DIVISION OF LEGISLATIVE SERVICES

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This Issue Brief contains descriptions of the issues that appear likely to capture the attention of legislators at the 2003 Session of the General Assembly. It is not intended to be a comprehensive listing of every issue that will be considered. Unanticipated issues will undoubtedly surface, and some of the issues discussed in these pages may not be considered during the 2003 Session. Finally, and most important, these descriptions are *not* predictions of how the General Assembly will respond to any issue.

2003 SESSION:

General Assembly Issues

Finance/Taxation

2002-2004 Budget

The most important issue faced by the 2003 Session will be dealing with the 2002–2004 biennium budget gap, which is currently estimated to be in excess of $1.1 billion. The nationwide recession and slow-growing economy have impacted Virginia since the summer of 2000 and have caused Virginia's revenues during the past fiscal year to fall well below the official forecast. For the fiscal year ended June 30, 2002, Virginia's general fund revenue actually declined 3.8 percent, which is almost double the official estimate the Appropriations Act was based upon. The decline is the largest since the Department of Taxation started to keep such records.

The $1.1 billion gap is over and above the $3.8 billion gap the General Assembly closed during the 2002 Session and the $857.7 million in appropriation reductions Governor Warner proposed on October 15, 2002. At that time, the Governor used the authority granted in the Appropriations Act to reduce agency appropriations by up to 15 percent in every agency in the executive branch, which resulted in approximately 1,837 layoffs, excluding higher education. Governor Warner's plan, in addition to the layoffs, resulted in the closing of DMV offices, shorter hours at ABC stores and the state library, increases in tuition at virtually all of Virginia's state universities and colleges, elimination of the $101.4 million appropriation included for state employee pay raises, and a reduction in a variety of local aid programs. As painful as the cuts and increased tuitions and fees were, the 2003 Session will need to take additional steps to reduce the Commonwealth's expenses.

On December 20, 2002, Governor Warner will present his blueprint for the next round of budget cuts by proposing his amendments to the existing 2002–2004 Appropriations Act. The only known is that the package will surely lead to a great deal of debate and discussion of how to reduce the impact of these cuts on the citizens of Virginia and on the services they are provided. Additional cuts are likely to include abolishing specific agencies or consolidating certain agencies, eliminating

certain governmental functions, reducing funds for previously untouchable items such as standards of quality funding for elementary/secondary education or for Medicaid purposes, an early retirement option to reduce the size of the workforce and lower the state's payroll, using the available resources of the "Rainy Day Fund," and any other option that could be used to deal with the shortfall whether on the expenditure side or on the revenue side. Clearly, with each succeeding series of cuts, the budget decisions the Governor and the General Assembly will be forced to make will be increasingly painful and have more impact on the Commonwealth and its citizens.

❑ *John Garka*

Incentives for State Workers to Retire

In light of the current fiscal challenges facing the Commonwealth, one issue that may surface in the 2003 Session of the General Assembly is the creation of an incentive program for state workers to retire. In general, the annual cost of total benefits to state retirees, including retirement pay, health care, and life insurance, is less than the annual cost of total benefits for active employees. Thus, in the short run at least, the Commonwealth could potentially accrue some savings if a significant number of state workers were to retire.

Article X, Section 11 of the Virginia Constitution may prescribe some limitations in the creation of such an incentive program. It provides, in part, that "[r]etirement system benefits shall be funded using methods which are consistent with generally accepted actuarial principles." A retirement incentive program could offer prospective retirees additional years of creditable service or could add years to a person's age for retirement purposes, or a combination thereof. While such a plan might result in short-term savings to the Commonwealth, it may also increase long-term retirement payouts by the Commonwealth. It appears that an incentive program for state workers to retire is not prohibited under Article X, Section 11, so long as state agencies would be able to fund any increase in long-term retirement payouts in an actuarially sound manner.

Retirement programs for state workers for which retirement incentives may be offered include the Virginia Retirement System (VRS), the State Police Officers' Retirement System (SPORS), and the Virginia Law Officers' Retirement System (VaLORS).

❑ *Mark Vucci*

Tax Code

The joint subcommittee appointed to study and revise Virginia's state tax code was created originally by HJR 685 and SJR 387 during the 2001 General Assembly Session for a two-year period; HJR 60 (2002) confirmed the continuance of the study.

Throughout 2001 and 2002, the joint subcommittee members spent numerous hours in meetings receiving information provided by staff and a wide variety of interested parties both from the public and private sectors. During the first year, they studied broadly the state and local taxes and administration of each and then focused on more specific issues during the second year, when they divided themselves into two task forces. They examined the individual and corporate income taxes, sales and use tax, property taxes, business, professional and occupational license (BPOL) tax, estate tax, and administrative issues, both state and local.

During that same time period the national and state economies began to suffer, and Virginia's has worsened during this past year. Therefore, the joint subcommittee decided it would not be prudent at this time to go forward with all of the changes they have been considering but instead to continue the study for one more year and make the following recommendations to the 2003 General Assembly:

1. Adopt House Finance Subcommittee report with standards for charitable organization sales tax exemptions.
2. Restore conformity with federal income tax law, except for accelerated depreciation and carryback loss issues in order to essentially eliminate fiscal impact.
3. Revise administrative appeals process for income taxpayers to provide for no payment of tax in advance of adjudication.
4. Eliminate June accelerated sales tax collections in 2002–2004 budget.
5. Revise property tax appeals process to clarify procedures and standard of proof for taxpayer.
6. Phase out estate tax beginning in fiscal year 2005.
7. Impose no new state unfunded mandates on localities and, to the

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maximum extent possible, eliminate existing ones.
8. Support a moratorium on new sales and use tax exemptions.
9. Maintain policy of no sales tax on access to Internet and digital downloads.
10. Continue working with the national Streamlined Sales Tax Project.
11. Require purchasers to report the greater of (i) the actual purchase price or (ii) the NADA value (less $1,500) for casual sales of motor vehicles that are no more than five years old when titling the vehicle and paying the sales and use tax.
12. Continue the study in 2003 with final report in December 2003.

With the continuation of the study through 2003, the joint subcommittee plans to complete the task of revising Virginia's state tax code. The anticipated changes will likely have widespread, long-term effects.

❑ *Joan Putney*

Property Tax Exemptions

At the polls in November, Virginians adopted a constitutional amendment that gives localities the sole authority to exempt from taxation real and personal property that is owned by charitable and other similar organizations. Accordingly, beginning January 1, 2003, the amendment's effective date, the General Assembly no longer will have the authority (or burden) of considering and granting property tax exemptions.

The constitutional amendment grew from a sense of the General Assembly that because the taxation of real and personal property is strictly local, it is more appropriate that determinations of property tax exemptions rest with localities. In addition, partly as a result of procedures adopted by the General Assembly in 1980 for handling such exemptions (§ 30-19.04 of the Code of Virginia), it became evident over time that the General Assembly was operating essentially as a "rubber stamp" in granting the exemptions.

These procedures required that any bill seeking a property tax exemption be accompanied with a resolution, adopted after a public hearing, by the respective locality's governing body supporting or refusing to support the exemption. Prior to adopting such resolution the local governing body was required to consider, among other things: (i) whether the organization seeking the exemption is exempt from taxation pursuant to § 501 (c) of the Internal Revenue Code; (ii) whether any director or officer is paid an unreasonably high salary; (iii) whether the organization provides services for the common good of the public; and (iv) whether a substantial part of the organization's activities involves participation in political campaigns or lobbying efforts.

Local resolutions supporting property tax exemptions also had to include a recommendation to the General Assembly of a specific classification for the organization (i.e., religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground). Article X, Section 6 permitted exemptions only for property used for such specific purposes, and this restriction remains in this section as amended.

As a result of these procedures, ordinarily, almost all tax exemption bills that were introduced were accompanied by a favorable local resolution and were passed by the General Assembly, and the few that were not so accompanied were not passed. Nonetheless, because of the large volume of such bills, considerable legislative time and effort were consumed.

During the 2003 Session, at the very least, legislation will be introduced repealing the code sections that set forth the old procedures for handling these property tax exemptions. In addition, the General Assembly may consider legislation that places certain restrictions or conditions on localities in granting such exemptions. Article X, section 6, as amended, reads as follows:

> (6) Property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be provided by classification or designation by an ordinance adopted by the local governing body and **subject to such restrictions and conditions as provided by general law.** (Emphasis added.)

There is no limitation on the restrictions and conditions that the General Assembly may provide by general law. Some restrictions and conditions that the General Assembly may wish to consider include: (i) requiring that the organization be a nonprofit entity, (ii) requiring the local governing body to hold a public hearing, (iii) requiring any of the other conditions contained in the "old" procedures (see above), or (iv) any other restrictions that the General Assembly deems necessary.

Some questions have been raised as to how to advise nonprofit entities that wish to obtain new exemptions, as well as how to advise nonprofit entities that currently are afforded such exemptions by statute. Because the constitutional amendment's effective date (January 1, 2003) is prior to the beginning of the next General Assembly session, nonprofit entities may safely be advised that the General Assembly can no longer grant individual tax exemptions. By the same token, until January 1, 2003, localities are not constitutionally authorized to grant such property tax exemptions. Even after January 1, 2003, it would be wise, if not legally required, for localities to wait to see what restrictions and conditions ("enabling legislation") the General As-

sembly may place on the exemption process, before granting such exemptions.

Regarding the status of current statutory exemptions after January 1, 2003, the law in Virginia is not entirely clear. Accordingly, the General Assembly may wish to clarify such status in the enabling legislation. For example, the General Assembly may wish to condition the right of localities to grant new exemptions on their agreement to recognize the exempt status of any entity currently afforded a statutory exemption.

❑ *David Rosenberg*

Health

Prescription Drugs

Prescription drugs continue to be a hot issue on both the federal and state levels. Every day, many people must make crucial decisions about whether to pay the rent, heat the home, eat, or fill their prescriptions. Many of the prescriptions ordered are never filled or, if filled, will be stretched to make the drugs last longer—by taking half doses or every other day, for example. Each year, countless persons experience health crises that require emergency room visits and suffer serious illnesses that could be prevented or ameliorated by access to proper prescription medications. Hospitalization coverage and indigent care budgets are being severely strained as a result.

More than one million Virginians do not have health insurance, and over half of these have incomes of less than 200 percent of the federal poverty level (approximately $18,000 for an individual). A majority (67 percent) of these people work full time. Individuals whose income is above 200 percent of the poverty level represent an increasing number of the uninsured population (50 percent in 2000 compared to 34 percent in 1996).

More than 162,000 persons in Virginia who are eligible for Medicare have incomes below 200 percent of the federal poverty level (FPL) and do not have prescription drug coverage. Officials on the federal and state level are searching for ways to expand or supplement the Medicare program by providing prescription drug assistance. HMOs, which generally provide prescription drugs in-house, have generally withdrawn from the Medicare market in Virginia. Only about 12 percent of Medicare recipients nationwide remain in HMOs. A recent announcement by the Center for Medicare and Medicaid Services (CMS—formerly HCFA) stated that a pilot program under Medicare would offer a new option that would be a managed care plan that offers prescription drug coverage but is more flexible than HMOs in that patients have more choice in their providers. This is a Preferred Provider Organization (PPO), similar to current programs in which about 50 percent of those persons under age 65 are currently enrolled. A total of 33 health plans have signed up and committed to provide services for at least three years in 23 states. CMS estimates that about 11 million persons would be eligible. Unfortunately, the only company to do business in Virginia serves only a portion of the far Southwest, so many Virginians are ineligible.

More than 25 states currently have prescription drug assistance programs that provide medications to varying populations—some cover all persons who meet eligibility criteria, and some are directed to the elderly, especially those who no longer work and for whom Medicare is their sole medical coverage. The plans run the gamut of eligibility criteria, income levels, co-payment requirements and other requirements. Some of the newer plans that depend upon the negotiation with drug companies that currently do Medicaid business in that state to provide equal discounts for the persons under their prescription assistance programs are currently in litigation. The various plans are funded through general funds, lottery or casino profits, tobacco settlement funds, expansion of Medicaid and other sources.

In the past few General Assembly sessions, a number of bills have been introduced to establish prescription assistance programs funded primarily through the tobacco settlement fund. Estimates of the cost run about $150–$200 million. All of these bills have died.

Over the last two years a legislative commission has been reviewing the problem and designing an assistance program, but the work of the commission has been complicated and thwarted by the budget drain. Additional work is being done by the Secretary of Health and Human Resources as well as the money committees. In lieu of a prescription plan at the current time, the commission is considering the development of a public/private partnership to expand the use of the compassionate prescription programs and the newer discount cards being offered by a number of drug companies.

The compassionate drug programs provide free medications to those who qualify, but the application process and the delivery process are cumbersome and complicated. The Pharmacy Connection, a program developed by the Virginia Health Care Foundation, developed and utilizes a software program that expe-

dites the process, but this is used primarily in health clinics, free clinics, some hospitals, and a specialized program in the Southwest in the Mountain Empire Older Citizens, a area agency on aging. The discount cards are generally directed to those persons, mostly the elderly, with higher incomes but within 200–400 percent of the federal poverty level. The cards generally provide either a percentage discount for certain drugs manufactured by that company or a straight base fee for a 30-day prescription. While well intended, the population to which such programs are directed has great difficulty in accessing these programs. A single card with participation by the varying companies runs afoul of antitrust regulations.

The commission is committed to publicizing these programs and developing a system that provides local outreach, state coordination, and development of a system to facilitate the enrollment in and participation by more individuals.

❑ *Gayle Vergara*

Regulation of Health Professions

The Department of Health Professions (DHP) and Virginia's 12 health regulatory boards, along with the Board of Health Professions, have responsibility for ensuring the safe and competent delivery of health care services through the regulation of the health professions. In 2000, the Joint Legislative Audit and Review Commission issued its final report on health regulatory boards, and part of its focus was on the disciplinary system used by the boards. Significant findings in the report included:

1. The gross negligence standard that applies to Board of Medicine standard of care cases under current law does not appear to adequately protect the public from the substandard practice of medicine by physicians.
2. No citizen members are included on the Board of Medicine's seven-member executive committee.
3. The 12 health regulatory boards vary in their restrictions on eligibility to apply for reinstatement after license revocation. Individuals licensed by the Boards of Medicine and Optometry must wait at least one year. Individuals licensed by the Board of Counseling by regulation must wait at least two years, and the regulations for the Board of Veterinary Medicine allow practitioners to apply for reinstatement at any time following revocation.
4. DHP should enforce laws against unlicensed practice of the health professions when Commonwealth's attorneys do not pursue these cases.
5. The Board of Medicine does not adequately consider cases that derive from medical malpractice payment reports.

Prefiled HB 1441 lowers the disciplinary standard for persons licensed by the Board of Medicine from gross negligence to simple negligence. Among its many provisions, the bill also requires that the executive committee of the Board of Medicine be required to have two citizen members. The bill provides that before reinstatement to practice, a three-year minimum period must elapse after the revocation of the certificate, registration or license of any person regulated by one of the boards; however, individuals who have had their licenses revoked by a health regulatory board are grandfathered and subject to provisions concerning reinstatement in effect prior to July 1, 2003. DHP is given increased authority to regulate unlicensed practice and is directed to investigate all complaints within the jurisdiction of the relevant health regulatory board.

❑ *Amy Marschean*

Patient Records

Widely heralded as providing employees with enhanced expectations for continuous health insurance coverage through discrimination protections, limiting preexisting condition exclusions, and greater assurances of portability when changing jobs, the Health Insurance Portability and Accountability Act, commonly known as HIPAA, was signed into law by former President Clinton in August of 1996.

In addition to the health insurance provisions, HIPAA required certain actions regarding standards for security and privacy of protected health information (patient's records). The federal act mandated that, if Congress did not enact provisions relating to patient privacy within three years (August 1999) the Secretary of Health and Human Services was required to promulgate regulations establishing national standards for such matters as electronic transactions, identifiers, and security. Congress did fail to act within the deadline and, after the usual lengthy regulatory process, the final HHS rules were published in the Federal Register on December 28, 2000—just days before President Bush was sworn into office.

As is customary with new federal administrations, President Bush placed many regulations that were scheduled to take effect after he assumed office on hold for review. In April of 2001, President Bush announced that the Secretary of Health and Human Services had been directed to let the rules on patient privacy go into effect.

President Bush also stated that the secretary had been asked to evaluate the regulations and recommend revisions. Thus, the December 2000 rules became effective on April 14, 2001; however, enforcement remained set to begin on April 14, 2003, for most "covered entities." Some

"covered entities" must comply in 2004.

As expected, the Bush administration proposed amendments to the regulations, with the final revisions published in the Federal Register on August 14, 2002, becoming effective in October 2002.

In Virginia and across the country, lawyers have debated issues relating to compliance with the HIPAA patient-privacy regulations long before the publication of the final rules. In the case of Virginia law relating to disclosure of patient records, the question of whether a conflict of laws exists concerning the requirements for subpoenas is an important question, with potentially costly federal consequences. In early summer of 2002, some Virginia health lawyers and organizations that could be affected by enforcement of HIPAA compliance began discussions of whether Virginia's law on subpoena duces tecum for patient records is consistent or contrary to the HIPAA requirements. In other words, the issue is one of federal preemption.

Virginia's law on patient records disclosure is contained in subsection H of § 32.1-127.1:03. This state law requires that parties to litigation provide a copy of a subpoena for the other party's patient records to the opposing party at the same time as the subpoena is issued. If a person is representing himself or is a nonparty witness, he must also receive a copy. In the case of a person representing himself or a person who is a nonparty witness, a statement is set out in the Virginia law that must accompany the subpoena that instructs the person of the right to file a motion to quash the subpoena—that is to file an objection to the release of the information. If a motion to quash is filed, the records must be placed in a sealed envelope and sent to the appropriate clerk. Upon resolution of the motion to quash, the records could be released, in whole or in part, or returned.

Phrased in simply terms, HIPAA requires that, to disclosure protected health information, health care providers must receive (i) satisfactory assurances that the party seeking the patient information has made "reasonable efforts" to ensure that written notice of the subpoena has been received by the party who is the subject of the subpoena, that any objections have been resolved, or that no objections have been timely filed or (ii) satisfactory assurances that the parties have agreed to a qualified protective order from the relevant court or administrative agency or that the party seeking the information has requested a qualified protective order from the relevant court or administrative agency. A qualified protective order forbids the use of the protected health information for other purposes than the specific litigation or proceeding and requires that the information be returned after the litigation or proceeding is ended.

As with many federal laws, more stringent state laws are not preempted by the HIPAA regulations; however, agreement on whether Virginia's law is more stringent is impossible. Some attorneys have concluded that compliance with both laws can be achieved with some attention to detail in providing notice and assurances. However, regardless of their views on preemption, many attorneys remain concerned about the lack of consistency between the requirements of the state law and the federal regulations and the potential for confusion as the deadlines for HIPAA compliance approaches. Thus, although total agreement does not seem to have been obtained, a proposal was developed, has been circulated to health lawyers in the Virginia State Bar and the Virginia Bar Association, and may be introduced in the coming Session. This proposal may raise issues concerning subpoena powers of Virginia state agencies and whether the details of the proposal are more stringent than or merely consistent with the HIPAA regulations.

❑ *Norma Szakal*

Public Education

While state budgetary challenges will likely hamper the enactment of any new public education initiatives requiring state funds, the General Assembly may nonetheless tackle a number of complex education issues in the 2003 Session.

Educational Accountability

The federal No Child Left Behind Act imposes a variety of educational accountability requirements on the states. The Commonwealth's consolidated plan for implementing the federal statute includes Virginia's definition of the requisite Adequate Yearly Progress (AYP)—measuring performance at the school, division, and state levels in reading, mathematics, and graduation and attendance rates—and starting points for the calculation of yearly objectives. To address the achievement gap, the act requires all student groups—students with disabilities, economic disadvantage, limited English proficiency (LEP), and minorities—to meet these objectives. Schools must disaggregate data to confirm this requirement.

A hallmark of the federal act is its required annual math and reading testing for all students in grades three through eight. Because the Commonwealth has already established Standards of Learning (SOL) and has implemented SOL assessments in grades three, five, and eight, new tests are only needed for grades four, six, and seven. It is anticipated that existing end-of-course tests will satisfy the act's high school testing

requirement. Annual testing will include students with limited English proficiency; however, scores for these students will not be incorporated in the AYP for three years.

The federal act also requires certain struggling schools to offer transfers to students this school year; sets a 2005-2006 goal for the employment of "highly qualified teachers and paraprofessionals" in the core academic subjects; establishes requirements for annual school report cards addressing school performance and teacher quality; and sets specific reading skills requirements. While the Commonwealth has already made progress in many of these areas addressed by the federal act, the General Assembly may be asked to consider a variety of initiatives targeting teacher preparation and shortages, annual testing, data collection and disaggregation, and other refinements to current Virginia law and practice.

Funding

Because the Commonwealth's ongoing budgetary woes are not limited to state-level programs and initiatives, the General Assembly may also be asked to revisit local public education responsibilities and Virginia's current method of apportioning the state and local share for public education programs meeting the Standards of Quality. Findings from the 2002 report of the Joint Legislative Audit and Review Commission (JLARC) on public education funding may also provide the basis for 2003 legislation.

Vouchers and Tuition Tax Credits

On June 27, 2002, in *Zelman v. Simmons-Harris*, the United States Supreme Court upheld Ohio's school voucher initiative, authorizing government aid for students in failing Cleveland public schools to attend, upon independent parental choice, private and parochial schools. Similar education reform initiatives would face distinct challenges in the Commonwealth. Significantly, traditional legal interpretation of Virginia constitutional provisions has been more restrictive than those for federal constitutional provisions addressing government entanglement with religion. While carefully crafted voucher initiatives aiding sectarian private schools may pass muster under the U.S. Constitution, application of the Commonwealth's constitutional requirements could warrant a different result. Despite budgetary challenges, the General Assembly may nonetheless be asked to review vouchers, tuition tax credits, and other similar initiatives, as access to quality education continues to be a priority.

Educational Leadership

The work and recommendations of the HJR 20/SJR 58 Commission to Review, Study and Reform Educational Leadership will also likely surface in the 2003 Session.

A shortage of qualified educators willing to undertake the calling of principal or division superintendent may prompt consideration of initiatives addressing incentives, compensation, internships, training programs, and other recruitment and retention strategies. Additional school administrator recruitment and retention concerns include improving women and minority representation, increasing compensation, enhancing the "manageability" of the principalship through potential job reorganization; and providing greater flexibility and autonomy.

The commission has recommended that, among other things:

- The Board of Education, by October 1, 2003, examine and revise its administrative licensure requirements to ensure alignment with the evaluation criteria for principals, administrators, and central office instructional personnel as set forth in the board's *Guidelines for Uniform Performance Standards and Evaluation Criteria for Teachers, Administrators and Superintendents*;
- The board and the State Council of Higher Education (SCHEV) coordinate to ensure that the performance and leadership standards described in the board's *Guidelines* are reflected in preparation and training programs for principals and superintendents in institutions of higher education;
- The board and SCHEV develop guidelines for mentorships for administrators within approved administrator training programs;
- Approved higher education programs, in collaboration with school divisions, develop and implement models for internships for aspiring principals and assistant principals:
- The board review its regulations as may be necessary to incorporate alternative licensure routes for principals and assistant principals that recognize the various and particular skills required for the functions of such positions as well as potential alternative sources of training for such licensure; and
- Article VIII, Section 7 of the Virginia Constitution be amended to authorize the General Assembly to prescribe by statute a mechanism for the delegation of school board authority over certain personnel hiring and termination decisions.

❑ *Kathleen Harris*

Drug Testing in School

Drug testing is a search of the person and is, thus, subject to scrutiny for "reasonableness" under the Fourth Amendment of the Constitution of the United States and the Virginia Constitution. The powerful language of the Fourth Amendment prohibits "unreasonable" searches

and seizures without a warrant issued after a finding of probable cause:

> The right of the people to be secure in their persons, houses papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Thus, probable cause and then the issuance of a warrant are required in most law-enforcement searches. Although probable cause defies exact definition or characterization, it generally means that a reasonable person would believe that there is more evidence in favor of the search or proceeding than against it. Even in the law-enforcement context, the Supreme Court has, however, upheld warrant-less and suspicion-less searches. In other words, in some cases, the Court has not required probable cause or warrants for searches applied to a large group of people, many of whom are suspicion-less. For example, the Court has upheld the use of automobile checkpoints for drunk drivers, illegal immigrants, and contraband. In addition, the Court has upheld other suspicion-less searches of large groups—for example, drug testing of railroad personnel implicated in train accidents. These cases have turned on the nature of the governmental "need" and spoken to the state's interest in excluding illegal immigrants and contraband (for example, illegal drugs) and safety concerns relating to accident risks inherent in driving and operating heavy engines while intoxicated and the strong evidence that use of drugs and alcohol is implicated in such mishaps.

In public school settings, however, the Court has found that probable cause and warrants are not required for student searches and has declared that "reasonable suspicion" meets Fourth Amendment standards in the public school environment.

On June 27, 2002, the Supreme Court upheld the constitutionality of random drug testing of public school students as a condition of participation in competitive extracurricular activities. The case, *Board of Education of Independent School District No. 92 of Pottawatomie County, Oklahoma et al. v. Earls et al.*, concerned a testing requirement adopted by the Tecumseh, Oklahoma school district that mandated, as a condition of participation in any extracurricular activity, that the student submit to urinalysis for illegal drugs. It is important to note that practical application of the policy related only to students desiring to participate in **competitive** extracurricular activities managed by the Oklahoma Secondary Schools Activities Association—the Oklahoma organization that is analogous to the Virginia High School League.

The case hinged on the Court's application of the balancing test that it had previously used to determine the "reasonableness" of suspicion-less drug testing of public school athletes in *Vernonia School District 471 v. Acton*. The *Pottawatomie County* case carries the *Vernonia* reasoning beyond student athletes and removes any requirement for individualized suspicion for the random drug testing of students involved in extracurricular activities, particularly those that are engaged in competition. Examples of competitive extracurricular activities in Oklahoma are instrumental and vocal music organizations, academic competitions, music, and speech.

❑ *Norma Szakal*

Natural Resources

Land Application of Biosolids

During the 2002 session of the General Assembly, the Senate Committee on Agriculture, Conservation and Natural Resources referred SB 618 to the Commission on the Future of Virginia's Environment. As introduced, SB 618 would grant localities the authority to ban the land application of sewage sludge (biosolids) within its boundaries.

The Virginia Department of Health defines biosolids as sewage sludge that has received an established treatment for required pathogen control and is treated or managed to reduce vector attraction to a satisfactory level and contains acceptable levels of pollutants, such that it is acceptable for use for land application, marketing or distribution.

The land application of biosolids is regulated at both the federal and state level. Minimum health and scientific standards are established under Rule 503 of the Clean Water Act, while the majority of monitoring and enforcement is delegated to the state and administered by the State Health Department through its Biosolids Use Regulations (12 VAC 5-585-10 et seq.). Biosolids generators (wastewater treatment plants) that want to land apply biosolids must first obtain a permit from the Department of Environmental Quality (DEQ). Independent contractors

must receive permits from the Health Department.

- 50 percent of biosolids generated in Virginia are land applied, while the rest are either incinerated (20 percent) or land filled (30 percent).
- 50 percent of all biosolids applied to land in Virginia come from out of state.
- Since 1997, the Health Department has approved more than 100 permits covering 300,000 acres, many of which are currently due for re-issuance.
- More than 40,000 acres receive biosolids annually.
- 42 counties contain permitted sites.
- There are nine contractors currently land-applying biosolids in Virginia.
- Biosolids contain nutrient-rich organic material such as nitrogen and phosphorous, dry solids consisting mostly of paper and hair fibers, trace elements from sewage, including very low levels of toxic chemicals, and millions of microorganisms per gram.

Due to a variety of reasons, including citizen complaints regarding the odor, potential health risks, truck traffic and spillage issues, several Virginia localities have recently enacted ordinances placing limits on or banning the land application of biosolids within its boundaries.

In *Blanton v. Amelia County* (2001) the Virginia Supreme Court held that a local ordinance prohibiting the land application of sewage sludge was invalid due to its inconsistency with state law. State law, the court held, expressly authorizes the land application of biosolids conditioned upon the issuance of a permit. Ordinances placing special requirements on land application of biosolids are currently being challenged by contractors in the Spotsylvania County Circuit Court and by farmers in the U.S. District Court for the Western District of Virginia.

During its study of this issue the Commission on the Future of Virginia's Environment received testimony from state and federal regulatory agencies, local governments, wastewater treatment facilities, concerned citizens, environmental groups and scientific experts. The commission formed a biosolids subcommittee that received in-depth written comments from all interested parties and presented its findings in the form of a legislative draft. The draft, which was slightly amended and endorsed by the full commission on November 7, 2002, attempts to accomplish the following:

- Create standard complaint and investigation procedures;
- Provide flexibility for the Health Department to enact reasonable special site-specific conditions;
- Require proof of financial responsibility from biosolids contractors;
- Create a program to train and certify applicators;
- Allow localities to order abatement of application in cases of violations;
- Require the Health Department to conduct further study of biosolids; and,
- Require Nutrient Management Plans of all application sites (currently NMPs are required only of sites where applications takes place more than once every three years).

The commission voted not to endorse SB 618 (2002) and instead recommended that its bill be drafted and introduced during the 2003 Session of the General Assembly. Other upcoming biosolids issues include HB 1103 (passed in 2002 with a reenactment clause), which moves regulatory enforcement of the program from the Health Department to DEQ.

❑ *Jeffrey Gore*

Courts

Mental Retardation and the Death Penalty

There is likely to be legislation during the 2003 Session to define who is mentally retarded for the purposes of capital sentencing. In June the United States Supreme Court, in *Atkins v. Virginia*, 536 U.S. (2002), held that executions of mentally retarded persons are cruel and unusual punishment prohibited by the Eighth Amendment. The decision provided little guidance to states in determining how to implement the Court's finding. Among the issues that must be decided are:

- What is the definition of mental retardation?
- Who decides whether the defendant is mentally retarded—the judge or jury?
- When in the process should the decision be made—pretrial or at sentencing?
- Who is qualified to evaluate mental retardation?
- What procedures should apply to persons already on death row?

A subcommittee of the Crime Commission has been working on a bill. ❑ *Jescey French*

Guardian Ad Litem

There is likely to be legislation in 2003 to:

1. Provide training for lawyers serving as guardians ad litem for

children. The training would be offered by the Virginia State Bar and would focus on lawyers serving the best interest of the children and not assuming judicial powers.

2. Provide training, through the Office of the Executive Secretary of the Supreme Court of Virginia, to judges on the role of the guardian ad litem that would focus on not delegating judicial power and authority to lawyers in carrying out their duties to represent the best interest of children.
3. Develop performance standards for guardians ad litem in custody and visitation cases, requiring home visits by guardians ad litem.
4. Develop model policies and procedures for the reimbursement of lawyers serving as guardians ad litem.

❑ *Bill Crammé*

Transportation

Highway maintenance and construction funds. Since the 2002 Regular Session, the Commonwealth Transportation Board has drastically curtailed its six-year transportation improvement plan. The defeat of two sales tax increase referenda at the November 2002 election eliminated one potential source of additional revenues to support the Commonwealth's highway program. Very likely the 2003 Session will see two general kinds of bills in this area: (i) changes in the statutory formulas that distribute construction funds to the primary, secondary, and urban highway systems and (ii) reducing expenditures on other programs and redirecting that revenue to the highway program. Since either sort of legislation would create "winners" and "losers," legislative decisions in this field are likely to be painful and hard-fought.

Low-cost/no-cost issues. In transportation (as in just about all areas), the 2003 General Assembly will be looking for legislative issues that can be addressed either without any cost or with only minimal cost. Bills authorizing new special license plates and naming highways and bridges will probably be even more popular than ever this year. Bills "tinkering" with the motor vehicle laws are also seen as low-cost initiatives and will therefore probably be more numerous than usual.

Driver and identification documents issued by DMV. In the aftermath of the events of September 11, 2001, the 2002 Session took steps to ensure that DMV would be issuing driver's licenses and other documents only to persons qualified to receive them and "tightened up" the kinds of proofs of identity and residency that DMV would require. One issue that was considered but not directly addressed in 2002 was the question of whether applicants for DMV-issued driver documents would be required to prove their legal presence in the United States. A report on this issue that DMV will be presenting to the 2003 Session will, almost certainly, prompt the General Assembly to revisit this issue.

❑ *Alan Wambold*

Constitutional Amendments

The 2003 legislature will propose new amendments for agreement by the next General Assembly and final approval by the voters in November 2004. Prefiled and 2002 resolutions give an indication of some areas of interest:

- **Successive terms for the governor**. Virginia is now the only state that prohibits the governor from serving two terms in succession. Whether or not successive terms could lead to too strong an executive will be a topic for discussion.
- **Restoration of civil rights for felons.** Should there be an alternative to the governor's clemency powers for the restoration of civil rights to ex-felons? The Virginia Crime Commission discussed but did not endorse a possible constitutional amendment to authorize a statutory process for restoration of civil rights to ex-felons. The commission has proposed several steps to fine-tune the present process.
- **Protections for special funds.** The General Assembly will almost certainly examine ways to protect the existing Transportation Trust Fund and other special funds so that the revenues placed in the funds are used for the purposes specified in creating the funds.
- **Tax limits and surplus funds.** Proposals to refund portions of surplus revenues to taxpayers will be on the legislative agenda along with measures to limit the rate of growth in general fund revenues.
- **Redistricting commissions.** As is usual following the decennial redistricting process, there will be measures put on the table to modify the redistricting process and possibly establish a bipartisan or nonpartisan redistricting commission or procedure.

❑ *Mary Spain*

Campaigns/Elections

Legislation will likely surface on contribution limits, random audits of campaign reports, mandated electronic filing of campaign reports, and other refinements in Virginia's Campaign Finance Disclosure Act. Some proposals to modify the new "Stand by Your Ad" law can be anticipated.

There will be a review of the recently enacted federal Help America Vote Act for possible revisions needed in Virginia election laws to meet new federal requirements and qualify for federal funds. However, Virginia already meets two of the main objectives of the federal act with its established statewide voter registration system and existing provisional ballot procedures.

❑ *Mary Spain*