (that is, before July 1, 1987)?

YES

NO

Second Hypothetical Situation: Plaintiff, a farmer, brought a products liability action against Defendant, a manufacturer of farm machinery, on theories of negligence and strict liability. The complaint, signed by Plaintiff's Attorney, alleged that the accident took place on September 6, 1987. In actuality, the accident occurred on September 6, 1986, and when the suit was filed on September 2, 1989, the two-year statute of limitations had already run.

Defendant filed its answer, alleging that the claims were barred by the statute of limitations. Defendant's Attorney served a demand for medical disclosure, and Plaintiff's Attorney complied. Defendant's Attorney then telephoned Plaintiff's Attorney and asked him to nonsuit the case, referring to proof in Plaintiff's medical records that the accident had taken place in 1986, not 1987, and that the action was therefore time-barred. Defendant's Attorney confirmed this call by letter, also providing Plaintiff's Attorney with a copy of a 1986 newspaper reporting that the accident took place on September 6 of that year. Plaintiff's Attorney did not respond to the requests for dismissal, and Defendant's Attorney filed a motion for summary judgement (attaching copies of the letter and newspaper) and for recovery of attorney's fees under Va. Code § 8.01-271.1.

At the hearing, Plaintiff's Attorney offered a personal affidavit stating that his client had told him that the accident had occurred on September 6, 1987, that he found no reason to believe otherwise, and that he had acted in good faith. When asked what inquiry he had made before filing the suit, Plaintiff's Attorney said he had talked to Plaintiff and his family members and had inspected copies of the machine's owner's manual. When asked why he had refused to nonsuit the action, Plaintiff's Attorney said that he had "a duty to protect the interests of my client."

Questions:

7. Do you think Plaintiff's Attorney's action is in violation of Va. Code § 8.01-271.1? (Circle one)

YES

NO

8. If you were the judge in this case, would you grant Defendant's request for attorney's fees?

YES

NO

9. In this case, approximately what percentage of judges in your district (if you are a General District Judge) or circuit (if you are a Circuit Judge) do you think would grant Defendant's request for attorney's fees?

_____ %

10. If you answered YES to question 8, how much would you be inclined to order Plaintiff's Attorney to pay Defendant in this case? (check one)

___ an amount less than all reasonable expenses and attorney's fees

- ___ all reasonable expenses and attorney's fees
- ___ all reasonable expenses and attorney's fees, plus some form of supplemental damages

11. In addition to or instead of expenses and attorney's fees, would you impose any other sanctions against Plaintiff or Plaintiff's Attorney, and if so, what would they be? (please explain)
12. Would you have imposed any sanctions on Plaintiff's Attorney under the law as it stood before § 8.01-271.1 came into effect (that is, before July 1, 1987)?

YES

NO

Additional Questions:

13. In general, what do you see as the primary function of sanctions under § 8.01-271.1? (please rank in order of importance, using 1 to indicate the most important and 3 to indicate the least important)
 - ___ to compensate the aggrieved party
 - ___ to penalize the offending party
 - ___ to deter future actions of a similar nature
14. How many times in the last 12 months have you been confronted with a motion for sanctions under § 8.01-271.1?
15. In how many cases did you grant the request for attorney's fees?
16. How many times in the last 12 months have you, on your own initiative, imposed sanctions under § 8.01-271.1?

D

**VIRGINIA'S NATURAL DEATH ACT:
IS IT USEFUL TO INDIVIDUALS IN A PERSISTENT VEGETATIVE STATE?**

Deborah A. Ryan

As scientific advances make it possible
for us to live longer than ever before,
even when most of our physical and mental
capacities have been irrevocably lost,
patients and their families are increasingly
asserting a right to die a natural death
without undue dependence on medical technology
or unnecessarily protracted agony - in short,
a right to die with dignity.¹

INTRODUCTION

One of the most controversial medical, moral and legal issues of our time is whether patients in a persistent vegetative state (PVS) have a legal right to die. "The most commonly cited estimate of the number of PVS patients in the United States is 5,000 to 10,000, and this number can be anticipated to significantly increase in the future, especially when coupled with their increased longevity."² This article will discuss this issue in four sections. The first section will define what it means to be in a PVS in an attempt to reconcile some of the common misconceptions associated with this condition. The second section will discuss the rights of such patients to discontinue treatment as well as the rights of a surrogate to act on their behalf. The third section will explore Virginia's Natural Death Act³ to see if it effectively deals with PVS patients. Finally, this article will suggest possible solutions to this ongoing controversy.

¹ *In re Conroy*, 98 N.J. 321, ___, 486 A.2d 1209, 1220 (1985).

² Cranford, *The Persistent Vegetative State: The Medical Reality (Getting the Facts Straight)*, 18 HASTINGS CENTER REP. 27, 31 (Feb.-Mar. 1988).

³ VA. CODE ANN. §§ 54.1-2981 to -2992 (1988 & Supp. 1989).

PVS DEFINED

PVS patients are said to be in a state of "permanent unconsciousness".⁴ They have lost all cognitive functions, they do not experience anything.⁵ These individuals are not simply demented, they are amented.⁶ They are not merely retarded, they have lost all mental capacities. However, these patients are not terminally ill⁷ in the traditional sense. PVS individuals commonly live five, ten, twenty years or more if care is maintained,⁸ although they are not able to enjoy many of the pleasures normally associated with living. "There is virtually no chance that such a [PVS] patient will ever recover consciousness."⁹

Given these circumstances one might wonder whether PVS patients should be considered alive at all. They are not totally brain dead. Their brain stem, which controls such functions as breathing and reflexes, is still intact. Yet they have lost the very capacities that make us human and separate us from other animals. Many commentators argue that because of this loss of "personhood," PVS patients should be considered brain dead.¹⁰ As it stands now, the Uniform Determination of Death Act

⁴ Cranford, *The Persistent Vegetative State: The Medical Reality (Getting The Facts Straight)*, 18 HASTINGS CENTER REP. 27, 28 (Feb.-Mar. 1988) (citing to PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 171-92 (March 1983)).

⁵ *Id.* at 31.

⁶ *Id.* at 28. Amented is defined as having no mind and demented is defined as deprived of reason. STEDMAN'S MEDICAL DICTIONARY 50, 373 (5th ed. 1982).

⁷ Terminal illness is defined as an illness which occurs at or contributes to the end of life. STEDMAN'S MEDICAL DICTIONARY 1418 (5th ed. 1982).

⁸ Cranford, *supra* note 4, at 31.

⁹ Annas, *Do Feeding Tubes Have More Rights Than Patients?*, 15 HASTINGS CENTER REP. 26 (Feb. 1986).

¹⁰ Smith, *Legal Recognition of Neocortical Death*, 71 CORNELL L. REV. 850, 858 n. 39 (1986).

does not include PVS patients in its definition of death.¹¹ Thus, PVS patients are not legally dead,¹² but they experience none of the joys of being alive. The question that logically follows then is, should such individuals be given the "right to die"?

SHOULD PVS PATIENTS HAVE THE RIGHT TO DIE?

The best known "right to die" case is that of Karen Ann Quinlan.¹³ Karen was a twenty-two year old woman in a PVS. The doctors believed that she would die very soon if taken off her respirator.¹⁴ The court held that her physicians could pull the plug on her respirator at the request of her parents.¹⁵ However, when her father was asked if he wanted her nasogastric feeding tube removed, he replied, "Oh no, that is her nourishment."¹⁶ As a result, Karen lived for nine years in a PVS.

The single most troubling issue in determining if PVS patients have the "right to die" is that in many cases they will only die if their artificial hydration and nutrition

¹¹ The Uniform Determination of Death Act § 1, 12 U.L.A. 271 (Supp. 1985), provides: "An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards."

¹² The Virginia Code, § 54.1-2972, defines legal death to be either (1) irreversible cessation of spontaneous respiratory and spontaneous cardiac functions, or (2) irreversible cessation of spontaneous brain functions and spontaneous respiratory functions. VA. CODE ANN. § 54.1-2972 (1988).

¹³ *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

¹⁴ *Id.* at ___, 355 A.2d at 655.

¹⁵ *Id.* at ___, 355 A.2d at 671-72.

¹⁶ Ramsey, *Prolonged Dying: Not Medically Indicated*, 6 HASTINGS CENTER REP. 14, 16 (Feb. 1976).

(AN&H) system is withdrawn.¹⁷ Inherently, there seems to be something morally and ethically wrong with denying any patient food and water. It is somehow different from withholding other medical treatment.¹⁸ When a respirator or similar life support system is disconnected, a patient is simply allowed to die naturally, and the underlying disease is the cause of death. However, when AN&H is withdrawn, the patient is being starved to death, and an active and unnatural killing is taking place.¹⁹ Thus, the fear is that society will embark down a slippery slope toward the endorsement of euthanasia or suicide as the solution rather than simply allowing a person to die a natural death.²⁰

Although the inherent morality of this theory may be very appealing, the harsh reality of carrying it through has led many courts to decide in favor of withholding or withdrawing AN&H.²¹ Unfortunately, the courts seem to reach this result because of their desire to do the right thing and fail to apply any clear and consistent legal principles to guide us. The determination that allowing PVS patients to forego AN&H is the right thing seems to be based on two basic premises.

First, it has long been recognized that patients who are competent to determine the course of their therapy may refuse any and all interventions proposed by others, as

¹⁷ Artificial nutrition and hydration (AN&H) is the provision of food and water through medical intervention. There are two basic procedures which provide the required nutrients. The first is a nasogastric tube which is inserted through the nose into the stomach. The second is a gastrostomy tube (G-tube) which is surgically inserted directly into the stomach. *See generally*, Lynn & Childress, *Must Patients Always Be Given Food and Water?*, 13 HASTINGS CENTER REP. 17 (Oct. 1983).

¹⁸ *See generally*, Derr, *Why Foods and Fluids Can Never Be Denied*, 16 HASTINGS CENTER REP. 28 (Feb. 1986).

¹⁹ *Id.* at 28.

²⁰ *See generally*, Wikler, *Not Dead, Not Dying? Ethical Categories and Persistent Vegetative State*, 18 HASTINGS CENTER REP. 41 (Feb.-Mar. 1988).

²¹ *See, e.g.*, Gray v. Romeo, 697 F. Supp. 580 (D.R.I. 1988); McConnell v. Beverly Enterprises, 209 Conn. 692, 553 A.2d 596 (Conn. 1989); Delio v. Westchester County Med. Center, 516 N.Y.S.2d 677 (N.Y. App. Div. 1987); *In re Gardner*, 534 A.2d 947 (Me. 1987); Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 497 N.E.2d 626 (1986); *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985).

long as their refusals do not seriously harm or impose unfair burdens upon others.²² Second, it is assumed that few people would opt to continue such an existence if given the choice, because their lives would not be worth living.²³ However, these premises provide little assistance in the absence of a pre-written document, such as a living will,²⁴ because PVS patients are incompetent by definition. This leaves courts in the unenviable position of having to balance the underlying assumption that many of these patients would choose to forego AN&H if they were competent against the state's interest in the sanctity of life.²⁵

Perhaps some of the biggest strides in dealing with this issue were made by the New Jersey Supreme Court in deciding *In re Conroy*.²⁶ Claire Conroy was a single, eighty-four year old woman with serious and irreversible physical and mental impairments. She was legally incompetent and had only minimal cognitive capacities. Her only living relative, a nephew, was appointed her legal guardian. Her nephew filed suit to have her AN&H, which was provided through a nasogastric tube, withdrawn. The court declared termination of any medical treatment, including AN&H, for incompetents lawful so long as certain procedures are followed.²⁷ In reaching this

²² See Lynn & Childress, *supra* note 17, at 18.

²³ Wikler, *supra* note 20, at 41.

²⁴ Living will is a common term used to refer to a patient's prior written instruction that a physician withhold life-sustaining procedures in certain circumstances. For a detailed discussion of living wills, see Dufraine, *Living Wills - A Need for Statewide Legislation or a Federally Recognized Right?*, 3 DET. C. L. REV. 781 (1983).

²⁵ Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 741, 370 N.E.2d 417, 425 (1977). The court asserts four countervailing state interests; 1) preservation of life; 2) protection of third parties; 3) prevention of suicide; and 4) maintenance of the ethical integrity of the medical profession. *Id.* at 741, 370 N.E.2d at 425.

²⁶ *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985).

²⁷ Annas, *When Procedures Limit Rights: From Quinlan to Conroy*, 15 HASTINGS CENTER REP. 24, 25 (Apr. 1985).

decision, the court specifically rejected some of the most common arguments set forth by the proponents of mandatory AN&H. The court found no difference between allowing a person to die and the hastening of the death process by terminating treatment;²⁸ between withholding and withdrawing treatment;²⁹ between extraordinary and ordinary care;³⁰ and between AN&H and other life sustaining procedures.³¹ Based on the foregoing analysis, the court set out a three part test to apply when the patient is incompetent and unable to express his/her own desires. First, if the individual's wishes can be determined, no further inquiry is required.³² The patient's wishes must be granted based on his/her common law right to refuse any medical treatment.³³ Alternatively, when the patient's wishes are not discernible, the court set forth two "best interests" tests. The "limited objective test" allows life sustaining treatment to be withdrawn if there is some evidence the patient would refuse treatment and the burdens imposed by the treatment outweigh the benefits the patient receives.³⁴ The "pure objective test" is to be applied when there is absolutely no evidence about what the patient would want. This test requires that the burden imposed clearly outweigh the benefits to the patient and the unavoidable and severe pain of the patient's life must be such that the effect of administering treatment would be inhumane.³⁵ The severity of

²⁸ Conroy, 98 N.J. 321, ___, 486 A.2d 1209, 1233-34 (1985).

²⁹ *Id.* at ___, 486 A.2d at 1234.

³⁰ *Id.* at ___, 486 A.2d at 1234-35.

³¹ *Id.* at ___, 486 A.2d at 1235-36.

³² *Id.* at ___, 486 A.2d at 1229-30. The court notes that the patient's wishes could be embodied in a "living will," deduced from prior oral statements, deduced from religious beliefs, a consistent pattern of conduct, or a durable power of attorney. *Id.*

³³ *Id.* at ___, 486 A.2d at 1226.

³⁴ *Id.* at ___, 486 A.2d at 1232.

³⁵ *Id.*

the third test is based on the court's belief that "[w]hen evidence of a person's wishes or physical or mental condition is equivocal, it is best to err, if at all, in favor of preserving life."³⁶

While the court has certainly made progress in setting forth clear legal standards, there are still problems with its approach. First, the procedural requirements are narrowly tailored for nursing home patients.³⁷ Thus, the legal standards are far too rigorous to be applied generally. More importantly, the tests themselves are severely flawed. The self-determination test is both legally and morally sound, but there will rarely be enough evidence to apply it. While logically sound, the "best-interests" tests are inapplicable to PVS patients because these patients can't experience anything. Therefore, it is impossible to discern how any medical intervention could benefit or harm them.³⁸ In these instances, the only justifiable reason to sustain their life is "for their loved ones and the community at large."³⁹ Presently, it is generally accepted that if the parents feel strongly that no AN&H should be provided, and the caregivers are willing to comply, the law should not stand in the way.⁴⁰ However, this principle offers no assistance when family members and caregivers disagree. Some courts have dealt with this by allowing the patient to be moved to a hospital that would honor the family's wishes.⁴¹ This "compromise" puts an extra strain and certainly an added financial imposition on a family that has already endured a great deal. Perhaps a better

³⁶ *Id.* at ___, 486 A.2d at 1233.

³⁷ *Id.* at ___, 486 A.2d at 1240-43.

³⁸ Lynn & Childress, *supra* note 17, at 18.

³⁹ *Id.*

⁴⁰ *Id.* (citing to PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 171-196 (March 1983)).

⁴¹ Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 497 N.E. 2d 626 (1986).

solution would be to apply the benefits versus burdens analysis to the family. In a very real sense, the family members are the ones suffering. It is they who are incurring the severe financial burden,⁴² and the emotional strain. It therefore seems more logical that this analysis, if at all, be applied to the family members, who are indeed burdened, rather than the PVS patient who can experience nothing.

Another commonly asserted argument against withholding AN&H is that it leads to a horrible and gruesome death and not the dignified experience we associate with "natural death."⁴³ The symptoms associated with this dying process are a dried mouth, lips parched and cracked, tongue swollen and cracked, eyes sunk back into their orbits, cheeks hollow, nose bleeding and stomach dried out causing dry heaves and vomiting.⁴⁴ While seemingly justifiable, these concerns are wholly unwarranted. With adequate nursing care and good oral hygiene, PVS patients will not incur these horrible effects.⁴⁵ Further, only family members, who might witness the manifestation of these symptoms, would need protection because PVS patients cannot experience pain and suffering.⁴⁶

⁴² Cranford, *The Persistent Vegetative State: The Medical Reality (Getting the Facts Straight)*, 18 HASTINGS CENTER REP. 27, 31 (Feb.-Mar. 1988). "The cost of maintaining [PVS] patients varies substantially by state, type of institution and support systems. *Id.* In general, the costs range from \$2,000 to over \$10,000 a month. *Id.*

⁴³ See generally, Battin, *The Least Worst Death*, 13 HASTINGS CENTER REP. 13 (Apr. 1983).

⁴⁴ Brophy, 398 Mass. at 444 n.2, 497 N.E.2d at 641 n.2 (Lynch, J., dissenting).

⁴⁵ Cranford, *supra* note 42, at 31.

⁴⁶ Cranford, *supra* note 42. "No conscious experience of pain and suffering is possible without the integrated functioning of the brain stem and cerebral cortex. Pain and suffering are attributes of consciousness, and PVS patients like Brophy do not experience them. Noxious stimuli may activate peripherally located nerves, but only a brain with the capacity for consciousness can translate that neural activity into an experience. That part of Brophy's brain is forever lost." *Id.* (citing to Brophy v. New England Sinai Hospital, Inc., Amicus Curiae Brief, American Academy of Neurology, Minneapolis, MN (1986)).

Finally, the withdrawal of AN&H will result in death in one to thirty days, making it a fairly quick process.⁴⁷

IS THE VIRGINIA CODE EFFECTIVE IN DEALING WITH PVS PATIENTS?

The Virginia Natural Death Act⁴⁸ allows a competent adult to make a written declaration⁴⁹ directing the withholding or withdrawal of life-prolonging procedures in the event such person should have a terminal condition.⁵⁰ In the absence of a written declaration directing withdrawal, life-prolonging procedures may be withdrawn from a comatose or incompetent patient, with a terminal condition, provided there is agreement between the attending physician and the court-appointed guardian or certain other individuals.⁵¹ A terminal condition is defined by the Act to mean "a condition caused by injury, disease or illness from which, to a reasonable degree of medical certainty, (i) there can be no recovery and (ii) death is imminent."⁵² This seemingly restrictive and vague definition would provide little assistance to a PVS patient.

The first judicial interpretation of the Act construed the terminal condition provision narrowly. The case, decided in 1986, was *Hazelton v. Powhatan Nursing Home*.⁵³ Mrs. Hazelton had a malignant brain tumor which caused her to slip into an irreversible coma. The attending physician, her husband and two adult children all agreed that her AN&H, supplied through a nasogastric tube, should be withdrawn. However, the Powhatan Nursing Home, where Mrs. Hazelton was staying, refused to

⁴⁷ *Id.*

⁴⁸ VA. CODE ANN. §§ 54.1-2981 to -2992 (1988 & Supp. 1989).

⁴⁹ VA. CODE ANN. § 54.1-2983.

⁵⁰ *See* VA. CODE ANN. § 54.1-2982.

⁵¹ VA. CODE ANN. § 54.1-2986.

⁵² VA. CODE ANN. § 54.1-2983.

⁵³ Chancery No. 98287 (Cir. Ct. of Fairfax County, Va., Aug. 29, 1986).

honor the attending physician's request. The Circuit Court of Fairfax County held that Mrs. Hazelton's illness satisfied the terminal condition provision and ordered withdrawal of the nasogastric tube.⁵⁴ The court relied on the testimony of four medical experts in determining if the Act's two-part test defining a terminal condition was met.⁵⁵ While all four experts agreed that "there could be no recovery," there was dissension as to whether the "death must be imminent requirement" had been satisfied.⁵⁶ The court determined that Mrs. Hazelton met the "death must be imminent" requirement because her illness would lead to death within a few months regardless of treatment. This narrow reading of the provision does not help PVS patients who could live for several years.⁵⁷ In fact, the court specifically stated that the statute does not apply to "those who are in a coma but are not afflicted with a disease or other treatment that will specifically lead to their death."⁵⁸ The Act further prohibits "any affirmative or deliberate act or omission to end life other than to permit the natural process of dying."⁵⁹ This terminology certainly opens the door for an abundance of litigation as to whether the withdrawing or withholding of AN&H ends life in a way other than the natural process of dying.⁶⁰ The Act, as it now reads, helps a very small group of people and fails to aid those with the greatest need. Arguably, PVS patients who are

⁵⁴ Hazleton, slip op. at 1-2.

⁵⁵ *Id.* at 11-12.

⁵⁶ *Id.* at 5.

⁵⁷ Cranford, *The Persistent Vegetative State: The Medical Reality (Getting the Facts Straight)*, 18 HASTINGS CENTER REP. 27, 31 (Feb.-Mar. 1988) (citing to Cranford, *Termination of Treatment in the Persistent Vegetative State*, Seminars in Neurology 4(1): 36-44 (Mar. 1984)). "The longest reported, well documented, survival (without recovery) was thirty-seven years, 111 days." *Id.*

⁵⁸ Hazleton, slip. op. at 6.

⁵⁹ VA. CODE ANN. § 54.1-2990.

⁶⁰ See generally, Derr, *Why Foods and Fluids Can Never be Denied?*, 16 HASTINGS CENTER REP. 28 (Feb. 1986).

forced to live a life devoid of human experiences,⁶¹ for several years,⁶² placing tremendous financial⁶³ and emotional stress on their families have a greater need for the "right to die" than someone who will die shortly regardless of the court's decision.

The Act is also of little utility in that it requires the attending physician and the family or guardian to agree.⁶⁴ It has already been recognized that under such circumstances of agreement, the law should not stand in the way.⁶⁵ Instead, the law needs to provide guidance when these parties are in dispute. The Act is clearly ineffective in achieving this goal.

Further, the written declaration sections⁶⁶ is virtually devoid of value. Based on the doctrine of informed consent, individuals have a basic common law right to refuse any medical treatment, so long as it does not place undue burdens on others.⁶⁷ The written declaration provision only allows competent individuals to refuse life-prolonging medical procedures if they fall within the Act's narrow definition of terminal condition. The Act specifically purports not to impair existing common law rights⁶⁸ and therefore there is no practical reason to draft a provision that falls far short of those rights.

The Virginia courts have had little opportunity to apply the Act to date. Unfortunately, the restrictiveness of the Act coupled with the vagueness of the "terminal

⁶¹ Cranford, *The Persistent Vegetative State: The Medical Reality (Getting the Facts Straight)*, 18 HASTINGS CENTER REP. 27, 28 (Feb.-Mar. 1988).

⁶² *Id.* at 31.

⁶³ *Id.* at 31-32.

⁶⁴ VA. CODE ANN. § 54.1-2986.

⁶⁵ Lynn & Childress, *Must Patients Always Be Given Food and Water?*, 13 HASTINGS CENTER REP. 17, 18 (Oct. 1983) (citing to PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 171-96 (March 1983)).

⁶⁶ VA. CODE ANN. § 54.1-2983.

⁶⁷ See generally, Lynn & Childress, *supra* note 65.

⁶⁸ VA. CODE ANN. § 54.1-2992.

condition" provision will leave them with little guidance when the need arises. This situation could result in a contradictory body of case law and necessitates the broadening of the Act to provide a uniform approach to "right to die" decisionmaking within the state.⁶⁹ Similar problems have arisen in other states with restrictive natural death acts.⁷⁰ This is largely because courts are ruling, with increasing frequency, that common-law and constitutional rights to refuse treatment supersede restrictive legislative directives.⁷¹ The courts recognize that the patient's rights are not unconditional⁷² and must be balanced against the State's interest in life. However, most courts have found it "difficult to conceive of a case in which the State could have an interest strong enough to subordinate a patient's right to choose not to be sustained in a persistent vegetative state."⁷³ Therefore, in order to be of any use to the courts and citizens of Virginia, the Act should be redrafted to be both more comprehensive and more conclusive. Specifically, a redrafted statute needs to include PVS patients, a group the current statute virtually overlooks.

⁶⁹ Note, *The "Terminal Condition" Condition in Virginia's Natural Death Act*, 73 VA. L. REV. 749, 766 (1987).

⁷⁰ The restrictive natural death acts in California and Washington caused the courts in those states to create their own ad hoc solutions to the complex non-treatment cases before them. *Id.* at 763-66.

⁷¹ Note, *A Necessary Compromise: The Right to Forego Artificial Nutrition and Hydration Under Maryland's Life-Sustaining Procedures Act*, 47 MD. L. REV. 1188, 1205 (1988).

⁷² The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions.

Roe v. Wade, 410 U.S. 113, 154 (1973).

⁷³ *In re Peter*, 180 N.J. 365, ___, 529 A.2d 419, 427 (1987).

PROPOSALS FOR REFORM

There are two possible resolutions to the current ineffectiveness and inconsistencies in the law with respect to the rights of PVS patients. The first involves redefining the legal definition of death to include those who are in a state of permanent unconsciousness. The permanent unconsciousness of an individual is sometimes referred to as neocortical death.⁷⁴ A redrafting of the statute would allow the withholding or withdrawal of all life-support systems, including AN&H, from PVS patients without

⁷⁴ Smith, *Legal Recognition of Neocortical Death*, 71 CORNELL L. REV. 850, 875 (1986). Smith proposes a model statute which reads as follows:

Neocortical Death

- Sec. 1. For the purpose of this statute, "neocortical death" means the irreversible loss of consciousness and cognitive functions. An individual who has sustained neocortical death is legally dead. A determination of neocortical death under this section must be made in accordance with reasonable medical standards and procedures.
- Sec. 2. After a medical determination of neocortical death, the individual may be biologically maintained if the individual has executed a written instrument [in accordance with the jurisdiction's living will statutes or procedures] expressing the desire to be maintained on artificial life-support systems in the event of neocortical death. If the individual has made no such prior written declaration, the family, next of kin, or guardian may provide for biological maintenance.
- Sec. 3. If neither the individual (by a prior written directive) nor the family, next of kin, or guardian elects to provide for biological maintenance, all artificial life-support systems may be withheld and terminated, and the provision of nourishment and fluids may be withheld or ceased. As an alternative to the withholding or cessation of nourishment and fluids as a means of terminating biological existence, the family, next of kin, or guardian may request injection of a chemical in a quantity sufficient to cause biological death. The chemical must be administered in accordance with reasonable medical procedures.
- Sec. 4. No person, firm, or organization shall be subject to criminal responsibility or civil liability for terminating the biological existence of a neocortically dead individual by any of the methods or procedures authorized in Section 3 (withholding or terminating artificial life-support systems, cessation of nourishment and hydration, or lethal chemical injection).

Id. at 875-76.

controversy. In fact, if the revised statute followed the existing death statutes, the patient's wishes for termination of treatment would not have to be ascertained.⁷⁵

There are several reasons why including neocortical death in the definition of legal death makes sense. First, as stated earlier, many courts are already finding a way to allow the withdrawal of AN&H from PVS patients, due to the severity of their affliction.⁷⁶ The revised statute would simply provide clear and consistent reasoning for the decisions that many state courts have already been reaching. Thus, unnecessary litigation could be avoided. Also, the traditional benefits versus burdens analysis used in "right to die" cases breaks down when applied to PVS patients.⁷⁷ The late Senator Jacob Javits stated, while himself suffering from a terminal illness, that "[b]ecause medical technology can now sustain life even when the ability to think is gone, society must change its laws."⁷⁸ Finally, it is virtually impossible to know with any certainty, in the absence of a prior written directive, what the wishes of a person devoid of mental capacities would be. Classifying these patients as legally dead would relieve the courts from their duty to do the impossible and protect individuals from the emotional and financial stress generally incurred in litigating the issue.

The revised statute would also rebut some of the most common arguments asserted by proponents of mandatory AN&H. For example, one argument is that withdrawing AN&H is actively killing the PVS patient as opposed to allowing him to die a natural death.⁷⁹ The conflict of whether it was the underlying disease or starvation

⁷⁵ *Id.* at 860 n. 44.

⁷⁶ *See* cases cited *supra* note 21.

⁷⁷ Lynn & Childress, *Must Patients Always Be Given Food and Water*, 13 HASTINGS CENTER REP. 17, 18-19 (Oct. 1983).

⁷⁸ Smith, *supra* note 74, at 860 n.44 (citing to *Former Senator Pleads for Dignified Death*, Am. Med. News, Oct. 25, 1985, at 13, col. 2).

⁷⁹ *See generally*, Derr, *Why Foods and Fluids Can Never be Denied*, 16 HASTINGS CENTER REP. 28 (Feb. 1986).

that caused the patient's death⁸⁰ would be resolved because the patient would be declared legally dead before the AN&H was withdrawn. Moreover, many commentators argue that the withdrawing of AN&H from PVS patients, will allow society to embark down a "slippery slope"⁸¹ which will eventually lead to active euthanasia of physically and mentally handicapped individuals. This fear could be eliminated by the proposed redefinition of legal death.⁸² Under the new statute, only individuals who were in a state of permanent unconsciousness, who had lost all cognitive functions, and who could experience nothing would be classified as legally dead. The courts should still apply the benefits versus burdens analysis to anyone who was severely handicapped but could, to some extent, experience joy and pain.

One of the purposes of law is to provide clear and consistent guidelines for members of society to abide by. The current ad hoc decisionmaking by courts,⁸³ with regard to the rights of PVS patients and their families, is of little use in this regard. The result is costly and time consuming litigation for families that have already endured a great deal of heartache and expense. Further, the current definition of death has other negative implications. As the law reads now, death benefits cannot be received by PVS patients or their families, vital organs cannot be donated to save someone who might be able to lead a full life⁸⁴ and murderers can go unpunished for years, until a PVS

⁸⁰ Steinbock, *The Removal of Mr. Herbert's Feeding Tube*, 13 HASTINGS CENTER REP. 13, 14-16 (Oct. 1983).

⁸¹ See generally, Wikler, *Not Dead, Not Dying? Ethical Categories and Persistent Vegetative State*, 18 HASTINGS CENTER REP. 41 (Feb.-Mar. 1988).

⁸² Smith, *supra* note 74, at 861 n.51.

⁸³ Note, *The "Terminal Condition" Condition in Virginia's Natural Death Act*, 73 VA. L. REV. 749, 766 (1987).

⁸⁴ Superintendent of Belchertown State School v Saikewicz, 373 Mass. 728, 741, 370 N.E.2d 417, 425 (1977). The state's interest in sanctity of life would certainly be promoted by allowing vital organs to be donated to individuals who might otherwise die. *Id.*

victim is pronounced dead.⁸⁵ These grave effects could all be avoided by adopting a revised statute which defines legal death to include neocortical death.

The first proposal assumes that no one would want to remain in a state of permanent unconsciousness. This assumption, while clearly supported by some,⁸⁶ may not be unanimously backed. Smith⁸⁷ proposes that we allow some PVS patients to be biologically maintained. This exception, although compassionately designed, will make the inclusion of PVS patients among the legally dead look like "definitional gerrymandering."⁸⁸ The expansion of legal death must not simply be a means to a desired end, it must be based on independent medical grounds. Therefore, if PVS patients are to be considered legally dead, it is imperative that they are treated as such in every respect. However, if the redefinition of death seems unconscionable to many, there is an alternative solution. The "living will"⁸⁹ doctrine could be expanded both in its content and its availability. The Virginia Natural Death Act⁹⁰ only allows a living will to mandate the withholding or withdrawal of life-prolonging procedures in the case of a terminal condition. Thus, the written directive section⁹¹ must be expanded to allow individuals to carry out their constitutional and common law right⁹² to refuse any medical treatment. The legislature could achieve this by revising the Act to allow a living will to include the denial of life-prolonging measures for the patient who loses

⁸⁵ Smith, *supra* note 74, at 872 n.128.

⁸⁶ *Id.* at 858 n.39.

⁸⁷ *Id.* at 856-77.

⁸⁸ Wikler, *supra* note 81, at 44.

⁸⁹ See generally, Dufraine, *Living Wills - A Need for Statewide Legislation or A Federally Recognized Right?*, 3 DET. C.L. REV. 781 (1983).

⁹⁰ VA. CODE ANN. §§ 54.1-2981 to -2992 (1988 & Supp. 1989).

⁹¹ VA. CODE ANN. § 54.1-2983.

⁹² Lynn & Childress, *supra* note 77, at 18.

all cognitive abilities and enters a state of permanent unconsciousness. Further, in order to be truly effective, the availability of living wills must be brought to the public's attention. Members of society should be encouraged to draft a living will just as they are encouraged to vote or encouraged to become organ donors. Unfortunately, expanding the use of living wills would not achieve the level of consistency that redefining death provides. However, it is certainly a positive step in protecting the rights of PVS patients and a viable solution for those who are not ready to include such individuals among the legally dead.

CONCLUSION⁹³

PVS patients do not enjoy any of the experiences that make us human. Yet as long as they are biologically maintained, their families are prevented from getting on

⁹³ In 1988, the Supreme Court of Missouri overruled a trial judge's decision to allow the withdrawal of AN&H from Nancy Cruzan at the request of her parents. *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. banc 1988), *cert. granted*, 109 S. Ct. 3240 (1989). Nancy Cruzan was a twenty-five year old woman in 1983 when she was involved in a one car accident which caused her to stop breathing for approximately 12 to 14 minutes. *Id.* at 411. The deprivation of oxygen caused severe brain damage. Nancy Cruzan lies in a persistent vegetative state today.

Approximately one month after the accident, on February 7, 1983, a gastrostomy feeding tube was implanted. *Id.* At that time there was still hope for recovery. Today, that hope is gone. "The evidence is clear and convincing that Nancy will never interact meaningfully with her environment again." *Id.* at 422. Yet, it is predicted that Nancy "will live a life of relatively normal duration if allowed basic sustenance." *Id.* at 419.

The Missouri Supreme Court held that Missouri's strong interest in life outweighs any right that Nancy's guardians have to refuse medical treatment on her behalf. *Id.* at 426. The court reached this decision despite the fact that when other courts have considered the issue, "nearly unanimously, those courts have found a way to allow persons wishing to die, or those who seek the death of a ward, to meet the end sought." *Id.* at 413.

The Cruzans appealed to the United States Supreme Court and the case was argued on December 6, 1989. However, a decision has not yet been handed down. This is the first "right to die" case to reach the Supreme Court and the decision should help to define the rights held by PVS patients and their families. Although, as with the regulation of the right to have an abortion performed, great discretion may be given to the individual states in this area.

At this point, the effect of the Supreme Court's decision on Virginia's Natural Death Act is unknown and any speculation on the issue is beyond the scope of this article. The purpose of this article is merely to point out that the Act is currently of little value to many PVS patients and their families.

with their lives and incur thousands of dollars in medical bills every month. Most people would not opt to remain in such a condition, yet the law is presently unclear as to how they can avoid it. The Natural Death Act of Virginia is both too restrictive and too vague to aid PVS patients. The statute should be revised in one of two ways. It should either include PVS patients among the legally dead or guarantee them their rights through expansion of the living will doctrine. Due to the length and severity of their condition, PVS patients, possibly more than any other group, need and deserve the "right to die" with dignity.

AIDS AND DISCRIMINATION IN THE WORKPLACE: HOW WILL THE VIRGINIA COURTS RULE?

Anne D. Bowling

INTRODUCTION

In June of 1989, *Nation's Business* magazine reported the results of a study conducted by the Philadelphia Commission on AIDS and the Greater Philadelphia Chamber of Commerce on the attitudes about and the impact of AIDS in small businesses in Philadelphia.¹ The results were disturbing. Only four percent of the enterprises surveyed had company policies on AIDS. Further, 75 percent of the companies knew little, if anything, about any of their legal obligations towards employees with AIDS. Forty percent responded that they would limit contact between the employee with AIDS and his co-workers. Sixteen percent indicated that they would encourage employees with AIDS or HIV (Human Immunodeficiency Virus or Human T-Cell Lymphotropic Virus Type III)² infection to resign. Thirty percent said that they would disclose to the infected employee's co-workers confidential information concerning his infection without the employee's consent.³

The Fall 1988 issue of *The Colonial Lawyer* included an article ("1988 article") authored by Thomas Sotelo,⁴ which investigated whether under the available regulations and cases, the Rehabilitation Act of 1973⁵ ("Rehabilitation Act") afforded protection to individuals suffering from the Acquired Immune Deficiency Syndrome (AIDS), AIDS-

¹ Singer, *AIDS Concerns for Business; Includes related articles on principles for the workplace and information about AIDS*, NATION'S BUS., June 1989, at 75, ____.

² See *infra* text accompanying notes 12-35.

³ Singer, *supra* note 1, at ____.

⁴ Sotelo, *AIDS: Handicap or Not?*, 17 COL. LAW. 1 (1988).

⁵ 29 U.S.C. § 794 (1983).

related Complex (ARC), or infection with the Human Immunodeficiency Virus (HIV),⁶ and whether this protection could be extended to those perceived as being at a high risk of having AIDS, because of their association with certain "high-risk" groups.⁷ If the Rehabilitation Act's formulation of "handicapped individual" is found to be applicable to these persons, its antidiscrimination policies also apply to them. In the 1988 article, the author concluded that persons suffering with the forms of AIDS listed above indeed fit within the Rehabilitation Act's definition of handicapped, and may use the act as a defense against employment discrimination.⁸

The purpose of this paper is to examine developments in the law since the 1988 article, both at the federal and state levels. Although AIDS victims may be deemed handicapped individuals under the Rehabilitation Act and the attendant regulations, the human rights laws of the states may differ significantly in structure and degree of protection offered the handicapped individual. In all cases, there are many factors to be taken into account in deciding whether the situation in any given case actually fits into the scope of the statutes. On the state level, this paper will focus primarily on Virginia's Rights of Persons with Disabilities Law,⁹ and its probable interpretation in an AIDS-related employment discrimination case.

The examination of Virginia's laws protecting the rights of AIDS victims will be looked at in the context of general facts about the nature of AIDS, ARC, HIV infection, and the spread of the disease. Developments in the federal law since *School*

⁶ Throughout the article, "HIV" is used to refer to Human T-Cell Lymphotropic Virus Type III (HIV-III) as well as Human Immunodeficiency Virus, both recognized as AIDS causing agents.

⁷ Homosexuals, blacks, and hispanics are groups who have been hit the hardest by the spread of the syndrome. Singer, *Helping People with AIDS Stay on Job*, N.Y. Times, Apr. 15, 1989, § 1, at 28, col. 1. See also Kosterlitz, 'Us,' 'Them' and AIDS, 20 NAT'L. J. 1738, 1741-42 (1988).

⁸ Sotelo, *supra* note 4, at 13.

⁹ VA. CODE ANN. §§ 51.5-1 to -46 (1988 & Supp. 1989).

Board of Nassau County, Florida v. Arline,¹⁰ and *Thomas v. Atascadero Unified School District*¹¹ will also be examined. Finally, it examines the probable construction of Virginia's antidiscrimination statute in light of the interpretations courts of other states have given their own human rights statutes.

THE AIDS EPIDEMIC

Epidemiologists believe that the AIDS virus was actively spreading in the United States by the late 1970's;¹² early cases were first documented in 1979.¹³ Originally considered a disease limited to homosexual males and intravenous drug users, AIDS has spread into the general population striking individuals in other "lower risk" groups.¹⁴

The HIV virus, which causes AIDS, is extremely fragile, and must gain access to the bloodstream of its intended victim.¹⁵ It has spread in four ways: (1) through sexual intercourse with persons infected by the AIDS virus, (2) sharing needles used to inject intravenous drugs, (3) injections of contaminated blood products, as in blood transfusions,¹⁶ or (4) to a child from an infected mother during birth, or from breast

¹⁰ 480 U.S. 273 (1987) (A teacher with tuberculosis met the statute's requirements for a handicapped individual, and could not be removed from employment because of a relapse of her disease. The fact that the disease is contagious does not, in and of itself, remove it from the protection of the Rehabilitation Act).

¹¹ 662 F. Supp. 376 (C.D. Cal. 1987) (A child who was demonstrating symptoms of ARC was designated "otherwise qualified" for the purposes of being allowed to remain in class).

¹² N.Y. Times, Nov. 7, 1989, at B7, col. 1.

¹³ Comment, *AIDS and Employment Discrimination Under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act*, 20 U. RICH. L. REV. 425, 425 (1985) [hereinafter Comment, *Aids and Employment Discrimination*].

¹⁴ Kosterlitz, 'US,' 'Them' and AIDS, 20 NAT'L J. 1738, 1740 (1988).

¹⁵ J. LANGONE, AIDS: THE FACTS 73 (1988).

¹⁶ *Id.* at 71.

feeding.¹⁷ All evidence has indicated that the virus is not spread through casual contact.¹⁸ Once in the bloodstream, the virus attacks white blood cells and disrupts the functioning of the immune system.¹⁹ Two types of blood cells, B-cells and T-cells, work together to find and destroy unfamiliar substances (antigens) in the bloodstream.²⁰ The B-cells attach themselves to antigens and produce multiplying antibodies, or "memory cells," that will attack antigens of the same type.

T-helper cells recognize any familiar antigens that enter the bloodstream, and prompt the B-cells to immediately begin production of the antibodies needed to fight them.²¹ T-suppressor cells limit antibody production, and ensure that the B-cells only make antibodies to attack the appropriate antigens.²²

HIV impairs the functioning of T-helper cells, rendering them incapable of recalling substances to which the B-cells have antibody-producing abilities. Since the

¹⁷ *Id.* at 73-74.

¹⁸ *Id.* at 75-77. In February, 1986, the *New England Journal of Medicine* reported the results of a study of the possible spread of AIDS among family members. Families were singled out for the study, since the contact between family members is closer and more intimate than in any other instances that may be considered "casual contact." "[T]he study involved 101 people -- parents, children, siblings, and other relatives of 39 AIDS victims --each of whom had lived with the patient for at least three months . . . , while the victims were infected. *Id.* at 75-76. Although there was significant evidence of close contact -- for instance, ninety-two percent of the family members surveyed shared the same shower or bathtub as the AIDS patient, fifty percent drank from the same drinking glasses, and thirty seven percent slept in the same bed as the patient -- only one person out of the 101 studied had positive results for the presence of antibodies when later tested. This single victim was a five year old girl, whom doctors believe was infected since birth, as her mother had AIDS. *Id.* at 76.

¹⁹ Comment, *Aids and Employment Discrimination*, *supra* note 13, at 426-28.

²⁰ *Id.* at 427.

²¹ *Id.* It is essential for the T-helper cells to remind the B-cells of their capacity for making the antibodies, since B-cells neither recognize antigens on their own, nor remember that they are able to make the applicable antibodies. *Id.*

²² *Id.*

B-cells are unable to recognize antigens, they fail to produce antibodies, and the body cannot protect itself from viral and fungal invasions.²³

Infection with HIV tends to have three basic manifestations. The most severe is full-blown AIDS, the final stage of an AIDS virus infection.²⁴ A diagnosis of AIDS involves laboratory evidence of the presence of the AIDS virus (HIV infection), as well as an "indicator disease."²⁵ Also referred to as opportunistic diseases, these invade the body once the immune system is suppressed by the AIDS virus.²⁶ Symptoms of AIDS itself include swollen glands, unexplained loss of appetite, weakness, recurring fever and common infections, night sweats, persistent and unexplained diarrhea, continuous dry coughing, shingles, and skin rashes and spots.²⁷ Evidence indicates that HIV attaches to the central nervous system as well as the immune system causing a range of consequences "from forgetfulness to dementia."²⁸ AIDS is usually fatal when confronted in its full-blown state. ARC (AIDS-Related Complex) is a milder form of the disease, and is generally not life-threatening.²⁹ Further, ARC may or may not ever develop into full-blown AIDS.³⁰

²³ *Id.*

²⁴ LANGONE, *supra* note 15, at 8.

²⁵ Comment, *Protecting Persons with AIDS from Employment Discrimination*, 77 KY. L.J. 403, 404-05 (1988-89) [hereinafter, Comment, *Persons with AIDS*].

²⁶ Sotelo, *AIDS: Handicap or Not?*, 17 COL. LAW. 1, 2 (1988). Two often-noted opportunistic diseases associated with AIDS are pneumocystis carinii pneumonia, and Kaposi's sarcoma. *Id.* Pneumocystis carinii pneumonia is a form of pneumonia that causes weakness, fever, labored breathing, and a dry, hacking cough. LANGONE, *supra* note 15, at 14. Kaposi's sarcoma is a usually non-fatal skin cancer that produces painful purple lesions that cover the body. *Id.* at 16.

²⁷ LANGONE, *supra* note 15, at 14-16.

²⁸ *Id.* at 14.

²⁹ *Id.* at 12.

³⁰ *Id.*

The third possible manifestation of the disease is an often-asymptomatic infection with the HIV virus.³¹ A person in this category could either test virus-positive, with detectable antibodies in the blood, or antibody-positive, with a positive serological test result, and never develop the symptoms of AIDS or ARC.³² The infection caused by HIV proceeds slowly, and it is impossible to predict the number of people who are HIV-positive and will develop AIDS or ARC.³³ It is estimated that for every current AIDS patient, there are 25 to 75 people who are carrying the virus.³⁴ It is also estimated that 1.5 million Americans are currently in this category.³⁵

THE REHABILITATION ACT OF 1973

The Rehabilitation Act of 1973³⁶ ("Rehabilitation Act") provides for equal opportunities for benefits of federally-funded programs and federal agencies, to those persons who qualify as "individual[s] with handicaps."³⁷ Such a person is defined by

³¹ Comment, *AIDS and Employment Discrimination*, *supra* note 13, at 430. See also LANGONE, *supra* note 15, at 10. The only symptom that tends to manifest itself at this stage of the syndrome is a short-term, mononucleosis-type disorder, characterized by swollen glands. *Id.*

³² Comment, *AIDS and Employment Discrimination*, *supra* note 13, at 430.

³³ LANGONE, *supra* note 15, at 10-11. Infected persons without symptoms have developed detectable antibodies within two to eight weeks after being exposed to the virus, though antibodies have also taken up to six to eight months to appear. Even with the presence of the antibodies, the victim may remain free of symptoms for a considerable amount of time (weeks or years), depending on how the disease was transmitted. *Id.* at 11.

³⁴ Koch, *Arlington AIDS Program to Focus on Education*, The Washington Post, May 12, 1988, Virginia Weekly, § vi. See also Singer, *Helping People with AIDS Stay on Job*, N.Y. Times, Apr. 15, 1989, § 1, at 28, col. 1.

³⁵ LANGONE, *supra* note 15, at 10.

³⁶ Pub.L. No. 93-112, Title V, § 504, 87 Stat. 394 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (1983)).

³⁷ The Rehabilitation Act states, in pertinent part, that:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title,

the Rehabilitation Act as either an individual "who has a physical or mental impairment which substantially limits one or more of such person's major life activities,"³⁸ "has a record of such an impairment,"³⁹ or "is regarded as having such an impairment."⁴⁰ For

shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C.A. § 794 (Supp. 1989).

³⁸ 29 U.S.C.A. § 706(8)(B)(i) (Supp. 1989).

Regulations promulgated under this statute define "physical or mental impairment" as:

any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; . . . hemic and lymphatic; skin

45 C.F.R. § 1232.3(h)(2)(i) (1989). All of these apply to AIDS or ARC patients.

"Major life activities" are defined as:

functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

45 C.F.R. § 1232.3(h)(2)(ii) (1989).

³⁹ 29 U.S.C.A. § 706(8)(B)(ii) (Supp. 1989).

Regulations define this to apply to a person who:

has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

45 C.F.R. § 1232.3(h)(2)(iii) (1989).

⁴⁰ 29 U.S.C.A. § 706(8)(B)(iii) (Supp. 1989). An individual regarded as having a physical or mental impairment:

(A) has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairment; or (C) has none of the impairments defined in

the purposes of employment discrimination, persons whose handicaps involve drug or alcohol abuse are specifically excluded from coverage. These are the only such limitations.⁴¹

The Rehabilitation Act does not apply to all persons who have a disability. Under the plain language of the Rehabilitation Act, protection to individuals with a handicap is limited to those who are "otherwise qualified."⁴² In the 1988 article, the author argued that individuals with AIDS, ARC, or who are carriers of the HIV virus are all protected under the Rehabilitation Act.⁴³ Persons afflicted with AIDS fit into the criteria of having a physical or mental impairment, due to the symptoms they endure.⁴⁴ They meet the second criteria, substantial limitation of major life activities, through their impaired ability to fight disease, need for constant medical attention, and endurance of the stigma associated with having AIDS.⁴⁵ Persons with ARC, or who are asymptomatic carriers of the virus, may meet the handicapped criteria as persons with "a record of

paragraph (h)(2)(i) of this section but is treated by a recipient as having such an impairment.

45 C.F.R. § 1232.2(h)(2)(iv) (1989).

⁴¹ 29 U.S.C.A. § 706(8)(B) (Supp. 1989).

⁴² 29 U.S.C.A. § 794(a) (Supp. 1989). Regulations define "qualified handicapped person" as:

(1) . . . , a handicapped person who, with reasonable accommodation, can perform the essential functions of the job or assignment in question.

45 C.F.R. § 1232.3(i)(1) (1989). In cases involving contagious diseases, "reasonable accommodation" is concerned with eliminating the risk to other employees or others working closely with the AIDS victim. *But see* 29 U.S.C.A. § 706(8)(C) (Supp. 1989).

⁴³ Sotelo, *AIDS: Handicap or Not?*, 17 COL. LAW. 1, 4-9 (1988).

⁴⁴ *Id.* at 6-7.

⁴⁵ *Id.* at 7. *See also* J. LANGONE, *AIDS: THE FACTS*, 71-72 (1988).

such impairment."⁴⁶ The author also cited cases that indicated that courts also tended to support the definition of AIDS as a handicap within the scope of the Rehabilitation Act,⁴⁷ despite the fact that AIDS is not listed as a handicap in the statute.

Other authors have agreed with the view that AIDS is a handicap.⁴⁸ The only exception to inclusion of AIDS in the Rehabilitation Act appears to be in limited circumstances, where bona fide health and safety risks render employment of an AIDS victim imprudent.⁴⁹ In these conditions, the employee will not be considered "otherwise qualified" to participate in the employment in question, and thus the Act is inapplicable.

Cases decided since the publication of the 1988 article continue to point towards the idea that, were the question before the Supreme Court, the Court would rule that AIDS is indeed a handicap under the Rehabilitation Act.⁵⁰ The holdings in the two cases principally cited in the 1988 article, *Thomas v. Atascadero Unified School*

⁴⁶ Sotelo, *supra* note 43, at 8. This applies whether or not the carrier actually has symptoms; the criteria is more based on the ways that the individual is perceived by other persons. *Id.*

⁴⁷ *Id.* at 9-12.

⁴⁸ See, e.g., Comment, *Protecting Persons with AIDS from Employment Discrimination*, 77 KY. L.J. 403, 407-17 (1988-89); Comment, *AIDS and Employment Discrimination Under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act*, 20 U. RICH. L. REV. 425, 433-45 (1985).

⁴⁹ Examples of these situations involve "sensitive jobs," positions where the employee is charged with the safety of others, or is involved with an intellectually demanding or particularly intricate line of work. The AIDS virus' attack on the central nervous system has been shown to cause dementia in the victim, and the slow process of deterioration often makes detection of any mental impairment difficult. See generally Hentoff, *The Rehabilitation Act's Otherwise Qualified Requirement and the AIDS Virus: Protecting the Public from AIDS-Related Health and Safety Hazards*, 30 ARIZ. L. REV. 571 (1988).

⁵⁰ The following does not purport to represent a comprehensive survey of all the new federal case law since the Fall 1988 issue of the Colonial Lawyer. For the purposes of this article, these cases are included to indicate the apparent direction that case law has taken.

District,⁵¹ and *School Board of Nassau County, Florida v. Arline*⁵² both turned on the presence or absence of a significant risk of infection to others. The courts in those cases held respectively that absent a significant risk of others contracting the illness (ARC in *Thomas* and tuberculosis in *Arline*), the individual will be classified a "qualified individual," and thus protected under the Rehabilitation Act. In the *Arline* decision, the Supreme Court endorsed the American Medical Association's formulation of the finding of facts necessary to balance whether or not an individual with a contagious disease is "otherwise qualified" for the employment in question.⁵³ The *Arline* decision is cited extensively in *Chalk v. United States District Court Central District of California*.⁵⁴ This case, similar to *Arline*, involved a situation in which a teacher was removed from his position due to his contagious disease. However, *Arline* involved tuberculosis, and the Supreme Court was careful not to rule on the applicability of the case's holding to the AIDS virus.⁵⁵ In *Chalk*, the Ninth Circuit Court of Appeals

⁵¹ 662 F. Supp. 376 (C.D. Cal. 1987).

⁵² 480 U.S. 273 (1987).

⁵³ *Id.* at 288. The Court held that:

this inquiry should include: "[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm."

Id. (citing Brief for the American Medical Association as *Amicus Curiae* 19).

⁵⁴ 840 F.2d 701 (9th Cir. 1988).

⁵⁵ The case does not present, and we therefore do not reach, the question whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered solely on the basis of contagiousness, a handicapped person as defined by the Act.

utilized the standards articulated in *Arline* for finding a significant risk, to overturn the District Court's refusal to issue a preliminary injunction reinstating Chalk to his teaching position.⁵⁶

Another case that used the *Arline* standards to deal with AIDS in the classroom, though in the context of a student's right to attend class, is *Martinez v. School Board of Hillsborough County, Florida*.⁵⁷ This case involved the segregation of a five-year-old mentally retarded girl, who was isolated from the rest of her special education class, because of the school board's fear that the AIDS virus with which she was infected would present a risk of contamination to the other students. The girl was not toilet trained, and habitually sucked her fingers.⁵⁸ The court took an approach similar to that in *Arline* in interpreting Section 504 of the Rehabilitation Act. The 11th Circuit Court of Appeals held that the risk involved in having the child in the classroom was easily accommodated by seating her apart from the other students, and therefore, the risk did not rise to the level of "significant."⁵⁹

The situation involved in *Martinez*, where it was found that the risk of AIDS infection was merely a "remote theoretical possibility,"⁶⁰ may be compared to an employment setting, in an attempt to predict how a court might rule in the latter situation. It is clear that, with the exception of a few lines of work where AIDS

Arline, 480 U.S. at 282 n. 7.

⁵⁶ Chalk, 840 F.2d at 710-11.

⁵⁷ 861 F.2d 1502 (11th Cir. 1988).

⁵⁸ *Id.* at 1503-04.

⁵⁹ *Id.* at 1505-06. The court divided the process of determining a significant risk into steps. First, the "trial judge must determine whether the individual is 'otherwise qualified,'" based on the criteria set forth in *Arline*. *Id.* at 1505. Then, even if the individual with a handicap is not deemed "otherwise qualified," the court must determine if the handicapped person could be made so through reasonable accommodation. *Id.*

⁶⁰ *Id.* at 1506.

constitutes a valid threat to either those around the victim or the victim himself,⁶¹ segregation and discriminatory treatment will not be permitted, and the *Arline* criteria will classify the AIDS victim as "otherwise qualified" under the Rehabilitation Act.

THE VIRGINIA HUMAN RIGHTS ACT

Like the majority of state statutes on human rights, Virginia's Rights of Persons with Disabilities Law ("Disabilities Law") does not specifically address AIDS or any other infection with the HIV virus.⁶² Surprisingly, there have been no cases in Virginia at the appellate level to assist in the interpretation of the Disabilities Law. One author, faced with this problem, has suggested merely relying on the plain language of the statute.⁶³

⁶¹ See *supra* note 48. See also Local 1812, American Fed'n. of Gov't. Employees v. Dept. of State, 662 F. Supp. 50 (D.D.C. 1987), where AIDS testing was upheld on the grounds that persons who were HIV infected were medically unfit for worldwide service with the Department of State. The reasoning behind the testing was that many foreign posts are considered medically inadequate to deal with complications that may arise from the HIV infection, and both the sanitary conditions in other countries, and the live-virus vaccines which were often required for overseas assignments could exacerbate the condition of those already infected with the AIDS virus. *Id.* at 52.

⁶² The Virginia Human Rights Act provides the policy behind the Act:

[t]o safeguard all individuals within the
Commonwealth from unlawful discrimination
because of race, color, religion, . . . ,
or disability, . . . in employment. . . .

VA. CODE ANN. § 2.1-715.1 (1987). States with statutes whose codes specifically address persons with AIDS include Florida, Iowa, Maryland, and Texas. The Texas code expressly excludes persons with AIDS from its protection, if the "infection with human immunodeficiency virus . . . constitutes a direct threat to the health or safety of other persons or . . . makes the affected person unable to perform the duties of the person's employment." TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(4)(B) (Vernon 1989).

⁶³ Comment, *AIDS and Employment Discrimination Under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act*, 20 U. RICH L. REV. 425, 446 (1985).

However, the current state of the federal law, after cases such as *Arline* and *Chalk*, as well as amendments to the Disabilities Law shed more light on how the Virginia statute would be interpreted. In 1988, the definition of "otherwise qualified person with a disability" was amended, making the Disabilities Law conform more closely with the Rehabilitation Act.⁶⁴ This is a significant change in the law, because prior to this amendment, the major difference in the protections afforded persons with AIDS under the Disabilities Law, and the corresponding sections of the Rehabilitation Act, turned on the fact that the Rehabilitation Act included an allowance for accommodations when considering the qualifications of a potential employee infected with the AIDS virus.⁶⁵ Conversely, the Disabilities Law defined an "otherwise qualified person with a disability" as one who had to be "qualified without accommodation" to perform the job in question.⁶⁶ Accommodation, however reasonable, could not be considered in addressing whether or not the person was otherwise qualified for employment. Once the employee was hired, the now amended § 51.01-41(c) provided for accommodations once the employee had been deemed qualified, and hired.⁶⁷ Since most persons with AIDS could easily and appropriately fill most of the positions from which they would have been barred because of their need for accommodations, the author correctly asserted that the Disabilities Law should be modified to conform to the Rehabilitation Act.

⁶⁴ VA. CODE ANN. § 51.5-3 (1988 & Supp. 1989). The 1988 Amendments deleted the term "without accommodations" following the word "qualified" in the definition.

⁶⁵ 29 U.S.C.A. § 706(8)(B) (Supp. 1989).

⁶⁶ Comment, *AIDS and Employment Discrimination under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act*, 20 U. RICH. L. REV. 425, 446-48 (1985) (quoting VA. CODE ANN. § 51.01-3 (Supp. 1985)).

⁶⁷ *Id.* at 447-48.

In 1988, the Disabilities Law was indeed modified, and now reasonable accommodation is required when considering the employment of a person with AIDS.⁶⁸ Since this modification, the Disabilities Law is actually broader than the Rehabilitation Act, since it applies not only to those agencies and programs supported by state funds, but to private employers as well.⁶⁹ Further, the Disabilities Law goes a step beyond the affirmative policies in the Rehabilitation Act, since it also mandates the formulation of specific policies in several state agencies for procedures dealing with AIDS in the scope of the workings of the agency.⁷⁰ This affirmative step, encourages the agencies themselves to review their own policies and procedures for working with persons with AIDS, forces them to address the issue, indicates that Virginia's view on AIDS is

⁶⁸ VA. CODE ANN. § 51.5-3 (1988 & Supp. 1989). As amended, § 51.5-3 now defines "otherwise qualified person" as one who is qualified [without accommodations] to perform the duties of a particular job or position. (Brackets mark text deleted by the 1988 Amendment.) *Id.*

⁶⁹ VA. CODE ANN. § 51.5-41(A) (1988). § 51.5-41(A) expands the coverage of the statute to cover private employers:

A. No employer shall discriminate in employment or promotion practices against an otherwise qualified person with a disability solely because of such disability.

Id.

⁷⁰ For instance, VA. CODE ANN. § 2.1-51.14:1 mandates that

The Boards of Health, Mental Health, Mental Retardation, and Substance Abuse Services, Rehabilitative Services, Social Services and Medical Assistance Services shall review their regulations and policies related to service delivery in order to ascertain and eliminate any discrimination against individuals infected with the *human immunodeficiency virus*. (emphasis added)

VA. CODE ANN. § 2.1-51.14:1 (Supp. 1989). Other statutes provide for school-attendance guidelines, and model education programs on the human immunodeficiency virus. VA. CODE ANN. §§ 22.1-271.3, 23-9.2:3.2 (Supp. 1989).

realistic, and that any cases concerning AIDS discrimination brought under the current code would be resolved in a manner that would interpret the code's provisions broadly.

CONCLUSION

The projections available on the probable spread of AIDS are disturbing. The U.S. Public Health Service has predicted that, by the end of 1991, 270,000 cases will have developed in the United States, with more than 74,000 of those occurring in that year alone; 179,000 people in the United States will have died of AIDS by 1991, with 54,000 of those deaths occurring that year; and new cases of AIDS spread through heterosexual contact will increase from the 1,100 reported in 1986 to almost 7,000 in 1991.⁷¹ With these numbers, the inescapable fact is that sooner or later every manager or employee will be faced with a subordinate or co-worker with AIDS.⁷² Problems arise when these employers adopt an ostrich posture, and refuse to recognize this possibility.⁷³ Commonly-cited factors include the attitude that since the company has yet to be confronted with the issue of AIDS in the workforce, it can afford to deal with the problem when it arises, or that the sensitive nature of the disease is such that cases can only be dealt with on an individual basis.⁷⁴ The natural result of these attitudes is that when a case of AIDS does surface at a particular workplace, the result is fear and discrimination, as reported in the survey at the opening of this article.⁷⁵

⁷¹ LANGONE, AIDS: THE FACTS 67-68 (1988).

⁷² Singer, *AIDS Concerns for Business: Includes related articles on principles for the workplace and information about AIDS*, NATION'S BUS., June 1989, at 75, ____.

⁷³ Singer, *Helping People with AIDS Stay on Job*, N.Y. Times, Apr. 15, 1989, § 1, at 28, col. 1.

⁷⁴ AMERICAN MANAGEMENT ASSOCIATION, AIDS: THE NEW WORKPLACE ISSUES 50 (1988).

⁷⁵ Singer, *supra* note 72, at ____.

While many states, as well as the federal government, are constantly expanding the employment protections afforded by their statutes and regulations that deal with handicapped individuals, the real key to ending this discrimination is education of the workforce.⁷⁶ Like Virginia, many states are implementing this concept through their laws, which, while they may only affect a portion of the job market for now, lead the way and provide an example for companies in both the public and the private sector, in ending the irrational fear of individuals with AIDS.

⁷⁶ Without more widespread education about AIDS, it appears that those with the disease will continue to experience discrimination through adverse decisions about hiring, firing, promotion, and conditions of employment. Programs that address the scientific, psychological, social, legal, and human-resource issues concerning AIDS can minimize workplace disruptions, preserve employee morale, and sidetrack discriminatory behavior.

Id. at ____.

**THE ZONING OF RELIGIOUS INSTITUTIONS AFTER
LYNG V. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION**

Michael Grattan

INTRODUCTION

The determination of what constitutes a "religious use" for the purposes of state or local zoning ordinances is a difficult question.¹ The issue presents a tension between the government's admittedly strong interest in regulating local areas and the right of individual entities to the free exercise of their religious beliefs.² These often conflicting interests have not escaped the notice of the courts. Indeed, state courts have adopted widely divergent solutions to deal with the problem. Still, at no point has the United States Supreme Court decided a case that would unify, or at least give some guidance to, the state courts attempting to define "religious use."

Though the Supreme Court has frequently heard zoning cases dealing with various first amendment issues,³ it has consistently refused to grant certiorari to zoning cases that implicate the free exercise clause of the first amendment.⁴ Indeed, no federal

¹ Walker, *What Constitutes a Religious Use for Zoning Purposes*, 27 CATH. LAW. 129, 129-130 (1982).

² *Id.* at 130-31.

³ See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

⁴ See *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983); *Marsland v. Int'l Soc'y for Krishna Consciousness*, 66 Haw. 119, 657 P.2d 1035 (1983), *appeal dismissed*, 464 U.S. 805 (1983); *Lubavitch Chabad House of Illinois, Inc. v. City of Evanston*, 112 Ill. App. 3d 223, 445 N.E.2d 343 (1982), *cert. denied*, 464 U.S. 992 (1983); *Medford Assembly of God v. City of Medford*, 72 Or. App. 333, 695 P.2d 1379 (1983), *cert. denied*, 474 U.S. 1020 (1985).

appellate court addressed the free exercise clause in the zoning context until 1983.⁵ This lack of guidance from the federal judiciary has given rise to a plethora of disparate state court approaches to free exercise zoning cases. The time is ripe for a unified approach.⁶

The time may have come. Though the Supreme Court has still not decided a case which specifically addresses what is considered a religious use in the zoning context, it has recently addressed a related question. In *Lyng v. Northwest Indian Cemetery Protective Association*,⁷ the Court set forth criteria to determine the types of government regulation allowed under the free exercise clause of the first amendment.⁸ Unlike many of the prior state court approaches, Justice O'Connor's opinion in *Lyng* did not focus on whether the use involved was religious or not. Instead, the *Lyng* Court focused on the impact of the government regulation upon the practice and beliefs of the particular religious group involved.⁹

In this article, I will attempt to show that the Supreme Court's new formulation of what is protected under the free exercise clause has unified a once diverse and eclectic body of case law. Though the Court in *Lyng* did not directly deal with a religious zoning question, it opened the door for local zoning boards across the country to zone religious institutions virtually the same way they would zone any other property. The zoning boards no longer have to examine the use in question. Indeed, whether the use itself is religious is now irrelevant. Based on *Lyng*, government zoning is valid as

⁵ See *Lakewood*, 699 F.2d at 304.

⁶ Cf., Note, *In Search of Objective Criteria For a National Standard of Review in Church Zoning: Islamic Center of Mississippi, Inc. v. City of Starkville*, 11 GEO. MASON L. REV. 147, 148 (1989).

⁷ 485 U.S. 439, 108 S. Ct. 1319 (1988).

⁸ U.S. CONST. amend. I. The first amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*

⁹ 485 U.S. at ___, 108 S. Ct. at 1326.

long as it does not directly or indirectly prohibit the practice or belief of a particular religion.¹⁰

The article will first briefly examine the power of governments to zone based upon *Village of Euclid v. Ambler Realty Co.*¹¹ Second, it will review the facts and style of *Lyng v. Northwest Indian Cemetery Protective Association*.¹² Third, the article will examine Justice O'Connor's opinion for the majority in *Lyng*. This third section will include the three part "test"¹³ of what types of government action are prohibited under the free exercise clause.¹⁴ Fourth, the article will examine the impact of *Lyng* upon various states' treatment of religious use property in the zoning context. The final section will examine *Lyng*'s impact upon Virginia law.

TRADITIONAL POWERS OF LOCAL GOVERNMENTS TO ZONE

In 1926, the Supreme Court decided *Village of Euclid v. Ambler Realty Co.*,¹⁵ a case that was destined to become the foundation of modern zoning law.¹⁶ The *Euclid* court observed the need for comprehensive zoning plans and for accompanying restrictions upon the use of private property.¹⁷ These plans were a result of modernization and were necessary for the smooth functioning of society.¹⁸ Under the

¹⁰ *Id.*

¹¹ 272 U.S. 365 (1926).

¹² 485 U.S. 439, 108 S. Ct. 1319 (1988).

¹³ Justice O'Connor does not propose a "test" per se. She merely sets out the relevant criteria, 485 U.S. at ___, 108 S. Ct. at 1326.

¹⁴ As will be noted below, the term "religious use" is now obsolete and should be discarded.

¹⁵ 272 U.S. 365 (1926).

¹⁶ Walker, *supra* note 1, at 146.

¹⁷ *Id.* (discussing *Euclid*, 272 U.S. at 386-87).

¹⁸ *Id.* at 146-47 (discussing *Euclid*, 272 U.S. at 386-87).

court's analysis, zoning regulations were given a presumption of constitutional validity.¹⁹ Only when the zoning ordinance was arbitrary, unreasonable and without any substantial relationship to public health, welfare, safety or morals would the ordinance be deemed unconstitutional.²⁰

The Supreme Court has consistently upheld this presumption of validity. It has applied the presumption in cases involving government appropriation of private land for the purpose of devising a coordinated zoning plan;²¹ in cases involving government restriction on the composition of families that could live in single family dwellings;²² and in cases involving government regulation of adult uses.²³ When a zoning decision has infringed upon a fundamental right, the Court has been quick to strike down the proposed zoning ordinance.²⁴ The free exercise of religion is clearly a fundamental right.²⁵

Limitations on the free exercise of religion have traditionally been allowed, under the government's police power. The Supreme Court has held that the freedom to believe is absolute, but that the freedom to act in the furtherance of those beliefs is not.²⁶ Religious conduct remains subject to regulation for the protection of society.²⁷

¹⁹ See *Euclid*, 272 U.S. at 388-89.

²⁰ *Id.* at 395.

²¹ *Berman v. Parker*, 348 U.S. 26 (1954).

²² *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

²³ *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (The Court based *Renton* on both first amendment and zoning analyses).

²⁴ See *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (regulation found to infringe on personal choice in matters of family and family life).

²⁵ See *Walker*, *supra* note 1, at 154.

²⁶ *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); see also, *McDaniel v. Paty*, 435 U.S. 618 (1978).

²⁷ *Cantwell*, 310 U.S. at 304.

For example, one's religious beliefs may not justify the committing of an overt criminal act.²⁸ On the other hand, the Court has also held that some aspects of religious exercise cannot in any way be restricted or burdened by federal or state legislation.²⁹ The test traditionally applied in determining the validity of zoning ordinances is whether the state has a compelling interest in the legislation and whether less restrictive means exist to accomplish the state objective.³⁰

In *Lyng*, Justice O'Connor set out new³¹ criteria to be considered when determining whether government action has violated the free exercise clause. Those criteria severely limit the situations where government action implicates free exercise rights. After *Lyng*, the free exercise clause will apply only when the plaintiffs are in some way prohibited from practicing their religion.

The impact of narrowly defining what is protected by the free exercise clause is significant. Clearly, strict scrutiny review is appropriate when first amendment rights are at issue.³² By narrowly defining what is protected by the free exercise clause, Justice O'Connor was able to avoid strict scrutiny review in *Lyng*. In the Court's view, no first amendment concerns were implicated.³³ Therefore, the government did not need to show a compelling need for its action.³⁴ A mere legitimate state interest test was good enough. Justice O'Connor did not change the level of review for occasions when

²⁸ *Reynolds v. United States*, 98 U.S. 145, 162-64 (1878).

²⁹ *Branfield v. Brown*, 366 U.S. 599, 603 (1961).

³⁰ *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963).

³¹ This may not actually be a "new" approach. Before *Sherbert* the Supreme Court used analysis similar to that used in *Lyng* when deciding free exercise issues. See Note, *Wisconsin v. Yoder: The Right to Be Different-First Amendment Exemption for Amish under the Free Exercise Clause*, 22 DE PAUL L. REV. 539, 545-46 (1972).

³² *Thomas v. Collins*, 323 U.S. 516 (1945).

³³ *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. at ___, 108 S. Ct. at 1326.

³⁴ *Id.*

first amendment free exercise rights are implicated; instead she drastically reduced the number of occasions when an infringement rises to that level.

FACTS AND STYLE OF
LYNG V. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION

In *Lyng v. Northwest Indian Cemetery Protective Association*,³⁵ the United States Forest Service planned to complete a seventy-five mile road between two California towns by building a six mile connecting segment (the G-O road) through a national forest.³⁶ The area had historically been used by members of three Indian tribes to conduct religious rituals for the purpose of personal spiritual development.

A study commissioned by the Forest Service found that specific sites within the area were used for religious rituals, and that the area as a whole had great religious significance for the Indians. According to the study, successful religious use of the area depended on privacy, silence, and an undisturbed natural setting. The study found that construction along any of the available routes would cause serious and irreparable damage to the sanctity of the area.

Despite these findings, the Forest Service decided to proceed with the construction. The Forest Service chose a route through the area that avoided archeological sites as well as the sites used by contemporary Indians for specific spiritual activities. The Forest Service also adopted a plan allowing for the harvesting of timber in the area, with a half mile protective zone around the specific religious sites.

An Indian organization, individual Indians, and others challenged both the timber-harvesting and the road-building decisions in the United States District Court for the

³⁵ 485 U.S. 439, 108 S. Ct. 1319 (1988).

³⁶ The following factual description can be found at 485 U.S. at ___, 108 S. Ct. at 1321-22.

Northern District of California.³⁷ The district court found that both the timber-harvesting and road-building decisions violated the free exercise clause of the first amendment and several federal statutes.³⁸ With regard to the first amendment claim, the district court permanently enjoined the timber-harvesting and the road-building.³⁹ The Ninth Circuit affirmed the decision concluding that the Government failed to demonstrate a compelling interest in the completion of the G-O road.⁴⁰

ANALYSIS OF
LYNG v. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION

In *Lyng v. Northwest Indian Cemetery Protective Association*,⁴¹ the Supreme Court reversed the Ninth Circuit decision and determined that the United States Forest Service could build a six mile stretch of highway through government land considered sacred by local Indians.⁴² The Court reached this decision despite the appellate court's prediction that the construction and use of the road would "virtually destroy the Indians' ability to practice their religion."⁴³ Writing for the majority, Justice O'Connor based the Court's decision on two separate grounds.

First, the Court stated that the government had a "right to use what is, after all, *its* land"⁴⁴ (emphasis in original). The Court viewed the building of the highway as

³⁷ *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586, 589-90 (N.D. Cal. 1983).

³⁸ *Id.* at 594-96.

³⁹ *Id.*

⁴⁰ *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 695 (9th Cir. 1986).

⁴¹ 485 U.S. 439, 108 S. Ct. 1319 (1988).

⁴² *Id.* at ___, 108 S. Ct. at 1321.

⁴³ *Id.* at 1326 (quoting *Northwest Indian Cemetery Protective Ass'n*, 795 F.2d 688, 693 (9th Cir. 1986)).

⁴⁴ *Id.* at ___, 108 S. Ct. at 1327.

involving "legitimate conduct by government of its own affairs."⁴⁵ The Court also cited *Bowen v. Roy*⁴⁶ for the proposition that the free exercise clause "does not afford an individual a right to dictate the conduct of the Government's [own] internal procedures."⁴⁷ Because the government action at issue in *Lyng* affected government land, rather than private land, this portion of the Court's decision is inapplicable to cases involving the zoning of private property.

Second, and more important for zoning concerns, the Court also stated that the sacred Indian lands were not entitled to first amendment protection under the free exercise clause because the government action of building the road did not prohibit the practice of the Indian religion.⁴⁸

In *Lyng*, Justice O'Connor started from the perspective that the government action was "lawful"⁴⁹ and "legitimate."⁵⁰ She then set forth three criteria to be considered when determining whether government action is prohibited under the free exercise clause. When phrased in the form of questions, these criteria form a three-part test for what government action is permissible under the free exercise clause:

- 1) Whether the government action actually prohibits the practice of religion;⁵¹
- 2) whether the government action has a tendency to coerce individuals to act contrary to their religious beliefs;⁵²
- 3) whether the government action imposes penalties on the practice of that

⁴⁵ *Id.* at ___, 108 S. Ct. at 1326.

⁴⁶ 476 U.S. 693 (1986).

⁴⁷ *Lyng*, 485 U.S. at ___, 108 S. Ct. at 1325.

⁴⁸ *Id.* at ___, 108 S. Ct. at 1329.

⁴⁹ *Id.* at ___, 108 S. Ct. at 1326.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

religion.⁵³

If the answer to all three of these questions is negative, then no infringement of the free exercise of religion has occurred. All other "incidental effects of government programs," including those "that may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not give rise to constitutional concerns.⁵⁴

Justice O'Connor based these criteria upon the literal text of the free exercise clause that states that "Congress shall make no law *prohibiting* the free exercise [of religion]." (emphasis in original).⁵⁵ Only government action that somehow prohibits the practice of religion is unconstitutional. Mere interference with religious practices will not do.⁵⁶

This three part test does not focus upon the land use in question. It also does not focus upon the government action per se. Instead, it examines the effect of the government regulation of the land use on the practice of religion. The phrase "religious use," previously the cornerstone of "church zoning" jurisprudence, is now obsolete. As Justice O'Connor stated: "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."⁵⁷ Her point is that whether the land use is religious or not is irrelevant. Indeed, the *Lyng* Court admitted that the use at issue was religious.⁵⁸ The

⁵³ *Id.* This would come into play in a situation similar to that in *Sherbert v. Verner*, 374 U.S. 398 (1963), where ineligibility for unemployment benefits, based solely on a refusal to violate the Sabbath, was considered a fine on religious belief.

⁵⁴ *Lyng*, 485 U.S. 439, 108 S. Ct. 1326 (1988).

⁵⁵ *See id.* at 1329 (quoting U.S. CONST. amend. I).

⁵⁶ *Id.*

⁵⁷ *Id.* at ___, 108 S. Ct. 1326 (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)).

⁵⁸ *Id.*

pertinent question after *Lyng* is whether the government action prohibits the practice and belief of a particular religion.

By narrowly defining which governmental actions the free exercise clause disallows, *Lyng* invalidated, or at least undermined, a substantial amount of state case law defining "religious uses." Traditionally, state courts, to varying degrees, have protected religious uses of property from the states' otherwise plenary zoning power. Under *Lyng*, this must change. *Lyng* only barred actions which prohibit, as opposed to actions which inhibit the practice of a particular religion.⁵⁹

The Court made the practical argument that the "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."⁶⁰ The Court went on to point out that virtually every government action will affect the spiritual well-being of some person.⁶¹ The first amendment cannot give an individual citizen "a veto over public programs that do not prohibit the free exercise of religion."⁶²

It should be noted that Justice O'Connor tempered her position. She stated that nothing in the majority's opinion "should be read to encourage governmental insensitivity to the religious needs of any citizen."⁶³ As evidence of the government's sensitivity, she pointed to the accommodations made by the Forest Service to ensure that the Indians' religious practices were disturbed as little as possible by the building of the road.⁶⁴ This limitation on government conduct, *i.e.*, sensitivity to religious needs, is, as the dissent noted, a "toothless exhortation."⁶⁵ It is really no limitation at all.

⁵⁹ *Id.*

⁶⁰ *Id.* at ___, 108 S. Ct. at 1327.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at ___, 108 S. Ct. at 1327-28.

⁶⁴ *Id.* at ___, 108 S. Ct. at 1328.

⁶⁵ *Id.* at ___, 108 S. Ct. at 1338 (Brennan, J., dissenting).

In his dissenting opinion, Justice Brennan argued that the free exercise clause has a much broader scope than the majority allowed.⁶⁶ In Brennan's view, government actions that merely inhibit, in addition to those that prohibit, religious use are invalid under the first amendment.⁶⁷ Brennan stated that the free exercise clause is directed against any form of governmental action that inhibits or frustrates religious practice.⁶⁸ He rejected the majority's contention that the first amendment bars only outright prohibitions, indirect coercion, and financial penalties on the free exercise of religion.⁶⁹

Brennan viewed the majority's decision to allow the Forest Service to build the G-O road through sacred Indian lands as impermissible interference with the practice of the Indians' religion.⁷⁰ First, the majority's decision refused "to even acknowledge the constitutional injury the [Indians would] suffer."⁷¹ Second, the majority's "refusal" to affirm the injunction "essentially [left] Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices."⁷² Brennan cryptically concluded that this decision left the Indians with a hollow freedom, which "fail[ed] utterly to accord with the dictates of the First Amendment."⁷³

⁶⁶ *Id.* at ___, 108 S. Ct. at 1330 (Brennan, J., dissenting).

⁶⁷ *Id.* at ___, 108 S. Ct. at 1335 (Brennan, J., dissenting).

⁶⁸ *Id.*

⁶⁹ *Id.* at ___, 108 S. Ct. at 1333-34 (Brennan, J., dissenting).

⁷⁰ *Id.* at ___, 108 S. Ct. at 1330 (Brennan, J., dissenting).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at ___, 108 S. Ct. at 1340 (Brennan, J., dissenting). Justice Brennan's characterization of the majority decision as bad first amendment law will not be addressed here. This paper makes no attempt to critique the majority's reasoning in *Lyng*. This paper attempts to examine the impact of the *Lyng* decision, not question its wisdom.

Lyng is distinguishable from zoning cases because it involves use of federal and not private lands.⁷⁴ Therefore, the case does not compel state courts to change their free exercise standards in the zoning area. Still, *Lyng* is a guiding light in the traditionally dark and murky free exercise area.⁷⁵ State courts must now adopt a new approach to determine how churches and other religious institutions may be zoned. In every state, the new approach will give great power to zoning boards. Because states have widely different approaches to the free exercise question, each will have its own unique adaptations to the new standard.

VARIOUS STATE TESTS AND *LYNG'S* EFFECT ON THOSE TESTS

The first amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁷⁶ The United States Supreme Court has never addressed the clause in the specific context of zoning regulations.⁷⁷ As a result of this lack of guidance, states have developed individual approaches to determine what is considered a religious use. Approximately five schools of thought can be discerned from the diverse case law.⁷⁸ These approaches are best exemplified by the approaches of: 1) California; 2) Texas

⁷⁴ *Id.* at ___, 108 S. Ct. at 1327.

⁷⁵ The Supreme Court has stated that the language of the Religion Clauses of the first amendment "is at best opaque." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

⁷⁶ U.S. CONST. amend. I.

⁷⁷ *See supra* note 4.

⁷⁸ At least one commentator has stated that only two groups could be discerned, *i.e.*, the California and the New York approaches. In his view all of the other approaches fell into one of these two camps. *See Pearlman, Zoning and the Location of Religious Establishments*, 31 CATH. LAW. 314, 317 (1986).

and Pennsylvania; 3) the federal courts; 4) Michigan, New Jersey and Oregon; 5) New York.⁷⁹

The California Approach

California courts employ the most restrictive approach regarding whether churches may be excluded from certain areas.⁸⁰ California gives great weight to legislative judgment regarding zoning issues and is loathe to second-guess those judgments. The basic standard in California was stated in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*.⁸¹ There, a California court held a church could be prohibited from single family districts as long as a legislative body of a community made a valid judgment that the churches in those district would cause traffic, noise and parking problems.⁸² Like the majority in *Lyng*, the *Porterville* court started from the view that the zoning regulation was legitimate.⁸³ The *Porterville* court allowed the religious nature of the use in question to be taken into account as one of several factors to be considered when making a zoning decision.⁸⁴ The weight given this religious factor was not determined by the court, but by the community group making the zoning decision.⁸⁵ The court analogized the regulation of religious institutions through zoning ordinances to the regulation of religious institutions

⁷⁹ Goldberg, *Gimme Shelter: Religious Provision of Shelter to the Homeless as a Protected Use Under Zoning Laws*, 30 WASH. U.J. URB. & CONTEMP. L. 75 (1986).

⁸⁰ *Id.* at 90-91 n. 94.

⁸¹ 90 Cal. App. 2d 656, 203 P.2d 823 (1949), *appeal dismissed*, 338 U.S. 805 (1949).

⁸² *Id.* at ___, 203 P.2d at 825.

⁸³ *Id.* at ___, 203 P.2d at 825-26.

⁸⁴ *Id.* at ___, 203 P.2d at 825.

⁸⁵ *Id.*

through building codes.⁸⁶ According to the court, the plaintiff had the burden of proving that the regulation was unreasonable.⁸⁷ The plaintiff failed to make such a showing.⁸⁸

Since *Porterville*, the California courts have continued to hold that communities have the right to exclude churches from residential areas.⁸⁹ Those courts have generally treated religious uses the same as other uses for zoning purposes.⁹⁰ Under the California standard, the community must merely show a rational basis for zoning the church as it did.⁹¹ One court has even explicitly rejected the majority position disallowing restriction of churches as an extreme viewpoint which ignores the basis of modern day zoning.⁹² Although the California courts have not entirely ignored the free exercise limitations involved in zoning religious institutions,⁹³ they have held that the consideration of those limitations should be at the planning stage rather than at the judicial stage.⁹⁴

The restrictive nature of the California approach and its deference to legislative judgment will continue to have vitality after *Lyng*; however, the method in which California weighs the religious nature of a use will have to change. The California

⁸⁶ *Id.*

⁸⁷ *Id.* at ___, 203 P.2d at 826.

⁸⁸ *Id.*

⁸⁹ See *Garden Grove Congregation of Jehovah's Witness v. City of Garden Grove*, 176 Cal. App. 2d 136, 1 Cal Rptr. 65 (1959); *Minney v. City of Azusa*, 164 Cal. App. 2d 12, 330 P.2d 255 (1958); *City of Chico v. First Ave. Baptist Church*, 108 Cal. App. 2d 297, 238 P.2d 587 (1951).

⁹⁰ See *Minney*, 164 Cal. App. 2d 12, 330 P.2d 255 (1958); see also, *Garden Grove*, 176 Cal. App. 2d 136, 1 Cal Rptr. 65 (1959).

⁹¹ *Minney*, 164 Cal. App. 2d 12, 330 P.2d 255 (1958). The use of a rational basis standard can be implied from the court's decision.

⁹² *Id.*

⁹³ *Garden Grove*, 176 Cal. App. 2d 136, 1 Cal. Rptr. 65 (1959).

⁹⁴ *Id.*

approach does not examine the effect of the religious behavior upon the belief of the petitioners. Under the criteria set forth in *Lyng*, the petitioner's religious belief is the center of the analysis.

Applying the new criteria to the fact situation in *Porterville*, for instance, the court would examine whether the denial of the permit prohibited the practice of the religion, coerced the believers into acting contrary to their religious beliefs or financially penalized them for their beliefs. Because the zoning restriction in *Porterville* allowed churches in other parts of the city,⁹⁵ the practice of the petitioners was neither prohibited nor substantively frustrated. The case also offers no evidence that it would cost the religious practitioners any more money to build their church in a non-residential area. Under the *Lyng* test, therefore, the court would find no infringement of the right of free exercise of religion.⁹⁶

*The Texas/Pennsylvania Approach*⁹⁷

The Pennsylvania courts look at the purpose of the land's use to determine whether the conduct in question constitutes a "religious use" of the property.⁹⁸ Under this approach, if the purpose is found to be secular, the zoning ordinance will be upheld.⁹⁹ Thus, a cemetery was found to be secular even though the land on which the

⁹⁵ *Porterville*, 90 Cal. App. 2d at ___, 203 P.2d at 824.

⁹⁶ Factually, this case is remarkably similar to *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983). *Lakewood* is discussed extensively below.

⁹⁷ One commentator has stated that Texas and Pennsylvania represent separate approaches. See Goldberg, *supra* note 79, at 91. I believe, however, that Texas and Pennsylvania follow the same theoretical approach although the Texas approach is more restrictive in application.

⁹⁸ Goldberg, *supra* note 79.

⁹⁹ *Id.* (citing *In re Russian Orthodox Church*, 397 Pa. 126, 152 A.2d 489 (1959)). It makes no difference what type of entity is conducting the use. Mere ownership by a religious entity does not indicate a religious use. *Russian Orthodox* at 129, 152 A.2d at 491.

cemetery rested was owned by a church.¹⁰⁰ Similarly, a religious, for-profit radio station was held not to be a religious use.¹⁰¹ Religious use has been broadly defined in Pennsylvania. A Pennsylvania court has defined "church" as protecting "any purpose connected with the religious practices which the group or sect maintaining that particular church desires to pursue."¹⁰² For example, Pennsylvania courts have found retreat houses,¹⁰³ houses used to lodge travelling missionaries, and houses to conduct religious classes and to do office work are within the definition of churches.¹⁰⁴

The perspective of the Pennsylvania courts must change. Courts must not focus on the proposed use by the religious entity. Courts should focus on the effect of the government action on the religious belief. Note that under *Lyng*'s criteria the issue is not the effect of the government decision on the use itself, but on the religious belief of the petitioners.

For example, in the Pennsylvania cemetery case,¹⁰⁵ the court would not examine whether the use of the cemetery was religious, nor would the court ask whether the government action affected the use of the cemetery. After *Lyng*, the court should focus upon whether the government's restriction of the use of the property affected the belief of the petitioners. The *Lyng* approach focuses on the beliefs of the religious petitioners, not upon the effect of the government regulation on the use. The government's zoning of the cemetery did not prohibit the practice of the religion. The case offers no

¹⁰⁰ Russian Orthodox at 129, 152 A.2d at 491.

¹⁰¹ Goldberg, *supra* note 79, at 91-92 (citing *Gallagher v. Zoning Board of Adjustment*, 32 Pa. D & C.2d 669 (Dist. & County Ct. 1963)).

¹⁰² Goldberg, *supra* note 79, at 92 (citing *In re Stark*, 72 Pa. D & C. 168, 189 (1950)).

¹⁰³ *Id.*

¹⁰⁴ Goldberg, *supra* note 79, at 92 (citing *Conversion Center v. Zoning Bd. of Adjustment*, 2 Pa. Commw. 306, ___, 278 A.2d 369, 370 (1971)).

¹⁰⁵ Russian Orthodox, 397 Pa. 126, 152 A.2d 489 (1959).

evidence that the zoning restriction financially penalized the practice of the religion or that it had a tendency to coerce individuals into acting contrary to their religious beliefs. Therefore, after *Lyng*, the zoning in the cemetery case would be valid.

Although the Texas approach is theoretically similar to the Pennsylvania approach, the Texas view is more restrictive in its application. Like Pennsylvania, Texas courts look to the use in question to determine whether it is religious or secular. If the use is secular, it is not protected from zoning regulation. Unlike Pennsylvania, however, the Texas courts construe the meaning of religious use narrowly.¹⁰⁶ Although both states examine the use in question, the use will have to be closer to the core of the religious beliefs in Texas than it would be in Pennsylvania to receive protection.¹⁰⁷

*Coe v. City of Dallas*¹⁰⁸ gives a good example of the restrictive nature of the Texas approach. In *Coe*, the appellants, believers in faith healing, sought to compel the City of Dallas to issue a building permit for the purposes of building a church.¹⁰⁹ The court upheld the city council's determination that the proposed site was not a church even though the building was going to have 600 square feet of church proper attached to 2400 square feet of healing or prayer space.¹¹⁰ One commentator has noted that the city council's decision that the building was not a church was probably erroneous.¹¹¹

After *Lyng*, the restrictive nature of this approach will remain substantially unchanged. Texas courts will continue to rarely invoke first amendment analysis in church zoning cases. Justice O'Connor's opinion indicates that the United States

¹⁰⁶ Goldberg, *supra* note 79, at 91 (discussing *Heard v. City of Dallas*, 456 S.W.2d 440 (Tex. Civ. App. 1970)).

¹⁰⁷ *Cf.*, Goldberg, *supra* note 79, at 90-92.

¹⁰⁸ 266 S.W.2d 181 (Tex. Civ. App. 1953).

¹⁰⁹ *Id.* at 182-83.

¹¹⁰ *Id.* at 183.

¹¹¹ Walker, *supra* note 1, at 163 (1982).

Supreme Court, like the courts of Texas, is willing to trust the legislature's decision on the appropriate location for churches. In practice, there should be no change in the result of church zoning cases in Texas.

The rationale of the Texas approach will change somewhat, however, because these courts must now shift their examination of "religious uses" away from the use itself and focus on the effect of the government's regulation of that use upon the practice of the religion involved. Thus, in *Coe*, the question is not whether the religious healing that would occur in the healing space is a religious use, but whether the denial of the building permit prohibits the practice of the religion, penalizes the practitioners of the religion for their beliefs, or somehow coerces those practitioners into acting contrary to their beliefs.

Under the new criteria, the court would most likely find that the church in *Coe* would not pass the three part test. The denial of the building permit, absent evidence that the church was unable to build elsewhere in the city, does not prohibit the practice of the religion. Additionally, no evidence exists showing that the zoning restriction either coerced the petitioners into not believing in faith healing or imposed any financial penalty for holding that belief. Therefore, the denial of the building permit would not implicate first amendment concerns.

The Federal Approach

Three federal courts have specifically addressed the circumstances under which religious institutions may be zoned. Each court differs slightly on the test to be applied in determining what is a religious use. The most thorough treatment of the topic was given by the Eleventh Circuit in *Grosz v. City of Miami Beach*.¹¹² The *Grosz* court put the test in terms of two threshold questions:

¹¹² 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984).

1) whether the government action regulated religious belief or religious conduct?¹¹³ If the government is attempting to regulate the plaintiff's beliefs, the regulation was invalid. If, however, the regulation was merely attempting to regulate religious conduct, then the first threshold would be passed. If the government action validly regulated conduct, the court would move to the second consideration;¹¹⁴

2) whether the regulation had a secular purpose as well as a secular effect?¹¹⁵ A sectarian purpose was prohibited, whereas a secular purpose was allowed.¹¹⁶

With its focus on the government action, the initial inquiry in *Grosz* is, to some extent, still correct after *Lyng*. The first part of the *Grosz* test is inaccurate because it examines the government's purpose for the zoning restriction instead of the actual effect of that restriction. Part one of the *Grosz* test examines whether the government action somehow infringes upon the practice of religious beliefs. The purposes of the regulation are irrelevant. The effect of the regulation on the practice of the religion is what is important.

For the same reason the second part of the *Grosz* test is incorrect after *Lyng* to the extent that it looks exclusively to the purposes of the government action and not to the effect of the government action upon the beliefs of the petitioners.¹¹⁷ The purposes of the regulation are irrelevant after *Lyng*. There, the majority did not find that the government's purposes in constructing the G-O road were vital. That was not the

¹¹³ *Id.* at 733.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ The *Grosz* court gave some consideration to the effect of a government regulation, noting that a law would violate the free exercise clause if the "essential effect of the government action [was] to influence negatively the pursuit of religious activity or the expression of religious belief." *Id.* at 733.

crucial issue. The crucial issue was whether the government's use prohibited the practice of religion.¹¹⁸

The second federal case to address the zoning of religious institutions was *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*.¹¹⁹ *Lakewood* involved a church which wanted to relocate in a residential neighborhood consisting of large one and two-family homes.¹²⁰ The church was initially denied an exception to the local residential zoning for several reasons, including noise and traffic hazards.¹²¹ After a comprehensive rezoning of the city, the zoning ordinance left the property in a single-family district that did not permit churches. The church was again denied a permit.¹²²

The *Lakewood* court examined the nature of the religious observance and the burden placed on that observance by the zoning regulation.¹²³ The court concluded that though financial and aesthetic burdens existed, they were only indirect burdens. Therefore, first amendment rights were not implicated.¹²⁴ The court held that relocating to a more attractive part of the city, though desirable, was not an indispensable tenet of the religious belief.¹²⁵ The fact that only 10% of the land in the city was suitable for a new church was not a factor in the decision. If the church wished to locate in

¹¹⁸ 485 U.S. at ___, 108 S. Ct. at 1326.

¹¹⁹ 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983).

¹²⁰ *Id.* at 304.

¹²¹ *Id.* at 304-05.

¹²² *Id.* at 305.

¹²³ *Id.* at 306-07.

¹²⁴ *Id.* at 307-08.

¹²⁵ *Id.* at 307.

a residential neighborhood, it could buy existing churches or buildings in 90% of the city or use the 10% of the city that was zoned for religious uses.¹²⁶

The *Lakewood* analysis should continue to have vitality after *Lyng* and should still be an appropriate standard for determining whether a zoning regulation infringes upon the free exercise clause. Applying the three criteria of *Lyng* to the situation in *Lakewood*, one gets the same result with virtually the same reasoning. The denial of the building permit did not prohibit the exercise of religion. The religious group could still practice their religion either where they had been doing so previously or in the 10% of the city left open for churches. No one was compelled to act contrary to their religious beliefs. The petitioners could still practice in the same manner and in the same location as they had before. Finally, the financial penalty imposed by the city, *i.e.*, not allowing the church to build on residential property, did not directly penalize the petitioners for their beliefs.¹²⁷ No fine was imposed for the belief of the religion.

The most recent federal case to address the church zoning issue is *Islamic Center of Mississippi, Inc. v. City of Starkville*.¹²⁸ *Islamic Center* involved a group of Muslim college students who were denied a permit to establish a religious institution as a place of worship and housing. The Fifth Circuit determined that the students' proposed establishment of a place of worship was a religious use and strictly scrutinized the state action.¹²⁹ The court held that the denial of the permit impermissibly burdened

¹²⁶ *Id.* at 307. Note that the Supreme Court has previously employed similar reasoning in the case of adult uses. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

¹²⁷ Arguably, any added costs the church accrued in finding and purchasing alternate land could be construed as similar to the costs the court found offensive in *Sherbert v. Verner*, 374 U.S. 398 (1963). I have not taken that view here, however, because the penalty involved in *Sherbert*, *i.e.*, no unemployment benefits unless applicant worked on the Sabbath, was a direct penalty to the free exercise of religion. *Id.* Here, any added cost would be an indirect cost to the petitioner.

¹²⁸ 840 F.2d 293 (5th Cir. 1988).

¹²⁹ *Id.* at 300.

the students' free exercise rights and suggested that it amounted to a denial of equal protection under the law.¹³⁰

In light of *Lyng*, the Fifth Circuit's decision in *Islamic Center* is troublesome. The decision could go either way. It could be argued that the denial of the permit did not prohibit the students from practicing their religion. They did not have a place of worship before they applied for the permit but they had still worshipped; no coercion of any type was involved here, and there was no financial penalty for practicing their beliefs. On the other hand, the structure involved here was a "church," *i.e.*, a place of worship. If the free exercise clause does not prohibit the government from denying a permit to an organization attempting to establish (as opposed to merely relocating as in *Lakewood*) a religious institution, then it would seem that *Lyng* has essentially read the free exercise clause out of zoning issues.

The Michigan/New Jersey/Oregon Approach

This view focuses not upon the use as in the Pennsylvania approach, but upon the structure involved. These courts ask whether the building or property affected by the government regulation is a "church."¹³¹ Thus, in *Portage Township v. Full Salvation Union*,¹³² camp meetings requiring the use of tents and shacks were found to violate the local zoning ordinance and were not considered a religious use.¹³³ The court reasoned that, even though religious services were conducted in the tents, not every place where religious services were held is a "church."¹³⁴

¹³⁰ *Id.*

¹³¹ Goldberg, *supra* note 79, at 92.

¹³² 318 Mich. 693, 29 N.W.2d 297 (1947), *appeal dismissed*, 333 U.S. 851 (1948), *reh'g denied*, 334 U.S. 830 (1948).

¹³³ *Id.* at 699-700, 29 N.W.2d at 800.

¹³⁴ *Id.* at 700, 29 N.W.2d at 300.

Similarly, in *Sexton v. Bates*,¹³⁵ the Superior Court of New Jersey found that a Jewish mikvah¹³⁶ was not a "church" or "accessory use" and disallowed a building permit authorizing alterations for its construction in a one family house.¹³⁷ The court, though accepting the religious importance of the mikvah, narrowly construed the term "church"¹³⁸ to be "a place where persons regularly assembled for worship."¹³⁹ One commentator has correctly noted that by this narrow "semantic inquiry," the New Jersey Court "effectively precluded consideration of the free exercise questions presented by the restriction."¹⁴⁰

After *Lyng*, this restriction, *i.e.*, the refusal of the building permit to build a mikvah in a home zoned as residential, would not prohibit the practice of the religion, financially penalize the practice of the religion, or coerce Jewish believers into acting contrary to their religious beliefs. The mikvah could still take place in an authorized place of worship, at no extra cost to the believers. As long as the city authorized some place for the mikvah, no free exercise claims would succeed under *Lyng*. In short, after *Lyng*, as long as this zoning restriction is not arbitrary, it is valid.

Using similar reasoning, an Oregon court upheld the local county commissioner's denial of a conditional use permit for a church, school and gymnasium in a residentially zoned district.¹⁴¹ The court upheld the administrative board's decision because a rational

¹³⁵ 17 N.J. Super. 246, 85 A.2d 833 (1951), *affirmed, sub nom.*, *Sexton v. Essex County Ritualarium*, 21 N.J. Super. 329, 91 A.2d 162 (1952).

¹³⁶ A mikvah, used mostly by Jewish females, is a ritualistic bathing place for purification in accordance with Jewish law. *Id.* at 252-53, 85 A.2d at 835-36.

¹³⁷ *Id.* at 248, 85 A.2d at 838-39.

¹³⁸ The court assumed that something had to fit into the definition of church to be considered an accessory use. *Id.* at 258, 85 A.2d at 839.

¹³⁹ *Id.* at 255, 85 A.2d at 837.

¹⁴⁰ Walker, *supra* note 1, at 159.

¹⁴¹ *Archdiocese of Portland v. County of Washington*, 254 Or. 77, 458 P.2d 682 (1969) (en banc).

basis existed for the board's decision.¹⁴² The court here, as the New Jersey court in *Sexton v. Bates*, did not consider the structure involved as essential to the religious belief of the plaintiffs.¹⁴³ It was not a "church" and therefore was not entitled to free exercise protection.

Again, after *Lyng*, the Supreme Court would not consider these "religious uses" sufficient to trigger the free exercise clause. A school and gymnasium are not absolutely essential to the plaintiff's beliefs; denial of the permit imposes no financial penalty upon the believers; and the denial of the permit did not coerce the plaintiffs to act contrary to their religious beliefs. No first amendment rights are implicated. In sum, the Michigan/New Jersey/Oregon "is it a church?" approach should have no application after *Lyng*. There, the Court explicitly stated that the "Indian religious practices [were] intimately and inextricably bound up" with the land at issue in the case.¹⁴⁴ In Michigan/New Jersey terms, the land at issue in *Lyng* was a "church." This factor did not influence the Court's decision. The focus now is not on the structure but on the effect of a restriction on actual beliefs.

The New York Approach

New York has the most expansive definition of "religious use." The New York approach is the majority approach in the United States.¹⁴⁵ In New York, a religious use is broadly defined as "a conduct with a religious purpose."¹⁴⁶ This requirement has been interpreted to include "any conduct which is in accordance with the doctrines, practices

¹⁴² *Id.* at 87, 458 P.2d at 686-87.

¹⁴³ *Id.*

¹⁴⁴ *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, ___, 108 S. Ct. 1319, 1326 (1988).

¹⁴⁵ See Pearlman, *Zoning and the Location of Religious Institutions*, 31 CATH. LAW. 314, 317 (1986).

¹⁴⁶ *Slevin v. Long Island Jewish Medical Center*, 66 Misc. 2d 312, 316, 319 N.Y.S.2d 937, 943 (Sup. Ct. 1971).

or regulations of a religious organization."¹⁴⁷ Any activity related to the purpose of a religious organization is a religious use.¹⁴⁸ This expansive protection of churches is based upon the theory that churches, synagogues and other religious institutions serve a high moral purpose and therefore should not be subject to local zoning as are other properties.¹⁴⁹

Lyng and any progeny should effectively destroy this approach. The judicial zoning exercised by the New York courts when reviewing religious use issues is contrary to the language and spirit of *Lyng*. The "Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours."¹⁵⁰ That task, to the extent it is feasible, is for the legislatures and other institutions."¹⁵¹

The New York approach is invalid after *Lyng* for two reasons. First, New York courts erroneously focus upon the use rather than the effect of the government action. Second, they are very expansive in their definition of religious use. Clearly, the intention of the court in *Lyng* was to limit, not increase, the protection the free exercise clause offered against the government's power to regulate religious property.

For example, in *Community Synagogue v. Bates*,¹⁵² the New York Court of Appeals reversed a zoning board's determination denying a use permit under a village

¹⁴⁷ Goldberg, *supra* note 79, at 93 (citing Note, *Judicial Definition of Religious Use in Zoning Cases*, URB. L. ANN 291, 292 (1973)).

¹⁴⁸ 2 R. ANDERSON, AMERICAN LAW OF ZONING, § 12.25 at 460 (2d ed. 1976).

¹⁴⁹ *Community Synagogue v. Bates*, 1 N.Y.2d 445, 136 N.E.2d 488, 154 N.Y.S.2d 15 (1956).

¹⁵⁰ *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, ___, 108 S. Ct. 1319, 1327 (1988).

¹⁵¹ *Id.*

¹⁵² 1 N.Y.2d 445, 136 N.E.2d 488, 154 N.Y.S.2d 15 (1956).

zoning ordinance.¹⁵³ The court found the local board's factual conclusion that the property was to be utilized for other than a church or other strictly religious use to be incorrect.¹⁵⁴ The court concluded that to allow the zoning board to have the authority to deny an application for a church at any particular location would be to confer upon it the power to dictate the location of a place of worship, and to thereby interfere with the "free exercise and enjoyment of religious profession and worship."¹⁵⁵

This type of judicial factual review of zoning decisions is entirely against the basic notion of the *Lyng* decision. The *Lyng* approach would presume the validity of the zoning board's decision. Then, it would use the three part test. If no type of prohibition, penalty or coercion appeared, then the zoning regulation would be valid. With its expansive view, New York effectively defines zoning ordinances that affect religious property as presumptively invalid. Clearly, this is contrary to the intent and language of *Lyng*.

In *Diocese of Rochester v. Planning Board*,¹⁵⁶ a companion case to *Bates*, the court held that an adverse effect on property values, loss of potential tax revenue, decreased enjoyment of neighboring property, possible traffic hazards and lack of opportunity for future residential development failed to justify the denial of a building permit for a church and school.¹⁵⁷ Here, as in *Bates*, the New York courts required a compelling¹⁵⁸ interest by the state to justify the imposition of burdens on a religious institution. The very means most often invoked to justify imposition of zoning under

¹⁵³ *Id.* at 458, 136 N.E.2d at 496, 154 N.Y.S.2d at 26.

¹⁵⁴ *Id.* at 453, 136 N.E.2d at 493, 154 N.Y.S.2d at 21-22.

¹⁵⁵ *Id.* at 458, 136 N.E.2d at 496, 154 N.Y.S.2d at 26 (quoting N.Y. CONST. art. I, sec. 3).

¹⁵⁶ 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (Sup. Ct. 1956).

¹⁵⁷ *Id.* at 524-26, 136 N.E.2d at 835-37, 154 N.Y.S.2d at 861-63.

¹⁵⁸ The *Diocese of Rochester* court did not use the word "compelling."

the rational basis inquiry--diminished potential tax revenue and enjoyment of property--were explicitly found to be insufficient to deny the church the use of its property for religious purposes.¹⁵⁹

In short, under the New York approach, any use of property that is connected in any way with the beliefs of a religious organization is protected from the zoning authority of the local government. After *Lyng*, this position is constitutionally unsound.

LYNG'S EFFECT ON VIRGINIA LAW

Unlike the states addressed above, Virginia courts have never directly addressed the role of the federal or state¹⁶⁰ free exercise clauses in the zoning context. The question in Virginia, therefore, is not how to change the law regarding the zoning of religious institutions but how to merge existing zoning law with free exercise jurisprudence after *Lyng*. In Virginia, a zoning board's decision to zone an area is considered a "legislative" action.¹⁶¹ There is a rebuttable presumption that legislative actions are reasonable,¹⁶² and the party challenging the zoning regulation has the burden of rebutting that presumption.¹⁶³ "Legislative action is [considered] reasonable if the matter in issue is fairly debatable."¹⁶⁴ An issue is "fairly debatable" when the evidence offered in support of the opposing views would lead objective and reasonable persons

¹⁵⁹ Walker, *supra* note 1, at 173.

¹⁶⁰ VA. CONST. art. I § 16.

¹⁶¹ County Bd. of Arlington County v. Bratic, 237 Va. 221, 227, 377 S.E.2d 368, 371 (1989).

¹⁶² *Id.* at 371.

¹⁶³ Bratic, 237 Va. at 227, 377 S.E.2d at 371; Bd. of Supervisors in Loudoun County v. Lerner, 221 Va. 30, 34, 267 S.E.2d 100, 102 (1980).

¹⁶⁴ Bratic, 237 Va. at 227, 377 S.E.2d at 371; *see also*, Fairfax County v. Parker, 186 Va. 675, 680, 44 S.E.2d 9, 12 (1947).

to different conclusions.¹⁶⁵ When the issue of reasonableness is "fairly debatable," the legislative decision to zone will be sustained.¹⁶⁶

Thus, when coupled with these existing standards, *Lyng* allows Virginia localities to zone churches freely, as long as the following conditions are met:

- 1) The zoning decision is a reasonable one (whether the decision is correct is an issue over which objective and reasonable people could differ);
- 2) The Board is "sensitive" to the religious nature of the property;
- 3) The zoning action does not impose financial penalties on the practice of that religion;
- 4) The zoning decision does not actually prohibit the practice of religion; and,
- 5) The government action does not tend to coerce individuals to act contrary to their religious beliefs.

Thus, Virginia lawmakers have a relatively free hand when zoning religious institutions. As long as they act reasonably and take religious beliefs into consideration when making zoning decisions, they should be able to zone religious facilities with minimal constraint.

CONCLUSION

The *Lyng* decision provides a unified approach to what has been a diverse and confused area of the law. Because no Supreme Court decision had ever addressed the free exercise clause in the land use context, state courts had differed widely on the protection afforded religious institutions in the zoning context. Although not directly applicable to the zoning context, *Lyng* is significant because it establishes

¹⁶⁵ Bratic, 237 Va. at 227, 377 S.E.2d at 371.; *see also*, Fairfax County v. Williams, 216 Va. 49, 58, 216 S.E.2d 33, 40 (1975).

¹⁶⁶ Bratic, 237 Va. at 227, 377 S.E.2d at 371.

some basic parameters under which state and lower federal courts can continue to guide free exercise jurisprudence in land use legislation. These parameters are:

- 1) The protection afforded religious institutions by the free exercise clause is narrow, not broad as has been suggested by some commentators.¹⁶⁷
- 2) Whether something is protected by the free exercise clause will be determined by looking at three criteria:
 - a) whether the government action actually prohibits the practice of religion;
 - b) whether the government action has a tendency to coerce individuals to act contrary to their religious beliefs;
 - c) whether the government action imposes financial penalties on the practice of that religion.
- 3) The government, at least to some extent, must continue to be sensitive to the needs of religious institutions.

Lyng has given state courts some guidance in an area where none had previously existed. To conform with *Lyng*, every state that has addressed the issue of church zoning must now change to some degree. The broadest approaches, *e.g.*, New York's, are now invalid. While it is true that religious uses have traditionally been viewed as favored uses,¹⁶⁸ how this favoritism will be factored in the free exercise clause is unclear after the *Lyng* decision. Specific details will have to be determined in subsequent cases. Some protection does survive; how much is uncertain.

Even with this surviving protection, *Lyng* has severely limited any first amendment protection of religious institutions in the land use context. After *Lyng*, the

¹⁶⁷ Walker, *supra* note 1, at 173. See also, Note, *In Search of Objective Criteria For a National Standard of Review in Church Zoning: Islamic Center of Mississippi, Inc. v. City of Starkville*, 11 GEO. MASON U.L. REV. 147 (1989).

¹⁶⁸ See *Garden Grove Congregation of Jehovah's Witness v. City of Garden Grove*, 176 Cal. App. 2d 136, 1 Cal. Rptr. 65 (1959).

standard in the religious zoning context should be similar to the *Lakewood* holding discussed above. First amendment protection will be construed narrowly. As long as local zoning boards are somewhat solicitous of the concerns of religious institutions, these boards can essentially zone religious institutions as they would any other properties. *Lyng* gives the state power at the expense of the church.

ATTORNEY ADVERTISING AND SOLICITATION IN VIRGINIA

Peter S. Jordan
Steven N. Nachman

Since the mid-1970s, when the modern commercial speech doctrine was born, attorneys throughout the United States have turned in increasing numbers to advertising and solicitation in order to attract clients. States have struggled with such efforts, striving on the one hand to protect the public from abusive advertising and solicitation practices while on the other to respect attorneys' first amendment rights. The Virginia rules governing advertising and solicitation, adopted in 1983 in the revised Code of Professional Responsibility, are considerably more permissive than the rules of most other states and those recommended by the ABA. This article surveys the major United States Supreme Court decisions on advertising and solicitation, the ABA Model rules, and the Virginia disciplinary rules. Following this article is an interview with the President of the Virginia State Bar Association, Phillip B. Morris, concerning efforts by the association to place greater restrictions on in-person solicitation of prospective clients.

CONSTITUTIONAL DEVELOPMENT: FROM *BATES* TO *SHAPERO*

For nearly a century since Alabama first addressed the issue of ethical standards for attorney behavior in 1887, the United States Supreme Court considered absolute prohibitions on attorney advertising and solicitation constitutional.¹ In 1976 the

¹ The Alabama State Bar Association adopted the first Code of Professional Ethics in 1887, permitting attorneys to provide useful information about legal services to the general public. The courts, however, did not look favorably on attorney self-promotion in any form. See Calvani, Langenfeld & Shuford, *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761, 762-74 (1988) (containing a discussion of the history of ethical and judicial restraints on attorney advertising and solicitation). See also Bowers & Stephens, *Attorney Advertising and the First Amendment: The Development and Impact of a Constitutional Standard*, 17 MEM. ST. U.L. REV. 221 (1987).

Court, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,² formulated the modern commercial speech doctrine, affording commercial speech limited first amendment protection.³ The recognition of advertising as commercial speech forced the courts to reevaluate the constitutionality of prohibitions on attorney advertising and solicitation.⁴

The following year, in *Bates v. State Bar of Arizona*,⁵ the Court extended first amendment protection to certain forms of attorney advertising. In *Bates*, two attorneys listed their fees for routine legal services in local newspaper advertisements.⁶ The Court found that the public interest in receiving information outweighed the state's interest in suppressing attorney advertising.⁷ The Court held that although a state could prohibit false, deceptive or misleading advertising, it could not impose an absolute ban on all attorney advertising.⁸

The Court clarified this standard in *In re R.M.J.*⁹ by ruling that absent a finding that the advertising in question was false or misleading, restrictions on attorney advertising "may be no broader than reasonably necessary to prevent . . . deception."¹⁰ Accordingly the Court held a regulation prohibiting the mailing of professional

² 425 U.S. 748 (1976).

³ *Id.* at 770. See also Recent Developments, *Shapiro v. Kentucky Bar Association: Regulating Lawyers' Targeted Direct-Mail Advertising -- A Constitutional Standard For An Ethical Dilemma*, 63 TUL. L. REV. 724, 726-27 n.13 (1989).

⁴ See Note, *Professional Ethics -- Direct Mailings by Attorneys to Target Audiences*, 16 MEM. ST. U.L. REV. 409, 410 (1986).

⁵ 433 U.S. 350 (1977).

⁶ *Id.* at 354.

⁷ *Id.* at 379.

⁸ *Id.* at 383-84.

⁹ 455 U.S. 191 (1982).

¹⁰ *Id.* at 203. See also Recent Developments, *supra* note 3, at 728.

announcement cards by attorneys to persons other than family, friends, other attorneys, clients and former clients overly restrictive and in violation of the first amendment.¹¹

The Supreme Court also considered the extension of first amendment protection to different forms of client solicitation by attorneys in the companion cases of *Ohralik v. Ohio State Bar Association*¹² and *In re Primus*.¹³ These two cases represented opposite ends of the solicitation spectrum. In *Ohralik*, an attorney personally solicited the business of two young automobile accident victims.¹⁴ The Court upheld the state's prophylactic rule against in-person solicitation for pecuniary gain, finding that the potential for undue pressure, overreaching and other forms of misconduct inherent in in-person solicitation went beyond the constitutional protection enunciated in *Bates*.¹⁵ In *Primus*, however, the Court ruled that solicitation by direct-mail letter informing a potential client of free legal assistance available from the A.C.L.U. was worthy of constitutional protection.¹⁶ The Court distinguished this case from *Ohralik* by characterizing the solicitation as politically rather than financially motivated and determining that the potential adverse consequences of in-person solicitation were not shown to be present in this direct-mail solicitation.¹⁷

The Supreme Court again confronted the issue of attorney advertising in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,¹⁸ which involved a newspaper advertisement directed towards a specific class of potential clients.

¹¹ R.M.J., 455 U.S. at 206-07.

¹² 436 U.S. 447 (1978).

¹³ 436 U.S. 412 (1978).

¹⁴ *Ohralik*, 436 U.S. at 449-50.

¹⁵ *Id.* at 465-68.

¹⁶ *Primus*, 436 U.S. 439.

¹⁷ *Id.* at 434-36.

¹⁸ 471 U.S. 626 (1985).

The advertisement targeted women who had suffered injuries from the use of the Dalkon Shield Intrauterine Device.¹⁹ The Court found the advertisement to be truthful and that the public interest in the free flow of information outweighed the justifications for regulation proffered by the state.²⁰ The Court reasoned that print advertisements posed less risk of overreaching or undue influence than in-person solicitation,²¹ and held that states are not permitted to restrict truthful, non-deceptive attorney print advertising for any reason.²²

Though *Zauderer* presented a factual situation falling just short of direct-mail solicitation, the Supreme Court addressed the classic direct-mail scenario in *Shapero v. Kentucky Bar Association*.²³ This case presented the question of whether a state could prohibit an attorney from engaging in truthful and nondeceptive targeted direct-mail solicitation of potential clients known to face particular legal problems.²⁴

The Kentucky Supreme Court adopted the American Bar Association's Model Rule of Professional Conduct 7.3,²⁵ which prohibited targeted direct-mail solicitation by lawyers for pecuniary gain, to support its decision disallowing the proposed

¹⁹ *Id.* at 630-31.

²⁰ *Id.* at 639-42. The state advanced the traditional arguments, advanced in *Ohralik*, 436 U.S. at 465-68, that an absolute ban was necessary to prevent overreaching, undue influence, invasion of privacy, and fraud. *Zauderer*, 471 U.S. at 641.

²¹ *Zauderer*, 471 U.S. at 642.

²² *Id.* at 646-47.

²³ 486 U.S. 466 (1988).

²⁴ *Id.* at 468. Mr. Shapero, a member of the Kentucky Bar, requested a ruling from the State's Attorneys Advertising Commission on a proposed letter offering his legal services "to potential clients who have had a foreclosure suit filed against them." *Id.* at 469.

²⁵ Model Rules of Professional Conduct (1983) [hereinafter cited as Model Rules]. The rules applicable to advertising and solicitation are Rule 7.1 through 7.5. The American Bar Association has amended Model Rule 7.3 in light of the *Shapero* decision; see *infra*, note 34.

solicitation.²⁶ The United States Supreme Court reversed.²⁷

The Court equated the permissible targeted newspaper advertisement in *Zauderer* to a targeted mass-mailing of the type found in *Shapero*.²⁸ The Court also distinguished *Shapero's* targeted mass-mailing solicitation from the prohibited in-person solicitation found in *Ohralik*, finding targeted direct-mail posed less risk of abusive practices than did in-person solicitation.²⁹ The Court held that states could not categorically prohibit targeted direct-mail solicitation which is neither false nor misleading, but that certain forms of regulation were indeed permissible.³⁰ The Court also reiterated the principle that a total ban of in-person solicitation for pecuniary gain is permissible.³¹

THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

The *Shapero* decision extended first amendment protection to all forms of non-

²⁶ *Shapero v. Kentucky Bar Association*, 108 Ky. 1916, 1920, *rev'd* 486 U.S. 466 (1988).

²⁷ *Shapero*, 486 U.S. 466, 480 (1988).

²⁸ *Id.* at 473-74.

²⁹ *Id.* at 475-76. "In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference . . ." and in this respect "targeted, direct-mail solicitation is distinguishable from in-person solicitation" *Id.* at 475.

³⁰ *Id.* at 475-78. States may promulgate regulations that are "far less restrictive and more precise" than a total ban in order to minimize abuses and mistakes. *Id.* at 476. Examples of permissible regulations include: the filing of direct-mail advertisements with an appropriate state agency; identification of the letter as an advertisement; inclusion of additional information or disclosures in every mailing; inclusion of information on how to report inaccurate or misleading letters. *Id.* at 476-78. See also, Wechsler, *Direct Mail Solicitation By Attorneys: A Pragmatic Approach To A New Rule*, 39 SYR. L. REV. 973, 987-88 (1988).

³¹ *Shapero*, 486 U.S. at 472, 475. The Court reviewed the factors justifying a prophylactic restriction of all in-person solicitation: in-person solicitation is a "practice rife with possibilities of overreaching, invasion of privacy, the exercise of undue influence, and outright fraud" and "unique difficulties" adhere to state regulation of in-person solicitation because it is "not visible or otherwise open to public scrutiny." *Id.* at 475 (citing *Ohralik*, 436 U.S. at 457-58, 466).

deceptive solicitation except in-person solicitation.³² The decision also directly invalidated the old ABA Model Rule 7.3.³³ The ABA has amended Model Rule 7.3 to comply with constitutional standards.³⁴ The new ABA Model Rule prohibits lawyers from using direct-mail to contact potential clients who have made known their desire not to receive such communications and from engaging in conduct that involves coercion, duress or harassment. The rule also requires that targeted direct-mailings include the words "Advertising Material" on the envelope.³⁵ The rule retains the complete prohibition on in-person solicitation for pecuniary gain of persons with whom the attorney has no family or prior professional relationship.³⁶

THE VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY

The revised Virginia Code of Professional Responsibility was adopted in 1983. The Virginia Code deviates from the ABA Model Code in its standards for advertising, placing fewer restrictions on Virginia lawyers than the ABA recommended.³⁷ The rules governing attorney advertising and solicitation are set forth in Canon 2 of the Virginia Code.³⁸

³² See Recent Developments, *supra* note 3, at 732-33.

³³ See *supra* note 25.

³⁴ See Law. Man. on Prof. Conduct (ABA/BNA) ¶ 81: 601-608 (Sept. 27, 1989) (contains text of amended The Model Rule 7.3).

³⁵ *Id.*; Model Rule 7.3(b)(c) (as amended Feb. 7, 1989).

³⁶ *Id.*; Model Rule 7.3(a) (as amended Feb. 7, 1989).

³⁷ See Comment, *The Status of Lawyer Advertising in Virginia: What Is Good Taste*, 19 U. RICH. L. REV. 629, 634 (1985).

³⁸ Virginia Code of Professional Responsibility, Canon 2, DRs 2-101 through 2-104 (1983) [hereinafter cited as VCPR]. Further guidelines to assist attorneys to determine when an advertisement or personal communication goes beyond the scope permitted by Virginia law are given in the Ethical Considerations which follow the Disciplinary Rules, ECs 2-1 through 2-17.

DR 2-103, which concerns solicitation, reads, in part:

(A) A lawyer shall not, by in-person communication, solicit

Advertising

The advertising rule prohibits a lawyer from using a form of "public communication" which "contains a false, fraudulent, misleading or deceptive statement or claim."³⁹ The rule also requires that public communication for which a lawyer gives value must be so identified unless it is apparent from the context of the communication.⁴⁰ Public communication is defined as "all communication other than 'in-person' communication."⁴¹

Solicitation

The solicitation rule prohibits only "in-person" communication - defined as "face to face communication and telephonic communication"⁴² - which is false or deceptive, or involves the use of, or the potential for, "coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching or vexatious or harassing conduct."⁴³ Factors to be considered include "the sophistication regarding legal

employment as a private practitioner for himself, his partner, or associate or any other lawyer affiliated with him or his firm from a nonlawyer who has not sought his advice regarding employment of a lawyer if:

- (1) Such communication contains a false, fraudulent, misleading, or deceptive statement or claim; or
- (2) Such communication has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct, taking into account the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made. In person communication means face-to-face communication and telephonic communication.

Id.

³⁹ *Id.* at Canon 2, DR 2-101.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at Canon 2, DR 2-103.

⁴³ *Id.*

matters, the physical, emotional, or mental state of the person to whom the communication is directed and the circumstances in which the communication is made."⁴⁴

The Virginia regime for regulating attorney advertising and solicitation provides a wide range of freedom for attorneys, particularly in the areas of direct-mail and in-person solicitation.

All forms of direct-mail solicitation, including targeted direct-mail, are considered "public communication" subject only to the prohibition against false or deceptive statements.⁴⁵ Virginia has declined to adopt the alternative regulations suggested by the Court in *Shapiro* and by the ABA in its amended Model Rule 7.3.⁴⁶

In-person solicitation of a nonlawyer who has not requested advice regarding employment is permissible if the solicitation is not false or misleading, or if it does not have the potential for coercion or duress, taking into account the recipient's mental, physical and emotional condition.⁴⁷ Virginia has declined to adopt the stricter standard proposed by the ABA in its amended Model Rule 7.3, prohibiting in-person solicitation for pecuniary gain.⁴⁸

Enforcement and New Initiatives in Virginia

The Virginia rule concerning solicitation, DR 2-103, is considerably more permissive than the solicitation rules in most other states. As noted above, this rule permits in-person solicitation which is not accompanied by threats, intimidation, overreaching or other forms of vexatious conduct.

⁴⁴ *Id.*

⁴⁵ *Id.* at Canon 2, DR 2-101.

⁴⁶ *See supra* notes 29 and 34.

⁴⁷ VCPR at DR 2-103.

⁴⁸ *See supra* note 35.

Last year, the Virginia State Bar Association received numerous complaints from attorneys in the personal injury field concerning in-person solicitation of prospective clients by other attorneys. In June of 1989, the President of the Virginia State Bar Association, Philip B. Morris, appointed a special committee to investigate in-person solicitation by personal injury lawyers in Virginia. The committee was charged with drafting a proposed modification to DR 2-103. On March 30, 1990, *The Colonial Lawyer* interviewed Mr. Morris about advertising and solicitation in Virginia and the status of the special committee's efforts to modify DR 2-103.

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On March 30, 1990, Peter Jordan and Steve Nachman, Research Editors for *The Colonial Lawyer*, conducted an interview with State Bar President Philip B. Morris on attorney advertising and solicitation in Virginia:

CL: As we were looking through the Virginia Disciplinary Rules (DRs) and the ABA Model Rules, we noticed that the Virginia rules provide more freedom for attorneys in the areas of advertising and solicitation, and in particular in the targeted direct-mail and in-person solicitation fields. How has this affected advertising and solicitation in Virginia?

PM: Well, I can give you my thoughts on the application of the in-person solicitation rule in Virginia The rule in Virginia, which is DR 2-103, is clearly more permissive than the anti-solicitation rules in most other states. Under our rule solicitation itself is not a violation. In most cases, [the solicitation] must include vexatious or harassing conduct [in order to violate the rule].

CL: We understand that a commission has been formed to look into DR 2-103 and look into possible modifications [to the rule] in the area of in-person solicitation [in personal injury cases]. Could you give us some background on the committee?

PM: It came to my attention that there was an increase in the many areas of the state of lawyers soliciting personal injury cases in hospital rooms and private homes. I found that lawyers who do that argue that it is permitted under DR 2-103 unless the solicitation is accompanied by threats, intimidation, overreaching or other forms of vexatious conduct. What really brought it home to me was [one instance] where I was advised that a personal injury lawyer lecturing at a state approved CLE [continuing legal education] program on marketing told the audience that direct solicitation in personal

injury cases was permitted in Virginia under DR 2-103. He told the audience it was an effective business development tool. My view of that is that it is ambulance chasing. It never has, never will and never should be accepted practice of any kind in Virginia. In any event, my concern was that not only was the practice clearly being engaged in, but that lawyers were, based on the . . . looseness of our rule, encouraging other lawyers to do that.

CL: How was this problem otherwise brought to your attention?

PM: A number of lawyers who practice primarily in the plaintiff's field and lawyers that I have great respect for . . . came to me and gave me some examples that they knew of in their practices or actual cases that they were aware of where this had occurred. They were very concerned about it because they felt it was not appropriate for Virginia They felt that it was doing damage to the profession and they also felt that lawyers not engaging in those practices were at a competitive disadvantage. I received a number of examples, one being a contact in a funeral home which was characterized as being very similar to the scene in the movie [The Verdict]. I suspect that the person would have been reported and disciplined even under the Virginia rules. There are a whole lot of examples that fall short of that that allow lawyers, much as door-to-door salesmen knock on doors, to sit down in a living room with people involved in accidents . . . and solicit business without doing it in an overreaching or vexatious manner, and who . . . refrain from the kinds of activities that are described under our rule that would be proscribed. It is clear in Virginia, even though I'm counting that the drafters never intended to do so, that direct contact with strangers to solicit personal injury cases in person is permitted under our rule as long as it is not accompanied by those forms of intimidation or vexatiousness that are described in the rule.

CL: Do you take the position that in those situations where a lawyer shows up at a funeral parlor or scene of an accident there is an implied coercion?

PM: I suppose there would be circumstances that would be, in and of themselves, coercive, and I think showing up at the funeral parlor would fall into that category. You can infer from those circumstances that this was in violation of the rule, but that's not where the problem is. Those people will be turned in, found out, and they probably will be convicted. Same thing with an accident scene, and the same thing with somebody laying up in a body cast on medication within days of an accident. But where the practice is being promoted by other lawyers is later on when you go by and see people in the home or go by the hospital when someone is not drugged up and present them with your portfolio and convince them that you are the proper person to represent them in a personal injury case. That practice is not permitted in many states - Ohio, for example. I know that you must be familiar with the *Ohralik* case. This is not permitted in Ohio. It is not permitted in most other states, and it is permitted in Virginia. I have appointed a committee of lawyers to study the issue and requested that they come up with a legal, constitutionally sound rule change that will curtail this particular practice in Virginia.

CL: When was the committee started and what are they currently working on?

PM: I took office in June [1989] and appointed the commission shortly thereafter. The chairman is [S. D.] Roberts Moore [of Roanoke], who has a broad-based trial practice, and there are eight or nine more people. It was my intent to balance [the commission] with plaintiffs' lawyers, people who normally represent defendants, and other people who are not in the personal injury field at all but have kept up with the constitutional issues [and other developments in this field] It is an extremely good committee.

They are having difficulty reaching a consensus because they are coming from different perspectives, and that's good. The [Virginia State Bar] Council itself is going to be acting on this issue at the June meeting. Whether the committee comes up with a consensus or not, the question will be put to the Bar Council to make a judgment as to whether or not [to approve a rule change] - assuming we can come up with a legally and constitutionally permissible rule change based on *Ohralik*.

CL: Will the special committee be meeting in June?

PM: No, that will be a meeting of the [State Bar] Council [Any rule changes] which we submit to the Supreme Court for action would have to come from the Council. An issue like this, once it is properly developed through study, and a proposal is made, will be presented to Council. It will be debated in Council, and Council will either vote it up or down. If we come up with a rule change which the Council votes up, then it will go to the Virginia Supreme Court and [the Court] could either approve the rule change or disapprove it.

CL: Will the new rule focus only on personal injury cases?

PM: I hope we will get alternate proposals that will allow people to pick the solution that they like best. The one that I like best and the one that I think . . . would pass the legal test necessarily would be one that is applicable to personal injury litigation. I make that statement based on the various statements of Mr. Justice Powell in the majority opinion in the *Ohralik* case. He gave us a great deal of guidance as to what would be permissible. I think it can be done. I don't think it is necessary in the commercial setting to do away with all solicitation. If the proposal to do away with in-person solicitation in personal injury cases fails, then I believe . . . that the damage

[such solicitation] is doing professionally is sufficiently important that I would support an across-the-board ban on in-person solicitation In my judgment, that would not be the best way to go. But if we have a choice between allowing wholesale solicitation in personal injury cases, or abolishing in-person solicitation across the board - which used to be the rule - then I think the damage being done is so great that it would justify an across-the-board ban.

CL: Do the problems with in-person solicitation go beyond the personal injury area?

PM: I'm not aware of problems in other areas. I know that it is certainly common practice for lawyers to contact business executives in formal and informal settings Most county and city attorneys have [been approached] by members of the bar to work with them. Solicitation of that type where sophisticated people are hustling sophisticated people - it seems to me that that's different from the situation we are talking about here.

CL: Have there been problems with lawyers contacting prospective clients by direct mail, for example in DUI, divorce or foreclosure proceedings where the attorneys get a hold of a list of people who are in trouble and send them a letter?

PM: I think there is a potential for overreaching and a potential for harm [to the public] in that area. I think the same applies to some forms of advertising But, as Justice Powell said, the potential for overreaching is significantly greater when a lawyer solicits [in-person a prospective personal injury client]. That to me is hands-down unreasonable for the State to permit.