

V.B.A News Journal

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Social Networking and the Workforce: Blurring the Line Between Public and Private Spheres

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Common Law in Divorce

Fall Meetings and Events Photos

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THE VIRGINIA BAR ASSOCIATION
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Inspiring Work by Two Inspiring Groups

JOHN D. EPPS

When you think of The Virginia Bar Association, I hope you think of our mission of service to the profession, to the judicial system and to the public. You might think of the promulgation of the Principles of Professionalism for Virginia Lawyers, the response to the call of the Chief Justice to increase legal services to underserved Virginians by creating a pro bono task force, or the implementation of the Rule of Law Project in schools across the Commonwealth. These programs have accomplished and are accomplishing a great deal and have received significant attention and recognition—rightfully so. But one of the most enjoyable aspects of being the president of this Association is being in a position to learn how much else is being done, how many of our members are actively engaged in important and inspiring projects, many of which receive little outside attention.

I would like to discuss in these paragraphs some truly inspiring work being done by two groups of dedicated VBA volunteers who are working on behalf of a constituency you might not always associate with the VBA—Virginia's families. Those two groups are the VBA Commission on the Needs of Children and the Virginia Family Law Coalition.

The VBA Commission on the Needs of Children

The VBA Commission on the Needs of Children was the creation of the late Professor Robert Shepherd, a tireless and persistent champion of children involved in the legal process. Professor Shepherd was a leading scholar on legal issues involving children, and, over the years, he succeeded in the reform of Virginia's juvenile justice system and our guardian *ad litem* laws. Sadly, Bob died about a year ago. His loss is truly irreplaceable. I am delighted, however, to be able to say that his work on behalf of Virginia's children continues. This year, his colleague at the University of Richmond Law School, Professor Margaret Bacigal, agreed to assume the leadership of the Commission. Ra-



I would like to discuss in these paragraphs some truly inspiring work being done by two groups of dedicated VBA volunteers who are working on behalf of a constituency you might not always associate with the VBA—Virginia's families. Those two groups are the VBA Commission on the Needs of Children and the Virginia Family Law Coalition.

ther than be intimidated by the idea of succeeding a legend, Margaret has brought vision and energy to the Commission's work. I am delighted to report to you that the Commission is not only still active, but thriving. Its 18 members include academics, judges, physicians, private practice lawyers, legal aid lawyers, prosecutors and children's rights advocates. At the Commission's first meeting under Margaret's leadership earlier this year, the members articulated the group's mission as follows:

To improve the lives of children through advances in law, justice, knowledge, practice and public policy.

The minutes of that meeting go on to say:

In furtherance of this mission, the Commission plans to concentrate its activities on promoting legislation that serves the interests of children, encouraging or undertaking needed studies on issues relating to children and their families, fostering collaboration among agencies and groups, working on behalf of children and families and promoting education and training to address issues related to children's well-being.

The Commission's agenda is as ambitious as its mission. Under Margaret's leadership, the Commission has formed working groups in criminal law, family law, health law and education law. Among the issues they are working on are:

- reforming the procedures for referrals of certain juveniles to the adult criminal justice system;
- analyzing whether the state's barrier laws—those laws which specify who can become foster or adoptive parents

—need to be made less restrictive;

- the special legal and other needs of autistic and other special needs children;
- legal issues related to the problem of truancy and high school dropouts; and
- juveniles' rights in school disciplinary proceedings.

And this is just the beginning! Of all of the wonderful things which our members have accomplished this year, none is more exciting than the work being tackled by this Commission, and none will have a greater impact on the lives of children and families in Virginia.

The Virginia Family Law Coalition

In 1996, the VBA, under the leadership of then Domestic Relations Section Chair, (now Judge) Winship Tower, organized the VBA Coalition on Family Law Legislation. The goal was to bring together statewide and local bar associations to evaluate and advocate for or against family law legislation in the Virginia General Assembly. It was chaired by Betty Thompson, an esteemed family law practitioner from Arlington, for 12 years. Over that time, she proved to be a tireless advocate of family law reform in Virginia and a familiar face to Virginia legislators. In recognition of her service to the VBA and her dedicated work on improvement of the law, she was awarded one of the VBA's most prestigious awards, the Walker Award for Public Service, in 2008.

In 2008, Betty stepped down and Virginia Beach family law lawyer

Cheshire I'Anson Eveleigh became the chair. At the same time, the VBA invited the Virginia Trial Lawyers Association to become a partner in sponsorship of the Coalition and changed its name to the Virginia Family Law Coalition. The members of the Coalition include distinguished, experienced family law practitioners from all parts of Virginia, including representatives from the VTLA, the VBA Domestic Relations Section Council, the Virginia Chapter of the American Academy of Matrimony Lawyers and the Virginia State Bar Family Law Section Board of Governors.

Cheshire had an immediate impact. She was instrumental in successfully representing the VBA's position that the statute which allowed psychologists to refrain from testifying about their examinations of parents at custody hearings needed to be repealed, an effort that was spearheaded by VBA member Carol Schrier-Polak. In 2009 she worked with lawmakers to help shape an important bill regarding child custody issues involving military personnel.

The Coalition has met again this fall to prepare for the 2010 legislative session and to identify areas of the law requiring study and analysis for possible future legislative reform. The issues the group is focusing on include:

- the use of the Fifth Amendment in family cases;
- the high cost of service of pleadings and notices in cases in which the defendant has failed to appear, an issue regarding which the Virginia Poverty Law Center asked for VBA assistance; and
- vocational rehabilitation evaluations

The Coalition has earned the respect of other important family law organizations. For example, the Coalition is currently conducting a study of laws governing allocation of expenses in shared custody cases at the request of the Virginia Child Support Guidelines Review Panel. Another study of issues related to interim equitable distribution awards in Virginia is being conducted by the Coalition at the request of the American Academy of Matrimonial Lawyers.

This, too, is a daunting agenda, but each of these issues is important to our family law jurisprudence. The Coalition continues the tradition of making law reform in the family law area a reality.

The VBA Commission on the Needs of Children and the Virginia Family Law Coalition are two prominent examples of how VBA members are pursuing the Association's mission of service to the law and to the public. Their work to make our judicial system and our society better for families is important and exciting. What is most gratifying is that these talented professionals do not do this work for publicity, they do not do it to make more money, or to get more clients. They do it simply because they believe the work must get done, and they have chosen not to leave it to someone else.

On behalf of all of the members of the VBA, I am privileged to say thank you, and keep up the good work!

VBA Commission on the Needs of Children

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WRITER'S BLOCK

NEVER TOO LATE TO GO HOME AGAIN

BY DAVID H. SPRATT



In the life of your resident columnist, what once was old is new again! About four years ago, in the days before I sat perched in my Ivory Tower, I wrote an article for this journal called "Writing Like a Contemporary (and Effective Lawyer): The Joys and Pitfalls of Legal Writing." Today, as I pondered what I should write about in this column (and admittedly suffering from writer's block—ah, the hypocrisy!), I decided to revisit some of the points that I made in that article. Perhaps some of you will find this column oddly familiar (having saved my previous article as a treasured resource); others, and hopefully most of you, will find some new tips or refreshers on how to improve your own writing.

1. Take a Sudafed: Get Rid of Throat-Clearing!

Ever witness a speaker catch a frog in her throat right before she starts to speak? She clears her throat several times as you sit there and wonder when she will start speaking. Finally, you reach in your briefcase to offer her a Sudafed, and she begins her presentation.

As legal writers, many of us suffer from the same allergies. Throat-clearers, or unnecessary preambles, are introductory phrases that communicate little more than "I'm getting ready to say something." Throat-clearers prevent you from getting to the point as quickly as you could. Rid your memos, briefs, and other documents of throat-clearing phrases, words that can be removed without sacrificing content; many of these phrases begin with the word "it" and end with the word "that."

"It is obvious that"/"It is clear that"/"It is evident that": If the point is evidently clear and obvious, then the message should jump off the page, allowing the reader to understand the point without an unnecessary preamble.

"It is interesting to note that": The point might be earth-shatteringly amazing to you, but if you make your statement clearly and concisely, your reader will determine the true level of interest.

"I am of the belief that": Shocking, I know, but as lawyers, many of us like to hear ourselves talk and see ourselves write. In reality, neither opposing counsel nor a judge care about what we personally believe, instead preferring to focus only on what the law requires.

2. Avoid Legalese: Follow *Said* Rule!

Wherefore counselors heretofore drafted legal instruments using an esteemed vocabulary a layperson could not comprehend, said practice is quickly becoming obsolete. Translation: Although lawyers used to draft documents using words and phrases a client could not understand, this practice is becoming outdated.

A contemporary reader doesn't have any use for a document that sounds like it was written by a wigged barrister hunched over a Dickensian desk with a quill pen!¹ A lawyer's words should not differ without reason from the words used in ordinary, everyday English.²

Remember, good writing clarifies and poor writing confuses and creates ambiguity.

3. Remove Redundancies.

If one word says it best, don't clutter up the text with additional words that mean the same thing. Eliminating words that have similar or identical meanings is yet another way to combat the page requirements imposed by your local court. Delete unnecessary words from your writing! If there is no difference between two words, only use one of them.

Full and complete: If something is full, isn't it complete?

Null and void: How could something be null without being void?

Each and every: If you followed each of these rules, wouldn't every rule have been followed?

Reason is because: Need I explain why?

4. Clean out the Clutter.

Lawyers have a propensity for using several words when one word will suf-

fice. Avoid multiple word prepositions, replacing them with the words that you would use in everyday conversation. Clumsy, convoluted words and phrases clutter up a lawyer's writing, making the points harder to follow (and annoy the reader). In fact, a very good friend of mine cringes each time she sees a writer use "in order to" and "in order for" instead of "to" and "for." Here is more clutter you can get rid of:

In the course of: during

In close proximity to: near

Concerning the matter of: about

Most of the time: usually

A large number of: many

For the reason that: because

In light of the fact that: because

In view of the fact that: because

Due to the fact that: because

Wow! This column was easy. Even though I used a previous article as a jumping-off point, I found myself changing words and adding new text. Quite frankly, I found myself rewriting the article, ending up with a column very different from where I started. The writing process is recursive, as we always strive to make our writing better and better; with experience, we should rely less and less on past work product (but that topic is a subject for another, fully-original column).

As always, questions, comments, or suggestions are welcomed (even encouraged)!

NOTES:

1) Mark P. Painter, *The Legal Writer: 40 Rules for the Art of Legal Writing* 92 (2d ed. 2003).

2) Richard C. Wydick, *Plain English for Lawyers* 4 (5th ed. 2005).

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Virginia Celebrates First Lawyer Professionalism Day

BY LISA M. SHARP and STEPHEN W. MURPHY

Editor's note: This article, on the development of the Principles of Professionalism for Virginia Lawyers promulgated by the VBA Commission on Professionalism, is reprinted with permission from the American Inns of Court and Lisa M. Sharp, and was published in the September/October 2009 issue of *The Bench*, a bi-monthly publication of the American Inns of Court.

In our self-regulating profession of law, it is up to us to set a high standard for professional conduct. To this end, a group of Virginia lawyers decided that the bar of the Commonwealth needed clearly articulated and agreed-upon standards not just for ethical issues, but also for lawyer professionalism. Over a period of several months, a committee of the Virginia Bar Association, many of whom are members of the American Inns of Court, developed the Principles of Professionalism for Virginia Lawyers.

The principles are aspirational in nature—they are voluntary and cannot serve as a basis for disciplinary action or civil suits. The principles are designed to inspire lawyers to act with civility and integrity.

An Inspirational, Aspirational Set of Principles

According to B. Waugh Crigler, U.S. Magistrate Judge for the Western District of Virginia and a member of the principles' drafting commission, the drafters felt that it was important to set goals for professionalism above any "minimum." Judge Crigler explained that "the whole idea was that [the principles] were to be aspirational, that we wanted to encourage those that practice law in Virginia to rise above the minimum, and to strive for something that really reflected what the character and the reputation of the bar should be." For Judge Crigler, the practice of these principles will not only allow the profession to survive, but will also help it thrive.

The principles prize integrity, honesty, and civility. They are written in the first person and cover conduct towards clients, opposing counsel, courts, and everyone. The principles also provide specific guidance for lawyers. They state that in court, "I should... [a]void any conduct that offends the dignity or decorum of any courts or other institutions," such as "inappropriate displays of emotion" or "unbecoming language." In dealing with opposing counsel, the principles remind lawyers to avoid ad hominem attacks and to promptly respond to correspondence from opposing counsel.

The principles do not present civility and professionalism as a hindrance to effective representation of clients. To the contrary, the principles see civility as a means of improving that representation. The principles acknowledge that clients often equate incivility with effective representation, and state that the lawyer should "[e]xplain to clients that my courteous conduct towards others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests." With a combination of general and specific guidelines, the principles provide a roadmap for civil and dedicated representation.



Virginia Supreme Court Justice Donald Lemons, vice president of the American Inns of Court, and Virginia Governor Timothy M. Kaine hold the Governor's Certificate of Recognition praising The Virginia Bar Association for its efforts in promulgating Principles of Professionalism for Virginia Lawyers and declaring April 13, 2009 Lawyer Professionalism Day in the Commonwealth. Photo by Michael L. White.

A Diverse Panel

The commission was composed of distinguished Virginians and American Inns of Court members, prominent judges and attorneys, and representatives of statewide bar groups. Virginia Bar Association President William R. Van Buren, III, of Norfolk, originally appointed the commission members. The primary draftsman was Thomas E. Spahn, a legal ethics authority. Spahn also chaired the commission.

The panel was deliberately diverse, both demographically and professionally. The panel included state and federal judges and lawyers from a range of private and public practice areas, and its members hailed from cities and towns across the state. The diversity of the panel helps lend credibility to the principles, to show that we all agree [on the principles] as lawyers.

The commission included attorneys from a wide range of practice areas, including litigation, transactions, and business, as well as government attorneys, all of whom had practiced for varying lengths of time in the Commonwealth...in different contexts and with different experience. The experience of the commission was key, in that the members of the committee could use their diverse experiences to bring out the issues that should be addressed by the principles.

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Social Networking and the Workforce: **BLURRING THE LINE** Between Public and Private Spheres

BY ERIN L. GOUCKENOUR

An Illinois public defender, a Montana police officer, an after hours school employee in Charlotte and a seasonal employee for the Philadelphia Eagles all share an unexpected trait. Each posted controversial comments or material to a personal social networking page, and in each employee's case, the posting led to loss of employment. This article explores how information is spread online from social networking sites and provides social networking users with guidelines on what information should not be posted.

The Changing Effects of Social Networking

Use of social networking sites, such as Facebook, MySpace, Twitter and LinkedIn, has exploded in recent years. According to Facebook's published statistics, 300 million people currently maintain profiles.¹ Furthermore, even though young adults and teenagers make up the bulk of user profiles, Facebook reports that its fastest growing demographic is 35 and over.²

To many, social networking pages feel personal and private. The very nature of social networking pages, however, makes them public. Even those individuals who protect their privacy on Facebook likely connect with others they know little or nothing about. Such users cannot say for certain who sees their information. Because of this uncertainty associated with many social networking circles, posting information and opinions that may be viewed as polarizing or offensive can lead to unexpected penalties.

The nature of some professions impose obvious restrictions on what content can be placed on a social networking page. For example, a Montana police officer posted a

comment on his Facebook page that police should be able to arrest people for being "stupid." The post prompted complaints that the officer did not respect citizens' rights and was willing to abuse his position of authority. The officer later resigned.³ Similarly, lawyers should not complain about a judge, clients, or cases in general on social networking sites—such comments have landed lawyers in Florida and Illinois before their respective bars.⁴

Reprimands and firings based on the content of social networking pages are not limited to professions governed by codes of ethics or with built-in ethical obligations. A gate chief for the Philadelphia Eagles was fired from his seasonal employment after making a disparaging comment on his Facebook page about the Eagles for allowing player Brian Dawkins to go into free agency.⁵ Last year, two teachers in the Charlotte-Mecklenburg School District were either fired or reprimanded due to Facebook postings. In one situation, a special education teacher complained about hating her students.⁶ In the other, a teacher described the school she was teaching at as "ghetto."⁷ Yet another school employee in the Charlotte district was fired after risqué pictures were found on his Facebook page. He was an after-school staffer, however, not a teacher.⁸

These posts were likely intended to be viewed by "friends" of the posters on Facebook. Many people using social networks such as Facebook, however, fail to draw clear lines for who they will accept connections with and who they will not. Some never reject connection requests. This leads to an unknown network of people that will see personal pictures and unedited thoughts, such as those expressed by the Charlotte teachers. In some

instances, the very people in a social network may have an obligation to report behavior.

These restrictions seem clear, yet some social networking site members do not make the connection between what they post and the ethical obligations of their employment. Employers and regulatory bodies appear to be paying attention, though. The Florida bar is now examining Facebook profiles to determine whether applicants who have reported a history of substance abuse are truly rehabilitated.⁹ There is no reason to suspect other state bars and employers will not follow Florida's lead.

Many social network users probably expect certain users' jobs to restrict what information those users can post. An EMT on Staten Island was fired after posting a cell phone photo of a murder victim on his Facebook page.¹⁰ Most people would probably agree with the decision to fire the EMT. Many people would probably also agree to the firing of a temporary employee who vehemently criticizes her boss and the work she has to do, forgetting that her boss is one of her connections and will see her status updates.¹¹

In situations similar to the Philadelphia Eagles employee mentioned above, however, an employee's firing may appear unexpected. Yet many employees are at-will, and even those that are not, such as the Charlotte school teachers, may be bound by contract provisions that indirectly restrict use of social networking sites.¹² The decorum an employee is expected to act with in the workplace has, in effect, been extended to what many social media users would consider private space.

Where is the line drawn between

safe and questionable posts on a social networking site? This problem appears to be basic, but is not easy to answer. General guidelines may help social networking users determine which side of the line—safe or questionable—their posts fall.

Web 2.0: Where does the information go?

How much should social networking users tailor their behavior on social networking sites? The answer to that question lies in the way information is distributed from "personal" social networking pages.

Social networking sites are essentially internet tools that can spread information just as rapidly as the internet itself. Social networking sites merely guide the initial spread of information, something users may mistake for controlling information, leading them to engage in discussions that would otherwise be kept private. For example, after the arrest of Henry Louis Gates, Jr., the Harvard scholar arrested at his home last July, the deputy press secretary of the Manhattan Borough President in New York engaged in an animated, race-based discussion of the incident on Facebook. The aide criticized Mr. Gates and President Obama, referring to the latter as "O-dumb-a." Following criticism of the postings, the aide resigned. She later released a lengthy statement defending her remarks. The former aide was unapologetic, declaring that she "expressed a personal opinion in a private forum that was based on [her] understanding of the facts available to [her]."¹³ The incident and the statement demonstrate a disconnect in the way information on social networks is shared and users' belief in their privacy. Postings to "private forums" may seem to have limited internet presence, but in reality the information is not restricted to certain viewers and does not go away.

If a social network user posts information that the user later decides should not be available, the user can delete the information. But because of the nature of the internet, the posting will survive. Anything that was once searched and cap-

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tured by Google will live on as a cached link. Google runs searches on its own; an individual does not have to search for information in order for Google to capture that information. More interesting still: Google's archived information is searchable.¹⁴ If an individual posts an angry diatribe about that individual's boss or workplace on a social networking site and later deletes the post, the archived version of the post can still be found.



Another misconception is that a social networking user's privacy settings will safeguard the user from the release of personal information or posts. Both Facebook and Twitter, the social networking site which limits communication to 140 characters or less, allow users to restrict who can view a personal site. Twitter accounts can be locked to allow the user to control who sees his or her postings, or "tweets." But if one of those approved connections "retweets" something posted by the private user, that private user's name is now public and connected with the original post.

For example, consider the situation in which an employee tweets: "I hate my boss! Who wants to work on the weekend?!" on a private Twitter account which is traceable to the employee's email address. One of the employee's friends, John, decides he agrees. John can retweet

the message, which will include the original poster's username. A retweet might read "@Employee: I hate my boss! Who wants to work on the weekend?!" If John is connected to one of the employee's supervisors on Twitter, or if his profile is unrestricted and anyone can view it, the statement can now be traced back to a private account by someone who may not like the original tweet.

Considering the Impact

Those who began using social networking as a purely social tool may not have realized the impact information included on social networking sites could have on their professional lives. Those same individuals are surprised when the information they regarded as private is suddenly publicly available, sometimes viral. A brief search for firings related to social network postings provides numerous examples. What may not be so obvious is the number of job offers or other opportunities lost due to information available from social networking sites. Individuals should avoid posting information that a job applicant would not state in an interview, such as extreme political views, may be discovered by the potential employer.

Generally, social network users should assume everything posted is public. This assumption should be made even if a user has enacted the most restrictive privacy settings available. Users should also consider the range of people who may read information posted on their site.¹⁵ If stating such information in the workplace, a job interview or in a pitch to a client would cause problems, reconsider posting it.

Whether sites such as Facebook and Twitter survive or are replaced

Continued next page

by new social networking is irrelevant. The very nature by which people interact with each other has changed. Anyone using social networking sites should be mindful of how information is passed from user to user and be sensitive to the growing use of such sites.

Despite the need for reasonable restraint by users, absolute bans by employers on employees' use of social networking sites, both in and out of the office, would be unreasonable. Instead, to avoid unnecessary confusion over social networking in the workplace and appropriate content of personal social networking sites, companies and employers can clearly define social media rules.¹⁶ Social networking sites are useful marketing and employee networking tools and their use should not be discontinued solely because information posted by personal users may end up far from intended targets. As long as those using social networking sites do so with the knowledge that posted information is never truly private, users will not have to wonder whether posts are safe or questionable.

NOTES

- 1) <http://www.facebook.com/press/info.php?statistics>.
- 2) *Id.*
- 3) *Police Officer Resigns Following Facebook Comment About Jailing People for Stupidity*, law.com, Sept. 4, 2009, available at http://www.law.com/jsp/article.jsp?id=1202433588156&src=EMC-Email&et=editorial&bu=Law.com&pt=LAWCOM%20Newswire&cn=NW_20090904&kw=Police%20Officer%20Resigns%20Following%20Facebook%20Comment%20About%20Jailing%20People%20for%20Stupidity.
- 4) *Blogging Lawyer Charged with Confidentiality Violations*, Legal Profession Blog, Sept. 9, 2009, available at http://lawprofessors.typepad.com/legal_profession/2009/09/wave-of-the-future.html. http://www.nytimes.com/2009/09/13/us/13lawyers.html?_r=1&hp.
- 5) *Eagles Reportedly Fire Man Over Facebook Post*, NBCSports.com, Mar. 9, 2009, available at <http://nbcsports.msnbc.com/id/29602428/>.
- 6) Ann Doss Helms, *Teachers Disciplined for Facebook Postings*, Charlotte Observer, Nov. 12, 2008; available at: <http://www.charlotteobserver.com/597/story/319902.html>.
- 7) *Id.*
- 8) Ann Doss Helms, *School Employee in Charlotte Fired Over Facebook Posting*, The News & Observer, Nov. 15, 2008, available at <http://imc.mbhs.edu/cap/court/newsarticle.pdf>.
- 9) *Florida Bar Begins Checking Applicants' Facebook Pages*, Jacksonville Observer, Sept. 15, 2009, available at: <http://www.jaxobserver.com/2009/09/15/florida-bar-will-now-begin-checking-applicants-facebook-pages/>.

10) Janet Wilmoth, *EMT Fired After Posting Murder Victim Photo*, Fire Chief, May 20, 2009, available at <http://firechief.com/leadership/management-administration/facebook-murder-victim-photo-emt-fired-20090520/>.

11) *Hilarious Facebook Quote*, Krizii's Posterous, Aug. 9, 2009, available at <http://krizii.posterous.com/hilarious-facebook-quote-why-you-shouldnt-add>.


12) The Charlotte teachers were disciplined under a provision in the District's contract that allowed teachers to be punished for "behaving in any unethical or lascivious conduct at any time; if there is a reasonable and adverse relationship between the conduct and the continuing inability of the employee to perform any of his/her professional functions in an effective manner." *Superintendent Weighs in on Teacher Facebook Pages*, WCNC.com, Nov. 13, 2008, available at <http://www.wcnc.com/news/local/stories/wcnc-111108-mw-facebook.1a2df67aa.html#>.

13) *Sewell Chan, Aide Resigns Over Facebook Posts on Harvard Arrest*, New York Times, July 28, 2009, available at <http://cityroom.blogs.nytimes.com/2009/07/28/aide-resigns-over-facebook-posts-on-harvard-arrest/>.

14) Telephone Interview with Garth Callahan, President of 127Tech (www.127tech.com), (Sept. 22, 2009).

15) The term "information" is intended to cover personal information and opinions and applications such as surveys conducted on social networking sites. Many surveys and similar applications make unequivocal political or religious statements.

16) An example is IBM, which created a social networking policy based on input from its employees. See <http://www.ibm.com/blogs/zz/en/guidelines.html>



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the Virginia Bar Association Young Lawyers Division,
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April 5 - 16, 2010

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Professionalism Day

Continued from page 7

Statewide Acceptance and Endorsement

The panel's diversity was especially important because it enabled the commission to craft principles that would be accepted across the Commonwealth. As a result, the principles have been enthusiastically accepted by Virginia's executive and judiciary.

On April 13, 2009, Virginia Governor Timothy M. Kaine recognized Lawyer Professionalism Day in the Commonwealth of Virginia with a proclamation that stated that "a hallmark of the legal profession from the Commonwealth's early days has been that Virginia lawyers aspire to a higher standard of professional conduct than those established by its ethics rules."

The particular date for Lawyers Professionalism Day was chosen deliberately for its special historical significance. The official certificate of recognition of Lawyer Professionalism Day noted that April 13 was the birthday of Thomas Jefferson, "one of Virginia's greatest Governors and lawyers."

The principles have also been endorsed by courts across Virginia. The Supreme Court of Virginia endorsed the Principles of Professionalism on June 2, 2008. The principles have also been endorsed by the U.S. District Courts in both the Western District and the Eastern District of Virginia.

A Guide for New and Current Lawyers

The principles are designed to serve as a teaching tool for law students and new attorneys, a guide and reference for practicing lawyers, and a public statement for the importance Virginia lawyers attach to professional integrity and stability. The principles are important for new and experienced attorneys alike. They will help mentor new lawyers and serve to remind more seasoned lawyers and judges of what is rightly expected of the profession quite apart from consideration of ethics. The principles were especially intended to serve as a guide for new members of the profession.

A Set of Higher Principles

According to the commission, the Principles of Professionalism will help to counter-balance the personal and financial concerns that can get in the way of effective representation of a client. Professionalism increases the focus on substantive issues that concern the client, which therefore reduces litigation costs.

It was especially hoped that the principles would help to balance against the financial incentives that are present in the legal profession.

A Reminder during the "Staring out the Window Moment"

It is often easy for ethics to get lost in the face of personal and financial concerns. The principles serve to "remind that you have to decide what kind of person you are at the end of the day."

The principles will be especially important

during the critical "staring out the window moment"- a phrase credited to ethics expert John P. Ratnaswamy, an attorney and professor who regularly contributes columns on ethics to The Bench. For Ratnaswamy, the "staring out the window moment" occurs when a lawyer is confronted with a particularly difficult and defining ethical dilemma. But those moments occur in the realm of professionalism, as well, when a lawyer considers reciprocating unprofessional conduct or being inconsiderate or disrespectful in order to frustrate the other side.

These moments are not only critical in defining who the lawyer will be professionally and personally, but they are also frequent. It is during these defining moments that the lawyer should recall the Principles of Professionalism. This will ensure that the lawyer acts with the integrity and civility of the profession, and it will also ensure that, at the end of the day or the end of a career, the lawyer will respect himself and his or her work.

World Class Lawyers

According to the commission, professional behavior is central to effective representation and advocacy. This is especially true because lawyers often rely on the good standing they have before judges and other attorneys. Adherence to the principles will improve the efficiency of representation. A bar of professionals that treats each other with civility, respect, and courtesy results in less stress for attorneys and judges, greater efficiency, and enhances the good image that Virginia attorneys and judiciary currently enjoy.

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The Development & Death of Federal Common Law in Divorce¹

BY LESLIE ANN SHANER

It is uncommon for the United States Supreme Court to weigh in on issues related to divorce which are normally the province of state law. However, the United States Supreme Court has decided two cases since 2001 that have a significant impact on the practice of divorce law in Virginia. Both cases involve beneficiary designations for nonprobate assets that are not changed following divorce. The first case, *Egelhoff v. Egelhoff*² in 2001, involved a determination that the Employee Retirement Income Security Act of 1974 (ERISA) preempted a Washington revocation of nonprobate assets upon divorce statute; and, *Kennedy v. DuPont Savings and Investment Plan* in 2009³, established the "plan documents rule" for plan administrators to follow where beneficiary designations are not changed following divorce.⁴ Given the decisions in *Egelhoff* and *Kennedy*, questions arise under Virginia divorce law concerning the applicability of Virginia's revocation of nonprobate assets statute, § 20-111.1 of the Code of Virginia of 1950, as amended, and waivers in property settlement agreements of employer-sponsored benefits where beneficiary designations are not changed following divorce.

A Few Conflicts

The conflicts with § 20-111.1 of the Code of Virginia of 1950, as amended, and the *Egelhoff v. Egelhoff* decision in 2001⁵ will be discussed first. Virginia is only one of twenty-three states that have revocation of nonprobate assets upon divorce statutes.⁶ Most, if not all, state revocation of nonprobate assets upon divorce are modeled after different versions of § 2-804 of the Uniform Probate Code. In 1993, Virginia adopted § 20-111.1 which provides that, upon divorce, any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other is revoked. If the statute is applicable, the death benefit is paid as if the former spouse had predeceased the decedent. The payor

of any death benefit is then discharged from all liability upon payment according to the terms of the contract providing for the death benefit, unless the payor receives written notice of a revocation prior to payment.⁷ This statute applies to any life insurance contract, annuity, retirement arrangement, compensation agreement, or other contract designating a beneficiary of any right, property or money in the form of a death benefit.⁸ By definition, these types of financial assets are referred to as nonprobate transfers in Virginia.⁹ However, the revocation of these assets does not apply (1) to the extent a decree of annulment or divorce, or a written agreement providing for a contrary result as to specific death benefits, or (2) to any trust or any death benefit payable to or under any trust.¹⁰

ERISA Issues

In 2007, the statute was amended to provide that, if it is preempted by federal law, a former spouse who receives the payment of any death benefit to which the former spouse is not entitled, is personally liable for the amount paid.¹¹ There are a number of problems associated with § 20-111.1 for different types of financial assets, e.g., transfer on death accounts, individual retirement accounts, and securities, etc.; however, the focus of this discussion is to the application of § 20-111.1 to employer-sponsored benefit plans, i.e., group life insurance and group retirement plans. A distinction between the two types of employer-sponsored benefit plans is necessary. Under federal law, employer-sponsored benefit plans are referred to as employee benefit plans. As a further classification, there are employee welfare benefit plans which include group life insurance policies,¹² and employee pension benefit plans which include both defined contribution and defined benefit plans.¹³ Both types of employer-sponsored benefit plans are governed by ERISA and fall under the umbrella of employee benefit plans.¹⁴ However, ERISA does not apply to all



types of employer-sponsored benefit plans.¹⁵ And, ERISA supersedes any and all state laws involving plans under the federal umbrella.¹⁶

In 2007 when § 20-111.1 was amended, it had already been preempted by federal law by the *Egelhoff* decision in 2001. Virginia attempts to sidestep the federal preemption issue by providing that former spouses who receive benefits to which they are not entitled are obligated to either return the benefits or become personally liable for the amount they received.¹⁷ The practical problem associated with this remedy is, once the benefits are distributed to former spouses by plan administrators, it will be difficult, if not impossible, to recoup the proceeds. In addition, litigation involving proceeds in these cases will generally be in federal, as opposed to state, courts.

It is important to examine § 20-111.1 in light of the *Egelhoff* ruling. In *Egelhoff v. Egelhoff*,¹⁸ the United States Supreme Court made clear that ERISA preempts revocation of nonprobate assets upon divorce statutes. Therefore, proceeds are paid to persons who are named by covered individuals in their plan documents. In *Egelhoff*, Mr. Egelhoff designated his wife as the beneficiary of his life insurance policy and pension plan. They were subsequently divorced, and he did not change either of the beneficiary designations for his employer-sponsored benefits. Mr. Egelhoff died intestate two months after the divorce. The husband's children sued to recover the benefits under the life insurance policy and pension plan under a Washington revocation of nonprobate assets upon divorce statute. The Washington statute provided that "If a marriage is dissolved or invalidated, a provision made prior to that event that relates to the payment or transfer of the decedent's interest in a nonprobate asset

in favor of or granting an interest or power to the decedent's former spouse is revoked."¹⁹

The ex-wife ultimately appealed the Washington state court decisions to the United States Supreme Court which reversed the Washington Supreme Court. There were two overriding principles underlying the *Egelhoff* decision. First, Congress specifically provided that ERISA superseded state law dealing with employer-sponsored benefit plans; and, state law relating to the distribution of employer-sponsored benefit plans in divorce established the nexus between federal and state law involving employer-sponsored benefit plans. Second, the goal of ERISA is to establish a uniform administrative scheme that provides a set of standard procedures to guide the processing of claims and disbursement of benefits.²⁰ As a result of the *Egelhoff* decision, § 20-111.1(A)-(C) were preempted by federal law because of the similarity of the Virginia statute to the Washington statute.

Federal Common Law

Generally, the proceeds from employer-sponsored benefit plans are significant enough for former spouses, widows, and/or children to bring actions to ensure they receive these proceeds where beneficiary designations are not changed. In these situations, litigation is almost a certainty. In situations where beneficiary designations are not changed, former spouses will argue that ERISA preempts the revocation upon divorce statute; and, widows and/or children will argue that either § 20-111.1 applies or that former spouses have waived their interest in property settlement agreements based upon federal common law.

In an effort to ameliorate the effects of former spouses receiving employer-sponsored benefits following divorce where beneficiary designations are not changed; and, presumably the reason the Virginia legislature included § 20-111.1(C), federal courts have applied federal common law both before and after the *Egelhoff* decision, despite the apparent black letter law established in *Egelhoff* which required beneficiary designations to be in plan administrators' files to become effective. Under federal common law, plan administrators were required to examine and interpret divorce law in all 50 states and the District of Columbia to interpret the

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meaning of waivers of employer-sponsored benefit plans in property settlement agreements to determine if an agreement waived the survivor benefits associated with the employer-sponsored benefits. In *Divorcees Turn About in Their Graves as Ex-Spouses Cash In: Codified Constructive Trusts Ensure an Equitable Result Regarding ERISA-Governed Employee Benefit Plans*,²¹ the author posits that instead of creating a nationally uniform plan administration in these situations that the development of a body of federal common law applicable to state revocation of nonprobate assets upon divorce statutes has led to inconsistency, as opposed to consistency, in the application to ERISA employee benefit plans.²² A review of the cases where the federal common law approach is utilized indicates the inconsistency. For example, some cases determine that, where there are waivers of ERISA benefits in property settlement agreements, the waivers are effective to deny a former spouse the benefits, e.g., in defined contribution plans,²³ life insurance policies,²⁴ and pensions.²⁵ On the other hand, some cases determine the waivers of ERISA benefits in property settlement agreements are not effective to deny a former spouse the ERISA benefits, e.g., life insurance policies,²⁶ pensions,²⁷ and annuities.²⁸

As a result, due to the uncertainty in the law, the Virginia statute will eventually be challenged unless it is amended or repealed. Lawyers cannot rely on § 20-111.1 of the Code of Virginia of 1950, as amended, as the ultimate determination of who will receive the proceeds of employer-sponsored benefit plans where beneficiary designations are not changed following divorce. In addition, any challenges made to § 20-111.1 have been made substantially more difficult because of a 2009 United States Supreme Court decision involving waivers of employer-sponsored benefits in property settlement agreements.

Death of Federal Common Law

Waivers of employer-sponsored retirement plans are not uncommon in divorce. If there are waivers of

employer-sponsored benefit plans in property settlement agreements, the question arises if these waivers are sufficient to waive any survivorship benefits associated with these benefits. The question was answered in *Kennedy v. DuPont Savings and Investment Plan*.²⁹ The *Kennedy* case resolved the split among the federal courts of appeals and state supreme courts over (1) a divorced spouse's ability to waive pension plan benefits through a divorce decree that does not constitute a Qualified Domestic Relations Order (QDRO) and (2) whether a beneficiary's federal common law waiver of plan benefits is effective where the waiver is inconsistent with plan documents.³⁰

Mr. and Mrs. Kennedy were married from 1971 to 1994. Mr. Kennedy was a participant in the DuPont Savings & Investment Plan (SIP), a defined contribution plan. Mrs. Kennedy waived her interest in the DuPont SIP in their property settlement agreement.³¹ Mr. Kennedy died in 2001 and never changed the original beneficiary designation on the SIP account from Mrs. Kennedy to another person nor was there a contingent beneficiary listed with the plan administrator. DuPont paid the SIP to Mrs. Kennedy. The SIP had specific procedures in place to change beneficiary designations which Mr. Kennedy did not follow;³² and, the plan had provisions for Mrs. Kennedy to execute a qualified disclaimer of her interest in the SIP which she did not follow.³³

Mr. Kennedy's estate challenged the decision to award the SIP to Mrs. Kennedy in federal court. Ultimately, Mr. Kennedy's estate appealed to the United States Supreme Court. The question before the United States Supreme Court was "... whether the terms of the limitation on assignment or alienation invalidated the act of a divorced spouse, the designated beneficiary under her ex-husband's ERISA pension plan, who purported to waive her entitlement by a federal common law waiver embodied in a divorce decree that was not a QDRO." ³⁴

Continued on page 16

VBA Fall Meetings and Events

In Pictures



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1) Labor Relations and Employment Law Chair Tom Bagby presents Bill Rachels with the Chair Award in Virginia Beach.

2) Labor Relations and Employment Law Section Council meeting in Virginia Beach.

3) Health Law Section past chair Mark Hedberg presents a health information technology update to participants of the Fifth Annual Health Practitioners Roundtable in Richmond.

4) Members and guests of the YLD Executive Committee interact between events at the fall meeting in Staunton.

5) Eddie Isler (L) and Harris Butler (R) present an annual employment law update at the 39th Annual Labor Relations and Employment Law Conference in Virginia Beach.

6) Members of the Administrative Law Section enjoy a reception following the 15th Annual Administrative Law Conference in Richmond.

7) Participants of the Integrated Life in the Law Book Luncheon discuss various legal books at the VBA office in Richmond.

8) Tom Spahn addresses the attendees of the Labor Relations Conference on ethics for the employment lawyer.

9) Participants at the 60th Annual National Moot Court Competition in Richmond enjoy a banquet following the competition.

10) Chairman, President and CEO of Dominion Resources, Inc., Tom Farrell, II, presents the keynote address at the 11th Annual Corporate Counsel Fall Forum in Richmond.

11) Members and guests of the YLD Executive Committee enjoy dinner at the fall meeting in Staunton.



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1) (L to R) Dave Spiro, John Maddock, Jason Harbour, Paul Campsen and Robert Westerrman in a bankruptcy panel discussion at the Corporate Counsel Fall Forum.

2) Attendees at the Corporate Counsel Fall Forum listen to labor and employment "hot topics".

3) Deja Vishny speaks on spotting remedying abusive police interrogation at the 17th Annual Capital Defense Workshop in Richmond.

4) E. Duncan Getchell, Jr., speaking at the banquet for the National Moot Court Competition participants.

5) Participants in the Health Law Roundtable gather before the meeting begins.

6) Attendees at the Administrative Law Conference listen to a presentation regarding energy related initiatives.

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Divorce

Continued from page 13

Under ERISA, employee pension benefit plans cannot be assigned or alienated except by the terms and provisions of a QDRO which is used for "... the creation or recognition of the existence of an alternate payee's right to actually receive all or a portion of the benefits payable with respect to a participant under a plan."³⁵ Since Mrs. Kennedy waived her interest in the SIP, she did not have an interest which could be subject to a QDRO. Therefore, the waiver in the property settlement agreement did not "... constitute an assignment or alienation rendered void under the terms of § 1056(d)(1)."³⁶

Impact on Divorce

The *Kennedy* decision was not solely based on the Court's determination regarding the ERISA anti-alienation clause or federal preemption of state law by ERISA. Rather, the focus was on whether a beneficiary's federal common law waiver of plan benefits is effective where the waiver is inconsistent with plan documents. The *Kennedy* case wholly rejected the federal common law approach utilized by federal courts both before and after the *Egelhoff v. Egelhoff* decision.³⁷ The focus in *Kennedy* was solely on the requirements of the plan documents under ERISA.³⁸ It is the elimination of the "... administrative and financial burdens on plan administrators³⁹ and "... plan documents rule,"⁴⁰ as opposed to federal common law developed throughout the federal circuits, that governs who takes survivorship benefits if the required designations are not changed. Whatever provisions are made for survivorship benefits that are contained in plan documents will be strictly adhered to when clients fail to correctly follow the required procedures. However, the Court noted that questions about a waiver's effect in circumstances where it is consistent with plan documents remain open. And, the Court did not express an opinion as to whether an estate could bring a state or federal action to obtain benefits after they are distributed.⁴¹ This leaves § 20-111.1 wide open for future challenges.

Impacts

The *Kennedy* decision will have an impact on the practice of divorce law. Essentially, property settlement agreements purporting to waive clients' rights under either employee pension benefit plans, i.e., defined benefit and

defined contribution plans, as well as employee welfare benefit plans, i.e., group life insurance policies, will have no effect on who will receive survivorship benefits under these plans in the event clients do not take affirmative steps to make the necessary changes required by their plan documents. In Virginia, § 20-111.1(D) of the Code of Virginia of 1950, as amended, provides that revocation of death benefits for employer-sponsored benefit plans does not apply if a decree of annulment or divorce or a written agreement of the parties provides for a contrary result as to specific death benefits. After the *Egelhoff* and *Kennedy* decisions, it no longer matters what provisions are made in a final decree or property settlement agreement regarding the survivorship aspect of these assets. Plan administrators will look no further than their files to make a determination concerning payment of any death benefits.

Conclusion

Unless lawyers know what the specific plan documents require and follow through with clients to ensure that all necessary steps are taken to waive any survivorship benefits under either employee pension benefit plans and employee welfare benefit plans, general waivers in property settlement agreements of these types of plans are not going to be effective to waive these interests. The failure of clients to follow through with plan instructions can be a costly mistake. In the *Kennedy* case, the former spouse received \$400,000 from the defined contribution plan.⁴² The only practical way to cure this problem is to include language in property settlement agreements notifying clients that the waiver of the right to a specific employer-sponsored benefit plan does not constitute a waiver of any survivorship interest in the plan. This type of provision serves two purposes. The first is to put clients on notice that they have to take affirmative action to ensure their benefits are protected. And, second, the provision takes the onus off of lawyers (1) to obtain and review plan documents in cases involving waivers of employment benefits and (2) to have to follow through with clients to make sure they have taken the necessary steps to make any necessary changes.

NOTES

- 1) Portions of this text were taken from *Divorce in the Golden Years* by Leslie Ann Shaner, Esquire, to be published by the American Bar Association in 2010.
- 2) 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d

- 264 (2001).
- 3) 555 U.S. ___, 29 S.Ct. 865, 172 L.Ed.2d 662 (2009).
- 4) Id. at 877.
- 5) 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001).
- 6) The other states are Alaska, Arizona, California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, Montana, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Washington, and Wisconsin.
- 7) Va. Code Ann. § 20-111.1(A) (2009).
- 8) Va. Code Ann. § 20-111.1(B) (2009).
- 9) Va. Code Ann. § 64.1-45.3 (2009).
- 10) Va. Code Ann. § 20-111.1(C) (2009).
- 11) Va. Code Ann. § 20-111.1(D) (2009).
- 12) 29 U.S.C. § 1002(1) (2008).
- 13) 29 U.S.C. § 1002(2) (2008).
- 14) 29 U.S.C. §§ 1001 to 1461 (2008).
- 15) *For the types of employer-sponsored benefit plans that are not covered by ERISA see*, 29 U.S.C. § 1003(b)(1) (2008); 29 U.S.C. § 1002(32) (2008) and 26 U.S.C. § 414(d) for definitions of government plans; 29 U.S.C. § 1003(b)(2) (2008); 29 U.S.C. § 1002(33) (2008) and 26 U.S.C. § 414(e) for definitions of church plans; 29 U.S.C. § 1003(b)(3) (2008); 29 U.S.C. § 1003(b)(4) (2008); and 29 U.S.C. § 1002(36) (2008) for the definition of excess benefit plans.
- 16) 29 U.S.C. § 1144(a) (2008).
- 17) Va. Code Ann. § 20-111.1(D) (2009).
- 18) 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001).
- 19) Id. at 144.
- 20) Id. at 146-147.
- 21) Sarabeth A. Rayho, *Divorcees Turn About in Their Graves as Ex-Spouses Cash In: Codified Constructive Trusts Ensure an Equitable Result Regarding ERISA-Governed Employee Benefit Plan*, 106 Mich. Law Rev. 373 (2007).
- 22) Id. at 384-385.
- 23) See, e.g., *IBEW Local 613 Defined Contribution Pension Fund v. Moore*, No. 1:04-CV-3738-WT, 2005 U.S. Dist. LEXIS 42034, *15-16 (N.D. Ga. Oct. 12, 2005) and *Graef v. Retirement Income Plan for Emples. Of Albemarle Corp.*, No. 98-1188, 1998 U.S. App. LEXIS 31582, *12-16 (4th Cir. 1998).
- 24) See, e.g., *Federal: Forcier v. Metro. Life Ins. Co.*, 469 F.3d 178, 186 (1st Cir. 2006); *The Guardian Life Insurance Company of America v. Finch*, 395 F.3d 238, 243 (5th Cir. 2004); *Metro. Life Ins. Co. v. Flusty*, No. 07-12560, 2008 U.S. Dist. LEXIS 551, *8-9 (E.D. Mich. Jan. 3, 2008); *Barber v. Grimm*, No. 4:05-CV-573-4, 2005 U.S. Dist. 31546, *4-5 (N.D. Tex. 2005); *Metro. Life Ins. Co. v. Flinkstrom*, 303 F.Supp.2d 34, 40-42 (D. Mass. 2004); and *John Hancock Mut. Life Ins. Co. v. Timbo*, 67 F.Supp.2d 413, 420 (D.N.J. 1999). State Cases: *Sweetbe v. Sweetbe*, 474 Mich. 151, 712 N.W.2d 708, 712-714 (2008); *Moore v. Moore*, 266 Mich.App. 96, 700 N.W.2d 414, 416-418 (2005); and *Macinnes v. Macinnes*, 260 Mich.App. 280, 677 N.W.2d 889, 892-894 (2004).
- 25) See, e.g., *Federal: Estate of Antobelli v. IBM Int'l Business Mach. Corp.*, 77 F.3d 78, 80-81 (4th Cir. 1996); *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 281-282 (7th Cir. 1990); and *Graef v. Retirement Income Plan for Emples. Of Albemarle Corp.*, No. 98-1188, 1998 U.S. App. LEXIS 31582, *12-16 (4th Cir. 1998). State Cases: *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320, 328-330 (2005); *Pinkard v. Confederate Life Ins. Co.*, 264 Neb. 312, 647 N.W.2d 85, 88-90

Continued on page 21

Calendar of VBA Events

January 21-24, 2010
120th VBA Annual Meeting
 Williamsburg Lodge and
 Conference Center

April 16-17, 2010
Board of Governors Meeting
 Berry Hill Plantation Resort, South Boston

April 23-25, 2010
**YLD Executive Committee/
 Council Meeting**
 The Sanderling Inn, Duck, NC

October 15-16, 2010
Board of Governors Meeting
 The Red Fox Inn, Middleburg

July 22-25, 2010
120th VBA Summer Meeting
 The Homestead, Hot Springs

January 20-23, 2011
121st VBA Annual Meeting
 Williamsburg Lodge and
 Conference Center

Classifieds

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Another View of *The Great Moonshine Conspiracy Trial of 1935*

BY WILLIAM B. HOPKINS

Thomas S. Word, Jr.'s review of Keister Greer's book *The Great Moonshine Conspiracy Trial of 1935* in the summer 2009 issue of the *VBA News Journal* is an interesting read, much more so than the book itself. Yet, Word's understandable lack of familiarity with the factual background surrounding the conspiracy trial has assisted Greer in painting a false picture of Carter Lee.

The Book

This self-published book of 916 pages purports to give the reader a definitive study of the 50-day 1935 trial and background, the longest trial in Virginia. History House Press published the book. Greer formed History House Press and was its president and a director. There are lots of names—a few developed, a few more partially developed—with the great majority names only. This makes the reader move slowly. Greer's determination to unjustifiably tarnish the reputation of Carter Lee is the glue that holds the story line together.

Lacking is the original transcript of the trial, which was apparently lost somewhere between the federal court in Roanoke and the Fourth Circuit. In compiling his story, Greer leans towards the testimony before the federal grand jury. His text would have been more accurate had he relied more heavily on the daily in-depth news articles in *The Roanoke Times* and *The Roanoke World-News*.

Greer wrote, "I knew little or nothing about the 1935 conspiracy trial. I was only 13 when the case was tried and my family was not in Franklin County." The opposite was true for me. Carter Lee was one of my favorite uncles whom I admired greatly; thus I read every word printed in the daily *Roanoke Times*.

The Beginning

Carter Lee's involvement began at the trial of Tom Cundiff's son for assault of a neighbor, John Horsley.

On cross-examination by Lee, Cundiff blurted out that he had been paying Carter Lee protection money, which Lee called a lie. He again made the statement, to which Lee said, "That's a lie and you know it." Immediately, Cundiff left the witness stand and ran towards Lee with a balled fist and mumbling incoherently. Lee held up a chair to protect himself from the onrushing Cundiff. Nevertheless, Cundiff fractured a rib when he hit the chair as it was thrust between himself and Lee. Two deputy sheriffs restrained Cundiff.

Cundiff was fined \$55 and given 10 days in jail for contempt of court. While in jail, Cundiff's lawyer, Brady Allman, put Cundiff in touch with Samuel White, an ATF agent located in Roanoke and Colonel Thomas Bailey, an FBI agent who had spent a year among Franklin County's whiskey makers.

After getting out of jail, Cundiff met with White and Bailey in Rocky Mount. After the meeting, White informed Bailey that he did not believe Tom Cundiff's story. White's opinion was probably based on Cundiff's demeanor and that he found Lee to be very cooperative with the feds in the apprehension of whiskey makers, testimony he would later make at trial. Immediately a rift developed between White and Bailey.

White had an outstanding record in law enforcement which left him vulnerable to attack by Bailey. Bailey could easily find someone to testify against White among the numerous lawbreakers he, White, had brought to justice.

Three months after his son's trial, Tom Cundiff was arrested for assaulting John Horsley. On motion of attorney Brady Allman (not Carter Lee as Word claimed), Cundiff was sent to Western State Hospital for a sanity test. Having been declared sane, a jury sentenced him to three years in prison. Two days later he escaped the Rocky Mount jail and



reported to Thomas Bailey in Harrisonburg, where he testified before the federal grand jury. Cundiff's testimony primarily caused Carter Lee's indictment.

Lee was an unusual man. At age 19 he passed the Virginia bar; at age 22 he became Commonwealth's Attorney of Franklin County. During his six and a half years of service as Commonwealth's Attorney prior to the conspiracy trial, Franklin County had 28 murders. Lee solved and convicted 26 of these murders. The killing of Deputy Sheriff Jeff Richards and his prisoner Jim Smith remained unsolved at that time. Carter Lee's conviction rate for other crimes was equally impressive.

Now, at age 29, he became the focus of the longest trial in Virginia's history. Judge John Paul of Harrisonburg presided. Sterling Hutcheson of Eastern Virginia, assisted by Frank Tavenner, represented the government's prosecution. Stephen Timberlake of Staunton represented Lee; a number of prominent attorneys from Western Virginia represented the 32 other defendants.

The Trial

The great conspiracy trial began on April 20, 1935. After the impaneling of the jury and Judge Paul's overruling defense motions as to conspiracy, the government presented testimony that showed the magnitude of whiskey-making in Franklin County.

The government kicked off its case against individual defendants on the 24th of April with the testimony of former sheriff Wilson Hodges. On

April 25th, *The Roanoke Times* ran a full-length picture of Carter Lee on its front page, with headlines: "Lee never given a cent of protection money, former sheriff states," sub headline: "Good prosecutor Hodges declares," followed by, "Admissions of government witness hailed as signal victory by defense." Sheriff Wilson Hodges admitted that he and some of his deputies accepted bribes. He named those who shared the protection money.

Sheriff Jamison served from January 1, 1932, until January 1, 1936. The government failed to call Sheriff Jamison or any of his deputies to testify, as it is believed all had a very favorable opinion of Carter Lee and would so state in court. To prove its case, the government had to rely almost solely on lawbreakers, most of whom Lee convicted.

On May 8, 1935, Judge Paul showed his preference for the prosecution when he denied a motion by Stephen Timberlake to introduce a letter from Governor John Garland Pollard to all Virginia commonwealth's attorneys. Sterling Hutcheson had just read to the jury provisions from the Code of Virginia requiring mandatory penalties for certain prohibition law violations. Pollard's letter, in contrast, directed commonwealth's attorneys to take fines from whiskey makers wherever possible in order to relieve congestion in both the courts and jails. All prosecutors across the state followed Pollard's instructions, which admittedly was not conducive to crime prevention. Judge Paul in particular thought it was wrong. The governor's policy told the individual moonshiner that he was not going to prison for making whiskey.

As the trial progressed, some witnesses claimed to have heard damaging rumors about Lee, but no one except Tom Cundiff claimed to have paid him directly. On May 20, 1935, Tom Cundiff took the witness stand. He had long been hailed as a key witness for the government. The next morning's *Roanoke Times* had Cundiff's picture on the front page under the headlines, "Cundiff gives account of battle with Lee in court."

Cundiff produced a check for \$39 made out to C. C. Lee, endorsed by Lee, which he claimed was part of the protection money paid to Lee. The check in question was also

William B. Hopkins is a former principal in Martin Hopkins and Lemon, P.C. in Roanoke. He retired from the practice of law in May of 2009. He served in the United States Marine Corp. in World War II and the Korean War and had combat in both wars. Mr. Hopkins served in the Virginia State Senate from 1960 to 1980. He was Majority Leader from 1976 to 1980. He is a graduate of Washington and Lee University and the University of Virginia Law School. He is a nephew of the late Charles Carter Lee.

endorsed by the Clerk of the Circuit Court of Franklin County. This endorsement should have told the prosecution that Lee did not get the money. However, the more Timberlake insisted that the \$39 was in part payment of a fine, the more Cundiff dug in that it was in back payment for protection.



Carter Lee

Testifying about his previous courtroom encounter with Lee in Franklin County, Cundiff claimed that Lee came at him with a chair while he was in the witness box and would have hit him over the head had he not stood up as Lee swung the chair. He also claimed that he paid protection money to those deputies who had broken up his still and impounded his automobile, namely Richards, Beckett and Abshire. Later, when the defense presented its case, Wilson Carper, Clerk of the Circuit Court of Franklin County, identified the \$39 check to C. C. Lee on his books as part of \$142 in payment of a fine and court costs for Cundiff's conviction for possession of a still.

Carper's testimony was straightforward. The only plausible explanation for the \$39 check to Lee was that it was for payment of a fine. Keister

Greer's attempt to cast doubt on the purpose of the check says more about Greer than Lee.

Only one other government witness testified before the grand jury of seeing Carter Lee participate in an illegal activity. Her name was Willie Carter Sharpe. Spectators filled the courtroom when Willie Carter Sharpe took the witness stand. She sometimes hauled whiskey but more often was the lead car in front of the vehicle with the moonshine. Keister Greer's book relies heavily on Mrs. Sharpe's grand jury testimony where there was no cross-examination.

At the trial, she embellished her grand jury testimony in placing Carter Lee at numerous roadblocks where she and others carrying whiskey were let through. On cross examination, Judge Paul attempted to rescue her. When Timberlake began an attack on her morals, Judge Paul said, "This could not possibly affect the woman's veracity." Nevertheless, the defense easily rebutted her testimony. A number of witnesses, including Carter Lee himself, testified that Lee had never been at any roadblock.

Sharpe's career in the whiskey business stopped in 1931 while she served three years in federal prison. Wilson Hodges, the government's witness, returned to the witness stand. He testified that Carter Lee was never at or participated in the roadblock while he was sheriff. On this and other matters, Willie Carter Sharpe's testimony lost all credibility when not any of the government's 279 witnesses could verify her story.

The last of the government's witnesses against Lee made little impression. C.C. Greer, a former deputy sheriff under Wilson and Peter Hodges—and a distant cousin of Keister Greer—took the stand near the close of the government's case. He admitted that he took bribes and he made references to where Lee might have been wrong, but could not be specific. He said he never saw Lee take any protection money.

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On the defense, Carter Lee made an excellent witness for himself, being on the stand for all of two days. The prosecution failed to alter his testimony on cross examination. Later in the trial, the commonwealth's attorney from Patrick County testified that he and all other commonwealth's attorneys that he knew of followed Governor Pollard's instructions in dealing with whiskey makers. The case was sent to the jury on a Saturday, the 48th day of trial.

After such a lengthy trial, 11 members of the jury desired to convict all 33 defendants and go home. One juror wanted to review the evidence. After an examination of the testimony, Carter Lee and two others were acquitted with the other 30 defendants found guilty.

The Aftermath

Word's review fails to report that within weeks after his acquittal, Carter Lee ran for re-election to the office of commonwealth's attorney in the Democratic primary against a popular and very competent attorney, Dalton Dillard. Lee won by a narrow margin and was re-elected in the fall by a rather large majority.

Keister Greer's book is completely off base in his treatment of Deputy Sheriff Jeff Richards' murder in 1934. This was a killing for revenge which had no bearing on the conspiracy

trial other than the elimination of a defendant. Prior to the murder, the three brothers-Franklin, Paul and Hubbard Duling-lived in West Virginia. Their business consisted of hauling whiskey from Franklin County to the West Virginia coalfields.

On December 23, 1933, Franklin County Deputy Sheriff Jeff Richards and Roanoke County Deputy Clarence E. "Big Boy" Simmons established a roadblock at the Roanoke-Franklin County line on Route 220. Franklin Duling drove alone on Route 220. Simmons shot his tires. Franklin lost control of his car and was killed.

On October 12, 1934, Jeff Richards and Edgar Beckett picked up a prisoner, Jim Smith, in Callaway to take to Rocky Mount. They stopped at Edgar Beckett's home at about 9:00 P.M. to let him off. Within minutes after leaving Edgar Beckett's place, Richards and Jim Smith were gunned down. The only clues were seven empty shotgun shells found beside the road.

In spite of the fact that the Duling brothers were seen in Franklin County on the date of the murders, and their gun participated in the killings, the first trial ended in a hung jury.

At the second trial, both sides agreed it was impossible to impanel a jury in Franklin County. At the third trial, a jury from Halifax County convicted the Duling brothers and gave them 99 years in prison. There was never any question about their guilt. The Duling brothers' case gave Carter Lee a 100 percent conviction rate for the 28 murders in Franklin County prior to the conspiracy trial.

The off-the-wall suggestion by Greer that Carter Lee could have set up Richards for killing by the Dulings shows clearly that Greer had a bias against Lee and should have been accepted by Word as such.

In his book's conclusion, Greer correctly sized up Judge Paul's performance at trial. He said, "Judge Paul functioned essentially as senior counsel for the government. He had served as United States Attorney for the Western District of Virginia, and that experience and perspective animated his conduct throughout the

trial."

Hugh Rakes of Floyd County and some conspiracy case defendants were tried and convicted of jury tampering. Carter Lee was not involved and there was no evidence to suggest otherwise.

To my knowledge, Judge Paul never made a public statement as to Carter Lee's guilt or innocence, although it was no surprise that after the trial ended he forbade Carter Lee from practicing in his court. During the following years, the federal court in Roanoke became flooded with cases from Franklin and other nearby counties. Seeing that other sheriffs' offices and commonwealth's attorneys handled whiskey matters the same as Carter Lee had done, and that most moonshine lawbreakers had the proclivity to avoid the truth, Judge Paul had a change of heart. Shortly after WWII, he invited Carter Lee to again appear in his court.

The Life of Carter Lee

After 19 years of service, Carter Lee retired as Commonwealth's Attorney of Franklin County. He entered the private practice of law. Some two-and-a-half years later, he hired Keister Greer as an associate.

On page xx (20) of his book, Greer said, "As I write this, it has been over half a century since I practiced with Carter Lee. I thought him an able lawyer, one of the ablest I have known....But Lee was the farthest thing from a bumbling country practitioner. His knowledge of the law was encyclopedic, and his pleadings were of so high a standard that Judge Hopkins, who didn't like him, considered that they should be preserved as models."

It is true that my father did not always get along with Carter, probably because he leaned over backwards not to give him any preference in court, and Carter Lee was a very aggressive attorney. Years after Carter's death my father said that he, Carter, was the best examiner of witnesses, especially cross examination, of any lawyer that he had known. I concur with my father on this point. He also said he knew that Carter Lee was innocent of the charges brought by the prosecution.

Shortly after I began the practice

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of law in Roanoke in January 1948, I met Sam Price, one of the lead defense counsel in the conspiracy case. "I greatly admire your uncle, Carter Lee," he said. "He was completely innocent and never should have been indicted. However, this Colonel Bailey was determined to get him at all costs. The other defendants in the conspiracy case said Carter was innocent and they were in a position to know." Shortly thereafter, Price became judge of the Roanoke Law and Police Court.

During the decade of the 1950s, Carter Lee enjoyed an excellent law practice, a combination of business and trial work, including many high-profile cases in other parts of the state. He died of a heart attack on January 1, 1958, at the age of 52.

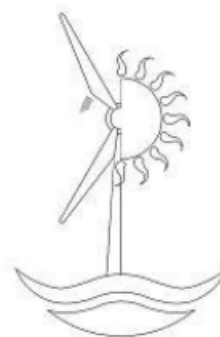
Greer's statement that Carter Lee owed money to my mother is pure fiction. My mother settled her interest in the Lee home place in 1932 when my father became judge; there was never an incident where Carter owed money to my mother where he did not promptly pay.

Reflecting

Looking back, and having recently reviewed much of the conspiracy trial on The Roanoke Times microfilm, I have made a few conclusive thoughts. For those who seek the truth, the account of trial in *The Roanoke Times & World-News* is by far the best source of information. The newspaper account is much easier to read than Greer's 916 pages, and not a great deal longer. Although there may have been some doubts among the jurors, the newspaper account shows clearly why Carter Lee was rightfully acquitted.

Today it is generally recognized that the police and prosecutors are often subjects of false accusations by society's criminal element. Standard procedure demands that an in-depth investigation be made of the accused before any charges are filed. Colonel Thomas Bailey should have extended this courtesy to Carter Lee. Had he done so, Judge Sam Price's opinion would have prevailed; that is, Carter Lee never would have been indicted in the first place. But then, Keister Greer would not have used such time and effort to publish his book, *The Great Moonshine Conspiracy Trial of 1935*.

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Common Law in Divorce

Continued from page 14

(2002); *Keen v. Weaver*, 121 S.W.3d 721, 728-733 (Tex. 2003).

26) See, e.g., Federal: *Melton v. Melton*, 324 F.3d 941, 945-946 (7th Cir. 2003); *Metro. Life Ins. Co. v. Pettit*, 164 F.3d 857, 864-865 (4th Cir. 1998); *Minn. Life Ins. Co. v. Hamilton*, No. 07-cv-0056-MJR, 2008 U.S. Dist. LEXIS 26514, *17-18 (S.D. Ill. Apr. 2, 2008); *O'Neil v. O'Neil*, 136 F.Supp.2d 690, 694-695 (E.D. Mich. 2001).

State Cases: *Smith v. Smith*, 919 So.2d 525, 528 (Fla.App. 5 Dist. 2005).

27) See, e.g., *McGowan v. NJR Service Corp.*, 423 F.3d 241, 244-250 (3rd Cir. 2005).

28) *Hallingby v. Hallingby*, 541 F.Supp.2d 591, 596-598 (S.D.N.Y. 2008).

29) 555 U.S. ___, 29 S.Ct. 865, 172 L.Ed.2d 662 (2009).

30) *Id.* at 870.

31) *Id.*

32) *Id.* at 869.

33) *Id.* at 877.

34) *Id.* at 868.

35) *Id.* at 873.

36) *Id.*

37) 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001).

38) *Kennedy v. DuPont Savings and Investment Plan*, 555 U.S. ___, 29 S.Ct. 865, 876, 172 L.Ed.2d 662 (2009).

39) *Id.* at 877.

40) *Id.*

41) *Id.* at 875.

42) *Id.* at 869.

120th Annual Meeting of The Virginia Bar Association

January 21-24, 2010 • Williamsburg Lodge and Conference Center, Colonial Williamsburg, Virginia

Our Winter Weekend Schedule

Thursday, January 21, 2010

- 9:00 AM - 1:00 PM **Virginia CLE Committee Meeting**
- 10:00 AM - 5:00 PM **Virginia Law Foundation Committee and Board Meetings**
- 12:00 N - 4:30 PM **VBA Board of Governors Luncheon and Meeting** (For 2009 Board Members)
- 2:00 PM - 6:00 PM **Registration and Information Desk Open**
Courtesy of Kaufman & Canoles, PC
- 5:00 PM - 6:00 PM **Friends of Bill W.** (Open meeting)
- 6:30 PM - 7:30 PM **Welcome Reception**
Courtesy of SunTrust Bank
- 7:30 PM - 9:30 PM **Virginia Law Foundation Fellows Dinner and Induction Ceremony**

Friday, January 22, 2010

- 8:00 AM - 6:00 PM **Registration and Information Desk Open**
Courtesy of Kaufman & Canoles, PC
- 8:15 AM - 9:15 AM **Continental Breakfast**
Courtesy of Virginia Business Magazine
- 8:30 AM - 9:30 AM **Past Presidents Council Breakfast**
- 8:30 AM - 9:30 AM **Section/Committee Business Meetings**
- 8:30 AM - 5:00 PM **Exhibits**
- 9:30 AM - 12:30 PM **CLE Programs: Concurrent Sessions**
(See separate listing)
- 10:00 AM - 11:30 AM **Spouse/Guest Program: A Culinary Demonstration and Tasting**
(Separate registration and fee required)
- 10:00 AM - 12:00 N **YLD Law School Liaison Recruiting Roundtable**
- 12:00 N - 4:30 PM **Virginia Association of Defense Attorneys Board Luncheon Meeting**
- 12:30 PM - 2:00 PM **Legacy Series Luncheon Program**
"John Brown's Raid in American Memory."
A presentation by Dr. William M. S. Rasmussen of the Virginia Historical Society on behalf of the VBA Committee on Special Issues of National and State Importance on the 150th anniversary of John Brown's raid at Harpers Ferry.
Courtesy of Hunton & Williams LLP
(Register separately—additional fee for lunch)
- 12:30 PM - 2:00 PM **YLD Executive Committee/Council Luncheon and Passing of the Gavel**
- 2:15 PM - 4:00 PM **General Session**
"Judging the New New Deal: The Constitution in Times of Economic Crisis."
A presentation by the Committee on Special Issues of National and State Importance.
- 5:00 PM - 6:00 PM **Friends of Bill W.** (Open meeting)

- 5:45 PM - 7:00 PM **VBA Portrait Gallery**
Complimentary photographs will be taken of VBA couples and guests as they enter the reception.
Courtesy of Wells Fargo Private Bank Legal Specialty Group
- 6:00 PM - 7:00 PM **Reception** (black tie)
Courtesy of LexisNexis
- 7:00 PM **Banquet and Dance** (black tie)
Banquet courtesy of The McCammon Group
Visual Presentation
Courtesy of McGuireWoods, LLP
Decor Design
Courtesy of MercerTrigiani
After Dinner President's Reception
Courtesy of Hunton & Williams, LLP and McGuireWoods, LLP
After Dinner Entertainment
Live Music Courtesy of Equity Concepts, L.L.C. and U.S. Bank Corporate Trust Services
- 10:30 PM - 12:30 AM **YLD "After-Hours" Social**
Members of the YLD (Young Lawyers Division) and the OLD ("Old" Lawyers Division!) are invited to participate in after-hours cheer!
Courtesy of Williams Mullen

Saturday, January 23, 2010

- 8:00 AM - 9:15 AM **Annual Breakfast and Business Meeting**
(Spouses and guests are welcome)
Courtesy of Minnesota Lawyers Mutual Insurance Co. and Virginias Legal Directories
- 8:30 AM - 1:30 PM **Registration and Information Desk Open**
Courtesy of Kaufman & Canoles, PC
- 9:00 AM - 12:30 PM **Exhibits**
- 9:30 AM - 12:30 PM **CLE Programs: Concurrent Sessions**
(See separate listing)
- 12:30 PM - 2:00 PM **Managing Partners Roundtable Luncheon**
"Recruiting and Professional Development to Improve Your Bottom Line."
A presentation by the Law Practice Management Division for law firm managers and others responsible for hiring and professional development.
(Register separately—additional fee for lunch)
- 12:30 PM - 1:30 PM **Reception**
Courtesy of Colonial Williamsburg
- 1:30 PM - 2:30 PM **Orientation for Newly Elected Members of the VBA Board of Governors**
- 2:30 PM - 5:00 PM **VBA Board of Governors Meeting**
(For 2010 Board Members)

Hotel Reservations

Room reservations can be made by phone, fax, mail or online. Please refer to the form provided. Hotel contact information: Group Reservations, Colonial Williamsburg Co., P. O. Box 1776, Williamsburg, Virginia 23187; Phone: (800) 261-9530; Fax: (757) 220-7729; Website: www.cwf.org; VBA Online Reservation Code: <https://resweb.passkey.com/go/vira10a>

Educational Programming

Friday, January 22, 2010

- | | |
|--------------------------------------|--|
| 9:30 AM - 11:00 AM
(1.5 Credits) | Business Law Section
"LLC Fiduciary Duties After <i>Remora</i> : Are They Optional?" |
| 9:30 AM - 11:00 AM
(1.5 Credits) | Domestic Relations Section
" <i>Brandenburg</i> Revisited: Does Separate Property Equity Formula Still Apply?" |
| 9:30 AM - 11:00 AM
(1.5 Credits) | Virginia Alternative Dispute Resolution Joint Committee • Civil Litigation Section
"Mastering the Art of Advocacy in ADR: Tips and Techniques for the Skilled Practitioner." |
| 9:30 AM - 11:00 AM
(1.5 Credits) | Wills, Trusts & Estates Section
"1-2-3 GRAT! A Practical Look at Three Days in the Life of an Essential Estate Planning Technique." |
| 11:00 AM - 12:30 PM
(1.5 Credits) | Criminal Law Section
"Putting Passion and Perfection into Lawyers' Performance in Criminal Trials." |
| 11:00 AM - 12:30 PM
(1.5 Credits) | Labor Relations and Employment Law Section
"Establishing a Competing Business: Smart Moves and Pitfalls." |
| 11:00 AM - 12:30 PM
(1.5 Credits) | Law Practice Management Division • Intellectual Property & Information Technology Law Section
"Essential Law Practice Technology Tips to Power and Protect Your Practice." |
| 11:00 AM - 12:30 PM
(1.5 Credits) | Retirement Journey Series: Taxation Section
"2010 Is Here: New Rules Mean New Opportunities for Roth IRA Conversions." |
| 12:30 PM - 2:00 PM
(No Credits) | Legacy Series Luncheon Program
"John Brown's Raid in American Memory."

<i>A presentation by Dr. William M. S. Rasmussen of the Virginia Historical Society on behalf of the Committee on Special Issues of National and State Importance. A critical analysis is provided on the 150th anniversary of John Brown's raid on the Federal Armory at Harpers Ferry on the eve of the Civil War which resulted in Brown being put to trial and ultimately executed. (Spouses and guests are welcome and encouraged to attend. Register separately—additional fee for lunch.)</i> |
| 2:15 PM - 4:15 PM
(2 Credits) | General Session: Committee on Special Issues of National and State Importance
"Judging the New New Deal: The Constitution in Times of Economic Crisis."
<i>(Spouses and guests are welcome and encouraged to attend)</i> |

Spouse/Guest Programs

Scheduled for Friday morning from 10:00-11:30 AM is a culinary demonstration and tasting by Chef Rhys Lewis of the Williamsburg Inn. The charge for this program is \$25. Advance registration is suggested for this program.

Saturday, January 23, 2010

- | | |
|---|--|
| 9:30 AM - 11:00 AM
(1.5 Credits) | Elder Law Section • Wills, Trusts & Estates Section
"Virginia Advance Medical Directives Statute and Uniform Power of Attorney Act: Current Issues." |
| 9:30 AM - 11:00 AM
(1.5 Credits) | Health Law Section
"National Health Reform: Consequences for Virginia and Virginians." |
| 9:30 AM - 11:00 AM
(1.5 Credits) | Intellectual Property and Information Technology Law Section • Law Practice Management Division
"Practical Aspect of Social Media Marketing: What It Is and How to Do It." |
| 11:00 AM - 12:30 PM
(1.5 Credits) | Administrative Law Section • Environment, Natural Resources & Energy Law Section
"The Perfect Storm: How Changes in Air, Water and Waste Regulations are Combining to Make Electric Power Generation Both Expensive and Complicated." |
| 11:00 AM - 12:30 PM
(1.5 Credits) | Construction and Public Contracts Section • Civil Litigation Section • Real Estate Section
"Chinese Drywall: Poison or Politics?" |
| 11:00 AM - 12:30 PM
(1.5 Credits) | Health Law Section
"Disruptive Physicians: Tension, Dissension, Prevention and Intervention—Resolution Without Revolution." |
| 11:00 AM - 12:30 PM
(1.5 Credits/1.5 Ethics) | Lawyers Helping Lawyers
"Civil Commitment in Virginia: What Every Practitioner Should Know After <i>Cho</i> ." |
| 12:30 PM - 2:00 PM
(No Credits) | Law Practice Management Division: Managing Partners Roundtable Luncheon
"Recruiting and Professional Development to Improve Your Bottom Line."

<i>A presentation by the Law Practice Management Division for law firm managers and others responsible for hiring and professional development. (Register separately—additional fee for lunch)</i> |

YLD: A Year in Review

BY TURNER A. BROUGHTON, CHAIR



Almost ten years ago, Pete Johnson walked into my office and asked that I get involved with the VBA's Child Support Enforcement Project. A few weeks later, I attended my first VBA meeting. Although I did not know a soul in the room, folks like David Anthony, Jim Ingold, Steve Otero and Ashley Taylor went out of their way to make me feel welcome. I recall sitting at the meeting and being blown away by the time and effort that dozens of young lawyers were spending to make Virginia a better place.

In many ways, not much has changed over the past ten years. I still sit at our meetings and listen in amazement as dozens of young lawyers recount the work that they have performed under the VBA banner. By way of example, over the past year:



- **Chris Gill and Derek Swanson** worked tirelessly to grow the Food Frenzy, which resulted in lawyers donating more than 1.6 million pounds of food to Virginia's food banks;

- **Mike Goldman, Ryan Furgurson** and more than 20 other VBA volunteers provided pro bono services to the Hispanic community in greater Richmond, and they are working to expand their efforts into Northern Virginia;

- **Elaina Blanks, Dana Dews, Monica McCarroll and Karen Robinson** expanded the Diversity Job Fair and hope to provide training and constructive feedback to diverse candidates so that they can better position themselves for jobs in today's competitive environment;

- **Audrey Burges** worked to make the Robert E. Shepherd, Jr., Juvenile and Family Law Symposium a success, and her passion and commitment to Juvenile and Family Law is palpable to anyone who spends more than two minutes with her;



- **Brian McCann** revived the communications committee, ensuring that more young lawyers knew about and got involved in our projects. Brian has also promised to work on getting his brother Mike involved in the VBA in 2010;

- The VBA/YLD, through the hard work of **Ryan Boggs, Travis Hill, Brandy Rapp** and **Leigh Strelka**, sponsored the only debate between Bill Bolling and Jody Wagner in their race for Lieutenant Governor;

- **Dan Campbell, Kevin Greene, Sam Towell** and dozens of other volunteer lawyers (including a number of judges and Supreme Court Justices) donated countless hours to the Model Judiciary Program, which provided high school students with exposure to our profession; and,

- **Dan Ortiz** did anything and everything asked of him, including agreeing to take on the thankless task of preparing our ABA Award of Achievement submission (we were an award winner yet again).

To learn more about the YLD, all of its committees and how to get involved, visit www.vba.org/divisions/yld.htm!

The commitment of these and many other young lawyers place the future of this organization in great hands, and I am excited by chair-elect **Henry Willett**'s thoughts about how to make the YLD even stronger during his tenure as its chair.

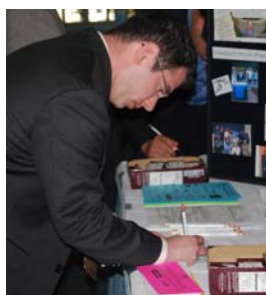
While I am proud of the work performed by the YLD, the personal relationships that my family and I have developed through my involvement in the YLD are what I value most. These personal relationships have been a hidden gem that did not factor into my decision to get involved with the VBA, but they are a primary reason that I intend to stay involved. While a number of these memories are not appropriate for publication, I take comfort in knowing that VBA young lawyers will drive the wait staff at the Sunset Grille crazy as they and their hordes of ankle biters descend on Duck next spring. Moreover, I hope that the Gill, King, Hill and Ortiz children develop friendships like those that my children developed with the Cheek, Haskell and Willett children as we dragged them across the Commonwealth (and over state lines) these last few years.

In closing, I want to thank the VBA staff for all of their hard work. It has not gone unnoticed, and they play a large and too often transparent role in the VBA's success. Moreover, I want to thank John Epps, who I consider one of my true mentors in the practice of law. John was there whenever the young lawyers called on him this past year, and he is proof positive that you can work hard and succeed in your profession without taking yourself too seriously. The VBA is stronger as a result of his leadership.

YLD Recruits 60 New Members at First Day in Practice Seminar



With the help of president John Epps and president-elect Steve Busch, the YLD successfully recruited 60 new VBA members at the annual First Day in Practice Seminar! YLD chair Turner Broughton along with Travis G. Hill, Williams Mullen; Rudene Mercer Bascomb, Hunton & Williams; Audrey J. Burges, Strother Law Offices; Lile T. Benaicha, Troutman Sanders; and Richard N.P. Naylor, Hunton & Williams shared their YLD passion and inspired newly admitted Virginia lawyers to experience the different facets of the VBA. Section membership in the VBA was of interest to many this year; lawyers approached the YLD volunteers and VBA staff about discussing the additional benefits of practice-focused section membership, as well as getting involved in different YLD committees and projects.



The Virginia Bar Association Member Spotlight

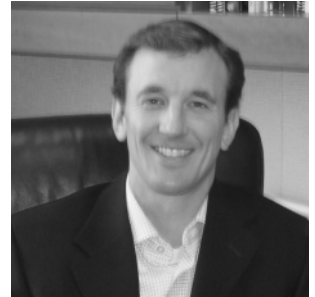
W. Brian McCann

Firm: Hirschler Fleischer PC

City: Richmond

VBA Member Since: 2003

VBA Activities: YLD Executive Committee; Chair, YLD Communications Committee



1. Who has had the greatest affect on your legal career? All of my clients who have either lost a loved one or who have suffered a severe injury such as traumatic brain injury.

2. What is the current background on your computer screen? The firm's logo. (They either won't let us change it or I just don't know how to change it. Most likely the latter.)

3. What is your most memorable YLD moment? Taking a historical tour of the Capitol in Colonial Williamsburg followed by a meeting in the House of Burgesses.

4. What is one thing all law students should know? If you interview with a Richmond firm and are asked during your interview why you want to work in Richmond, do not say it is because Richmond is "the New York of the South." I still don't know what the interviewee meant by that, but I do know that she is not working in Richmond.

5. What is your favorite thing to do in Richmond? Mountain bike the North Bank and Buttermilk trails along the James.

6. What do you consider to be your greatest achievement? Practicing law for six years without owning a BlackBerry (unfortunately, though, I just purchased one after it was "recommended" that I do so. Thanks, Bud.).

7. Do you have any secret talents? I can toss a putter remarkably far after missing a three foot putt!

8. Why did you join the VBA? The VBA and the YLD have given me the opportunity to get to know other lawyers and judges around the state and to give back to the community and the legal profession.

Hon. Diane M. Strickland



Firm: The McCammon Group (retired Circuit Court judge)

City: Roanoke

VBA Member Since: 1973

VBA Activities: former Board of Governors member; Joint ADR Committee member, Judicial Section member; former chair of the Boyd-Graves Conference

1. What is the best thing about being a VBA member? I love the networking opportunities. At both the winter and summer meetings, I can renew friendships with folks from all over the state.

2. What is your favorite legal term? *Res ipsa loquitor*. Wouldn't life be simpler if we had more *res ipsa loquitor*?

3. What is your favorite thing about Roanoke? The people. The "Star City" is one of the friendliest places in the Commonwealth.

4. What was your first job? My first legal job was attorney for students at the University of Virginia. While I am dating myself by acknowledging this fact, I believe that I may hold the record for having represented the greatest number of streakers.

5. What is one thing people would be surprised to learn about you? I switched to law school at UVA when I realized that I couldn't make the grade in the graduate Spanish Department.

6. What is your biggest pet peeve? I'd like to say that I don't have any, but my husband, Art, would probably tell you that it is having the toilet paper roll put on the "wrong" way.

7. Who encouraged you to join the VBA? I had the good fortune to practice law with four former presidents of the VBA: Frank W. Rogers, John L. Walker, John L. Walker Jr. and Thomas T. Lawson.

8. What do you consider to be your greatest achievement/accomplishment? My work in the establishment of Drug Courts and Youth Courts in Virginia and surviving the teenage years of my three children and witnessing them become productive adults.



The Virginia Bar Association

Membership Application

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Web: www.vba.org
E-Mail: thevba@vba.org

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

Name _____
Title First Middle Last Suffix

First/Call Name for Meeting Badge _____ E-Mail Address _____

Firm/Organization Name _____

Business Address _____ Home Address _____

City _____ State _____ Zip _____ City _____ State _____ Zip _____

Business Phone () _____ Fax No. () _____ Home Phone () _____

Date of Birth _____ Gender _____ Law School _____ Year Graduated _____

Original Virginia License Date _____ Other State(s) & Date(s) Licensed _____

VBA MEMBERSHIP DUES (Check appropriate category)

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

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

A. TOTAL MEMBERSHIP DUES \$ _____

VBA SECTION DUES (Elective)

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

B. TOTAL SECTION DUES \$ _____

VBA FOUNDATION PATRON CONTRIBUTIONS (Elective)

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

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

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

Applicant's Signature _____
 Date _____

C. TOTAL PATRON CONTRIBUTIONS \$ _____

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

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