



The Virginia Bar Association
YOUNG LAWYERS DIVISION

Opening Statement™

THE OFFICIAL PUBLICATION OF THE VBA YOUNG LAWYERS DIVISION

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INTRODUCTION

Spring Has Arrived

We are pleased to present the Spring 2015 issue of *Opening Statement*. In this issue, YLD Chair Nupur Bal highlights several YLD projects and looks ahead to an exciting year (page 3), and we also feature the recently reinvigorated UVA Law School Council (page 2). We interviewed Sam Towell and the Hon. Daniel E. Ortiz, recipients of the YLD's Sandra P. Thompson Award, about their experience over many years of active involvement in the YLD (page 4). In addition, Matt Finley offers advice about how to succeed when creating a new prosecutorial position (page 6), and Dan Mauler explains recent amendments to Virginia's fraudulent conveyance statutes and advises lawyers how to avoid sanctions (page 10). You will also find some photo highlights from the most recent VBA Annual Meeting (page 8).

The goal of *Opening Statement* is to tell the story of the Young Lawyers Division and to promote community within the YLD. If you are planning a YLD event, please let us know how we can help publicize it and increase participation. After your project or event is over, please send us a write-up and photos so that we can share your successes with the rest of the Young Lawyers Division and the VBA. Let us be your voice!

In addition, the *Opening Statement* Editorial Board is always looking for substantive articles to include in this newsletter. Please consider turning a recent experience or research assignment into an article to share with your fellow young lawyers. If you are a more experienced lawyer reading this newsletter, please consider writing an article for *Opening Statement* to share your wisdom with attorneys who are in the early stages of their career. We look forward to receiving your submissions, and we welcome your comments and suggestions. You may contact us at: editors@openingstatement.org.

Thank you for reading. We hope you enjoy this issue of *Opening Statement*!



Andrew B. Stockment
Editor-in-Chief



Matthew D. Baker
Development Editor



Daniel D. Mauler
Development Editor

VBA Summer Meeting

The Virginia Bar Association will hold its **125th VBA Summer Meeting** on **July 23-26 (Thurs. - Sun.)** at The Omni Homestead Resort in Hot Springs, Virginia. The Summer Meeting will have many CLE opportunities to sharpen your legal acumen and learn from leading lawyers, as well as opportunities to network, play golf, hike the Allegheny Mountains, and enjoy the many resort amenities. The YLD will have programming specifically geared for young lawyers, including the third installment of the VBA Leadership Series, as well as opportunities to socialize with lawyers of all ages. We encourage you to be a part of this historic meeting!

More details coming soon at:
vba.org/vbasummer15

Upcoming VBA Events

June 3: 17th Annual Health Law Legislative Update and Extravaganza

July 23-26: 125th VBA Summer Meeting

Aug 6: ABC Networking Social in Richmond

Sept 10-12: 45th Annual Conference on Labor Relations and Employment Law

Sept 30: 2015 VBA/VSB Appellate Summit

Oct 2-4: YLD Fall Meeting

View the complete calendar at:
vba.org/calendar

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FEATURED PROJECT

UVA Law School Council Reinvigorated

Continuing its mission to increase the VBA's presence on Virginia law school campuses, the YLD Law School Councils recently reestablished a student organization on grounds at UVA. The new UVA Law School Council will be led by co-chairs **Carrie Stanton**, an associate at Williams Mullen, and **Seth Ragosta**, an associate at Lenhart Pettit. **Henry Young**, 2L at UVA Law, is the new UVA Council president.

The mission of the law school councils is to introduce the VBA to law schools and provide networking and mentoring opportunities for students interested in practicing in Virginia after graduation or at some point in the future. We believe early VBA membership is an important part of developing a new law practice, and the best time to introduce new VBA members is right before they begin practice. The YLD supports seven active law school councils: Appalachian School of Law, George Mason University, Regent University, University of Richmond, University of Virginia, Washington and Lee and William and Mary.

The inaugural event for the new UVA Council was a mixer happy hour co-sponsored with the Young Lawyers Section of the Charlottesville Albemarle Bar Association. The event took place on February

26 at Livery Stable in Charlottesville, and was well attended by students and local young lawyers. Students enjoyed the opportunity to meet with local practitioners, and both the local bar and the UVA Council are excited for future events. Henry reported that, "Everyone was so welcoming and genuinely seemed to enjoy practicing in Charlottesville," and **Billy DuVal** (a 2L in UVA's JD/MBA program) commented that, "It was great to meet local attorneys in a casual setting. Hearing about all the different types of law being practiced in Charlottesville was a huge eye opener." **Michael Sanders** (1L) echoed that sentiment, "As a first year student, I really enjoyed meeting local lawyers and learning about the very different things they work on. It was a great experience and everyone was having a great time."

Please consider participating in your law school's council! For more information about the UVA Law School Council, contact Seth Ragosta (434.817.7979 or sjr@lplaw.com) or Carrie Stanton (434.951.5708 or cstanton@williamsmullen.com). For more information about the YLD Law School Councils in general, contact **Nancy Lester** (804.663.2331 or nancy.lester@ogletreedeakins.com). ■



The University of Virginia School of Law

Courtesy: Andrew Stockment

Looking Ahead

By Nupur S. Bal

The Young Lawyers Division has been busy! 2015 has gotten off to a great start and it is my pleasure to share with our readers what we have been up to.

VBA ANNUAL MEETING

At The Virginia Bar Association's annual meeting in Williamsburg in late January, VBA President **Harry M. "Pete" Johnson, III** launched a leadership series directed towards members of the Young Lawyers Division ("YLD") members. It featured a leadership panel for young lawyers where Attorney General Mark Herring and General Counsel for Altria, Denise Keane, shared their experiences. The YLD also hosted a "Pints and Pairings" judicial networking reception, providing young lawyers an opportunity to network with the esteemed members of our judiciary in a casual environment. Finally, the YLD held our business meeting where **L. Lucy Brandon, Franklin R. Cragle, III, Laura Lee Golden Liff, Andrew T. Richmond, W. Randolph Robins, Jr. and Lauren W. Wheeling** were elected to the Executive Committee—a warm welcome to our new EC members!

LAW SCHOOL COUNCIL

Our law school councils have been hard at work! Recently, on March 20th, the University of Richmond Law School Council, in conjunction with YLD, presented an Ethics Symposium on Client Confidentiality in the Social Media Age. It was a wonderful program that Pete Johnson and I had the pleasure of

attending on behalf of the VBA. The University of Virginia Law School Council also had a networking reception in conjunction with the Charlottesville Bar Association on February 26th (see page 2). Finally, the George Mason University Law School Council is hosting their 18th annual public interest auction to raise money for scholarships for law students who work unpaid internships during the summer—and the YLD is happy to be co-sponsoring that event.

PRO BONO

There are also plans underway, through the YLD's Domestic Violence Project and the Central Virginia Legal Aid Society, to organize training sessions on providing pro bono representation to domestic violence victims who require protective orders. In addition, the YLD hosted a training session in Roanoke for the pro bono hotline on February 12th.

LEGAL FOOD FRENZY

The Legal Food Frenzy, a collaboration between the Attorney General's Office, the VBA-YLD, and the Federation of Virginia Food Banks kicked off on March 30th and ran through April 10th. For those of you are unfamiliar with it, Legal Food Frenzy is a food and fund drive/competition that has raised more than 11.4 million pounds of food over the past eight years. We have had a number of kick off receptions throughout the Commonwealth. On March 26th, the YLD hosted happy hours at Chef Geoff's in Tyson's Corner and at The Quarter Restaurant in Roanoke. On

April 2nd, the YLD hosted kickoff receptions at Gordon Biersch in Virginia Beach and Pearl Raw Bar here in Richmond. All the events were well attended and had representatives from the area food banks as well as YLD leaders in attendance.

OPEN WORLD RULE OF LAW PROGRAM

Finally, there is a novel opportunity that the VBA-YLD is participating in. The Norfolk Sister Cities Association (in conjunction with the United States District Court, local courts, and several Virginia law schools), under the auspices of the Open World Rule of Law Program sponsored by Congress, is hosting a group of lawyers from the Republic of Georgia in April. The YLD will host a luncheon on April 13th in the Tidewater area for young Virginia lawyers from different backgrounds to meet with the lawyers from the Republic of Georgia.

SPRING MEETING

We are now preparing for our Spring Meeting, which is being held in conjunction with the VBA Board of Governors this year (for the first time ever!) from April 23rd-26th at the Sanderling Resort in the Outer Banks, NC. We are excited and honored to have the Board attend our meeting and look forward to a dynamic dialogue between our groups.

Personally, I am enjoying immensely my year as Chair. It is challenging and rewarding. If I can assist you in any way, please don't hesitate to contact me. ■



Nupur S. Bal

Associate, Batzli Stiles Butle PC (Richmond)

Practice Areas: Family Law and Divorce

Law School: Tulane University Law School (2005)

College: Emory University (2002)

VBA Leadership: YLD Chair (2015 - Present)

Awards: Virginia Super Lawyers Rising Star (2015); Virginia Business Legal Elite (2014); People's Choice Award, Richmond Times Dispatch; Influential Women of Virginia, Virginia Lawyers Weekly (2015).

Bio: In addition to her law practice and her work as YLD Chair, Nupur is also active in her community, serving as a board member for SCAN (Stop Child Abuse Now) and volunteering her time to provide pro bono services.

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Interviews with Sam Towell and the Hon. Daniel Ortiz

On January 23, 2015, at the 125th Annual Meeting of The Virginia Bar Association, Samuel T. "Sam" Towell (Deputy Secretary of Agriculture & Forestry) and the Hon. Daniel E. "Dan" Ortiz (Circuit Court Judge for Fairfax County) were presented with the 2014 Sandra P. Thompson Award in recognition of their outstanding work and long-term service.

Sam and Dan, congratulations on receiving the Sandra P. Thompson Award! What prompted you to get involved in the VBA?

Dan: I joined the VBA 12 years ago when my mentor/employer Judge Keith (a former VBA president) recommended that I get involved in the VBA-YLD. He took the time to introduce me to the organization. **Sam:** I was dragooned into service in 2007 by Ben Pace, a then-senior associate at my first law firm, Williams Mullen. He was looking for volunteers to serve as attorney-advisors to high school students in the Model Judiciary Program.

What projects have you worked on during your time in the Young Lawyers Division and what leadership positions have you held?

Sam: I moved through most of the positions of the Model Judiciary Program. I started as an attorney-advisor for a Richmond high school. I then served for a few years as the Richmond Region Coordinator before becoming the Statewide Coordinator for a couple of years. After I devoted more of my time to the Executive Committee, I remained involved in assisting with the coordinating of the program. I also volunteered most every year with the National Moot Court Program. Besides my stint as statewide coordinator of the Model Judiciary Program, I served on the Executive Committee from 2010 until 2014. **Dan:** I worked on a variety of projects throughout my tenure with the YLD. I began with the Professionalism and Civility Committee and developed an ethics CLE for young lawyers. Over the years I have participated in the Pro Bono Hotlines, Domestic Violence Projects, and other membership activities. I was the Chair of the Professionalism and Civility Committee, served on



Hon. Daniel E. Ortiz



Samuel T. Towell

the YLD Executive Committee, and served as YLD Chair.

Tell us about some of your favorite YLD memories.

Sam: The Spring Meeting at the Sanderling is a perennial favorite. Not only do you get to interact with your peers in a relaxed setting, you also have the opportunity to meet their families. I also enjoyed working with the members of the Richmond area bench, the volunteers from the Courts of Appeals and the Supreme Court, and other attorneys as high school students presented their trial and appellate arguments in the Model Judiciary Program. **Dan:** Like Sam, some of my favorite memories with the YLD were at the Spring Meeting in Duck. The Spring Meeting has many of the best attributes of a "lawyer conference." It is at a great location, great people attend, and I always came out of the meeting energized about the VBA. Spending time with my family and the other families of the YLD members in Duck on the beach, cooking s'mores in the evening, and having fun is one of my favorite YLD memories.

How has your participation in the VBA impacted your development as a lawyer?

Dan: The YLD has been a valuable part of my development as a lawyer, allowing me to develop and hone my skills as a lawyer through service in various YLD programs

and pro bono activities. More importantly, it has been a great networking opportunity to meet lawyers from across the Commonwealth and different practice areas, while fulfilling my aspiration to serve our profession. **Sam:** Active service in the VBA put me in touch with some of the most experienced and influential law-

'Find one of the over fifty projects or programs that inspires you and commit to it. Get involved with one project and all of the benefits of the YLD will be available to you.'

yers in the Commonwealth. I learned a great deal from them—skills I was able to employ both in my practice and as I developed professionally.

What was the most rewarding aspect of your time in the VBA Young Lawyers Division?

Sam: Watching the transition to the next suite of leaders in the YLD has been particularly rewarding. I was honored to chair the 2014 Nominating Committee, and from that position I was able to see how bright the organization's future is. **Dan:** Making new friends in the YLD has been the most rewarding aspect of participating in the YLD.

What do you see as the YLD's greatest challenges and opportunities in the years ahead?

Sam: By its very nature, the YLD undergoes a complete turnover every few years. As a result, institutional memory is limited. However, that also means that every participant has the opportunity to reinvent a part of the YLD. New programs are always encouraged, and the YLD is terrific at putting resources behind members' ideas. I am looking forward to seeing what future teams develop. **Dan:** The greatest challenge

is to continue to engage new lawyers and introduce them to the YLD. Once young lawyers get involved, the YLD sells itself.

What advice would you give to young lawyers beginning their careers and thinking about getting involved in the VBA? Do you have any thoughts on the best way to get plugged in?

Dan: Pick a committee or project with the YLD that matches one of your interests and join it. Listen to the advice of a lawyer

at your firm about what to get involved with or solicit the input of the YLD Chair. Find one of the over fifty projects or programs that inspires you and commit to it. Get involved with one project and all of the benefits of the YLD will be available to you. **Sam:** Become engaged. Service in any program will present an opportunity to make your mark and take that program in your own direction. The YLD leadership is terrific about supporting those kinds of endeavors, and undertaking those types of challenges will bring you to the attention of the leadership. ■

Submit Your Article or Event Write-up to *Opening Statement*

The *Opening Statement* Editorial Board welcomes the submission of articles by young lawyers. Generally, articles should be about 1,300 words and should be on a topic of interest to young lawyers. (Longer articles are may be divided into two installments and published in successive issues.)

Articles. Substantive article topics may include, for example:

- New developments in the law
- Day in the Life of... (e.g., "Day in the life of a Circuit Court law clerk" or "Day in the life of an assistant city attorney")
- Recent experience with... (or Lessons learned from...) (e.g., "Lessons learned from taking a legal aid pro bono case", "Recent experience with arbitration", or "Lessons learned from participating in the VBA Veterans Issues Task Force")
- Tips/Advice (e.g., "Arguing your first jury trial", "Tips for effective negotiations", or "How to handle your first client meeting")
- General Overview of a legal practice area (e.g., "Understanding partition suits" or "What every lawyer should know about property settlement agreements," etc.)

We welcome articles that are written specifically for *Opening Statement*, as well as articles that are adaptations of previously published material, such as blog posts, articles from firm newsletters, excerpts or summaries of law review articles, etc.

The complete Author Guidelines and the VBA Publication Agreement are available online at: www.openingstatement.org.

Photos and Event Write-ups. In addition to substantive articles, we are also interested in receiving photos and/or write-ups from YLD events. If you took photos at a YLD social or other event, please pass them along to us for possible use on the YLD website or in the *Opening Statement* newsletter.

Please send your submissions or questions to the *Opening Statement* Editorial Board at: editors@openingstatement.org.

Do It Yourself Prosecution: Creation of a New Prosecutorial Position

By Matthew G. Finley

It may be rare for a new attorney, but I was fortunately tasked to grow a new position. Some would say I reinvented the wheel. But if inventing the wheel in my own interior cubicle grants me new insight into prosecution and process, then it is worth doing. I would encourage any new attorney with the opportunity to redefine a position to do so and to take some thoughts into consideration.

Prosecution—like politics—is about people, and, however cliché, that adage serves an attorney well in the creation and implementation of a prosecutor position. These points will be old news to someone currently prosecuting, but any new attorney would do well to take these points to heart.

1. Your legal assistant/paralegal is the keystone to successful implementation.

You are not as good at this as you think. No matter how much you studied in law school, or how late you stay at the office, you have no idea how the courts in your jurisdiction function. There are only two groups of people who understand this jungle: the court clerks (see below) and the legal assistants/paralegals in your office. You may also believe, falsely I'll add, that you can absorb the legal assistants' and paralegals' understanding of the court system, perhaps through a crash course or standing near them for an extended period of time.

The bottom line is that these positions exist for a reason that is sometimes lost on new attorneys. These individuals know more about the specific court process in your jurisdiction than you could ever know save from years of practice. This makes them essential to a new attorney and even more essential to a new attorney defining a position. You should clear everything by them; learn how they do things, but most importantly how the courts do things. Minute rules such as what exactly a

circuit court wants in a Motion for Continuance are impossible to find unless your jurisdiction publishes their Rules of Court (a chance inversely related to how rural the jurisdiction), but are essential to lend credibility to yourself and your position and to find immediate success.

2. After your legal assistants and paralegals, the court clerks are essential to your success.

You are not in the court clerk's system. They don't know you and they don't know what you do. The odds of you actually receiving notice of a case you are intended to try are practically zero. A priority should be introducing your-

'[T]he legal assistants' and paralegals' understanding of the court system...makes them essential to a new attorney...'

self to everyone in the clerk's office as soon and as thoroughly as possible.

Once you have met the clerks, you should aim to understand their process for getting cases to you or the office. How are the clerks going to know you are attached to a case as the prosecutor? Are you going to get notice from them, the police officers, your office itself, or are you responsible for checking? Knowing how the process currently works enables you to make suggestions for how it may work more efficiently or more to your organizational liking.

Much of what you may suggest depends on how your office organizes cases among the prosecutors, i.e. date or offense. Organizing by offense allows you to address the process for those particular cases. Organizing by date means that your office has more responsibility in getting files to you, but you should have no problem reckoning that process because you are already getting to

know the legal assistants and paralegals in your office (see #1 above).

3. Black letter law, while important, is nowhere near as important as shepherding your case through the court system correctly and efficiently.

The most time consuming work you do as a new prosecutor is learning procedure—all the procedure. This will be best illustrated with a hypothetical.

Imagine a case comes across your desk. Your first question should be, "where did this come from? Did the law fairy place it in my chair while I was schmoozing with court clerks and judges?" No, but we'll come back to that. You open the file. It's a simple possession of marijuana case. You don't even know what marijuana is because you're a prosecutor and you passed character and fitness, but a quick search of the Virginia code leads you to the correct code section with all the elements you need to prove. Bingo! Close the folder and shove it in a drawer until the morning of.

You walk into court, thoroughly pleased with your command of the English language and search engines only to find out that your officer did a field test of the alleged drugs that he

'[T]he second a judge says, "That's not how I do things in my courtroom,"...be ready to pivot.'

found in the defendant's jacket strewn across the backseat, which came back negative. Further, the defendant is represented and said lawyer filed a DC304 form requesting a Certificate of Analysis, and he wants to argue chain of custody, forcing you to subpoena the chemist who tested the substance.

If you failed to study the procedure

surrounding the crime you're prosecuting, you're going to have a bad morning. The point is that you will lose many more cases on a procedural misstep than failure to prove an element. Failure to prove an element may say more about the facts of the case than your skill as an attorney. Become a scholar of criminal procedure and know every option at your disposal.

4. Be open, be courteous, be curious and everyone will want to help.

People like to talk, mostly about themselves. That's not a judgment, merely an observation. And you would be wise to let them talk, about themselves, at you. There's a fine line between pretending to be interested in someone and genuinely being interested. My advice is to be genuinely interested, because it's much too late in anyone-that-will-read-this's career to learn to believably feign interest. Ask questions, ask how they would run the position, what they believe is important, and be cognizant of their time. Everyone is pleased to help a person who they believe has true interest forming the foundation of their questions.

Not to mention, this practice allows you to speak intelligently with individuals in all levels of the criminal justice process and earns you more credibility, a trait that new prosecutors should be looking to gain in spades.

5. Finally, no matter how sure you are of your plan, implementation, or yourself, it will all change to suit the context in which you are practicing.

Don't get me wrong, planning is an essential step in commencing any new position. But the second a judge says, "that's not how I do things in my courtroom," you should be ready to pivot. That means being amenable to change and having everyone you need on speed dial to inform them of changes in the process. The individuals who have helped you thus far may not enjoy changing once they have agreed on a plan, but see points 1-4 on how they should already be more willing to help now than when you started.

You should also be willing to change a

VBA Online CLE



Nothing beats the total, immersive experience of attending VBA programs in person, but if you have to miss a VBA event, VBA Online CLE provides an opportunity for you to view the programs you missed. Recent additions from the

Summer Meeting include: *Stepping in It: Avoiding the Accidental Franchise in Your Business Plan*, and *15th Annual Review of Civil Decisions of the Supreme Court of Virginia*, and *Drones: A Discussion of the Criminal and Civil Law Impact of Unmanned Aerial Surveillance*. View the full catalog of available VBA Online CLE programs at: vba.org/cle.

Opportunities to Get Involved

Are you looking for an opportunity to get involved with the VBA Young Lawyers Division? You can read about the YLD's more than 50 projects and committees at: vba.org/yldactivities. Just reach out to the project or committee chair to learn more. In addition, the YLD always welcomes ideas for new projects. Just reach out to anyone on the YLD Executive Committee to share your proposal: vba.org/yld.

process that is already in place. There is almost always room for improvement, and clerks and judges may take this opportunity to pitch ideas to a new attorney. Listen and honestly assess the value of such ideas, because many of these individuals are employing a different perspective on the criminal justice process.

There is no seamless way to create a new prosecution position. I would say the same for transitioning into a position already created. But one should set

oneself up for success through meaningful interactions with the individuals in the office, judges, clerks, and law enforcement officers. Learn how the case flows through the system then you can truly make the process more efficient or dam it up and redirect the cases you need to your desk.

Of course, everything could be perfect already, in which case: congratulations. Good Luck! ■



Matthew G. Finley

Assistant District Attorney (Chester County, PA)
(formerly Assistant City Attorney in Hampton, VA)

Practice Areas: Criminal Prosecution

Law School: William and Mary Law School (2014)

Bio: During his time as an Assistant City Attorney in Hampton, Virginia, Matt's work focused on prosecution of marijuana possession and possession with intent to distribute.

Contact Info: mgfinley@chesco.org

VBA Annual Meeting



Courtesy: VBA Staff.

VBA President John Walker and YLD Immediate Past Chair Elaina Blanks-Green present the Sandra P. Thompson Award to Hon. Daniel E. Ortiz.



Courtesy: VBA Staff.

Andrew Baugher and Hon. S. Bernard Goodwyn talk during the YLD's Pints and Pairings Event.



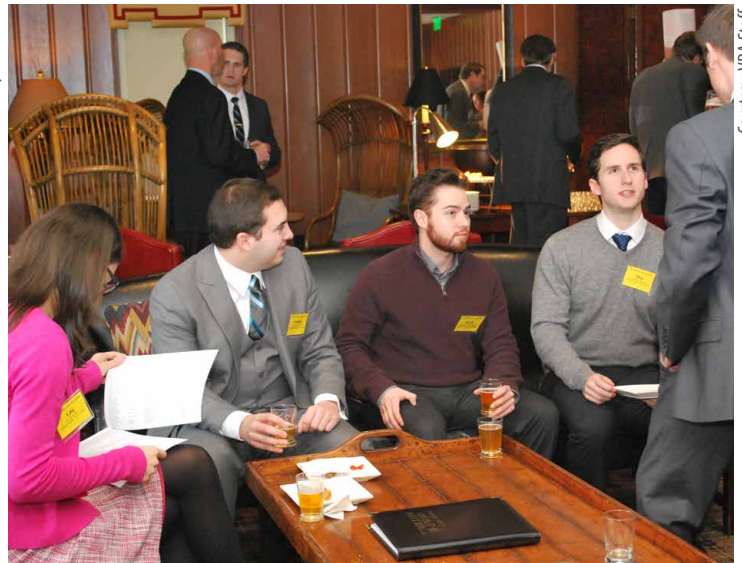
Courtesy: VBA Staff.

Elaina Blanks-Green hands the YLD gavel to Nupur Bal as she transitions to the role of YLD Immediate Past Chair and Nupur steps up to become YLD Chair.



Courtesy: VBA Staff.

YLD Chair Elaina Blanks-Green presents the Emerson G. Spies Award to J. Britton Williston for his enthusiasm, loyalty and dedication to the work of the VBA.



Courtesy: VBA Staff.

Law students socialize during the YLD's Pints and Pairings event.



Courtesy: VBA Staff.

Andrew Stockment and Dan Mauler listen to Britton Williston provide a report on the ABA Awards of Achievement during the YLD Executive Council meeting.



Courtesy: VBA Staff.

YLD leaders attend the annual VBA Leadership Conference on March 31st in Richmond with the VBA Board of Governors and Section Chairs.

Support the VBA Foundation

The VBA Foundation funds numerous programs, including the *Ask A Lawyer Project*, the *Pro Bono Hotlines*, the *Model Judiciary Project*, the *Veterans Issues Task Force*, and *Regional Mentoring Programs*.

To donate or to learn more, visit: vba.org/foundation.

VBA Career Center



The VBA Career Center is an excellent resource for young lawyers seeking new job opportunities. Login now to upload your résumé or browse current openings: vba.org/jobs.

Avoiding Sanctions: New Remedies and Warnings in Fraudulent Conveyance Law

By Daniel D. Mauler

This article is based on the author's interview with Sen. Chap Petersen, who sponsored the recent amendment to Virginia's fraudulent conveyance statutes.

In 2012, Senator J. Chapman "Chap" Petersen (D-Fairfax) sponsored legislation to amend Virginia's fraudulent conveyance statutes. It is no exaggeration to say that his amendment is one of the most significant developments in Virginia's fraudulent conveyance law that traces its history back over 400 years. Recently, I interviewed Sen. Petersen at his law office in Fairfax for his thoughts and the legislative intent behind the amendment.

Sen. Petersen's amendment offers a powerful new remedy against parties who structure fraudulent conveyances on behalf of other judgment debtors but who do not take title to the conveyed property themselves. This provides significant new opportunities for creditors' attorneys. But it also opens up serious liability for the attorney who knowingly assists a client in evading creditors. Young attorneys must be extremely wary the next time a judgment debtor seeks help to hide assets and evade creditors. If an attorney assists a debtor to evade a judgment, the attorney faces sanctions under the new amendment.

AMENDMENT INSPIRED BY THE TRAGIC CASE OF CRAIG AND MARY JO SANFORD

Today, Virginia lawyers are seeing more

complicated schemes to fraudulently convey and hide the assets of judgment debtors. Usually, the assets are not real property, but instead, are items that can be easily hidden, disposed, or transferred. Moreover, these schemes are being devised by professionals (such as lawyers, accountants, or brokers) to assist their clients to hide assets. It was one particular scheme—complete with international intrigue, false identities, and a cameo appearance of the infamous Wikileaks documents¹—that drove Sen. Petersen to sponsor the amendment.

In 2007, Craig and Mary Jo Sanford had just sold a successful small business and were looking forward to retirement. Interested in preserving their retirement assets, the couple was introduced to Jamie Smith, a person who held himself out as a CIA-trained veteran of military operations in the Middle East. Smith convinced the Sanfords to invest their retirement assets in his upstart-company which would provide training services to military and law enforcement personnel. The Sanfords never saw their money again. Represented by Sen. Petersen, the Sanfords sued Smith for fraud and won a \$9.5 million jury verdict in a case tried before Judge Gerald Bruce Lee in the Eastern District of Virginia. The jury verdict against Smith was later affirmed by the Fourth Circuit.²

When the Sanfords attempted to collect on their judgment against Smith, he claimed

that he had no assets, despite the fact that he continued to drive a Mercedes during the litigation. According to Sen. Petersen, Smith's assets had been transferred to his brother and his wife through a number of shell companies. Sen. Petersen recalls (with particular outrage) the involvement of an accountant working for Smith who masterminded the transfer of assets. Without the accountant's help, according to Sen. Petersen, Smith would not have successfully transferred his assets, leaving the Sanfords with an uncollectible judgment.

The Sanfords filed a subsequent suit for fraudulent conveyance, yet the accountant could not be held liable under the old § 55-80 because he was not a transferee of any fraudulently conveyed property.

'Anyone who touched the transaction now faces liability, whether they're lawyers, real estate agents, or accountants. If you touch [the transaction], you're dirty.' –Sen. Petersen

He had certainly participated in the conveyance, yet he never took title to the property. This struck Sen. Petersen as an injustice that required a change to Virginia's fraudulent conveyance law to ensure that such parties would face liability for



Daniel D. Mauler

Partner, Redmon, Peyton & Braswell, LLP (Alexandria)

Practice Areas: Commercial Litigation, eDiscovery & Information Governance, Appellate

Law School: Georgetown University Law Center (2006)

VBA Leadership: *Opening Statement* (Development Editor, 2014 – Present)

Awards: Virginia Super Lawyers Rising Star (2009, 2010, 2014, 2015), Washington DC Super Lawyers Rising Star (2015)

Bio: Dan focuses his practice on courtroom advocacy and technology, and he is currently litigating a fraudulent conveyance case involving these issues in circuit court. When not blogging or practicing law, he is an avid travel photographer, and he wonders when the rest of his colleagues will tire of him hanging his photos in the office.

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their actions.³

VIRGINIA'S FRAUDULENT CONVEYANCE LAW TRACES ITS ROOTS 400 YEARS

To understand the significance of Sen. Petersen's amendment, an overview of Virginia's law of fraudulent conveyances is necessary. Virginia's law on the subject is hundreds of years old and dates back to Elizabethan England. The Commonwealth's fraudulent conveyance statute, codified at Va. Code § 55-80 through § 55-82.2, renders void any transaction by a debtor that is intended to "delay, hinder or defraud" a creditor. This language first appeared in the Statute of 13 Elizabeth, which was enacted by the English Parliament in 1571. One reason for passage was to prevent judgment debtors from transferring their property to family members or other confederates prior to seizure in payment of debts or obligations.⁴ The statute provided liberal authority to courts of equity to set aside such transactions that were deemed fraudulent. "The statute [of 13 Elizabeth] is established for the suppression of fraud, the advancement of justice, and the promotion of the public good. Consequently, it should be liberally and beneficially construed to suppress the fraud, abridge the mischief, and enlarge the remedy."⁵

The Statute of 13 Elizabeth then migrated to the Colonies. "Virginia's present fraudulent conveyance statute is a modified version of 13 Elizabeth with minor variations."⁶ In addition to Virginia, the same "hinder, delay, or defraud" language has been adopted, in some version or another, in most states and in the federal Bankruptcy Code.⁷ Thus, the language originally drafted in 1571 "is the source of fraudulent disposition law in this country."⁸

One traditional remedy for a fraudulent conveyance was to "unwind" the transaction. Developed in cases dealing with real property, such a remedy was generally effective to return the debtor's assets to his creditors. This remedy made sense in the 16th through 19th centuries when a person's major asset was his land. The problem with this remedy in modern times becomes obvious, however, when the fraudulently-conveyed asset is not land, but instead is a fungible item (such as cash or personal property) that cannot be readily traced. How does one "unwind"

a transaction involving assets that cannot be recovered or that no longer exist?

THE VIRGINIA SUPREME COURT RECOGNIZES ALTERNATIVE REMEDIES.

In response to this problem, the Supreme Court of Virginia recognized a new remedy in *Price v. Hawkins*.⁹ In that case, a debtor fraudulently conveyed cash to his girlfriend and his two sons after he was hit with a significant judgment in a defamation lawsuit. After the girlfriend and sons received the cash from the debtor, they spent a significant portion of it. By the time the fraudulent conveyance lawsuit was filed, they had little or no cash to return to the creditor. During the subsequent fraudulent conveyance lawsuit, the transferees defended on the ground that they could not be liable because they no longer possessed the fraudulently-conveyed property.

The Supreme Court of Virginia rejected the defendants' argument. In doing so, the Court quoted a 50-year-old treatise on the subject and stated that a fraudulent transferee was "personally liable, on his account, for the value of the original property in case he cannot produce it or a substitute. Receiving the property fraudu-

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lently . . . the grantee is liable to the extent of its value."¹⁰ The Court then looked to the history of the fraudulent conveyance statute and its equitable nature and pointed to two of its previous decisions that affirmed remedies fashioned by circuit courts that were not expressly authorized in the fraudulent conveyance statute.¹¹ In light of this, the Court affirmed the circuit court's imposition of money judgments against the transferees for the full amount

of the cash that had been previously conveyed to them.

Price represents an important development in fraudulent conveyance law where the Supreme Court of Virginia recognized that simply unwinding a transaction would not provide an adequate remedy in all cases. Instead, the Court focused on the equitable nature of the fraudulent conveyance statute by stating "[m]oreover, equity will not suffer a wrong to be without a remedy."¹² Invoking this traditional maxim, the Court noted that a circuit court may fashion a remedy to a fraudulent conveyance that is not expressly provided for in § 55-80.¹³

SEN. PETERSEN'S EXPANSION OF REMEDIES

Sen. Petersen's amendment is the next major development in the history of Virginia's fraudulent conveyance law, and it follows in the spirit of Court's expansion of remedies in *Price*. In 2012, Sen. Petersen sponsored SB 164 in the Virginia Senate, which inserted the following language into § 55-82.1: "Upon a finding of fraudulent conveyance pursuant to sec. 55-80, the court may assess sanctions, including such attorney fees, against all parties over which it has jurisdiction who, with the intent to defraud and having knowledge of the judgment, participated in the conveyance."

This amendment was overwhelmingly supported in the General Assembly, passing the Senate on a vote of 38-2 and a unanimous 99-0 vote in the House. After being signed by the governor, it went into effect on July 1, 2012.

The effect of the new language is to give courts the authority to award "sanctions" against any other person or party who participated in the fraudulent conveyance, regardless of whether they took title to the property or were a transferee.¹⁴ Thus, the potential targets of sanctions are now firmly expanded beyond a mere transferor/transferee of the conveyed property. Since the Virginia Supreme Court has never addressed the question of whether non-transferees who participated in the fraudulent conveyance could be held liable under a conspiracy claim (though at least 18 other states permit such claims¹⁵), § 55-82.1 may be the most effective remedy against the perpetrators who participate in fraudulent conveyances.

According to Sen. Petersen, his amendment to § 55-82.1 was intended to be “as broad as possible,” in terms of providing a remedy against those who had set up or facilitated a fraudulent conveyance but were not themselves transferees. If a person or entity helped set up the fraudulent conveyance, then they face potential liability as a “party” who participated in the conveyance. In Sen. Petersen’s words, “It is very broad. ‘Parties’ in the statute means more than just transferees. Anyone who touched the transaction now faces liability, whether they’re lawyers, real estate agents, or accountants. If you touch [the transaction], you’re dirty.”

Under § 55-82.1, the attorneys, accountants, or brokers who drafted the transfer documents or organized the accounts necessary for a fraudulent conveyance face liability under § 55-82.1. Attorneys—especially young attorneys starting out in practice—should be aware of potential liability if they help a client evade a creditor.

This raises the serious issue of what an attorney should do when a client has suffered a judgment. According to Sen. Petersen, “An attorney should be very careful when their client takes a judgment. In many ways, the attorney’s relationship to the client changes at that point. Since the attorney knows about the judgment, if he counsels the client on how to evade it, then the attorney faces liability.” Sen. Petersen’s recommendation is that an attorney who represents a client facing a final judgment should counsel that

‘Attorneys must be extremely careful to avoid assisting debtors to evade judgments, or else, the attorneys face liability themselves.’

client to enter payment negotiations with the creditor or to consider bankruptcy. According to Sen. Petersen, the attorney should refuse to help the client convey away assets simply to evade the judgment.

Section 55-82.1 speaks in terms of “sanctions” against a participating party. Sen. Petersen said that the new amendment was intended to provide circuit courts “as wide latitude as possible. The idea



Sen. Chap Petersen

Courtesy: Surovell Isaacs Petersen & Levy PLLC

is that the court would have maximum authority like it was sitting in equity” to fashion an appropriate remedy. According to Sen. Petersen, “[i]n most cases, the sanction would be an award of money damages against the parties involved . . . The sanctions are intended to make the victims whole [for the underlying judgment] so they can get on with their lives and to punish and deter anyone who helps another person evade a judgment.”

Sen. Petersen also stressed the flexibility that the court has under the amendment and noted that the damage award does not have to be money. “It could be something else that the court thinks is appropriate.” Such flexibility is consistent with the Supreme Court of Virginia’s approval in previous cases¹⁶ of remedies that are not expressly authorized in the fraudulent conveyance statute.

CONCLUSION

Virginia’s fraudulent conveyance statute has a long history. It is remarkable that the Commonwealth’s current statute contains the same language adopted in 1571. But it is also remarkable that this 400-year-old body of law was significantly expanded due to a real-world, modern-day attempt by a judgment debtor and his accomplices to evade paying a lawful judgment, which left a retired couple with no assets. Sen. Petersen has provided Virginia lawyers a new and important tool to combat an age-old problem, but it is also comes with a warning: Attorneys must be extremely careful to avoid assisting debtors to evade judgments, or else, the attorneys face liability themselves. ■

Endnotes:

1. Describing the complete, dramatic saga of the

case of Craig and Mary Jo Sanford against Jamie Smith is beyond the scope of this article—but it makes for fascinating reading. See, e.g., Ace Atkins & Michael Fechter, *Secret Agent Man*, Outside, Nov. 2014, at 90; Bill Sizemore, *His Company Defrauded Investors.Yet the Air force Kept Doing Business*, The Virginian-Pilot, July 25, 2012, at A1.

2. See *Sanford v. Smith*, 490 Fed. Appx. 570 (4th Cir. 2012).

3. The Supreme Court of Virginia has not answered the question of whether a cause of action for conspiracy may be based upon a fraudulent conveyance, though at least 18 other states allow such a claim. See Footnote 15 below.

4. See 1 Garrard Glenn, FRAUDULENT CONVEYANCE AND PREFERENCES § 61b, at 90-91 (rev. ed. 1940).

5. Orlando Bump, FRAUDULENT CONVEYANCES: A TREATISE UPON CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS 11-12 (3d ed. 1882).

6. Prof. Doug Rendleman, ENFORCEMENT OF JUDGMENTS AND LIENS IN VIRGINIA 307 (1982).

7. 11 U.S.C. § 548(a)(1)(A) (West 2015) (prohibiting a debtor’s voluntary or involuntary transfer “with actual intent to hinder, delay, or defraud” any creditor).

8. Prof. Peter A. Alces, THE LAW OF FRAUDULENT TRANSACTIONS § 1:13 (2012)

9. *Price v. Hawkins*, 247 Va. 32, 439 S.E.2d 382 (1994)

10. *Price*, 247 Va. at 36; 439 S.E.2d at 384 (*quoting* 1 Garrard Glenn, FRAUDULENT CONVEYANCE AND PREFERENCES § 239, at 415 (rev. ed. 1940)).

11. See *Darden v. George G. Lee Co.*, 204 Va. 108, 129 S.E.2d 897 (1963); *Mills v. Miller Harness Co.*, 229 Va. 155, 326 S.E.2d 665 (1985).

12. *Price*, 247 Va. at 37; 439 S.E.2d at 385.

13. *Price*, 247 Va. at 37, 439 S.E.2d at 385 (“In *Darden* and *Mills*, the respective debtors had improperly preferred legitimate creditors to the detriment of another creditor. In those cases, ratable distribution, likewise a remedy not explicitly authorized by § 55-80, was appropriate under the circumstances.”)

14. This is evident by the use of the term “parties” as opposed to “debtors” (used earlier in § 55-82.1) or “transferors” (used in the Voluntary Conveyance statute in § 55-81). Further, if the General Assembly intended “parties” to mean only transferors/transferees, then “against all parties over which it has jurisdiction who, with the intent to defraud and having knowledge of the judgment, participated in the conveyance” is mere surplusage and of no meaning. In short, “all parties” means something more expansive than debtors or transferees.

15. See, e.g., *Janssen v. Lommen, Abdo, Cole, King & Stageberg, P.A.*, No. A14-0452, 2014 WL 7237121, at *4 (Minn. Ct. App. Dec. 22, 2014); *Essex Crane Rental Corp. v. Carter*, 371 S.W.3d 366, 379, 382 (Tex. App. 2012); *In re Allou Distributors, Inc.*, 379 B.R. 5, 36 (Bankr. E.D.N.Y. 2007) (applying New York law); *Tareco Properties, Inc. v. Morris*, 196 F. App’x 358, 365 (6th Cir. 2006) (applying Tennessee law); *Banco Popular N.A. v. Gandi*, 876 A.2d 253, 263 (N.J. 2005); *Qwest Commc’ns Corp. v. Weisz*, 278 F. Supp. 2d 1188, 1192-93 (S.D. Cal. 2003) (applying California law); *Summers v. Hagen*, 852 P.2d 1165, 1169 (Alaska 1993); *McElhanon v. Hing*, 728 P.2d 256 (Ariz. Ct. App. 1985); *Dalton v. Meister*, 239 N.W.2d 9 (WI 1976).

16. See Footnote 11 above. ■