Contributors


Atkinson


Javonovich


Bell


Tennant


Lionberger


Hedrick


Warwick


Grier


Keeler


Crowgey


Wingfield


Dockendorf


Montgomery


Hasan

Elizabeth J. Atkinson is a shareholder in LeClair Ryan's corporate group. She is a member of the Virginia State Bar Access to Legal Services Committee and is immediate past president and a current board member of the Community Tax Law Project.

Elaine Javonovich joined the Community Tax Law Project in 1999 as its pro bono coordinator and was appointed executive director in 2003. For more information about the project or its programs, please contact her at (804) 358-5855 or elainej@ctlp.org.

Craig D. Bell is a partner with McGuireWoods LLP and is a member of the tax and employee benefits department. He heads the firm's state and local tax and tax litigation groups and serves as the firm's lead tax litigator in trial and appellate federal, state, and local tax disputes.

J. Christian Tennant practices with McGuireWoods LLP and is a member of the tax and employee benefits department and works in the state and local tax group.

David S. Lionberger is a partner with Hirschler Fleischer PC in Richmond. His practice focuses on taxation and business planning, tax credit transactions, trusts and estates, and mergers and acquisitions.

Lisa J. Hedrick is an associate with Hirschler Fleischer PC in Richmond. Her practice focuses on business and corporate matters, including corporate formation and dissolution, corporate maintenance and governance, reorganizations, and tax issues.

Robert A. Warwick is of counsel with Thompson McMullan PC of Richmond. He focuses his practice on state, federal and international taxation.

Richard L. Grier is a stockholder with Thompson McMullan PC of Richmond.

Steven J. Keeler is a partner in McGuireWoods LLP's private equity group, and also practices in the firm's emerging company and venture capital group. He regularly represents venture-backed companies and investors in connection with venture capital, private equity, merger and acquisition, and strategic partnering transactions.

Guy C. Crowgey is a principal of the law firm of Crowgey & Grossman, where he represents clients in tax controversies at the federal and state levels. Crowgey is also a member of the Virginia State Bar Council and a member of the board of governors of the VSB Taxation Section. He is a graduate of the University of Richmond School of Law and received his master of laws degree with a focus in taxation from the College of William and Mary.

Kyle H. Wingfield is an associate with the law firm of Crowgey & Grossman. He is a 2008 graduate of the University of Richmond School of Law and received a master of laws degree with a focus in taxation in 2009 from Georgetown University.

Dee Dee Dockendorf is an assistant law librarian at the Virginia State Law Library. She received a master's degree in information science from the University of North Carolina at Chapel Hill and her bachelor's degree from Santa Clara University. She is an active member of the American Association of Law Libraries and the Virginia Association of Law Libraries.

Kathryn R. Montgomery prosecutes attorney ethics cases as an assistant bar counsel for the Virginia State Bar, a position she has held since 2003. She previously was an associate with McGuireWoods LLP in Richmond. She holds bachelor's and law degrees from the University of Virginia.

Nadar F. Hasan is chair of the Fee Dispute Resolution Committee for the Arlington circuit. He has a solo practice that focuses on business, criminal, and family law. He has a bachelor's degree in business administration from James Madison University, a master's in international business transactions from George Mason University, and a law degree from the University of Illinois.

CLE Calendar

"Understanding and Implementing Virginia's Revised Health Care Decisions Act" — October 22, 8:15 AM–4 PM, University of Virginia School of Law, Charlottesville. Sponsors include U.Va.'s Institute of Law, Psychiatry and Public Policy; the U.Va. Institute on Aging; and the Virginia Hospital & Healthcare Association. Details: Carol Brown at cbrown@vhha.com or (804) 965-1280

Virginia Trial Lawyers Association
Details: http://www.vtla.com or (804) 343-1143, ext. 310

Annual Advocacy Seminar: "Expert Witnesses" — 9 AM–4:45 PM on October 22, Norfolk, and October 28, Fairfax.

Annual Paralegal Seminar — November 28, 8:30 AM–4:30 PM, Glen Allen.

Virginia Criminal Sentencing Commission
Details: http://www.vcsc.virginia.gov or (804) 225-4398

Introduction to Sentencing Guidelines, for attorneys and criminal justice professionals who are new to Virginia's guidelines — 9:30 AM–5:30 PM, November 16, Henrico County.

Advanced Sentencing Guidelines, for experienced users of the Virginia guidelines — 9:30 AM–5:30 PM on October 22, Lynchburg, and October 29, Roanoke.

Virginia Lawyer publishes at no charge continuing legal education program announcements for nonprofit bar associations and state agencies. The next issue will cover December 16, 2009, to February 19, 2010. Send information by October 23 to chase@vsb.org. For other CLE opportunities, see Current Virginia Approved Courses at http://www.vsb.org/site/members/mcle-courses or the websites of commercial providers.

Change is Natural Progression

Kate O'Leary's letter, in the June/July *Virginia Lawyer*, reflects unfortunate attitudes.

Her euphemism for her regional prejudice is "northern sensibilities," but her assumption of intrinsic superiority shows she has not become any more sensible since being "mortified" at the fact that Robert E. Lee and Martin Luther King Jr. are honored at the same time, near their birthday anniversaries. Studying history might have left her a little less surprised; she might have learned that our respect for Lee includes the anecdote of his kneeling for communion in Richmond's largest church, beside a gentleman of color, demonstrating racial tolerance and acceptance when nobody else would do so. Probably nobody in Connecticut would have, either, but she doesn't say that was the reason she was mortified. A look into more recent history would have shown her that the triple Lee-Jackson-King holiday was implemented by the nation's first African American governor, who wasn't from Connecticut.

Ms. O'Leary becomes condescending when she states that "I have seen things change in the Commonwealth of Virginia" in the last ten years. It may be her perception that has changed. When I started practicing law three decades ago, the Virginia bar showed racial diversity and was in the awkward process of achieving gender diversity. Attorneys worked well with colleagues, court officials and employees, police, and others of all ethnic backgrounds, without tension. Any "change" in Virginia during the past decade has been only natural progression in the atmosphere that already existed.

After attending one conference, Ms. O'Leary presumes to preach to us how to "learn what it feels like to be in the minority." To me, as the first woman to practice law in one Appalachian community, her statements seem tinged with arrogance. It wasn't just a matter of "walk one's talk," for a week or a weekend, but of walking a tightrope between the accepting, generous, and courteous majority of colleagues and judges and the rare but poisonous "good ol' boys" who sometimes turned up in unexpected places and positions. She is fortunate to have missed those days, even though there was no queue for the ladies' room at CLE classes.

If she found the Old Dominion Bar Association conference worthwhile, and wants to recommend it, fine. If the ODBA wants more diversity of members and conference attendees, appropriate invitations will be extended.

But her migration doesn't qualify Ms. O'Leary as moral arbiter of what VSB members "must" do.

Patsy A. Bickerstaff
Richmond

Cover Conveyed President's Message

Hurrah for Jon Huddleston and *Virginia Lawyer*. Your June/July 2009 cover captured Jon Huddleston's message "to emphasize the many contributions lawyers make to their communities in ways other than law."

Keep up the good work and spread the message.

Susan Pesner
McLean

Letters

Send your letter to the editor* to:
coggin@vsb.org;
fax: (804) 775-0582;
or mail to:
Virginia State Bar,
Virginia Lawyer Magazine,
707 E. Main Street, Suite 1500,
Richmond, VA 23219-2800

*Letters published in *Virginia Lawyer* may be edited for length and clarity and are subject to guidelines available at **http://www.vsb.org/site/publications/valawyer/**.

Join a VSB Section

Section membership is open to all members in good standing of the Virginia State Bar. Many sections also have law student and associate memberships. The sections are supported by dues which range from $10 to $35.

- Administrative Law
- Antitrust, Franchise & Trade Regulation
- Bankruptcy Law
- Business Law
- Construction Law & Public Contracts
- Corporate Counsel
- Criminal Law
- Education of Lawyers
- Environmental Law
- Family Law
- General Practice
- Health Law
- Intellectual Property Law
- International Practice
- Litigation
- Local Government Law
- Military Law
- Real Property
- Taxation
- Trusts and Estates

Find more information online at **http://www.vsb.org/site/members/sections/**.

by Jon D. Huddleston

Let Me Tell You A Story

SPORTS ENTHUSIASTS WILL undoubtedly recognize the headline as the title of John Feinstein's wonderful homage to the legendary Celtics coach Red Auerbach. Auerbach was not only a masterful coach and general manager, but a raconteur of the highest order. Feinstein is one of my favorite writers and no slouch in the story-telling department himself. I have read most of his books — even *Forever's Team*, his tribute to the 1978 NCAA runner up Duke University basketball team, (Bill Foster's team not Coach Krzyzewski's). What I like about John Feinstein's works is that he revels in telling stories that are not squarely in the public eye. He has written books about small-college football, a terminally ill professional caddy, and the Army/Navy rivalry. He tells human interest stories that are significant but not necessarily high profile.

It is with this notion that I have set out to tell the story of the Virginia lawyer. Our profession and its members remain selflessly devoted to their communities despite the often humbling public perception. Adopting the mantra *Virginia Is for Good Lawyers,* we seek to tell the stories of several of our commonwealth's finest practitioners. We are off to an excellent start. In June, we established a YouTube channel, where we have posted several interviews under the heading "The Big Picture."

YouTube is an amazing phenomenon. At your fingertips, you can check out Walter Cronkite's last broadcast, watch a live version of Wilson Pickett's *Midnight Hour*, or review an ill-advised late night snowboard catastrophe involving a certain family friend and Tech student who thought a homemade ramp was a cool idea.

You can also meet Jay Weinberg. Jay is a brilliant lawyer whose contributions to the Greater Richmond area are legion. He was instrumental in bringing the Virginia Holocaust Museum to Richmond, among his manifold contributions. In the video clip, Jay recalls that on his last day of law school, his dean told the graduating class that "As lawyers we were going to be experts in democracy and practitioners of humanity, an awesome responsibility if you think about it." Jay opines that his firm and he personally have always felt that the "commitment to community makes you a better lawyer." He adds, "The rule of law is not an abstract thing, it's very tangible, it's what every lawyer devotes a significant portion of his daily life to." These are wonderful, inspiring words from a very good Virginia lawyer.

Perhaps you watched the story about the Law Camp in Leesburg. In this episode Judge Thomas D. Horne, a Loudoun County Circuit Court Judge notes

> *Whether it is picking up trash or whether it's working on Law Camp or whether it's working with youth sports or doing something with respect to the legal profession, I think we as public servants owe a duty and responsibility. As members of the bar, we have a responsibility to other people in the community to reach out, to be able to help, to lead, to encourage, invite participation and do all we can to show that we as lawyers are not only leaders in the community; not only do we have an honored profession, we have a vital and considerate interest in everything that goes on in the community.*

I cannot really add a whole lot to that. It is the story of the Virginia lawyer that is key and it is the story that must be told.

You may have seen the episode with Chip Delano talking about his years of scouting and its continued relevance in our society and community. The images of the youth from all over the world with the international scout jamboree that Chip attended in London a couple of years ago are awe-inspiring. Although his kids have now passed the scouting age, Chip adds, "I have never grown up; I am going to stay involved in scouting." The Richmond area remains the better for Chip's efforts.

Certainly, I hope you will not miss Winchester attorney Pete Buchbauer helping to feed the hungry or our portrait of Stu Spirn on his thirty-plus years of youth soccer in Williamsburg. I hope you have connected with Judge Angela Roberts and discovered her tremendous work with adoptions. I can go on and on and on … and I will for the remainder of the year.

Have we gone viral? Hardly, but I believe we are telling worthwhile stories. I believe that the public needs to know what Virginia good lawyers contribute on a daily basis. Please check out all of our *Big Picture* episodes on YouTube or the State Bar website at www.vsb.org.

Story continued on page 57

by Karen A. Gould

The Year Ahead: What You Need to Know

I HOPE YOU HAVE HAD an opportunity to visit the VSB website and review President Jon Huddleston's *Virginia Is for Good Lawyers* campaign. The campaign is designed to spotlight Virginia lawyers' community involvement. Through the artistic and technical support of Madonna Dersch of the VSB publications staff, the interviews can be accessed through the VSB home page http://www.vsb.org under the title *The Big Picture*. In addition, Jon has solicited essays from and about Virginia lawyers and gathered them into a collection titled *Reflections*. This is a wonderful public relations campaign, and we should all thank Jon for his efforts to improve the image of lawyers in Virginia. If you have suggestions for interview opportunities or would like to write an essay, please send Jon an email at TheBigPicture@vsb.org.

MCLE Information

On the regulatory front, you should be aware that the Mandatory Continuing Legal Education Board is considering limiting the amount of MCLE credits you can earn through distance learning. This rule change, if adopted by the MCLE Board, would require that every active member of the VSB attend some amount of live programming every year. The MCLE Board is concerned that the increasing usage of the Internet will undermine one of the primary purposes of the MCLE requirement: to preserve the collegiality of the profession. Any proposed rule change will be published for comment before being adopted.

This may be the last year the VSB mails to all members the MCLE End of Year Report, which logs the number of MCLE credits you have completed (and are lacking). The Supreme Court of Virginia has before it a proposed change to the Rules of Court Part 6, Section IV, Paragraph 17 — Mandatory Continuing Legal Education Rule. (http://www.vsb.org/site/regulation/paragraph-17-form/) The change would eliminate a requirement that the bar mail the annual MCLE form to all members.

With the new system, members can access their End of Year Report online or request that it be mailed. To access it online, enter your member number and password to reach the secure Member Login area at VSB.org, then click on the MCLE Records button.

You can also report your MCLE hours from the same page, which will then immediately post the hours to your compliance report — a much more efficient and reliable method of reporting your hours than sending or faxing your MCLE record to the bar.

The VSB has already eliminated MCLE's midyear Interim Report.

In May 2009, the Supreme Court approved an additional MCLE delinquency fee of $100 if a lawyer has not complied with the MCLE requirements by February 1 of a given year.

The season between the MCLE compliance deadline of October 31 and administrative suspensions of members who fail to comply — usually in March — is the busiest for the bar's MCLE staff.

To cite an example, by the close of business on October 31, 2008, more than 8,000 attorneys had not complied with MCLE requirements. Delinquent filers who had not completed their required hours were fined $100 and had until December 15 to complete their credits and file a report without further penalty.

Thousands of MCLE certifications flooded the bar's offices from late October through mid-December. After the December 15 deadline, approximately 1,600 attorneys continued to be noncompliant. Those members were charged an additional $100 for failing to file an End of Year Report.

It takes the VSB approximately one month to process all the certification forms that come in during December and notice those members who still have not complied. Sixty-day notices of noncompliance required for administrative suspension under Paragraph 19 thus are usually not issued until mid-January. In our example, approximately 1,031 attorneys still had not complied by February 27, 2009.

The MCLE Board and the VSB staff hope that, by instituting an additional $100 penalty to be imposed on February 1, prior to the suspension notice, the bar will encourage more attorneys to comply with MCLE requirements without being suspended and incurring reinstatement costs.

Proposed Rule Changes

The Virginia State Bar's Rule 4.2 Task Force is proposing an amendment to Rules of Professional Conduct, Rule 4.2, Comment [5] to address the situation in which a defendant who is in custody, formally charged, and represented by counsel waives his or her rights under *Miranda v. Arizona*

The Year Ahead continued on page 57

The Message and the Media

Virginia Is for Good Lawyers Gives VSB Its First Experience with Social Media

by Dawn Chase

One-quarter through his presidential year, Coach Jon D. Huddleston has left the dugout to drum up some infield chatter from the members of the Virginia State Bar.

So how's it going, Coach? "I think the message that we're trying to convey is going very well," said Huddleston, whose free time is devoted to youth sports when he's not in the office and who has the smiling enthusiasm required for working with kids.

That message is the *Virginia Is for Good Lawyers* campaign, a multimedia collection of Virginia lawyers' stories about the passions that drive them in their lives — professionally and in their communities.

The Message

In the video most recently posted at VSB.org and the bar's YouTube channel, Loudoun County Circuit Judge Thomas D. Horne and attorney Rhonda Wilson Paice of Leesburg describe the Leadership in the Law Summer Camp sponsored for high school rising seniors by the Loudoun County Bar Association.

Horne sums up his philosophy:

> Whether it's picking up trash, or whether it's working on law camp, or whether it's working with youth sports, or whether it's doing something with respect to the legal profession, … as members of the bar we owe a responsibility to other people in the community to reach out, to be able to help, to lead, to encourage, invite participation, and do all that we can to really show that we as lawyers are not only leaders in the community — not only do we have an honored profession — but … we have a vital and considered interest in everything that goes on in the community.

That's just the kind of message Huddleston was hoping to elicit when he assumed the VSB presidency in June and launched the campaign with *The Big Picture* video project and *Reflections*, an essay collection posted at VSB.org.

The essays contributed by Virginia lawyers are introspective, funny, and touching.

In one, Jack W. "JB" Burtch of Richmond leads the reader through his own professional history, which started with big-firm work in labor and employment.

> Independence has always been an important value for me. When I didn't find enough of it in the large firm, I joined a small firm. Even though some labor and employment clients came with me, I found myself doing other types of legal work, including some family law. I soon realized that while I actually enjoyed the stylized combat of labor-management disputes, participating in the process of separating children from their parents was more than I could handle. Likewise, representing a client in a dispute over who was liable for a boxcar of damaged widgets engaged no part of my legal curiosity.

James W. Korman of Arlington provokes laughs as he writes of his first case — as a teenager, defending a fellow summer camper who "had broken sixty plates, forty at one time in a massive kitchen cart tip-over maneuver." He begins:

> I was always good at arguing. And I enjoyed it. If I wanted to, even when I was a kid, I could switch sides and argue the other side of any dispute. Some of my masterpieces you may have heard about: Bill Russell is better than Wilt Chamberlain; Willie Mays is better than Mickey Mantle; my Mom is prettier than yours; and, of course, the never-to-be-forgotten: there is no way Stanley Bagan could tackle Jim Brown.

(Who is Stanley Bagan? Read the essay at http://atlanticwire.theatlantic.com/read-more.php?id=988.)

And Judge Pamela L. Brooks of Loudoun County Juvenile and Domestic Relations Court describes how her paying job meshes with her volunteer work with Loudoun Girls Little League Softball and Central Loudoun Little League:

> I am fortunate to have these opportunities to work with children in a positive environment. It strengthens me when I go back into court and meet the many children and young adults who never got the chance to be part of a team and too infrequently see that adults care about them and the choices they make.

Huddleston says he is delighted with the breadth of the essays and the passion they reveal for community.

Meanwhile, Huddleston has a President's Blog — *Raising the Bar* — to which he has posted four entries thus far. His goal in part is to promote lawyers' contributions to *Virginia Is for Good Lawyers*. In August, he wrote:

> The act of communicating our thought for others solidifies them for us, and it can be a transformative process, as those who write briefs, pleadings, and motions well know.

On the VSB's Twitter channel, Huddleston tweets summaries of news and announcements posted at the bar's official website, VSB.org, and encourages followers to view contributions to *Virginia Is for Good Lawyers*. And sometimes he just chats. The September 9 tweet:

> Happy 09/09/09, everyone. Having a great week: kids back to school, busy practice, and meeting with/for VA's good lawyers as VSB president.

Huddleston also contributes the traditional president's column to *Virginia Lawyer.*

The Media

Huddleston's project has presented the VSB with its first experience in several social media — video, blogging, and Twitter. A Virginia State Bar Facebook page might also be developed during his presidency.

With each video, Huddleston's performance is smoother. "I'm getting better," he said. "I'm a little bit more comfortable talking to the camera." He also has learned to be "more concise with the lead-ins and teasers."

Bar videographer Madonna G. Dersch also is gaining skill at directing, recording, and editing interviews for "The Big Picture."

Huddleston says that Twitter and the blog reinforce the messages of the video and the essays, and the news items posted at VSB.org, mailed to the entire bar in the monthly E-News, and published in *Virginia Lawyer* magazine. He calls the interweaving of the media a "cross-pollination."

The social media expand the reach of other bar communications, and they are more timely, Huddleston said. The project started with his desire to shine a light on lawyers for their nonlegal contributions to the community. But the essay contributors and video interviewees are broadening the focus.

The Message and the Media
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The Virginia State Bar's story is being told on several channels now. They are:

Virginia Is for Good Lawyers
President Jon D. Huddleston's project to memorialize the community work of lawyers across the state.

***The Big Picture* (video)**
Interviews with lawyers and on legal topics.
http://www.vsb.org site/about/va-good-lawyers/ and
http://www.youtube.com/virginiastatebar

***Reflections* (essays)**
Lawyers ponder about what led them to law, the professional paths they have traveled, and community activities that help them right some of the wrongs they see through their practices.
http://www.vsb.org site/about/va-good-lawyers/

Twitter
Huddleston's channel for tweeting *Virginia Is for Good Lawyers* contributions, and for receiving tweets that others think he'll find interesting.
http://twitter.com/VA4GoodLawyers

Blog
Another vehicle for highlighting Huddleston's project, official VSB business, and general legal chat.
http://www.vsb.org/site/blog/

Official VSB Communications

VSB.org — Latest News and Meetings and Events
Need-to-know postings about upcoming events and news items of importance to Virginia lawyers.
http://www.vsb.org/

E-News
A monthly e-mail to alert VSB members to important events.
Each E-News is posted in the Latest News section at http://www.vsb.org/

Virginia Lawyer
A printed magazine that includes bar news and substantive law articles produced by VSB sections. It is mailed to all VSB members.
Archived at http://www.vsb.org/site/publications/valawyer/

Virginia Lawyer Register
A printed and online publication of record that reports Virginia disciplinary actions and governance matters before the Supreme Court of Virginia, the General Assembly, the VSB Council, and VSB committees. The printed magazine, an index, is archived with links to full disciplinary orders and governance proposals.
http://www.vsb.org/site/publications/register/

The Message and the Media
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The project has taken on the collective personalities of the contributors.

Huddleston observes that the social media have fewer filters than the bar's official means of communicating. Information in *Virginia Lawyer* and VSB.org news postings undergo fact-checking, editing, and analysis of relevance to VSB members and the VSB's mission.

The social media, while more timely and spontaneous, do not go through this process. Huddleston said, "You have to be very careful about what you're putting out there." His tweets and blog postings largely are "announcement-oriented, news-oriented," and refer to links on the VSB website that have gone through the agency information filters.

He has promoted Fastcase — the VSB's legal research service for members — and the Young Lawyers Conference's Professional Development Seminar, and he has reminded Virginia lawyers that a payee notification proposal is on the table to require insurance companies to notify liability claimants when the companies issue a settlement check for $5,000 or more.

Another part of Huddleston's technical learning curve has been management of the time required to tape videos, tweet, post to the blog, and review and respond to any responses he might receive. He goes through his mental list of deadlines: "The blog needs some attention. I owe Caryn Persinger a President's Column. We have a taping schedule coming up. … You catch as catch can." He joked that he spent a couple of weeks practicing law recently.

Clearly, one of his satisfactions as president will be knowing that the VSB "placed in cyberspace" retired justice Harry L. Carrico's remarks at a Professionalism Seminar and Jay M. Ipson of the Virginia Holocaust Museum talking about the Nuremburg Trial exhibit there.

So on many days Jon Huddleston will be out in the field soliciting contributions for his project. Or you might find him in cyberspace promoting bar businesses.

VSB Executive Director Karen A. Gould is watching Huddleston's project with interest.

"In publicizing his *Virginia Is for Good Lawyers* campaign, Jon is giving the Virginia State Bar its first experience with the new social media," she said "We're learning how such venues as Twitter and blogs can help the bar communicate to its members and the public. We are also learning what media are best suited for different types of messages — bar governance matters versus public image campaigns such as Jon's, for example.

"Jon's efforts will help us understand the panoply of communication tools that exist. We'll be evaluating those tools and assessing what will work for our mission."

— CALL FOR NOMINATIONS —

HARRY L. CARRICO PROFESSIONALISM AWARD

The Harry L. Carrico Professionalism Award was established in 1991 by the Section on Criminal Law of the Virginia State Bar to recognize an individual (judge, defense attorney, prosecutor, clerk or other citizen) who has made a singular and unique contribution to the improvement of the criminal justice system in the Commonwealth of Virginia.

Nominations must be received no later than December 4, 2009.

For more information visit http://www.vsb.org/site/sections/criminal/view/Professionalism-Award/

VSB Disciplinary Conference Brings Professional Regulation Volunteers to Richmond

The Virginia State Bar's Twenty-ninth Annual Disciplinary Conference, held in Richmond July 16–17, 2009, brought together volunteers who sit on district disciplinary committees, the Disciplinary Board, and the Committee on Lawyer Discipline (COLD).

Photo 1: For the first time, the conference also invited defense attorneys to serve on a discussion panel. James C. Roberts (left) and Michael L. Rigsby presented the respondent's perspective on the disciplinary process.

Photo 2: Kimberley Slayton White, the 2009–10 COLD chair, handed out awards to district committee members who have completed their terms.

Photo 3: William H. Monroe Jr., 2009–10 chair of the Disciplinary Board, recognized outgoing board members.

Photo 4: VSB President Jon D. Huddleston with Disciplinary Board member Sandra L. Havrilak.

Mandatory Continuing Legal Education
MCLE DEADLINE: October 31, 2009

Failure to complete twelve CLE hours, including two hours in ethics/professionalism, by October 31, 2009, will result in a $100 noncompliance fee. (See the Rules of the Supreme Court of Virginia Part 6, Section IV, Paragraph 19.)

Check and certify your MCLE record online through the Member Login at http://www.vsb.org. If you do not have access to the Internet you may contact the MCLE Department at (804) 775-0577 to request that a copy of your transcript be mailed.

Robert Grey Appointed to Diversity Position, Nominated for Legal Aid Directorship

Robert J. Grey Jr., a Richmond lawyer who served as president of the American Bar Association, has been named interim executive director of the Leadership Council on Legal Diversity.

The council is a newly formed organization of corporate legal officers and law firm managing partners dedicated to creating a diverse legal profession by eliminating impediments that preclude minorities and women from participating fully in the legal profession.

Grey is a partner at Hunton & Williams LLP. His duties as interim executive director will include increasing the council's membership, establishing partnerships, creating best practices for promotion of diversity, and helping search for a permanent executive director. His term is expected to last six months.

In another appointment, Grey has been nominated by President Barack Obama to the eleven-member Legal Services Corporation Board of Directors, a nonprofit corporation that supports civil legal assistance to low-income Americans.

Grey serves as vice chair of his firm's Pro Bono Community Service Committee.

W&L's Smolla Designated "Legal Rebel" by ABA

Rodney A. Smolla, dean of the Washington and Lee University School of Law, is included among fifty legal professionals singled out by the *ABA Journal* Legal Rebels Project of the American Bar Association.

Smolla recently has gained attention for reforming the law school's third-year curriculum to give students experience with real-life client interactions, simulated practice situations, and practice development training.

Professional development also is emphasized during the third year. Third-year students study and reflect on legal ethics, civility in practice, civic leadership, and pro bono service. (http://law.wlu.edu/news/storydetail.asp?id=376)

The Legal Rebels Project is profiling fifty professionals the magazine has identified as "leading innovators" in the law. Those persons' stories are told in a series of online videos that will be posted through Thanksgiving.

The project is accepting nominations for "mavericks" who "are finding new ways to practice law, represent their clients, adjudicate cases, and train the next generation of lawyers. Most are leveraging the power of the Internet to help them work better, faster, and different," according to the project's website.

The project includes other components, including a Legal Rebels Manifesto (http://www.legalrebels.com/manifesto); encouragement to follow the project's progress and chat about it through various social media (http://www.legalrebels.com/connected); and a Legal Rebels featured projects shop.

For more information, see http://www.abajournal.com/news/welcome_to_the_legal_rebels_project/.

Professional Guidelines To Be Published in Online Searchable Format

The Virginia State Bar *Professional Guidelines* for the first time are being published online in a searchable HTML format that will allow users to quickly access the sections they are looking for without flipping through pages or waiting for PDFs to download.

Because the format will meet most VSB members' needs, print copies of the *Professional Guidelines* are not being mailed with the October 2009 issue of *Virginia Lawyer*. A limited number of copies will be printed and provided to members on request.

The print version is published each fall and contains the rules and regulations of the bar, including the Rules of Professional Conduct, attorney trust account regulations, mandatory continuing legal education regulations and forms, Virginia Consumer Real Estate Settlement Protection Act regulations, and portions of the Rules of the Supreme Court that outline VSB governance and the procedure for disciplining attorneys.

The online HTML version will allow members to browse the Rules of Professional Conduct by using a table of contents with hot links. Previously, the *Professional Guidelines* were available on the VSB website only as PDF files.

The HTML version will be updated throughout the year to provide a current version at all times. The print version is updated once a year. Changes approved by the VSB Council and the Supreme Court of Virginia are published online as a supplement.

The newly formatted *Professional Guidelines* is scheduled to be posted before the end of 2009. Watch your first-of-the-month VSB E-News for further details.

In Memoriam

Edwin Boyd Baker
Keysville
June 1942–June 2009

Norman Baum
North Miami Beach, Florida
March 1923–January 2009

Brenda Louise Friend Briggs
Chester
December 1943–June 2009

Laura Eve Brown
New Bern, North Carolina
August 1955–April 2009

James W. DeBoer
Colonial Heights
May 1946–July 2009

Robert Irving Dodge III
Stafford
August 1937–December 2008

Benjamin W. Dunlany
Washington, D.C.
August 1919–May 2009

Martha Bryan Ennis
Fredericksburg
August 1944–July 2008

James E. Harvey Jr.
Green Cove Springs, Florida
June 1919–April 2009

Robert J. Katz
Washington, D.C.
June 1939–April 2009

Edward Patrick Kelley Jr.
State College, Pennsylvania
September 1943–September 2008

Michael Richard Kelly
Washington, D.C.
October 1964–April 2009

Hon. W.S. Kerr
Gladstone
October 1939–December 2008

Dickson Edwin Kesler
Melbourne, Florida
June 1944–September 2008

Milton William Kirkpatrick Jr.
Fairfax
July 1932–May 2009

G.L. Knight
Springfield
October 1925–May 2009

H. Bailey Lynn II
Middleburg
April 1943–September 2008

Alison Baird Macdonald
Washington, D.C.
February 1973–June 2009

Henry C. Mackall
Fairfax
April 1927–July 2009

Edward Francis Manning
Fairfax
February 1941–August 2008

Peter C. Manson
Charlottesville
January 1918–April 2009

Hon. D.B. Marshall
Charlottesville
June 1919–June 2009

John Michael McDonald
Washington, D.C.
July 1963–December 2008

Hon. Burch Millsap
Englewood, Florida
August 1923–June 2009

R. Dennis Osterman
St. Michaels, Maryland
February 1947–June 2009

Stephen Turner Owen
Alexandria
May 1943–July 2009

William M. Phillips
Lynchburg
August 1933–July 2009

Mary Elizabeth Pierce
Midlothian
January 1922–August 2009

Robert Nelson Pollard III
Glen Allen
June 1958–August 2009

Una Rita Quenstedt
Sun City West, Arizona
December 1907–April 2009

Dueward H. Scott Jr.
Clifton Forge
December 1926–February 2009

Donald E. Selby
Charlottesville
September 1925–March 2009

Louis Calvin Shell
Petersburg
December 1925–August 2009

Russell Edsel Sherman
Fairfax
September 1936–July 2009

J. Alvernon Smith Jr.
Richmond
May 1924–June 2009

Daren Myrl Stephens
Alexandria
June 1922–August 2008

Hugh C. Stromswold
Spokane, Washington
July 1919–June 2009

Alice Evans Watson
Virginia Beach
February 1918–September 2008

Donald G. Wise
Portsmouth
October 1938–May 2009

Melvin Reginald Zimm
Norfolk
November 1953–August 2009

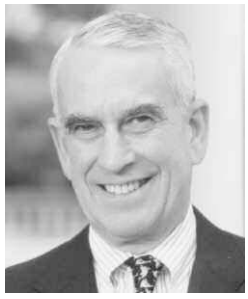
Leigh Middleditch Receives ABA Honor

Leigh B. Middleditch Jr. of Charlottesville has been presented with the American Bar Association's John H. Pickering Award for his outstanding service to the legal profession, educational projects, and his community.

The award is presented by the ABA Senior Lawyers Division in memory of a Washington, D.C., lawyer who was involved in many pro bono activities and law-related societal issues. Middleditch was honored July 30, 2009, during the ABA meeting in Chicago.

Middleditch has practiced for his entire legal career — starting in 1957 — with McGuireWoods LLP. He now is senior counsel to the firm's Charlottesville office.

He has been an active volunteer with the Virginia State Bar and the ABA. He was chair of the VSB Senior Lawyers Section — before it became a conference — and a member of the VSB Committee on Lawyer Discipline, among other bar activities. His service to the ABA included a term as chair of the Senior Lawyers Division and membership on the Commission on Law and Aging.



His work in education includes the South African Lawyers Association Commercial Law Project, which presents seminars to black South African attorneys who were held back by apartheid.

In his community, he has volunteered with the American Red Cross, the Salvation Army, Child and Family Services, the Mental Health Association, Charlottesville Free Television, and many other nonprofit groups.

Keep Up with the VSB — Read the E-News

Have you been receiving your Virginia State Bar E-News?

The E-News is an important way of keeping informed about your regulatory bar.

We only send it out once a month — a brief summary of deadlines, programs, rule changes, and news to keep you on track professionally.

We e-mail it to all VSB members, except for those who opted out of receiving it.

If you didn't get yours, check your spam filter for October 1 and see if it's in there.

If your Virginia State Bar E-News is being blocked by your spam filter, contact your e-mail administrator and ask to have the VSB.org domain added to your permitted list.

Local Bar Elections

Greater Richmond Intellectual Property Law Association
Brian James Teague, President
Matthew Robert Osenga, Vice President-Treasurer
Gregory Michael Murphy, Corresponding Secretary
Cheryl Lynn Black, Recording Secretary

Hispanic Bar Association of Virginia
Dennis Adrian Somech, President
Juan Ever Milanes, Vice President
Kristina Aurelia-Magraner Cruz, Secretary
Juan Carlos Estevez, Treasurer

Lynchburg Bar Association
Ronald David Henderson, President
Sharon Kathleen Eimer, President-elect
Burton Leigh Drewry Jr., Secretary-Treasurer

Newport News Bar Association
Herbert Valentine Kelly Jr., President
Robert Wayne Lawrence, President-elect
Mark Andrew Short, Secretary
Michael John Walsh, Treasurer

Roanoke Bar Association
Roy Vogel Creasy, President
Francis Hewitt Casola, President-elect
Lori Dawn Thompson, Secretary-Treasurer

Salem-Roanoke County Bar Association
Leisa Kube Ciaffone, President
Compton Moncure Biddle, 1st Vice President
Matthew Jason Pollard, 2nd Vice President
Patricia Ann McGee Green, Secretary-Treasurer
Lora Ann Keller, Judge Advocate

York County-Poquoson Bar Association
John Patrick Walsh, President
Melanie Barbour Economou, President-elect
Karla Jeanette Keener, Secretary
Patricia Ann Dart, Treasurer

How Do Poor People Have Tax Problems?

by Elaine Javonovich and Elizabeth J. Atkinson

How do poor people have tax problems?

It's a question many individuals ask when they first learn about the services of the Community Tax Law Project (CTLP), a nonprofit that provides low-income Virginians with pro bono legal representation in federal and state tax disputes. Yet requests for clinic services have reached an all-time high. During the first six months of 2009, CTLP's caseload increased by 52 percent over the same period last year, causing the clinic to limit its assistance to emergency situations such as garnishments and immediate procedural deadlines.

The CTLP staff believes much of this increase is due to the effects of the economic downturn. Taxpayers who have fallen on hard times due to job loss and other family income changes have been hardest hit. Some taxpayers are facing tax consequences as a result of dipping into their retirement funds to make ends meet. Others are incurring tax liabilities from cancellation of debt income due to home foreclosure, car, medical, or credit card debt. Taxpayers who have existing payment arrangements are defaulting on their agreements due to changes in their family income.

In one case, an 84-year-old taxpayer who did not file a return was unaware he had a tax liability related to cancellation of debt imputed income from his home foreclosure. A pro bono volunteer prepared his tax return claiming the insolvency exclusion and later followed up when the Internal Revenue Service demanded proof of the taxpayer's insolvency. As a result, the taxpayer owed nothing, instead of the $25,000 alleged by the IRS. The volunteer also prepared the taxpayer's 2007 return so that the taxpayer received the $300 economic stimulus payment.

Self-employed taxpayers and small-business sole proprietors, who were rare among CTLP's clients a few years ago, now make up a noticeable portion of the clinic's caseload. Generally, these taxpayers are experiencing difficulty in making federal and state estimated tax payments. CTLP staff anticipate this trend will continue as workers in the building trades, independent truck drivers, and those who provide personal services — such as landscapers and housekeepers — are affected by reduced consumer spending.

The Virginia Department of Taxation has increased collection activity in response to the state budget crunch. This trend began in 2008 and often focused on taxpayers carrying liabilities longer than ten years. The CTLP represented taxpayers in 121 Virginia tax matters in the first six months of 2009, a 181 percent increase from the same period last year.

In addition to cases related to the current economic downturn, the CTLP helps recover federal tax refunds and credits wrongfully withheld from taxpayers. Many of these cases involve family-status tax issues. The CTLP's clients prevail in many of these cases, resulting in substantial refunds and credits that help these low-wage Virginians maintain their housing, feed and clothe their children, and pay medical and other bills. Much of this money is spent in the communities where these families live and work.

The CTLP relies on a strong network of volunteer attorneys located throughout Virginia and the District of Columbia. Clinic staff and pro bono volunteers work with the IRS and Virginia Department of Taxation to get the right result for a taxpayer. Because a number of the CTLP's clients are unable to pay their liabilities, the clinic's services save the IRS and the commonwealth valuable resources that would best be focused in other areas.

Many CTLP volunteers are esteemed tax attorneys who provide their expertise in U.S. Tax Court advising and representing pro se litigants. For example, in March, CTLP staff and pro bono attorneys provided eighteen petitioners with advice or representation that enabled them to settle their cases without trial. One taxpayer who had lost his job withdrew substantial amounts of money from investment accounts in order to pay his bills. The IRS calculated the tax liability on the gross amount of the taxpayer's investment accounts and did not take into account his basis in the assets. With the CTLP's advice, the taxpayer was able to determine his cost basis and significantly lower his tax liability.

The CTLP receives federal funding and a state appropriation administered by the Virginia State Bar. However, due to recent budget cuts and reduced access to new funding, the clinic has had to implement its own cutbacks during a time of increasing need. The clinic is committed to continuing to provide outstanding tax legal services to a population that is underserved in Virginia. The project is actively recruiting pro bono legal and other assistance in response to the need for increased services.

Despite the large caseload, CTLP staff remain optimistic. "It's very rewarding for us and our volunteers to see how grateful our clients are," said Paul R. Harrison, the CTLP's clinic coordinator. "These are folks experiencing extreme financial hardship because of a tax problem. They're doing the best they can to resolve the problem and move forward. With our help, it's like the weight of the world is lifted from their shoulders."

Virginia Lawyers Honored for Work on Behalf of Service Members

Five Virginia civilian lawyers have been honored by the Naval Legal Service Office (NLSO) Mid-Atlantic for helping U.S. Navy lawyers advocate for low-income service members in consumer matters in the Hampton Roads area.

Lawyers recognized are:

- Robin A. Abbott, a partner in the Newport News law firm Consumer Litigation Associates PC. She has advised navy lawyers about options for service members who face mortgage foreclosure. "She is also one of the few attorneys in Hampton Roads who represent service members in actions against unscrupulous automobile dealers," according to a press release from the NLSO.

- Tricia Lund Batson, managing attorney of the Legal Aid Society of Eastern Virginia. She trained navy attorneys in landlord-tenant law. She helped in case development and litigation tactics for the Expanded Legal Assistance Program in Hampton Roads. And she helped develop do-it-yourself pleadings for divorce.

- Leonard A. Bennett, senior partner of Consumer Litigation Associates PC. He is a litigator experienced in many federal courts nationally, and he helps legal assistance attorneys work through complex consumer law problems.

- Dale W. Pittman who concentrates his Petersburg practice on the Fair Debt Collection Practices Act. He has advocated in the General Assembly for military and civilian consumer rights, and he has represented military members in consumer cases. He also teaches legal assistance attorneys in Hampton Roads and at the army and navy judge advocate general schools.

- James W. "Jay" Speer, executive director of the Virginia Poverty Law Center in Richmond. In the General Assembly, he led efforts to curtail payday loans, title lending, and deceptive consumer practices. He also has trained attorneys and low-income clients in these areas.

"Consumer law problems are some of the most prevalent legal issues our service members face," the press release stated. "Each of the civilians honored … has provided the Hampton Roads military legal community the intellectual tools needed to support and protect the service members we service."

The presentations were made during the Mid-Atlantic Joint Services Consumer Law Symposium on June 12, 2009.

CALL FOR NOMINATIONS

2010 Lewis F. Powell Jr. Pro Bono Award

and the

2010 Oliver White Hill Law Student Pro Bono Award

The deadline for receipt of nominations by the bar is 5:00 PM, Friday, February 12, 2010.

For more information visit http://www.vsb.org/site/pro_bono/resources-for-attorneys/ and scroll to Awards & Honors.

Is Your Client Overpaying BPOL Tax?

by Craig D. Bell and J. Christian Tennant

For more than a hundred years, the Business, Professional, and Occupational License (BPOL) tax has been a bane for all Virginia businesses. The tax is imposed on a company's gross receipts in a locality, without any adjustment for the business's income or the deductible expenses incurred by the business. A company that exceeds a minimum level of gross receipts will have a BPOL tax liability even if the business fails to turn a profit in the same year. However, some Virginia localities during the 1980s and early 1990s administered the BPOL tax as if it were a tax on gross income, regardless of where such income was earned.

Contributing greatly to the business community's distaste for the BPOL tax was the inconsistent nature in which the BPOL tax was administered from locality to locality over the years. With more than one hundred Virginia localities imposing the BPOL tax, one does not have to stretch the imagination too far to notice different localities both claiming a company's source of gross receipts as part of their respective tax bases when a business conducts its activities at multiple locations throughout the commonwealth.

The legislation was a classic political compromise.

In 1993, the Virginia General Assembly tasked a joint subcommittee to study the BPOL tax and make recommendations to either replace the tax or restructure it to make it more efficient to administer.[1] The joint subcommittee studied the tax for three years and in 1996 the General Assembly adopted the joint subcommittee's recommendations to reform the BPOL tax.[2] The legislation was a classic political compromise. The business community made an all-out press for repeal of the BPOL tax, believing it to be fundamentally unfair and its aggressive administration by some Virginia localities to be over-reaching. Local governments' emphasis was on retaining the revenues this tax provided. After concluding that a replacement revenue source could not be found, a compromise plan that focused on reforming the administration of the tax was passed by the General Assembly in 1996.[3]

As a result of the legislation, the Virginia Department of Taxation was given a large role in the administration of the BPOL tax.[4] The tax department was tasked with promulgating guidelines for the administration of the BPOL tax.[5] In addition, taxpayers were allowed to request advisory rulings and appeal the results of local audits to the state tax commissioner for an impartial determination or review.[6] The need for an independent arbitrator's review of the BPOL tax can be seen clearly in the number of rulings issued by the state tax commissioner in the first few years after the passage of the legislation. In 1997 the commissioner issued 109 rulings and decisions on the BPOL tax.[7] The number of BPOL rulings and appeal decisions that the tax commissioner issues each year decreases significantly as the administration of the BPOL tax becomes more standard or uniform across the state. In 2008, the state tax commissioner issued just nine rulings and decisions on the BPOL tax.[8]

The decreased number of BPOL determinations appealed to the tax commissioner may suggest that localities have been administering the tax more uniformly in accordance with the 1996 reformation of the BPOL tax statutes and the adoption of BPOL guidelines that have the force and effect of regulations.[9] Yet, in the words of

ESPN college football analyst Lee Corso, "Not so fast, my friend!"

Trial Court Decision: No Throwback Allowed

Expecting more than one hundred Virginia localities to rapidly alter how they administer the BPOL tax is like herding cats. Despite the 1996 BPOL reform legislation, a number of localities still incorrectly believe that if a business earns gross receipts in a locality that does not impose the BPOL tax, the gross receipts are "thrown back" and subjected to tax in the locality where the business has its principal location.

In 2004 the City of Lynchburg assessed English Construction Company Inc. and W.C. English Inc. (collectively referred to as English) with additional BPOL tax based on thrown back receipts.[10] English is a construction contractor with a principal place of business in Lynchburg and other definite places of business in localities throughout Virginia.[11] Lynchburg assessed English with BPOL tax on all of the gross receipts English received from projects in other localities that did not impose the tax.[12]

English initiated a lawsuit challenging Lynchburg's assessment of taxes on its BPOL receipts received, but not taxed, in the other localities.[13]

The Lynchburg Circuit Court held there is no express authority for Lynchburg to tax the untaxed gross receipts English earned from other localities where English maintained a definite place of business, and held that Lynchburg's assessments for such taxes are invalid and abated.[14] Lynchburg appealed the circuit court's decision to the Supreme Court of Virginia. Lynchburg's appeal provided the Court with the opportunity to address the BPOL tax statutes for the first time since its substantial revision and reformation in 1996.[15] The question before the Court was whether the City of Lynchburg could tax gross receipts attributable to the activities of a business conducted outside of Lynchburg simply because the outside localities do not tax gross receipts.[16]

Supreme Court Decision: No Throwback Permitted

The Court agreed with the Lynchburg Circuit Court that the *Code of Virginia* did not provide Lynchburg with authority to tax English's gross receipts earned in other localities where English maintained a definite place of business.[17] The Supreme Court stated that a local governing body must have clear statutory authority to impose a tax.[18]

Virginia Code § 58.1-3703.1(A)(3) specifies, as a general rule for purposes of the BPOL tax, gross receipts to be included in the taxable measure are only those attributable to the exercise of a privilege subject to licensure at a definite place of business within Lynchburg. Furthermore, Virginia Code § 58.1-3715 contains no language granting Lynchburg the authority to levy a tax on gross receipts from services performed by a contractor in other localities in which it has a definite place of business. Lynchburg sought such authority by implication. The Court refused to recognize any authority to impose the tax by implication and noted that Lynchburg's interpretation of the code renders parts of the code meaningless and ignores the clear legislative intent underlying the General Assembly's 1996 revision of the business license tax laws. [19]

Relevant Statutory Analysis

The general rule set forth in Virginia Code § 58.1-3703.1(A) is that a business is taxable locally only if it has a "definite place of business" in the locality. And then a business is taxable only with respect to the gross receipts attributed to that definite place of business.[20]

Providing further definition to a locality's taxing power, Code § 58.1-3703.1(A)(3) sets forth rules for attributing gross receipts. A locality can tax "only those gross receipts attributed to the exercise of a privilege subject to licensure at a definite place of business within this jurisdiction."[21] The primary attribution rule for contractors such as English is based on where the work is performed:

> The gross receipts of a contractor shall be attributed to the definite place of business at which his services are performed, or if his services are not performed at any definite place of business, then the definite place of business from which his services are directed or controlled, unless the contractor is subject to the provisions of section 58.1-3715.[22]

The *English* case concerned the first part of this statute; that is, the allocation of gross receipts between definite places of business — not a locality taxing a contractor's receipts earned at a job site in another locality where the contractor does not have a place of business (e.g., an electrician, plumber, or other contractor doing small jobs while working out of an established office in

another jurisdiction). More simply, the issue in this case was whether Lynchburg could tax receipts attributable to a place of business in a locality that chooses not to tax.

Virginia Code § 58.1-3703.1(A)(3) provides a rule of apportionment when a business has places of business in more than one locality and each of those places of business works on the same contract. This method of operation is not unusual, especially in large government contracts staffed by employees working in different cities and even different states. The rule in such cases is payroll apportionment.[23] The General Assembly made absolutely clear even in such cases that what each locality can tax depends on its local activities, not on what any other taxing jurisdiction may have done in taxing or not taxing:

> b. Apportionment. If the licensee has more than one definite place of business and it is impractical or impossible to determine to which definite place of business gross receipts should be attributed under the general rule, the gross receipts of the business shall be apportioned between the definite places of businesses on the basis of payroll. Gross receipts shall not be apportioned to a definite place of business unless some activities under the applicable general rule occurred at, or were controlled from, such definite place of business. *Gross receipts attributable to a definite place of business in another jurisdiction shall not be attributed to this jurisdiction solely because the other jurisdiction does not impose a tax on the gross receipts attributable to the definite place of business in such other jurisdiction.*[24]

This statutory scheme makes perfectly clear that a locality's ability to tax rests with the activities that occur at a local place of business and the attribution of gross receipts to that local place of business under set statutory rules. The ancient argument of localities that "gross receipts" means "everything is taxable" was rejected by the General Assembly. More importantly for this case, the argument that a locality could tax anything not taxed by another locality first was expressly rejected by the Supreme Court. Virginia's BPOL tax statutes were carefully drafted to eliminate the "throwback" concept of taxation, and it is a variation of throwback on which Lynchburg relied in this case.

The ancient argument of localities that "gross receipts" means "everything is taxable" was rejected by the General Assembly.

What Was Lynchburg Thinking?

Under the principles of BPOL reform the meaning of Virginia Code § 58.1-3715 is apparent. The statute provides a unique rule allowing localities where there is no definite place of business to require a BPOL tax when local contracts exceed $25,000 in value and, to avoid double taxation, requiring these receipts to be deducted from the tax base in the locality where the contractor has its "principal office or any other office." The statute provides, in part:

> A. When a contractor has paid any local license tax required by the county, city or town in which his principal office and any branch office or offices may be located, no further license or license tax shall be required by any other county, city or town for conducting any such business within the confines of this Commonwealth. However, when the amount of business done by any such contractor in any other county, city or town exceeds the sum of $25,000 in any year, such other county, city or town may require of such contractor a local license, and the amount of business done in such other county, city or town in which a license tax is paid may be deducted by the contractor from the gross revenue reported to the county, city or town in which the principal office or any branch office of the contractor is located.

This statute allows a very limited form of throwback applicable when a contractor performs work in a locality without having a definite place of business in that locality. In such cases, the locality where the work is performed (performance locality) can tax if the value of the local contracts exceeds $25,000. If the performance locality does not tax, then those receipts are thrown back to the "definite place of business locality" for taxation under the general rules. More accurately, those receipts are not deducted from the otherwise taxable receipts of the definite place of business locality.

The *English* case did not concern the rule set forth in Code § 58.1-3715. Lynchburg was not trying to tax receipts that it is entitled to tax under the usual allocation rules of § 58.1-3703.1(A)(3). Rather, Lynchburg was trying to tax receipts that are earned by and allocated to English's other definite places of business. In the words of the statute quoted above, Lynchburg, as the situs of English's "principal office," was trying to tax receipts attributable to a "branch place of business" of English. Lynchburg's position was directly contrary to the clear mandate of the BPOL reform legislation. Lynchburg was trying to tax activities that are not performed in Lynchburg.[25] Lynchburg was trying to tax English's gross receipts, not based on what English does in Lynchburg, but based on the fact that, for example, Pulaski did not choose to tax English's place of business there.[26]

Are Localities Now on the Same Page with the Law?

With such a definitive answer from the Court that localities may not tax a business's gross receipts earned in another locality where the business has a "definite place of business," a reasonable person must assume that localities will now abide by the law and not seek to tax these receipts. Again, not so fast.

It is conceivable that it still may take more time for the Court's decision to find its way down to the more than one hundred localities that impose the BPOL tax. Hopefully, the most sophisticated localities have reviewed the opinion, have communicated the implications to its staff, and have made any adjustments that are necessary and consistent with the opinion. Unfortunately, it would not surprise us if a handful of localities ignore the *English* case.

Recently one of our clients was informed by a local commissioner of the revenue, during a BPOL tax audit, that if the business's gross receipts are not taxed by another locality, such receipts will be thrown back and taxed in that locality where our client has its principal place of business. This commissioner of the revenue obviously still believes that all gross receipts are thrown back to the principal place of business when not taxed elsewhere.

We have also heard from other state and local tax lawyers that some localities, starved for revenues, intend to take the position that the Court's opinion only applies to construction companies. These extreme and uninformed positions by Virginia localities are not surprising. It is likely that a few Virginia localities will choose to ignore the Court's opinion. If your client has multiple places of business in different Virginia localities, you should advise them to be on the lookout. Companies and their advisors must remain vigilant and make sure businesses are not overpaying their BPOL tax if one of their places of business is in a locality that does not tax gross receipts, while the locality where a second place of business is located does tax receipts received. ■

Endnotes:

1 *See* H. Doc. 59 (1995), Report of the Joint Subcommittee Studying the Business, Professional, and Occupation License Tax to the Governor and the General Assembly of Virginia (hereafter, H. Doc. 59), at 9.
2 Act of Apr. 6, 1996, ch. 720, 1996 Va. Acts 1247.
3 *See* H. Doc. 59 at 14.
4 *See* Va. Code § 58.1-3700 *et seq.*
5 Under Virginia Code § 58.1-3701, the "guidelines" had the effect of regulations in 2001. They are now published in the Virginia Administrative Code at 23 VAC 10-500-10, *et. seq.*
6 Va. Code § 58.1-3701.
7 *See* Virginia Department of Taxation Tax Policy Library (http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf) (Click Advanced Search, then restrict search to all Rulings of the Tax Commissioner under BPOL Tax issued between 1/1/97 and 12/31/97).
8 *See* Virginia Department of Taxation Tax Policy Library (http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf) (Click Advanced Search, then restrict search to all Rulings of the Tax Commissioner under BPOL Tax issued between 1/1/08 and 12/31/08).
9 Under Virginia Code § 58.1-3701, the "guidelines" had the effect of regulations in 2001. They are now published in the Virginia Administrative Code, 23 VAC 10-500-10, *et. seq.*
10 *City of Lynchburg v. English Construction Company, Inc., et al.*, 277 Va. 574,579; 675 S.E.2nd 197, 199 (2009).
11 *Id.* At 578.
12 *Id.* At 579
13 *Id.*
14 *Id.*
15 Briefs *amici curiae* were filed by the Local Government Attorneys of Virginia, the Commissioners of the Revenue Association of Virginia, the Treasurers Association of Virginia, and the Virginia Municipal League, in support of Lynchburg, and by the Virginia Chamber of Commerce, in support of *English*. Mr. Bell was a co-author of the brief submitted by the Virginia Chamber of Commerce.
16 *English Construction*, 277 Va. at 580.
17 *Id.* at 584.
18 *Id.* at 583.
19 *Id.* at 584.
20 Va. Code § 58.1-3703.1(A)
21 See also Virginia Code§ 58.1-3703.1(A)(9) setting the local audit standard as determining whether gross receipts are "directly attributable to the taxable privilege exercised" in the locality.
22 Va. Code § 58.1-3703.1(A)(3)(a)(1).
23 Va. Code § 58.1-3703.1(A)(3)(b).
24 *Id.* (Emphasis added.)
25 *See* Virginia Code § 58.1-3703.1(A)(3)(b)(no taxation under apportionment rules simply because another locality does not tax).
26 *See* Virginia Code § 58.1-3703.1(A)(3)(a) (taxable only with respect to gross receipts earned from activities at a local place of business).

Dealer or No Dealer:
Unlocking Capital Gains Treatment in Land Sales

by David S. Lionberger and Lisa J. Hedrick

The road to bankruptcy is paved with well-intentioned investments. This new take on an old adage seems quite fitting given the events of the past year. No doubt the shareholders of Circuit City, Chesapeake Corporation and LandAmerica thought they were making good investments. And any of us who have seen the balances on our quarterly 401(k) and Individual Retirement Account quarterly statements plummet likely did not start our savings thinking that contributing to our retirement accounts would be a bad investment. Of course, investments carry inherent risks. But the risks currently associated with stocks for some investors may seem more like picking the million-dollar case on a game show than like making an evaluated and reasoned investment decision. So even as the stock markets begin to rally and sources indicate that the worst may be over, investors have good reasons to be gun-shy about investing in the stock market.

While an investment in land is far from a sure thing, the two greatest risks associated with such an investment are appreciation in value and tax treatment.

Fortunately, the stock market is not the only game in town. Other investment opportunities allow investors to funnel capital into various sources with the hopes of generating a return over time. One particularly attractive investment is land. While an investment in land is far from a sure thing, the two greatest risks associated with such an investment are appreciation in value and tax treatment. Appreciation in value is largely outside of the investor's control. Timing and improvements impact the value of land, but market — although not necessarily stock market — forces have the greatest impact on appreciation in land values. However, the other primary risk, tax treatment, is more controlled by the investor. Investors can reduce taxes by 20 percent by maximizing the likelihood of being classified as an investor rather than as a dealer.

General Lay of the Land

Internal Revenue Code Section 1222 states that the sale of a capital asset will generate capital gain or capital loss. Under Section 1221, land will generally be treated as a capital asset as long as it is not held by the investor "primarily for sale to customers in the ordinary course of [the investor's] trade or business." The investor who sells land in the ordinary course is considered a dealer and is subject to ordinary income tax on all gains or losses on the land sales.

The classification of taxpayers as dealers versus investors has been litigated and has been frequently discussed in IRS guidance. Ultimately, the tax treatment of gains and losses in real estate sales hinges on this classification. The line between investor and dealer is unclear and subject to change; someone initially holding property for investment can later become a dealer if he or she acts like a dealer.

Fortunately for investors, in the specific context of real estate transactions the courts have developed numerous factors to aid the analysis involved in identifying a dealer.[1] These factors include:

- **Number and frequency of sales**: The greater the number and the more frequent the land sales, the more likely the taxpayer will be treated as a dealer.

- **Purpose for acquisition and reason for holding the property**: The intent of the taxpayer affects the analysis; however, authorities are unclear as to when intent is determined. What is clear is that intent can change over time.[2]

- **Development activities**: The more extensive the development activities, the more likely the taxpayer will be treated as a dealer; however, the motivation for development impacts the determination.

- **Sales activities**: Advertising and marketing activities or the use of brokers or agents in selling the property indicates dealer status.

- **Duration of Ownership**: The longer the property is held the more likely the taxpayer will be classified as an investor.

- **Relationship of Property to Business**: If the sale of the property benefits the taxpayer's primary business, the taxpayer will be a dealer for that parcel.

- **Maintenance of an office and requisite licenses**: The maintenance of a sales office and the appropriate license for conducting sales activities indicates dealer status.

- **Substantiality of sales**: If the income derived from land sales comprises a significant portion of the taxpayer's net income, the taxpayer will likely be a dealer.

- **Replacement Property:** The acquisition of new property to replace property sold indicates an intent to trade in real estate and thus supports dealer status.

Most courts are of the opinion that no one factor is determinative; each case is evaluated individually on its specific facts. Additionally, a taxpayer may be considered an investor as to one parcel of property, even though he or she is clearly in the real estate business and is a dealer of other properties.[3] The multifactored analysis contributes to the uncertainty, and thus the risk, in receiving capital gains treatment for land investments. However, armed with the proper information and legal guidance, investors can structure transactions and holdings to maximize the likelihood of preserving investment treatment for those parcels held for investment purposes.

More than a Game of Chance

Investors at the greatest risk of being classified as dealers in land are those who hold multiple parcels and who wish to develop the land to improve its resale value. Take the following three examples:

Case One: Taxpayer owns seven lots, six of which have been held for just over one year. All seven lots are sold by Taxpayer in unadvertised sales during the course of the year. Taxpayer has sold twenty-two lots over the prior three years.

Dealer or no dealer? No dealer. The facts of this case were presented in *Byram v. United States*[4] and although the government argued that the short holding period along with the frequency and substantiality of the sales argued in favor of finding dealer status, the court disagreed. The court determined that because the sales were unadvertised and no broker was used, the substantiality and frequency of sales alone was not sufficient to sustain a finding of dealer status.

Case Two: Taxpayer owns six tracts of unimproved property. Taxpayer sells all six tracts over a four-year period in five separate sales. Over a thirty-two-year period Taxpayer has made 244 land sales, or seven per year on average. Taxpayer's development of the parcels was minimal and Taxpayer did not advertise or otherwise actively solicit the sales.

Dealer or no dealer? Dealer. These facts are similar to those considered in *Suburban Realty Co. v. United States*[5] in which the court determined that the continuous sales over a long period of time supported a finding of dealer status even though there were minimal improvements and no active advertising activities. The court also indicated that the taxpayer's lack of other business activity supported its finding that the primary business of the taxpayer was dealing in land.

Most courts are of the opinion that no one factor is determinative; each case is evaluated individually on its specific facts.

Land Sales continued on page 35

Virginia Requirement for Withholding Tax by Pass-through Entities

by Robert A. Warwick and Richard L. Grier

In 2007, the Virginia General Assembly added § 58.1-486.2 to the Code of Virginia to require pass-through entities (e.g., S corporations, partnerships, and limited liability corporations) doing business in Virginia to "pay a withholding tax." The statute is somewhat bipolar in that it refers sometimes to "withholding," as if the entities were required to withhold taxes on distributions to members and sometimes to the payment of a "withholding tax" by the pass-through entity itself. The statutory language gives rise to a number of questions as to the federal and state income tax consequences and raises issues relating to allocations of income in the pass-through entities. The purpose of this article is to analyze the statute and address some of those uncertainties.

The withholding tax requirement first applies to taxable years beginning in 2008 and the withholding tax is to be paid with the pass-through entity's Virginia information return.

Summary of the Statutory Provision

In imposing the withholding tax obligation, Subsection A of § 58.1-486.2 states:

> For the privilege of doing business in the Commonwealth, a pass-through entity that has taxable income for the taxable year derived from or connected with Virginia sources, any portion of which is allocable to a nonresident owner, shall pay a withholding tax under this section, except as provided in subsection C.

Subsection B specifies the amount of tax to be paid as:

> five percent of the nonresident owner's share of income from Virginia sources of all nonresident owners as determined under this chapter, which may lawfully be taxed by the Commonwealth and which is allocable to a nonresident owner.

Note that the pass-through entity need not be a Virginia organization. All that is required is that the businesses have income from sources in Virginia. Subsection C provides that withholding is not required "for any nonresident owner" who is exempt from Virginia income taxes or where the Virginia tax commissioner grants the entity's petition for exemption from the withholding requirement on the grounds of undue hardship.

Subsections D, F, G, and H contain administrative rules, including, in subsection F, a requirement that each pass-through entity that is required to "deduct and withhold tax" must provide each nonresident owner with a written statement showing the amount of Virginia income allocated by the entity to the nonresident owner and "the amount deducted and withheld as tax under this section." That provision is awkward since there is no requirement to deduct or withhold taxes. Nevertheless, it is interpreted as meaning that the entity report the amount of withholding tax paid and allocable to each nonresident owner. Subsection E allows each nonresident owner a credit for "that owner's share" of the tax withheld by the entity and states that the nonresident owner's share of the withholding tax shall be treated as distributed to the owner on the earlier of the day the withholding tax was paid by the entity or the last day of the taxable year for which the entity paid the withholding tax. If the nonresident owner is a corporation, subsection F provides that the credit will be applied against the owner-corporation's Virginia corporate income tax liability. However

the subsection does not specify how a non-corporate owner would apply the credit.

The withholding tax requirement first applies to taxable years beginning in 2008 and the withholding tax is to be paid with the pass-through entity's Virginia information return. Thus, pass-through entities first paid the withholding tax with returns filed in 2009.

Compliance Issues

What entities are subject to the requirement?

Any "pass-through entity that has taxable income for the taxable year derived from or connected with Virginia sources, any portion of which is allocable to a nonresident owner" must "pay" the withholding tax. For this purpose a

> "pass-through entity" is "any entity, including a limited partnership, a limited liability partnership, a general partnership, a limited liability company, a professional limited liability company, a business trust or a Subchapter S corporation, that is recognized as a separate entity for federal income tax purposes, in which the partners, members or shareholders report their share of the income, gains, losses, deductions and credits from the entity on their federal income tax returns."

A nonresident owner is any person who is treated as a partner, member, or shareholder of the pass-through entity for federal income tax purposes and, in the case of an individual, is not a domiciliary or actual resident of Virginia, or, in the case of any other entity, does not have its commercial domicile in Virginia. Taxable income from or connected with Virginia sources is interpreted by the Virginia Department of Taxation to mean the amount of income from Virginia sources allocated to all nonresident owners other than those on whom the withholding tax is not imposed. The department's compliance guidelines (set forth in Public Document 07-150 dated September 21, 2007) state that the entity's income from Virginia sources should be allocated to the nonresident owners in proportion to their percentage of ownership or participation in the pass-through entity or as provided in the partnership agreement or other entity document. In addition, the instructions to Form 502 state that publicly traded partnerships and disregarded entities for federal income tax purposes are not subject to the withholding tax.

Compliance Requirements

The pass-through entity is required to pay the withholding tax (net of credits) to the tax department at the same time its annual information return is due — by the fifteenth day of the fourth month following the end of the entity's tax year. If the entity obtains an extension to file the information return, it is nevertheless required to pay the withholding tax by the due date before extension and, if the amount paid by the due date before extension is less than 90 percent of the withholding tax actually due, the tax department guidelines (but not the statute) state that penalties will be imposed. If the return is filed and the withholding tax is paid by the extended due date, the penalty is 2 percent of the unpaid withholding tax for each month or part of a month between the original due date and the date the return is filed. The maximum extension penalty is 12 percent of the unpaid tax.[1] If the balance of the withholding tax is not paid with the return, a penalty equal to 6 percent for each month or part of a month between the date the return was filed and the date the withholding tax is paid (up to a maximum of 30 percent of the unpaid withholding tax) will be imposed in addition to the extension penalty. If the entity obtains a filing extension and does not file its return by the extended due date, these penalties will not apply and an underpayment penalty equal to 30 percent of the withholding tax will be imposed.[2]

Each pass-through entity that is required to "deduct and withhold" the withholding tax is also required to provide to each nonresident owner a written statement showing:

- the name, address, federal employer identification number, and Virginia account number of the pass-through entity;
- the amount of Virginia taxable income allocable to the owner, whether or not distributed for federal income tax purposes by the pass-through entity to the nonresident owner;
- the owner's share of any credits taken into account by the pass-through entity in computing the withholding tax attributable to the nonresident owner; and
- the amount of withholding tax paid on behalf of the nonresident owner.

The statement is to be provided on or before the date (including extension) that the entity files its information return (unless the tax commissioner allows the statement to be provided at a later date) and a copy of the statement is to be attached to the return. Again, even though the pass-through entity is not required to "deduct and withhold" taxes, we believe this language is intended to mean each pass-through entity that is subject to the withholding tax must provide this information.

The Internal Revenue Code and many state income tax laws do not impose income taxes on pass-through entities.

The statute allows the pass-through entity to apply "any tax credits allowable under the Code of Virginia to the pass-through entity that pass through to nonresident owners," provided that the application of credits may not reduce any nonresident owner's Virginia income tax liability below zero. The statute does not state how tax credits are allocated for this purpose; however, the code sections authorizing specific credits may deal with how credits allowable to pass-through entities are allocated.[3]

Interpretive Issues

The language of § 58.1-468.2 alternates between imposing a "withholding tax" on the pass-through entity and obligating the pass-through entity to "deduct and withhold" Virginia income tax imposed on the entity's nonresident owners.

At first glance it might appear that the General Assembly was trying to devise a convenient method to collect taxes otherwise owed by nonresident owners who might have no other connection with Virginia. Absent this statute, the Commonwealth of Virginia has the practical burden of finding nonresident owners (who might not even realize they are subject to tax in Virginia) and assessing and collecting taxes in foreign (i.e., non-Virginia) jurisdictions. The requirement to pay withholding tax, together with the requirement that the entity provide the nonresident owner with a statement, would — in theory at least — collect tax from the nonresident owner and remind the owner of the obligation to file a Virginia income tax return. The instructions to the pass-through entity information return (Form 502), which state that the entity "must withhold and pay Virginia income tax on behalf of each of its nonresident owners" support the withholding obligation approach.

However, the language of § 58.1-468.2 states that "for the privilege of doing business" in Virginia, a pass-through entity that has income attributable to a nonresident owner shall "pay" (rather than "withhold and pay over") the withholding tax. Moreover, in its 2009 session, the General Assembly added the following sentence to § 58.1-390.2: "Any taxes imposed on the pass-through entity itself, such as, but not limited to, sales and use taxes, withholding taxes with respect to employees or nonresident owners, and minimum taxes in lieu of income taxes, shall be paid by the pass-through entity."[4] The quoted language from § 58.1-468.2, together with the amendment to § 58.1-390.2 indicates that, rather than requiring the pass-through entity to collect tax payable by its nonresident owners, the General Assembly imposed a new tax on the entity itself.

The General Assembly may have been persuaded to impose the tax on the pass-through entity itself because of two 2007 decisions of the Richmond Circuit Court. In *DiBelardino v. Commonwealth* and *Dutton v. Commonwealth* (Docket Nos. CL06-5696; CL06-6291, issued June 22, 2007), the court essentially held that ownership in a pass-through entity (at least one organized in another jurisdiction) does not, in itself, create sufficient nexus to permit Virginia to tax a nonresident owner's share of the entity's Virginia sourced income.[5]

Imposition of the withholding tax directly on the pass-through entity will have a significant impact on all of the owners, Virginia residents as well as nonresidents, of every pass-through entity doing business in Virginia and having nonresident owners.[6] The Internal Revenue Code and many state income tax laws do not impose income taxes on pass-through entities. Instead, the entity determines its taxable income or loss under the applicable tax law and allocates its income among its owners, either in proportion to the owners' relative interests or as provided in a partnership, operating or other agreement of the owners. The owners then take their respective shares of the entity's income into account in determining their individual taxable incomes and income taxes. However, non-income taxes, such as property taxes, sales and use taxes, and the employer's share of Federal Insurance

Contributions Act taxes are generally imposed on the entity itself.

For federal tax purposes, taxes that are imposed on the entity as opposed to its owners are deducted in determining the entity's income. Thus, if the Virginia withholding tax is a tax on the entity rather than merely a collection obligation, the entity should deduct the withholding tax in determining the income to be allocated among all its owners for federal income tax purposes. This would result in a smaller amount of income allocated to each member — resident and nonresident alike.

It is unlikely that many, if any, partnership or operating agreements currently take account of the withholding tax in their income allocation or distribution provisions. Typically, allocations and distributions are made in proportion to percentage ownership. Thus, if the withholding tax is a tax on the entity, it will result in reduced allocations, at least for federal income tax purposes, to all owners, whether Virginia residents or not. And where, as is the case under many partnership or operating agreements, distributions follow income allocations, the withholding tax would also result in smaller distributions to all owners, whether Virginia residents or not.

As a simple example, consider a pass-through entity owned 60 percent by Virginia residents and 40 percent by nonresidents, which has $1,000 of net income (all sourced to Virginia) before the Virginia withholding tax and which allocates income according to percentage ownership. Prior to consideration of the Virginia withholding tax, the income allocable to the Virginia residents would be $600 and the income allocable to nonresidents would be $400. Also assume that the Virginia withholding tax is 5 percent of the $400 allocated to nonresidents (but see the discussion below), or $20. If the withholding tax is imposed on the entity, the tax is deductible in determining the entity's federal income, therefore the entity's income for federal tax purposes would be reduced to $980, with $588 allocated to the residents and $393 allocated to the residents.

Whether the withholding tax deduction will similarly reduce the entity's income for Virginia purposes depends on whether the withholding tax is an income tax. Virginia income taxes are not deductible in determining Virginia taxable income. Thus, if the withholding tax is an income tax, it is not deductible in determining the entity's income for Virginia income tax purposes and in the above example, the entity's Virginia income would be $1,000, the resident owners' $600 and the nonresident owners' $400 and the amount of tax to be withheld would be $20 as assumed above.

On the other hand, if the withholding tax is not an income tax, then it should be deductible in determining the entity's income for Virginia as well as federal tax purposes. In this case the withholding tax is determined by the equation $T = (.05nI)/I + .05n$, where T represents the amount of the withholding tax, I the amount of income before application of the withholding tax and n the percentage of income to be allocated to nonresidents. In the above example, $T = (.05*40*\$1{,}000)/.05*40 = \$19.61$ and the entity's income to be allocated among the owners is $980.39 for federal and Virginia purposes. The allocation to resident owners is 60 percent of $980.39 or $588.23 and the amount allocated to nonresident is $392.16.

The situation is further complicated because Virginia provides a credit for the withholding tax but allocates it entirely to nonresident owners. Thus, under either scenario of the example, resident owners must pay all of the Virginia income tax on income allocated to them, whereas nonresident owners receive a credit for the withholding tax against the Virginia tax on income allocated to them. Assuming the maximum Virginia tax rate of 5.75 percent, under the first scenario in the above example (i.e., the withholding tax is an income tax), resident owners have $600 income for Virginia purposes and pay $35 Virginia income tax while nonresidents have $400 income but, because of the $20 credit, pay only $3 of Virginia income tax. In the second scenario (the withholding tax is not an income tax), resident owners have $588.23 of income and pay $33.82 of Virginia income tax, whereas nonresidents have $392.16 of income but, after the credit pay only $2.94 of Virginia income tax.

Pass-through entities affected by this benefit shift might desire to change their allocation and distribution methods to allocate the entire withholding tax to the nonresident owners so that, in the above example, resident owners would continue to be allocated $600 with no withholding tax, while the entire withholding tax (and the associated credits) would be included in the $400 allocated to the nonresident owners. However, if the governing agreement requires unanimous consent for an amendment, the nonresident owners will be able to block any attempt to change the allocation (which, as shown in the above example, results in a relative benefit to the nonresidents). And if the entity is an S corporation, allocation

must be in proportion to the owners' respective share ownership and no amendment of the allocation method will be possible without modifying relative share ownership.

At least nine states other than Virginia impose a withholding tax obligation on pass-through entities having foreign owners.[7] Except for Ohio, whose statutes state that the tax is levied on the entity itself, each of the other states' statutes require the pass-through entity to withhold tax on behalf of the non-resident owner rather than imposing the tax on the entity itself.[8]

Conclusion

Understanding and applying this statute will be significantly enhanced if the statute is amended to eliminate its bipolar nature. The statute should either refer to the "withholding tax" or require withholding as do most other states. Because it appears Virginia has chosen not to go that route, in view of *DiBelardino*, the statute must be revised to clarify. Beyond that, the clarifications will be more appropriate in either instructions or in releases by the tax department. Finally, owners of pass-through entities may wish to amend their partnership agreements, operating agreements or other entity documents to clearly spell out how the payment of the withholding tax, as well as the related deduction, will be allocated for book purposes as well as for tax purposes.[10] ■

Endnotes:

1 These penalties are similar to the penalties imposed on individuals and corporations, which pay less than the minimum required estimated income tax. *See,* Code of Virginia §§ 58.1-344B and 58.1-453B

2 This is equal to the maximum penalty imposed on individuals and corporations for underpayment of income tax. *See,* Code §§ 58.1-347 and 58.1-450.

3 For example, § 58.1-334 of the Code requires that the credit for the purchase of conservation equipment be allocated among the owners of a pass-through entity in proportion to their ownership or interest in the entity, whereas § 58.1-339.2 allows historic rehabilitation credits to be allocated either in proportion to ownership interests or as otherwise agreed by the owners in writing.

4 Prior to the 2009 amendment § 58.1-390.2 provided: "Except as provided for in this article, owners of pass-through entities shall be liable for tax under this chapter only in their separate or individual capacities."

5 The *DiBelardino* and *Dutton* cases involved two nonresident (and nonmanagement) owners of a limited liability corporation organized in Delaware. The LLC received proceeds from settlement of a patent dispute, which the Virginia Department of Taxation determined (and the court agreed) was income properly sourced in Virginia. The department attempted to tax DiBelardino and Dutton on their respective shares of the LLC income. Because DiBelardino owned two bed and breakfasts in Norfolk (apparently unrelated to the LLC), the court held that Virginia could tax his share of the LLC income. On the other hand, Dutton had no connection with Virginia other than ownership in the LLC, and the court found that Virginia was prohibited from taxing him by the due process and commerce clauses of the U.S. Constitution. Although the court's constitutional reasoning may be questionable (and raises issues that are beyond the scope of this brief article), the decision likely influenced the General Assembly to impose the withholding tax on the pass-through entity.

6 Other than single member entities, which are excluded from the definition of pass-through entities and perhaps, publicly traded entities, which seem to have been administratively exempted from the withholding tax.

7 Va. Code §§ 58.1-322d.1. (individuals), 58.1-402B.4. (corporations)

8 The states are: Arkansas (ACA §26-51-919), Kentucky (KRS §141.206), Maine (36 MRS § 5250-B), Montana (Montana Code § 15-30-1113), New Mexico (NM Stat. Ann. § 7-3-12), Ohio (ORC §§ 5733.41 and 5747.41), Oklahoma (68 Okla. St. § 2385.30), Oregon (ORS § 314.781), and Rhode Island (RI General Laws § 44-11-2.2).

9 ORC Ann. 5733.41 ("For the same purposes for which the tax is levied under section 5733.06 of the Revised Code, there is hereby levied a tax on every qualifying pass-through entity having at least one qualifying investor that is not an individual."); ORC Ann. 5747.41 ("For the same purposes for which the tax is levied under section 5747.02 of the Revised Code, there is hereby levied a withholding tax on every qualifying pass-through entity having at least one qualifying investor who is an individual"). Notwithstanding this language, the authors understand that Ohio treats the tax as being imposed on the owner(s) rather than on the entity itself.

10 Montana's statute allows the pass-through to file a statement from a nonresident owner in which the owner agrees to file Montana tax returns, pay Montana income tax and submit to personal jurisdiction in Montana for the purpose of collecting income tax on its share of the entity's Montana income instead of withholding. Montana Code § 15-30-1113(1)(a).

Land Sales continued from page 29

Case Three: Taxpayer owns a tract of land that has been subdivided into 152 lots. Taxpayer received approval for a subdivision plat and engaged a construction company to build streets and install sewer and water systems. Taxpayer then sold the improved tract in six different sales to six contractors.

Dealer? Or no dealer? No Dealer. In *Thrift v. Commissioner*[6] the court reviewed similar facts and determined that the taxpayer was not a dealer. The court found that the improvements and subdivision of the land were made only to promote the sales of the land. The court noted that the taxpayer never advertised the sales to individuals and never held a license as a real estate dealer.

Like the taxpayers in the cases above, typical land investors want to capture gain as capital gain but also want to improve or develop the property in order to make the property more saleable. Ideally, investors want to separate the gain attributable to general appreciation of the property over time (capital gain) from gain attributable to active business efforts of the investor (ordinary income).

This separation is sometimes accomplished by having the investor establish both an "investment entity" and a "development entity." The involvement of multiple entities owned by the same or similar taxpayers carries the risk that the IRS will treat the investment and the development activities as being conducted by the same taxpayer (or agents of the same taxpayer), thus supporting a finding of dealer status. However, there may be legitimate reasons to separate a taxpayer's investment and development activities into separate entities — for example, the protection against liability arising from the taxpayer's development activities. Furthermore, the taxpayer's subsequent involvement in the development of land does not necessarily negate the taxpayer's earlier investment intent or investor status.

Conclusion

The classification of the investor as a dealer or as an investor determines whether the taxpayer will receive the benefit of tax savings in the form of a current 20 percent difference between ordinary income and long-term capital gain rates. Planning may not eliminate market risks associated with real estate, but with advanced planning and proper structuring a landowner may be able to separate investment activities from development activities with respect to the same land and receive capital gains treatment on the appreciation of the investment land. ■

Endnotes:

1 *See e.g.*, *Biedenharn Realty Co. v. United States*, 526 F.2d 409, 415 n.22 (5th Cir. 1976), *cert. denied*, 429 U.S. 819 (1976).
2 *See e.g.*, *Maddux Construction Co. v. Commissioner*, 54 T.C. 1278 (1970) (permitting capital gains treatment for the sale of land even though the parcel was originally acquired to be developed and sold as part of a subdivision).
3 *See e.g.*, *Scheuber v. Commissioner*, 371 F.2d 996 (7th Cir. 1967) (finding that a parcel sold by the dealer-taxpayer was a capital asset even though the other parcels held by the investor were dealer assets).
4 705 F.2d 1418 (5th Cir. 1983).
5 615 F.2d 171 (5th Cir. 1980).
6 15 T.C. 366 (1950).

Operating Agreements for Emerging Growth LLCs: A Deal Lawyer's Perspective on Tax Provisions

by Steven J. Keeler

I began my career as a tax lawyer and evolved into a transactional lawyer, over time handling a diverse mix of merger and acquisition, private equity, and venture capital transactions. The year I started practicing, the Tax Reform Act of 1986[1] was enacted. Less than five years later, Virginia enacted the Virginia Limited Company Act.[2] Having practiced law through the bursting of the tech bubble at the beginning of this decade[3] and the recent credit and banking crises,[4] I am struck by the enduring impact these laws have had on the practice of business law in Virginia. And after living with limited liability companies (LLCs) for almost two decades, I try to bring a more balanced perspective to drafting operating agreements that cover the essential tax bases without making them too complex and expensive for our clients.

The tax benefits to the members and future financing and transaction flexibility afforded the company are well worth the drafting challenge.

Enduring LLC Popularity

The LLC continues its dominance as the business entity of choice for income tax planning purposes.[5] Small business, real estate, and investment concerns traditionally formed as partnerships were the earliest adopters. Now many venture-capital-backed, service, and technology companies are choosing the LLC form. And this choice is not only made by company founders at the formation stage, but, increasingly, later, when more tax-wary private equity investors demand that a corporation's business be transferred to a new LLC as a condition to their investment of capital.[6]

In contrast to simpler partnerships with equal and similarly-situated partners, the modern-day LLC includes companies traditionally structured as corporations and members with different contribution obligations and the economic rights that follow. Company founders and employees contribute their services and intellectual property to the LLC, while one or more investor members contribute cash.[7] Unlike an S corporation, LLCs permit businesses to combine the state law benefits of corporations with the tax flexibility of partnerships.

Flexibility Spells Complexity

This flexibility introduces complexity in drafting LLC operating agreements — a complexity not usually confronted by attorneys drafting corporate articles of incorporation, bylaws, and shareholder agreements. LLC drafting can be frustrating to us and our clients. When we prepare the operating agreement (or review and negotiate one prepared by another attorney), we must first make certain we and the members understand their intended business deal, including their sharing of capital, profits, losses, and proceeds of a company sale.[8] Then the tax-related provisions of the operating agreement should be tailored to ensure that the tax effects of the LLC's formation, operation, and ultimate sale or liquidation do not inadvertently alter the business deal intended by the members.

The tax benefits to the members and future financing and transaction flexibility afforded the company are well worth the drafting challenge. The process can be navigated for most clients by adopting certain drafting protocols (even forms) and, when necessary (or always if the drafting business lawyer is not comfortable with partnership taxation), consulting with tax counsel and the company's accountants during preparation of the operating agreement.

A Good Starting Form Gets it Right, and Readable

No one form fits all situations. Significant drafting errors can occur when technical tax boilerplate is ignored, or a form more appropriate for a real estate development partnership or hedge fund is used for an operating company structured more like a corporation. That said, in my experience good and efficient drafting starts with a set of defined terms and tax provisions with which the draftsperson is familiar and which have proven effective in prior deals. With these as a start, a good form can be tailored to the current client's situation and objectives, provided the business deal and the tax effect are clearly understood.

Use a Corporate Model for the Business Deal

In my experience, it is much more efficient to draft operating agreements governing service, property, and investor members by using terminology similar to that used in corporate venture capital deals.[9] First, entrepreneurs, investors, and third parties are familiar with terms such as "shares" (versus "interests," and including common and preferred classes), and "directors" (versus "managers"). Second, compared with the terms "interest" or "membership interest" (borrowed from the statute and partnership forms, and describing a member's LLC equity as a contribution-driven or percentage concept), the use of terms such as "shares" or "units" simplifies the designation of the different equity classes and the tracking of changes in the LLC's membership. Of course, the terminology is not completely transferable. To distinguish membership interests from corporate stock, I typically refer to LLC membership interests as "units." And to preserve the important tax distinction between partnerships and corporations, I never refer to LLC distributions as "dividends." I refer to the LLC as the "company," and not the "corporation." Although not legally required, I refer to the most junior class of units as "common" units. Units such as investor units that have priority, preference, or preferential rights senior to the common units are "preferred" units.

Put the Tax Terms and Tax Boilerplate in Their Place

Of course, even with corporate terminology that the members can understand quickly in the context of their business deal, the operating agreement must also borrow tax terminology from the partnership model (the principal drafting implications of which are the need to distinguish unit ownership from capital accounts, and allocations of profit and loss from cash distributions). A well-drafted operating agreement will include relatively standard provisions designed to incorporate or take advantage of certain elections in the income tax regulations that govern partnerships.[10] I put these in an appendix to the operating agreement so they do not overwhelm and distract my clients from the more important business terms of the operating agreement. Some of these regulatory provisions and definitions are not necessary for every deal, but without a crystal ball to predict the LLC's future profit-and-loss results, debt and equity structure, and other transactions or events that may have partnership tax consequences to the members, I am more comfortable having the important boilerplate in the operating agreement in case it is ever needed.

More fundamental to the business deal than the regulatory boilerplate are the defined terms that marry the LLC's tax status to the members' intended economic deal. The defined terms can also be incorporated into an appendix. The best drafting protection of the business deal against inadvertent and unintended tax effects are relatively standard and consistent definitions of "profits," "losses,"[11] "capital accounts," and "book basis" (or "gross asset value").[12] My definitions of these critical tax terms (and equally important business terms such as "units," "capital contributions," and "distributable cash," or what is sometimes referred to as "net cash flow" or "cash available for distribution") change very little from agreement to agreement, because they have withstood the scrutiny of my tax partners and many accountants who prepare the tax returns for our LLC clients.

What's the (Distribution) Deal?

Money Talks: Start with the Investor Members.

Investor members recognize no gain or loss on the contribution of money to the LLC in exchange for LLC units.[13] The operating agreement should credit each investor member with both a capital contribution and capital account equal to its money contribution, as each of these will drive the distribution rights of the investor member. If the investor member demands preferred units, these will typically entitle the investor member to receive a return of its entire capital contribution (always from liquidating and often from operating distributions; these, together with any preferred return, are called a "liquidation preference"), plus an additional amount

representing "interest" or a specified return on its unreturned capital contribution (most often cumulative, and called a "preferred return"). Therefore, the distribution section of the operating agreement usually should provide for the distribution of available cash — first to the investor members in an amount equal to their capital contributions and any cumulative preferred return that have not previously been repaid, and thereafter to the investor, service, and property members in proportion to their percentage ownership of units. Some service and property members can successfully negotiate to limit the investor members' right to receive the return of their capital contributions and any preferred return to a liquidation preference payable only upon a sale and liquidation of the company.[14]

Property (Including IP) Contributors

Occasionally, the investor members are willing to place a value (that is, an agreed book basis) on intellectual property contributed to the LLC by a property member (who might also be a service member). While this will result in the property member being credited with a capital contribution and capital account having an equal value, the property member would most often receive common, and not preferred, units in exchange for the intellectual property, putting the property member on equal footing with the service members for future operating distributions (although depending upon the value of the intellectual property and the property member's leverage, preferred units might be negotiated). The tax law requires that LLC allocations account for the difference between the property member's tax basis in the contributed intellectual property (typically its cost) and the agreed value to be reflected in the property member's capital account.[15]

This allocation rule is mandatory and trumps the general allocation provisions of the operating agreement. Although more relevant to the regulatory and allocation provisions of the operating agreement, perhaps the most important drafting implication of contributions or revaluations of appreciated property is the ability to select from among several allocation methods prescribed by the tax regulations.[16] Although beyond the scope of this article, depending upon the context and the numbers involved, the selected allocation method can materially impact the after-tax economic effect to the service, property, and investor members, respectively. Even if there were no property member upon the LLC's formation, a well-drafted operating agreement should address the tax and accounting implications of in-kind property distributions to deal with the possibility of future contributions (including, as is relatively common for venture-backed companies, property contributions in connection with the LLC's acquisition of other businesses in exchange for units).

Service Contributors: Planning with Profits Interests

Most of our growth-company LLC clients grant common units or options to acquire common units to service members, both at formation and later when new talent is hired.[17] Although beyond the scope of this article — because they can be received without current tax consequences to the service member, require no purchase or payment by the service member, and do not raise other tax issues associated with options,[18] we will assume that the service provider is granted actual common units, rather than being required to purchase the units for cash or a note, or being granted options to purchase units in the future.

If possible and otherwise consistent with the members' business objectives, to avoid current taxation to the service member on the receipt of his or her common units in exchange for services, steps should be taken to maximize the likelihood that the units will be treated as a profits interest for tax purposes.[19] I have encountered significant confusion among clients and business lawyers who are under the impression that profits interests must be designated as a separate class of units in the operating agreement for state law purposes. The simplest drafting dictates that the service member just be granted common units as defined in the operating agreement. To ensure these units will be respected as nontaxable profits interests, the draftsperson should confirm that the aggregate capital accounts of the other members (after any permitted restatement or book up) equals or exceeds the company's then-fair market value (or going concern or enterprise value) and provide that liquidation distributions will be made in accordance with the members' respective capital accounts. Because of the likely nominal initial value of common units, the grant of profits interest upon an LLC's formation does not usually present any issues, provided the operating agreement does not permit the recipient to receive any portion of the property and investor members' capital accounts upon a hypothetical liquidation. If, as is often the case, business negotiations or different drafting practices require that the operating agreement provide for liquidation distributions in accordance with unit ownership instead

of capital account balances, then the draftsperson should confirm that the then-unpaid liquidation preference of any investor members equals or exceeds such company value such that the service member would not, on the date of his receipt of the common units, be entitled to any share of the sale proceeds in respect of his percentage ownership.

The planning for profits interests is somewhat uncertain in that, regardless of operating agreement terms, the law has continued to evolve and tax results depend upon subjective valuation principles.[20] In general, however, at least until future legislation or regulations provide otherwise, provisions mandating liquidation distributions in accordance with capital accounts should provide the best protection to service members, provided the other members' capital accounts then reflect the company's full value and, it follows, the service member's capital account is zero. Alternatively, if the service member can be recast as a property member based upon a contribution of intellectual property or other assets, this may provide a further hedge against the tax risk. Although not technically required under current law, prudence dictates that service members make an 83(b) election,[21] and lawyers should consider including provisions that would enable the LLC to elect a liquidation value safe harbor under not-yet-finalized Department of Treasury regulations and an IRS notice, to avoid having to obtain member consents to conforming amendments in the future if and when the regulations and procedures are finalized.[22]

Tax Distributions

Most operating agreements will include provisions that obligate the LLC to make distributions to the members at times and in amounts sufficient to enable them to pay their income taxes (including estimated taxes) attributable to their allocable share of LLC profits. For the sake of convenience, my typical operating agreement tax provision assumes that each member's share of profits constitutes their only taxable income and that such income was taxable at the highest federal marginal rate in effect for the applicable year, plus some fixed rate (e.g., 6 percent) for state and local taxes. To avoid inadvertent excess distributions, the tax distribution provision should be clear that any tax distributions offset, or are considered an advance against, the next distributions payable to the receiving member pursuant to the operating distribution scheme.

Preserving the Distribution Deal with Proper Allocation Provisions

Capital Accounts Versus Membership Interests

The concept of a capital account is the client's first clue that an LLC involves not-so-parallel book and tax universes. I often describe the capital account as a thermometer (the red line goes up with capital contributions and profit allocations, and goes down with loss allocations and distributions), and the key to ensuring that the members' economic arrangement can be carried out through a tax-efficient pass-through entity. The § 704(b) regulations[23] referenced in good operating agreements tax provisions are designed to ensure that allocations of LLC profits, losses, and other tax items to the members will impact them economically (that is, will affect the amount of distributions they will ultimately receive from the LLC). The capital account concept and maintenance rules are the engine of the § 704(b) regulations. Distributions of cash[24] and allocations (of profits — whether or not distributed — or losses — as reflected in the forms K-1 issued to the members) are not the same thing and may be divided differently among the members from year to year. Properly maintained capital accounts ensure that, over the life of the LLC, the total distributions to each member will equal, to the extent possible, such member's capital contributions, plus such member's aggregate profits allocations, less such member's loss allocations.

The concept of a capital account is the client's first clue that an LLC involves not-so-parallel book and tax universes.

Given the fundamental importance of capital accounts to the process of correlating economic (book) and accounting (tax) income, the operating agreement should define the capital account of each member and describe the determination of such capital account with specific reference to the regulatory maintenance rules.[25] Furthermore, to avoid economic distortions resulting from future contributions and distributions of LLC property (which will usually have a tax basis different from its fair market value), and to permit member capital accounts to be increased or

decreased to reflect a revaluation of LLC property (which can be important not only to the members' intended business deal but also the characterization of a service member's units as a profits interest), in connection with a distribution in redemption of a member, a contribution of a new member, the liquidation of the LLC, or the grant of an LLC interest in connection with the performance of services, the operating agreement provisions defining capital accounts, profits, and losses should incorporate a book basis (gross asset value) concept.[26]

Allocation Provisions: Choosing Between Tiered or Targeting Styles

With proper capital account definitional and maintenance provisions built in to every operating agreement, the draftsperson can then focus on making sure that the allocation provisions not interfere with the business intent of the distribution provisions. I find it helpful to design allocation provisions with the end — the operating agreement's liquidating distribution provisions — in mind. I have heard it said that more traditional operating agreement provisions mandating liquidation distributions per capital accounts "capital account provisions," while providing more tax certainty, increase the risk of drafting errors that may cause inadvertent changes in the business deal. On the other hand, waterfall-style liquidation distribution provisions (similar to the tiers governing operating distributions), which seem to have become more common in recent years, are thought to introduce tax uncertainty but avoid business deal mistakes. Over the years, I would estimate that roughly half of my operating agreements employed capital account provisions and half unit percentage provisions. There is no one right approach. The important thing is that the allocation, operating distribution and liquidating distributions work in concert to comply with tax law and achieve the members' business deal.[27] Older operating agreement forms tend to employ multiple layered tiers of allocations corresponding to the operating distribution provisions. The more complicated the business deal, the more complicated are these types of allocation provisions. Because an LLC's members will generally focus on the operating agreement's distribution provisions to confirm that they achieve their economic deal, and rely on the lawyer to tailor the operating agreement with appropriate allocations provisions, I have increasingly defaulted to an allocation provision popularly described as "targeting" capital accounts. Such a targeting provision allocates profits and losses each year in a manner such that the members' capital accounts will equal, as closely as possible, the amounts they would be entitled to receive (under the operating distribution scheme of the operating agreement) were the company's assets sold for their book basis and the proceeds distributed to the members in liquidation of the LLC.

Over the years, I would estimate that roughly half of my operating agreements employed capital account provisions and half unit percentage provisions.

Expecting the Unexpected

Test Drive Your Distribution and Allocation Provisions

Even with significant expertise in partnership tax and experience drafting operating agreements, the prudent draftsperson will request profit-and-loss projections and future assumptions from the client and test the operating agreement by preparing spreadsheets of liquidating distribution outcomes based upon numerous profit, loss, financing, and exit scenarios. These projected operating agreement results should be reviewed with input from the client and the likely tax return preparer to minimize the risk of future misunderstandings.

Savings Clauses

Perhaps the greatest indication that there may be no perfect operating agreement in terms of coordinating the members' business deal with partnership tax law, many well-drafted operating agreements include a savings clause. Such a clause states the members' intent that the allocation provisions are intended to result in capital account balances and liquidating distributions that comport with the their business deal regarding distributions and, to the extent that objective is not achieved, permits the LLC's manager or governing board to amend the operating agreement to permit reallocations of prior, open years' profits and losses for the purpose of more closely achieving the intended economic result.

Talk to the Tax Return Preparer

Depending on whether the client is the LLC or a controlling member to avoid the risk of future

questions, professional disagreements and amendments, it is advisable to seek the input and approval of the LLC's accountant or tax return preparer regarding the operating agreement's distribution, allocation, definitional, and regulatory tax provisions in the context of the preparation of the LLC's returns.

Common Partnership Tax Red Flags

It is helpful for LLC counsel to be aware of business or transaction scenarios that may create unanticipated tax issues for the members. While some of these are addressed in more complex operating agreements, especially when the issues arise in connection with the LLC's formation, the standard operating agreement is not usually dispositive of these issues.

LLC Liability Issues

In contrast to S corporation shareholders, LLC members benefit from the fact that they can include their share of LLC liabilities in their outside basis in their LLC membership interest. But this benefit can create unanticipated income tax consequences. Always look for transactions (including routine LLC borrowings, debt repayments, guarantees or releases therefrom), property contributions and distributions, and changes in the LLC's membership that might result in a change in the members' respective shares of LLC liabilities. Generally speaking, members share recourse debt in proportion to their economic risk of loss. So-called partner nonrecourse debt or a nonrecourse liability for which one member bears the economic risk of loss (for example, because such member made or guaranteed the loan to the LLC) are included in the definition of recourse debt. Members generally share nonrecourse LLC debts (that is, those for which no individual member or members have the risk of loss) in proportion to their interests in LLC profits.[28] A reduction in a member's share of LLC liabilities is treated as a distribution of cash to the member and, to the extent the amount of such deemed distribution exceeds the member's basis in its membership interest, can trigger taxable gain to the member.[29]

Capital Account Book Ups

I have mentioned the circumstances in which LLC asset revaluations and capital account restatements or book ups are either required or permitted under the § 704(b) regulations. Counsel should consider the advisability of such revaluations and seek the input of the LLC's tax return preparer whenever an LLC interest is issued or redeemed in consideration of a contribution or distribution, respectively, of money or property, an LLC interest is granted as consideration for services (particularly if the interest is intended to be a profits interest), or the LLC is to be liquidated.[30] When capital accounts of the existing members are booked up in connection with the grant of an interest to a new member that is intended to be treated as a profits interest, allocations of future gain in the amount of such book up are required to be made to the existing members pursuant to so-called "reverse § 704(c)" allocations.[31]

Disguised Sales

Some otherwise tax-free contributions of property to LLCs may be taxable in whole or in part as "disguised sales" if made in connection with related transfers, or around the time of other transfers (for example., within two years), of money or other consideration to the contributing member.[32] If a disguised sale is identified in connection with an LLC formation, operating agreement provisions may be drafted in a manner to optimize the impact of the regulations governing such transactions.[33]

Convertible Notes Member Loans and Guarantees

It is common for companies in need of venture capital to occasionally issue convertible notes instead of preferred units. Notes are often used either to address emergency cash needs or to defer the question of the company's valuation until a future round of equity financing. Assuming the convertible notes are respected as debt, the lawyer needs to consider the fact that a nonmember note holder will not be treated as a partner for tax purposes and the implications of this fact both for the terms of the units into which the note is convertible (including the parties' intent regarding profit and loss allocations during the term of the note) and the distribution and allocation provisions of the operating agreement. Furthermore, a note conversion should be carefully planned to address the potential recognition of debt cancellation income.[34] If an existing member makes or guarantees a loan to the LLC, the loan will constitute partner nonrecourse debt with respect to the lender-member under § 752 and, as a result, impact LLC loss allocations.[35] However, the characterization of such partner nonrecourse debt as recourse or nonrecourse under § 1001 for purposes of the cancellation of indebtedness consequences is less certain.[36] ■

Endnotes:

1 Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2277 (86 Act). The 86 Act and subsequent legislation reduced the gap between the maximum marginal income tax rates applicable to LLC members (who, as partners in a partnership for tax purposes and, similar to S corporation shareholders, pay the taxes on the LLC's income) and corporations, respectively. An LLC is subject to a single, member-level tax on its earnings, whether or not earnings are distributed, whereas a C corporation's distributed earnings are subject to a double tax (i.e., at both the corporate and shareholder levels). The ability of an LLC to sell its assets in a taxable transaction with only one level of tax offers considerable flexibility given the difficulty in predicting the timing or manner of a company's exit years into the future.

2 Va. Code § 13.1-1000 *et seq*. Virginia was one of the first states to adopt the LLC, although LLCs are now recognized in all states.

3 The most significant byproduct of the 2001 market correction was the closing of the initial public offering (IPO) market as an exit alternative for relatively small and early-stage companies formed, in part with an IPO in mind, as C corporations.

4 The biggest impact of the credit and banking crises on the business lawyer's practice has been the unavailability of bank debt to fund company growth and acquisitions.

5 LLCs are generally treated as partnerships for federal and state tax purposes, thereby avoiding the restrictive ownership and capital structure requirements of S corporations and the double-tax regime governing regular C corporations. Because an LLC can be later converted to a corporation (note, the reverse is not true), LLC property can generally be distributed to members, and an LLC can generally effect a spin-off, each on a tax-deferred basis, an LLC can more often navigate future transactions that are difficult to predict on a tax efficient basis.

6 Thanks to IRC § 721, a drop-down of corporate assets can be often accomplished on a tax-deferred basis and, in the case of an S corporation target, if handled carefully (through the use of a QSUB conversion to a single-member LLC subsidiary to avoid any taxable conversion or liquidation of the S corporation or QSUB), may even be accomplished without any need to transfer assets.

7 Depending upon the industry, life-cycle stage and profile of the company, the investors might include employees, high net-worth individuals known as "angels," or venture capital or private equity funds.

8 Of course, the initial draftsman will typically represent only the service or property members and/or the company, on the one hand, or the investor members, on the other, so the final operating agreement provisions will reflect the input of and negotiations with counsel to the other parties.

9 The company capital structure contemplated by a standard venture capital "term sheet" includes common stock (or stock options or restricted stock subject to vesting restrictions) for the service and property members (and perhaps prior "friends and family" investor members), preferred stock for the investor members having seniority with respect to return of capital, dividends and liquidating distributions, and often preferential "co-sale," "drag-along," "put," preemptive and other transfer rights.

10 These "regulatory" provisions ensure operating agreement compliance with Reg. § 1.704-1(b)(2)(iv), and include "minimum gain chargeback," "qualified income offset," § 754 election-related provisions, a negative capital account avoidance provision, and other tax accounting provisions which, in my experience, are valuable reminders when you need them, particularly when explaining and interpreting the operating agreement for the LLC's tax return preparer.

11 The "industry-standard" definition for profits and losses starts with net taxable income or loss determined in accordance with applicable tax accounting methods, accounts for tax-exempt income and nondeductible expenditures, excludes the regulatory or any special tax allocations and, perhaps most important in reconciling the economic (book) terms of the operating agreement (which are ultimately reflected in the capital accounts) with the tax treatment, substitutes the "book basis" (gross asset value) concept for the tax basis (reflecting a "mark-to-market" approach) of the LLC's assets for purposes of calculating future depreciation of, and gain or loss on sale of, LLC assets.

12 *See* discussion under "Capital Accounts Versus Membership Interests" below.

13 IRC Section 721(a).

14 When investor members holding units of the same class have invested at different times and at different purchase prices, consideration must be given to providing for distribution of the liquidation preference among them based upon the amounts of their respective preferences rather than their number of preferred units.

15 IRC § 704(c) (which is designed to prevent the shifting of tax consequences of pre-contribution gain or loss among members) and Treasury Regulations (Reg.) § 1.704-3. This section also applies to capital account restatements, revaluations or so-called "book ups" to reflect the true value of LLC assets upon the admission of new members.

16 Reg. § 1.704-3(b) ("traditional method"), (c) ("traditional method with curative allocations") and (d) ("remedial method").

17 In lieu of the "subscription agreement" memorializing the investor member's money investment and the "contribution agreement" evidencing the property member's in-kind contribution, it is advisable to have a Unit "award" or "option" agreement (sometimes supplemented by an equity "plan" document) separate from the operating agreement to include provisions governing the vesting (e.g., employment or time-based, or "milestone," or performance-based, vesting) and transfer (including any company right to repurchase the service member's units upon termination of employment).

18 Like corporate stock options, options to purchase LLC units are less tax efficient to the service member because the "spread" between the exercise price and fair market value of the units upon exercise is taxed as ordinary, compensation income to the service member. Furthermore, IRC § 409A, which can accelerate income recognition and trigger penalties in respect of certain option grants, does not apply to grants of restricted property (including LLC capital or profits interests) subject to IRC § 83.

19 A "profits interest" is an interest that would not entitle the holder to a share of the proceeds if the LLC's assets were sold for their fair market value and the sale proceeds were distributed to the members in liquidation of the LLC, determined as of the time the profits interest is granted. Rev. Proc. 93-27, 1993-2 CB 343. *See* also Rev. Proc. 2001-43, 2001-2 CB 191.

20 Proposed Treasury Regulations and IRS notice issued in 2005 would generally not distinguish between profits and capital interests, but would provide an elective "safe harbor" pursuant to which compensatory LLC interests could be valued based upon their liquidation value. Lawyers should consider the inclusion of this election in operating agreements even prior to finalization of the proposed regulations. In any event, with proper planning and drafting, tax-free grants of LLC interests should still be possible after enactment of the proposed regulations. REG-105346-03, 70 Fed. Reg. 29675 – 29683 (May 24, 2005); Notice 2005-43, 2005-24

I.R.B. 1221 (which, if finalized, would make the Rev. Proc. 93-27, 1993-2 CB 343 and Rev. Proc. 2001-43, 2001-3 CB 191 obsolete). *See also*, e.g., Prop. Regs. § 1.83-3(e) and -6(b), 1.707-1(c), 1.704-1(b)(2)(iv)(b)(1), 1.721-1(b)(2), and 1.761-1(b).

21 IRC § 83 allows the recipient of an unvested equity interest in connection with the performance of services to elect to include the Robertson, Tracy (DOE) [Tracy.Robertson@doe.virginia.gov]value of the interest in gross income. The election must be made within 30 days of the date the interest is received, and ensures that (a) any appreciation in value of the interest from the date of grant through the vesting date will be taxed as capital gain and not as compensation income, and (b) that the recipient will be deemed to be a "partner" of the LLC for tax purposes.

22 *See* footnote 21 above.

23 Reg. § 1.704(b).

24 It is important to note that salary-type (guaranteed) and other payments to members not in respect of their units are not treated like distributions: they do not reduce a member's capital account and are taxable without regard to the member's basis in his or her units. *See* IRC § 707(a) and (c).

25 *See* specifically Reg. § 1.704-1(b)(2)(iv).

26 *See* generally Reg. § 1.704-1(b)(2)(iv)(d)(1), -1(b)(2)(iv)(e)(1), -1(b)(2)(iv)(f) and § 1.704-3.

27 Provisions requiring liquidation distributions per capital accounts should simplify the planning for future profits interest grants after formation of the LLC, as capital accounts can be restated and the operating agreement requires no amendment. Unit percentage distribution provisions, on the other hand, would require amendment to ensure the distribution tiers reflect the "mark-up" in the revalued LLC assets. *See* generally Reg. § 1.704-1(b)(2)(iv)(f)(5)(iii) (permitting capital account "book ups" in connection with LLC interest grants).

28 Actually, members share non-recourse debt in proportion to, first, their share of LLC "minimum gain," second, their share of "§ 704(c) minimum gain," and, finally, their interest in LLC profits. IRC § 704(b) and 752; Reg. § 1.704-2(i) and 1.752-3(a).

29 *See* IRC § 731(a)(1).

30 § 1.704-1(b)(2)(iv)(f).

31 *Id.*

32 IRC § 707(a)(2).

33 Reg. § 1.707-3 and -4. Through careful drafting around extremely technical rules, distributions can be structured as guaranteed payments, preferred returns, operating distributions and pre-formation expense reimbursements in an attempt to avoid the disguised sale rules.

34 IRC § 108(d)(6).

35 Reg. § 1.704-2(i).

36 Reg. § 1.1001-2(c).

Tax Amnesty:
Striking a Deal with Virginia's Delinquent Taxpayers

by Guy C. Crowgey and Kyle Wingfield

Most Virginians pay their taxes on time. But some individuals and businesses are unable to satisfy their tax obligations on a timely basis. In addition to being liable for the interest that accumulates on their bills, these taxpayers normally face civil and criminal penalties by not paying their taxes.

Tax amnesty waives, for a limited time, all of the penalties and half the interest due on most taxes owed to the commonwealth.

These are not normal times, however, as Virginia operates with a $1.35 billion deficit and desperately requires new sources of revenue. To help solve its budget woes, the General Assembly is looking to strike a deal with delinquent taxpayers through a tax amnesty program.

Sponsored by Senator Charles J. Colgan[1] and enacted as Va. Code § 58.1-1840.1 in March of 2009, the Virginia Tax Amnesty Program intends to improve voluntary compliance with tax laws and to increase and accelerate the collection of delinquent taxes owed to the commonwealth.[2] 2009 amnesty program is expected to produce approximately $48 million in revenue.[3]

Tax Amnesty waives, for a limited time, all of the penalties and half the interest due on most taxes owed to the commonwealth. To participate, taxpayers must pay the taxes due and half the interest on outstanding bills and delinquent returns.[4] Those who do not participate are assessed a 20 percent penalty on the amount of the unpaid tax remaining at the end of the amnesty period.[5]

This is not the first time that the General Assembly has used a tax amnesty program to raise revenues. Similar programs were conducted in 1990 and 2003 with great success. The 1990 program generated approximately $32 million, and the 2003 program netted $95 million — far surpassing the Virginia Department of Taxation's original goal of $48 million.[6]

It remains to be seen whether a struggling economy will significantly impact the revenue collections for the current program.

All practitioners — not only tax professionals — should be aware of the Tax Amnesty Program when advising their clients.

This article provides an overview of the program and guides taxpayers and practitioners through frequently asked questions about participation in the program.

The Tax Amnesty Framework

What is Virginia tax amnesty?
Tax amnesty waives all penalties and one-half of the interest on outstanding bills and delinquent returns for any tax administered by the Virginia Department of Taxation. To receive these benefits, the taxpayer must pay all of the taxes and the other half of the interest before December 5, 2009.[7]

When does amnesty begin and end?
Amnesty will be available for sixty days, between October 7 and December 5, 2009.[8]

What interest rate applies to previously unfiled returns and underreported income?
An interest rate of 8 percent will be used to determine the interest on previously unfilled returns or underreported income. Interest will be calculated from the due date of the return through October 6, 2009.[9]

What are the consequences to a taxpayer who does not participate in amnesty?
The tax department will impose a 20 percent penalty on the amount of unpaid tax related to any amnesty-eligible bill that remains unpaid at the end of the program. Taxpayers will also remain liable for any outstanding tax, interest, and criminal or civil penalties.[10]

Taxpayers are ultimately responsible for determining their eligibility to participate in the amnesty program.[11] Ignorance of the liability or amnesty is no excuse. The 20 percent penalty

applies to any eligible taxpayer who did not participate.[12]

Administration of Tax Amnesty

Who is responsible for administering the Tax Amnesty Program?
The state tax department will administer the amnesty program.[13] The commissioner of taxation has issued detailed guidelines and rules for participation in the program.[14]

How will taxpayers be notified of their eligibility to participate in amnesty?
The department is sending approximately 550,000 notices to eligible individuals and businesses.[15] During the 2003 amnesty program, the department also placed over 377,000 follow-up phone calls to similar taxpayers.[16] Similar efforts are expected for the current program.

Will normal criminal, civil, and collection actions be suspended during amnesty?
Normal collections will continue during amnesty. Taxpayers who wait for amnesty before paying their bills risk audit, lien, or seizure. However, the department will only pursue criminal proceedings in special circumstances.[17]

Eligibility for Tax Amnesty

Which taxpayers are eligible to participate in tax amnesty?
Generally, any individual, corporation, partnership, trust, or estate is eligible to participate in the Amnesty Program. Certain taxpayers, however, are not eligible to participate, including those currently under investigation or prosecution for filing a fraudulent return or failing to file a return with the intent to evade tax.[18]

Which bills and returns are eligible for tax amnesty?
Most bills or delinquent returns administered by the tax department are eligible for amnesty, except the following:

- Bills paid before October 7, 2009;
- Bills with an assessment date after July 9, 2009, with certain exceptions for bills issued during the amnesty period; and
- All obligations of a taxpayer with an active jeopardy or fraud assessment.[19]

Getting Tax Amnesty

What steps must a taxpayer take to obtain tax amnesty?
Taxpayers must file any amended or missing returns to accurately report their income. Then, the taxpayer must pay the tax and one-half of the interest for any eligible bill before December 5, 2009. No special application forms are necessary to participate.[20]

What if the taxpayer is unable to pay the full tax and one-half of the interest?
Taxpayers may enter an offer-in-compromise or establish a payment plan if they are unable to pay the tax and half the interest on their bills. Taxpayers doing so will not receive the benefits of amnesty unless the amnesty amount due is paid during the amnesty period, however. Taxpayers may also consider paying just one of several eligible bills to receive amnesty benefits.[21]

How will payment plans be treated under amnesty?
Taxpayers who are on established payment plans with the tax department or one of its outside collection agencies prior to amnesty will be allowed to continue on those plans. If the bill is amnesty-eligible and full payment is made according to amnesty terms during the amnesty period, that bill will receive amnesty benefits.[22]

Taxpayers may enter into payment plans during amnesty but will not receive amnesty benefits unless full payment is made within the amnesty period. If the taxpayer fails to make timely payments, the 20 percent penalty will be imposed.[23]

Will taxpayers with pending offers-in-compromise qualify for amnesty?
The offer-in-compromise process will continue during amnesty, and taxpayers will receive amnesty for qualifying assessments if full payment is made during the Amnesty period. Alternatively, the taxpayer may choose to terminate an offer and to participate in amnesty by paying the full tax and half the interest.[24]

Taxpayers may enter into payment plans during amnesty but will not receive amnesty benefits unless full payment is made within the amnesty period.

Will a taxpayer who is either protesting an assessment before the tax commissioner or challenging an improper assessment in circuit court be eligible for amnesty?
Taxpayers who have a pending appeal prior to or during amnesty may participate by paying the full amount and one-half of the accrued interest on the assessment. By paying under the amnesty terms, the taxpayer terminates its current appeal.

A 20 percent penalty will be imposed on any eligible tax liability that remains unpaid at the close of amnesty.

If the taxpayer chooses to continue with the contested assessment, the 20 percent amnesty penalty may apply.[25]

Is a refund available for payments made before amnesty began?
No. Only bills paid and refunds filed during the period of October 7 through December 5, 2009, are eligible for amnesty.[26]

What methods of payment will be available to taxpayers?
The tax department will provide a variety of payment methods during amnesty. Taxpayers may pay with a credit card online or over the telephone for a fee; or they can pay for free online using the Department's QuickPay service. They can also mail a check or money order to the following addresses:

Business Taxes
P.O. Box 26627
Richmond, VA 23261-6627

Individual Taxes
P.O. Box 26685
Richmond, VA 23261-6685

Estate Taxes
P.O. Box 1500
Richmond, VA 23218-1500

Cigarette Taxes
P.O. Box 715
Richmond, VA 23218-0715

Estate taxes and cigarette taxes must be paid by check. All payments must be postmarked no later than December 5, 2009. Checks and money orders must be payable to the Virginia Department of Taxation.[27]

The 20 Percent Penalty

What penalties will be imposed on eligible taxpayers who do not participate in the program?
A 20 percent penalty will be imposed on any eligible tax liability that remains unpaid at the close of amnesty. The penalty is in addition to all other penalties and interest that may apply to the taxpayer.[28]

What if a taxpayer later realizes that he or she was eligible for amnesty?
Taxpayers are responsible for determining whether they are eligible to participate in tax amnesty.[29] The 20 percent penalty applies to any taxpayer who was eligible but did not participate.[30]

Publicity

How will the public be informed about tax amnesty?
The tax department will conduct a public awareness campaign for the amnesty program. Efforts will include television and print advertising, an informational website at GetSquareVA.com, and a toll-free number at 1-888-560-0057 to answer taxpayers' questions about the program.[31]

What kind of follow-up will there be?
In addition to receiving a Virginia Tax Amnesty Notice that details their outstanding tax bill and delinquent returns, potential amnesty participants will receive follow-up mailings or phone calls to urge their participation in the program.[32] ■

Endnotes:

1 S.B. 1120.
2 VA CODE § 58.1-1840.1(A) (2009).
3 http://www.GetSquareVA.com (last visited Sept. 29, 2009)
4 VA CODE § 58.1-1840.1(D)(2).
5 VA CODE § 58.1-1840.1(F)(1).
6 Press Release, Va. Dept. of Taxation, VIRGINIA TAX AMNESTY CLOSES IN A FLURRY (Nov. 7, 2003).
7 VA CODE § 58.1-1840.-1(D)(2) (2009); Virginia Tax Amnesty Guidelines 2009, PD 09-140, II.

8 VA CODE § 58.1-1840-.1(D)(1); Virginia Tax Amnesty Guidelines 2009, PD 09-140, I.
9 VA CODE § 58.1-1840.1(E); Virginia Tax Amnesty Guidelines 2009, PD 09-140, IV.
10 VA CODE § 58.1-1840.-1(F)(1).
11 P.D. 05-156; P.D. 06-128; P.D. 08-164.
12 VA CODE § 58.1-1840.-1(F)(1).
13 VA CODE § 58.1-1840-.1(B).
14 Virginia Tax Amnesty Guidelines 2009, PD 09-140.
15 *Virginia's Tax Amnesty Will Start on Oct. 7*, RICHMOND-TIMES DISPATCH, Sept. 30, 2009.
16 Press Release, Va. Dept. of Taxation, VIRGINIA TAX AMNESTY CLOSES IN A FLURRY (Nov. 7, 2003). This article does not say anything about 377,000 phone calls.
17 Virginia Tax Amnesty Guidelines 2009, PD 09-140, IV.
18 VA CODE § 58.1-1840-.1(D)(2)(a); Virginia Tax Amnesty Guidelines 2009, PD 09-140, V.
19 Virginia Tax Amnesty Guidelines 2009, PD 09-140, III.
20 Virginia Tax Amnesty Guidelines 2009, PD 09-140, IV.
21 http://www.GetSquareVA.com
22 Virginia Tax Amnesty Guidelines 2009, PD 09-140, V.
23 *Id.*
24 *Id.*
25 *Id.*
26 http://www.GetSquareVA.com.
27 Virginia Tax Amnesty Guidelines 2009, PD 09-140, VII
28 VA CODE § 58.1-1840.1(F)(1).
29 P.D. 05-156; P.D. 06-128; P.D. 08-164.
30 P.D. 05-156; P.D. 06-128; P.D. 08-164 VA CODE § 58.1-1840.1(F)(1).
31 Virginia Tax Amnesty Guidelines 2009, PD 09-140, VII; http://www.GetSquareVA.com.
32 http://www.GetSquareVA.com.

by Gifford Ray Hampshire, Chair

Local Bars Encourage Public Service

I WRITE TO YOU AS THE NEW CHAIR of the Conference of Local Bar Associations (CLBA). I thank William T. "Bill" Wilson, the immediate past chair of the CLBA, for his introduction in the June/July 2009 issue of *Virginia Lawyer*. Bill deserves high praise for his leadership during a very busy and successful year.

As Bill stated in his outgoing article, the CLBA held its annual Bar Leaders Institute (BLI) on April 15, 2009, at the Virginia Historical Society in Richmond. The CLBA is currently working on a BLI program for July 2010. If you are a current, future or aspiring local bar leader, you will want to attend. The BLI will help you plan for your time at the helm of your local bar. Be on the lookout for more information in *Virginia Lawyer*, as well as in e-mails from the VSB.

For some years now, the CLBA has also been honored to provide a forum for the VSB Small-Firm Practitioner Forums held in conjunction with the Supreme Court of Virginia. These programs inform and train solo practitioners and members of small law firms. Topics include ethics, law office management, and technology.

The latest Solo and Small-firm Practitioner Forum was held on July 16, 2009, in Abingdon. Former VSB President Joseph A. Condo spoke on "Breaking Free of the Jealous Mistress — Achieving Balance and Reducing Stress in Your Life as a Lawyer." Joe's talk flowed naturally from his term as VSB president in 2000–01, when he made "getting a life" a central theme of his presidency. Joe's theme was that a balanced and healthy life is far from antithetical to a successful practice. Joe conveyed the important message that a rested and less-stressed lawyer will usually make sounder professional judgments than a lawyer who is sleep-deprived, unhealthy, or stressed.

The demands of the Jealous Mistress can also be checked through public service. Former Governor Gerald L. Baliles spoke eloquently on this subject at the 2008 Solo and Small-Firm Practitioner Forum in Virginia Beach.

> When we don't rise to service *and our profession fails to deeply encourage it*, it's not entirely surprising that law students become nervous and lawyers become burned out — because I believe that lawyers chose the profession *in order* to contribute to the public good. Lawyers are practical but lawyers also — especially the best — have a twinge of idealism, a yearning to do good, as a citizen lawyer in the long tradition.[1] (emphasis added)

It is apparent that local bar associations provide Virginia lawyers with an important way of breaking free from the Jealous Mistress by deeply encouraging public service. The CLBA provides to local bars assistance with ideas and resources for this public service, but the local bar associations do the heavy lifting. Here are just a few examples of how local bars have given back to their communities through the good works of their citizen lawyers.

Members of the Roanoke Bar Association recently took time out of their busy schedules to teach the importance of law to American society. They provided this free instruction to seventh and eighth graders. They taught the students the importance of the Rule of Law and that lawyers are dedicated to public service in their community.

Another example of public service is the Metropolitan Richmond Women's Bar Association's Partnership with Safe Harbor. Safe Harbor is a shelter for women who face domestic violence. Members of the association donated goods and more than $2,500 to the shelter. The association also hosted a luncheon at which the shelter's director of development spoke, as did a prosecutor experienced in domestic violence abuse. The association's contribution to public service heightened public awareness of the problem of domestic abuse and demonstrated that lawyers are prepared to fight it — not only with financial resources, but also through public scrutiny on the problem.

The Prince William County Bar Association recently gave back to its community by creating a Modest Means Program, designed to provide reduced fee legal services for civil matters to residents of the county and the cities of Manassas and Manassas Park. The program's goal was to help those with incomes too high to qualify for legal aid but too low to afford an attorney at market rates. The association's pro bono committee partnered with Northern Virginia Legal Services and the Potomac Legal Aid Society in providing these reduced-rate services.

Local Bars continued on page 62

by Lesley Pate Marlin, President

Planting Trees

AS LAWYERS, WE MAKE OUR LIVING through words. So it should come as no surprise that I turn to words of others for inspiration. Among my favorite quotations, and an anonymous one at that, is: "Service is planting a tree under whose shade you'll never sit." The Young Lawyers Conference truly embodies the spirit of that quotation. The YLC's theme is service: service to its members, the bar, and the communities of the commonwealth. Year after year, through its various programs and initiatives, the YLC plants trees under whose shade we'll never sit.

Recently, the YLC renewed its commitment to service through the adoption of a new five-year long range plan. The YLC currently serves its members and the bar through the following programs and initiatives: The Celebration Bench Bar Dinner; the *Docket Call* newsletter; the Admissions and Orientation Ceremony; the Annual Meeting; the First Day in Practice Seminar; Board Match; the Professional Development Conference; and Unlock Your Potential. The YLC currently serves the public through the following programs and initiatives: Prelaw Conferences, the Domestic Violence Safety Project, Emergency Legal Services, Community Law Week, No Bills Night, Immigrant Outreach, Mental Health Reform, Oliver Hill/Samuel Tucker Prelaw Institute, Wills for Heroes, and programs in which students spend a day in court or at the Virginia Capitol. The YLC also has several commissions — Children and the Law, Pro Bono, and Women and Minorities in the Profession — that explore needs and seek out opportunities to better serve our members, the bar, and the public.

In furtherance of the YLC's purpose, the long-range plan proposed a significant change to our existing structure, which we are currently in the process of implementing. Specifically, the long-range plan recommended modifying the circuit representative structure to promote more involvement and interaction with local bar associations. Circuit representatives will continue to represent geographic regions across the commonwealth, but they will now be selected wherever possible based on nominations from local bar associations and their young lawyers sections. We have established a new Circuit Representative Coordination and Outreach Committee to support the transition and the work of our circuit representatives. We hope that these changes will increase collaboration between local bar associations and the YLC.

We are also charting new territory this year by establishing a Commission on Health and the Law and by launching a new initiative aimed at the legal issues faced by cancer survivors. More often than not, cancer survivors struggle not only with treatment decisions but also legal problems that arise because of their diagnosis. Those legal problems may include employment matters, health insurance and Medicaid, real estate or landlord-tenant issues, bankruptcy, and advance medical directives. So we will be developing a handbook to help cancer survivors navigate the variety of nagging legal issues they face as they fight their disease. We will also sponsor a continuing legal education program in hopes that lawyers will, in turn, help family members, friends, neighbors, and strangers who are fighting cancer and need legal assistance.

As Winston Churchill said: "We make a living by what we get, but we make a life by what we give." The YLC is always looking for leaders and volunteers to give their time and talents to help the conference continue its thirty-five-year legacy of service. To that end, if you would like to get involved in the YLC, please contact me at (202) 344-8033 or lpmarlin@venable.com or Brian Charville at (703) 288-3100 or bcharville@arlingtonva.us. The YLC will plant new trees this year, and we'll help those trees that have already been planted grow, so that others may some day benefit from their shade.

> *"We make a living by what we get, but we make a life by what we give."*
>
> *— Winston Churchill*

Volunteers Needed by VSB Young Lawyers Conference

The Virginia State Bar Young Lawyers Conference needs program chairs and committee member volunteers for many of its programs in the 2009-2010 bar year.

Becoming a program chair or a committee member volunteer is an excellent way to get involved in the YLC to serve the profession and the public. If you are interested in any of the leadership positions or volunteer opportunities listed below, please contact:

Lesley Pate Marlin at (202) 344-8033 or lpmarlin@venable.com
or
Brian Charville at (703) 228-3100 or bcharville@arlingtonva.us

More information about each of these programs can be found on the YLC's website at http://www.vayounglawyers.org/

The YLC is currently seeking individuals to serve as chairs for the following programs:

Mental Health Reform
No Bills Night Regional Chairs in:

Charlottesville	Fredericksburg	Lexington/Staunton
Lynchburg	Martinsville	Northern Virginia
Roanoke	Tidewater	Winchester

The YLC is currently seeking circuit representatives for the following judicial circuits:

FIRST CIRCUIT
City: Chesapeake

FIFTH CIRCUIT
Cities: Franklin & Suffolk
Counties: Isle of Wight & Southhampton

TWENTY-FIRST CIRCUIT
City: Martinsville
Counties: Patrick & Henry

TWENTY-SIXTH CIRCUIT
Cities: Harrisonburg & Winchester
Counties: Frederick, Clarke, Shenandoah, Page, Rockingham, Warren

TWENTY-NINTH CIRCUIT
Counties: Giles, Bland, Tazewell, Buchanan, Russell, Dickenson

The YLC is also seeking volunteers for the following programs:

Admission and Orientation Ceremony
Annual Meeting – Programs Committee
CLE on Legal Issues Facing Cancer Survivors
Community Law Week
Legal Handbook for Cancer Survivors
Northern Virginia Minority Pre-Law Conference
Bench-Bar Celebration Dinner
Docket Call newsletter
Domestic Violence Safety Project
Immigrant Outreach
No Bills Night

by John G. Mizell Jr., Chair

Conference Supports Seniors with Innovative Programs, Publications

JUST AS WE EXPERIENCE cooler temperatures and know that football season is upon us, we know the fall kickoff season has begun for the Virginia State Bar program year. The Senior Lawyers Conference is no different. During the summer we have the opportunity for a time of pausing, reflecting, recharging ourselves, and planning for the coming year. It is my pleasure and privilege to assume the leadership of the Senior Lawyers Conference.

Being part of the Senior Lawyers Conference (the over-55 crowd) certainly causes me to have mixed feelings. While we don't want to be called old enough to receive senior citizen discounts, once we acknowledge reality — we find there are certain benefits waiting for us. My association with the Senior Lawyers Conference has been filed with wonderful friendships.

During the past several years as a member of the SLC Board, it has been my pleasure to have the opportunity to renew relationships from the distant past and make new friendships with very distinguished and wise senior lawyers. I extend my heartfelt thanks to Frank O. Brown Jr. for being kind enough to encourage me to be part of this distinguished group. There are a number of retired judges, active judges, former members of the Virginia General Assembly, commissioners in chancery, commissioners of accounts, and general practitioners from all walks of life. All geographical areas of the state are well represented, and it has been impressive to see the sacrifices made by many in this group to come to meetings each year and share their composite wisdom and enjoy fellowship. It has been a pleasure to renew acquaintances with a number of former legislators with whom I worked earlier in my life as a young committee clerk in the House of Delegates, legislative assistant, and lobbyist.

I am very excited to have the opportunity to lead the Senior Lawyers Conference and be part of a team working with the VSB Council under the leadership of Presidemt Jon D. Huddleston.

As you may know, the Senior Lawyers Conference has more than fourteen thousand members throughout the state. It is the bar's largest conference. We have the challenge of providing valuable assistance to serve the particular interests of senior lawyers and promote the welfare of seniors generally. We have a wonderful opportunity to help educate senior citizens of the commonwealth, and give them greater access to legal services, and to become more knowledgeable about their rights.

I hope each of you is aware of the recently published 2009 edition of the *Senior Citizens Handbook.* This valuable resource is a project of the Senior Lawyers Conference of the Virginia State Bar with funding in part from the Virginia Law Foundation. This publication is available online through the conference website at www.vsb.org/conferences/slc and is also available in hard copy by contacting the Virginia State Bar office at (804) 775-0576 or at Sliger@vsb.org. Print copies are available free of charge to nonprofit groups and for $4 per copy for all other individuals or groups. The publication is available in both English and Spanish.

I particularly commend to senior lawyer Frank Brown's valuable program, "Protecting Lawyers' and Clients' Interests in the Event of the Lawyers' Disability, Death, or Other Disaster." This is available in the form of a one- or two-hour continuing legal education credit format. Many bar associations have availed themselves already of this valuable resource.

I also bring to your attention the Senior Citizens Law Day Program, which has become the flagship program of the Senior Lawyers Conference. The program was developed by William T. "Bill" Wilson and initiated with a program in the Covington area. A packet of materials is available as a blueprint for how such a program can be presented and publicized. Customarily, the *Senior Citizens Handbook* is distributed in conjunction with this program. This has been an extremely popular and well-received program throughout the commonwealth. Many bar associations have already sponsored such a program, and I encourage other groups to do so in the coming months.

Please let me know if you have any suggestions for new ways we can serve the particular interests of senior lawyers and promote the welfare of senior citizens.

The Chesapeake Project: Preserving "Born Digital" Documents

by Dee Dee Dockendorf

HAVE YOU EVER RETURNED to a website looking for a document that you know was there last week, just to find the document has been replaced or taken down?

More and more, documents that are published on the Web are disappearing with no back-up or archived copies. The Virginia State Law Library, Georgetown University Law Library, and Maryland State Law Library are participating in a digital preservation program that hopes to solve this problem by harvesting documents that originated in digital form and might not be published in print. The Chesapeake Project, as it is called, was developed by the libraries to address permanency of online materials — a subject of great importance to the legal research community.

In the past, government reports, nonprofit studies, and other materials not commercially published were distributed to libraries across the country for cataloging and maintenance. As the Internet has become an easier and more affordable way to disseminate information, organizations have ceased to print and distribute materials and instead have created "born-digital" materials.

These materials have no hard-copy version — they were created digitally and published digitally. This in turn created a new obstacle for libraries. These materials are important and need to be preserved, but how? Are we to trust website managers to keep items on a website forever? Once that document is taken down, can it ever be accessed again? The Chesapeake Project aims to answer some of these questions by identifying, cataloging, and archiving born digital documents.

Each of the member libraries created its own collection development policy that states specifically what types of documents it is responsible for archiving. The Virginia State Law Library's statement is:

> The digital archive collection of the Virginia State Law Library consists of all publications issued by the Supreme Court of Virginia, such as annual reports, special studies, handbooks, directives, etc.
>
> The Law Library is also committed to collecting all publications issued by the Judicial Council of Virginia and the range of administrative divisions, commissions, and task forces operating within Virginia's judicial branch of government. The Library will seek and retrain copyright permission for those materials not in the public domain.
> — http://www.legalinfoarchive.org/

As an example, the Supreme Court of Virginia's website contains Adult Drug Treatment Court Standards under the Drug Treatment Court section. The current version of the document reads "Adopted September 23, 2006 (Revised 10/07)." Unfortunately, the original version of this document was replaced when the revision was released. Since both of these documents were born digital there is no hard copy of the original standards in any library in Virginia. The Chesapeake Project has harvested both the original document and the revised document, so both documents will be forever accessible through the archive.

The Chesapeake Project participants have been collecting statistics and data about the project for the past two years, and early results have proven the effort to be very effective. A recently conducted two-year project evaluation showed 14.3 percent of the items harvested are no longer available on the Web, up from 8 percent after the first year. We fully expect this number to continue to rise as the project continues. During this time, the project's digital archive was populated with more than 4,300 digital items representing nearly 1,900 Web-published titles, the vast majority of which have no print counterpart.

If you are interested in viewing the materials collected by the Chesapeake Project, visit http://www.legalinfoarchive.org/. From this page, users can browse each institution's collection or search single or multiple collections. To browse a particular collection, select Browse from the main page. Then use the drop-down box in the upper left corner to select each institution's collection. To search, select the Search link from the main page and use the search fields to compose a search. The default is to search across all libraries in the project, but the user can easily change the selected libraries to one institution.

We will continue to add materials to the archive, and we are currently looking to recruit other law libraries to the project, hoping to inspire a "nationwide preservation program." While the Chesapeake Project cannot save every born-digital document, we hope to create a robust archive of materials and to provide researchers permanent access to these critical documents.

Dealing With Bar Complaints

by Kathryn R. Montgomery, Assistant Bar Counsel

IF YOU'VE EVER RECEIVED an envelope from the Virginia State Bar stamped "Personal & Confidential" in red ink, you know the feeling: a mix of disbelief, fear, and anger. Here you were, minding your own business, when suddenly you find yourself the subject of a bar complaint. You feel like you've been punched in the stomach, but you know a response is required. Before taking action, however, it may be helpful to understand how the bar complaint arrived on your desk.

All complaints received by the Virginia State Bar are analyzed by intake counsel. The standard for review is "does the conduct questioned or alleged present an issue addressed by the Rules of Professional Conduct?" For example, a bar complaint that asserts a lawyer was rude usually would not present an issue under the Rules, but an allegation that a lawyer failed to return a client's telephone calls would implicate Rule 1.4, which governs client communication. If the complaint meets the standard of review, a copy is mailed to the subject lawyer (respondent) for a response within twenty-one days. If the complaint is facially insufficient, the bar takes no action other than to advise the complainant of its decision. The subject lawyer is not notified. Internally, the bar refers to these as "no action taken" cases. Intake counsel estimates that half of the complaints received by the VSB become "no action taken" files.

So what should an attorney do upon receipt of a bar complaint?

Respond promptly.
Perhaps the worst response to a bar complaint is no response. While silence may be golden in criminal matters, it can fail miserably in bar proceedings. Bar counsel has the authority to dismiss complaints after receiving the respondent's answer, but cannot do so if the lawyer fails to give his or her side of the story. Therefore, in the absence of a response, bar counsel almost always refers the complaint to a bar investigator to gather documents and interview witnesses, which usually include the complainant and respondent. Another reason to answer is that, unless criminal activity is involved, there is no Fifth Amendment right to silence in disciplinary matters. Finally, a failure to respond could be deemed to be a violation of Rule 8.1 of the Rules of Professional Conduct, which provides that a lawyer shall not "fail to respond to a lawful demand for information from an admissions or disciplinary authority."

Consider whether to retain counsel.
Many lawyers who receive a bar complaint retain or at least consult with another lawyer to prepare the response. Even the U. S. Supreme Court has quoted the adage "a lawyer who represents himself has a fool for a client." *Kay v. Ehrler*, 499 U.S. 432, 438 (1991). When a lawyer is too close to a legal issue, as he or she may be when accused of ethical misconduct, good judgment and common sense are often cast aside. Hiring counsel, or at least having a colleague review the response, may help ensure that the lawyer's license does not suffer the same fate.

That being said, many respondent attorneys do not retain counsel and submit well-prepared and persuasive answers. All effective responses have one thing in common: they objectively and thoroughly explain the lawyer's side of the story and, when appropriate, attach supporting documentary evidence.

When appropriate, attach supporting documents.
The more information a lawyer submits to support his side of the story, the more likely the bar complaint can be dismissed without further investigation. For example, if a complainant alleges that her lawyer failed to communicate, a response that includes copies of the lawyer's letters or e-mails to the complainant may be sufficient evidence upon which bar counsel may dismiss the complaint without further investigation.

Respect client confidences
Under Rule 1.6, which governs client confidences, a lawyer may reveal confidential information to respond to allegations contained in a bar complaint. The lawyer must be careful to reveal only what is reasonably necessary to defend himself, and must avoid disclosing unrelated client confidences. In cases where the complaint was filed by the client, the respondent lawyer may be tempted to reveal embarrassing information about the client or to make intemperate remarks. Resist the urge.

Do not bill the client for responding to the bar complaint.
Another urge a lawyer may have upon receipt of a bar complaint is to bill the client for responding, especially if the client is the complainant. Billing for time spent answering a bar complaint, however, could be construed as a violation of Rule 1.5, which governs fees. While the Supreme Court of Virginia has not spoken on the issue, a few years ago the Oregon Supreme Court affirmed a public reprimand imposed upon a lawyer for billing his client $67.50 for responding to a bar complaint filed by the client. That court found that the legal fee was clearly excessive because it was charged for time spent exclusively representing the lawyer's own interests, not those of the client. *In re Paulson*, 71 P.3d 60 (Or. 2003).

Last year the Virginia State Bar received approximately 4,200 bar complaints. Despite an attorney's efforts to stay on the right side of the ethics rules, at some point in his or her career the lawyer may be on the receiving end of a "Personal and Confidential" envelope from the bar. Should you find yourself in this unpleasant situation, remember to stay calm, consider talking to counsel, file a prompt and thorough response, and maintain a professional demeanor toward the client.

Fee Dispute Resolution Saves a Lawyer's Time, Money, and Reputation

by Nader M. Hasan

HAS A CLIENT QUESTIONED YOUR FEES after an unfavorable or mediocre result?

As attorneys, there is nothing we fear more than a letter from the Virginia State Bar stating that a client has filed a complaint against us. Regardless of the complaint's validity, the time required to review the file and prepare a detailed response leads to unnecessary stress. The same holds true when it comes to fee disputes with a former client. A sample letter reads:

> Dear Virginia State Bar:
>
> I paid my attorney $750 to represent me on a reckless driving charge. I never actually met with him until my court date. From the moment we met that morning, he recommended I accept a plea agreement. I accepted his advice, and as I waited for my case to be called, I realized that people with the same charge and driving record received the same sentence *without* attorneys. I asked him to see my file and there may have been one or two pages in the folder. I later learned (while paying my fine) that he had three other cases that same day, and all of his clients told me the same thing happened to them. He only worked fifteen to twenty minutes to negotiate a deal I could have negotiated myself. I want my money back.
>
> Sincerely,
> Former client
>
> P.S. My only word-of-mouth advertising for this lawyer is that he's a scam artist.

Early in my career, I was fortunate enough to have a friend and colleague, Timothy R. Hughes, introduce me to the Virginia State Bar Fee Dispute Resolution Program (FDRP). While providing me guidance as a solo practitioner, he impressed upon me the importance of maintaining your credibility by standing behind the services you provide to the public. He gave me a simple paragraph to add to my retainer agreements to help prevent letters such the example above. The agreement clause reads (with minimal modification):

> The last thing our firm wants is to have a dispute with our clients regarding our representation, our fees, or any other matter. Further, we do not want to create litigation in court over fees associated with legal representation. Our firm agrees that any fee disputes will be arbitrated through the Virginia State Bar Fee Dispute Resolution Program. More information regarding this program is available at http:www.vsb.org/site/public/fee-dispute-resolution-program/. If litigation or arbitration is required to enforce this agreement, and it is not through the Virginia State Bar Fee Dispute Resolution Program, then the prevailing party will be entitled to their attorney's fees and costs. The laws of the Commonwealth of Virginia will apply in connection with this agreement.

When reviewing this paragraph with my client, it provides me with an additional opportunity to establish trust in my firm, as well as my credibility as an attorney. I explain to my client that the VSB licenses me to practice law and that I am willing to accept the opportunity to defend the reasonableness of my fees before VSB's Fee Dispute Resolution Program. I further explain that a panel of attorney and non-attorney arbitrators makes the decision and that it only costs $20 to initiate the hearing process.

Neither the client nor the lawyer needs to retain counsel to participate.

I am surprised to learn how few of my colleagues know this program exists and the benefits it provides to the firm. The program informs the client that it cannot hear their dispute unless it is purely monetary, and that there is no existing claim of an ethical violation. Their signature agreeing to this is required to proceed with the FDRP.

Clients will typically agree to this because of time. If they do not agree, then they are left with the option of pursuing any ethical or malpractice claim they may have. The FDRP can provide a hearing sixty to ninety days after receiving the petition.

The benefits for the attorney are legitimacy, credibility, an alternative to an ethical violation claim, less expense, and expeditious resolution. Why not use it? It works, and the legitimacy of your firm and our profession are bolstered.

Retired General Back in South Hill, Practicing Law and Sharing What He Has Learned

by Dawn Chase

Day Work to Duty
by Bruce E. Robinson
www.bruceerobinson.com, $8.50

Bruce E. Robinson's ***Day Work to Duty*** is an autobiography with stories you wish you'd heard from an admired relative when you were growing up — an account of "what my life brought to me and what I did with it." It's a retroactive blueprint, matter-of-fact, with no conceit in its pages.

Not that pride wouldn't be justified. On August 1, 2007, Robinson retired as a major general in the U.S. Army Reserve, after commanding the 98th Division (Institutional Training) — the Iroquois Warriors, with headquarters in Rochester, New York. The 98th was charged not only with preparing weekend warriors for a long-term mission with Operation Iraqi Freedom, but also with preparing American soldiers to train an Iraqi security force.

Robinson, 60, now is a busy South Hill lawyer — a bankruptcy trustee, a substitute judge, a special justice who presides over adult mental competency hearings, and a twenty-plus-year member of the Virginia Legal Aid Society's board of directors.

But that's deep into the story.

Day Work to Duty traces the development of a man who was born into the projects of Philadelphia. He didn't have a drive toward any particular career or life dream — he just wanted to help others and make a decent living along the way.

What he had was the ability and willingness to work hard. Those traits caught the eyes of mentors throughout his life — another gift. And, from his teens on, he could recognize an opportunity and grasp it.

This is what Robinson says of "day work":

> I am of the stock of hardy people initially tied to the soil of the American South. One distinguishing feature they shared is their willingness to do a day's work. "Day work" was the common vocational vernacular for women of color who did domestic work. It was a form of entrepreneurship by which one could work in multiple venues during the week and not be controlled by one master.

It was through day work that Robinson's family was able to purchase a home and move out of the projects. Robinson himself did odd jobs throughout his childhood, and added part of his earnings to the family's budget.

When school ended, Robinson piled into the car with his siblings to ride to South Side Virginia, where they spent summers helping extended family with their tobacco crop. They had to prearrange their Virginia rest stops so they would not encounter facilities that did not welcome African Americans.

Robinson received an appointment to West Point, which taught him to study and tested his endurance in many ways. In his third year, Martin Luther King Jr. was assassinated and riots broke out across the nation. Robinson and other cadets gazed at newspaper photos of soldiers from the 82nd Airborne Division guarding the U.S. Capitol. "Why are your people doing this?" other cadets asked Robinson.

After completing his five-year Regular Army obligation, Robinson left active-duty service but entered the Army Reserve. Thus began the thread of his civilian life, braided with reserve duty and training that prepared him for his future role in Iraq.

He tells of one year's employment at Philip Morris, manufacturing cigarettes; law school at the University of Richmond; and his first law practice on Hull Street in South Richmond, where he was mentored by, among others,

Bruce E. Robinson

Circuit Judge Frank A.S. Wright, and where he invested in real estate with the help of Juvenile and Domestic Relations Court Judge Arlin F. Ruby.

Robinson writes of his court-appointed criminal defense work and of prosecuting as a commonwealth's attorney, and the philosophy of justice he developed from those roles.

On the military side, he describes the commitment a military spouse must make and ends his salutes to each of his two former wives with: "We … are friends." The challenges of his mission interweave with funerals of 98th Division soldiers, with Robinson presiding as the head of the "Iroquois Warriors family."

His final sketches include musing on the advantages of living alone, his run in the thirty-first Richmond Marathon, and the unfolding of his beliefs about the role of God in his life. All were contemplative experiences that helped him integrate the ribbons of his life — the duty to country, family, profession, and community.

In our cynical society, we're sometimes primed to roll our eyes when a writer enters this territory. But Robinson's perspective is so even, so grounded, and so dedicated to finding the ground, that we can accept his conclusions as the gift he recognizes them to be.

The Year Ahead continued from page 12

and wants to give a statement to a law enforcement officer without the defendant's counsel present. The proposed amendment to Rule 4.2, Comment [5] clarifies that the commonwealth's attorney can advise a law enforcement officer regarding the legality of an interrogation or the legality of other investigative conduct. The proposed amendment to Comment [5] does not authorize a commonwealth's attorney to "script" or "mastermind" the police's interrogation of the defendant. The Virginia State Bar Council will consider at its October 16, 2009, meeting whether to recommend the amendment to the Court.

Legal Ethics

The Standing Committee on Legal Ethics is proposing that the Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 10, be amended to eliminate redundancy in the rule's procedures for notice and public comment. Paragraph 10 as revised would continue to provide sufficient notice and comment periods in the *Virginia Lawyer Register* and on VSB.org as related to draft advisory opinions and proposed rule amendments. Additionally, the rule has been reformatted into new subparagraphs to conform to the recent reformatting of Paragraph 13 of the Supreme Court Rules. The proposed changes to Paragraph 10 will be voted on by VSB Council at its October 16 meeting. If approved, the proposed amendments will be presented to the Court for approval.

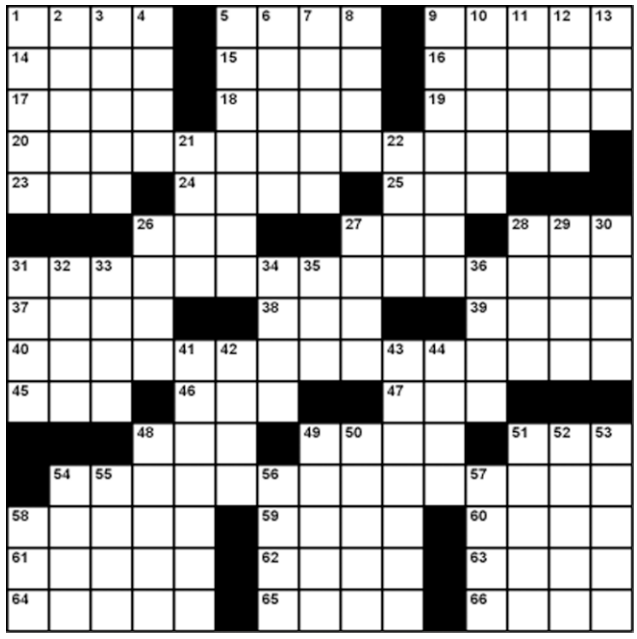
Member Directory

The VSB's online Lawyer Directory has been well-received by the bar and the public, with very few complaints. As of September 14, 2009, only 2,109 members out of 27,798 active "in good standing" (IGS) members have elected to not be listed in the directory. Members who seek admittance to local and regional jails and courts may wish to be listed in the directory, because sheriffs and administrators of the regional jails are aware that the directory lists of 92.4 percent of the active IGS members of the VSB. If you decide to change your status in the directory, just go to Member Login, enter your member number and password and select Virginia Lawyer Directory Options.

If you need assistance, do not hesitate to email me at gould@vsb.org. I hope you are successfully weathering the economy and enjoying the practice of law. ■

Go Ask Alex

by Brett A. Spain



Crossword answers on next page

Across

1. Apothecary's dose
5. Normandy city
9. Bizarre
14. "Lovely" meter maid
15. Wish
16. Normal
17. Top Gun grads
18. Basic gymnastics skill
19. "So much" in music
20. This is the act of formally charging a crime through a grand jury
23. NASA vehicle
24. "Straight up"
25. Hybrid, e.g.
26. Goof
27. NYC hours
28. Novelist Harper
31. This is the endorsement that accompanies the act in 20A
37. Chaplin wife
38. Paul or Howard
39. Kinks' hit
40. This is the act of seating a jury
45. Wino
46. More for Pedro
47. Globe
48. Conifer
49. Sesame Street denizen
51. Wardrobe malfunction dept.?
54. This attaches when 40A follows, 20A and 31A
58. Caribbean island
59. Serf
60. Prepares to feather?
61. Cause
62. Common teen problem
63. Disorderly protest
64. Sleep loudly
65. Bankruptcy filing result
66. Charity

Down

1. Way to identify a southerner
2. Nouveau _____
3. B.A. Baracus outfit
4. Non-judicial military hearing
5. Shot followers
6. Main artery
7. Spaceship Earth Pavillion locale
8. Flavored soft drink
9. Make obsolete
10. Continental rival
11. Nunc pro _____
12. "Round and Round" group
13. "Evil Woman" group
21. Crucifix inscription
22. Wolfpack coll.
26. Coup d' ____
27. Sea eagle
28. Disney's Simba
29. Fashion magazine
30. Israeli airline
31. Stuns
32. Twinkie relative
33. Med. sch. subject
34. Fine or liberal follower
35. Also
36. Spill the beans
41. Copy
42. Indian dress
43. Wayan brothers 1992 film
44. Stage accessory
48. Animal House college
49. VCR button
50. Infamous Helmsley
51. Slight
52. Floppy successor
53. Dermatologist's concerns (hopefully)
54. Songbird
55. Les Miserables author
56. Resort amenities
57. Gillette razor
58. Crunch target

This legal crossword was created by Brett A. Spain, a partner in the commercial litigation section of Wilcox & Savage PC in Norfolk. He can be reached at (757) 628-5500 or at **bspain@wilsav.com**.

Crossword answers.

Story continued from page 10

Our efforts are not limited to the video profiles. I have asked lawyers and judges from across the state to write essays about their lives, about their passions, about what drives them on a daily basis. Check out VSB.org and click on Reflections to read about the journeys of many of our best. George Shanks of Luray talks about the life of a small-town practitioner. Tidewater lawyer Lynn Marie Kohm talks about the importance of her faith and her quest for justice. Juvenile and Domestic Relations Court Judge Pamela Brooks from Loudoun County understands the importance of her coaching and umpiring youth softball and how youth sports help keep kids out of her courtroom. Think they are all basically variations on a theme? Not for a moment. Look no further than Jim Korman's hilarious essay on his days at summer camp when he was called upon to defend the "worst waiter in history" and how he knew that he was destined to become a lawyer in real life. These reflections are simply not to be missed.

I am very proud of our online presence although I must confess I am still embracing Twitter and some of the other more foreboding aspects of social media. Nevertheless, we are doing all we can to get our stories out to the public. Please join me on this journey.

One of my ever-helpful colleagues reviewed a draft of this message before going to print and predictably commented, "But Jon, you are no John Feinstein." True enough, but so far, we are holding our own against him on YouTube. Stay tuned. ■

Local Bars continued from page 49

The good works of three bar associations are representative of how local bar associations enable lawyers to realize what Governor Bailies recognized as their inherent desire for public service. The CLBA will continue this year to assist local bar associations as they strongly encourage pubic service by Virginia lawyers.

The next Solo & Small-Firm Practitioner Forum is scheduled for Monday, March 8, 2010, at the University of Richmond School of Law. Details and registration information will be available in January at http://www.vsb.org/site/conferences/clba/.

1 The full text of Governor Baliles's remarks at the July 21, 2008 Solo and Small-Firm Practitioner Forum at Virginia Beach are published on the VSB website. Look for "Conferences" and "CLBA."