V·B·A News Journal

THE OFFICIAL PUBLICATION OF THE VIRGINIA BAR ASSOCIATION • VOL. XXXII, NO. 4 • AUGUST/SEPTEMBER 2006

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OUR 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.

THE VIRGINIA BAR ASSOCIATION
VOLUME XXXII, ISSUE 4
AUGUST/SEPTEMBER 2006

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On the Cover: Arcade of the Page County Courthouse (1834); photograph by John O. Peters. One hundred forty photographs of Virginia courthouses are contained in *Virginia's Historic Courthouses,* written by John O. and Margaret T. Peters with a foreword by the late Justice Lewis F. Powell Jr.; photographs by John O. Peters; published by University Press of Charlottesville; and sponsored by The Virginia Bar Association. To order the book, call the VBA at (804) 644-0041 or 1-800-644-0987.

VBA NEWS JOURNAL, the official publication of The Virginia Bar Association (ISSN 1522-0974, USPS 093-110), is published six times per year (December/January, February/March, April/May, June/July, August/September and October/November). Membership dues include the cost of one subscription to each member of the Association. Subscription price to others, $30 per year. Statements or expressions of opinion appearing herein are those of the authors and not necessarily those of the Association, and likewise the publication of any advertisement is not to be construed as an endorsement of the product or service unless specifically stated in the advertisement that there is such approval or endorsement. Periodicals postage paid at Richmond, VA 23232. POSTMASTER: Send address changes to The Virginia Bar Association, 701 East Franklin Street, Suite 1120, Richmond, VA 23219.

Improving the Law in the Public Interest

BY WILLIAM R. VAN BUREN III

One of the unique strengths of The Virginia Bar Association is its singular ability to represent a broad spectrum of the lawyers of Virginia in lobbying important issues of law reform before Virginia's General Assembly. As a voluntary organization, free of the constitutional restraints on the application of mandatory dues payments, and as a statewide organization attracting Virginia lawyers of diverse specialties and backgrounds, we have always felt an obligation to use our considerable resources to stand front and center as advocates of issues that are important to the administration of justice and the improvement of Virginia's legislative scheme.

There is no better example of the seriousness with which we take this responsibility than our fight to eliminate the inadequacies of Virginia's system of funding the defense of indigent citizens accused of criminal conduct. The VBA and the great majority of its members have no economic interest in this issue. We welcome to our membership all Virginia lawyers, whose practice areas range the full breadth of civil and criminal practice, whether focused on plaintiff or defense work and whether large- or small-firm based. Our objectivity on this issue is well recognized and respected by the legislature and the public. Given the lack of any natural constituency of voters that might otherwise rise up in support of correcting this problem, the issue is squarely within the zone of the VBA's primary mission. Working to improve the law and the administration of justice has been a key element of our mission statement since the founding of this organization.

The political leverage of your dues payments is enormous and may well be reason enough to support the VBA with your membership. Unquestionably, there is strength in numbers and the more you convince your colleagues to join their collective voice with ours, both as dues-paying members and as public advocates, the more effective we will be in our law reform efforts.

Virginia is last among all 50 states in its funding for court-appointed counsel and has consistently underfunded public defender offices where salary levels, inadequate resources and heavy caseloads have left open the clear possibility that even the best intentioned of the lawyers serving these defendants can be challenged to provide an adequate defense to the accused indigents placed in their charge. Our system depends on a fair process to ensure that the real perpetrators of crime are brought to justice, and we are determined that Virginia step forward to appropriately fund this constitutional obligation. Virginia's traditions of fairness and its legacy of leadership in democratic principles are suffering from its failure to do so.

Together with our colleagues in the Virginia Indigent Defense Coalition, we are applying the full measure of our political resources to address this issue. We have employed our lobbyists and met with the Governor, the Chief Justice and the Attorney General to advocate an effective and immediate solution. In response to this initiative, the Governor has appointed a Criminal Justice Reform Committee on which I have agreed to serve and we are optimistic that we will have the opportunity to build on the first small steps forward taken in this year's legislative session.

Although the indigent defense effort has been a key area of focus for your Board, it is but one of a multitude of issues we address each year in our efforts to improve the law in ways that serve the public interest. Our substantive law sections do extraordinary, often unheralded, work in offering the benefit of their collective expertise to the Virginia General Assembly. For example, our Business Law Section is unquestionably the driving force behind continuing improvements in our business law statutes, including the Virginia Stock Corporation Act, the Virginia Limited Liability Company Act and the Virginia Business Trust Act. The VBA Health Law Section has taken a leadership role in conforming Virginia's medical record statutes with federal HIPAA legislation and is a trusted resource for the General Assembly in the complex field of health law. The Boyd-Graves Conference, coordinated and supported by the VBA, and our Civil Litigation Section continually advance important initiatives that improve the court and trial procedures in the Commonwealth. In addition to the many hours devoted by your

volunteer leadership, section councils and legislative committees, the VBA's executive director, Guy Tower, is a registered lobbyist and actively promotes our legislative agenda. And we invest significant financial resources annually in the work of our effective "outside" lobbyists, Tony Troy and Anne Leigh Kerr of Troutman Sanders and Rob Jones of Alliance Group, to advance this important work on behalf of the lawyers of Virginia. Many of these efforts greatly improve the climate for business in the Commonwealth and the due process afforded Virginia citizens.

The political leverage of your dues payments is enormous and may well be reason enough to support the VBA with your membership. Unquestionably, there is strength in numbers and the more you convince your colleagues to join their collective voice with ours, both as dues paying members and as public advocates, the more effective we will be in our law reform efforts. The next time the legislature suggests that a sales tax should be imposed on legal services, you will be glad to know that a viable and strong VBA will be there to oppose it.

Before I conclude this message about the importance and effectiveness of our law reform efforts, I want to share with you an e-mail exchange with one of our newest Board members who asked a question that I suspect concerns many of our members from time to time. We get a great deal of thoughtful input and critical thinking from our Board members, particularly those whose first experiences in the inner workings of our Board cause us to appropriately reflect on our responsibilities.

Dave Sump, the outstanding new chair of the Law Practice Management Division, wrote to me during the last legislative session and I offer, with his permission, an excerpt of his potential concerns regarding the VBA's work in law reform.

As a new board member, I have a question that may not warrant an agenda item but may be worth some discussion via e-mail. I am not sure I understand how the VBA Board of Governors determines its positions on various legislative items before the General Assembly. I am a member of another "broad-based" bar association, the Maritime Law Association. The membership of the MLA includes attorneys from every side of almost every issue. Usually the MLA has great difficulty in supporting or opposing legislation because in doing so, they are acting against the interests of some of the membership.

As such, the MLA narrowly addresses legislation. The MLA will opine if the proposed legislation deviates from "international norms"— thereby disturbing uniformity in the law. The MLA will also opine when the proposed legislation will do widespread harm to the maritime law by invoking the "rule of unintended consequences." As a member of the MLA Legislative Committee, it is rare that the organization speaks on substantive matters, and the association typically just keeps the members informed so they may act accordingly.

As for the VBA, the current legislative effort to enhance indigent defense is an excellent example of a program with widespread support. However, the general rubric "law reform" is puzzling to me. How does the VBA avoid alienating a segment of the membership, or potential membership, in the positions it takes in the name of "law reform?" This is especially true of legislative actions taken by substantive committees. Are we sure the legislative actions taken by the substantive committees are supported by and benefit the membership as a whole or even the practitioners of that substantive area of the law?

Having given this issue much thought during my years of involvement with the VBA, I offered Dave the following response, one which I think explains, in the most succinct way possible, the process by which we act on these matters for the benefit of our members and the public and one which I hope will give you great trust in the importance we place in the fulfillment of our responsibility as your leadership.

David, your point is well taken and is a notion that we are continually focused on. The Board must approve all legislative initiatives. Our focus is on law reform that improves the administration of justice, eliminates ambiguity in the statutory scheme and enhances the overall progressiveness of our code system to improve its compatibility with federal and other state schemes. We try to avoid issues that represent the interests of a narrow business constituency or that are likely to be politically sensitive, either because they involve moral judgments, or specific economic interests. We do run the risk from time to time that not all of our members will agree with the positions we take. The Board's job is to be sure we are engaging in law reform for the right reasons as the conscience of the profession and a resource to the Virginia legislature. We serve as a check on the work of the substantive law sections to be sure that the contrary views are understood and respected and to be sure that the motivation for the change is consistent with our overall charge. Hopefully, we get that right most of the time but we look to our Board members to help us remain cognizant of other perspectives.

The relevance of the VBA is clear to those who do its most important work. Our continued challenge is to appropriately communicate and continually reinforce that relevance to our membership and the lawyers of Virginia. The judicial selection process, the recommendations of the Futures Commission on the Virginia Judiciary, the indigent defense initiatives and the need to assure appropriate levels of funding for judges and other court personnel are all issues of current focus in which we are fully engaged. I hardly know what issues the future will bring. As a lawyer in Virginia, I do know that I will always need the VBA to address them. ***VBA***

116th SUMMER MEETING

A Review in Photos

Highlighted by a debate between Virginia's Republican and Democratic U.S. Senate candidates and a visit from the Governor and First Lady, buttressed by an array of CLE programs and enlivened by fine art and festive entertainment, the VBA's 116th Summer Meeting, held July 20-23 at The Homestead, was a weekend to remember for all who attended!

RIGHT: Governor Tim Kaine, guest of honor for the Saturday reception sponsored by LexisNexis, offered special praise to First Lady Anne Holton for her legal work on behalf of the indigent.

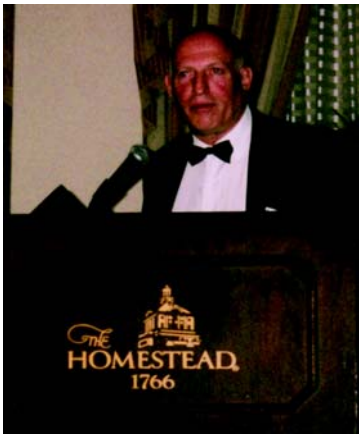
The sounds of KOS (formerly the Kings of Swing) lured the VBA crowd to the dance floor during an evening that was "short on speeches, long on entertainment."

RIGHT: John Bredehoft and Lynn Jacob led a lively CLE program presented by the Labor Relations and Employment Law Section.

LEFT: VBA President Bill Van Buren (right) helped Justice Steven Agee unveil his portrait, presented to him by the VBA during the Friday evening banquet.

Speakers for programs during the weekend included Anne Marie Whittemore (above), chair of the Futures Commission; Prof. John Norton Moore of UVA (left); and Dr. James Kelly of the Virginia Historical Society (far left).

U.S. Senate candidates, incumbent Republican George Allen and Democratic challenger Jim Webb, faced off in a Saturday morning debate moderated by Dr. Robert Holsworth of VCU (far left), with assistance from panelists David Lerman, Jay Warren and Tyler Whitley, and timekeeper Henry Willett. The "Senatorial Showdown" attracted international media attention (right) and several hundred VBA members, guests and interested citizens.

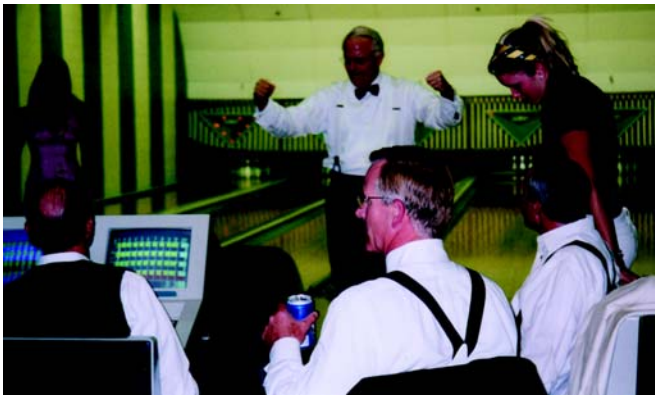


FAR LEFT: VBA President-elect Glenn Lewis accepted the DeMallie Award for outstanding contributions to continuing legal education in Virginia.

LEFT: VBA Life Members John M. Ryan, Joseph C. Knakal Jr., and Hon. F. Ward Harkrader Jr., joined VBA President Bill Van Buren to celebrate their 40 years of VBA membership.

Gallery owner Ginger Levit (left) offered tips on evaluating and collecting art, while art dealer Martha Craddock (right, with Steve Busch and Dr. George Craddock) displayed Virginia landscapes for sale in the registration area.

Members packed CLE programs, balancing educational pursuits with recreational activities and social events.



VBA Board member John Epps (standing, center) celebrated a lucky strike during the VBA/YLD bowling social.

Pre-Filing Injunctions: A Practical Solution to the Problem of Harassing *Pro Se* Litigants

BY BRYAN M. HAYNES AND BRANDON ALMOND

Harassing *pro se* litigants are a familiar problem for many large companies. Under this regrettably common scenario, a *pro se* plaintiff repeatedly files the same frivolous claims against the same company. Although the claims are ultimately dismissed, the company incurs substantial legal fees each time a new suit is filed. Monetary sanctions often are not an option because the *pro se* plaintiff cannot afford to pay any court-imposed penalty. Fortunately, there is a solution to this problem — court-imposed pre-filing injunctions.

Sources of Court Authority for Imposing a Pre-Filing Injunction

It is no secret that a litigious plaintiff pressing a frivolous claim, although rarely succeeding on the merits, can be extremely costly to the defendant and can waste an inordinate amount of court time.[1] Although this often appears to be an incurable problem when the plaintiff is *pro se*, federal courts have both the inherent power and the constitutional obligation to protect their jurisdiction from conduct that impairs their ability to carry out their Article III functions.[2] An effective way for courts to enforce this power is to impose pre-filing injunctions that prevent a plaintiff from filing future frivolous suits.

In federal court,[3] there are two sources of authority for courts to impose a pre-filing injunction.[4] The first is a defendant's motion for sanctions – or imposition of sanctions on the court's own initiative – under Federal Rule of Civil Procedure 11(c). Under the familiar Rule 11 standard, such sanctions are warranted if the suit is not "well grounded in fact, well grounded in law," or is "interposed for an improper purpose."[5] For example, in *Mazur v. Woodson*, the court awarded the defendant's attorneys' fees and imposed a pre-filing injunction against the plaintiffs based on a finding that the plaintiffs violated Rule 11.[6]

Federal courts also have the authority to impose pre-filing injunctions under the All Writs Act,[7] which provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This statute gives federal courts the authority to issue injunctions limiting access to the courts by vexatious and repetitive litigants.[8] However, courts have held that such injunctive relief is an extreme remedy that should not be routinely granted, and that such relief is inappropriate unless there is a real and immediate threat of future injury combined with objectionable past conduct.[9] In granting pre-filing injunctions under the All Writs Act, courts generally are concerned with preventing re-litigation of issues that have already been decided. It is essentially "an extra arrow in the quiver of *res judicata* and collateral estoppel."[10]

Irrespective whether a court imposes a pre-filing injunction under Rule 11 or the All Writs Act, the plaintiff must first be given notice and an opportunity to object.[11] Note, however, that when a defendant makes a motion for sanctions under Rule 11, and the plaintiff responds to such a motion, this constitutes adequate notice and opportunity to be heard such that pre-filing injunctions may thereafter be imposed.[12] Likewise, when a court orders a plaintiff to show cause why sanctions should not be imposed for filing a frivolous suit, the plaintiff is considered to have received adequate notice and an opportunity to respond.[13]

Standards for Obtaining a Pre-Filing Injunction

In determining whether to issue a pre-filing injunction, courts in the Fourth Circuit consider the following circumstances: (1) the party's history of litigation, in particular whether they have filed vexatious, harassing, or duplicative lawsuits; (2) whether the party has a good faith basis for pursuing the litigation, or simply intends to harass; (3) the extent of the burden on the court and other parties resulting from the party's filings; and (4) the adequacy of alternative sanctions.[14] The fourth factor can be particularly important when a *pro se* plaintiff is involved; therefore, a court must

consider the *pro se* status of the litigant when determining whether a pre-filing injunction is appropriate.[15]

In *Payman*, the plaintiff, who had an extensive history of filing *pro se* lawsuits without evidentiary support, nonsuited a motion for judgment in state court that alleged the same facts, against the same defendants, as two complaints which recently had been dismissed in federal court.[16] On the defendants' subsequent motion in federal court for a pre-filing injunction, the court found that "because [the plaintiff] has a pattern of filing frivolous lawsuits; does not have a good faith basis for continuing to prosecute this legal action; has burdened the legal system with other lawsuits concerning the same issues raised in this case; and alternative sanctions have not worked in the past," the plaintiff met the requirements for a pre-filing injunction.[17] Citing it as "clearly necessary based on [the plaintiff's] litigation history," the court enjoined the plaintiff from filing any actions against the defendants in any court (state or federal) without first obtaining leave of the court.[18]

Possible Parameters of a Pre-Filing Injunction

Although pre-filing injunctions generally prohibit a vexatious litigant from filing future lawsuits, the parameters of the injunction vary depending on the circumstances. Courts have crafted pre-filing injunctions containing a wide range of prohibitions, including: (1) requiring the plaintiff to submit an "Application for Leave to File Suit in Federal Court," a copy of the order imposing the pre-filing injunction, and a notarized affidavit certifying that the matters raised in the suit have never been raised or disposed of on the merits in either state or federal court;[19] (2) prohibiting the plaintiff from filing any civil action in any federal court without leave of court, requiring the plaintiff to certify in her application for leave to file that the claim(s) she wishes to raise have never been "raised or disposed of on the merits by any state or federal court," and "absolutely" prohibiting the plaintiff from filing any action that is related to the facts or parties in the current case;[20] (3) limiting the number of cases the plaintiff may have pending on the active docket;[21] and (4) enjoining the plaintiff from filing further suits until monetary sanctions are paid and unless the judge rules that the new claims are not frivolous.[22]

There are some limitations, however, on the possible parameters of a pre-filing injunction. Rule 65(d) of the Federal Rules of Civil Procedure requires that, if an injunction is granted, the order granting the injunction "shall set forth the reasons for its issuance[,] . . . be specific in its terms[,] . . . [and] describe in reasonable detail . . . the act or acts sought to be restrained."[23] Furthermore, pre-filing injunctions should be "tailored to the specific circumstances presented," such that no litigant shall be denied their day in court.[24] For example, in *Cromer*, the Fourth Circuit found too broad an injunction that prevented the *pro se* plaintiff from making any future filings in *any* case (even unrelated cases) in federal court without first obtaining permission from the magistrate judge who issued the injunction.[25] Likewise, in crafting the injunction issued in *Payman*, the court first stated that it would "not enjoin [the plaintiff] from filing any actions anywhere against the defendants or parties in privity with the defendants, as that would deny [the plaintiff] access to the courts for potentially meritorious claims in the future."[26]

The Anti-Injunction Act Limits a Federal Court's Authority to Enjoin Litigants from Proceeding in State Courts

Although Rule 11 and the All Writs Act give federal courts considerable latitude to issue injunctions against vexatious litigants, federal courts are limited in their authority to enjoin plaintiffs from filing future suits in *state* court. A federal court may not enjoin a litigant from filing in state court unless the injunction falls within one of the exceptions listed in the Anti-Injunction Act,[27] which provides that: "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[28]

Only the Anti-Injunction Act's third exception, which allows a federal court to enjoin state court proceedings to protect its judgments, provides an avenue through which a federal court can enjoin a vexatious litigant from proceeding in state court. This exception, which has come to be known as the "relitigation exception," permits a federal court to prevent state court litigation of an issue that previously was presented to and decided by the federal court.[29] This exception is founded in the well-recognized concepts of *res judicata* and collateral estoppel.[30] A federal court may issue an injunction under the relitigation exception if it has actually decided the claims or issues subject to the injunction,[31] and a party who seeks to invoke the exception must make a "strong and unequivocal showing" of relitigation of the same issue.[32] Finally, any doubts

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as to the propriety of a federal injunction against a state proceeding are resolved against entering the injunction.[33]

Conclusion

Parties faced with vexatious litigants, for whom monetary sanctions are not a deterrent, have an effective solution in pre-filing injunctions. Both Rule 11 and the All Writs Act give federal courts the power to sanction such plaintiffs through the issuance of pre-filing injunctions. Parties may obtain such a remedy provided that the injunction is narrowly tailored and the plaintiff is given adequate notice and an opportunity to object to the injunction. Finally, a federal court may extend a pre-filing injunction, not only to federal court proceedings, but also to state court proceedings, provided that the claim or issue has been previously litigated in federal court.

NOTES

1. *See Sassower v. Whiteford, Taylor & Preston*, Nos. 90-1142, 90-1146, 90-8122, 1991 U.S. App. LEXIS 13933, *3 (4th Cir. July 2, 1991), reported at 940 F.2d 653.
2. *See Armstrong v. Koury Corp.*, Nos. 99-2511, 99-2512, 2000 U.S. App. LEXIS 6459, *2 (4th Cir. Apr. 10, 2000); *Johnson v. Pep Boys*, No. 2:04cv632, 2005 U.S. Dist. LEXIS 41500, *23 (E.D. Va. June 14, 2005) ("A district court has the fundamental power to protect itself against abuse.").
3. Although most pre-filing injunctions are issued in federal court, Virginia circuit courts also have issued pre-filing injunctions on occasion. *See, e.g.*, *Morrissey v. Rockingham Mem'l Hosp.*, 62 Va. Cir. 462, 464 (Va. Cir. Ct. 2003) (holding that, should the plaintiff wish to file future suits involving the same issues or parties as the case at bar, he must first submit an "Application for Leave to File Suit in a State Court," and attach a notarized declaration or affidavit certifying that the matters raised in the new suit have never before been raised in state or federal court and that he has satisfied all previous monetary judgments); *Anderson v. Sharma*, 33 Va. Cir. 543, 544-47 (Va. Cir. Ct. 1992) (barring the plaintiff from filing further suits in the same circuit without prior leave of the court, and stating that "the Court has an inherent power to protect its jurisdiction from repetitious, frivolous and harassing conduct which abuses the judicial process"). Both of these decisions relied on the court's authority to issue sanctions under Va. Code § 8.01-272.1, which mirrors Fed. R. Civ. P. 11.
4. *See Ezell v. Dan River, Inc.*, No. 4:02cv17, 2002 WL 32512847, *5 (W.D. Va. Nov. 1, 2002).
5. *McMahon v. F&M Bank-Winchester*, No. 93-2392, 1994 U.S. App. LEXIS 36788, *6 (4th Cir. Dec. 30, 1994).
6. *See Mazur v. Woodson*, 191 F. Supp. 2d 676, 684 (E.D. Va. 2002) (citing a clear pattern of the plaintiffs abusing the state and federal court systems, and in the process harassing the defendant and costing him unnecessary litigation expenses).
7. 28 U.S.C. § 1651(a) (2000).
8. *See Cromer v. Kraft Foods N.A., Inc.*, 390 F.3d 812, 817 (4th Cir. 2004).
9. *See Payman v. Mirza*, Nos. 2:02cv23, 2:02cv35, 2005 U.S. Dist. LEXIS 14262, *8 (W.D. Va. July 18, 2005).
10. *Ezell*, 2002 WL at *5.
11. *See, e.g.*, *Tucker v. Drew*, Nos. 94-6241, 94-6242, 94-6243, 1994 U.S. App. LEXIS 11784, *2-3 (4th Cir. May 23, 1994) (vacating the district court's order imposing an injunction and noting that "a litigant must be given notice and an opportunity to object prior to imposition of a pre-filing review order, and must be notified of the consequences of failure to object to [such an order]"); *West Virginia Dep't of Highways v. Hart*, 915 F.2d 1566, 1566 (4th Cir. 1990) (finding that a district court must not issue an injunctive order *sua sponte* without first giving the litigant notice and an opportunity to be heard); *In re Head*, No. 06-6066, 2006 U.S. App. LEXIS 8265, *1 (4th Cir. Apr. 5, 2006) (same); and *Cromer*, 390 F.3d at 819 (noting that before a judge issues a pre-filing injunction under the All Writs Act, even a narrowly tailored one, it must afford a litigant notice and opportunity to be heard).
12. *See Mazur*, 191 F. Supp. 2d at 683.
13. *See Autry v. Woods*, 106 F.3d 61, 63 (4th Cir. 1997).
14. *See Cromer*, 390 F.3d at 818 (noting that the district judge did not consider each of the factors as required, and thereafter vacating the lower court's injunction).
15. *See Ezell*, 2002 WL at *5.
16. *Payman*, 2005 U.S. Dist. LEXIS at *4.
17. *Id.* at *12.
18. *Id.* at *14.
19. *See Mazur*, 191 F. Supp. at 685.
20. *See McMahon*, 1994 U.S. App. LEXIS at *4-5. Note, however, that the court did not specify whether "any action that is related to the fact or parties" in the current case includes state as well as federal actions.
21. *See Butler v. United States Dep't of Justice*, 119 F. App'x 566, 567 (4th Cir. 2005).
22. *See Autry*, 106 F.3d at 64.
23. *See* Fed. R. Civ. P. 65(d) (2006).
24. *Armstrong*, 2000 U.S. App. LEXIS at *2; *see also Tinsley v. More Bus. Forms, Inc.*, No. 93-2086, 1994 U.S. App. LEXIS 14208, *5 (4th Cir. June 9, 1994) ("An absolute bar to filing actions would be patently unconstitutional."); *Pep Boys*, 2005 U.S. Dist. LEXIS at *23-24 ("[S]o long as the injunction does not completely close access to the court. . . . it should be tailored to the specific circumstances presented.").
25. *Cromer*, 390 F.3d at 819 (stating that although the plaintiff had proved to be a "frequent filer" with respect to his employment discrimination suit, "nothing in the record justified infringing upon his right to bring suit in *unrelated* cases") (emphasis in original).
26. *Payman*, 2005 U.S. Dist. LEXIS at *13.
27. 28 U.S.C. § 2283 (2000).
28. *Id.* at *8-9.
29. *See Miller v. Brooks*, 315 F.3d 417, 440 (4th Cir. 2003).
30. *Id.*
31. *Id.*
32. *See Nationwide Mut. Ins. Co. v. Burke*, 897 F.2d 734, 737 (4th Cir. 1990).
33. *See Bluefield Cmty. Hosp. v. Anziulewicz*, 737 F.2d 405, 408 (4th Cir. 1984).

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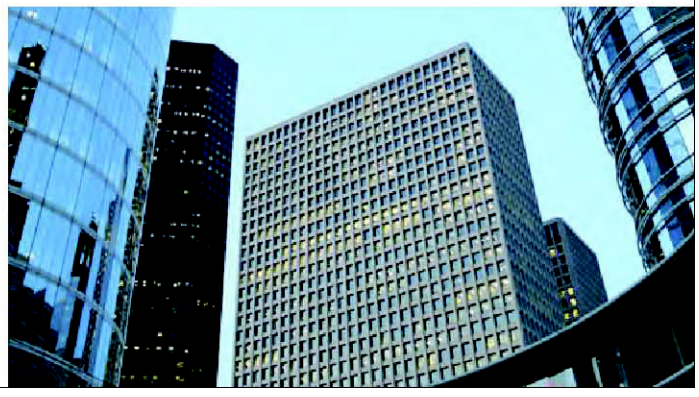

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Ex Parte Communications with an Adversary's Current or Former Employees: Making Sense of Critical Rules

BY ATTISON L. BARNES III, CHARLES C. LEMLEY AND REBECCA L. SAITTA

Background

"We've got a guy who wants to talk…" The Insider (1999).

Movies about lawyers often feature an "insider," a current or former employee who spills the beans on the corporate defendant. Litigators may dream of finding such a witness, but the dream could turn sour if the zealous litigator becomes the subject of a motion for sanctions and/or disqualification or even a bar investigation for running afoul of ethical rules regarding contact with represented parties. Even worse, it may not be enough for counsel to become acquainted with the ethical rules of one jurisdiction; given the often transient nature of corporate employees and the nationwide litigation practice of many lawyers, counsel may have to consider the ethical rules of two or more jurisdictions before making contact with the adverse party's current or former employees.

A review of Virginia's authority on the topic reveals inconsistent treatment throughout the Commonwealth. This article will explore the Virginia rules and caselaw regarding such communications, and briefly discuss the hazards (and potential solutions) to be considered in multi-jurisdictional practice. The article concludes with a recommendation that Virginia consider adopting a clarifying comment from the ABA Model Rules. The bottom line: counsel should make sure to check the rules and case law of *all* relevant jurisdictions (both within and without Virginia) before communicating with an "insider" of their own.

Virginia's Approach

Virginia's rules in this regard appear relatively straightforward at first glance. Rule 4.2 of the Virginia Rules of Professional Conduct addresses "Communication With Persons Represented By Counsel":

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.[1]

The rule's application depends in the first instance upon whether counsel seeks to contact a current or a former employee. As for current employees, counsel is prohibited from communicating about the subject matter of the representation with persons in the corporation's "control group", as defined in *Upjohn v. United States*, 449 U.S. 383 (1981).[2] The rules governing *ex parte* communications with *former* employees of an adversary organization are more relaxed:

> The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate *ex parte* with such former employee or agent even if he or she was a member of the organization's "control group."[3]

Thus, the Virginia Rules of Professional Conduct generally provide that counsel may contact the *former* employees of an adversary without consideration for their position within the company, but may only contact *current* employees who are not within the "control group."

Why do the rules treat current and former employees differently? According to Virginia Legal Ethics Opinion (LEO) No. 1670, the distinction turns on the inability of former employees to bind the corporation through their statements or actions: "[O]nce an employee who is also a member of the control group separates from the corporate employer by voluntary or involuntary termination, the restrictions upon direct contact cease to exist because the former employee no longer speaks for the corporation or binds it by his or her acts or admission."[4] Officers and managers, likely deemed to fall within the organization's "control group" and thus off-limits with respect to *ex parte* communications when currently employed by an adversary, suddenly become valuable potential interviewees upon termination or resignation from the corporation. The rationale is found in the *Restatement (Third) of the Law Governing Lawyers* §100 comment g (2000):

> [C]ontact with a former employee or agent originally is permitted, even if

the person had formerly been within a category of those with whom contact is prohibited. Denial of access to such a person would impede an adversary's search for relevant facts without facilitating the employer's relationship with its counsel.

As with many legal rules, applying these directives in practice is more complicated. First, the relevant LEOs and sparse case law addressing this issue suggest some limitations that may not be evident from the text and related commentary of Rule 4.2. The court in *Armsey v. Medshares Mgmt. Servs., Inc.*, 184 F.R.D. 569 (W.D. Va. 1998) acknowledged LEO 1670, but nonetheless prohibited counsel from communicating *ex parte* with former employees of the adversarial corporation. The decision appears to have been based on the fact that Plaintiffs' counsel specifically informed the court that they believed the former employees' statements would, in fact, be imputed to the corporation.[5] Thus, the reason for distinguishing between current and former employees did not exist, and the court chose not to do so. The court explained its apparent departure from Va. LEO No. 1670 by noting that LEO NO. 1670 explicitly recognizes that the specific facts of a particular case may warrant a different conclusion.[6] The *Armsey* opinion thus demonstrates that counsel should consider what they hope to do with the former employees' testimony before making *ex parte* contact with unrepresented former employees of an adversary.

After the *Armsey* decision, the Virginia State Bar's Standing Committee on Legal Ethics (Committee) published an LEO focusing specifically on whether there exist any content-based restrictions on the communications between counsel and the former employee. The Committee in Va. LEO No. 1749 (2001) addressed the hypothetical question of whether counsel, upon initiating *ex parte* contact with the former employee of an adversary, may "ask questions that seek information from confidential communications with the corporation's attorney."[7] The Committee balanced the fundamental importance of protecting client confidences against rules permitting *ex parte* communications with former employees by prohibiting counsel from seeking information "that may reasonably be foreseen as stemming from attorney-client communications."[8]

The most recent ruling in Virginia affirms that former employees are fair game for *ex parte* contacts, but does not consistently apply the "control group" test when prohibiting *ex parte* contacts with current employees. In *Pruett v. Virginia Health Services, Inc.*,[9] the court denied the defendant's motion for a protective order prohibiting *ex parte* contacts with its former employees, but granted the motion with respect to current employees regardless of whether they were part of the control group. With respect to former employees, the court reviewed the *Armsey* decision, but relied upon the specific language of Comment 4 to Rule 4.2, and upon LEO 1670, to permit contact with former employees regardless of their position with the defendant corporation. Thus, while *Armsey* suggests that counsel must consider what they hope to elicit from the former employee before making *ex parte* contact, such contact will generally be permitted under Virginia law.

As for current employees, the court in *Pruett* distinguished a previous opinion of the Winchester Circuit Court, *Dupont v. Winchester Medical Center*,[10] because the court in that case had relied upon an ABA Model Rule comment that was omitted when Virginia adopted Model Rule 4.2. Nonetheless, the *Pruett* court then followed the *Winchester* court's logic and prohibited *ex parte* contact with current employees who were not members of the control group but could be regarded as the "alter ego" of the corporation because they act on behalf of the corporation in performing the work they are assigned. The *Pruett* court's ruling with respect to current employees seems to be based upon a desire to protect the defendant's employees and the defendant corporation from disruption it predicted would be caused by an especially zealous plaintiff's attorney, who argued that the defendant nursing home was "killing people and making a lot of money doing it."[11] It is unclear how the court would have ruled given a less-zealous plaintiff's counsel, but the case makes clear that the scope of the rule concerning current employees is still very much up in the air under Virginia law.

Practical Considerations

It is important to note that the rules governing communications with current or former employees of an adversary do not distinguish between contact by the attorney to the employee and an unsolicited call to the attorney from the employee. In either case, the lawyer's ability to elicit information from the employee may be compromised.

Another factor to consider is whether the employee is bound by a confidentiality agreement and/or attorney-client privilege obligations with her former employer. So as not to risk breach (by the employee) or tortious interference with contract (by you), caution the employee upfront that you: (1) represent a party adverse to her former employer; (2) do not seek attorney-client privileged information acquired during her prior employment; and (3) do not seek any information arguably protected by a valid contract between the employee and her former employer.

One area not well developed in

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the caselaw is when the lawyer becomes a witness (e.g. when your client's interest is served by our testimony at trial with respect to statements made by the former employee which are disavowed under oath). Your client could find itself without you (its counsel of choice) at trial. Therefore, recognize early that as a lawyer for a party in litigation, it may be wise to inform your client of the risks associated with such contact before interviewing the former employee.

The Importance of Choice-of-Law Provisions

Even if we understand where Virginia stands on this issue, awareness of Virginia's ethical rules may not always be enough. The Virginia Rules of Professional Conduct recognize that an attorney licensed in Virginia may, at times, be subject to another jurisdiction's disciplinary rules. An attorney licensed in Virginia and admitted *pro hac vice* to a court in Maryland, for example, must observe Maryland's ethical rules when acting in connection with the proceeding before a Maryland court—unless the rules of the Maryland court provide otherwise.[12] Moreover, just as case law in Virginia may shed a different light on the plain language of the ethical rules, counsel must be careful to consider both the Rules of Professional Conduct *and* any relevant case law from the courts in the foreign jurisdiction.

While the choice-of-law provisions governing an attorney's ethical responsibilities should always be a factor for consideration, the potential for conflicting rules is particularly great in the area of *ex parte* communications with former employees. Different jurisdictions have adopted approaches that vary significantly from one another:

> In interpreting ABA Model Rule 4.2 and their own rules governing attorney ethics, state and federal courts have come up with various tests to determine which employees of represented organizations may be contacted by opposing counsel. On one end is the "blanket" test, which prohibits contact with any current or former employees of an organization. At the other end is the "'control group' test, which covers only high-level management employees. Several tests fall in the middle, including a party-opponent admission test, a case-by-case balancing test, and a 'managing-speaking agent' test."[13]

A Maryland court, for example, disqualified a plaintiff's lawyer who conducted *ex parte* communications with an adversary's former employee, noting that "[a]n organization has no less interest [than an individual] in protecting its confidences when an employee who once shared those confidences leaves the company fold." *Camden v. Maryland*, 910 F. Supp. 1115, 1120-21 (D. Md. 1996). Thus, the multi-jurisdictional litigator faces a minefield of inconsistent rules regarding *ex parte* communications.

The ABA has attempted to standardize and clarify these rules, with limited success. ABA Model Rules of Professional Conduct, rule 4.2 (ABA Model Rule 4.2) proscribes certain *ex parte* contacts in words almost identical to those found in the Virginia rule,[14] but the comments to the two rules are substantially different. ABA Model Rule 4.2 states as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

As noted above, comment 4 to the Virginia rule continues to rely upon the *Upjohn* opinion's somewhat discredited definition of "control group." The comments to ABA Model Rule 4.2 try to provide greater clarity. Prior to the 2002 amendments, the relevant portion of the comment to ABA Model Rule 4.2 read as follows:

> [i]n the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

The comments were substantially revised when the ABA Model Rules were revised in 2002, so that Comment 7 now reads as follows:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for the purposes of civil or criminal liability.

The revisions to the comment were meant to "provide[] clearer guidance than the broad general reference to 'managerial responsibility.'"[15] "The phrase 'whose statement may constitute an admission on the part of the organization' was omitted from the comment 'because it had been misapplied to situations when an employee's statement could be admissible against the organizational employer…'"[16] Like authorities in California and elsewhere, the ABA has recognized the inconsistency associated with the "control group" test and has attempted to spell out more clearly the scope and application of the rule on *ex parte* communications.

Note that the ABA has consistently indicated that *ex parte* communications with *former* employees are permissible under the Model Rules. The current version of Comment [7] states that "consent of the organization's lawyer is not required for communication with a former constituent." Even before the 2002 revisions, the ABA had permitted such contacts. *See* ABA LEO 396 (7/28/95).

Conclusion

While communications with an adversary's current or former employees may present valuable opportunities for pre-trial discovery, impermissible *ex parte* contact can subject an attorney to harsh evidentiary sanctions or even disciplinary action. Knowledge of all

applicable rules of professional conduct governing this issue, as well as a fundamental understanding of the case law in the relevant jurisdiction, is critical to a successful and ethical practice. Other jurisdictions and the ABA have recognized the inadequacy of the "control group" test to which the Virginia rule still adheres, and the lack of clarity in the Virginia rule is emphasized by the *Pruett* opinion. The Virginia Supreme Court should consider adopting Comment 7 to ABA Model Rule 4.2 to provide greater clarity and uniformity in the application of this rule. In the meantime, counsel should carefully consider the facts of each situation before making *ex parte* contact with *any* current or former employee of a corporate adversary. ***VBA***

NOTES

1. VIRGINIA RULE OF PROF'L CONDUCT R. 4.2.
2. *See* VIRGINIA RULE OF PROF'L CONDUCT R. 4.2 cmt. [4]. It should also be noted that "[i]f an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule." *Id.* Also, note that the comment cites *Upjohn* for the definition of "control group," although *Upjohn* itself rejects the "control group" test for attorney-client communications and points out that the term "control group" has been inconsistently defined. *Upjohn*, 449 U.S. at 684-85. Other jurisdictions have noted that, far from clarifying the application of the "control group" test to *ex parte* contacts with employees, *Upjohn* required clarification of rules that relied upon the "control group" test. *Snider v. Superior Ct.*, 113 Cal. App.4th 1187, 1199 (2003)(noting that *Upjohn* prompted California authorities to adopt a "bright line" test barring *ex parte* contact with any employee of a corporate adversary). California later adopted a new rule of professional conduct, Rule 2-100, that confirms the use of the "control group" test, but more clearly defines the "control group" in a manner similar to (and to some extent modeled after) the comments to ABA Model Rule 4.2. *Id.* at 1202. The Virginia authorities cited herein, and comment 3 to the Virginia Rule, indicate that Virginia relies upon the general definition of "control group" that the Supreme Court rejected in *Upjohn*.
3. VIRGINIA RULES OF PROF'L CONDUCT R. 4.2 cmt. [4].
4. Va. LEO No. 1670 at p.1.
5. *Armsey v. Medshares Mgmt. Servs., Inc.*, 184 F.R.D at 573.
6. *Id.* at 574.
7. Va. LEO No. 1749 at p.2.
8. Va. LEO No. 1749 at p.3.
9. 2005 WL 2386030 (Lancaster Cty. Cir. Ct. Aug. 31, 2005).
10. 34 Va. Cir. 105 (1994). The court in *Winchester* prohibited plaintiff's counsel from contacting currently employed nurses who were not part of the control group with respect to the negligent acts alleged in the suit, relying upon an official comment to ABA Model Rule 4.2 that it found expanded the scope of the control group to include current employees who were alleged to have acted negligently.
11. *Pruett* at *4 ("Such a statement to a current employee is unnerving [and] creates a significant potential for disrupting the current operation of the defendant's facility. With respect to current employees, we believe a more controlled process of discovery under the rules of court would better serve the administration of justice in this case.").
12. *See* VIRGINIA RULE OF PROF'L CONDUCT R. 8.5. Additional considerations may be required for attorneys licensed in more than one jurisdiction.
13. *Snider*, 113 Cal. App.4th at 1204 (citations omitted); *see also* Robert D. Rhoad and Thomas P. Lihan, *Think Before You Act—Ethical Considerations in Contacting Your Adversary's Former Employee,* NINETEENTH ANNUAL JOINT SEMINAR PROGRAM: PATENT PRACTICE UPDATE, (May 9, 2003)(discussing NEW JERSEY RULE OF PROF'L CONDUCT 1.13(a), which includes among those individuals represented by a corporation's attorney "[f]ormer agents and employees who were members of the litigation control group."); Ellen J. Messing and James S. Weliky, *Contacting Employees of an Adverse Corporate Party: A Plaintiff's Attorney's View,* 19 THE LABOR LAWYER 353, 365 (2004).
14. The Virginia rule uses "person" instead of "party," while the 2002 amendment to the ABA rule added the words "or a court order." Neither difference is important to this discussion.
15. ABA Model Rule 4.2, Reporter's Explanation of Changes.
16. *Snider*, 113 Cal. App.4th at 1204 (citation omitted).

YLD Projects Earn National Recognition

BY LORI D. THOMPSON, Chair, VBA Young Lawyers Division

This year, The Virginia Bar Association Young Lawyers Division (VBA/YLD) continued its storied tradition of receiving national honors for service to the public and our profession. From August 2-6, 2006, I had the honor of representing the Commonwealth of Virginia as a delegate to the American Bar Association Young Lawyers Division (ABA/YLD) Assembly during its annual meeting in Honolulu, Hawaii. During the meetings that week, in addition to basking in the Hawaiian sun, I had the opportunity to bask in the glow of the VBA/YLD's success. The VBA/YLD received two First Place Awards of Achievement.

Each year, the ABA/YLD presents Awards of Achievement to affiliated state and local young lawyer organizations in three primary areas. The *Comprehensive* category evaluates the overall effectiveness of the organization based upon consideration of up to 12 of its projects. The *Service to the Public* and *Service to the Bar* categories allow organizations to submit applications highlighting their best new or significantly expanded program providing a valuable service to the general public and to members of the bar, respectively. Each state affiliate organization is then placed within one of four divisions based upon the number of its members.

According to the ABA/YLD, the Award of Achievement program "is designed to encourage project development by recognizing the time, effort and skills expended by young lawyer organizations in implementing public service and bar service projects in their communities." For the VBA/YLD, that objective has been achieved.

The ABA Award of Achievement is a valuable tool by which the YLD measures how well our organization is achieving the dual goals of keeping our existing projects relevant while creating new programs to meet the unmet needs of our communities and the profession.

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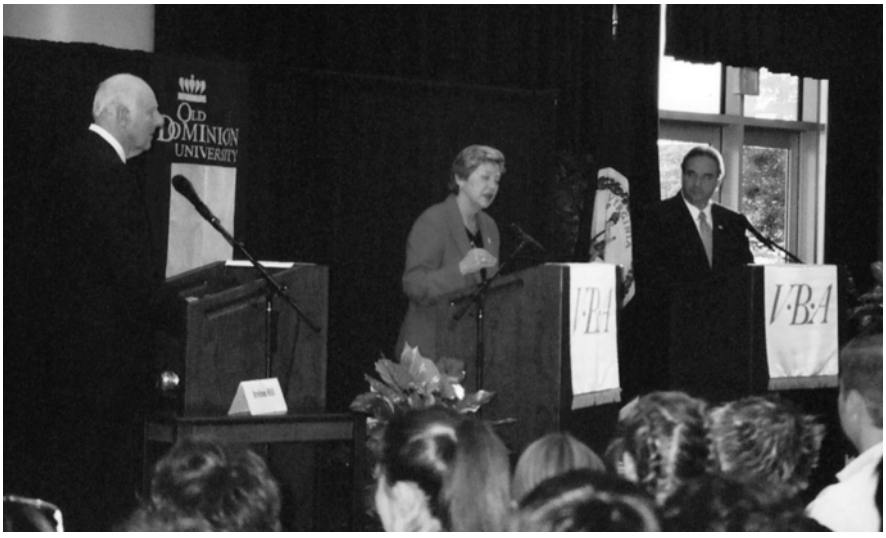
Exactly 25 years ago, the VBA/YLD earned its first national award, by receiving the First Place honors for best single project from the ABA. Since then, the VBA/YLD has earned over 70 Awards of Achievement, including first place in the Comprehensive category 12 times.

The Award of Achievement application process is a daunting task, requiring analysis of each of the VBA/YLD's 40 projects, completion of three applications providing detailed information about the highlighted programs, and compilation of three volumes of materials in support of the applications. **Turner Broughton**, an attorney at Williams Mullen in Richmond, completed the application with the assistance of other YLD officers and members of the YLD Executive Committee and Council. In addition to overseeing the ABA Award of Achievement application process, Turner serves as a member of the YLD Executive Committee and chair of the YLD's Bridge the Gap program.

Broughton

This year, in addition to receiving first place in the Comprehensive category, the VBA YLD received first place for Service to the Public for the Town Hall Meeting in which the VBA/YLD sponsored the debate between candidates for Lieutenant Governor of Virginia.

The Richmond and Hampton Roads Town Hall Meeting Committees of the VBA/YLD hosted a debate between the candidates for Lieutenant Governor, Republican Bill Bolling and Democrat Leslie L. Byrne, at the Ted Constant Convocation Center at Old Dominion University on October 19, 2005. The spirited debate was moderated by Irvine Hill, with Dr. G. William Whitehurst and Paul E. Fletcher serving as panelists. Given its proximity to election day in a closely contested race, the debate was well attended by students from Old Dominion University and area public and



Debate moderator Irvine Hill and Republican candidate Bill Bolling listened as Democrat Leslie Byrne answered a question during the lieutenant governor candidates' debate at ODU in October 2005. Bolling went on to win the election.

private high schools, as well as citizens from the community and area attorneys. The debate received coverage from news media across the Commonwealth.

The primary purpose behind the VBA/YLD's hosting the debate was to provide the general public and students with access to and interaction with the candidates for Virginia's second-highest elected office and members of the bar. A reception was held immediately following the debate, which allowed for the general public and the students at the debate to speak directly with the candidates and the lawyers in attendance.

The Town Hall Meeting Committees facilitated communications between the campaigns, which culminated in their agreement to participate in the debate. This process involved negotiating the specific rules and guidelines for the debate, selecting panelists, reserving a site, publicizing the event, preparing the panelists for the event and assisting in site preparation and briefing the campaigns on the day of the event.

Stacy Ross Purcell, an attorney practicing in Norfolk with Eastern Virginia Medical School, serves as chair of the Hampton Roads Town Hall Meeting. **Travis G. Hill**, a government affairs attorney with Williams Mullen, and **Henry I. Willett III**, a litigation attorney with Christian & Barton LLP, serve as co-chairs of the Richmond Town Hall Meeting.


Purcell


Hill


Willett

Wills for Heroes program expanding; volunteers needed in Richmond and Charlottesville areas

For several years, the Wills for Heroes program has provided wills, durable powers of attorney, and advanced medical directives to first responders in Virginia on a *pro bono* basis. Having successfully implemented Wills for Heroes in Arlington and Roanoke, program organizers are planning an expansion to the Richmond and Charlottesville areas in the near future, and invite interested attorneys to sign up as volunteers.

Wills for Heroes is the result of a collaboration of the VBA Young Lawyers Division, the Virginia State Bar Young Lawyers Conference and the George Mason University School of Law, with support from Virginia CLE, LexisNexis, the Fellows of the Virginia Law Foundation, Hunton & Williams LLP and McGuireWoods LLP.

Stephanie M.D. Albright, of McGuireWoods LLP in Richmond, chairs the Wills for Heroes Committee for the VBA Young Lawyers Division. Please contact her at (804) 775-1162 or salbright@mcguirewoods.com if you are interested in volunteering for Wills for Heroes or in having the program administered in your locality.

NOTE: See the VBA/YLD committees page at www.vba.org for more volunteer opportunities.

Students of color encouraged to *Choose Law*

Choose Law: A Profession for All is the 2006-07 Public Service Project sponsored by the American Bar Association Young Lawyers Division (ABA/YLD). The program is designed to encourage middle and high school students of color to consider professions in the law. The ABA/YLD has produced an eight-minute video, which contains a series of testimonials from minority attorneys advocating the reasons why students of color should pursue legal and law-related professions. The ABA/YLD has encouraged its young lawyer affiliates to visit local schools and host informational/discussion sessions targeted specifically at students of color and educate them about the diversity of professions in the law and the "how to's" of making a profession in the law a reality.

The VBA has decided to implement this project during the current bar year. For more details about *Choose Law*, interested persons can log onto **www.abanet.org/chooselaw**. Watch for more information to come!

Fall VBA conferences scheduled; Annual Meeting returns to Lodge

Autumn is the season when most of the VBA's section-sponsored conferences occur, and this year's fall schedule kicks off October 5-7, with the VBA Labor Relations & Employment Law Conference at the Hotel Roanoke. The VBA Corporate Counsel Fall Forum will be held October 17 at The Jefferson in Richmond, with the VBA Virginia Tax Practitioners' Roundtable later that week, on October 20 at Farmington in Charlottesville.

On November 8, the VBA Administrative Law Conference will be held at the Omni Richmond, which will also be the location of the VBA Legislative Day on November 14. The VBA Capital Defense Workshop closes out the "season" on December 7-8 at the Richmond Marriott.

Online registration is available for section-sponsored conferences, in addition to brochures and/or information packets mailed to members.

In other arenas, the VBA Young Lawyers Division Executive Committee and Council will meet at The Boar's Head Inn in Charlottesville over the weekend of September 27-29; the Boyd-Graves Conference will hold its annual meeting October 13-14 at the Hilton Oceanfront in Virginia Beach; and the VBA Board of Governors will gather October 27-29 at the Hampton Inn Col Alto in Lexington. Coordinators of the VBA Pro Bono Hotlines will meet for their annual roundtable on November 15 at the Renaissance Portsmouth, during the Virginia Poverty Law Conference.

The VBA Annual Meeting returns to the freshly renovated and expanded Williamsburg Lodge & Conference Center on the weekend of January 18-21, 2007. Room reservations may be made at 1-800-HISTORY; please indicate that you are with the VBA.

See more details of the Lodge renovation and newly added features at www.history.org/visit/williamsburgHotels/williamsburgLodge/.

VBA entities encouraged to submit letters of intent for 2007-08 Virginia Law Foundation grants

The Virginia Law Foundation, a 501(c)(3) not-for-profit organization, is now accepting Letters of Intent from organizations wishing to request grant support for the 2007-08 grant cycle (July 1, 2007, through June 30, 2008).

Letters of Intent to be submitted under the VBA umbrella should be prepared in the name of The Virginia Bar Association Foundation and must reach the VBA office at 701 East Franklin Street, Suite 1120, Richmond, Virginia 23219, no later than December 6, 2006, for Executive Committee approval and signing on behalf of the VBA Foundation.

Funds are expected to be awarded for the support of programs that promote or provide improvements in the administration of justice, legal services to the poor, education of the public about the law and the legal profession, and public service internships for Virginia law students.

Letters of intent should be submitted on a special form (available from the VBA office) which includes instructions for preparing required information. From the Letters of Intent received, the Foundation's Grants Committee will select those projects for which full grant proposals will be invited. An invitation to file a grant proposal does not guarantee grant approval.

VBA staff can be reached to assist with basic information about The Virginia Bar Association Foundation and preparation of Letters of Intent by calling (804) 644-0041.

'Frenzy' spreading across Virginia; help needed in many areas

Got your attention?

This is not a pre-Halloween prank or horror-movie hype. Nor is it a call for volunteers from the joint disaster legal services committees of the VBA and VSB.

Rather, it is a request from none other than Virginia's **Attorney General Bob McDonnell,** who on August 29 launched an effort to take Hampton Roads' successful "Legal Food Frenzy" statewide in the "First Annual Virginia Legal Food Frenzy," planned for early 2007.

In the "Frenzy," organized by the Tidewater legal community and the Food Bank of Southeastern Virginia, law firms have competed for years to bring in the most donated food. In the 2006 competition, for which Attorney General McDonnell served as keynote speaker, participating groups collected a total of 172,593.64 pounds of food.

According to the Attorney General's letter, a recent study by the Food Security Institute, Center on Hunger and Poverty, revealed that more than half a million Virginians are considered "food insecure," while more than 120,000 are "food insecure with hunger."

The "Virginia Legal Food Frenzy" will be organized regionally, with law firms competing in food drives on behalf of their area food banks. Firms and employers will challenge their members to bring in food donations, and the law firm that brings in the most food for its local food bank will receive the "Attorney General's Cup."

The VBA Young Lawyers Division is working with the Attorney General's office to coordinate the regional committees and preparations for the "Frenzy." Volunteers are needed in all areas of Virginia.

Committees are being set up now and interested persons who would like to help with the "Legal Food Frenzy" in their areas are asked to contact VBA/YLD members **Katja Hill** at (804) 783-7543 or khill@leclairryan.com, or **Christopher Gill** at (804) 697-4114 or cgill@cblaw.com.

YLD seeks mementos for 50th anniversary celebration, exhibit

The VBA Young Lawyers Division, as previously announced, will celebrate its 50th anniversary in 2007 with a weekend-long celebration at the VBA Annual Meeting, to be held January 18-21 at the Williamsburg Lodge & Conference Center. Special events, a dedicated issue of the *VBA News Journal* and an exhibit of YLD memorabilia are planned, among other festive features.

Any current or former YLD member with photos (particularly from 1957 through the 1980s), printed materials or other mementos of YLD projects or events is invited to loan originals or submit copies for the exhibit and possible use in the *News Journal*.

If you have items for the exhibit, please contact Caroline Cardwell or Jeremy Dillon at the VBA office, (804) 644-0041, or by e-mail at carolinecardwell@vba.org or jeremydillon@vba.org.

Time to finalize proposals for '07 General Assembly

With the coming of autumn, VBA sections and committees are reminded that legislative proposals for the 2007 General Assembly are due for review by the Association's Board of Governors at its fall meeting, to be held October 27-29 in Lexington.

The VBA's annual legislative workday will be held November 14 in Richmond.

VBA's Capital Defense Workshop and Credit Issues Project receive grants

On May 5, the Virginia Law Foundation Board of Directors approved 51 grants totaling $420,205 for law-related projects across Virginia. Now in its 22nd year of grantmaking, the Foundation has provided more than $21 million in support to programs that provide civil legal assistance to low-income Virginians, law-related education to the public, public service internships for Virginia law students, and projects designed to improve the administration of justice. The Foundation allocates five percent of its assets annually for grants and operations. During the current grant cycle, the VLF received 72 requests for funding totaling $1,044,312.

The VLF awarded $149,635 to 16 pro bono/legal services projects; 13 law-related education projects received $68,600; 20 administration of justice programs received $137,970, and $64,000 was awarded to support public service internships. VLF funds are provided in support of these projects for a one-year period beginning July 1, 2006.

Grants awarded to VBA projects include $17,000 to the **Capital Defense Workshop,** a renowned program of The Virginia Bar Association Foundation which covers training requirements in both forensics and litigation for attorneys appointed to represent defendants charged with capital murder cases, and $8,000 to the **VBA Credit Issues Project,** a project of the VBA Young Lawyers Division which aims to prepare a publication focused on educating teenagers about the importance of credit and debt management.

NEWS IN BRIEF

The Honorable Leroy R. Hassell Sr., chief justice of the Supreme Court of Virginia, has been elected to a second four-year term by his fellow justices.

Former VBA President **E. Tazewell "Ted" Ellett** of Alexandria, a partner in the law firm of Hogan & Hartson LLP, has been elected to a two-year term as the VBA delegate to the American Bar Association House of Delegates, succeeding **David Craig Landin** of Richmond.

Missed the **Allen-Webb debate** at the VBA Summer Meeting? The debate transcript will remain available at www.vba.org through Election Day.

The **Virginia Criminal Sentencing Commission** has changed its website address to www.vcsc.virginia.gov. The schedule of upcoming fall and winter "Introduction to Sentencing Guidelines" workshops is now available. To register for a class, call (804) 225-4398 or e-mail the staff at jody.fridley@vcsc.virginia.gov or angela.kepus@vcsc.virginia.gov.

The **American Bar Association Section of Dispute Resolution** has published two new handbooks, *Corporate Governance: A Practical Guide for Dispute Resolution Professionals* and *Improving Board Effectiveness: Bringing the Best of ADR Into the Boardroom*, with the support of the Alfred P. Sloan Foundation. Copies are available free of charge. To order, contact Stephen Kotev at (202) 662-1698 or kotevs@staff.abanet.org.

The VBA office has welcomed several new additions to the staff in recent months: **John Wimer**, staff assistant for membership; **Dana Snead,** staff assistant for administration; and **Anne Bryant,** director of administration. In related matters, **Caroline Cardwell,** director of communications, celebrated her 10th anniversary with the VBA in August.

Watch for launch of redesigned VBA website this fall

The VBA website is being redesigned and will be launched with a different look and structure this fall (coordinated with the freshened design of the *VBA News Journal*). While some elements will be consolidated, condensed and/or restructured, the site will have a more streamlined appearance and clearer navigation using an easily followed "breadcrumb trail" with related links in a separate box on each page.

One new feature will be the "e-Center," accessible from the home page, which will include all online meeting registration forms, downloadable documents, membership applications and other electronic and/or printable forms and publications in one convenient location. There will also be an expanded calendar of events and newsroom page.

A members-only area, under discussion for some time, will be added in the near future after the new site is launched. *See the related article on page 22.*

PROFESSIONAL ANNOUNCEMENTS

Pitcairn Financial Group, a privately held wealth management and investment firm, has announced that **Howard M. Zaritsky** has joined the firm as Vice President. Mr. Zaritsky will be based in the firm's Vienna, Virginia office and responsible for consulting on estate-planning strategies for clients of the Virginia and Pennsylvania offices and throughout the country.

Prior to joining Pitcairn, Howard Zaritsky had recently retired from his own practice, Zaritsky & Zaritsky. The practice focused on estate planning, administration, and related tax matters. As a well-respected expert in the field of estate planning and taxation, Mr. Zaritsky has lectured on taxes at major institutes such as New York University Institute on Federal Taxation and the University of Miami [Heckerling] Estate Planning Institute, where he is a member of the advisory committee. Along with lecturing, he has written numerous articles and treatises on estate planning. He is a member and former chairman of the Wills, Trusts and Estates Section of The Virginia Bar Association. He is a fellow of the American College of Trust and Estate Counsel and of the American College of Tax Counsel. He received his B.A. from Emory University, his J.D. from Stetson University, and his LL.M. (Taxation) from Georgetown University Law Center, where he has also been an adjunct professor of law.

Pitcairn Financial Group is a privately held wealth management and investment firm offering fully integrated and highly personalized services to a diversified clientele including individuals, families and family offices, institutions, foundations and endowments. For more information, call 1-800-211-1745 or visit www.pitcairn.com.

Roger G. Bowers has become a principal of FutureLaw, L.L.C., a Richmond-based law firm specializing in real estate development, land use, construction contracting, legislative representation, public and governmental affairs and landlord tenant law. FutureLaw, L.L.C. is located at 823 East Main Street, Suite 1801, Richmond, VA 23219; phone: (804) 726-2400; www.futurelaw.net.

VALS plans fall institute and board meeting in Charlottesville

NPALSA…*the association for legal professionals* will host the Fall Institute and Board of Governors Meeting of VALS…*the association for legal professionals* on October 14-15, 2006, at the Doubletree Hotel in Charlottesville. The Fall Institute consists of a full day of seminars, beginning at 9 a.m., followed by a leadership/membership workshop. Seminar topics include "Jury Persuasion: Keeping Them Awake," "Cold Case Investigation," "Lawyers Helping Lawyers," "Effective Use of Medical Graphics," "The 411 on the AG's Initiatives" and "It's All Gregg to Me."

Registration begins at 8 a.m. and lunch is included in the registration fee of $75 for VALS members and $90 for nonmembers.

The VALS Board of Governors will meet on Sunday, October 15, at 9 a.m. with a registration fee of $3. Deadline for registration for both the Fall Institute and Board of Governors meeting is September 23.

For more information, please contact Mary Hartman, Certified PP, PLS, Legal Education Council chair, at mhartman@wilsav.com or 757-628-5540, or visit the VALS website at www.v-a-l-s.org.

CLASSIFIED ADS

OFFICE SPACE

Luxury office condo in Sterling, Loudoun County, Virginia. Many upgrades including crown molding throughout, handicapped bathroom in the unit. Sliding pocket glass doors open up to the library with built-in book shelves. Executive office with built-in fishpond/fountain. Conference room, waiting room, reception area and much more. For sale $440,000. Call Kamal Khachi, Listing Agent, (703) 975-8617.

The *VBA News Journal* offers classified advertising. Categories available are as follows: positions available, positions wanted, books and software, office equipment/furnishings, office space, experts, consulting services, business services, vacation rentals, and educational opportunities.

Rates are $1 per word for VBA members and $1.50 per word for non-members, with a $35 minimum, payable at the time of submission. Ad costs must be paid in advance. The *VBA News Journal* reserves the right to review all copy before publication and to reject material deemed unsuitable.

Professional announcements may be printed; the cost per announcement is $15 and text may be edited for style and space limitations. Deadlines are one month in advance of the date of publication. Information is available online at www.vba.org, or call for details at (804) 644-0041.

Password protection coming soon to www.vba.org

VBA members will soon need a password to view protected areas of the website. This feature will protect members' privacy and allow the VBA to provide more value-added features for members only. To simplify matters, each VBA member will have a unique user name which consists of that member's ID number. The password will be the member's ID number plus the first three letters of the member's last name, as indicated by the following (facetious) example:

Member: Virginia B. Lawyer
User Name: 12345 **(VBA member ID)**
Password: 12345law **(member ID plus first three letters of last name)**

For quick reference, member IDs are now being included with the address information on the *VBA News Journal* inkjet label.

One Good Idea

can change your life... *

*The purpose of every article that appears in **The Complete Lawyer**™ is to provide fresh insights and tools that help lawyers be more successful and satisfied in their careers and lives as a whole. The online magazine is published every 60 days but is available continuously at:*
http://virginia.thecompletelawyer.com

Regular Departments & Sections Include:
Associates, Book Reviews, Business Development, Communications, Coaching & Mentoring, Diversity, Financial Matters, Health, Humor, Leadership, Marketing, Managing, Navigating Your Career, On Writing, Personal Development, Profiles, Technology, The Family, Travels, Trend Watch, Women In The Law, Work/Life Balance
and more...

The Complete Lawyer
How Lawyers Succeed

TCL is a collaborative effort of **The Virginia Bar Association in cooperation with YellowWoods Consultants*

CALENDAR OF EVENTS

October 5-7, 2006
VBA Labor Relations & Employment Law Conference
Hotel Roanoke

October 13-14, 2006
Boyd-Graves Conference
Hilton Oceanfront, Virginia Beach

October 17, 2006
VBA Corporate Counsel Fall Forum
The Jefferson, Richmond

October 20, 2006
VBA Virginia Tax Practitioners' Roundtable
Farmington, Charlottesville

October 27-29, 2006
VBA Board of Governors Meeting
Hampton Inn Col Alto, Lexington

November 7, 2006
VBA Virginia Health Care Practitioners' Roundtable
The Berkeley Hotel, Richmond

November 8, 2006
VBA Administrative Law Conference
Omni Richmond

November 14, 2006
VBA Legislative Day
Omni Richmond

November 15, 2006
VBA Pro Bono Hotline Roundtable
Renaissance Portsmouth

November 17-18, 2006
Region IV National Moot Court Competition
Omni Richmond

December 7-8, 2006
VBA Capital Defense Workshop
Richmond Marriott

January 18-21, 2007
VBA Annual Meeting
Williamsburg

July 19-22, 2007
VBA Summer Meeting
The Homestead, Hot Springs

For more details on specific events, visit our website at www.vba.org or call the VBA office at (804) 644-0041. A complete calendar of events with links to additional information is posted on the website.

V·B·A
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