

INSIDE THIS ISSUE:

<i>Views from the (Substitute) Bench: Raphael E. "Ray" Ferris, Esq.</i>	1
<i>President's Corner</i>	2
<i>My Superlative Case</i>	2
<i>Courthouse Program for Young Lawyers</i>	3
<i>The Defense of a Lawsuit Through the Eyes of the Insured</i>	3
<i>Roanoke Law Library: News and Information</i>	4
<i>An Update on Virginia State Bar Activities</i>	4
<i>Santa to the Rescue</i>	10
<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.

Editors

Christopher S. Dadak - 387-2320
christopherd@guynnwaddell.com

Thomas "Bo" Frith - 985-0098
bfrith@frithlawfirm.com

Jonathan Puvak - 983-9399
puvak@gentrylocke.com

Linda L. Gustad - 857-5100, Ext. 5323
lindag@vawd.uscourts.gov

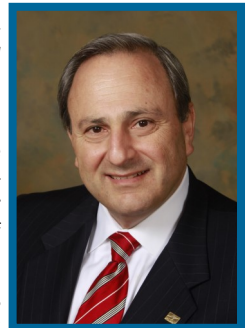
Alicha M. Grubb - 983-9361
grubb@gentrylocke.com

Ray Escobar - 983-7765
rescobar@woodsrogers.com

VIEWS FROM THE (SUBSTITUTE) BENCH: RAPHAEL E. "RAY" FERRIS, ESQ.

BY CHRISTOPHER S. DADAK, ESQ.

This article, inspired by the Views from the Bench series, focuses on the background, experience, and helpful insight from local substitute judges.



Many attorneys have likely come across a substitute judge in one of their cases. Likely fewer have had a practicing attorney serving as the substitute judge. Even fewer know how one becomes a substitute judge and the details of such service.

Ray Ferris applied for an appointment a couple years back in 2019 (due to the pandemic, that likely feels like a lot more than two years to our readers). As a former city council member, Ray was motivated by his diverse practice areas (criminal, plaintiff's, and family law), his commitment to public service, and his general interest in what it was like to serve as a judge. The questionnaire tracked the format and substance of such forms for judicial appointments to the various courts in the Commonwealth. He remembers a focus in the application on potential conflicts or ethical issues. After going through the process, Ray received an e-mail from Judge Carson confirming his appointment as a substitute judge. He then immediately started receiving emails from the Supreme Court of Virginia about his training.

Training for substitute judges is similar to the training provided to newly appointed general district court (GDC) judges. Over multiple days, the substitute judges learn the basics of their new jobs, such as primers on each area of the law. The training focuses on forms because a lot of what the substitute judges will do will be form-driven. The forms are not always intuitive, and it is one area with a steep learning curve. Ray is grateful that through this program, he has access to additional trainings.

Courts request a full day or half day from him as the substitute judge. The clerks prepare the time and mileage form for him before he leaves so the paperwork is put together and done the same day. Sometimes cases settle and his afternoon docket goes away. In those situations, he always also checks with the criminal clerk to make sure he does not have any criminal cases before he leaves. Ray averages about 2-3 days a month as a substitute judge. On occasion, he has served outside of the 23rd Circuit, primarily in Botetourt County and Bedford County.

Substitute judging harkened Ray back to his substitute teaching days prior to law school. When you are needed, you get a call asking if you can show up a certain day to that court. He praised the local clerks for giving him advance notice and being accommodating in terms of scheduling. Like any new job, the first few times of substitute judging were stressful and required adjustment to basic logistical issues, such as where to park and which way to enter the court. There is also the awkwardness of sitting in somebody else's chambers and wearing a robe that does not belong to you. As a substitute judge, he is also mindful to keep his approach consistent with other judges in that court so that litigants do not feel like their results are materially affected (positively or negatively) by having a substitute

(Continued on page 8)

PRESIDENT'S CORNER

BY MACEL H. JANOSCHKA, ESQ.



In my fall article, I noted that we were hoping to return to a “normal” bar year, but that it was unclear how the Delta variant would affect those plans. Fast forward to winter, and we are now dealing with the Omicron variant.

We had hoped to host Santa in the Station this year, but concerns from the shelters related to the Omicron variant led us to pivot and once again host “Santa to the

Rescue.” Volunteers delivered treats and gifts to children. While it wasn’t what we had planned, we were glad to spread some holiday cheer to others this season. As always, thank you to Lori Thompson for planning this event.

COVID did not prevent us from assisting with Judge Carson’s and the Roanoke City Circuit Court’s New Attorney Orientation. The event was held at 3:30 on October 7 in Courtroom 4. New attorneys heard from the chief judge of each court, the clerks of each court, and the Sheriff. Afterwards the attendees enjoyed a social hour at 202 Social House that was sponsored by Planet Depos. We have heard great feedback on the program and hope that it will become an annual event. Once again, thank you to Judge Carson and to Sarah Jessee, our RBA Young Lawyer Chair, for their efforts in planning and implementing this program.

We have been fortunate enough to be able to meet in person this year and have had outstanding speakers. Judge Ballou opened the bar year with an inspiring discussion of professionalism. Sheriff Bell gave an informational talk about the Sheriff’s office and upcoming security upgrades to the courthouse. In November, Pete Eshelman discussed economic development and how it ties into Roanoke becoming a premier outdoor destination. Finally, Monica Monday provided a great update on the expansion of the Virginia Court of Appeals.

We have partnered again with Roanoke City Schools in an effort to assist their efforts in providing for homeless students. In conjunction with the Roanoke Law Foundation, the Roanoke Bar Association plans to volunteer and help fund a celebration lunch for graduating seniors on May 21, 2022. Volunteers will be needed for set up and to work the event. Please stay tuned for more information on this event. Thank you to Adam McKelvey and Molly Elder for coordinating these efforts.

Finally, please save the date for our Bench Bar Conference which will be held on March 25, 2022. Lunch will begin at noon and the conference will be over by 3:30 pm. James McCauley with the Virginia State Bar Ethics Counsel Office will present a one-hour CLE. Thanks to Jonathan Puvak for his hard work planning this conference.

As always, 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 this time of uncertainty.

Macel H. Janoschka is a partner at Frith Anderson & Peake, PC

MY SUPERLATIVE CASE

BY KIRK M. SOSEBEE, ESQ.

I recently concluded my first pro bono civil rights case, but probably not my last.

Many civil rights cases are filed by prisoners every year, with few proceeding past the motion to dismiss/summary judgment stage. These cases are very difficult to pursue and to win. However, if one of these cases looks like it is heading to trial, the Western District of Virginia judges will often attempt to get an attorney to take the case on, pro bono (with a dedicated Bench Bar Fund available to reimburse certain out-of-pocket expenses and exert costs).

Judge Cullen’s office reached out to our firm in April of this year and requested that we take on a pro bono Section 1983 civil rights case that was filed by an inmate at Red Onion State Prison, that was heading to trial in the Western District of Virginia. I had been interested in taking on one of these cases, and together with Guy Harbert and our paralegal, Heather Beyer, we jumped in. In May, I attended a CLE training led by Judge Ballou on handling these prison Section 1983 cases virtually from Hilton Head while on vacation.

Both the case and the client turned out to be extremely interesting. The client had been incarcerated at Red Onion State Prison for over a decade, with around twelve years remaining on his sentence. I learned that Red Onion is located in the middle of nowhere in Pound, Virginia (Wise County), and was designed as Virginia’s first super-max prison, to house inmates who committed serious crimes or got in trouble at other Virginia prisons. It was quite intimidating to visit, once the COVID restrictions lifted long enough for me to be able to meet in-person with our client. Setting up phone calls to speak with our client was a challenge as well. The interaction with the client was rewarding, and he was very grateful for our assistance.

The case presented interesting legal challenges as well, starting with the tight schedule of entering notice of appearances in the first week of May, with a trial set for the end of October. The case revolved around an Eight Amendment claim of excessive use of force – that the defendant intentionally or recklessly shot our client in the head with a “less-lethal” direct impact round, similar to a rubber bullet, during an incident in the prison where our client was effectively an “innocent bystander.” The defense theory was that our client had not been shot, or that if he was, it was an accidental ricochet. We dove into discovery and engaged an expert, who was the former warden of San Quentin State Prison in California. Through discovery, we obtained video surveillance footage of the incident. We utilized the services of a video consultant to slow down the surveillance footage and track each round as it hit and ricocheted off the first surface it impacted – tables, walls, and inmates located all over the room. We then got the defendant to testify at length at his deposition about his qualifications and how good a shot he was with this weapon. He testified that he felt he was entitled to shoot at inmates who were not involved in a fight, if they weren’t complying quickly enough with the prison’s “hit the ground and don’t move in the event of a fight” protocol. With this evidence, we developed a strong case that the defendant either intentionally or recklessly fired his weapon at or near inmates all over the room.



(Continued on page 8)

COURTHOUSE PROGRAM FOR YOUNG LAWYERS

BY SARAH C. JESSEE, ESQ.



On October 7, 2021, the Roanoke Bar Association, along with the Roanoke City Courthouse, held the first Introduction to the Courthouse Program for new attorneys in Roanoke. Chief Judge Carson initiated this program with the Roanoke Bar Association Young Lawyers Committee in order to provide an opportunity for young lawyers to meet the Chief Judges, Clerks of the Court, and the Sheriff and to educate them about proper court practices. The Roanoke City Courthouse graciously welcomed new attorneys, who either passed the Virginia Bar between 2017 to 2021 or are waiting on results, to attend the program.

A goal of this program was to help new attorneys become more knowledgeable about and comfortable with practicing in Roanoke. The Sheriff discussed information that the



Judge David Carson



Sarah Jessee, Young Lawyers Chairman

attorneys should be aware of when visiting Roanoke City Jail as well as security precautions when entering the Roanoke City Courthouse. The Chief Judge of each court, along with a Clerk, discussed courtroom decorum and expectations and advice for filing pleadings in each Court. For the Juvenile and Domestic Relations District Court, Chief Judge Griffith explained the unique J&DR docket schedule. Chief Judge Talevi discussed the form pleadings that are typically used and ex-

pected in the General District Court. Chief Judge Carson discussed updates to the Courts as a result of COVID-19. The program concluded with Chief Judge Carson inviting all new attorneys to introduce themselves to the Judges.



Aicha Grubb & Macel Janoschka

Following the program, the young lawyers and Judges were invited to 202 Social House to continue with the introductions. Chief Judge Carson and the Roanoke Bar Association plan to continue a program for young lawyers in the future and appreciate the RBA members' continued encouragement



Judges M. Friedman, F. Friedman, & D. Carson

THE DEFENSE OF A LAWSUIT THROUGH THE EYES OF THE INSURED

BY JASON GUY MOYERS, ESQ.

For those of us who practice insurance defense, a mainstay of our practice is the tripartite relationship between attorney, insurer, and insured. We go to great lengths to zealously represent our client—the insured—and to comply with insurance company guidelines in terms of defense strategy and keeping the insurer informed. All too often, however, in the course of these efforts, the insured herself can get lost in the shuffle.



More often than not, a particular lawsuit is an insured's first and only experience with the judicial system. Things such as pleadings, written discovery, depositions, and trial, while common to us, are, to her, foreign. In addition, the stress and uncertainty associated with being sued can be overlooked. Regardless of the length of time you have been practicing, it's easy to lose sight of the personal side of things when representing an insured. In keeping with our role as attorneys and counselors, it is imperative that we remain mindful of the persons we are representing and do all we can to help the insured through the litigation process.¹

Every aspect of a lawsuit is stressful for the insured.² This stress can manifest itself in many ways, to include: (1) interference with insured's daily mental, emotional, and physical life; (2) impaired decision making; (3) strain on the insured's support systems (personal relationships); (4) physical illness; (5) interference with your efforts as counsel to advance the litigation; and (6) erosion of the attorney-client relationship.³ This stress often can—and does—co-exist with the strain resulting from the underlying accident or event that gives rise to the litigation. For many insureds, whose participation in lawsuit is completely involuntary, it can seem “as though time has stopped for everything else except the lawsuit.”⁴

“Stress can begin as early as the first notification that one is going to be sued and lasts until well after litigation has ended.”⁵ Questions such as, “Will I have to go to court?” “How long will this take?” “Can they take my house?” “How do they expect me to pay the amount sued for?” and “Will my insurance company drop me as an insured?” are common. This stress intensifies at critical stages, or “psychological soft spots,” in the litigation process.⁶ These soft spots include: (1) service of the lawsuit; (2) the insured's initial meeting with counsel; (3) written discovery; (4) depositions; (5) settlement negotiations; (6) trial; and (7) appeal. “With greater awareness” of the negative aspects of legal processes on the emotional and psychological functioning of clients, “lawyers can better prepare their clients for litigation stress, and, where appropriate, take preventative actions to minimize the negative aspects of the litigation experience.”⁷

Initial Meeting

Along with the shock of being sued, an insured comes into the attorney-client relationship with a certain degree of skepticism and suspicion. After all, she didn't pick you; her insurance company did. In this form of an arranged marriage, the insured often will wonder whose interests you hold paramount—hers or the insurance company who hired you.

With this in mind, it is important to realize that your initial meeting with the insured can be at the same time both comforting and stressful. It is critically important, therefore, to make a

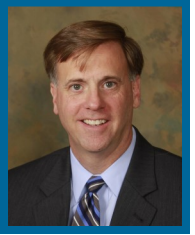
UPDATE ON VIRGINIA STATE BAR RECENT ACTIVITIES

BY DANIEL FRANKL, ESQ. AND
BRETT MARSTON, ESQ.



The Virginia State Bar Council had a meeting on October 29, 2021 in Hot Springs, Virginia. At the meeting, our council heard annual reports from a few of the Virginia State Bar Standing Committees. In addition, the council took the following actions:

Proposed Legal Ethics Opinion 1896



Our council unanimously approved a draft legal ethics opinion 1896 that holds a foreign lawyer may work remotely in Virginia, from home or otherwise, regardless of the circumstances, as long as the work being performed involves the practice of law of the foreign lawyers licensing jurisdiction or exclusively federal law that does not require Virginia licensure. The foreign lawyer must avoid holding him or herself out as if they hold a license to practice law in Virginia but may otherwise have a public presence in Virginia. This opinion will be presented to the Supreme Court of Virginia for their approval.

Amendment to Rule 1.2 of the Professional Guidelines and Rules of Conduct

Our council approved on a vote of 57 to 3 an amendment to Rule 1.2 (c) and a new comment [13] to accompany the amendment. The proposed amendment addresses whether, and how, lawyers can advise clients who would wish to engage in marijuana-related activities that are legal under Virginia state law but illegal under federal law. Basically, the amendment will allow lawyers to advise clients to how to comply with state law as long as clients are also advised about the application of federal law. Comment [13] explains the purpose of the rule change and the content of the advice that must be provided to the client. The proposed change will be presented to the Supreme Court of Virginia for approval.

Proposed Amendment to Paragraph 13-6.H

Regarding the disciplinary board's review of agreed dispositions, bar council unanimously approved an amendment to paragraph 13-6.H facilitating feedback from the disciplinary board to the parties as to what would be acceptable concerning agreed dispositions. This change is being made in the interest of judicial economy and transparency and conforms to the current disciplinary board's practices and procedures. This proposed change will be presented to the Supreme Court of Virginia for approval.

Amendment to the Client's Protection Fund Rules

Bar council unanimously approved an amendment to the client's protection fund rules, specifically Revision 2, Rule v.f.5 raising the per-petitioner cap from \$75,000 to \$100,000 for losses incurred on or after July 1, 2021.

Brett Marston is partner at Gentry Locke and Daniel Frankl is a partner at Frankl, Miller, Moyer & Webb.

ROANOKE LAW LIBRARY: NEWS AND INFORMATION

BY JOSEPH KLEIN, LAW LIBRARIAN

I am in shock that 2021 is almost over and that the holidays are almost here. I hope things are calming down for you all after a couple of crazy years and that you are able to have a relaxing and rewarding holiday season with loved ones. Personally, 2021 has been a crazy year with the closing of the Law Library in the courthouse this spring and the reopening here in the Main Library in the early summer. In addition to the huge work related undertaking of moving the library, my family also had an enormous blessing this year. September 28 was a huge day as I, my wife and our daughter Harper were thrilled to adopt a sibling pair we had been fostering into the Klein family, welcoming Kayla age 9 and Christopher age 7. Going from a family of 3 to a family of 5 has been an enormous yet rewarding challenge. It was also cool to see the Roanoke legal landscape from the other side. I have a renewed appreciation for the work that you all do. It's not always glamorous but when things go right as they did in my case (pun intended) it is a beautiful thing. The only regret I have is that I wasn't able to get Kayla and Christopher to help me decorate my tree in the courthouse as was my annual tradition with Harper.



The Law Library here at the Main Library is really taking shape. There are still a few improvements that need to be made but for the most part things are located where they will be permanently. We have settled in nicely here in the Virginia Room and have been busy trying to make access to legal resources as smooth and easy as possible. It has been great being reopened and helping people in person. I have been overjoyed to see some of you in the last few months. If you haven't stopped by since we reopened please stop by and say hi and check things out. If you haven't been to the Virginia Room before, it is a wonderful space, very quiet and serene (compared to the rest of the Main Library), with a wonderful collection of local history and genealogy materials in addition to the legal resources. There are some really cool things here that we would love to show you.

I think that when things closed down because of the pandemic we all developed new ways of doing things and helping people virtually became the norm for me. I am and will continue to be glad to help people find legal resources virtually but it's always great to see you guys and find out what you are up to. While I miss running into you all in the courthouse, I realize that things will never return to that former normal and they probably wouldn't have even if I hadn't been forced to move. If you need virtual help feel free to call (540-853-2268) or email me (joseph.klein@roanokeva.gov) at any time. We now have access to both Lexis and Westlaw and are able to provide material from both at the touch of a button. Whenever the Library is open, Westlaw and Lexis are available on our research terminals here in the Virginia Room/Law Library and can be used by anyone. So stop by and use Westlaw and/or Lexis whenever you desire. Hope to see you all in 2022.



The McCammon Group

is pleased to welcome our newest Neutral



Hon. Beverly W. Snukals (Ret.)

Retired Judge, 13th Judicial Circuit Court of Virginia, Richmond

The Honorable Beverly Snukals recently retired after twenty-three years of distinguished judicial service in the Richmond Courts, most recently serving twenty years as a Judge on the Circuit Court including two years as Chief Judge. Prior to her judicial career, Judge Snukals enjoyed a successful private practice in Richmond. She is a Past President of the Metropolitan Richmond Women's Bar Association and a recipient of their Women of Achievement Award. Judge Snukals is a Former Chair of the Judicial Education Committee for the General District and Circuit Courts of Richmond, a Former Chair of the Judicial Section of the Virginia Bar Association, and a Member of the Lewis Powell Inn of Court. She has served as an Adjunct Law Professor at the University of Richmond School of Law for twenty years. Judge Snukals now brings this record of devotion and accomplishment to The McCammon Group to serve the mediation, arbitration, judge pro tempore and special master needs of lawyers and litigants throughout the Commonwealth.

THE
MCCAMMON
GROUP

For a complete list of our services and Neutrals throughout VA, DC, and MD,
call 888.343.0922 or visit www.McCammonGroup.com

THE DEFENSE OF A LAWSUIT THROUGH THE EYES OF THE INSURED

(Continued from page 3)

good first impression. Your goal going in is to gain and maintain the insured's trust. Talk to the insured in plain English. Be open and honest with her as to what the legal process entails. Be open and honest with regard to what is expected of the insured.⁸ Without sugar-coating it, convey a sense of empathy, patience, and warmth. Take the time to listen, avoiding a "seen one, seen them all" or "cut to the chase" mentality. Let the insured tell you her story. Give her a chance to share with you her feelings about being sued and what's alleged in the plaintiff's lawsuit. The more the insured trusts you, the better she'll feel, the more she'll tell you, and the better the job you can do to help her in the defense of her case.

Introduce the insured to your "team," including your paralegal, legal assistant, etc. If an associate in your firm is going to be doing the "grunt work," with the partner planning to try the case if it doesn't settle, introduce the client to both the associate and the partner up front. Don't have the partner—whom the client has never met and has no existing level of comfort—"parachute" in to try the case. Such a maneuver will only increase the insured's level of anxiety. Explain, too, to the insured your role and that of the insurance company. Make sure she understands that it is with her, not the insurer, that your ultimate loyalty lies.⁹

While some insureds prefer not to be bothered with the lawsuit, or deal with the litigation by pretending it doesn't exist, most want to be kept informed. The number one bar complaint is from clients who feel like their attorney isn't keeping them up to speed.¹⁰ Set clear guidelines for communication, both method and schedule. Don't ever leave the insured to feel as if it's a hassle to get in touch with you. Return all telephone calls within 24 hours. If you can't get back to her in that time frame, ask your assistant or paralegal to call the insured, acknowledge receipt of her call, ask if there is anything they can do to help, and, if not, let them know that you will call the insured back as soon as you can.

Appreciate that there are going to be things the insured does not understand. Clients who call constantly or ask the same questions over and over are engaged in the process and looking to you for answers. Allow the insured grace instead of getting frustrated with her. View her questions and calls not as a nuisance, but as an opportunity to learn from the insured and improve your customer service. Use the insured's calls as an opportunity to alleviate her anxiety and concerns and to reassure her that you have things under control. Insureds, for the most part, want to feel connected. Your keeping them in the loop helps reduce their anxiety. Not to mention, a needy client is better than one who never calls at all.

The insured's being sued is a weight on her shoulders. You are there to help her lift it. Call the insured from time to time to see how she is doing. If pressed for time, ask your paralegal or legal assistant to do so. If nothing else, be sure to ask the insured how she is doing when you contact her to give her an update on the case.

Written Discovery

Whether served with the Complaint or soon thereafter, written discovery is the next psychological soft spot for the insured. The in-depth and oftentimes personal nature of information or documents requested can come across to the insured as "invasive," "demoralizing," or "humiliating."¹¹ The insured can resent, or even feel victimized by, the imposition on her time, particularly with respect to matters she feels should be off limits

(Continued on page 8)

COURTHOUSE PROGRAM FOR YOUNG LAWYERS

(Continued from page 3)

for their new attorneys to attend the program in the years to come. The Roanoke Bar Association would like to thank Judge Carson for assisting with organizing this program, the speakers, and the sponsor for the event, Planet Depos.



Attendees at Young Lawyer Event



Attendees at Young Lawyer Event



Gracemarie Braunberg,
Planet Depos

The Pro Bono Committee is in need of volunteers to assist with conflict cases referred by the Legal Aid Society of Roanoke Valley. Please email Allegra Black, Esq., Chairman Pro Bono Committee, for more information at ablack@vadefenders.org

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.

SOUTHWEST VIRGINIA MEDIATIONS**P.O. Box 576, Salem, Virginia 24153****www.swvmediations.com 540 556 4296 jmitcalfe99@aol.com**

VIEWS FROM THE (SUBSTITUTE) BENCH: RAPHAEL E. “RAY” FERRIS, ESQ.

(Continued from page 1)

judge instead of one of the regular presiding judges.

A good portion of his substitute judging to date has been in J&DR Court. Obviously, he takes making decisions about a child’s life seriously. So on those days, he gets to the courthouse early to review the files ahead of time to be adequately prepared for the hearings. Foster care decisions can be some of the most stressful because, unlike civil GDC cases, they are not quickly or easily reviewable, and they have a significant impact on people’s lives.

Ray has enjoyed the camaraderie and help he has received from other judges during his sessions as a substitute judge. As an example, the courts use a computer spreadsheet for child support guidelines and calculating the monthly payment. However, the substitute judges do not have access to it. Judge Griffith gladly helped him with those calculations by plugging the numbers in at her computer. In between dockets or cases, he also has the opportunity to visit judges in their chambers and get their informal thoughts and advice.

Serving as a substitute judge has provided Ray with a new perspective. In terms of advice for younger practitioners, he does recommend opening statements for cases where the parties have not filed pleadings. Without pleadings or an opening statement, the judge will have no context or background of the case and it can be difficult to catch up then. He also emphasized that judges understand that not every case can be settled and that lawyers should not be afraid to try cases. Particularly with the pandemic and the masking requirement, it is important to listen carefully and communicate loudly with the court, particularly when reciting all the elements of a plea agreement.

Overall, he finds his experience as a substitute judge quite rewarding and is grateful for this opportunity to serve his community. He looks forward to meeting and seeing local bar members in a courtroom.

Christopher Dadak, Esq. is an associate at Guynn, Waddell, Carroll & Lockaby, P.C.



MY SUPERLATIVE CASE

(Continued from page 2)

When the trial at the end of October was canceled, due to Judge Cullen being designated to sit on the Fourth Circuit that week, we instead scheduled a mediation with Judge Ballou for that day. We conducted it virtually, with our client participating remotely from Red Onion. We were able to negotiate a monetary payment for our client, and to get him transferred out of Red Onion, to Sussex, to be closer to his family.

This was a rewarding case, and good experience handling a federal court litigation matter outside my normal commercial litigation/construction law wheelhouse, as well as a great lesson in client relationships. I encourage other attorneys to take on these pro bono cases as well.

Kirk M. Sosebee is an associate at Gentry Locke

THE DEFENSE OF A LAWSUIT THROUGH THE EYES OF THE INSURED

(Continued from page 6)

or which she’d rather not reveal or discuss.¹² The stress associated with written discovery can be especially high when it comes to revealing information that undermines the insured’s defense(s) to the lawsuit.¹³

Send the insured ahead of time a courtesy copy of any discovery requests, explaining what they are and what the insured needs to do. Meet with the insured to prepare responses. Brief the insured on information from the insurer’s claim file that will be included in the responses. Once the responses have been prepared, provide the insured with a final draft to review and approve. Make sure the insured understands the significance of her notarized signature on the responses. Lastly, provide the insured with a courtesy copy of the signed final product.

Depositions

For the insured, this part of litigation can be especially “unnerving.”¹⁴ It generally marks the first time the insured faces interrogation by plaintiff’s counsel. It also is likely the first time the insured has seen the plaintiff since the day of the accident. The insured is forced to sit and answer questions under oath. She is not allowed to speak unless spoken to. She is not allowed to ask questions. She is not allowed to challenge anything the plaintiff or another deponent says with which the insured disagrees.

The questions asked of the insured during her deposition can be vague and confusing or specific and probing. The insured may resent being asked to speculate or for information that she deems to be personal or irrelevant. She may resent questions that, directly or indirectly, challenge her honesty and integrity. There oftentimes is a tension between honestly answering the questions asked and giving up information that may be damaging to the case. There, too, is often a tension between not volunteering information and wanting to be helpful and provide a meaningful narrative.

When it comes to depositions, preparation is key. Send the insured a letter, followed by a telephone call, advising her of date, time, and location of her deposition. Schedule a time to meet with the insured ahead of time to prepare. (Where the complexity of the case requires, meet with the insured multiple times.) During this meeting, explain the deposition process. Let the insured know if it will be videotaped. Identify the players. Give the insured a heads up on the types of things she will be asked. Ask the insured to consider how she may react to certain evidence or testimony, thereby identifying areas that may need additional preparation or that need to be approached in a more cautious manner.¹⁵

Other helpful aspects of deposition preparation include practicing sample questions. Review with the insured important documents, such as the police report, photographs, the transcript of her recorded statement, the insured’s discovery responses, etc. Before concluding your preparation of the insured, confirm with her the start time for her deposition, where to meet, and what to wear. Where helpful, make arrangements for someone from the insured’s support system to attend. Let the insured know that it’s okay—up to a point—for her to be nervous going in, especially if it’s the first time she’s been deposed.

During the deposition itself, be sure to have the insured’s back, especially in the face of aggressive questioning from plain-

(Continued on page 9)

THE DEFENSE OF A LAWSUIT THROUGH THE EYES OF THE INSURED

(Continued from page 8)

tiff's counsel. Where appropriate, object. When needed, take a break. Mindful of the rules against speaking objections and the like, resist any tendency during breaks to "scold" the insured as to how she is answering questions. Rather, be as constructive, and as gentle, as you can. After the deposition, it is important to have with the insured a post-deposition debriefing. This debriefing helps minimize any lingering anxiety over what the insured just experienced. Provide feedback both as to how the insured did and how the testimony elicited fits into the overall defense of the case. Give the insured a preview of what will happen next.

Hearings

More often than not, hearings in a case are something the insured does not attend. That said, you should invite her to do so. In addition to giving her a chance to see the inside of the courthouse, the insured's attendance gives her an opportunity to meet the judge who will be presiding over her case should it be tried. Under the heading of "Knowledge is Power," the insured's attendance at hearings in the case can go a long way towards managing—and hopefully reducing—her anxiety regarding the litigation. If the insured tells you that her attending a hearing is too stressful, keep in mind how much more stress the insured will experience if her first trip to the courthouse is the morning of trial.

Settlement

"The typical policy provisions authorizing an insurer to settle claims or suits are unambiguous and give the insurer the right to assume control of the defense of an action against the insured to the exclusion of the latter."¹⁶ Where the insured has adequate coverage for the claim at hand, the insurer's right to control the defense is "virtually absolute."¹⁷ The issue of control sometimes arises in cases where the insurer settles within the policy limits a case that the insured, for whatever reason, does not want to settle. Per the American Bar Association, if the policy vests in the insurer the right to dictate litigation strategy and settlement, you, as counsel, must disclose this limitation to the insured.¹⁸ You may not settle a case over the insured's objection without giving her a chance to take over the case at her own expense.¹⁹

An insured oftentimes has mixed emotions about settling a case. An initial desire to fight to the end oftentimes yields to a sense of relief to have the litigation behind her. Conversely, a desire going in to settle the case quickly can give way to an insistence that the plaintiff is not entitled to any recovery. An insured further can be reluctant to settle for fear that any payout at all is tantamount to an admission that the insured did something wrong. It is "helpful" in this situation for the insured "to understand that an out-of-court settlement is not an admission of guilt, and neither is it anything to be ashamed of"²⁰

Trial

Not surprisingly, trial is one of the primary psychological soft spots for an insured during the course of a lawsuit. For this reason, as well as a multitude of others, preparation is key. As soon as a trial date is set, send the insured a letter, followed by a telephone call, advising of the date, time, and location. In addition, set up a time—even multiple times—to meet with the insured to prepare. As with the deposition, explain to the insured the trial process—the sequence of events, rules of evidence, etc. Identify who will be present. Review with her the jury list. Review with her, too, important documents, such as her deposition

transcript and her discovery responses.

Provide the insured with an overview of her expected testimony. Practice sample questions and mock direct and cross-examinations. Discuss with her the potential for her to be called as an adverse witness. Prepare her for the potential for an unfavorable verdict. Especially for insureds who did not accompany you to a hearing in the case, strongly consider inviting the insured on a trip to the courthouse. Allow her to familiarize herself with where to park, the security process for entering the building, the layout of the courtroom, where everyone will sit, and so on. Perhaps, too, give the insured a chance to sit in the witness box. Brief her on how to conduct herself the day of trial while she is in the courthouse. This added bit of preparation can go a long way in helping to manage the insured's stress as the trial date approaches.

During the trial, as you did during her deposition, always have the insured's back. Let her know during the course of the day how you think things are going. Involve the insured as much as you can in the trial process itself. Solicit her input during jury selection. Provide her with a pen and a legal pad so that she can note for you questions or concerns she may have. Let her know during the course of the day how you think things are going.

Exit Interview

Once the representation is concluded, meet or speak with the insured one last time. Ask the insured to share with you her thoughts regarding the case as a whole—what she liked, what she didn't like, what surprised her, what she would have liked to have seen done differently, etc. You might learn something you didn't know or realize. Too, you might learn something you can employ with your next client. To the extent not achieved via settlement or trial, a meeting such as this can also provide the insured with a degree of closure.

Mistakes

Lastly, a word about mistakes. We all make them. Own up immediately to any service lapses. Assure the insured that you are in control of the situation and that you know, or will determine, what went wrong and will make every effort to fix it. Avoid a "lawyer" approach when addressing mistakes. Instead, empathize with your client's position in these situations, "regardless of what you think the 'rational' allocation of 'blame' should be."²¹

Conclusion

Judge Learned Hand once remarked that "[a]s a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death."²² True, civil litigation provides "a means for redressing grievances, resolving disputes and vindicating rights when other means fail."²³ These attributes, however, while laudable, do nothing to lessen the stress, aggravation, and anxiety that one experiences on the receiving end of a lawsuit. As counsel for the defense, it is our job to do what we can within the bounds of ethics and applicable law to lessen this aggravation, stress, and anxiety and help the insured through the litigation process. If all else fails, we are wise to consider what we would want to see happen if the roles were reversed and treat the insured the way we would want her to treat us.²⁴ The insured will benefit from this approach. Our system of justice, too, will be better served.

Jason Guy Moyers is a trial attorney with Frankl Miller Webb & Moyers, LLP

¹ "Remember that every step in their case is new and frightening to them. Try to see the process through their eyes. While you have done 1,000 depositions, they have never done one. ... Never forget how scary the entire process can be to someone going through it for the first time." Alexander Y. Benikov, *Four Types of Clients That All Lawyers Need to Understand*, ABA Law Practice Today (Oct. 13, 2016).

SANTA TO THE RESCUE

While it was hoped that there would be a return to the traditional Roanoke Law Foundation's "Santa at the Station", due to concerns expressed by the shelters regarding the raise in COVID-19 numbers, it was decided that another year of Santa to the Rescue would be best for all. Volunteers were able to deliver a meal and treats to the various shelters.

Thank you to those who donated to make this possible:

Frith Anderson & Peake

Slovensky Law

Glenn Robinson Cathey Memmer & Skaff

John Koehler, Esq.

David N. Cohan, Esq.

J. Brian Barnett, Esq.

Martha Elder, Esq.

Pass the Hat participants

Tables filled with treats and surprises for the shelter residents.



*A special thank you
To our fall speakers.*



September
Judge Robert
Ballou



October
Sheriff David Bell



November
Pete Eshelman



December
Monica Monday,
Esq.

THE DEFENSE OF A LAWSUIT THROUGH THE EYES OF THE INSURED

(Continued from page 10)

² Larry J. Cohen and Joyce H. Vesper, *Forensic Stress Disorder*, 25 Law & Psychol. Rev. 1 (2001). See also *Timms v. Rosenblum*, 713 F. Supp. 948, 955 (E.D. Va. 1989), *affirmed*, 900 F.2d 256 (4th Cir. 1990) (“simple truth is that mental anguish attends all litigation”).

³ Michaela Keet, Heather Heavin, & Shawna Sparrow, *Anticipating and Managing the Psychological Cost of Civil Litigation*, 34 Windsor Y. B. of Access to Just. 73, 83-87 (2017); Larry H. Strasburger, *The Litigant-Patient: Mental Health Consequences of Civil Litigation*, 27 J. Am. Acad. Psychiatry Law 203 (1999).

⁴ Cohen and Vesper, *supra* at 4-5.

⁵ Keet, Heavin, & Sparrow, *supra*.

⁶ *Id.*

⁷ *Id.* at 75.

⁸ See *State Farm Mut. Auto. Ins. Co. v. Davies*, 226 Va. 310, 310 S.E.2d 167 (1983) (insured’s duty to cooperate); Va. Code Ann. § 38.2-2204(C) (2019); Va. Code Ann. § 38.2-2206(K) (Michie 2019) (duty to cooperate with UIM carrier); Va. Code Ann. § 8.01-66.1:1 (Michie 2019) (same).

⁹ *Norman v. Ins. Co. of N. Am.*, 218 Va. 718, 726-28, 239 S.E.2d 902, 906-08 (1978).

¹⁰ Tyler Chapman & Any Kosey, “The Secret Law Firm Metric Clients Will Pay Their Attorneys to Improve,” *Lexis Nexis*, at 7 (2015); Michael B. Rynowecer, “The Declining Client Satisfaction Antidote,” *The BTI Consulting Group, Inc.*, at 3.

¹¹ Cohen & Vesper, *supra* at 5, 8-9; Keet, Heavin, & Sparrow, *supra* at 89.

¹² Cohen & Vesper, *supra*, at 9.

¹³ Cohen & Vesper, *supra*, at 9; Keet, Heavin, & Sparrow, *supra* at 89.

¹⁴ Cohen & Vesper, *supra* at 10-11. See also Keet, Heavin, & Sparrow, *supra* at 89-91, 95; Strasburger, *supra* at 206-07.

¹⁵ See generally A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 Md. L. Rev. 273, 318, 324 (1998) (counsel’s duty to prepare insured for psychological aspects of deposition).

¹⁶ *Teague v. St. Paul Fire & Marine Ins. Co.*, 10 So. 3d 806, 818-19 (La. App. 2009).

¹⁷ *Id.* at 818-19.

¹⁸ ABA Formal Opinion 96-403.

¹⁹ *Id.*

²⁰ Strasburger, *supra* at 209.

²¹ Micah Solomon, *Transform Your Law Firm’s Client Service: Consultant Offers Five Steps for Starting Your Legal Industry Initiative* (Feb. 4, 2014).

²² Learned Hand, “The Deficiencies of Trials to Reach the Heart of the Matter,” 3 *Association of the Bar of the City of New York, Lectures on Legal Topics* 89, 105 (1926).

²³ *Zauderer v. Office of Disciplinary Counsel*, S. Ct. of Ohio, 471 U.S. 626, 643 (1985).

²⁴ *Matthew 7:12* (KJV).

ROANOKE LAW FOUNDATION: YOU AND THE LAW 2021

On November 4, 2021, the Roanoke Law Foundation presented the program, “Navigating Bankruptcy & Evictions During the COVID-19 Pandemic”. It was a two part presentation which included an overview of how bankruptcy courts operate and key rules and procedures that govern how bankruptcy cases are conducted. Attendees gained a better understanding of the fundamental differences between Chapters 7, 11 and 13, and the role of attorneys and trustees in bankruptcy proceedings. The second part focused on basic landlord-tenant law related to residential evictions in Virginia, including recent changes of state and federal law affecting evictions. It finished with an overview of Virginia’s Rent Relief Program. A special thank you to the speakers: Judge Paul Black, U.S. Bankruptcy Court, Andrew Goldstein, Esq., Bankruptcy Trustee, David Beidler, Esq., Legal Aid Society and Grimes Creasy, Esq., Johnson, Ayers & Matthews.



Andrew Goldstein, Esq. and Judge Paul Black



David Beidler, Esq. and Grimes Creasy, Esq.



David Beidler welcomes the attendees



Judge Paul Black, Lori Thompson, Dan Frankl and David Beidler

Save the Date

Bench Bar Conference
on
Friday, March 25, 2022

Noon to 3:30 pm.

ANNOUNCEMENTS

NEW MEMBERS

The Roanoke Bar Association welcomes the following new members:

Active Members

Effective December 14, 2021

Brooks Duncan, Esq.

Anderson Legal

Jim McKell, Esq.

in-house counsel, Freedom First

Emily Stubblefield, Esq.

Guyann, Waddell, Carroll & Lockaby

Juan Vega, Esq.

Juan Vega Law, PLLC

UPCOMING EVENTS

Roanoke Bar Association Meetings
2021 - 2022

September 14, 2021

October 12, 2021

November 9, 2021

December 14, 2021

January 11, 2022

February 8, 2022

March 8, 2022

April 12, 2022

May 2, 2022 (Law Day)

June 14, 2022

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

OFFICERS

Macel H. Janoschka 725-3372
President

Lori Jones Bentley 767-2041
President-Elect

Christen C. Church 983-9390
Secretary-Treasurer

Daniel P. Frankl 527-3515
Past President

Diane Higgs 342-4905
Executive Director

BOARD OF DIRECTORS

Phillip V. Anderson 725-3361

Allegra M.C. Black 857-7111

Christopher S. Dadak 387-2320

Martha W. Elder 983-7535

T. Daniel "Bo" Frith, IV 985-0098

Amy H. Geddes 989-0000

Sarah C. Jessee 283-0134

D. Adam McKelvey 342-2000

Jonathan D. Puvak 983.9399

Nancy F. Reynolds 983-7605

Seth C. Weston 342-5608



DON'T FORGET TO CHANGE YOUR ADDRESS!

Name: _____ Firm: _____

Address: _____

Phone: _____ Fax: _____

Email: _____

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

Email: rba@roanokebar.com