



## Spring Sections Seminar

May 14-15, 2020

Via Webinar

### AGENDA

**14.0 CLE HRS Approved (#VDHH003)**

#### **Thursday, May 14**

##### **APPELLATE ADVOCACY (2.0 HRS)**

8:30-9:30      **Case Law Update**

This session will explore recent decisions of the Supreme Court of Virginia, the Fourth Circuit, and the US Supreme Court that impact Virginia practitioners. We will provide a detailed overview of important cases decided by these courts. The cases typically focus on jurisdictional questions, insurance law, torts, civil rights, damages, and remedies.

Jeffrey Miller, *Gentry Locke*

Joseph Pope, *Goodman Allen Donnelly*

9:30-10:30      **Appellate Mediation**

This topic will be dedicated to appellate mediation. Justice Millette and Steven Emmert will explain another alternative to resolving a case that has been appealed and the benefits of using mediation at this stage.

Hon. LeRoy F. Millette, Jr. (Ret.), *The McCammon Group*

L. Steven Emmert, *Sykes, Bourdon, Ahern & Levy*

**JOINT SESSION: AUTO & TRANSPORTATION LIABILITY and CORPORATE & COMMERCIAL LITIGATION (2.0 HRS)**

*Sponsored by Exponent*

**10:45-11:45 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*

**11:45-12:45 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*

**MEDICAL MALPRACTICE, PART 1 (2.0 HRS)**

**1:00-2:00 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 C. Mayer, *Hancock Daniel*

2:00-3:00 **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*  
Nathan Moberley, *Frith Anderson & Peake*

**LOCAL GOVERNMENT (2.0 HRS)**

3:15-4:15 **Trying the *Pro Se* Case**

This session will discuss procedural and legal tools to aid in efficiently navigating cases in state and federal court involving *pro se* plaintiffs and the challenges associated with defending these cases. This session will discuss common claims and tactics used by *pro se* plaintiffs and suggestions for countering those tactics.

Michael A. Beverly, *Norfolk City Attorney's Office*

4:15-5:15 **The Freedom of Information Act General Law & Impacts on Litigation**

This session will focus on the Freedom of Information Act, covering the substantive law, including application and exemptions, and its application in litigation. It will discuss how FOIA can be used as a tool in defending cases of all types, as well as discussing its limitations. This session will also discuss how it can be used as a pre-investigative tool prior to litigation.

Margaret Kelly, *Norfolk City Attorney's Office*



5:30 PM on Thursday, May 14

All meeting attendees are invited to join our sponsor, S-E-A Limited, for a virtual networking reception.

**JOINT SESSION: PROFESSIONAL LIABILITY & POLICY COVERAGE (2.0 HRS)**

8:30 – 9:30      **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.

Moderator: Lindsey A. Lewis, *Franklin & Prokopik*  
Julie S. Palmer, *Harman Claytor Corrigan & Wellman*  
Jason Riley, *The Jacobs Co. Inc.*  
Elizabeth E.S. Skilling, *Harman Claytor Corrigan & Wellman*

9:30-10:00      **Use of Extrinsic Evidence in Declaratory Judgment Actions**  
This session will focus on the question of whether, and under what circumstances, an insurer or insured may rely on extrinsic evidence for purposes of establishing or defeating an insurer's duty to defend under a liability policy.

Tom Garrett, *Harman Claytor Corrigan & Wellman*

10:00-10:30      **Appraisal Process in an Insurance Policy**  
This 30 minute session will focus on appraisal in property insurance policies under Virginia law. The session will cover the standard appraisal provision, the scope of appraisal, requirements for the appraisers and umpire, enforceability of the appraisal provision as well as practical practice pointers for counsel.

Rob Ross, *Midkiff Muncie*

## **MEDICAL MALPRACTICE, PART 2 (2.0 HRS)**

### **10:45-11:45 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*

### **11:45-12:45 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 (2.0 HRS)

### 1:00-2:30 **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*

### 2:30-3:00 **A Discussion of the "Handel" Ruling and its Impact Upon the Long-Standing Definition of Injury by Accident and Sudden Mechanical Change**

The Court of Appeals, on its own, changed the definition of "injury" under the Act, and therefore, along with the Van Buren/Dugger line of cases, the law as to what constitutes an "injury by accident" has been dramatically changed over the last few years in contradiction to 70 years of case law. The Court of Appeals incorrectly stated that the concept of "sudden and obvious mechanical or structural change in the body" which has been long-held to define an "injury" in fact merely describes whether an "accident" has occurred. This is not only incorrect and contrary to decades of case law, but it then leaves open and unanswered the question of what is the legal definition of "injury." The Act does define "injury" but only in the broadest of terms and does not provide a practical guideline for adjudicating that issue. The Court of Appeals also misapplied the concept of "injury" in a confusing ruling that once an

“injury” does occur, presumably a “mechanical or structural change,” then every other medical condition claimed need not meet that definition to be awarded but merely be proven to be causally related to the accident. Not only is this portion of the Handel ruling inconsistent with existing case law, it makes no sense, demonstrating the Court’s fundamental misunderstanding of workers’ compensation law.

The Supreme Court granted the defendants’ petition for appeal, and briefs have been filed, including an amicus brief filed on behalf VRSA, VSIA, and Prince William County Public Schools. Oral arguments will be scheduled in the near future.

3:00 PM Ralph L. Whitt, Jr., *Whitt & DelBueno*  
CLE Adjorns

*Many thanks to our sponsors,*



**Know.**

