



The Virginia Bar Association
YOUNG LAWYERS DIVISION

Opening Statement™

THE OFFICIAL PUBLICATION OF THE VBA YOUNG LAWYERS DIVISION

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INTRODUCTION

Getting Ready for Summer

We are pleased to present the Summer 2015 issue of *Opening Statement*. This issue is packed with photos from the YLD Spring Meeting (pages 8-9) and relates the successes of this year's 9th Annual Legal Food Frenzy (page 3). YLD Chair Nupur Bal encourages young lawyers to become the architects of their careers (page 2), and Cheryl Pellegrino tells young lawyers a few basics we need to know about health insurance (page 10). Jennifer Long Ligon informs general practitioners how to spot health care issues that they may encounter in their practice (page 6), and Andrew Stockment clears up some of the common misconceptions about copyrights and works made for hire (page 5). In addition, YLD Chair-Elect Steven Gould highlights changes to the YLD bylaws that will be proposed at the Summer Meeting. Finally, we are seeking three volunteers to join the *Opening Statement* Editorial Board—please see page 11 for more information.

The goal of *Opening Statement* is to tell the story of the Young Lawyers Division and to promote community within the YLD. If you are planning a YLD event, please let us know how we can help publicize it and increase participation. After your project or event is over, please send us a write-up and photos so that we can share your successes with the rest of the Young Lawyers Division and the VBA. Let us be your voice!

In addition, the *Opening Statement* Editorial Board is always looking for substantive articles to include in this newsletter. Please consider turning a recent experience or research assignment into an article to share with your fellow young lawyers. If you are a more experienced lawyer reading this newsletter, please consider writing an article for *Opening Statement* to share your wisdom with attorneys who are in the early stages of their career. We look forward to receiving your submissions, and we welcome your comments and suggestions. You may contact us at: editors@openingstatement.org.

Finally, as you are making your plans for the summer, we hope you will consider joining us at the VBA Summer Meeting. Whether you have never attended a VBA meeting or you have never missed one, every VBA meeting is a great opportunity to strengthen existing friendships with colleagues and to form new ones.

Thank you for reading. We hope you enjoy this issue of *Opening Statement*!



Andrew B. Stockment
Editor-in-Chief



Daniel D. Mauler
Development Editor

VBA Summer Meeting

The Virginia Bar Association will hold its **125th VBA Summer Meeting** on **July 23-26 (Thurs. - Sun.)** at The Omni Homestead Resort in Hot Springs, Virginia. The Summer Meeting will have many CLE opportunities to sharpen your legal acumen and learn from leading lawyers, as well as opportunities to network, play golf, hike the Allegheny Mountains, and enjoy the many resort amenities. The YLD will have programming specifically geared for young lawyers, including the third installment of the VBA Leadership Series, as well as opportunities to socialize with lawyers of all ages. We encourage you to be a part of this historic meeting!

More details coming soon at:
vba.org/vbasummer15

Upcoming VBA Events

July 23-26: 125th VBA Summer Meeting

Aug 6: ABC Networking Social in Richmond

Sept 10-12: 45th Annual Conference on Labor Relations and Employment Law

Sept 30: 2015 VBA/VSB Appellate Summit

Oct 2-4: YLD Fall Meeting

Nov 5: 21st Annual Administrative Law Conference

View the complete calendar at:
vba.org/calendar

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MESSAGE FROM THE CHAIR

Architecting Your Career

By Nupur S. Bal

Success as a young lawyer is more than just learning the law and practicing it. It entails cultivating career and personal development that ultimately fosters the skills necessary to achieve that success.

Developing a professional persona and reputation as a young lawyer can be challenging. In order to be the architect of your career, you must make a plan, follow through, and be willing to review and revise that plan as needed.

1. Draft action items. Career Development is each young lawyer's responsibility. Law firms often assist by providing networking and service opportunities to allow young lawyers mechanisms to engage, but ultimately, it is each individual's own initiative that will get recognition. Join a committee at your firm or become active with one of the YLD's committees. Attend the upcoming VBA Summer Meeting (even if you have never attended a VBA event before). Form relationships through those interactions and build your reputation.

2. Do not be afraid to think big. We have all heard the motivational quote "Shoot for the moon. Even if you miss, you will land among the stars." We all chart our own paths. If something appeals to you and your passions, do not hesitate to go after it enthusiastically and with fervor. Your professional

satisfaction will increase if it is something you enjoy and goal-driven action is always more fruitful than the alternative.

3. Be flexible. There are often golden opportunities hidden in the unexpected. Be open and receptive to their pursuit. Constantly revisit your plan and revise it as your goals change and develop. As your practice grows, your skill set will help you identify circumstances and occasions that lend themselves to promotion and progress for you.

Whatever your plan for the future, lay the foundation now as a young lawyer. You must be an active participant in creating your success. You must make a plan (big or small) and embrace the steps needed to make your plan a reality now – and so that you may enjoy the fruits of your labor in the future. ■



YLD Chair Nupur Bal and VBA President Pete Johnson at the YLD Spring Meeting at The Sanderling Resort.



Nupur S. Bal

Shareholder, DeFazio Bal PC (Richmond)

Practice Areas: Family Law and Divorce

Law School: Tulane University School of Law (2005)

College: Emory University (2002)

VBA Leadership: YLD Chair (2015 - Present)

Awards: Virginia Super Lawyers Rising Star (2015); Virginia

Business Legal Elite (2014); People's Choice Award, Richmond Times Dispatch; Influential Women of Virginia, Virginia Lawyers Weekly (2015).

Bio: In addition to her law practice and her work as YLD Chair, Nupur is also active in her community, serving as a board member for SCAN (Stop Child Abuse Now) and volunteering her time to provide pro bono services.

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Gathering Food for Those in Need

This past spring, Virginia law firms, legal departments, government offices, and law schools joined together to raise the equivalent of more than 1.3 million pounds of food for Virginia's hungry during this year's statewide Legal Food Frenzy, a two-week drive to raise food and funds for Virginia food banks. During the two-week contest, held March 30-April 10 this year, legal professionals statewide compete against like-size firms and law offices for the most overall and per-capita contributions.

A committee of the VBA Young Lawyers Division helps organize the law firms, legal departments, government offices and law schools -- more than 150 participants this year -- for what is one of the year's biggest food drives for Virginia's seven food banks. The Legal Food Frenzy program runs in conjunction with the Attorney General's Office and the Federation of Virginia Food Banks.

This year, the firm of B. Cullen Gibson from Norfolk took overall first place for the fifth consecutive year by raising 25,050 pounds per person, and as a result, won the coveted Attorney General's Cup. The Office of the Attorney General won the "Urbanna Oyster Award" as the top contributor in the government and public sector category.

"The legal community has once again provided much needed food and funds to their local food banks at a very critical time, raising the equivalent of over 12.7 million pounds of food in the last 9 years across the Commonwealth of Virginia" said Leslie Van Horn, Executive Director of the Federation of Virginia Food Banks, a partner state association of Feeding America.

Attorney General Mark Herring spoke at an event commemorating the successful results, and he offered a special thanks to Leslie Van Horn and the Virginia Bar Association's Young Lawyer's Division co-chairs **Chris Gill** from Christian & Barton, **Derek Swanson** from McGuireWoods, **Lauren Wheeling** from Williams Mullen, **Stacey Forbes** from Reed Smith, and **Will Prince** from ThompsonMcMullan for organizing the campaign. ■



Virginia Attorney General Mark Herring speaks at the kickoff luncheon for the 9th Annual Legal Food Frenzy.

Courtesy: VBA Staff

The winners of the 9th Annual Statewide "Legal Food Frenzy" Categories:

Attorney General's Cup Winner:	Per Capita:
B. Cullen Gibson (Norfolk)	25,050 pounds per person
Small (1-20) Law Firm Total Pounds: "The Brunswick Stew Award"	
MercerTrigiani (Alexandria)	21,680 pounds
Small (1-20) Law Firm Per Capita: "The Shenandoah Apple Award"	
Roussos, Glanzer & Barnhart P.L.C. (Norfolk)	2,588 pounds per person
Medium (21-100) Law Firm Total Pounds: "The James River Shad Award"	
Christian & Barton LLP (Richmond)	68,191 pounds
Medium (21-100) Law Firm Per Capita: "The Hanover Tomato Award"	
McKerry Dancigers Dawson P.C. (Virginia Beach)	1,595 pounds per person
Large (101 and up) Law Firm Total Pounds: "The Smithfield Ham Award"	
McGuireWoods LLP (all locations)	128,110 pounds
Large (101 and up) Law Firm Per Capita: "The Chesapeake Bay Blue Crab Award"	
Kaufman & Canoles (all locations)	604 pounds per person
Sole Proprietor (1-2) Law Firm Total Pounds: "The Virginia Peanut Award"	
Ronald Page, PLC (Richmond)	10,249 pounds
Law School Winner of Attorney General's Cup	
William & Mary Law School (Williamsburg)	4,938 pounds
Government and Public Service Total Pounds: "The Urbanna Oyster Award"	
Office of the Attorney General (Richmond)	69,265 pounds
Government and Public Service Per Capita "The Old Dominion Soybean Award"	
Prince William County Attorney's Office	1,645 pounds per person
Legal Department Per Capita: "The Virginia Strawberry Award"	
Norfolk Southern Corp. Legal Dpt. (Norfolk)	1728 pounds per person

Revision of YLD Bylaws

By Steven P. Gould

The YLD is nothing if not dynamic. With more than 50 active committees and projects, our division is in constant motion. And, while not at the forefront of our work, our bylaws provide the foundation for all that our division does.

At the Spring Meeting, the officers presented to the Executive Committee and the Executive Council a series of proposed amendments that both conform the bylaws to our practices as they have evolved in recent years *and* lay the groundwork for continued growth and success. A brief overview of the proposed substantive changes—which will be considered for formal adoption at the Summer Meeting—can be found below.

ARTICLE II – MEMBERSHIP AND MEETINGS

Ever been asked exactly who is eligible for membership in the YLD but not been sure of the answer? Look no further than the clarifying changes to Section 1 for guidance. Our membership comprises VBA members who either are under 37 years of age or have been licensed to practice law for less than three years. YLD membership terminates automatically at the end of the Annual Meeting (in January) after a member turns 37 or three years after first being licensed to practice law, whichever occurs last.

A second change to this Article reduces from 15 to 10 the number of Executive

Council members constituting a quorum for our division meetings. While we easily exceed this threshold at our Winter, Spring, and Fall meetings, we typically see a smaller number of our members attend the Summer Meeting. The proposed quorum reduction will help to ensure that we can conduct business at the Summer Meeting with a slightly smaller crowd.

ARTICLE III – EXECUTIVE COMMITTEE

The amendments to Article III provide clarity and structure with respect to the composition of the Executive Committee, confirming how vacancies (between Annual Meetings) are filled and allowing the removal of Committee members in limited circumstances. The proposed amendments also remove as an *ex officio* member of the Executive Committee the chair of any local affiliates of the YLD, of which there presently are none.

ARTICLE IV – OFFICERS

The limited changes to Article IV shift from the Chair to the Chair-Elect the responsibility for presenting to the Executive Committee—prior to its Fall Meeting—a proposed budget for the next fiscal year. This budget is then formally considered at the Annual Meeting.

ARTICLE V – COMMITTEES

Each year, a Nominating Committee does yeoman's work in soliciting nominations

for the roles of Chair-Elect and Secretary-Treasurer and for vacancies on the Executive Committee. Interestingly, our bylaws call for this process to begin at the Spring Meeting, but—in recent years—our practice has diverged considerably from this framework.

The proposed amendments to Article V will formalize the process that has worked well for the YLD in recent years. The Chair is required to appoint the Nominating Committee at the Fall Meeting and to inform members of its appointment within 7 days. The Nominating Committee must meet at least 45 days prior to the Winter Meeting to perform its duties.

ARTICLE VI – EXECUTIVE COUNCIL

In its current form, Section 3 of Article VI allows for special meetings of the YLD to be called by the Chair, by the Executive Committee, or by a majority of the members of the Council. The proposed change to this Article clarifies that, for the Executive Committee to call a special meeting, a majority vote by its members is required.

You can review a complete redline of the bylaws at: <http://bit.ly/1MOETbb>. We encourage you to attend the 125th Summer Meeting of The Virginia Bar Association so that you can vote on the adoption of the bylaws. ■



Steven P. Gould

Associate
Clement Wheatley (Danville)

Practice Areas: Civil Litigation, Employment Law, Administrative Law

Law School: University of Virginia School of Law (2010)

VBA Leadership: Chair-Elect (Jan. 2015 – Present), Secretary-Treasurer (2014-15), Capitol Town Hall (Co-Chair, 2011-14)

Awards: Virginia Super Lawyers Rising Star (2015), Danville Pittsylvania County Chamber of Commerce PACE Award (2015)

Bio: Steven maintains an active civil litigation practice, with a particular focus on insurance defense. He also regularly counsels clients on matters of employment law and assists businesses and individuals regulated by Virginia's state government. He was elected to the Danville School Board in May 2014 and, before attending law school, served for five years as a policy adviser in the administrations of Governors Mark Warner and Tim Kaine.

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Clearing Up Confusion: Copyrights and Works Made for Hire

By Andrew B. Stockment

Copyrights are unique among the various types of intellectual property rights because they are the most easily obtained but, arguably, the most misunderstood. And within the sphere of copyrights, the concept of “works made for hire” is particularly counterintuitive. This article gives an overview of some copyright law fundamentals and then unpacks the law regarding the requirements for a work to qualify as a “work made for hire.”

In the United States, copyrights exist from the moment that original works of authorship (such as poetry, software code, and musical works) are fixed in a tangible medium of expression (such as paper or flash memory cards).¹ Neither publication nor registration is required to secure copyright protection. However, registration does provide additional benefits (such as statutory damages and attorneys’ fees² and a presumption of validity³) and is a prerequisite to filing a copyright infringement lawsuit.⁴

The categories of works of authorship that are eligible for copyright protection include: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”⁵ Ideas, procedures, processes, systems, methods of operation, concepts, principles, and discoveries, regardless of the form in which they may be described, explained, illustrated, or embodied in an original work of authorship, are not eligible for copyright protection.⁶ Similarly, single words, short phrases, book titles, headlines, or slogans cannot be copyrighted,⁷ although they may qualify for protection as trademarks.⁸

Except in the case of a “work made for hire,” the author of a work is the initial owner of the copyright in the work. Copyright owners have several exclusive rights, including the rights to reproduce, distribute, publicly perform, publicly display, or create derivative works based on the work.⁹

For works created on or after January 1, 1978, copyright protection lasts from creation until 70 years after the author’s death, or, in the case of works made for hire (and pseudonymous or anonymous works), the later of 120 years after creation or 95 years after first publication.¹⁰

The employer or commissioning party is considered the author and the initial owner of the copyright in a work made

‘The concept of a “work made for hire” is frequently misunderstood, even by lawyers, because it does not align with widespread expectations.’

for hire.¹¹ Although copyrights may be assigned, an assignment is less desirable than original ownership because an assignment (or a license) may be terminated by the author (or by certain family members if the author is deceased) during a five-year window beginning approximately 35 years after the date of the assignment, and the right of termination may be exercised “notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”¹² If a business expects a work to be of significant value over the long term, it should consider taking the steps necessary for the work to qualify as a work made for hire.

The concept of a “work made for hire” is frequently misunderstood, even by lawyers, because it does not align with widespread expectations. A work is not “made for hire” simply because one person pays another to create the work or because an agreement between the parties labels it a “work made for hire.” Under the Copyright Act (17 U.S.C. §§ 101 *et seq.*), a work created on or after January 1, 1978, is a “work made for hire” only if: (1) it is prepared by an employee within the scope of his employment; or (2) it is specially ordered or commissioned from an independent contractor pursuant to a written agreement and the work falls within one of nine statutorily defined categories.¹³

For works created by employees, courts apply general principles of agency and employment law to determine whether an individual is an “employee” and whether the work was created within the “scope of employment.”¹⁴ Courts generally apply a three-prong test to determine whether a work is an employee-created work made for hire:

- whether the work is of the kind the employee is employed to perform;
- whether the work occurs substantially within authorized work hours; and
- whether the work is performed, at least in part, to serve the employer.

If a company is uncertain whether an individual is an employee or whether the creation of the work falls within the scope of such individual’s employment, it should obtain a written agreement from the individual expressly assigning the copyright in the applicable works to the company.

For works created by independent contractors, only the following types of works are eligible to be a “work made for hire”:¹⁵

- a contribution to a “collective work” (a work, such as a periodical, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole);
- a part of a motion picture or other audiovisual work;
- a translation;
- a “supplementary work” (a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes);

Continued on page 12

Health Care Issue Spotting for General Practitioners

By Jennifer Long Ligon

Health care law is extensive and dynamic. It permeates the public and private sector, and it includes transactional, regulatory, and litigation matters. Health care law is also exceptionally diverse. Health care attorneys provide a wide range of services, from negotiating complex transactions on behalf of health care systems and facilitating real estate developments of medical office buildings, to establishing non-profit companies and counseling providers in how to manage and grow a practice.

As evidenced by the breadth of these services, health care law implicates many other areas of law, including, but not limited to, corporate, real estate, tax, and employment. This means that, even if you are not a health care attorney, odds are that you will encounter a health care issue at some point in your career. It is important to be able to recognize when a health care issue is present so that you can effectively and efficiently advise your client. This article highlights some health care issues that may arise in your practice.

FRAUD AND ABUSE CONCERNS

Before a client enters into a business transaction with a physician, an attorney needs to analyze the transaction for compliance with state and federal anti-self-referral laws. Specifically, the transaction needs to comply with the Virginia Practitioner Self-Referral Law,¹ the federal Stark Law,² and the federal Anti-Kickback Statute,³ each of which prohibits physicians from benefiting financially from self-referrals or illegal remuneration. The rationale is that, if a physician refers a patient to a facility in which the physician has a financial interest, there is an inherent conflict of interest, which may encourage overutilization of services.

Each law contains a general prohibition on self-referrals or improper remuneration, which is subject to a complex array of statutory and regulatory exceptions. For instance, the Stark Law, a civil statute, prohibits a physician from referring Medicare or Medicaid patients for “designated health services” to an entity with which the physician, or an immediate family member, has a financial relationship.⁴ The Stark Law also prohibits the entity that provides the designated

health services from submitting a claim to Medicare for those services.⁵ There are many exceptions to the Stark Law’s prohibition on referrals, each of which contains detailed requirements for compliance. The exceptions to the Stark Law are mandatory, meaning that, if a transaction fails to satisfy the requirements of an exception, it violates the Stark Law.

By comparison, the Anti-Kickback Statute is an intent-based, criminal statute that prohibits any party from knowingly and willfully

‘Before a client enters into a business transaction with a physician, an attorney needs to analyze the transaction for compliance with state and federal anti-self-referral laws.’

offering, paying, soliciting, or receiving any “remuneration” to induce or to reward referrals for items or services payable by any federal health care program.⁶ Certain “safe harbors” to the Anti-Kickback Statute permit certain non-abusive arrangements, provided that every element of the safe harbor is met. Unlike the exceptions to the Stark Law, the safe harbors to the Anti-Kickback Statute are voluntary, meaning that failure of a particular arrangement to fit into a safe harbor does not necessarily mean that the arrangement violates the Anti-Kickback Statute. In that situation, the arrangement is evaluated on a facts and circumstances basis to determine whether the requisite intent to induce or to receive prohibited referrals may be inferred.

Compliance with each law is critical. Failure to comply subjects the offender to several penalties, including False Claims Act liability, civil monetary penalties (ranging up to \$50,000 per violation), program exclusion, and, for violations of the Anti-Kickback Statute, imprisonment.

DUTY TO REPORT UNPROFESSIONAL CONDUCT

Hospitals, assisted living facilities, and other

health care institutions are required to report to the Department of Health Professions any information indicating that there is a reasonable probability that a licensed health professional may have engaged in “unethical, fraudulent or unprofessional conduct.”⁷ The disclosing entity must submit the report within 30 days of determining that a reasonable probability exists.⁸ Licensed professionals and licensed health care institutions must report similar information to the Board of Medicine within 30 days of occurrence.⁹

It is not always clear when conduct by a licensed health professional triggers the duty to report. A single incident could trigger multiple reporting obligations by multiple individuals or entities. To determine whether certain behavior constitutes “unethical, fraudulent or unprofessional conduct,” you must analyze the relevant licensing statutes and regulations. These rules and regulations are complex and often contain many cross-references in defining what constitutes “unprofessional conduct.” Accordingly, you must thoroughly analyze all relevant provisions to be able to properly advise a client regarding any reporting obligation. In some situations, it is in the best interest of your client to voluntarily disclose, even if disclosure is not otherwise clearly required.

Any person who fails to make a required report is subject to a civil monetary penalty up to \$5,000¹⁰ or \$25,000,¹¹ depending on the governing statute. In addition, a hospital or nursing home that fails to pay an assessed civil penalty will not be issued a license, certification, or renewal thereof.¹²

DUTY TO DISCLOSE BREACHES OF PHI

Both state and federal law vigorously protect patient privacy. In general, except as otherwise permitted by law, health care entities may not disclose a patient’s individually identifiable health information, otherwise known as “protected health information” or PHI.¹³ Despite this prohibition, health care entities sometimes unintentionally disclose PHI. In the event of an unintentional disclosure, the disclosing party may be required to

notify state and/or federal authorities of such disclosure.

Under the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), a covered entity (defined as a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by HIPAA) must notify “each individual whose

‘A single incident could trigger multiple reporting obligations by multiple individuals or entities.’

unsecured [PHI] has been, or is reasonably believed by the covered entity to have been, accessed, acquired, used, or disclosed as a result of [a] breach.”¹⁴ A covered entity must also notify the Secretary of the Department of Health and Human Services following a breach.¹⁵

The threshold inquiry in determining whether your client is subject to a reporting obligation is whether the unintentional access, acquisition, use, or disclosure constitutes a breach. Under HIPAA, unless statutorily excluded, any unintentional access, acquisition, use, or disclosure of PHI is presumed to be a breach unless the covered entity demonstrates that there is a “low probability that the [PHI] has been compromised” based on a risk assessment of at least four enumerated factors.¹⁶ No one factor is dispositive, and a covered entity has the burden of demonstrating that all required notifications were made or that the unintentional use or disclosure did not constitute a reportable breach. In addition to HIPAA, state law requires certain entities to disclose a breach of “medical information,” as that term is defined by statute.¹⁷

DUTY TO NOTIFY TRANSFER OF PATIENT RECORDS

When a health care provider closes, sells, or relocates his or her practice, the provider cannot transfer patient records unless he or she first attempts to notify current patients of the pending transfer.¹⁸ The provider must notify patients by mail and by publishing prior notice in a newspaper of general circulation within the provider’s practice area. Among other disclosure requirements, the notice must inform the patient of the right to have his or her records sent to another provider or to the patient. For purposes

of this notification requirement, a practice is deemed to be “relocated” when it moves from the location at which the records are stored at the time of the notice to another site that is located more than 30 miles away or to another state or the District of Columbia.¹⁹ ■

Endnotes:

1. Va. Code Ann. § 54.1-2410.
2. 42 U.S.C. § 1395nn et seq.
3. *Id.* § 1320a-7b.
4. *Id.* § 1395nn(a). “Designated health services” includes, but is not limited to, clinical laboratory services, physical therapy services, radiation therapy services, inpatient and outpatient hospital services, and outpatient prescription drugs. *Id.* § 1395nn(h)(6).
5. *Id.* § 1395nn(a)(1)(B).
6. *Id.* § 1320a-7b(b).
7. Va. Code Ann. § 54.1-2400.6(A)(2).
8. *Id.*
9. *Id.* § 54.1-2909(A)(4).
10. *Id.* § 54.1-2909(G).
11. *Id.* § 54.1-2400.6(F).
12. *Id.* § 32.1-125.01.
13. See generally *id.* § 32.1-127.1:03; 45 C.F.R. §§ 160, 164.
14. 45 C.F.R. § 164.404(a).
15. *Id.* § 164.408(a).
16. *Id.* § 164.402.
17. Va. Code Ann. § 32.1-127.1:05.
18. *Id.* § 54.1-2405.
19. *Id.* ■

Join the YLD at the Homestead!

VBA Summer Meeting July 23-26, 2015

Please join other members of the Young Lawyers Division at the 125th VBA Summer Meeting on July 23-26 at The Omni Homestead Resort in Hot Springs, Virginia.

All YLD members are encouraged to attend especially those who have never attended a VBA or YLD event before. New faces appear at every VBA Summer Meeting, and this is an opportunity to meet young lawyers from across the Commonwealth and to learn about leadership opportunities within the YLD.

Planning to attend? Make sure to reserve your hotel room now before they disappear.

For more details, navigate to:
www.vba.org/vbasummer15



Jennifer Long Ligon

Associate, McCandlish Holton (Richmond)

Practice Areas: Health Care Law, Certificate of Public Need Law, and Business Law

Law School: University of Virginia School of Law (2010)

VBA Leadership: Health Law Section Council (YLD Representative)

Bio: Jennifer is an associate in the Health Care Practice group at McCandlish

Recent Event: Open World Program

On April 13th, the Tidewater Representatives, Andrew Richmond and Lucy Brandon, along with several other young attorneys in the area, hosted a working luncheon with attorneys from the Republic of Georgia as part of Congress’s Open World Program. Beginning in 1999, the Open World Program is one of the most effective U.S. exchange programs with post-Soviet countries, which promotes professional relationships and democratic values to up-and-coming leaders. Andy and Lucy worked closely with the Norfolk Sister Cities, which hosts young professionals and students from various Eurasian countries.

During the luncheon, the attorneys discussed the judicial processes and constitutional aspects of each country. As Georgia is a young democratic country, the attorneys were very interested in learning more about our legal system and values. We hope to host another event with Norfolk Sister Cities and the Open World program next year. To learn more about the Open World Program or to get involved, contact **Lucy Brandon** at lbrandon@wilsav.com or **Andrew Richmond** at arichmond@poolmahoney.com.

YLD Spring Meeting



Courtesy: VBA Staff.

YLD Leaders and members of the VBA Board of Governors gather for a group photo after the morning meetings at The Sanderling Resort in Duck, NC.



Courtesy: VBA Staff.

YLD leaders and members of the VBA Board of Governors share ideas and project updates.



Courtesy: VBA Staff.

YLD Chair Nupur Bal leads the discussion at the Spring Meeting.



Courtesy: VBA Staff.

YLD members Lucy Brandon and Frank Cragle brainstorm with VBA Board of Governors member Lori Thompson.



Courtesy: VBA Staff.

Lawyers and guests socialize before dinner at the Spring Meeting.



Courtesy: VBA Staff.

Guests socialize before dinner at the Spring Meeting.



Courtesy: VBA Staff.

VBA President-elect Jim Guy and YLD Chair Nupur Bal enjoy the pre-dinner reception at The Sanderling Resort.

Submit Your Article or Event Write-up to *Opening Statement*

The *Opening Statement* Editorial Board welcomes the submission of articles by young lawyers. Generally, articles should be about 1,300 words and should be on a topic of interest to young lawyers. (Longer articles are may be divided into two installments and published in successive issues.)

Articles. Substantive article topics may include, for example:

- New developments in the law
- Day in the Life of... (e.g., "Day in the life of a Circuit Court law clerk" or "Day in the life of an assistant city attorney")
- Recent experience with... (or Lessons learned from...) (e.g., "Lessons learned from taking a legal aid pro bono case", "Recent experience with arbitration", or "Lessons learned from participating in the VBA Veterans Issues Task Force")
- Tips/Advice (e.g., "Arguing your first jury trial", "Tips for effective negotiations", or "How to handle your first client meeting")
- General Overview of a legal practice area (e.g., "Understanding partition suits" or "What every lawyer should know about property settlement agreements," etc.)

We welcome articles that are written specifically for *Opening Statement*, as well as articles that are adaptations of previously published material, such as blog posts, articles from firm newsletters, excerpts or summaries of law review articles, etc. The complete Author Guidelines and the VBA Publication Agreement are available online at: www.openingstatement.org.

Photos and Event Write-ups. In addition to substantive articles, we are also interested in receiving photos and/or write-ups from YLD events. If you took photos at a YLD social or other event, please pass them along to us for possible use on the YLD website or in the *Opening Statement* newsletter.

Please send your submissions or questions to the *Opening Statement* Editorial Board at: editors@openingstatement.org.

What You Need to Know About Health Insurance

By Cheryl Pellegrino, CLTC (Virginia Barristers Alliance, Inc.)

Virginia Barristers Alliance, Inc. (VBAI) is the wholly-owned insurance subsidiary of The Virginia Bar Association. The representatives of VBAI are able to serve as your health insurance broker. With all of the health insurance resources at their fingertips, they can help you identify the best health insurance option for you. Created by attorneys for attorneys, VBAI has offered a wide array of insurance products to Virginia's legal community since 2001. For more information, visit: virginiabarristersalliance.com.

The Patient Protection and Affordable Care Act (PPACA) also known as the Affordable Care Act (ACA), or “Obamacare,” remains as controversial today as it was the day it was passed in March 2010. Five years later, this law is still highly debated and continues to evolve. Whether you agree with it or not, you need to understand the basics in order to make an educated decision when you purchase a health insurance plan.

The “individual shared responsibility payment,” or “individual mandate,” is a provision of the Affordable Care Act, and

is one of the key building blocks of the insurance overhaul. It requires most US citizens and legal residents to obtain qualified health coverage or pay a tax penalty.¹

Such health insurance coverage can be obtained by:

- an employer-provided plan,
- an individual plan, or
- Medicare, Medicaid, or other federal-state run programs.

If you choose not to comply with the law, and do not qualify for an exemption, it is important to understand the shared responsibility provision and how it works. The provision began with the 2014 tax year, and will be phased in over the next several years. The shared responsibility payments are as follows:

- For 2015: The greater of 2% of household income or \$325 per adult (\$162.50 per child under 18);
- For 2016 and beyond: The greater of 2.5% of household income or \$695

per adult (\$347.50 per child under 18) (with the fixed dollar amounts subject to increases for inflation).²

If you decide to pay the penalty rather than buy health insurance, you could expose yourself to financial ruin if a medical emergency occurs. Unpaid medical expenses are the leading cause of personal bankruptcy in the United States.³ Having a health insurance policy to help pay for unexpected medical expenses is part of the foundation of a solid financial plan to protect your lifestyle.

Tax credits (subsidies) are currently available to help pay for health insurance premiums, if you qualify. The Health Insurance Marketplace will determine the tax credit by the number of individuals in the household and the household income. If the policy originates on the Marketplace, all updates and changes, including changes in income, must be communicated directly to them, not the insurance company. The insurance company takes direction from the Marketplace. Over the past year,

Virginia Barristers Alliance, Inc.

(a wholly-owned subsidiary of The Virginia Bar Association)

In 2001, The Virginia Bar Association determined that an opportunity existed to enhance member benefits by providing insurance services to VBA members. This idea resulted in the creation of Virginia Barristers Alliance, Inc. (VBAI), an insurance subsidiary that is wholly-owned by the VBA. As it has for 14 years, VBAI continues to serve lawyers' individual and group insurance needs for life, long-term care, health and disability income protection, as well as fixed annuity products. However, as of January 2015, the VBAI has expanded its insurance offerings to include malpractice insurance and an array of business lines that include cyber liability, property, general liability, workers' compensation and employment practices coverage.

Unlike most bar organizations across the country that endorse insurance providers, the VBA created VBAI as an integral part of the association—created by attorneys for attorneys. Its consultative professionals remain keenly aware of the legal industry and impacts on law practices, and serve as a single resource of unbiased recommendations in the insurance marketplace.

VBAI clients protect their practice, their families, and their colleagues. These insurance relationships also support your profession. VBAI returns its profit to the VBA, where it keeps dues low and helps finances programs, services, and year-round advocacy for attorneys. This non-dues revenue helps the VBA fulfill its mission of being “the independent voice of the Virginia lawyer, advancing the highest ideals of the profession.” VBAI, its mission, goals, marketing, and processes are governed by a Board of Directors which is composed of member attorneys and members of the VBA Board of Governors.

The VBAI's team of seasoned insurance professionals stands ready to help law firms, individual attorneys, their staff, and their clients across the Commonwealth of Virginia. To reach a life and health representative call 804.290.8751 (or toll free at 800.358.7987). To reach a property and casualty representative call 804.377.1012 (or toll-free at 844.370.9218).

We encourage young lawyers to take a new look at Virginia Barristers Alliance Inc. by visiting online at www.virginiabarristersalliance.com.

this has created confusion over whom to contact.

Another major change under the ACA requires that you maintain the same plan and insurance company throughout the year. Prior to January 2014, individuals could change insurance companies at any time for any reason. This is no longer the case. Plan and company changes can only occur during open enrollment each year unless there is a qualifying event. Otherwise, you are locked into the plan.

Some qualifying events which allow you to change plans:

- moving out of service area,
- marriage,
- divorce,
- birth of a child,
- death, or
- loss of group coverage.

Purchasing health insurance under ACA has not changed if you purchase your benefits through an employer. However, if you purchase health insurance on your own, there are three options purchasing in Virginia: through the Federally-facilitated Exchange, or, “Marketplace” at healthcare.gov; directly from an insurance company; or through a broker.

Virginia uses the Federally-facilitated site, Healthcare.gov, which provides a comparison of health insurance benefits and pricing based on an applicant’s location, family make-up, and annual income. This site provides extensive information on health care reform, information on the health insurance companies, and additional resources

to help the consumer choose a plan based on particular needs.⁴

Health insurance purchased directly through the insurance company offers extensive information on the company itself as well as additional health insurance plans not offered through the marketplace. In addition to health insurance options, information can also be found on other insurance products such as life, dental, vision, accident, and wellness products. If purchasing directly from an insurance company, the assistance of a representative can be helpful to narrow down the options. These representatives are trained to know their company’s products, but cannot offer guidance to compare products outside of their own company.

Shopping the plan options with each insurance company can make the decision of choosing a health plan extremely confusing. An independent broker is a helpful resource in comparing different companies and plans. Brokers are able to evaluate and sift through all of the options to help you identify a plan that meets your specific needs. A broker is licensed, insured, and trained to research a wide range of insurance companies and plans. Independent brokers can help make shopping for health insurance a more pleasant experience.

According to healthcare.gov, the Open Enrollment period for 2016 will be November 1, 2015 to January 31, 2016.⁵ Under ACA guidelines, everyone will renew at the same time unless there is a special enrollment period available. Therefore, it will be important for you to plan ahead and reach out to your broker early if you intend to pursue that option.

This information is intended for education purposes only, and is not specific to the individual needs of each insured. You are encouraged to consult with a licensed health insurance professional regarding your personal needs and options. ■

Endnotes:

1. Kaiser Health News, FAQ: How Will The Individual Mandate Work? By Alvin Tran, September 3, 2013.
2. Reporting Health Insurance Coverage for Individuals and Families: Individual Shared Responsibility Provision & Premium Tax Credit report, page 18, Gladys Nichols, Wage & Investment, IRS, January 9, 2015 IRS.gov.
3. NerdWallet Health Study: “Medical Debt Crisis Worsening Despite Policy Advances”, Discussion, by Christina LaMontagne, October 8, 2014, NerdWallet.com.
4. Glossary, Health Insurance Marketplace, Healthcare.gov.
5. 2016 Open Enrollment, healthcare.gov/marketplace-deadlines/2016. ■

Recent Event: Model Judiciary Program

The Model Judiciary Program held its final round at the Supreme Court of Virginia on April 21st. This is the 39th year of the program. Justice Powell, along with Judge Decker, Judge O’Brien, Judge Russell, and Judge AtLee from the Court of Appeals presided over the arguments.

Hundreds of high school students competed from all over the Commonwealth. The students worked their way through the judicial system, beginning at the trial level. Ultimately, ten teams were selected to compete in the final round at the Supreme Court of Virginia. Perry Coburn, Michele Fanney and Evan Stepanick coordinated the Richmond, Tidewater, and Northern Virginia teams, respectively.

The Panel was impressed with the arguments and the talent of the upcoming generation. Next year we embark on the 40th year of the Program and hope to continue to inspire high school students to become involved in the legal process. To learn more about the Model Judiciary Program or to get involved, contact **Lucy Brandon** at 757-628-5690 or lbrandon@wilsav.com.

We Want You!

Join the Editorial Board of Opening Statement

The Editorial Board of Opening Statement is growing to accommodate the success of our newsletter. We have three open volunteer positions for Development Editors. If you are looking for a way to become involved with the leadership of the Young Lawyers Division, then this is the perfect opportunity.

Our requirements are simple: Reliability and membership in the VBA YLD. We publish four issues a year, so we need editors who can commit to editing pieces, writing at least one substantive article a year, and soliciting pieces from their friends and colleagues. No previous editing experience is necessary. Above all, we need people who are reliable and will follow through on their commitments.

For more information or to join our team, please contact **Andrew Stockment** (abs@lplaw.com) or **Dan Mauler** (dmauler@rpb-law.com).

- a “compilation” (a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship);
- an “instructional text” (a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities);
- a test;
- answer material for a test; or
- an atlas.

This list of eligible works does not include many types of works that businesses frequently hire outside personnel to create, such as websites, logos, advertisements, photography, and custom software. For works that do fall within the defined categories, the business must have a written agreement from the author expressly stating that the work is made for hire in order for it to qualify as such.

Although the agreement and course of dealings between a business and an independent contractor may give rise to an implied nonexclusive license for the business to use the works created by the contractor, it is highly preferable to avoid relying on an implied license. Any business that engages a non-employee to create a work and intends to own the copyright to such work should have a written agreement with the author expressly stating that the work is made

for hire (if it falls within one of the eligible categories). If the work is not eligible to be a work made for hire, and as a safeguard even if it is, the written agreement should include a provision assigning the copyrights to the business, such as: “To the extent that the Work Product is not recognized as a ‘work made for hire’ as a matter of law, the Contractor hereby

‘A work is not “made for hire” simply because one person pays another to create the work or because an agreement between the parties labels it a “work made for hire.”’

assigns to the Company any and all copyrights in and to the Work Product.” By doing so, a business can obtain the copyright to a work (subject to statutory termination rights) even if the work does not qualify as a “work made for hire.” ■

Earlier abridged versions of this article were previously published by the American Bar Association in TYL In Focus and by the Virginia State Bar in Docket Call.

Endnotes:

1. 17 USC §§ 101, 302(a).
2. 17 USC §§ 412, 504, and 505.
3. 17 USC § 410.
4. 17 U.S.C. § 411(a).
5. 17 U.S.C. § 102(a).
6. 17 U.S.C. § 102(b).
7. See U.S. Copyright Office, Circular 34. For an interesting discussion of copyright protection for short phrases, see Mary Minow, *Copyright Protection for Short Phrases – Rich Stim*, Fairly Used Blog (Sept. 9, 2003), available at:

http://fairuse.stanford.edu/2003/09/09/copyright_protection_for_short/ (archived at: <http://bit.ly/1C0D58t>).

8. For more than half a century, federal trademark law has been settled that the title of a single work, such as a book or movie, is not considered a trademark and is not eligible for federal trademark registration, but that the name of a series is eligible for trademark protection. See, e.g., *Herbko International, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375 (Fed. Cir. 2002). However, in *In re King Productions, Inc.*, 2014 TTAB LEXIS 473, Serial No. 76703458 (Nov. 19, 2014), the Trademark Trial and Appeal Board expressly rejected its own longstanding precedent (and the precedent of the Federal Circuit—its primary reviewing court) and held that the title of a single work is eligible for federal trademark registration upon a showing of acquired distinctiveness.
9. 17 USC § 106.
10. 17 USC § 302. Calculating the copyright duration for works created before January 1, 1978, is more complicated.
11. 17 USC § 201(b).
12. 17 USC § 203.
13. 17 USC § 101. For works created before 1978, the work-for-hire precedents under the Copyright Act of 1909 still govern. See *Twentieth Century Fox Film Corp. v. Entertainment Distributing*, 429 F.3d 869 (9th Cir. 2005); *Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004).
14. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); *U.S. Auto Parts v. Parts Geek, LLC*, 692 F.3d 1009 (9th Cir. 2012).
15. 17 USC § 101. ■

Support VBA Foundation

The VBA Foundation funds numerous programs, including the *Ask A Lawyer Project*, the *Pro Bono Hotlines*, the *Model Judiciary Project*, the *Veterans Issues Task Force*, and *Regional Mentoring Programs*. To donate or to learn more, visit: vba.org/foundation.



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VBA Leadership: YLD Executive Committee (2014 – Present), Intellectual Property and Information Technology Law Section Council (YLD Representative, 2012 – Present), Law Practice Management Division Executive Council (YLD Representative, 2014 – Present), ABA Awards of Achievement Committee (Co-Chair, 2015 – Present), *Opening Statement* (Editor-in-Chief, 2012 – Present), YLD Communications/Publicity Committee (Chair, 2012 – Present)

Awards: Super Lawyers Rising Stars (2013 – 2015), VBA YLD Emerson G. Spies Award (2012)

Bio: Andrew was a software engineer before becoming an attorney, and he has been a lifelong technology and innovation enthusiast (including a particular interest in data security and privacy). When he is not practicing law or working on bar projects, Andrew and his wife Martha enjoy running, hiking, and watching U.Va. sports. Andrew's other articles and projects are available at: www.andrewstockment.com.

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