ROANOKE BAR ASSOCIATION

ROANOKE BAR REVIEW

Roanoke Bar Review March 2019

INSIDE THIS ISSUE:

CRIMINAL DEFENSE TAKEAWAYS FROM THE FIRST STEP ACT

BY LISA M. LORISH, ESQ.

After years of attempted criminal justice reform legislation, Congress finally passed, and President Trump signed, the First Step Act into law. This article will highlight some key takeaways for practitioners.

Takeaway 1 – Everything has Changed for § 851 Notices of Prior Convictions. The First Step Act changed the mandatory minimums that apply in drug cases where the government has filed a notice of a prior conviction, and in significant ways, it changed the definition of what types of prior convictions count toward sentence enhancement. Now, when a prosecutor files a notice of one prior qualifying felony conviction in a case with a ten-year mandatory minimum under 21 U.S.C. § 841, the mandatory minimum is increased only to 15 years. A notice of a second conviction increases the mandatory penalty to 25 years, instead of life. For clients facing a five-year mandatory minimum, notice of any number of prior qualifying convictions changes the mandatory minimum to ten years. These mandatory penalties increase for any case alleging that the defendant's drug distribution offense resulted in death or serious bodily injury.

Previously, § 851 notices could be filed for any prior felony offense "relating to" drugs—regardless of the age of conviction or the actual prior sentence served by the defendant. Now, "serious drug offenses" are described in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2). Notably, the prior offense must have a statutory maximum of ten years or more, the offender must have served more than 12 months of imprisonment, and he must have been released from that term of incarceration within 15 years of the commencement of the instant federal offense. Under these requirements, many prior drug offenses will no longer count toward an ACCA enhancement. Numerous state offenses have statutory maximums of less than ten years, and in the past, prosecutors could file notices in cases where a defendant had only served a few days or months of incarceration.

However, the statute *added* recidivist penalties when a defendant has a prior "serious *violent* felony." Qualifying prior offenses are described in 18 U.S.C. § 3559(c)(2) and 18 U.S.C. § 113. Again, a prior violent felony counts only if the defendant actually served more than 12 months, but there is no limit to how old the offense may be. The list of offenses at § 3559(c)(2) is long, and like many other statutes of this type, it includes specifically enumerated offenses, offenses committed by physical force, and then a catch-all "residual clause" covering offenses involving a substantial risk of physical force. This residual clause is likely unconstitutionally void for vagueness after *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), but it will need to be challenged accordingly. To determine whether a prior offense fits under the other two parts of the statute, the categorical approach is likely to apply.

None of these changes are retroactive, but they do apply to pending cases—arguably including cases pending on appeal or, in some cases, on collateral review. Finally, as if things were not complicated enough, watch out for *ex post facto* issues if a notice of a prior conviction for a "serious violent felony" is filed against a defendant now, when the law at the time of the offense did not provide for enhancements of this type.

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President's Corner

By J. Lee E. Osborne, Esq.

As we anticipate the emergence of spring, I also feel the lingering clutches of winter as I write this article. Last quarter I gave you a comprehensive update on the myriad activities of the Roanoke Bar Association and our committed board members and committees. This quarter I will instead focus on a few key activities that we are working hard to address this year.

First, the Bylaws review committee, under the leadership of Christen Church for the second year in a row, is tackling the difficult but important project of revising our Judicial Endorsement Process. Her committee, consisting of Past President Hugh Wellons, Melissa Robinson, Bob Ziogas, and Justin Simmons, is grateful for the addition of Adam Moseley, who is not only a member of the RBA but also the First Vice President of the Salem Roanoke County Bar Association. This committee is trying to bring relevance to our Judicial Review process in light of the current legislative reality and to achieve some coordinated actions in this area by our two local bar associations. The committee is working on a proposal to establish a joint review committee that will screen all judicial candidates in the Twenty-third Judicial Circuit for their suitability for the bench, thus allowing both bar associations to consider the same candidates with reviewed credentials in their separate endorsement processes. Look for more details on this in the coming few months.

Second, the joint RBA/SRCBA Rule of Law Committee (including RBA representatives Macel Janoschka and Brett Marston, and Mike Pace, of course), is hard at work recruiting volunteers to fill the middle school classrooms in Salem, Roanoke County, and Roanoke City this spring. The dates for these sessions are set and are available on the website for volunteers to sign up. There is a training session scheduled for March 25th at 4 p.m. at William Ruffner Middle School, which teachers and volunteers are encouraged to attend. I hope that many of you will take this opportunity to engage or re-engage in this important project. The importance of the Rule of Law in our society has never been more evident than it is now.

Third, we have successfully continued our Barrister Book Buddy program in the City elementary schools and have successfully expanded our efforts to promote reading through our partnership with Turn the Page. This program of providing books and breakfast on Saturday mornings was expanded to the Hurt Park and Westside Elementary Schools under the leadership of Lauren Ellerman and numerous other volunteers from our association. You can sign up through the RBA's website for any Saturday this spring, and I encourage you to give this program a try. You will find the experience both rewarding and worthwhile.

Fourth, our CLE committee under the leadership of Nancy Reynolds is holding its final CLE offering this spring on April 26th at the Higher Ed Center from noon to 4 p.m. The topic will be "Professionalism and Civility: Beyond Ethics," and our presenters will include outstanding speakers from the bench and the bar. Please mark this event on your calendars and plan to attend. There will be more information available on the RBA's website soon.

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My Superlative Case: The "Stubborn" Client

By Randy V. Cargill, Esq.

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

Many years ago I tried my first criminal case in federal court in Roanoke. My client, Eric, was charged with gun and drug charges, and I was Eric's second lawyer. His first court-appointed attorney, Larry, took a job with the federal government and had to withdraw. So I stepped in, having been advised by Larry that Eric was polite and respectful but "stubborn."

"Stubborn," in this context, is a term of art for those of us who practice criminal law. Prosecutors too often seem to see stubborn defendants as those who have the gall to stand on their rights and fight. "Stubborn" clients, to defense attorneys, are those who won't consider pleading guilty despite the strong evidence against them. Most of the cases I have tried over the years have involved "stubborn" clients; many involved clients who, it turned out, had good reason to be "stubborn."

Larry was right about Eric. He was pleasant, respectful, and "stubborn." And quite young—19 or 20 if memory serves. He lived with his mother, his younger sister, and his older brother in a low-income neighborhood near downtown Roanoke. Eric had been in jail for a few months when I met him. He insisted that he was not guilty despite the evidence against him.

And the evidence appeared to be strong. In a nutshell: police, armed with a search warrant, searched Eric's home and found ounce quantities of marijuana, thousands of dollars in cash, and a gun—all in Eric's bedroom. The cash and marijuana were in a shoe box under Eric's bed; the gun was in a nearby bureau drawer. The main witness against Eric (and the source of probable cause to search) was Eric's brother who testified that the gun, drugs, and cash belonged to Eric who was a drug dealer and kept the gun to guard his stash. As so often happens in federal court, the brother was testifying because he too was in trouble—facing similar charges, except his gun charge involved a machine gun. The brother, of course, was hoping to help himself at Eric's expense. Such is the leverage that federal prosecutors can bring to bear on defendants.

But there were flaws in the government's case. First, there was no physical evidence (DNA, fingerprints) linking Eric to the drugs, the cash, the shoe box, or the gun. I found no sign that police even checked for such evidence. Second, Eric's brother's bedroom was right next to Eric's bedroom, and the brother had routine access to both bedrooms. Third, while the house (surrounded by police cars) was being searched, Eric rolled up on his bicycle to see what was going on. Would a guilty person do this? Fourth, there was no evidence that Eric led the lifestyle of a drug dealer with a cash hoard. He got around on his bike and spent his free time playing basketball at the park and cutting grass for money. Fifth, of course, Eric's brother had a strong motive to lie and what he was doing was particularly loathsome—testifying against his little brother to save his own skin.

I emphasized these points at trial. The jury, after one *Allen* charge and hours of deliberation, announced that it was hopelessly deadlocked. The foreman gratuitously noted in open court that the vote was 11 to 1 to acquit and pointed to the lone holdout — an

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Views from the Mediator: Judge Robert S. Ballou

By Christopher S. Dadak, Esq.

This is the first installment of a new series, inspired by the Views from the Bench *series and the continued rise of alternative dispute resolution, focusing on the views of local mediators.*

The Honorable Robert S. Ballou, a Magistrate Judge for the U.S. District Court for the Western District of Virginia, is a familiar figure within the RBA. This article explores Judge Ballou's background, experience, and insight into his mediation process. (For a deeper look into his personal and professional background, please see "Views From the Bench: U.S. Magistrate Judge Robert S. Ballou," *Roanoke Bar Review*, December 2013.)

Judge Ballou had just begun the process for becoming a certified mediator before ascending to the bench. He had completed the two-day seminar but had not done any of the "shadowing" required. Once on the bench, obviously, he did not need to worry about "shadowing" mediators. The orientation program for new judges included two segments on mediations, "one about four months out, the other closer to a year out." In those segments, "what became clear is that every judge handles them differently."

Judge Ballou had to adjust from the role of a participating advocate to his new role as the presiding mediator. The biggest adjustment "was probably . . . sitting in both rooms and seeing the thought process." From that vantage point, he could often guess that the "case was going to settle a couple hours before it" actually did. A difficult balance to keep as a mediator is timing. Judge Ballou has found that if he tries to get the parties to reach settlement too quickly, his efforts will backfire and keep them from settling at all. Patience, from everyone, is key "to let the lawyers and the clients get there." Judge Ballou noted that clients "are much happier when they get there themselves as opposed to being told where to go." This understanding of the process has led to his approach—"if things are moving, albeit slowly, [he] will let it continue."

When asked what, in hindsight, he would have changed in his approach to mediations during private practice, Judge Ballou emphasized the importance of mediation statements and client preparation. He would "never" do mediation statements as a lawyer, "and now [he] cannot live without them as a mediator." Preparing the client and (if applicable) an adjuster, knowing "what they're willing to do," and maintaining flexibility for the process are critical and often overlooked in preparation for a mediation. As part of that preliminary process, the client (especially a stubborn or aggressive one) needs to understand the other side of the case and see how the other side could win. "You want that client to hear [the other side] from the mediator, but you don't want them to hear it from the mediator for the first time."

Judge Ballou repeatedly emphasized the collaborative nature of mediations, a feature that affects each part of the process. Mediation "is one part of our adversarial process where we are working in a collaborative manner to try to arrive at something together." For the opening statement to encourage collaboration, it "has to acknowledge what the purpose of the mediation is," has to acknowledge that there will be no recognized winners and losers at the end of the day, and "needs to reflect

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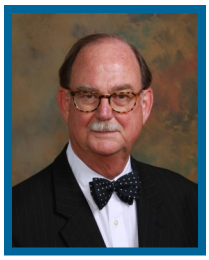
Update on Virginia State Bar Actions and Programming

By Gene Elliott, Esq., and Brett Marston, Esq.



As your Twenty-third Judicial Circuit representatives, we appreciate the chance to keep you updated on activities and programs of the Virginia State Bar. There has been quite a bit going on with the VSB, and there are opportunities for you to get involved. Here are some of the major items of current interest and importance.

We just concluded the first of the three VSB council meetings for the year. This one occurred in Richmond on Saturday, February 23. There were several issues of importance that were reported or decided upon.

Renu M. Brennan was unanimously approved to become the new VSB Bar Counsel to replace Ned Davis. Renu, who was most recently the deputy executive director of the VSB, will be in charge of the enforcement arm of the lawyer disciplinary system in the state.

Council approved a proposed budget for the bar year beginning July 1, 2019. This budget of $16 million will now go to the Supreme Court of Virginia for consideration. The budget is increased this year due to technology investments, potential salary increases, and the $30 increase in dues for the Wellness Fund established by the Supreme Court.

After heavy debate, the VSB council approved a new Comment 5 to Rule 3.8 of the Rules of Professional Conduct relating to the issue of "needle in the haystack" discovery in criminal cases in Virginia. This proposed addition to the Rule will now go to the Supreme Court of Virginia for consideration.

If you practice in the criminal law arena, be aware that on January 29, 2019, the Supreme Court issued an order that delayed the adoption of the new criminal discovery rules that were set to go into effect on July 1, 2019.

Council also approved updates to the Unauthorized Practice of Law Rules that had not been updated for a number of years. This was an effort to synthesize, modernize, and clarify the rules, given the changing landscape of legal practice.

Finally, at the February 23 meeting, the VSB council approved modifications to Rule 4.4 of the Rules of Professional Conduct by adding subparagraph (b) related to how an attorney is to handle receipt of a document that he or she knows to be privileged and that was inadvertently sent. This modification, which codifies guidance presented in Legal Ethics Opinion 1702, will also go to the Supreme Court of Virginia for consideration.

On February 15, the Supreme Court of Virginia amended the rules on file formats for documents. The new rule takes effect on May 1, 2019.

In terms of items that are coming up or opportunities for you to get involved, there are many. First, the VSB is looking for candidates to fill vacancies on the 8th district disciplinary committee. This district is composed of the 23rd and 25th judicial circuits. If you are interested, please let one of us know immediately, because replacements will be selected by April 5, 2019.

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Roanoke Law Library News and Information

By Joseph Klein, Law Librarian

I don't know about all of you, but I am very excited about the end of winter this year. Even though we've been having lots of showers, I am looking forward to the actual April showers that will hopefully bring beautiful May flowers. I am even more excited about the end of flu and cold season, since it seems like I was sick most of the winter. I long for the warm spring and summer months when we all crawl out of our winter dens and enjoy this fantastic region we call home.

Lexis Advance

I wanted to take one more opportunity to remind you that the Roanoke Law Library has switched its legal research database subscription from WestlawNext to Lexis Advance. After many years using Westlaw, there has been a bit of an adjustment period. But I have found that Lexis Advance has many advantages, and I will attempt to highlight some of them here.

Except for the *Code of Virginia* volumes, my most-used resource at the Law Library is definitely the *Virginia Forms* set. The fact that these are available on Lexis Advance was a huge selling point. It is possible to electronically search the thousands of forms in the set, and to download and/or email them electronically, allowing a user to cut and paste information directly into existing forms or create new ones. This Lexis Advance feature also makes it easy for me to email forms directly to you. If you find a need one of the Virginia Forms in the set, please call me (853-2268) or send me an email (joseph.klein@roanokeva.gov). I will be glad to locate and send it to you.

Another powerful feature included in Lexis Advance is the ability to search *Michie's Jurisprudence*. The Law Library has always had a print subscription, and those volumes are still available. Now, however, it is also possible to search this comprehensive Virginia legal encyclopedia electronically, allowing you to do in-depth legal research quickly and efficiently. Lexis Advance also provides access to up-to-date copies of the *Virginia Model Jury Instructions* and *Harrison on Wills and Administration for Virginia and West Virginia*.

These are just a few of the resources that are available. It is still possible to search statutes and case law for all 50 states, as well as all federal statutes and case law. I will be glad to sit down with any interested attorney, to discuss electronic legal research in general, or to assist in crafting a particular legal database search. If you can't make it to the Law Library, I'll be glad to email you materials. If you have questions about anything, please contact me.

Small Business Resources

The Law Library has the most comprehensive collection of legal resources in the area. Here, I wanted to bring your attention to some of those resources that the Roanoke Public Libraries provide that you might find useful.

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Update on Virginia State Bar Actions and Programming

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Next, Brett's seat on the VSB council is up for election. Brett has submitted his paperwork to run again. Anyone else who is interested needs to submit paperwork and qualifications to the VSB by April 1, 2019.

The VSB Standing Committee on Lawyer Discipline is seeking public comment on proposed changes to the Rules of the Supreme Court of Virginia, concerning "Procedure for Disciplining, Suspending, and Disbarring Attorneys." A full description of the proposed amendments can be found on the VSB website. The primary element of the changes is to Paragraph 13 and includes the elimination of certain categories of sanctions. Please provide any comments to the VSB or to one of us.

The Access to Legal Services Committee seeks comment on a proposal to amend the VSB Bylaws to designate this committee as a standing VSB committee. Comments are due by April 5.

The United States Court of Appeals for the Fourth Circuit seeks public comment on two proposed rule amendments, concerning Local Rule 35(c) and Internal Operating Procedure 34.2, due March 25. Please check the Fourth Circuit's website to register your comments.

There are openings on several of the VSB special and standing committees, such as budget & finance, legal ethics, access to legal services, Lawyers Referral, and more. If you are interested in joining one of these committees, let one of us know, or contact VSB President-elect Marni E. Byrum (mebyrum@mcquadebyrum.com).

Nominations are open for two pro bono awards: *The Virginia Legal Aid Award* honors a lawyer that works for a Virginia legal aid society. *The Oliver White Hill Law Student Pro Bono Award* honors extraordinary law student achievement in the areas of *pro bono* and under-compensated public service work in Virginia. The deadline to nominate is March 29.

The VSB Solo and Small Firm Practitioner Forum is Tuesday, March 26, at the Hilton Garden Inn, Suffolk Riverfront. Mark your calendars today and make plans to attend.

The Council of the VSB meets again in June at the VSB Annual Meeting in Virginia Beach. Contact one of us if you have questions or suggestions regarding the meeting. The Executive Committee of the VSB next meets April 18, 2019, so contact Gene if you have questions or suggestions regarding that meeting. We hope that you will consider attending the annual meeting, and getting more involved in the VSB.

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

Book Buddy Jennie Waering reading to her class

The McCammon Group

is pleased to announce our newest Neutral

Hon. Cynthia D. Kinser (Ret.)

Retired Chief Justice, Supreme Court of Virginia

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

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Criminal Defense Takeaways From the First Step Act

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Takeaway 2 – The Act brings new life to the Safety Valve. The safety valve in 18 U.S.C. § 3553(f) allows a federal court to sentence a defendant beneath the mandatory minimum sentence otherwise required by law. Before the First Step Act, a defendant qualified by having no more than one criminal history point, not using violence or a weapon during the offense, not having a supervisory role, and truthfully providing information about the offense. Now, a defendant can have up to four criminal history points and still qualify for a safety valve reduction, subject to certain exceptions—namely, no three-point prior criminal offenses and no violent two-point offenses. Qualifying violent offenses are defined in 18 U.S.C. § 16(a), covering offenses with an element involving the use, attempted use, or threatened use, of physical force. Notably, one-point offenses do not count towards the four-point total. Again, this change applies for convictions entered on or after December 21, 2018, when President Trump signed the Act into law.

Takeaway 3 – Stacking of § 924(c) Charges. The First Step Act takes some of the sting out of multiple charges under 18 U.S.C. § 924(c). Before the Act, a defendant could be charged under § 924(c) in the same indictment with two counts of possessing or using a firearm in connection with a drug trafficking offense and receive: a consecutive mandatory minimum of five, seven, or ten years on Count One, depending on whether and how the gun was used, and a consecutive mandatory minimum of 25 years on Count Two. Now, the 25-year penalty for subsequent convictions under § 924(c) kicks in only after a prior conviction under the same code section has become final. Charges under § 924(c) can still be stacked in the same indictment, but carry consecutive mandatory minimums of five, seven, or ten years. These changes apply only to pending cases and, potentially, those on direct or collateral review.

Takeaway 4 – The Act widens the application of the Fair Sentencing Act. The Fair Sentencing Act of 2010 changed the statutory ranges and minimum supervised release terms that applied to federal crack cocaine offenses. However, it applied only to defendants sentenced after August 3, 2010. The First Step Act now gives the Court discretion to reduce sentences in any case where the statutory penalties were modified by the Fair Sentencing Act. In the Western District of Virginia, defendants in well over a 100 cases are potentially eligible to receive reduced terms of imprisonment or terms of supervised release. The court has appointed the Federal Public Defender's Office to review these cases and represent eligible defendants.

Takeaway 5 – Federal inmates can receive more Good Time and Earned Time. The First Step Act has fixed a prior ambiguity in the way the Bureau of Prisons (BOP) calculates Good Time. Prisoners are now eligible to earn up to 54 days per year, and this change applies retroactively. As a result, many federal prisoners are now eligible to receive an additional seven days of Good Time credit per year of incarceration they have served. However, the BOP has interpreted the statue as providing officials 210 days from the statute's enactment to implement the amended Good Conduct time calculations.

In addition, the Act provides for additional Earned Time credits for certain offenders, up to ten extra days per month, for completing certain programming. But the BOP is unlikely to implement these evidence-based recidivism reduction programs or the corresponding Earned Time credits this year. Inmates with certain of-

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My Superlative Case: The "Stubborn" Client

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awkward moment. The judge discharged the jury and immediately ordered that Eric be released on bond.

Shortly thereafter, the prosecutor did what most prosecutors do when dealing with defendants who are "stubborn" and nearly acquitted—offered a deal the defendant could not refuse: plead to misdemeanor marijuana possession and get time served. Eric took the deal.

Tragically, all did not end well for Eric. A few months later, the newly freed Eric was shot and killed in his girlfriend's home. Apparently, the gunman broke in, looking for someone who was not there; Eric confronted the gunman and was shot.

Eric's case drove home several points to me, including the value of listening to clients, especially "stubborn" ones, and not jumping to conclusions; and the irony that Eric likely would be alive today had I not helped him deal with a federal criminal justice system that too often tilts the playing field uphill for defendants who plead not guilty because they are not guilty. The truth is that federal criminal jury trials are so rare because federal law gives prosecutors the discretion and the power to make the price of trial too high for most (and I'm not talking about attorney's fees). Mandatory minimums, potential sentence enhancements, and virtually unreviewable prosecutorial discretion to deny sentence reductions for substantial assistance—one or more of these factors too often looms large enough to pressure even innocent defendants to abandon their righteous stubbornness and plead guilty to uncommitted crimes. Eric's case reminds me that the goal we Americans pledge to each other—"and justice for all"—can get lost in the noise of law and order unless we all remain committed to achieving it.

Randy Cargill serves as an attorney in the Federal Public Defenders Office in Roanoke.

In Memoriam

The following are the Association's losses since December 25, 2018:

A. Carter "Chip" Magee, Jr., Esq.

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

Criminal Defense Takeaways From the First Step Act

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fenses will also be ineligible for Earned Time credits, including, but not limited to those with drug offenses involving heroin or methamphetamine (if the offender was a leader or organizer), drug offenses resulting in death or serious bodily injury, offenses involving a detectable amount of fentanyl, immigration offenses, offenses committed after a prior final order of removal, § 924(c) offenses, carjacking offenses, child pornography offenses, and charges for failure to register as a sex offender.

Takeaway 6 – The Act allows a defendant to move for compassionate release. Previously, only BOP officials could file such a motion. Now, after considering the sentencing factors listed in 18 U.S.C. § 3553(a), on a defendant's motion, the court can reduce a term of imprisonment upon a finding of "extraordinary and compelling reasons" under the First Step Act. Sentencing Guideline section 1B1.13 provides advice and a non-exclusive list of circumstances that may justify compassionate release: inmate has a terminal illness, a serious physical or medical condition, serious functional or cognitive impairment, is at least 65 years of age and deteriorating physically or mentally and has served either ten years or 75% of the term of imprisonment, or has a minor child whose caregiver has died or been incapacitated and the defendant is the only available caregiver.

Defendants may typically file for compassionate release only after fully exhausting administrative remedies. Importantly, the BOP is now required to notify the prisoner's attorney and family members within 72 hours after an inmate has been diagnosed with a terminal illness so that they may prepare a request for a sentence reduction.

Takeaway 7 – The Act requires changes in prison conditions, while maintaining exceptions based on security. For example, the First Step Act requires inmates to be placed at prison facilities within 500 driving miles of their families, but carve-outs for security and other reasons remain. Similarly, the Act bans the shackling of pregnant and post-partum women, ensures that each inmate will have an ID card when released, requires the BOP to report on its ability to treat opioid abuse, and compels the BOP to match individual needs to programs, training, and services.

Lisa Lorish is an Assistant Federal Public Defender in the Western District of Virginia, based in Charlottesville. Our office is always available to respond to any questions or provide litigation ideas about the First Step Act: lisa_lorish@fd.org or christine_lee@fd.org.

President's Corner

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Finally, I want to thank Patrick Kenney for the great programs that he has arranged for this bar year, and Andrew Gerrish for organizing another successful and informative Bench Bar Conference on February 22nd. As the Young Lawyers Committee Chair, Andrew has done an outstanding job with this program for two years in a row and his efforts are greatly appreciated.

Lee Osborne is a partner at Woods Rogers PLC.

Views from the Mediator: Judge Robert S. Ballou

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that there are strengths and weaknesses on both sides." An effective opening can be delivered "without being zealous." "The best ones . . . talk directly to the client on the other side, not the lawyer, not the mediator, do it in a respectful way, and don't finger point why we are going to beat you." Adversarial opening statements are counterproductive, because they elicit defensive reactions, which will not be conducive to finding a resolution.

Featuring the client as an active participant is an overlooked, but effective method of increasing the collaborative nature of mediations. Having a client directly address a weakness, or even apologize, can be particularly effective and "help disarm" any anger the other party feels. Judge Ballou discussed an example, in an (understandably) emotional case for the plaintiff who was visibly frustrated at the onset of the mediation, when a representative from the defendant "was the most effective advocate [he's] seen at a mediation." That client representative was able to directly and respectfully address the plaintiff in a way that demonstrated his empathy. For either plaintiff or defense, "whenever a client can talk meaningfully to the other client, it is helpful."

Patience and focusing on collaboration are key ingredients to the mediation process. Judge Ballou noted that the local bar has had a good track record of providing both in his mediations. The local bar is certainly grateful to have Judge Ballou, both as a judge and as a mediator.

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

Roanoke Law Library News and Information

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Many of you are small business owners, and the Roanoke Public Library has really focused in the last few years on providing lots of resources for small business owners. We have a small business page on our website (https://www.roanokeva.gov/2153/Small-Business-Resources). This page provides links to many small business resources, including powerful databases, government statistics and data, and organizations and associations that support small businesses. The page also includes a list of up-to-date small business books and materials available from the library. Additionally, if there are materials that you would like to see that are not available in the Roanoke Valley Library system's collections, we are often able to borrow these materials from other libraries through Interlibrary Loan. To access the ILL form to request such materials, go to https://www.roanokeva.gov/1185/Interlibrary-Loan.

Nick Conte, Carilion Clinic Office of Corporate Council, spoke at the March meeting about Carilion and its new partnerships with Virginia Tech and Radford University.

Dr. Todd C. Peppers, Fowler Professor of Public Affairs at Roanoke College, spoke at the February meeting about his new book *A Courageous Fool: Marie Deans and Her Struggle Against the Death Penalty*.

Bob Cowell, Roanoke City Manager, spoke at the January meeting. He discussed the new direction of Roanoke as we move from a "train" city to a "brain" city .

The 2019 Bench-Bar Conference Report

On February 22, 2019, over 80 local attorneys and judges gathered in the White Room at Blue 5 for the 2019 Roanoke Bar Association Bench-Bar Conference. Attendees enjoyed the new venue and expanded lunch menu.

The program was an entertaining and informative presentation by Beth Burgin Waller, Esq., on ethical obligations about cybersecurity and the protection of firm data. Ms. Waller is a principal of Woods Rogers and chair of the firm's cybersecurity practice. Bench-Bar Attendees received one hour of ethics CLE credit. (If you attended the conference and forgot to take your CLE form with you, contact Andy Gerrish or Diane Higgs.)

State-of-the-judiciary addresses followed the CLE program. Magistrate Judge Robert S. Ballou of the United States District Court for the Western District of Virginia provided the address for that court. Most importantly, Judge Ballou reported that the court was not shut down. And although the court operated smoothly during the shutdown, Judge Ballou detailed the court's plans to carry on as necessary in the event of any future government shutdowns.

Judge Ballou also reported that Chief District Judge Michael F. Urbanski and District Judge Elizabeth K. Dillon have started presiding over the court's drug-treatment court. In addition, Judge Ballou also provided a welcome update on District Judge Conrad, who has maintained an active civil docket.

Finally, Judge Ballou encouraged local attorneys to consider taking *pro bono* prisoner cases. *Pro se* prisoner civil rights cases under 42 U.S.C. § 1983, concerning everything from alleged excessive force to unaccommodated religious practices, make up about 25% of the court's docket. When a *pro se* prisoner case has progressed beyond dispositive motions, the court notifies interested volunteer attorneys of the opportunity to provide *pro bono* representation to the plaintiff and take the case to trial. The court has recently instituted a *pro hac vice* fee to create a fund to reimburse volunteer attorneys for some of the costs they may incur in preparing these cases for trial. The court is also planning a CLE program on the handling of § 1983 cases to encourage more lawyers to get involved in representing prisoners in federal civil rights trials.

Judge Paul M. Black of the United States Bankruptcy Court for the Western District of Virginia reported that filings in that court were up 2% in the past year. By contrast, in the same period, filings were down 2% nationwide. In total, there were about 6,700 cases in the Western District this year. Although Chapter 11 filings are still down, pending legislation regarding the affiliate rule might increase the number of Chapter 11 filings in the District. Judge Black indicated that the court is proud of the Chapter 13 completion rate of approximately 50%, which was about 20% higher than the Eastern District's rate. Finally, Judge Black encouraged attorneys and staff to attend the Western District's bankruptcy seminar on June 7, 2019, which will include an ethics seminar on bankruptcy and domestic relations with Judge Black and Judge David B. Carson of the Twenty-third Judicial Circuit of Virginia.

Chief Judge William Broadhurst of the Twenty-third Judicial Circuit of Virginia reported for that court. He reminded attendees to make sure to file briefs in accordance with the briefing schedule set forth in Va. Sup. Ct. R. 4:15. In addition, Judge Broadhurst remarked that courtesy copies of briefs are helpful, and attorneys should send courtesy copies directly to

(Continued on page 11)

Andrew Gerrish

Beth Burgin Waller

Judge Geddes, Eric Spencer and Amy Geddes

Judges Panel

Judge Ballou, Judge Dorsey, and Beth Waller

Hugh Wellons and Jared Adams

Judge Ballou

Judge Broadhurst

Judge Dorsey and Judge Ware

Judge Weber, Judge Ciaffone, Judge Roe, Judge Geddes, and Judge Broadhurst

Judge Broadhurst, Judge Dillon, Judge Swanson, Judge Black, and Judge Ballou

The 2019 Bench-Bar Conference Report

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chambers. Otherwise, the brief may get delayed in the clerk's office. In Roanoke City, cases are usually assigned a judge on the Tuesday of the week before the hearing. Most civil cases in Roanoke County and Salem are assigned a judge when filed.

Judge Broadhurst also reminded attendees that when scheduling hearings, the default hearing time limit is 30 minutes. The court is happy to set longer hearings, but the attorney must let the assistant scheduling the hearing know that additional time should be scheduled. Also, the attorney should include the scheduled length of the hearing in the hearing notice.

Finally, Judge Broadhurst reminded attendees that Judges Charles N. Dorsey and James R. Swanson are presiding in Roanoke County five days a week. Judges J. Christopher Clemens, Carson, and Broadhurst preside in Roanoke City. But through June 2019, Judge Carson will also preside in Salem on Wednesdays through Fridays. Beginning in July 2019, Judge Clemens will begin presiding in Salem on Wednesdays through Fridays.

Judge Scott Geddes presented on behalf of the Twenty-third Judicial District of Virginia. He reported that filings were up in the district, but the courts boasted an approximately 100% clearance rate. Throughout the district, over 85,000 cases were filed in 2018.

The courts in the district are also working on streamlining arraignments. Roanoke City arraignments are being held by video. And for those being held in Roanoke City, arraignments in Roanoke County are being held by video as well. Finally, in Salem, walk-in arraignments are being held on the first and third Fridays of the month.

Judge Geddes also reminded the attendees that criminal and longer traffic cases in Roanoke City and Roanoke County can be specially set on the 2 p.m. docket with court approval to allow additional time for trial.

Lastly, Judge Geddes indicated that the clerks' offices are getting a lot of calls about driver's licenses that were suspended for the defendant's failure to pay fines and court costs and a preliminary injunction recently imposed by District Judge Norman K. Moon of the Western District of Virginia on that issue. Attorneys should remind their clients, however, that a driver whose license has been suspended for whatever reason can be stopped for driving before the suspension has been lifted.

Judge Frank W. Rogers III reported on behalf of the Juvenile and Domestic Relations District Courts in the Twenty-third Judicial District of Virginia. He reported that Michelle Ong Esparagoza is the new clerk in Roanoke City. Judge Rogers also reported that the judges are meeting regularly with the clerks to ensure the smooth operation of the courts. He encouraged attendees to bring the courts their ideas. Finally, Judge Rogers reported that the Roanoke City clerk's office is publishing a monthly newsletter, which the RBA posts here: http://roanokebar.com/newsletter-juvenile-and-domestic-relations-district-court/.

After the state-of-the judiciary addresses, judges from all of the local courts participated in a question-and-answer panel.

The RBA appreciates all the judges who attended and participated in this year's Bench-Bar Conference.

ANNOUNCEMENTS

NEW MEMBERS

The Roanoke Bar Association welcomes the following new members:

Effective March 12, 2019

Active Members

Mary K. Atkinson
Gentry Locke

John W. Beamer
Roanoke City Commonwealth's Attorney

Lauren Coleman
Gentry Locke

Christopher E. Collins
Glenn Feldmann Darby and Goodlatte

Michael V. Darmante
OPN Law, PLC

Benjamin R. Law
Gentry Locke

Daniel Martin
Fishwick and Associates

Nicholas Mirra
Woods Rogers PLC

Phyllis C. Spence
Caskie & Frost

UPCOMING EVENTS

Roanoke Bar Association Meetings
2018 - 2019

September 11, 2018

October 9, 2018

November 13, 2018

December 11, 2018

January 8, 2019

February 12, 2019

March 12, 2019

April 9, 2019

May 1, 2019
(Law Day)

June 11, 2019
(Annual Meeting)

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

OFFICERS

J. Lee E. Osborne President	983-7516
Patrick J. Kenney President-Elect	982-7721
Daniel P. Frankl Secretary-Treasurer	527-3515
Kevin W. Holt Past President	983-9377
Diane Higgs Executive Director	342-4905

BOARD OF DIRECTORS

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Nancy F. Reynolds	510-3037
Melissa W. Robinson	767-2203
Devon R. Slovensky	492-5297
Justin E. Simmons	983-7795
Robert Ziogas	224-8005

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