

## INSIDE THIS ISSUE:

<i>Give Yourself the Gift of Warm Fuzzies: Pro Bono Legal Work</i>	1
<i>President's Corner</i>	2
<i>Virginia Code § 8.01-379.2:1: The Legislature Responds to Emerald Point</i>	2
<i>Views From the Mediator: Judge David B. Carson</i>	3
<i>Roanoke Law Library News and Information</i>	3
<i>Santa at the Station</i>	9
<i>Announcements</i>	12

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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## GIVE YOURSELF THE GIFT OF WARM FUZZIES: PRO BONO LEGAL WORK

BY KATHLEEN L. WRIGHT, ESQ.

As another calendar year ends, take a moment to consider your pro bono legal contributions this past year. If you met or exceeded the two percent goal in Rule 6.1,<sup>1</sup> thank you for your generous and important service. We all benefit when our legal system is operating fairly for everyone.

If you did not quite meet the two percent goal, there are many ways to increase your pro bono publico involvement in 2020. Many people face significant legal problems without the resources for legal work. Unfortunately, people continue to suffer from predatory lending, elder and other domestic abuse, consumer fraud, housing, and health issues, among others.<sup>2</sup>



And pro bono work doesn't always involve litigation. Many people need wills, powers of attorney, and other life-planning documents. Charitable, civic and religious groups who serve the needs of disadvantaged people also need legal advice.<sup>3</sup> Mediation and other alternative dispute resolution for pro bono publico cases are within the Rule 6.1 definition of pro bono publico work, as is training or recruiting other lawyers to provide pro bono services.<sup>4</sup> Short-term advice forums like the Pro Bono Hotline and Free Legal Answers (see below) provide needed legal help with a minimal investment of lawyer time or money. Pro bono publico work includes services provided at a nominal fee, as long as the lawyer intended to charge only the nominal fee when the representation began.<sup>5</sup>

Keep in mind that financial donations to groups that provide direct legal services also count toward the Rule 6.1 pro bono goal. Firms may meet the two percent goal collectively, too.

Finding ways to help is easy, thanks to the many resources available in our area and online. Here are just a few ways to get involved:

Our two local legal aid service providers, Blue Ridge Legal Services and Legal Aid Society of Roanoke Valley, do not have the time or resources to handle every civil matter that needs attention. In some cases, client conflicts prevent them from acting. The RBA keeps a list of lawyers who are willing to take cases that BRLS and LASRV cannot. You can join the list by using the RBA online form or contacting the RBA Pro Bono Chairman. The sign-up form includes options for providing full representation or advice only. Our local legal aid offices also outsource work on wills, advance directives, powers of attorney and other life-planning documents, and uncontested divorces and guardianships. Watch the RBA website and e-mail notices for information on upcoming training events. These are simple cases with a minimal time commitment.

The local Roanoke Pro Bono Hotline allows lawyers to provide phone advice on Thursday afternoons from 2:30 to 4:00 p.m. for simple domestic relations, landlord-tenant and consumer matters. Sign up at: <http://bit.ly/1LKmRUI>. As more lawyers sign up, the Hotline can be covered without each lawyer volunteering more than two or three Hotline sessions per year.

The United States District Court Clerk's office in Roanoke keeps a list of lawyers willing to be appointed to represent prisoners in civil rights cases and periodically provides training for this work. Contact the Clerk's office for more information.

The Justice Server site<sup>7</sup> matches pro bono lawyers with legal aid clients across Virginia. Users register and then review lists of available cases and choose matters they would like to handle.

## PRESIDENT'S CORNER

BY PATRICK J. KENNEY, ESQ.



As I write this message, Thanksgiving is in the rear-view mirror and the celebrations of Christmas and Hanukkah await. These celebrations carry feelings of hope, renewal, and possibility as we head into 2020. Members of the Roanoke Bar Association have been active in community programs in December.

Over 140 attendees and volunteers attended the long running Santa at the Station outreach benefitting homeless children and their families.

I hope everyone takes the time to peruse the pictures from this outstanding event on pages 9 and 11. Members of the Association have volunteered this month to speak to every 8th grade civics class in Roanoke County Schools as part of the Rule of Law Project. Additionally, members are continuing our involvement with the Barrister Book Buddies 2.0 program that partners with Turn the Page to provide books and read with grammar school age children. These are just some examples of the good work our members are doing to benefit the community—and this is just in the month of December!

Our Program Chair Dan Frankl has scheduled excellent speakers for our upcoming meetings. All of these speakers are leaders in our community and carry a spirit of giving in their professional lives. It is my hope they inspire our members to continue our service to the Roanoke Valley. Upcoming programs are Roanoke College President Michael Maxey in January, businessman and philanthropist Heywood Fralin in February, Vice President of Advancement for Virginia Tech Charles Phlegar in March, and Federal Public Defender for the Western District of Virginia Juval O. Scott in April.

I encourage all our members to continue to seek service opportunities within the Roanoke Bar Association and throughout the Roanoke Valley. This not only benefits the community, but it also enriches our lives and contributes to professional successes. One does not need to look far for service opportunities. Community involvement can be to volunteer with the above Bar programs or signing up for the Pro Bono Committee Conflict Referral on the RBA webpage. Current events inform us that the talents and work of lawyers are needed, whether it involves impeachment proceedings, Second Amendment sanctuaries, criminal justice reform, mental-health work or Roanoke's burgeoning health-care and research hub. I pledge to seek new service opportunities, and I look forward to seeing our members' contributions.

Happy Holidays and Happy New Year!

Patrick J. Kenney is a solo attorney.



Patrick Kenney, president, and Heath Lee, author, speak at the November luncheon.

## VIRGINIA CODE § 8.01-379.2:1: THE LEGISLATURE RESPONDS TO *EMERALD POINT*

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

In March 2019, the Virginia General Assembly took steps to correct the spoliation standard "*botched*"<sup>1</sup> by the Virginia Supreme Court in *Emerald Point, LLC v. Hawkins*, 294 Va. 544 (2017). The legislature eliminated a prerequisite finding of "bad faith," or intentional misconduct, before courts fashion sanctions against a party for spoliation of evidence.<sup>2</sup> Virginia Code § 8.01-379.2:1, effective July 1, 2019, now sets the boundaries for trial courts imposing sanctions in response to the loss or destruction of important evidence:



### § 8.01-379.2:1. Spoliation of evidence.

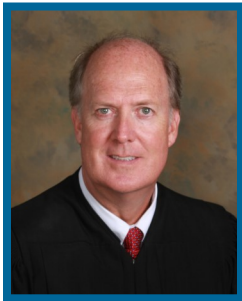
- A. A party or potential litigant has a duty to preserve evidence that may be relevant to reasonably foreseeable litigation. In determining whether and at what point such a duty to preserve arose, the court shall include in its consideration the totality of the circumstances, including the extent to which the party or potential litigant was on notice that specific and identifiable litigation was likely and that the evidence would be relevant.
- B. If evidence that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, or is otherwise disposed of, altered, concealed, destroyed, or not preserved, and it cannot be restored or replaced through additional discovery, the court (i) upon finding prejudice to another party from such loss, disposal, alteration, concealment, or destruction of the evidence, may order measures no greater than necessary to cure the prejudice, or (ii) only upon finding that the party acted recklessly or with the intent to deprive another party of the evidence's use in the litigation, may (a) presume that the evidence was unfavorable to the party, (b) instruct the jury that it may or shall presume that the evidence was unfavorable to the party, or (c) dismiss the action or enter a default judgment.
- C. Nothing in this section shall be interpreted as creating an independent cause of action for negligent or intentional spoliation of evidence.

Legislative reaction to *Emerald Point* was swift—but not exactly definitive. HB 1136, proposed in January 2018, only days after the December 28, 2017 decision, attempted to create a jury instruction providing or allowing an inference that evidence concealed or destroyed by one party "would be detri-

(Continued on page 4)

## VIEWS FROM THE MEDIATOR: JUDGE DAVID B. CARSON

BY CHRISTOPHER S. DADAK, ESQ.



*This series of articles, inspired by the Views from the Bench series and the continued rise of alternative dispute resolution, focuses on the background, experience, and helpful insight from local mediators.*

As an outstanding trial lawyer and well-respected judge, the Honorable David B. Carson, circuit court judge for the 23<sup>rd</sup> Judicial Circuit, brings a unique perspective to our series of articles on local mediators.<sup>1</sup> Known for his wide smile, bicycle commute, and his extensive community involvement, Judge Carson has taken a highly active role in judicial settlement conferences, to date already conducting around 90-100 of them.

During his time in private practice, Judge Carson first heard of alternative dispute resolution (ADR) when he was contacted by a firm offering its services for mediations and arbitrations. He had not heard much about ADR before, but that is when Judge Carson took it upon himself to learn more about the process. He then started using that firm for binding arbitrations. That "kind of morphed into doing mediations," which were "absolutely new" to Judge Carson. He thought it was "a pretty good way to resolve a case that was kind of a win for everybody."

Judge Carson became so interested in mediations that he started offering his services as a mediator (he did not do arbitrations, however). Judge Carson presided over his first mediation because a local plaintiff's lawyer asked him to do so, which is quite the vote of confidence given that Judge Carson was a litigator on the defense side. The plaintiff's counsel still "did [ask Judge Carson] and [he] was flattered to do it." For Judge Carson, "that was the level of collegiality" in the local bar.

When he came to the bench, he remembers early on listening to information about the settlement conference program, which seemed underutilized. The local judges would, upon request, do settlement conferences for each other. Judge Carson got to work and is now locally designated "all over the place," including the 22<sup>nd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, and 27<sup>th</sup> Judicial Circuits. Judge Carson is always willing to preside over a settlement conference, so long as the presiding judge approves.

Judge Carson has several main thoughts on successful use of the process.

First, mandatory mediation is a non sequitur. While certain jurisdictions do have mandatory settlement conferences, Judge Carson believes the process has to be voluntary. "Both sides have to voluntarily want to do something." When both sides mutually agree to participate in a settlement conference, Judge Carson believes the case is 65-70% settled already.

Second, he limits the settlement conference to two and a half hours. "[C]ases that were going to settle would settle in precisely the amount of time you gave them." At first, he did a couple all day conferences, and "predictably" towards the end of the day, the progress made became "serious" and the case would ultimately settle. After that, he decided "[he is] not doing that." While he understood that the process required more than an hour, he ultimately settled on a half-day as the time limit for

## ROANOKE LAW LIBRARY NEWS AND INFORMATION

BY JOSEPH KLEIN, LAW LIBRARIAN

My daughter, Harper, and I have a tradition. Every year on the Monday after Thanksgiving she comes to the Roanoke Law Library and helps me put up Christmas decorations. She has come for the past four years, and as she grows older, the decorations get a little more intricate. This year we couldn't find an acceptable tree topper, so we had to make one ourselves. In the process, she searched every closet, drawer, box, and niche looking for materials to make it. Consequently, I had to retrace her steps and return everything to its rightful place once she left. But spending time with family is what the holiday season is all about, and I wouldn't trade these memories for anything. I hope that you are all able to make wonderful memories with your families this holiday season. At the end of the day, I'm thrilled with the decorations and would love it if you took a moment to stop by the Law Library this holiday season and said hi.



### Law Library Services

Since it is better to give than receive, I would like to give you a rundown of some of the fantastic services we provide to everyone for free at the Law Library. As I am sure you know we provide the area's most extensive collection of Virginia legal resources, including current and historical editions of the Code of Virginia. We also provide free access to Lexis Advance, which includes all 50 states and federal case law and statutes. If you are in need of legal information but are not able to make it into the Library, just give me a call—I am often able to email you the material that you need directly from Lexis Advance. If you are looking for materials that we do not have at the Law Library, I am usually able to track those materials down for you via Interlibrary Loan.

If you are in the courthouse, we have an Attorney's Lounge with comfortable seating and a telephone for use by members of the Roanoke Bar Association.



Additionally, we have a conference room should you need to conduct business privately or have a meeting or deposition. Most of the Law Library's collection does not circulate. Yet members of the RBA are able to check out Virginia Continuing Legal Education materials. There are hundreds of books on most important areas of Virginia law, and they are searchable on our online catalog ([www.rvl.info](http://www.rvl.info)—change library to Law Library and include the term CLE in your keyword search).

If you have questions about these or any other services that the Law Library offers, please give me a call at 853-2268 or email me at [joseph.klein@roanokeva.gov](mailto:joseph.klein@roanokeva.gov), or just stop by and check it out for yourself. I would love to meet you if I haven't already, and talk to you about how the Law Library can better serve your legal information needs.

(Continued on page 8)

## GIVE YOURSELF THE GIFT OF WARM FUZZIES: PRO BONO LEGAL WORK

(Continued from page 1)

The Virginia State Bar provides a wealth of information on pro bono work, including resources, articles, awards, and links to other websites, both state and national.<sup>8</sup> The site also includes guidance on the voluntary reporting rule that went into effect this past January.

Both the VSB's Young Lawyer's Conference and the VBA's Young Lawyer's Division<sup>9</sup> offer resources for implementing statewide pro bono initiatives at a local level, and for proposing new pro bono projects and collaborations.

The VSB supports the Virginia Lawyer Referral Service,<sup>10</sup> which connects people with a lawyer in their area for up to one-half hour for a prepaid fee of \$35.

The American Bar Association and others sponsor the Free Legal Answers site.<sup>11</sup> It allows qualifying pro bono clients to e-mail legal questions to the attorney volunteers, and notifies the client when an e-mail response has been sent. Near the top of the page is a link to "Volunteer Attorney Registration," which gives more information about providing legal advice through the site.

There are also sites that support pro bono work by providing research and forms resources.<sup>12</sup>

The best thing about pro bono publico work, as any lawyer who has done it will testify, is the warm, fuzzy feeling of doing something helpful for someone who really needs help. Even just a little of your time or money can make a big difference in people's lives.

So make time in 2020 to help people using your legal skills, and reward yourself with the warm fuzzies.

*Kathleen L. Wright is a partner at Gentry Locke.*

## VIRGINIA CODE § 8.01-379.2:1: THE LEGISLATURE RESPONDS TO EMERALD POINT

(Continued from page 2)

mental to the case of such party."<sup>3</sup> The Bill's concluding sentence flatly rejected and reversed the bad faith requirement created by the Virginia Supreme Court in *Emerald Point*:

The party seeking such instruction *need not* show that the disposal of, alteration of, concealing of, or failure to preserve such evidence was undertaken intentionally or in bad faith in order for such instruction to be given.<sup>4</sup>

HB 1336 passed the House but failed in the Senate Courts of Justice Committee after the Committee added a sentence defining "Probable Litigation" as "those instances where there has been a specific threat of litigation from a party or the legal counsel of a party."<sup>5</sup> The Senate Committee's first revision left intact the House Bill's closing sentence expressly rejecting *Emerald Point*'s bad faith requirement.

After the revision failed, the Courts of Justice Committee went back to the drawing board and offered a new draft:

- A. A party or potential litigant has a duty to preserve evidence that may be relevant to reasonably foreseeable litigation. In determining whether and at what point such a duty to preserve arose, the court shall include in its consideration the extent to which the party or potential litigant was on notice that specific and identifiable litigation was likely and that the evidence would be relevant.
- B. If evidence that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, or it is otherwise disposed of, altered, concealed, destroyed, or not preserved, and it cannot be restored or replaced through additional discovery, the court (i) upon finding prejudice to another party from such loss, disposal, alteration, concealment, or destruction of the evidence, may order measures no greater than necessary to cure the prejudice or (ii) only upon finding that the party acted with the intent to deprive another party of the evidence's use in litigation, may (a) presume that the evidence was unfavorable to the party, (b) instruct the jury that it may or shall presume that the evidence was unfavorable to the party, or (c) dismiss the action or enter a default judgment.<sup>6</sup>

This version, which also failed to pass, removed the House Bill's final sentence expressly rejecting the bad faith requirement, but otherwise differed by only six words from the first two paragraphs of the new statute, Virginia Code § 8.01-379.2:1.

First, "the totality of the circumstances" language was returned to subsection (A), providing broad parameters for the court's consideration of whether or not the duty to preserve evidence arises. This language apparently generated much unne-

<sup>1</sup> Rules of the Supreme Court of Virginia, Pt. 6, § II, Rule 6.1: "Voluntary Pro Bono Publico Service."

<sup>2</sup> See the Legal Services Corporation of Virginia's FY 2017-18 Annual Report, available at <http://www.lscv.org/work-of-legal-aid> for more information about services provided and needed in Virginia.

<sup>3</sup> For example, the Mid Atlantic Innocence Project, which investigates criminal convictions, sometimes uses pro bono help for policy work, amicus briefs, and other tasks. See <https://exonerate.org/get-involved/>.

<sup>4</sup> See Comments to Rule 6.1. Also, [https://www.vsb.org/site/sections/pro\\_bono/articles](https://www.vsb.org/site/sections/pro_bono/articles), for articles regarding pro bono work.

<sup>5</sup> Comment 6 to Rule 6.1 specifically excludes services provided on a contingency fee basis from the definition of pro bono publico work: "Service in any of the categories described is not pro bono publico if provided on a contingent fee basis. Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free or nominal fee legal services is essential. Accordingly, services for which fees go uncollected would not qualify."

<sup>6</sup> RBA Online Sign-Up: <https://fs30.formsite.com/slovensky/yj9ozdkcs/index.html>.

<sup>7</sup> Available at <https://www.justiceserver.org/JusticeServer/Home/Index>.

<sup>8</sup> See, e.g., [http://www.vsb.org/site/pro\\_bono/](http://www.vsb.org/site/pro_bono/); [https://www.vsb.org/site/sections/pro\\_bono/](https://www.vsb.org/site/sections/pro_bono/).

<sup>9</sup> VSB-YLC Pro Bono initiatives include the Domestic Violence Safety Project, Emergency Legal Services, Immigrant Outreach, Legal Handbook for Cancer Survivors, a Mental Health Law Committee, Non-Profit Board Match, and Wills for Heroes (in conjunction with VBA-YLD). See <https://www.vsb.org/site/conferences/ylc/committees>. The VBA-YLD programs include the Domestic Violence Project, Town Hall events, the Hispanic Chamber of Commerce Legal Aid Clinic and the Veterans Issues Task Force. See <https://www.vba.org/page/yld>.

<sup>10</sup> Available at [https://www.vsb.org/vlrs/index.php/vlrs\\_online\\_referral/](https://www.vsb.org/vlrs/index.php/vlrs_online_referral/).

<sup>11</sup> Available at <https://virginia.freelegalanswers.org/>.

<sup>12</sup> Available at <https://www.probono.net/va/>, created by the Virginia Legal Aid offices; and the Virginia Continuing Legal Education site [https://www.vacle.org/Free\\_Pro\\_Bono\\_Content-pg222.aspx](https://www.vacle.org/Free_Pro_Bono_Content-pg222.aspx).

(Continued on page 8)



# The McCammon Group

is pleased to announce our newest Neutral



## **Hon. Cynthia D. Kinser (Ret.)**

Retired Chief Justice, Supreme Court of Virginia

The Honorable Cynthia D. Kinser retired as Chief Justice of the Supreme Court of Virginia in 2014. Justice Kinser was initially appointed to the Supreme Court in 1997 and was elevated to Chief Justice in 2011. She was the first and remains the only woman to have held that position. Previously, she presided as a U.S. Magistrate Judge for the Western District of Virginia from 1990 to 1997. As a lawyer, Justice Kinser enjoyed a successful private practice for many years and also served as Commonwealth's Attorney for Lee County, Virginia from 1980 to 1984. Justice Kinser now brings this exemplary record of dedication and leadership to The McCammon Group to serve the mediation, arbitration, judge pro tempore, and special master needs of lawyers and litigants throughout the Commonwealth.

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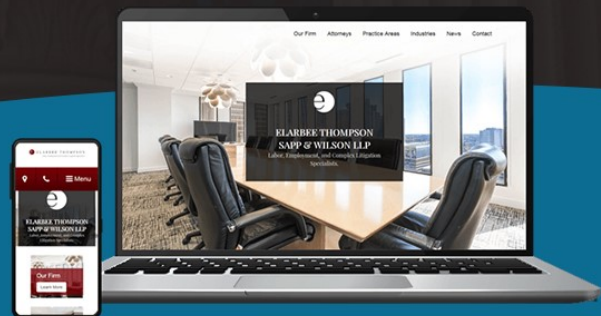
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Having previously served twenty-one years as both a full time and a retired, recalled circuit court judge, Jonathan M. Apgar has successfully mediated scores of cases. He is also certified in civil mediation by the National Judicial College. He offers skilled mediation and arbitration at a modest cost.

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## VIRGINIA CODE § 8.01-379.2:1: THE LEGISLATURE RESPONDS TO *EMERALD POINT*

(Continued from page 4)

essary debate. The “totality” language was included when the Bill was initially offered from the House, but it was removed by the Senate Courts of Justice Committee from the first revision; only to return in the present law. Aside from paying homage to *Emerald Point*, where the Court twice states the phrase,<sup>7</sup> the language adds nothing to the spoliation analysis. Trial courts need not be reminded to consider the *totality of circumstances* before imposing sanctions for various misconduct.

Second, the legislature added “recklessly” to subsection (B). This is a BIG deal. Had the legislature not specifically included “reckless” acts to those sufficient to trigger sanctions for spoliation, the new statute arguably only codifies *Emerald Point*’s spoliation holding. “Recklessly” is undeniably the operative word in the new law. Future cases interpreting the statute will predictably focus on whether or not evidence was destroyed “recklessly” or for reasons “less-careless.” Unlike the *Emerald Point* conclusion, however, proof of intent to harm or affect litigation by destruction of evidence is not required.<sup>8</sup>

Subsection (B) also sets up potential conflict between the remedies available when trial courts find that one party has been prejudiced by the other’s loss of evidence. *Emerald Point* offered no remedy for harm suffered by negligent loss of evidence regardless of the magnitude of harm suffered. The new statute recognizes without regard to fault the court’s inherent ability to “cure the prejudice”<sup>9</sup> caused anytime lost or destroyed evidence harms a party: “the court may order measures no greater than necessary to cure the prejudice.” But should the court want to offer an adverse inference instruction, or dismiss a claim as a sanction, it first must find that the despoiler acted recklessly or intentionally.<sup>10</sup> The statute’s wording leaves room for much debate about remedies appropriate to “cure the prejudice” in the absence of reckless or willful destruction of evidence.

Finally, subsection (C) seems straightforward in its proclamation that no right of action accrues to the party aggrieved by misconduct violative of the statute,<sup>11</sup> but the legislature included an important acknowledgement. The legislature expressly recognized that spoliation occurs by both intentional misconduct and negligent conduct. Virginia’s statutory recognition of negligent spoliation is in keeping with the well-reasoned case law of the Fourth Circuit,<sup>12</sup> and, more importantly, it flatly rejects the contrary holding from *Emerald Point*, which deprived trial courts of the discretion necessary to remedy litigation misconduct.

In summary, the legislative response to *Emerald Point* established the following:

1. Parties have a statutory duty to preserve relevant evidence.
2. When a party is prejudiced by the loss of relevant evidence, reckless misconduct is actionable without proof of intentional or willful misconduct.
3. There is *no* requirement of proof that the evidence was lost or destroyed with the “intent” to deprive a party of its use at trial.

(Continued on page 9)

## VIEWS FROM THE MEDIATOR: JUDGE DAVID B. CARSON

(Continued from page 3)

the settlement conferences he conducts. He makes it “clear right up front” that is “the time you will get.”

Third, presentations by attorneys should be “short and sweet.” “What made cases settle were not the big, long dramatic presentations” because if an attorney is doing his or her job, the client and the other side already know 95% of the case. Therefore, he limits openings to five minutes. He wants that opening spent educating the other side on “that 5% that they may not know about.” He “does not need a show, the other side does not need a show, what the other side needs is to know that you are serious” and “here are some important things about your case we want you to know about.” Naturally, Judge Carson does not expect sides to reveal critical strategy for trial, but he has found a succinct and substantive presentation of the issues to be most helpful. The focus needs to be on the 5% that the other side “is not taking into consideration.” The most efficient openings Judge Carson has seen acknowledge that there “are two sides to each coin” and offer a “very specific and very substantive acknowledgment of weaknesses and statements of strength, that are not stridently set forth.”

Finally, Judge Carson emphasizes that successful use of settlement conferences requires a host of preparation just like trial. He finds attorneys that are “well prepared” and “appropriately humble” are the most effective.

Christopher S. Dadak is an Associate at Guynn, Waddell, Carroll & Lockaby, P.C.



<sup>1</sup> Note: the term mediator here is used colloquially. As an active judge, Judge Carson presides over settlement conferences, not mediations.

***Save the Date***

**Bench Bar  
Conference**

**February 28, 2020  
Blue 5, White Room**



## SANTA AT THE STATION 2019



Santa at the Station, the Roanoke Law Foundation's annual holiday event for local families, returned to the Virginia Transportation Museum for 2019 on Monday night, December 2, 2019. This year, more than 140 children, family members and volunteers took part in the festivities. The guests visited Santa Claus and received a family photograph, chose small gifts that they could give to a parent or guardian from Santa's Sack, made crafts at Santa's Workshop, and enjoyed snacks distributed at the buffet table by a collection of attorneys and judges. Volunteers painted faces, handed out gifts, applied temporary tattoos, and sang Christmas carols.

As always, Lori Thompson organized the entire event, including coordinating with the Museum and area family support organizations, lining up volunteers, and purchasing food and gifts.

Members of the Association and corporate sponsors who provided generous financial support to the event were: Deborah Caldwell Bono; Chick-fil-a; Roy V. Creasy, Attorney at Law; Webster and Lynn Day; Robert Dean; Domino's Pizza 3021 Brambleton Ave.; Lauren Ellerman; Ray Ferris; Ferris & Eakin; Frankl, Miller & Webb; Frith, Ellerman & Davis; Gentry Locke; Fred Hoffman a/k/a Santa Claus; Kevin Hurley Photography; Easter P. Moses; Lee Osborne; Raleigh Court Presbyterian Church Choir; Roanoke Bar Association; Roanoke Law Foundation; Richard Scott; Spilman Thomas & Battle; The Virginia Museum of Transportation; Mark and Lori Thompson; and Woods Rogers.



Thank you to all of the sponsors and volunteers who provided so much enjoyment for the guests, and help put all of the volunteers in the holiday spirit!



## VIRGINIA CODE § 8.01-379.2:1: THE LEGISLATURE RESPONDS TO EMERALD POINT

(Continued from page 8)

4. Virginia law expressly recognizes the "negligent" spoliation of evidence.

*Trey Smith is a partner at Gentry Locke*

<sup>1</sup> See Charles H. Smith, *Spoliation Sanctions Botched by Virginia Supreme Court*, Roanoke Bar Review (Sept. 2018), <http://roanokebar.com/wp-content/uploads/2013/10/September-2018-Final-Draft.pdf>.

<sup>2</sup> The *Emerald Point* holding required a finding of specific intent, or "intentional loss or destruction of evidence in order to prevent its use in litigation," before the trial court could instruct the jury on spoliation. *Emerald Point*, 294 Va. at 559.

<sup>3</sup> HB 1336(B), 2018 Session, Introduced (2018).

<sup>4</sup> *Id.* (emphasis added).

<sup>5</sup> HB 1336(A), Senate Substitute (Feb. 26, 2018).

<sup>6</sup> HB 1336, Senate Substitute (Mar. 5, 2018).

<sup>7</sup> *Emerald Point*, 294 Va. at 559.

<sup>8</sup> The Second Restatement of Torts addresses the difference between recklessness and intentional misconduct:

Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless.

RESTATEMENT (SECOND) OF TORTS § 500 cmt. f (AM. LAW INST. 1979).

<sup>9</sup> Va. Code § 8.01-379.2:1(B)(i).

<sup>10</sup> *Id.* § 8.01-379.2:1(B)(ii).

<sup>11</sup> Virginia has never recognized a cause of action for negligent or intentional destruction of evidence. See *Austin v. Consolidated Coal Co.*, 256 Va. 78, 82 (1998) (refusing to recognize a cause of action when plaintiff's employer, a third party, destroyed evidence important to a products liability claim).

<sup>12</sup> See, e.g., *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995).



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[FORMER MEMBER, VIRGINIA STATE BAR DISCIPLINARY BOARD]

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# ANNOUNCEMENTS

NEW MEMBERS	UPCOMING EVENTS	OFFICERS
<p>The Roanoke Bar Association welcomes the following new members:</p> <p>Effective December 9, 2019</p> <p><b>Active Members</b></p> <p>None</p>	<p>Roanoke Bar Association Meetings 2019 - 2020</p> <p>September 10, 2019</p> <p>October 8, 2019</p> <p>November 12, 2019</p> <p>December 10, 2019</p> <p>January 14, 2020</p> <p>February 11, 2020</p> <p>March 10, 2020</p> <p>April 14, 2020</p> <p>May 1, 2020 (Law Day)</p> <p>June 9, 2020 (Annual Meeting)</p>	<p>Patrick J. Kenney President 982-7721</p> <p>Daniel P. Frankl President-Elect 527-3515</p> <p>Macel H. Janoschka Secretary-Treasurer 725-3372</p> <p>J. Lee E. Osborne Past President 983-7516</p> <p>Diane Higgs Executive Director 342-4905</p>
		<p><b>BOARD OF DIRECTORS</b></p>
		<p>Lori Jones Bentley 767-2041</p>
		<p>Christen C. Church 983-9390</p>
		<p>Christopher S. Dadak 387-2320</p>
		<p>John P. Fishwick, Jr. 345-5890</p>
		<p>Amy H. Geddes 989-0000</p>
		<p>Sarah C. Jessee 510-3019</p>
		<p>D. Adam McKelvey 342-2000</p>
		<p>Jonathan D. Puvak 983.9399</p>
		<p>Devon R. Slovensky 492-5297</p>
		<p>Justin E. Simmons 983-7795</p>
		<p>Robert Ziogas 224-8005</p>
		<p>Go to <a href="http://www.roanokebar.com">www.roanokebar.com</a> for more information on all upcoming events.</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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