V·B·A Journal
THE OFFICIAL PUBLICATION OF THE VIRGINIA BAR ASSOCIATION

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THE OFFICIAL PUBLICATION OF THE VIRGINIA BAR ASSOCIATION



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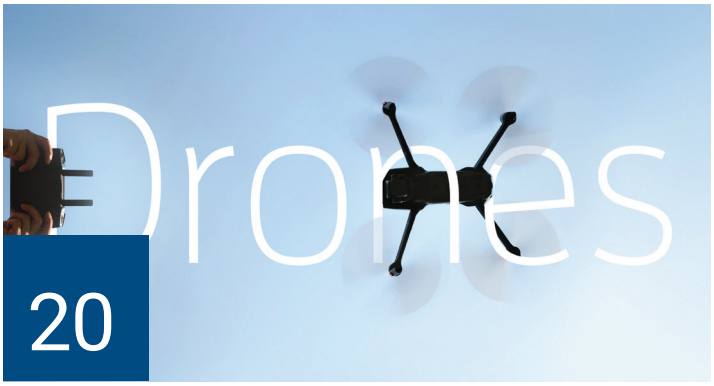


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**OUR MISSION**

The Virginia Bar Association is the independent voice of the Virginia lawyer, advancing the highest ideals of the profession through advocacy and volunteer service.

**BY BENJAMIN D. LEIGH**
VBA PRESIDENT

# 'Vanity of Vanities … All Is Vanity' (and ChatGPT)

Taking words from the first chapter of Ecclesiastes is not a precursor to some attack on the vanity of lawyers by your Virginia Bar Association president. Nor were the words generated by a computer. In the fall of 2023, the VBA contemplates its position amid rapid technological advancements and changes to the "how, where and who" of legal work. In the face of previous shifts, the legal profession has proved adaptable. The internet, the mobile telephone and even the typewriter all left their mark on the legal profession and our work.

Recently, a panel at the 2023 VBA Summer Meeting, spearheaded by Virginia Supreme Court Justice D. Arthur Kelsey, explored the challenges artificial intelligence poses to the legal profession. The VBA's involvement in such forward-thinking initiatives is crucial for the profession's future. The manner of legal work may change rapidly but the sources of work are constant: conflict, justice and commerce. Yet AI may pose profoundly different tests for the legal system.

**The manner of legal work may change rapidly but the sources of work are constant: conflict, justice and commerce. Yet AI may pose profoundly different tests for the legal system.**

## AI IS A 'NEW THING UNDER THE SUN'?

AI's potential for misuse raises a host of fresh disruptive concerns: unauthorized practice, confidentiality breaches, intellectual property, falsification risks and the timeless question of truth. Will lawyers become mere programmers of legal queries rather than retaining their status as a "learned profession"? This pressure is not unprecedented; *Goldfarb v. Virginia State Bar* (1975) set in motion the role of real estate lawyers in residential closings.

AI and ChatGPT must not supplant lawyers in totality. Before writing this article, I spent nine hours on a Saturday resolving a dispute over a family's real estate with split ownership, entangled in two lawsuits and a narrow window to try to rezone the property, increasing its value tenfold in the next six months. AI did nothing to bring about a solution. Instead, it took choreography, psychology, empathy and country-lawyer savvy. While AI can undoubtedly streamline certain legal tasks, it cannot replace these unique human skills central to the legal profession. This human touch is part of that which is "nothing new under the sun."

## THE ROBOTIC REBUTTAL

While it is true that the legal profession has always adapted to technological progress, it is important to acknowledge that AI represents a significant departure from previous advancements. The capabilities of AI technologies, particularly in areas such as document review, contract analysis and legal research, have the potential to revolutionize how legal work is performed. Most of this paragraph was written by a chatbot, asked to review this article and add rebuttal points. This is a new and powerful tool.

## EMBRACING EXCHANGE, NOT PROGRAMMING

Confronting the challenges of 2023, including AI, necessitates human agency, not algorithms. The VBA's great strength lies in its vibrant exchanges among the community of legal professionals. We must call upon and work with the regulatory Virginia State Bar to establish safe-use guidelines for AI technologies. Expedited Legal Ethics Opinion processes must match the pace of change. Moreover, when it comes to the rule of law, AI's aids to persuasion must always remain subservient to human governance.

We are more than digital scribes. Society needs the profession's help to mitigate AI's potential for misuse and mischief. Enter the rule-makers, the judges and the law — the human exchange that is the essence of what the VBA has been and must be.

The VBA must continue its leadership of the legal community. We consider and shape important questions of the day — through the Committee on Special Issues of National & State Importance and the Boyd-Graves Conference. We tackle the hard issues — on the attraction, development and retention of lawyers, the duty borne by

caregiving attorneys ("Mom, Esquire" programs) and generational differences and diversity in the workforce (the VBA DEI program).

The VBA's Special Committee on Small-Firm and Solo Practice initiative showcases the value of this community of exchange. Lawyers working from smaller practice platforms are innovating and experimenting with how legal work gets done. The meetups involve accomplished lawyers looking to better their practices. These exchanges offer peer-to-peer validation of common hurdles and ideas discarded or brilliant. My hope is that these exchanges continue throughout the commonwealth in the years to come. Committee Chair Steven D. Brown and the other members have given more than their time and talent — they constantly validate the worth of the VBA.

In closing, the call for the VBA to lead the profession in the face of challenges is not a new thing under the sun. This call has been answered before. But the challenges AI poses may be uncharted. We have to consider the growing disconnect between human advocacy and direct interaction and a digital justice generated by a programmed source. This is altogether a new thing. We hope for Solomon's wisdom. ■

**Benjamin D. Leigh** is a principal with Troxell Leigh P.C. in Leesburg, Virginia. His practice focuses on real estate, assisting owners, developers and institutions with issues and litigation. Previously, he served as law clerk to Chief Justice Harry L. Carrico of the Supreme Court of Virginia. He joined the VBA in 1997 and has been active in the Real Estate Section since 2011, serving as section chair in 2015-2017. In 2018, he was appointed to the VBA Public Service Committee and in 2019 he joined the Board of Governors.

**BY R. PATRICK BOLLING**
CHAIR, VBA YOUNG LAWYERS DIVISION

# Send Your Young Lawyer to the Fall Meeting

First of all, thank you. Thank you for sending your young lawyers to our Spring Meeting on Chincoteague Island in April. Thank you to the 70-plus attendees who joined us. As promised, it was an absolute blast.

Thanks to our Platinum Sponsors, Woods Rogers Vandeventer Black PLC, McGuireWoods LLP and Gentry Locke Attorneys, and our Silver Sponsors, Planet Depos and Williams Mullen, we gathered at the Bayside Comfort Suites on quaint Chincoteague Island, overlooking the Chincoteague Bay on Virginia's Eastern Shore. We dined at The Ropewalk to celebrate another successful Lawyer Wellness Challenge.

David R. Berry, partner with Gentry Locke in Roanoke, presented "You Need to Know: Recent High-Impact Appellate Decisions in Virginia," and Darius K. Davenport Sr., managing partner of Crenshaw, Ware & Martin, P.L.C., in Norfolk, presented "Managing the Mid-Career Leap: From Great Young Lawyer to Great Leader of Young Lawyers."

We boarded the 100-foot Martha Lou, where J. Arthur Leonard, mayor of the Town of Chincoteague (and moonlight boat captain) ferried us to Assateague Island to see the famous wild ponies, then back to Chincoteague for dinner at Bill's Prime Seafood & Steaks.

The Spring Meeting exhibits what the YLD is all about. Over the years, I've heard much speculation about the YLD's "value proposition." Is it the MCLE? Is it professional development? Bar service projects? We have all of those in spades, but the value is in the human connection that happens amid and around those things. Post-pandemic, there's less of that connection "IRL" (in real life). That makes the YLD's contribution increasingly rare and special. There will always be a business case for connecting people with other people.

So, what's next? We've knocked it out the park during the Wellness Challenge, Legal Food Frenzy and, as I write, are preparing to attend the Summer Meeting at the newly renovated Homestead, where we'll continue some old traditions and begin some anew. We are recruiting Executive Board member leaders for a number of the YLD's most critical leadership roles. Please encourage the young lawyer in your life to get involved.

I'm going to look way, way forward to the Oct. 27-28 Young Lawyers Fall Meeting, which we'll hold at the newly renovated grand Virginian Hotel in downtown Lynchburg. If you haven't been to Lynchburg in the past five years, I promise you're in for a treat. Our downtown is a thriving hub of new bars, restaurants, art galleries and venues. And, best of all, this will be our first joint meeting with the Board of Governors in many years.

Planning is underway for this year's National Moot Court Competition. The regional event is tentatively scheduled for Nov. 17-18, 2023, at the 4th U.S. Circuit Court of Appeals in Richmond. The YLD always is looking for attorneys to serve as appellate judges for the competition. If you are interested in serving as a judge, please let me know.

Send your young lawyers to get to know some of Virginia's most dedicated servant-leaders. ■

**R. Patrick Bolling** is a principal with Woods Rogers Vandeventer Black PLC, where he is part of the labor and employment team working out of the firm's Lynchburg, Virginia, office.. He is a "Rising Star" in *Virginia Business* magazine's Legal Elite and was named "One to Watch" by *Best Lawyers in America*. He teaches eDiscovery at the Washington & Lee University School of Law, his alma mater. A VBA member since 2014, he has served on the YLD Executive Board since 2018 and is the YLD representative on the Labor and Employment Law Section Council.

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**https://www.virginia-mountain-valley-lawyers-alliance.org/2023-annual-meeting-and-fall-seminar**

**BY MICHAEL C. GUANZON**
CHAIR, LAW PRACTICE MANAGEMENT DIVISION

# Keeping Up With the Joneses During Post-Pandemic Recovery?

During a recent VBA Law Practice Management Division Council meeting, we discussed programming ideas for the coming year. One issue sparked a lot of discussion: Should small and mid-sized law firms even attempt to keep up with the latest aggressive recruitment push by Big Law? Is offering higher salaries enough of an investment for recruitment and retention success? If so, can these small and mid-sized firms maintain and preserve their firm cultures?

Anecdotally, based on conversations with colleagues and my perusal of online law practice articles, several Big Law firms reportedly have dispensed with a cost-of-living adjustment for first-year associate starting salaries, presumably because of work-from-home policies initiated or expanded during the pandemic. Salaries for Big Law associates starting their careers in a secondary law market, such as Richmond with its lower cost of living, would be the same as those starting in big metro cities, such as Manhattan or San Francisco. What a time to be a Big Law associate in a secondary law market!

Then, something seemed eerily reminiscent of the early 2000s during the startup dot-com boom, when I was a bright-eyed associate. At that time, the associate market was frenzied. The startup dot-com companies were taking off and poaching young Big Law corporate associates in large metro cities. To slow the bleeding and to retain those associates, Big Law in those big metro cities increased starting pay for first-year associates in all practice groups by 30% or more. This started a domino effect in which Big Law, to stay competitive in associate recruitment and retention, was squeezed to increase pay scales of all associates, not only in those big metro legal markets but also in smaller ones.

Big Law also instituted in-house headhunter programs in which associates could receive from some firms $25,000 (equivalent to about $44,000 today) for successfully recruiting their friends and classmates. I even recall a "greedy associates" chat board for many states, where associates of various firm sizes anonymously shared compensation scales, benefits packages, retention bonus plans and finder's fees. The associates were ready to jump ship.

Admittedly, I was caught up in the frenzy when I joyfully accepted my 30% pay bump in January 2000. But I knew that the big pay bumps across Big Law associates were market driven and firm culture would be adversely affected.

Big Law partners, feeling the squeeze of the market and having to accept reduced profits per partner, responded. Some raised or required annual billable goals. Partner tracks were lengthened. New tiers of associates and partners were created. Assignments for first-year associates became less sophisticated (to increase the return on investment, young associates were assigned work that arguably could be, and customarily has been, handled by senior paralegals). Senior associates and junior partners did not have the same freedom to mentor young associates because doing so would take away their ability and time to meet their own billable requirements.

Ultimately, the frenzy ended when the economy slowed, but firm culture did not change back.

Maybe this is a cautionary tale worth considering as private law firms emerge out of the pandemic.

*This column represents the individual opinions and insights of the author alone and not necessarily those of his affiliated law firm or the VBA.* ■

**Michael C. Guanzon** is a partner at Christian & Barton LLP in Richmond, Virginia, where he focuses his practice on business law, economic development law and health law. He is a director of the Asian Pacific American Bar Association of Virginia and serves on the board of managers of the University of Virginia Alumni Association. He joined the VBA in 1995 and serves on the Board of Governors as chair of the Law Practice Management Division and as its liaison to the Health Law Section. He previously served on the VBA Board of Governors and the executive committee of the Virginia State Bar Council.

# Supreme Court extends appellate mediation pilot program

Appellate practice in Virginia has undergone numerous changes over the past few years. Amid an expanded Court of Appeals and the establishment of appeals of right, a development that has flown under the radar for many is appellate mediation.

In 2019, following the recommendation of the Special Committee to Study Appellate Mediation in Virginia (part of the Joint Alternative Dispute Resolution Committee of the Virginia State Bar and The Virginia Bar Association), the Supreme Court of Virginia started a two-year pilot program for appellate mediation in both the Supreme Court and the Court of Appeals.

The goal of that program was straightforward: give to appellate practitioners and litigants the same sort of experienced and capable alternative dispute resolution that's available in lower court proceedings.

The program includes mediator training focused on the unique aspects of appellate litigation and process, offering those mediation services to the parties, and an automatic stay of briefing for those who opt to mediate. Just as they can in lower court proceedings, then, practitioners and parties can use the services of experienced and certified appellate mediators to resolve their disputes and exercise some control over what could otherwise be an unpredictable, time-consuming and expensive appellate process.

Since the program's creation, the Supreme Court has extended the pilot programs in both courts. After last year's expansion of the Court of Appeals and the increasing caseload before that court following the establishment of appeals of right in Virginia, the benefits of appellate mediation are even more pronounced. The special committee is pleased to announce that on May 24, 2023, the Supreme Court extended the pilot program an additional two years, to Dec. 31, 2025.

-John P. O'Herron

**Find the most up-to-date information about in-person and virtual events at vba.org/events.**

## September 2023

**14** | **Seventh Annual White-Collar Criminal Law Forum**
Bank of America Center, Richmond

**15** | **23rd Annual Corporate Counsel Fall Forum**
The Jefferson Hotel, Richmond

**19** | **VBA Legislative Day**
Virtual, Zoom

**20** | **Small-Firm Management Meetup**
Hyatt Regency Reston, Reston

**21-23** | **53rd Conference on Labor and Employment Law**
Hyatt Regency Reston, Reston

**27** | **Practice Management Advisor webinar — Not Your Grandfather's Writing: Legal Writing for the 21st Century**
Virtual, Zoom

**28** | **Appellate Summit**
McGuireWoods LLP, Richmond

## October 2023

**4** | **Helping the Helpers: Legal Assistance for Children and Their Kinship Caregivers**
Virtual, Zoom

**12** | **19th Annual Virginia Health Care Practitioners' Roundtable**
Troutman Pepper, Richmond

**13-14** | **Boyd-Graves Conference (invitation-only)**
Kingsmill Resort, Williamsburg

**19-20** | **Civil Rights Law Institute at Monticello**
In person and virtual, Monticello, Charlottesville

**27** | **34th Annual Virginia Tax Practitioners' Roundtable**
Farmington Country Club, Charlottesville

## October continued 2023

**27-28** | **Board of Governors Fall Meeting**
The Virginian, Lynchburg

**27-28** | **Young Lawyers Fall Meeting**
The Virginian, Lynchburg

## November 2023

**8** | **Small-Firm Management Meetup, Harrisonburg**
Brix & Columns Vineyard, McGaheysville

## December 2023

**19** | **Practice Management Advisor webinar — Tame the Digital Chaos**
Virtual, Zoom

## January 2024

**18-20** | **134th Annual Meeting**
Williamsburg Lodge, Williamsburg


**Watch for announcements about other conferences and meetings online at vba.org and vba.org/events, via social media and in your email inbox. Not getting emails about VBA events and meetings? Contact the VBA office at 804-644-0041 or thevba@vba.org about opting back in to emails.**

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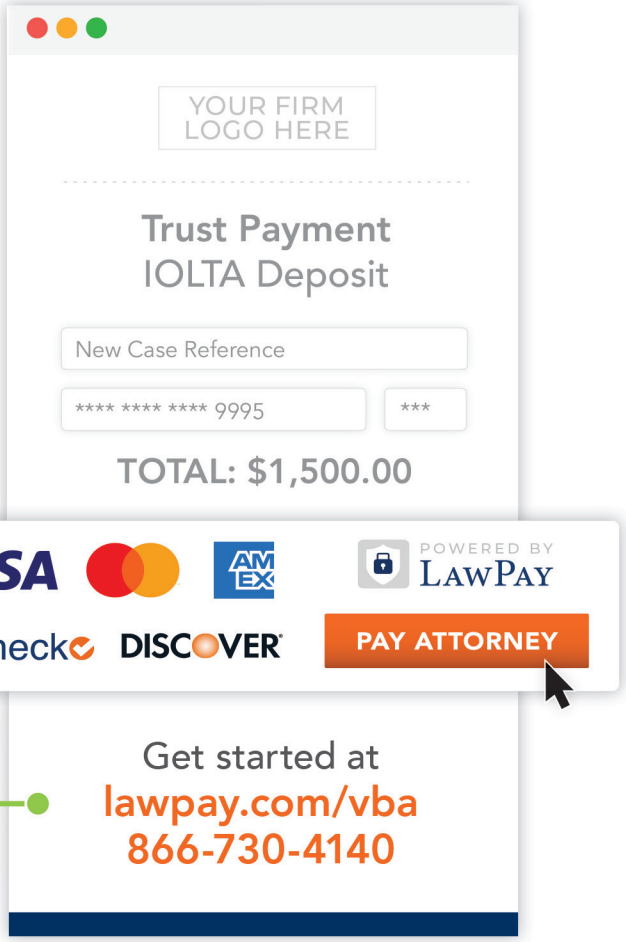


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**BY DAVID H. SPRATT**
PROFESSOR, AMERICAN UNIVERSITY

# The Art of Discovery: Part 1

My son, a junior in high school, took Advanced Placement tests recently. He wants to score high enough to receive college credit at a to-be-determined college in the fall of 2024. Every morning, I remind him to read each word carefully and focus on the call of the question, answering only what the question is asking. I hope he listened. But, even if he didn't, my words inspired a new series of columns about best practices in propounding and answering discovery, one of which is answering specifically what is asked of your client. But I am jumping ahead. For nonlitigators, let's first review the basics.

Discovery is the primary fact-gathering method in the formal litigation process. There are many types of discovery, but I will focus on interrogatories (questions that must be answered under oath) and requests for production of documents.

Discovery is expensive. Often, the parties, the attorneys, and other litigation staff would choose a trip to the dentist (and perhaps even a root canal) over discovery. Discovery can lead to court appearances arguing over what is relevant and discoverable or whether the opposing party fully responded to the requests. Unfortunately, discovery is sometimes used as a weapon to embarrass the other side and/or force a settlement. In a perfect world, discovery requests are made in good faith and not simply to harass the other side or bury them in a mountain of paperwork. In that same perfect world, responding parties provide the requested information subject only to relevant objections without purposely trying to be evasive or misleading. As we all know, the world is far from perfect.

In the next few installments of this column, regrettably, I will not offer advice on achieving utopia. I will, however, give some tips on how to adeptly practice the art of discovery.

## EDUCATE YOUR CLIENT AND CONTROL EXPECTATIONS FROM THE OUTSET

Discovery is a necessary evil, one that many clients will try to resist. Regardless, discovery enables both parties to prepare for settlement or, if that fails, litigation. Make sure your client knows from the outset that only in certain, limited circumstances is withholding of information or documents permissible. Clients should err on the side of overproduction, not to the opposing party, of course, but in drafting their responses for your review. Let clients know that you need to collect their responses and review them before sending them to the opposing side or deciding whether to object. It is better to receive too much from a client than too little. This way, you, as the attorney, can determine from the wealth of information and documents provided what needs to be included in the final answers and responses.

Empathize with the client. Discovery sucks. It takes a lot of time and emotional and physical energy. It forces self-reflection, often making parties relive bad moments in their lives – particularly in family law, my former practice area. Acknowledge how time-consuming and frustrating responding to discovery can be for a client, but stress how important it is for the client to provide timely and complete responses. Each time I sent my client discovery requests, I included this language: "Should a party fail to fully answer all Interrogatories or produce the requested documents, the other side can go to court and ask the judge to award penalties ("sanctions") in the form of attorney's fees, and/or other forms of relief, which could seriously damage your case. Please be aware that failure to respond to these discovery requests in a timely manner will also hamper our ability to insist on strict compliance from the opposing counsel."

## PROVIDE YOUR CLIENT WITH INSTRUCTIONS FOR ANSWERING THE REQUESTS

I will let you in on a little secret: Clients do not always follow our advice. Shocking, I know, but much like my son, they know best how to do everything and sometimes ignore our best-intentioned guidance.

Nonetheless, providing clients with a framework from which to respond to discovery is quite useful in reducing the amount of chaos. I impart this wisdom to my law students. In my upper-level family law litigation and practice class, I give students a client's "first pass" at answering interrogatories, which is significantly unorganized. The client rambles to the point of free association, gives a lot of extraneous details, and says she is simply "too busy" to follow the format we prescribed. The students then must cobble through the information provided and answer the specific interrogatories. This shows them, in part, the importance of providing and insisting on structure from a client as much as possible.

## Discovery is a necessary evil.

To control the chaos, here are some instructions I gave clients who were answering discovery:

**Interrogatories:**

1. Please answer each question, including subparts, to the best of your ability.

2. If questions are not applicable in your case, please state, "Not applicable."

3. If you cannot answer a question because the information needed is not in your possession, please state this fact, indicating who has the information needed to answer.

4. When a question asks for monetary values, indicate if the values provided are estimates.

5. If you do not know the answer to a question, state "Unknown."

6. You should not unilaterally decide not to answer a question because you find it objectionable, offensive, or intrusive. The scope of inquiry is broad under the court rules. As your counsel, we will determine if any Interrogatories are objectionable.

**Request for Production of Documents:**

All documents must be organized, labeled, and complete. Disorganized material will cause you to incur additional and unnecessary fees, as it will require additional time for us to organize your documents.

**Do <u>not</u> write on the documents.** Documents that have notes written on them will have to be erased and/or covered before re-copying, causing you to incur additional fees. Should you feel that notation is necessary, please attach a Post-It Note.

1. Provide all documents in your possession, custody, and control responsive to the request. Again, we will decide whether any requests are objectionable.

2. Include a numbered list that indicates what documents you have enclosed, whether the documents requested do not exist, or if the documents sought are in another's possession.

3. Compile your documents in chronological order and attach all documents related to a certain issue or account together. In addition, use Post-It Notes to label each document or group of documents with the number of the request to which it pertains.

4. If you do not have a document, take a plain sheet of paper and mark on it the document request number, the name of the document requested, state whether it exists, and who has the document.

Future columns will address effectively drafting and specifically responding to discovery. ■

Please send any suggestions that you have "discovered" along the way to dspratt@wcl.american.edu.

**David H. Spratt** is a professor of legal rhetoric at The American University, Washington College of Law, where he teaches legal writing, contracts, and family law litigation and practice and is associate director of the Legal Rhetoric Program. He received a bachelor's degree in government and psychology from William & Mary and graduated summa cum laude from The American University, Washington College of Law. In 2001, Professor Spratt was a founding partner of Schwartz & Spratt, PLC, a family law firm in Fairfax, Virginia. Previously, he worked as an associate at the Law Office of Betty A. Thompson, Ltd. Professor Spratt is the chair of the Virginia State Bar Section on the Education of Lawyers and formerly was the civil reporter of decisions for the Court of Appeals of Virginia. In February, Professor Spratt published a textbook, "Contracts: A Modern Coursebook," with co-author Ben Templin. A VBA member since 1995, he also is a member of the Domestic Relations Section.

# 133rd Summer Meeting

## July 20-22, 2023

**PHOTOS BY** MEGAN CONNOR, SUNNI O'BRIEN, KEVIN REMINGTON PHOTOGRAPHY AND MARILYN SHAW


**Benjamin D. Leigh** presides over the banquet program. The VBA president is with Troxell Leigh P.C. in Leesburg.

**Mark T. Coberly**, with Woods Rogers Vandeventer Black PLC in Norfolk, accepts his class of 2023 Life Member gift from President **Benjamin D. Leigh** during the banquet.

**Kevin J. Daniel** of Troxell Leigh P.C. in Leesburg chats with **Amy and William B. Porter** before the banquet. Bill Porter is with Blankingship & Keith, PC, in Fairfax.

Former Board of Governors member **Rosalie P. Fessier** with TimberlakeSmith in Staunton, poses for a banquet reception photo with VBA President-elect **W. Ryan Snow** of Crenshaw, Ware & Martin, P.L.C., in Norfolk, and wife **Sarah Snow**.

The closing general session on how artificial intelligence will change the legal profession features **Shawn D. Lillemo** with Harrity & Harrity, LLP, in Fairfax, **Justice D. Arthur Kelsey** with the Supreme Court of Virginia and **Laura Ellingson**, Kelsey's law clerk.


Four former U.S. Supreme Court law clerks discuss how the court has evolved over time. From left, the general session panelists are **Professor Katherine Mims Crocker** (Antonin Scalia), **Judge Toby Heytens** (Ruth Bader Ginsburg), the **Honorable J. Michael Luttig** (Warren Burger) and **Professor A.E. Dick Howard** (Hugo L. Black).

At the opening reception, **Carlyle R. "Randy" Wimbish III** of Wimbish Gentile McCray & Roeber PLLC in Richmond and **Dean M. "Mac" Nichols** catch up. Nichols is with Flora Pettit PC in Harrisonburg.

**Heather R. Pearson**, an associate with Willcox & Savage, P.C., in Norfolk, learns she won the 50/50 raffle coordinated by the Young Lawyers Division.

**J. Benjamin Rottenborn** with Woods Rogers Vandeventer Black PLC in Roanoke and former law partner **Darryl D. Whitesell**, general counsel and CFO at Foster Fuels, Inc., in Brookneal, relax in the conference area before the banquet reception.

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# UPDATE THOSE SEVERANCE AGREEMENTS

EMPLOYEES CAN'T BE REQUIRED TO GIVE UP LABOR RIGHTS

BY JOHN M. BREDEHOFT AND NEIL S. TALEGAONKAR

In Virginia, far fewer than one out of every 20 employees belongs to a union.[1] Accordingly, outside of the somewhat rarified air where labor law specialists dwell, Virginia attorneys usually do not follow the proceedings of the National Labor Relations Board (NLRB) with rapt interest. However, for more generalized employment lawyers, as well as general practitioners and those who regularly advise smaller businesses, this disregard of the NLRB may increasingly prove dangerous.

Since the start of this year, the board has been quite active in adopting and promulgating principles of law that affect even the nonunion workplace. Some of these principles represent a simple return to positions taken by previous administrations while others encompass exploration of new governing law. (See sidebar on next page.) In any event, anyone in Virginia who advises a company client that employs people – and in our still largely pre-AI world, that is most of us – must take heed of what is coming out of the NLRB. It is time to dust off and update our form severance agreements.

Perhaps the most important of these pronouncements, because it will find application virtually every day, is the board's stance on what kind of releases an employer may seek or obtain from a resigning or terminated employee in a severance agreement. It is commonplace for many employers to make an enhanced payment to a departing employee, nominal or enormous depending on circumstance, in exchange for a comprehensive release of claims against the employer. The NLRB decision in *McLaren Macomb*, 372 NLRB 58 (2023), a 3-2 decision of the board, provides mandatory guidance for any employer wishing to avoid an unfair labor practice charge. Whether the employee is a member of a union, and whether any other union activity is present in the employer's workplace, is irrelevant to the analysis.

A brief recap: Section 7 of the National Labor Relations Act provides broad protections for the rights of employees collectively to criticize and protest employment practices, including the "right to self-organization … and to engage in other concerted activities for the purpose of … other mutual aid or protection." Section 8 of the act makes it an unfair labor practice to require or even request an employee to a forfeit those Section 7 rights. In *Baylor University Medical Center*, 369 NLRB 43 (2020), the board generally endorsed the view that broad provisions in a severance agreement do not, at least per se, have an unreasonable tendency to interfere with Section 7 rights. In *McLaren Macomb*, the board expressly overruled *Baylor*, holding that a severance agreement proffered to 11 employees of that company violated the act.

## THE *McCLAREN McCOMB* CASE

The case arose from the COVID crisis. The company operates a hospital in Michigan where a bargaining unit of approximately 350 service employees was certified in 2019. After the onset of the pandemic, government regulations prohibited the company from performing elective and outpatient surgery or allowing nonessential employees to work inside the hospital. In response, the company admitted only trauma, emergency and COVID-19 patients, furloughing the 11 unionized "nonessential" employees at issue here. Several months later, the company permanently furloughed those employees and presented each with a "Severance Agreement, Waiver and Release." All of the employees accepted the severance and signed the agreement. The agreement generally releases the company from any claims arising out of their employment or from the termination of that employment.

## A COUPLE OF RELATIVELY STANDARD PROVISIONS

The problem arose[2] from a couple of relatively standard provisions. Paragraph 6 of the agreement made terms of the agreement itself confidential; the employee could not disclose the terms of the agreement to any third person other than for the purpose of legal counsel or tax advice, unless legally compelled to do so. Paragraph 7 imposed on the employees the duty "not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the employee has or had knowledge of, or involvement with, by reason of the employee's employment. At all times hereafter, the employee agrees not to make statements to employer's employees or to the general public which could disparage or harm the image of employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives."

**Since the start of this year, the [NLRB] has been quite active in adopting and promulgating principles of law that affect even the nonunion workplace.**

The board found these commonplace nondisparagement and confidentiality provisions illegal: They unlawfully restrained and coerced furloughed employees in the exercise of their Section 7 rights. The agreements provided for "substantial monetary and injunctive sanctions" against the employee in the event these proscriptions were breached.

The board overruled *Baylor* and a contemporary companion case, *IGT d/b/a International Game Technology*, 370 NLRB 50 (2020), which roughly speaking together imposed a balancing test and focused

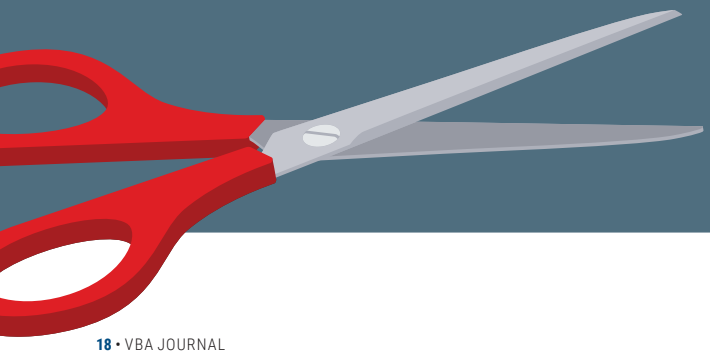
## NLRB ALSO TARGETS NONCOMPETE AGREEMENTS

Severance agreements and releases do not constitute the only field in which the NLRB is spreading its wings. For example, on May 30, the general counsel of the NLRB issued a memorandum contending that covenants not to compete generally "interfere with employees' exercise of rights under Section 7." The memorandum counsels, "except in limited circumstances … maintenance and enforcement of such agreements violate section 8(a)(1) of the Act."

The memorandum suggested a number of ways in which noncompete agreements may chill the exercise of Section 7 rights, including deterring employees from concertedly threatening to resign to demand better working conditions, concertedly seeking or accepting employment with a local competitor and soliciting co-workers to go to work for a competitor as part of a broader course of protected activity. The general counsel memorandum did suggest, however, that noncompete agreements may not violate the act where provisions only restrict an individual's post-employment managerial or ownership interests in a competing business. Of course, the general counsel's statements come in the context of the still-pending Federal Trade Commission rule intending to restrict or eliminate noncompete agreements nationwide.

Similarly, on May 1, the board again reinstated precedent it had discarded in 2020, restricting the right of management to discipline or discharge employees for abusive outbursts during protected activity. In *Lion Elastomers, LLC*, 372 NLRB 83 (2023), the board again rejected Trump-era decisions and reestablished more comprehensive protection for abusive employee conduct occurring during disputes over wages, hours and working conditions.

Importantly, like the *McLaren Macomb* decision, each of these about-faces by the board apply to all employers and **all** employees, not just in unionized workplaces. It remains to be seen how expansive the board's outreach will be in going after noncompetition agreements, particularly in nonunionized workplaces.



on the employer's motivation. In particular, the board discarded as "incorrectly premised" the contention that whether an employer had any animus against protected activity might be a relevant consideration. The board returned to the long-standing test enunciated in *American Freightways Co.*, 124 NLRB 146 (1959): whether interference violates Section 8 does not turn on the employer's motive or indeed whether the attempted coercion succeeded or failed. "The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the act."

The decision brings to mind the words of the renowned philosopher, the late George Carlin. Mr. Carlin posited that if one wanted to go down to the schoolyard to sin, one need not make the trip; "wanna" is a sin all by itself. So is it here. Simply offering a severance agreement with these confidentiality and nondisparagement terms was itself an unfair labor practice and violated Section 8 of the act. This is true whether or not the employee felt compelled to sign it, enjoyed signing it, was asked to sign it, or didn't sign it or even read it at all. And, of course, although unionized employees were involved in this case, whether a union is present has no bearing on the issue of whether an unfair labor practice has occurred.

### WHAT'S A PRACTITIONER TO DO?

One recommendation would be to amend both the release portion of any severance agreement and any confidentiality or nondisparagement provisions (or to add some form of superseding short paragraph) to ensure that the former employee is not discouraged or chilled from undertaking activity protected by Section 7. That is easy to say, easy to write and very difficult conceptually. In essence, a severance agreement should now **preserve** the former employee's right to bring a complaint to the NLRB, to testify or otherwise provide support for a complaint about working conditions, and to allow the employee freely to coordinate with other employees and former employees in the pursuit of better working conditions. This eviscerates most standard nondisparagement clauses.

There may be an upside. In our experience, no employee who has signed a severance agreement that has maintained inviolate the ability to initiate a proceeding before the NLRB – or for that matter, a proceeding before the U.S. Equal Employment Opportunity Commission – has ever actually initiated such a proceeding. In our experience, employees sign their severance agreement and then go away. This is particularly so because the agreement can be crafted to give up the employee's right to obtain any personal relief (after all, what good is the release if it doesn't release claims?) while maintaining their rights to initiate or participate in protected activity.

We recommend language somewhat along the following lines:

> Notwithstanding any other provision in this Agreement, nothing in this Agreement prohibits Employee from (i) filing a claim or charge or complaint with the U.S. Equal Employment Opportunity Commission, the Virginia Human Rights Council, the National Labor Relations Board, or any other governmental agency; (ii) participating in, providing evidence or information in support of, or otherwise supporting such a claim or charge

or complaint; or (iii) acting collectively with any other employee or former employee of Company in the exercise of rights under Section 7 of the National Labor Relations Act. However, Employee does release Company from any liability to Employee of any kind resulting from or arising out of any such proceeding (including for attorneys' fees or costs), and Employee irrevocably disclaims any entitlement to personal injunctive, declaratory, monetary, or any other form of relief resulting from or arising out of any such proceeding.

We often combine such language with an explanation that, for example, signing the agreement does not sign away ERISA or retirement plan rights.

The NLRB appears determined to expand the scope of its remit. All Virginia lawyers, even those who do not deal with unionized workplaces, would be well advised to keep abreast of developments at the board. ■

**ENDNOTES**

1 According to the Bureau of Labor Statistics, the unionization rate of employees in Virginia for 2022 was 3.7%, down significantly from 4.8% the prior year. https://www.bls.gov/regions/mid-atlantic/news-release/unionmembership_virginia.htm

2 Actually, there were a number of problems. One was the fact that the company terminated the employees and contacted them directly about the severance agreement, all without contacting their union representatives – entirely bypassing the union – also in violation of Section 8 of the act. That holding is noncontroversial.


**In essence, a severance agreement should now *preserve* the former employee's right to bring a complaint to the NLRB. ...**

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# Drones IN VIRGINIA

## Evolving Uses and Potential Litigation

BY MARIALUISA GALLOZZI AND WESTON COWARD

Drones are flying in to solve some real problems in Virginia. Imagine that you are scrambling up Sharp Top Mountain when you realize that you're lost. It's getting dark and you're not sure what to do. Enter the Bedford Fire Department, which uses drone technology to detect heat from your body and with that information send a rescue team to save you. This isn't just a hypothetical; the Bedford Fire Department located two lost hikers in 2021 in this exact way.[1] Drone technology is not limited to missing person calls, either. First responders across the state are using drones to respond to other types of service calls, such as reports of criminal activity and traffic pursuits.[2]

Now imagine that you live on the Eastern Shore or Tangier Island – both rural areas – and suffer from hypertension. It is a trek to get in your boat and pick up your prescribed medication from the "nearest" drugstore. Soon, you will be able to have your prescribed medication dropped off at your doorstep – via drone. Virginia's Riverside Shore Memorial Hospital Group is working with a Virginia headquartered company to have drones shuttle medication across the Chesapeake Bay, which will make residents' lives easier and give them faster access to medication.[3]

But drones aren't just addressing life-or-death problems. Take, for example, Wing, an Alphabet Inc. subsidiary, which has been piloting its drone delivery service in Christiansburg since 2019. Wing's delivery partners include Walgreens, a local coffee shop and the Girl Scouts, who used drone delivery to help improve sales during the pandemic.[4] Similarly, Walmart customers in Hampton Roads can have their orders delivered by a drone.[5]

These solutions offered by drone technology present new questions – many of which implicate the law – that Virginians and Virginia lawyers will have to face.

As of May 2023, more than 860,000 drones were registered with the Federal Aviation Administration ("FAA"), primarily for recreational use.[6] The FAA forecasts that by 2026 there will be over 1.8 million small recreational drones and the commercial fleet will grow to over 850,000.[7] The drone market is predicted to pass $134 billion by 2028.[8]

Virginia was recently ranked as the No. 1 state for its initiatives in unmanned aerial systems business.[9] Beyond saving lost hikers, Virginian localities use drones to fight wildfires,[10] inspect roads, update city maps, collect data from water meters and inspect trees.[11] Virginia's farmers have used drones to improve yields and lower operational costs.[12] With these new uses come new risks and, inevitably, litigation. We list below some of the types of drone-related litigation to date involving privacy, Fourth Amendment, criminal, evidentiary, First Amendment and insurance issues.

## PRIVACY LITIGATION

Concern about privacy invasions was dramatically illustrated by the "drone slayer" case from 2017. John David Boggs sued in the Western District of Kentucky after his neighbor, William H. Merideth, shot down a drone Boggs owned as it flew over Merideth's property.[13] Boggs argued that his drone was in federal airspace, not on Merideth's property. Merideth argued that flying a drone over his property: (1) was trespassing, and (2) violated Merideth's "reasonable expectation of privacy." The court granted Merideth's motion to dismiss.

## FOURTH AMENDMENT

Drones also evoke concerns about government surveillance in violation of the Fourth Amendment.

In *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, the 4th U.S. Circuit Court of Appeals confronted the constitutionality of a *manned* aerial surveillance program.[14] The Baltimore Police Department's Aerial Investigation Research pilot program used cameras whose images could be magnified to show individuals (as blurred dots or blobs). Law enforcement would then review the images to identify suspects associated with criminal activity.[15] On rehearing, the en banc panel held by an 8-7 vote that "[b]ecause the … program enable[d] police to deduce from the whole of individuals' movement, … accessing its data [was] a search, and its warrantless operation violate[d] the Fourth Amendment."[16] The opinion suggests that the court could similarly conclude that warrantless drone surveillance also violates the Fourth Amendment.

The admissibility of aerial photos taken by a camera mounted on a drone was at issue in *Long Lake Township v. Maxon.* The township alleged that the plaintiff's property was an illegal junkyard and used aerial photos taken by drone as evidence of the alleged zoning violation. On remand from the Supreme Court of Michigan, the Michigan Court of Appeals held that the exclusionary rule did not apply because of the unlikelihood of any penalty being exacted and the fact that the zoning action was not coupled with a criminal prosecution of any sort.[17] This issue is on appeal to the Supreme Court of Michigan.[18]

## EVIDENTIARY DISPUTES

Drones also present *civil* evidentiary issues. In *Midwest Operating Engineers Welfare Fund v. Davis & Sons Excavation*, the Northern District of Illinois denied a motion in limine to exclude video footage collected by drone.[19] The court reasoned: (1) there was no showing that use of the drone violated FAA regulations; (2) even if FAA regulations had been violated, those regulations do not provide a basis for excluding evidence; and (3) the drone did not record audio, so it was not an illegal interception of communications. The court, however, noted that the proponent would need to present a proper evidentiary foundation for the admission of the drone footage.

## CRIMINAL LITIGATION

Drones not only expand what law enforcement agencies can do, but also can be used by criminal enterprises. In *U.S. v. Brown*, Joe Brown was charged with drug-related charges as well as with an attempt to use an unregistered drone in furtherance of marijuana possession with intent to distribute.[20] Brown pleaded guilty to the drone offense rather than the drug offenses and was sentenced to 48 months in prison and three years of supervised release. The 11th U.S. Circuit Court of Appeals upheld Brown's guilty plea. In so doing, it rejected Brown's argument that his plea was not fully informed because, although he was aware that the drone was unregistered, which was an element of the offense, the court did not tell him the drone was eligible for registration.

## FIRST AMENDMENT LITIGATION

First Amendment issues arise in connection with the use of drones for newsgathering. In *National Press Photographers Association v. McCraw*, press photographers and their professional association challenged a Texas statute restricting drone use.[21] The statute imposed civil and criminal penalties for violations, potentially chilling speech and implicating First Amendment rights. The Texas statute restricted "surveillance," without defining surveillance, and included "no-fly" provisions over certain facilities. Although educational institutions and law enforcement were exempt from the statute, newsgathering was not. The court found that strict scrutiny applies because the provisions restricting drone use are content-based, and that those provisions failed that scrutiny. It commented that "[a]s a matter of law, use of drones to document the news by journalists is protected expression" under the First Amendment.

## INSURANCE LITIGATION

Drones also have spawned insurance-related disputes. In *Philadelphia Indemnity Insurance v. Hollycal Production*, a drone photographing a wedding made contact with a wedding guest's eye.[22] The wedding guest claimed she lost her sight as a result of the accident. The plaintiff insurer declined coverage. The court granted the insurer's unopposed motion for summary judgment. The insurance company argued in its motion that the drone was not covered because the policy excluded: (1) "aircraft," (2) "miscellaneous recreational exposure," (3) bodily injury "[a]rising out of the ownership, operation, maintenance, [or] use … of any flying craft or vehicle," and (4) "any object propelled, whether intentionally or unintentionally, into a crowd by or at the direction of a participant or insured."

Other cases show that drone use is now standard in the insurance industry. For example, in *Bellina v. Liberty Mut. Ins. Co.*, an insured sued an insurer for denying coverage for hail damage.[23] The insured alleged that the denial was arbitrary and capricious because the adjusters inspected from a ladder and reviewed drone footage but did not actually climb on the roof. The court granted summary judgment for the insurer on the insured's bad-faith claim. The court also denied the insured's motion to exclude the insurer's expert report, which relied upon expert's physical inspection of the damaged roof, supplemented by drone photographs of areas of the roof that could not be inspected by an expert from a ladder.

In a similar case from 2022, *Jajou v. Safeco Ins. Co. of Indiana*, a court in the Western District of Texas held that it was not unreasonable for the insurer to use a drone rather than a lift to inspect the policyholder's hail-damaged roof.[24]

As the varying litigation demonstrates, the insurance industry must evolve to keep up with drone technology. Insurers underwriting

various types of coverage are adding or revising exclusions applicable to unmanned aerial systems. Other insurers are issuing products designed to provide drone-specific coverage.

## CONCLUSION

Virginia's state and local governments tout the importance of drone technology and drone-related businesses. Gov. Glenn Youngkin, for example, referred to one drone company as "an impressive and highly impactful project" that is "an important part of Virginia's business fabric."[25] Virginia's schools invest in educating students on how to build and operate drones; Virginia Tech operates one of the largest drone parks in the country and Richard Bland College is developing a commercial drone training program.[26] And Virginia's facilities and infrastructure make it a national leader in drone technology; the Wallops Research Park on the Eastern Shore makes Virginia one of only four states licensed by the FAA to launch spacecraft into orbital trajectories, further demonstrating how Virginia has prioritized aerospace investment.[27]

Virginia is continuing to invest in programs that will bring drones into our everyday lives, meaning Virginia lawyers should be ready to confront the tough legal questions discussed in this article. ■

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# Tips from the Bench: Better Legal Writing

BY ERIN DEBOER

Have you ever experienced writer's block? Or wondered why the legal brief you drafted doesn't flow well? Have you found yourself wishing you could phone a friend – better yet, the court – for help?

If so, you're in luck. I reached out to justices and judges across Virginia for their advice.[1]

Several common themes arose. Their responses repeatedly highlighted five key components. An excellent brief is clear, concise, organized, supported by legal authority and proofread. But don't just take my word for it. Read on for the experts' firsthand tips about the do's and don'ts of legal brief writing.

## CLEAR

"Always keep in mind two goals: (1) Make the complex simple. (2) Make the decision-maker's job easier."

— Judge David B. Carson, 23rd Judicial Circuit of Virginia

"Laying out the facts chronologically and advancing your position simply and logically, avoiding jargon and detours, will make an excellent brief."

— Justice Thomas P. Mann, Supreme Court of Virginia

A common problem that attorneys should avoid in legal briefs is "not clearly explaining what the attorney wants the court to do and why."

— Chief Justice S. Bernard Goodwyn, Supreme Court of Virginia

## CONCISE

"Everything begins with your brief. An appellate judge must sift through hundreds of pages of briefs every week. Your target audience, therefore, wants to understand your case quickly and with as little reading as possible."

— Judge Robert J. Humphreys, Court of Appeals of Virginia

An excellent legal brief "omits extraneous material: If something isn't an issue on appeal, no need to write about it; no need for a string cite for a basic proposition of law."

— Justice Stephen R. McCullough, Supreme Court of Virginia

"Avoid repetition – saying the same thing more than once does not strengthen the argument."

— Justice Mann

"The word and page cut-offs are a limit, not a goal. … [Avoid] filling up pages for the sake of the act."

— Judge Dominique A. Callins, Court of Appeals of Virginia

## ORGANIZED

"An excellent legal brief is well researched, well organized and concise, and it directly and thoroughly addresses the key issues it wants the court to rule upon."

— Chief Justice Goodwyn

"Organize your brief well and use subsections to break down your arguments into more easily digestible pieces. Doing so will help you build your arguments in a coherent fashion, and it will also make it easier for the systemic mode thinkers in your audience to understand precisely where you are going and how you are going to get there."

— Judge Humphreys

"Clarity and organization … can be effectively presented in your table of contents as well as in the body of your brief. It is helpful to discern a preview of the issues and supporting arguments from the table of contents."

— Judge Callins

An excellent brief has a "good table of contents with succinct point headings that serve as a stand-alone summary of the facts and argument; an introduction that tells the reader within 45 seconds what the case is about, what the issues are and how they should be decided; paragraphs that start with topic sentences; [and] paragraphs that end in sentences that transition well to the next paragraph."

— Judge Stuart A. Raphael, Court of Appeals of Virginia

## SUPPORTED BY LEGAL AUTHORITY

An excellent legal brief "includes supporting authorities (not just the author's opinion)."

— Chief Judge David W. Lannetti, Norfolk Circuit Court

"Show the court *how* to rule for you. Explain your legal theory of the issue and how precedent supports it, or why existing precedent should be modified or overruled. What your analysis should *not* contain is stream-of-consciousness assertions of case law, applied to the facts without regard for context or the development of the law."

— Judge Humphreys

A common problem in legal briefs is "citing/quoting cases but failing to clearly indicate the authority on which you rely and the reason for that reliance."

— Judge Callins

"Get right to the point when discussing why a case controls or is important. … Confront the bad facts and adverse authorities; don't leave them for the other side to point out that you ignored them."

— Judge Raphael

A frequent deficiency in legal briefs is "ignoring hard facts/hostile precedent/possible procedural defaults. Address them; don't sweep them under the rug."

— Justice McCullough

"When discussing out-of-state cases that help your position, please tell us which states go the other way and whether there's a majority rule."

— Judge Raphael

## PROOFREAD

There is "no such thing as good writing – only good rewriting. Proofread and consider having a fresh set of eyes – a paralegal, an associate, a friend – to look over it."

— Justice McCullough

"Your audience consists of people who read and write for a living, so understand that small things like spelling and grammar mistakes can hurt your credibility tremendously. Such seemingly insignificant mistakes suggest that you didn't spend a lot of time on the case and have little invested in the outcome."

— Judge Humphreys

"Your brief can never be better than your credibility. Everything is read. All cites are checked. Cases are read to confirm that your stated holding and factual descriptions are accurate. Be straightforward. Acknowledge the weakness in arguments or facts. Avoid esoterica. Avoid Latin. Finally, an appellate brief is something not every lawyer can do [alone]. Ask for help if you need it."

— Justice Mann

"Don't ignore grammar/spellcheck notations."

— Judge Callins

"When in doubt, follow the Bluebook."

— Chief Judge Lannetti

**Erin K. DeBoer** is the managing attorney for the appellate practice at Liberatore DeBoer & Ryan, PC, in Norfolk, Virginia. She previously clerked for Chief Justice S. Bernard Goodwyn in the Supreme Court of Virginia. She also has taught legal writing and appellate advocacy courses at Regent University School of Law. A member of the VBA Appellate Practice Section, she joined the association in 2022.

# FINAL TIPS

"Excellent writing is a lifelong endeavor," Chief Judge Lannetti contends. With practice comes progress. And, even if you're out of practice, editing, rewriting and proofreading can significantly improve the final product.

In closing, keep in mind three final tips to guide your legal writing journey.

First, remember that good writing takes time. As Justice McCullough explains, "It is unlikely that your best insights and writing will happen when you are in a hurry. Give yourself the time to think, write and rewrite, as opposed to cobbling something together in a rush to meet a deadline."

Second, evaluate and seek to improve your weaknesses. "Understand your weaknesses so you can focus on improving them (and ask others to assist you in that endeavor)," Chief Judge Lannetti recommends. "Have someone unfamiliar with the case read the brief and provide feedback. … Recognize that feedback is a gift; encourage it."

Lastly, consult and use writing resources, including classes, brief-writing programs[2] and books.[3] Judge Callins suggests, "Attorneys should read books and/or take classes on brief writing. The class you took in law school will not necessarily serve you when you are writing an appellate brief for the first time 20 years later." ■

**ENDNOTES**

1 The views advanced in this article represent education and advice authorized by the Virginia Canon of Judicial Conduct 1(M). These views should not be mistaken for the official views of the courts or the opinion of a justice or judge in any specific case.

2 For example, BriefCatch, a Microsoft Word Add-in, is a legal brief-writing program and Quick Check (Westlaw Edge) analyzes legal authorities within a brief.

3 Recommended books include the following:
Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges (*2008).

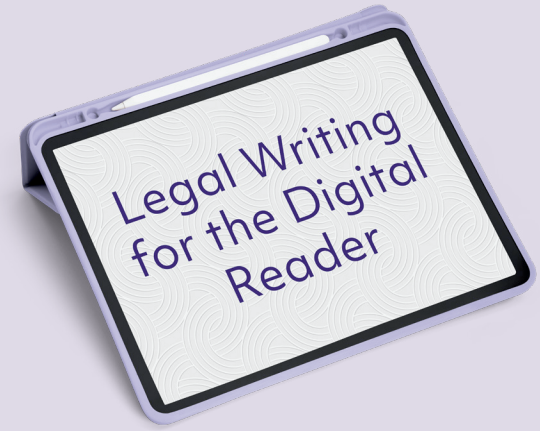
Bryan A. Garner, *Garner's Modern English Usage* (5th ed. 2022).

Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* (3d ed. 2014).

H.W. Fowler, *A Dictionary of Modern English Usage* (1983).

Richard C. Wydick, *Plain English for Lawyers* (5th ed. 2005).

Ross Guberman, *Point Made: How to Write Like the Nation's Top Advocates* (2d ed. 2014).




**BY JOHN P. O'HERRON**

More and more, Virginia's judges are reading briefs on a digital device. And with e-filing now the norm in Virginia's appellate courts, this is especially true at the appellate level. This is a monumental shift in how judges are consuming your argument, and it should change how you write your briefs.

Why? Because the human brain interacts with, comprehends and recalls information differently when reading on a screen. If the needs of your reader have changed, so too has your job as a writer.

Studies (and your own experience, most likely) show several key differences between reading on an electronic device and reading on paper. First, the obvious: Reading on a screen can be distracting. Sure, we're more mobile now, but we also are straining more to focus because email, music or whatever-is-on-that-new-tab-we-just-opened issue their siren calls. And each interruption takes time to recover from.[1]

But aside from that, reading on a screen is simply harder and more time-consuming. Those websites tell you how long it'll take to read their article because they know people give up. Studies show that we make up for this added burden of reading by skimming content more than reading it. This ends up looking like an F pattern: We read the first few sentences of paragraphs, and scan down the left side of text. Content down the page, to the right, and at the end of paragraphs is often skimmed.[2]

Finally, reading on a device robs us of many spatial orientation markers that help us comprehend and recall information. We can feel the thickness of a paper brief and how much we have left to go, we can quickly flip to page 3 from page 23 and we can recall important information at a specific place on a page. Digital text leaves us with fewer spatial cues, and the ones we have (internal hyperlinks, Ctrl F) interrupt our attention and focus.[3]

With these differences in mind, I offer the following tips to improve your writing for the digital reader.

# TIPS FOR REACHING YOUR DIGITAL AUDIENCE

## INCREASE READABILITY

Readability is the lodestar of every brief. With the challenges of digital reading, it matters more than ever.

1 **Add white space with more headings, lists, tables and images (as appropriate).** More white space and a variety of content and structure gives your reader a rest and keeps things fresh.

2 **Spend more time on headers and topic sentences.** Overcoming the F pattern requires grabbing your reader's attention at the start and forecasting where you're going. Good headings also enable skimming for rereads or in advance of oral argument. Spend the time needed to get them right.

3 **Shorten your paragraphs and sentences.** Some sentences are better long. But mental breaks are important, and paragraph breaks and new sentences provide them.

## IMPROVE SPATIAL ORIENTATION

Help your readers orient themselves to your brief.

1 **Use strong headings and subheadings.** Strong and descriptive headings help orient your reader to each section of your brief and to its place in the bigger picture. Add them to your fact section, too. Don't waste the opportunity to guide your reader along.

2 **Change your page numbers and header numerals.** Page "2 of 30" orients the reader better than just "2." And changing your enumeration from roman numerals (I, I.A., I.B., I.B.i) to numbering (1, 1.1, 1.2, 1.2.1) will orient the reader better to the overall structure and place in your brief.

3 **Hyperlink your table of contents.** Many court rules address this, but navigating a digital document can be vastly improved with bookmarks and a hyperlinked table of contents, allowing the reader to easily move from one part of your brief to another.

## ELIMINATE DISTRACTIONS

Your digital reader is busy and already distracted. Avoid distractions in your brief.

1 **Reduce or eliminate footnotes.** Footnotes interrupt. Scrolling back and forth between the text and the footnote adds a step for your reader. Try to eliminate them.

2 **Eliminate ALLCAPS.** It is harder to read and immediately triggers skimming.

3 **Review for redundancies.** Editing is always of paramount importance, but even more so when needless repetition can trigger digital skimming.

As readers' habits change, so too must those of writers. This is no less true in the law. Spending time to make your brief more readable and usable to the digital reader will pay off. ■

**ENDNOTES**

1 *See,* e.g., Thomas Jackson, et al., *The Cost of Email Interruption* 5 (2001) (noting that on average it takes 64 seconds to recover from email interruption) ("The time it takes the average employee to recover from an email interrupt and to return to their work at the same work rate at which they left it, is on average 64 seconds.").

2 *See* Robert B. Dubose, *Legal Writing for the Rewired Brain: Communicating in a Paperless World,* at 4-6 (2010), available at www.texasbarcle.com/materials/events/10949/140308_01.pdf (citing F-pattern study).

3 *See generally* David Hricik and Karen J. Sneddon, *Screen Time: Legal Documents in the Digital Age*, 38-SUM Del. Law. 14 (2020) at 16 (citing authorities); Mary Beth Beazley, *Writing (and Reading) Appellate Briefs in the Digital Age*, 15. J. App. Prac. & Process 47, 49-51 (2014) (citing authorities).

**John P. O'Herron** is a partner at ThompsonMcMullan P.C. in Richmond, Virginia, where his practice focuses on appellate litigation and motions practice in both state and federal court. He joined the VBA in 2014, is a member of the Appellate Practice and Civil Litigation sections and serves as a member of the Joint Alternative Dispute Resolution Committee Council's Special Committee to Study Appellate Mediation in Virginia. He is vice chair of the Appellate Section of the Federation of Defense and Corporate Counsel and the Virginia chair of the Council of Appellate Lawyers, a division of the ABA. He keeps his clients updated through the website richmondappeals.com. He joined ThompsonMcMullan after clerking with Chief Justice Cynthia D. Kinser at the Supreme Court of Virginia.


Photos by Marilyn Shaw

The meetups, like this first one in Richmond at VBA on Main, incorporate an ethics CLE, technology and other practical advice, resources and a reception to continue the conversations. Space is limited to encourage discussion.

**BY TERI SAYLOR**

At Dunlap Law PLC, Tricia Dunlap loves practicing at the intersection of law and business. She admits that launching her firm eight years ago wasn't easy.

"I was solo at that point, and brought in an attorney after two years," she said. "It has been financially challenging, and there were times I wasn't on payroll."

Today, Dunlap Law is a thriving, innovative firm of five attorneys who exclusively serve small-business clients in Richmond. When she walked into The Virginia Bar Association's Small-Firm Management Meetup in Richmond this past spring at the VBA office, she entered a room filled with kindred spirits.

"That was a fantastic day," she said. "I met some small-firm leaders from other parts of the state, and I actually referred a client to one of them who has a specialty knowledge that client needed."

Dunlap also learned a new way to mentor young attorneys by taking a strategic approach.

"I invest a lot in our young attorneys and get to know their strengths, hopes and dreams, but what I haven't done is create a structured, written plan for their growth and development," she said. "That is one area of improvement I can adopt for my firm, and it was helpful for me to learn that at the meeting."

The Richmond meetup is one of four small-firm meetings taking place around Virginia this year, part of an initiative by VBA President Benjamin D. Leigh and the Board of Governors to harness the power of collaboration for helping solve the unique challenges often faced by small law firms and solo practitioners.

"There is nothing as strong as peer-to-peer affirmation in areas where lawyers are bombarded with challenges," Leigh said. "Many small firms not only handle these challenges but also innovate in the delivery of legal services."

At Dunlap Law, innovation is in its DNA.

After teaching high school government and history for the first half of her career, Dunlap enrolled in law school at age 40. She went on to join McGuireWoods LLP before branching out in 2015 to launch Dunlap Law.

"I feel a deep and meaningful purpose in finding new and better ways to serve our small-business clients," Dunlap said.

So far, the VBA has held two Small-Firm Management Meetups. In addition to the March meeting in Richmond, attorneys in the Hampton Roads area attended a session in Norfolk on May 17. Other meetups are slated Sept. 20 in Reston and Nov. 8 near Harrisonburg.

**"We want our small firms to develop relationships to help each other and make referrals to each other."**

- Steven D. Brown

The three-hour afternoon event includes a 60-minute ethics CLE program and education sessions on succession planning and technology, followed by open discussion and a reception. VBA members pay a $75 registration fee to attend.

A special committee of the board was tapped to create the meetups.

"The majority of law firms in Virginia are small practices," said Steven D. Brown, chair of the Special Committee on Small-Firm and Solo Practice. "Part of what we do as an organization is to make sure we help

Scott Kowalski with Petty, Livingston, Dawson & Richards PC; James Williams with Tingen Law, PLLC; and Zachary Lacy with Zachary S. Lacy, Attorney at Law, PLLC, share a moment during group discussion.

maximize and enrich the professional experiences for all our members and that's why we decided to focus on small firms and solo practices."

Brown is the founding partner of the Richmond office of Isler Dare, a labor, employment and employee benefits firm with 19 lawyers. Isler Dare's headquarters is in Tysons Corner.

"We want our small firms to develop relationships to help each other and make referrals to each other," Brown said. "Many clients out there have needs that don't require a large firm, and small and solo practitioners can handle those."

Technology is the planning committee's top focus, with operational issues such as hiring, training and retaining employees not far behind.

"We aim to offer practical advice and resources to help small firms succeed," Brown said. "Among our goals are helping firm leaders determine what they need for implementing remote and hybrid working environments, performing document management, and purchasing software or applications without spending money on applications and features they don't need."

Richard E. Garriott Jr., a VBA past president and founding partner of Garriott | Maurer, PLLC, a small family-law practice in Virginia Beach, appreciates the spotlight on technology. He's also keen to focus on operational issues, including strategies for hiring top talent.

At the Norfolk meetup, Garriott met like-minded firm leaders who have the same problems and who were able to offer advice from their own experiences.

**"I think the VBA has been forward-thinking in trying to start this program."**

- Kimberly H. Phillips

"Most small firms are concerned about how to utilize technology and how to leverage it to better serve their clients," he said. "And while it's not unique to small firms, being able to hire good attorneys and staff has become difficult."

Garriott spent most of his career in larger firms before forming Garriott | Maurer in 2021 with Patrick L. Maurer. The firm employs five attorneys and Garriott estimates that 95% of his firm's practice is devoted to family law.

"We've been plugging along for about two years," he said. "It's very different going from a firm with 45 lawyers to five, and while it was a big change, it was a nice change."

Garriott added that his biggest learning curve has been embracing the duties and tasks that come along with managing a small firm.

"You become not only the chief, but also the chief bottle washer," he said and laughed. "I mean, you're doing everything."

For small-firm leaders such as Garriott, who have spent their careers immersed in large-firm culture and suddenly find themselves in charge of operations, it can be a shock to the system with an added layer of stress.

## POTENTIAL ADDED LAYER OF STRESS

Another reason Leigh wanted to implement the meetups is to provide a support network for attorneys.

Leigh recalled efforts by past Virginia State Bar President Leonard C. Heath Jr. to recognize the need to focus on lawyer wellness, since stress is an occupational hazard of the profession. The meetups are also a way to foster a sense of community among small firms to help mitigate the ill effects of stress and to show participating attorneys they are not alone in their challenges.

"Small firms use the power of peer-to-peer collaboration to recognize their VBA colleagues are encountering the same issues, and if they have a great way of handling a particular issue at the office, they are willing to share it," he said.

Garriott agreed.

"Being able to exchange ideas and, frankly, to have somebody not in your firm to complain to is very helpful," he said. "And when you do complain, you find that others have the exact same problems, so you feel like it's not just you."

Kimberly H. Phillips appreciated the opportunity to focus on issues related to the business of managing small law firms.

"We already know how to reach out to one another for substantive information in certain areas of the law, and we've done that very well over the years. But I don't think we've done a very good job of supporting each other from the business side of things," she said. "I think the VBA has been forward-thinking in trying to start this program."

Phillips, who attended the Hampton Roads meetup, was thankful to be there.

She and her law partner, Corrynn J. Peters, left a full-service firm in 2010 to form Phillips & Peters, PLLC, in Norfolk, where they practice family law exclusively. The firm has three attorneys, including Phillips and Peters.

"We decided we wanted to run a small family-law firm tailored to our clients in a relaxed setting, but it's hard when you are a small firm," Phillips said. "Corrynn and I wear many hats, and practicing law is probably only 50% of what we do."

As a small-business owner, Phillips said she recognizes that her firm is supplying jobs for people to pay their rent or mortgage, provide for their families and have access to health care. She maintains a strong sense of responsibility for her employees. Despite the challenges, it is a role she enjoys.

"While all those considerations are not unique to a law firm, they're common among many small businesses," she said. "I could just focus on practicing law, but I really like the business side of our firm."




Tricia Dunlap (top) with Dunlap Law PLC, Douglas Burtch with Burtch Law PLLC and Paul Gibson with Holland & Knight LLP shared their challenges and successes and listened to their colleagues' solutions to common concerns.

## SUCCESSION PLANNING IS A DRAW

She pointed to a discussion of succession planning as one reason she attended the Norfolk meeting.

"My business partner is 12 years younger than me, and I always knew there would come a time when I would start to phase out and wondered how that would look," she said. "So, succession planning was very important for me, and not that I am planning to leave or retire, but you don't know what life is going to hand you tomorrow."

Phillips also appreciated a forum where attorneys who are running a firm can share how the business side of their practices works. She said she knows other Virginia lawyers who would benefit from it.

All this is music to Leigh's ears.

"Our small-firm meetups to date have been unlike many other CLEs or management seminars in the past," he said. "The law firms benefit, but ultimately so do their clients across Virginia."

And while the small-firm leaders appreciate what the VBA is offering, the meetups have whetted their appetites for more.

"We hope these meetups will give the VBA more ideas for programs that appeal to the smaller shops and the solo practitioners," Garriott said. "There's really nowhere else for small firms to go if we're not meeting and exchanging ideas on ways to develop our practices."

He and a few other family practice leaders from the Norfolk meeting

## Meetup attendees share their *thoughts*

### Main concerns involving my law firm:

- Adopting new technologies and ever-changing business practices
- Finding quality clients and cases
- Balancing law practice and business
- Hiring, developing and retaining associates and staff
- Taking time for professional development
- Continuity (we have great lawyers, but size makes us fragile)

### Why did you attend the meetup?

- To listen to others for tools and processes to improve my firm's systems
- To learn how other folks deal with similar challenges
- To network with other small-firm lawyers

### What's the most useful thing you learned at the meetup?

- How other firms manage business
- Tools and practices from other attorneys
- Benefits of relationships
- Discussion of leadership in the firm
- Value of the VBA to small firms


**"It was an 'un-meeting,' where we all started discussions and wanted to keep them going and were buoyed in knowing we left with good ideas. ..."**

- Benjamin D. Leigh


already have scheduled lunches and happy-hour gatherings on their own to keep the conversation going.

Dunlap said she would like to see the VBA take the small-firm meetings to the next level and create a program like an innovation summit meeting.

"I'd like to learn how we can use technology to help us be more profitable and bring prices down," she said.

Phillips said she left the meeting in Norfolk feeling energized.

## A RELAXED, COLLEGIAL SETTING

"Of all the attorneys at the meeting, four were also running small family-law firms like mine and we already knew each other," she said. "In a relaxed setting like that, we can be collegial, look out for one another, talk about the struggles we have in common and share our successes."

These results are what Leigh had envisioned when he and the VBA created the initiative. He was delighted at the end of the Richmond meeting when the participants were reluctant to leave once the reception afterward was over.

"It was an 'un-meeting,' where we all started discussions and wanted to keep them going and were buoyed in knowing we left with good ideas on how to tackle the practice," he said. "That is what this effort will yield, because every day great work is being done in small and solo law offices."

**Teri Saylor** is a freelance writer in Raleigh, North Carolina. Her work has appeared in a variety of state, local and national newspapers, magazines and niche publications. Contact her at terisaylor@hotmail.com

## Legislative proposals to be heard Sept. 19

VBA Legislative Day is Sept. 19. This is when the VBA Board of Governors and VBA lobbying team hear member and affiliated group proposals and the board determines which items to bring before state lawmakers in the upcoming session.

The deadline to submit legislative proposals was Aug. 18.

For ease in participation, Legislative Day will be held virtually via Zoom. Interested individuals can learn more on the legislative advocacy page of the website, at **www.vba.org/advocacy**, and sign up for the Legislative Day Zoom link via the event calendar at **www.vba.org/events/**.

Prefiling of bills for the 2024 General Assembly session starts Nov. 20, 2023. The legislative session convenes Jan. 10, 2024.

## Nominations considered for Board of Governors

The VBA Board of Governors will consider the Governance Committee's slate of nominees to fill upcoming board vacancies at its fall meeting, Oct. 27-28 in Lynchburg. An approved slate will be presented for election by VBA members Jan. 20, 2024, during the 134th VBA Annual Meeting at the Williamsburg Lodge.

Candidates will be sought to serve three-year terms in the Southwest Division as well as for two at-large positions. The term for the Potomac Division seat was set to expire in January, but that vacancy was filled with the board election of Daniel L. Gray. He is expected to finish this term and then serve a full three-year term. Also, the legislative, law school, judicial and government attorney representatives, appointed to renewable one-year terms, will be discussed.

The VBA bylaws permit write-in nominations by Dec. 6 from members. To nominate yourself or a member colleague, email Executive Director Paul Fletcher at **pfletcher@vba.org**, state why you are interested in serving the VBA and list your VBA involvement to date.

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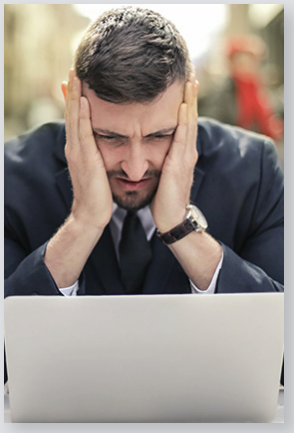

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