Docket Call

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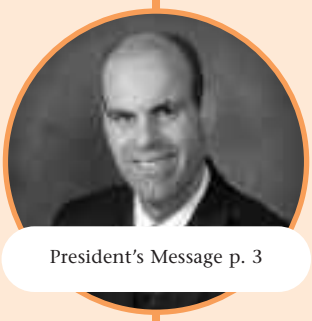
Christopher E. Gatewood, Ed.

The newsletter of the Young Lawyers Conference of the Virginia State Bar

in this issue



Community Law Week Committee Brings Law to High Schools

Nathan Olson

On May 1, the American Bar Association celebrated Law Day. Each year in conjunction with Law Day, the Young Lawyers Conference conducts Community Law Week events such as charity food drives, no bills nights, and many other activities. In the spirit of this year's theme, "Empowering Youth Ensuring Democracy," the YLC's Community Law Week committee conducted mock trials for two high school classes.

The committee chose two Northern Virginia high school classes as participants for the mock trials: Mr. Gil Fegley's Law in Action class at James Madison High School in Vienna, and Mrs. Catherine Ruffing's Law in Action class at Centreville High School in Clifton. "Law in Action" is an elective offered to juniors and seniors. Students learn about the law itself and how it is applied to the everyday American. The committee selected these two classes based on the excellence of their students and teachers as well as their interest in participating as attorneys, witnesses, and jurors. For each trial, the committee selected the fact pattern and arranged for a local attorney to serve as judge. The students then spent class time preparing for their roles.

The James Madison students participated in the case of *People v. Kendall*, a fictional fact pattern in which the Defendant is accused of vehicular manslaughter and participation in an illegal street gang. Corinne Magee, of the Magee Law Firm, PLLC in McLean served as the trial judge.

Mr. Fegley set aside nearly three weeks for trial preparation. Senior Ellie Hoptman worked diligently to prepare for her role as a prosecution attorney. "I read the fact pattern and then all the witness statements. Then, I talked with my witness about not only all of my questions but also about all of the questions he might get from the defense," she said. "But even with all that preparation, I was still really nervous when it came time to get up there."

After weeks of preparation, the case was heard in James Madison's Warhawk Hall. Before trial, Ms. Magee heard pre-trial arguments on whether the state's statutes controlling race car clubs violated free speech under the First Amendment. Senior Grant Leighty successfully argued that part of the statute was unconstitutional. "After reading the statute and the case law, I truly believed the law violated free speech," said Leighty. "Really believing in what I was arguing made it easier to argue my case," he added.

▲ Ann Zimmerman and Eric Mersch, of the James Madison High School defense team celebrate their victory in Warhawk Hall

During trial, each side presented opening statements, called four witnesses, and made closing arguments. At the conclusion of the case, the jury of five students found Mr. Kendall, played by Senior Eric Mersch, not guilty on all

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see you in court

Michael R. Spitzer II

News and Practice Tips for Virginia Litigators

Finding the Best Forum

Objecting to Venue under the Virginia Code

Any litigator whose practice involves civil defense in Virginia is familiar with the standard responsive pleadings that must be filed within twenty-one days of service of the Complaint on the defendant, such as demurrers, pleas in bar, and answers. However, just as important as analyzing the allegations and claims of the Plaintiff for legal sufficiency and available defenses is determining whether the plaintiff's choice of venue is 1) appropriate and 2) advantageous to your client. After all, cases are often times won or lost not only on the sufficiency of the evidence presented at trial, but sometimes in part because of the jury before which the case is tried.

Pursuant to Virginia Code § 8.01-264, in order to challenge the plaintiff's choice of venue, a motion objecting to venue must be filed with the court within the twenty-one day period for responsive pleadings; otherwise, any objection to venue is waived. Thus, it is imperative to determine whether the plaintiff's choice of venue is appropriate and advantageous to your client within the twenty-one day period. If the answer to either of the two inquiries is negative, a motion objecting to venue must be timely filed in addition to any other responsive pleadings.

If you determine that a motion objecting to venue is appropriate, Virginia Code § 8.01-264 mandates that the defendant state in the motion where venue is believed to be proper. In addition, pursuant to Code § 8.01-264, the motion objecting to venue must be promptly heard by the court upon reasonable notice by any party. Thus, as defense counsel, not only must you state that the plaintiff's choice of venue is inappropriate, you must also articulate exactly where venue would be proper in your motion objecting to venue. Further, the motion objecting to venue must be heard promptly by the Court, or the objection to venue is waived. The burden is thus on the moving party to bring the objection to the court's attention in a reasonable time period after the motion is filed, or risk waiving the objection. See Faison v. Hudson, 243 Va. 413, 417 S.E.2d 302 (1992).

… cases are won or lost not only on the sufficiency of the evidence at trial, but sometimes in part because of the jury before which the case is tried.

Virginia Code § 8.01-264 allows transfer of venue upon showing that venue has been improperly laid according to Code Sections 8.01-261 and 8.01-262. In addition, Code § 8.01-265 permits Courts to 1) dismiss a case upon motion if the action is brought by a person who is not a resident of the Commonwealth of Virginia and if no part of the cause of action arose in Virginia and 2) to transfer a case to another more fair and convenient forum in the Commonwealth of Virginia upon good cause shown. One problem that can arise for defense attorneys is that frequently it is necessary to engage in preliminary discovery to gather sufficient facts to demonstrate that venue was improperly laid. The requirement for discovery can create timing issues with regard to waiver as outlined above. Obviously, the sooner a motion objecting to venue can be heard, the less likely it will be waived on timeliness grounds. If discovery is necessary to support a motion objecting to venue, however, the motion cannot be heard as quickly, thus potentially creating a problem of timeliness.

As stated above, consideration of the merits of a motion objecting to venue must be made immediately after the lawsuit is filed. Thus, familiarize yourself with the Code provisions dealing with venue so that you are prepared when you are representing a defendant in the future.

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YLC's listserv at www.vayounglawers.com

message from the president

Daniel L. Gray

As you glance at the haggard face in the corner of this page, you may think that your new President pushes the envelope as a member of the 'Young' Lawyers Conference. You're right, but according to our charter's cruelly named Grandfather Clause, I can remain a Young Lawyer because I became a member of our Board's Executive Committee before I turned 36. An incentive to leadership if there ever was one.

One of my pleasurable duties as President is this column. For my inaugural piece, I thought I might share some of what I've learned over 10 years of practice in the hope that you—you shiny young thing—can avoid some of the mistakes I've made along the way. Here are some of the hard-won lessons that resulted in the wreck pictured above:

Don't let worry consume you. During my first five years practicing law I carried a constant ache in the pit of my stomach from the conviction I was constantly committing malpractice. Slowly, this ache dissipated as I recognized patterns in my work. "I've been to this movie before, and I know how it ends," I thought. After a year of relief, the ache came back when I realized how much I still didn't know about the practice of law.

You have to conquer that ache somehow, or it will make you miserable. You have every right to be concerned, but don't let your concern turn into worry. You are concerned when you cross the street: you watch for traffic, you don't dart out in front of cars, you look both ways. But you don't worry when you cross the street: you don't pace back and forth endlessly, and the thought of crossing the street doesn't keep you up nights. In crossing the street, you recognize the risks and act accordingly. Why should the practice of law be different for you? The stakes are much higher crossing the street (death, disability) than they are in your job.

Don't be afraid to make a decision. Ask all the questions you need to ask of your boss, but eventually you'll need to make a tough decision. Do it and move on. Many times it will be the wrong decision. Accept that and expect it. If people were right more often than they were wrong, we'd all get rich playing the stock market. We're usually more wrong than we are right.

I thought I might share some of what I've learned over 10 years of practice in the hope that you—you shiny young thing—can avoid some of the mistakes I've made along the way.

Have a sense of humor. Yes, the law is a learned profession, borne of the noblest ideals of mankind. But I can tell you as a domestic relations attorney that the law, your clients, the courts, and your colleagues can be awfully humorous. You're funnier than all of them, so don't take yourself too seriously. If you can laugh under pressure, you'll do very well as a lawyer.

Pursue other interests. When I started practicing in 1996, cell phones were not ubiquitous. The Blackberry did not exist. I survived being out of contact with the office for hours, sometimes days at a time. I used some of that time to do bar work and volunteer. The world did not stop spinning if I took the afternoon off to attend a bar conference. If you're working someplace where commerce grinds to a halt without you, you're not being paid enough.

No one will make your life easy. It took me a while to learn this lesson. I worked for partners who took advantage of my willingness to work hard. I over-committed myself to all manner of endeavors. I struggled to balance work and family. Eventually you realize that none of the people you deal with will ever change, and you can't sigh or complain your way into happiness. All you can do is change how you deal with people and your situation. If you want a balance between work and family, you have to make that happen. Your firm's Associate Life Committee can barely put together Happy Hour – they can't solve your lifestyle problems. Ironically, making your life easier involves very difficult sacrifices. If you decide you need to leave the office at 6 p.m., you might endure a lot of nasty looks, delayed partnership, or less money. Ultimately, though, you have to decide what's important to you.

Four words that changed my practice. When I stared out in family law, I approached my cases as a legal gladiator – argue, fight, WIN! This approach did not endear me to my colleagues. My strategy changed after practicing an opening statement with a colleague. She was not much older than me, but she gave me the best advice I ever got about the practice of law. As I finished my opening statement, breathless after pouring forth the virtues of my client and the evils of her spouse, my colleague put her hand on my shoulder and said, "Dan, ones don't marry tens." So, so true. There are two sides to every story, and you're annoying other people endlessly if you can't or won't acknowledge that. Stop trying to lobby opposing counsel – you won't change their minds, and you'll get a reputation as a "difficult" lawyer.

You will screw up. Very few lawyers share their mistakes. Oh, they'll tell you cutesy stories about the time they mispronounced some Latin phrase in court, or the unintentional double-entendre in their appellate brief. But they won't tell you about their real screw-ups—the

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legal ethics corner

Jeffrey Hamilton Geiger

You Make the Call

Q Who said you can't be in two places at once! Here I am, sitting on the beach drinking a cold one while my assistant is manning the fort, and scheduling my appointments. Although, I must confess that I am a little concerned by his last e-mail. Apparently, my assistant scheduled an appointment for me to meet with Brian. I told him, however, to cancel it after I met with Brian's ex-wife and agreed to represent her in connection with a custody petition Brian filed against her. Now, Brian is complaining that he told my assistant "all the facts" about his case. Of course, my assistant denies he learned any confidential information about Brian. The last thing that I want to happen is to get into a case only to have to withdraw or be disqualified.

A The issue concerns whether the lawyer can continue to represent Brian's ex-wife in the face of his claim that he imparted confidential information to your assistant. Even if the lawyer and client do not agree to enter into a professional engagement, information provided to a lawyer with the expectation that it be kept confidential is protected under Rule 1.6 of the *Rules of Professional Conduct*. *See* L.E.O. 1757.

Yet, in this situation, the purportedly confidential information was imparted not to the lawyer, but to his assistant. While legal assistants may not be covered by the *Rules of Professional Conduct*, Rule 5.3(b) requires that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Part of that obligation requires that "A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, *particularly regarding the obligation not to disclose information relating to representation of the client ….*" Rule 5.3, Comment.

So, what is the answer? To avoid the imputation that confidential information was received by the lawyer (and possible disqualification in any civil litigation), the lawyer should establish a screen between himself and his assistant as to the matter involving Brian and his ex-wife. *See* L.E.O. 1800; 1832. This may entail:

using another staff person with respect to this matter
advising all attorneys and staff members to not discuss the matter with the "infected" assistant
preventing the assistant from having access to the file (electronic and paper)
noting on the file in question the key information regarding confidentiality
notifying Brian or his lawyer that measures have been taken to quarantine the confidential information (if any)

Practice Hint: Train support staff to minimize the receipt of confidential information received from prospective clients until after performing the necessary conflicts analysis.

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President's Message continued from p. 3

profound mistakes that require someone to talk you off the ledge. Trust me, we all make these mistakes. Think of the best, most capable lawyer you ever met. I guarantee they've screwed up royally more than once. The lawyer who thinks he's never made a big, fat, ugly mistake is delusional and dangerous. You will screw up. Accept it, admit the mistake loudly and early, do what you can to fix it, and move on.

You could be at this 50 more years—pace yourself. As you've read, I practice family law. My review of alimony cases in the last few years leads me to conclude that for the courts, 65 no longer represents retirement age. The Court of Appeals is fond of saying, in so many words, if you can get out of bed in the morning, you can work. This is not a bad thing. Generally, work keeps the mind and body sharper longer, and people who work into older age tend to be better off financially. If you think you may work to age 70 or older, wouldn't you make some adjustments now? After all, you have 50 years to make partner!

Why bother having crazy-money anyway if you're eating peanut butter?

You don't have to suffer to be a good lawyer or make a good living. After I was practicing a few years, a partner confided in me that she had been feeding herself and her family peanut butter sandwiches for two weeks, because she was so busy working she didn't have the time to grocery shop. She relayed this as if it was perfectly normal. As if the Law required this sacrifice. It's not normal. It's crazy. Here's a secret: you can get to work at 8:30 and leave at 5:00 or 6:00 and still get paid very well. Trust me, those firms are out there. You might not earn crazy-money, but you can do well. Why bother having crazy-money anyway if you're eating peanut butter?

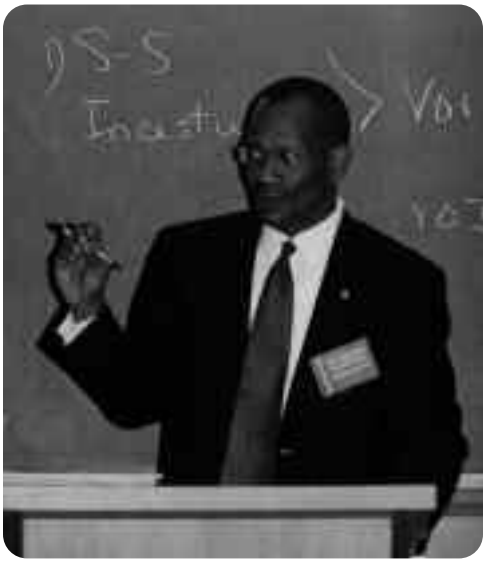
I hope these suggestions have some value you to you—even if it's just the assurance that someone else has been where you are right now. However you approach the practice of law, keep one thing in mind: 10 years passes like 10 days. Do your best to enjoy yourself.

Minority Pre-Law Conference Reaches Southwest Virginia

Shyrell A. Reed

For the first time, on Saturday, April 14, 2007, the YLC held the Southwest Virginia Minority Pre-Law Conference at Washington and Lee School of Law in Lexington. In the past, the Young Lawyers Conference of the Virginia State Bar has annually conducted a single Minority Pre-Law Conference that takes place in Richmond or more recently in Northern Virginia. In an effort to reach out to minority undergraduate students who attend schools located in the southwest part of Virginia, the YLC held a second Conference to further encourage minority undergraduates to consider the legal profession as a career. Approximately 50 minority undergraduate students attended from various undergraduate schools primarily located in Southwest Virginia. Like the Northern Virginia Conference, the Southwest Conference exposed the students to all phases of developing a legal career, from the law school admissions process to the selection of career paths in the law. The program included a panel of law school deans and directors of admissions who provided an inside perspective to the law school admissions process. Additionally, there was a panel of law students who provided a students' perspective of their experiences in law school.

▶ Conference Chair Shyrell A. Reed and Keynote speaker Delegate Onzlee Ware



▲ Keynote speaker Delegate Onzlee Ware of the Virginia House of Delegates discussed his career.

▲ Monica Sanders, 2L student at Catholic University School of Law, addressed the conference.

▼ Conference Attendees were primarily undergraduate students considering a career in the law

Cynthia Hintze, ▲ Senior Assistant Director of Financial Aid of Washington and Lee School of Law, explained to students how to get money to attend law school.

Delegate Onzlee Ware of the Virginia House of Delegates was the keynote speaker for the Conference. He spoke to the students about his unique legal and political career. Further, other members of the bar, including, Judge Margaret Spencer of the Circuit Court for the City of Richmond; Deputy Commissioner Andrea White Lee of the Virginia Workers' Compensation Commission; the Hon. Diane M.

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corporate corner

R. Willson Hulcher, Jr.

Issues of Interest for Virginia Transactional Attorneys

When Drafting Transactional Documents, Don't Forget to Think About Real World Ramifications

One of the challenges new transactional attorneys face as they begin to draft and review agreements is learning to look beyond the agreement itself to the relationship it represents. When you are learning how to understand, draft and negotiate contract language, your primary focus, necessarily, is on what happens on the page. But that focus can blind the drafter to the real world implications of contract provisions. So, while it is necessary to take the time to understand what each provision means on its own and how it fits into the agreement as a whole, it is also important to consider what it means in the context of a particular transaction.

Take, for example, acquisition agreement covenants governing the pre-closing actions of the entity being purchased. These covenants prohibit the target from taking certain actions without the consent of the buyer in the time between signing the agreement and closing the transaction. The reason for such covenants is that the buyer doesn't want the target to be free to make any significant changes in its business without the buyer's consent before closing.

As buyer's counsel, the temptation is to think of these covenants as zero sum: The buyer wants them tight and the seller wants them loose. So if the buyer's counsel revises the form provisions at all, it should be to make them tighter, right? Not necessarily. Once the agreement is signed, it will have to be implemented. It may not be desirable, or even feasible, to require that the buyer approve, for example, every contract with a value of more than $10,000 or every employee hired or fired. Disproportionately tight covenants might be ignored by the business people, even when they apply to significant matters. Or, instead, overly tight covenants could send the signal to the non-lawyers implementing them that the buyer should be consulted on everything, including matters like pricing changes where the buyer should have no say, at risk of stepping into an anti-trust thicket.

Failure to keep in mind the real world consequences of even a standard contract provision can lead to a "what was that lawyer thinking?" moment. That moment may or may not occur before the client signs the contract. In the best case, another lawyer on the drafter's side of the transaction will raise the issue. Worse, opposing counsel may read the agreement and wonder if the drafter knew what he or she was doing, which could color their approach to the negotiation going forward. However, if no one catches it until a problem arises, the client will be faced with an agreement its own counsel drafted that the client needs the consent of the other party to amend and that may have already led to liability.

Failure to keep in mind the real world consequences of even a standard contract provision can lead to a "what was that lawyer thinking?" moment.

Will Hulcher is an associate in the Business and Corporate Finance & Securities sections at Williams Mullen. He can be reached at whulcher@williamsmullen.com

Virginia State Bar 69th Annual Meeting

Weather was frightful, but YLC was delightful

The weather outside may have been unseasonably cool, but inside Virginia Beach's Oceanfront Cavalier Hotel, the warm greetings of old friends and new acquaintances provided a cheery contrast to the dreary sky and chilling winds.

The occasion was the Young Lawyers Conference Meeting and Reception, held during the Virginia State Bar's Annual Meeting in June and sponsored by Hunton & Williams LLP. Members of the conference gathered to honor fellow young lawyers for special service.

Sarah Louppe Petcher, a Fairfax attorney, received the R. Edwin Burnette Jr. Young Lawyer of the Year Award for her advocacy on behalf of immigrants. Petcher also was recognized with an Outstanding Service Award for Immigrant Outreach.

The YLC recognized 16 other members with Outstanding Service awards during the meeting, including Samantha Ahuja and Tomika N. Stevens for the Northern Virginia Pre-Law Conference; Kenneth L. Alger II for the Domestic Violence Safety Project; Eunice P. Austin, Meghan M. Cloud, Melissa L. Lykins, Daniel E. Ortiz, William B. Porter, chair, Julia E. Sexton, vice chair, and Brent M. Timberlake for the Professional Development Conference; Darren W. Bentley as statewide chair of No Bills Night; Maureen E. Danker for the Annual Meeting Athletics; Demian J. McGarry for the Annual Meeting Program; Shyrell A. Reed for the Southwest Minority Pre-Law Conference; Hugo R. Valverde for Immigrant Outreach; and Erin S. Whaley for Wills for Heroes.

▲ YLC President, Maya Eckstein, presents the Young Lawyer of the Year Award to Sarah Louppe Petcher, left

◀ Incoming YLC President Dan Gray and Immediate Past President Maya Eckstein enjoy the YLC Awards Luncheon

▼ Petcher is recognized by the award's namesake, Judge Burnett

At the conclusion of the meeting, the YLC elected its leadership for the 2007-08 bar year. With a mixture of humor and humility, Fairfax attorney Daniel L. Gray accepted the helm of the YLC from 2006-07 President Maya M. Eckstein of Richmond.

Earlier that cloudy Friday, the YLC sponsored a well-received continuing legal education program that focused on the implications of the 2005 landmark Supreme Court decision in Kelo v. City of New London, an eminent domain case that involved transferring land from one private owner to another to further economic development.

While business and education was the focus of the Annual Meeting, the YLC also found time to have – and encourage attendees of all ages to have – a lot of fun as well.

On Friday morning, the conference hosted the 26th Annual Run in the Sun, a 3.1-mile race along the Virginia Beach Boardwalk. The run was sponsored by Virginia Lawyers Weekly. On Friday night, the YLC sponsored the dance at the Cavalier Beach Club. Once again, the TFC Band provided the tunes for the evening, mixing oldies from the '50s to the Top-40 hits of today.

Finally, on Saturday morning, the conference hosted the 23rd Annual Beach Volley Follies, a competitive volleyball tournament that unfolded beachfront. The winner of the tournament, which was sponsored by Chicago Title Insurance Company and Curran & Whittington PLLC, was the Executive Committee Team, followed closely by Team Winners in 2nd place.

Virginia Beach, VA

▼ Run in the Sun

counts. "I was pretty nervous," said Mersch, who dressed for the part by wearing a suit and tie both days of the trial. "Both sides did such good job, I really didn't know how it was going to turn out."

After the trial, Ms. Magee provided critiques and tips to a captivated audience. She informed the class that the law is not like it appears on television. She encouraged students to go to a courthouse and watch a real trial.

A week later, Mrs. Ruffing's students took part in the trial of *Kyle Wilkins v. New Columbia County School District*. In this fictional fact pattern, New Columbia student Chris Wilkins dies during a track meet from complications due to excessive steroid use. Chris' father, Kyle, sues New Columbia claiming that the track program's win-at-all-costs attitude and the history of drug dealers on school property constituted negligence, which lead to Chris' death. Chidi James, a civil litigator at Blakingship & Keith PC, in Fairfax, served as trial judge.

After opening statements, both sides aggressively argued their cases. Four students served as attorneys for the plaintiff and four for the defense. Each student-attorney conducted one direct examination and one cross examination. Senior Brett Kube, a plaintiff's attorney, enjoyed the challenge of his role. "Direct examination was a little bit easier, because you could anticipate your witness's answers," he said. "Cross was really hard, because you didn't know how the witness would answer."

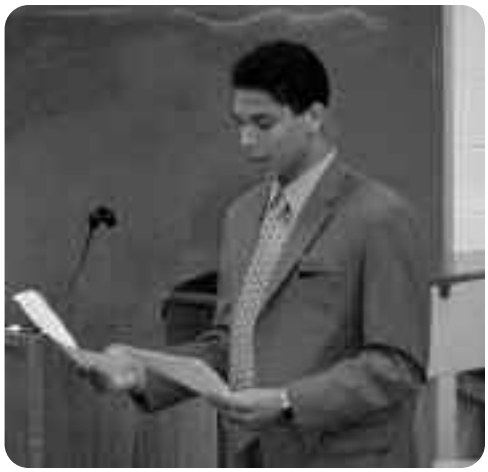
▲ At Centreville High School, defense attorney, Elizabeth Render, cross examines the Plaintiff played by Josh Braaten.

▶ Defense attorney Drew Carter delivers his opening statement in the Wilkins v. New Columbia County School District trial.

Attorneys from both sides showed their knowledge of the rules of evidence by making objections such as hearsay, beyond the scope of direct, and lack of foundation. Mr. James complimented the students on their command of the courtroom, but cautioned them about objecting too much. "You don't want to object to something unless the answer will hurt your case," he said. "Who knows? The answer might actually help your client."

The trial lasted nearly two ninety-minute class sessions. At the end of closing arguments, the 12-person jury returned a verdict of not-guilty. Jury members explained that both sides were effective but that they were not convinced that the plaintiff proved its case. Defense attorney, senior Elizabeth Render, was pleased with the verdict. "It was a very close case, but because it was the plaintiff who brought the case, I think they had a little more to prove."

The Community Law Week committee was thrilled with the extraordinary efforts by Mr. Fegley and Mrs. Ruffing's students. It appears that there are some future litigators on the horizon. Finally, the committee would like to thank everyone involved in the mock

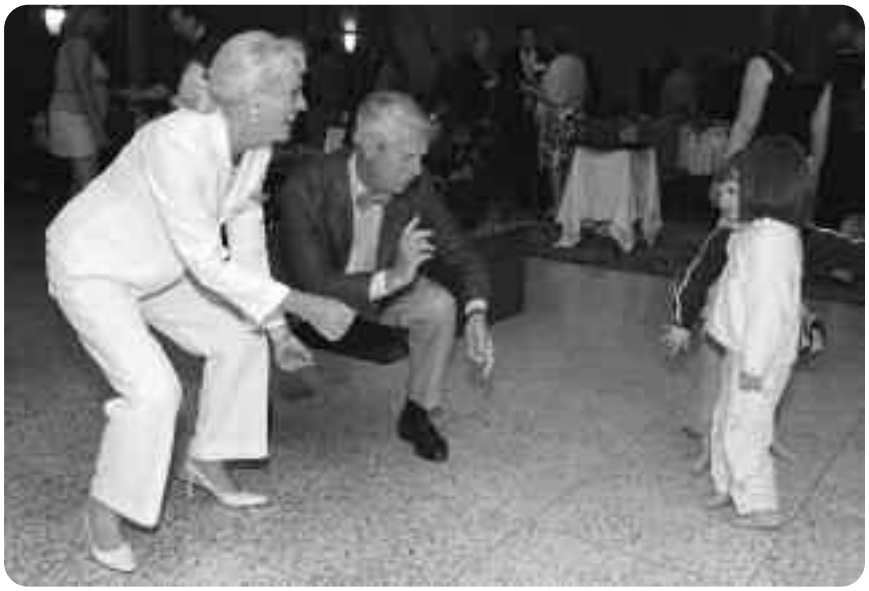


trials, especially Corinne Magee and Chidi James for serving as presiding judges and for providing valuable feedback to the students.

Nathan Olson is an associate with Cooper Ginsberg Gray PLLC and may be reached at nolson@cgglawyers.com

▼ Run in the Sun, VSB 69th Annual Meeting, Virginia Beach

VSB 69th Annual Meeting in pictures



▲ Perennial favorites the TLC Band were crowd pleasers again this year.

▼ Incoming YLC president Dan Gray receives the baton (and a plaque) from outgoing president Maya Eckstein

▲ (Above and left) Athletes and dancers of all ages enjoyed this year's YLC-sponsored Annual Meeting events

▼ Winners of the Run in the Sun (from left) Greg Forbes, 3rd place male; Lynne Rhoades, 3rd place female; Daniel Ullrich, 1st place male; Linda Jackson, 2nd place female; Nathan Olson, 2nd place male (Not pictured: Mary Nelson, 1st place female)

Strickland of The McCammon Group; Professor A. Benjamin Spencer of the University of Richmond School of Law; Melvin L. Hill of Ware & Hill, LLP; Kevin D. Purnell of Dinkin & Purnell, PLLC; and Fay Spence of the Federal Public Defender's Office, shared their career experiences and advice to students interested in pursuing a career in the law.

There were also workshops on law school financial aid, the Law School Admissions Test (presented by Glenn E. Bell of the Law School Admission Council) and the Virginia Character and Fitness Requirement, presented by Henry M. Sackett, III, of Edmunds & Williams, PC. Professor Robin Wilson of Washington and Lee School of Law gained the attention of the students with a family law class that addressed Britney Spears and Kevin Federline's divorce and child custody issues. Further, a criminal mock trial was presented before the students by Kevin D. Purnell as prosecutor and Fay Spence as defense attorney, with Judge Spencer presiding and the students acting as the jury. Students were given a tour of the Washington and Lee School of Law, and attended a law school fair with law schools represented across the state.

With this year's success, the YLC plans to make the Southwest Virginia conference an annual event, as an addition to the Northern Virginia Conference. Sponsors for the Conference included Washington and Lee School of Law and Gentry Locke Rakes & Moore, LLP. The YLC's Conference Chair was Shyrell A. Reed, an associate at Gentry Locke. Members of the committee included Brooke Rosen, Sherry Fox, and Jennifer Belcher.

Shyrell A. Reed is an associate at Gentry Locke Rakes & Moore, LLP, in Roanoke. She can be reached at shyrell_reed@gentrylocke.com

Immigrant Outreach Committee Committed to Educating the Criminal Bar

Hugo Valverde

A first offense domestic assault and battery conviction under Va. Code § 18.2-57.3 can subject a lawful permanent resident to deportation. A conviction for possession of a controlled substance with intent to distribute, regardless of the sentence imposed or the actual time served in prison, would consequently subject a lawful permanent resident to certain deportation and a lifetime bar from ever returning or ever becoming a U.S. citizen. Just keeping the sentence below one year does not automatically save a client from deportation. These and other non-obvious aspects of the overlapping worlds of immigration and criminal law were the focus of the Young Lawyers Conference Immigrant Outreach Committee's spring CLE presentation in Virginia Beach.

Over 45 people attended the CLE, which was comprised almost entirely of criminal defense attorneys and public defenders. The Immigrant Outreach Committee provided participants with several resources on CD, including a comprehensive analysis of select sections of the Virginia Criminal Code provided by Mary Holper of the Boston College Law School's Immigration Law Clinic.

Increasingly, effective criminal representation requires knowing the immigration consequences of criminal convictions. The non-citizen population in our state continues to increase. In addition, more state and local law enforcement officers are cooperating with federal authorities and playing an active role in enforcing immigration laws. As a result, the number of non-citizens has grown who find themselves in the state's state criminal court system and need criminal representation. However, criminal defense attorneys unaware of the immigration consequences can unwittingly place their clients in deportation proceedings. Often a lawful permanent resident will attend a naturalization interview only to be taken away in handcuffs by immigration agents because he plead guilty to a misdemeanor based on a criminal defense attorney's advice.

Due to the success of the Virginia Beach CLE, the Immigrant Outreach Committee is planning another similar program this fall or next spring.

For more information or if you would like to become involved contact Hugo Valverde at hugo.valverde@gmail.com or Sarah Louppe Petcher at sarahlouppe@yahoo.com.

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First Day in Practice
For more information and to register, see www.vsb.org
Tuesday, October 30, 2007
Greater Richmond Convention Center
Seminar: 8:30 A.M.–4:15 P.M.

S Corporations v. LLCs: Distinguishing two popular 'pass-thrus

Richard M. Price

When establishing a new business, Virginian entrepreneurs often choose between two forms: the subchapter S corporation ("S corporation") or the limited liability company ("LLC"). Both forms provide liability protection and "pass-thru" profits. Virginia's attorneys should be aware, however, of some important distinctions between S corporations and LLCs. This article will highlight a few of the basic regulatory, tax and capitalization distinctions.

Regulatory

S corporations must adhere to certain regulatory formalities mandated by the Internal Revenue Code ("IRC") and the Virginia Stock Corporation Act ("VSCA"). These formalities primarily concern IRC restrictions on share distribution rights and ownership, and VSCA record keeping and reporting requirements.

As a condition of S corporation tax treatment, the IRC has three primary requirements: First, S corporation shareholders must be natural U.S. residents – no business entities or nonresident aliens. Second, there can be no more than 100 shareholders in the aggregate. And third, there can be no more than one class of shares for purposes of distribution rights.

As a condition of incorporation, the VSCA requires that S corporations observe the same record keeping and reporting formalities as C corporations. This means that corporate actions must be documented, minute books maintained and directors and statutory officers elected. Additionally, S corporations must file annual reports with the State Corporation Commission ("SCC").

By contrast, LLCs are substantially less regulated. The IRC does not impose any restrictions with respect to the quantity or identities of owners (called "members"). Similarly, the IRC does not forbid distribution preferences among members. And, while LLCs must file Articles of Organization with the SCC, Virginia does not require the actions of LLCs to be executed with any formality.

Tax

Though both S corporations and LLCs are disregarded entities for tax purposes, not all "pass-thrus" are equal under the relevant sections of the IRC. The employment tax made applicable to some S corporation shareholders is substantially different than the self-employment tax applicable to all LLC members.

Employment or self-employment taxes are levied on the first $97,500 of an employee's income at an aggregate rate of 15.3% for 2007, reflecting both social security and Medicare taxes. Each dollar above $97,500 is then taxed at 2.9%, reflecting only the Medicare tax.

Though S corporations and LLCs both offer liability protection and "pass-thru" profits, there are important differences between the two forms

The employment/self-employment tax distinction arises when the business entity in question makes profits in excess of what a market wage to the owners would be. This is because, under the employment tax rules, S corporations can protect substantial profit from the employment tax by identifying shareholder dividends as distributions of corporate income, rather than as payment for the services of active owners. (Note that the IRS disallows abusive characterizations.) By contrast, all LLC profit is generally characterized as member remuneration subject to the self-employment tax, from the first dollar to the last, absent an LLC's qualification and election to "check-the-box" for corporate tax treatment.

Capitalization

Of preeminent concern for many start-up entrepreneurs is securing adequate "seed-money" for their operations. The choice of form, S corporation or LLC, necessarily has implications for the business entity's ability to raise capital.

S corporations offer investors a tangible, relatively uncomplicated representation of their investment and right to profits – the stock certificate. Consequently, S corporations may be preferred where capital is sought from individual investors who prefer this familiar instrument of ownership.

LLCs are generally favored over S corporations, however, as a vehicle for attracting venture capital. The reasons for this are varied, but four factor prominently: First, unlike S corporations, LLCs are not prohibited by the IRC from soliciting other business entities for capital. Second, venture investors typically desire a mix of investment preferences which are inconsistent with the IRC restriction on distribution rights among S corporation shares. Third, start-up loans at the LLC entity level increase the tax basis in members' interests under the partnership tax rules applicable to LLCs. And fourth, start-up losses flow through to LLC members with fewer restrictions than are placed upon S corporation shareholders, taking some of the sting out of growing pains.

Virginia's entrepreneurs will continue to require sound counsel when organizing their businesses. Though S corporations and LLCs both offer liability protection and "pass-thru" profits, there are important differences between the two forms with regard to regulatory compliance, tax and the ability to attract capital. An understanding of the basic distinctions between S corporations and LLCs will better serve your clients, grow your practice and help keep Virginia strong in the competition for new businesses.

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08/23 | **VSB Professionalism Course, Roanoke**
10/05–06 | **YLC Leaders Conference**, Richmond
09/16–18 | **First National Family Law Symposium**
University of Richmond School of Law
National Center for Family Law
Go to www.vacle.org for more info.
09/27 | **VSB Professionalism Course, Richmond**
10/29 | **VSB-YLC Admission & Orientation Ceremony**
10/30 | **VSB First Day in Practice Seminar**
11/07–14 | **VSB Midyear Legal Seminar 2007**
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