The Virginia Bar Association
YOUNG LAWYERS DIVISION

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Opening Statement™

THE OFFICIAL PUBLICATION OF THE VBA YOUNG LAWYERS DIVISION

INSIDE THIS ISSUE

SPRING IS HERE

Warm up with the YLD

Although the Virginia winter was reluctant to let go this year, spring has undoubtedly arrived. The warmer weather has brought with it new opportunities for involvement with the YLD outlined in this Spring 2018 issue of the *Opening Statement*.

Looming large on the horizon is the Young Lawyers Division Spring Meeting on April 27–28 at the Sanderling Resort in Duck, North Carolina. All young members of the YLD—officially those 37 and younger, as well as any new lawyer in practice for three years or less—are welcome to attend. Details about the event, including the three CLE programs (including an hour of ethics), are available on the VBA website. There's still time to sign up to attend this family-friendly weekend in the Outer Banks!

In this issue, we welcome YLD Chair Andrew Stockment and feature his inaugural column in that capacity on page 2. Andrew is no stranger to the *Opening Statement*—he was this newsletter's founding Editor-in-Chief and has penned numerous insightful contributions since its inception in Fall 2012. Andrew received the gavel from Immediate Past Chair Jeremy S. Williams at the VBA Annual Meeting held in Williamsburg last January. We feature a spread of photographic highlights from the Annual Meeting on pages 8–9 so you can relive the good times—or see what you missed and start planning to attend next year.

Our selection of in-depth articles continues this month with Joseph A. Figueroa's analysis of a recent opinion on motions craving oyer in "A Craving for Oyer: Opinion Highlights Need for Change in Motions Practice" on page 4. We then turn to changes in the rules for discovery sanctions in Daniel R. Sullivan's "Changes Come to Virginia's Discovery Rules" on page 10. Finally, Frances L. Caruso discusses the sobering topic of what lawyers should do when technology advances beyond governing regulations in "Protecting Against 'We Don't Know': Counseling and Protecting Clients When Technology Outpaces Law" on page 6.

Spring is a time of new beginnings, so if the blooming flowers inspire you to likewise turn over a new leaf in your professional involvement, the YLD is here with opportunities for you. We're always looking for attorneys interested in participating the YLD's signature activities like the Legal Food Frenzy, Model Judiciary Program, and elementary school mentorship initiative. Visit the YLD website for more information on becoming involved.

Thank you for reading. We trust you will enjoy this issue of the *Opening Statement*!

Daniel D. Mauler
Editor-in-Chief

Lena L. Busscher
Development Editor

Kelsey S. Miller
Development Editor

Graham K. Bryant
Development Editor

YLD Spring Meeting

All new and young lawyers are invited to attend the YLD Spring Meeting. The Spring Meeting is a family-friendly event and a great opportunity to see old friends and make new ones. Opportunities will abound for socializing and networking with young lawyers from throughout the Commonwealth. Three hours of CLE programming are anticipated, including one hour of ethics credit. For more information and registration details, visit: **vba.org/18YLDSpring**.

All young lawyers, whether previously involved with the YLD or not, are invited to attend YLD programs and meeting. We are delighted to see new faces at every event, and the YLD is designed to welcome newcomers with professional comraderie. If you are interested in becoming involved with the YLD but unsure of your first step, come to the Spring Meeting.

Key Details:

Dates: Friday, April 27 - Saturday, April 28

Location: Duck, North Carolina

Accommodations: The Sanderling Resort (855-412-7866 or www.sanderling-resort.com), 1461 Duck Road, Duck, NC 27949

CLE: Programs will cover topics in ethics, constitutional law and legal history, and family law.

Meals: Four meals and a social included in lawyer registration

Family-Friendly Event: Spouses, significant others, and children are all welcome!

Contact: For questions or registration concerns, contact Kylie Hinson at 804-644-0041 ext. 124 or khinson@vba.org.

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MESSAGE FROM THE CHAIR

Sustaining Our Success

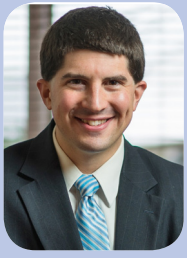
By Andrew B. Stockment

You're up! … Well that was fast. Leadership positions sometimes have a way of sneaking up on you. It's not as though I didn't know my term as YLD Chair was coming. I spent a year as YLD Secretary/Treasurer and then a year as YLD Chair-Elect watching my predecessors lead the YLD. Even so, when it's your turn to take the helm, sometimes you discover that there are a multitude of decisions to make and a myriad of details of which you were previously unaware. You may have had a similar experience in the YLD or another organization.

Fortunately, Steven Gould (2016 YLD Chair) and Jeremy Williams (2017 YLD Chair) did an excellent job leading the first two phases of a multi-year restructuring and improvement process to enhance the ability of the YLD to advance the VBA's mission. Through their tireless efforts, the YLD now has a leadership and organizational structure in place to provide stability and long-term success, and they have made my job as YLD Chair (and the job of my successors) easier.

This year, we will continue the work that Steven and Jeremy began and will focus on improving the YLD's efficiency and making each leadership transition within the organization easier so that every time a young lawyer steps into a new role he or she will be prepared for success. Among other things, we will begin the process of developing best practices for each of our committees, projects, and events, and we will focus on improving the collection and sharing of information. We will be asking each committee and project chair to begin compiling a handbook with information that can be passed along to the next chair and future young lawyers who serve in that role. Each committee and project chair should ask what she wished she had known when she started in the role and document that information for future chairs. For example, each chair's handbook could include information such as: (1) a timeline for when decisions need to be made, events need to be scheduled, and announcements need to be sent, (2) a list of past and potential event sponsors and their contact information, (3) details about where events have been held, the number of people who attended, and event costs, (4) information about what has worked well and what hasn't, (5) ideas for new things to try, and (6) any other information that would be helpful.

It is an honor and a privilege to serve as YLD Chair for 2018. If there is anything I have learned during my years in the YLD, it is that the success of our organization is a team effort—and together we can do great things in service to the bar and in service to the public. The YLD is always recruiting and has an abundance of opportunities for young lawyers to join the team. If you are a young lawyer (or know a young lawyer) who wants to become more engaged in the legal profession, reach out to me or anyone on the YLD Executive Board and we'll find an opportunity that is a good fit for you. ■



Andrew B. Stockment
Shareholder, Lenhart Pettit (Charlottesville)
YLD Chair, 2018-19

Bio: Andrew focuses his practice on intellectual property, technology, and business law, and he leads Lenhart Pettit's cybersecurity and data privacy practice. He joined the VBA as a law student and served in various positions over the years, including founding Editor-in-Chief of *Opening Statement*, Co-Chair of the ABA Awards of Achievement Committee, and YLD Representative to the Law Practice Management Division. Andrew received the YLD's Emerson G. Spies Award for 2012, and he currently serves as a member of the VBA Intellectual Property and Information Technology Law Section Council. He is a graduate of the University of Virginia School of Law. Andrew, his wife Martha, and their daughter live in Crozet and are active members of Trinity Presbyterian Church. They enjoy reading, hiking, and watching U.Va. Men's Basketball.

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The Secret to Being a "Happy" Lawyer

By Christopher J. Tyson

Most of us are not from Washington, D.C., but we all came to D.C. to practice law in the nation's capital. Wherever we are from, we are accustomed to winning, and we like how winning feels. We did not, and do not, accept participation ribbons or trophies, and, as far as we are concerned, there is no second place. We are ultra-competitors, whether in the classroom, on the athletic field, or now, in the courtroom. We work hard, we play hard, and would not have it any other way.

Even with much professional and personal success—and many wins under our belts—I often meet lawyers who still are not completely "happy." I am writing this article to challenge other lawyers to use their legal skills in a way that I believe will bring lasting happiness, fulfill our need to win, *and* help others in the process.

As a fellow ultra-competitor, I would imagine that when you get a favorable verdict or ruling in one of your cases, you feel great. But no matter how big the win, I assume that you still feel what I feel— that it is not enough. I expect that you have tried to fill that gap with more challenging cases, more wins and more success. You took exciting vacations, tried great restaurants, and bought nice clothes and a cool car. Why?

What I realized is that no matter how much success I achieved, I was still trying to make myself "happy." But over the past few years, I have recognized that being happy is actually very simple. Perform a simple and selfless act, and you will begin to understand. I know this sounds corny, and I know attorneys, especially those who work in this town, will be inherently skeptical.

So, I first challenge each and every one of you to the following simple test. The next time you go to lunch or dinner at a fancy steakhouse in D.C., for business or personal reasons, box up the leftovers. **On your way back from the restaurant, take the leftovers to one of the people you walk by every day on the street, look them in the eyes and tell them that you hope they enjoy it as you did.** As good as the meal was, as great as the meeting went, and as fantastic as it felt to celebrate, you will remember how that simple act made you feel.

And that is just the tip of the iceberg. The real challenge is this: **I challenge each of you to apply your talent, intellect, ultra-competitive nature and law license to help another person, without reciprocation.** For example, want to thank a veteran for their service? Don't say it, **do it** by taking a shift on a Friday at the legal clinic at the brand-new Transition and Care Management Center of the Veterans Affairs ("VA") Hospital in Washington, D.C., and/or by representing one of these veterans in court or before the VA.[1] There are also opportunities to help D.C.-area, low-income tenants at the Landlord Tenant Resource Center, where one may represent one of the tenants facing eviction in court.[2] While this representation may be out of your comfort zone, when has that ever stopped you before? Besides, training is readily available. Even though this representation may not garner front-page coverage of the *Washington Post*, or in *Law360*, like a well-drafted *amicus* brief or a big appellate victory, the gratitude you receive may truly make you a "happy" lawyer.

Why? Because true happiness is rooted in selfless acts performed simply for the good of another person. Unlike everything else, these acts are what endure and remain. You may argue that your other wins endure, that they make law, and law is what remains. You also may argue that even if you help someone one time, they will likely be hungry again in six hours or they may be on the street again with a different landlord. But you would be missing the point. What perseveres is not the win in the case or the leftover food that you

Continued on page 12

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Bio: Christopher J. Tyson practices in the area of intellectual property law with a focus on patent prosecution and litigation. He has experience with complex intellectual property litigation at every stage in federal courts across the country. A registered patent attorney focusing in the mechanical and electrical arts, Tyson assists clients with acquiring U.S. and foreign patent rights in diverse technologies and regularly practices before the Patent Trial and Appeals Board of the U.S. Patent and Trademark Office. Tyson also has experience representing U.S. military veteran clients before the Court of Appeals of Veterans Claims and serves as one of two chairs of the firm's military discharge upgrade practice groups. Prior to his legal career, Tyson served for seven years as an officer in the U.S. Navy, where he managed the operation and maintenance of nuclear power plants in a Nimitz-class aircraft carrier and was qualified as a nuclear engineering officer.

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A Craving for Oyer: Opinion Highlights Need for Change in Motions Practice

By Joseph A. Figueroa

What types of documents can a defendant seek to incorporate into a complaint through a motion craving *oyer*? A recent letter opinion from Judge David Oblon of the Fairfax Circuit Court has once again raised a hotly contested debate about a curiously named tool of Virginia Civil Procedure.

In *Logan Antigone et al. v. Jay C. Taustin*,[1] the plaintiff filed suit challenging the ownership of multiple limited liability companies. The defendant[2] filed a motion craving *oyer* asking the Court to incorporate into the complaint certain corporate documents, promissory notes, and settlement documents.

Judge Oblon held that *oyer* cannot be granted to incorporate such documents. Relying largely on the old common-law concept of *oyer*, the Court held that such motions can only be granted to incorporate specific categories of documents. Defendant's requested documents fell outside of these categories, and the motion was denied.

Under the common law cited by the Court, *oyer* could only be granted to incorporate "specialties," "letters of probate and administration," and deeds whose operation is directly relied upon in a complaint.[3] As pointed out by Judge Oblon, the doctrine has been tweaked slightly to address whether sealed or unsealed instruments within these categories are subject to *oyer*.[4] And interestingly, Judge Oblon found that if the parties agree to incorporate a document through *oyer*, such a motion can be granted as to other categories of documents.[5]

The Court ultimately held, however, that "the Supreme Court has not explicitly expanded the Oyer Doctrine beyond deeds or letters of probate and administration." Judge Oblon saw the matter as a simple application of valid Supreme Court precedent. So does this ruling mean that the scope of *oyer* motions is a straightforward and resolved analysis?

Not so fast. Other opinions suggest that the law of *oyer* is open to multiple interpretations. And while Judge Oblon followed precedent that has not been explicitly overruled, strong policy considerations suggest that the old common-law *oyer* doctrine must be abolished, one way or another, and once and for all.

The first complicating factor is *Culpeper National Bank v. Morris*.[6] This case involved an agreement not to challenge a will. A prior lawsuit had contested the will in dispute. After the second-suit plaintiffs only attached part of the first suit's record in their complaint, the second-suit defendants craved *oyer* seeking incorporation of the entire record from the previous matter.

The trial court granted *oyer* to incorporate the entire record from the first lawsuit, and the Supreme Court affirmed. In doing so, the Supreme Court included broad commentary on the propriety of *oyer* motions:

> No intelligent construction of any writing or record can be made unless all of the essential parts of such paper or record are produced. A litigant has no right to put blinkers on the court and attempt to restrict its vision to only such parts of the record as the litigant thinks tend to support his view. When a court is asked to make a ruling upon any paper or record, it is its duty to require the pleader to produce all material parts.[7]

Two comments are worth making. First, the repeated reference to "any writing" and "any paper" seemingly conflicts with the common-law doctrine, which limits *oyer* to probate documents and deeds. Second, in this language, the Supreme Court identifies the central policy reasoning behind *oyer* motions: to prevent parties from presenting at the pleading stage only those facts that support its case, thereby thwarting a court's full review of the complaint's sufficiency on demurrer.

Judge Oblon addressed *Culpeper*, noting that the case was a matter involving "probate," and thus fit into one of the common-law categories of *oyer*.[8] In addition, the Court stated that "if the Court in Culpeper intended to broaden the permissible categories of oyer, it certainly would have said so as it dramatically expanded the scope of a Common Law doctrine."[9]

Fair enough. But what about *Ward's Equipment v. New Holland North America, Inc.*?[10] In that case, the trial court granted *oyer* incorporating a "dealer agreement" between a farm equipment manufacturer and dealer. The Supreme Court, seemingly approving of the use of *oyer* in a context outside of the common law categories, stated that when *oyer* is granted, "the court in ruling on [a] demurrer may properly consider the facts alleged as amplified by any written agreement added to the record on the motion."[11]

Once again, the policy behind *oyer* motions plays a supporting role in *Ward's Equipment*. An implication from the opinion is that a successful *oyer* motion can help the Court

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Bio: Joe maintains an active civil litigation practice in a wide array of practice areas, with a particular focus on real estate and commercial litigation. He also counsels clients on matters of Virginia election law and recounts. In addition to the VBA, Joe is also active in the Northern Virginia legal community, serving on the board of directors of the Young Lawyers Section of the Fairfax Bar Association. Joe previously served as a law clerk to the Honorable Daniel E. Ortiz and Charles J. Maxfield of the Fairfax Circuit Court.

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separate the meritorious from the frivolous when a key document is before the Court. It gives the Court a fuller picture of the facts on demurrer. And adding documents through *oyer* may not only serve to "amplify" the facts alleged; indeed, "a court considering a demurrer may ***ignore*** a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings."[12]

Judge Oblon has an answer for *Ward's Equipment* as well, pointing out that the *oyer* motion in that case was "unopposed."[13] The case thus fell into Judge Oblon's category of "*oyer* by agreement." In Judge Oblon's view, agreed-upon *oyer* motions are the only circumstances where documents that are not deeds or probate documents can be incorporated into a complaint.

This article is not a criticism of Judge Oblon's decision. What this article proposes, however, is a proper and final abrogation of the old common-law doctrine of *oyer* through statute or rule—a prospect that was agreeable to Judge Oblon.

Even accepting that *Culpeper* and *Ward's Equipment* did not reverse the common-law rule, there is an unmistakable policy articulated by the Court in these cases. Parties may not present the Court with only those portions of key documents that most support its case. Courts would be deciding demurrers with a hand over one eye. And with summary judgment disfavored in Virginia, a party could easily hide the weaknesses of its case from legal disposition all the way until trial or beyond. *Oyer* helps to open the court's eyes and end non-meritorious cases at an early stage.

Obviously, this policy is not limited to deeds and probate documents. It applies to any case which relies upon written documents. This is why many circuit courts in recent years have expanded the grant of *oyer* beyond the traditional common-law categories.[14]

This expansion should be established uniformly. And it should come through either a statute or Supreme Court rule. As is evident from the dearth of recent Supreme Court cases dealing with contested *oyer* motions, this issue is not likely to come up on appeal. Short of getting the consent of the other party and the court to lodge an interlocutory appeal under Virginia Code § 8.01-670.1 (consent which will likely never come from the party successfully defeating the motion), the parties must turn to discovery and trial where the document is produced. At that point, the failure to grant *oyer* and consider a demurrer with a fuller record is likely overtaken by events.

Such changes have been proposed before. As noted by Judge Oblon, a committee of the Boyd-Graves Conference recommended a change to the Supreme Court rules in 2010 to permit *oyer* beyond the traditional common-law categories.[15] This 2010 attempt was ultimately unsuccessful, yet Judge Oblon's opinion provides an opportunity for these reform efforts to begin anew.

In concluding his opinion, Judge Oblon stated that if the *oyer* doctrine is to be expanded, it can be done by the General Assembly through statute or by the Supreme Court by rule (or decision).[16] Judge Oblon is right—and the General Assembly or Supreme Court should accept that invitation. ■

Endnotes

1. Case No. CL-2017-16560, *available at* https://www.fairfaxcounty.gov/circuit/sites/circuit/files/assets/documents/pdf/opinions/cl-2017-16560-anti-gone-et-al-v-taustin.pdf
2. This Author's law firm represents the defendant in this case, although this Author is not participating in the representation.
3. *Grubbs v. National Life Maturity Ins. Co.*, 94 Va. 589, 591 (1897) (citing *Langhorne v. Richmond Ry. Co.*, 91 Va. 369 (1895).
4. Letter Op. at 2.
5. *Id.*
6. 168 Va. 379 (1937).
7. *Id.* at 382-83.
8. *Id.*
9. Letter Op. at 3.
10. 254 Va. 379 (1997).
11. *Id.* at 382.
12. *Id.* at 382-83 (emphasis added).
13. *See* Letter Op. at 4; *Ward's Equipment*, 254 Va. at 382.
14. *See* Letter Op. at 4-5 (citing other circuit court cases expanding oyer).
15. *See* Letter Op. at 4-5 (citing Boyd-Graves Conference memoranda).
16. Letter Op. at 5.

Counseling and Protecting Clients When Technology Outpaces Law

By Frances L. Caruso

It depends – the answer to any and every legal question. *It depends* on how the statute reads; *it depends* on what the case law says; *it depends* on the specific facts. It always depends. We, as lawyers, love the *it depends* answer because it gives us a chance to advocate for our client (and a chance to put to use that degree we paid an unmentionable amount of money to hang on our wall). The *it depends* answer, although not the yes or no answer that the client so often wants, allows us to consider, analyze, and strategize the best potential outcome for our client.

However, when dealing with evolving technologies, often the more truthful answer is *we don't know*. In any number of new technologies – bitcoin and blockchain[1], computing processes[2], or assisted reproductive technology[3] to name just a few – lawyers are left with *we don't know* because the law necessarily lags, creating a gap in guidance.[4] A common concern for practitioners and scholars alike is the unpredictability and risk associated with a new area of the law.[5] Yes, it can be exciting to explore and develop a new area, but when you have a client sitting at your conference table asking you how everything will work out, you long for the *it depends* answer, not the *we don't know*.

As young lawyers, we are uniquely situated to embrace and assist clients who are parties to and beneficiaries of the recent technology boom. We can bridge the technology-law gap. We understand the ever changing and evolving nature of technology and, therefore, we can partner with clients to safeguard their interests, even when the law is unclear. Because the potential ramifications of decisions are not always clear to clients, it is imperative that we advise and counsel clients on the necessity of ensuring that the intent, purpose, and basis for decisions and contracts are explicitly and thoroughly documented for every transaction, regardless of the technology employed. Parties who do not protect their interests may be faced with unexpected, and occasionally unreasonable, consequences when things go awry.

One area of technology where things can have dire, untenable consequences is assisted conception. Disastrous freezer malfunctions at fertility clinics[6] and celebrity battles over frozen embryos[7] attest to the unpredictable and high risk/reward potential of this quickly expanding field. Although assisted conception dates back to the late 1970s/early 1980s, increased technological innovations have resulted in unanswered, uncharted legal territory. Furthermore, even when there are applicable laws, they are often deficient. For example, Virginia law provides that a donor is not a parent of a child conceived through assisted conception unless the donor is the husband of the gestational mother.[8] However, disputes can arise if an unmarried donor did not intend to be a "donor," but intended to be a parent—this was the issue in *L.F. v. Breit*, 285 Va. 163 (2013).

In *Breit*, the biological, donor father was not married to the biological, gestational mother and the mother unilaterally terminated all contact between the child and the biological father after one year.[9] The mother argued that "the assisted conception statute prevents all unmarried sperm donors from asserting parental rights with respect to children conceived by assisted conception."[10] In finding that the biological father was also the child's legal father, the Court focused on the "Acknowledgment of Paternity" jointly executed by both biological parents the day after the child's birth.[11] The Court held that the assisted conception statute references Virginia Code section 20-49.1, which provides how a parent and child relationship is determined, and that one such way is through a voluntary written statement by the biological parents.[12] However, the Court also held that "a sperm donor aided only by the results of the genetic testing may not establish parentage."[13] Without a document unequivocally stating the intent and positions of the parties regarding parentage, the biological father in *Breit* would have been just a donor with no parental rights.

In *Breit*, the biological father's original desires were protected through a written agreement; a similar result was not afforded the mother in *Bruce v. Boardwine*, 64 Va. App. 623 (2015). In *Boardwine*, the mother wanted to conceive a child without incurring any future involvement of the biological father.[14] Reaching out to a longtime friend who reluctantly agreed to be the sperm donor, the mother was subsequently inseminated by an "ordinary turkey baster."[15] A child was born and, although things started off harmoniously, the parties ultimately disagreed as to the biological father's level of involvement with the child.[16] The court held that the biological father was the legal father, not a donor, because the pregnancy did not fall under the assisted conception

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Bio: Frances is both a litigator and a counselor. She maintains an active civil litigation practice, with a particular focus on employment law. She is capable of advising and counseling on a myriad of assisted reproductive technology law issues, including surrogacy, gamete donation and preservation, and adoption. Prior to joining ThompsonMcMullan, Frances was a law clerk for Henrico County Circuit Court. She is an alumnus of Vanderbilt University and the University of Richmond School of Law. She lives in Richmond with her husband and her very loud beagle.

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statute.[17] To proceed under the assisted conception statute, the pregnancy has to be the result of an "intervening medical technology"[18] – the court found that an "ordinary turkey baster" did not meet this requirement.[19] Notably, both parties acknowledged that they had discussed a written contract, but none was ever signed.[20] If such an agreement had existed, the parties could have detailed their intent to proceed under the assisted conception statute, ultimately protecting the mother's desire to parent solo.

In other cases, unintended and absurd consequences have resulted from the lack of consistent, clear legal guidelines and detailed documentation of intent. In Kansas, a donor who signed documents waiving his parental rights was required to pay child support because a licensed physician was not involved in the artificial insemination process as required under state law.[21] In a Pennsylvania surrogacy case, the surrogate donated her egg and the intended father his sperm, but the surrogate refused to give the baby to the intended parents and the biological father was required to pay child support.[22] These results arguably could have been avoided if the parties had a clear, exhaustive agreement detailing all parties' understanding and interests as well as all potential outcomes. Courts look to the intent of the parties at the time of contracting in these cases; with an agreement outlining said intent, there can be little question as to the parties' understanding.

> 'As young lawyers, we are uniquely situated to embrace and assist clients who are parties to and beneficiaries of the recent technology boom.'

The future bounds of technology require human, and thus legal, apperception. We must protect our clients' interests by documenting and clearly articulating the intent and understanding of all those involved. Not only does this result in our clients recognizing and detailing all aspects of their ventures, but it also protects our clients if and when a disagreement arises. While this article has focused on the issues surrounding assisted reproductive technology, the same issues arise in matters involving such varied technologies as block chain development, private space exploration, or autonomous vehicles. Through thorough documentation and thoughtful client counseling and advising that takes into account the multiple situations which may occur, our answer can change from *we don't know* to *we know how to help protect you*. ■

Endnotes

1. *See* Reade Ryan & Mayme Donohue, *Securities on Blockchain*, 73 Bus. Law 85 (Winter 2017–2018).
2. *See* Nancy Blodgett, *Computer Law Quicksand: Pioneers in Burgeoning Field Have Little to Guide Them*, A.B.A. J. 32 (Nov. 1984).
3. *See* Deborah Zalesne, *The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of ART*, 51 U. Rich. L. Rev. 419 (2017)
4. *See generally* Lyria B. Moses, *Recurring Dilemmas: The Law's Race to Keep Up with Technological Change*, 2007 U. Ill. J.L. Tech. & Pol'y 239 (2007); Lyria B. Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 Minn. J.L. Sci. & Tech. 505 (2005).
5. *See Recurring Dilemmas*, *supra* note 4.
6. *See* Ariana E. Cha, *FAQ: Are my Frozen Embryos safe? Everything you Need to Know About the Freezer Malfunctions*, Wash. Post, Mar. 17, 2018, https://www.washingtonpost.com/news/to-your-health/wp/2018/03/14/faq-are-my-frozen-embryos-safe-everything-you-need-to-know-given-two-fertility-clinics-recent-problems/?utm_term=.dc080010d83d.
7. *See, e.g.*, Hilary Hanson, Judge Allows Sofia Vergara's Ex to Sue For Custody Of Frozen Embryos, HuffPost (May 24, 2015, 3:32 PM), https://www.huffingtonpost.com/2015/05/24/sofia-vergara-embryo-lawsuit-nick-loeb-custody_n_7432114.html (last updated Dec. 6, 2017).
8. Va. Code § 20-158(A)(3).
9. *L.F. v. Breit*, 285 Va. 163, 171-72 (2013).
10. *Id.* at 176.
11. *Id.* at 171, 186.
12. *Id.* at 176-80.
13. *Id.* at 180.
14. *Bruce v. Boardwine*, 64 Va. App. 623, 625 (2015).
15. *Id.* at 625-26.
16. *Id.* at 626-27.
17. *Id.* at 628-30.
18. *Id.* at 630-31.
19. *Id.*
20. *Id.* at 625.
21. Chandrika Narayan, *Kansas Court Says Sperm Donor Must Pay Child Support*, CNN (Jan. 24, 2014, 2:33 AM), http://www.cnn.com/2014/01/23/justice/kansas-sperm-donation/.
22. Caitlin Keating, *Heartbroken Parents Left Paying Child Support After Surrogate Keeps Their Baby Girl*, People (Mar. 7, 2016, 1:25 PM), http://www.people.com/article/heartbroken-parents-surrogate-keeps-child.

Opportunities to Get Involved

Are you looking for an opportunity to get involved with the VBA Young Lawyers Division? You can read about the YLD's multiple projects and committees at: **vba.org/yldactivities**. Just reach out to the project or committee chair to learn more. In addition, the YLD always welcomes ideas for new projects. Just reach out to anyone on the YLD Executive Board to share your proposal: **vba.org/yld**.

VBA WILLIAMSBURG MEETING A SUCCESS

Stockment Inducted as 2018 Chair

Courtesy: VBA Staff

(L-R): Charles Molster, Judge Lawrence Leonard, Judge Daniel Ortiz, and Daniel Mauler present on the use of technology in Virginia state and federal trials.

Courtesy: VBA Staff

Immediate Past YLD Chair Jeremy Williams congratulates Andrew Stockment upon his inauguration as YLD Chair for 2018-2019.

Courtesy: VBA Staff

Jennifer Ligon, Jamie Martin, and Sam Haisley listen to a presentation on the Supreme Court of Virginia's Wellness Task Force.

Courtesy: VBA Staff

Informative CLE presentations were a staple at the Williamsburg Meeting.

Courtesy: VBA Staff

(L-R): Frank Cragle and Jeremy Williams enjoy a laugh with a law student attending his first VBA meeting.

Courtesy: VBA Staff

Ameet Habib (center-right) listens to a CLE presentation.

Courtesy: VBA Staff

Lauren Waller and Monica McCarroll present a CLE on the Technology Disruption in the Practice of Law.

Courtesy: VBA Staff

(L-R): Sean Liverman and Andrew Stockment present a CLE on Practical Cybersecurity in a World of Data Breaches.

Courtesy: VBA Staff

William & Mary 1L Philip Delano talks shop with Deputy Commissioner Debbie Blevins of the Virginia Workers' Compensation Commission.

Courtesy: Dan Mauler

VBA Life Member Gant Redmon (center), accompanied by his wife, Mrs. Redmon, receives the President's Award from President David Mercer (right) during the Annual Banquet.

Courtesy: VBA Staff

YLD member Lauren Coleman of Gentry Locke talks with Justice S. Bernard Goodwyn and others at the Pints and Pairings reception.

Courtesy: VBA Staff

(L-R): Kristen Jurjevich and Larry Liff chat during a networking break.

Changes Come to Virginia's Discovery Rules

By Daniel R. Sullivan

An opponent who repeatedly fails to respond to discovery can clog up the court system and aggravate even the coolest-headed lawyer among us. Rule 4:12(d) of the Rules of the Supreme Court of Virginia provides for sanctions against parties who doggedly fail to respond to discovery requests. On January 25, 2018, the Supreme Court of Virginia adopted an amendment to Rule 4:12(d), effective April 1, 2018, designed to make discovery flow faster and streamline the process of obtaining sanctions against a party who abuses the discovery process. This article examines what in Rule 4:12(d) has changed, and forecasts what the amended rule will look like in practice.

The Old Rule 4:12(d)

Virginia circuit courts may choose from a bundle of heavy sticks to punish parties who stonewall discovery (for the purposes of this article, we'll call these parties and their attorneys "non-responders.") The Supreme Court evidently sees the strengthening of Rule 4:12(d) as a way to get to the point where the non-responders are worried enough about punishment to do something about it.

"Old" Rule 4:12(d) addressed situations in which a party failed to respond to discovery.[1] In practice, the moving party must have first sought an order compelling the non-responding party to act—after certifying that the movant had (a) conferred with the non-responder in good faith, or (b) attempted to do so. This necessitated a hearing (and was often the point at which a less dedicated non-responder would decide he or she needed to act). Once that order was obtained, the movant could then move for sanctions if the non-responder still refused to act.

Having received the sanctions motion, the court then would hold another hearing. Assuming the non-responder still failed to respond, the court had discretion to choose from a variety of punishments to prod the non-responder into action (they generally got more serious the further we went).[2] The court could issue an order (A) holding that the matters regarding which the previous order was made are established as facts (e.g., that a request for admission is deemed admitted); (B) holding that the non-responder may not oppose designated claims or defenses (or may not introduce designated matters into evidence); or (C) striking out pleadings or parts thereof, staying the case until the order is obeyed, dismissing the action, or rendering a default judgment against the non-responder.[3] Of course, the court could also hit the non-responder where it hurts—her wallet. The court would issue monetary sanctions in place of or along with any of the sanctions in (A) – (C).[4]

The structure of Old Rule 4:12(d) was such that a non-responder could kick the proverbial can down the road, have an order issued against him, generally waste everyone's time until the last minute, and then finally respond to the discovery—sometimes showing up at the sanctions hearing with the requested discovery. Then, when the next request for discovery came along, our non-responder could reset the clock and start wasting everyone's time again.

The New Rule 4:12

The "New" Rule 4:12(d) cuts to the chase. Instead of first requiring the movant to get an order, wait a month (or more) and then move for sanctions, the court can issue the same sanctions outlined in (A) – (C) above at the first hearing.

Here is the relevant text from New Rule 4:12(d):

> . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may—without prior entry of a Rule 4:12(b) order to compel regarding this failure—impose any of the sanctions listed in paragraphs (A), (B), and (C) of subdivision (b)(2) of this Rule.[5]

Essentially, the Supreme Court has removed the requirement that the movant first obtain an order compelling discovery before moving for sanctions.

PRACTICAL CONSIDERATIONS

We don't yet know how judges across the Commonwealth will apply the New Rule 4:12(d). However, we can surmise a few things.

1. The changes specifically do not address objection-only responses to discovery.

The amended Rule allows the presiding judge to impose sanctions without a previous order only in situations where the non-responder fails to do anything—fails to show up at her deposition, fails to serve answers or objections to interrogatories, or fails to respond to a request for production or inspection. What this means is that a party may still file objections to a request for discovery (and not do anything else) without fear of sanctions. In that situation, you may still have to file a motion to compel a response other than objections—and get a court order granting it—before Rule 4:12(d)'s teeth come into effect.

2. This doesn't mean you should file for sanctions any more often than you normally do (which should be rarely).

Just because courts will now have the (express) power to issue sanctions against a non-responder at the initial motion to compel hearing does not mean that you

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should ask for them. The court is unlikely to appreciate your zeal if you file a motion for sanctions because your opponent's answers to interrogatories were due five days ago and they failed to answer your phone call asking them why.

As in any situation involving potential sanctions, you should think long and hard—and talk it over with an attorney who (a) is not involved directly in your case and (b) you know to be wiser than you before filing any motion for sanctions.

3. The court "shall" grant monetary sanctions.

While this is not a change to Rule 4:12(d), it still bears noting. A party who obtains an order under this Rule should be aware that there is little discretion in the Rule's text. A judge granting an order under the New Rule 4:12(d):

> shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.[6]

In other words, unless the court finds that your non-responder was "substantially justified" in failing to respond or that an award of expenses would be otherwise unjust, the court "shall" force the non-responder to pay your reasonable attorney's fees and expenses caused by the failure to respond. In fact, the court could even force the non-responder's attorney to foot the bill, if appropriate.

It remains to be seen how Virginia circuit court judges will apply New Rule 4:12(d). At the least, it should result in more non-responders answering discovery before the initial hearing on the movant's motion to compel—which is likely what the Supreme Court wants to see. ■

Endnotes

1. Va. Sup. Ct. R. 4:12(d): "If a party or an officer, director, or managing agent of a party or a person designated under Rule 4:5(b) (6) or 4:6(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 4:8, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 4:9 . . ."
2. *Woodbury v. Courtney*, 239 Va. 651, 654, 391 S.E.2d 293, 295 (1990) (explaining that "[r]ule 4:12 gives the trial court broad discretion in determining what sanctions, if any, will be imposed upon a litigant who fails to respond timely to discovery.")
3. Va. Sup. Ct. R. 4:12(b).
4. *Id*. at (d) ("In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure . . .")
5. Am. Va. Sup. Ct. R. 4:12(d), available at http://www.courts.state.va.us/courts/scv/amendments/2018_0125_rule_4_12.pdf.
6. *Id*. (emphasis added).

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

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

Articles. Substantive article topics may include, for example:

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

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

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

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

Stockment Inducted as 2018 Chair

Courtesy: VBA Staff

(L-R): Dan Mauler, Jeremy Williams, Frank Cragle, and Jennifer Ligon catch up at during the VBA Annual Meeting.

Courtesy: VBA Staff

YLD member Tyler Rosá of Pender & Coward chats with William & Mary law student Alec Young and others during a networking reception.

Courtesy: VBA Staff

Judge Everett A. Martin, Jr. (left) chats with YLD members during the annual "Pints and Pairings YLD/ Judiciary" Reception.

Support VBA Foundation

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

…The Secret to Being a "Happy" Lawyer, continued from page 3

gave—it is the ACT. It is the invaluable gift of your time, energy, intellect and talent, for nothing in return. That gift is what endures and remains, in the recipient of the gift and in you.

We are part of a community of more than 80,000 lawyers in Washington, D.C.[3] In contrast, there are more than 8,000 homeless people in the area, including more than 350 veterans.[4] Ninety-five percent of tenants in Washington, D.C., do not have a lawyer while 95 percent of landlords do.[5] If you and I, along with 10 percent of our colleagues, take the challenge to be a "happy" lawyer, these numbers will plummet.

But what if 80,000 lawyers challenged each other to be the "happiest" lawyer in Washington, D.C.? Well, why don't we find out? I'll see you at the start line and let's see what happens. Remember—there is no such thing as second place. ■

Endnotes

1.For more information, or if interested in volunteering, please contact me at 202.776.7851 or cjtyson@duanemorris.com or Samantha Stiltner with The Veterans Consortium at 202.733.3317 or samantha.stiltner@vetspro-bono.org.

2. For more information, or if interested in volunteering, please contact the D.C. Bar Pro Bono Center at 202.737.4700 ext. 3293.

3. *See* "Washington DC Legal Market," Georgetown University, available at: https://www.law.georgetown.edu/careers/career-planning/Washington-DC-Legal-Market.cfm.

4. *See* "Homeless Population in D.C. up 14%, One of Biggest Spikes in U.S.," November 21, 2016, available at: http://www.washingtontimes.com/news/2016/nov/21/homeless-in-dc-up-14-one-of-biggest-spikes-in-us/.

5. *See* Sandman, J., President, Legal Services Corporation, https://www.dcbar.org/about-the-bar/news/40-at-50-breakfast-2017.cfm.