

# Wolcott Rivers Gates

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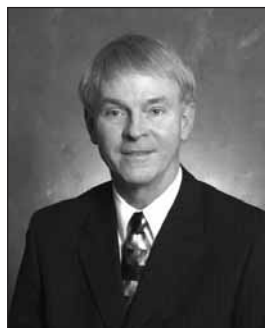
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## TRADEMARKS: Valuable Assets That Must Be Protected

*Anthony F. Radd, Esquire*



Trademarks represent valuable assets of a business. A company's good will, reputation, and product line are at risk if not legally protected. A trademark can be a product name, a service name, a business name, a logo, a character, or a domain name. A trademark can be either a word, phrase, or design, or a combination, which distinguishes an owner's goods or services from those of its competitors.

Unlike copyrights or patents, trademarks can last indefinitely if the owner continues to use the mark to identify its goods or services. A federal trademark registration is good for 10 years, with 10 year renewal terms. However, a declaration must be filed during the sixth year after the date of original registration, certifying that the trademark is still in use in commerce. A renewal must also be filed every 10 years following the registration.

Trademarks can be registered with the state or federal government. State registrations are effective only within the state, whereas federal registrations cover the entire country. In order to obtain a federal trademark registration, however, there must be some use of the trademark in interstate commerce.

Federal registration can be extremely valuable. It allows you to use your trademark and stop most imitators, as you roll out your products and services across the country or on the Web. Specifically, you can prevent anyone using an identical or confusingly similar trademark (for similar goods/services) after your trademark has been registered. Federal registration also puts others on notice of your trademark, giving you the right to a strong set of legal remedies, such as recovery of damages, attorney's fees, and possibly triple damages. If you use your Web domain name also as a trademark, registration helps to protect against someone taking away your domain name, and against cybersquatters registering, trafficking in, or using a confusingly similar domain in bad faith.

To avoid rejection in filing a trademark application, you must choose carefully. Trademarks that are descriptive – words that merely describe the goods or services or a feature of them – normally cannot be registered. Trademarks of geographic terms, surnames, or generic words are also likely to be rejected. The strongest trade names, least likely to be rejected, are "fanciful" trademarks, which are essentially made up words (i.e., Exxon, for gasoline, Kodak, for photographic supplies), and arbitrary trademarks that have nothing to do with the product or services (i.e. Amazon, for book selling, Camel, for cigarettes, and Apple, for computers). Also favored and acceptable are "suggestive" trademarks, which suggest attributes of, but don't describe, the goods or services (i.e. Champion, for sporting goods, Chicken of the Sea, for tuna fish, and Jaguar, for a car).

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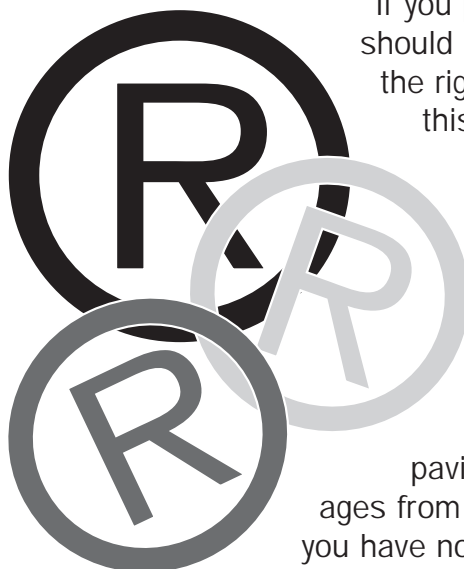
## TRADEMARKS: Valuable Assets That Must Be Protected

It is important to note that a trademark registration only covers the goods in a particular class. The same trademark can be used by someone else on goods in a different class, without conflict. Thus, the term "Champion" can be used as the name of spark plugs, and also be registered separately by another as a trademark of sporting goods.

In evaluating a trademark application, the Trademark Office carefully scrutinizes applications. Applications will be rejected if a conflicting trademark is found. The key test is whether there would be likelihood of confusion, that is, whether consumers would be likely to associate the goods or services of one party with those of another party by the use of the mark. The principal factors considered in reaching this decision are the similarity of the trademarks and the commercial relationship between the goods and services. The trademarks do not have to be identical, and the goods and services do not have to be exactly the same, for the Trademark Office to reject a mark.

Many erroneously believe that registering their company's name with the State Corporation Commission protects the name. A corporate name issued by the state is not a trademark, and does not create any trademark rights. In addition, "trade names" that can be registered at the local Circuit Court level are not trademarks. Only a trademark allows you to prevent others from using a confusingly similar name for similar goods or services.

Another common misconception is that registration of a Web domain name protects the company. All that a domain name registration does is rent usage of the domain name for a period of time. A domain name registration (usually from an entity such as Network Solutions or Register.com) does not create trademark rights.



If you possess a registered trademark, you should place the trademark symbol ® adjacent to the right side of the trademark. You cannot use this symbol if your mark is not registered.

This is a federal offense, and grounds for refusing registration later. By placing the trademark symbol ® next to your trademark, you further protect your rights by (1) putting the world on notice that you are claiming that trademark as your property (and not as a generic or descriptive term that others are free to use), and (2) paving the way for recovering profits and damages from anyone who infringes your trademark. If you have not registered your trademark, you should place the letters "TM" next to your trademark. This shows the world that you are claiming trademark rights in your mark, but have not yet registered.

To properly protect your logo, product name, business name, etc. initially, you should go to a trademark lawyer with a short list of five to ten potential trademark candidates. The lawyer can advise you on the comparative strength of each, and perform preliminary clearance research on the potential candidates, in order to identify the best for registration.

## TRADEMARKS: Valuable Assets That Must Be Protected

If you fail to conduct trademark clearance research, you are taking a big risk. You gamble on creating good will in a name you may later be forced to drop. You might even have to pay damages to someone else, not to mention substantial attorney fees you will incur in later examining and defending the demand for a name change. Also, if you ever intend to sell your business or product line, being able to convey solid trademark rights will be important to the prospective buyer.

Many business transactions arise where trademark rights play an important role. The transfer of trademarks from one corporate owner to another may be necessary in a corporate reorganization, a corporate structuring for tax purposes, or in a sale of your business. Regardless of the reason, you must be careful in any transfer of trademark rights, and take the following minimum precautions: (1) a transfer must be accompanied with the good will associated with the trademark. If this does not occur, the trademark may be destroyed; (2) to be effective, any assignment of registered trademarks should be recorded with the United States Patent and Trademark Office, using special forms and procedures, and (3) for a security interest to be legally effective in a trademark, the security interest must be recorded with the United States Patent and Trademark Office.

This has been a brief overview of trademark law. We encourage you to set an appointment or call to discuss your specific issues or questions.

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## BUSINESS LAW CONSIDERATIONS

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Choosing the proper business entity is one of the most important decisions an individual must face when creating a business. There are a multitude of Virginia business entities available and the task can appear daunting. This article focuses on those business entities which are most commonly used today.

A corporation may be formed for any lawful purpose. A typical corporate structure consists of shareholders, board of directors, and officers. The shareholders are the owners of the corporation, and their responsibilities with regard to the day-to-day business of the corporation are limited. The board of directors are tasked with all corporate powers and authority over the business affairs of the corporation. The officers' responsibilities include performing the duties set forth in the Bylaws and following the direction of and duties promulgated by the board of directors. Typically, the officers handle the day-to-day business of the corporation. Corporations are the most traditional and formal form of business.

A limited liability company ("LLC") offers the same liability protection as provided by a corporation. However, the formalities of a LLC are less stringent than those required of a corporation in that the members are not required to annually meet, as required of shareholders in a corporation. Furthermore, the members, through the operating agreement, may adjust the rules governing the LLC as they deem appropriate. The members are the equivalent to shareholders in a corporation; however, members in a LLC may also choose to carry out the day to day business or appoint a manager and officers much like a corporation.

A business trust is the newest entity form in Virginia. A business trust may be a preferable entity for an individual owning several parcels of property, as business trusts may have sub-trusts with individual



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## BUSINESS LAW CONSIDERATIONS

guidelines and structures, thereby eliminating the need to create multiple entities. Beneficiaries are the equivalent to shareholders, as they receive the economic benefits derived by the business trust. Business trusts are governed by trustees who are responsible for the management and carrying out the business purpose.

Determining the appropriate Virginia entity is primarily dependent upon the intended business purpose for the particular entity and whether the owners desire different treatment based upon their individual needs. Also important is whether the entity will be conducting business outside of Virginia, as other jurisdictions may not recognize the form of business entity created in Virginia. For instance, business trusts have not been widely adopted by other jurisdictions and, as such, may not be recognized in the other jurisdiction. Also, it may be wise for the owners to consider the tax treatment the entity will receive in another jurisdiction.

It is important to understand all these factors and to seek proper professional advice before creating a business entity. In the event that you have formed an entity and now realize that another form is more appropriate, there are procedures under Virginia law for conversion of entities.

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## THE GOVERNMENT IS HERE TO HELP YOU –

*If You Want to Pay Your Employees More Than They Asked to Be Paid*

**Barry J. Dorans, Esquire**



The Department of Labor has recently issued press releases tallying the amount of money it recovered from companies for overtime wages owed to employees. On June 13, 2006, it announced that Sterling Jewelers, Inc. agreed to pay approximately \$1.3 million in overtime wages to nearly 17,000 current and former employees. In May, the Department announced that Compass Bank agreed to pay \$1 million in overtime wages covering nearly 3,000 employees. In addition to these large claims, the Department of Labor regularly performs audits on smaller cases. For example, it obtained approximately \$45,000 in overtime wages for employees of a company that provide quality inspectors overseeing Hurricane Katrina clean up efforts. In total, the Wage and Hour Division recovered over \$166 million in back wages for over 240,000 employees in fiscal year 2005. In essence, if an employer fails to pay overtime, it may face a costly Department of Labor audit.

On its face, the overtime rules are fairly straight forward. Any non-exempt employee who works more than 40 hours in a work week must be

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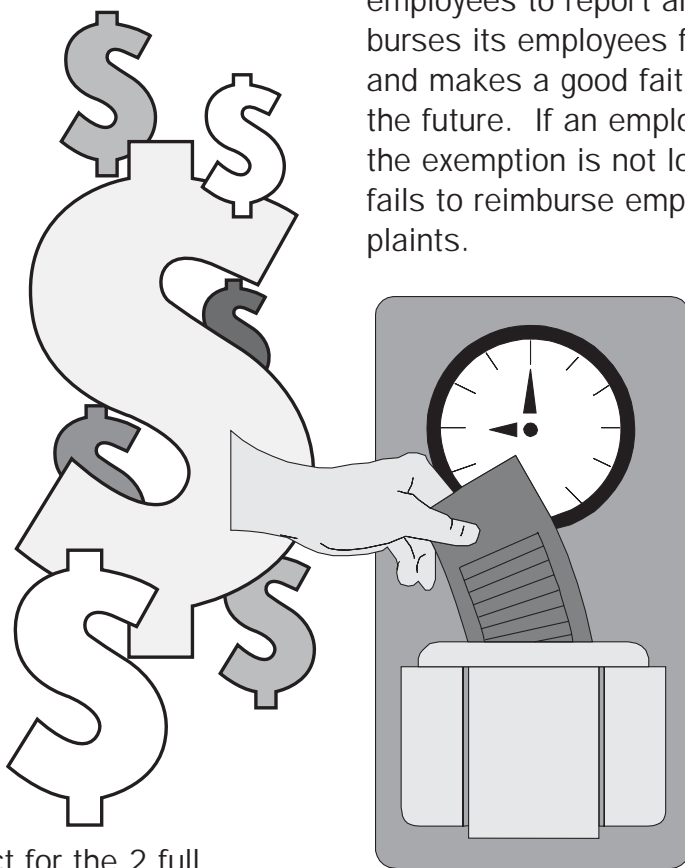
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## THE GOVERNMENT IS HERE TO HELP YOU

paid time and one-half for all hours worked in excess of 40. While many audits involve employers failing to give credit for small blocks of time, another active audit area is the classification of employees as exempt versus non-exempt. Many employers do not recognize that most exemptions require that the employee also be paid on a salaried basis. For example, a person may be exempt as a manager if he actually managed two or more people and he is paid on a salaried basis. To be considered salaried, the employee must receive the full salary for any week in which he performs any work, regardless of the number of days or hours worked. Thus, the employee receives the same pay per week whether he works 35 hours or 50 hours. The problem arises that many employers make deductions from "salary" if an employee does not work a full week or is out for parts of a day. Thus, if an employee misses one-half day for illness or for personal reasons such as vacation, then he still is entitled to receive his full salary and any deduction from that salary is improper. If an auditor finds that an employee is paid the same amount during each pay period during the year, he will likely conclude the employee is salaried. If the pay from pay period to pay period varies, the auditor may conclude the employee is not salaried unless the employer can show the deductions from the salary are permitted. Permitted deductions include absence of one or more full days for personal leave, or sickness (if under a bona fide plan of providing compensation for loss of salary due to sickness). However, if an employee takes off 2 1/2 days for personal reasons, the employer may only deduct for the 2 full days.



Under regulations issued in August of 2004, an employer who makes improper deductions may only treat the employee as exempt if it can show that the deductions were not its normal practice. In making that determination, the court may consider the number of improper deductions, the time frame in which the deductions were made, the number and geographic locations of employees whose salary was improperly reduced, the number

and geographic locations of the managers who were responsible for taking the deductions and whether the employer has clearly communicated policy prohibiting improper deductions. If the court finds that improper deductions have been made, the employees who work in the same job classification may also be treated as non-exempt, though persons working in other facilities or working for other managers may be considered exempt.

The net result is that employers need to be mindful that most exemptions from overtime require that the employee actually be paid on a salary basis. In other words, the employee must receive the same amount each and every week they perform work. Further, the employer must make sure that any deductions permitted under the regulations are only made for full day increments. Finally, the employer should issue a memorandum to employees clearly communicating a policy that prohibits improper pay deductions, includes a complaint mechanism that allows employees to report an improper deduction, reimburses its employees for improper deductions, and makes a good faith commitment to comply in the future. If an employer follows such a policy, the exemption is not lost unless the employer fails to reimburse employees after receiving complaints.

In closing, the overtime laws are like a number of other government regulations in which it does not make a difference whether the employer is trying to treat his employees fairly or whether the employees are happy with the pay they are receiving. If the employer fails to follow the rules, or structures his operations in a certain fashion, the Department of Labor can

make him pay more than if he structured it the correct way.

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