



Spring Sections Seminar

May 13-15, 2020

NEW LOCATION: Hotel Madison, Harrisonburg

DRAFT AGENDA

Requesting 9.0 CLE Hours

Wednesday, May 13

6:00-7:30 Welcome Networking Reception at the Joshua Wilton House

7:30 Dinner on own

7:30 Optional Young Lawyers Dinner

Thursday, May 14

8:30-9:00 **REGISTRATION AND CONTINENTAL BREAKFAST**

APPELLATE ADVOCACY (3.0 HRS)

9:00-9:55 **Case Law Update**

Speakers TBD

10:00-11:00 **Topic 2 TBD**

11:00-11:15 Break

11:15-12:15 **Appellate Mediation**
Session Description TBD

Hon. LeRoy F. Millette, Jr. (Ret.), *The McCammon Group*
L. Steven Emmert, *Sykes, Bourdon, Ahern & Levy*

JOINT SESSION: AUTO & TRANSPORTATION LIABILITY; CORPORATE & COMMERCIAL LITIGATION; and PRODUCT & TOXIC TORTS (3.0 HRS)

9:00-9:55 **What Virginia Lawyers Need to Know About Cannabis Legalization**
A robust panel of industry leaders discuss the current landscape of cannabis legalization in Virginia, legal challenges in other states, and takeaways for Virginia manufacturers and businesses looking to enter this space. They will assist Virginia practitioners in navigating cannabis and CBD regulations at the federal and state levels, licensing requirements, and relevant litigation in the industry, including Vapegate, and its implications for vaping device manufacturers.

Willie McKinney, Ph.D., DABT, *Kinney Regulatory Science Advisors*
Jenn Michelle Pedini, *The National Organization for the Reform of Marijuana Laws (NORML)*
Stewart Pollock, *Moran Reeves Conn*
Brian Quigley, *Green Sky Strategy*

10:00-11:00 **Challenging the use of BAC Test Results in Civil Litigation**
This presentation identifies strategies for challenging the use of blood alcohol content (“BAC”) tests in personal injury cases arising from motor vehicle accidents, with a focus on how to exclude such evidence in punitive damages cases. Topics addressed include methods of verifying the validity of the test, contesting opposing toxicology reports, and pointers from the criminal defense perspective that can assist the civil litigator.

Patrick O’Grady, *Harman Claytor Corrigan & Wellman*
Charles Nucciarone, *Bancroft, McGavin, Horvath & Judkins*

11:00-11:15 Break

11:15-12:15 **Crossroads: Bankruptcy and Corporate Representation**
Ms. Hall brings her years of experience with the bankruptcy bar, including her time as a Chapter 7 Trustee and federal receiver, to discuss tips for navigating the complex world of bankruptcy law in representing corporate clients. Topics include different types of bankruptcy and how they may affect representation of corporate clients, communications with Trustees (including what to do when you get a demand for payment from the Trustee), avoiding pitfalls with the automatic stay, when to advise your corporate client to seek bankruptcy counsel, adverse actions and what to do when you get named in a suit, and preferences and fraudulent transfers and how to defend each.

Donna Hall, *Goodman, Allen, Donnelly*

12:15-1:15 LUNCH

LOCAL GOVERNMENT (3.0 HRS)

1:15-2:15 **Cybersecurity**
Session Description Pending

Nicole Harrell, *Kaufman and Canoles*
Darius Davenport, *Crenshaw Ware & Martin*

2:20-3:15 **The Freedom of Information Act General Law and Impacts on Litigation**
Session Description Pending

Margaret Kelly, *Norfolk City Attorney's Office*

3:15-3:30 Break

3:30-4:30 **Topic 3 TBD**

MEDICAL MALPRACTICE, PART 1 (2.0 HRS)

1:15-2:15 **Virginia Birth-Related Neurological Injury Compensation Fund 101**
This session focuses on the Virginia Birth-Related Injury Fund. It will explore what is set forth in the Virginia Birth-Related Neurological Injury Compensation Act, the requirements of admission to the fund, what to expect in terms of timing and procedure, and ideas for effective use of the fund as a defense in medical malpractice litigation.

Julie Mayer, *Hancock Daniel*

2:20-3:15 **Improper Informed Consent v. Technical Battery**
Two medical malpractice defense attorneys will discuss the challenges inherent in defending an allegation that a patient was not given proper informed consent for a medical procedure as compared to an allegation that a medical professional engaged in technical battery by exceeding the scope of the informed consent. The presentation will include a discussion of techniques used to address common challenges in defending informed consent cases (including but not limited to inadequate documentation,

template documentation, and lack of independent recollection by the physician). And it will include an evaluation of the Supreme Court of Virginia's technical battery decision in Mayr v. Osborne, 293 Va. 74 (2017) in light of the Fairfax Circuit Court's recent decision in S.M. v. Thompson, No. CL-2019-0011030, 2020 Va. Cir. LEXIS 3 (Fairfax, Jan. 7, 2020), the first published Virginia Circuit Court decision applying Mayr.

Samuel T. Bernier, *Frith Anderson & Peake*
Matthew E. Kelley, *Frith Anderson & Peake*

3:15-3:30 Break

3:30-4:30 ROUNDTABLE DISCUSSION (*MedMal members only*)

4:30-6:00 Cocktail Reception

6:00-8:30 Dinner on own

8:30-10:30 VADA Late Night at Quills Lobby Bar

Friday, May 15

8:30-9:00 Continental Breakfast

JOINT SESSION:

PROFESSIONAL LIABILITY AND POLICY COVERAGE (3.0 HRS)

9:00-9:55 **Claims Against Insurance Brokers and Agents**

This hour of programming will address claims against insurance brokers and best practices in defending such claims. We will discuss the reasons why such claims are brought and the types of claims that may be asserted (failure to procure or recommend certain coverage, failure to act timely when claims are presented or policy changes requested, etc.) We also will cover potential defenses that may be invoked and how such defenses can be bolstered through discovery.

Speakers TBD

10:00-11:00 **Recent Opinions and Updates in Professional Liability and Coverage Law**

Topic description and speakers TBD

11:00-11:15 Break

11:15-12:15 **Additional Topic TBD**

MEDICAL MALPRACTICE, PART 2 (3.0 HRS)

9:00-9:55 Defending the Corporation in Medical Malpractice

In medical malpractice litigation, it has become a common practice for the corporate provider (hospital, practice group or long term care facility) to be named as a separate defendant when an individual healthcare provider is named. There is often an insufficient basis for these claims, but dismissal is not pursued because the primary allegations of malpractice take center stage. The presentation will focus on the commonly filed claims against the corporate healthcare provider based upon theories of vicarious liability, negligent hiring, negligent retention, corporate negligence, etc. The presentation will discuss the burden of proof for these claims, as well as strategies for managing the litigation and dismissal.

Phylicia A. Preston, *Byrne Legal Group*

10:00-11:00 Hospital's Duty to Protect Patients and Control Other Violent Patients On Premise

This session will focus on various duties imposed on hospitals to control the conduct of patients and/or third parties. We will discuss recent case law addressing when the existence of a hospital-patient relationship creates a duty to control a patient, as well as a hospital's liability for injuries their patients suffer at the hand of third parties. In addition, we will discuss potential steps to protect patients from violent criminal acts of third parties, including other patients, and ways to avoid liability for unforeseeable third-party criminal acts.

A. William Charters, *Goodman Allen Donnelly*

11:00-11:15 Break

11:15-12:15 Direct Liability Claims Against Healthcare Providers

Following the recent Supreme Court of Virginia opinion in *Parker v. Carillion Clinic, et al.*, 296 Va. 319, 819 S.E.2d 809 (2018), plaintiff's attorneys are looking to incorporate direct liability claims against healthcare providers in medical malpractice and other tort-based cases as a separate basis for liability beyond traditional vicarious liability. Health care facilities now face being held directly liable for alleged negligent conduct in the care of a patient. This presentation will explore the implications of negligence claims based

upon direct liability against health care facilities in medical malpractice actions and the effects it has on all aspects of litigating these actions – how to defend against such claims at the pleadings stage, the impact upon the scope of discovery into the inner workings of facilities and the respective governing structures, and how to litigate these claims in circuit courts given this recent ruling, while simultaneously defending the traditional vicarious liability claims.

Eileen R. Geller, *O'Hagan Meyer*
Katie Rockwell, *O'Hagan Meyer*

WORKERS' COMPENSATION (3.0 HRS)

9:00-9:55 **Procedural and evidentiary issues associated with Employers' Applications and the willful misconduct defense**
Employers' Applications: the number of employers' applications being rejected has steadily risen. Applications are generally rejected for either a failure to meet technical compliance pursuant to Commission Rule 1.4 or a failure to provide sufficient evidence to meet the probable cause requirement. The purpose of the presentation is to outline those minimum requirements necessary to have the application referred to the hearing docket. The presentation will cover the most common reasons for technical rejections of employer's applications and evidence needed to establish the probable cause requirement depending on the basis of the application. Some of the requirements of Rule 1.4 may not apply if the application does not allege a change in condition and does not seek the modification or termination of an award of compensation benefits. The role of protective applications and the importance of identifying with some level of specificity all reasons for the application.
Willful misconduct: the employer bears the burden of proof on the issue of willful misconduct. The presentation will cover the notice requirement, horseplay, attempt to injure another, self-inflicted injuries, violation of a statute or rule, use of alcohol or drugs and the distinction between negligence and willful misconduct.

Hon. Robert Rapaport, *Virginia Workers' Compensation Commission*

10:00-11:00 **An overview of presumptions, procedure, and entitlement to death benefits in claims brought under the Virginia Workers' Compensation Act**

Attorney Theisen and Attorney Lauer will discuss the litigation of Virginia Workers' Compensation death claims, summarizing the procedural and substantive rights under Virginia Code sections 65.2-512 through 65.2-516, including benefits available, and the requirements that must be met to qualify for benefits as a dependent and statutory beneficiary. The presentation will also cover presumptions and other evidentiary challenges that arise in death claims.

Steven H. Theisen, *Midkiff, Muncie & Ross*
Carl N. Lauer, *Dulaney, Lauer & Thomas*

11:00-11:15 Break

11:15-12:15 **A discussion of the "Handel" ruling and its impact upon the long-standing definition of injury by accident and sudden mechanical change**

Attorney Whitt will discuss the 2019 "Handel" ruling and how the Court of Appeals changed the definition of "injury" under the Act and incorrectly stated that the concept of "sudden and obvious mechanical or structural change in the body" merely describes whether an "accident" has occurred. Handel is contrary to decades of case law and misapplied the concept of "injury" in a confusing ruling which held that once an "injury" does occur, presumably a "mechanical or structural change," then every other medical condition claimed need not meet that definition of "injury" to be awarded but need only be proven to be causally related to the accident to be deemed compensable.

Ralph L. Whitt, Jr., *Whitt & DelBueno*

12:15 "Grab & Go" or "Sit & Chat" Lunches