ROANOKE BAR ASSOCIATION

ROANOKE BAR REVIEW

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GHOSTWRITING GUIDELINES

BY B. WEBB KING, ESQ.

On July 28, 2014, the Standing Committee on Legal Ethics of the Virginia State Bar issued Legal Ethics Opinion 1874. That LEO is titled "Limited Scope Representation – Reviewing Pleadings for Pro Se Litigants – Substantial Assistance and 'Ghostwriting.'"[1] In LEO 1874, the Committee overruled a number of prior LEOs and found that, with a few limitations, it was ethically permissible for an attorney to "ghostwrite" pleadings for clients.

Legal Ethics Opinion 1874

The question that led to LEO 1874 concerned issues under a pre-paid legal services plan. Members of the plan requested that a law firm review and provide legal advice regarding a warrant in debt in general district court and a change of custody petition in juvenile and domestic relations district court. The law firm agreed to review the documents and provide legal advice if the client would transmit a letter to the Court with the filing identifying the law firm, stating that it had reviewed the pleading, had provided the pro se party legal advice regarding the pleading, but that the law firm had not been retained to represent the pro se party in the matter.

Overruling a number of prior LEOs, the Committee found that it was ethically permissible for an attorney to ghostwrite pleadings. Critical to the Committee's analysis was Rule of Professional Conduct 1.2(b), which permits a lawyer and a client to "limit the objectives of the representation if the client consents after consultation." This Rule became effective on January 1, 2000, with the adoption of most of the ABA Model Rules of Professional Conduct.

Most concerns regarding ghostwriting fall into two groups: 1) assisting a client with a pleading constitutes a false or misleading statement to the court;[2] and 2) pro se parties are entitled to lenient construction of their pleadings, so having attorney-drafted pleadings construed leniently gives the pro se party an advantage. In LEO 1874, the Committee found that there was no misrepresentation to the court when an attorney ghostwrites pleadings, because the attorney is not making any representation to the court. The attorney is merely drafting documents for the client, which the client then files (perhaps modified, perhaps unmodified) with the court. The Committee also found that pro se parties would not unfairly benefit from attorney-drafted pleadings, because courts will not apply a liberal review of the pleadings if they are well drafted. The Committee found any remaining concerns on this issue to be outweighed by the benefits of the court having a well drafted pleading to consider and the increased access to the legal system fostered by ghostwriting.

For purposes of the LEO, the Committee assumes that the lawyer is practicing in areas where "no law or tribunal rule requires disclosure" of ghostwritten pleadings and not in areas where lawyers are prohibited, such as small claims court. Further, the Committee did explain that lawyers who ghostwrite pleadings must do so competently and may not prepare a frivolous suit.[3] The attorney is required to make "sufficient inquiry of the facts and research of applicable law to ensure that the pleading contains claims that are not frivolous." Further, the attorney must determine that ghostwriting the pleadings is an appropriate means to accomplish the client's objectives, which may depend on the complexity of the matter and the sophistication of the client.[4] The attorney must explain to the client the

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[1] "Ghostwriting" refers to an attorney drafting pleadings for a client who then files them with the court and proceeds *pro se*.

[2] Rule 3.3 of the Rules of Professional Conduct prohibits false statements of fact to a tribunal. Rule 8.4 of the Rules of Professional Conduct prohibits acts, including "dishonesty, fraud, deceit or misrepresentation" that "reflects adversely on the lawyer's fitness to practice law."

[3] Required by Rules of Professional Conduct 1.1 and 3.1.

President's Corner—Holiday Cheer

BY RICHARD C. MAXWELL, ESQ., PRESIDENT

Take a deep breath and exhale slowly. Take a deeper breath, close your eyes, and exhale more slowly. The holidays will soon be upon us, and I wanted to get you ready.

As we enter the holiday season, my thoughts run to all the wonderful things members of the RBA do for our community, including our members who participate in the Barrister Book Buddies program and who volunteer to teach middle school students about the Rule of Law. In particular, I would like to thank all the people who make Santa at the Station so wonderful and memorable. There has developed a strong cadre of people composed of RBA members and staff from law firms who devote their time to making this event a success. This success is, in no small part, due to the tireless efforts of Lori Thompson, with the able assistance of Cathy Caddy. Santa at the Station is especially wonderful, because it provides an evening of entertainment for children and their parents who reside in one of the shelters in the Roanoke Valley. The children are excited to pick out and wrap gifts to give to their parents at Christmas. The highlight of the evening is getting to sit on Santa's lap and leave with a photo, courtesy of Rob Dementi. Thank you, Rob.

As you look through this issue, you will see many pictures of the festivities at this year's Santa at the Station. I think the volunteers had as much fun as the children. You will be pleased to know that every penny you contributed to Santa at the Station went directly to the event.

I wish you peace and joy over the holiday season, and don't forget to take a few deep breaths. Also, don't forget our dinner meeting on January 13, 2015 at the Shenandoah Club.

Rich Maxwell is a Partner at Woods Rogers

President Rich Maxwell at **Santa at the Station**
More pictures on page 10

VADA: Defenders United

BY ELIZABETH G. PERROW ESQ., WITH BROOKE D. SIMONS, ESQ.

For over 40 years, the Virginia Association of Defense Attorneys, or "VADA," has pursued its mission of assisting Virginia attorneys in the professional and ethical representation of their clients in civil litigation through education, communication, and fellowship. Made up of more than 800 attorneys whose litigation is primarily focused on the defense of civil actions, the VADA community is comprised of attorneys of all ages and experience.

It is easy for members to find their fit within the VADA, as there are many different sections tailored to specific practice areas, including: Appellate Advocacy; Auto & Transportation Liability; Corporate & Commercial Litigation; Medical Malpractice; Policy Coverage; Product & Toxic Torts; Professional Liability; and Workers' Compensation. These sections allow members to customize their experience within the VADA, networking with and learning from some of the best attorneys in their chosen practice area.

Newly minted attorneys, in particular, benefit from the Young Lawyers Division of the VADA. The YLD provides new members of the Bar with opportunities designed to meet their needs and gives them access to special seminars, where they can pick up invaluable practical information and enjoy the camaraderie of fellow young attorneys from throughout the state.

The VADA organizes educational and social activities throughout the year, such as the New Associates' Boot Camp, the Deposition Workshop, the Trial Workshop, the Spring Meeting, and the Annual Meeting, where attendees of all ages and experience can learn, receive CLE credits, and socialize with one another.

In addition to these benefits, VADA attorneys also enjoy online access to the VADA's Journal of Civil Litigation, which is published four times a year and includes in-depth articles and summaries of trial court decisions not readily available from other sources. Members have the benefit of Listserv access, which allows them to exchange files and information with other attorneys, and stay current with the latest news concerning legal updates and civil litigation in Virginia. VADA's website also allows members to update their own profiles, keeping their membership working for them as their practices evolve.

Elizabeth G. Perrow is a Partner at Woods Rogers and Brooke D. Simmons is an Associate at Woods Rogers

Your Supreme Court: What's New?

By Monica T. Monday, Esq.

It has not been a quiet year at the Supreme Court of Virginia, and change is in the air for 2015. A number of changes at the Court this year have improved practice before the Court and have shaped the future of the Court.

First, we will have a new Chief Justice on January 1, 2015. Justice Donald W. Lemons will become Chief Justice of the Supreme Court of Virginia when the current Chief Justice, Cynthia D. Kinser, retires at the end of this year. Chief Justice Kinser has served on the Court since 1997, and has held the title of Chief Justice since February 2011 when Chief Justice Leroy R. Hassell, Sr. died. Next in seniority on the Court to Kinser, Lemons has been a Justice of the Supreme Court of Virginia since 2000. He previously served as a judge on the Circuit Court of the City of Richmond and on the Court of Appeals of Virginia.

The Chief Justice serves as the head of the Judiciary in the Commonwealth. In the highly-publicized struggles to fill judicial vacancies in the last few years, Chief Justice Kinser has been a strong advocate for access to justice and for the judiciary as a whole. With continued state budgetary problems, the new Chief Justice will likely face similar challenges in addition to his regular duties as head of a branch of the Commonwealth's government and as a Justice of the Court.

The Court also hired a new Chief Staff Attorney in 2014. K. Lorraine Lord left private practice at McGuire Woods LLP to manage and lead the Court's staff attorneys and law clerks. That office is responsible for preparing bench memos for the Justices at the petition stage of an appeal, performing research, reviewing cases for procedural defects, and otherwise assisting the Court.

The Court also relaxed the rules relating to assignments of error. Assignments of error, which identify the particular errors committed by the trial court, are required in petitions for appeal and opening briefs, and may be included by an appellee in the brief in opposition or brief of appellee. The amendments to Rule 5:17 soften some of the penalties associated with deficiencies in assignments of error so that a show cause procedure, rather than dismissal of the appeal, will result from certain rule violations. Rule 5:17(c)(1) and (c)(1)(iv) (references to the part of the record where error has been preserved); Rule 5:17(c)(1)(i) and (e)(1)(iv) (separate heading for assignments of error). Further, the Court has relaxed the requirements relating to the wording of assignments of error in appeals from the Court of Appeals of Virginia. Rule 5:17(c)(1)(iii). The rules regarding assignments of error still contain a number of minefields, but the harsh effects of certain deficiencies have been removed.

The Court has also stepped into the technology age. In 2013, the Court adopted a policy permitting computers, laptops, or tablets in the courtroom for use during the presentation of oral argument. In another advance for technology, the Court began releasing audio recordings of its oral arguments in early 2014. You may access the audio recordings from the Court's merits arguments since January 7, 2014, at http://courts.state.va.us/courts/scv/oral_arguments/home.html. Petition arguments are not available.

I will confess to having listened to hours of oral argument since January 2014. These audio recordings have reinforced some suspicions I have had about the Supreme Court, and appellate arguments in general. And they have provided some new insight on these topics as well. Here are a few observations about oral argument at the Supreme Court that I have gleaned from these recordings.

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Views from the Bench: Judge Francis W. Burkart, III

By Robert E. Dean, Esq

One summer, Judge Burkart, then a high school student, arrived for his first day of work tarring roofs on a construction crew. The site supervisor explained the basics of tarring. Take a bucket, grab a roller, and begin spreading the oily, black substance in even strokes across the flat roofs. Be sure to work backwards, he said, toward your ladder. Take breaks. It would be a long day.

The next morning, Judge Burkart returned to work. The supervisor was waiting alone. Faced with another day of spreading coal tar and fighting off the inevitable burns and stains, the entire crew had quit. Judge Burkart had returned, because, as he puts it, he was either too foolish to know better, or too excited to get paid working outside. As a city native, he always enjoyed being outdoors. It was one of the main reasons he settled in Virginia to raise his family and practice law.

Judge Burkart was born in Queens, New York. He now lives in southwest Roanoke County. He loves to fish, hunt, and raise vegetables in his garden. In his spare time, he reads science fiction novels, "not the space stuff," he remarks, but serialized collections of time travel, futuristic cities, and fantasy adventures. Judge Cleaveland turned him onto J.R.R. Tolkien ("Lord of the Rings"). Recent favorites include Robert Jordan ("Wheel of Time") and Raymond Feist ("The Riftwar Cycle"). He and his wife have two grown children and a grandson, age six.

His dad, a police officer, met his mother, a phone company employee, while walking his beat past where she was picketing with her co-workers in a wage dispute. The strike ended, the couple married, and they had four children ("Three sisters, and me," says Judge Burkart). Growing up, Judge Burkart has many fond memories accompanying his dad to Yankees games. "As the son of a police officer, you got moved to the front of the rope line," to meet the players after the games. He graduated high school, then moved south to attend the College of William and Mary.

In between semesters at college, Judge Burkart returned to New York to earn money for the upcoming school year. Fortunately, he says, he found other work besides tarring roofs. He worked many summers hoisting sheet metal as an iron worker. Another summer, he found a job as a security guard at Rockefeller Center. As much as he enjoyed growing up in New York, by now, he had spent several years in Virginia, including annual family vacations to see relatives near Pulaski. He decided to stay in Virginia after graduation.

He attended Washington & Lee School of Law. He had an offer to work for a real estate firm after sitting for the bar exam, but he turned it down. "My dad thought I was nuts," says Judge Burkart, "but I deeply wanted to be in the courtroom." He accepted a job in the Roanoke City Public Defender's Office and joined a "wonderful group of attorneys [and future judges]," including Ray Leven, David Walker, David Damico, John Kurtin, Jack Gregory, and fellow future jurist Judge Broadhurst, as public defenders.

Practicing law in Roanoke, he recalls trying a lot of cases, "a lot more than we try now, it seems." He especially enjoyed the cordial relationship between the public defenders and the prose-

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Ghostwriting Guidelines

(Continued from page 1)

advantages and disadvantages of ghostwriting versus standard legal representation.[5]

With regard to the disclosure of the ghostwriting to the court, the Committee found that "the Rules of Professional Conduct do not prohibit undisclosed assistance to a pro se litigant." Attorneys undertaking to ghostwrite pleadings "may advise the pro se litigant to insert a statement to the effect that 'this document was prepared with the assistance of a licensed and active member of the Virginia State Bar.'" However, the Committee also explained that this disclaimer is subject to Rule of Professional Conduct 1.6(a) regarding confidentiality. Under that Rule, if a client objects to the attorney revealing the ghostwriting, the attorney may not do so, and the attorney should not include a disclaimer.[6]

Ghostwriting and Making an Appearance for a Client

One issue left open in LEO 1874 is whether a law firm that ghostwrites pleadings is making an appearance in the pending case. The Committee concluded that the appearance issue is a question of law "beyond the purview of [the] Committee." Of course, when an attorney appears as counsel of record in a case, there are a number of legal consequences. Most importantly, the attorney "shall not withdraw from a case except by leave of court after notice to the client of the time and place of a motion for leave to withdraw."[7]

Practitioners should note that an attorney can make an appearance in a case, thus becoming counsel of record, even if he or she never files a pleading. Rule 1:5 states: "'Counsel of record' includes a counsel or party who has signed a pleading in the case or who has notified the other parties and the clerk in writing that he appears in the case."

The Virginia Supreme Court passed on what is necessary to make an appearance in a case in *Walker v. American Association of Professional Eye Care Specialists, PC*, 268 Va. 117, 597 S.E.2d 47 (2004). In the *Walker* case, an attorney assisted a client in filing a *pro se* medical malpractice suit drafted by another attorney by transmitting the suit to the clerk and paying the filing fee out of money held in the attorney's trust account. The suit was signed by the plaintiff herself. The attorney had also evaluated the case, but declined to take it, and had assisted the client in finding a medical expert for a fee. The defendant filed a motion to strike, arguing the suit was improperly filed, because the attorney was representing the client for the purposes of filing the suit. After an evidentiary hearing, the circuit court agreed and dismissed the case.

The Supreme Court reversed, pointing to the fact that the suit had been signed by the client, and not the attorney, and that the attorney's cover letter to the clerk did not notify the other parties and the clerk that he was appearing in the case. The Supreme Court also held that the fact that the attorney continued to represent the client until she retained new counsel did not support a finding that he had represented her for the purpose of the suit. In fact, the court stated that such action

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[4]Rule 1.2 of the Rules of Professional Conduct.

[5]This is to meet the requirements of consultation with the client under Rule 1.2 of the Rules of Professional Conduct.

[6]Rule 1.6(a) prohibits the disclosure of information "that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation."

[7]Rule 1:5 of the Rules of the Supreme Court of Virginia. An appearance in a case as counsel of record is for the entire matter and not just for a discrete motion or portion of the proceeding. While an attorney may contract with a client for limited services, such agreements are not binding on the Court and an attorney cannot withdraw from a case without approval of the Court. *See Sharp v. Sharp*, No. 02-74, 2006 WL 3088067 at *9-10 (2006) (Portsmouth City Circuit Court) (Judge Davis).

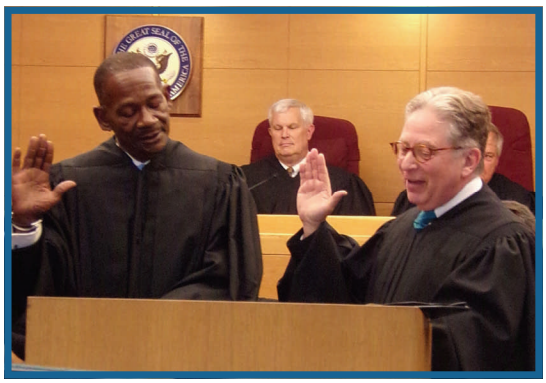
Judge Onzlee Ware Takes Oath of Office

On Friday, November 21, 2014, Roanoke attorney and former Delegate Onzlee Ware was sworn in as a judge in the Twenty-Third Judicial Circuit's Juvenile & Domestic Relations Court. Judge Ware became the first African-American juvenile & domestic relations court judge in the Twenty-Third Circuit.

Prior to taking the bench, Judge Ware practiced law in Roanoke, and served in the legislature from 2004 through 2014. A native of Greensboro, Judge Ware graduated from North Carolina A&T in 1976, and obtained his law degree from North Carolina Central School of Law in 1984.

Judge Philip Trompeter, a thirty-year veteran of the J&D court, administered the oath of office to Judge Ware. The investiture ceremony featured additional remarks from Judge James R. Swanson and Judge Charles N. Dorsey.

Judge Ware fills the judicial seat vacated by the retirement of the Honorable Joseph P. Bounds. Judge Ware began hearing cases on December 1, and will serve a six-year term as J&D Court judge.



Judge Ware is sworn in by Judge Trompeter.

Roanoke Law Library News and Information

By Joseph Klein, Law Librarian

It seems just yesterday that the green of spring was arriving, and now almost all the trees are bare. But rejoice, for it is almost time to gather with family, friends and loved ones and to give thanks for another wonderful year and to celebrate the holidays and the coming of a new year. I would like to wish you all a wonderful holiday season and a very happy New Year.

Westlaw Next

The Roanoke Law Library has added access to Westlaw Next. Currently, we have both Westlaw Next and Westlaw Classic, and we will continue to offer both for as long as Westlaw Classic exists. I have spent a good deal of time using Westlaw Next over the past several months, and as I familiarize myself with it, I see that it has several advantages over its predecessor. First of all, with Westlaw Next, it is much easier to save and email information to yourself and others. You will no longer have to open documents as PDFs and save to the desktop to later email. Now, you can email a court decision or law review article directly from the web interface to anyone.

Another advantage I have found is that searches in Westlaw Next bring back results in multiple data categories that are easily accessible. One search can return results that include cases, statutes, and secondary materials.

Third, West's key number system for finding on point information is much more accessible in Westlaw Next. While you can still use Boolean search terms and symbols to fine tune your searches, Westlaw Next's intuitive interface also provides further results that it predicts you might otherwise have missed.

The new version takes some getting used to, but it has clear advantages. As always, access to Westlaw Next is free at your Roanoke Law Library and open to all. Please feel free to stop by and try it out, and I will be glad to assist you. Or from your desk, you can give me a call at 540-853-2268 with any questions about Westlaw Next or other areas of legal research.

Main Library

As you have no doubt heard, the Main Library (706 S. Jefferson Street) has reopened after a fantastic renovation. I would encourage you all to check it out when you get a chance, there is something for everyone. The children and teen areas on the first floor have been drastically improved, including the addition of two new family restrooms. The giant slide from the new second floor children's mezzanine to the first floor is a particular favorite of my daughter, Harper. The second floor holds all of the adult collections, all the adult public computers, and of course the Virginia Room's fantastic local history and genealogy collection. There is also an outdoor reading porch overlooking the new amphitheater, which is a perfect place to sit and read when the weather is nice. Additionally, the library has all new computers throughout, as well as tons of brand new books. We will continue to schedule wonderful educational and cultural events at the Main Library, so make sure you check out our events calendar at http://bit.ly/dnSLCn.

VWAA's Holiday Reception

On December 4, 2014, the Virginia Women Attorneys Association, Roanoke Chapter, hosted its annual holiday reception to celebrate the local judiciary and their staff. Over 80 attorneys, judges, and staff enjoyed the festive event, with high spirits and fellowship at Schaal's Metamorphosis downtown.

The VWAA is most appreciative of the support of its generous sponsors for the event, which included Gentry Locke Rakes & Moore, Woods Rogers, Moss & Rocovich, The Poarch Law Firm, and Wiese Law Firm.

Hon. Onzlee Ware, Hon. Fred and Mrs. Dee King, Hon. William Broadhurst

Hon. Michael Urbanski and Leigh Strelka

Lindsay Grindo, Wendy Slemp and Rachel Thompson

New RBA Website Launched On October 1

On October 1, 2014, the Roanoke Bar Association launched a new website designed to bring the RBA into the 21st century and to facilitate access by both RBA members and the public. The new site continues to provide information about the RBA with registration capabilities for all events. Navigation around the web site has been greatly improved for both desktop and mobile access.

The most notable changes from the old web site involve events, the member directory, and public access to member information.

We now have a continuous Events Calendar which can be viewed by the month or as a list. Information on past events is still available and future events are posted as details become finalized. To access the calendar, click on *Events*; to change from month to list, click on *View As*.

The Member Directory is available under *Member Resources* and now includes the option to list up to three practice areas. To add practice areas to your profile, click on the *Update Profile* button in the bottom right corner of the profile page and complete the form. It should be noted that completing the form does not automatically update the profile; that will be done by the RBA office.

The Member Directory is password protected and available only to members. However, members now have the option to give the public access to their profiles. Under *Public Resources/Find An Attorney,* citizens may locate an attorney by name, firm or practice area. To allow public access to your profile, simply check the "*Yes*" box when updating your profile.

If you have questions or need help with the new web site, please do not hesitate to contact Cathy Caddy at 342-4905 or roanokebar@earthlink.net for assistance.

In Memoriam

Charles D. Fox, III

August 25, 1929 – February 14, 2014

In grateful recognition of the contributions of Mr. Fox to our profession, and his contribution to our Association, the Association laments his passing. A memorial resolution in honor of Mr. Fox was presented during the December 9, 2014 meeting of the Association. To read this and other past memorial resolutions, please go to www.roanokebar.com and click on News.

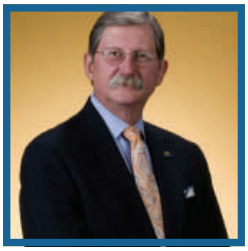
Rule of Law Project: Five Years and Going Strong

By G. Michael Pace, Jr., Esq. and H. Timothy Isaacs

Mike Pace

For the fifth consecutive year, members of the Roanoke Bar Association and the Salem-Roanoke County Bar Association (47 of them, including Judges Ballou, Talevi and Lilley, Congressman Goodlatte and Mayor Bowers) came together again on October 21, 24 and 27 to teach 2369 students in 74 classrooms in all 12 public middle schools in Roanoke City, Salem and Roanoke County.

What a team effort! Thanks to each of our volunteers, and a special thank you to Cathy Caddy and John Koehler for doing the heavy lifting in coordinating the class schedules, sign-ups, and other logistics. They make it look easy when it is anything but.



Tim Isaacs

With your continued involvement, we have developed significant credibility and close working relationships with the superintendents, principals, curriculum coordinators, and teachers in each of the school divisions in the Roanoke Valley. Evidence of this is that we have been invited back each year since our beginnings in 2009. This is one way to measure our effectiveness. Another is having teachers thank us for adding something exciting and significant to their history, civics, and social studies curriculum. Yet another is remembering the expressions on the faces of your students when they tell you, in their own words, why the Rule of Law is important. You help them connect the dots between active citizen engagement and why democracy works. Well done!

What we started here continues to spread across Virginia and other states. Through our statewide Lawyers Advisory Council, we have created Rule of Law committees in each of the public school divisions in Virginia. These committees enable us to organize a Rule of Law Day in every community in Virginia, using our model in the Roanoke Valley as the example. The successes we are experiencing in the Roanoke Valley are now being lived out in every region of the Commonwealth.

It is important that we continue our work together. With the national discussion about reducing the number of standardized tests in our public schools in every state, including ours, testing in history, civics and social studies is being eliminated, beginning in middle schools. We should be concerned that "if it isn't tested, it won't be taught," leaving gaps in the educational experience that should otherwise provide students a deeper understanding of why democracy works and what it takes to get and keep it alive and well. The Rule of Law Project fills this gap in knowledge by providing teachers with the resources to teach our youth what they need to know to become active and engaged citizens and to perpetuate democracy in America.

Our collaboration with teachers is vitally important work. There has never been a more important time to become involved in the Rule of Law Project.

We are very pleased and proud of what we are doing together. We are also grateful for the opportunity to work with all of you. Please continue to help us teach our children the things they need to know in order for them to carry the flame of the underlying principles of the Rule of Law - freedom, liberty, justice, fairness and equality.

You are our heroes!

G. Michael Pace, Jr., is the President and CEO and H. Timothy Isaacs is the Vice President and Director of Education, Center for Teaching the Rule of Law

Ghostwriting Guidelines

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by the attorney was consistent with the attorney's ethical obligation to protect the client's legal rights after he determined he was not going represent her in a lawsuit.[8]

Walker would permit an attorney to take action for a client, short of signing a pleading, without being considered counsel of record. That said, the inquiry as to whether an attorney has made an appearance in a case is fact-driven. In *Walker*, the attorney who facilitated the filing of the pleading had not actually drafted the complaint. If counsel only intend to provide limited services, they should be careful in situations where their actions might be considered making an appearance for a client in a pending case.

Ghostwriting in the Courts

Of course, the State Bar is not the only voice on this issue. Practitioners should be aware that LEO 1874 is not consistent with many court decisions.

Ghostwriting in the Eastern District

There are a number of decisions from the U.S. District Court for the Eastern District of Virginia, all of which pre-date LEO 1874, that prohibit ghostwriting in that Court. The seminal case is *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*, 968 F. Supp. 1075 (E.D. Va. 1997) (Judge Morgan). In *Laremont-Lopez*, the court entered a show cause order after determining that a number of employment discrimination cases had been prepared by attorneys, but filed by parties proceeding *pro se*. In all of the cases, the attorneys drafted the complaints. In several cases, the attorneys were paid a flat fee for that service. In other cases, the attorneys had engaged in pre-filing attempts to resolve the cases. One attorney actually obtained service on the defendant.

Judge Morgan found that "the practice of lawyers ghostwriting legal documents to be filed with the Court by litigants who state they are proceeding *pro se* is inconsistent with the intent of certain procedural, ethical, and substantive rules of the Court."[9] The court explained that ghostwriting "(1) unfairly exploits the Fourth Circuit's mandate that the pleadings of *pro se* parties be held to a less stringent standard than pleadings drafted by lawyers, . . . (2) effectively nullifies the certification requirement of Rule 11 of the Federal Rules of Civil Procedure . . . , and (3) circumvents the withdrawal of appearance requirements of Rule 83.1(G) of the [court's] Local Rules . . . ."[10]

Judge Morgan goes on to hold that "the Attorneys should have known that this practice was improper, [but] there is no specific rule which deals with such ghostwriting."[11] Accordingly, the court held there was "insufficient evidence to find that the Attorneys knowingly and intentionally violated its Rules," and in the absence of intentional wrongdoing, the Court held that "disciplinary proceedings and contempt sanctions are unwarranted."[12]

The Eastern District revisited the issue in *Chaplin v. DuPont Advance Fiber Systems*, 303 F. Supp. 2d 766 (E.D. Va. 2004) (Judge Hudson). In *Chaplin*, the defendants filed a Rule 11 motion on a number of grounds, including the fact that the plaintiff's attorney, who was not admitted in Virginia and did not have local counsel, prepared pleadings that were signed and filed by his clients in a pending case. The plaintiff's attorney admitted that he was aware of *Laremont-Lopez* when the pleadings were filed.

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[8]See Rule 1.16 of the Rules of Professional Conduct.

[9]*Laremont-Lopez*, 968 F. Supp. at 1077.

[10]*Id.* at 1078.

[11]*Id.* at 1080.

[12]*Id.*

RVLSA's 49th Annual Bosses Night

RVLSA . . . *the association for legal professionals* held its 49th annual Bosses Night on September 18, 2014 at Schaal's Metamorphosis. Bosses Night is RVLSA's annual fundraiser for its scholarship program, and is also an event to honor a deserving Boss and Member for dedication to the legal community and commitment to and support of RVLSA and its members.

Mark Loftis, Esq. of Woods Rogers was named 2014 Boss of the Year, and Monica Guilliams, a paralegal at Gentry Locke Rakes & Moore, was named 2014 Member of the Year.

Attorneys Les Bowers and Jay O'Keeffe of Gentry Locke Rakes & Moore presented an informative and entertaining program on *Legal Technology: How I Learned to Stop Worrying and Love the iPad*.

RVLSA appreciates the continued support of the Roanoke Bar Association and the attorneys in the Roanoke Valley. Your support allows us to present annual scholarships to deserving students who plan to study and pursue a career in the legal field.

Mark Loftis, 2014 Boss of the Year, and Monica Guilliams, 2014 Member of the Year.

Les Bowers and Jay O'Keeffe: Love the iPad!

Your Supreme Court: What's New?

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First, the justices are talking to each other when they ask their questions. This is something that is hard to follow during the heat of oral argument. However, listening to the argument after the fact, it is clear that many questions are not really for me, but are directed towards another justice, or the entire Court. The justices are actually discussing the case with each other and trying to convince their colleagues on the bench of their positions.

So does this mean that my answers don't matter? Am I just a pawn on the Court's chess board? Not at all. My answers to those questions can influence that private, judicial discussion – and the ultimate outcome of the case – by showing why my position is right.

Second, some questions are not at all what I thought they were at the time. During argument, it can be difficult to really listen to the Court's questions when you are focused on delivering the argument you have prepared. Things become clearer with the luxury of hearing the argument again without the stress of being in the middle of it. In particular, I have noticed that some questions were not exactly what I thought they were at the time; rather, the Court was asking something slightly different.

Good listening at oral argument is hard. It requires us to focus on the Court first, and our prepared argument second. Because the Court is the decision-maker, though, we must understand its concerns and questions so we can respond meaningfully. If we haven't answered the Court's questions, then we have not done our jobs as oral advocates. So, be flexible during oral argument. Weave the important points of the argument into your answers, but make sure you are addressing the issues the Court wants to discuss.

Third, the Court genuinely wants to understand your argument and the ramifications of its decision. This is why the justices ask hypothetical questions – to test the boundaries and effect of the Court's ruling in future cases involving different facts. And this is why it may press the advocate to define the scope of the ruling he seeks and to explain the effect of that ruling. Concisely explaining the scope and limiting principles of your position will greatly assist the Court in understanding the effect of adopting your position, and becoming comfortable with it. Embrace the opportunity to help the Court do its job well.

Finally, audio recordings only tell you half the story. Listening to an audio recording of an argument I heard – or delivered – is a different experience from being there live. The visual, relational, and intangible aspects of the live argument cannot be captured on an audio recording. Thus, many essential ingredients to an effective oral argument, such as genuineness, credibility, eagerness, passion, engagement, and rapport with the Court are not fully experienced on an audio recording.

Therefore, being there in person is the only way to fully appreciate the argument. And, you should not agree to argue your case by phone – that separation prevents full engagement with the Court.

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Views from the Bench: Judge Francis W. Burkart, III

(Continued from page 3)

cutors. Said Judge Burkart, "We would work as hard as we could against each other in court, but at the end of the day, it was a collegial relationship. We had a close-knit group of lawyers who practiced criminal law."

After working as a public defender, Judge Burkart was asked to join John Lampros in the Office of the Commonwealth's Attorney in Roanoke County. He worked with Mr. Lampros, and later, Tommy Blaylock, who was an early mentor. When Mr. Blaylock moved into private practice in 1987, Judge Burkart was elected the Roanoke County Commonwealth's Attorney, a position he held for 15 years until his appointment to the General District Court for the 23rd Judicial District of Virginia.

Since 2002, Judge Burkart has served as a district court judge. He primarily sits in the Roanoke City Courthouse. When he was first appointed to the court, he joined Judge Talevi and Judge Julian Raney. "They helped me transition from prosecuting cases," says Judge Burkart. Now, he is honored to serve alongside Judge Talevi, Judge Lilley, and Judge Clemens.

He misses the time when the court had a fifth judge, who, most recently, was Judge King. "When we had five judges, we were able to schedule a traffic docket five days per week, a criminal docket five days per week, and a civil docket five days per week." Judge Burkart says the civil docket for return cases was reduced to four days. Then, after Judge King's retirement, it was limited even further, with civil return cases set on Tuesday mornings, Thursday afternoons, and Friday mornings.

The district court judges, says Judge Burkart, have been adept at helping one another manage the court's business. "When we finish with our docket in one courtroom, we often coordinate with the judges in the other courtrooms who might be still working through their docket, in order to help with caseload." He says that the court functions smoothly, due in large part to the dedicated staff and courtroom personnel. "We have a great team in place," says Judge Burkart.

He encourages lawyers who are new to his courtroom to introduce themselves before their hearing. Also, when there is time after docket is concluded, he says lawyers should feel free to speak to him about the rationale for his decisions. Finally, he appreciates lawyers who arrive on time and are prepared to try their case, which includes having witnesses ready to testify. The key, especially for new lawyers, is "dogged preparation," in both the facts and the law.

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GHOSTWRITING GUIDELINES

(Continued from page 7)

The court re-affirmed *Laremont-Lopez*, but found the attorney's actions were not intentional or malicious and issued only a public reprimand.[13] The facts in *Chaplin* were different from *Laremont-Lopez* in a number of ways that may have played into the court's decision. The problems for the plaintiff's attorney, who was from North Carolina, arose when the original local counsel dropped out. The plaintiff's counsel was unable to find replacement local counsel, despite some level of assistance from the court. It was during this period that the plaintiff's attorney prepared pleadings for his clients and had them file the pleadings *pro se*. Ultimately, the court waived the local counsel requirement and permitted the attorney to proceed without local counsel. Although the court emphasized that there other options beyond ghostwriting pleadings, the court may have sympathized with the attorney's predicament. The attorney was also sanctioned $10,000 on other grounds in the same opinion, so the court may have felt that he had been punished enough and that further sanction for the ghostwriting was not warranted.

There are two other ghostwriting opinions from the Eastern District that deserve mention, although neither contains as in-depth a discussion of the issues as *Laremont-Lopez* or *Chaplin.* In *U.S. v. Salamanca*, No. 3:11CR255–HEH, 2014 WL 108899 (E.D. Va. 2014) (Judge Hudson), the court found the fact that the underlying motion was ghostwritten to be an equitable factor weighing against granting a motion for relief from a judgment or order under Rule 60.[14] In *Stewart v. Angelone*, 186 F.R.D. 342 (E.D. Va. 1999) (Magistrate Judge Prince), the court ordered a *pro se* plaintiff in a habeas corpus case to identify the counsel who ghostwrote the pleadings and "to declare whether counsel intends to represent him in this case."[15] The court further directed that "[c]ounsel for petitioner must comply with the ethical obligations of [Rule 11] or otherwise face the possibility of sanctions."[16]

Finally, there are a number of other Eastern District cases that discuss ghostwriting. In most of these cases, circumstances indicated that the pleadings before the court were written by an attorney and not by the *pro se* party. The cases do not involve any finding of actual ghostwriting and do not involve any attempt to punish the ghostwriting attorney. Instead the court issues a warning against ghostwriting, pointing out that it may be unethical and subject to punishment for contempt of court.[17]

Ghostwriting in the Western District

Research only found two cases from the U.S. District Court for the Western District of Virginia regarding ghostwriting. In *ADI Motorsports, Inc. v. Hubman*, No. 4:06CV00038, 2006 WL 3421819 (W.D. Va. 2006), Judge Kiser considered a request from a plaintiff to sanction a defendant for allegedly ghostwriting pleadings filed in connection with a motion to dismiss for lack of personal jurisdiction. Judge Kiser declined to do so, stating that if the pleadings were ghostwritten, they were probably ghostwritten by a member of the Florida Bar, and the court had no authority to discipline a matter of the bar from another state.[18] Perhaps most importantly, Judge Kiser explained that he had not held the defendant's pleadings to the less stringent *pro se* pleading standard, so if the defendant had submitted ghostwritten pleadings, she had derived no advantage.[19] Finally, since Judge Kiser had already determined that the court lacked personal jurisdiction over the defendant, any further dispute about ghostwriting would only have served to "drag out the litigation."[20]

In *Couch v. Jabe*, 2010 WL 1416730 (W.D. Va. 2010), Judge Turk considered an admittedly ghostwritten suit by a *pro se* prisoner in a dispute about access to a book. The issue before the court was whether the suit should be dismissed because of the existence of an already pending suit covering the same issue. Judge Turk decided that the suit should be dismissed, essentially mooting any dispute about ghostwriting.[21] In a footnote, however, the court explained,

> "[G]hostwriting" motions for a *pro se* plaintiff is contrary to the spirit of the Federal Rules of Civil Procedure and the privilege of liberal construction afforded to *pro se* litigants. . . . For future reference, if an attorney wishes to notify the court of parallel proceedings after a *pro se* party contacts him or her, counsel is encouraged to file a letter with the court instead of drafting pleadings. Further inquiry by the undersigned into plaintiff's allegations is presently unnecessary. However, any additional instances or allegations of ghostwriting would be appropriately adjudicated.[22]

Ghostwriting in the State Courts

Research did not locate any state court cases about ghostwriting.[23] Of course, trial court opinions from state courts are not reported as often as federal trial court opinions.

Based on conversations with local Judges in connection with this article, the author understands that at least some of the judges of the circuit courts of 23rd Judicial Circuit are considering entering a standing order regarding ghostwriting. Attorneys who practice in the 23rd Judicial Circuit should be alert for any such orders that might be issued.

Response to LEO 1874

All of the cases discussed above were decided before LEO 1874 was issued. At least one court has already cited to LEO 1874 and warned that ghostwriting pleadings will not be tolerated. In *In re Tucker*, No. 12–71910, 2014 WL 4346279 (Bankr. W.D. Va. 2014), Judge Black considered a Rule 11 motion brought by a *pro se* debtor. Judge Black rejected ghostwriting and specifically referenced LEO 1874 in a footnote:

> The Court accepts the Debtor's testimony that she received no undisclosed assistance on the Motion. However, given the nature of the Motion and the manner in which it was drafted, it raised the suspicion of having been "ghost-written." The Virginia State Bar recently released Legal Ethics Opinion

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[13] *Chaplin*, 303 F. Supp. 2d at 775.

[14] *Salamanca*, 2014 WL 18899 at *4 (citing *Chaplin*).

[15] *Stewart*, 186 F.R.D. at 344.

[16] *Id.* Westlaw did not reveal what, if anything, happened to the ghostwriting counsel.

[17] *See Greene v. U.S. Department of Education*, Civil No. 4:13cv79, 2013 WL 5503086 (E.D. Va. 2013) (Judge Doumar); *Sejas v. MortgageIT*, No. 1:11cv469 (JCC), 2011 WL 2471205 (E.D. Va. 2011) (Judge Cacheris); *Davis v. Bacigalupi*, 711 F. Supp. 2d 2010 (E.D. Va. 2010) (Judge Williams); *Davis v. Back*, No. 3:09cv557, 2010 WL 1779982 (E.D. Va. 2010) (Judge Williams) (companion case to *Bacigalupi*); *Clarke v. United States*, 955 F. Supp. 593 (E.D. Va. 1997) (Judge Doumar).

[18] *ADI Motorsports*, 2006 WL 3421819 at *6.

[19] *See id.*

[20] *Id.* at *7.

[21] *Couch*, 2010 WL 1416730 at *2.

[22] *Id.* at *1 n.1.

[23] The author consulted with the office of the legal ethics counsel at the Virginia State Bar regarding this article. That office was not aware of any state court opinions regarding ghostwriting pleadings.

GHOSTWRITING GUIDELINES

(Continued from page 9)

> 1874 ("LEO 1874") on the subject of "ghostwriting" for *pro se* litigants, finding it to be not objectionable in certain circumstances. To the extent that the practicing bar may intend to rely on LEO 1874 in the future to "ghost-write" in this Court, all counsel should be aware that this Court takes a different view. This Court agrees with those courts that find, at a minimum, the practice of ghostwriting transgresses counsel's duty of candor to the Court and such practice is expressly disavowed. *See, e.g., Chaplin v. DuPont Advance Fiber Sys.,* 303 F.Supp.2d 766, 773 (E.D.Va.2004) ("[T]he practice of ghostwriting will not be tolerated in this Court."); *In re Mungo,* 305 B.R. 762, 767–70 (Bankr.D.S.C.2003).

In re Tucker, 2014 WL 4346279 at *2 n.3.

Research has not found any other cases regarding LEO 1874 in any court in Virginia, state or federal. Of course, the LEO was issued less than six months ago, so there has not been much time for issues surrounding it to be litigated.

Conclusion

While the State Bar has found that ghostwriting, at least in certain circumstances, is ethically permissible, there are many reported cases that disapprove of the practice. Practitioners considering ghostwriting pleadings should also carefully review whether their efforts will be deemed to be making an appearance in the case. More importantly, counsel considering ghostwriting pleadings should carefully consider the possible ramifications if the Judge handling the case disapproves of the practice. Certainly, counsel should be aware of the opinions or orders on the issue from the court where the pleading is going to be filed. Finally, members of the Roanoke Bar should

Children attending **Santa at the Station** visit Santa's Sack to choose gifts for their parents.

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Santa At the Station - December 15, 2014

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