The Litigation Issue
Sanctions for ESI Spoliation
Animal Bites on the Job
Avoiding Waiver in Unanticipated Rulings
A Tale of Two Litigators
THE TOP 5 CYBER SECURITY TIPS

1. Keep hardware and software as current as possible.
You don’t need to be first in line for the latest and greatest, but don’t be the last in line either. Once software becomes unsupported, it is unethical to use it because it is no longer receiving security updates and is vulnerable to hackers. Apply patches as soon as they are available to reduce vulnerability to an attack or compromise.

2. Backup all data.
Don’t forget to periodically conduct a test restore of the backup and make sure your backups are impervious to ransomware – either backed up in the cloud or agent-based. Talk to your IT provider to learn more. Backups should be encrypted with a user-defined encryption key, whether on-site, off-site or stored in the cloud. If using a cloud vendor, the vendor should not have access to the decryption key.

3. Develop a password policy.
The policy should mandate the use of strong passwords (14 characters or more with upper and lower case, numbers, and special characters) and require that passwords be changed on a regular basis. The use of a password manager can make this task quite easy. Consider enabling two-factor-authentication (2FA) when available.

4. Mandate that all work-related internet sessions be encrypted.
Prohibit the use of public computers and unsecured open public Wi-Fi networks. Access to the office network must always occur through the use of a VPN, MiFi, smartphone hotspot or some other type of encrypted connection.

5. Provide mandatory social engineering awareness training to everyone at the firm at least once a year.
Technology alone cannot protect your data. The greatest vulnerability comes from the folks who use your network. Cyber attacks are successful because someone did something stupid like clicking on a link, opening an e-mail attachment, or verifying an ID and password when they shouldn’t have.

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Another Response to the Self-Represented Litigants Study
Bradley Marrs writes in his Letter to the Editor (August 2018 Virginia Lawyer) that “the court is supposed to enforce the law, after all, and when debtors fail to pay justly due debts, plaintiffs are entitled to judgments[.]” Anyone who has ever tried a case knows that nothing could be further from the truth. This statement is akin to saying, “If a defendant committed the crime, the prosecution is entitled to a conviction.”

For a creditor to secure a judgment, it needs more than just a firm belief that the money is owed; a creditor also needs admissible evidence of the indebtedness and the amount thereof, including a contractual basis for all interest and other charges incident to the principal amount for which it seeks judgment. From my perspective defending civil collection actions over the past ten years, it seems that precious few creditors in Virginia have such admissible evidence, and the more frequent a litigant the creditor is, the less likely it is to have such admissible evidence or the means to lay foundation at trial. We have all sat through General District Court return-date dockets where we see creditor after creditor obtain default judgments or consent judgments against pro se defendants for debts that they would never be able to prove at trial, were the defendant represented by an attorney familiar with the rules of evidence. I cannot count the number of collection actions that were nonsuited merely upon my filing a Grounds of Defense raising evidentiary objections or sending a subpoena duces tecum requesting proof of the indebtedness and proof of the creditor’s ownership of the debt. And I cannot count the number of collection cases in which, upon investigation, I determined that the creditor had no legitimate contractual basis to charge the elevated interest rate, late fees and service charges that combined can often equal or exceed the principal value of the debt.

Increased representation of civil defendants will undoubtedly result in individuals who actually do owe money avoiding a judgment against them, just as the existence of public defenders’ offices has resulted in acquittals of individuals who actually did commit crimes. In the criminal field, we accept this as part of due process and a fair judicial system. A crippling money judgment can have a more detrimental and more long-term impact on a poor person’s life than would a weekend in jail; it is high time we recognized the same due process protections for civil defendants as well.

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E: bspicknall@vsbmic.com | www.vsbmic.com
Forum

More on Marijuana

I am writing about the marijuana debate (Zach Mauldin, April 2018 Virginia Lawyer).

The arguments against over-the-counter marijuana use make no sense because the same arguments could be used against aspirin or antihistamines. If you take too many aspirin, you can die. There is no proven lethal dose of marijuana, so that means it is safer than most retail drugs you can buy without a prescription. Most of them have lethal doses.

The same is true with DUI. I fully support people not driving while impaired. Again, if you take too much of certain over-the-counter antihistamines before driving, you will fall asleep while driving. But we don’t ban Benadryl simply because it can be used in a DUI fashion.

Marijuana is a mild drug that has some hallucinatory effects. It is not a “gateway” drug, but instead an “exit” drug that can be used to help people stop using more powerful drugs like heroin and cocaine. The reason is because marijuana controls pain very effectively and its oils (CBD oil) can control seizures. Some people use illegal drugs because no legal drugs are available to them that work.

This idea that marijuana has no medical use was a political decision made 100 years ago, not a medically-validated position. There are literally thousands of studies verifying the benefits of cannabis, and those who oppose its use, either as a medicine or as a recreational drug like alcohol or tobacco, have ulterior political motives that drive their poor reasoning.

The refuseniks don’t like “potheads” for political reasons. But we already experimented with Prohibition in the 1920s and 1930s, because political fanatics at that time didn’t like “drunks.”

If I see an amputee veteran smoking a marijuana cigarette, I see someone managing their pain privately who should be left alone to do so. So, all Virginia lawyers should support the use of marijuana as a pain control liberty covered by both the state and federal constitutions. A person can grow their own tobacco and smoke it. A person should be able to do the same with marijuana. After all, cannabis was used by the ancient Jews as part of their worship of God (Exodus). There are religious reasons for protecting this liberty.

It is time to abandon the prejudice associated with cannabis and start respecting personal pain control choices.

Andrew Straw
Bauan City, Batangas Region
The Philippines

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More on Self-Represented Litigants Study

This concerns the recent colloquy in your August issue between Bradley Marrs and John Whitfield concerning the usefulness of General District court statistics as a measure of the indigent need for legal services. I think Mr. Marrs is on to something.

I was the executive director of a government funded legal services program for twenty years between 1980 and 2000, when my program was consolidated out of existence. During that period, it was not unusual for us to turn away low-income people with cases in general district court. Those rejections were based not on lack of resources, but on a consideration of the nature of the case and the impact of the rejection on the client’s interest/well-being.

Cases are not fungible; a rose is a rose, but each case has its own truth or lack thereof. As Marrs correctly notes, a goodly number of General District cases are collection cases where the central and often only question is whether the client “owes the money.” Unfortunately, in many instances, the client did owe the money and there were few and often no defenses.

In instances where a defense was hard to come by, we would typically consider a second issue — that of impact for the client. Missing from both Marrs’ and Whitfield’s analyses is any mention of the fact that a large percentage of low-income people both rent their housing and derive their incomes not from employment but from pro-

Letters continued on page 15
President’s Message
by Leonard C. Heath Jr.

"Hey Dad, I heard from your competition today." This was a statement my son, who is now a third-year law student, made last spring. When I asked him what he meant, he said that some people from the Virginia Bar Association (VBA) had visited his law school to recruit members. I then explained to my son why the VBA was not the Virginia State Bar’s competition, but instead plays a necessary, but very different, role in our legal community. My son’s initial comment did not surprise me because it took me several years to really understand the difference between mandatory bars and voluntary bars. When he asked which was more important, I told him it was like asking a farmer: “What is more important: your tractor or your pickup truck?” It is a false choice, because they are both important, but for different reasons. Then, just a few weeks ago, I was having a conversation with an experienced and competent lawyer, whom I respect, and she questioned why voluntary bars exist. I believe that other Virginia lawyers may share her position and that is why I selected this topic for this month’s article.

You may think that the president of the Virginia State Bar, which is a mandatory and regulatory bar association, is an odd recruiter for voluntary bar associations. However, mandatory bars and voluntary bars, at least in Virginia, have a symbiotic relationship. Stated simply, voluntary bars are vital for the development and maintenance of a healthy, vibrant, and robust legal community.

The Virginia State Bar, as an administrative agency of the Supreme Court of Virginia, protects the public by regulating the legal profession of Virginia, advancing the availability and quality of legal services, and assisting in improving the legal profession and the administration of justice. At first reading, this may seem like a very broad mission. However, we are constitutionally restricted in what we can do. The United States Supreme Court has provided some guidance in Keller v. State Bar of California. In Keller, the Court approved mandatory bars with the caveat that their expenditures and activities must necessarily or reasonably be connected to the purpose of regulating the legal profession or improving the quality of legal service available to the people of the state. This is a significant restriction when it comes to speech and lobbying activities. Voluntary bars have no such restrictions.

A comparison of mandatory bars and voluntary bars is enlightening. Consider the following:

1. The Virginia State Bar regulates and disciplines lawyers; voluntary bars do not.
2. The Virginia State Bar can only lobby on issues related to the VSB and the practice of law given the constitutional constraints of Keller, while voluntary bar associations have no such restrictions.
3. For the same reason, the Virginia State Bar can only speak to certain topics, while voluntary bars have no such limitations.

I have attended a number of national conferences where I have had the pleasure of sharing ideas with other state bar officers and executive directors. Some states do not have mandatory bars. Others do not have significant state-wide voluntary bars. In some states where there are both voluntary and mandatory bars, they actually compete with each other and do not get along. And then there is the Commonwealth of Virginia. Not only do we have a healthy mandatory bar, but we have numerous state-wide voluntary bars that energetically serve their members. This is a rare combination. In Virginia we are blessed with such voluntary state-wide bars as the VBA, the Old Dominion Bar Association, the Virginia Trial Lawyers Association, the Virginia Association of Defense Attorneys, and numerous other organizations. I am a longtime member of several of these associations.

Voluntary bar associations are important for the following reasons:
President’s Message

A. They can speak to, and lobby for or against, important political topics of the day;
B. The evolution of the Rule of Law depends on political speech that sometimes originates outside of the permissible topic parameters for mandatory bars;
C. Voluntary bars can focus on a specific viewpoint or a specific area of the law; and
D. Voluntary bars provide exquisitely focused and competent educational and professional development programs, tailored for their members.

Our society depends on informed, knowledgeable, and educated discourse. Through their specialized education and training, and given their stature in the community, lawyers, through their bar associations, are particularly well-suited to contribute to political debate. This is where voluntary bar associations are particularly effective.

But, perhaps the most important advantage of having strong voluntary bar associations is that their mere existence tempers the temptation of a mandatory bar to venture beyond its constitutionally-restricted role. As an example, at a recent national bar conference, C. J. Steuart Thomas III, who is the current president of the VBA, and I sat at the table listening to ideas, with each commenting to the other, “This is something good for the VBA” or “This is something good for the VSB.” At the same conference, I heard from one mandatory bar president whose state apparently has no effective voluntary bar associations. That president proudly stated that his mandatory bar spoke on each and every piece of legislation proposed in the General Assembly. In my opinion, that is not a proper role for a mandatory bar, and in Virginia the VSB would not attempt to do so. However, when you live in a state that has no viable statewide voluntary bar to speak on legislation, the mandatory bar may at best be tempted, or at worst forced by others, to lobby on that legislation.

So, here is my message. Find a voluntary bar association or two and join them. They come in all shapes and sizes — statewide, local, and specialty, just to name a few. Support them with your time and talents. Do this because you will get more out of the associations than you put into them. But also do this because they play an essential role in making our Virginia experience both unique and exceptional.
Executive Director’s Message
by Karen A. Gould

Why Are Court Reporters More Willing to Review Judges Than We Are?

In all likelihood, it’s because we are afraid frank assessments will hurt us later. Thus, it is important for lawyers to understand that Judicial Performance Evaluation (JPE) surveys are administered by Virginia Commonwealth University, not the Virginia State Bar. Lawyer anonymity is preserved, and survey reports do not contain any identifying information when provided to the evaluated judge or General Assembly.

The JPE Program, authorized by the General Assembly of Virginia and orchestrated by the Supreme Court of Virginia, is a two-step process. First, lawyers must respond to a survey to determine whether they are eligible to participate in a judge’s evaluation. The eligibility survey will establish whether you can participate in the actual evaluation survey by asking whether you have appeared before or observed the judge under review within a particular time frame — one year for district court judges; three years for other judges. District and circuit court judges, and now Court of Appeals judges and Supreme Court justices are evaluated in the JPE process.

The eligibility survey provided is simple and not time consuming. The email from VSB Immediate Past President Doris Henderson Causey described the process as follows this year:

Recently you should have received from the Judicial Performance Evaluation (JPE) Program an email with a link to an “eligibility survey” that lists all the judges who have evaluations coming up this summer and fall. I am writing to encourage you to respond to this and future surveys for the JPE Program.

The JPE Program will evaluate over 100 judges during the second half of 2018. Nearly 60 of these judgees will receive evaluations that are provided to the General Assembly for use in the re-election process. The remainder will be evaluated as a means of self-improvement only.

As Virginia attorneys we have the opportunity to provide feedback about the judges who serve our court system. The feedback we provide impacts both the careers of those individual judges as well as the overall quality of Virginia’s judicial system. It is our responsibility to use this opportunity to provide accurate information via the surveys.

Participation is simple, and not time-consuming:

1. Complete the eligibility survey.
   This tool allows the JPE Program to correctly identify attorneys who have interacted with the judges being evaluated.

2. Complete the evaluation survey.
   If you are selected to evaluate a judge, please take a few minutes to carefully complete the evaluation survey. It doesn’t take long, and your role is critical in providing the information needed by the judges and the General Assembly.

If you have not received the eligibility survey, or if you have questions or comments about the process, please contact Patricia G. Davis, the JPE Program Director, at pgdavis@vacourts.gov or (804) 786-6455. Thank you for doing your part to provide thoughtful feedback.

The eligibility surveys take place twice a year and are announced by the VSB in its online News and in the hard-copy Virginia Lawyer magazine. They are sent via email to all members of the VSB who are active and in good standing. If an attorney qualifies for participation, the evaluation survey tool for a particular judge may then be provided to the attorney.
The numbers for attorneys responding to the eligibility surveys since 2014 are disappointing. On average, only 32 percent of lawyers actually respond to the eligibility surveys. This may be because many attorneys do not practice in Virginia’s state courts, and so they do not respond to the survey. The Supreme Court of Virginia would like for all attorneys to respond to the survey. If you do not practice in Virginia’s state courts, then you may use the opt-out option provided in the email, so the JPE Program will have that information.

The JPE Program sends evaluation surveys to as many as 250 attorneys per judge. The figures on response rates for the 2018 evaluation surveys are provided in the chart below.

<table>
<thead>
<tr>
<th>Attorneys</th>
<th>Bailiffs</th>
<th>Clerk Staff</th>
<th>Court Reporters</th>
</tr>
</thead>
<tbody>
<tr>
<td>61%</td>
<td>65%</td>
<td>78%</td>
<td>64%</td>
</tr>
</tbody>
</table>

While the attorney percentage isn’t as high as the other groups, attorneys still make up the majority of responses for the judges. As you can see from the table above, court reporters who work in the courtrooms where evaluated judges sit are asked to participate in the JPE program. The court reporters are responding at a higher rate than attorneys.

There were 166 trial court judges evaluated during 2018. Of those, 57 judges will complete end-of-term evaluations for re-election during the 2019 session of the General Assembly. “End-of-term” evaluations are done during the judge’s last full year, anticipating the judge’s reelection. All judges receiving end-of-term evaluations received their reports by September 1, 2018.

In 2017, 47 end-of-term reports were furnished to the General Assembly. One judge retired and did not seek re-election, one judge passed away, and one judge was not nominated for re-election. The remaining judges were re-elected.

Patricia Davis is currently working on the process for 2019. The next eligibility survey will be in early November of 2018 for evaluations to be conducted during the first six month of 2019. In 2019, the program will evaluate over 135 judges, including three Court of Appeals judges. The total number currently includes 58 end-of-term evaluations.

If you wish to see the evaluations that have been provided to the General Assembly, they are accessible on the General Assembly website, under Reports in the LIS system. If you have difficulty locating the reports for 2015, 2016, and 2017, please contact me directly at gould@vsb.org. Reports for 2018 should be available in early December.

Why would you pass up the opportunity to evaluate sitting jurists if you have appeared before them or observed them? Exercise the ability the judicial system of Virginia has given you to give honest, fair feedback on our judiciary. Doris Henderson Causey said it best in her email to Virginia’s lawyers enlisting their help in completing the surveys:

As Virginia attorneys we have the opportunity to provide feedback about the judges who serve our court system. The feedback we provide impacts both the careers of those individual judges as well as the overall quality of Virginia’s judicial system. It is our responsibility to use this opportunity to provide accurate information via the surveys.

You’ve Got Mail!

Or you might if your email and address were up to date with the Virginia State Bar.

Please make sure you are getting our monthly VSB News and annual member compliance messages by adding vsbnews@vsb.org and MCLE@vsb.org to your email contacts.

And as always: Keep all of your information current by logging on to the member login at www.vsb.org.
Ethics Counsel
by James M. McCauley

Lawyer Advocacy Using Social Media and Rule 3.6’s Limitation on Lawyer Speech

IF A LAWYER is participating in a criminal case, Virginia Rule 3.6 prohibits the lawyer from making extrajudicial statements to the media the lawyer knows or reasonably should know “will have a substantial likelihood of interfering with the fairness of the trial by jury.” As Comment [1] to the rule notes, “[i]t is difficult to strike a fair balance between protecting the right to a fair trial and safeguarding the right of free expression.”

Lawyers that represent clients in cases attracting public attention may face special ethical challenges with the use of social media and communicating with the media about their client’s case. Many lawyers are reluctant to make any statements to the media about a pending civil or criminal case. Yet, a “no comment” approach may be a disservice to a client and fall short on the duty of competence and diligence if the client is taking a beating in the media from adverse publicity.

In a plurality opinion, the Supreme Court of the United States reversed, finding that the so-called “safe harbor” provision in the Nevada rule was unconstitutionally vague and a “trap for the unwary” but upheld a less demanding standard than the “clear and present danger” standard, concluding that the “substantial likelihood of material prejudice” test applied by the Nevada court satisfied the First Amendment.

After Gentile, the ABA amended Model Rule 3.6 and added Comment [7]:

Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party’s lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer’s client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

For a recent example of defense counsel’s proactive use of social media, see Nicola A. Boothe-Perry, Friends of Justice: Does Social Media Impact the Public Perception of the Justice System?, discussing defense counsel’s use of Facebook, Twitter, and a website to counter adverse publicity during the defense of George Zimmerman, charged with the homicide of Trayvon Martin in Florida, a case that received widespread attention in the national and international media over local law enforcement’s slow response in bringing charges against Zimmerman.

In the wake of Zimmerman’s...
grams such as SSI and disability benefits. Those programs do not allow garnishment, and any judgment would have no real consequence. In such instances, turning down the judgement-proof client was a rational decision concerning allocation of resources which was grounded in the client’s actual situation.

A final point is worthy of mention. In his response to Marrs’ letter, Whitfield limits his attention exclusively to civil litigation. A large percentage of the cases in General District Court are criminal cases in which indigent defendants are represented by court-appointed lawyers. If universal legal representation is the only answer to injustice, then one might reasonably wonder both why the quality of advocacy in the criminal justice system frequently seems so passive and also why the rate of incarceration is so high.

Hugh F. O’Donnell
Norton
CALL FOR NOMINATIONS

HARRY L. CARRICO PROFESSIONALISM AWARD
VSB Section on Criminal Law

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

The award is made in memory of the Honorable Harry L. Carrico, former Chief Justice of the Supreme Court of Virginia, who exemplified the highest ideals and aspirations of professionalism in the administration of justice in Virginia. Chief Justice Carrico was the first recipient of the award, which was instituted at the 22nd Annual Criminal Law Seminar in February 1992.

Although the award will only be made from time to time at the discretion of the Board of Governors of the Criminal Law Section, the Board will invite nominations annually. Nominations will be reviewed by a selection committee consisting of former chairs of the section.

Prior Recipients

<table>
<thead>
<tr>
<th>Year</th>
<th>Nominee Name</th>
<th>Professional Affiliation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>The Honorable Harry L. Carrico</td>
<td>Overton P. Pollard, Esquire</td>
</tr>
<tr>
<td>1993</td>
<td>James C. Roberts, Esquire</td>
<td>Hon. Paul B. Ebert</td>
</tr>
<tr>
<td>1995</td>
<td>Oliver W. Hill, Esquire</td>
<td>Rodney G. Leffler</td>
</tr>
<tr>
<td>1996</td>
<td>Hon. Robert F. Horan</td>
<td>Prof. Ronald J. Bacigal</td>
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<tr>
<td>1999</td>
<td>Hon. Dennis W. Dohnal</td>
<td>Claire G. Cardwell</td>
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<td>2000</td>
<td>Hon. Paul F. Sheridan</td>
<td>Gerald T. Zerkin</td>
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<td>2001</td>
<td>Hon. Donald H. Kent</td>
<td>Hon. Jerrauld C. Jones</td>
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<tr>
<td>2002</td>
<td>Craig S. Cooley, Esquire</td>
<td>Hon. Michael N. Herring</td>
</tr>
<tr>
<td>2003</td>
<td>Prof. Robert E. Shepherd</td>
<td>Philip J. Hirschkop</td>
</tr>
<tr>
<td>2004</td>
<td>Richard Brydges, Esquire</td>
<td>Judge Martin F. Clark Jr.</td>
</tr>
</tbody>
</table>

Criteria

The award will recognize an individual who meets the following criteria:

- Demonstrates a deep commitment and dedication to the highest ideals of professionalism in the practice of law and the administration of justice in the Commonwealth of Virginia;
- Has made a singular and unique contribution to the improvement of the criminal justice system in Virginia, emphasizing professionalism as the basic tenet in the administration of justice;
- Represents dedication to excellence in the profession and “performs with competence and ability and conducts himself/herself with unquestionable integrity, with consummate fairness and courtesy, and with an abiding sense of responsibility.” (Remarks of Chief Justice Carrico, December 1990, Course on Professionalism.)

Submission of Nomination

Please submit your nomination on the form below, describing specifically the manner in which your nominee meets the criteria established for the award. If you prefer, nominations may be made by letter.

Nominations should be addressed to Nancy G. Parr, Chair, Criminal Law Section, and mailed to the Virginia State Bar Office: 1111 East Main Street, Suite 700, Richmond, VA 23219-0026. Nominations must be received no later than December 3, 2018. Please be sure to include your name and the full name, address, and phone number of the nominee. If you have questions about the nomination process, please call Maureen D. Stengel, Director of Bar Services, Virginia State Bar, at (804) 775-0517.

HARRY L. CARRICO PROFESSIONALISM AWARD
NOMINATION FORM

Please complete this form and return it to the Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, VA 23219-0026. Nominations must be received no later than December 3, 2018.

Name of Nominee: ____________________________________________________________

Profession: ________________________________________________________________

Employer/Firm/Affiliation: __________________________________________________

Address of Nominee: _________________________________________________________

________________________________________________________________________

City ___________________________ State _____________ Zip ______________________

Name of person making nomination ____________________________ Telephone ______________

(Please print)

Email _______________________________________ Signature ______________________

(Please attach an additional sheet explaining how the nominee meets the criteria for the Harry L. Carrico Professionalism Award.)
arrest, defense attorney Mark O’Mara’s team set up a Twitter account, a Facebook page and a website with a defense fund registered with the Florida Division of Consumer Services. O’Mara stated on the website that “[u]sing social media in a high-profile lawsuit is new, and relatively unprecedented, but that is only because social media itself is relatively new. We feel it would be irresponsible to ignore the robust online conversation, and we feel equally as strong about establishing a professional, responsible, and ethical approach to new media.”

Prosecutors in the Trayvon Martin case unsuccessfully sought to bar George Zimmerman’s lawyers from blogging about legal issues on a website, as well as using traditional news and social media, to comment about the case, claiming that O’Mara was jeopardizing the trial by making prejudicial statements in his comments to the traditional media, as well as on Twitter, Facebook, and a legal blog.  

Not all ethics authorities agree with that approach. In addition, Va. Rule 3.6 limits regulation of attorney speech to pending criminal matters that may be tried by jury. Therefore, lawyers who handle civil cases are not bound by the rule’s restrictions on extrajudicial statements to the media.

Ultimately, experts say that whether it is prudent for an attorney to go on the offensive with social media depends upon the client’s goals and desires, tactical considerations, and ethics issues that must be considered on a case-by-case basis. And lawyers must be aware of and compliant with court rules that prohibit or restrict statements to the media during pending cases.

Endnotes:
2 35 Pace L. Rev. 72 (2014)
3 See Nicola Boothe-Perry article, supra.
5 Daniel L. Hudson Jr., Prime Time Cases, 104 ABA Journal 24 (August 2018)
6 In re Morrissey, 996 F. Supp. 530 (E.D. Va. 1998): attorney held in contempt for violating local rule of court on two occasions by making statements to the media.

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November 9, 2018

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Please contact Stephanie Blanton at (804) 775-0576 or blanton@vsb.org for more information.
The Valley’s Tradition of Pro Bono Service

There was no legal aid program in the Shenandoah Valley in 1969 when my late mother, penniless and distraught, walked the streets of downtown Staunton searching for an attorney who would represent her even though she had no means to pay. I was 14 years old at the time, but my recollection is that Mary Baldwin College had just started a pro bono referral program in our town as a community service, and my mother was one of the first to seek assistance through it. Her great fortune was that a promising young lawyer in Staunton, Rudolph “Duke” Bumgardner III (later, a general district, circuit, and Virginia Court of Appeals judge), had signed up for the pro bono list, and she was referred to him. Mr. Bumgardner graciously agreed to represent my mother on a pro bono basis, and he zealously did so over the next several years, ultimately obtaining a favorable outcome for her. She was eternally grateful for his representation. She would always note that not only did he do an outstanding job in representing her, but that he was also unfailingly respectful and courteous to her — “treating [her] like a queen” — even though she could not afford to pay him for his services. Judge Bumgardner’s pro bono assistance had a real impact on the lives of my mother and her children. In the process, it impressed upon me the critical importance of ensuring access to justice for the less fortunate and the crucial role pro bono service plays in accomplishing this.

This culture of professionalism and the duty to render pro bono service it engenders — embodied in Judge Bumgardner’s pro bono representation of my mother a half century ago — is still alive amongst the members of the valley’s legal community. To wit, the Harrisonburg-Rockingham Bar Association has operated a pro bono referral program with Blue Ridge Legal Services (“BRLS,” the legal aid society that serves the Shenandoah Valley, the Roanoke Valley, and the Alleghany Highlands) for over 35 years. The bar’s program presumes universal participation by its members and an expectation that each will donate a minimum of 20 hours annually to these pro bono referrals, in addition to other pro bono and community service undertaken. Thirty-five years later, this program is still going strong. It has received state and national recognition, including the American Bar Association’s prestigious Harrison Tweed Award in 1995 and the Virginia State Bar’s Lewis F Powell Jr. Pro Bono Award in 1998. Similar pro bono programs have long been supported by the various bar associations across the Shenandoah Valley, dating back to the early 1980s.

At the southern end of BRLS’ service area, the legal community in the Roanoke Valley has similarly displayed a strong commitment to pro bono service for decades. The Virginia Bar Association won the ABA’s Harrison Tweed Award in 1995 for its pro bono hotlines, including its pro bono hotline in Roanoke. In addition to supporting the pro bono hotline, the Roanoke Valley’s legal community has supported a robust pro bono referral program operated by legal aid since the 1980s.

In 2017, at the request of Chief Justice Lemons, the judiciary and bar leaders in the 25th Judicial Circuit collaborated with BRLS in a pro bono recruitment initiative among the four bar associations in the circuit, ranging from Staunton to Fincastle. The initiative resulted in an impressive 86 percent of the actively practicing private attorneys in the Circuit agreeing to participate in BRLS’ pro bono referral programs.

In 2013, the Virginia State Bar’s Access to Legal Services Committee undertook the first study ever to measure the amount of pro bono service being rendered across the commonwealth. Using the data available (there being no system in place at that time for comprehensive pro bono reporting), the study found that the valley’s attorneys were performing pro bono service at twice the rate of the commonwealth as a whole. The valley led every other region of the state both in the percentage of lawyers participating in pro bono programs and in the number of pro bono cases handled per capita.

I proudly commend the lawyers in the valley of Virginia for your quiet, longstanding tradition of pro bono service. If there are attorneys in our service area who are not yet being provided meaningful pro bono opportunities, please contact me, and we will work together to find the best way to use your skills to provide access to justice for folks in the valley who really need legal representation — just as my mother did, fifty years ago.

John E. Whitfield is the executive director of Blue Ridge Legal Services.
Then don’t read this. Otherwise, consider joining the Virginia Lawyer Referral Service (VLRS), particularly if you practice in needed areas of the law and the corresponding localities. See a list and map online at bit.ly/vlrs18.

The VLRS offers Virginia lawyers a staff of three experienced intake professionals who prescreen callers and then pass the referrals on to matching attorneys.

At $95 per year, this service is one of the most effective uses of your advertising budget and allows you to become the first face of the Virginia State Bar to some of the 12,000 people who call each year seeking legal help. For more information on becoming a VLRS lawyer panel member, please see bit.ly/vlrslawyers or contact Toni Dunson at (804) 775-0591.
CALL FOR NOMINATIONS

William R. Rakes Leadership in Education Award
The Virginia State Bar Section on the Education of Lawyers in Virginia

The Section on the Education of Lawyers in Virginia has established an award to honor William R. Rakes, of Gentry Locke, for his longstanding and dedicated efforts in the field of legal education, both in Virginia and nationally. The inaugural award was presented to Mr. Rakes in conjunction with the 20th Anniversary Conclave on the Education of Lawyers in Virginia sponsored by the Virginia State Bar’s Section on the Education of Lawyers in April 2012.

Past Recipients

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<tr>
<th>Year</th>
<th>Name</th>
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<tr>
<td>2018</td>
<td>Stephen A. Isaacs</td>
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<tr>
<td>2017</td>
<td>James E. Moliterno</td>
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<td>2016</td>
<td>Hon. Donald W. Lemons</td>
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<td>Hon. Elizabeth B. Lacy</td>
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<td>W. Taylor Reveley III</td>
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<td>2012</td>
<td>William R. Rakes</td>
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Criteria

This award recognizes an individual from the bench, the practicing bar, or the academy who has:

1. Demonstrated exceptional leadership and vision in developing and implementing innovative concepts to improve and enhance the state of legal education, and in enhancing relationships and professionalism among members of the academy, the bench, and the bar within the legal profession in Virginia.

2. Made a significant contribution (a) to improving the state of legal education in Virginia, both in law school and throughout a lawyer’s career; and (b) to enhancing communication, cooperation, and meaningful collaboration among the three constituencies of the legal profession.

Nomination Process

Nominations will be invited annually by the Section on the Education of Lawyers. A selection committee appointed by the section's board of governors will meet annually to discuss possible nominations. The selection committee will include five members: at least three members of the Section on the Education of Lawyers, with one each from the bench, the practicing bar, and the academy, including the chair of the section; and at least one former award winner. The award may only be made from time to time at the discretion of the selection committee.

When a nominee is selected, the award will be presented at a special event to include a reception for the honoree and his/her family, friends and colleagues; past award recipients; and special guests. The law firm of Gentry Locke has agreed to underwrite the award and the special event to honor award recipients on an ongoing basis. Please submit the nomination form below, together with a letter describing specifically the manner in which your nominee meets the criteria established for the award. Nominations should be addressed to Kimberly A. Pierro, chair, Section on the Education of Lawyers, and submitted with your nomination letter to the Virginia State Bar: 1111 East Main Street, Suite 700, Richmond, VA 23219-0026.

Nominations must be received no later than December 7, 2018. For questions about the nomination process, please contact Maureen D. Stengel, Director of Bar Services: (804) 775-0517 or stengel@vsb.org.

WILLIAM R. RAKES LEADERSHIP IN EDUCATION AWARD NOMINATION FORM

Please complete this form and return it with your nomination letter to the Virginia State Bar: 1111 East Main Street, Suite 700, Richmond, VA 23219-0026. Nominations must be received no later than December 7, 2018.

Name of Nominee: ________________________________________________________________

Profession: ____________________________________________________________________

Employer/Affiliation (Law Firm, Law School, Court): ________________________________________________________________

Address of Nominee: _____________________________________________________________

City: ___________________________ State: _____________ Zip: _______________________

Name of Nominator: ___________________________ Telephone: ________________________

Email: ___________________________ Signature: ________________________________

WILLIAM R. RAKES LEADERSHIP IN EDUCATION AWARD
NOMINATION FORM
I am very grateful for the opportunity to have been elected chair of the board of the largest section of the Virginia State Bar, namely, the Litigation Section — to which this edition of *Virginia Lawyer* is dedicated. This year the board will hold four scheduled meetings: two of them at the Virginia State Bar in Richmond, one in Warrenton, and one in Charlottesville.

These meetings will help enrich collegiality within the board and provide, ideally, less driving for some who are attending a given meeting. Looking forward, the Litigation Section is planning a CLE in conjunction with the Federal Bar Association on October 25, 2018, at the Richmond Division courthouse of the Eastern District Court of Virginia, generously overseen by Judges Gibney and Payne. More information on this event may be found on page 27 of this magazine.

Additionally, we will continue to host our spring CLE and are already gearing up for our goal of hosting a showcase CLE at the Virginia State Bar Annual Meeting in Virginia Beach in June of 2019. The board’s initial CLE topic idea is “Civility in Discovery.” This would contemplate not only written discovery, but depositions, depositions in lieu of live testimony at trial, site inspections, motions to compel — from both sides of the bench, and other discovery matters. This dovetails into Chief Justice Lemons’s recent focus on attorney wellness, which includes being able to manage our personal lives outside the practice of law so that we can better manage our practice of law.

As chair of the Litigation Section, I, like most of our members, deal with virtually every form of discovery almost every single day — and written discovery is my least favorite by a landslide. I suspect that I am not alone in that. I also happen to know that judges loathe hearing squabbles between and amongst counsel related to discovery disputes on motions to compel and the like. The board hopes this CLE idea finds itself in concert with the Chief Justice’s emphasis on wellness among lawyers.

This year, the board hopes to espouse a theme that I predict many of our parents taught us in our childhood (my own parents had to remind me well past grade school), that we should still ask ourselves: Do we fight a particular battle because we can, or because we ought. When the latter demonstrates itself to be true, both in law and in life, we can enjoy civility, not only in discovery and the practice of law, but in the practice of a more serene and healthy daily life.

Nathan J. D. Veldhuis practices in Richmond with Veldhuis & Bullock, which he co-founded with his partner Howard W. R. Bullock. His practice is focused solely on representing victims and their families who have suffered catastrophic injury or death, sexual assault, brain injuries, trucking accidents, defamation, slips and falls, and other events causing serious personal or bodily injury or death. Veldhuis has served on the board of governors of the Virginia Trial Lawyers Association since 2007 and is a member of the Boyd-Graves Conference.
It’s a situation every litigator dreads: you open your mail (or email), find an opinion from a trial court, and discover a holding that no one anticipated. You know that Virginia’s preservation of error rules declare that “[n]o ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling . . . .” Rule 5:25 of the Supreme Court of Virginia. But how is that supposed to happen when a court rules on a basis that neither party advocated?

Virginia cases have been in tension on this point. On one hand, Va. Code § 8.01-384(A) provides that “recital of objections in a final order . . . shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.” On the other hand, a string of cases require that a party obtain a ruling on their objections in order to preserve them. An illustrative case is *Nussbaum v. Berlin,* where the Supreme Court of Virginia held that specific objections noted after a hearing were insufficient because counsel never sought a ruling on them, and the objections in the final order were more specific than the objections made at the hearing. *Nussbaum* explains that listing objections to the final order is insufficient unless a trial court has “an opportunity to rule intelligently” on them.

It is difficult to prompt a court to rule intelligently on your objections to a certain logic when you do not encounter that logic until after the ruling. That is why appellate counsel often recommend filing a motion to reconsider contesting the new grounds. But a motion to reconsider is not always feasible. Courts that have reached an opinion are
sometimes unable or unwilling to rule on a motion to reconsider before losing jurisdiction of a matter under Virginia’s 21-day rule.

A recent decision by the Supreme Court of Virginia offers some hope in this dilemma. In Cherry v. Lawson Realty Corp., the Supreme Court of Virginia addressed a case where at a pre-trial conference the Circuit Court ruled that common law claims had been precluded by statute. Plaintiffs objected to that ruling in written objections that they attached to the Circuit Court’s order dismissing their common law claims. But they did not seek a separate ruling on the objections, and the Defendants argued that they’d thus waived their claims.

The Court found the written objections preserved Plaintiff’s argument – even without a separate ruling. The decision in Cherry comes down on the side of the line of cases finding objections to an order sufficient. It distinguishes the cases highlighting the importance of a separate ruling. In particular, it explains that Nussbaum was an “unusual combination of circumstances.” Those unusual circumstances include (1) that counsel made only a general objection during the hearing and (2) that counsel later filed specific objections while expressly stating that counsel was not asking for a new ruling.

Cherry makes it tempting to simply file objections when faced with the mailed or emailed opinion. But there is reason for caution. Cherry also highlights that preservation of error is “a context specific enterprise.”

While Cherry presents a scenario in which the Circuit Court had an opportunity to consider Plaintiff’s objections, that will not always be the case. For one thing, in Cherry the Circuit Court made it clear that it understood the dispute because it certified its own decision for an interlocutory appeal. This is, needless to say, unusual. Further, the dispute in Cherry was baked into the case. Plaintiffs thought that they had common law claims: they put them in their complaint. They defended them from summary judgment. They were about to go to trial on those claims, but then the Circuit Court took them away. Not every unanticipated holding will be so fundamental to a case.

It is difficult to prompt a court to rule intelligently on your objections to a certain logic when you do not encounter that logic until after the ruling.

So, Cherry speaks to, but does not resolve, the tension in Virginia law regarding preservation of error. Depending on the circumstances of the case, it is still advisable to seek an express ruling on objections to unanticipated holdings. But where that is not possible, Cherry also affirms the place of written objections in the litigator’s toolkit.

Endnotes:
1 279 Va. 385, 403 (2007)
2 Id. at 402-03
3 Id. at 403
4 295 Va. 369 (2018)
5 Id. at 373
6 Id. at 373
7 Id. at 373-74
8 Id. at 374
9 Id. at 374
10 Id. at 374
11 Id. at 374, n.4
12 Id. at 373

Erin Ashwell is a principal at Woods Rogers in Roanoke. She represents clients in state and federal litigation, including civil litigation and appeals. She focuses on civil defense and appellate law, particularly commercial, domestic, and other appeals before Virginia’s state appellate courts and the U.S. Court of Appeals for the Fourth Circuit. Prior to joining Woods Rogers, she was a trial attorney for the U.S. Department of Justice. Erin was appointed by the Governor of Virginia to the Virginia Board of Historic Resources in 2017. She is a graduate of Harvard College and Harvard Law School.
Spoliation refers to “the destruction or material alteration of evidence or to the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”

A party seeking a spoliation sanction in Virginia federal courts must establish the following elements in order to be entitled to relief:
1. The party having control over the evidence had an obligation to preserve it when it was destroyed or altered;
2. The destruction or loss was accompanied by a “culpable state of mind”; and,
3. The evidence that was destroyed or altered was “relevant” to the claims or defenses of the party that sought the discovery.

Courts derive their “power to sanction a party for spoliation” from the Federal Rules of Civil Procedure and “the court’s ‘inherent power to control the judicial process and litigation.’” When evidence is destroyed, altered, or not preserved, a district court “may use its inherent power to control the judicial process to determine an appropriate sanction to the extent necessary to redress conduct which disrupts the judicial process.”

“The policy underlying this inherent power of the courts is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.”

Courts have “broad discretion to choose the appropriate sanction” for spoliation.

Sanctions available to a district court include judgment by default, preclusion of evidence, an adverse interference instruction, a monetary fine, and/or an assessment of attorney’s fees and costs.

On December 1, 2015, Rule 37(e) of the Federal Rules of Civil Procedure, which addresses failure to preserve electronically
stored information ("ESI"), was amended. The Advisory Committee Notes state that revised Rule 37(e) “authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures.”

Rule 37(e) states that “[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it,” the court “upon finding prejudice to another party from loss of the information, may order measures...necessary to cure the prejudice.”

Additionally, if the court finds “that the party acted with the intent to deprive another party of the information’s use in the litigation,” the court may “(A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.”

**Element 1: Obligation to Preserve**

A party has a duty to preserve material evidence not only during litigation but also during “that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” Further, it is “an objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation.”

The duty to preserve may be imputed in order to avoid unfair prejudice.

**Element 2: Destruction or Loss Accompanied by a “Culpable State of Mind”**

In order to impose sanctions for spoliation, the court must find “some degree of fault.” The Court of Appeals for the Fourth Circuit (“Fourth Circuit”) has instructed that bad faith is not “an essential element of the spoliation rule.” Instead, “any level of fault, or culpable conduct” is sufficient “for a finding of spoliation,” meaning conduct which is “merely negligent may serve as the basis for a finding of spoliation.”

The Fourth Circuit has held that “[e]ven the mere failure, without more, to produce evidence that naturally would have elucidated a fact at issue permits an inference that ‘the party fears [to produce the evidence]; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party.’”

**Element 3: Relevance of the Evidence Destroyed or Altered to the Claims or Defenses**

“To draw an adverse inference from the absence, loss or destruction of evidence, it would have to appear that the evidence would have been relevant to an issue at trial and otherwise would naturally have been introduced into evidence.”

**Intent to Deprive under Rule 37(e)(2)**

Based on the amendment to Rule 37(e) effective December 1, 2015, a court can use the “specified and very severe measures” outlined in Rule 37(e)(2) “only on finding that the party that lost the information acted with the intent to deprive another party of the information’s use in the litigation.” Revised Rule 37(e)(2) “rejects cases...that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence” and instead limits the “most severe measures to instances of intentional loss or destruction.” This means that in order to enter a default judgment, dismiss an action, or give an adverse inference jury instruction, the moving party must show that the other party acted with an intent to deprive the moving party of use of the information in litigation.

Rule 37(e) states that “[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it,” the court “upon finding prejudice to another party from loss of the information, may order measures...necessary to cure the prejudice.”
To date, Virginia district courts have been reluctant to impose the more severe sanctions under Rule 37(e)(2) such as dismissal or entry of default judgment.

Conclusion
Obtaining sanctions under Rule 37(e) is challenging based upon the level of proof required. Proving spoliation of ESI requires a threshold finding that the ESI at issue should have been preserved in the anticipation or conduct of litigation, was lost, and cannot be restored or replaced because a party failed to take reasonable steps to preserve the ESI. If the moving party can prove prejudice, the court can order measures to cure the prejudice. If the moving party can prove that the other party acted with an intent to deprive, the court can award more severe sanctions such as dismissal, entry of default judgment, or issuance to the jury of adverse inference in circumstances.

The Virginia federal district court decisions issued since revised Rule 37(e) was adopted in December 2015 confirm that it is difficult to prove intent to deprive and even more difficult to obtain a dismissal or entry of default judgment as a sanction for spoliation.

Endnotes:
1 Silvestri v. GMC, 271 F.3d 583, 590 (4th Cir. 2001) (citations omitted).
5 Silvestri, 271 F.3d at 590.
6 Id.
7 Kettler, 81 F. Supp. 3d at 500; BMG Rights Mgmt. (US) LLC v. Cox Comm’ns, Inc., 199 F. Supp. 3d 958, 986 (E.D. Va. 2016) (“Spoliation instructions can take many forms and range in degree of severity. The Court is satisfied the instruction given ‘alerted the jury to the fact of spoliation, identified the missing evidence, and permitted them to consider that fact in their deliberations.’”)
9 Id.; BMG Rights Mgmt., 199 F. Supp. 3d at 986 (“Dismissal is reserved for only the most egregious circumstances.”)
10 Silvestri, 271 F.3d at 591 (citations omitted); Wall v. Melford, No. 7:16cv00305, 2018 U.S. Dist. LEXIS 73717, at *7 (W.D. Va. May 2, 2018) (“the evidence does not support a finding that the defendants or their co-workers should have known to preserve the recording before deleting it”).
personally committed no misconduct related to the failure to retain the desired footage, imputation to these defendants of other officials’ negligent spoliation [was] necessary to avoid unfair prejudice to” the defendant). See also Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, n.16 (D.Md. 2009) (“A party may be held responsible for the spoliation of relevant evidence done by its agents. Thus, agency law is directly applicable to a spoliation motion, and the level of culpability of the agent can be imputed to the master.”) (citations omitted).

13 Silvestri, 271 F.3d at 590.
16 Vodusek, 71 F.3d at 156 (citing 2 Wigmore on Evidence, § 285 at 192 (Chadbourn rev. 1979)).
17 Id.
19 Id.

21 Id., 2016 U.S. Dist. LEXIS 187186, at *25; Linlor v. Polson, No. 1:17cv0013, 2017 U.S. Dist. LEXIS 216708, at *5 (E.D. Va. Dec. 6, 2017) (“The relief sought in this motion (either a default judgment or instruction to the jury) would require a showing that the defendant acted with the intent to deprive the plaintiff of use of the information in the litigation.”)
22 Raynor, 2016 U.S. Dist. LEXIS 187186, at *25; Jenkins, 2017 U.S. Dist. LEXIS 9581, at *44 (“While some aspects of this record give the Court significant pause, the Court is unable to find that Sheriff Woody had the requisite intent to deprive Ms. Jenkins of use of this information at issue in litigation.”)
24 Jenkins, 2017 U.S. Dist. LEXIS 9581, at *43 (“The standard for proving intent under the rule is not settled.”)
It is disheartening to instruct the members of a jury to return to their deliberations once they have reached a unanimous verdict in a personal injury case. However, there are circumstances that arise where the jury’s verdict is set aside as inadequate as a matter of law. Not only is this issue important to plaintiffs’ attorneys who may seek to have a second attempt at proving damages, but also to defense attorneys who may use existing law to prevent re-litigation of damages. This article seeks to educate judges and practitioners on those instances.

A jury verdict will not be disturbed unless the evidence supporting the damages is uncontroversed and may not be ignored or disregarded by the fact-finder. When the evidence presented by the plaintiff regarding special damages is “so complete that no rational fact-finder could disregard it,” that evidence must be a “fixed” part of the jury verdict. When the evidence must be a fixed part of the jury verdict, a trial court must set aside any verdict that is inadequate as a matter of law. When the plaintiff’s evidence is subject to doubt as to whether the plaintiff’s special damages were attributable to the defendant or some other cause, the evidence is not a “fixed part of the jury’s verdict.” In that circumstance, the trial court may not set aside a jury verdict as inadequate because “a rational fact-finder might properly find the plaintiff entitled to considerably less than the amount claimed as special damages.”

There is one exception to this rule. In a personal injury case, when a jury returns a
verdict awarding an amount in damages that is identical to the amount of special damages sought by the plaintiff, that verdict is insufficient as a matter of law. This is true regardless of whether the damages were controverted. The rationale behind this rule is that a verdict in the exact amount of special damages indicates that the jury neither considered nor compensated the plaintiff for general damages, including items like pain, suffering, and mental anguish.

This rule, however, is very narrow and only applies when the jury returns a verdict in the exact amount of the plaintiff’s medical and special damages. “The rationale underlying the [Bowers] rule does not extend to an award which deviates from the amount of all the special damages claimed, even if the amount of the verdict corresponds to an identifiable portion of the special damages.” Therefore, based on the current status of Virginia case law, it is important for judges and practitioners to employ the following, a three-step analysis, of a jury’s verdict in a personal injury case.

**Exactness**
First, the trial court must inquire into whether the verdict is in the exact amount as the medical and special damages. This step examines the jury verdict under Bowers. While this may appear to be a simple step of matching numbers, judges and practitioners must accurately classify damages as special damages and not simply view the total amount the plaintiff requests. If the verdict is the exact amount of the plaintiff’s special damages, then the court must find that the jury award is insufficient as a matter of law under the Bowers rule. If the verdict is not the exact amount, the court continues its analysis under Bradner.

**Completeness**
Second, continuing under the Bradner test, the trial court must inquire into whether the plaintiff has presented evidence that is “so complete that no rational fact-finder could disregard it.” This analysis evaluates the evidence presented to the jury in its totality. Regarding completeness, one circuit court noted, “when reasonable minds could differ as to the result,” the court would not disturb the jury verdict. If the evidence is not complete or subject to some doubt, the jury verdict must remain because it is conceivable that the jury rejected some portion of the evidence presented by the plaintiff. If, however, the evidence is complete, the jury verdict must be analyzed for adequacy under the third step.

**Adequacy**
Third, the trial court must inquire into whether the jury verdict is adequate as a matter of law. If the jury verdict is significantly higher than the plaintiff’s special damages, the verdict is adequate and the analysis under Bradner ends because it appears the jury considered and compensated the plaintiff for the various elements of damages. Practically speaking, a plaintiff will likely be satisfied with a verdict that is considerably higher than the plaintiff’s special damages. These issues commonly arise when the jury verdict is lower than the amount of the plaintiff’s special damages or only marginally higher than special damages. Adequacy is viewed under the totality of the evidence presented.

Adequacy refers to whether the jury properly considered all the elements in the damage instruction. Indeed, the Supreme Court of Virginia has commented “[w]hen the evidence permits a jury to conclude that only some of the damages claimed resulted from the accident, a verdict in an amount less than or approximating a portion of the special damages does not justify the conclusion that the jury failed to consider other damages.

There is one exception to this rule. In a personal injury case, when a jury returns a verdict awarding an amount in damages that is identical to the amount of special damages sought by the plaintiff, that verdict is insufficient as a matter of law.
THE ADEQUACY OF JURY VERDICTS IN PERSONAL INJURY CASES

Determining whether the jury properly considered the elements in the damage instruction by awarding a proper verdict.

Judges and practitioners should be aware of the analyses under Bowers and Bradner when the jury in a personal injury case deliberates. When all are aware of this issue, the trial court can simply instruct the jury to return to its deliberations.19 When instructing the jury, the trial judge should take care not to influence the jury with its cautionary instruction. If the jury has been excused, the trial court must order a new trial on damages, as the jury has found the defendant liable.20 The three-step analysis provided in this article will give judges and practitioners a better understanding of Bradner, Bowers, and jury awards in personal injury cases.

The views advanced in this Article represent commentary “concerning the law, the legal system, [and] the administration of justice” as authorized by Virginia Canon of Judicial Conduct 4(B) (permitting judges to speak, write, lecture, teach, and otherwise participate in extrajudicial efforts to improve the legal system). These views, therefore, should not be mistaken for the official views of the Norfolk Circuit Court or the opinion of a circuit court judge in the context of any specific case.

Endnotes:
2  Id. 234 Va. at 487, 362 S.E.2d at 720.
3  Id.
4  Id. 234 Va. at 487, 362 S.E.2d at 721.
5  Id. 234 Va. at 487–88, 362 S.E.2d at 721.
7  Id. 254 Va. at 431, 492 S.E.2d at 638.
9  Id.
10  Bradner, 234 Va. at 487, 362 S.E.2d at 720.
11  Id. 234 Va. at 488, 362 S.E.2d at 721.
12  Foy v. Gilena, 51 Va. Cir. 421, 426 (Virginia Beach 2000). Another circuit court explained it similarly. See Mix v. Stallard, 64 Va. Cir. 73, 75 (Spotsylvania 2004) (“Although Stallard presented no independent evidence, she emphasized throughout the trial … that Mix did not complete her physical therapy, and therefore failed to mitigate her damages. Thus, the jury reasonably could conclude that her later expenses were not necessary or proper.”).
13  See Bradner, 234 Va. at 487–88, 362 S.E.2d at 721.
14  See id.
15  Depending on the circumstances, the court may grant remittitur of the jury verdict.
16  See, e.g., Walker, 257 Va. at 68, 69–70, 71, 510 S.E.2d at 735, 736, 737; Mix, 64 Va. Cir. at 73; Foy, 51 Va. Cir. at 421; Bates v. Bailey, 48 Va. Cir. 161, 161 (Richmond City 1999).
18  Id., 257 Va. at 64, 510 S.E.2d at 733. One circuit court noted that although a jury verdict exceeded the plaintiff’s special damages, the judge would reject a settlement under Virginia Code section 8.01-424 based on the evidence presented. Bates, 48 Va. Cir. at 163 (setting aside a verdict of $7,000, only $480.18 more than the plaintiff’s special damages).
19  Although the Court has sent cases on remand for a trial on damages only, see infra note 20, the parties and the trial court can save their clients’ and the trial court’s resources by instructing the jury to resume its deliberations.
20  Bradner, 234 Va. at 491, 362 S.E.2d at 723.
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Even as a small child, Emily Meyers Munn displayed the quick tongue and desire to provide counsel that is often the hallmark of a great trial attorney.

Listening in on a conversation between her father, a Duke grad who started his own construction company in Durham, NC, and his employee, who was complaining about some aspect of his job, Munn recalls that she tapped the employee on the arm, and using the words she had heard in a country song that was in heavy rotation on the radio at the time, said to the man: “If I were you, I would tell him that he can ‘take this job and shove it.’”

She recalls her father’s eyes widening as he looked down at his seven-year-old daughter and she laughs, “Yeah, I guess I always had a strong voice.”

Today, Munn uses her strong voice in the courtroom as a trial attorney in the Norfolk office of Bischoff Martingayle, where she specializes in criminal defense. She is certified by the Virginia Indigent Defense Commission as lead counsel in death penalty cases, and on the Criminal Justice Act panel for all crimes including capital murder in the Eastern District of Virginia. She has defended people accused of being gang members, cop killers, and child killers.

“There are not many female attorneys who defend the most serious crimes: I spend a lot of time in jails, looking at crime scene photos, and having really difficult conversations with clients and their families,” she says.

Munn speaks rapidly, with a confidence that helps her go up against charges for her clients where, as she puts it, “The evidence is usually stacked against me.”

But that doesn’t stop her from trying a case, and prosecutors know that. She says there have been years when she’s tried ten jury trials and hundreds of bench trials. “Once your community at the courthouse knows that you’re capable of trying a case, that changes the way things go for you as a lawyer and the people who hire you.”

Munn ended up in the rough and tumble world of criminal defense as a way to use her law degree, while still spending time with her small children. She married her college sweetheart from Wake Forest undergrad while she was a 1L at Wake Forest Law School. By her third year, she was hustling through summer school classes in order to finish law school before the birth of her first child. She was eight months pregnant when she took the bar exam in February and had her first child that March. Her second child followed 16 months later.

“I really wanted to use my degree, but I didn’t want to work 40 hours a week in a high-rise building with people who couldn’t understand the schedule I needed to keep,” she says. So she contacted a public defender she had interned for named Clark Daugherty (now the Hon. S. Clark Daugherty of Norfolk General District Court) and asked for an interview.

“It was so hot, and I was pregnant and sweating and so stressed out when I went to meet with him,” she says. “And I asked him if I could work part-time for him in the mornings and I just rambled on and on and he sat there without saying a word, and finally when I stopped talking he said, ‘I feel like you’re going to work harder than anybody I’ve ever hired.’”

According to Judge Daugherty, “She did a great job. I enjoyed giving Emily her start, and I was disappointed when she left.”

Like most defense attorneys, Munn started out with the small

Emily Munn: “Everyone in This World Deserves to Have a Voice” by Deirdre Norman

Emily Munn in front of the Norfolk Courthouse and with her children.
His two young daughters carry around an old Cabbage Patch doll that they have adoringly named “Baby David,” but more on that later.

What most lawyers want to know is how 37-year-old David Dickens from the small town of Orange, Virginia, ended up winning a $289 million verdict against agrochemical giant Monsanto in state court in San Francisco, California.

It all started with a kiteboarding accident in Hatteras that left Dickens’ colleague, Michael J. Miller, seriously injured with two punctured lungs and other injuries — weeks before the country’s first case involving Monsanto’s weed killer Roundup was scheduled to go to trial. Miller founded The Miller Firm LLC over 30 years ago and, in 2007, set up shop in Orange. The firm has developed a national reputation for representing plaintiffs in pharmaceutical mass tort litigation, most recently in the Actos bladder cancer trials. Today, it is one of only three firms nationally that the United States District Court for the Northern District of California has appointed to lead the Roundup litigation.

The case, DeWayne Johnson v. Monsanto Company, involved DeWayne “Lee” Johnson, 46, a Bay Area groundskeeper, who developed non-Hodgkin lymphoma four years ago and whose terminal illness allowed the case to be expedited in California state court. Johnson, who had used a Monsanto herbicide 20–30 times per year in his job, contacted The Miller Firm to represent him in his lawsuit against Monsanto after he developed cancer. The Miller Firm worked with California-firms Baum Hedlund Aristei & Goldman and Audet & Partners as local counsel. Monsanto was represented by Winston & Strawn, Farella Braun + Martel, and Hollingsworth LLP.

Dickens has spent his entire legal career at The Miller Firm. A native of Connecticut, he graduated from James Madison University, and then attended Suffolk University in Boston for law school to be closer to his father — a lawyer and scientist who was dying of cancer. Dickens met his wife, Alison, at James Madison University, and after graduating from Suffolk he began looking for work as a lawyer in Virginia to be close to Alison and her family.

“I knew I wanted to do something to help people,” says Dickens. “I was thinking I would be a criminal defense attorney or a public defender. Then Mike Miller called me. I drove to his farm in Gordonsville, and there was a little barn on the property and I thought ‘Wow, is this the office?’”

Thankfully, it wasn’t, and the office Miller chose was in the center of Orange directly across from the train depot. Dickens’ desk chair is about ten feet from the train tracks. “I apologize a lot to people on the phone for the noise,” he says of the rumbling double decker trains that travel the track daily.

Of the enormous verdict, Dickens says, “It’s still hard to wrap my head around it. Mr. Johnson’s injuries are devastating but all he wanted was his wife and sons to be okay. He hoped that his wife would no longer have to work two jobs. I’m just glad that we were able to give him that peace of mind and send a strong, clear message to Monsanto.”

The jury selection was “the most unique we ever had,” says Dickens. Lasting over four days, the jury that was ultimately chosen included a molecular biologist, a couple of PhDs, and other well-educated individuals. “We had some fears about the molecular biologist,” Dickens says.

The two-month trial included hours of opening arguments, sometimes stultifying videotaped depositions, and bloggers and Hollywood celebrities following the case. In the continued on page 39
A surprisingly large number of workers’ compensation cases involve interactions with animals: Man’s (usually) best friend. Fickle felines. All sorts of winged, wild, and wooly creatures invariably intersect with us at the workplace. Granting workers’ compensation benefits to the dog catcher bitten by a wayward hound is no stretch. But more tangential encounters can tax our thinking.

Virginia has a long history of animal-related workplace injuries. In 1612, while exploring the Chesapeake Bay for the Virginia Company of London, Captain John Smith was impaled by what likely was a cownose ray. The episode gave name to what is now Stingray Point at the mouth of the Rappahannock River:

But it chansed our Captaine taking a fish from his sword (not knowing her condition) being much of the fashion of a Thorneback, but with a long taile like a ryding rode, whereon the middest is a most poisoned sting, of two or three inches long, bearded like a saw on each side, which shee strucke into the wrist of his arme an inch and halfe: no blood nor wound was seene, but a little blew spot, but the torment was instantly so extreame, that in foure houres, had so swolen his hand, arme, shoulder, we all with much sorrow conclud-ed his funeral, and prepared his grave in an Island by, as himselfe directed: yet it pleased God by a precious oile, Doctour Russell at the first applied to it when he sounded it with probe (ere night) his tormenting paine was so well asswaged that he eate of the fish to his supper, which gave no lesse joy and content to us then ease to himself, for which we called the Island Stingray Isle after the name of the fish.
Cases involving animals present intriguing legal analyses. A friend of a friend knows an attorney who lost a troubling case. A customer’s driveway was lined with piles of wood. A carpet installer walked down it to his van. He encountered a snake that coiled and sprang to bite. He lurched, twisted, and injured his back. Did the snake present an actual risk of the employment? The victim’s attorney tried to gain admission of the homeowner’s hearsay statement about snakes. The homeowner said he didn’t go anywhere near the wood piles, “until it’s cold weather.” The employer’s counsel objected, and a colloquy ensued:

Claimant’s Attorney: Your honor, you can take judicial notice of the fact that virtually everyone knows that snakes like to hang around wood piles.

Judge: I’m not sure that is subject to judicial notice, I think common sense may say that.

Claimant’s Attorney: My point, exactly. Common sense did not prevail. Absent testimony from a herpetological expert, the judge declined to take judicial notice of the fact that snakes like to hang around wood piles.

In workers’ compensation, Virginia applies a relatively narrow interpretation of “arising out of” the employment. Ostensibly, we apply an “actual risk” analysis. This test “requires only that the employment expose the workman to the particular danger from which he was injured, notwithstanding the exposure of the public generally to like risks.” Nonetheless, encounters with animals have proven challenging for the courts. Let’s look at some decisions:

**The Bee Stung Surveyor** — A surveyor who suffered a bee sting was entitled to compensation. The employer argued “a bee sting may occur indoors or outdoors, at work or at play.” But, the worker was assigned to survey a large field on the edge of woods when he was stung. The commission found the work required him “to be outdoors in a natural environment and to be exposed to the hazard of hostile bees.”

**Pet Store Spider Bite** — A pet store employee was bitten by a spider. The commission awarded the case because the claimant’s employment directly exposed him to the risk. The commission made a factual finding that the workplace exposed him to the risk of spiders. It held if the employment exposed the claimant to the risk which caused injury, “the claim cannot be denied simply because the same injury could have occurred away from the employment.”

**Housekeeper Spider Bite** — But consider the housekeeper who alleged a spider or insect bite. There was no evidence that the work area attracted spiders, although she had seen them there on occasion. The commission denied

*It rejected the notion that “snakes like to hang around wood piles” was a universally regarded fact.*
The claimant was a traveling a salesman and a good Samaritan. While driving, he noticed a turkey buzzard which appeared to be in distress in a field beside the highway. He stopped the car, got out, and slipped in the snow, fracturing his elbow.

Foxhunting Fatality — The headnote sounds strange. The facts are even stranger. A farmer’s crew did not have much work. The farmer decided they would go to a field to “smoke out” a den of foxes to prevent damage to the property. A farm hand lifted his gun by the barrel from the back of the truck and it discharged, killing him. Without discussion, the commission held the accident arose out of and in the course of the employment.

Chasing an Opossum from a Cab Company — Karma is, well, karma. A cab dispatcher was injured. The claim was defended on the grounds it did not arise out of and in the course of the employment. An opossum came through the open door of the dispatcher’s office. He shooed it from the building and then from beneath a cab. He chased it across the street. While, “kicking at it,” his foot slipped, and he fell to the pavement. He continued to chase it after it left the premises because he was afraid it would return and be killed by one of the employer’s taxis. He would have been required to remove the remains. Given the employer’s testimony that the claimant’s job duties included sweeping the driveway and the office, the Commission concluded he was performing, “one of the implied duties of his employment and an activity causally related to his employment.”

Rescuing a Turkey Buzzard — No good deed goes unpunished — or maybe, not all good deeds are rewarded. The claimant was a traveling a salesman and a good Samaritan. While driving, he noticed a turkey buzzard which appeared to be in distress in a field beside the highway. He stopped the car, got out, and slipped in the snow, fracturing his elbow. He later learned the buzzard was caught in a steel trap. Although he was doing “something of a humane nature,” the commission held this was “not a part of his usual duties but a duty that would be performed by anyone who would see an animal or bird in distress.” Benefits were denied.

The Cat on the Pizza Box — The claimant worked at a furniture seller and arrived at his desk to find a cat sitting on his pizza box. He attempted to pick up the cat and was bitten. The work area was a warehouse with a large open door. The cat entered the store several times earlier that day and the claimant’s supervisor had “tossed it out,” only to have it return. He called animal control but was told they did not have “jurisdiction” over cats. He posted information about the cat on Facebook and called a local radio station, but no one responded. Previously, a possum, a snake and birds had entered the building through the open door. The full commission held the accident arose out of the employment. The open doors of the warehouse allowed animals to enter the work space and increased the risk of a toothy encounter.

Greeting the Customer’s Pet — The claimant approached a dog to greet it in a store. The dog jumped and knocked over the claimant. The employer also had a policy requiring store associates to interact positively with customers. The claimant’s act of approaching the dog to greet it was in furtherance of the policy favoring interaction with customers. The accident arose out of the employment. The employer’s suggestion that the claimant could have greeted the dog from a safer distance was no more than an allegation of contributory negligence, which could not bar a claim.

No Job Duties Associated with Animals — Some decisions deny compensation when an employee is injured at work by an animal, but the job duties do not reasonably include interacting with the animal. The Supreme Court of Virginia denied benefits to a farm employee.
bitten by a co-employee’s dog. The claimant’s job was working with horses. At a farmhouse lunch break, he was bitten. The court held nothing about the character or nature of the claimant’s work exposed him to the risk of a dog bite.26 Similarly, where a scrap metal yard worker’s job included repairing equipment and loading trucks, his injuries were not compensable when he gave a co-worker’s dog water and was bitten. The employer permitted the dog to be on its premises. It was chained in place and there were warning signs. Nothing about the claimant’s work required him to interact with the dog, and the employer said he was warned not to do so.27

Analysis and Summary

The animal encounter cases demonstrate tensions in determining whether injuries “arise out of” the employment. A couple of themes emerge. Several cases grant benefits where an animal encounter is closely related to a required or incidental work duty. If some part of the work directly introduces the risk of injury by an animal, the claim is compensable. When there is an insufficient relationship between exposure to animals and the work, the claim will be denied. The good Samaritan salesman aiding the trapped buzzard and the scrap yard worker bitten after watering the dog were clearly in the scope of their employment – they were on the job. But the injuries were not tied to acts required by the work. There likely is a spectrum of cases which will be accepted or denied where an animal encounter is incidental or closely related to the work. The former cases are predictable; the latter perhaps not.

In some contexts, interpreting “arising out of” is more difficult. Particularly for injuries from insects, Virginia tends to apply an increased risk analysis to determine compensability. As part of the burden of proof, an injured worker must prove the work environment exposed him to a greater risk of injury than that faced by the general public. In the 2017 insect bite case, the commission held, “[b]enefits will be unavailable … if it is not shown that the work environment makes the risk of being bitten by an insect or animal greater than that experienced by a member of the general public.”28

Accepting this approach, Virginia appears to use the increased risk doctrine as a proxy for the actual risk doctrine in animal injury cases. This may result from the difficulty of defining actual risk for animal encounters in neutral risk situations. Virginia does not recognize the “positional risk doctrine.”29 The appellate courts have said so strongly. For the finder of fact, there may be reluctance to saying someone actually encountered the risk of an injury from an animal at work, given that it might be viewed as adopting positional risk. The actual risk-positional risk distinction is fine. There may be a dog chasing his tail character to saying something is an actual risk of the employment because you actually encountered it there. There is no doubt — an increased risk analysis raises the evidentiary bar. But it provides an identifiable standard that is perhaps less illusory than relying only on a workplace exposure to prove actual risk.

With that, I will go home and pet my dog — he doesn’t bite.

Wesley G. Marshall is a Commissioner at the Virginia Workers’ Compensation Commission. He was appointed by the Virginia General Assembly in 2012 and reappointed in 2018. He is active in the Southern Association of Workers’ Compensation Administrators, the National Association of Workers’ Compensation Judges, the International Association of Industrial Accident Boards and Commissions and other bench and bar organizations.

Endnotes:
1 In accordance with Canon 2B of the Canons of Judicial Conduct for the State of Virginia, any opinions in this presentation are those of the authors, they are personal, and they are not official opinions of the Virginia Workers’ Compensation Commission or any other court or governmental agency. The author appreciates the assistance of staff attorney Brian Larson who assisted with editing and research.
2 See Kefene v. Pizza Boli’s, JCN VA02000014023, 2014 Va. Wrk. Comp. LEXIS 1024 (November 6, 2014) (accident arose out of employment where claimant driver bitten by dog while delivering pizza).
5 Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938).
6 Griffin Truck Corp. v. Smith, 150 Va. 95, 142 S.E. 385 (1928). See also City of Roanoke v. Moody Graphic Color Serv., 70 Va. Cir. 165, 170 n.17 (Cir. Ct. 2006).
7 As noted by the United States Supreme Court, the statutory phrase, “arising out of and in the course of employment,” is “deceptively simple and litigiously prolific.” Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 479 (1947). “The few and seemingly simple words ‘arising out of and in the course of the employment’ have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion. From their number counsel can, in most cases, cite what seems to be an authority for resolving in his favor, on whichever side he may be, the question in dispute.” Id. at 479, n. 4 (quoting Herbert v. Fox & Co. [1916] 1 A. C. 405, 419 (Wrenbury, L.J.)).
10 Id. at 128.
12 Id.
14 Id.
15 Id. (citing Elder v. Hardee’s of Lawrenceville #1822, VWC File No. 201-64-45 (May 1, 2001). There is some logic to this argument.
18 The cases reflect one unique relationship of scale. The more inhumane the act of the worker to an animal, the more serious the resulting injury seems to be.
19 Id.
21 Id. at 165.
23 Id.
24 Id. This case, along with Wilkerson, 49 O.I.C. 177, amply demonstrates the problematic nature of possums in the workplace.
29 “We do not apply the positional risk test used in other jurisdictions where simply being injured at work is sufficient to establish compensability.” Cty. of Chesterfield v. Johnson, 237 Va. 180, 185, 376 S.E.2d 73, 76 (1989); Hill City Trucking, Inc. v. Christian, 238 Va. 735, 740, 385 S.E.2d 377, 380 (1989) (Virginia Supreme Court has “consistently rejected,” the positional risk doctrine).
Munn continued from page 32

cases, trying 10 or 12 cases a day in juvenile court. “You’re trying a case that might be petit larceny of a pack of gum from 7-11, but that’s a microcosm for the giant case that takes three or six weeks. You have to know the same rules and come up with theories on the spot.”

Munn likens her trial work to an art, describing it as being “part scholar and part actress,” and admits she often thinks of the words of a mentor who called defense work “the thrill of victory and the agony of defeat.”

“The hardest times for me, the lowest lows, are when I have a truly innocent, wrongfully charged client. I don’t sleep the night before those trials. And the highs are when I win and that very same client goes free.”

Munn sings the praises of the Norfolk courts, saying, “They are incredibly efficient, the people are helpful, and it is an extremely pleasant place to schedule and try a case”

When asked how she copes with the adversarial nature of her job she says, “I would hate to come to work if I saw it as fighting with people all the time. I see it like we are all part of the same system, and I have one job, and the prosecutor has a job, and the cop has a job, and the bailiff has a job. I see them all as my coworkers. The commonwealth attorneys I try cases against every day are some of my best friends in this business. We are honest with each other along the way and shake hands when our cases are over.”

Now single, Munn has a home with three teenagers that she describes as her “proudest accomplishment.”

“They are the first thing I think about when I wake up and the last thing I think about when I go to bed. My goal every day is for my kids to be proud of me and know what it means to work hard even at really gut-wrenching things. I want for them to know that everyone in this world deserves to have a voice, no matter what they are accused of having done in their worst possible moments.

My kids have driven around in my car with a man’s business suit so that I can provide clothes for an inmate going to trial more times than I can count. They know what I do, they know the unsavoriness of it, they and their friends read about my cases in the newspaper, and they save me every night with their normalcy. When I get home from work, my kitchen is full of hungry kids with inside jokes, supported by grownups who love them more than anything on earth. Most of my clients never had that kind of warmth in their lives; they never had a chance.” She spends her rare free moments watching her kids play sports, traveling with them, and working as the president of the Norfolk Court Appointed Special Advocates board of directors.

As for the criminal justice system, Munn says, “I can’t imagine working anywhere else. My favorite thing about my job is that every single day is different. I’ve never worked the same day twice. Never.”

And Daugherty was right in his interview assessment of Munn. “I work at a high rate of speed,” she says. “Whether it’s a drug case and I’m trying to get an addict to rehab, or I’m figuring out how to keep the government from executing someone on capital murder case – my conversations with people make it all possible. I’m either getting evidence I need to understand or figuring out the back story to a crime or cross-examining a witness. The gift of trial work is in figuring out the balance between talking and listening.”

Dickens continued from page 33

end, the jury returned a verdict of $289 million, $39 million in compensatory damages and $250 million in punitive damages for failing to warn of the potential danger of glyphosate.

In September, Monsanto requested that the trial court set aside the verdict, reduce the award, or grant a new trial. In a company announcement Monsanto stated that glyphosate does not cause cancer: “We will appeal this decision and continue to vigorously defend this product, which has a 40-year history of safe use and continues to be a vital, effective, and safe tool for farmers and others.”

There are now over 8,000 glyphosate cases pending against Monsanto, of which The Miller Firm has over 1,800 — with a new trial starting in February. In addition to pharmaceutical and chemical plaintiffs’ work, the firm also has a thriving terrorism practice, representing victims of terrorism as close as Charlottesville and as far away as Tanzania.

Dickens copes with the stresses of legal work that includes a two-month trial 2,800 miles from home by being, according to his 5 and 7 year old daughters and his wife, both a “clown” and an “elf.” After discovering his old Cabbage Patch doll while cleaning out his mother’s attic after her recent death from cancer (a doll that, according to Dickens, bears an uncanny resemblance to him and is slightly worse for the wear), he often accommodates his daughter’s requests that he “talk in Baby David’s voice.”

“My daughters love that old doll, but I have to admit, talking in public as a 30-year-old doll is fairly ridiculous,” he says. “My kids think I’m a clown.”

He also enjoys the Christmas season to the point that his wife, Alison, jokingly refers to him as an elf. “I like making wreaths. I probably make about eight a year. I make my own ornaments. My wife laughs at me because of how much I love Christmas.”

Asked what he would tell a young lawyer who aspires to litigation work he admits, “For a long time, I felt like I needed a certain bravado to be a trial attorney. But I’ve learned that it’s far more important to be genuine. I don’t mind being described as ‘trustworthy’ or ‘dependable’ or ‘warm.’ You don’t have to be a certain way to be a trial attorney.”
The Supreme Court of Virginia has approved a pilot program for limited appellate mediation in the Court of Appeals of Virginia and Supreme Court of Virginia beginning January 1, 2019. The Court’s announcement recognizes the importance of expanding the availability of alternative dispute resolution to all levels of Virginia’s court system.

The pilot program will run for two years. It is designed to support mediation in Virginia’s appellate courts so litigants may make informed decisions about resolution of their disputes and fashion creative solutions, even after entry of a final or appealable order.

Appellate mediation will be available in certain civil cases where both parties are represented by counsel. Appeals where one or both parties are pro se are not eligible for appellate mediation through the pilot program. In the Court of Appeals, mediation will be available in equitable distribution and/or related attorney fee disputes. In the Supreme Court, mediation will be available only where a petition for appeal has been granted; motions to vacate criminal convictions and petitions for actual innocence are not be eligible for appellate mediation.

How appellate mediation will work
Appellate mediation is entirely voluntary. In the Supreme Court of Virginia, the parties will be informed of the availability of appellate mediation when a writ is granted. At that time, the clerk of the Supreme Court will send a letter to the parties describing mediation and explaining that if all parties agree to mediation and notify the clerk in writing of their agreement within 14 days, any further appellate deadlines (except the statutorily-required bond deadline) will be stayed for a period of 30 days to allow the parties an opportunity to mediate. The clerk’s letter will attach a list of certified appellate mediators but will explain that the parties may choose any mediator, whether or not the mediator is on the list.

In the Court of Appeals, appellate mediation is not available until the Court receives the record in a domestic relations case. At that time, the clerk of the Court of Appeals will send the parties a letter similar to that sent by the Supreme Court clerk. As in the Supreme Court, if the parties agree to mediate, there will be an automatic stay of the proceedings for 30 days to provide an opportunity to mediate. If the Court of Appeals issues a stay, the clerk will notify the parties of the deadline for filing the next document.

Appellate mediation will promote access to justice
Chief Justice Donald W. Lemons initiated the study of mediation in the appellate courts last year when he asked the Joint Alternative Dispute Resolution Committee to appoint a group to consider the issue. The Joint ADR Committee appointed the Special Committee to Study Appellate Mediation, which includes members of the appellate bench, appellate litigators from the Virginia Bar Association and VSB, and members of the Joint ADR Committee.

Following months of study, the special committee issued a report in June 2018, recommending that the Supreme Court and Court of Appeals undertake the pilot program. According to the special committee’s report, appellate mediation is “a vehicle” to provide “viable appellate mediation for economically disadvantaged litigants” in an effort to promote access to justice at the appellate level of the commonwealth’s court system.

To become a certified appellate mediator in Virginia, one must be certified as a mediator in Virginia or complete the 20-hour basic mediation course.
Training and certification of appellate mediators

The special committee also recommended that the Judicial Council of Virginia approve specific training and certification for appellate mediators during the pilot projects. To date, there is no special training in Virginia for mediators regarding the unique aspects of appeals in Virginia’s courts. The special committee hopes to close this gap by offering a new two-hour course focusing exclusively on appellate litigation in Virginia. This course will be required for individuals (except those who have served on the Supreme Court and Court of Appeals) who seek to be certified as appellate mediators.

To become a certified appellate mediator in Virginia, one must be certified as a mediator in Virginia or complete the 20-hour basic mediation course. The special committee has also recommended additional minimum qualifications for certification of appellate mediators in each appellate court to ensure that mediators have the skills necessary to effectively mediate disputes at the appellate level.

The Joint ADR Committee is holding a training program for interested appellate mediators on November 14-16, 2018, in Richmond. For information about the training course, go to the events section of the VSB website. The report of the special committee can be found at: https://cdn.ymaws.com/www.vba.org/resource/resmgr/adr/report-special_cmte_to_study.pdf.

Monica T. Monday is the managing partner of Gentry Locke, and leads the firm’s appellate practice group. She chairs the Appellate Practice Committee of the Virginia State Bar Litigation Section and the Fourth Circuit Rules Advisory Committee, and is Vice-Chair of the Virginia Bar Association’s Appellate Practice Section Council. Monica is a Fellow of the American Academy of Appellate Lawyers, and is a member of the Judicial Council of Virginia, the Boyd-Graves Conference, and the Virginia Model Jury Instruction Committee.
Andrew Nea is the 2018 Lewis F. Powell Jr. Pro Bono Award Recipient

G. Andrew Nea Jr., pro bono partner at Williams Mullen in Richmond, has been named the 2018 recipient of the Lewis F. Powell Jr. Pro Bono Award.

“Pro bono at Williams Mullen begins and ends with Andy Nea,” says Benjamin Pace, a partner at the firm.

Nea created the pro bono committee at Williams Mullen and has single-handedly crafted policies that institutionalize pro bono service there, Pace explains. Technically retired for a number of years, Nea receives no salary from the firm but devotes nearly full-time hours to pro bono service.

Pace estimates that in 2017 Nea organized and attended 29 wills clinics, serving 531 clients. More than 150 attorneys and 79 law students participated. So far in 2018, Nea has organized and attended 16 Wills Clinics, serving 335 clients.

His focus on seniors’ issues means that Nea was also endorsed by Thelma Bland Watson, the executive director of Senior Connections, who estimates the value of Nea’s pro bono services at over $800,000. Through Nea’s Senior Law Day program, more than 450 low income seniors a year receive assistance with the provision of wills, powers of attorney, and advance health care directives. “This is priceless,” adds Watson.

Beth Browning, Client Services Attorney for CancerLINC, which makes volunteer legal services available to cancer patients, praises Nea for his help creating and participating in their Life Planning Workshops. Nea trains other lawyers for the workshops and takes on individual cases himself. “Andy works tirelessly to help people get the legal documents they need,” she says. “And he’s able to answer questions and explain the process more clearly and thoroughly than anyone I know. Anyone who works with him or his team is guaranteed a wonderful experience.”

“His level of professionalism is above reproach and his generosity most certainly comes from the heart,” says Karen Stanley, the CEO of CARITAS, where Nea also offers free wills clinics. Nea “gives of his time freely and without judgment to an underserved community.”

Nea also serves as a de facto “general counsel” to a number of local nonprofits, like Boy Scouts, Richmond Metropolitan Habitat for Humanity, and Homeward.

“It has been my great honor to learn pro bono from Andy,” says Pace. “And he sets a sterling example for all Virginia attorneys in terms of pro bono and community involvement.”

The Powell Award was established by the Special Committee on Access to Legal Services of the Virginia State Bar to honor attorneys and attorney groups that have made outstanding pro bono contributions. This year’s award will be presented October 17 during the Virginia State Bar Pro Bono Conference and Celebration in Norfolk.

Andy works tirelessly to help people get the legal documents they need,” ... “And he’s able to answer questions and explain the process more clearly and thoroughly than anyone I know. Anyone who works with him or his team is guaranteed a wonderful experience.”
Access to Legal Services

Prince William County Bar Association Receives Frankie Muse Freeman Pro Bono Award

The Prince William County Bar Association has been named the 2018 Frankie Muse Freeman Organizational Pro Bono Award, which is named for the famed civil rights leader and first woman appointed to the U.S. Commission on Civil Rights.

The 518-member bar in Northern Virginia has donated hundreds of hours of legal services over the years via a variety of programs designed to fit the needs of the low income and underserved residents in their region.

Formed in 1995, the bar’s pro bono committee established a domestic violence program, its longest running one, to provide legal assistance to victims of domestic violence. The bar also turned the VSB’s So You’re 18 booklets into a yearly service project, where volunteer attorneys present and answer questions about civic duties, rights, and responsibilities of legal adulthood to county high-schoolers. Around 6,800 students in the class of 2017 benefitted from the program.

The bar’s uncontested divorce program helps couples through that civil process, and two conciliators’ programs create alternatives to traditional court proceedings for clients in civil and criminal cases.

“The conciliators program has been a great addition to the services we provide to litigants,” says Judge Lisa M. Baird of the Prince William County Juvenile and Domestic Relations Court. “The attorneys assist in facilitating resolutions for custody, visitation, and support matters, giving parties more control over the outcome in cases involving their children and it’s an effective diversionary measure for the court.”

Other pro bono programs by the Prince William County Bar Association have assisted seniors, first responders, those affected by natural disasters, pro se litigants, tenants, veterans, and those of modest means who don’t qualify for services through a qualified legal services provider.

The bar estimates that the total value of pro bono legal services provided by its members equals over $400,000 annually.

“We continue to fulfill the original goals established by our Pro bono Committee 23 years ago and look forward to increasing the ways in which we serve the low income and underserved residents of Prince William County, Manassas, and Manassas Park,” writes Executive Director Alissa Hudson in the bar’s nomination.

The award will be presented during the Pro Bono Conference and Celebration on October 17.

2018 Pro Bono Conference

October 17
1:15 to 5:30 p.m.
Waterside Marriott in Norfolk

The event will include three free CLEs for a total of four hours credit (pending). Ross Hart will present “Death and Dying,” a session on end of life and burial issues. The conference will be followed by the Annual Pro Bono Awards Dinner & Celebration featuring keynote speaker Eve Runyon, President and CEO of The Pro Bono Institute, at 6:30 p.m. honoring the recipients of the Lewis F. Powell Jr. Pro Bono Award and Frankie Muse Freeman Organizational Pro Bono Award. For more information visit bit.ly/probono2018 or contact Crista Gantz at cgantz@vsb.org.
Thank you to these Pro Bono Stars!

Seventeen Virginia lawyers celebrated Virginia Free Legal Answers’ 2nd Anniversary by answering two questions each for low-income Virginians.

Andrew M Hendrick
Dan Rosenthal
Glenn E Chappell
Jason P Livingston
John D Williams
Jonathan M Wallis
Juliane Smith
Julie A Currin
Kolleen L Daniels
Lorrie Sinclair
Martin D Wegbreit
Nathaniel J Webb
Nichole B Vanderslice
Rixon C Rafter
Tammy L Sossei
William C Tucker
Chanel Anne Gray

Interested in signing up?
 virginia.freelegalanswers.org
or contact Crista Gantz
(804) 775-0522
cgantz@vsb.org
Join the Disciplinary System – Applications Sought for District Committee Vacancies

The Standing Committee on Lawyer Discipline (COLD) seeks applicants for disciplinary district committee vacancies to be filled by Bar Council in June.

Local disciplinary district committees are a great way for lawyers and members of the public to get involved on the ground floor of one of the bar’s most important functions. The 17 committees in 10 districts review complaints and investigations against attorneys in their jurisdiction and determine whether there is sufficient evidence of a violation of the Rules of Professional Conduct. Committee members also review agreed dispositions and hear disciplinary matters.

Service on a district committee can lead to a place on the Disciplinary Board, which handles cases of suspension and disbarment. And most members of the Committee on Lawyer Discipline, which oversees the disciplinary system, have served some years in the disciplinary system.

Disciplinary district committee volunteers meet during the annual Disciplinary Conference in July.

Seven lawyers and three nonlawyers serve on each disciplinary district committee. The bar seeks balance and diversity in the members that serve in the disciplinary system, in aspects like race and gender, and also in the types of practice the lawyers engage in — from solos to corporate counsel, prosecutors to defense. The bar encourages attorneys to share non-attorney vacancies with interested members of the public.

Seven lawyers and three nonlawyers serve on each disciplinary district committee. The bar seeks balance and diversity in the members that serve in the disciplinary system, in aspects like race and gender, and also in the types of practice the lawyers engage in — from solos to corporate counsel, prosecutors to defense. The bar encourages attorneys to share non-attorney vacancies with interested members of the public.

**Disciplinary District Committees**

**Vacancies for 2019–2020**

<table>
<thead>
<tr>
<th>Judicial Circuits represented by the Disciplinary District</th>
<th>Attorney Vacancies*</th>
<th>Non-attorney vacancies*</th>
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<td>1st District Committee</td>
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<td>10th District Committees (2 sections)</td>
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* Some current committee members are eligible for reappointment, so not all vacancies will be filled by those applying.
There are vacancies which may not become available, as some current members are eligible for reappointment. Members serve staggered three-year terms — with two consecutive terms allowed.

Applications in the form of a résumé and short statement of interest are due February 28, 2019, to Stephanie Blanton — either at blanton@vsb.org or mailed to her at Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, VA 23219-0026. Bar Council members nominate from the applicant pool within their districts, and the entire council body votes on nominees at the VSB Annual Meeting in June.

Interested lawyers cannot have:
• A criminal record
• A disciplinary record of disbarment, revocation or suspension
• A public reprimand within the past 10 years
• Private discipline within the past five years (with a few exceptions)

See Rules of the Supreme Court of Virginia Part 6, § IV Rule 13-4

NOTICE: Check Your MCLE Hours Online Now

The Mandatory Continuing Legal Education compliance deadline is October 31, 2018. Go to member.vsb.org/vsbportal/ to review your MCLE record.

Now is the time to check your online record and plan your MCLE compliance. Please apply for any non-approved courses now to avoid a late application fee for applications received over 90 days after course attendance.

Reminder: Of the 12.0 CLE hours required each year, 2.0 must be in ethics and 4.0 must be from live, interactive programs. If you have any questions, please contact the MCLE Department at (804) 775-0577 or mcle@vsb.org.

You're retiring, but your law degree doesn't have to.

Transition into emeritus status and practice only pro bono.

For questions about the program, contact the VSB Pro Bono / Access to Legal Services department at (804) 775-0522. To start the application process toward emeritus status, call the membership department at (804) 775-0530.
In Memoriam

Joseph Emile Cazenavette
Washington, D.C.
November 1967 – December 2017

John Maston Davis
Warsaw
June 1942 – July 2018

Robert Lloyd Deatherage
Martinsville
November 1978 – July 2018

Patrick Finnegan
Midlothian
September 1949 – July 2018

The Hon. Ernest P. Gates
Richmond
June 1924 – June 2018

Ronald Paul Geiersbach
Richmond
April 1952 – May 2018

Kimberly Sharyce Glanville
Charlotte, North Carolina
January 1976 – May 2018

The Hon. James H. Harvell III
Newport News
January 1935 – October 2017

Joseph Gordon Hylton Jr
Charlottesville
May 1952 – May 2018

Mark Snyder James
Vienna
February 1951 – March 2018

Katherine Howe Jones
Troutville
January 1952 – December 2017

Kevin K. Kent
Virginia Beach
November 1940 – May 2018

Kathleen Marie King
Alexandria
March 1951 – June 2018

Herman W. Lutz
Alexandria
February 1925 – July 2018

Neil F. Markva
Warrenton
September 1937 – June 2018

James W. Morris III
Richmond
October 1932 – June 2018

William Albert Nunn III
White Stone
December 1936 – September 2017

Kevin Alan Ruby
Columbia, Maryland
September 1972 – May 2018

Toy Dixon Savage Jr.
Norfolk
October 1921 – December 2017

William M. Scaife Jr.
Fredericksburg
April 1929 – May 2018

Thomas Clifford Scanlan
Fairfax
August 1946 – June 2018

Daniel Schorsch
Waynesboro
May 1935 – May 2018

Robert C. Stackhouse
Norfolk
October 1923 – May 2018

William Carl Streets
Winchester
September 1929 – March 2018

Ronald B. Zedd
Norfolk
March 1938 – July 2018
On August 23, 2018, the Virginia Law Foundation (VLF), a philanthropic organization established in 1974 and an independent 501(c)(3) organization, held its 2018 Grant Recipient Luncheon in Richmond.

The Foundation has provided over $25 million in grants to support projects throughout the commonwealth. VLF President Steve Busch presided over the luncheon, which included $440,000 in grants.

**Capital Area Immigrants’ Rights (CAIR) Coalition — $40,000**
The Capital Area Immigrants’ Rights (CAIR) Coalition strives to ensure equal justice for all immigrant men, women, and children at risk of detention and deportation.

**Domestic Violence Conferences — $12,000**
The Southwest Virginia Legal Aid Society hosts their annual two day-long domestic violence conferences that provide no-cost training and education for 250 to 300 professionals who serve victims of domestic violence.

**Justice In the Classroom Program — $40,000**
The John Marshall Foundation’s Justice in the Classroom program brings federal and state judges into public school classrooms for discussions with students about the constitutional foundation of our nation, our three co-equal branches of government, the rule of law, and the role of the judiciary in preserving the rights and liberties of all citizens.

**Public Service Internships — $50,000**
Public service internships for first- and second-year law students help bring to light the importance of public interest and pro bono work. Eight Virginia law schools receive funding for public service internships during the summer where law students work under the supervision of a practicing attorney.

**Rule of Law Project, Center for Teaching the Rule of Law — $40,000**
The Center for Teaching the Rule of Law seeks to change the way the rule of law is taught in America’s schools. VLF grant monies for 2018 will further the goals of the Statewide Lawyers Advisory Council, Statewide Judges Advisory Committee, and Statewide Teachers Advisory Panel in expanding their networks of local lawyers and educators who collaborate to teach the Rule of Law.

**Supreme Court of Virginia — $75,000**
A new Supreme Court of Virginia Judicial Learning Center will tell the story of Virginia’s judiciary history, providing a valuable educational resource for visitors to the Supreme Court building, including elementary and high school students, leadership groups, civil organizations, and individuals from every corner of the state.

**Tahirih Justice Center — $20,000**
The Tahirih Justice Center’s Falls Church office meets the urgent and emerging legal needs of low income immigrant women and children facing gender-based violence, including domestic violence and sexual assault, female genital mutilation, trafficking, and forced marriage.

**VBA Capital Defense Workshop — $26,500**
Administered by the Virginia Bar Association, the Capital Defense Workshop is the only educational program that covers training requirements for Virginia lawyers representing defendants charged with capital murder.

**Virginia Beach Justice Initiative — $20,000**
The Virginia Beach Justice Initiative was founded to initiate and facilitate justice for those victimized by human trafficking and to bring justice to those who are perpetrators.

**Virginia Holocaust Museum — $5,000**
The Virginia Holocaust Museum (VHM) preserves and documents the Holocaust to educate and inspire future generations of Virginians to fight prejudice and indifference.

**Virginia Lawyers Helping Lawyers — $35,000**
Virginia Lawyers Helping Lawyers provides confidential, non-disciplinary assistance.
Local and Specialty Bar Elections

Fairfax Bar Association
Christie Ann Leary, President
Luis Antonio Perez-Pietri, President-elect
Donna Reubena Banks, Vice President
John Ara Kassabian, Secretary
Richard Francis Gibbons Jr., Treasurer
The Honorable Christopher Anthony Costa, Director
Joseph Benjamin Dailey, Director
Aaron Joseph Christoff, Director
Lacey Ullman Conn, Director

Fairfax Bar Young Lawyers
Nicholas Valdis Cumings, President
Emily Caroline Baker, President-elect

Fredericksburg Chapter, VWAA
Stacie Coleen Bordick, President
Amanda Anne Reid, President
Danielle Marie Bringard, Treasurer
LaBravia Sharon Jones Jenkins, Assistant Treasurer

Greater Peninsula Women’s Bar Association
Molly Elizabeth Newton, President
Shannon Marie Jones, Vice President
Angela Marie Haen, Treasurer
The Honorable Stephen Ashton Hudgins, At-Large Board Member

Hampton Roads Chapter, VWAA
Rose Ellen Coley, President
Carmelou G. Aloupas, President-elect
Sarah Jo Schmidt, Secretary
Michelle Casale Anderson, Treasurer

Local Government Attorneys of Virginia
Roderick Benedict Williams, President
Timothy Ross Spencer, Vice President
Michelle Renee Robl, Secretary
Lola Rodriguez Perkins, Treasurer

Loudoun Chapter, VWAA
Rachel Diane Robinson, President
Christine Maria Newton, President-elect
Leslie Yvette Barnes, Secretary
Karen Stoutamyer Law, Treasurer

Northern Virginia Chapter, VWAA
Alison Rachelle Mullins, President
Virginia Claire Haizlip, President-elect
Taylor Sumner Chapman, Secretary
Maureen Elizabeth Carr, Treasurer

Prince William Chapter, VWAA
Anna Brigman Bristle, President
Donna Mae Dougherty, President-elect
Claire Therese Salitsky, Secretary
Elizabeth Munro von Keller, Treasurer

Roanoke Chapter, VWAA
Susan Alicia Waddell, President
Susan Elizabeth Cook, Vice President
Jennifer Lindsay Crook, Secretary
Julianne Maria Blake, Treasurer

South Hampton Roads Bar Association
Shemeka Christina Hankins, President
Jamilah Danyel Le Cruise, President-elect
Tiffany Janelle Lea, Secretary
Michael David Pierce, Treasurer

Virginia Association of Commonwealth’s Attorneys
Roy Franklin Evans Jr., President
Jeffrey Wayne Haislip, President-elect
James Edwin Plowman, Vice President
Theophani Katherine Stamos, Secretary-Treasurer
Bryan Lal Porter, NDAA Representative

Virginia Women Attorneys Association
Claire Frances Egan Keena, President
Janet Won Cho, President-elect
Gerarda Marie Culipher, Secretary
Cynthia Kaplan Revesman, Treasurer

SAVE THE DATE:
APRIL 12, 2019
Bar Leaders Institute
Lewis Ginter Botanical Garden, Richmond

The Bar Leaders Institute (BLI) is a one-day program sponsored by the Conference of Local and Specialty Bar Associations to train and provide resources to current and prospective local and specialty bar leaders. Details will be posted on the CLSBA Calendar as soon as they are available at http://bit.ly/CLSBAcalendar.

Solo & Small-Firm Practitioner Forum

The Solo & Small-Firm Practitioner Forum focuses on issues that confront attorneys who practice alone or in small firms. Law office management and ethics are among several topics covered at these CLEs.

These CLEs are free, include lunch, and are available on a first-come, first-served basis. Register online at http://bit.ly/2018SoloWytheville.

October 18, 2018
Wytheville Meeting Center in Wytheville, Virginia
Next-Gen AI Drives Mainstream Legal Research
by Amy A. Wharton

We hear it everywhere: advances in legal technology are “disrupting” the practice of law. The recent proliferation of new legal research services bear witness to this. Artificial intelligence (AI)-powered applications from companies like FastCase, Ross Intelligence, and Casetext have pushed legal research tools and techniques in new directions. Lexis and Westlaw have incrementally advanced the technology that powers their flagship systems, but their most recent enhancements could prove to be game changers.

AI Is Not New, But It’s Coming of Age
Pioneer users of the first iterations of Lexis and Westlaw had no choice but to translate legal and factual concepts into computer-friendly Boolean (“terms and connectors”) phrases. Boolean search done well provides precision but requires the researcher to think like the machine. With Natural Language, a form of AI, the computer tries to “think” like the researcher instead. But while the algorithms, or interpretive rules, that power Natural Language have improved significantly over the years, Boolean is still useful when greater precision is needed.

The most recent round of enhancements to Natural Language search in Lexis (Lexis Answers) and Westlaw (WestSearch in Westlaw and WestSearch Plus in Westlaw Edge) may not obliter-ate Boolean, but they do take AI-empowered legal research to a new level. These systems can anticipate what the searcher wants and suggest queries as search terms are being entered. Though the range of questions recognized by each system is limited, Westlaw Edge currently has the largest question bank and is designed to add new questions and answers as it learns from user interaction. Westlaw Edge also uses enhanced AI to flag cases that rely on a point of law that has been invalidated by authority not directly cited.

Is a Picture Worth a Thousand Billable Minutes?
Search that’s powered by state-of-the-art AI is impressive on its own, but when combined with good data visualization technology, efficiencies can multiply. Data visualization maps like the new Ravel View on Lexis provide nearly instant insight into the relationships among cases in search results and Shepard’s reports, indicating visually which cases are most cited, at which court level, and whether the cases are positive authority or have negative treatment.

Ravel View users must think about citation relationships in new ways. The image below illustrates the meaning of five features of a Ravel View map with respect to a selected case (Hardwick), which is represented by the open circle: (1) authorities cited by the selected case and their citation networks, (2) cases citing the selected case and their citation networks, (3) larger circle sizes to indicate the most cited cases among the results, (4) connection line colors that correspond with Shepard’s signal colors for positive and negative treatment, and (5) higher or lower placement within a horizontal band to indicate relevancy within the same court level. (The view can be switched to show relevancy irrespective of court level and can be filtered by jurisdiction.)

Beyond enabling better caselaw research, AI and related technologies enable modes of legal inquiry that were not available a few years ago. Litigation analytics tools from Lexis (through Lex Machina) and Westlaw Edge aggregate, organize, and parse massive amounts of information from case docket databases. With these applications, litigators can discover how a particular judge and opposing counsel have acted in the past with respect to matters and proceedings that are similar to those currently faced by their clients. Insights derived from analytics allow litigators to more accurately predict timelines, outcomes, and costs, changing the game by reducing uncertainty for lawyers and clients alike.

Amy A. Wharton is the director of the Arthur J. Morris Law Library at the University of Virginia School of Law.
Using Social Media to Investigate Potential Jurors in Virginia

by Charles B. Molster III

Trial lawyers welcome any opportunity to learn additional information about potential jurors. Given the extensive use of social media by many members of the public (e.g., Facebook, Twitter, LinkedIn, etc.), a new arrow has been added to the quiver of the trial lawyer — using social media to investigate the jury pool. These efforts can quickly and inexpensively provide very significant information regarding potential jurors that can help inform whether a juror has likely biases, experience relevant to the particular case, prior lawsuit experience, and the like. This information can then be used to develop more effective themes and analogies, and to empower jurors sympathetic to counsel’s side of the case. But it is critical that the lawyer/trial team understand the ethical rules of the road, as well as some of the practical issues involved.

Ethical Considerations
There is no question that technology has changed the practice of law and continues to shape the profession, including the ethical issues facing lawyers. The issue of online jury research raises two such questions: 1) May lawyers ethically use social media to investigate potential jurors?; and 2) Are lawyers ethically required to use social media to investigate potential jurors? I submit that, if the appropriate guidelines are followed, the answer to both questions is a resounding “Yes.”

May Virginia Lawyers Use Social Media to Investigate Potential Jurors?
While there are no Virginia Legal Ethics Opinions directly addressing this question, ABA Formal Opinion 466 (April 24, 2014) has addressed the issue, and confirms that, within certain parameters, lawyers may use social media to investigate jurors. Essentially, the opinion provides that so long as the attorney accesses only publicly available information on the potential juror’s social media site and does not communicate directly — or through another — with the potential juror (e.g., no “friending,” etc.), the use of social media is perfectly appropriate.

The opinion also states that if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent in the course of reviewing a juror’s or potential juror’s internet presence, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal. The opinion further provides that, if a juror learns that an attorney is reviewing the juror’s internet presence when a network setting notifies the juror of such, that communication from the network does not constitute an impermissible communication from the lawyer, because the lawyer is not communicating with the juror — the social media platform is. LinkedIn is a social media platform that has this functionality in certain circumstances.

James McCauley, Ethics Counsel for the Virginia State Bar, has commented that he agrees with this portion of ABA Opinion 466: the auto-generated third-party notice would not violate Rule 3.5 because “the lawyer is not communicating with the juror, the social media provider is.”

However, while it may be ethically permissible for a lawyer to access a potential juror’s social media platform that electronically notifies the potential juror of such activity, I would counsel against any member of the trial team accessing such a platform (such as LinkedIn) because of the risk of a potential juror discovering the investigation of his or her social media platform, which the juror could find threatening and/or an invasion of privacy — with potentially disastrous results for the lawyer/trial team at trial.

Is a Virginia Lawyer Required to Use Social Media to Investigate Potential Jurors?
ABA Opinion 466 expressly stated that it did not take a position as to whether the standard of care for competent lawyer performance requires using internet research to locate information about jurors that is relevant to the jury selection process. The opinion did, however, specifically reference the addition of Comment [8] to Model Rule 1.1, which explains that a lawyer “should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” Obviously, Virginia has its own Rule 1.1 regarding competency, and the amendments effective March 1, 2016 added the language “Attention should be paid to the benefits and risks associated with relevant technology.” The ABA opinion cites a number of sources that suggest that lawyers are required to use social media to investigate potential jurors, including the following: Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (lawyer must use “reasonable efforts” to find potential juror’s litigation history in Case.net, Missouri’s automated case management system); N. H. Bar Ass’n, Op. 2012-13/05 (lawyers “have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in liti-

Social Media continued on page 53
Legal Reads

It’s that time of year when lawyers and nonlawyers alike wait until the very last minute to buy gifts for their friends and loved ones. But let’s face it: no one likes to read more than lawyers, except perhaps law librarians. With this in mind, here are a few book ideas for that lawyer or lover of the law on your holiday gift list.

**My Own Words** by Ruth Bader Ginsburg with Mary Hartnett and Wendy W. Williams

A *New York Times* bestseller, this autobiography is now out in paperback, coinciding with the “Notorious RBG’s” 25th anniversary on the Supreme Court of the United States. The book is a collection of essays and reminiscences that showcases not only Justice Ginsburg’s strong opinions on equal rights for women and judicial independence, but also her love of opera, family, and those lawyers who fought against anti-Semitism. Importantly, the book conveys her ability to respect and love those who hold differing opinions than she does, including her tributes to Justices Rehnquist and Scalia. In addition to photos, the book features writings from her childhood, including an 8th grade article she wrote in 1946, saying: “There can be a happy world and there will be once again, when men create a strong bond towards one another, a bond unbreakable by a studied prejudice or a passing circumstance.”

**Just Mercy: A Story of Justice and Redemption** by Bryan Stevenson

Originally published in 2014 and also a bestseller, Stevenson’s book is always worth revisiting, but especially this year, with his recent receipt of the American Bar Association’s highest honor, the ABA Medal. Stevenson, whose great grandparents were enslaved in Caroline County, Virginia, founded the Equal Justice Initiative in Montgomery, Alabama, after graduating from Harvard Law School, and the book has collected a number of awards for its compelling story of justice and call for compassion. The author’s note at the end of the book makes this plea: “With more than two million incarcerated people in the United States, an additional six million on probation or parole and an estimated sixty-eight million Americans with criminal records, there are endless opportunities for you to do something about criminal justice policy or help the incarcerated or formerly incarcerated.” A film based on the book begins production in Alabama this year.

**What Millennial Lawyers Want: A Bridge from the Past to the Future of Law Practice** by Susan Smith Blakely

Do we ever get tired of discussing the myriad preferences, peculiarities, and progresses of the millennial generation? Blakely, a member of the Virginia State Bar, has written extensively about being a woman in the legal profession in her earlier series of three books published by Wolters Kluwer, entitled *Best Friends at the Bar*. Her new book, released in September, explores millennial lawyers and the issues and challenges they face as they coexist within a legal profession created by past generations. Blakely offers advice on retaining millennial lawyers, improving outdated firm cultures, and how millennials might best fit into current environments.

**We Face the Dawn: Oliver Hill, Spottswood Robinson, and the Legal Team that Dismantled Jim Crow** by Margaret Edds

Reviewed in the April issue of *Virginia Lawyer* magazine, Edds’ nonfiction book weaves the lives of Virginia civil rights lawyers Hill and Robinson with their 1950s struggles to overturn racially discriminatory laws — namely, school segregation. With interviews from surviving family members and colleagues, including Robinson’s fellow justice on the U.S. Court of Appeals, Ruth Bader Ginsburg, Edds tells a deeply human story, framed by the law and the legal strategies that defined the era.

**The Fallen by David Baldacci** or **The Reckoning by John Grisham**

For those looking for lighter fare, Virginia’s favorite lawyers-turned-novelists have new legal thrillers out this year. Richmonder and University of Virginia Law School graduate Baldacci has another entry in his Amos Decker series, centered on a former professional football player who becomes a detective. And, out on October 23, sometimes-Charlottesville resident Grisham has a murder trial novel set in 1946 Mississippi.

Bryan Stevenson wrote the foreword for another notable law-related book recently chosen as an Oprah’s Book Club selection: **The Sun Does Shine: How I Found Life and Freedom on Death Row**. In it, Anthony Ray Hinton tells of his 30 years on death row in Alabama for crimes he did not commit.
Social Media continued from page 51

assistance to lawyers, judges, law students, and legal professionals who are experiencing impairment as a result of substance abuse or mental health conditions.

Virginia Legal Aid Society — $21,500
Virginia Legal Aid Society is a non-profit law firm that provides free civil legal services to eligible low-income residents in 20 counties and six cities in Central, Southside, and Western Tidewater Virginia.

Virginia Poverty Law Center — $25,000
The Virginia Poverty Law Center provides leadership, support, training, public education, and advocacy to address the civil legal needs of Virginia’s low-income population.

Virginia Sexual & Domestic Violence Action Alliance — $15,000
The Virginia Sexual & Domestic Violence Action Alliance is Virginia’s leading voice on sexual and intimate partner violence.

Virginia State Bar Hill Tucker Pre-Law Institute — $15,000
The Hill Tucker Pre-Law Institute is presented by the Virginia State Bar Diversity Conference and Young Lawyers Conference to increase diversity in the legal profession by reaching future lawyers at an early age.

Fortunately, there are many lawyers working day in and day out to increase access to justice and to further education about the importance of the rule of law. For more information about the mission and work of the Virginia Law Foundation, or to donate, visit www.virginialawfoundation.org.

Practical Considerations
One important practical factor is timing: when counsel will be able to obtain the list of the potential jurors, and how much time there will be to use social media to investigate the jury pool. Another related consideration is whether a jury consultant should be assigned this task, especially so that trial counsel can be freed up to focus on trial preparation. Finally, it is critical to develop user-friendly work product to allow counsel (perhaps with the assistance of a jury consultant) to make decisions during the jury selection process, including developing voir dire questions for particular jurors (in state court at least), asserting challenges to particular jurors for cause, and ultimately exercising peremptory strikes.

Conclusion
In sum, social media sites can provide a treasure trove of information regarding potential jurors that can quickly, and inexpensively, be accessed by lawyers preparing for jury trials in Virginia. A clear understanding of the applicable ethical rules is critical, and it may well be that a lawyer’s ethical competency requirements — as well as the applicable standard of care — actually require the lawyer to conduct online research regarding potential jurors.

Endnotes:
2 Id.

Charles B. Molster III has been a practicing trial lawyer in state and federal courts in Virginia and around the country for the past 33 years, beginning his legal career as a law clerk in the Eastern District of Virginia. Molster practiced for 20 years with the global law firm Winston & Strawn LLP and then opened his own law firm in 2016. He is a graduate of the University of Virginia and the T.C. Williams School of Law at the University of Richmond.

Sharon D. Nelson is a Fellow of the Virginia Law Foundation and a former Virginia State Bar president. She is the president of Sensei Enterprises Inc., a legal technology, cybersecurity, and digital forensics firm based in Fairfax. (703) 359-0700 www.senseient.com.
Virginia Criminal Sentencing Commission Calendar
Details at vcss.virginia.gov

Understanding Rap Sheets, Automation & SWIFT! (3 Hours – Approved for 3 CLE & VIDC Re-certification)
The understanding rap sheets and automation seminar is designed for the attorney or criminal justice professional who prepares or uses Virginia’s Sentencing Guidelines. Cost $50.00 (Paralegals $25.00) Purchase manual separately.* Call to schedule a seminar in your area.

Introduction to Sentencing Guidelines (6 Hours – Approved for 6 CLE & VIDC Re-certification)
The introduction seminar is designed for the attorney or criminal justice professional who is new to Virginia’s Sentencing Guidelines.

Sentencing Guidelines Knowledge & Skills Evaluation (Including Ethics Issues) (5 Hours – Approved for 5 CLE – 1 Ethics & VIDC Re-certification)
The evaluation course is designed for the experienced user of Virginia’s Sentencing Guidelines. Ethics Council with the VSB will lead the discussion and answer questions related to ethical responsibilities relating to the Sentencing Guidelines. Cost $100.00. (Paralegals $50.00) or $40 for ethics portion only. Purchase manual separately.*

Virginia CLE Calendar
Virginia CLE will sponsor the following continuing legal education courses. For details, see www.vacle.org/seminars.htm.

October 12
19th Annual Virginia Information Technology Legal Institute 2018
Live — Fairfax 8 AM–4:20 PM

October 12
Clarence Darrow’s Ethics Lessons for Today’s More Ethical Lawyer
Video — Hampton 9 AM–12:15 PM

October 12
36th Annual Real Estate Practice Seminar 2018
Video — Charlottesville 9 AM–4:10 PM

October 15
CLE at the Virginia Holocaust Museum: Legal Responses to War Crimes, Genocide, and Human Rights Atrocities
Live — Richmond 10 AM–NOON

October 15
Ethics Update for Virginia Lawyers
Webcast/Telephone NOON–2 PM

October 15
44th Annual Recent Developments in the Law 2018: News from the Courts and General Assembly
Video — Charlottesville, Roanoke, Tysons 9 AM–4:25 PM

October 16
37th Annual Trusts and Estates Seminar 2018
Live — Roanoke 9 AM–4:15 PM

October 16
Ethical Advocacy in Personal Injury Mediation
Live — Charlottesville/Webcast/Telephone NOON–2 PM

October 16
44th Annual Recent Developments in the Law 2018: News from the Courts and General Assembly
Video — Alexandria, Norfolk, Richmond 9 AM–4:25 PM

October 16
Lawyer as Leader: Outside the “Thinking Like a Lawyer” Box
Webcast/Telephone 1–4:15 PM

October 17
Video — Norfolk, Tysons 9 AM–12:20 PM

October 18
Fraud — The Most Used and Least Understood Cause of Action: Allegations, Defenses, and Practice Tips
Live — Fairfax 9 AM–12:20 PM

October 18
Essentials of Handling No-Fault Divorces in Virginia
Live — Charlottesville/Webcast/Telephone 10 AM–NOON

October 18
Employment Law Ethics: Staying on the Right Side
Live — Charlottesville/Webcast/Telephone 1–3 PM

October 18
27th Annual Advanced Elder Law Update Seminar 2018
Video — Abingdon, Alexandria, Norfolk, Richmond, Roanoke 9 AM–4:15 PM

October 19
Tom Spahn on Confidentiality: Clients’ Past and Ongoing Misconduct
Webcast/Telephone 3–5 PM

October 19
27th Annual Advanced Elder Law Update Seminar 2018
Video — Charlottesville, Tysons 9 AM–4:15 PM

October 22
37th Annual Trusts and Estates Seminar 2018
Live — Fairfax 9 AM–4:15 PM

October 22
Essentials of Virginia Civil Motions Practice
Webcast/Telephone 3–5 PM

Virginia Lawyer publishes at no charge notices of CLE programs sponsored by nonprofit bar associations and government agencies. The next issue will cover December 18 through February 22. Send information by October 30 to norman@vsb.org.

Virginia CLE Calendar
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October 22
27th Annual Employment Law Update Seminar 2018
Video — Charlottesville 8 AM–4:45 PM

October 23
Understanding Financial Statements
Webcast/Telephone 9 AM–1:35 PM

October 23
Litigating Contested Guardianship Cases: What Every Elder Law Attorney Should Know
Webcast/Telephone 3–5 PM

October 23
19th Annual Virginia Information Technology Legal Institute 2018
Video — Tysons 8 AM–4:20 PM

October 24
27th Annual Employment Law Update Seminar 2018
Video — Abingdon, Alexandria, Norfolk, Richmond, Roanoke 8 AM–4:45 PM
(Richmond video begins at 9 AM)

October 24
Essentials of Evidence
Webcast/Telephone 10 AM–Noon

October 24
Ethical and Practical Issues Facing the GAL in Contested Adult Guardianship Cases
Webcast/Telephone 3–5 PM

October 24
19th Annual Virginia Information Technology Legal Institute 2018
Video — Alexandria, Norfolk, Richmond, Roanoke 8 AM–4:20 PM
(Richmond video begins at 9 AM)

October 25
DUI Defense in Virginia
Video — Abingdon, Alexandria, Fredericksburg, Norfolk, Richmond, Roanoke 8:30 AM–3:45 PM
(Richmond video begins at 9 AM)

October 26
Gain the Edge!' Negotiation Strategies for Lawyers
Live — Fairfax 8:30 AM–3:45 PM

October 26
DUI Defense in Virginia
Video — Charlottesville, Hampton, Tysons, Warrenton, Winchester 8:30 AM–3:45 PM

October 29
Ethics Update for Virginia Lawyers
Webcast/Telephone 10 AM–Noon

October 29
Employment Law Ethics: Staying on the Right Side
Webcast/Telephone 1–3 PM

October 29
37th Annual Family Law Seminar 2018: Perspectives, Perspectives …
Video — Charlottesville 9 AM–4:30 PM

October 30
Trials of the Century I, Featuring Todd Winegar
Live — Richmond 8:25 AM–3:45 PM

October 30
37th Annual Trusts and Estates Seminar 2018
Live — Williamsburg 9 AM–4:15 PM

October 30
Police Use of Excessive Force: § 1983 Litigation and Remedies in Federal Courts
Webcast/Telephone 9–11 AM

October 30
Tom Spahn on Confidentiality: Clients’ Past and Ongoing Misconduct
Webcast/Telephone Noon–2 PM

October 31
37th Annual Family Law Seminar 2018: Perspectives, Perspectives …
Video — Fredericksburg, Harrisonburg, Tysons 9 AM–4:30 PM

November 2–3
39th Annual Construction Law and Public Contracts Seminar
Live — Charlottesville Friday: 8:15 AM–5:25 PM; Saturday: 8 AM–12:20 PM

November 7
Modifying and Terminating Irrevocable Trusts in Virginia
Webcast/Telephone 9–11 AM

November 7
Ethical Advocacy in Personal Injury Mediation
Webcast/Telephone Noon–2 PM

November 8
Representation of Incapacitated Persons as a Guardian Ad Litem — 2018 Qualifying Course
Live — Charlottesville 9 AM–4:05 PM

November 10–17
International Destination CLE: Lisbon 2018
Live — Lisbon, Portugal

November 13
Fraud—The Most Used and Least Understood Cause of Action: Allegations, Defenses, and Practice Tips
Video — Abingdon, Alexandria, Norfolk, Richmond, Roanoke 9 AM–1:20 PM

November 14
Fraud—The Most Used and Least Understood Cause of Action: Allegations, Defenses, and Practice Tips
Video — Charlottesville, Tysons, Warrenton 9 AM–1:20 PM

November 27
37th Annual Trusts and Estates Seminar 2018
Video — Ashburn 9 AM–4:15 PM

November 29
Fraud—The Most Used and Least Understood Cause of Action: Allegations, Defenses, and Practice Tips
Video — Alexandria, Charlottesville, Fredericksburg, Norfolk, Richmond, Roanoke 9 AM–4:30 PM

December 10
Trials of the Century I, Featuring Todd Winegar
Live — Fairfax 8:25 AM–3:45 PM

December 10
37th Annual Trusts and Estates Seminar 2018
Video — Ashburn 9 AM–4:15 PM
November 29
37th Annual Trusts and Estates Seminar
2018
Video — Warrenton, Winchester 9 AM–4:15 PM

December 4
Trials of the Century I, Featuring Todd Winegar
Video — Alexandria, Charlottesville, Danville, Norfolk, Richmond
8:25 AM–3:45 PM (RICHMOND VIDEO BEGINS AT 9 AM)

December 5
The Rocket Docket: Trying Cases in the Eastern District of Virginia
Live — Richmond/Telephone 8:55 AM–1:25 PM

December 5
Ethics Update for Virginia Lawyers 2018
Webcast/Telephone Noon–2 PM

December 5
Trials of the Century I, Featuring Todd Winegar
Video — Dulles 8:25 AM–3:45 PM

December 6
The Rocket Docket: Trying Cases in the Eastern District of Virginia
Live — Alexandria/Telephone 8:55 AM–1:25 PM

December 6
Tom Spahn on Confidentiality: Clients’ Past and Ongoing Misconduct
Webcast/Telephone Noon–2 PM

December 6
Trials of the Century I, Featuring Todd Winegar
Video — Tysons 8:25 AM–3:45 PM

December 10
Essentials of Landlord-Tenant Law in Virginia
Webcast/Telephone Noon–2 PM

December 10
44th Annual Recent Developments in the Law 2018: News from the Courts and General Assembly
Video — Charlottesville, Tysons 9 AM–4:25 PM

December 11
Adult Guardianship Law and Mediation
Live — Charlottesville/Webcast/Telephone Noon–2 PM

December 12
Substance Abuse and Mental Health Issues in the Legal Profession: Am I My Brother’s Keeper?
Webcast/Telephone 10 AM–Noon

See the most current dates and registration information at www.vsb.org/site/members/new.
DISCIPLINARY SUMMARIES

The following are summaries of disciplinary actions for violations of the Virginia Rules of Professional Conduct (RPC) (Rules of the Virginia Supreme Court Part 6, ¶ II, eff. Jan. 1, 2000) or another of the Supreme Court Rules.

Copies of disciplinary orders are available at the link provided with each summary or by contacting the Virginia State Bar Clerk's Office at (804) 775-0539 or clerk@vsb.org. VSB docket numbers are provided.

CIRCUIT COURT

Peter M. Baskin  
Fairfax, Virginia  
17-052-109440  
Circuit Court Case No. CL2018-06138  
By order entered August 24, 2018, the Circuit Court for the County of Fairfax approved an agreed disposition suspending, with terms, Peter M. Baskin's license to practice law in Virginia for a period of sixty days. The suspension is effective September 1, 2018. The three-judge panel found that Baskin violated professional rules governing diligence and the safekeeping of property. RPC 1.3 (a); 1.15 (a)(3), (b)(5)  
www.vsb.org/docs/Baskin-092418.pdf

John William Tripp  
Virginia Beach, Virginia  
16-022-103341, 16-022-105230, 17-022-106582 and 17-022-109733  
Circuit Court Case No. CL18-2672  
By order entered September 10, 2018, the Circuit Court for the City of Virginia Beach approved an agreed disposition suspending, with terms, John William Tripp's license to practice law in Virginia for a period of six months. The suspension is effective September 12, 2018. The three-judge panel found that Tripp violated professional rules governing competence, diligence, communication, fees, conflict of interest (prohibited transactions), client with impairment, safekeeping of property, and fairness to opposing party and counsel. VSB Docket No. 17-022-106582 was dismissed with prejudice, as set forth in the agreed disposition. RPC 1.1; 1.3 (a); 1.4 (a); 1.5 (a); 1.8 (h); 1.14 (b); 1.15 (b)(5); 3.4 (d), (j)  
www.vsb.org/docs/Tripp-091118.pdf

DISCIPLINARY BOARD

Patrick Richard Blasz  
Vienna, Virginia  
17-052-107961  
On September 27, 2018, the Virginia State Bar Disciplinary Board revoked Patrick Richard Blasz's license to practice law based on his affidavit consenting to the revocation. By tendering his consent to revocation at a time when allegations of misconduct are pending, Blasz acknowledges that the material facts upon which the allegations of misconduct pending are true. Rules of Court Part 6, § IV, ¶ 13-28  
www.vsb.org/docs/Blasz-092818.pdf

Dana Lauren Tapper  
Buffalo Grove, Illinois  
18-032-112017  
On September 13, 2018, the Virginia State Bar Disciplinary Board revoked Dana Lauren Tapper's license to practice law based on her affidavit consenting to the revocation. By tendering her consent to revocation at a time when allegations of misconduct are pending, Tapper acknowledges that the material facts upon which the allegations of misconduct pending are true. Rules of the Supreme Court of Virginia Part 6, § IV, ¶ 13-28  
www.vsb.org/docs/Tapper-091418.pdf

Scott Alan Webber  
Roanoke, Virginia  
19-000-113007  
On August 21, 2018, the Virginia State Bar Disciplinary Board revoked Scott Alan Webber's license to practice law based on his affidavit consenting to the revocation. By tendering his consent to revocation at a time when allegations of misconduct are pending, Webber acknowledges that the material facts upon which the allegations of misconduct pending are true. Rules of the Supreme Court of Virginia Part 6, § IV, ¶ 13-28  
www.vsb.org/docs/Webber-082118.pdf

DISTRICT COMMITTEES

Vincent Mark Amberly  
Leesburg, Virginia  
17-053-107711  
On August 28, 2018, a Virginia State Bar Fifth District Subcommittee issued a public reprimand without terms to Vincent Mark Amberly for violating professional rules that govern the safekeeping of property. This was an agreed disposition of misconduct charges. RPC 1.15 (a)(1)  
www.vsb.org/docs/Amberly-082918.pdf

John James McNally  
Norfolk, Virginia  
18-022-111805  
On August 28, 2018, a Virginia State Bar Second District Subcommittee issued a public reprimand without terms to John James McNally for violating professional rules that govern the safekeeping of property and bar admission and disciplinary matters. This was an agreed disposition of misconduct charges. RPC 1.15 (a)(3)(i-ii); 8.1 (c)  
www.vsb.org/docs/McNally-082818.pdf

Christopher Paul Reagan  
Newport News, Virginia  
17-010-108162  
On August 28, 2018, a Virginia State Bar First District Subcommittee issued a public reprimand without terms to Christopher Paul Reagan for violating professional rules that govern competence, diligence, and communication. This was an agreed disposition of misconduct charges. RPC 1.1; 1.3 (a); 1.4 (a)(b)  
www.vsb.org/docs/Reagan-081018.pdf
DISCIPLINARY SUMMARIES

DISTRICT COMMITTEES

John Lewis Taylor III
Richmond, Virginia
17-031-108347
On August 29, 2018, a Virginia State Bar Third District

Subcommittee issued a public reprimand without terms to John Lewis Taylor III for violating professional rules that govern the impartiality and decorum of the tribunal. This was an agreed disposition of misconduct charges. RPC 3.5 (f)
www.vsb.org/docs/Taylor-090418.pdf

DISCIPLINARY PROCEEDINGS

Suspension – Failure to Pay Disciplinary Costs

<table>
<thead>
<tr>
<th>Name</th>
<th>Location</th>
<th>Effective Date</th>
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<tr>
<td>B. Walter Billips</td>
<td>Grundy, VA</td>
<td>July 30, 2018</td>
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<tr>
<td>Shelly Renee Collette</td>
<td>Winchester, VA</td>
<td>July 25, 2018</td>
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<td>Rory Kieran Nugent</td>
<td>Herndon, VA</td>
<td>August 14, 2018</td>
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<td>Dominick Anthony Pilli</td>
<td>Fairfax, VA</td>
<td>January 16, 2018</td>
<td>August 13, 2018</td>
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Suspension – Failure to Comply with Subpoena

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<thead>
<tr>
<th>Name</th>
<th>Location</th>
<th>Effective Date</th>
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<tbody>
<tr>
<td>Patrick Richard Blasz</td>
<td>Vienna, VA</td>
<td>September 11, 2018</td>
</tr>
<tr>
<td>Travis Joseph Tisinger</td>
<td>Berryville, VA</td>
<td>September 19, 2018</td>
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</tbody>
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* The administrative suspension effective 7/30/18 is associated with the disciplinary case that resulted in a one year and one day suspension effective 2/16/18. The administrative suspension effective 7/25/18 is associated with the disciplinary case that resulted in a revocation effective 3/23/18.

NOTICES TO MEMBERS

VSB COUNCIL SEeks Comments on Proposed Changes to Judicial Candidate Evaluation Committee Procedures and Policies

The Virginia State Bar seeks comments, due October 20, 2018, on proposals made by its Judicial Candidate Evaluation Committee to change the Judicial Candidate Evaluation Committee Procedures and Policies, as well as proposed statutory amendments.
www.vsb.org/site/news/item/comments_sought_JCEC

SUPREME COURT OF VIRGINIA COMMITTEE RELEASES REPORT ON LAWYER WELL-BEING

The Supreme Court of Virginia Committee on Lawyer Well-being released a report on September 19, 2018, detailing the crisis in lawyer wellness and recommending a number of measures for the judiciary, law schools, the private sector, and the public sector — as well as general structural and funding changes to the legal profession.
www.vsb.org/site/news/item/report_on_wellness

LEGAL ADVERTISING OPINIONS WITHDRAWN

At its meeting on August 1, 2018, the Standing Committee on Legal Ethics withdrew 12 Legal Advertising Opinions (LAOs) issued by the former Standing Committee on Lawyer Advertising and Solicitation. The LAOs had become obsolete, superseded by amendments to the Rules of Professional Conduct, or have been restated in whole or in part in LEO 1750.
www.vsb.org/pro-guidelines/index.php/rule_changes

SUPREME COURT OF VIRGINIA AMENDS RULE 1A:1

On September 14, 2018, the Supreme Court of Virginia amended Rule 1A:1 to become effective on December 1, 2018. The Rule pertains to Rule 1A:1. Admission to Practice in This Commonwealth Without Examination.
www.vsb.org/site/news/item/supreme_court_of_virginia_amends_rules_1a1

SUPREME COURT OF VIRGINIA SEeks Comments on Rule Changes

The Supreme Court of Virginia is considering proposed new Rules 1:1B and 1:1C regarding transfer of jurisdiction during the appeal
CHIEF JUSTICE LEMONS ISSUES STATEMENT ON NEW CRIMINAL DISCOVERY RULES

Supreme Court of Virginia Chief Justice Donald W. Lemons issued a statement in September regarding the reformed rules of criminal discovery to become effective July 1, 2019. The rule changes, made after considerable efforts from numerous stakeholders, affect Rule 3A:11. Discovery and Inspection, and Rule 3A:12. Subpoena.

www.vsb.org/site/news/item/lemons_statement_criminal_discovery_rules

SUPREME COURT OF VIRGINIA AMENDS RULES 1:1, 1:11, AND 3:20

On August 30th, 2018, the Supreme Court of Virginia has amended Rules 1:1, 1:11, and 3:20, to become effective on November 1, 2018. The Rules pertain to Rule 1:1. Finality of Judgments, Orders and Decrees; Rule 1:11. Motion to Strike the Evidence; and Rule 3:20. Motion for Summary Judgment.

www.vsb.org/site/news/item/SCV_seeks_comments_on_rule_changes

JUSTICE LEMONS RE-ELECTED CHIEF JUSTICE OF THE SUPREME COURT OF VIRGINIA

The Justices of the Supreme Court of Virginia announced today that they have re-elected the Honorable Donald W. Lemons as Chief Justice.

www.vsb.org/site/news/item/justice_lemons_re-elected

NEW CLERK OF THE COURT APPOINTED

The Justices of the Supreme Court of Virginia have appointed Douglas B. Robelen to the position of Clerk of the Court, replacing the retiring clerk, Patricia L. Harrington, who has served in the role since July 1, 2003. Mr. Robelen's position is effective February 1, 2019.

www.vsb.org/site/news/item/clerk_SCVOA

JOIN THE DISCIPLINARY SYSTEM

The Standing Committee on Lawyer Discipline seeks lawyers and nonlawyers for disciplinary district committee vacancies to be filled by Bar Council in June. The 17 committees review complaints and investigations against attorneys in their jurisdiction and determine what the appropriate disposition on the complaint is. Applications in the form of a résumé and short statement of interest are due February 28, 2019. See page 45 for more information and a list of vacancies by judicial circuit.

www.vsb.org/site/news/item/join_the_disciplinary_system

VSB DISCIPLINARY BOARD TO HEAR STEVEN FRANK HELM’S REINSTATEMENT PETITION ON NOVEMBER 16, 2018

Deadline for Comment: November 9, 2018

On December 27, 2018, Steven Frank Helm petitioned the Supreme Court of Virginia for reinstatement of his license to practice law pursuant to Part 6, § IV, ¶ 13-25.F of the Rules of the Supreme Court of Virginia. On January 16, 2018, the Clerk of the Virginia State Bar Disciplinary Board certified that the requirements of Part 6, § IV, ¶ 13-25.F were met. Accordingly, the Virginia State Bar Disciplinary Board will hear the Petition for Reinstatement on November 16, 2018 at 9:00 a.m. at the State Corporation Commission, Courtroom A, 1300 E. Main Street, Richmond, VA 23219. After hearing evidence and oral argument, the Disciplinary Board will make factual findings and recommend to the Supreme Court whether the petition should be granted or denied.

The Disciplinary Board seeks information about Mr. Helm’s fitness to practice law. Written comments or requests to testify at the hearing should be submitted to DaVida M. Davis, Clerk of the Disciplinary System, 1111 East Main Street, 7th Floor, Richmond, Virginia, 23219 or by email to clerk@vsb.org, no later than November 9, 2018. Comments will become a matter of public record. Copies of Mr. Helm’s April 1, 2011, Consent to Revocation (with Mr. Helm's Affidavit Declaring Consent to Revocation attached) and the Petition for Reinstatement with all attachments are available to the public by contacting Ms. Davis at clerk@vsb.org, or by calling the clerk's office at (804) 775-0539.

Mr. Helm was initially licensed to practice law in the Commonwealth of Virginia on September 30, 1991. On April 1, 2011, the Virginia State Bar accepted his Affidavit Consent to Revocation and entered an order revoking his law license to practice law, effective that date. At the time that he consented to the revocation of his license, Mr. Helm was under investigation for three cases involving lack of diligence, lack of communication, failure to properly account for client funds, and failure to properly maintain client funds in his trust account.

On March 29, 2012, pursuant to a plea agreement, Mr. Helm pled guilty in the United States District Court for the Western District of Virginia to one count of mail fraud (violation of 18 U.S.C, Section 1341) and one count of fraud and false statements in violation of 26 U.S.C. 7206 (1). Mr. Helm engaged in mail fraud by utilizing the United States Postal Service in furtherance of a scheme to wrongfully use client funds to pay personal expenses and obligations. Mr. Helm engaged in the offense of fraud and false statements by filing a false tax return in which he intentionally failed to properly report income acquired during the 2009 calendar year.

Mr. Helm was awarded a sentence that included imprisonment for a period of 24 months and, upon his release from confinement, a period of supervised release of two years. On June 12, 2012, he reported to the Federal Correctional Institute in Morgantown, West Virginia. He was released to a halfway house in Newport News,
VA, on December 26, 2013, after serving 18 months, two weeks, and two days of his federal sentence, having been awarded “good time” for good behavior. He was released from the halfway house on January 22, 2014, at which time he commenced his period of supervised release. In furtherance of a recommendation from his probation officer, Mr. Helm was released from his supervised release approximately one year early, that being on March 30, 2015.

In his Petition for Reinstatement, Mr. Helm asserted that he has learned valuable lessons from his mistakes, that he is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law within the Commonwealth of Virginia. He further asserted that he now recognizes the severity of his situational depression, which he contends contributed to his committing the misconduct that resulted in the revocation of his license and his criminal convictions, and that he has recovered from this situational depression. Mr. Helm further asserted that more than six years have elapsed since the revocation of his license and that he has used that time to serve his debt to society, and to grow in character, maturity and experience. Mr. Helm submits that he has kept current with the law, and that since the time of his revocation, he has completed over ninety credit hours of continuing legal education, including fifteen hours in ethics, all of which have been approved by the Virginia State Bar. He further provided proof that he took and passed the Multistate Professional Responsibility Examination on August 13, 2016, receiving a scaled score of 97.

Mr. Helm’s law license was placed under a Cost Suspension on September 28, 2011, for failure to pay costs associated with the three misconduct cases which were under investigation at the time he submitted his Consent to Revocation. A receiver was appointed for Respondent’s law practice and on February 13, 2017, the receiver made payment to the Virginia State Bar for all outstanding costs, including a payment in the amount of $7,266.27 to the Clients’ Protection Fund. Thereafter, the Cost Suspension was lifted. Presently, Mr. Helm does not owe the Virginia State Bar any costs or fees associated with any complaints against him.

Mr. Helm reported that his law-related employment since his release has included positions with several law firms, including: Commonwealth Accident Injury Law, P.C. (Litigation and Office Manager) 2016 to present; UnitedLex (document review) 2015 to 2016; and 2255 Appeals (founder/owner of an appellate consulting business) 2014 to 2016. Mr. Helm also served as a consulting paralegal to Richmond-area law firms.

Mr. Helm reported that his non-law-related employment included: Downtown and James Center YMCAs (group fitness instructor and personal trainer) 2015 to present; Max’s on Broad/Tarrant’s Café/Tarrant’s West (RVA Hospitality) (various positions from bartender to director of public relations) from 2014 to 2017; KennTico Cuban Bar & Grill (bartender) 2015; and Pegasus Restaurant (bartender/server) 2015. Mr. Helm reported that his community service includes volunteering with the Lewis Ginter Botanical Gardens and supporting local charities by training for and running in marathons.

You Don’t Always Get What You Pay For: Sometimes You Get Something For Free.

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The law firm of Midkiff, Muncie & Ross, P.C., is pleased to announce the addition of two new lawyers: Daniel L. Robey has joined the firm’s office in Oakton, leading its first- and third-party practice. Mr. Robey is an experienced civil litigation defense attorney, having handled hundreds of cases involving complex coverage, personal injury, property damage, product liability, and construction defects.

Thomas A. Counts II has joined Midkiff, Muncie & Ross, P.C.’s Roanoke office as Of Counsel, where he will focus his practice in the areas of complex civil litigation, the defense of first- and third-party insurance claims, and coverage.

Nina Ginsberg of Alexandria was sworn in as president-elect of the National Association of Criminal Defense Lawyers at the association’s annual meeting in Miami Beach, FL. Ms. Ginsberg is a founding partner at DiMuro Ginsberg, P.C., in Alexandria and has practiced criminal law for more than 35 years.

Vicki O. Tucker of Hunton Andrews Kurth has been named chair of the American Bar Association’s Business Law Section with over 50,000 members and 60 committees. Tucker is counsel in the Firm’s Richmond office where her practice focuses on secondary market transactions involving residential mortgage loans and mortgage servicing rights, representing banks, servicers and others on hundreds of transactions.

Founder Norman F. Oblon and Managing Partner Philippe J.C. Signore, Ph.D., of Alexandria-based Oblon LLP, one of the largest law firms focused exclusively on intellectual property law, recently celebrated 50 years in business by hosting a golden anniversary party for all attorneys and staff at the Westin Ballroom. The firm also celebrated the longevity and professional commitment of the more than 50 lawyers and administrative personnel who have been with the firm for more than 20 years.

The Judicial Council of Virginia has named Judge William W. Sharp, presiding judge in Warren County and Winchester/Frederick Juvenile and Domestic Relations District Courts, as the recipient of the Harry L. Carrico Outstanding Career Service Award. The award recognizes members of the judiciary who, over an extended career, have demonstrated “exceptional leadership in the administration of the courts while exhibiting the traits of integrity, courtesy, impartiality, wisdom, and humility.”

Vault’s 2019 “Top 150 Under 150” list, which recognizes midsized law firms based on firm culture, quality of life, satisfaction, diversity, pro bono, hours, compensation, and selectivity has named three Virginia firms to its roster: Gentry Locke Rakes & Moore LLP; Oblon LLP; and Freeborn & Peters.
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