



The Virginia Bar Association
YOUNG LAWYERS DIVISION

Opening Statement™

THE OFFICIAL PUBLICATION OF THE VBA YOUNG LAWYERS DIVISION

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INTRODUCTION

Presenting the Winter Issue

We are pleased to present the Winter 2014-2015 issue of *Opening Statement*. In this issue, YLD Chair Elaina Blanks-Green shares twelve lessons she has learned over the years (page 2), Andrew Baugher explains how to effectively protect attorney-client privileged materials (page 6), David Irvine offers advice on how to approach your first medical malpractice case (page 4), and Andrew Stockment discusses the substantial security benefits of using two-factor authentication to protect information stored online (page 10). You will also learn about Lawyers for the Arts (page 3) and the YLD Pro Bono Hotline (page 5) and opportunities to get involved with those programs.

As *Opening Statement* enters its third year, we would like to thank the many contributors who have made this publication a success, including the authors of our 21 substantive articles and the many YLD members who have submitted event write-ups, photos, and other content. Please continue to help us fulfill our mission of telling the story of the Young Lawyers Division and promoting community within the YLD.

If you are planning a YLD event, please let us know so that we can promote it, and then 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. In addition, please consider turning a recent experience or research assignment into an article to share with your fellow young lawyers. You may send your submissions, comments, and suggestions to: editors@openingstatement.org.

We hope that you will join us at the VBA Annual Meeting in Williamsburg (see sidebar), including the Pints and Pairings event, which will provide an opportunity for young lawyers to socialize with members of the judiciary, including the Hon. Daniel E. Ortiz, former YLD Chair and newly elected Circuit Court Judge for Fairfax.

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

—The Editorial Board



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VBA Annual Meeting

The Virginia Bar Association will hold its 125th Annual Meeting in Williamsburg on January 22-24. The theme of the conference is: *In Pursuit of the Rule of Law: Honoring the 800th Anniversary of the Magna Carta and the 127th Anniversary of the VBA*. The Annual Meeting is an excellent opportunity to attend CLEs, to see old friends and make new ones, and to network and socialize with lawyers of all ages. The YLD will have programming specifically geared for young lawyers.

Featured Activities:

- YLD Executive Council Luncheon and Passing of the Gavel
- CLE: "Framing Your Case for Mediation"
- Pints and Pairings—Good For What 'Ales' You!
A networking opportunity for young lawyers to meet and socialize with members of the judiciary in a casual setting.
- Banquet and Dance (black tie)
- YLD "After-hours" Social
- And much more...

Register today at:

vba.org/vbaannual2015

Upcoming VBA Events

Jan. 22-24: 125th VBA Annual Meeting

Apr. 24-26: YLD Spring Meeting

Jul. 23-26: 125th VBA Summer Meeting

View the complete calendar at:
vba.org/calendar.

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MESSAGE FROM THE CHAIR

VBA YLD: A Few of My Favorite Things

By Elaina Blanks-Green

In my final column as chair of the YLD, I want to thank each and every one of you for your support, hard work, dedication and enthusiasm over this past year. The YLD is only as strong as its members and its leaders and I believe that the VBA YLD is second to none. The support that we receive from the Board of Governors and the staff is outstanding. The participation and leadership that the executive committee, executive council and various YLD chairs exhibit on a daily basis is amazing. Thank you all for a phenomenal year. I have no doubt that the YLD will continue its record of success!

I thank you for a wonderful year filled with lots of successes and achievements. I am so appreciative of the people that I have gotten to know so much better through my service as chair. I encourage each of us to continue to strive to be our best both professionally and personally. See you at the next VBA meeting!

I want to end my column-writing days with a quick list of 12 things I have learned over the years. In fact, all of these “lessons” have been shared by my various-teachers—parents, counselors, advisers, mentors. I try to live each day with these thoughts in mind and hope that they will be of some relevance to any young lawyer. They are in no particular order.

1. Mentors Are Priceless.

And truthfully, we have all had mentors since birth. They are called parents and other family and friends who offer experienced advice in life. In grade and high school, they are called guidance counselors, teachers and coaches. In college and law school, they are called advisers. In practice, they are called mentors. As long as there is someone with more experience, there will always be an opportunity to have a mentor.

2. A Good Reputation Will Carry You Far.

Reputations build upon every little thing. Every matter that you complete, every interaction that you have, every activity that you participate in adds to your

reputation. You will meet people in your capacity as a lawyer, as a volunteer, as a parent, as a spouse or any other title that you may have (e.g., coach, board member, etc.). Every individual matters and every impression is potentially a lasting one.

3. Communicate Often.

One of the wonderful things about the evolution of technology is that we can communicate almost anywhere at any time. No longer are we restricted to phone calls and letters. We can now communicate via emails, text messages and video chats. Most people will appreciate constant communication and the few who do not will likely tell you so that you can adjust accordingly.

4. Strive For Expertise In Your Practice Area.

The law is an ever-evolving machine that changes daily. Becoming a lawyer who is knowledgeable in a particular practice area takes time, and for some time it may not appear you are making any strides. One day, however, you will be asked a question and you will respond quickly and confidently (or correctly) with the answer based upon your past experience and research. Savor that moment because the next moment will result in the all-too-familiar feeling that you really have so much more to learn about your practice area.

5. Five Extra Minutes Can Be The Minutes Needed For Peace Of Mind.

Many times we are asked to respond to questions and situations quickly. Sometimes, taking that extra 5 minutes to do a little bit of research, find that email or contact that one person before responding can give you the peace of mind you need to know that your response is thorough and complete.

Continued on page 9

Lawyers For The Arts

By Timothy L. Lyons

Artists are members of an underserved community for legal services in Virginia. VBA YLD's Lawyers for the Arts is a project within the YLD which is motivated by a need in the community to provide educational opportunities for artists about their legal rights and connect deserving members of the arts community with attorneys willing to provide pro bono services. The project serves people or organizations who are often without other legal education or services. Lawyers for the Arts runs two seminar series throughout the year to help educate artists: *C3 ED: Left Brain Advice For Right Brain Professionals and Law & The Arts*.

C3 ED: Left Brain Advice For Right Brain Professionals is an educational series presented by Lawyers for the Arts and the Creative Change Center ("C3") in Richmond. The monthly series provides artists, writers, musicians and other "creatives" practical advice on the business of being creative. Speakers range from attorneys to accountants to marketing experts, etc. Legal topics include, but are not limited to: (i) choosing and forming your entity, (ii) trademark 101, (iii) copyright 101, (iv) the Internet, and (v) trusts and estates.

C3 ED provides much needed information in a comfortable setting to a group generally without access to legal and business professionals. For more information, please visit: www.c3richmond.org/programs/c3-ed-left-brain-advice-for-right-brain-professionals/.

Law & The Arts is a similar series held quarterly in Charlottesville and co-sponsored by Lawyers for the Arts and Piedmont Council for the Arts, with additional support provided by the Virginia Commission for the Arts. The purpose is to assist artists in navigating the legal processes for arts-related issues. Speakers are attorneys and topics include, but are not limited to: (i) contracts basics, (ii) trademark law, (iii) intellectual property introduction, and (iv) business/entity formation.

Piedmont Council for the Arts provides the space and access to the Charlottesville Arts community. Lawyers for the Arts provide the speakers and expertise not normally accessible to the artists who attend these seminars. For more information, please visit: www.charlottesvillearts.org/workshops-events/seminars-workshops/.

The mission of Lawyers for the Arts is three-fold: (1) to help an underserved arts community in the Commonwealth of Virginia, (2) to provide an opportunity for attorneys of all experience levels to gain speaking experience and provide their knowledge of the legal system and legal framework to the spaces in which the artists operate, and (3) serve as a pro-bono clearing house for deserving arts organizations and attorneys willing to assist those organizations.

The first two goals are met through the innovative seminars in Richmond and Charlottesville. In addition to the regularly scheduled seminars, Lawyers for the Arts also sponsors various one-time lecture series, such as one which was held this year in a gallery space in Richmond. These types of series reached artists who do not necessarily attend the regularly scheduled C3:Ed or Piedmont Council for the Arts series.



Presentation at C3 ED in Richmond, Virginia.

Courtesy: Nora Nickel

The third goal, to provide pro bono services to qualifying community organizations, received a great enhancement this year through the creation of an online application form. This form sends the applicant's information to the VBA Lawyers for the Arts Committee members who then evaluate the merits of the application and, if found to be acceptable, place the applicants with an attorney willing to provide free services to the organization. This year's pro bono assignments included the International Human Rights Committee, which was attempting to establish a cooperative organization for immigrants who sell crafts in craft shows around the state.

Any VBA Young Lawyer Division members (especially those in areas of Virginia outside Richmond and Charlottesville) who are interested in assisting Lawyers for the Arts can contact **Tim Lyons** at tim@timlyonslaw.com or **Nora Nickel** at nora.nickel@troutmansanders.com. ■



Presentation at C3 ED in Richmond, Virginia.

Courtesy: Nora Nickel

Approaching Your First Med-Mal Case

By David M. Irvine

Many of us are no stranger to the call from a new client who has had an adverse outcome from a medical procedure and needs advice as to how to pursue a claim, or at least have fielded questions from friends and acquaintances as to whether they may have been harmed by medical negligence. But for all the inquiries regarding potential medical malpractice made every day to lawyers all across Virginia, only a fraction of those will result in viable claims that can and should be filed. The trick for the careful attorney is differentiating the cases with merit from those without, and advising her client accordingly. Here are some basic tips to assist in that effort.

HOW DOES THE CLIENT DESCRIBE WHAT HAPPENED?

Consider carefully what your client has to say. Often a deviation from the standard of care—or at least one with a reasonable chance of being proved to a jury—is a clear, discrete action or inaction. The intestine was punctured during surgery. The cesarean section was not ordered in time. The fractured bone was incorrectly set. This is not to say that negligence cannot occur over extended periods of time, as may be the case in circumstances involving, for example, missed or incorrect diagnoses. But beware of the client who complains of the unprofessional manner in which she was treated by multiple health care providers, over a long period of time, for various conditions. This is rarely the stuff of medical negligence. Equally dubious are situations in which there has been a catastrophic and unexpected outcome, but no one is able to articulate exactly who did what wrong

and when. Accordingly, even as you keep an open mind, cast a critical eye on your client's description of the event giving rise to the inquiry.

REVIEW THE MEDICAL RECORDS CAREFULLY

No matter how much detail the client is able to provide at your initial call and

‘The trick for the careful attorney is differentiating the cases with merit from those without, and advising her client accordingly.’

meeting, there is no substitute for ordering a complete set of her medical records from the appropriate health care providers and reviewing them carefully. This includes not only the provider whose alleged negligence is at issue, but other providers who treated the client before and after incident. Look for signs of technical difficulties, complications, and unexpected occurrences in the records of the potential defendant. Keep an eye out for concerns expressed by subsequent treating physicians that are telling. Also be vigilant for pre-existing conditions or comorbidities that may call into question the element of causation. An expert's opinion is almost always based heavily on medical records, so eventually it will be important for there to be some evidence in black and white of what was done incorrectly. To the extent possible from your lay perspective, use the record to either identify or rule out potential negligence at an early stage.

CONDUCT YOUR OWN RESEARCH

Do not be afraid to perform a quick Internet search to learn more about the procedure or course of treatment at issue and the injuries which your client has suffered. This search may confirm that the complication experienced by your client is a known risk of the procedure, making an action for negligence

untenable. (In such a situation, however, be sure to check the office notes and consent form in your client's medical record to be sure that the physician obtained your client's informed consent for the procedure.) The search may instead reveal past successful malpractice cases with similar facts, tending to suggest that your client has a meritorious case. Check abstracts from peer reviewed journals, available online from PubMed, for research related to your client's condition or treatment. If nothing else, this information can help you pose the most informed questions possible to your standard of care expert.

WHAT ABOUT EXPERTS?

Medical opinion testimony is the foundation of a malpractice case. For all the attorney's efforts to identify potential negligence, ultimately she will need a physician, nurse or other professional in the same field of specialty as the potential defendant to tell her whether or not there has been a deviation from the standard of care in any given case. Identifying an expert to provide such an opinion is not always easy. Requesting from colleagues the names of experts they have used in the past often is a good start. There are also commercial services which provide directories of expert witnesses in various fields. One may even attempt to approach the client's other treating physicians for standard of care testimony.

‘An expert's opinion is almost always based heavily on medical records, so eventually it will be important for there to be some evidence in black and white of what was done incorrectly.’

While a detailed discussion of the requirements pertaining to standard of care experts is outside the scope of this article, the attorney must be sure that her expert's knowledge and practice history satisfy the standards set forth in Virginia Code § 8.01-581.20. Obtaining the opinion of

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.

a qualified expert at an early stage of the attorney's investigation is critical. Under Virginia Code § 8.01-20.1, prior to requesting service of process on a named defendant in a medical malpractice action, the plaintiff's attorney must have obtained from her expert a certification that, based on a reasonable understanding of the facts, the defendant deviated from the applicable standard of care and caused the plaintiff's injuries. It is the best practice to have the opinions of this certifying expert, as well as any other standard of care and/or causation experts which may be necessary, secured before filing the complaint.

MEASURING THE DAMAGES

Medical malpractice cases are not cheap. The testimony of the experts discussed above comes at a hefty price. There are plenty of circumstances in which a medical provider deviates from the applicable standard of care, proximately causing the client's injury, yet no malpractice case is justified. If the injury is not severe, it simply will not be economically viable to invest several years and tens of thousands of dollars in pursuit of a recovery which may not even match that investment. Consider the permanency of the injury. Evaluate the special damages including medical bills, lost income, etc. In wrongful death cases, learn about the statutory beneficiaries and their relationship to the decedent. The sooner the client can be advised as to the economic realities of her claim, the better.

WHO IS THE DEFENDANT?

Identifying the appropriate defendant presents its own set of considerations. In many cases liability will rest solely on the negligent physician and her practice group. For occurrences in the hospital setting, consider the liability of hospital employees, including nurses. For those hospitals operated by an agency of the Commonwealth, such as the University of Virginia and Virginia Commonwealth University, sovereign immunity considerations come into play. The law of sovereign immunity in the medical malpractice setting is complex and beyond the strictures of this article. Do be aware, however, that the notice requirement imposed by the Virginia Tort Claims Act, Va. Code § 8.01-195.6, may apply in such circumstances. This imposes a one-year limitations period for the plaintiff to provide notice to the appropriate authority of a potential negligence claim against an agent of the Commonwealth, including physicians and nurses. Speaking of limitations periods, it is also important to determine the identity of the defendant as soon as possible in order to assess the applicable statute of limitations. The standard two-year limitations period applies, but can be extended in some circumstances if the defendant provided continuing treatment to the plaintiff following the negligent act.

CONCLUSION

Pursuit of a meritorious medical malpractice claim can be a worthwhile investment for the injured party and her attorney, but a careful and critical evaluation of the claim, performed from the very outset, is critical before undertaking what will necessarily be a complicated and strongly contested case. Keep these considerations in mind the next time a client calls seeking advice as to whether she has a viable claim for malpractice. ■

Richmond Pro Bono Hotline Seeks Volunteers, Rolls Out New Platform

Training Session Scheduled for Feb. 3, 2015

The YLD Pro Bono Hotline Committee is seeking volunteer attorneys to staff the Central Virginia Legal Aid Society pro bono telephone hotline. The program is a longstanding partnership between the YLD and the Central Virginia Legal Aid Society. YLD volunteers in the Richmond area sign up on a quarterly basis and commit to staffing the hotline for two hour shifts two to three times per quarter. The matters typically involve family law, consumer law, housing law, and employment law. Legal Aid coordinates client intake and conflicts checks with the YLD volunteers via email. The volunteers are then responsible for providing legal advice via telephone and populating case files. After completing their assigned calls, volunteers return the case files to Legal Aid for any additional follow up. Historically, volunteers have staffed the hotline at Legal Aid's offices during scheduled shifts. Starting in 2015, Legal Aid will also administer the program through JusticeServer, a web-based pro bono case management system. As a result, volunteers will have the option of completing calls from their own offices on a more flexible schedule.

The Pro Bono Hotline is an excellent way to fulfill our collective duty as citizen-lawyers to use our time, talent, and resources to make a meaningful contribution to society. The YLD Pro Bono Hotline Committee hopes you will consider volunteering. Steve Dickinson, Marty Wegbreit and Doris Causey from the Central Virginia Legal Aid Society will conduct a training session at the Richmond office of Hunton & Williams LLP on Tuesday, February 3, 2015, from 5:30-7:30 p.m. To RSVP for the training session or to learn more about the Richmond Pro Bono Hotline program, please contact **Wyatt Deal** (wdeal@hunton.com or 804-788-8502) or **Marty Wegbreit** (marty@cvlas.org or 804-200-6045). Additional information is also available on the VBA website at: vba.org/yldactivities.



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Avoiding Full Disclosure: Effectively Protecting Privileged Materials

By Andrew Baugher

A recent case from the Western District of Virginia confirmed that “the subject matter of an attorney-client communication is not privileged.”¹ Citing Fourth Circuit precedent, the court stated that the “identify of the client...and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege because such information ordinarily reveals no confidential professional communications between attorney and client.”² Thus, when responding to discovery seeking the subject matter of communications between attorney and client, identifying generally, for example, that a business consulted with counsel “about its business” is usually insufficient.³ Instead, the proper response is to provide a more precise description about the subject matter of the communications without “disclos[ing] the specific nature of the advice sought.”⁴

Although not the subject of the opinion, the *Knox Energy* decision is instructive in determining whether a party has made a sufficient claim of privilege to adequately protect documents from disclosure. Simply because an attorney and her client are parties to a communication does not make the communication privileged per se.⁵ Often, however, privilege logs include merely this type of information—the name of the attorney, the name of the client and a general statement that the two were communicating. The rules of procedure applicable to actions in Virginia’s federal and state courts require additional detail. Consistent with *Knox Energy*, these rules provide that, in order to withhold discoverable information, a claim of privilege must be expressly made and “describe the nature of the documents, communications, or things” withheld from production “in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”⁶ The potential penalty for failing to adequately identify the “nature” of the information withheld is severe. When a privilege log fails to meet the “specificity requirements” of the rules, a party risks waiver of any protections

that may be attached to the documents withheld from production.⁷

Usually, complying with the “specificity requirements” in asserting privilege should not be difficult. Simply read the

‘When a privilege log fails to meet the “specificity requirements” of the rules, a party risks waiver of any protections that may be attached to the documents withheld from production.’

documents, determine if they are protected, and then determine why they are protected. Don’t assume that because a lawyer is involved in the communication that the information is automatically privileged. Instead, assert the basis for the privilege and a short description of the “nature,” or subject matter, of the communication to make sure that anyone assessing the validity of your assertion—including the court, if challenged—can readily determine that the document is protected from disclosure.⁸

This is not as easy in a document heavy case. With the proliferation of e-mail, the scope of discoverable information has multiplied exponentially. The discovery of electronically stored information, or “ESI,” has become one “of the more complicated and contentious issues at play in present day civil litigation,” and “[t]he inadvertent production of a privileged document is a specter that haunts every

document intensive case.”¹⁰ Discovery is no longer “something most often managed down the road.”¹¹ Now the question at the forefront of nearly every discovery plan is how to assess relevant documents for privilege without “breaking the bank.”

Both the Federal Rules of Civil Procedure and the Virginia rules provide some protection to parties who inadvertently produce privileged information.¹² These rules provide that a party claiming privilege or work product protection over previously disclosed material may notify the receiving party, who then has a duty to sequester the information until the claim is resolved.¹³ Additionally, Virginia courts have recognized the efficacy of “claw back” agreements, which permit parties to agree in advance to return privileged material disclosed in discovery in order to minimize the expense and burden of reviewing a vast number of documents for privilege before they are produced.¹⁴

Although these developments are helpful, it is difficult to “un-ring the bell” after inadvertently disclosing a privileged document. As a result, whether and how to best assert privilege is an issue that needs to be addressed early in every case. ■

Endnotes

1. *Knox Energy, LLC v. Gasco Drilling, Inc.*, 2014 U.S. Dist. LEXIS 112794, *6, Case No.: 1:12CV00046 (W.D. Va. Aug. 14, 2014).
2. *Id.* at *6–7 (quoting *United States v. Under Seal (In re Grand Jury Subpoena)*, 204 F.3d 516, 520 (4th Cir. 2000)).
3. *Id.* at *11.
4. *Id.*
5. *Id.* at *6.
6. FED. R. CIV. PROC. 26(b)(5)(A); Va. Sup. Ct. R. 4:1(b)(6)(i).



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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.

7. *Eppard v. Kelly*, 62 Va. Cir. 57, 59 (Charlottesville 2003). The Court of Appeals for the Fourth Circuit – in a case with a fascinating backstory involving a multi-billion-dollar judgment rendered in Ecuador—recently described how the failure to file a privilege log can result in waiver of any claimed privileges. See *Chevron Corp. v. Page*, 768 F. 3d 332 (4th Cir. 2014).
8. See, e.g., *Knox Energy*, 2014 U.S. Dist. LEXIS 112794 (involving attorney and client communication about an addendum to a contract for the purpose of seeking advice).
9. *Adair v. EQT Production Co.*, 2012 U.S. Dist. LEXIS 90250, *8, Case No.: 1:10CV00037 (W.D. Va. Jun. 29, 2012).
10. *FDIC v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 479-80 (E.D. Va. 1991).
11. Michael Yager, *E-Discovery as Quantum Law: Clash of Cultures—What the Future Portends*, 19 RICH. J.L. & TECH. 10, 28 (2013).
12. FED. R. CIV. PROC. 26(b)(5)(B); Va. Sup. Ct. R. 4:1(b)(6)(ii).
13. *Id.* Also note that although these rules provide some relief, they do not address whether privilege has been waived by production, which is left to the courts. See 2006 Committee Notes on FED. R. CIV. PROC. 26; see also FED. R. EVID. 502(b) (requiring reasonable steps to prevent disclosure and prompt and reasonable steps to correct the error to maintain privilege).
14. *Adair*, 2012 U.S. Dist. LEXIS 90250 at *13-14. ■

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.

YLD Fall Executive Council Meeting



Courtesy: VBA Staff.

Elena Patarinski, YLD Secretary/Treasurer Steven Gould, YLD Chair Elaina Blanks-Green, Chris Gill, Britton Williston, YLD Chair-Elect Nupur Bal, VBA President John Walker, Seth Ragosta, Jeremy Williams, Brian Ragland, YLD Immediate Past Chair Travis Hill, Braxton Hill, and Shawn O'Brien during the YLD Fall Meeting at the Sunset Beach Inn and Grille in Cape Charles, Virginia.



Courtesy: VBA Staff.

Steven Gould, Shawn O'Brien, Jeremy Williams, and Sam Towell.



Courtesy: VBA Staff.

Breakfast at the YLD Fall Meeting.



Courtesy: VBA Staff.

Shawn O'Brien, Sam Towell, Seth Ragosta, Brian Ragland, and Elena Patarinski preparing for a kayaking and wine tasting excursion at the YLD Fall Meeting.



Courtesy: VBA Staff.

YLD leaders and their guests go kayaking.

...Favorite Things, continued from page 2

6. A Soft “No” With An Alternative Is Still A No But Now Sounds Like A Yes.

One of my least favorite responses is to tell someone no. Sometimes, offering a reasonable alternative to a proposed course of action will come across much softer and more palatable than a simple no without a proposal for resolution. In the end, the goal is to solve the problem or resolve the issue.

7. Flexibility Reduces Stress.

Oftentimes, matters or even practice areas take on different courses as time lapses. Being flexible and open to inevitable change allows you to evolve into a broader and better professional. Much like having to juggle meeting times with multiple schedules, being flexible on change is necessary for success.

8. An Adversary And An Enemy Are Not The Same.

Many attorneys may be on opposite sides of a matter you are working on, but in the end, these are all your fellow attorneys of the bar. Therefore, treating your fellow attorneys as enemies may not serve you well in the long run.

9. Vacations Are Meant For You To Vacate.

Always take and enjoy your vacation and actually vacate. If you must check your smartphone, do so infrequently and with very tight parameters so that you are not working during the majority of your vacation. Try to actually enjoy the vacation by not thinking about work too often.

10. Bragging Is Not Rude.

Being selected for an achievement or accomplishing a wonderful outcome for a client is outstanding news that needs to be shared. People love to celebrate another’s successes and, if there is no one there to beat your drum for you, then you must pick up the sticks and beat it for yourself so that others can join in.

11. Being Happy Is A Choice.

You have the ability to make your own happiness and decide to be happy. There will always be little nuances that you can dwell on that are not ideal, but if you focus on the overwhelming majority of things that are positive in your life you will receive even more positive things in the future.

12. Invest In Your Community Like You Have Invested In Your Profession.

Law school is expensive and time consuming. It takes a lot to learn an area of law to practice, and it takes a lot of money to attend law school. In the end, we completed law school in spite of the financial and time commitments because we considered both as an investment in our future. Our communities should be viewed similarly. Investing in our various communities through our time, our finances and our expertise is at the core of our chosen profession. Giving back is an automatic enhancement to our communities. ■

YLD Officer and Executive Committee Candidates

The YLD Nominations Committee has nominated the following individuals to serve as officers or members of the YLD Executive Committee, as indicated:



Jeremy S. Williams
Secretary/Treasurer



L. Lucy Brandon
Executive Committee



Franklin R. Cragle, III
Executive Committee



Laura Golden Liff
Executive Committee



Andrew T. Richmond
Executive Committee



W. Randolph Robins, Jr.
Executive Committee



Lauren M. Wheeling
Executive Committee

Please join us in thanking the following YLD members who are rotating off of the Executive Committee for their service to the Young Lawyers Division: **Audrey J. Burges, Ethan G. Ostroff, Samuel T. Towell, and J. Britton Williston.**



Elaina L. Blanks-Green

General Tax Attorney, Norfolk Southern Corporation
(Norfolk)

Practice Areas: Tax

Law School: University of Virginia School of Law (2003)

College: University of North Carolina at Chapel Hill (2000)

VBA Leadership: YLD Chair (2014 – Present); Taxation Section Council (Immediate Past Chair)

Awards: Legal Elite (Virginia Business), 2006, 2008-2014; Virginia Rising Stars (Super Lawyers), 2007, 2009-2012; Top 40 Under 40 (Inside Business), 2011.

Bio: Elaina is a huge sports fan (UNC Tar Heels and UVA Cavaliers) and a VBA devotee.

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Two-Factor Authentication: Simple and Powerful Security

By Andrew B. Stockment

You have probably heard horror stories about people whose personal accounts were hacked or companies that suffered data breaches that exposed their customers' information.¹ The personal and business repercussions of an account being hacked range from minor inconvenience to major embarrassment, a damaged reputation, and financial loss. For those of us in the legal profession, beyond merely protecting ourselves, we have an ethical obligation to take reasonable precautions to safeguard our clients' confidential information.

In order to prevent unauthorized access to your account, most online services (such as your e-mail provider and your bank) require you to enter a username and password in order to authenticate your identity and login to the service. Three big weaknesses of the username and password model are: (1) people often select weak passwords; (2) people often use the same password with multiple accounts, which means a data breach of one service provider allows hackers to access all the other accounts that have the same username and password; and (3) usernames and passwords are often compromised, such as by logging in to accounts over an insecure Wi-Fi connection that allows hackers to capture your password or through phishing attacks where hackers use social engineering to trick you into giving them your username and password (e.g., through a phony login page for your

bank sent to you in an official-looking e-mail). By using two-factor authentication, you can add an additional layer of protection so that a hacker would not be able to access your account with only your username and password.

WHAT IS TWO-FACTOR AUTHENTICATION AND HOW DOES IT HELP?

Two-factor authentication (also commonly referred to as two-step authentication, 2-step verification, or multi-factor authentication) involves the use of two or more items (or factors) to authenticate your identity and gain access to the service in question. In most cases, the first item is your username and password combination. There are a variety of methods used to provide the second authentication factor, but the most common method of providing the second factor is for the user to enter a short numeric code into the website in addition to the username and password. In most cases, after entering the username and password, the user either generates the second-factor code using a smartphone app or the code is sent to the user either by SMS as a text message to the user's cell phone or by an automated phone call. This second-factor code can generally only be used once and is often time-sensitive, meaning that anyone who intercepted the code would not be able to use it because it would no longer be valid.²

Thus, if your account was protected with two-factor authentication, access would only be granted to someone who both (1) **knows** your username and password and (2) **has** access to your phone. The obvious advantage of using two-factor authentication is that a hacker would need to steal your phone in addition to guessing or intercepting your password (and you would probably notice pretty quickly if your cell phone was stolen).³

TWO-FACTOR AUTHENTICATION IS EASY TO USE

Although the precise method of two-factor authentication varies from site to site, in most cases configuring two-factor authentication is a straightforward process. For websites that provide two-factor authentication by text message or phone call, the setup process typically requires you to supply your phone number and then type the code that is sent to you by SMS or phone call. And that's it! Your account is setup and protected with two-factor authentication. The next time you login you will be required to supply the security code sent to you by SMS or phone call.

For websites that use a smartphone app to generate security codes, the setup process requires you to install a compatible app. Most implementations support standardized TOTP (time-based one-time password algorithm) apps, such as the free



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Awards: Super Lawyers Rising Stars (2013 – 2014), VBA YLD Emerson G. Spies Award (2012)

Bio: Andrew was a software engineer before becoming an attorney, and he has been a lifelong technology and innovation enthusiast (including a particular interest in data security and privacy). When he is not practicing law or working on bar projects, Andrew and his wife Martha enjoy running, hiking, and watching U.Va. sports. Andrew's other articles and projects are available at: www.andrewstockment.com.

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Google Authenticator, Duo Security, and Authy apps⁴, meaning you don't need to install a separate app for each website. After installing the app of your choice, you then use the smartphone app to scan a QR code (similar to a barcode) displayed by the website during the setup process, and then you type into the website the short numeric code displayed by the app. You are then protected and ready to go. The next time you login to the website, you will simply open the app on your phone and type the short code it displays.

Most websites that support two-factor authentication will supply you with one or more backup codes that you should print and store in a safe location. The backup code would be used to regain access to your account if your phone was lost or stolen. Of course, if your security codes are received by SMS or phone call, if your phone is stolen, you will still receive the codes on your replacement phone once it is activated with your mobile phone provider.⁵

To make using two-factor authentication less inconvenient, many websites that support two-factor authentication allow you to “trust” the computer that you are currently using so that you will not be required to supply the second factor the next time you login from the same device. Of course, you should only trust your personal computer and you should not trust your device if you are connecting over an insecure Wi-Fi connection.

To determine whether a particular website or service supports two-factor authentication and the methods it supports, you may want to begin by checking: TwoFactorAuth.org. Websites that support two-factor authentication include: Google⁶, Microsoft⁷, Apple⁸, Box⁹, Dropbox¹⁰, Facebook¹¹, Twitter¹², LinkedIn¹³, Evernote¹⁴, and Yahoo¹⁵.

BOTTOM LINE: IT'S WORTH THE MINOR INCONVENIENCE

Two-factor authentication is fairly easy to setup. Moreover, it provides a meaningful additional layer of protection for your accounts and the sensitive information stored in those accounts. And for legal professionals who have an ethical duty to safeguard client information, a minor inconvenience for a substantial security gain is definitely worth it. After all, if your account was hacked and a client's

information was stolen, your client would probably not be impressed with an explanation that “I decided not to setup two-factor authentication because it was too inconvenient.”

Hackers employ many techniques to gain unauthorized account access and to steal sensitive information. There is no panacea that will provide complete protection, and there are many important steps that you should take to mitigate the risk of unauthorized account access, including the password best practices discussed below.¹⁶ But using two-factor authentication is simple to setup, easy to use, and well worth the minor inconvenience of entering a second code when logging in to your online accounts.

PASSWORD BEST PRACTICES

In addition to using two-factor authentication, you should consider implementing the password best practices discussed below.

1. Never use the same password for multiple accounts

You should not reuse the same password for multiple accounts because, if a security breach causes the password to be revealed, the person who obtains it could then use it to login anywhere that you have used the same username/password. It is likely that you have already had one or more of your passwords stolen in one of the many, widely publicized security breaches (e.g., LinkedIn). In particular, you should not reuse the same password for any confidential, sensitive, or important information or accounts, including:

- Any account, device, or service used to store or access confidential client information
- Banks or other financial accounts
- Cloud storage services
- E-mail accounts
- Domain name registrars, DNS providers, or hosting services
- Network access (e.g., to access your law firm's network, VPN, or computer)
- Social networking services (because they are a rich source of personal information that could be used for identity theft or phishing attempts)

2. Use a reputable password manager

Examples of good password managers are: 1Password (www.agilebits.com), KeePass (www.keepass.info), Password Safe (<https://www.schneier.com/passsafe.html>), and LastPass (www.lastpass.com). (LastPass is widely respected, but unlike the other password managers listed above, it stores your encrypted password database online.) It is also critical to regularly backup your password manager database in a secure location and to make sure you are able to retrieve and decrypt that backup without needing a password or encryption key that is only stored in the password database itself.

3. Use a long, truly random master password for your password manager

The master password for your password manager should be sufficiently complex and random so that it is difficult (but not impossible) to memorize. If you follow the advice to use a password manager to generate and store random passwords for all your accounts, you will probably use the password manager and type your password often enough that it should be feasible to memorize and remember a fairly complex password.

The best practice would be to use a password generator to create a truly random password at least 18 characters long, with mixed case letters, numbers, and symbols. Avoid using “clever” patterns or techniques (e.g., substituting “3” for “E”, “0” for “O”, or “!” for “I”), all of which are incorporated into the password cracking tools used by hackers—and the speed of such password cracking tools is staggering and increasing all the time. In some cases, cracking tools are able to guess *hundreds of billions* of passwords *per second* or faster. Another alternative would be to generate a password using the “Diceware” method to generate at least eight random words to combine into your password.¹⁷

If you lose your master password, it could be extremely difficult to regain access to your accounts (particularly if your e-mail password is randomly generated and stored in your password manager). Therefore, you should be absolutely certain you will never forget the master password. It would be a good idea to securely save the master password (or steps to recreate

the master password). Despite some degree of debate on the subject, in most cases, it is reasonably safe to write down your master password on a piece of paper and secure the piece of paper. (Note: Placing a sticky note under your keyboard does not count as securing the paper.)¹⁸ Until you are comfortable that you have memorized the master password, it is probably a good idea to *temporarily* keep the password, or sufficient hints to re-create the password, written on a piece of paper in your wallet.

4. Use your password manager to generate long, random passwords for all of your accounts

The best passwords are too complex for humans to remember (or at least to remember more than a handful), and people are notoriously bad at selecting passwords, even when attempting to select “random” or “complicated” passwords. According to one analysis: 40% of people have a password from the top 100 passwords, 79% have a password from the top 500 passwords, 91% have a password from the top 1,000 passwords, and 98.8% have a password from the top 10,000.¹⁹ When people are required to select passwords using a mix of upper- and lower-case letters, numbers, and symbols, people tend to follow predictable patterns that are easily uncovered by password cracking tools. Instead of attempting to create unique passwords on your own, you should use your selected password manager to *generate* and *store* long, truly random passwords, at least 16 characters in length (longer is better), with mixed case letters, numbers, and symbols for all (or most) of your passwords.

5. Use false, random, and/or nonsensical answers to security questions

Online accounts frequently require or permit you to provide answers to security questions (e.g., “What is your mother’s maiden name?”) as a way to regain access to the account if you forget your password. However, the security question concept is fundamentally flawed and poses a serious security risk because it encourages users to answer questions for which there is only one true answer (and the answers are often readily discoverable in the age of Google and social media). Having a strong password is of little value if you have insecure answers to security questions. Some well-known public figures, including Mitt Romney and Sarah Palin, have had their e-mail accounts compromised by hackers answering security questions. A security answer is just another password, and anything that would make a bad password also makes a bad answer to a security question. The best practice would be to generate unique, random answers using a password generator and save them in your password manager. For example, website #1: mother’s maiden name is: btYxsQb3jh9WgXBYr, website #2: mother’s maiden name is: RCQEgVZKyoZRLBHM9. If you can’t bring yourself to use different, random answers for each site, at a minimum you should make up false and/or nonsensical answers that you will be able to remember. For example: mother’s maiden name: yellow, favorite dessert: spinach.

CONTINUED VIGILANCE

By using two-factor authentication and following the password best practices discussed above, you will substantially increase the security of your online accounts. But no security system

is hack-proof, and you should continue to be vigilant, monitor your accounts for unusual activity, and keep current with evolving security best practices. ■

A previous version of this article was first published by the American Bar Association in Law Technology Today, available at: www.lawtechnologytoday.org/2014/11/multi-factor-authentication-is-effective-and-easy-to-use/.

Endnotes

1. One of the most famous examples of an individual being hacked was the 2012 hacking of Mat Honan, who was a writer for WIRED. See: www.wired.com/2012/08/apple-amazon-mat-honan-hacking/all/. Another horror story about hackers deleting someone’s e-mails can be found at: www.theatlantic.com/magazine/archive/2011/11/hacked/308673/. Data security breaches at companies are numerous and widely reported, including the recent hacking of Sony Pictures Entertainment. See: <http://bit.ly/2014DataBreaches>.
2. Other second-factor methods include: (1) generating a security code using a hardware token or card, (2) entering a one-time use code received by e-mail instead of by SMS or phone call; (3) authenticating through an alternate channel, such as by approving a login request (a) through a smartphone app (Twitter or Duo Security, for example) or (b) by receiving a phone call and entering a PIN using your phone’s keypad; (4) hardware tokens or security keys that must be connected to a computer during the login process; or (5) using biometrics such as fingerprints to authenticate. Some online services, particularly financial institutions, use security questions and answers as a supposed additional layer of protection when logging in from a device that does not have a login cookie stored from a previous login session. However, the answers to security questions are nothing more than a second password, and using two unchanging passwords does not provide much, if any, additional security and should not be considered genuine two-factor authentication. Moreover, people frequently pick even weaker answers to security questions than they do for their passwords. See also: www.theatlantic.com/technology/archive/2012/08/security-questions-the-biggest-joke-in-online-identity-verification/260835/.
3. Different implementations of two-factor authentication provide varying degrees of security, and none of them are completely secure. For example, someone could hack into your cell phone account and forward your calls or text messages, or someone could steal your phone or your security key. See: arstechnica.com/security/2014/11/cell-carrier-was-weakest-link-in-hack-of-google-instagram-accounts. But any method of two-factor authentication provides an additional layer of security to protect your account and the information it contains.
4. Google Authenticator: <http://goo.gl/mKEWgt>; Duo Security: <https://www.duosecurity.com>; Authy: <https://www.authy.com/users/>.
5. For some services, such as Apple, it is critically important to save the recovery key (or backup code) that is generated when setting up two-factor authentication. For example, if someone makes too many unsuccessful attempts to login to your Apple account, Apple will place a security lock on your account, and the only method of regaining access to your account is with the recovery key—even if you know your password and have access to your two-factor device. See: <http://tnw.to/t3Mmh>.
6. <https://www.google.com/landing/2step/>.
7. <http://windows.microsoft.com/en-us/windows/two-step-verification-faq>.
8. <http://support.apple.com/en-us/HT5570>.
9. <https://support.box.com/hc/en-us/articles/200526658-Can-I-enable-2-step-verification-for-my-account->
10. <https://www.dropbox.com/help/363>.
11. <https://www.facebook.com/help/148233965247823>.
12. <https://support.twitter.com/articles/20170388>.
13. https://help.linkedin.com/app/answers/detail/a_id/544/ft/eng.
14. <https://blog.evernote.com/blog/2013/10/04/two-step-verification-available-to-all-users/>.
15. <https://help.yahoo.com/kb/SLN5013.html>.
16. It is also important to keep in mind that two-factor authentication is not foolproof and can be circumvented if not implemented correctly. For example, see: shubh.am/how-i-bypassed-2-factor-authentication-on-google-yahoo-linkedin-and-many-others/.
17. See: www.diceware.com. Attempting to think of random words on your own is not sufficiently random.
18. See: www.schneier.com/blog/archives/2005/06/write_down_your.html.
19. See: <http://xa.to/1P> and <http://bit.ly/500WorstPasswords>. ■