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**The views expressed in the *Roanoke Bar Review* do not represent the policy or carry the endorsement of the Association unless specifically noted.**

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## THE ROLE OF THE ADMINISTRATIVE LAW JUDGE

BY THE HONORABLE ROBERT S. HABERMANN

In an article published in 1995, William E. Adams wrote that "one cannot read a newspaper or listen to a newscast without realizing that judges are affecting human life more deeply, and on more matters, than ever before in our history." His observations remain constant today. I believe that judges affect the lives and freedom of the American people on a greater scale than any other group of professionals.

Perhaps no other tribunal in the United States touches more citizens than the administrative law judges assigned to the Social Security Administration. If a citizen is ever to have "a day in a federal court," it will most likely be before an administrative law judge. Despite the fact that these judges heard over 3 million cases in the prior five years, they are probably the most invisible judges in our Nation's federal judiciary. *U.S. News & World Report* once referred to them as the "hidden judiciary." To most Americans, the administrative law judge's role remains a mystery.

The purpose of this article is to describe the role of the administrative law judge in the disability adjudicative process. In addition, I will mention some personal reflections and provide a few practice tips.

### ADMINISTRATIVE LAW JUDGES

In his textbook, *Administrative Law*, Professor Kenneth Culp Davis noted that the first administrative hearing officers utilized by the federal government may have been Continental Army officers who, in 1786, determined which soldiers were "disabled during the late war," and customs officers who, in 1789, were authorized to "estimate the duties payable" on imports.

The creation of the current corps of federal administrative law judges stems from the Administrative Procedure Act (APA) enacted in 1946. During the succeeding decades, the APA has been expanded and made applicable to most individuals and businesses that have issues with the federal government. When a judge holds an administrative hearing under the APA, he or she functions as an independent judicial officer. In the federal government today, there are over thirty federal agencies that use approximately two thousand administrative law judges. These judges adjudicate more cases than all of the other federal courts combined.

For 14 of my 25 years as a judge, I was assigned to the Office of Disability Adjudication and Appeals, which is presently situated on Jefferson Street in downtown Roanoke. While on the bench, I heard cases involving Social Security Disability Insurance Benefits, Supplemental Security Income (SSI), and Medicare reimbursement cases, among other programs. In fiscal year 2015, the judges assigned to the Roanoke hearing office heard and decided 3,733 cases.

### THE SOCIAL SECURITY DISABILITY ADJUDICATION PROCESS

A claimant filing for social security disability insurance benefits must follow a multi-tiered administrative process. After a claimant applies for benefits at the local Social Security District Office, the matter is assigned to the Disability Determination Service (DDS), a state agency. The DDS gathers up and reviews the medical evidence of record and issues an initial determination of eligibility. If a claimant is found to be ineligible and is denied for a second time by the DDS following a request for reconsideration, he or she may ask for a hearing before an administrative law judge.



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## PRESIDENT'S CORNER

BY HUGH B. WELLONS, ESQ.



I am honored and excited to be the President of the Roanoke Bar Association this Bar year. I begin with thanks to Cathy Caddy, who toiled over our Association for so many years and tried to prepare me enough to avoid embarrassing myself or the RBA. Many past presidents have also helped point me in the right direction, including Joe Mott, Rich Maxwell, Stephen Lemon, and old friends Judge Rogers, Doug

Densmore and Lori Thompson. They all set examples impossible to reach. Kevin Holt has prepared a wonderful schedule of speakers for our meetings, starting with the "Factory Man," Mr. John Bassett, III. Most of the hard work was already done by others.

We forge ahead now with a new executive director, Diane Higgs. She is already a positive force in the RBA. My major task, according to Joe, Rich, Cathy, and others, is to help Diane transition, while not mucking things up too much. The help, so far, is almost all from, not to, Diane.

This year I will press a concept that most of our members embrace: service. What we do is important to us, our clients, and our families. When we provide service outside our normal, paying practice, pushing our comfort zones, we occasionally accomplish great things for our community. Many in this Association do that, but I provide an example today outside our Bar.

"This American Life," a radio program broadcast by WVTF, recounts stories along a theme. On August 29, the theme was "Deep End of the Pool."\* One story involved Jack Bailey, a 64 year old personal injury lawyer in Louisiana. It was a shock to Bailey, and an affront, when a local judge randomly assigned him to defend a young Mr. Hardy against a charge of armed robbery. The case seemed open and shut. The robbers wore masks, but one of them left a hat at the scene. DNA was found in the hat, and it matched Hardy's. Hardy had a prior felony conviction, so he was arrested and placed in jail.

Bailey fought the assignment, ignoring the pleadings until he was forced to act on the case. Reluctantly, he met the defendant and was shocked. He expected Hardy to proclaim his innocence, but Bailey did not expect to believe him! He also accepted Hardy's claim, later confirmed by others, that Hardy almost always wore a hat. Hardy would wear a hat until he tired of it, and then sell it, give it away or trash it. Many hats floated around Hardy's neighborhood with his DNA on them. Hardy, with his previous unpleasant experience with the justice system, wanted to plead guilty for a lesser sentence. Bailey talked Hardy out of it many times.

Bailey dug in, reading books and watching old VHS tapes to recollect criminal procedure. He was blustery and difficult in motions prior to trial. He created unexpected work for the prosecution on what it believed was a simple case. Bailey discovered just before trial that the hat contained two persons' DNA, and that was all the prosecution had to tie Hardy to the crime. At trial, the prosecution dismissed the case. Bailey was upset, because he was prepared for trial! If he'd allowed the client to plead or if he had not been difficult and prepared, who knows if Hardy would have found justice?

It's not only in pro bono that we find our hidden importance. It might be in reading to children, drafting wills for first

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## JOHNSON V. UNITED STATES: THE "FAILED ENTERPRISE" OF THE RESIDUAL CLAUSE

BY ALLISON WEISS, ESQ.

In June 2016, prisoners filed more than seven times the number of habeas corpus petitions under 18 U.S.C. § 2255 that they had filed in all of 2015. We have a recent Supreme Court decision, *Johnson v. United States*, 135 S. Ct. 2551 (2015), to thank for the deluge. *Johnson*, penned by the late Justice Scalia with his usual panache, does not pull any punches: "It has been said that the life of the law is experience. Nine years' experience . . . convinces us that we have embarked upon a failed enterprise." *Id.* at 2560. The decision is important for anyone who practices criminal law in federal court. Why should you care about this decision, which has resulted in a cascade of § 2255 petitions, filed generally by federal pro se inmates to collaterally attack their federal convictions and sentences? Because the reverberations from *Johnson* are far reaching, and the decision conforms to a broader trend in criminal law circumscribing the application of enhanced sentences based on prior criminal convictions.

*Johnson* proscribed the types of crimes that used to classify a defendant as an armed career criminal, the designation of which exposes the defendant to an increased prison term. Federal law prohibits convicted felons from possessing firearms. 18 U.S.C. § 922(g). Generally defendants who violate this law are subject to a prison term of up to ten years. 18 U.S.C. § 922(a)(2). But when defendants have three or more prior convictions for a "serious drug offense" or "a violent felony," the Armed Career Criminal Act (ACCA) increases their potential punishment to a mandatory minimum of 15 years' imprisonment and a maximum of life. 18 U.S.C. § 924(e)(1). The ACCA defines a "violent felony" as:

[A]ny crime punishable by imprisonment for a term exceeding one year . . . that—

has as an element the use, attempted use, or threatened use of physical force against the person of another; or

is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

*Id.* § 924(e)(2)(B). In *Johnson*, the Supreme Court struck down the so-called residual clause: the part of the violent felony definition that "involves conduct that presents a serious potential risk of physical injury to another." 135 S. Ct. at 2563. The Court concluded that the phrase was too vague to provide courts and defendants with an understanding of the types of crimes covered, and so violated the Constitution's guarantee of due process. *Id.* Subsequently, the Court held that the rule in *Johnson* applies retroactively, allowing defendants previously sentenced as armed career criminals to collaterally attack their sentences. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). The residual clause was used to cover a wide range of prior convictions, from unlawfully possessing a short-barreled shotgun to knowingly and intentionally fleeing from police by vehicle. Now prior convictions qualify as ACCA "violent felony" predicates only if they involved force or were for burglary, arson, extortion, or involved explosives.

But *Johnson*'s reach extends beyond the ACCA. An identically worded residual clause is also found in the career offender section of United States Sentencing Guideline (U.S.S.G.) § 4B1.2. Similar to the ACCA, the career offender guideline allowed for an increased sentence when a defendant has prior convictions for a "crime of violence," which

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## VIEWS FROM THE BENCH: JUDGE HILARY GRIFFITH

BY BRADLEY C. TOBIAS, ESQ.



Before she became a judge, married a future congressman, and was the mother to three children, Judge Hilary Griffith began her life in the Hoosier State, living just outside of Indianapolis. Her father was a lawyer and her mother was a dentist, and Judge Griffith spent the majority of her young life out in Indiana. It wasn't until high school, when she encountered her history teacher, Mrs. Rogers, that Judge Griffith was introduced to the Roanoke Valley. "Mrs. Rogers went to Hollins," she told me, "and she was the one who really got me interested in government and public affairs . . . She sold me on the virtues of a single-sex education." Fully charged by Mrs. Roger's spark, Judge Griffith went off to Hollins College and the Roanoke Valley.

Judge Griffith enjoyed Hollins, and became captivated with the Valley. She had an interest in attending law school, but her father advised her that it would be better to take some time off after college before going on to the law instead of jumping right in. So, upon taking the advice, she decided to stay in the Roanoke Valley and got a job in sales with what was then an early mobile-phone-device company. "I basically was a sales agent trying to convince retail stores, like Best Buy and Circuit City, that they needed to buy and sell these massive portable phones to their customers. In 1994 and '95 when I worked there, these phones were huge. They came in bags." She vividly remembers attending a corporate meeting in her office where executives from the company's Chicago office came down and raved about the future possibilities and usages for these devices. "Soon they'll be total personal communication devices," she remembers them saying. "They'll be able to hold your calendar and all your contacts." Of course, at that point, Judge Griffith was skeptical: "Yeah, right, we thought. These clunkers? These guys from Chicago must be crazy."

After her two-year fray into what she thought was a soon-to-be-defunct industry, Judge Griffith decided that she had hit the ceiling of the cellphone business and wanted to pursue a greater challenge. She moved back home and attended law school at Indiana University in Indianapolis. Back at home, she lived with her father, and while in law school, she worked with him in his office doing insurance-defense work. To put it kindly, Judge Griffith did not particularly enjoy the work. She often felt like there were faceless and nameless insurance corporations behind the cases and that the work was largely intangible. Between her first and second years, Judge Griffith got a job back in this region, at the Office of the Botetourt County Commonwealth's Attorney under the supervision of long-time veteran prosecutor Joel Branscom.

There, Judge Griffith developed a voracious love for practicing in court. "Every case felt tangible," she recalled. "I loved it, because there was always someone, a real person, behind every story." After she graduated law school and passed the bar, Judge Griffith moved back to take a part-time job in the same office. At that time, there were not enough full-time slots open; there were only three total positions for prosecutors allotted to Botetourt County based on its caseload. As part of her effort to try to win a fulltime position, Judge Griffith scoured over case files and data for long hours for more than two weeks. What she discovered in

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## VSB COUNCIL UPDATE: IS MANDATORY REPORTING OF PRO BONO HOURS ON THE HORIZON?

BY GENE ELLIOTT, ESQ., AND  
BRETT MARSTON, ESQ.

We are pleased to represent the 23rd Circuit as representatives to the Virginia State Bar Council. Gene is also a member of the VSB Executive Committee. We look forward to providing you with regular updates on the issues and items being considered by the VSB and the Council. Likewise, we want to be accessible to you to answer any questions or address any issues related to the issues being considered by Council.



By way of update, there are several current items of interest related to the VSB that may affect your practice, several of which relate to the provision of pro bono services:

### New VSB Pro Bono Website Kicks Off.

Recently, the VSB started a pro bono website, [www.freelegalanswers.org](http://www.freelegalanswers.org), by which low-income Virginians can seek answers to questions about civil legal issues. You can assist by volunteering to respond to these questions on this private, web-based forum. Participation is voluntary, can be done at any time, and does not involve taking on an ongoing representation of the individual. All you need to do is complete the Attorney Interest form at <http://www.vsb.org/docs/volunteer-form-pb.pdf>. Volunteers will have the option to select questions that they are able to address and answer them anonymously. Please consider this easy-to-use and beneficial way of providing help. It also will be a convenient way to provide pro bono services at any time and in any amount that you are able to do.



**Proposal for Mandatory Reporting of Pro Bono Hours.** At the Executive Committee meeting in Richmond on September 22, and when the Council convenes here in Roanoke for its fall meeting on October 7, debate will occur over a proposal for mandatory reporting of pro bono hours. At the Council meeting in June, there was a presentation by members of the Virginia Access to Justice Commission, which has proposed rule amendments regarding annual reporting of pro bono service. Rule 6.1 of the Rules of Professional Conduct provides that attorneys should devote 2% of their professional time to pro bono matters. Presently, there are not any means of gathering information to assess whether the members of the VSB are meeting that aspirational goal. The Commission has unanimously supported amendments to the rule. These changes would make Virginia the eleventh state to adopt self-reporting of estimated pro bono hours and pro bono-related financial support. Information about the proposed changes can be found at [http://www.vsb.org/site/news/item/self\\_reporting\\_pro\\_bono\\_comments\\_sought](http://www.vsb.org/site/news/item/self_reporting_pro_bono_comments_sought). We encourage you to provide your feedback directly to one of us ([emejr@emelliottlaw.com](mailto:emejr@emelliottlaw.com) or [marston@gentrylocke.com](mailto:marston@gentrylocke.com)) or to the

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# INVESTITURE OF THE HONORABLE J. CHRISTOPHER CLEMENS

BY CHRIS S. DADAK, ESQ.

On June 30, 2016, a packed house at the Roanoke County courthouse observed the investiture of the Honorable J. Christopher Clemens as judge of the Circuit Court for the Twenty-third Judicial Circuit of Virginia.

The Honorable James R. Swanson, Chief Judge, welcomed and introduced the numerous public officials. Tony Anderson and Bev Davis provided entertaining and insightful biographical sketches of Judge Clemens. They highlighted his competitive spirit and success across many sports, which translated into a bright career as a lawyer and, of course, eventually as a judge. (For an in-depth look into Judge Clemens's background and service on the bench, see the "Views from the Bench" article in the March 2015 issue of the *Roanoke Bar Review*.)

Judge Clemens's father, the Honorable G. O. Clemens, retired Circuit Court Judge for the Twenty-third Judicial Circuit of Virginia, gave an impromptu and moving speech that provided both laughter and tears from the audience. Judge G. O. Clemens teased a little on his son, but primarily elucidated his great fatherly pride in his son following in his footsteps, both in the practice of law and in serving as a judge. Judge G. O. Clemens gleefully reminded the audience that during the administration of the oath of office at his son's General District Court investiture he made sure to add to the oath the duty to take care of Judge G. O. Clemens in his old age.

Judge Clemens was presented his judicial robes by representatives of the Roanoke Bar Association, the Salem-Roanoke County Bar Association, and the Virginia Women Attorneys Association. His wife, Meg Clemens, read the commission, and his sons, Will and Grant Clemens, joined Meg and their grandfather, Judge G. O. Clemens, to make the administration of the oath a family affair.

After the oath, Judge Clemens gave his remarks detailing both his gratitude for the opportunity to serve as a Circuit Court Judge and also his recognition of the struggles that he will face in taking on that responsibility. He emphasized how the legal system's purpose is for the greater good of the people and the country, but that the law can come with harsh or unpopular results.

Following the investiture, a reception was held in the courthouse law library.

*Christopher S. Dadak is an associate with Johnson, Ayers & Matthews, PLC.*



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# ROANOKE LAW LIBRARY NEWS AND INFORMATION

BY JOSEPH KLEIN, LAW LIBRARIAN

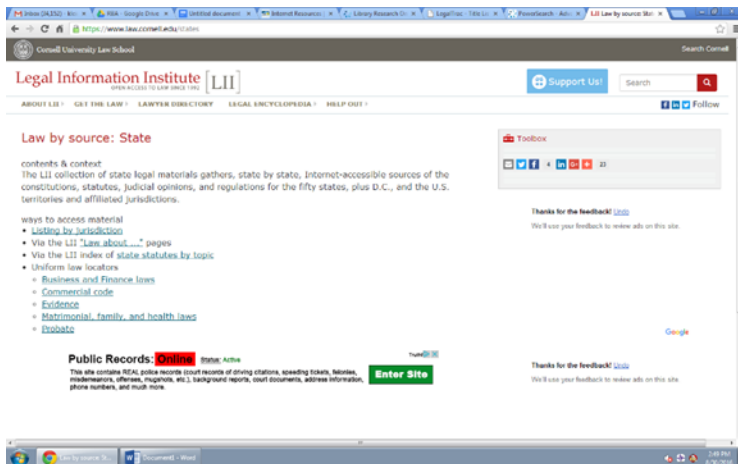


The heat of summer is slowly fading away and cooler weather is on the horizon. Summer vacations are over and most of our kids have started school again. Soon the leaves will begin changing and fall will arrive, bringing with it majestic views, crisp and juicy apples, college (and professional) football, and, most important, pumpkin-flavored drinks, desserts, and other delicacies.

## Legal Resources on the Internet

As you all hopefully know, the Roanoke Law Library provides free access to Westlaw Next for anyone and, if you can't make it to the library during our hours of operation (Monday 8 a.m. to 4:30 p.m. and Tuesday–Friday 8 a.m. to 12 p.m.) I will be glad to e-mail materials to you from Westlaw. Contact me at 853-2268 with any questions.

Additionally, I have compiled a list of the most used legal websites on the Roanoke Law Libraries webpage (<http://roanokeva.gov/1141/Legal-Links>). There are quick links to Virginia and Federal executive, legislative, and judicial resources. There is also a link to Cornell's Legal Information Institute (<https://www.law.cornell.edu>), which has links to legislative, statutory, and judicial information for all 50 states. In addition, there are general legal resources that are used regularly by all legal practitioners.



## Gale Research Databases

The Roanoke Public Library also provides access to the powerful Gale Research Databases using your library card. There are thousands of publications and millions of scholarly articles on any subject imaginable. These databases are fantastic for your kids when researching a tough paper, and they are equally powerful for the legal professional. There are hundreds of full text legal journals and thousands more that are not full text but that are indexed. If you find an article that is not available full text, I will be glad to track it down for you through interlibrary loan. Go to our webpage (<http://roanokeva.gov/1176/Internet-Resources>), enter your library card number, and click on Gale Research Databases to search. All you have to do is enter your library card number. Feel free to stop by the Law Library for a demonstration, or give me a call and I will be glad to assist you with this or any other research question.

## PRESIDENT'S CORNER

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responders, teaching Rule of Law to middle school students, volunteering at the Rescue Mission, serving on a charity board, painting faces at Santa at the Station, or even taking a pro bono case. We are fortunate to have so many opportunities to help our community. So if you receive a "call," take it. Like Jack Bailey, each of us just has to get out of the comfort zone.

\*The transcript can be found here: <http://www.thisamericanlife.org/radio-archives/episode/595/transcript>

Hugh B. Wellons is a partner at Spilman Thomas & Battle, PLLC.

## Save the Date!

Thursday, October 6, 2016

5:30 p.m. to 7:30 p.m.

The Shenandoah Club



Join us as we honor  
the Honorable  
Clifford R. Weckstein  
and his service to our Circuit and our  
Commonwealth.

Details and registration can be found at

[www.roanokebar.com/events](http://www.roanokebar.com/events)

# The McCammon Group

is pleased to announce our newest Neutral

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## Hon. Colin R. Gibb (Ret.)

Retired Judge, 27th Judicial Circuit of Virginia

The Honorable Colin R. Gibb (Ret.) recently joined The McCammon Group after serving for over twenty years as a Judge of the 27th Judicial Circuit, including two terms as Chief Judge. Prior to his service on the bench, Judge Gibb enjoyed a successful general litigation practice in southwest Virginia. He is a Master Emeritus of the Ted Dalton Inn of Court, a Former Member of the Executive Committee of the Judicial Conference of Virginia, and a Former Convener of the Ninth District Committee Section I of the Virginia State Bar. Judge Gibb has been active in various civic and community organizations, including serving on the Boards of Directors of New River Valley Legal Aid and for the Giles County United Way. Judge Gibb now brings this distinguished record of leadership and commitment to The McCammon Group to serve the mediation, arbitration, judge pro tempore, and special master needs of lawyers and litigants throughout the Commonwealth and beyond.

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HON. JOHN E. WETSEL, JR. (RET.)

HON. ROBERT W. WOOLDRIDGE, JR. (RET.)



## THE ROLE OF THE ADMINISTRATIVE LAW JUDGE

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At the hearing, the claimant may appear with or without representation, submit additional medical and vocational evidence, and call witnesses. In approximately 80 percent of these hearings, the claimant is represented by an attorney or a non-attorney representative.

An evidentiary hearing typically lasts about one hour. Often a medical expert (usually a physician, psychiatrist, or psychologist) appears and testifies in order to help the judge evaluate the claimant's residual functional capacity. Furthermore, a vocational expert is nearly always called by the judge to assess the parameters of the claimant's prior jobs and determine the scope and character of the skills that the claimant acquired from the performance of those jobs.

Testimony is taken under oath. Following the conclusion of the hearing and the completion of the evidentiary record, the judge follows a five-part sequential evaluation review process and issues a written decision. Unless timely appealed, the judge's ruling becomes the final decision of the Commissioner of the Social Security Administration.

Claimants who are dissatisfied with the judge's decision may request a review of that decision with the Appeals Council in Falls Church, Virginia—the final level of administrative review. Generally, the trial level decision may not be overturned by the Council when the underlying findings of fact are supported by substantial evidence, are not irrational, and the conclusions are in accordance with law. Furthermore, the Council will not disturb the judge's decision for deficiencies in style or clarity of expression if its underlying rationale can be reasonably discerned and the holdings are sufficient to withstand judicial review.

Following its review of the appellate matter, the Council has three options. First, it can deny review of the appeal (similar to a denial of certiorari) and affirm the decision of the judge. Second, the Council can issue its own decision—either favorable or unfavorable. Should the Council issue its own decision, this action becomes the final decision of the Commissioner. Finally, the Council may remand the matter to the judge for further development, factual findings, or legal conclusions. Once rescheduled, the judge will normally hold a de novo hearing.

If the claimant remains dissatisfied with the final decision of the Commissioner, the claimant may file a formal appeal with the United States District Court in the jurisdiction where the claimant resides. Thereafter, the Court must affirm the final decision of the Commissioner if the correct legal standards were applied and if substantial evidence supports the factual conclusions.

For the decade 2000 to 2010, the number of district court filings involving Social Security disability cases increased from around 15,000 to approximately 25,000 cases per year. The volume of cases continues to grow. Increasingly, district court judges do not perform the initial review of disability cases by themselves. Instead, they refer the cases to the magistrate judges for a report and recommendation. If the parties consent, the magistrate judge may act as the presiding judge, take evidence, decide on summary judgment, or remand the matter to the Commissioner.

### ELIGIBILITY FOR DISABILITY BENEFITS

To receive benefits, a disabled worker must affirmatively establish that he or she is unable to engage in any substantial gainful activity because of a medically determinable physical or mental

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## VSB COUNCIL UPDATE: IS MANDATORY REPORTING OF PRO BONO HOURS ON THE HORIZON?

*(Continued from page 3)*

VSB itself at [publiccomment@vsb.org](mailto:publiccomment@vsb.org). Any feedback that you can provide from now until October 6 would be appreciated.

**Upcoming VSB Pro Bono Conference.** Also, mark your calendars for October 26, when the VSB's Special Committee on Access to Legal Services will hold its annual Pro Bono Conference and Celebration in Hampton. This event will take place at the Embassy Suites by Hilton Hampton Hotel Convention Center & Spa.

**Changes to Disciplinary Process.** Of course, the attorney disciplinary process is a key part of the VSB's mission, and the VSB's Standing Committee on Lawyer Discipline (COLD) has been active in making and considering changes to Virginia's lawyer disciplinary system. Recently, COLD approved proposed revisions to Virginia Code § 54.1-3935, which provides the procedure for an attorney or the Virginia State Bar to demand that an attorney disciplinary matter proceed before a three-judge circuit court in lieu of a district committee or the disciplinary board of the Virginia State Bar. COLD is also considering changes to Part 6 § IV ¶ 13-24 regarding reciprocal discipline.

**Professionalism Course Issues.** Another important part of the VSB's activities is the required professionalism course. The VSB Executive Committee is also seeking comments on proposed amendments to Paragraph 13.1 of the Professionalism Course Rule regarding suspension for failure to complete the professionalism course. The amendments would authorize the VSB executive director to grant, for good cause, an extension request from a member who fails to complete the Professionalism Course by the deadline. The comment period has passed, but Gene, as a member of the Executive Committee, would welcome any input on this item in advance of September 21.

**Getting Involved with the VSB.** As always, there are plenty of chances for 23rd Circuit members to get involved with the VSB. It is important for our part of the state to have attorneys actively involved. Please let either of us know if you are interested, or contact the VSB directly to get your name on the nominations list. The Nominating Committee will refer nominees to the VSB Council for consideration at its October meeting.

In conclusion, we look forward to representing our Circuit on Bar Council and through Gene's service on the Executive Committee for the coming year. There are important issues being considered by the VSB and by Council, and these issues can affect your practice and the overall practice of law in the Commonwealth. Your awareness and feedback on these issues is important. We look forward to keeping you informed and hearing from you.

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

## THE ROLE OF THE ADMINISTRATIVE LAW JUDGE

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impairment that is expected to result in death or to last for more than one year.

It is not enough for the worker to establish that he or she cannot perform past relevant work or even comparable and gainful work, as required by many state workers' compensation programs and the Federal Black Lung Program. Rather, the worker must establish that he or she cannot perform any jobs that exist in significant numbers in the national economy, even if there are few such jobs available in the claimant's geographical area. To resolve this central issue, the judge or the DDS adjudicator considers the claimant's age, education, work history, and identified physical and mental impairments. It is often a very difficult standard to meet, especially for highly educated claimants.

### SOME PERSONAL REFLECTIONS

Before I stepped down from the bench to Senior Judge status, I estimate that I had heard and decided well over 10,000 disability cases and resolved over 25,000 Medicare reimbursement cases. Geographically, I have held hearings in more than 25 cities, including Miami, Mobile, Atlanta, and New York City. Each hearing was unique, whether the hearing involved a Social Security or SSI claimant, a Medicare beneficiary, or a physician, psychologist, hospital administrator, or provider of durable medical equipment. Each person told me his or her individual story, and each story was different from the next one.

Some of my hearings involved familiar American names, such as Daniel Webster, Ed Sullivan, Robert E. Lee, and Martha Stewart, and some claimants came to the hearing with names that I could not pronounce. While most of my hearings were conducted in English, I also held hearings in Spanish, Farsi, Vietnamese, and other languages with the assistance of interpreters.

Although all of my cases were interesting, one hearing still stands out clearly in my mind. An unrepresented older woman appeared before me on one summer day in Bluefield, West Virginia. Neither of us realized that a thunderstorm was brewing just above the federal courthouse. When she entered the hearing room, I noticed that she was nervous and visibly shaking. I asked her to stand in order to be sworn in. She raised her right hand and I administered the oath. Just after I spoke the words "... so help you God?" a fierce clap of thunder resounded throughout the courtroom. Quite befuddled, she responded, "Yes, I swear. I promise, judge. Oh yes, I promise." I believed every word of her testimony during that stormy afternoon.

Throughout my career, I have often reflected on the inherent power of judges. A colleague of mine once noted that our entitlement decisions will affect the claimants' lives like few other matters. He said that our ruling may be the difference between a claimant and his or her family members eating a meal together that day and whether they will have somewhere safe to sleep that night. Those words have always stayed with me.

William Bowen, a judge on the Alabama Court of Criminal Appeals, once wrote:

In the long run, there is no guarantee of justice except the personality and the professionalism of the judge. A judge need not be vicious, corrupt, or witless to be a menace to his office. Mediocrity and indifference can be, in the long run, as bad to the administration of justice.

I agree fully with his assessment.

### A FEW PRACTICE TIPS

Although attorneys who are skilled in disability benefit cases

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## JOHNSON V. UNITED STATES: THE "FAILED ENTERPRISE" OF THE RESIDUAL CLAUSE

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has been defined, in part, by the residual clause. U.S.S.G. § 4B1.1.

Many defendants, following *Johnson*, have argued that the identically worded residual clause in U.S.S.G. § 4B1.2 is also unconstitutionally vague. The United States Sentencing Commission decided to "promptly take action on the issue" and in its August 1, 2016 supplement to the 2015 Guidelines, eliminated the residual clause in the career offender guideline definition of "crime of violence." The Commission has not made the amendment retroactive. But the Supreme Court has granted certiorari in *Beckles v. United States*, 15-8544, to determine whether *Johnson* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in U.S.S.G.

§ 4B1.2. It will hear oral arguments on the issue in its October term, which will likely spur another round of § 2255 filings. In addition, defendants will likely continue to raise *Johnson* issues by challenging clauses similarly worded to the residual clause found in other federal statutes, including 18 U.S.C. §§ 16(b), 924(c)(3)(B), and 3559(c)(2)(F)(ii).

Federal defendants can expect to face fewer enhancements to their sentences because of their prior criminal history following the demise of the residual clause, coupled with other Supreme Court cases that require courts to narrowly construe a defendant's prior criminal convictions for ACCA sentence-enhancement purposes. So, on a practical level, if you are representing a federal defendant facing an enhanced sentence based on prior criminal convictions, take a hard look to make sure that such an enhancement is still appropriate in the shifting legal landscape post-*Johnson*.

Allison Weiss is a part-time pro se law clerk in the United States District Court for the Western District of Virginia.



Past President Joe Mott receiving VSB Awards at the Annual Meeting



# *A Summer Reception*

## *Celebrating Congeniality and Professionalism*

On August 22, 2016, the Roanoke Bar Association Young Lawyers Committee again hosted a casual summer social at The River and Rail in South Roanoke. Over forty RBA members, including members of our local judiciary, attended the event.

Attendees enjoyed beer and wine offerings along with light fare, including The River and Rail's famous, and crave worthy, house-made pimento cheese. Macel Janoschka, a partner with Frith Anderson & Peake, PC, and RBA Board Member, commented: "As always, this event was a great opportunity to see some old friends and to meet new colleagues while enjoying delicious food and drinks."

In a profession increasingly conducted over the phone and via e-mail, the summer social was another opportunity provided by the RBA for members to gather together for socializing and networking outside the courtroom or the conference room. Bryce Hunter, an attorney with Spilman Thomas & Battle, PLLC, remarked: "I greatly enjoyed the RBA Summer Social! Because my practice took me outside the Roanoke Valley for several years, I've missed the opportunity to participate in these events. Being away gave me a meaningful perspective on how active and valuable to the growth of one's legal practice and professional development the RBA can be."

Many thanks to the owners of The River and Rail, Whit and Lauren Ellerman and Lee and Kari Atwood, who were kind enough to open their doors on a Monday night so that the RBA could host this private event.

This event was free to all RBA members thanks to the generosity of several law firms. Thank you to Frith Anderson & Peake, PC, Gentry Locke, LeClairRyan, Spilman Thomas & Battle, PLLC, and Woods Rogers PLC for their generosity and continuing support of this event.



More pictures are available at [www.roanokebar.com](http://www.roanokebar.com) under "Recent Posts."

### **Thanks to our Social Sponsors!**

**Frith Anderson & Peake, PC  
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## VIEWS FROM THE BENCH: JUDGE HILARY GRIFFITH

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her tireless effort was that the numbers that had been reported to the Supreme Court and then used to determine the allocation of attorney positions were decidedly off. "The statistics were completely skewed," she recalled. "We actually were working about one-and-a-half times more cases than the data reflected". With the new data uncovered, thanks to her, the county received an additional fulltime prosecutor position, to which she was appointed.

During her time at the Office of the Commonwealth's Attorney, Judge Griffith developed a passion for working with children in the juvenile justice system. She loved being able to impact young lives for the better. Judge Griffith maintains that she always said, "If I were ever to become a judge, then that's what I would want to do."

After a 12-year tenure as a prosecutor, Judge Griffith moved over to private practice. After her husband, Morgan Griffith, was elected to Congress, Judge Griffith briefly filled the position he had vacated at his old law firm, Albo & Oblon. Later, in 2013, she moved to start a new firm with Aaron Houchens and the mother-and-son duo of Bill and Diane Stanley. At Stanley, Houchens & Griffith, Judge Griffith practiced what she called "street law," but focused on criminal and traffic cases, and representing families and individuals in domestic matters, often serving as a guardian ad litem for children.

Judge Griffith's main hobby outside of work these days is her children. With three of them, ages 16, 10, and 8, and a husband who is a U.S. Congressman in campaign season, she must carefully manage her time and work responsibilities. "Last weekend, we went to family camp" she told me when I spoke to her this past August. "It was just me, my 10 year old and 8 year old; my daughter was lifeguarding and my husband was out on the campaign . . . . The kids loved every second of it." This judge's busy family keeps her work-life balance in check, but it also provides her with a unique perspective. "As a mother of three sitting on the J&DR court, I can really understand the perspective of the parents of the children who come into my courtroom, and where they are coming from."

One of Judge Griffith's biggest practice pointers to attorneys is to get involved with court-appointed work. "There are so many attorneys out there who might be scared or think that it's not for them, but it is such a great opportunity. There are many fulfilling opportunities that come out of the court-appointed cases, whether it's learning about evidentiary issues or working on your ability to client-control. I can think of no better benefit for a young attorney's career than doing court-appointed work." As someone who leads an extremely busy life, Judge Griffith extols the benefits of preparedness. She praises the attorneys who come into her courtroom well prepared.

As a judge working with children, Judge Griffith says that she has "the best job ever. Every day, I look forward to going to work. People surprise me every day and it amazes me each time." She says that she particularly enjoys the tools at her discretion to help out the kids and set them on the right track. "Adults can be often set in their ways; children can be taught and their behavior can be molded." She credits the great people in the system who can help her carry out the remedies that she orders, like those in the social services agencies and court services units. "It's always amazing to me how kids in a bad situation can quickly turn their lives around."

*Bradley C. Tobias is an associate at Gentry Locke.*



## THE ROLE OF THE ADMINISTRATIVE LAW JUDGE

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already know these tips, those new to disability adjudication may find some of them valuable.

Be patient. The average elapsed time between the filing of a Social Security Application and the date of the judge's decision is usually longer than 18 months. If the matter goes to the Appeals Council, it may take an additional year. The attorney's fees are awarded only after the issuance of a favorable decision.

If your client needs help in securing medical reports or in seeking a consultative medical or mental evaluation, ask the DDS or the judge for assistance.

Provide the judge with a written summary concerning the merits of your claim. The judge often has more than 500 cases on the docket, and the attorney's assistance in navigating the matter at hand could be instrumental in a favorable decision.

Provide the DDS and the judge with up-to-date reports from your client's treating physicians and psychologists. Be sure to have the professional state when he or she began treating the claimant, how many times the claimant was seen at the medical facility, and what specific functional limitations the claimant displays. Remember that the ultimate decision is primarily a vocational determination. Once the specific physical and mental limitations are determined, the central issue becomes whether jobs exist that the claimant can perform.

Be sure to spend time at the hearing developing the claimant's past relevant work. This part of the testimony often determines the outcome of the case, particularly when the claimant is 50 years old or older.

Try to get all evidence to the judge at least ten days prior to the hearing. Providing abundant medical evidence just before or during the hearing may result in postponing the hearing for weeks or even months.

### FINAL THOUGHTS

For well over 50 years, our nation's administrative law judges have worked diligently to resolve hundreds of thousands of cases. The 21st century has brought new challenges to the administrative adjudication process as technological and digital advances have changed the landscape of judging like nothing else before.

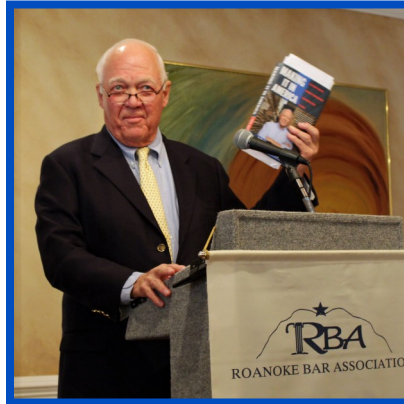
When I began, my staff utilized only rudimentary word-processors and fax machines. Furthermore, all of the evidentiary files were paper, and all of the hearings were "live." Now the process is becoming paperless, judges have their own portable laptop computers, law libraries are digital, and many disability hearings are conducted by video-teleconferencing. The world keeps changing, and judges must continue to adapt to their new environment.

The art of judging, however, has stayed the same. It remains a case-by-case approach, and it requires the judge's dedication to the duties and responsibilities of his or her profession. Even assuming the latest technology, well-drafted implementing regulations, and appropriate hearing procedures, the personality and the professionalism of the judge still determine the quality of justice in these cases. I believe that judges will continue to rise to the challenges of tomorrow.

*The Honorable Robert S. Habermann was an Administrative Law Judge in the Office of Disability Adjudication and Review in Roanoke.*



## RBA Luncheon September 13, 2016



The first guest speaker of the 2016 - 2017 year was John D. Bassett, III, President of Vaughan-Bassett Furniture, Galax. Pictured as he reads excerpts from *The Factory Man* by Beth Macy.

## IN MEMORIAM

The following are the Association's losses since June 2016:

The Honorable James P. Brice  
(August 7, 1926 — September 15, 2016)

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



**Lori Thompson receives the Distinguished Service Award**

The Distinguished Service Award was established to recognize those who are above and beyond exceptional. The RBA and RLF are incredibly fortunate to have exceptional volunteers who give their time willingly and cheerfully.

### YLC Professional Development Conference

**September 30**

**6 hours CLE (pending)**

**Gentry Locke, Roanoke**

The MCLE is deadline is at the end of October. Do you need CLE credit that is affordable AND relevant to your career?

Come to our Professional Development Conference, September 30 from 8:45 to 4:00. We will be at Gentry Locke in Roanoke.

The program will have six (6) hours of CLE credit (pending) and will fulfill the in-person requirement and have two (2) hours of ethics (pending).

The price: \$50

Need additional CLE?

We will also offer programs in Richmond and Wise County on October 7.

For more information, see our website  
<http://www.vsb.org/site/conferences/ylc/professionalism-development-conference>

Register online at <https://vsbevent.virginiainteractive.org/>



# ANNOUNCEMENTS

NEW MEMBERS	UPCOMING EVENTS	OFFICERS
<p>The Roanoke Bar Association welcomes the following new Active members:</p> <p>Cerid Lugar Lugar Law</p> <p>Hunter W. Naff Copenhaver, Ellett &amp; Derrico</p> <p>Elizabeth Louise Noles Glenn, Feldmann, Darby &amp; Goodlatte</p> <p>Kirk M. Sosebee Gentry Locke</p> <p>The Roanoke Bar Association congratulates the following new Lifetime member:</p> <p>Robert E. Glenn Glenn, Feldmann, Darby &amp; Goodlatte</p>	<p>Roanoke Bar Association Meetings 2016 - 2017</p> <p>September 13, 2016</p> <p>October 11, 2016</p> <p>November 8, 2016</p> <p>December 13, 2016</p> <p>January 10, 2017</p> <p>February 14, 2017</p> <p>March 14, 2017</p> <p>April 11, 2017</p> <p>May 1, 2017 (Law Day)</p> <p>June 13, 2017 (Annual Meeting)</p> <p>Go to <a href="http://www.roanokebar.com">www.roanokebar.com</a> for more information on all upcoming events.</p>	<p>Hugh B. Wellons President 512-1809</p> <p>Kevin W. Holt President-Elect 983-9377</p> <p>J. Lee E. Osborne Secretary-Treasurer 983-7516</p> <p>Joseph Mott Past President 857-2250</p> <p>Diane Higgs Executive Director 342-4905</p> <p>BOARD OF DIRECTORS</p> <p>Lori Jones Bentley 767-2041</p> <p>Christen C. Church 983-9390</p> <p>Robert E. Dean 585-1776</p> <p>Daniel P. Frankl 527-3500</p> <p>Macel H. Janoschka 725-3372</p> <p>Patrick J. Kenney 982-7721</p> <p>James J. O’Keeffe 983-9459</p> <p>Diana M. Perkinson 343-2436</p> <p>Nancy F. Reynolds 510-3037</p> <p>Melissa W. Robinson 767-2203</p> <p>Justin E. Simmons 983-7795</p>



**DON'T FORGET TO CHANGE YOUR ADDRESS!**

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**Complete and Forward to:** Roanoke Bar Association, P.O. Box 18183, Roanoke, VA 24014

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