ROANOKE BAR ASSOCIATION

ROANOKE BAR REVIEW

Roanoke Bar Review September 2018

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SPOLIATION SANCTIONS BOTCHED BY VIRGINIA SUPREME COURT

BY CHARLES H. "TREY" SMITH, III, ESQ.

Last December, in Emerald Point, LLC v. Hawkins, *the Supreme Court of Virginia adopted a new standard for imposing sanctions for the spoliation of evidence. This issue features an article about the decision from the perspective of the plaintiffs' bar. The next issue will feature an article about the decision from the perspective of the defense bar.*

Of the six assignments of error potentially worthy to reverse the plaintiffs' verdict in *Emerald Point, LLC v. Hawkins*, 294 Va. 544 (2017), the spoliation issue would rank a distant fourth on the list of most consequential. The case had problems, but there was little need for the Supreme Court to consider the spoliation issue to reverse. There was less cause for the Court to undermine Virginia's historically capable standard for imposing sanctions when one party destroys evidence important to the other side.

Before *Emerald Point*, Virginia never required the aggrieved party to show that the evidence-destroying party acted intentionally or in "bad faith" to justify an appropriate remedy leveling the evidentiary playing field. For more than 200 years, trial courts in Virginia have competently balanced sanctions befitting both the harm caused *and* the motive of the destroyer within their "judicial discretion." The right to impose sanctions for spoliation is vested in the court's inherent power to redress conduct "which abuses the judicial process." *Chambers v. Nasco, Inc.*, 501 U.S. 23, 45–46 (1991).

I. There is nothing unique about *Emerald Point* to justify a higher burden before imposing sanctions for spoliation.

The *Emerald Point* plaintiffs were tenants of an apartment owned by the defendant. Over a period of months, the defendant responded unsuccessfully to multiple alarms of the carbon monoxide monitors in the plaintiffs' apartment by replacing batteries in the monitors, improperly securing a vent pipe with "zip screws," and ultimately replacing the gas furnace. Gas levels remained high after the furnace was replaced until the local gas company determined that the furnace vent for the adjoining apartment was leaking into the plaintiffs' attic. *Emerald Point*, 294 Va. at 549–50. Before trial, but with notice that the plaintiffs had been injured and were pursuing claims, the defendant threw away the furnace removed from the plaintiffs' apartment.[1]

At trial, the plaintiffs moved to sanction the defendant for disposing of the gas furnace (and photos of it) before the plaintiffs had an opportunity to establish that the furnace was a source of their carbon monoxide poisoning. The plaintiffs sought a spoliation sanction for the loss of the furnace evidence and asked the trial court for an instruction essentially establishing that the furnace was a source of their exposure. The trial court denied the motion but instead issued an "adverse inference" instruction permitting, but not requiring, the jury to infer that if the furnace had been available, it would have been detrimental to the party who disposed of it. *Id.* at 555-56. In explaining the basis for the instruction to the jury, the trial judge offered that the defendant "did nothing in bad faith" in tossing out the furnace. *Id.* at 556.

Seizing upon the trial judge's language as law of the case, the Virginia Supreme Court phrased defendant's assignment of error on the spoliation issue as follows: "whether, in the absence of an express finding that the responsible party acted in bad faith by failing to preserve evidence with deliberate intent to deprive the other party of its use at trial, a spoliation instruction is appropriate." *Id.* at 556-57.

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President's Corner

By J. Lee E. Osborne, Esq.

It is an honor to serve this year as President of the Roanoke Bar Association. As I look through the list of Past Presidents of the RBA, I see the names of many Woods Rogers partners and alumni and distinguished attorneys from other firms, all of whom dedicated their lives to service to the Bar and to the community in which we live. From Frank W. Rogers and his son, Bo Rogers, and grandson, Frank, to our past three Presidents—Joe Mott, Hugh Wellons, and Kevin Holt—a high standard of leadership has been set. I will do my best to keep us on the path of progress and to lead us to capitalize on the opportunities presented to us.

In doing so, I would like to thank in advance the members of the RBA Board and Executive Committee for the service they will perform this year. I also wish to recognize and thank Diane Higgs, the RBA's Executive Director, for the work she has done and will do in keeping our ship on course and in attending to the many tasks involved in running the RBA. I do not believe anyone could do this job without her, and I appreciate her support this year.

Several initiatives started under the leadership of our recent past Presidents will continue this year, including:

(1) The renewed focus on meeting the need for pro-bono legal services in our community and organization of the process by which such services can be delivered. Devon Slovensky will head up that effort as chair of the Pro Bono Committee;

(2) The expansion of our Barrister Book Buddies program through our partnership with Turn the Page (we are in the process of signing up volunteers right now!) and renewal of the Peace of Mind Project providing free basic estate planning services to some of our first responders. Lauren Ellerman and Macel Janoschka will head up that effort as co-chairs of the Services Committee; and

(3) Reaching out to the Salem-Roanoke County Bar to explore opportunities for coordination of our involvement with the Rule of Law Project and our judicial endorsement processes. Christen Church is heading up the Bylaw Audit Committee in this effort and in addressing the potential changes needed to our bylaws to accommodate any change in the current judicial endorsement process.

We already have an exciting year of programs ahead of us thanks to the efforts of President-Elect and Program Committee Chair Patrick Kenney. At our September meeting, we heard from Ralph Berrier, a local author and *Roanoke Times* columnist. Future speakers will include Thomas Cullen, the new U.S. Attorney for the Western District of Virginia; The Honorable Michael Urbanski, Chief U.S. District Court Judge for the Western District of Virginia; and Beth Doughty, the Executive Director of the Roanoke Regional Partnership. And that is just the Fall lineup!

Amy Geddes, our Membership Committee Chair, will continue efforts to maintain and grow our membership roster. If you know of any attorneys in the City of Roanoke who are not members of the RBA, please do them a favor and invite them to come to a meeting and join. Please check out our website, and if you have not liked us on Facebook, do so! Nancy Reynolds will chair the Continuing Legal Education Committee this year and has her CLE schedule already mapped out, including a trust-and-estates presentation on October 2 by Tim Guare, a pro bono training ses-

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Views From the Bench: Judge Elizabeth K. Dillon

By D. Paul Holdsworth, Esq.

If one were to poll 100 lawyers and judges and ask them to identify a word that describes the practice of law, I would venture to say that the word "enjoyable" is not even among the top three results. We have all read the statistics or have generally seen the arguments that anxiety, depression, and suicide are prevalent in the legal profession, and more so than many other professions. Indeed, too often the negative adjectives of "stressful," "time consuming," "difficult," and "exhausting" overshadow the incredibly rewarding aspects of practicing law.

Quite refreshingly, Judge Elizabeth Dillon refuses to let the potentially challenging aspects of the legal profession distract her focus from the positives. After meeting with her for this article, the predominant theme of our conversation centered on how the practice of law is, and should be, enjoyable. For Judge Dillon, endeavoring to enjoy the law is more than a noble or idealistic theory. It is a sincere and genuine pursuit.

The idea of a career in the law was first pitched to Judge Dillon by her political science professor at Lenoir-Rhyne University. She was an English major, thinking that she might become a teacher, and she otherwise had no family connections to the legal profession. Intrigued by the prospect of a career in the law, Judge Dillon began working part-time with a small firm in Hickory, North Carolina. After graduating from law school at Wake Forest in 1986, she joined Woods Rogers and worked primarily in private practice until her appointment to the federal bench in 2015.

When asked about her first three and a half years as a judge, Judge Dillon remarked that she finds her job very interesting and intellectually challenging. She continues to learn something new every day. Among the most enjoyable aspects of Judge Dillon's role is presiding over naturalization ceremonies. She explained that while the courtroom is often viewed as a controversial, contentious, or intimidating place, naturalization ceremonies are an opportunity for the courtroom to be filled with joy and gratitude. Among the more challenging aspects of being a federal judge is criminal sentencing. She explained that while sentencings are difficult by their nature, the difficulty is compounded by the weight of responsibility on the judge's shoulder to achieve justice for the victims while also making sure the punishment is "sufficient but not greater than necessary." She explained: "Ideally, I would love to be able to look through the crystal ball and see what changes the person will make going forward, but that is not possible. I just try to make the best decision I can, given the facts, the law, and the sentencing guidelines." Aside from sentencing, Judge Dillon reiterated that each case presents its own substantive challenges. She noted: "It is a rare case where the decision is clear. There just aren't many bright lines."

Judge Dillon reiterated the seemingly universal sentiment that the Roanoke bar is distinguished by its collegiality, and the relationships between the bar and the bench. She reiterated that the practice of law is especially enjoyable in this area of the country, and hopes that the bar feels that way as well.

In terms of substantive suggestions for the bar, Judge Dillon remarked that lawyers should never let an opportunity pass to educate and persuade the court. It is critical for lawyers to know the pertinent rules, standards of review, and applicable law. In writing a brief, they should contemplate what the court will need to make a decision

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My Superlative Case

By Raphael E. "Ray" Ferris, Esq.

This article is the latest installment in a series of musings from RBA members about their superlative cases, legal counseling opportunities, or other law-related endeavors that remind us of why we became lawyers. The RBA invites its members to share stories about their superlative cases.

It was 10:00 p.m., New Year's Eve, when my cell phone rang from a number that I did not immediately recognize. I was in Youngstown, Ohio, to ring in the New Year with my wife, Terri, and our family. The voice on the other end of the phone was muffled. I didn't recognize it. It sounded like he said: "She's here. I can't leave. What should I do?" Then, before I could respond, the line went dead.

I didn't give the phone call much thought. Prank call or wrong number I assumed. We rang in the New Year and fought a snowstorm as we returned to Roanoke the next day. Terri asked me if I had any more thoughts about the phone call. "What phone call? Oh, yeah. Wrong number, I guess."

On January 4, I got a call from a not-so-happy client we'll call "Abe." He explained that he called me New Year's Eve to tell me that "Angel"—the woman who had just two months earlier accused him of attempted rape and abduction—had showed up at his house that night to party. All of a sudden, my defense of Abe took a most unexpected turn.

Abe was a businessman who worked hard and partied even harder. It was not uncommon for him, after a night of entertaining friends and hardy drinking, to call a pilot friend who would rent an aircraft and fly him and several friends, usually all female, to Atlantic City for a continuation of the festivities. For the previous six months, however, Abe's constant companion/"arm candy" had been Angel. Abe and Angel were well paired: He was tall, dark, and handsome; and she was tall, blonde, and beautiful. Both had quite the reputation for living *la vida loca.*

Angel, however, was also explosive, but Abe enjoyed the unpredictability. Unfortunately, that unpredictability turned into a nasty assault that left Abe bloodied after Angel turned her claw-like fingernails on him. Abe had the lack of foresight to threaten to call the police, which prompted Angel to preempt him by reporting an alleged attempted abduction and sexual assault to the police.

Angel was a tall lady who worked out regularly. Abe, on the other hand, went to the gym because he thought it was a cool place to hang out and meet females. The police believed Angel. A forensic evaluation revealed evidence of sexual intercourse, but the only evidence of force was Angel's alleged resistance. Angel, to her credit, admitted consensual sex earlier in the day and told the police that she was able to resist Abe's advances and eventually get away from him.

Abe was denied bond, and we appealed the denial to circuit court. After a two-hour bond hearing in circuit court, the judge set a $100,000 bond with conditions that essentially confined Abe to his home and his place of business. His movements were monitored by an ankle-worn GPS device.

At the preliminary hearing, we extracted all kinds of useful detail from Angel about the couple's whereabouts on the evening of the alleged assault. We were very successful in getting Angel to be specific. We then hired an expert who analyzed where Abe's cell

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Update on Virginia State Bar Actions and Programming:

By Eugene M. Elliott, Jr.,Esq and K. Brett Marston, Esq.

As your 23rd Judicial Circuit representatives, we appreciate the chance to keep you updated on activities and programs of the Virginia State Bar. Here are some of the major items of current interest and importance.

- Leonard C. Heath Jr. of Newport News is the VSB's new president. He heads a state agency that regulates and supports 50,000 Virginia lawyers, and he is the first attorney from the Virginia Peninsula to serve in this capacity in over 50 years. He was sworn in as the 80th president of the VSB on June 15, 2018, during the VSB's Annual Meeting in Virginia Beach. He is a partner at Heath, Overbey, Verser & Old PLC. He has served in numerous positions in the bar dating back to 1989.
- Marni E. Byrum of Alexandria is the VSB's new president-elect. She will succeed President Heath for the 2019-20 term. Byrum has served in numerous positions in the bar dating back to 1984.
- With the passage of SB 672 by the General Assembly, a "small group" may now be defined for health-insurance purposes to include sole practitioners so long as they work for 30 hours per week or more. This change allows solo lawyers to obtain health-insurance coverage for the historically lower rates and better coverages available to law firms with 2–50 employees.
- Wellness initiatives took center stage at the VSB Committee on Lawyer Discipline's 2018 Disciplinary Conference here in Roanoke July 26 and 27, where more than 150 lawyers and lay members of boards and committees gathered for training, education, and professional fellowship. Attendees of the conference discussed finding balance between the bar's primary mission of protecting clients of Virginia lawyers through the self-regulation of the profession and the expanding focus on lawyer well-being.
- The VSB's Young Lawyers Conference won the State Division, Class A first place award in the Comprehensive Category at the American Bar Association Young Lawyers Division's 2018 Awards of Achievement program in Chicago, beating out other large state bars including Texas, Florida, California, New York, Michigan, Illinois, and Georgia. The Comprehensive Category pits young lawyer groups from around the U.S. for their projects occurring during the previous bar year. Competitors are judged by originality of the programs, impact of the programs, involvement of the greater bar, budget size, and balance of programs for new and experienced lawyers, among other criteria. The judges consisted of young lawyer leaders from around the country. This is the YLC's first win in this category in over a decade. We appreciate the hard work of our local young attorneys, including Cate Huff, who represents the 8th District (and thus the 23rd Judicial Circuit) on the board of governors.

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Roanoke Law Library News and Information

By Joseph Klein, Law Librarian

This fall will mark my 14-year anniversary at the Roanoke Law Library. I have truly enjoyed serving as the Law Librarian, and working with the wonderful legal professionals of the Roanoke Bar Association is one of the principal reasons it is so enjoyable. Roanoke is truly a special place to live and, in my opinion, the fall is when it shines the brightest. As the leaves change from greens to radiant reds, oranges, and yellows, these mountains become truly magical.

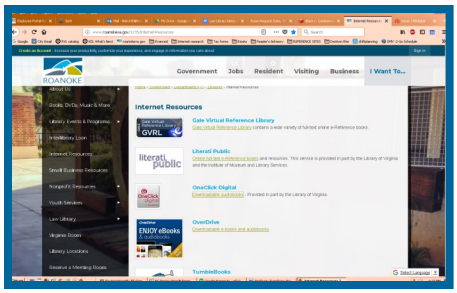
Lexis

Speaking of change, I am excited to announce some changes at the Roanoke Law Library.

After over a decade of providing free access to Westlaw, we recently made the decision to switch to Lexis Advance for our legal-research database. Change is always uncertain, but I am excited that we are still able to continue providing free, high-quality access to such a powerful legal research tool. I am also excited that Lexis Advance provides access to several of the most used resources that were not previously available electronically at the Roanoke Law Library, including *Michie's Jurisprudence* and *Virginia Forms*. In addition, Lexis Advance provides access to Virginia Circuit Court cases and Virginia Court of Appeals cases, some of which were not available on Westlaw.

You will still be able to access all the same federal and state statutes and case law as before, and you will be able to Shepardize cases and statutes to ensure that they are still good law. I am always available to provide one-on-one training in using Lexis Advance, or any other Roanoke Law Library resource. Feel free to stop by and check out Lexis Advance; or call me at 853-2268, and I will be glad to answer any questions you might have or to set up an appointment for a one on one tutorial.

General Library Databases



Free access to Lexis Advance is only available at the Roanoke Law Library, but your Roanoke Valley Libraries card provides free access to many other powerful electronic databases. The electronic-resources page lists all the databases that you can access for free with your card. One of my favorites is *Zinio*, which provides access to over 100 current magazines. You can view these magazines at home on your computer or tablet, or anywhere on your phone. *Newsbank* is also a wonderful resource that provides access to every issue of *The Roanoke Times* from 1990 to current. To see a list of the available databases, go to our website at http://www.roanokeva.gov/1176/Internet-Resources. It is also possible to access Ancestry.com at all Roanoke Public Libraries branches, including the Roanoke Law Library. If you have any questions about any of the wonderful resources provided by the Roanoke Public Library, please contact me.

Update on Virginia State Bar Actions and Programming

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- It has been two years since Free Legal Answers, a project of the American Bar Association, got up and running in Virginia, and it's on a roll. Over 1,400 low-income clients have registered to have their legal questions answered by 315 registered volunteer attorneys. They've asked 1,250 total questions and received 1,181 answers – a 94 percent attorney response rate. Roanoke lawyers can start Year Three off right by registering today at Virginia Free Legal Answers, https://virginia.freelegalanswers.org.
- The VSB Mandatory Professionalism Course is offered September 12, 2018, in Richmond at the Greater Richmond Convention Center from 8:00 AM until 4:00 PM. Check the VSB website for details.
- The Fall Meeting of Section, Conference, and Committee Chairs meets in Richmond on September 29, 2018.
- The Executive Committee of the VSB meets again in Newport News on October 25, 2018. Contact Gene Elliott if you have questions or suggestions regarding the meeting. The Council of the VSB meets in Newport News on October 26, 2018. Contact Brett Marston and/or Gene Elliott if you have questions or suggestions regarding the meeting.

Gene Elliot is a solo attorney, and Brett Marston is a partner at Gentry Locke.

President's Corner

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sion in January at Woods Rogers, and a four-hour seminar planned for March to include some ethics credits. Justin Simmons will continue to do excellent work as Chair of the Communications and Library Committee, publishing the *Roanoke Bar Review* and bringing you the news and developments in the Roanoke legal community. Again, thanks to all of the Board members for the dedication of their time and energy in support of the RBA.

Once again we will provide our members with a number of service opportunities through the RBA and the Roanoke Law Foundation. Please consider participating in the Barrister Book Buddies and Turn the Page programs, the Peace of Mind Project and the Rule of Law Project sponsored by the RBA, as well as the Roanoke Law Foundation's Santa at the Station event to help children and families in need in our community at Christmas time. At the Virginia State Bar meeting this past June, I accepted on behalf of the Roanoke Bar Association an Award of Merit for the You and the Law program organized the past several years by Past President Tom Miller. We hope to continue this program designed to increase public awareness of and familiarity with our courts and legal system. We have an obligation as members of the legal profession to serve the community, and the RBA provides a number of opportunities to do just that. I encourage you to get involved this year and support these worthwhile activities.

We have another full and exciting year ahead of us. With your help, the RBA will continue to provide worthwhile and meaningful opportunities for involvement and service in our community and for our profession.

Lee Osborne is a partner at Woods Rogers PLC.

The McCammon Group

is pleased to announce our newest Neutral

Hon. Malfourd W. "Bo" Trumbo (Ret.)

Retired Judge, 25th Judicial Circuit Court of Virginia

The Honorable Bo Trumbo has joined The McCammon Group after twenty-seven years of distinguished public service. He most recently served for thirteen years as a Judge of the 25th Judicial Circuit Court, including several years as Chief Judge. Prior to his tenure on the bench, Judge Trumbo was elected to serve in the Virginia General Assembly, first as a Member of the House of Delegates and then as a Member of the Senate, throughout which time he also maintained a successful private law practice in western Virginia. Among his many credentials, Judge Trumbo is a former member of the Commission on Courts in the 21st Century, the Advisory Committee on Intergovernmental Relations on the Condition and Future of Virginia Cities, and the Blue Ridge Economic Development Commission. He now brings this distinctive record of service and leadership to The McCammon Group to serve the mediation, arbitration, and judge pro tempore needs of lawyers and litigants throughout the Commonwealth.

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Spoliation Sanctions Botched by Virginia Supreme Court

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As postured, the assignment allows at least six ways to answer "no." Unsurprisingly, the Court held that the trial court erred in submitting the adverse inference instruction, stating: "[T]he evidence must support a finding of *intentional loss or destruction* of evidence in order to prevent its use in litigation" before a spoliation instruction is appropriate. *Id.* at 559 (emphasis added). This has never been the law, nor should it be the law.

II. Spoliation is the intentional *or negligent* destruction of evidence.

While the despoiler's[2] motive is undeniably relevant, motive is less important when great prejudice is suffered by the party deprived of missing evidence. Whether evidence is lost accidentally, or destroyed intentionally, the aggrieved party suffers the same harm. Trial courts are best suited to balance the motive versus the harm on a case by case basis since (as acknowledged by the Court in *Emerald Point*), the analysis is "highly fact specific." *Id.* "[T]he destruction of potentially relevant evidence occurs along a continuum of fault." *Greenwood v. Mepamsa*, 2013 Ariz. App. Unpub. LEXIS 162, at *48–50 (Ariz. Ct. App. Feb. 7, 2013); *accord WESCO Distrib., Inc. v. ArcelorMittal Ind. Harbor LLC*, 23 N.E.3d 682, 702–03 (Ind. Ct. App. 2014); *Rest. Mgmt. Co. v. Kidde-Fenwal, Inc.*, 986 P.2d 504, 508–09 (N.M. Ct. App. 1999).

The Virginia Supreme Court has rarely been tasked to reverse a trial court's spoliation sanction as evidenced by *Emerald Point*'s reference to only two preceding Virginia decisions—*Allied Concrete Co. v. Lester*, 285 Va. 295 (2013), and *Gentry v. Toyota Motor Corp.*, 252 Va. 30 (1996). In *Allied Concrete* (the "I ♥ hot Moms" case), the Court upheld sanctions imposed by the Charlottesville trial court for plaintiff's intentional misconduct, and in *Gentry* (where plaintiff's expert destructively tested the subject Toyota's throttle cable) the Court held that dismissal of plaintiff's case was too severe a sanction for the expert's "deplorable" conduct in the absence of bad faith.

The *Gentry* holding aptly reflected the Court's historical reliance upon the discretion of trial courts to impose spoliation sanctions: "Courts often impose sanctions when a litigant or his attorney has acted in bad faith. The purpose of such a sanction is to punish the offending party and deter others from acting similarly." *Gentry*, 252 Va. at 34. Virginia trial courts have proven proficient at protecting the judicial process with spoliation sanctions in a centuries-tested framework.

Spoliation of evidence has been recognized in Virginia courts since the 1700s. *See, e.g.*, *Austin v. Consol. Coal Co.*, 256 Va. 78 (1998); *Gentry*, 252 Va. at 30; *Neece v. Neece*, 104 Va. 343 (1905); *Lee v. Tapscott*, 2 Va. 276 (1796); *Yates v. Salle*, 1792 Va. LEXIS 4 (June 1, 1792). "The textbook definition of 'spoliation' is the intentional destruction of evidence. However, spoliation issues also arise when evidence is lost, altered or cannot be produced. *Spoliation encompasses conduct that is either intentional or negligent.*" *Wolfe v. Va. Birth-Related Neurological Injury Comp. Program*, 40 Va. App. 565, 581–82 (Va. Ct. App. 2003) (emphasis added; internal citations omitted).

Emerald Point did not discuss the standard applied by the Virginia Court of Appeals in *Wolfe* or reference the case at all. The decision suggested, inaccurately and without review of Virginia cases, that imposition of an adverse inference sanction for spoliation, without intentional misconduct or bad faith, was an issue of first impression in Virginia. *Emerald Point*, 294 Va. at 556–57. The Virginia Supreme Court also ignored reference to the fact that the

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Views From the BENCH: Judge Elizabeth K. Dillon

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and write an opinion. Attorneys should use their time wisely, both in written and oral advocacy. They should hone in on the most important issues, spend the most time on the stronger points of their case, and emphasize and expound (as opposed to repeating arguments made previously, on brief or otherwise). It is also important for attorneys to have a strong knowledge of the record and the main cases at issue in a particular case.

When asked what one trait every lawyer should have, Judge Dillon unequivocally said, "Integrity." She explained: "If you lose your credibility, it is incredibly hard, if not impossible, to overcome. It certainly will make your career less enjoyable. If people can't trust you, you've lost the essence of what it is to be an attorney."

Judge Dillon then shared with me a quote from Martin Luther King, Jr., that is framed on her desk. The quote and frame were given to her by Judge John Gibney of the United States District Court for the Eastern District of Virginia, a dear friend and colleague. The quote's message is simple but powerful: "The time is always right to do what is right."

In closing, Judge Dillon reiterated the legacy she feels every day as she comes in to work. She acknowledged that she was preceded by judges who had brilliant legal intellect, but who also established a tradition of professional excellence and a welcoming atmosphere to the Western District of Virginia. She hopes to keep that legacy alive. She wants the lawyers and individuals who appear in her court to feel welcomed. Judge Dillon hopes those individuals feel that regardless of whether or not they liked the outcome, she tried to be fair and endeavored to do what is right.

D. Paul Holdsworth is an associate at Isler Dare, P.C.

In Memoriam

The following are the Association's losses since May 1, 2018:

Joseph Dandridge Logan, III
(July 22, 1940—May 30, 2018)

In grateful recognition of the contributions of Mr. Logan to our profession, and his contributions to our Association, the Association laments his passing.

RBA Big Lick Summer Social 2018

On July 26, 2018, the Roanoke Bar Association had its 2018 Summer Social. The annual event is a well-deserved opportunity for RBA members to get together in a relaxed atmosphere during the warm (and hopefully slower) summer months. For the first time, the RBA held the event at Big Lick Brewing Company on Salem Avenue in downtown Roanoke. About two years ago, Big Lick expanded into a new, large, and beautifully done brick building (the former location of the Habitat for Humanity ReStore). Big Lick is an excellent example of the downtown revitalization happening in the Star City.

Over 40 lawyers, judges, summer associates, and law clerks filled the special event room at Big Lick. Attendees enjoyed the rich variety of beers brewed on-site and the provided snacks and hors d'oeuvres. Thanks go out to the sponsors—Frith, Anderson & Peake; Gentry Locke; LeClairRyan; Spilman Thomas & Battle; and Woods Rogers—for making this event possible.

Devon Slovensky and Lee Osborne

Kevin Holt and Andy Gerrish

Tommy Strelka and son

Bob Ziogas, Devon Munro and Steve Higgs

Judge Roe and Risa Katz

Dan Frankl and Cerid Lugar

Bill Callahan, Judge Black and Peter Katt

My Superlative Case

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phone had been that night, and the results were clearly exculpatory. But we all know that's not enough. Then came the phone call on New Year's Eve.

Angel had showed up unexpectedly at Abe's house New Year's Eve. She knew he couldn't leave; she had attended the bond hearing, and so knew about the GPS monitoring.

Abe explained that Angel admitted she had set him up for fear he'd go to the police and report her fingernail assault on him. However, when Angel's anger subsided, her plan was to tell the police that she now believed that she misinterpreted Abe's intentions and that she did not want to go forward with the criminal charges against him. "But then, your lawyer hired that d***n b***h to come to court and take down every word I said and now if I go back to the police I'll go to jail."

Abe described three days of sex, drugs, and alcohol while he was being held hostage in his own home. Needless to say, I was skeptical. But if he was telling the truth, we needed video evidence of Angel's "confession."

"Will she come back to the house?" I asked.

"She's coming tomorrow night at 8:00 p.m." Abe responded.

All of this occurred before surreptitious digital-video recording was readily available. It took some expertise. So I hired a private investigator to "bug" the house. I instructed Abe to be sure to sit in a position where the GPS box on his ankle could be seen clearly in the video. The next night, Angel didn't disappoint.

After the strip tease, Angel went into detail about her plan to take care of Abe's businesses for him while he was incarcerated. She then closed with, "You wouldn't be in this f*****g mess if your smart-a****d lawyer hadn't hired that g*d-d****d b***h to write down everything I said in court."

Reciprocal discovery certainly has its benefits. I don't think I ever enjoyed delivering discovery to the Commonwealth's Attorney as much as I enjoyed delivering that video the next day. The *nolle prosequi* was quick to follow.

Lesson learned: Just when you think you've heard it all, remember that you haven't. Some people *really are* not guilty, or at least not guilty of what they are charged with. Codifying stupidity has challenged mankind for centuries.

Note: Names have been changed to protect the innocent/stupid.

Ray Ferris is a partner at Ferris & Eakin, P.C.

SPOLIATION SANCTIONS BOTCHED BY VIRGINIA SUPREME COURT

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majority of jurisdictions in the United States that have considered the question have found that bad faith is *not* a prerequisite to an adverse inference instruction.[3]

III. Recognizing an adverse inference for spoliation in the absence of bad faith is *not* "an issue of first impression" in Virginia.

When 39 year-old Ransom Aistrop was found dead in the poorly ventilated mine shaft of his employer, Blue Diamond Coal Company, in Lee County in 1941, his widow sought workers compensation benefits on the basis that Aistrop was exposed to a lethal dose of carbon monoxide after a blasting operation. *Blue Diamond Coal Co. v. Aistrop*, 183 Va. 23 (1944).[4] In denying Aistrop's claim, Blue Diamond maintained that Mr. Aistrop's death "was due to natural causes," rather than a work-related condition like exposure to poisonous gas. However, for "unexplained reason[s]" the coal company failed to record air samples from the mine until the day after Aistrop died, and the company physician—who advised Aistrop's widow that an autopsy would conclusively determine the cause of death—failed to arrange the autopsy despite soliciting written authorization from Mrs. Aistrop. *Id.* at 29. ("Just why a competent surgeon was not employed for this purpose is not explained.").

In affirming Mrs. Aistrop's jury verdict, the Virginia Supreme Court recognized an adverse inference for the coal company's failure to procure this evidence: "The failure of these agents of the company to procure this vital evidence, which was thus made available to them, *justified the inference that they at least thought it would be adverse* to their principal, and feared that it would fasten upon someone the responsibility for this fatal injury." *Id.* at 29 (emphasis added). There was no suggestion of bad faith or deliberate intent by the coal company to deprive Mrs. Aistrop of the evidence. To the contrary, the Court imposed the inference when the despoiler's conduct was at worst "unexplained."

IV. *Emerald Point* was "mis"guided by Advisory Committee Notes to FRCP 37(e).

Federal Rule of Civil Procedure 37(e) outlines measured sanctions for a party's failure to preserve electronically stored information, and the Advisory Committee's note that the Virginia Supreme Court found to be "persuasive" in *Emerald Point* specifically states that "[t]he new rule applies *only* to electronically stored information." Fed. R. Civ. P. 37(e) advisory committee's notes to 2015 amendment (emphasis added). It is beyond the scope of this article to address why federal courts have employed specific guidelines for preserving, and failing to preserve, electronic data. It is sufficient to point out that gas furnaces are not electronically stored. The Advisory Committee's note has not altered how federal courts have weighed sanctions for claims of spoliation of cars, boats, stoves, or ladders.

There is abundant, well-reasoned federal authority on spoliation to which the *Emerald Point* court should have turned for guidance (had it been necessary) beginning, for example, with *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995), a wrongful-death case arising from a boat explosion (cited in the Fourth Circuit over 250 times). An adverse-inference instruction was given in favor of the defendant after the plaintiff's expert "virtually attacked the boat with a chain saw and sledge hammer" during his investigation. *Id.* at 155.

Vodusek claimed on appeal that "the defendants must show that she acted in bad faith before the jury can be permitted to draw an adverse inference" and that "there was not a shred of evidence that [she] or her agents, acted willfully, or in bad faith" in allowing the destructive testing. *Id.* at 156. The Fourth Circuit summarily disagreed, holding: "We reject the argument that bad faith is an essential element of the spoliation rule." *Id.*

V. A proper spoliation analysis must balance the harm and the motive.

Emerald Point gave zero consideration of the harm or prejudice suffered by plaintiffs as a result of the disposal of the gas furnace. The decision provides no guidance for future cases in which a remedy is necessary for one party deprived of evidence by the simple negligence of the other side. By comparison, the Fourth Circuit has routinely considered and imposed sanctions far more stringent than an adverse inference in cases of inadvertent or negligent spoliation—including confirming dismissal of a claim for plaintiff's negligent failure to preserve an allegedly defective automobile.

> [S]ometimes even the inadvertent, albeit negligent, loss of evidence will justify dismissal because of the resulting unfairness: "The expansion of sanctions to the inadvertent loss of evidence recognizes that such physical evidence often is the most eloquent impartial 'witness' to what really occurred, and further recognizes the resulting unfairness inherent in allowing a party to destroy evidence and then to benefit from that conduct or omission."

Silvestri v. GMC, 271 F.3d 583, 593 (4th Cir. 2001) (quoting *Kirkland v. New York City Housing Auth.*, 236 A.D.2d 170, 173 (N.Y. App. Div. 1997)). "[E]ven when conduct is less culpable, dismissal may be necessary if the prejudice to the [party] is extraordinary, denying it the ability to adequately [make] its case." *Id.* at 593.

Emerald Point got the spoliation analysis wrong. The decision burdens trial courts and aggrieved parties to prove willful or "intentional loss or destruction of evidence" before an adverse-inference instruction can be proposed to level the evidentiary playing field—in *any* case, regardless of the prejudice suffered. This standard, which expressly excludes negligent spoliation, will benefit spoliators and the capricious at the expense of innocent adversaries. Until reversed or remedied by legislative action, the holding will render trial courts and litigants aggrieved by evidentiary abuses without a remedy.

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1 The opinion is silent on facts demonstrating the defendant's actual knowledge of relevance of the furnace prior to disposing of it. Those facts included: (1) the defendant anticipated litigation one year prior to destroying the furnace when its property manager sent an email stating that the plaintiffs were "young kids and it looks like they are trying to take advantage of the situation. We just want to cover all our tracks in case it ends up in court"; (2) the plaintiffs' counsel advised the defendant of representation of the plaintiffs eight months before the furnace was destroyed; and (3) the defendant destroyed the furnace (and pictures of its relevant parts) three days before the liability carrier denied the plaintiffs' claim. (These facts were stated in the Joint Appendix in the matter at 19, 50, 69, 74–75).

2 Spoliators should not benefit from their wrongdoing. "This policy is captured in the maxim *omnia presumuntur contra spoliatorem*, which means, 'all things are presumed against a despoiler or wrongdoer.'" *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 284 (E.D. Va. 2001).

3 The supporting cases were summarized for the Court in the Brief of *Amicus Curiae* Virginia Trial Lawyers Association on behalf of Appellee, Hawkins, *et al.*

4 There is a perverse symmetry in comparing *Emerald Point* to *Blue Diamond Coal* given both considered the loss of causation evidence proving injuries caused by carbon monoxide.

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