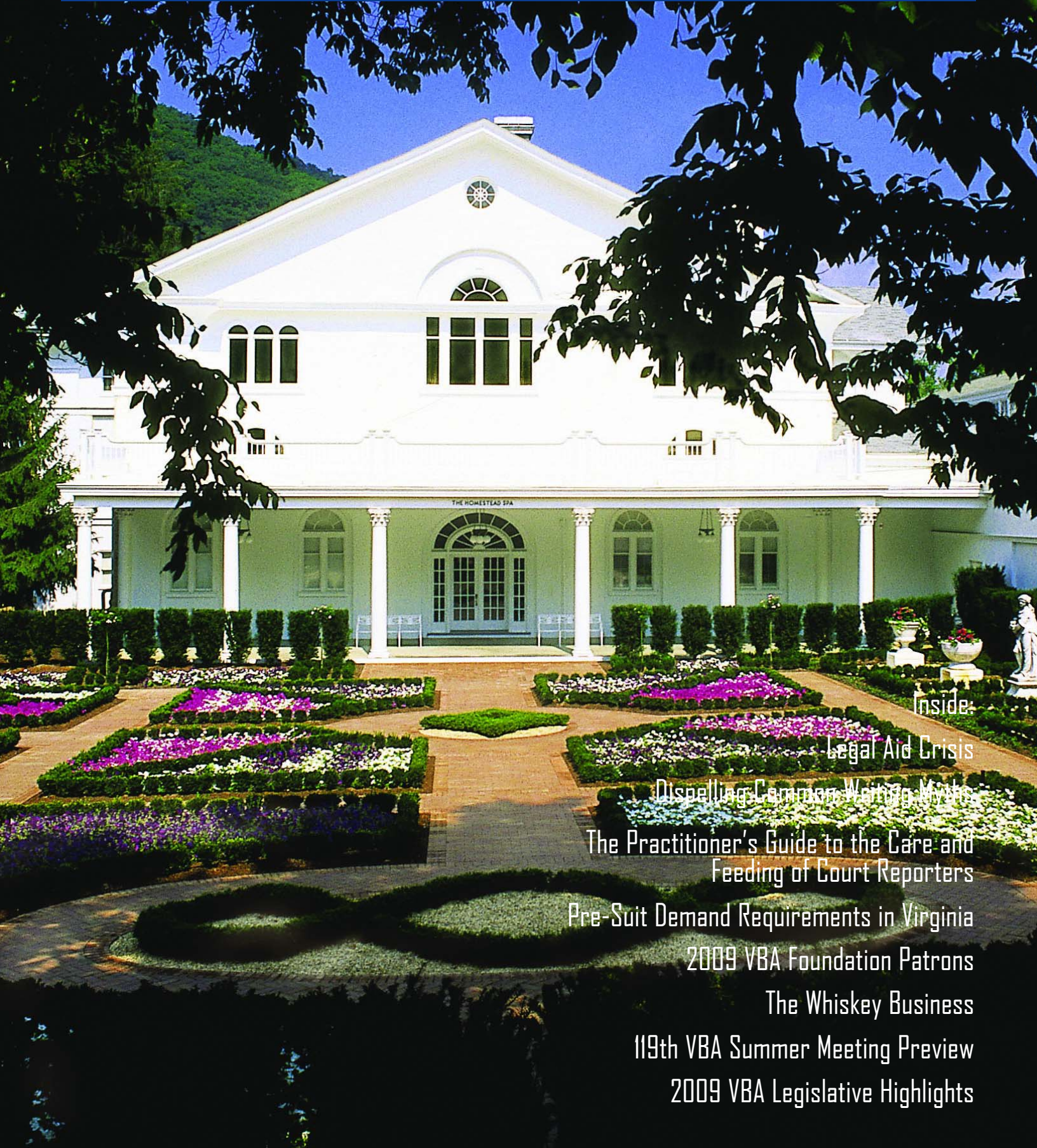


VBA News Journal

THE OFFICIAL PUBLICATION OF THE VIRGINIA BAR ASSOCIATION • VOL. XXXVI, No. 2 • SUMMER 2009



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Dispelling Common Writing Myths

The Practitioner's Guide to the Care and Feeding of Court Reporters

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The Virginia Bar Association is a voluntary organization of Virginia lawyers committed to serving the public and the legal profession by promoting the highest standards of integrity, professionalism, and excellence in the legal profession; working to improve the law and the administration of justice; and advancing collegial relations among lawyers.

THE VIRGINIA BAR ASSOCIATION
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Legal Aid Crisis

JOHN D. EPPS

Two days off in ten weeks. Not weekdays. Two days off, total. That's how hard one of the state's most senior legal aid lawyers is working. The work is pouring in—foreclosure prevention cases, unemployment benefit disputes, landlord-tenant cases, family abuse cases. Here are some eye-opening statistics:

- Total caseloads at Rappahannock Legal Services are up 24% just since last fall. This includes a 47% increase in evictions since 2007.
- Blue Ridge Legal Services has had to refuse services to *two-thirds* of those seeking help.
- Interest on Lawyers Trust Accounts (IOLTA), a voluntary program in Virginia, has plummeted along with interest rates. Statewide, these funds - - which go to fund civil legal services for the poor—are projected to drop over \$3 million in the next year.
- In a recent *Virginia Lawyers Weekly* article, legal aid administrators predicted that the funding crisis will inevitably result in lawyers being cut from the staff.
- Nationally, it has been estimated that the current mortgage crisis will result in two million American families losing their homes to foreclosures on sub-prime loans.

The economic recession is placing huge demands on our justice system and on our legal aid communities. In addition to the foreclosures and the evictions, financial stress creates stress on families in other ways, too. According to Legal Service Corporation's 2010 budget request, "couples who faced extensive financial strain had a rate of violence more than three times that of couples with low levels of financial stress." Added to the economy is the impact on families of our nation's military personnel serving overseas, as well as those who have returned to this country to face family, financial and psychological problems which need to be addressed.

Our delivery system for legal serv-



"The economic recession is placing huge demands on our justice system and our legal aid communities... Our legal aid lawyers do a tremendous and vitally important job. The work is not just important to the people who receive the service, it is a critical component of our justice system and the rule of law."

ices to the poor is in crisis. What can we do about it? One thing I urge all practicing lawyers to do is to contribute financial assistance to their local legal aid organization. Our legal aid lawyers do a tremendous and vitally important job. The work is not just important to the people who receive the service, it is a critical component of our justice system and the rule of law. Please contribute.

An additional way to help is to donate your time and your legal ability. Unfortunately, even with increased giving, legal aid organizations simply cannot keep up with the demand. Realistically, the only way for these important legal needs to be met is through the volunteer efforts of the bar. This has always been the case, but is even more so now. If you are interested, simply call your local legal aid office and ask how you can help. Also, many local bar associations have pro bono programs specifically designed to help match up those with needs with lawyers willing to help.

The need for additional lawyer volunteers has not been lost on Chief Justice Leroy Hassell. The Chief Justice has always been a proponent of lawyers providing free legal services when they can, and recently he has asked, both privately and publicly, for help from The Virginia Bar Association in encouraging and facilitating pro bono programs in Virginia. Indeed, in his State of the Judiciary speech at the Judicial Conference of Virginia in Roanoke in May, Chief Justice Hassell challenged all of the state's voluntary bar organizations, and, "particularly The Virginia Bar Association" to help increase the quantity of voluntary pro bono services provided by Virginia's practicing lawyers.

The VBA's response to the Chief Justice was plain and simple. Yes, we will. Yes, we will do what we can to promote pro bono service. Yes, we will collaborate with legal aid organizations and other community-based groups to give lawyers the opportunity to volunteer their time and energy in a meaningful way. And, yes, we will work with the Supreme Court to bring together those who are leading this effort from around Virginia in hopes of creating a sustained, coordinated, collaborative approach to the unmet legal needs of our fellow Virginians.

So, what exactly is the VBA doing?

To coordinate The Virginia Bar Association's efforts in response to the Chief Justice's challenge, we have created a special pro bono task force with members from around Virginia. The task force members are all lawyers who have been involved in pro bono programs before. The co-chairs are Harry ("Pete") Johnson of Richmond and Scott Oostdyk, also of Richmond. The other members of the task force are Nicole Harrell of Norfolk, Webb King and Lori Thompson of Roanoke, Robert Stoney of Fairfax, and Margaret Bacigal of the University of Richmond School of Law. The task force has begun its work and will be on the move across Virginia beginning this summer. Plans for a statewide pro bono summit next year are already in the works. On behalf of all of our members, I would like to publicly thank these lawyers for their willingness to assist in this effort.

Another initiative the VBA has underway will come to fruition on June 23, when the VBA is scheduled to host a veterans summit which will bring together people and organiza-

tions working on behalf of our veterans—especially those returning from Afghanistan and Iraq. If you attended the truly extraordinary program put on by the Committee on Special Issues of National and State Importance at the VBA Annual Meeting in January, which discussed the tremendous challenges faced by our armed forces when they return from Afghanistan and Iraq, you know that these men and women have legal, financial and psychological needs which are simply not being met. The good news is that many across Virginia have responded. There are pro bono programs for veterans underway at law schools and law firms around Virginia. Every day, more lawyers and judges are getting involved. The VBA has stepped into this arena to offer its services to help the numerous organizations involved to communicate with one another. The goal is to get those with the most knowledge of the need in the same room as those interested in helping meet those needs. In addition of a cadre of VBA leaders, expected to attend are representatives of the Lawyers Serving Warriors program, the Virginia Wounded Warrior program, the William and Mary Law School Veterans Benefits Clinic, the Judge Advocate General's office, military officers and the Virginia judiciary. This summit is the result of many hours of work by former VBA president Jim Meath and Bob Barrett, a Richmond lawyer who is a West Point graduate and a veteran of the war in Iraq. Please thank these lawyers when you see them.

In addition to these initiatives, our Young Lawyers Division has always been active in providing pro bono services. For many years, the YLD has spearheaded the Pro Bono Hotlines which have helped thousands of Virginians in several of our metropolitan areas. Similarly, our YLD members have provided legal assistance to victims of natural disasters. Just this year, the YLD has joined a collaborative effort with several law firms and the Hispanic Chamber of Commerce to help expand the provision of pro bono legal services to the growing and economically important Hispanic community in Virginia.

We cannot rest on these laurels, though. The Chief Justice has asked us for more. The bottom line is that The Virginia Bar Association is responding to the Chief Justice's challenge. Sometimes we have the luxury of picking our priorities and our projects. But, often, the priorities and projects pick us. That is the case this year, but I would not have it any other way. At this moment in our history, the VBA has been asked to help on one of the biggest issues facing our communities and our justice system. Our members, indeed all Virginia lawyers, are in a position to make a difference to a lot of people. Let's all get on with it.

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WRITER'S BLOCK

GRAMMAR CONFIDENTIAL: DISPELLING COMMON WRITING MYTHS

BY DAVID H. SPRATT

Urban myths or shared folklore are a significant part of our common heritage. Much, if not all, of this folklore, is passed down from generation to generation without questioning its accuracy. Some can be tested or proved using common sense, e.g., it doesn't take much verification to see the wisdom of your mother's comment to "look both ways before crossing the street." (On the other hand, although as adults we see the fallacy of the expression, "step on a crack, break your mother's back, step on a line, break your mother's spine," some of us still find ourselves acting overly careful when walking down a sidewalk.) Other rules that survive through the years are much less reasonable and often steeped in fiction. Many of these rules relate to basic grammar. This column seeks to debunk many of the grammar "myths" that have gained a stronghold in our collective conscience.

Urban Myth #1:

If you swallow a piece of chewing gum, it will take seven years to pass through your system. **False!**

Although gum resists the body's attempts at digestion, gum is eliminated as human waste the same way and at the same rate as anything else that we swallow.

Grammar Myth #1:

Never Split an Infinitive. **False!**

Splitting an infinitive, while it sounds a bit draconian, is nothing more than placing one or more words between the word "to" and a verb. Probably the most-quoted example of a split infinitive can be traced to Star Trek: "To boldly go where no man has gone before." To split infinitives is something that strict grammarians like my high school English teacher and William Strunk, Jr. (at least in the early editions of *The Elements of Style*) would have abhorred. Modern grammar texts, however, including the later and online versions of Strunk and White, have abandoned this rule, and advocate splitting infinitives if doing so eliminates confusion, adds precision, or simply sounds better.

Merriam-Webster Online, in discussing the usage of split infinitives, states, "Even though there has never

been a rational basis for objecting to the split infinitive, the subject has become a fixture of folk belief about grammar. You can hardly publish a sentence containing one without hearing about it from somebody. Modern commentators know the split infinitive is not a vice, but they are loath to drop such a popular subject."¹

"Wait," you might be saying, "you told us in your last column that we should always know our audience. If I am writing for someone who is a stickler for long-abandoned grammar rules, should I still split my infinitive and risk the wrath of my reader who now thinks I have made a grammar mistake?" My advice here is no different: know your reader and recognize that certain readers will be distracted when faced with a split infinitive. In short, there is nothing incorrect about refusing to routinely split infinitives unless this refusal results in a misplaced modifier or adds ambiguity to a sentence that would otherwise be clear (forgive my split, I couldn't help myself).

Urban Myth #2:

Mikey from the Life cereal commercial died after eating Pop Rocks and drinking Coca-Cola. **False!**

We can all breathe a collective sigh of relief. John Gilchrist, the child actor who played Mikey, is alive and well. Pop Rocks when eaten with any type of carbonated beverage produce at most, an unwelcome burp.

Grammar Myth #2:

Never Begin a Sentence with a Coordinating Conjunction (like "and," "but," or "or"). **False!**

Starting a sentence with a coordinating conjunction is not incorrect. Before doing so, however, consider whether your idea can be better expressed without resorting to such "deviant" behavior; often, a phrase that begins with a coordinating conjunction is really a sentence fragment, not a complete sentence. And given your likely audience and purpose, persuading or providing information to a court, client, or other lawyer, writing in complete sentences is preferable.

Urban Myth #3:

Never go swimming within one hour of eating or you will get a severe, life-

threatening stomach cramp, causing you to drown. **False!**

According to internet urban legend websites (and again, you've got to love my sources), not one death has been reported where someone drowned simply as a result of going in the water too soon after eating.

Grammar Myth #3:

Never End a Sentence with a Preposition. **False!**

This supposed "rule," unlike the other two, is less commonly quoted these days, due in some part to Winston Churchill, who mocked its absurdity, stating either "This is the sort of English up with which I will not put" or "This is the sort of bloody nonsense up with which I will not put." The exact quote seems to be unverified, and the number of unsubstantiated variations on the quote continues to grow.

There are some readers, however, who still feel somewhat queasy when confronted with a dangling preposition. When ending a sentence with a preposition, ask yourself two questions: 1) does the sentence need the ending preposition or would the same point be made by deleting it? (If so, delete the dangling preposition); and 2) does revising the sentence to remove the dangling preposition to put it somewhere else make sense or does the revision sound as strained as Churchill's quote? (When the sentence becomes strained after trying to revise it, leave the dangling preposition.)

Future columns will likely deal with additional rules you learned from a long-dead English teacher. Let me know if there are any others I should be aware of. I hope I didn't shatter your world.

NOTES:

1) <http://www.merriam-webster.com/dictionary/split%20infinitive>

David H. Spratt is a professor at The American University, Washington College of Law, where he teaches Legal Rhetoric, Introduction to Advocacy, and Family Law Practice and Drafting. Professor Spratt practiced family law for ten years and is a former chair of the VBA Domestic Relations Section.



VBA Rule of Law Project: Teaching the Teachers

The Virginia Bar Association Rule of Law Project and the Virginia Law Foundation hosted an event for more than 50 Virginia public school superintendents and administrators on Law Day, May 1, at the Virginia Holocaust Museum in Richmond. The four-hour program introduced the Project to a statewide audience of educators following the successful pilot program in middle school civics classes in the Roanoke Valley in February.

Moderating the event was Roderick B. "Rod" Matthews, ABA World Justice Project Commission member and member of the Virginia Holocaust Museum board of trustees and Virginia Law Foundation board of directors. Project chair and VBA immediate past president, G. Michael Pace, Jr., presented an overview of the Project to attendees, highlighting the need for a better understanding of the rule of law in public and private education in Virginia. Tim Isaacs, director of curriculum development for Roanoke City Public Schools, gave attendees a history of the Project and the benefits of the program to teachers and students, emphasizing the opportunity for collaborative learning. Dean Rodney Smolla from Washington & Lee School of Law presented a simulated oral argument before the Supreme Court, featuring the application of the rule of law in two fictitious scenarios which produced a lively debate among the educators who were anointed as temporary Supreme Court justices.

Participants were enthusiastic about bringing the program to their respective school districts for an October 2009 roll out date. Leaders of the Project thanked Jay M. Ipson, founder, president and executive director of the Virginia Holocaust Museum, and Jay M. Weinberg, secretary of the board of trustees of the Museum and an attorney with Hirschler Fleischer for their help with the program.

The Rule of Law Project has been recognized with an Award of Merit from the Virginia State Bar, and the Virginia Law Foundation has nominated the program for the National Conference of Bar Foundation's Award for Bar Foundation Excellence in Public Service Programming. This award recognizes a bar foundation for an innovative, imaginative program and/or grant award for public service projects in the legal arena, honoring a bar or law foundation for its creative response to important societal issues.

The VBA Rule of Law Project is funded by a grant from the Virginia Law Foundation. The Foundation promotes through philanthropy the rule of law, access to justice, and law-related education.



School district representatives learning about the Rule of Law Project at the May 1st event.



L to R: Mary Ann Delano (president of the Virginia Law Foundation), Tim Isaacs, Mike Pace, Dean Rodney Smolla and Rod Matthews at the May 1st event.

Public School District Participants:

Albermarle County
Alexandria
Appomattox County
Bath County
Campbell County
Caroline County
Carroll County
Charles City County
Chesapeake
Chesterfield County
Fairfax County
Fauquier County
Hampton
Hanover County
Henrico County
Henry County
Madison County
Manassas
Martinsville
New Kent County
Norfolk
Pittsylvania County
Rappahannock County
Richmond
Roanoke County
Rockingham County
Salem
Shenandoah County
Spotsylvania County
Stafford County
Tazewell County
Virginia Beach
West Point
Williamsburg-James City County
York County

The Practitioner's Guide to the Care and Feeding of Court Reporters

BY L. STEVEN EMMERT

Who's the highest-ranking person in a trial courtroom? No; it's not that scowling guy with the robe, menacingly waving the gavel at you. It's the court reporter. Want proof? Well, we can agree that the judge can tell everyone in the courtroom to shut up (assuming he's in a bad mood; otherwise he'd phrase it more delicately than that), and that he can enforce such a directive. But the court reporter can silence the judge. Code §8.01-420.3 provides that the judge can't direct that the reporter go off the record unless everyone consents. This statute is designed to ensure that all trial court proceedings are on the record, to facilitate appellate review. That means that the court reporter can say, "Excuse me, your honor, but I have to change paper," and his honor has to just sit there and fume in silence.

Now that you understand why the reporter is the highest-ranking person in the courtroom, here's why she is also the most important person in your appeal.

Rule 5:11(a) provides that the transcript of trial court proceedings is a part of the appellate record as long as it's filed within 60 days after the date of judgment. The transcript is essential to appellate review. You already know that the contemporaneous objection rule (Rule 5:25) is the biggest barrier by far to appellate review of the merits of an issue; the transcript helps the justices to identify where, exactly, you raised an objection in the trial court, how you presented it, and how the trial judge resolved it. In essence, if you don't have a transcript, then you don't have an appeal. (There are exceptions, such as where the trial court sustained a demurrer. In that instance, the only issue is the sufficiency of a pleading, so a transcript will usually be immaterial. But this kind of appeal is comparatively rare. In addition, you may be able to resuscitate your appeal by using a written statement of proceedings under Rule 5:11(c). I'll post a separate essay on that rule in the near future.)

What's more, the timely filing of the transcript is one of the mandatory deadlines in the appellate rulebook.

Rule 5:5(a) specifically identifies these mandatory deadlines (which the court interprets as jurisdictional), and the filing of the transcript is right up there with the notice of appeal and the petition for appeal. If you don't timely file a transcript, you're likely to get a letter from the court directing you to address how the court can consider the appeal without it. Unless you have one of those rare appeals (like the one with the demurrer) where a transcript isn't necessary, your appeal is probably headed for a premature end.

I hear all kinds of horror stories from trial lawyers about their dealings with court reporters. I hear about delays in getting transcripts, inaccuracies, even what they perceive as predatory pricing (including the suspicion that the other side's reporter is giving a sweetheart deal to the "friendly" lawyer, expecting to gouge the "unfriendly" lawyer on the copy rate). Many lawyers suspect that their opponents are playing footsie with their preferred reporter in this or similar ways. I'm good-natured enough that I doubt there's any real truth to these suspicions. But my customers fret about it. Happily, even if they're right, there is something they can do about it. Here's that something:

Rule #1:

You must cultivate a good working relationship with a competent, reputable, and reliable court reporting firm.

Rule #2:

You must bring a reporter from that firm to any proceeding in which the trial court will decide something more important than what to order for lunch.

Comment to Rule #1:

You should be prepared to spend at least some time meeting the first of these requirements: Finding a competent, reputable, and reliable reporting firm. Ask about more than just rates (although you should ask about those, too); find out what the firm's standard turnaround time is for non-expedited transcripts. Ask if the firm is affiliated with the National Court Reporters



Association and adheres to that association's Code of Professional Ethics. Find out how much experience each reporter in the firm has. As you'll see below, there are advantages to working with a firm with multiple reporters, so you should ask how many reporters work there. Find out how many lines of text the firm prints per transcript page. (25 lines per page is standard. Keep in mind that an unscrupulous reporter can give himself a largely-invisible 12% raise by printing only 22 lines per page.) Get references, and ask to see examples of their work; if you see loads of blank space on many pages, keep shopping.

Comment to Rule #2:

Yes, I said any proceeding. You should volunteer to provide the reporter for every deposition, every hearing, every trial. The only exception is where the deposition will be in another jurisdiction, or so far away that your reporter doesn't travel that far. Even then, ask your reporter for a recommendation in that jurisdiction or locality.

If you follow these two simple rules, over 90% of your transcript-related problems will vanish immediately. You'll know in advance what to expect when you get a bill. You'll know how long the reporter generally takes to turn transcripts around. You won't have to worry about trying to convince a complete stranger that she typed

four when what you really said was before - or worse, that she left out a not. You will be able to file transcripts with confidence instead of grumbling about getting home-cooked by a . . . a menial functionary, for cryin' out loud!

Well, perhaps that's step 1 in your conversion away from the Dark Side. Court reporters are not mere functionaries. They are not machines and they're not slaves who must do everything that you direct in order to comply with your wishes. (Neither are court clerks; but that's another essay.) They're professionals who deserve your respect, and that includes the times when you're having a bad day. Start out by treating them with courtesy, in the way you would want to be treated.

Toward this end, I have developed a set of procedures you can use to care for and feed your court reporters, and reduce the transcript-related stress in your life.

Before trial

1. Call in advance! I know that emergencies sometimes arise in your practice, but it's rare that the need for a court reporter will arise without warning. Ideally, you should call your reporter the same day you select the hearing or trial date. Don't wait until 5:45 pm the day before the 9:30 am trial; although many reporters can accommodate such last-minute requests, they don't enjoy it. Would you?

2. Provide plenty of contact information, for yourself and your secretary. The reporter may have questions before the hearing, or he may want to contact you afterward with a question about something that occurred during the hearing. Make it easy for him to get in touch with you.

3. If you cancel or reschedule the deposition, hearing, or trial, don't forget to call the reporter. That can save you an appearance fee, and the reporter the hassle of getting dressed up to go to court.

4. Let the reporter know in advance if you'll be needing expedited or daily transcripts. This enables the reporting firm to make arrangements that are in your mutual interests. For example, the firm can send John in to take down the morning's proceedings. At the lunch break, he heads back to the office to start transcribing; in the meantime, his colleague, Mary, appears to take down the afternoon's testimony. John may be able to get you his transcript by the end of the day, and Mary has only three hours' worth of materials to transcribe that evening, in order to get the

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transcript to you first thing the next morning. If you don't let them know this, John has to stay in the courtroom all day. He then gets back to the office at 6:00 pm or so, with six hours' worth of trial to transcribe. Do you enjoy staying up 'til the wee hours when you're in the middle of a multi-day trial? Well, neither does John. Do it my way, and you get your transcript promptly, plus you get a more attentive reporter for Day 2, since he got a good night's sleep.

5. Here's the scene: You're preparing for tomorrow's scheduled two-hour hearing on a complex statute of limitations question. You're going to cite to the judge four key cases, one of which is the little-known but dynamite case of *Cowznafski v. Pastafalooza*. You make three copies of the case - one to give to his Honor; one to grudgingly hand over to the Bad Guy, even though he doesn't deserve it; and one for your own notebook. Have a heart; make a fourth copy, and give that to the court reporter. That will make her life easier because (1) she won't have to remember to ask you how to spell Pastafalooza, and (2) when you start reading from the case, and read too fast (see below), she can look at her copy and be sure to get the wording down right.

At the trial

1. Slow down when reading. Studies show that 62.4% of Americans, and 100% of American lawyers, speed up when they're reading from a prepared text. That's because when you're speaking extemporaneously, as we usually do while arguing a motion or responding to a question from a judge, there are actually two consecutive processes going on. First, your brain has to decide what you're going to say. Only then do you actually start speaking. (This protocol is waived for teenagers and most college students, who spontaneously speak anything that comes to mind without considering whether it would or would not be a good idea to say that. They also start sentences with no clue of where the ultimate destination will be. But I digress.) This two-step process tends to slow your speech, as your mouth

has to wait for your mind to conjure up just the right thing to say. But when the words are right there on the paper you're holding in your hand, there is no governor on the accelerator pedal; you can go as fast as your lingual dexterity will allow you to form the syllables. Slow the hell down! Fast speech isn't persuasive anyway; when a speaker wants to make a profound point, he slows down his speech for emphasis. (Try it.) The record for the fastest recorded speech by a public figure has been reported to be John Kennedy's 327 words in one minute in 1961; professional "speed-talkers" reputedly have passed 600 WPM. You don't want to go there; it makes for a mystified jury and a hopeless mess of a transcript anyway.

2. During breaks in the proceedings, approach the reporter and ask something like, "Do you need any spellings of anything?" Assuming your reporter doesn't faint at receiving this remarkable courtesy, he will usually say yes, and ask you how to spell Pastafalooza, or the "bijillion" dollars you asked the jury in opening statement to award your client. This one is virtually guaranteed to endear you to even the most experienced, jaded reporters; they are not accustomed to meeting lawyers who care one whit about the court reporter's lot in life.

After the trial

1. Order the transcript as soon as you perceive a need for it. This might even be during the trial; but if you conclude a few days later that you'll need to appeal, go ahead and order it then. Don't wait until that mandatory and jurisdictional 60-day deadline starts to approach. Rush jobs (a) are stressful for the reporter, (b) tend to produce a few more errors, and (c) cost you more.

2. The reporter will usually attach a bill to your copy of the transcript. You should pay that bill no later than the next day. Not in ten days; not 30 days; and certainly not after two nagging phone calls asking for payment. The next day. I learned long ago that the surest way to acquire the favor of any vendor is to develop a reputation as someone who pays his bills, not just promptly, but immediately. ■

Pre-Suit Demand Requirements in Virginia: Should Universal Demand Be Universal?

BY CHRISTOPHER T. PICKENS

The Supreme Court of Virginia has observed that "consistent application of commercial rules promotes predictability" and that businesses may opt-out of those rules when doing so is desirable.¹ But an inconsistency in the Virginia Limited Liability Company Act (the "LLC Act") makes that commercial statute unpredictable: it is unclear if the LLC Act always requires a member to demand action from the LLC's management before filing derivative claims on the LLC's behalf, or in the alternative, if the member can avoid making demand by alleging in his or her derivative complaint that such a demand would have been futile. This uncertainty was created in 1992, when the Virginia Stock Corporation Act (the "VSCA"), which is incorporated into the LLC Act, was amended to make pre-suit demand on Virginia corporations a universal requirement? Because this uncertainty has several potentially negative effects, the LLC Act should be amended to clarify whether pre-suit demand on Virginia LLCs is universally required, as it is with Virginia corporations. As explained below, the more sensible approach may be to apply the same demand requirements to both corporations and LLCs—as was the case before the 1992 VSCA amendments. But because of a fundamental difference between corporations and LLCs—the former being a creature of statute, the latter being a creature of contract—an amendment to the LLC Act also could permit LLC members to opt out of the universal demand requirement through the LLC's articles of incorporation or operating agreement.

As a general matter, rules governing pre-suit demand dictate who - as between a shareholder or member plaintiff and management - has the right to control litigation brought on a company's behalf. If demand is universally required, a shareholder or member may initiate litigation on behalf of a company only after first demanding that its management do so. In response to a demand, management must determine whether the

proposed litigation is in the company's best interests, and then accept or reject the demand accordingly. If management refuses the demand, the plaintiff may only initiate litigation if he or she can allege that management did so wrongfully; alleging wrongful refusal, in turn, can be difficult because management's conclusion that litigation was not in the company's interest is protected by the business judgment rule.³ In contrast, a demand-futility exception allows a plaintiff to proceed immediately to litigation in the name of the company, without first making demand on management, if that plaintiff can allege particularized facts that establish management would be incapable of considering the demand impartially—a situation that may arise if the potential claims challenge a transaction from which the managers benefited or face a substantial likelihood of liability.⁴

The rationale for universal demand is that it (1) provides the board of directors a pre-litigation mechanism to resolve problems underlying litigation, essentially functioning as a method of alternative dispute resolution; (2) eliminates costly litigation over directors' alleged interest in the potential claim, which previously had been necessary to establish demand futility but was only collateral to the merits of the claim itself; and (3) vests primary control over a company's claims in those who are statutorily responsible for managing the company's affairs, the directors.⁵

The present uncertainty about which pre-suit demand requirements apply to LLCs in Virginia can have several deterrent effects on commerce in the Commonwealth. For example, prospective members may have concerns, *ex ante*, about other members misappropriating the LLC's assets or business opportunities. The ordinary remedy against such abuse is a derivative claim. But absent clear rules governing who may initiate those claims and how those claims may be initiated, a prospective member cannot be certain he or she will have an adequate mechanism to redress that

abuse. Similarly, a prospective member may be concerned that another member will disrupt the LLC's operations by filing frivolous derivative claims, and given the uncertainty of the LLC Act's requirements, he or she will be uncertain if the LLC has sufficient control over those suits. In some instances, these uncertainties may deter prospective members from organizing - or joining an LLC already organized - in Virginia. Finally, *ex post*, neither an LLC member nor LLC management can know with certainty how a derivative claim should be initiated, potentially spawning additional litigation to determine the applicable demand rules, in addition to whether those rules were followed.

When it enacted the LLC Act in 1991, the General Assembly made clear that the demand requirement applicable to shareholder-derivative suits under the VSCA, which at that time included a demand-futility exception, also applied to member-derivative suits under the LLC Act. At that time, the LLC Act read:

*A member may bring an action in the right of a limited liability company to recover a judgment in its favor to the same extent that a shareholder may bring an action for a derivative suit under the Stock Corporation Act, Chapter 9 (§ 13.1-601 et seq.) of this title. Such action may be brought if members or managers with authority to do so have refused to bring the action or if an effort to cause those members or managers to bring the action is not likely to succeed. . . .*⁶

In 1992, however, the General Assembly amended the VSCA so that "[n]o shareholder may commence a derivative proceeding until...[a] written demand has been made on the corporation to take suitable action,"⁷ thereby establishing universal demand, and eliminating the previously recognized demand-futility exception, for derivative claims brought on behalf of a Virginia corporation. Yet when the "extent [to which] a shareholder may bring an action for a derivative suit under the

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[VSCA]" was changed in 1992, the LLC Act was not amended to make a similar change; nor was the LLC Act amended to eliminate its reference to the VSCA's demand requirements. The LLC Act's continued reference to the VSCA's now-amended shareholder demand requirements conflicts with its own apparent recognition of a demand-futility exception: the first sentence expressly limits a member's ability to bring derivative claims to those situations in which a stock corporation shareholder may do so - i.e., only after making demand - while the second sentence purports to permit a member to bring derivative claims without making demand if doing so would have been futile.⁸

The circumstances surrounding the LLC Act's inconsistency suggest that the General Assembly intended the LLC Act to mirror the VSCA but simply failed to amend the LLC Act to remove its demand-futility language. In the absence of legislative action, however, this uncertainty and its deterrent effects will persist, and it is unclear whether the Virginia courts can resolve the conflict in the LLC Act's language: it will be difficult for a court, employing canons of construction typically used to interpret ambiguous statutes, to discern the General Assembly's actual intent. On one hand, the LLC Act refers to the entire VSCA rather than a specific section, making its incorporation of the latter one of general reference, and when one statute incorporates another by general reference, any subsequent amendments to the incorporated statute—e.g., the subsequently enacted universal-demand requirement—also become part of the incorporating statute.⁹ Thus, it could be reasoned that by incorporating the VSCA's restrictions for shareholder-derivative suits, the General Assembly intended the LLC Act to incorporate VSCA's restrictions even if they were subsequently amended. On the other hand, legislatures are presumed not to use surplus words, and to the extent possible, courts are to give meaning to all words in a statute.¹⁰ Yet to interpret the LLC Act as incorporating the universal-demand requirement from the VSCA is to completely ignore the LLC Act's own language acknowledging a demand-futility exception, which suggests that the General Assembly did not intend the demand-futility exception to change even if the VSCA was later amended.¹¹

The General Assembly can resolve this conflict and achieve consistency and predictability by amending the LLC Act to establish either that (a) the

demand futility exception applies to LLCs, or (b) the universal demand rule applies to LLCs, as it does to corporations. Several reasons suggest, however, that a universal-demand requirement may be the preferable statutory rule. First, like the directors of a corporation, those managing an LLC should have an opportunity to control—at least initially—claims brought on its behalf. An LLC, like a corporation, is a legal entity separate and distinct from its members with authority to conduct business on its own behalf. In member-derivative suits, the LLC is the real party in interest, just as the corporation is the real party in interest in shareholder-derivative suits. The authority to manage an LLC's affairs is vested in all of the members (proportionately according to their contributions to the LLC) or the managers they appoint, not in any individual member.¹³ Indeed, to encourage the exercise of this authority, an LLC's managers, like a corporation's directors, are entitled to a limitation on liability and the protection of the business judgment rule.¹⁴ Second, the issues raised during demand-futility motions in member-derivative suits, like their counterparts in shareholder-derivative suits, are collateral to the merits of the underlying claims. Thus, eliminating those issues from a dispute streamlines the litigation and eliminates the unnecessary expenditure of resources associated with them.

Furthermore, several features of the LLC that could be perceived as unique actually parallel features of the corporation under Virginia law. The LLC Act allows members to allocate man-

agement responsibility for the LLC among members or non-member managers in the articles of organization or operating agreement,¹⁵ possibly creating confusion as to the body on which a derivative plaintiff must make demand, but the VSCA also allows shareholders to eliminate the board of directors or restrict its authority by agreement.¹⁶ And the LLC Act's flexibility does not necessarily create confusion because a derivative plaintiff must be a member and therefore would be privy to the articles of incorporation or operating agreement that allocated the relevant authority. Similarly, although any act by an LLC member or manager may be taken without a meeting,¹⁷ creating possible concern that members or managers would give a demand short shrift, any act by a corporation's directors also may be taken without a meeting.¹⁸

Nonetheless, LLCs are not exactly like corporations. Unlike corporations, which are creatures of statute, LLCs are created by contract, and an LLC's members can opt-out of most rules contained in the LLC Act. But this flexibility apparently does not extend to pre-suit demand requirements: the LLC-demand statute does not include "unless otherwise provided in the articles of organization or operating agreement" or other similar language.¹⁹ As a result, the pre-suit demand requirements (whatever they may be) currently appear to be mandatory for all Virginia LLCs. That the pre-suit demand requirements are mandatory is another reason to

Continued on page 17

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Catherine M. Reese, Esq., Council Member-elect to the Virginia State Bar, and of the Reese Law Office formerly known as The Law Office of Catherine M. Reese, PLC, along with her associates, Laurie M. Crawford and Katelin T. Moomau, are pleased to announce their relocation to **10300 Eaton Place, Suite 150, Fairfax, Virginia 22030**, where they will continue to offer a full array of personalized family law solutions through advocacy, mediation, collaboration and litigation.

Douglas R. Burtch has joined Macaulay & Burtch, P.C. after practicing law in Northern Virginia with Littler Mendelson and Pillsbury Winthrop Shaw Pittman. Burtch earned his bachelor's degree from Emory University in Atlanta and his law degree from the University of Richmond. He then clerked for the Supreme Court of Virginia. Burtch represents companies, executives and professionals in employment and labor issues.

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The Whiskey Business

(A Book Review)

BY THOMAS S. WORD, Jr.

On April 25, 1935, the curtain rose in Roanoke, Virginia, on a courtroom drama unrivaled since the trial of Aaron Burr. Fifty court days later, thirty-one defendants stood convicted of conspiracy to manufacture and sell moonshine. Official corruption motivated the prosecution, to the severe embarrassment of the Byrd Machine. The government's principal target, Charles Carter Lee, Robert E. Lee's grand nephew, Commonwealth's Attorney of Franklin County, and a staunch Byrd Democrat, stood acquitted, to the consternation of Special Prosecutor Sterling Hutcheson and Judge John Paul. Remarkably, two years in prison and a \$5,000 fine was the toughest sentence Judge Paul levied. Seven, including the only corporate defendant, raw materials supplier Ferrum Mercantile Company, Inc., plead *nolo contendere* and got only fines. Four individuals who plead guilty got probation.

With exhaustive research, Franklin County lawyer T. Keister Greer (1921-2008) collected the facts of the case, and related cases of jury tampering and three brutal murders, for *The Great Moonshine Conspiracy Trial of 1935* (2002, History House Press, 916 pp.). Greer briefly practiced law with Charles Carter Lee and knew many of the characters in the drama, as well as the history of Franklin County, the subject of his honor's thesis at the University of Virginia. The desperation of the place and time leaps from the pages. So does humor and pathos.

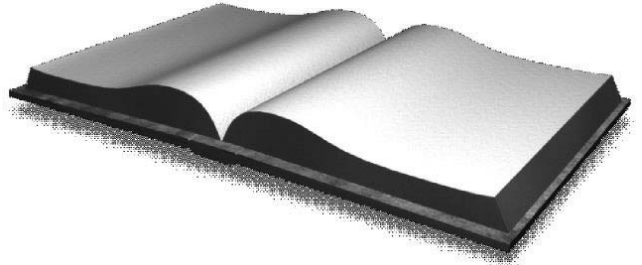
In 1931 the U.S. Attorney General, in a survey of Prohibition's unintended consequences, reported that in Franklin County ". . . 99 people out of 100 . . . have some connection with illicit liquor." This led J. Edgar Hoover to target the county for investigation after Prohibition's repeal, thereby adding insult to the injury to commerce caused by repeal (the still-side price of moonshine fell from \$2.50 to 60 cents a gallon with repeal).

Colonel Thomas Bailey, a remarkable G-man and combat hero of World War One, spent a year living quietly

among Franklin's whiskey makers and transporters. He persuaded two hundred of them to testify before a federal grand jury in Harrisonburg, belying the legend that moonshiners would not talk. Remarkably, they testified without immunity from prosecution. Perhaps many, rendered destitute by the Depression and Prohibition's repeal, considered truthfulness their last hold on dignity. The indictment named fifty-five unindicted co-conspirators, many of whom testified for the government.

Whiskey making had a long and at first honorable history in hilly Franklin. Yeoman farmers turned their apples and grains into legal brandy and whiskey in the Eighteenth Century. But then rural distilleries were outlawed, thanks to the temperance movement. In 1920 the confluence of an agricultural depression and the 18th Amendment to the U. S. Constitution created a perfect storm. Land values and crop prices plummeted, and whiskey became the farmers' only profitable crop. Franklin County embraced it with enthusiasm. Over six Prohibition years, thirty-four million pounds of sugar were shipped into Franklin-along with thirty-million pounds of grain and meal, a million and a quarter five-gallon cans and one hundred fifteen thousand pounds of copper sheet. That translated into 5.25 million gallons of moonshine. (The county's population was just 24,000.)

Under the orchestration of Judge Paul and prosecutor Hutcheson, later a distinguished federal judge in eastern Virginia, and assistant prosecutor Frank Tavenner, later a prosecutor of Japanese war criminals and counsel to the House Un-American Activities Committee, the government put on 287 witnesses to prove the conspiracy. Charged were moonshiners large and small, a federal and a state Prohibition officer, a former sheriff, four deputies, and the kingpin and principal target,



Charles Carter Lee.

The trial attracted the leading criminal defense lawyers of Western Virginia, including Steven Timberlake of Staunton for Carter Lee, who would act as lead counsel. T. Warren Messick of Roanoke, famous for murder defense, played a key role, as did John W. Carter of Danville and Rocky Mount's Dalton Dillard, Herbert Dillard and, J. Brady Allman, a fellow Democrat but bitter political enemy of Lee. B. A. Davis Sr. and Jr., Republican leaders in Franklin, had multiple clients. Many of the same lawyers also served in the related jury tampering and murder cases. With destitute defendants and no system for court payment of counsel fees, the lawyers did much of their work for free.

In opening statements, all defense counsel denied the existence of the conspiracy. After the government's evidence was in, they admitted the conspiracy and tried to show that the government had failed to prove their particular client's involvement. The government's case against Lee and its defense provided the trial's principal drama, humor, and pathos.

Only one moonshiner testified to paying Lee directly for protection. Tom Cundiff was small time, illiterate, a Republican, and a bitter enemy of Lee. Their feud boiled over when Lee prosecuted Cundiff's sixteen-year-old son for assault of a neighbor, John Horsley. Tom Cundiff testified for his son, and Lee cross-examined him. During that exchange, Cundiff blurted out that he'd long paid Lee \$10 a month for protection, whereupon Lee called him "a liar . . . an infernal liar . . ."

. a black liar," and struck him with a chair, breaking two ribs. The judge, Lee's brother-in-law, found Cundiff in contempt, fined him \$50, and sent him to jail for ten days. He said nothing derogatory to Lee for his courtroom violence.

Cundiff served his time for contempt, but was jailed again a month later for assaulting the same John Horsley. Lee promptly had Cundiff committed to Western State Hospital in Marion for mental evaluation, where he languished for three months before being pronounced sane and returned to Rocky Mount for trial. Carter Lee then came to Cundiff in jail with a written retraction of his statement that he'd paid Lee for protection. Cundiff refused to sign it, but shrewdly sent his wife to Lee the next day to get the paper. Meanwhile, Colonel Bailey had heard of Cundiff's outburst against Lee, and came to interview Cundiff in jail, setting off alarm bells in the Franklin County constabulary. During the interview, Cundiff slipped Bailey the written retraction tendered to him by Lee.

Cundiff was tried and convicted on the charge of assaulting John Horsley and sentenced to three years. The next day he broke jail. After two days and nights as a fugitive, he called Colonel Bailey and offered to surrender if Bailey would assure him protection against Lee and the Franklin county law. Cundiff was convinced they intended to kill him.

The paper Lee asked Cundiff to sign read as follows, and was introduced into evidence by Hutcheson during Cundiff's testimony:

Rocky Mount, Va., September 3, 1934

TO WHOM IT MAY CONCERN: This is to certify that the statements made by me that I had paid to C. C. Lee, Commonwealth's Attorney, money for protection of myself or property used in the liquor business are not true, and I wish to apologize for having made such statements.

Respectfully,

(For signature)

Cundiff testified he'd paid Lee \$10 a month for eighteen months as protection, then refused to pay more as Lee demanded. A check on Cundiff's bank account for \$39, filled out by and made payable to Lee, then endorsed by Lee to the Clerk of Court, was claimed by Cundiff to be four month's arrearages for protection (Cundiff claimed the last dollar was paid in cash because \$39 was all he had in the bank). Lee testified the check was in payment of a fine for possession of a still.

Thomas S. Word, Jr. is a principal with Word & Word PLC in Richmond. He also is Of Counsel with McGuireWoods. Mr. Word concentrates his practice on tax, estate planning, estate and trust administration, charitable giving, family business planning and fiduciary litigation law. Mr. Word received a B.S. from Virginia Tech and a J.D. from the University of Richmond Law School.

Lee admitted to a regular practice of reducing charges of whiskey making, a felony, to still possession, a misdemeanor, in exchange for a guilty plea, a practice endorsed by Governor Pollard and circuit judges. They did not endorse Lee's practice of doing it on his own motion without involvement of any judge, and collecting the fine himself, often in cash and without giving a receipt.

After Cundiff's testimony to the grand jury, its members had expressed concern to Judge Paul for Cundiff's safety if he were returned to the Franklin County jail. The judge kept Cundiff confined in the Harrisonburg jail until the grand jury permanently recessed, but explained to the grand jury that eventually he would have to be returned to Franklin since he was a state prisoner. When Cundiff was finally returned to the jail in Rocky Mount to finish his assault sentence, four ATU officers escorted him, a show of force intended to let Lee and the Franklin constabulary know he better not be abused in their custody.

* * *

The government's evidence in the broader case showed that a "granny fee" of \$10 to \$50 a month was paid, usually to a deputy sheriff, for each still, depending on capacity, and shared among lawmen. In exchange the still would not be "cut," except occasionally with warning, so the deputies could earn their official fees of \$10 per still destroyed (they were unsalaried). Soon after, the fee system for arrests in law enforcement was abolished in Virginia.

Protected transporters were free to haul the whiskey out of the county unstoppped, then led cross country by fast "pilot cars," unburdened by whiskey loads. The daredevil pilot drivers were famously skilled at protecting the whiskey cars from pursuing revenueurs. They were the forerunners of today's NASCAR drivers-stock-car racing was invented by transporters and their mechanics for weekend entertainment. Franklin's whiskey went to bootleggers in Roanoke, Lynchburg, West Virginia coalfields, North Carolina, and Tidewater Virginia. Carried in car loads of 100 to 125 gallons, it sold FOB the buyers' whiskey cars at \$1 to \$2.50 a gallon and resold to small-time city bootleggers for \$6 to \$7, until Prohibition's repeal

in 1933.

Willie Carter Sharpe, female pilot car driver extraordinaire who once sported diamonds in her teeth, proved a star witness. U. S. Commissioner Charles D. Fox testified, "She'd always tell you the truth." She testified to Lee's presence at roadblocks where protected transporters were allowed to pass. She admitted leading caravans of whiskey cars out of Franklin "365 days a year from 1927 on" (until she went to federal prison, from which she came to testify). Her pay was \$10 a trip. Age thirty-two at the time of her testimony, she'd been born a farmer's daughter at the Floyd County Village of Check, married first Floyd Carter, son of the king of Roanoke bootleggers, John Carter, then lived with fellow transporter-bootlegger Charlie Sharpe, whose name she adopted without benefit of clergy. Federal Prohibition officer and defendant Samuel White was her lover. She also admitted to sex for pay with Franklin deputy and chief granny fee collector Jeff Richards, who had been assassinated gangland style just before the grand jury convened at Harrisonburg. He'd stated too often that he expected to get about ten years in the federal pen, but that he intended to have company. How he happened to be driving at night with black prisoner Jim Smith, also assassinated, and without his usual sidekick, county policeman Edgar Beckett, who got Judge Paul's toughest sentence, led to suspicion that Charles Carter Lee had set him up for the hit.

After a similar "hit" in 1936 on a Roanoke County deputy, Clarence E. Simmons, the same indefatigable federal investigator, Thomas Bailey, pinned all three murders on two notorious West Virginia bootleggers, Hubbard and Paul Duling. The motive was revenge for the death of their brother Frank Duling, who died when he made the "bootlegger's roll" to escape pursuit by Richards and Simmons. Frank's skull had been fractured by the frozen ground when he jumped out of his whiskey car on a turn after Simmons shot his tires. Key evidence was a shotgun the Dulings had sold in a lottery, tied by an FBI ballistics expert to seven shell casings found at the scene of the Richards and Smith killings in Franklin, and the testimony of Thomas Thomas, operator

Continued next page

Continued from previous page

of Uncle Tom's Barbecue in Roanoke, who'd seen the Dulings and two lady friends on the night of the Simmons slaying, driving a car without a rear license plate and asking the whereabouts of officer Simmons.

The Dulings, whose clan controlled the moonshine supply to the mining regions of West Virginia, were convicted of second-degree murder after two trials in the Simmons case, and of first-degree murder in the Richards and Smith killings. That took three trials, the first two ending in mistrials. The third required a jury drawn from Halifax County. They got 99 years, but were out on probation in twelve.

The mystery of the Richards and Smith killings didn't end here. In 1942 a soldier named Hallie Bowles from Franklin County died by suicide in Washington State. He left two notes addressed to Carter Lee saying he "and one other guy" killed Richards and Smith and that the Dulings were not involved. Bowles' wife at the time of the killings gave an affidavit that Bowles had taken her to the scene and confessed, telling her he'd kill her if she ever told. Colonel Bailey figured out Bowles' likely accomplice according to his report in the National Archives. Efforts to free the Dulings on this evidence went for naught, but may have influenced their parole.

How did Charles Carter Lee win acquittal? In the whiskey conspiracy case, the jury voted 11 to 1 on their first ballot to convict all defendants. The one dissenter, L. E. Marshall, claimed he couldn't remember the testimony, only the arguments. He steadfastly refused to change his vote. In the end he agreed to vote to convict all but Lee and two deputy sheriffs. They won acquittal in a compromise verdict.

The jury foreman, E. H. Charlton, a Montgomery County farmer (and distant cousin of this reviewer), voiced suspicion of attempts to bribe jurors. Other jurors had told Hutcheson during the trial of having been approached. Again the relentless investigator Bailey went to work, and soon twenty-four people were indicted for conspiracy to influence the jury, including the son of juror Marshall (a Maryland bootlegger). Noticeably absent from the list was Charles Carter Lee.

All but three of those indicted for jury tampering conspiracy plead guilty or *nolo contendere*. A jury convicted two of the three. Judge Paul was again compassionate in sentencing. Hugh Rakes, the principal instigator of the bribery scheme, got two years and a \$1,000 fine. Thirteen, called together last for sentencing, got only probation. They wept with relief and in gratitude. The prosecutors were not pleased with Judge Paul's leniency.

What prompted this leniency and the light sentences in the whiskey

case? Judge Paul was a former prosecutor and a strict law-and-order man. But he also knew well the suffering the Great Depression had rained on the defendants. It was said that in Franklin a farmer's choices in the 1930s were, make whiskey or steal or starve. And he believed the most guilty, Charles Carter Lee, had gone free in a great miscarriage of justice.

How had Lee escaped indictment in the jury conspiracy? Again investigator Bailey's report, uncovered by Greer in the National Archives, is instructive. Bailey believed Lee successfully bribed the juror Marshall with help from the Democrat and Republican leaders of Floyd County, law partners Joe Proffit and Kyle Weeks, and the rascal Hugh Rakes, who would later be convicted in a check-kiting scheme that caused the failure of a Fredericksburg bank (see *Rakes v. United States* 169 F2d 739 (4th Cir 1948)). Hutcheson reported to the Attorney General there was insufficient evidence of Bailey's theory to indict Lee for jury tampering.

Steven Timberlake called two Virginia Supreme Court Justices, Herbert Gregory and Henry Holt, and Roanoke judge and future governor Lindsey Almond as character witnesses for Lee. Future Justice Kennon Whittle also testified favorably to Lee. Timberlake's opening statement set forth Lee's genetic defense. In his final argument to the jury, Timberlake said: "Charles Carter Lee comes from the most distinguished ancestry in America . . . Having those qualities, Carter Lee could not possibly sink to the level that the government here claims."

In a footnote containing the quote, Greer makes this amusing observation: "This tactic was not risk free . . . The risk lay in the fact that Henry Lee, Light Horse Harry's oldest son and Robert E. Lee's half-brother, was guardian of the person and estate of his wife's younger sister, Betsy McCarty. He violated both. The Virginians called him "Black Horse Harry."

As a young lawyer, Keister Greer worked briefly for Carter Lee. He regarded Lee as a very able lawyer despite the fact he learned law not in school but as an apprentice in his father's practice. He passed the bar at age nineteen. He succeeded his father as Commonwealth Attorney by judicial appointment at age twenty-two and was only twenty-nine when tried in the whiskey conspiracy case.

In the introduction to his book, Keister Greer tells a story revealing of Carter Lee's character. When he had to borrow money for his defense, Lee asked his siblings to convey their interests in the family homeplace to him so he could mortgage it. They did so, and Lee gave his sister a document to protect her interest. He never carried out its promise, and after Lee died, Keister, on behalf of Carter Lee's widow, advised the sister's husband, Judge A.

H. Hopkins, that Lee's promise to protect his sister was barred by the statute of limitations.

The trial transcript in this, the longest criminal trial in Virginia history, mysteriously disappeared, but the resourceful Keister Greer secured access to the grand jury transcripts by order of Judge James C. Turk. With daily contemporaneous articles from Roanoke's two newspapers and the Justice Department files from the National Archives, Greer spliced together a detailed account.

A Personal Aside from the Reviewer

This writer watched Warren "Squeak" Messick, who represented the Dulings in their murder trials, try neighboring Montgomery County's Trial of the Century in 1960. In it an oil distributor named Higgins was charged with murder in a shootout with a Christiansburg physician named Flannigan. Flannigan was killed, Higgins gravely wounded, as the two men blazed away at one another with pistols. The cause of the duel was a triangle with Higgins' wife. During his closing argument, Messick placed on the rail of the jury box a .44 cartridge (Flannigan's) beside a .22 cartridge (Higgins').

"Who does this tell you was the aggressor?" Messick asked the jury, as tears streamed down his cheeks and those of every juror. The jury quickly returned a not-guilty verdict. Three years later, Messick died a suicide at age sixty-three.

The moonshine conspiracy trial inspired three novels, one contemporaneous by Sherwood Anderson, then living in Marion. *Kit Brandon* (1936, Scribners, 373 pp) featured as heroine the pilot car driver Willie Carter Sharpe. Contemporary critics panned it. In *The Moonshiners* (1977) Jess Carr follows the conspiracy narrative more closely. In it Willie became Millie Jacobs. Greer considered Carr's the better book.

Greer's book inspired the recent novel, *The Wettest County in the World* (2008), by Matt Bondurant, which has received wide critical acclaim. Its author is the grandson and great nephew of two Franklin County moonshiners and whiskey transporters who were shot by a Franklin deputy sheriff at a Prohibition roadblock. Bondurant relied heavily on Greer's work in creating his Faulkneresque account of his forebears' adventures.

The stories of the Great Moonshine Conspiracy Trial of 1935 deserve to be a movie. The Coen Brothers should direct. The cast: Tom Hanks: Colonel Thomas Bailey. Nicolas Cage: Steven Timberlake. Anthony Hopkins: Warren Messick. Robert Duvall: Tom Cundiff. Tommy Lee Jones: B. A. Davis. Susan Sarandon: Willie Carter Sharpe. Matt Damon: Charles Carter Lee. ■

Pre-Suit Demand

Continued from page 11

expressly codify either universal demand or demand futility in the LLC Act, but it also suggests an additional amendment that may be beneficial: the General Assembly could add language to the codified rule (whichever it selects) that permits members to opt-out if they believe the other rule better suits the LLC's needs. This additional amendment would harmonize pre-suit demand requirements with most other aspects of the LLC.

To summarize, the continuing uncertainty about the LLC Act's demand requirements could deter those who want to establish an LLC from doing so in Virginia. To solve this problem, the General Assembly should amend the LLC Act and clarify whether the universal-demand rule or the demand-futility exception applies to LLCs, and whether members may contract around whichever rule is codified. And while any clear and unambiguous amendment addressing these issues would remove the ongoing uncertainty, there do not appear to be significant reasons to have a universal demand rule for corporations and a different rule for LLCs. Thus, the General Assembly should consider amending the LLC Act to codify a universal-demand requirement and also to permit members to adopt a demand-futility exception in the articles of organization or operating agreement if they believe that exception better suits their particular situation. ■

NOTES

- 1) *Simmons v. Miller*, 544 S.E.2d 666, 675 (Va. 2001).
- 2) The universal-demand requirement also has been enacted in at least 12 other states - Arizona, Connecticut, Georgia, Idaho, Maine, Michigan, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, and Wyoming - as well as incorporated into the American Law Institute's and American Bar Association's respective model rules. See American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations*, § 7.03 (1994); American Bar Association, Model Business Corporation Act, § 7.42 (3d ed.).
- 3) See Va. Code Ann. § 13.1-672.4.C (requiring court to dismiss complaint unless plaintiff "alleges with particularity facts establishing that" refusal was not made in good faith).
- 4) See *Abella v. Universal Leaf Tobacco Co.*, 495 F. Supp. 713, 717 (E.D. Va. 1980), modified on other grounds, 546 F. Supp. 795 (E.D. Va. 1982).
- 5) See, e.g., American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations*, § 7.03, cmt. e (1994); American Bar Association, Model Business Corporation Act, § 7.42, cmt. 7-342 (3d ed.).
- 6) Va. Code Ann. § 13.1-1042.
- 7) Va. Code Ann. § 13.1-672.1.B.
- 8) In addition, the LLC Act requires a complaint to "set forth with particularity the effort of the plaintiff to secure commencement of the action by a member or manager with the authority to do so or the reasons for not making the effort." Va. Code Ann. § 13.1-1044.
- 9) See 2B Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 51:7 (6th ed. 2007).
- 10) See *id.* § 47:37.
- 11) See *id.*
- 12) See Va. Code Ann. § 13.1-1009.
- 13) See Va. Code Ann. § 13.1-1022.A-C.
- 14) See Va. Code Ann. § 13.1-1024.1 & -1025 (LLC); Va. Code Ann. § 13.1-690.A & -692.1 (corporation).
- 15) Va. Code Ann. § 13.1-1024.
- 16) Va. Code Ann. § 13.1-671.1.A.1.
- 17) See Va. Code Ann. § 13.1-1022.E & -1024.I.
- 18) Va. Code Ann. § 13.1-685.
- 19) Va. Code Ann. § 13.1-1042.

Calendar of VBA Events

July 23-26, 2009

Annual Summer Meeting
The Homestead, Hot Springs

October 2-3, 2009

37th Annual Conference on Labor & Employment Law
Hilton Virginia Beach Oceanfront

October 9-11, 2009

YLD Executive Committee Meeting
Stonewall Jackson Hotel, Staunton

October 16-18, 2009

Board of Governors Meeting
Wintergreen Resort

January 21-24, 2010

120th Annual Meeting
Colonial Williamsburg

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119th Summer Meeting of The Virginia Bar Association

July 23-26, 2009 • The Homestead • Hot Springs, Virginia

The Agenda

Thursday, July 23, 2009

- 12:00-4:30 PM **Board of Governors Meeting/Luncheon**
2:00-6:00 PM **Registration**
Courtesy of: SunTrust Bank
6:00-7:00 PM **Opening Reception** (*Children welcome.*)
Courtesy of: The Homestead

Friday, July 24, 2009

- 8:30-6:00 PM **Registration**
Courtesy of: SunTrust Bank
9:00-10:30 AM **Concurrent CLE Programs**
(*See separate listing.*)
10:00-11:30 AM **Spouse/Guest Program: A Culinary Demonstration**
"Be a Guest at Your Own Summer Dinner Party and Still Be a Great Host!"
(*Separate registration and fee required.*)
10:30-12:00 N **General Session: Civil Litigation Section**
(*1.5 CLE Credits*)
"Life After the Virginia Tech Shootings: Changes On and Off Campus."
A presentation moderated by The Hon. William C. Mims, Attorney General of Virginia.
12:10-1:40 PM **Legacy Series Luncheon**
"Who Freed the Slaves? African-Americans and the Civil War."
A presentation of the Committee on Special Issues of National and State Importance by Andrew H. Talkov of the Virginia Historical Society.
(*For members, spouses and guests—separate registration and fee for lunch required.*)
Courtesy of: Hunton & Williams
12:30-5:00 PM **Golf Tournament**
Members, spouses and guests are welcome and players of every level are encouraged to participate. Prizes will be awarded at the Saturday evening reception.
(*See "Recreational and Leisure Activities" section for details.*)
Prizes courtesy of: Phillip S. Griffin, II, PC
2:00-3:30 PM **General Session: Law Practice Management Division** (*1.5 CLE Credits/1.5 Ethics*)
"Blogging, Twittering and Social Networking: The Opportunities and Risks of Using Cutting Edge Internet Resources for Practice Development."
3:30-5:30 PM **General Session: Law Practice Management Division** (*2 CLE Credits/2 Ethics*)
"Litigation Ethics: Part IV (Claims and Settlements.)"
An interactive and fast-paced ethics presentation by Thomas E. Spahn, utilizing hypotheticals and focusing on lawyers' interaction with others.
6:30-7:30 PM **Reception** (*black tie*)
Courtesy of: CSX Corporation and Norfolk Southern Corporation

Creigh Deeds and Bob McDonnell, candidates vying for the Commonwealth of Virginia's highest office have been invited to offer their opinions on issues important to VBA members and the public on Saturday morning at The Homestead. The gubernatorial debate will be moderated by Dean Rodney A. Smolla from Washington & Lee University School of Law.

Additional information can be found on page 20.

- 7:30-9:30 PM **Banquet** (*black tie*)
Presentation of VBA Honors
Recognition of 2009 VBA Life Members
Dancing and Entertainment: "The Entertainers"
Entertainment Courtesy of:
Equity Concepts, LLC and
U.S. Bank Corporate Trust Services
Decor Design Courtesy of:
nHealth, Inc.
Visual Presentation Courtesy of:
McGuireWoods LLP
After Dinner President's Reception Courtesy of:
Hunton & Williams LLP and
McGuireWoods LLP

Saturday, July 25, 2009

- 8:00-10:00 AM **YLD Executive Council Breakfast Meeting**
8:30-1:00 PM **Registration**
Courtesy of: SunTrust Bank
9:00-10:30 AM **Concurrent CLE Programs**
(*See separate listing.*)
11:00-12:30 PM **Gubernatorial Candidates Debate**
Moderated by Rodney A. Smolla
Dean, Washington & Lee University
School of Law
(*Members, spouses and guests are welcome.*
Members of the public welcome at no charge
with separate registration.)
Refreshments courtesy of: MercerTrigiani
12:30-1:30 PM **Meet-the-Candidates Reception**
Courtesy of: Dominion Resources
(*Members, spouses and guests are welcome.*)
1:30 PM **Golf Tournament/Tennis Round Robin**
Members, spouses and guests are welcome and players of every level are encouraged to participate. Prizes will be awarded at the Saturday evening reception.
(*Advance sign-up required for tennis—see "Recreational and Leisure Activities" section for details.*)
Prizes Courtesy of: Phillip S. Griffin, II, PC
6:30-7:30 PM **President's Award Reception** (*business attire*)
Honoring: W. Taylor Reveley, III
President
The College of William and Mary
Courtesy of: LexisNexis
9:30-11:30 PM **YLD Social**
(*All lawyers and their families welcome.*)
Courtesy of: Williams Mullen

119th Summer Meeting of The Virginia Bar Association

July 23-26, 2009 • The Homestead • Hot Springs, Virginia

Educational Programming

Friday, July 24, 2009

- 9:00-10:30 AM (1.5 Credits) **Concurrent Session: Civil Litigation and Construction and Public Contracts Law Sections**
“It Ain’t Rocket Science—Insights Into the 2009 General Assembly Session.”
- 9:00-10:30 AM (1.5 Credits) **Concurrent Session: Labor Relations and Employment Law Section**
“What Are Your Corporate Clients So Upset About? The Major New Employment Laws.”
- 9:00-10:30 AM (1.5 Credits) **Concurrent Session: Wills, Trusts & Estates Section**
“Drafting in Light of the Uniform Trust Code: Opportunities and Options.”
- 10:30-Noon (1.5 Credits) **General Session: Civil Litigation Section**
“Life After the Virginia Tech Shootings: Changes On and Off Campus.”
Moderated by Attorney General William C. Mims, panelists will discuss mental health, public safety and privacy issues, the role of mediation/settlement and other topics.
- 2:00-3:30 PM (1.5 Credits) **General Session: Law Practice Management Division**
“Blogging, Twittering and Social Networking: The Opportunities and Risks of Using Cutting Edge Internet Resources for Practice Development.”
- 3:30-5:30 PM (2 Credits/2 Ethics) **General Session: Law Practice Management Division**
“Litigation Ethics: Part IV (Claims and Settlements).”
An interactive ethics presentation by Thomas E. Spahn.

Saturday, July 25, 2009

- 9:00-10:30 AM (1.5 Credits) **Concurrent Session: Business Law and Intellectual Property and Information Technology Law Sections**
“It’s Not *That* Easy Being Green: Challenges and Opportunities in the Green Revolution.”
- 9:00-10:30 AM (1.5 Credits) **Concurrent Session: Civil Litigation, Judicial and Appellate Practice Sections**
“11th Annual Review of Civil Decisions of the Supreme Court of Virginia.”
- 9:00-10:30 AM (1.5 Credits) **Concurrent Session: Domestic Relations and Elder Law Sections**
“Divorce in the Golden Years: Special Issues in Senior Marital Disolution.”
- 9:00-10:30 AM (1.5 Credits/1.5 Ethics) **Concurrent Session: Lawyers Helping Lawyers (LHL)**
“2009 LHL Virginia Lawyer Survey Results: Is There Really a Substance Abuse and Mental Health Problem in the Legal Profession and If So, What Do We Do About It?”

Meeting Registration

Registration is available online at www.vba.org or by faxing or mailing the form, available at www.vba.org. Register by July 9 for a discounted rate. Please be sure to mark the activities in which you and your family want to participate that require a separate registration and/or additional fees.

Visit our website at www.vba.org for updated information.

Hotel Accommodations

There are two ways to make room reservations at The Homestead:

- **By Fax:** Fax the hotel’s reservation form to (540) 830-7922;
- **By Mail:** Mail the hotel’s reservation form to
Group Reservations, P.O. Box 2000, Hot Springs, VA 24445

For general information call (800) 838-1766.

Spouse Program

A culinary demonstration has been planned for spouses on Friday morning from 10:00 - 11:30 A.M. The Homestead’s very own Chef Rodger Martin will present, “**Be a Guest at Your Own Summer Dinner Party and Still Be a Great Host!**” He will prepare a variety of dishes to suit every taste; and, best of all, each may be prepared in advance if you’re entertaining! This is a demonstration and tasting that everyone will enjoy sampling on-site and duplicating at home for their next barbecue! The cost is \$27 per person. Register in advance using the accompanying meeting registration form.

Children’s Programs

A special program is being planned for children ages 5 to 12 during the formal Friday evening reception and banquet. From 6:00 PM to 11:00 PM, children will have dinner and be entertained with activities including a movie. The cost for this fun-filled evening is only \$18 for each child. Register for this program using the accompanying meeting registration form.

The Homestead’s Kid’s Club offers a full schedule of organized fun every day. Call The Homestead’s Activities Department at (800) 838-1766, option 3.

Private babysitting is offered on an hourly basis by calling (540) 839-7956.

Recreational and Leisure Activities

All members of the Association, their family members and guests are eligible to participate in our golf and tennis tournaments.

GOLF TOURNAMENT—Declared play on Thursday, Friday or Saturday on the Cascades Course will be eligible for prizes to be awarded at our Saturday evening reception. There is a 14-day cancellation policy and fees will be charged to your guest room upon arrival at the Activities Reservation Department at (800) 838-1766, option 3, to reserve a tee-time.

TENNIS TOURNAMENT—The Tennis Tournament format will be round-robin, all doubles, with interchanging partners. Men’s and women’s doubles will be played on Saturday at 1:30 PM. The top four scorers qualify for the finals with The Homestead Tennis pro, James Rutherford, determining format. Register in advance, indentifying yourself as a VBA tournament participant, by calling the tennis center at (540) 839-7545 or (800) 838-1766 ext. 7545. The cost is \$30 per event and may be charged to your guest room upon arrival at The Homestead. Non-tournament play can be arranged through the Activities Reservation Department at 1-800-838-1766, option 3.

THE HOMESTEAD’S ACTIVITIES RESERVATION DEPARTMENT is happy to arrange all of your individual recreational and leisure activities. Call (800) 838-1766, option 3 for horseback riding; carriage and pony rides; shooting; golf; tennis; spa; spa salon; Kid’s Club (other than the special Friday night children’s program); transportation; gorge hike. Advance reservations are suggested, particularly for golf, spa appointments and babysitting services. Dinner reservations for Thursday and Saturday evenings should also be made well in advance of your arrival by calling (800) 838-1766 option 3.

Deeds, McDonnell to Debate on July 25 at VBA Summer Meeting; Smolla to Serve as Moderator

The Virginia Bar Association has announced that Virginia gubernatorial candidates, Creigh Deeds and Bob McDonnell have accepted an invitation from the Association to debate at the VBA's 119th Annual Summer Meeting at 11:00 A.M. on Saturday, July 25, at The Homestead in Hot Springs, Virginia.

The debate will be moderated by Dean Rodney Smolla of Washington & Lee School of Law. Before joining Washington & Lee, Smolla was dean of the University of Richmond School of Law. He has written four legal treatises, a casebook on the First Amendment, a casebook on constitutional law and many articles in the nation's top law reviews. His writings have earned him the ABA Silver Gavel Award and the William O. Douglas Award. Smolla has taught law at Duke University, College of William & Mary, University of Denver, University of Arkansas, University of Illinois and DePaul University. Smolla received a B.A. from Yale University and a J.D. from Duke University.

Creigh Deeds, a Democrat, is currently a state senator representing the City of Charlottesville and a district that stretches to the West Virginia border. He was first elected to the House of Delegates in 1991 where he served until 2001. Deeds received degrees from Concord College and Wake Forest University School of Law.

Bob McDonnell, a Republican, held the position of Virginia Attorney General from 2006 up until February of this year. He served 21 years in the U.S. Army. McDonnell served in the House of Delegates from 1991 until becoming Attorney General. He holds degrees from the University of Notre Dame, Boston University and Regent University Law School.

This event continues a decades-long VBA tradition of hosting an early debate in statewide political contests at the Association's annual summer meeting, the most recent being a face-off between former Virginia governors, Mark Warner and Jim Gilmore in their 2008 U.S. Senate race. VBA debates are conducted before Association members and guests attending the summer meeting and are open to the public at no charge.

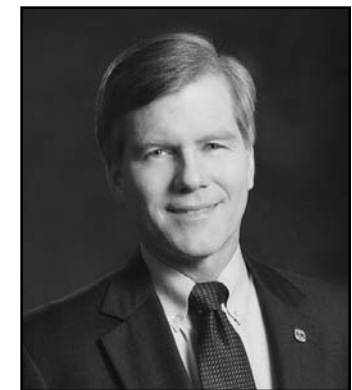
The Virginia Bar Association is a nonpartisan organization that does not endorse, support or oppose candidates for political office.



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Deeds



McDonnell

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The Virginia Bar Association to recognize Andrew K. Block, Jr. with first Robert E. Shepherd, Jr. Award; New chair, members of VBA Commission on Needs of Children announced

The VBA has announced the creation of the Robert E. Shepherd, Jr. award for excellence in advocacy for children. The first recipient of the award will be Andrew K. (Andy) Block, Jr., legal director of the JustChildren Program of the Legal Aid Justice Center in Charlottesville. The award will be presented at the VBA's 119th Summer Meeting at The Homestead on July 24.

A longtime chair of the VBA Commission on the Needs of Children and leader of the VBA's work in creating standards for guardians ad litem in Virginia courts, Shepherd died in December 2008. He was a professor emeritus at the University of Richmond School of Law and a leader in legal issues affecting children and families. As noted by Elizabeth Lacy, Senior Justice of the Supreme Court of Virginia, "Bob's contributions [to] informing and molding public policy for juveniles and juvenile justice are legendary." Richmond law school dean John G. Douglass added, "His teaching, writing and legislative advocacy have had a profound impact on the lives of children and youth throughout Virginia and the nation."

Shepherd was a founder and board member of Richmond law school's National Center for Family Law and headed the American Bar Association's Juvenile Justice Committee. He was the first person inducted into the Virginia Juvenile Court Hall of Fame and was also awarded the American Bar Association's Livingston Hall Juvenile Justice Award for his contributions to children's legal rights. Shepherd earned both bachelor's and law degrees from Washington and Lee University.

Formerly a lawyer for indigent juvenile defendants with the Seattle-King County Public Defender, Block founded the JustChildren Program in 1998 with a Soros Justice Fellowship. Now the largest children's law program in Virginia, the project includes 10 staff members in three cities (Charlottesville, Richmond and Petersburg) and provides comprehensive legal representation to vulnerable young people, coordinates statewide advocacy efforts to expand and protect the rights of Virginia children, and trains and organ-



Block (L) and Shepherd (R) at the ABA Annual Meeting in Chicago (2006).

izes parents, lawyers and child-serving professionals to become more effective and informed advocates for children. Block is also the founder and supervisor of the Children's Advocacy Clinic at the University of Virginia School of Law. A former winner of the American Bar Association Young Lawyers Division Child Advocacy Award and a Virginia Legal Aid Lawyer of the Year, he is a graduate of Yale University and Northwestern University School of Law.

Professor Shepherd played a key role in helping Block secure the initial fellowship to start JustChildren, and served as a friend, mentor, and advisor to him in the intervening years. Both received their awards from the American Bar Association at the annual meeting in Chicago in 2005. On receiving notice of the award, Block said that he was "truly honored to receive an award named for a real hero for children in Virginia and across the country."

In connection with the establishment of the Shepherd Award and announcement of Block as its first recipient, the VBA also announced today that its Commission on the Needs of Children will now be chaired by Professor Margaret Ivey Bacigal, director of the clinical placement program at the University of Richmond School of Law. Block, also a longtime member of the

Commission, will continue to serve in that capacity. Other members of the Commission, a multi-disciplinary group of professionals serving the legal and other needs of children, include Betty Wade Coyle of Norfolk, director of Prevent Child Abuse Hampton Roads; Jory H. Fisher, an attorney from Lynchburg; Robin L. Foster, M.D., director of pediatric emergency services at the VCU Medical Center in Richmond; Richard E. Garriott, Jr., a Norfolk lawyer; Larry T. Harley of Marion, executive director of the Southwest Virginia Legal Aid Society; Judge Jerrauld C. Jones of the Norfolk Circuit Court; Mary E. Langer, a deputy in the office of the Commonwealth's Attorney for the City of Richmond; Jean Niebauer, director of the City of Alexandria's Office of Human Rights; Diane E. Pappas, M.D., director of child advocacy for the University of Virginia Children's Hospital; Patricia Puritz, executive director of the National Juvenile Defender Center in Washington, D.C.; William B. Reichart, a Fairfax lawyer; Judge Winship C. Tower of the Virginia Beach Juvenile & Domestic Relations Court; and Professor Adrienne Volenik, acting director of the National Center for Family Law at the University of Richmond.

VBA 2009 Legislative Highlights

The 2009 legislative agenda supported by the Board of Governors of The Virginia Bar Association included proposals emanating from various VBA sections and affiliated organizations. Those proposals were introduced at the request of the VBA by a diverse group of legislators and included improvements to Virginia law in the following areas (references to Chapters are to the 2009 Virginia Acts of Assembly):

- Essentially reversing the decision of the Supreme Court in *Jenkins v. Johnson*, 276 Va. 30, 641 S.E. 2d 484, that the statute of limitations contained in § 64.1-5.1, which generally requires illegitimate children to bring an action to establish parentage for succession purposes within one year following the putative parent's death, does not apply for purposes of determining illegitimate children's rights as legal heirs to an intestate decedent's real property; clarifying the intended scope of the statute to provide broad application of the limitations period for all succession periods, not just those involving an intestate's personal property subject to probate (VBA Wills, Trusts & Estates Section; **House Bill 1944**, Peace, Ch. 449).
- Ensuring that a marital trust drafted as a unitrust will satisfy the requirements for the marital deduction for federal estate tax purposes by revising the Virginia version of the Uniform Principal and Income Act (VBA Wills, Trusts & Estates Section; **House Bill 2435**, Janis, Ch. 477).
- Establishing the Uniform Power of Attorney Act in Virginia to improve the portability of durable powers of attorney (DPA), including safeguards, remedies and sanctions for abuse by the agent under a DPA, protecting reliance by third parties on a DPA and providing remedies and sanctions for a third party's refusal to honor a DPA (VBA Wills, Trusts & Estates Section; **Senate Bill 855**, Edwards and Obenshain, Chapter 830). This legislation includes a reenactment clause that will require additional legislative approval in 2010 prior to it becoming effective.
- Correcting a substantial unintended restriction, effected through 2007 changes to the Virginia Nonstock Corporation Act, on the ability of a nonstock corporation to indemnify its directors and officers against claims arising from their official actions (VBA Business Law Section; **Senate Bill 903**, Stosch and O'Bannon, Ch. 587).
- Adopting the Uniform Interstate Depositions and Discovery Act to simplify procedures involved with conducting interstate discovery and reduce the costs of litigation by eliminating the need to retain local counsel to assist with discovery issues (Boyd-Graves Conference; **Senate Bill 958**, Obenshain and Loupassi, Ch. 701).
- Allowing recovery of attorney's fees when judgment has been obtained prior to instituting a fraudulent conveyance suit (Boyd-Graves Conference; **Senate Bill 959**, Obenshain and Loupassi, Ch. 593).
- Making technical and substantive changes to the Limited Liability Company Act (LLC Act), including changes to conform to changes to the LLC Act made in prior years; updates made to conform to changes and corrections made to the Stock Corporation Act in prior years; confirming that LLCs are bound by their operating agreements, a concept brought into question by a decision of the Supreme Court of Virginia in the *Mission Residential LLC* case; reducing the period during which a LLC may make a claim against a member to recall amounts improperly distributed when the LLC was insolvent from six years to two years to conform to similar provisions in the Uniform Limited Liability Company Act and the Virginia Stock Corporation Act relating to claims against a director (**Senate Bill 1241**, Stosch, Ch. 763).

In other public interest legislative action, the VBA actively supported successful legislation (i) revising the Health Care Decisions Act to allow advance directives in other than end-of-life care (VBA Health Law Section; **House Bill 2396**, Bell and Hamilton, Ch. 211) (Senate Bill 1142, Whipple, is identical) and (ii) conforming provisions of the Stock and Nonstock Corporation Acts regarding names, mergers and terminations with similar provisions applicable to other business entity forms and making other technical amendments supported by the Clerk of the State Corporation Commission (VBA Business Law Section, **House Bill 2445**, Sickles, Ch. 216). At the request of the Virginia Family Law Coalition, the VBA suggested clarifying changes to legislation, declarative of existing law, providing that an appeal from the juvenile and domestic relations district court or in a civil case from the general district court shall be heard de novo in the circuit court (**Senate Bill 1290**, Edwards, Ch. 729) and opposed amendments, which would have restricted courts' access to information necessary to determine the best interest of a child, to legislation providing that any history of sexual abuse must be considered as a factor in determining the best interests of a child for purposes of awarding custody or visitation (**Senate Bill 1000**, Quayle, Ch. 684).

Among measures proposed or supported by the VBA in the 2009 Session of the General Assembly which did not pass but are matters of continuing interest to the Association were a bill to establish priority among relatives regarding the right to make funeral arrangements for a deceased family member, following the statutory scheme for determining priority for making health care and end-of-life decisions for an incapacitated person in the absence of an advanced directive (VBA Wills, Trusts & Estates Section; **House Bill 1909**, Armstrong) and a bill allowing indigent defendants in capital cases to request court approval for payment of defense experts in an ex parte hearing from which the prosecutor is excluded in order to provide a method for the defendant to demonstrate the need for an expert without divulging trial strategy, work product or other privileged information to the prosecution (VBA Criminal Law Section; **Senate Bill 939**, Watkins). The failure of the latter bill to receive approval from the House Courts of Justice Committee (it passed the Senate by a 39-0 vote, was particularly disappointing in view of hard-won compromise provisions negotiated with interested Commonwealth's Attorneys to provide for restrictions and safeguards on the process. The VBA also supported a bill, resulting from a Boyd-Graves Conference proposal, directing the Joint Legislative Audit Review Commission to study the costs incurred by the Commonwealth and localities resulting from tort claims (**SJ 277**, Edwards); the bill was left in the House Committee on Rules.

Proposed legislation opposed by the VBA in the 2009 Session included a bill providing that if a full-time district court judge is convicted of a felony or a Class 1 misdemeanor during his term of office, and all rights of appeal have terminated, such term shall expire 30 days after the commencement of the next regular session of the General Assembly, notwithstanding the term for which the judge was elected (**House Bill 1753**, Carrico). The VBA opposed the bill as inconsistent with existing provisions for the discipline of judges via the Judicial Inquiry and Review Commission and for other policy reasons; the bill passed the House but was left in the Senate Courts of Justice Committee. The VBA, also opposed, on the basis of its policy of favoring restriction, rather than expansion, of exemptions from jury service, a bill which would have exempted full-time students at institutions of higher learning while classes are in session; the bill (**House Bill 2045**, Gear), passed the House but was stricken at request of its patron in the Senate Courts of Justice Committee.

On behalf of the Virginia Family Law Coalition, the VBA opposed several bills including (i) a bill related to supervised visitation (**House Bill 1897**, Watts) as unduly restricting a court's ability to determine appropriate visitation conditions consistent with the best interests of a child; the bill was left in the House Courts of Justice Committee, (ii) a bill to

recalculate the child support obligations of an incarcerated obligor (**House Bill 1913**, BaCote) as inequitable to non-incarcerated obligors who may be unable to meet child support obligations for reasons beyond their control; the bill was left in the House Courts of Justice Committee, (iii) a bill providing for interim equitable distribution (**Senate Bill 859**, Edwards) as likely to increase litigation and the costs of divorce, failing to take into account existing remedies available under § 20-103, and possibly resulting in irreparable harm from an asset distribution followed by dissipation or loss of value of remaining property; the bill was defeated by the Senate, and (iv) a bill (**Senate Bill 1340**, Herring) relating to school teachers as witnesses in custody hearings on the basis of the Coalition's general opposition to arbitrary restrictions on testimony at hearings conducted for the purpose of determining the best interests of a child; the bill was passed by indefinitely in the Senate Courts of Justice Committee.

Finally, the VBA, at the recommendation of its Health Law Section, initially opposed **Senate Bill 1229** (Barker) relating to privacy of medical information based upon concern that certain definitions in the bill were overly broad. The VBA negotiated a compromise with the patron to refer the bill to the Joint Committee on Technology and Science and the Joint Committee on Health Care for further study.

The principal mission of The Virginia Bar Association is to improve the law and administration of justice in Virginia. In that connection, it actively supports changes in statutes, rules and regulations which are in the public interest and opposes changes that do not serve the public interest. In addition to responding to proposals for improving the law generated by its multiple sections and committees and approved by its board of governors, the Association provides additional logistical and lobbying support for two organizations with which it has familial relationships, the Boyd-Graves Conference and the Virginia Family Law Coalition. The Boyd-Graves Conference is a group of experienced civil trial lawyers and judges which, acting by consensus of its membership, makes recommendations concerning needed changes to the Rules of Court of the Supreme Court of Virginia and the Code of Virginia relating to state court civil litigation in Virginia. The Virginia Family Law Coalition, now jointly sponsored by the VBA and the Virginia Trial Lawyers Association, is a group of experienced family law practitioners who serve at the request of the VBA and the VTLA to monitor legislative developments affecting the legal rights of families and put forward proposals for legislation to improve the law in this area.

The VBA's work on several of the matters in its 2009 legislative agenda involved cooperative efforts with various other organizations, including, in addition to the Boyd-Graves Conference and the Virginia Family Law Coalition, the Virginia Trial Lawyers Association, the Virginia Chapter of the American Academy of Matrimonial Lawyers, the Virginia Bankers Association, AARP, and the Office of the Executive Secretary of the Supreme Court of Virginia. The board of governors of the VBA extends appreciation of each of these organizations and their representatives as well as to the Association's principal lobbyists, **Rob Jones** and **Anne Leigh Kerr** and their colleagues at the Alliance Group and Troutman Sanders Public Affairs Public Group, respectively, and especially to the many VBA members who voluntarily devoted their time and skills to drafting and advocacy before and during the Session. At the risk of inadvertent omission of VBA members who testified before various committees of the General Assembly in 2009, in support of VBA legislative positions, special thanks go to the following members for their work in this regard: **Chesire Eveleigh** of Wolcott Rivers Gates, **Jim Hingeley** of the Charlottesville Public Defender Office, **Andy Hook** of Oast & Hook, **Dana Fitzsimons**, of McGuireWoods, **Rich Garriott**, of Clarke, Dolph Rapaport, Hull, Brunick & Garriott, **Professor Rodney Johnson** of the University of Richmond School of Law, **Jamie Martin** of McCandlish Holton, **Steve Price** of McCandlish & Lillard, **Katherine Ramsey** of Hunton & Williams, **Steve Rosenthal** of Troutman Sanders, **Carol Schrier-Polak** of Bean, Kinney & Korman, and **Andrew White** of LeClair Ryan.

'Legal Food Frenzy' Breaks Records, Raises the Equivalent of More Than 1.6 Million Pounds of Food for the Hungry

Schettine & Nguyen of Richmond Wins Third Annual Statewide Competition

The 3rd Annual Legal Food Frenzy was a huge success! Raising over 1.65 million pounds of food (in food and converted cash donations), Virginia's legal community broke last year's record of 1.36 million pounds and beat this year's goal of 1.5 million pounds. The winner of the coveted Attorney General's Cup, awarded each year to the law firm which raises the most food on a per capita basis, is Schettine & Nguyen PLC of Richmond. The law firm has 12 employees, raised 8,141 pounds of food per capita, and has now won the Cup for two years in a row. The mini-AG's Cup, which goes to the winning law school, was wrestled out of the hands of the Regent University School of Law for the first time this year by the University of Richmond School of Law. The contest ran from March 30 through April 10



and was open to all law firms, law schools, law offices and corporate legal departments across Virginia. There were 216 participants this year, up from 181 last year.

The Legal Food Frenzy was developed three years ago by the Young Lawyers Division in conjunction with the Office of the Attorney General and the Federation of Virginia Food Banks, as an expansion of the Legal Food Frenzy that had been conducted by the Norfolk & Portsmouth Bar Association and the Foodbank of Southeastern Virginia. For more information on this year's event, including a listing of the winners of the other statewide awards, see Attorney General Mims' press release at http://www.oag.state.va.us/PRESS_RELEASES/NewsArchive/043009_Food_Frenzy_Record.html. For information about next year's event, contact Christopher Gill (cgill@cblaw.com) or Derek Swanson (dswanson@mcguirewoods.com).

Congratulations to all of this year's winners!

The winners of the Third Annual Statewide "Legal Food Frenzy" Categories:

Attorney General's Cup Winner: Per Capita:

Schettine & Nguyen, PLC (Richmond)
8,140.93 pounds per person

Small (1-20) Law Firm: Total Pounds:

"The Brunswick Stew Award"
Schettine & Nguyen, PLC (Richmond)
97,691.25 pounds

Small (1-20) Law Firm: Per Capita:

"The Shenandoah Apple Award"
Schettine & Nguyen, PLC (Richmond)
8,140.93 pounds per person

Medium (21-100) Law Firm Total Pounds:

"The James River Shad Award"
Christian and Barton, LLP (Richmond)
68,415.25 pounds

Medium (21-100) Law Firm Per Capita:

"The Hanover Tomato Award"
McKenry, Dancigers, Dawson & Lake (Virginia Beach)
1,397.88 pounds per person

Large (101 and up) Law Firm Total Pounds:

"The Smithfield Ham Award"
McGuire Woods LLP
308,106.75 pounds

Large (101 and up) Law Firm Per Capita:

"The Chesapeake Bay Blue Crab Award"
Cooley Godward Kronish LLP (Reston)
654.82 pounds per person

Sole Proprietor (1-2) Law Firm Total Pounds:

"The Virginia Peanut Award"
Law Offices of David A. Greer, PLC (Norfolk)
5,050 pounds

Law School Winner of Attorney General's Cup

Total Pounds and Per Capita:
University of Richmond School of Law
37,583.75 pounds, 85.22 pounds per person

Totals for each regional Food Bank in Virginia are as follows:

Blue Ridge Area Food Bank (Charlottesville area)
63,807.20 Pounds

Capital Area Food Bank (Northern Virginia)
279,775.64 Pounds

Central Virginia Food Bank (based in Richmond)
836,220.96 Pounds

Foodbank of Southeastern Virginia (based in Norfolk)
374,821.20 Pounds

Foodbank of the Virginia Peninsula
8,626.32 Pounds

Fredericksburg Area Food Bank
12,688.00 Pounds

Southwestern Virginia Second Harvest Food Bank
76,792.20 Pounds

VBA Spring Meetings and Events in Pictures



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7

1) Civil Litigation Section chair, Harry Ware (L), with Prof. Ron Bacigal (C) and Judge Robert Payne (R) at the spring VBA Board of Governors reception at the capitol building in Richmond.

2) Board of Governors member Robin Wood (L) and co-chair of the Capital Defense Workshop, Jim Hingeley (R) enjoying the reception.

3) Attorney General Bill Mims with James Schettine, Angela Schettine and Nhan Nguyen, winners of the Attorney General's Cup with the Legal Food Frenzy.

4) The 12th Annual Bankruptcy Conference at the Sanderling Inn, Duck, NC.

5) Mitch Broudy, LaCresha Dunning and Heidi Hupp present a CLE seminar on managing the family law issues of military families at "Untying the Knot: Everything You Wanted to Know (and more) about the Military and Divorce".

6) (L to R) VBA/YLD Food Frenzy co-chair Katja Hill, Executive Director of the Federation of Virginia Food Banks Leslie Van Horn, Attorney General Bill Mims, VBA/YLD Food Frenzy co-chairs Derek Swanson and Chris Gill at a Legal Food Frenzy event.

7) Scott Johnson (L) and Mic McConnell (R) debate the prospects of medical malpractice reform at the 11th Annual Health Law Legislative Update and Extravaganza.

8) Rodd Winn (L) makes a CLE presentation to the attendees of "Untying the Knot" on calculating pay, benefits and support orders for the military and civil servants, conference chair Chesire Eveleigh (R) moderated the program.

9) Attendees of the 36th Annual Labor Law Conference enjoy a break between CLE programs at the Boars Head Inn in Charlottesville.



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The Virginia Bar Association Member Spotlight

Nupur S. Bal

Firm: The Lewis Law Firm, PC

City: Washington, D.C.

VBA Member Since 2007

VBA Activities: YLD Executive Committee; Membership Committee YLD representative; Domestic Relations Section member



- 1. What is your most memorable YLD moment?** April 2008, The Sanderling Resort, YLD Spring Meeting, "after hours social." 'nuff said...
- 2. What is one thing every law student should know?** A "tort" is not a pastry and if your highlighting marker still has ink after the first week or so, you might as well drop out.
- 3. Where is your favorite place to go in NOVA?** Loudon County Virginia Wine Country on a spring afternoon with a packed picnic basket.
- 4. What is the current desktop background on your computer?** A photo from a trip to London; I love to travel!
- 5. What is your favorite line from any movie?** "Fiddle-dee-dee!", *Gone with the Wind* and, "Of all the gin joints in all the towns in all the world, she walks into mine." *Casablanca*.
- 6. When you were younger, what did you want to be when you grew up?** A psychiatrist just like my mom.
- 7. On Saturdays I like to...** go out for a champagne brunch followed by some shopping and quality time with my husband. Wait, I mean, I go into the office and read law journals...

Howard C. McElroy



Firm: McElroy, Hodges & Caldwell

City: Abingdon

VBA Member Since 1978

VBA Activities: Commission on Professionalism member; Chair of the Committee on Federal Judgeships, Western District; Former member of the Board of Governors

- 1. The best thing about being a VBA member is...** Making many friends working on VBA law reform and public service projects with other VBA members
- 2. If you could have dinner with three people living or dead, who would they be?** Ernest Hemingway; Winston Churchill; my wife, Heidi (and our children)
- 3. Who was your most inspiring law school professor?** David J. McCarthy, former Dean of Georgetown University Law Center, who taught a local government law course that awakened me to the possibilities of a small-town law practice.
- 4. What is the most interesting thing on (or near) your desk?** Memorabilia of my years of volunteer work (not acting!) with Barter Theatre in Abingdon.
- 5. What is the best book you've ever read?** Impossible to say. However, the best book I recently read was *The Post-American World* by Fareed Zakaria. Mr. Zakaria explains how the United States can adapt and thrive in a world that will be reshaped by the rise of countries such as China, India and Brazil.
- 6. What is your favorite outdoor thing to do on a nice day?** Fly fishing for trout in the mountain streams and rivers of Western Virginia.
- 7. If you could visit any place in the world, where would you go and why?** I would go to Paris with my wife Heidi, to enjoy its streets, cafes, restaurants and art.



The Virginia Bar Association

Membership Application

701 East Franklin Street, Suite 1120
Richmond, Virginia 23219
(804) 644-0041 • Fax (804) 644-0052
Web: www.vba.org
E-Mail: thevba@vba.org

MISSION: The Virginia Bar Association is a voluntary organization of Virginia lawyers committed to serving the public and the legal profession by promoting the highest standards of integrity, professionalism, and excellence in the legal profession; working to improve the law and the administration of justice; and advancing collegial relations among lawyers.

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Firm/Organization Name _____
Business Address _____ Home Address _____
City _____ State _____ Zip _____ City _____ State _____ Zip _____
Business Phone () _____ Fax No. () _____ Home Phone () _____
Date of Birth _____ Gender _____ Law School _____ Year Graduated _____
Original Virginia License Date _____ Other State(s) & Date(s) Licensed _____

VBA MEMBERSHIP DUES (Check appropriate category)

- New Admittees — New admittees to the Virginia State Bar (June admittees are covered for balance of calendar year of admission; November admittees are covered for following calendar year). An application form must be returned to activate membership. \$0
Regular and Young Lawyers Division Members — 1-5 years in practice calculated from original license date. \$150
Regular and Young Lawyers Division Members — 6+ years in practice calculated from original license date. \$200
Full-time Law School Faculty and Government/Public Service Attorneys \$100
Fully Retired/Fully Disabled \$100
Judicial Members and Life Members \$0
Law Students — Currently enrolled in a fully accredited school of law. \$0

Membership dues may be deductible as an ordinary and necessary business expense but are not deductible as a charitable contribution. The Association estimates that 12% of your basic dues are used for lobbying expenses as defined by Section 13222 of the Revenue Reconciliation Act of 1993, and are therefore nondeductible as a business expense.

A. TOTAL MEMBERSHIP DUES \$ _____

VBA SECTION DUES (Elective)

- Administrative Law \$25
Appellate Practice..... \$25
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Business Law \$25
Civil Litigation \$25
Construction and Public Contracts Law \$25
Corporate Counsel \$25
Criminal Law \$25
Domestic Relations \$25
Elder Law \$25
Environment, Natural Resources and Energy Law \$25
Health Law \$25
Intellectual Property and Information Technology Law \$25
Judicial (Judges only) \$25
Labor Relations and Employment Law \$25
Real Estate \$25
Taxation \$25
Transportation Law \$25
Wills, Trusts and Estates \$25
Virginia Alternative Dispute Resolution Joint Committee \$25

B. TOTAL SECTION DUES \$ _____

VBA FOUNDATION PATRON CONTRIBUTIONS (Elective)

VBA Foundation Patron contributions are voluntary contributions to the VBA Foundation, an entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. Such payments will be promptly transferred to the VBA Foundation by the VBA as its agent. Contributions to the VBA Foundation support its charitable activities and will be deductible by the payor as charitable contributions.

- 1888 Society (Platinum) \$1000 and up
Leadership Patron (Gold) \$500-\$999
Sustaining Patron (Silver) \$250-499
Patron (Blue) \$100-249

C. TOTAL PATRON CONTRIBUTIONS \$ _____

I understand that any member of The Virginia Bar Association whose license to practice law is suspended, revoked or surrendered will automatically be removed from membership.

Applicant's Signature _____
Date _____

TOTAL MEMBERSHIP/SECTION/FOUNDATION DUES AND CONTRIBUTIONS (Sum of A, B and C) \$ _____

Please charge my credit card.
Check one: VISA MasterCard AMEX
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The Virginia Bar Association

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