YLD FALL MEETING

Join us in the Star City

We are happy to present this Fall 2019 issue of the Opening Statement.

The annual Young Lawyers Division Fall Meeting will take place before you know it. Held this year at the Hotel Roanoke and Conference Center on October 18 to 20, this last official YLD meeting of 2019 promises opportunities for young lawyers from across the Commonwealth to network, get CLE credit, and partake of much that Virginia’s Star City has to offer. If you’ve never been to a YLD event, the Fall Meeting is a great way to get involved. We are always happy to welcome new faces into this dynamic organization.

This issue is bursting at the seams with substantive content useful to your practice as well as highlights from recent VBA and YLD activities. Foremost among the latter is a feature highlighting the YLD’s remarkable success at this year’s American Bar Association Annual Meeting. The YLD won in its division in all four categories for which it submitted an application: single project service to the bar, single project service to the public, comprehensive, and newsletter. We also feature a photo spread from the VBA’s 129th Summer Meeting at The Omni Homestead Resort.

Turning to practical content, Christopher Holinger shares valuable insight from his experience as an appellate law clerk in Three Keys to Success at the Virginia Court of Appeals. This article emphasizes frequently overlooked, but absolutely crucial, procedural aspects of appellate practice that can make your case sink or swim. In Fighting Your Implicit Bias and Channeling Understanding, Leah Stiegler addresses a topic no legal hornbook covers: how do you proactively prevent unconscious stereotyping? She gives our readers three principles they can use to recognize and fight this tendency. Finally, the Opening Statement’s own Ithi Joshi uses contemporary examples to provide an overview of how securities fraud is evolving in the twenty-first century.

If you would like to see your work featured here, you can! All members of the YLD are encouraged to submit articles for publication consideration in the Opening Statement. This invitation includes law students, all of whom are eligible for a free membership in the Virginia Bar Association while they are in law school. We encourage all YLD members to send any questions or content submissions to our team at: editors@openingstatement.org.

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

YLD Fall Meeting

The Young Lawyers Division will hold its annual Fall Meeting at the Hotel Roanoke and Conference Center in Roanoke, Virginia. The Fall Meeting will feature an opening reception and dinner open to all attendees and guests on Friday evening. The business session will take place on Saturday morning following a breakfast open to all attendees and guests. Three MCLE credits are anticipated from a variety of programming on topics including regulation and enforcement of illegal alcohol manufacturing, preventing workplace violence, and an active shooter training. Saturday afternoon is rife with social activities, including a jaunt to Mill Mountain and fellowship at Big Lick Brewing before dinner at Corned Beef & Company. The meeting will conclude with a farewell breakfast on Sunday morning.

Key Details

Registration: Online or contact Khadijah Vasser, kvasser@vba.org.

Dates: October 18-20, 2019

Location: Hotel Roanoke and Conference Center, 110 Shenandoah Avenue, Roanoke, VA 24016

Accommodations: Hotel Roanoke. Reserve online or call 540-985-5900. Reference the VBA Young Lawyers Fall Meeting to receive the group rate.

CLE: 3.0 MCLE credits anticipated

Meals: Five meals, a reception, and Saturday afternoon social activities included in lawyer registration

Family-Friendly Event: Spouses, significant others, and children are welcome!
MESSAGE FROM THE CHAIR

YLD Summer Successes

By Jennifer L. Ligon

Happy Fall, everyone. The YLD had a busy—and successful—summer. In case you missed the news, the YLD again won in all categories for which we submitted an application for the American Bar Association Awards of Achievement (including taking top honors in the Newsletter category, which our coveted Opening Statement won for the fourth year in a row). See page 3 for more details on the YLD’s awards. Special thanks to Kristen Jurjevich and Ann Kossachev for their great work in assembling our application.

In other summer news, the VBA Board of Governors enthusiastically agreed to extend the length of time that a VBA member can remain in the YLD. Currently, all VBA members in good standing who are either under the age of 37 or who have been practicing in Virginia for fewer than three years (regardless of age) automatically are members of the YLD. The Board of Governors agreed to increase the age limit from 37 to 40 and to extend the length of service from three years to five years. The Board will formally vote to approve this change at its fall meeting in October. The change will be effective January 1, 2020. This means that if you are under the age of 40 or have been practicing in Virginia fewer than five years as of the date of the VBA’s Annual Meeting in January, you are a member of the YLD. Congratulations—and thank you, Board of Governors.

Turning to fall activities, on September 14, 2019, the Veterans Issues Task Force, led by Helen Chong, hosted a Vets Units Workshop in Virginia Beach titled “Helping Your Veteran with Mental Health Issues and Transitioning to Civilian Life.” Approximately 30 people attended the Workshop, many of whom expressed their appreciation for lawyers making legal matters more understandable for non-attorneys. Thanks to Helen for organizing the event.

On October 22, 2019, the University of Virginia Law School Council, chaired by Ashleigh Pivonka, will host a 2L/3L panel at UVA to discuss the summer associate search process in Virginia. On October 24, 2019, the UVA LSC will host a happy hour at Kardinal Hall with local young lawyers. If you are interested in attending either event, please contact Ashleigh or me.

Lastly, in November, the YLD will host the Regional IV Round of the National Moot Court Competition. The competition will be held November 15–16 in Richmond. Fellow YLD members and members of the VBA are strongly encouraged to volunteer as an appellate judge for the competition. Please contact Travis Gunn, chair of the National Moot Court Competition Committee, if you are interested in volunteering.

These activities reflect only a handful of the numerous projects sponsored by the YLD. We always are looking for more young attorneys to help with our projects and, ideally, take on a leadership position in the YLD. If you are interested in becoming involved (or more involved), please let me know.
The Young Lawyers Division of the Virginia Bar Association was recognized on a national level at the American Bar Association’s Annual Meeting in August for earning four Awards of Achievement among statewide bar groups, continuing its long-running list of successes.

Each year, the American Bar Association’s Young Lawyer’s Division holds an annual Awards of Achievement Program, which allows state and local young lawyer organizations across the country to submit their best projects for evaluation and recognition. The VBA YLD is currently in the State Division C of the ABA Young Lawyers Division. The Awards of Achievement Program is designed to encourage project development and provide national recognition of the time, effort, and skills expended by young lawyer organizations in implementing public service and bar service projects in their communities.

There are five categories of competition for submissions. Three of the categories are single project categories: Service to the Public; Service to the Bar; and Diversity (single projects must be new projects, not repeats). There is also a category for Newsletter, which highlights how the organization’s newsletter in achieving its overall goals and objectives, as well as a comprehensive category to demonstrate the organization’s broad range of programming. Each year, the VBYLD submits projects for evaluation and recognition in as many categories as possible.

This year, the VBYLD submitted projects for consideration in a total of 4 categories. The VBYLD made a remarkable showing at the 2019 American Bar Association’s Annual Meeting and WON in its division for ALL categories in which the VBYLD submitted an application:

**Single Project Service to the Bar:**
Virginia Bar Association Young Lawyers Division Spring Meeting CLEs

**Single Project Service to the Public:**
Wills for Heroes

**Newsletter:**
Opening Statement

**Comprehensive** (max of 5 projects can be submitted in this category):
- Law School Wellness Summit
- Virginia Hispanic Chamber Clinics
- Various Law School Council Events
- Model Judiciary Program
- Legal Food Frenzy

Many thanks to the hard work and effort from the various project and committee chairs, volunteers, and student members that coordinated, organized, and worked on the projects for which the VBYLD submitted applications for the ABA Awards of Achievement! The VBYLD could not achieve its successes without the participation, hard work, talent, and efforts of everyone involved.

The ABA Young Lawyers Division sends plaques to the winners of the ABA Awards of Achievement each year after announcing the winners. The plaques received over the years are proudly on display and can be seen at the VBA on Main.

---

**Kristen R. Jurjevich**
Shareholder, Pender & Coward, P.C.  
(Virginia Beach)

**Bio:** Kristen is a corporate and transactional attorney at Pender & Coward in Virginia Beach, focusing her practice in the areas of business law, residential and commercial real estate transactions, community association matters, and litigation in the state and federal courts in Virginia. Kristen is a member of the YLD Executive Board and has been actively involved in the VBA since January 2015, when she became the VBA YLD Chair of the Regent Law School Council. She also serves as Chair of the ABA Awards of Achievement Committee and has participated as a YLD member of the VBA Pro Bono Council.

**Contact Info:** krj@pendercoward.com or 757.490.6261
An Introduction to Securities Fraud

By Ithi H. Joshi

The Great Depression was an eye-opener for lawmakers in the United States. After the Stock Market Crash of 1929, Congress saw the dire need for securities regulation to avoid another financial downturn. Securities law was developed in the United States to achieve two primary goals: to protect investors through reasonable regulation of markets and to help entrepreneurs raise capital. In order to achieve these twin goals, Congress enacted the Securities Act of 1933 (the “33 Act”) and the Securities Exchange Act of 1934 (the “34 Act”). The Securities and Exchange Commission (“SEC”) was then founded as the federal regulator of the financial markets. The SEC strives to protect all investors through reasonable regulation of markets and to help entrepreneurs raise capital. In order to achieve these twin goals, Congress enacted the Securities Act of 1933 (the “33 Act”) and the Securities Exchange Act of 1934 (the “34 Act”). The Securities and Exchange Commission (“SEC”) was then founded in 1934 to help enforce both laws.

Brief Overview of Federal Securities Law

The SEC’s twin objectives—to protect investors and promote capital formation—can only be realized with full and fair disclosure. Full and fair disclosure of all material information ensures that all investors, including ordinary ones, will have access to the same basic level of material information when buying and selling securities. The failure to disclose material information on a timely basis creates a federal cause of action under the 34 Act.

The SEC strives to protect all investors and increase investor confidence in markets by making available all public information. Once companies disclose business practices, the market and investors can decide whether those practices are sound. Thus, efficient markets can only be made possible if companies make timely and proper disclosures.

Section 10(b) and Rule 10b-5 of the 34 Act define the elements of securities fraud: (1) material misrepresentation, (2) scienter, (3) reliance on the market, (4) causation, and (5) loss or harm.1

A material misrepresentation is a knowingly or recklessly made erroneous statement or omission. The false statement or omission must contain material information to be actionable. To measure whether a piece of public information is material, ask whether a reasonable investor would view such information to have significantly altered the total mix of publicly available information. If so, the information is material to investors. Examples of material information include earnings, movement in share price, merger or acquisition deals, joint ventures, tender offers, changes in control of management, and events like stock splits, defaults, or repurchases of shares.

Scienter is the defendant’s intent to deceive investors. Reliance is presumed for a securities fraud claim due to the fraud on the market theory. This theory assumes that the share price of any security reflects the total information available; if anything is withheld from the total mix of information, the market automatically becomes inefficient because it is no longer trading on all publicly available information. If a company injects material misstatements or omits data from the total mix of public information, share prices are distorted and markets become artificial. Like reliance, causation is also presumed because of the fraud on the market theory.

Loss and harm is measured by the amount of damages sustained by the plaintiff.

Musk’s Ill-Advised Tweets

Recent events illustrate how modern social media can implicate these decades-old principles. On August 7, 2018, Elon Musk tweeted to almost 27 million Twitter followers: “Am considering taking Tesla private at $420. Funding secured. Shareholders could either sell at 420 or hold shares and go private.” Musk, the CEO and then Chairman of Tesla Inc. (“Tesla”) did not realize at the time that a mere tweet would spark a federal investigation.

In a complaint filed in federal district court in the Southern District of New York, the SEC charged Musk with securities fraud for his false and misleading tweets about the potential to turn Tesla into a private company.2 The SEC’s complaint alleged that Musk violated antifraud provisions of Section 10(b) and Rule 10b-5 of the 34 Act by publishing a series of false and misleading statements.3

Although the SEC complaint ultimately settled, a reasonable court could have found that Musk’s August 7 statements were materially false and misleading because they risked misinforming investors into believing that Tesla already has the funds to go private. Musk had no real basis to provide specific deal terms from financiers because he knew that the attempt to take Tesla private was still uncertain. There is no evidence available to the public to suggest that Musk or the Tesla board had secured funding from a private financier. This is a material piece of information because a reasonable investor would believe that news of Tesla going private would change the total mix of available information on Tesla, and hence affect the current share price of Tesla stock.

A decision maker could likewise reasonably conclude that scienter was established because Musk knew or was reckless in not knowing that his statements were false and misleading. He did not discuss the information he tweeted.

Ithi H. Joshi

Bio: Ithi is an attorney in the Washington DC metropolitan area. Her practice area interests include investment management, corporate finance, and securities law. Ithi holds a JD from Temple University Beasley School of Law and a BA from the University of Virginia.

Contact Info: ithi.joshi@gmail.com
to almost 27 million Twitter followers beforehand or inform the stock exchange about his announcement. Musk also knew Tesla’s board had not voted on any proposal to take Tesla private because he had never submitted such a formal proposal to the board.

Finally, it appears that a court could have found that the reliance element was established because the tweets caused significant confusion and disruption in the market for Tesla’s stock and resulted in harm to Tesla investors. As a result of Musk’s statements and omissions, investors who purchased Tesla stock after the tweets but before accurate information was made known to the market appear to have suffered a harm—Tesla’s stock price jump by over six percent on August 7, 2018.

As noted, Musk ultimately settled with the SEC and the court approved of the settlement in October 2018. The settlement required Musk to step down as Chairman of Tesla for at least three years, be replaced by an independent Chairman and additional Directors, and pay a penalty of $20 million. Tesla was also required to place increased controls and procedures to oversee Musk’s communications and pay an additional $20 million penalty.

**Looking Forward**

Social media will be a new concern for twenty-first century regulators as the interaction of C-level executives with investors undergoes significant change; the level of difficulty in managing and overseeing social media publications continues to rise each year. Musk published another series of tweets about car production numbers in February 2019 which was not reviewed by a Tesla lawyer and thus was in violation of the SEC settlement.

All public communication regarding a company should generally be preapproved by a designed in-house lawyer in order to avoid violating securities law, especially if the statement submitted has a high likelihood of being false or misleading. Public companies and regulators alike will have to tread carefully in the coming years to make sure that all publicly available information does not contain any false or misleading statements and is indeed accessible by all investors across markets.

**Endnotes**

1. “It shall be unlawful for any person, directly or indirectly, (a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.” 17 C.F.R. § 240.10b-5.


---

**Liberty Law Hosts Careers Panel**

The VBA hosted a successful panel discussion before approximately 85 students at Liberty University School of Law’s 1L orientation. Students enjoyed a Chick-fil-A lunch and heard about the benefits of VBA membership and general career advice from Kristine Smith, Glenn Pulley, and Patrick Bolling.

Glenn Pulley tells attendees about the benefits of VBA membership during the VBA Lunch and Learn panel at Liberty University School of Law.

---

**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.
Fighting Your Implicit Bias and Channeling Understanding

By Leah M. Steigler

“We all know the danger of relying on one experience or interaction to extrapolate a conclusion about an entire group of people. However, we still tend to do it. And this extrapolation, even if minor, can lead us to take unconscious prejudicial or discriminatory shortcuts.

The tendency to stereotype is a common driver of our unconscious frequency to have a preference or dislike for a certain group of people based on that group’s outward appearance. Keep in mind having an implicit bias does not mean that someone is ageist, sexist, or racist. Implicit bias is unintentional—and we all have them!

In some instances, as a lawyer, you actively use implicit biases to aide your client. Jury selection is one example. You generally have little information on how each juror may perceive your case. You are therefore inclined to ask questions about the jurors’ background and experience to gauge whether they may understand your case, respond positively—or negatively—to certain facts, and ultimately rule in your client’s favor. When I select a jury in civil rights cases on behalf of prisoners, I ask detailed questions about jurors’ encounters with law enforcement and criminals—both good and bad—in an effort to better understand whether a juror might have a bias that could help my client.

An obvious consequence of relying on negative implicit biases is it could lead you to discriminate or fail to consider something from a perspective that isn’t your own. Suppose, as defense counsel, you are looking for an expert to conduct a forensic review of the plaintiff’s phone.

You are looking at the websites of possible candidates, all of whom are equally experienced. Your options are to choose between what appears to be a 28-year-old Asian male with glasses or a 60-year-old Caucasian female.

If you reflexively lean towards the male, you should examine whether an implicit bias is creeping into your conscious. Generally implicit biases stem from experience and exposure. Perhaps the media has conditioned you to see Asian men as “good with technology.” Or you could have an implicit bias against the woman—maybe your wife, mother, or sister is simply not “tech-savvy.” If you actually choose the Asian male over the Caucasian female merely based on their look, then one may argue your decision was discriminatory.

To confess, I train on these topics and implicit biases still creep into my practice every day. Recently, in an attempt to educate a judge who was over 55 years old, I asked my witness on the stand, “What is iCloud?” I had to reflect on how the judge’s tenor changed when he took over questioning of the witness and made it clear he was quite knowledgeable on the issue. I could argue I was laying the foundation, but perhaps I was operating with an implicit bias. Regardless, next time I will get a little more in-depth when asking my colleagues about the judge’s background.

I will leave you with three rules to improve your practice by reacting appropriately to implicit biases.

Rule 1: Recognize. Recognize when you have an implicit bias. Call yourself out. “Did I act by gut-reaction?” Why did he decide that way? You cannot address an implicit bias (sometimes referred to as “debiasing”) without first admitting you have one.

Rule 2: Expose. Expose yourself to diversity (and value it!). Evidence tells us that the more often we expose ourselves to what may be considered “abnormal” or
“un-stereotypical” the fewer implicit biases we have. Evidence also tells us the more diversity, whether it be on a trial team, in a mediation, or even in a firm, the more successful (and even profitable!) the group will be.

People can look at the same facts and see completely different themes, theories, and approaches. Your evaluation will be more well-rounded if people with different backgrounds and experiences weigh in on your case. When you drink less of your own Kool-Aid and make a commitment to involve people who are not within your typical group, you ensure your client’s case is more thoroughly evaluated.

**Rule 3: Dissect.** Take time to understand why you may be wrong about an underlying stereotype. Fight the notion that you are “right” about your extrapolation. It’s possible you simply don’t understand why someone does something.

I have heard my own parents talk about a lack of loyalty of young people to their employers. As an employment lawyer and a Millennial, this seemed interesting and, honestly quite plausible, judging by my closest friends. While researching, I noticed sometimes the Millennial generation is referred to as the “Job-Hopping Generation.”

But there are many reasons why this generation “hops” more than those that came before them. Remember, Millennials have far more debt, on average, than any prior generation. This generation also has better awareness of job opportunities from social media and online recruiting services. Taken together, it becomes clear what drives younger people to career change. What could be perceived outwardly as disloyalty may have valid underpinnings completely unrelated to an intent to undermine the employer.

Recognize, Expose, Dissect. Keep these principles in mind during all your interactions with clients, colleagues, jurors, or court personnel. You may be able to improve your practice!

---

**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](http://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.
Lawyers Live Large at VBA Summer Meeting at The Homestead

Panelists offer their perspectives during Saturday’s Women’s Roundtable Luncheon.

Kerriel Bailey speaks at a lively family law panel discussion on Saturday.

Members of the YLD Executive Board meet on Saturday.

Min and Toni Conti, winners of the tennis competition, pose with their awards during Saturday’s picnic.

Panelists Howard “Bud” Phillips, Robert D. Seabolt, Mary Thexton, and Cliona Mary Robb engage VBA members during a Friday CLE presentation.

Panelists offer their perspectives during Saturday’s Women’s Roundtable Luncheon.

Justice Mims kicks off the VBA Summer Meeting with his signature presentation on wellness.

Kerriel Bailey speaks at a lively family law panel discussion on Saturday.
Attendees actively participate in Friday’s ethics CLE.

Members of the VBA Board of Governors pose for a photo on Thursday evening.

VBA members dressed in their summer finery take in the scene during the Friday evening banquet.

VBA members and their families enjoy BBQ and live music at Saturday’s picnic.

Rhodes Ritenour poses with his golf trophy during the awards session of Saturday’s family picnic.
Attendees had the opportunity to catch up with old friends and make new ones during the Summer Meeting receptions.

The laughs came easy over wine and chocolate during Friday’s culinary demonstration.

VBA members mix and mingle over cocktails and refreshments before the banquet.

Attendees listen intently to Justice Mims’s speech on lawyer well-being.

VBA Members get tips and tricks on how to craft fine desserts during the Friday evening culinary demonstration.

VBA Members get tips and tricks on how to craft fine desserts during the Friday evening culinary demonstration.

Dr. Karen Sherry presents during the Legacy Luncheon on Friday.
Three Keys to Success at the Virginia Court of Appeals

By Christopher T. Holinger

So your client did not get the result he or she wanted at the circuit court and asked you to appeal. You filed notice in the trial court and complied with all the rules. If it is a criminal matter, your petition was successful—the Court granted your appeal. Now comes the tough part: briefing and arguing the appeal. If you have never argued an appeal, this part can be intimidating. Although appellate work is very different from trial work, with some practice and effort an attorney with good written and oral communication skills can succeed before the Court of Appeals of Virginia. Here are three keys to a successful appeal.

Key One: It all starts with good assignments of error.

The Court of Appeals of Virginia is an error-correcting court—it does not preside over a new trial. To get a reversal at the Court of Appeals, you must point to a specific error of law made by the trial court. Such errors might include failure to admit or suppress evidence, errors during jury selection (such as failure to strike a juror for proper cause), denying a motion to strike when the evidence is insufficient to prove all elements of a crime, or giving improper jury instructions. The purpose of an assignment of error is to focus the court, and opposing counsel, on the specific issue you think warrants reversal of the trial court’s decision. Carroll v. Commonwealth, 280 Va. 641, 649 (2010).

A good assignment of error is normally one or two sentences, written with proper grammar and capitalization. For example:

- The trial court erred by modifying custody when appellee failed to prove a material change in circumstances.
- The trial court erred by granting the motion to suppress on the ground that the defendant was illegally seized.

In contrast, the following example is too long and contains too much extraneous detail:

The trial court erred in denying the motion to strike and in finding the evidence sufficient to convict the defendant of the offenses of statutory burglary and XXXXX when it is evident that even if the defendant did break and enter into the home of the complaining witness XXXXX, he did so without the requisite intent to commit XXXXX, XXXXX, or XXXXX or any other felony. The only evidence of an item being stolen was based on the complaining witness’s testimony about her habit and routine, which should have been stricken.

This paragraph is actually two assignments of error, one dealing with the admissibility of evidence and another dealing with sufficiency. Better stated they are:

1. The trial court erred by admitting evidence of the complaining witness’s habit and routine, because Virginia Rule of Evidence 2:406 applies only to civil cases.
2. The trial court erred by failing to strike the Commonwealth’s evidence when there was no evidence the defendant intended to commit any felony when he entered the complaining witness’s home.

It is also important to make sure that your assignments of error comport with the facts as reflected in the record. Although attorneys learn to recite the facts in a manner that is as persuasive as possible and generally attempt to portray the facts in the light most favorable to their client, there is nothing to be gained by articulating an assignment of error that does not reflect what actually happened in the trial court.

During my time as a clerk, I all too often saw assignments of error like “The Workers’ Compensation Commission erroneously disregarded the un rebutted recommendations of Dr. XXX and Ms. YYYY . . .” when the record in the case shows that the commission did not “disregard” any of the recommendations—it just found some witnesses’ testimony more credible or convincing than others. It is bad practice to overreach and claim that a factfinder “disregarded” or “ignored” relevant testimony. Just because the factfinder was not convinced by your evidence does not mean that they ignored it.

Key Two: Get the standard of review right.

The Court of Appeals reviews the actions of a trial court according to standards that give...
deference in some areas but not in others. In general, the Court will defer to a trial court’s findings of fact, because the trial court sees and hears the witnesses directly. See Dennis v. Commonwealth, 297 Va. 104, 124 (2019). This puts a trial court in the best position to evaluate credibility.

The Court of Appeals will not, however, defer to a trial court’s legal conclusions. The standard of review is vitally important because it creates the lens through which the Court of Appeals views your case. For most questions the standard of review can be found in published case law. For example:

A factual finding of the trial court will be upheld unless it is plainly wrong or without evidence to support it. Spencer v. Commonwealth, 238 Va. 275, 283 (1989). This same standard applies when a criminal conviction is challenged as “contrary to the evidence” or when an appellant claims that the evidence was insufficient to convict him or her at trial.

Virtually all matters of trial management (admission of evidence, granting continuances, accepting or rejecting pleas) are reviewed for abuse of discretion. Under this standard “the trial judge’s ruling will not be reversed simply because an appellate court disagrees.” Thomas v. Commonwealth, 44 Va. App. 741, 753 (2005). An error of law, however, is by definition an abuse of discretion so any review must ensure that the judge’s discretion “was not guided by erroneous legal conclusions.” Dean v. Commonwealth, 61 Va. App. 209, 213 (2012). This “abuse of discretion by an error of law” most commonly comes up in the context of admissibility of evidence and in jury instructions.

Most family law matters (custody, equitable distribution, child or spousal support awards) are also reviewed for abuse of discretion. In that context, a trial court abuses its discretion when it ignores a relevant factor, considers an irrelevant factor, or when it makes a “clear error of judgment.” Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 352 (2011).

Pure legal questions are subject to de novo review. These include questions of statutory interpretation, constitutional issues, questions of jurisdiction, double jeopardy, and the application of res judicata and other bars. One semi-exception to this rule is that administrative agencies receive some deference interpreting their own regulations and their own governing laws.

Finally, some matters are considered mixed questions of law and fact. This is especially common in constitutional criminal procedure. For example: Was an encounter between a police officer and a suspect a seizure, or was it a consensual encounter? Was there reasonable suspicion to support a Terry stop, or probable cause to support an arrest? When addressing questions like these, the Court of Appeals defers to the trial court’s fact finding about what actually happened, but reviews de novo “the trial court’s application of defined legal standards to the particular facts of a case.” Robinson v. Commonwealth, 63 Va. App. 302, 310 (2014). Thus, while the Court of Appeals will defer to the trial court’s determination about whether the officer gave an order or asked a question, or if his patrol car’s lights and siren were activated, it will decide for itself whether whole encounter constituted a seizure under the Fourth Amendment.

Key Three: Account for the standard of review when you argue.

This is the most important key to success on appeal, and it separates good appellate briefs from average ones. If you want to win on appeal, your argument must acknowledge the standard of review and explain why your client should win given that standard. Focus on a legal question (subject to de novo review) and explain why the trial court’s legal conclusion was wrong given the facts as stated in the record. If the issue in question is subject to an abuse of discretion standard, you must show where the trial judge made an error of law, not just urge the the Court of Appeals to disagree with the trial court.

A winning argument must include sound analogous reasoning supported by examples from binding case law, or a combination of binding and persuasive authority. The quickest way to a win is to cite cases from the Supreme Court of Virginia or published opinions of the Court of Appeals containing analogous facts and reaching the legal conclusion you are after. I realize this may sound like “legal writing 101,” but during my two years as a clerk, I was amazed at how frequently I saw briefs with “arguments” like this:

- “It was obvious that no reasonable person would have felt free to leave...” (with no case law illustrating why that conclusion was “obvious”), or
- “The judge clearly abused her discretion by awarding custody of the children to the appellee” (with no discussion of the relevant factors and no case law applying those factors to similar facts).

Arguments unsupported by good case law are guaranteed losers.

Finally, if you are raising a “sufficiency of the evidence” claim in a criminal case, remember that although such a challenge is a question of law, you must still explain why the facts as they were found by the lower court were not enough to prove each element of the offense. “There was no evidence to prove element A” is at least a potentially winning argument, assuming that you are addressing the facts honestly. Avoid claims like “the trial judge should have rejected the testimony of witness X and should have listened to witness Y instead” or “the judge should not have found witness Z credible” unless you are prepared to make an argument that a particular witness’ statement was inherently incredible as a matter of law. The standard for “inherently incredible” testimony is spelled out in Cardwell v. Commonwealth, 209 Va. 412, 414 (1968) and Fisher v. Commonwealth, 228 Va. 296, 300 (1984). It is a very high bar and getting over it is the only way to get an appellate court to overturn a trial court’s credibility determination.

A few final tips related to argument:

1. “Due Process” is not a “magic phrase” that transforms a factual question into a legal one. If you put the word “due process” in your assignment of error, make a constitutional due process argument.

2. Avoid hyperbole, use adverbs sparingly, and avoid words like “clearly” all together. The more frequently you have to say that something is “clear,” the less clear it probably is.

3. If you are leading with a procedural default argument, consider including a merits argument to give the court something to work with if it disagrees with your default claim.

Appellate law is different from trial law, but it is not impossible. If you write good assignments of error, know the applicable standard of review, and integrate that standard into your argument, you will vastly improve your chances of success on your next appeal.