INTRODUCTION

Just Getting Started

Welcome to the Fall 2013 issue of Opening Statement. This issue is the first issue of Volume 2, and Opening Statement is just getting started. In this publication’s first year, we have benefited from the widespread support of everyone at the VBA. We have published articles, event write-ups, and photos from numerous contributors, and we are pleased to report that Opening Statement received the 2nd Place ABAYLD Award of Achievement in our division for the Newsletter category!

In this issue, Travis Hill encourages YLD members to cultivate the next generation of leaders and to inspire young lawyers to engage within the profession (page 3), and you will read about the VBA-YLD’s continued tradition of success and the four ABA YLD Awards of Achievement that our organization received for the 2012-2013 bar year (page 8). You will also learn about Brand Protection Essentials from Andrew Stockment (page 10). In addition, Chris Gill shares the story of the YLD’s ambition and generosity as seen through the fantastic success of the Legal Food Frenzy (page 5). Finally, in the first installment in a series by Virginia Barristers Alliance, you will discover what your biggest asset is and how to protect it (page 6).

Our mission is to tell the story of the VBA Young Lawyers Division and to foster the development of community within the YLD. Please let us know about your career and personal accomplishments so that we can share them with your fellow young lawyers. Likewise, please consider turning a recent experience or research assignment into an article for Opening Statement. If you are planning or hosting a VBA event, please let us know so that we can promote it, and send us a write-up and photos so we can share your success with all of the YLD. Let us be your voice.

As this publication enters its second year, we are seeking additional volunteers to join the Editorial Board and to contribute articles for publication. If you are interested or would like to learn more about getting involved, please contact us at: editors@openingstatement.org.

Thank you for reading. We hope you enjoy this Fall 2013 issue of Opening Statement.

YLD Fall Meeting

The Young Lawyers Division will be hosting its annual Fall Executive Council Meeting on October 4-5 (Fri. - Sat.) at The Carter Hall Conference Center in Millwood, Virginia. The Fall Meeting is a great chance to get to know fellow young lawyers, to re-connect with old friends, and to network and socialize in a relaxed atmosphere.

Featured Activities:

- YLD Executive Council Meeting with full breakfast
- CLE: “Unique Law and Regulations Impacting the Operation of Virginia Wineries”
- Breakfast, lunch, dinner and cocktail reception on Saturday
- Tour of the Philip Carter Winery
- S’mores by the fire pit!

Register today at: vba.org/yldfall2013.

Upcoming VBA Events

Oct. 4-5: YLD Fall Meeting

Oct. 15: Brave New World For Mediation: Skills For Forging The Future

Oct. 24-26: 43rd Annual Conference on Labor Relations and Employment Law

Nov. 1: 24th Annual VBA Tax Practitioners’ Roundtable

Nov. 7: 19th Annual VBA Administrative Law Conference

Nov. 15-16: National Moot Court Competition

View the complete calendar at: vba.org/calendar.
OPPORTUNITIES TO ENGAGE

YLD Program Highlights

NATIONAL MOOT COURT

This year marks the sixty-fourth annual National Moot Court Competition. The Young Lawyers Division of the Virginia Bar Association sponsors the Region IV preliminary rounds which will be held in Richmond, Virginia on November 15-16, 2013. During the Region IV preliminary rounds approximately 24 teams made up of law students from schools in Kentucky, North Carolina, Virginia, and West Virginia make appellate arguments as both petitioners and respondents. After the first day, the leading teams move to the quarter and semi-finals until two teams compete in the final round. The winner and runner-up will both advance to the national rounds in New York City.

Members of the Virginia Bar Association representing a wide range of ages and experience serve as judges for the preliminary rounds on Friday. Last year we had over 45 volunteers. Volunteers are given the transcript of the case and a confidential bench memorandum several weeks before the competition to assist them in serving as judges.

The YLD Moot Court Chairs are currently looking for volunteers to serve as judges for the morning (8:30-12:30) and afternoon (1:30-5:30) rounds on Friday, November 15, 2013 in Richmond. If you are interested in participating in this worthwhile event, please contact Daniel Watkins at 804.420.6405 or by e-mail at dwatkins@williamsmullen.com and please save the date on your calendar.

CAPITOL MENTOR PROGRAM

The co-chairs of the VBA-YLD Capitol Mentor Program organized the third annual College Appreciation Day for the Woodville Elementary School third graders on June 10, 2013. Many of Woodville’s students come from low-income housing developments with high rates of crime and poverty. Volunteers wearing their school colors led an interactive discussion with the students about going to college and the college experience generally. They also served the students pizza and juice while they participated. Volunteers brought memorabilia from their alma maters. Volunteers also gave the students handouts featuring a silhouette of a graduate in a cap and gown, labeled with a “Class of 2026” heading. This is the year these students could graduate from college. Students were encouraged to color the silhouette and to add captions indicating a college of interest and professions they might want to pursue.

After a summer break, the Capitol Mentor Program is back in session. Volunteers will be serving as classroom assistants, and YLD members can volunteer to serve in the classroom once a month. Other Capitol Mentor Program events include participation in Read Across America Day and a Book Tasting each spring. For more information or to signup as a volunteer, please contact Brit Mohler (bmohler@hunton.com) or Sarah Bridges (sbridges@hunton.com).
Motivating Young Lawyers to Engage

By Travis G. Hill

What motivates individuals to join an organization or group? Passion for a cause? Interest in learning more about the individual members? Simply looking for a way to fill time? I touched on membership and the YLD’s importance in maintaining the VBA’s vibrancy in the last edition of Opening Statement. In this edition, I’d like to dwell a little more on why young attorneys become members and how we can make sure we are always opening that door so new attorneys are joining our ranks.

I was already a member of the VBA when I showed up for a free lunch and an explanation of just what the YLD had to offer an attorney in his first years of practice. The joining part was easy, it was free and an excellent opportunity to connect with graduating law students preparing to take the Virginia bar exam and begin their legal careers. Already familiar with the VBA, there’s no reason any member of our Law School Councils who stays to practice in Virginia shouldn’t also become a member of the YLD upon admission to the bar. I’d like to examine how we maintain contact with recent graduates, congratulate them on bar passage and welcome them into YLD status.

This fall, I’m also looking to renew the membership lunches and happy hours that enable new members of the VBA-YLD to meet and speak to current leaders of the organization. These events are excellent opportunities to discuss all the various programs available within the YLD, including pro bono, public interest, service to the bar and opportunities to serve as a liaison to one of the substantive sections of the VBA. The VBA-YLD looks great on paper, but you fill a room with members who talk about their practices and their activities outside of work and I think you’ll get a true sense of the strength of the organization. My goal is to hold events like these in every region of the Commonwealth, building our membership base with young attorneys in their first few years of practice.

Finally, I want our committee chairs to consider whether there is an opportunity to build a membership component into any of their committee activities. Whether it’s simply having membership materials on hand or hosting a reception following an event open to all attorneys, we need to make sure that every attorney has an opportunity to join and that every member has an opportunity to get more involved.

By the time the First Day in Practice event and Swearing-In ceremony rolls around for newly licensed attorneys, I want most attendees to have heard of the VBA-YLD at least a couple of times. I’d like to talk to them about what committees they want to work on rather than convincing them that a free membership really is a good deal. So, let me know if you have ideas for membership events or want to help host a lunch or happy hour in your region. The VBA-YLD has a tremendous amount to offer young attorneys, we just need to make sure they know where to look.

Travis G. Hill
Deputy Secretary of Agriculture and Forestry, Office of the Governor (Richmond)

VBA Leadership: YLD Chair (2013 - Present); VBA Board of Governors (2012 - Present); YLD Executive Committee (2006 - Present); Richmond Town Hall Meeting, Co-Chair (2004 - 2010)

Other Leadership: Virginia CLE Committee (2008 - 2012)
Bio: Travis was appointed to his current position by Governor Bob McDonnell in July 2011. Prior to his appointment, Travis practiced at the Richmond office of Williams Mullen in its Government Affairs group. Travis is married to Katie Vatalaro Hill and father to Elise and Claire.
Contact Info: travisghill@hotmail.com or 804.687.9384
LEADERS CONVENE IN DUCK, NORTH CAROLINA

YLD Spring Executive Council Meeting

YLD Executive Council meeting on May 18, 2013 at The Sanderling in Duck, NC.

Shawn O’Brien and Elizabeth Ebanks during the Saturday morning YLD Executive Council Meeting.

Jeremy Dillon (VBA Director of Operations), Travis Hill (YLD Chair), Sarah Towell, Sam Towell, Elaina Blanks (YLD Chair-Elect), Dan Ortiz, Kathleen Bagby, and Tom Bagby (VBA President).

Travis Hill (YLD Chair), Chris Gill, Nell Mercer, David Mercer, Sarah Towell, Nupur Bal, Sam Towell, Elaina Blanks (YLD Chair-Elect), Dan Ortiz, Kathleen Bagby, and Tom Bagby (VBA President).

Young lawyers and their families socializing at the YLD Spring Meeting.
A Remarkable Testament to our Ambition and Generosity

By Christopher M. Gill

Lawyers are nothing if not ambitious. Members of the Virginia Bar Association, and of our own Young Lawyers Division, have proven this time and time again through countless pro bono and public service projects. I have had the good fortune of being involved in one such project, the Legal Food Frenzy, for the past seven years. During that time, I have seen how the ambition of Virginia’s legal profession has converged with its equally impressive generosity, for the great benefit of our community at large.

The Legal Food Frenzy began over 20 years ago as a friendly competition among lawyers in the Tidewater region, and has been supported for years by the Norfolk & Portsmouth Bar Association in that area. In 2007, then-Attorney General Bob McDonnell joined with the Virginia Bar Association Young Lawyers Division to take the Legal Food Frenzy statewide. In that first year, 169 law firms, offices and law schools raised approximately 679,000 pounds of food. Since then, the YLD has worked with Attorneys General McDonnell, Bill Mims and Ken Cuccinelli to add participants, increase donations, and raise awareness of the plight of too many of our neighbors who cannot afford to feed their families.

The success of Virginia’s Legal Food Frenzy has inspired bar organizations in other states, such as Massachusetts, Georgia, Illinois, and North Carolina to replicate the program. While lawyers and legal professionals of all ages have been vital to the success of the Legal Food Frenzy here in Virginia, our young lawyers have led the charge. They have served as statewide co-chairs and area captains across the Commonwealth, reached out to other lawyers and law firms to participate, organized and hosted kick-off luncheons and receptions promoting the Legal Food Frenzy, and motivated their firms’ attorneys and employees to support the event.

This year was a banner year for the Legal Food Frenzy. At the beginning of the year, after six highly successful years during which we raised approximately 8.5 million pounds of food (and converted monetary donations) for Virginia’s food banks, we set out to break the 10-million-pound threshold. Big, round numbers are always enticing to lawyers. Well, I am happy to report that, thanks once again to the incomparable ambition and generosity of Virginia’s legal community, the Seventh Annual Statewide Legal Food Frenzy raised the equivalent of almost 1.5 million pounds of food, bringing the total amount raised over the seven years of the competition to 10,025,355 pounds!

Under the leadership and support of four-year veteran Legal Food Frenzy chair Attorney General Cuccinelli, Virginia lawyers, legal professionals and law students competed during the first two weeks in April for the coveted Attorney General’s Cup and other statewide awards. The winner of this year’s Cup, for the third year in a row, was sole-practitioner B. Cullen Gibson, whose office raised the equivalent of 17,550 pounds of food per person—a staggering amount of food for any size firm.

Next year’s event will be held from March 31 through April 11, 2014. In the coming weeks, we will be looking for new young leaders to volunteer as area captains around the Commonwealth, to continue to build upon the great work so many of you have already done and to take this competition to the next level. If any of you are so inclined, my co-chairs and I would be tremendously honored to have you join our team. With your help, Virginia’s legal community can continue our valiant effort to battle hunger in our own backyards. To all who have been a part of the Legal Food Frenzy over the past seven years, thank you, and well done.

Christopher M. Gill
Partner, Christian & Barton, LLP (Richmond)

Practice Area: Commercial Real Estate and Environmental Law
Law School: University of Richmond (2004)
VBA Leadership: YLD Executive Committee (2009 - Present) and Legal Food Frenzy (Co-Chair, 2007 - Present)
Bio: Chris focuses his practice on commercial real estate and environmental law, and typically represents developers, landowners, lenders, local governments and government agencies in matters involving property transactions, property rights, financing, land use and a variety of environmental issues. He holds the Leadership in Energy and Environmental Design® (LEED®) Accredited Professional designation.
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Support the 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.
What IS Your Biggest Asset?

By Michael R. Thompson and Scott A. Paciocco (Virginia Barristers Alliance)

This article on long-term disability insurance is the first in a series of articles by Virginia Barristers Alliance, Inc., a wholly-owned subsidiary of The Virginia Bar Association. Future articles in the series will address topics including how to evaluate different benefits packages, Life Insurance 101, Health Insurance Basics, estate planning/business succession, long-term care insurance, and life audits.

When someone says the word “asset,” what comes to mind? Does it conjure up images of nice cars, homes or retirement accounts? These may be large assets, but are they really your biggest asset?

Everyone knows that having health insurance is a necessity. Many realize that life insurance can help to protect those who would suffer financially if you passed away. We all have auto insurance, and most of us probably have homeowner’s or renter’s insurance. How many of us, though, actually protect our ability to earn an income?

Think about it. Everything we do in life is driven by our income and our ability to earn that income. If we become sick or get injured, who will pay the bills? You might be saying “Really? I know that I can die or get sick, and that’s why I have health insurance and life insurance. Is disability really that big of an issue?” Consider the following:

• There is a death caused by motor vehicle crash every 15 minutes; there is a disabling injury every 9 seconds.¹
• More than 70% say a disability (which prevents them from working) would likely be caused by a serious accident, when more than 90% of disabilities are actually caused by illness.²
• 83% said a disability could happen to anyone at any time but deny it will specifically happen to them.³
• 1 in 4 of today’s 20 year olds will become disabled before reaching age 67.⁴

The legal profession is a highly specialized line of work, made possible by years of study. Because of its specialized nature, an attorney has the ability to earn a higher than average income. Protecting this income with disability income protection insurance protects future income against loss due to an illness or an injury. Today’s disability income contracts are also very specialized. For attorneys, long-term disability income insurance (L.T.D.) may have one or more commonly-used applications:

1. Traditional L.T.D. provides income to one’s family if they become sick or injured, and as a result of their injury, they are unable to work.

2. Business Overhead Expense is a type of L.T.D. which ensures that benefits are made payable to a company or firm in the event that a key person suffers a long-term disability. This enables the firm to continue functioning in spite of what would likely be a decline in revenue due to the absence of the key person.

3. Disability Buy/Sell is another form of protection that is used when a firm or company has multiple partners or owners. If a partner suffers a disability as defined by his/her contract, the other partners may receive benefits which would be used to “buy out” the interest of the partner suffering the disability. This ensures that all parties are made whole, and allows the firm to continue functioning as planned.

4. Group L.T.D. is the last type of L.T.D. protection used, but this topic requires a more thorough explanation. Usually found as a benefit provided by one’s employer, Group L.T.D. usually provides income with disability income protection against your $60,000 per year would then be reduced to $45,000 per year. How well could you manage that kind of reduction in your income?

While group long-term disability coverage is good to have in place, and while it does fill certain needs, there can be limitations. For example, a group plan might have “offset provisions” which reduce your disability benefits if you receive Social Security, other disability benefits, qualified plan distributions or partnership distributions. Additionally, many group plans do not protect one for their “own occupation,” or may do so for a very limited amount of time – 24 to 36 months. One may also find “caps” in their coverage which would limit their benefit payments. For those with higher incomes, a cap on benefits payments from a group plan could reduce their benefits well below 60%.

For many, the preferred route to consider is to obtain a fully-underwritten disability income protection contract that the insured owns. With this type of contract, the policy owner can take their coverage with them if they change firms. As these contracts are fully underwritten, the quality of the benefits that they offer are generally much higher, or “richer,” than those provided by group plans that do not require full underwriting.

Regardless of what type of disability protection you pursue, make sure that the company issuing the insurance contract has sound financials. After all, the best kind of insurance is the kind that pays when you need it! As well, it’s also a good idea to ask for a specimen contract that you can review ahead of time. Several insurance companies offer disability income protection contracts which are completely customizable with options or riders that can be added. Here are a

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¹ Insurance Information Institute, “Projections of Motor Vehicle Accident Deaths and Injuries,” 2006
⁴ National Council on Disability, “Disability and the Workforce,” 2006
⁵ ASSUR, “Disability and the Workforce,” 2006

‘1 in 4 of today’s 20 year olds will become disabled before reaching age 67.’

‘There is a death caused by motor vehicle crash every 15 minutes; there is a disabling injury every 9 seconds.’

requires little or no formal underwriting. Group L.T.D. will generally only cover approximately 60% of one’s pre-disability income. These benefits are usually then taxable. If you make a gross income of $100,000 per year, and become disabled with a group long-term disability plan in place, your gross benefit payable would be $60,000 per year. Assuming 20% Federal Taxes and 5% State taxes,
few coverage design options that should be considered when designing a disability income protection contract:

“Own Occupation Contract” – This is a type of disability income protection contract offered by an insurance company which provides specialized language for those in specialized professions.

“Extended Partial Benefits” – Since most disabilities happen as a result of an illness as opposed to an injury, an ability to work part of the time but not all of the time is a distinct reality. With variations from one carrier to another, this benefit allows the insured to receive benefits if they are only able to work a portion of the time.

“COLA” – A “Cost of Living Adjustment” feature is one of the most important features of a disability income contract. It ensures that benefits received will attempt to keep pace with inflation.

“Future Insurability Option Rider” – This important coverage rider contractually guarantees the right to purchase more LTD coverage regardless of the insured’s health at the time of the future purchase. This rider should be considered when you initially go through underwriting so that, as you grow in your career and your income increases, you will be able to protect that additional income without having more medical tests to qualify for new coverage.

“Residual Benefits” – These benefits and their importance are often overlooked when considering this type of insurance. Residual benefits can have many features. One of the main elements of this feature allows the insured to continue to receive disability benefits, after they have returned to work, as they rebuild their practice.

“Retirement Benefits” – If you’re not working due to a disability, you’re also not funding a 401k plan, a Simple IRA or a SEP IRA. This feature provides additional dollars that would be earmarked and saved for your retirement.

We all have risks in life. Part of establishing a well-rounded, long-term plan for success is implementing the correct types of insurance products that help us manage those risks. Many say “I’ll get it later when business improves…. ” The common problem with this strategy is that your health may not be good enough to qualify for the coverage if you wait. Premiums are lowest when the insured is young and healthy. As you get older, the premiums to purchase a new policy only go up. But once you obtain an individual LTD policy, your premiums are locked in for the life of the policy (typically until age 65). Consider your individual needs and think about whether disability income protection coverage could be a part of your strategy. Don’t just take our word for it. Talk to those in your firm who are successful and whose opinions you respect the most.

Preserve your lifestyle. Get disability income protection insurance.

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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. (“The Alliance”), an insurance subsidiary that is wholly-owned by the VBA. A team of seasoned insurance professionals was identified that would administer the program, and which would work with law firms, individual attorneys, their staff and their clients across the Commonwealth of Virginia.

By design The Alliance not only provides insurance services, but also increases non-dues revenue for the VBA. To date, The Alliance has produced nearly $500,000.00 of non-dues revenue for the VBA. 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…”

The Alliance offers the following products and services: (1) Group and Individual Health Insurance, (2) Group and Individual Dental Insurance, (3) Group and Individual Life Insurance, (4) Group and Individual Disability Income Insurance, (5) Group and Individual Long-Term Care Insurance, (6) Fixed Annuities, and (7) Fiduciary Audits of Trust-Owned Life Insurance.

Each time The Alliance earns a new client, it represents an opportunity for the member to support the VBA. By design, The Alliance will seek out and identify the best insurance products for VBA members from approximately 60 different “A-rated” insurance companies. The Alliance, 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.

Your agency representatives are Howard DiSavino, Jr., Dean Hardy, Michael Thompson, Scott Paciocco, Cheryl Pellegrino, Connie Maxey, and Jeff Graves. Whether you need information or help for you or your firm, or if you would like to consult with your representatives regarding insurance issues that affect your client, feel free to contact The Alliance by phone at 804.290.8751 (or toll free at 800.358.7987) or online via: www.virginiabarristersalliance.com.

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Endnotes
2. Council for Disability Awareness 2010 Consumer Disability Awareness Study.
Every year, the American Bar Association Young Lawyers Division presents Awards of Achievement to ABA YLD affiliated national, state, local, and specialty young lawyer organizations. The awards are given within three divisions based on the number of young lawyers that are members of the organization: (1) more than 8,000 members, (2) between 3,000 and 8,000 members, and (3) fewer than 3,000 members (plus an additional division for organizations that have been in existence for fewer than three years). The Awards of Achievement are given in five categories: Service to the Public, Service to the Bar, Newsletter, Minority, and Comprehensive. The Comprehensive category is awarded based on all new or significantly expanded activities and up to five continuing activities carried out by the organization, and the other awards are based on a single project selected by the organization within the category.

The VBA Young Lawyers Division has long been recognized for its outstanding programs and has received 1st or 2nd Place in the Comprehensive category every year for at least the past six years, including the most recent 2012-2013 bar year.

AWARDS OF ACHIEVEMENT FOR 2012-2013

Last month, the ABA YLD recognized the VBA Young Lawyers Division with the following Awards of Achievement for 2012-2013. Each of the YLD members who planned and participated in these projects should be congratulated for making these programs a success. In addition, J. Britton Williston deserves special recognition for his hard work to prepare and submit the applications for the awards to the ABAYLD.

Comprehensive: 2nd Place

The VBA YLD received 2nd Place in the Comprehensive category based on eight excellent projects and programs: (1) Restoration of Rights Town Hall Meeting, (2) Backpack to Briefcase, (3) Opening Statement Newsletter, (4) Legal Food Frenzy, (5) National Moot Court Competition, (6) Model Judiciary, (7) Shepherd Juvenile Law and Education Conference, and (8) Richmond Mentor Program. For more information on these and other VBA YLD programs, go to: vba.org/ylldirectory.

Newsletter (Opening Statement): 2nd Place

Opening Statement received 2nd Place in the Newsletter category. The goals of the Opening Statement newsletter are to provide a forum for young lawyers to share their knowledge and experiences, to highlight the activities and projects of the YLD, to promote the development of community within the YLD, and to encourage young lawyers to become more involved in the YLD and in the VBA at large. The Communications/Publicity Committee endeavors to create a newsletter that (1) features substantive articles to help young attorneys develop their practices, (2) highlights past and upcoming YLD events and inspires young lawyers to get more involved, (3) provides rich author profiles with photos and bios to help young lawyers market themselves and foster community within the YLD, and (4) is memorable and has an attractive design containing full color graphics and photos, all with the intention of creating a publication that YLD members look forward to reading. If you are interested in joining the Editorial Board or becoming a contributor, please contact: editors@openingstatement.org.

Service to the Bar (Backpack to Briefcase): 2nd Place

The Backpack to Briefcase program received 2nd Place in the Service to the Bar category. Backpack to Briefcase was designed to facilitate the transition from law school to the professional practice of law by providing skills-based training on a variety of subjects essential to all new lawyers regardless of their practice setting or substantive area of practice as well as to provide individualized substantive CLE materials to each new lawyer during their first year in practice. On November 14, 2012, the Virginia Bar Association Young Lawyers Division and Virginia CLE cosponsored the first annual Backpack to Briefcase seminar, a day-long CLE program for attorneys newly admitted to the Virginia Bar. The seminar was held at the Hospitality House and Conference Center in Fredericksburg, Virginia and drew more than sixty newly licensed lawyers. The Backpack to Briefcase seminar centers on practical, skills-oriented learning while providing interaction with experienced attorneys and judges. The seminar topics have included:

- Working With Lawyers: How to Avoid Common Mistakes Made by New Associates (presented by J.B. Burch and Ryan A. Glasgow);
- Client Interviewing and Communication (presented by Kimberly P. Fauss, Frank W. Morrison, and Paul R. Smollar);
- Persuasive Legal Writing and Correspondence (presented by Thomas E. Spahn);
- Effective Use of Technology and Social Media in Your Law Practice (presented by James M. McCauley, James J. O’Keeffe, and Jonathan M. Wilan);
- Time Management and Accounting (presented by Beth A. Bittel and Michael J. Holleran);
- Networking and Client Development (presented by Hugh M. Fain III, Edward Lee Isler, and Lucia Anna “Pia” Trigiani);
- Resources for Virginia Lawyers (presented by Stephen P. Gangemi and David S. Mercer);
- Negotiation Techniques (presented by Kimberly P. Fauss, Frank W. Morrison, and Paul R. Smollar);

VBA YLDiston

VBA YLD Member Directory

Are you looking for other young lawyers in your area? The member’s section of the VBA website has a searchable directory of YLD members. To locate your fellow young lawyers or to update your profile, visit: vba.org/ylldirectory.

To get involved with Backpack to Briefcase, contact Amanda L. Glickman (aglickman@mediageneral.com) or Leah S. Gissy (leahgissy@cox.net).

Service to the Public (Restoration of Rights Town Hall Meeting): Special Recognition

Capitol Region Town Hall Committee’s Restoration of Rights Town Hall Meeting received Special Recognition in the Service to the Public category. Capitol Region Town Hall Committee partnered with the University of Richmond School of Law’s Carrico Center for Pro Bono Service to present a program regarding the topic of restoration of civil rights in Virginia. Generally speaking, a person whose experienced a felony conviction in a Virginia court, a U.S. District or a military court, must have his rights restored in order to qualify for voter registration. The restoration of rights restores the rights to vote, to run for and hold public office, to serve on juries and to serve as a notary public. More than fifty people attended the Restoration of Rights Town Hall Meeting, which featured a distinguished and diverse group of panelists, including counsel to Virginia Governor Bob McDonnell, a leading state legislator from the Virginia House of Delegates, the executive director of a local offender re-entry program, and an ex-offender whose rights have been restored and who now seeks to assist others navigating the same process. The panelists discussed the current state of restoration efforts and what the future of this issue looked like.

To get involved with the Capitol Region Town Hall Committee, contact Steven P. Gould (GouldS@clementwheatley.com), Ryan W. Boggs (ryan.w.boggs@dom.com), or Michael Reynold (mreynold@mwcllc.com).

AWARDS FOR PREVIOUS YEARS

In the five years before the current 2012-2013 bar year, the VBA Young Lawyers Division received the following Awards of Achievement:

2011-2012
• Comprehensive: 2nd Place
• Service to the Public: Certificate of Performance

2010-2011
• Comprehensive: 1st Place
• Service to the Bar (VBA Diversity Job Fair): 2nd Place
• Service to the Public (Virginia Hispanic Chamber of Commerce Legal Aid Clinic): Special Recognition

2009-2010
• Comprehensive: 1st Place
• Service to the Bar (VBA Diversity Job Fair): 2nd Place
• Service to the Public (Virginia Hispanic Chamber of Commerce Legal Aid Clinic): Special Recognition

2008-2009
• Comprehensive: 2nd Place
• Service to the Bar (Robert E. Shepard, Jr. Juvenile Law and Education Conference): Special Recognition
• Service to the Public (Richmond Decision): Special Recognition

2007-2008
• Comprehensive: 2nd Place
• Service to the Bar (Law School Councils): 2nd Place
• Service to the Public (Financial Literacy): 1st Place
• Minority Project (VBA Diversity Job Fair): 2nd Place

Congratulations to all the young lawyers whose dedication and commitment made these programs a reality!

Available Now:

VBA Journal (Fall 2013)

Featured Contents:
• Non-Compete Covenants: Recent decisions illustrate five points Virginia lawyers should keep in mind.
• John Dean Interview: President Nixon’s White House counsel discusses Watergate, ethics, and advice for lawyers.
• New Advertising Rules: The most significant changes affect solicitation of potential clients.
• The Duel: Commonwealth v. Higgins stands out for strangeness, drama, and irony to seasoned lawyer.
• Plus more…

Digital version at vba.org/mag.
Practically every business has a brand—a name, a logo, or some other mark used to identify its products or services. Such marks include trademarks (for goods) and service marks (for services), as well as collective marks and certification marks. Throughout this article, the terms “trademark” and “mark” are used to refer to both trademarks and service marks.

PURPOSE OF TRADEMARKS

Trademarks are protected by the law in order to provide the public with a means of identifying the source of a product or service. Trademarks allow businesses to develop brand reputation and public goodwill in connection with the associated goods or services, and consumers rely upon trademarks and the reputation of the products sold under those marks to inform their buying decisions. As a result, trademarks are often among the most valuable and important assets owned by a business.

WHAT IS A TRADEMARK?

A trademark is any word, phrase, symbol, design, color, sound, scent, or any combination thereof, adopted and used by a business to identify its goods or services and to distinguish them from those manufactured, provided, or sold by others. Trademark law also protects trade dress (the overall “look” of a product or service, such as the distinctive fluted bottle used by The Coca-Cola Company to package Coke), fictional characters (such as the gecko character used by GEICO), and the personae of real people. The owner of a trademark has a limited property right in the exclusive use of the mark (subject to certain limitations).

HOW TRADEMARK RIGHTS ARE ACQUIRED

Trademark rights are created through use, not registration, and such use establishes a business’s common law rights in the mark. Those common law rights protect the owner’s use of the mark in the geographic area where it is used, in the channels of trade in which the products or services are offered or sold, and for those goods and services with which the mark is associated. Such unregistered marks are also protected under some state statutes and under the federal Lanham Act, 15 U.S.C. §§ 1051 et seq. The owners of unregistered trademarks and service marks are entitled to use the ™ and SM symbols respectively to indicate their claim of ownership.

Because trademark rights are established by first use, before developing a brand or filing a trademark application, a business should conduct a comprehensive trademark search. Doing so protects the business from investing substantial resources into developing a brand that is the same as or confusingly similar to a mark that is already in use by another business.

‘Trademarks allow businesses to develop brand reputation and public goodwill in connection with the associated goods or services....’

FEDERAL TRADEMARK REGISTRATION

Although unregistered trademarks receive some protection under the common law and under the Lanham Act, trademarks can be further protected through registration under both Virginia and federal laws. Federal trademark registration provides significant additional substantive and procedural rights. Marks are not eligible for federal registration if they fall within certain prohibited categories, such as “immoral, deceptive, or scandalous matter” or national symbols. Benefits of Federal Registration

An applicant obtains a federal registration by filing an application with the United States Patent and Trademark Office (USPTO). Federal registration under the Lanham Act can be on one of two registers—the Principal Register or the Supplemental Register. The Supplemental Register is for registration of potential marks that are capable of distinguishing the applicant’s goods or services but are not inherently distinctive and have not yet acquired a “secondary meaning” in the minds of consumers as an identifier of the specific provider of goods or services.

Registration on either register provides a number of benefits, including: (i) it grants the right to use the registered trademark symbol ® (ii) it grants the right to file a trademark infringement suit in federal court and to obtain monetary remedies, including infringer’s profits, damages, costs, and, in some cases, treble damages.

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and attorneys’ fees, (iii) it acts as a bar to the registration of another confusingly similar mark, and (iv) it may serve as the basis for an international trademark application.

Registration on the Principal Register provides additional benefits, including: (a) a statutory presumption that (a) the mark is valid, (b) the registrant is the owner of the mark, and (c) the registrant has the exclusive right to use the registered mark; (ii) the registration is proof that the mark has acquired secondary meaning; (iii) the registration serves as constructive notice of a claim of ownership, eliminating any justification or defense of good faith adoption and use made by a third party after the registration date; (iv) the registrant is entitled to nationwide priority based on the filing date; and (v) the registration becomes incontestable after five years on the Principal Register, creating conclusive evidence of the registrant’s exclusive right to use the mark, subject to certain statutory defenses.

Distinctiveness Requirement

In order for a mark to be eligible for federal registration, it must be distinctive—that is, it must be capable of identifying the source of particular goods or services. Trademarks that are more distinctive receive a wider scope of protection and are, therefore, stronger marks. The distinctiveness of trademarks is measured along a spectrum, of increasing distinctiveness: (1) Generic, (2) Merely Descriptive, (3) Suggestive, (4) Arbitrary, and (5) Fanciful. A generic term is the common name of a type of good or service, such as wine (for wine), software (for computer software), and consulting (for consulting services). Generic terms are the opposite of trademarks, and are incapable of ever serving as distinctive source identifiers. It is possible for a trademark to lose its distinctiveness through widespread misuse such that it becomes the generic term for a product (a process known as "genericide"). A mark that has become generic is no longer entitled to protection. Many former trademarks have fallen victim to genericide, including zipper, cola, escalator, and thermos.

A merely descriptive mark immediately identifies or brings to mind the characteristics, qualities, ingredients, composition, functions, purpose, attribute, use, or other features of a product or service. Examples include VISION CENTER (for an eye care facility), FANTRIP (for travel agency services… for fan-themed destinations), and THE BREATHABLE MATTRESS (for beds, mattresses, box springs and pillows). Laudatory terms, such as best, reliable, deluxe, and tasty, are generally considered to be merely descriptive. A merely descriptive mark is eligible for registration on the Supplemen tal Register. But it can only be registered on the Principal Register upon a showing that the mark has "acquired distinctiveness" and has a "secondary meaning" in the mind of the public as an identifier of the specific provider of goods or services.

Suggestive marks are words that evoke or suggest some characteristic or attribute of the underlying goods or services but do not describe the goods or services themselves. Unlike a merely descriptive mark, a suggestive mark requires the exercise of imagination to associate the word with the underlying product. Examples include STRONGHOLD (for nails), COPPERTONE (for tanning products), and MICROSOFT (for computer software).

An arbitrary mark is a word that has no logical relationship to the underlying product or service, including a generic term applied to an unrelated product. Examples include APPLE (for computers and consumer electronics), PENGUIN (for books), and COMET (for cleaning products). Fanciful marks are the strongest marks. A fanciful mark is an invented word created solely for the purpose of functioning as a trademark, including EXXON, CLOROX, STARBUCKS, and GOOGLE.

Each trademark application must indicate one or more classes of goods or services in which the mark is used. The international classification system includes 34 classes of goods and 11 classes of services. In addition, the application must identify the specific goods or services within the class on which the mark is used. The distinctiveness of a mark is measured based on this classification and description. Thus, Apple is generic for the fruit (in Class 31) but arbitrary for computers (in Class 09).

Because trademark rights are tied to particular goods and services, it is possible for different companies to have registrations for an identical mark for use in connection with unrelated goods or services. For example: DOVE (for soap and beauty products) and DOVE (for chocolate and candy); DELTA (for passenger air transportation services) and DELTA (for plumbing fixtures); and DEL (for paperback books), DEL (for dolls), DEL (for furniture), and DEL (for computers). Marks that are more distinctive or that have become famous enjoy a wider scope of protection than less distinctive marks.

Basis of Registration

There are five bases for federal registration: (1) actual use in commerce; (2) intent to use in commerce; (3) claim of priority based on a foreign application; (4) foreign registration; and (5) an extension of protection under the Madrid Protocol. The first two bases are the most common. The intent-to-use procedure gives the applicant the benefit of constructive-use priority based upon the application date, but an intent-to-use application cannot be registered on the Supplemental Register.

The Lanham Act defines commerce as any commerce that may lawfully be regulated by Congress, and it defines use in commerce as “the bona fide use of a mark in the ordinary course of trade, and not merely to reserve a right in a mark.” In most cases, use in commerce requires interstate use or use between the United States and a foreign country, and purely intrastate use generally will not qualify a mark for federal registration.

When a trademark application meets the requirements for registration, the USPTO will publish the mark in the Official Gazette for a 30-day opposition period. This process gives the public notice that the USPTO intends to issue a registration for the mark and it gives any person who would be harmed by the registration an opportunity to file an Opposition proceeding to prevent the registration.

Maintenance, Monitoring, and Use

Once a business obtains a federal trademark registration, it must maintain the registration by periodically paying...
...Brand Protection, continued from page 11

maintenance fees and filing declarations of continued use and renewal applications. In order to fully capitalize on the benefits provided by a federal trademark registration, the trademark owner should protect the mark by monitoring use by others of the same or confusingly similar marks. If the owner discovers that a confusingly similar trademark application is filed or that another business is infringing its trademark, the owner should seek legal counsel to determine the appropriate response to protect its valuable rights in its brand. In addition to policing use by other businesses, the trademark owner must ensure that it uses its own mark properly to avoid the narrowing or loss of its trademark rights (such as, through genericide).

Abridged and edited versions of this article have been published by the American Bar Association Young Lawyers Division in 101 Practice Series: Breaking Down the Basics and by the Virginia State Bar Young Lawyers Conference in Docket Call.

Endnotes

2. The details pertaining to other types of marks are beyond the scope of this article.
4. San Juan Prods., Inc. v. San Juan Pools of Kan., Inc., 849 F.2d 468, 474, 7 U.S.P.Q.2d 1230, 1235 (10th Cir. 1988) (“Unlike the registration of a patent, a trademark registration of itself does not create the underlying right to exclude. Nor is a trademark created by registration. While federal registration triggers certain substantive and procedural rights, the absence of federal registration does not unleash the mark to public use. The Lanham Act protects unregistered marks as does the common law.”) (citation omitted). Trademark rights may also be established through the federal registration of a mark based upon a bona fide intent to use the mark in commerce. 15 U.S.C. § 1051(b) (Lanham Act § 1(b)).
5. 15 U.S.C. § 1125(a) (Lanham Act § 43(a)).
7. The laws pertaining to state registrations and the benefits associated with such registrations vary from state to state. The process is usually controlled by each state’s secretary of state or corporation commission. E.g., Virginia Trademark and Service Mark Act (1998), Va. Code Ann. §§ 59-1-92.1 et seq.
17. 15 U.S.C. § 1051(a) (Lanham Act § 1(a)).
18. 15 U.S.C. § 1051(b) (Lanham Act § 1(b)).
19. 15 U.S.C. § 1126(d) (Lanham Act § 44(d)).
20. 15 U.S.C. § 1126(e) (Lanham Act § 44(e)).
21. 15 U.S.C. § 1141(f) (Lanham Act § 44(f)).
24. A trademark Opposition is an inter partes proceeding conducted before the Trademark Trial and Appeal Board.
25. Potential responses include filing an Opposition to prevent another business from registering a confusingly similar trademark, sending a cease and desist letter, offering to license the trademark to the infringer, and filing a trademark infringement lawsuit in federal court.

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