

Highlights of the June 13, 2013, Virginia State Bar Council Meeting

At its meeting on June 13, 2013, in Virginia Beach, the Virginia State Bar Council heard the following significant reports and took the following actions:

Budget

The council approved a \$14.66 million budget for 2013-14. This is an increase of \$1,088,989 over the 2012-13 operating budget. The budget includes a 2 percent raise for VSB staff and \$500,000 in increased expenditures due to relocating the VSB offices.

Office Relocation

Executive Director Karen A. Gould said that six buildings have been identified as

possible locations for the VSB offices. That list will be narrowed to three and those will be test-fitted for the bar's requirements. The VSB's broker will then negotiate with the broker for the chosen site.

Amendments to VSB Bylaws Regarding Executive Committee Membership

The council approved 62 to 5 the motion to amend the bylaws giving the Diversity Conference a seat on the Executive Committee. A proposal to increase the size of the committee from 13 to 16 was suspended.

Rule Changes

The council unanimously approved changes to Rules of Professional Conduct 1.11, conflicts of interest; 1.15, safekeeping property; and 5.4, independence of a lawyer.

Resolutions

The council unanimously approved resolutions honoring W. David Harless for his years of service and his law firm for its support of Harless during his years as an officer and service on the VSB Council.

SAVE THE DATE

September 13-15

Lawyers Helping Lawyers Fall Conference

Plan now to enjoy the autumn at Wintergreen Resort — sharing food, companionship and CLEs with friends and colleagues interested in helping others in the legal profession

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Lawyers Helping Lawyers offers confidential help for substance abuse problems and mental health issues.

For more information, call the toll free number: (877) LHL-INVA or visit <http://www.valhl.org>.

NOTICE: Check Your MCLE Hours Online Now

The Mandatory Continuing Legal Education compliance deadline is October 31, 2013. Go to <https://member.vsb.org/vsbportal/> to review your MCLE record.

An Interim Report and information on new MCLE requirements will be mailed to all active members in July. Reminder: Of the 12.0 CLE hours required each year, 2.0 must be in ethics and 4.0 must be from live, interactive programs. If you have any questions, please contact the MCLE Department at (804) 775-0577 or mcle@vsb.org.

Kevin E. Martingayle is President-elect of the Virginia State Bar

Kevin E. Martingayle, of Virginia Beach, is the Virginia State Bar's new president-elect. He will serve for a year, then succeed Sharon D. Nelson for the 2014–15 term as the first president from Virginia Beach.

Martingayle took office June 14 during the VSB's annual meeting in Virginia Beach.

Martingayle, an owner and partner of Bischoff Martingayle PC, just completed two terms as a 2nd District representative on the VSB Council and is chair of the Better Annual Meeting Committee. He serves on the Executive, Budget and Finance, and Legal Ethics committees.

He also is a member of The Virginia Bar Association, Virginia Beach Bar Association, Virginia Trial Lawyers Association, and Federal Bar Association. Martingayle has extensive involvement in the community. He is founder and race committee member of the Allen Stone Memorial Run-Swim-Run and 5K Run; founder and event coordinator of the Virginia Beach Brave Heart Run-Swim-Run; and legal advisor to the Virginia Beach Volunteer Rescue Squad.

Martingayle is a native of Richmond and graduated from Collegiate High School in 1985. He is a graduate of Hampden-Sydney College and has a law degree from the University of Virginia School of Law, 1991.



His practice focuses on appeals; civil, commercial, employment, and estate litigation; civil rights; and constitutional, land use and zoning, and municipal and administrative law.

He is married to Elisabeth Martingayle and has three children.

VSB Dues Can Be Paid Online

Lawyers can now renew their Virginia State Bar memberships and pay their dues online.

Online Membership Renewal is available to members in good standing with active, active/Virginia corporate counsel, and associate memberships. Members also still have the option of renewing by postal mail. Dues statements were mailed June 14.

The online service accepts individual attorney renewals only.

Access is provided through the secure "Member Login" area of VSB.org. As with the paper statements, members who choose "Online Membership Renewal" certify whether they are covered by a professional liability insurance policy, select what voluntary sections

they wish to join, and pay their mandatory annual dues (including the mandatory \$25 Clients' Protection Fund fee), plus any section dues, by credit card.

The site accepts MasterCard and Visa, which can be applied to dues-related payments only. These include late fees that accrue after the membership compliance deadline of July 31. The membership renewal, insurance certification, and dues payment are processed immediately, and a receipt is issued.

Access to the Online Membership Renewal option is available until early October, when attorneys are administratively suspended for membership non-compliance.

The VSB E-News

Have you been receiving the Virginia State Bar E-News? The E-News is a brief monthly summary of deadlines, programs, rule changes, and news about your regulatory bar. The E-News is emailed to all VSB members. If your Virginia State Bar E-News is being blocked by your spam filter, contact your email administrator and ask to have the VSB.org domain added to your permissions list.

Abingdon Conference Draws 265 Judges and Lawyers

by Gordon Hickey

Virginia Supreme Court Chief Justice Cynthia D. Kinser offered up an observation and a little advice for the 265 judges and lawyers at the recent Regional Bench-Bar Conference in Abingdon. The most common mistake lawyers make when appearing before her court? They don't listen. "Listen to the question and respond," she said.

Chief Justice Kinser was chief among a dozen judges who spoke at the joint Solo and Small Firm Practitioner Forum and Regional Bench-Bar Conference for the 28th, 29th and 30th Judicial Circuits on April 26. She offered up a few other tidbits during the centerpiece town hall meeting.

- How is the justice picked to write the court's opinion? Out of a hat.
- When will the court apply the "ends of justice" exception? Almost never.
- When assigning error in a brief, put it under the heading "assignment of error."
- When will electronic filing be allowed? "We are moving in that direction.... I'm anxious for it to be full-fledged across the commonwealth."

Chief Justice Kinser was joined on the stage by Elizabeth A. McClanahan, justice of the Supreme Court of Virginia, and Teresa M. Chafin, judge of the Virginia Court of Appeals. Kevin E. Martingayle, Virginia State Bar president-elect designate, moderated.

The judges touched on many areas during the hour-long meeting. Among them: emotional appeals (don't bother); petitions for rehearing (do bother); brevity in briefs; moving on when an argument is lost; the Court's budget restrictions.

The judges were all asked for their suggestions for improving the practice of law. Justice McClanahan said lawyers appearing in the Court should remem-



Leading the discussion at the Town Hall Meeting were (top, left to right) Elizabeth A. McClanahan, Justice, Supreme Court of Virginia; Cynthia D.F. Kinser, Chief Justice, Supreme Court of Virginia; and Teresa M. Chafin, Judge, Virginia Court of Appeals.

The panel on "eDiscovery: How Is it Changing the Way We Practice Law?" (middle photo) was moderated by Thomas R. Bagby and included panelists the Honorable Michael F. Urbanski, U.S. District Court; the Honorable Pamela M. Sargent, U.S. Magistrate; John W. Simek, Sensei Enterprises Inc. vice president; and the Honorable C. Randall Lowe, 28th Judicial Court.

The panel "Recent Developments in State/Federal Criminal Law and Procedure Law" (bottom photo) featured Kenneth F. Lammers Jr., Wise County deputy commonwealth's attorney; Zachary T. Lee, assistant United States attorney; Dean Lucy S. McGough of the Appalachian School of Law; the Honorable Michael L. Moore, 29th Judicial Circuit; and the Honorable Chadwick S. Dotson, 30th Judicial Court. VSB President-elect Sharon D. Nelson introduced the panel.

ber that they can file a reply brief. She also said that they should treat each other with civility.

Judge Chafin added that “there’s no reason we can’t agree to disagree.” She also advised lawyers to get involved in the community. Chief Justice Kinser agreed that lawyers should be out in the public doing community service and added that every lawyer has the responsibility to do pro bono work.

VSB President W. David Harless, who is from Lee County, was a driving force behind the conference that drew a large percentage of the lawyers and judges in the region. “The Abingdon conference was the first regional bench-bar program in the state. It was supported by Chief Justice Kinser and Justice McClanahan of the Supreme Court, and Judge Chafin of the Court of Appeals, as a means to improving professionalism and fostering communications between the bench and bar,” Harless said.

“The extensive participation and support by the local judges and lawyers, and the planning efforts of the region’s local bar leaders, the Conference of Local Bar Associations, and the Special Committee on Bench-Bar Relations, are responsible for making the Abingdon conference a great success. This success will encourage the VSB to offer the program to judges and lawyers in other rural regions of Virginia.”

VSB Executive Director Karen A. Gould said, “The Abingdon bench-bar conference was a wonderful collaboration. David Harless came up with the concept of a regional bench-bar conference hosted with the assistance of the VSB, reached out to the different constituencies, helped to line up speakers and attendees, and sent countless e-mails to keep people on track. It was due largely to his dedicated efforts that this conference was such a rousing success. He has had a phenomenal year as president of the Virginia State Bar, and I feel

Conference continued on page 41



The panel “Documents and Business Records: Introduction, Authentication and Admissibility” (top photo) was moderated by the Honorable Larry B. Kirksey (Ret.), 28th Judicial Circuit, and included Mary Lynn Tate, Roger W. Mullins, and Wade W. Massie.

The break-out CLE panels (second from top) drew full houses.

The panel “Guardian ad litem Best Practices” included moderator Patricia E. Smith and panelists the honorable Jeffrey S. Hamilton, 30th Judicial District; the Honorable Florence A. Powell, 28th Judicial District, and the Honorable Michael J. Bush, 29th Judicial District.

At right, VSB Executive Director Karen A. Gould was joined by Lawrence L. Koontz Jr., Senior Justice of the Supreme Court of Virginia, at the May 23 Solo and Small Firm Practitioner Forum in Staunton.



Justice Cleo E. Powell Opens the Ninth Annual Indigent Criminal Defense Seminar

The Ninth Annual Indigent Defense Seminar on May 3, 2013, at the Greater Richmond Convention Center was again a sellout.

Sessions covered a variety of topics, from “Making the Most of a Preliminary Hearing,” led by defense attorney Craig S. Cooley; to “Litigation Ethics: Claims and Settlements,” led by Thomas E. Spahn of McGuire Woods LLP. Other sessions covered “Eyewitness Identification”; “Field Tests, the ECIR2 and You”; “Scientific Methodologies for Drug Detection”; and “Discovery, Plea Bargaining and Prosecutorial Misconduct.”

The seminar was opened by the Honorable Cleo E. Powell, Justice of the Supreme Court of Virginia. Her remarks follow.

Good Morning.

It is my pleasure to bring you greetings at your ninth annual training session.

I have looked at the line-up and you are in for a wonderful opportunity to learn from a group of dedicated men and women who are masters of their topics, dedicated to their craft and to our profession.

That does not just include the names listed on the agenda, however, but it also captures the person to your left and to your right — those who labor in the trenches with you daily. I encourage you as the day goes on to not only listen/learn/share with the presenters but to listen/learn/share with the folks who do what you do every day. When I attend judicial conferences, it is always great to hear from the presenters, but I often find that I learn the most, or at least as much, in the informal discussions with those who walk in my shoes every day.

I am delighted to stand where my friend and mentor, former Chief Justice

Leroy R. Hassell Sr., stood for so many years. As you know, Leroy had a deep seated love of the law. He had a keen devotion to the principles of justice and equality under the law and a deep seated desire that the law operate fairly, that it be applied impartially, and that blind justice perform her role as designed. To that end, he developed this seminar and it is in that tradition that we carry on today.

Imagine for a moment ... the individual enters the courtroom alone, facing the crowd, not knowing what to expect, but knowing that it probably would not be good, with no one there to coach or with whom to commiserate, no one to champion her cause ... and that was just my first day as a judge. ... I can only imagine how the criminal defendant felt.

Having sat in both general district court and circuit court, I have witnessed first-hand the angst of the criminal defendant. To the untrained, appearing in court, accused of a crime, facing loss of reputation, liberty, or life, it must be like arriving in a foreign country where you do not speak the language and do not know the protocol. Everyone around you is speaking Latin and you only took two years of Spanish. ... It is a frightful scenario.

It took us three years to become comfortable with the subject matter, a time or two at the bar (exam) and a few years of hard knocks. ... We had to appear in court more than a few times before we knew when to stand/sit, speak/hold our peace, fight vigorously/throw ourselves on the mercy of the court.

The criminal defendant comes into the pretrial; the judge advises them of the charge and asks them what they are going to do about a lawyer. Often they are unemployed or underemployed and



Justice Powell

cannot afford one. I have witnessed first-hand the uncertainty, the unknowing, the abject fear on the face of the man or woman standing clueless before the bar as if in a foreign country.

And then to the relief of everyone — the defendant, the family, and even the judge — a champion arrives ready to give wise counsel, ready to translate, ready to do battle; in short, you come in. The playing field is leveled, and there is a learned advocate to intercede on their behalf.

I have sat on the bench and watched you enter and what I have seen is this:

1. A sense of relief overcome a criminal defendant, who before had a dazed, lost, forlorn, all alone expression;
2. I have watched you, just by your presence, restore a sense of dignity and even humaneness to a criminal defendant;
3. You entered the courtroom, gave them a warm handshake, as if greeting an old friend (and perhaps you were) whispered something in their ear (probably “do not say anything”) and at the appointed time made an argument that restored a degree of dignity and respect by painting a picture of a human being with redeeming qualities and characteristics that deserved to be balanced on the scales along with whatever accusations were being made against them;

4. You showed up and required/ demanded that the commonwealth prove its case.

My message to you today is simple; your dedication does not go unnoticed.

Our system of justice works when the truth is laid bare for dissection. The best legal system in the world, the best jurist in the world, the best jury in the world cannot reach a “just” verdict unless both sides are equally well represented.

The “truth” can only be found when the facts are competently brought to light.

To that end our system needs dedicated men and women such as yourselves who are willing to represent those accused of crimes, sometimes unimaginable crimes, but who are entitled to have their day in court, to have their Constitutional rights upheld.

The beauty of our system of justice, of our Constitution, is that it belongs to each of us. And it can only stand, it can only be truly honored, if its protections are afforded to each of us.

You recognize that principle, you honor that principle, and dedicate yourself, your life’s work to that end, and our system is all the better because you do.

Today as you begin your conference, while the commonwealth cannot pay you what you are worth, we can encourage you to continue, and say thank you for honoring the moral imperative to protect our Constitution one criminal defendant at a time. Your work is both recognized and deeply appreciated.

Thank you for what you do and enjoy your conference.

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certain that this conference will stand out in his memory as one of his primary achievements.”

Panels offered at the conference, all of which carried CLE credits, included “Trust Accounting for Solo or Small Firms,” presented by James M. McCauley, VSB ethics counsel; “Risk Management,” by Wendy F. Inge of Attorneys Liability Protection Society; and “Avoiding the Iceberg’s: Ethics in the Digital Age,” by Sharon D. Nelson and John W. Simek of Sensei Enterprises Inc.

Break-out sessions were:

- “Documents and Business Records: Introduction, Authentication and Admissibility,” moderated by the Judge Larry B. Kirksey (Ret.) of the 28th Judicial Circuit and including panelists Wade W. Massie, Roger W. Mullins and Mary Lynn Tate;
- “Recent Development in State/Federal Criminal Defense Law and Procedure Law,” moderated by Dean Lucy S. McGough of the Appalachian School of Law and including panelists Judge Chadwick S. Dotson of the 30th Judicial Circuit, Judge Michael L. Moore of the 29th Judicial Circuit, Wise County Deputy Commonwealth’s Attorney Kenneth F. Lammers Jr., and Assistant United States Attorney Zachary T. Lee;
- “eDiscovery: How is it Changing the Way We Practice Law?” moderated by Thomas R. Bagby, and including panelists Judge Michael F. Urbanski of the U.S. District Court, U.S. Magistrate Judge Pamela M. Sargent, Judge C. Randall Lowe of the 28th Judicial Circuit, and John Simek, vice president of Sensei Enterprises Inc., and;
- “Guardian ad litem Best Practices,” moderated by Patricia E. Smith and with panelists Judge Michael J. Bush of the 29th Judicial District, Judge Jeffrey S. Hamilton of the 30th Judicial District, and Judge Florence A. Powell of the 28th Judicial District.

NOTICE

CHANGE IN HOURS OF OPERATION

Effective July 1, 2013, The Clerk’s Office Of The City Of Richmond Circuit Court Will Be Open 8:30 AM until 4:30 PM, Monday through Friday.

Real estate recording hours will be 8:30 AM until 3:30 PM.

Bevill M. Dean, Clerk

Lexington Student Wins Annual Law in Society Essay Contest

Thomas Forster, a senior at Rockbridge County High School in Lexington, has been awarded first place in the 2013 Law in Society Contest sponsored by the Virginia State Bar and its Litigation Section. Forster will attend Yale University in the fall.

Forster won for his essay "Teacher Intimidation in the 21st Century." He will receive \$2,300. This year's essay theme had students explore online teacher intimidation by students. Entrants were asked to imagine that they were a legislative aide and write a law making it illegal for students to try to intimidate their teacher online. They were also required to argue in favor of their law and anticipate the arguments of those opposed to it and address them.

Teacher Intimidation in the 21st Century

by Thomas Forster
Rockbridge High School, Lexington

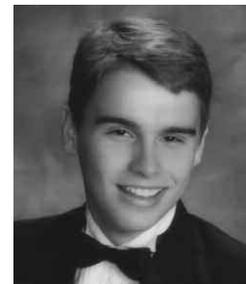
Part I

- A. It shall be unlawful for a student to intimidate, torment, or harass a teacher on the Internet, by, but not limited to:
1. Creating a fake profile, blog, or website with a teacher's personal information and posting or publishing with malicious intent;
 2. Posting material on social networking sites or personal blogs with the intent to defame or slander a teacher's reputation;
 3. Generating inappropriate or misleading photos that compromise a teacher's professional reputation;
 4. Urging fellow students on social networking sites or personal blogs to be disruptive in class or to hinder an instructor's ability to teach; or

5. Initiating or carrying out any other online activity that damages a teacher's reputation, hinders a teacher's ability to instruct, or intimidates or harms a teacher in any other way.
- B. Any student found to be in violation of this section shall be guilty of a Class 2 misdemeanor, with consequences including, but not limited to, one or more of the following:
1. A fine not to exceed \$1,000;
 2. Community service not to exceed 500 hours;
 3. Jail time not to exceed six months;
 4. Transfer of the student to another school; or
 5. Any other ramifications that the court sees fit.
- C. If the court finds that a parent has unreasonably contributed to or willfully assisted in the student's unlawful conduct, the court may order the parent to pay a civil fine not to exceed \$1,000.

Part II

Passing this proposed law would allow teachers a sense of security and protection against the malicious or mischievous intentions of discontented students. Teachers should be able to instruct students without fear of online harassment or bullying, and this law provides both teachers and students the freedom and opportunity to educate and learn in a comfortable and stable environment. Such a law discourages students from acting out against teachers in an inappropriate fashion and encourages students and their families to navigate through the proper avenues to resolve an issue or misunderstanding with a teacher. Rather than engaging in ill intentioned attempts to slander a teacher's name on the Internet, causing



Forster

irreparable harm, students will develop important conflict resolution skills.

The potential consequences of violating this law also dissuade an impetuous student from attempting to torment a teacher, as a conviction would precipitate financial and familial strain. Ideally, such ramifications serve as a strong deterrent, as the consequences greatly exceed any perverse and fleeting personal satisfaction. Cost-effective public awareness campaigns may persuade a parent or guardian to monitor his or her child's Internet activity, lest they be subjected to civil fines. Hopefully, a parent or guardian will also be prompted to educate his or her child on the proper methods to express dissatisfaction with another individual. This law fosters a more protected and harmonious classroom where both teacher and student may focus on the business of learning. The law encourages parents and members of the school community to better educate students on conflict resolution, while also spreading awareness throughout the Commonwealth of this growing and troubling issue.

Part III

Assuming *arguendo* that opponents claim the proposed law unduly restricts free speech, the First Amendment does not protect defamatory speech or fighting words. Libel and slander, which differ solely in the form in which a misleading statement is made, are unprotected forms of expression that can allow a plaintiff to prove in court that the speech was slanderous. In the same way, this law would protect the

Essay Contest continued on page 55

rights of a teacher, while also requiring that the teacher's claims of Internet intimidation be scrutinized and validated by the legal system. Thus, challenges to the law's constitutionality regarding freedom of speech would not prove compelling.

Opponents to this law might also suggest that the proposed punishments are too severe. However, North Carolina has already established a legal precedent for such action, which provides persuasive authority for Virginia. North Carolina adopted a similar law, which took effect on December 1, 2012, to protect teachers against abuse on the Internet. The bill, known as the "School Violence Protection Law of 2012," was passed with large bipartisan support, indicating a strong desire, across party lines, to protect educators.

In enacting this law, therefore, the Virginia General Assembly and the Commonwealth of Virginia would not be the first to do so and would have legislative precedent to combat those who do not support the law. Nevertheless, the most poignant argument is situated in the legitimate goal of this law, which, simply put, looks to protect the rights and reputations of the Commonwealth's dedicated educators.

This law is not intended to infringe upon the free expression of students on the Internet but rather to protect the safety of teachers, promote greater dialogue in Internet safety and conflict resolution between parents and children, and to create a protected and enjoyable classroom for both teachers and students.