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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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HOW HAS PRESIDENT BIDEN CHANGED IMMIGRATION?

BY RACHEL THOMPSON, ESQ.

How has President Biden changed immigration? I've been asked that question dozens of times by family and friends. Immigration has been such a hot topic during the 2016 and 2020 elections and many individuals are curious about what has changed between the previous administration and the current one. The reality is that most of the significant changes that affect an immigration attorney's day-to-day practice cannot be explained in an elevator speech or bullet list. This is not specific to the most recent administration change, but every time there is a change of presidency. I've now practiced under three different administrations and each new presidency brings with it a sea of change, and President Biden's short time in office has proven to be no exception.



Some quantifiable changes under the Biden administration (and the answer to the question I believe most people are looking for) include the following: 1) it reaffirmed Deferred Action with Childhood Arrivals (DACA): new applications for DACA were suspended during the majority of the previous administration; 2) it put a moratorium on deportations: certain deportations were banned for 100 days but it has since been enjoined by a Texas District Court; 3) it lifted travel bans: certain Muslim-majority and African nations are no longer barred from entry into the U.S.; and 4) it protected asylum seekers: the Migrant Protection Program requiring asylum seekers to wait in Mexico for their hearing was suspended.

Those changes are monumental for certain groups of people. However, the vast majority of my clients are affected by more unquantifiable changes: the ones that stem from the divergent philosophies regarding immigration each administration brings. Will the Department of Homeland Security agree to terminate my client's case or will I be required to litigate it? Should I send my clients to attend a marriage interview without an attorney present or will I need to attend with them? Will the administration adjudicate a case based on submitted evidence or will they routinely request more evidence? These are just three of many questions that seem mundane or insignificant, but the answers to these questions change depending on the tone set regarding immigration by the head of the Department of Homeland Security. Moreover, the answers to questions like these affect our day-to-day operations as it relates to time and resources. While I always want people to know the hot button and easily calculable changes each administration brings, I always wish I had more time to discuss the *real* changes immigration practitioners experience, requiring us to meet with our clients and reexplain that the process we thought would happen is actually going to turn on its head due to differing policies and rules.

Will Congress pass an immigration bill? This is another common question, and it has been decades since Congress passed a comprehensive immigration reform bill. The House passed a pair of immigration bills several weeks ago. The first is the American Dream and Promise Act which would create a path to citizenship for undocumented children who were brought to the U.S. as children. The bill also includes a path to citizenship for individuals with temporary protected status and beneficiaries of deferred enforced departure. The second bill is the Farm Workforce Modernization Act which would permit agricultural workers to earn temporary status and an eventual path to citizenship. It would also amend the H-2A temporary agricultural worker program.

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PRESIDENT'S CORNER

BY DANIEL P. FRANKL, ESQ.



As we begin the last quarter of the RBA's fiscal year, it appears that there is hope on the horizon that will allow us to safely hold in-person bar lunches before the end of the year. Currently, the number of individuals catching the coronavirus in the Roanoke Valley is down significantly, and the number of individuals being vaccinated against the coronavirus continues to grow. If these trends continue, we will send a survey to the membership,

in the near future, to determine whether or not a return to in-person bar lunches would be something our membership desires and, if so, that a significant number of us would attend. The board will take up the issue of restarting our in-person bar lunches at the April 13th board meetings prior to our regularly scheduled Zoom bar luncheon. Please be on the lookout for the survey if you want your opinion to be heard.

Based on the current state of the pandemic, the decision was made by the RBA's Board of Directors to postpone the annual Bench Bar Conference, that is usually held in February, to a date in May, in an attempt to allow for an in-person seminar or at least a combination of in-person and on-line attendance. We have selected Friday, May 14, 2021, in an effort to ensure that we can have, at least, partial in-person attendance at the Bench-Bar Conference using adequate safety protocols. At this time, we have gotten a commitment from the judges to participate in the Bench-Bar Conference and, if you are interested in attending, please mark your calendars accordingly.

Despite being virtual for the whole of the 2020/2021 fiscal year, to date, I am happy to report that the RBA's 'Keeping it Clean' initiative has raised enough funds to purchase and deliver 17 sets of washers and dryers to the Roanoke City Schools as well as a significant amount of detergent and dryer sheets to those schools as well. The Roanoke City Public Schools, on behalf of the initiative, is currently awaiting to hear if it will be the recipient of some grant funds that will allow us to complete the program's goals to purchase and deliver the remaining four washer and dryer sets. I am proud of the hard work by those in the RBA and others that have been instrumental in our efforts to reach this worthy goal.

During the remainder of this fiscal year, please do not hesitate to contact me or any of the other RBA Board Members with your thoughts and/or ideas as we move forward in these unprecedented times. Please stay safe and healthy as we turn the corner on this pandemic, so we can get back to normal or, at least, the "new" normal.

Daniel P. Frankl is a partner of Frankl Miller Webb and Moyer, LLP.

Save the Date

Firearms and Gun Sale Legislation

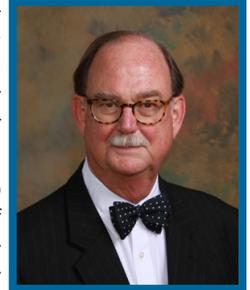
CLE Seminar, 2 hours credit pending

April 23, 2021

VIRGINIA STATE BAR UPDATE: ACTIONS AND PROGRAMMING

BY EUGENE M. ELLIOTT, JR., ESQ. AND K. BRETT MARSTON, ESQ.

The Executive Committee and Council of the Virginia State Bar met at the Homestead on October 22-23, 2020 in person. Attendance at Council was reduced because of concern for the COVID-19 virus.



- Council approved revisions to LEO 1850 regarding the outsourcing of work to a lawyer or nonlawyer outside the direct supervision of a lawyer in the firm and the requirement for client consent and explanation of fee structures. The proposed changes were sent to the Supreme Court of Virginia for approval, which occurred January 12, 2021.



- Council approved minor edits and corrections to wording, numbering, and grammar to the Rules of Professional Conduct 1.17, 1.18, and 5.5. and forwarded them to the Supreme Court of Virginia for approval, which occurred December 23, 2020.
- Due to the COVID situation, Council recommended amending the Rules of the Supreme Court of Virginia Part 6, Section IV, Paragraph 13-6D to allow a panel of five Disciplinary Board members, whether meeting in person or in an electronic meeting, to constitute a quorum for an agreed disposition of a disciplinary matter. The proposed change was sent to the Supreme Court of Virginia for approval.
- Council approved by a 36 to 8 vote amending the VSB audit requirement from yearly to once every three years. The VSB is the only state organization audited yearly and because such audits take 10 to 11 months to conduct, it was deemed to be overkill. An audit every three years is the common period for other state organizations. The recommendation was sent to the Supreme Court for the final say.

On January 6, 2021 the Supreme Court approved LEO 1890, which was first presented to it by Council in November of 2019. It concerns communications with others represented by counsel.

It also amended the Rules of Court - Part Six, Section II, Rule 4.2, Comment (7) sent to it previously by Council. The old Comment 7 limited the no-contact rule to "control group" or "alter ego" employees of a corporation. The revised Comment 7 bars communication with those persons "whose act or omission in connection with the matter may be imputed to the organization for the purposes of civil or criminal liability," among other categories.

If you have business with the VSB, due to COVID, their offices are closed to visitors. Much of the staff is operating remotely. Electronic and telephone communications may be used to do business or make appointments. Substantially all of the many

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VIEWS FROM THE J&DR BENCH: KIDS, COVID AND THE COURTHOUSE INTERVIEWS WITH JUDGES CIAFFONE AND GRIFFITH

BY ALICHA M. GRUBB, ESQ

Judge Trumpeter's driver's license ceremonies were legendary. His admonitions, his praise, the fanfare . . . the length. In 2020, there were no crowds, no long speeches, no group selfies, but there was still fanfare. Judge Griffith instituted drive-through license ceremonies (query – can one drive through the drive-through ceremony to receive her license?), and she stood out in the cold to hand teenagers their freedom to go . . . well . . . home.



Drive-through license ceremonies were just one change the J&DR Court saw during the pandemic.

The Twenty-third Circuit's Juvenile and Domestic Relations Court is led by Chief Judge Hilary Griffith who is joined by Judge Frank Rogers, Judge Leisa Ciaffone, and two new judges, Melissa Friedman and Heather Ferguson.



The J&DR Court handles cases for juveniles, including CHINS (Child in Need of Services) Petitions, child custody, child support, truancy, juvenile criminal and traffic offenses, adoption, foster care and the issuance of driver's licenses. The Court also oversees domestic matters and protective orders for related or co-habiting adults.

The COVID-19 pandemic initially caused the Court to shut down. And the emergency orders were unclear on the authority of the Court to conduct or modify hearings. But then Chief Judge Rogers along with Judge Griffith quickly adapted to the pandemic, instituting virtual hearings, allowing individuals to appear by phone and working with the sheriff's office to safely hear emergency cases.

Unlike the general district and circuit courts, the J&DR docket handles a high volume of emergency cases. Additionally, the foster care docket is governed by federal law and has strict timing deadlines to keep cases moving.

To be able to manage its responsibilities, the Court rotated its clerks on an A and B system so that if someone got sick, there was a team of unexposed clerks who could continue to work. The Roanoke County J&DR Court added new video conference technology particularly to accommodate jail hearings and limit exposure and movement throughout the court complex. The Court's backlog was quickly cleared by allowing parties to appear by phone, Zoom or WebEx.

As far as ongoing changes in the court, all criminal trials have been and remain in person, but bond hearings, arraignments and logistics can be and will continue to be done by video with the jail. In civil hearings, even if a party or witness is exposed to or contracts COVID, he or she will be permitted to appear by phone or video software so that hearings can continue.

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ROANOKE LAW LIBRARY NOTES SPRING 2021

BY JOSEPH KLEIN, LAW LIBRARIAN

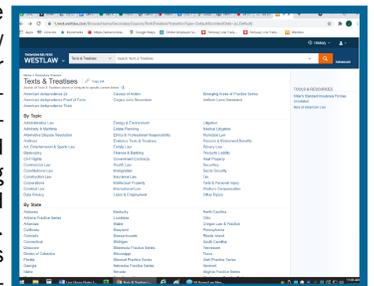
We survived the winter of 2020/21 and while there is always the fear of the occasional late snow-storm, the pollen that daily coats my car signals that spring is here. I always think of spring as a time of newness and growth. Spring of 2021 will not only bring new flowers and new leaves it will also hopefully bring a new normal as COVID vaccinations increase, infection rates hopefully decrease and people are able to return to places and activities that they have had to curtail in the last year.



While the Roanoke Law Library has been closed to the public for over a year now, we have strived to provide the very best service possible to all Roanoke valley citizens in need of legal information. It has been a challenge helping people in this way but I am proud of our success in continuing to assist the Roanoke legal community and the public during this difficult time. The City of Roanoke leadership and the administration of the Roanoke Public Libraries are working as diligently as possible to be able to reopen our facilities while keeping users and staff as safe as possible. The increased availability of vaccines and the improving COVID numbers are making it likely that this day will be here soon. I can't wait for the day to come, to welcome you all back into the Roanoke Law Library but in the meantime please don't hesitate to contact me with any legal research questions. I am able to provide access to resources for all but the most obscure requests without you having to come to the library using our legal research databases and can scan and email materials that are not available online. At this time, I am also able to provide access to items in the Roanoke Law Library collection that do not normally circulate. Please contact me by phone (540-853-2268) or email (joseph.klein@roanokeva.gov) to let me know how I can assist you and to make arrangements to pick items up. Even when we do allow users back into the library, I will still gladly provide online legal resources to you virtually whenever you have a legal research need.

Online Legal Research

We now provide free access to both Westlaw and Lexis Advance and our subscriptions provide primary and secondary resources for federal and state information including case law, statutes and subject specific databases. Even though the library is closed, we have a workstation that is available to



all that can access either online legal research database. If you are interested in using this workstation or finding out if we have access to a resource that might help you please give me a call and we can set up an appointment. If you do happen to be in the Courthouse don't hesitate to knock on the Law Library door and check on the workstation's availability.

MY SUPERLATIVE CASE

BY CHARLES R. ALLEN, JR., ESQ.



In 1976, I was the junior Assistant City Attorney in the Roanoke City Attorney's Office. The City Attorney was James N. Kincanon, who had hired me in June of 1974, right after I graduated from the William & Mary Law School.

At that time, there was a growing number of massage parlors on Williamson Road. This gave rise to many complaints by residents of the area, especially after one massage parlor was located near a school and church.

David Hooper, the Chief of Police, requested that the City Attorney assist him in drafting an ordinance limiting the activities in the massage parlors.

Mr. Kincanon assigned me to handle the matter. I met with Chief Hooper, whose primary concern was that activities not involving the administration of therapeutic massages were taking place in the massage parlors.

I researched how other Virginia jurisdictions had regulated massage parlors. The City of Falls Church had adopted an ordinance outlawing massages by persons of the opposite sex for "reward or hire." I drafted an ordinance that prohibited the administration "for hire or reward, to any person of the opposite sex any massage, any alcohol rub or similar treatment, any fomentation, and bath, or electric or magnetic treatment." The ordinance did not apply to licensed health care providers or barbers and beauticians who gave massages to the scalp, face, the neck or shoulders.

The proposed ordinance was submitted by the City Attorney to City Council for its consideration. Council held a public hearing on the proposed ordinance on February 2, 1976.

The Council chambers were packed. Most of the attendees were Williamson Road residents who opposed the massage parlors. But some of the masseuses and parlor operators also attended, including L.R. Brown, Jr., who was accompanied by his attorney and my friend, John H. (Jack) Kennett, Jr.

Shawn Dillon, one of the masseuses, rose and posed a question to the men who opposed the massage parlors. She asked how many men present had never visited a massage parlor. All of the men raised their hands. Dillon replied: "See, you don't know what you are missing."

Council adopted the ordinance.

Jack Kennett filed suit in U.S. District Court on behalf of L.R. Brown, Jr. and Barbara Ellis Thomas, seeking to enjoin enforcement of the ordinance. The court's decision is reported as Brown v. Haner, 410 F. Supp. 399 (W.D. Va. 1976). Byron E. Haner, the Roanoke City Manager, was a defendant, along with other City Council members and officials, because individual city officials were, at that time, named as defendants in lieu of the municipality in cases involving constitutional issues.

The suit alleged that the ordinance violated the plaintiffs' federally-guaranteed rights to freedom of association and privacy. These rights had been recognized and applied to the states through the Fourteenth Amendment in Griswold v. Connecticut,

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"BUILDING A BIKE WHILE RIDING IT": TRIAL OF A FEDERAL CASE ON ZOOM IN THE AGE OF COVID-19

BY TOMÁS GAHAN, ESQ.

REPRINTED FROM *TRIAL NEWS*, THE MONTHLY NEWSPAPER OF THE WASHINGTON STATE ASSOCIATION FOR JUSTICE.

Virtual Jury Trials Coming to the Western District

After months of having to postpone jury trials in civil cases to comply with government health recommendations and keep participants safe from COVID-19, the U.S. District Court for the Western District of Virginia has joined other trial courts around the country that are conducting jury trials virtually, using Zoom and other specialized software. A sister court, the Western District of Washington, pioneered this process in 2020 and has now conducted multiple virtual jury trials. When Western District of Virginia judges decided to move forward with virtual trials, participants in past Washington virtual trials generously shared information and materials they had developed—personal experiences, copies of written procedures for conducting a virtual jury trial, from start to finish, and handbooks for judges, court staff, attorneys, and jurors. These model documents have been adapted for Western District of Virginia virtual proceedings which will begin in April 2021. See <http://www.vawd.uscourts.gov/virtual-trials.aspx>

Attorney Mike Wampold (see article below) served as one of several contact persons available for questions and tips to smooth the Western District of Virginia's upcoming experience with virtual trials. The *Roanoke Bar Review* editors hope our readers will find Mike's virtual jury trial story enlightening and useful.

On October 5, 2020, Mike Wampold and I began one of the nation's first federal Zoom jury trials. For eight trial days, we presented every aspect of our case from a computer in our office's law library while jurors watched from their bedrooms, basements, kitchens, studies, and living rooms, and Judge Marsha Pechman made rulings from the comfort of her home office. Conducting an entire jury trial via Zoom was challenging and at times uncomfortable, but ultimately it was extraordinarily rewarding and sent a powerful message: Even in the time of COVID 19, plaintiffs still have a path toward justice and defendants cannot use the pandemic to avoid responsibility.

Our case was a relatively modest UIM denial of benefits claim in addition to a violation of the Consumer Protection Act, failure to act in good faith, violation of the Insurance Fair Conduct Act, and negligence claims against Integon Insurance Com-



Tomas Gahan



Mike Wampold

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The McCammon Group

is pleased to welcome our newest Neutral



Hon. Elizabeth A. McClanahan (Ret.)

Retired Justice, Supreme Court of Virginia

The Honorable Elizabeth McClanahan is the President and Dean of the Appalachian School of Law. Justice McClanahan retired in 2019 from judicial service after a combined sixteen years on the Supreme Court of Virginia and the Court of Appeals of Virginia. Prior to her service on the bench, she enjoyed a successful career in private practice and later as the Chief Deputy Attorney General for Virginia. Justice McClanahan has also served as a director on numerous professional and nonprofit boards, including the Via College of Osteopathic Medicine, North American Coalbed Methane Forum, National Chamber Foundation Board of the United States Chamber of Commerce, Energy and Mineral Law Foundation, and Virginia Oil and Gas Association. She now brings this exemplary record of leadership to The McCammon Group to serve the mediation, arbitration, special master, and judge pro tempore needs of lawyers and litigants throughout the Commonwealth.

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“BUILDING A BIKE WHILE RIDING IT”: TRIAL OF A FEDERAL CASE ON ZOOM IN THE AGE OF COVID-19

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pany, plaintiff’s insurer.

Our client, Mr. Hopkins, was a 72-year-old man who had been rear-ended in the spring of 2016 in what appeared to be a relatively innocuous collision with only minimal property damage to his car. But the following day (Sunday), Mr. Hopkins woke up with nauseating vertigo, and was diagnosed with a concussion on Monday. Unfortunately, Mr. Hopkins had sustained a nearly deadly traumatic brain injury four years earlier while riding a motorized scooter and had spent two difficult years recovering from the effects of three different brain bleeds. The concussion he suffered in the 2016 collision brought back many of the previous TBI symptoms, including memory and cognitive issues and headaches. These were well documented and supported by all of his treating doctors, two of whom testified on his behalf at trial.

The 2016 collision also caused a new vestibular issue called “gravitational vertigo,” an occasional unsteady rocking sensation triggered when Mr. Hopkins turned his head quickly, stood up, or walked up or down stairs. While his cognitive issues and headaches improved, his gravitational vertigo never went away entirely and his treating neurologist concluded that it was permanent.

The at-fault driver’s insurance limits of \$25,000 were paid quickly. Because Mr. Hopkins had suffered such a serious injury in the past, he had purchased \$250,000 in UIM coverage from Integon years earlier to make sure he would be protected should he suffer a second brain injury. But despite the clear evidence of his injuries and extensive treatment, Integon never offered more than \$40,000 for the 2016 collision. Instead, Integon hired neurologist Dr. Roman Kutsy to disagree with Mr. Hopkins’ treating doctors and conclude his injuries should have healed within three months. Integon disputed permanency and did everything in its power to assert its interests over those of its own policy holder.

Discovery revealed that the driving force behind Integon’s hiring of Dr. Kutsy and asking him to perform only a records review of Mr. Hopkins’ medical records (rather than an examination of Mr. Hopkins) was to attempt to weaken Mr. Hopkins’ claim and, if Dr. Kutsy’s opinion was favorable to Integon, to hide the results from Mr. Hopkins. This conduct, revealed in the claim file, became one of the principal bases for our extra contractual claims against Integon.

Judge Pechman first informed us that we would be going forward via a Zoom jury trial during a telephonic pre-trial conference in September [2020], although we had already suspected it for months. She referred us to her court’s Zoom handbook for bench trials, told us that the court was still working on a Zoom manual for jury trials, and that this should be ready a week or two before our trial actually began. Judge Pechman warned us that we would be “building a bicycle at the same time as we were riding it,” an analogy that accurately summed up the whole process.

The final draft of the court’s manual, titled “Virtual Trials: Bench & Jury – A Handbook for Attorneys” provided the groundwork for our basic practical preparation, both for us and for our witnesses:

Counsel shall inform all witnesses about testimony expectations. Witnesses, counsel, and parties should be in locations that are suitable for trial.

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MY SUPERLATIVE CASE

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381 U.S. 479 (1965). The City officials contended that they had authority to enact the ordinance because they had a duty to regulate commercial activities to protect public safety and morality.

Mr. Kincanon assigned me to represent the defendants. I had never appeared in federal court, but I knew enough to file a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted. That set the stage for argument on the motion to dismiss.

The Honorable Theodore Roosevelt “Ted” Dalton, Jr., who was in senior status, presided. Judge Dalton was a distinguished jurist, who ran for Governor of Virginia in 1953 as a Republican and was appointed to the federal bench by President Eisenhower.

In preparing for the hearing, I found a case in which a New Jersey township successfully defended its massage parlor ordinance in the U.S. Supreme Court. I located the township attorney. For \$65.00, he sent me copies of his entire Supreme Court case file. The was probably the best \$65.00 I ever spent. It prepared me for every issue that Jack Kennett would raise.

I walked to the courthouse on the day of the hearing with trepidation, my palms sweating and my heart in my throat. Because of the notoriety of the case, the courtroom was filled with press, Williamson Road residents and business owners, and City officials.

As counsel for the moving party, I argued first. Judge Dalton appeared to be interested in my argument, which I took as a good sign. Then Jack Kennett got up to argue for the plaintiffs. Jack could be loquacious. After he had argued for a long while, I looked up from my note-writing at Judge Dalton. He was fast asleep. I took that as a better sign.

The court ruled in favor of the City and upheld the ordinance. The plaintiffs did not appeal. Chief Hooper and the other city officials were happy. I was glad that I had not flubbed my first federal court case. The massage parlors disappeared from Williamson Road. Shawn Dillon, the massage parlor spokesperson, ran for mayor in the next election but received less than a thousand votes.

Charles R. Allen, Jr. is a solo attorney.

HOW HAS PRESIDENT BIDEN CHANGED IMMIGRATION?

(Continued from page 1)

These bills, which are part of a larger immigration proposal presented by President Biden, have an uncertain future as they move to the Senate. Some significant immigration changes have taken immediate effect while other policies, rules and laws remain in flux, and only time will tell the outcome of such changes.

Rachel Thompson is the managing attorney at Poarch Thompson Law.

MEDIATION**ARBITRATION****JONATHAN M. APGAR**

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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“BUILDING A BIKE WHILE RIDING IT”: TRIAL OF A FEDERAL CASE ON ZOOM IN THE AGE OF COVID-19

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- quiet
- alone and with some level of privacy
- free from distractions
- sitting at an empty desk or table and face clearly visible in the video
- consider backgrounds carefully as they can be a major distraction
 - avoid backlighting
 - use a PC, laptop or large tablet for the video portion of the hearing
 - consider use of dual monitors and a good quality web camera
 - consider audio quality (connect audio by phone vs computer speakers/microphone, with or without a headset)
 - close all other programs to avoid popups
 - cell phones on silent and be used only as backup to the Zoom connection

Further, witnesses shall be instructed:

- they may not use any other devices during their testimony
- with respect to any hardcopy set of exhibits provided to the witnesses, they are not to use the exhibits unless directed to do so.

To ensure that we complied with the recommendations in the manual, we met with each of our witnesses and discussed their ability to appear via Zoom and their access to the necessary equipment. For some, this meant multiple practice sessions, rearranging backgrounds and lighting, and negotiating the family schedule. This was particularly challenging for our client, who lives on a boat with his wife, who was excluded from the trial and therefore had to find somewhere else to spend her time until her testimony.

In the end, we settled on as simple a background as possible for each witness, with minimal distractions behind them, a decent light source in front of them, and a head-on camera angle. Witnesses had to ensure that their “Zoom” name was accurate (and not a left-over from their child’s Zoom class earlier in the day), that the camera eye did not reveal personal items in the background, and that their laptop’s notifications did not interrupt their testimony. For some witnesses this was easier than for others, but after multiple practice sessions, they all figured it out.

For our part, we decided to build a mock courtroom in our office’s law library. Our Microsoft Surface Laptop’s camera worked well (and better than the separate webcams we tried). This was to be our “courtroom laptop.” We placed the courtroom laptop on a standing adjustable desk and attached a Yeti blue microphone for better sound to the laptop. Directly behind the laptop, atop a makeshift base of books and boxes, stood an LED ring light that softened our appearance and gave the overall lighting a more professional look. We made the decision early on that we did not want to wear headsets during the trial. The background for our presentation was a bookshelf with uniformly-spined law books.

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VIEWS FROM THE J&DR BENCH: KIDS, COVID AND THE COURT-HOUSE INTERVIEWS WITH JUDGES CIAFFONE AND GRIFFITH

(Continued from page 3)

Judge Griffith has also instituted and participates in a truancy intervention program called TIPS where she meets with social workers and principals to address children with truancy problems before they get into the court system.

The Court has adapted. We’ve all adapted. And kids are resilient, but there are challenges the Court sees and may see in the future related to the health and success of juveniles. With limited in-person school, the Court sees less CPS complaints from teachers, but the Court is concerned about the mental health and self-esteem issues faced by teenagers in isolation as well as increasing truancy violations. As things open up, the Court encourages attorneys to seek opportunities to mentor our youth.

The Court commends attorneys, parties and court staff for their flexibility and kindness dealing with the frustrations of the pandemic. And a big welcome to Judge Friedman and Judge Ferguson. We look forward to working with you and seeing your impact on the J&DR bench.

Alicha M. Grubb is an associate at Gentry Locke.



VIRGINIA STATE BAR UPDATE: ACTIONS AND PROGRAMMING

(Continued from page 2)

meetings of the conferences, sections, and committees are virtual. Indeed, the Executive Committee and Council meetings held February 25-26, 2021 were virtual.

As always, if you have input about VSB matters, please let us know.

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

Save the Date

Bench Bar Conference

Friday, May 14, 2021

“BUILDING A BIKE WHILE RIDING IT”: TRIAL OF A FEDERAL CASE ON ZOOM IN THE AGE OF COVID-19

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After trying various configurations, we finally agreed that the laptop/standing desk would be the equivalent of the trial podium, used by whomever was presenting at the time, while the other would sit across the table with a separate laptop, muted and with the camera turned off. When it was my turn to present a witness or an argument, I would stand in front of the camera, my body framed within a box made with blue painter's tape on the carpet to stop me from moving excessively while on camera. Meanwhile, Mike would sit at a secondary laptop with his camera turned off, revealing instead a black box titled “Attorney for Mr. Hopkins.” When it was Mike's turn to present, we would switch stations. We found that the audio output for the secondary laptop also needed to be muted to prevent feedback; the non-presenting attorney could simply rely on the audio from the courtroom laptop while viewing the video feed on his own computer. This allowed us both to be in the same room and rely on each other for those visual cues that are so important between co-counsel during trial, and also permitted the silent attorney to hold up signs saying things like, “Stop Swaying” or “Slow Down!”

Our set-up was not without its pitfalls. The most dramatic one was when one of Mr. Hopkins' treating doctors testified that busy backgrounds, like the bookshelf behind us, would make it difficult for Mr. Hopkins to concentrate in light of his brain injury. Concerned that the background we had been using throughout the trial would affect Mr. Hopkins' testimony during his direct examination (or would make the jury think that we did not take the advice of his treater seriously), we decided to put a curtain in front of the books on the day that Mr. Hopkins testified. Unfortunately, the curtain was too heavy, and began falling down in the middle of Mr. Hopkins' testimony in what Judge Pechman called a “slow striptease.” My efforts to tape up the curtain during Mike's questioning of the witness were not successful, but did provide for some unintended entertainment. Despite this calamity, our decision to try the case in the same room with a single “courtroom laptop” and a professional-looking background proved effective and allowed many of the same freedoms and nonverbal communication that we achieve during an in-person trial. We will use the same or similar set up in our next Zoom trial.

It was obvious during the defendants' case that they had not thought through how their witnesses would appear on Zoom, and had not discussed the courtroom handbook's instructions for testifying via Zoom with their witnesses. This meant that when the insurance defense expert testified, the camera was sharply angled up toward his flaring nostrils and quivering jowls, a jarring image that his attorney never bothered to correct. Dr. Kutsy's presentation was not better: he leaned in close and tight against the camera, frequently blocking the screen with a close up of his ear or forehead. Worse still, Dr. Kutsy's audio was poor and distracting. I don't know whether these visual problems impacted the jury's impression of the defense witnesses' credibility, but they certainly did not help.

Exhibits provided their own unique set of challenges. Each party was required to download their exhibits into a program called “Box,” run by the courtroom deputy. Box was not particularly user friendly, and our ace paralegal Dana Vizzare spent hours trying to “gain access,” download defendant's exhibits,

and otherwise navigate the unreliable system. Judge Pechman wisely recommended that we provide paper copies of the exhibits themselves to each witness. While this meant that reliance on those exhibits with each witness during trial was seamless, it also meant that Dana had to ensure that boxes filled with binders were mailed to each individual witness, a costly process that made last minute additions difficult.

Using a virtual exhibit repository also made it difficult to ensure that the finalized exhibits were the correct ones. Despite numerous agreements with defense counsel that the defense exhibits would be redacted in accord with the court's rulings in limine, the final uploaded copies of those exhibits into Box consistently violated those rulings. We had to check and re-check every submission by defendants, and repeatedly found that they had included inadmissible materials, or had named the exhibits files themselves in such a way as to convey inadmissible information. This process was significantly more burdensome than the final, hard copy exhibit review conducted at the conclusion of an in-person trial before the exhibits are submitted to the deliberating jury.

For impeachment exhibits used during cross examination, we agreed with the defense to provide those exhibits one hour before the witness' testimony with the understanding that counsel would not speak to the witness about the content of those exhibits and that they would not be reviewed by the witness until they were on the witness stand. For those witnesses that said they could not access a printer during trial (or could not print more than a handful of pages), we sent sealed envelopes or boxes to the witnesses with instructions that they were not to be opened until they were directed to do so during cross examination. For the most part, this approach worked, but not entirely. Defense counsel did address the impeachment materials in his direct examination of the witness contrary to our agreement, and tailored his direct examination to try and “remove the sting” from what he predicted to be the cross examination based on his review of the impeachment evidence. In an in-person trial, these materials would not have been disclosed until we were in the process of impeaching the witness on cross-examination; having to disclose these materials ahead of time to satisfy the logistical issues created by Zoom was not ideal. We are brainstorming ways to prevent us from having to “show our cards” in the next trial, and still allow for the unpredictable spontaneity that is vital to some cross examination chapters.

What did work was having all of our documentary exhibits prepared with call outs on PowerPoint ahead of time, both for direct and cross examination. This allowed us to “share our screen” on Zoom and show the jury and the witness exhibits in real time, with relevant parts highlighted for discussion. While Box theoretically allowed for the exhibits to be screen shared from the program itself, this proved to be cumbersome, and the highlighting and focusing options on Box – at least for us – were neither intuitive nor functional. Instead, we used PowerPoint slides with the exhibits prepared ahead of time for a relatively seamless presentation. I did, however, have to keep reminding myself that the moment or two I would need to take to share my screen with the court and the jury was not an eternity, even though it felt that way while I was doing it.

Crucial to using PowerPoint to show exhibits (or any screen sharing technique on Zoom), was telling the jurors ahead of time about toggling between “speaker view” and about the option in the upper right hand corner of the Zoom display that permitted them to switch between the exhibit and

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“BUILDING A BIKE WHILE RIDING IT”: TRIAL OF A FEDERAL CASE ON ZOOM IN THE AGE OF COVID-19

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the witness. While the court did not allow us to tell the jury in what “view” they were required to use in order to observe our presentation (Judge Pechman noted that in a live trial, they would be able to focus on anything that they wanted to in the courtroom), we were permitted to suggest to the jury the viewing option that made the most sense. This was particularly important for opening and closing, when the courtroom computer’s screen was shared for most of the presentation, but jurors needed the ability to toggle back and forth between focusing on the attorney and on the exhibit or instruction that the attorney was referring to. The jury confirmed afterward that this was helpful and all of them appeared to use the option when it made sense.

Perhaps the aspect of the Zoom trial that seemed most different had to do with the jury. First, it was admittedly bizarre to be viewing the jury in their own space. One juror sat prone on her living room couch with a blanket on her lap, another sat with an overflowing laundry bin behind him, and still another walked around her house with her I-Pad camera pointing up at her nose and ceiling as she went from room to room. I can envision a scenario where observing the jurors in this sort of intimate setting could be an advantage, particularly in voir dire. After all, obtaining a glimpse of a juror’s preferred reading, bedroom posters, or objects on her nightstand, might provide a helpful insight into her personality for purposes of assessing bias. But in our case, no such helpful clues were revealed. Instead, it just felt strange and intrusive to be conducting a federal trial with jurors in their sweats watching from their couches and kitchens.

Second, the nature of Zoom voir dire, allowed us to address only six jurors at once, which meant that we had to appear natural repeating the same inquires three different times. Third, Zoom made it very difficult to connect with any juror, and the medium itself meant that the jury was necessarily disconnected from each other. Finally, it was virtually impossible to convey the sense of importance of the case and its consequences without the pomp and circumstance of the federal courthouse and all of its rituals as the backdrop for the trial. With these challenges in mind, we tried hard to remind the jury of their vital and historic role in this case, and Judge Pechman urged them to bond in the virtual jury room.

In the end, we were amazed by the similarities between a Zoom trial and an in-person trial. The revelatory satisfaction of a successful impeachment against a defense witness, the intensity of human connection during the direct examination of a witness, the sparks of humor and light-heartedness that bring sudden but welcome breaks to a tense argument – all of these still appeared throughout the trial despite the physical distance and attenuation inherent in a virtual setting. And while much of the romance of the trial itself was gone (e.g., the pageantry and formality of a federal trial, the eye contact with an invested juror during closing argument, the tell-tale twitch of defense counsel’s mouth in response to a juror question), our jury still thoughtfully evaluated the evidence, asked probing questions, and reached a just verdict against Integon Insurance Company. That is all we can really ask for.

This was especially satisfying because Integon, like so many defendants we face in 2020, clearly believed that the inability to safely conduct in-person jury trials during the pandemic meant

that it – and other defendants like it – could continue to avoid the justice of the courthouse indefinitely, and do so with impunity. This trial and its welcome results shows that – while justice may arrive in varied and unexpected ways – it inevitably arrives nonetheless.

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July 23, 2020 – A Guide To Virginia Residential Landlord & Tenant Law – 2hrs and the Update on April 1, 2021—Update -2hrs
By Grimes Creasy, Esq.

September 2020 – A Practical Guide to License Restoration and Criminal Expungement – 1hr
By Patrick Kenney, Esq.

October 2, 2020 – How to Make Friends, Influence People and Make Money – 5 hrs
By Hon. David Carson, Hon Scott Geddes, John Lichtenstein, Chelsea Williams, Mia Yugo, Esq.

October 22, 2020 – Ethical & Effective Advocacy in Mediation - 2hrs
By James W. Barkley, Esq. and Hon. William D. Broadhurst (Ret.)

April 13, 2021 – Occupational Well-Being: Understanding the Risks and Building Our Resilience – 1Hr
by Margaret Hannapel Ogden, Esq.

April 23, 2021 – Firearms and Gun Sale Legislation – 2hrs
By Gregory A. Porter, Esq.

May 14, 2021 – Bench Bar Conference – 1hr
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UPCOMING EVENTS

Roanoke Bar Association Meetings 2020 - 2021

October 13, 2020, virtual

November 10, 2020, virtual

December 8, 2020, virtual

January 12, 2021, virtual

February 9, 2021, virtual

March 9, 2021, virtual

April 13, 2021, virtual

May 3, 2021 (Law Day), virtual

June 8, 2021

Go to www.roanokebar.com for more information on all upcoming events.

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