Docket Call

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Meghan Cloud, Ed.

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

in this issue

The New "Of Counsel":

Increasing Flexibility in Law Firm Careers

By Joanna L. Faust

Young attorneys who believe that there are only two positions at law firms—associate or partner—should think again. The "of counsel" position exists at Virginia law firms of every size. While long considered a position for older attorneys segueing towards retirement, the American Bar Association notes that "the 'of counsel' designation is now used in so many different contexts that one cannot assign a single meaning to it."

The "of counsel" designation describes an attorney whose relationship with a law firm does not fit into the often rigid categories of associate and partner. Curtis Manchester, Managing Partner of Reed Smith's Richmond office, describes the "of counsel" position—which Reed Smith calls simply "counsel"—as the most flexible of the attorney positions he knows. James Korman of Bean, Kinney & Korman, PC, in Arlington agrees that the position can be structured in almost any way the firm and the lawyer choose. At large law firms, where associate positions tend to be more strictly structured in terms of salary and benefits and partners are subject to the demands of the partnership, such as holdbacks and equity buy-ins, attorneys who are "of counsel" generally have individually tailored compensation structures and customized requirements.

At Reed Smith, the "counsel" position differs from partner in several ways. Unlike equity partners, who do not have employee benefits but instead have partner benefits, "counsel" have employee benefits and health care benefits but no equity stake in the firm. As Manchester notes, such designees are governed by the same high standards that apply to other lawyers in the firm; performance reviews are conducted annually, and billable hour goals are higher than those of partners.

In one of its incarnations, according to Korman, the "of counsel" position is analogous to "an engagement before the marriage." It enables firms to bring in good candidates for partnership laterally and gives both the firm and the attorney the opportunity to see whether the attorney is a good fit for partner. Bean Kinney has also used the "of counsel" position to maintain valued relationships with individuals who have virtually full-time positions elsewhere, such as in government or academia, and thus cannot be 100% committed to the practice of law.

For small firms, the "of counsel" relationship may be that of the firm and an expert in an area of law in which the firm does not think of itself as particularly well-versed. Mark Cummings of Sher, Cummings and Ellis in Arlington describes the position as an opportunity to work with a colleague whom "you respect greatly, but for whatever reason, you don't want to share every case." While the positive aspect of this type of arrangement is a close affiliation with someone whose expertise the firm may not have, Cummings cautions that the firm must be aware of potential downsides—such as (in a worst case scenario) liability for the affiliated attorney's malpractice. For that reason, some firms who associate counsel may require that he or she maintain malpractice insurance.

One can become "of counsel" in a variety of ways. At Reed Smith, an associate with a specialized skill set but without the level of business generation necessary to make partner can be promoted instead to counsel. That attorney may then attain partner status at a later time.

Korman notes that, until relatively recently, the perception of the "of counsel" position was that of a senior attorney stepping back from a full-time

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see you in court

Robert E. Byrne, Jr.

News and Practice Tips for Virginia Litigators

The importance of jury instructions

I had my first civil jury trial last October. As first chair, I handled all aspects of the case, but some great mentors gave me vital guidance throughout the trial preparation process. Of all the input I received, none affected my case more thoroughly than the following advice about jury instructions.

Form your case around the instructions. Don't assume that because the jury instructions are due two days before trial you can begin working on them three days before trial. The instructions inform the allegations in your pleadings, determine what evidence you should seek in discovery, and shape the contours of the arguments you'll ultimately make to the jury. Given that the instructions are the lens through which the jury will view the evidence, it is vitally important that your initial legal research generate the jury instructions that you'll rely upon for the life of that case.

Strive for simplicity but preserve accuracy. There is tension between simplifying an instruction to promote juror comprehension while simultaneously remaining faithful to the instruction's true meaning. The model instructions for the tort of malicious prosecution provide an example of this tension: The plaintiff must show that the underlying proceedings were resolved "in a manner not unfavorable to the person prosecuted." Faced with this instruction, your first inclination may be to clean up the double negative by changing "not unfavorable" to "favorable." But doing that changes the meaning of the instruction: "favorable" is not the same as "not unfavorable," as "favorable" may arguably preclude a neutral result, such as a *nolle prosse*. If, as the plaintiff, you were to change the instruction, you would reduce your client's chance to prevail on that element. While you should aim to use plain language, be sure your alterations maintain the instruction's integral substance.

Know the law. The bar is set pretty low when it comes to having an instruction granted—you need only show that "more than a scintilla" of evidence supports it. *Holmes v. Levine*, 273 Va. 150, 159 (2007). Try to avoid lifting language directly from opinions; rely instead on either model instructions or instructions you draft yourself. *See Va. Elec. & Power Co. v. Dungee*, 258 Va. 235, 251 (1999) ("[L]anguage in an opinion is meant to provide a rationale for a decision—and may not translate immutably into jury instructions.").

Preserve your objections. Trial court decisions regarding jury instructions are fertile ground for appeal. To get to the next level, however, you must properly preserve objections to erroneous rulings. It goes without saying that instructions given without objection cannot be challenged on appeal, and if the trial court rejects one of your instructions, you should not only object to the instruction ultimately given but also proffer the rejected instruction for the record. Keep in mind, though, that if you proffer (or agree to) an instruction that contradicts a position you took earlier in the case, the instruction "becomes the law of the case, and [you are] deemed to have waived [your] previous objection," unless you specify clearly that you maintain your position on the prior ruling. *WJLA-TV v. Levin*, 264 Va. 140, 159 (2002).

Sometimes the simplest things in life are not only the most important, they're also the most commonly overlooked. Don't let that be true as far as jury instructions are concerned. Take the time to familiarize yourself with the governing instructions and craft your trial strategy accordingly.

Robert E. Byrne, Jr. is a litigation associate at Martin & Raynor, P.C., in Charlottesville. You can reach him at bbyrne@mrlaw.com.

"of Counsel" Designations continued from page 1

practice. However, the definition of the position has broadened in recent years to include attorneys at all stages of their careers. Korman notes that young lawyers should be keenly aware of the shift in the law firm culture. Says Korman, "there is a move afoot [in law firms] to be more inclusive and allow for more latitude to maintain an ongoing relationship with someone considered valuable to a firm" but who cannot maintain the sort of relationship with the firm that is typical of full-time associates and partners.

Lawyers who have scaled back their working hours to accommodate family or other responsibilities may find a particular advantage in being "of counsel." The position allows the attorney to remain an asset to the firm without being compared to associates who are able to be in the office five or more days a week. Korman describes it as enabling attorneys to compete more against themselves rather than against those with whom they would be perfectly capable of competing if they had more time. Both sexes are benefiting from the increased flexibility; Manchester notes that at Reed Smith, approximately 60% of those with the "counsel" designation are men.

Whether the firm is large or small, it appears that "of counsel" positions come in many shapes and sizes. At Reed Smith, says Manchester, the designation is typically "an avenue to tailor a certain working relationship to a person who does not necessarily fit within associate or partner metrics." For young attorneys plotting a career path outside the traditional associate-to-partner mold, "of counsel" may be the perfect fit.

Joanna Faust is a litigation associate in LeClairRyan's Alexandria office. She can be reached at joanna.faust@leclairryan.com.

message from the president

Daniel L. Gray

I addressed my first article featured in this periodical to the newly minted members of our Conference. Winter seems the appropriate time to cater to Conference members on the other side of the spectrum—those of you who are about to lose the designation "Young Lawyer." As you are pushed out of the Conference and into your sunset years, have you started to reflect on what you'll do now?

Among all the other organizations you've managed to annoy during your time as a young lawyer, the Virginia State Bar is mad at you, too. Too many of you—particularly women and minorities—aren't continuing the good work you do for the Conference by actively participating in "big Bar" activities. Where, the Bar recently asked the YLC, do you people go after you age out of the Conference, and how can we keep you involved?

I recently appointed Mollie Barton, of Richmond, to head our standing Commission on Women and Minorities in the Profession. I asked her to study (having myself been asked by incoming Executive Director Karen Gould to study) the issue of why the bar is having difficulty keeping women and minority lawyers active in the bar after they age out of the Conference. The Conference has always had healthy participation by a wide spectrum of attorneys, but there's apparently a drop-off when it comes time to transition out. Mollie has convened a stellar group of young lawyers to study this issue, and we eagerly await their findings and recommendations.

In the meantime, I asked Tom Edmonds, our now departed (figure of speech, Tom) Executive Director, to address our members at our annual leadership conference in Richmond in September. I asked him for his specific recommendations about staying active after young lawyers age out of the Conference. Tom had three specific recommendations:

Run for Bar Council. You know the Bar is an administrative agency of the Virginia Supreme Court, and that its primary mission is regulation of the profession. The bar is run, in part, by a Bar Council, constituted of practicing Virginia attorneys duly elected by bar membership. Bar Council governs and manages the bar's affairs and sets its policies. Council typically meets three times per year (late October/early November, late February/early March, and before the annual meeting in June), with special meetings called as circumstances require.

As you are pushed out of the Conference and into your sunset years, have you started to reflect on what you'll do now?

Bar Council members are elected in one of two ways. Up here in Fairfax, and I expect in most larger jurisdictions, we pick our Council members by voting on a ballot mailed by the bar. The ballot candidates have previously obtained ten signatures on a petition, which is then submitted to the bar, which places the names on a ballot.

In other jurisdictions, a circuit bar meeting is held, and attending members vote on nominations made prior to or during the meeting. (I'd be interested in knowing how many of you have participated in one of these meetings, and how they go.)

Your Conference has a say in Bar Council decisions through your President, an automatic member of Bar Council *and* an *ex officio* member of the Executive Committee, which oversees Bar Council.

As a member of Bar Council, I've found it fascinating to observe and participate in the regulation of our profession. I strongly encourage young lawyers—whether above or below the 36-year line—to consider serving on Bar Council. There's no age requirement, and my own opinion is that Bar Council would benefit from a vigorous young lawyer voice. All you need is ten lawyers who think you're qualified for service, so do it.

Disciplinary District Committees. Tom also recommended service on disciplinary district committees, the bodies that Bar Council convenes to review bar complaints and make recommendations. Again, no age requirement. You just have to "conscientiously discharge [your] responsibility as a member of the District Committee." For a full overview of the duties of a District Committee member, see the Virginia Rules, Part 6, section IV, Paragraph 13. My law partner Heather Cooper serves in this role, takes it very seriously, and thoroughly enjoys it. These are appointed positions, so contact your Bar Council member and express your interest. Convince them (lunch is always a good idea) you have the ability, and put a bug in their ear

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legal ethics corner

Jeffrey Hamilton Geiger

You Make the Call

Q *Legal marketing consultants always talk about branding yourself, establishing a niche and working to appeal to a certain audience. Forget soccer moms and NASCAR dads, I am going for Trekkies! Besides the obvious decorative features necessary to bedeck an appropriate office (e.g., models of the U.S.S. Enterprise), I intend to advertise fluency in Klingon. While I do not speak the language (which has 16 fluent speakers worldwide), my legal assistant, Rom Lan, does. I am considering a billboard advertisement proclaiming my office's ability to speak Klingon, replete with the phonetic spelling of "nuqenH," a traditional greeting.*

A You are probably saying to yourself, "Hou len ngotlhwI'Hey yIHoH," by which you are requesting the killing of one who looks like a Trekker (and, yes, I beg you to fact-check my phonetic spelling). The issue, however, concerns whether a lawyer can advertise the fact that someone speaks Klingon in the office—if the lawyer is not fluent in that language but one of the staff members is.

Rule 7.1(a)(1) of the Virginia Rules of Professional Conduct provides that a lawyer shall not issue a public communication that contains false or misleading information. Here, the lawyer does not speak Klingon and requires support personnel to communicate with anyone who does. Because clients need to make informed decisions regarding legal services, an advertisement that, for example, indicates Klingon fluency is permissible so long as the advertisement accurately explains how Klingon is used in the office. In other words, advertising materials may note that the office can handle matters requiring proficiency in the Klingon language, but they should make clear that the attorney himself cannot converse in Klingon. Cf. Legal Advertising Opinion A-0116 (Communications that Claim "Se Habla Español").

Jeff Geiger is a shareholder in the Richmond office of Sands Anderson Marks & Miller, P.C. You may reach him at jgeiger@sandsanderson.com.

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the next time a District Committee vacancy comes up.

Receivers. The last suggestion Tom gave was to volunteer to act as a receiver for law practices that have been put into receivership because of misconduct or lawyer disability. Tom emphasized the knowledge one would gain from such service. I knew practically nothing about receivership, so I consulted the relevant statutes, Va. Code §§ 54.1-3900.01 and 3936, to find out how receivers get appointed. (Actually, I did that after I called Rick Mendelson of Alexandria, past chair of the bar's Receivership Task Force, for a quick tutorial; he was extremely helpful, and generous with his time.) In a nutshell, the Bar petitions the local circuit court to appoint a receiver in the event of attorney misconduct or disability. The circuit court has the discretion to appoint a receiver. Here again, there's no age requirement, so we're all eligible.

What's apparent, though, is just how much work a receivership can entail. It can take months and even years to wade through a lawyer's papers and figure out what went wrong. Even in the event of a competent lawyer's death, you'd still be looking at a lot of work. The Bar will help, but be advised that the time commitment is not insignificant.

Having said that, I doubt there's much else out there that would give you the kind of education that this work would. You sure would learn a lot about what not to do. Since receivers are appointed by the circuit courts, if one were interested in this line, one should probably investigate whether there's a list of willing receivers in your jurisdiction.

What ought to be apparent to you young lawyers looking to continue with the Bar is the "closed loop" nature of these things. Bar Council appoints the District Committee—so one presumes that the District Committees are made up of lawyers who are known to Bar Council. You have to figure out a way to break into that loop. No fair arguing (as many of us do) that the bar can be too chummy, or isn't interested in you. Active members of the Bar are busy, and they can be forgiven for going with known quantities when vacancies pop up. You have to get to know your Council members and members of the District Committee. Call them up—that's what they're there for—and let them know you want to get involved. Then, follow up.

After one final year of serving in the Conference as Immediate Past President (forgotten, but not gone, as they say), I'll be in the same boat with you—aged out of the Conference. Some of us ought to take Tom's advice and stay active in the Bar. Heck, if enough of us get elected to Bar Council, we can change the "young lawyer" designation to age 40.

Daniel Gray is a principal practicing family law in the firm of Cooper Ginsberg Gray, PLLC, in Fairfax, Virginia.

Learning Comes to Life for Richmond Middle School Students During Students' Day at the Capitol

Jayne A. Pemberton

On November 13 and 14, 2007, approximately 600 middle school students from the Commonwealth of Virginia were given the opportunity to explore the newly renovated Capitol during Students' Day at the Capitol, sponsored by the Young Lawyers Conference. The program, which started in 2004, was designed to introduce students to our state government and the law through hands-on, interactive learning experiences. Participating students were given guided tours of the Capitol Building, Capitol Grounds, House of Representatives, Governor's Mansion, and Supreme Court.

▲ Students from Hill Middle School take a break from their tour of the Capitol building and surrounding grounds during the 2007 Students' Day.

This year's students were selected from four middle schools in the City of Richmond: Boushall, Brown, Henderson, and Hill. Although all of them live within the City of Richmond, the majority had never visited the Capitol before. Many of the students were extremely excited about the opportunity and listened closely to guided tours provided by the members of the Capitol, House of Representatives, Governor's Mansion, and Supreme Court staffs. Special thanks are due to Mark Greenough and John Wootton of the Capitol, Jay Pearson of the House of Representatives, Leslie David of the Supreme Court, and Laura Fields of the Governor's Mansion for their time and effort in coordinating and planning this two-day event. The help of Robin McVoy of Sands Anderson Marks & Miller was also invaluable.

To assist on the guided tours, student groups were each assigned an attorney or paralegal from local law firms and government agencies, including the Attorney General's Office, to answer questions and serve as chaperones. Volunteers included Al Albinston, Mark Button, Star Fleming, Julie Harrison, Christina Hart, Lindsey McGinnis, Kerri Nicholas, Cassandra Reynolds, Leslie Schmidt, Ben Thorp, and Mark Wickersham. The volunteers were provided with educational activity booklets filled with games and puzzles related to the tour, and the students enjoyed sitting on the lawn of the Capitol working on these booklets.

As in the past, the goal of this year's program was to give middle schoolers an opportunity to visit their Capitol and learn about local government. According to feedback provided by the students themselves, the program was a great success. It was equally worthwhile for the volunteers and coordinators, who were rewarded by seeing the students travel from venue to venue applying what they learned. Particularly impressive were the students from Hill Middle School, who were eager to answer questions and apply their newfound knowledge of Virginia history.

Given the participation we had at this year's Students' Day, we are already excited about next year, when we hope to open the program to other middle schools around the Commonwealth. Volunteers are always welcome, and your help will be especially appreciated as we plan for a bigger and better program in 2008. Interested individuals can contact me at jpemberton@sandsanderson.com.

Jayne Pemberton is counsel in the Richmond office of Sands Anderson Marks & Miller, P.C. Again, you may contact her at jpemberton@sandsanderson.com.

YLC Board Elections

At its Annual Meeting on June 20, 2008, the Virginia State Bar Young Lawyers Conference will be electing members to the Board of Governors in the following districts:

1st	Representing Judicial Circuits 1, 3, 5, 7, 8	7th	Representing Judicial Circuits 16, 20, 26
2nd	Representing Judicial Circuits 2 & 4	10th	Representing Judicial Circuits 27, 28, 29, 30 and one at-large position
6th	Representing Judicial Circuits 9 & 15		

All nominations are due on May 1, 2008. Letters of interest and nominations should be sent to: **Maya M. Eckstein**, Immediate Past President, Young Lawyers Conference, Hunton & Williams 951 East Byrd Street, East Tower | Richmond, VA 23219-4074 • 804-788-8200 • Fax: 804-788-8218 • meckstein@hunton.com. Any active and in-good-standing member of the bar under the age of 36 or in his or her first 3 years of practice may serve on the YLC Board.

off the beaten path

Sharon Choi Stuart

Representing Consumer Debtors after BAPCPA

Editor's note:

This article is one in an occasional series about Young Lawyers Conference members whose practice focuses on an area of the law to which some of us may never have much exposure. Sharon Choi Stuart's decision to represent debtors in bankruptcy proceedings has forced her to meet a number of challenges, not least of which was a 2005 sea change in the law. Fortunately, the reasons that drew her to her practice—the reality of her clients' distress and her ability to help them—have stayed the same.—MC

It was almost exactly as predicted: The practice of bankruptcy law ground to a sudden and dramatic halt in the second half of October 2005, when enactment of the federal Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) was followed by a sharp decrease in bankruptcy filings. Bankruptcy courts and attorneys for both debtors and creditors bore the brunt. My own law firm, which specializes in the representation of debtors in bankruptcy actions, was forced to lay off approximately half its staff.

Still, after some 2 1/2 years, the number of bankruptcy filings has slowly increased, and some analysts predict that it will continue to rise. That's a trend that few foresaw in the months leading up to BAPCPA's enactment, when media frenzy about the harshness of the new law contributed to a tsunami of filings by debtors anxious to get in under the wire. In the two-week interval before BAPCPA went into effect, for example, my firm filed 313 bankruptcy cases—almost triple the number of cases we would normally file each month. We were turning cases away because we could not handle the volume, and our experience was not an unusual one for members of the bankruptcy bar.

The change was immediate after BAPCPA went into effect, on October 17, 2005. Bankruptcy filings came to an almost complete stop. The first several debtors who attempted to file saw their petitions dismissed for non-eligibility or non-compliance with the new law. Proponents of the restrictions cheered loudly and declared the decreased activity empirical evidence of its success. However, in the months that followed, a disturbing picture began to emerge that affected both consumers and creditors. Foreclosures hit an all-time high. Sub-prime mortgage lenders began to fail. Gas prices rose steadily toward historical highs. Credit card minimums doubled. The housing market started to bottom out, just as mortgage lenders predicted rate adjustments. And BAPCPA has delayed and prevented some people—people who are in genuine and desperate need of relief—from seeking the fresh start to which they are entitled under the law.

One thing has remained constant during this turbulent time: the tragedy of the cases we saw and the need of hardworking individuals for a second chance. I can recount several very sad cases involving single mothers with sparse food budgets, and I can assure you that it is a humbling experience to realize that the person sitting across from you has been going without meals, too ashamed to seek help because of the stigma of bankruptcy. While that was true before BAPCPA, the new law only compounded the problem; numerous clients told me that they hadn't come in sooner because they had heard that bankruptcy was no longer available. I've even heard the same thing from other attorneys. With this much speculation, confusion, and misinformation, it is not surprising that the rebound to normal filings level has been very slow.

One of the reasons I chose to practice bankruptcy originally, and to stay despite the change in the law, is the clients I represent. Most of them have agonized over the decision to file bankruptcy, and because of the relief and new beginning that bankruptcy can afford them, I can come in like a knight in shining armor and solve their financial problems. I get to tell my clients that they can go home and finally get a good night's sleep—without fear that they will be losing their homes or cars, knowing that they can get groceries back on their table. It's hard to describe what a rewarding experience it is to get hugs and tearful, heartfelt thanks from my clients.

The reality is that people who file bankruptcies typically do so in the wake of one of three life-altering events: medical illness, job loss, or divorce. Often, they are conscientious individuals who have made every effort and

continued next page

Did you know?

Historically, bankruptcy hasn't been just for struggling single mothers and those faced with unexpected medical bills. You might recognize these famous individuals, all of whom took advantage of the opportunity to discharge debt and start fresh:

1. This showman said, "There's a sucker born every minute." He invested $500,000 in the Jerome Clock Company, which didn't exist. He also had his own circus and side-show.

2. This wealthy businessman, who had made his fortune in the oil fields of Pennsylvania, also wrote The Wizard of Oz.

3. One of the members of this R&B trio, Lisa Lopes, died in a car accident in Honduras in 2002.

4. This famous movie director, the uncle of Nicholas Cage, directed all of the Godfather movies.

5. Three (3) U.S. presidents.

Answers:
1. P.T. Barnum
2. Frank Baum
3. TLC
4. Francis Ford Coppola
5. Andrew Jackson, Ulysses Grant, and Abraham Lincoln

undergone considerable hardship in order to keep paying their bills. BAPCPA's advocates say it will eliminate the problem of fraudulent bankruptcy filers who abuse the system. But while BAPCPA certainly makes it more difficult to discharge debts, its reforms don't seem targeted at fraudulent filers only. Rather, it strikes at the heart of debt-burdened individuals who have committed no fraud and already feel ashamed of their financial condition. Some of the new requirements include:

Credit Counseling Certification. In order to file bankruptcy, the debtor must first obtain a certificate from an approved credit counseling agency certifying that he/she has received credit counseling. In reality, this new requirement forces debtors to pay an additional $50 to $60 for a certificate that falls short of its intended purpose: educating debtors about non-bankruptcy options.

Means Testing. Debtors must pass a new "means test" in order to file under Chapter 7. If the debtor's gross income for the prior six months exceeds the median income for a family of similar size, the debtor must overcome a presumption of abuse. Those who fail to do so are forced into Chapter 13 reorganization, but many of them will be unable to maintain a five-year repayment plan as required.

Stricter Documentation Requirements. The new law requires proof of income and tax returns, and a failure to produce these documents can result in dismissal.

Weakened Bankruptcy Stay. Before BAPCPA, debtors who filed for bankruptcy were given automatic protection (in the form of an immediate stay) from most debt collection efforts and lawsuits. Many of these protections have been eliminated, and filing a petition no longer automatically stops or delays evictions actions or driver's license suspensions. Without transportation and shelter, of course, the odds of a debtor's financial recovery are low.

Random and Targeted Audits. BAPCPA also calls for random and targeted audits of bankruptcy cases. At a minimum, 1 out of every 250 bankruptcy petitions filed in each judicial district will be selected for random audit by the United States Trustee's office. In addition, cases in which the debtor's income or expenses reflect a variance from the statistical norm will be audited.

BAPCPA has changed the practice of bankruptcy law completely. The entire system—from courts and trustees to debtor's and creditor's attorneys—has been forced to adapt. Many law firms have not only revamped their forms and contracts but also changed in more fundamental ways. Others have discontinued their bankruptcy practices altogether. And yet, for those of us who remain, the one constant has been our clients, despite the heightened requirements and changes in the law.

Sharon Choi Stuart practices with the Boleman Law Firm. She can be reached at sstuart@bolemanlaw.com.

Be Advised: Lawyers Helping Lawyers

The YLC's goals include not only public outreach but also service to the profession. With that in mind, we thought it a good time to remind you that Virginia lawyers provide critical support not only to the community at large but also to their colleagues. LHL is an excellent and commendable support network of which all of us—whether we're newly minted or seasoned veterans—should be aware. —Ed.

Not many people think of the law as a high-risk profession, but the facts are that lawyers suffer from alcoholism and depression—and die from suicide—at significantly higher rates than the general population. Law leads all other professions in the incidence of depression and suicide. In Virginia, Lawyers Helping Lawyers provides confidential, non-disciplinary assistance to lawyers, judges, legal staff, and law students who are experiencing professional impairment because of substance abuse or disabilities resulting from depression, traumatic episodes, and other mental or emotional problems.

All dealings with Lawyers Helping Lawyers are completely confidential. If you have questions or concerns, call LHL's Executive Director, Jim Leffler, MS, LPC, at (804) 644-3212, or contact Page Gilliam, chair of the Charlottesville Volunteer Committee of LHL, at pgilliam@hunton.com. For help 24 hours day, 7 days a week, call LHL's confidential hotline, at (877) 545-4682.

Seeking Nominations

The Virginia State Bar Young Lawyers Conference is seeking nominations for the R. Edwin Burnette, Jr., Young Lawyer of the Year Award. This award honors an outstanding young Virginia lawyer who has demonstrated dedicated service to the YLC, the profession, and the community. The nomination deadline is May 1. Nominations should be sent to:

Maya M. Eckstein
Immediate Past President, Young Lawyers Conference
Hunton & Williams
951 East Byrd Street, East Tower
Richmond, VA 23219-4074
804-788-8200 • Fax: 804-788-8218
meckstein@hunton.com

SAVE THE DATE

Virginia State Bar
ANNUAL PRO BONO & ACCESS TO JUSTICE CONFERENCE
May 22–23, 2008
Washington and Lee University School of Law
Lexington, Virginia
Featuring: Thursday evening, an Award Ceremony and Reception, and, on Friday, hosted special interest lunch tables and a CLE* on

Housing and Economic Development Partnerships between Higher Education, Legal Services & the Private Bar

- Ethics/Professionalism Lecture on the Evolving Role of Clinical Legal Education
- Small Business Development Centers & Other Economic Development Partnerships
- Point/Counterpoint: Predatory Lending & the Housing Crisis

(*6 MCLE Credits Pending Approval)

criminal corner

Kenneth L. Alger II

A primer on Virginia's sentencing guidelines

The Virginia Sentencing Guidelines rule virtually every aspect of my daily practice as an Assistant Commonwealth's Attorney. No plea agreement is contemplated, and no case is prepared for trial, without first "running the guidelines." It is surprising that a tool used by so many is understood by so few.

In 1994, the General Assembly created the Virginia Criminal Sentencing Commission "to establish a discretionary sentencing guidelines system which emphasizes accountability of the offender and the criminal justice system to the citizens of the Commonwealth [i]." The Commission was charged with establishing guidelines for punishment that are certain and consistent, with due regard to the seriousness of the offense, the dangerousness of the offender, deterrence of recidivism, and the availability (and propriety) of alternative sanctions [ii]. A major goal of the Commission remains to reduce unwarranted sentencing disparity.

Virginia's sentencing guidelines are detailed for the practitioner in a manual that breaks felonies into fifteen separate categories, or "offense chapters" [iii]. Each offense chapter contains detailed worksheets providing numerical values for various factors of each offense [iv]. The exact factors analyzed are customized to fit each offense chapter [v].

Each chapter is in turn broken up into Sections A, B, and C. The score on Section A determines whether you should go to Section B or Section C [vi]. The punishment corresponding to Section B ranges from probation to incarceration of up to six months, while Section C provides for much lengthier incarceration. A single additional point on Section A can lead to a substantial difference in confinement.

First, where there are multiple charges, you must identify the primary offense—the offense with the harshest statutory maximum penalty. If, as rarely happens, two or more offenses in a sentencing event have the same statutory maximum penalty, turn to Section C and determine which scores higher on the "primary offense" factor (as distinguished from, for example, the "prior record" factor; see note [iv]). The offense with the higher score is the primary offense for sentencing purposes.

No plea agreement is contemplated, and no case is prepared for trial, without first "running the guidelines." It is surprising that a tool used by so many is understood by so few.

Suppose, for example, that your client is charged with grand larceny and unlawful injury. While one might assume that unlawful injury is the primary offense (it is, after all, a serious offense that involves injury to person rather than just to property), in fact the primary offense is grand larceny, which carries a statutory maximum of twenty years. Unlawful injury, by contrast, carries a maximum of five years' imprisonment.

Once you've identified the primary offense, you should determine to which offense chapter it belongs. Finally, identify the appropriate Virginia Crime Code (VCC) assigned to the offense, as listed in the offense chapter. The VCC is your road map throughout the rest of the process.

So, to return to the example involving grand larceny and unlawful injury, you would identify the VCC for grand larceny: LAR-2808-F9. The "LAR" prefix indicates that the offense will be scored under the larceny chapter guidelines. Note, however, that while all offenses have a VCC, not all offenses are included in the guidelines; thus, once you have your VCC, you will need to verify that the offense at issue is actually listed at the beginning of the chapter in question. Suppose, for example, that your client had committed grand larceny with intent to sell or distribute, in violation of Va. Code § 18.2-108.01(A). This offense, which carries a statutory range of two to twenty years, is not listed on the larceny worksheet. Therefore, the guidelines do not apply, and another offense must be used as the primary offense. Grand larceny with intent to sell or distribute may, however, still be scored as an additional offense on other worksheets.

Section C alone takes into account a defendant's prior criminal record. Specifically, more points are assigned depending upon whether the offender is classified as Category I, Category II, or "Other" [vii]. Because additional points on the worksheet can lead to additional years of confinement, a thorough and accurate understanding of how a defendant may be scored is essential to a proper defense. Take the grand larceny/unlawful injury example: if the defendant was previously incarcerated, even on a minor conviction for only a few days, that would add five more points to his score. Those few points could be difference between a brief detention under Section B and a much longer one under Section C.

Out-of-state convictions should not be overlooked. A defense attorney once assured me that the relevant sentencing range was around twelve months, as he had advised his client. But in fact the correct range called for several years more. The attorney had neglected to score his client's Wisconsin burglary conviction—an offense that made him a Category II offender and added years to his possible sentence. In our grand larceny example, a prior burglary would add seven months. If the primary offense were aggravated sexual battery, categorizing a defendant as Category II because of a prior burglary or other conviction could add more than two and half years to his time.

Each worksheet calculation results in an active incarceration sentence range, with a sentencing midpoint for that particular offense. The sentencing ranges originally were derived from more than 100,000 felony-level cases sentenced

continued next page

between 1988 and 1992; later, adjustments were made based on 1996 and 1997 sentencing patterns. Each time, the Commission examined cases that fit into each offense category and determined the range based on the sentence the middle 50% of the defendants received. Because they incorporate time-served sentence ranges, Virginia's guidelines are considerably broader than those of the federal system and most other states.

Surprisingly, many offenses are not included in the guidelines [viii], perhaps because there is not enough data from which to derive an accurate range. On the other hand, guidelines have been developed for some crimes within a year of their introduction into the Virginia Criminal Code [ix].

While compliance with the sentencing guidelines is voluntary, guideline worksheets must be completed in every criminal case [x], and any deviation from the recommended sentence must be explained by the judge to the Sentencing Commission on the worksheet [xi]. The Sentencing Guidelines add consistency to a system that was riddled with judicial discretion and offender uncertainty. The development of guidelines for offenses that don't yet have them would further reduce sentencing disparity and enable prosecutors, defense attorneys, and accused criminals alike to make better-informed decisions. Whether that happens sooner or later, however, all lawyers involved with Virginia's criminal justice system should make sure they understand and can navigate its sometimes confusing sentencing regime.

Endnotes:

[i] Va. Code § 17.1-801 (1998).

[ii] Id.

[iii] The Virginia Sentencing Manual divides criminal offenses into the following categories:

Assault, Burglary of a Dwelling, Burglary of Other Structure, Drugs/Schedule I or II, Drugs/Other, Fraud, Murder/Homicide, Kidnapping, Larceny, Robbery, Rape, Other Sexual Assault, Traffic/Felony, Miscellaneous, Weapons/Firearms.

[iv] Points are scored for the primary offense, additional counts of the primary offense, additional offenses at conviction, characteristics of the weapons used in the offense, prior record, and whether the defendant was legally restrained at the time of the offense. Whether a victim was injured, the number of injured victims, and (in some cases) the age of the victim(s) are also relevant.

[v] For example, under property crimes, additional points are given for prior felony larceny convictions/adjudications, while the quantity of a drug might affect a drug offender's score.

[vi] The number of points that will put an offender into Section C differs for each offense chapter.

[vii] A Category I offender is one who has at least one adult conviction or juvenile adjudication for a violent crime with a maximum penalty of 40 years or more. A Category II offender is one who has been convicted of a violent crime with a maximum penalty of fewer than 40 years.

[viii] For example, there are no sentencing guidelines for § 18.2-108.01(A) (grand larceny with intent to sell or distribute), § 18.2-77(A)(i) (arson of an occupied structure), or § 18.2-192(1)(c) (selling or buying stolen credit cards), to name a few.

[ix] Certain crimes introduced in 2006 already have guidelines.

[x] Va. Code § 19.2-298.01(A) (2007).

[xi] Va. Code § 19.2-298.01(B) (2007).

Ken Alger is with the Shenandoah County Commonwealth's Attorney's office in Woodstock. If you have questions regarding the guidelines, please e-mail him at kenalger@shentel.net.

Domestic Violence Safety Project Trains Young Lawyers to Represent Victims of Abuse

Kenneth L. Alger II

Every day, someone in the Commonwealth of Virginia is physically assaulted by a family member. For many of the victims of such assaults, the effective—and affordable—assistance of counsel is absolutely essential to the protection of their rights and the prevention of future abuse. The Domestic Violence Safety Project (DVSP) is dedicated to training attorneys to help victims of domestic violence. The effort includes but is not limited to training initiatives that prepare attorneys to represent victims in protective order hearings.

On November 1, 2007, approximately 30 attorneys, shelter staff, and victim's advocates attended just such a free training session in Winchester. Christie Marra and Susheela Varkey of the Virginia Poverty Law Center provided CLE training on the essentials of protective orders. Participants discussed the many and varied legal issues that face victims of domestic violence over a boxed lunch. Anna Hammond, managing attorney for the Winchester office of Blue Ridge Legal Services, described the ways in which all members of the bar, regardless of age, could help prevent domestic violence and ameliorate its effects. As Hammond noted, YLC training sessions like the one in Winchester "really help us out. . . . Every attorney who volunteers for pro bono work means we can represent more of the indigent." Several attorneys signed up on the spot.

The DVSP's next training session will be held in Virginia Beach, in Regent University's Robertson Hall, on April 4, 2008, from 9 a.m. to noon.

Ken Alger is with the Shenandoah County Commonwealth's Attorney's office in Woodstock. If you are interested in getting involved with the DVSP, please e-mail him at kenalger@shentel.net.

corporate corner

R. Willson Hulcher, Jr.

Issues of Interest for Virginia Transactional Attorneys

Rule 144 Revisions Facilitate the Transfer of Unregistered Securities

In a move that will significantly enhance the liquidity of unregistered stock, the Securities and Exchange Commission has revised its Rule 144 safe harbor to reduce restrictions on the resale of privately purchased securities.

Rule 144 is relevant whenever a company issues stock (or any other type of security) without registering it publicly. Under the Securities Act of 1933, a person who receives unregistered stock may not resell it unless it is later registered or there is an exemption from registration in the '33 Act. For purchasers of unregistered stock, the relevant exemption covers sales by anyone who is not an issuer, underwriter, or dealer. This exemption is not as forgiving as it appears: The '33 Act defines "underwriter" to include anyone directly or indirectly involved in a distribution of securities. This definition is meant to keep issuers from receiving the benefits of a public offering while avoiding registration by selling to the public through a private intermediary. Rule 144 was designed as a safe harbor from the definition of underwriter; by complying with Rule 144, stockholders know they will not be classified as an underwriter when they try to resell. Issuers would not transfer shares on their books, and sophisticated purchasers would understandably be reluctant to buy and sell restricted stock, without the certainty Rule 144 provides that such transactions are legal.

To meet the requirements of Rule 144, restricted stock must be held for a period of time, and limits on the manner and volume of resales must be observed. In keeping with the purpose of the safe harbor, the resale restrictions are greater on shares held by affiliates of the issuer and on securities of an issuer that is not already a reporting company. The revisions to Rule 144, effective February 15, 2008, reduce the required holding period and relax certain of the other limitations on restricted securities.

As revised, the holding period for public company restricted securities is now six months after sale rather than a year. The reduced holding period applies to both affiliates and non-affiliates of the issuer, but restrictions after the period has run differ for affiliates and non-affiliates. Affiliates remain subject to certain volume, disclosure, and manner-of-sale restrictions, though the new rules have relaxed these limitations. Non-affiliates may freely resell securities held for six months subject only to the availability of public information during the six months following the completion of the holding period. The new rules similarly relax restrictions on resales by holders of non-reporting company securities, though the holding period is longer. Holders of non-reporting company securities can only take advantage of the new Rule 144 after the end of a one-year holding period, which is longer than the six-month period for public company securities but substantially shorter than the two-year period required by the old Rule 144.

The bottom line is that purchasers of restricted securities will now be able to resell their shares much sooner and with fewer restrictions, even when the issuer is a private company. These changes will likely reduce the need to negotiate for registration rights in many situations and generally increase the attractiveness of investing in restricted stock. As a result, the cost of raising money through the private sale of equity should decrease.

Will Hulcher is an associate in the Business and Corporate Finance & Securities sections at Williams Mullen in Richmond. You can reach him at whulcher@williamsmullen.com.

YLC to Hold All-Day CLE on Immigration Consequences of Criminal Convictions

Following last year's successful CLE in Virginia Beach, the YLC will be holding an all-day CLE on the Immigration Consequences of Criminal Convictions on April 4, 2008, in Courtroom 2 of the Fairfax Juvenile and Domestic Relations Court. For more information or to register, contact Hugo Valverde at hugo@valverderowell.com or 757-422-8472.

Virginia State Bar
Young Lawyers Conference

Immigration Consequences of Criminal Convictions in Virginia

April 4, 2008

9:30 AM – 4:30 PM

Fairfax County Juvenile and Domestic Relations Court
Courtroom 2
Fairfax, VA

The Immigrant Outreach Committee of the Young Lawyers Conference of the Virginia State Bar presents a seminar to promote effective representation of non-citizens in criminal court. The seminar will provide criminal defense attorneys with an overview of the adverse immigration consequences of criminal convictions and address the following topics:

- What Constitutes a Conviction for Immigration Purposes
- What Constitutes the Conviction Record for Immigration Purposes
- What Types of Criminal Convictions Carry Adverse Immigration Consequences
- Strategies for Defense Counsel to Avoid Adverse Immigration Consequences
- Strategies for Post-Conviction Relief to Avoid Adverse Immigration Consequences

Speakers will include nationally recognized expert Dan Kesselbrenner and Mary Holper, author of an analysis of the immigration consequences of the Virginia Criminal Code. The seminar is being offered free of charge. CLE credit is being applied for with the Virginia State Bar.

REGISTRATION FORM

To register, please complete this form and fax it to Valverde & Rowell, P.C., Attn: Gabi Theresin, 757-282-2502 or call 757-422-8472 by **March 28, 2008**.

NAME: _____

FIRM/ORGANIZATION: _____

ADDRESS: _____

PHONE: _____ FAX: _____ E-MAIL: _____

Upcoming VSB Events

03/14 | VSB YLC Board Dinner
03/15 | VSB YLC Board Meeting
03/31–4/11 | Second Annual Statewide Legal Food Frenzy
04/04 | CLE: Immigration Consequences of Criminal Convictions in Virginia
04/04 | CLE : YLC Domestic Violence Safety Project training on protective orders
05/01 | VSB Solo & Small-Firm Practitioner Forum
05/14 | VSB YLC Board Dinner
05/15 | VSB YLC Board Meeting
05/22–23 | VSB Pro Bono & Access to Justice Conference
06/02 | VSB YLC Admission & Orientation Ceremony

For a complete, up-to-date list of events, please visit: http://www.vsb.org/site/events/

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If you have moved or changed your address, please see the VSB Membership Department's page on the Web for an address update form, at www.vsb.org/site/members/.

Docket Call

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Editor:
Meghan Cloud

Board Liaison:
Brian R. Charville

Design & Production:
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Docket Call welcomes contributions from members of the YLC.

Send submissions to:
Meghan Cloud
McGuireWoods LLP
Suite 300
310 Fourth Street, NE
Charlottesville, VA 22902
mcloud@mcguirewoods.com

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Virginia State Bar Young Lawyers Conference
707 East Main Street, Suite 1500
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