

VADA



2023 Annual Meeting

DEVELOPING A MODERN
DEFENSE PRACTICE

OCTOBER 25-27, 2023

MARRIOTT RESORT
VIRGINIA BEACH OCEANFRONT

DRAFT AGENDA

Requesting 9.0 CLE Hours (2.0 Ethics)

(Second Ethics Hour is in the Professional Liability Breakout Session)

Wednesday, October 25

- 5:30 PM **New Members' Reception** (By Invitation Only)
Seaside Lobby
- 6:00 PM **President's Welcome Reception**
Seaside Lobby
- 7:30 PM **Dine Arounds**
Various locations
- 9:30-11:00 PM **Late Night**
Raleigh Room at the Cavalier

Sponsored by:



Thursday, October 26

- 6:30 AM **Group Walk or Run**, *Sponsored by the VADA Wellness Committee*
Meet in hotel lobby
- 8:00 AM **Registration and Buffet Breakfast**
Seaside Lobby



Please bring to the Registration Desk your donations for our local charity, Connect with a Wish.

- 8:00 AM **Past Presidents' Breakfast**
Location TBD
- 8:55 AM **General Session**
Seaside Ballroom

9:00-10:00 AM **Decoding the Gen-Z Jury, 1.0 HR**

Seaside Ballroom

This panel will explore the current and expected changes in jury demographics, which are trending towards younger and more plaintiff-friendly jury members. They will discuss how these changing demographics affect jury awards and offer strategies on how to communicate with and appeal to this generation as individuals and as members of a generationally diverse jury.

Leslie Ellis, *The Caissa Group*

Pamela Hutchens, *William & Mary School of Law*

Carlyle (Randy) Wimbish III, *Wimbish Gentile McCray & Roeber*

10:00-11:00 AM **Appeals as a Matter of Right – How is it Going One Year In? 1.0 HR**

Seaside Ballroom

Our panelists will give an update on Civil Appeals of Right in the Court of Appeals, discuss important decisions from the Court of Appeals and Supreme Court of Virginia as well as discuss practical tips for appeals in Virginia and important Rule discrepancies and changes.

Alicia M. Penn, *McGuireWoods*

S. Virginia Bondurant Price, *McGuireWoods*

11:00-11:15 **Break**

Seaside Lobby

11:15-12:15 PM **Daubert, 1.0 HR**

Seaside Ballroom

Discussion of the rules and procedures governing expert testimony in Daubert and Frye (federal) jurisdictions. Though Virginia does not have Daubert or Frye at the state level, the analysis has many similarities. The panelists will focus on the concept of *ipse dixit* (the "just how it is" argument) to challenge medical causation / damages experts in all types of cases in Virginia.

Brian Casey, *Clarke Dolph Hull & Brunick*

Gerald "Jerry" Harris, *City of Virginia Beach*

12:15-2:15 PM **Awards Luncheon**

Sponsored by:



2:30-4:30 PM **Litigation Section Breakouts**

APPELLATE ADVOCACY

2:30-3:30 **A Haunted House of Procedural Default: Spooky Ways to Hurt (or Lose) Your Appeal at Trial, 1.0 HR**

With the recent expansion in the size and scope of the Court of Appeals, having a full-blown appeal after trial is a much more realistic possibility. But with this expansion, tactical mistakes at trial and in the perfection process that can harm or fatally damage an appeal are of even greater importance. Our presentation will focus the steps that a trial litigant and appellate practitioner can utilize to minimize the possibility of a procedural default.

The Honorable Glen A. Huff, *Virginia Court of Appeals*
F. Nash Bilisoly, *Woods Rogers Vandeventer Black*
W. Thomas Chappell, *Woods Rogers Vandeventer Black*

3:30-4:30 **The Dos and Don'ts from the Perspective of Law Clerks, 1.0 HR**

This course will address common procedural defaults when preparing a case for appeal and strategies for effectively briefing and arguing appeals.

Whitney Davis, *Arlington County Attorney's Office*
Emily Kendall Chowhan, *Woods Rogers Vandeventer Black*
Brittany Ryers-Hindbaugh, *Law Clerk to the Honorable Frank Friedman*
Daniel Yates, *Newport News Attorney's Office*
Moderator: Elaine McCafferty, *Woods Rogers Vandeventer Black*

AUTOMOBILE AND TRANSPORTATION LIABILITY

Sponsored by: **HART REPORTING**
A VERITEXT COMPANY

2:30-3:30 **Brown v. Kirkpatrick, 1.0 HR**

The Court of Appeals of Virginia recently ruled in *Brown v. Kirkpatrick* that, where a UIM carrier has waived its right to subrogate and has paid a judgment in excess of the liability coverage, a plaintiff can nonetheless seek to recover the difference between the judgment amount and the liability coverage while also keeping the UIM payment. From his perspective as counsel in the case, John McGavin will present on the effects of this decision on transportation litigation and the defense's anticipated appeal efforts. A petition for hearing en banc has been filed and awaits consideration at the time of this writing.

John D. McGavin, *McGavin, Boyce, Bardot, Thorsen & Katz*

3:30-4:30 **Vehicle Technology in Accident Investigations, 1.0 HR**

This session will focus on vehicle technology in accident investigations, specifically focusing on newer technologies available today. Our presenter will discuss the various electronic modules that can record accident-related data, the available data types and how they can be utilized to reconstruct vehicular accidents, privacy and ethical considerations of data collection and use, and best practices for court admission of vehicle data.

James Whelan, *Beacon Forensics*

CORPORATE AND COMMERCIAL LITIGATION

2:30-3:30

How to Efficiently and Effectively Conduct a Workplace Investigation

Conducting a proper workplace investigation is vital to minimizing legal risks. Yet, many companies are not employing best practices when doing workplace investigations, and this is exposing them to significant and often avoidable legal liability. We have assembled a panel of seasoned legal and consulting professionals who will lead a very informative discussion on how best to conduct efficient and effective workplace investigations.

Broderick Dunn, *Cook, Craig & Francuzenko*
Karen Michael, *Karen Michael Consulting*
Moderator: Declan Leonard, *Berenzweig Leonard*

3:30-4:30

Conducting an Investigation in a Workplace After a Violent Employee-Involved Incident, 1.0 HR

Unfortunately, violence in the workplace is becoming increasingly common. In addition to first responders and upper-level management, attorneys are now often involved in the very early stages of workplace investigations after violent employee-involved incidents. Workplace violence involving employees can result in significant liability to employers. This panel will address the potential liabilities that may be faced by an employer including tort claims by the injured employee, workers' compensation, and regulatory liability, and the panel will also discuss how to conduct an effective investigation after a violent employee-involved incident in the workplace.

Daniel Deacon, *Conn Maciel Carey*
Susan North, *Gordon Rees Scully Mansukhani*

LOCAL GOVERNMENT

2:30-4:30

More Force Now = Less Force Later: The Uncomfortable Truth About Objective Reasonableness, 2.0 HRS

Join us for an electrifying demonstration and explanation of use of force alternatives provided by the Lead Taser and Defensive Tactics Trainers with the Chesterfield County Police Department. Followed by an update on recent use of force case law and a dynamic discussion of objective reasonableness, including an analysis of body worn camera video. Attendees will leave this breakout armed with tactical knowledge as well as practical insight to help defend those who defend us.

Corporal Paul (PJ) Cunniff, *Lead Taser Trainer for CCPD*
Master Officer Alexander Johnson, *Lead Defensive Tactics Trainer for CCPD*
Julie A. C. Seyfarth, *Chesterfield County Attorney's Office*

MEDICAL MALPRACTICE

Sponsored by:  In2Trial

2:30-3:30

Updates in the Law on Informed Consent in Medical Malpractice, 1.0 HR

This presentation will analyze the recent ruling by the Court of Appeals regarding informed consent in medical malpractice cases. The Court of Appeals ruled in early 2023 that a trial court erred when it allowed an impermissible informed consent theory. The Court found that a negligence theory based on a failure to obtain informed consent must be constrained by the diagnosis the physician actually made, not about what alternative therapies were available if he had made a different diagnosis. Additionally, the Court of Appeals found that a jury must determine whether the plaintiff, not an objective “reasonable person”, would have elected alternative treatment after receiving information from the physician. This presentation will also address informed consent in cases dealing with failures to diagnose, foundations of admission of expert testimony, and preservation of issues for appeal.

Paul T. Walkinshaw, *Wharton Levin*

3:30-4:30

Contesting an Administrator’s Standing - A Defense Attorney’s Guide to the Creation of and Challenges to Estate Actions, 1.0 HR

Summary: An administrator bringing a survival and/or wrongful death action is not always what he/she appears to be. A careful look at the administrator’s qualification and the decedent’s probate file often reveals defects which could limit claims or render the suit a nullity. This CLE will explore the process(es) for qualifying personal representatives to represent an estate in a civil action and how to identify errors which can be used to challenge an administrator’s standing.

Brian Vieth, *Goodman Allen*

POLICY COVERAGE

2:30-3:30

Levine v. Employers Insurance Company of Wausau, 1.0 HR

Our presenters will discuss *Levine v. Employers Insurance Company*, which interpreted how the UM/UIM declarations’ definition of a covered “auto” is to be reconciled with a broader definition of “covered auto” in the policy’s UM/UIM endorsement.

Pete Schurig, *Setliff Law*
Anthony Tamburro, *Setliff Law*

3:30-4:30

Removal of Insurance Coverage Litigation to Federal Court: A Good Faith Discussion of Strategies and Pitfalls

This session will address removal of cases involving insurance policies and insurance coverage to federal court. Specifically, it will address arguments for and against removal in given situations, the requirements and procedure for removal under relevant jurisdiction and removal statutes, common pitfalls and issues to be aware of in removing insurance coverage cases to federal court, and a discussion of hypothetical cases and whether they can and should be removed.

Michael Essig, *Hancock Daniel*
John Mumford, *Hancock Daniel*

PRODUCTS AND TOXIC TORTS

2:30-4:30

Product Liability and the General Maritime Law

The Supreme Court of the United States issued two opinions in 2019 that have had a dramatic impact on the defense of maritime tort product liability actions and the test for evaluating the available remedies. The panel will review the DeVries decision's impact defending product liability claims as well as its impact on the government contractor defense. Then they will evaluate how the courts have handled application of the test for damages articulated by Batterton.

Brian Schneider, *Schneider Law Group*
Justin Guthrie, *HunterMaclean*

PROFESSIONAL LIABILITY

Sponsored by:  MINNESOTA LAWYERS MUTUAL
INSURANCE COMPANY
PROTECTING YOUR PRACTICE IS OUR POLICY.*

2:30-3:30

Ethics Update: Navigating Recent Changes in Ethics and Attorney Discipline, 1.0 HR ETHICS

Covering recent disciplinary cases in Virginia, statistical trends in lawyer discipline, areas of practice and behaviors likely to trigger bar complaints and key takeaways to avoid bar complaints in the first place.

James M. McCauley, *Law Office of James McCauley; former Ethics Counsel, Virginia State Bar*

WORKERS' COMPENSATION

2:30-3:30

PTSD, Anxiety, and Depression: The Newest Areas of Presumption in Workers' Compensation, 1.0 HR

This segment will discuss the genesis and evolution of Va. Code §65.2-107 and will also discuss the implications of the Va. Code §65.2-107 provisions for PTSD diagnosis, comparison of the Code to the DSM-V guidelines for PTSD, applicable case law, and questions that arise in practice from the application of Va. Code §65.2-107. Analysis and discussion of the newest 2023 additions to Va. Code § 65.2-107 and how depression and anxiety fit within this established presumption criteria, a comparison of the Code to DSM-V guidelines for depression and anxiety, and questions that will now arise in litigation with these diagnoses based on this narrow class of workers. Explanation and analysis of differences between these three diagnoses within an injury context versus within a compensable consequence context under the Virginia Workers' Compensation Act.

Kerry K. Stolz, *Pender & Coward*

3:30-4:30

The Erosion of the "In the Course Of" Element of Compensability in Virginia Workers' Compensation, 1.0 HR

In Virginia, a claimant filing a workers' compensation claim must prove that an accident both arises out of the employment and occurs during the course of the employment to be found compensable. Generally, much of the analysis revolves around the "arising out of element" when defending a workers' compensation claim, whereas the "in the course of" element has been a more straightforward analysis. However, recent case law from Commission suggests that the "in the course of" element is becoming more blurry, and notably for employers and insurers, more claimant friendly. This presentation will analyze the history of the "in the course of" doctrine, including the various exceptions via the leading case law, and the apparent erosion of the defense. The goal of the presentation will be to highlight the trends in the case law and analyze whether the Commission is consistently applying the holdings from the leading Court of Appeals and Supreme Court cases regarding the "in the course of" doctrine.

Joseph P. Smith III, *Kalbaugh Pfund & Messersmith*

4:30-6:00 PM

Break

4:30-5:30 PM

Friends of Bill W. Meeting

Location TBD

5:00-6:00 PM

Young Lawyers Informal Gathering

Tulu Seaside Bar

6:00-7:30 PM

Networking Reception

Seaside Terrace

Sponsored by:  MDD

7:30-9:30 PM **Dinner on Your Own**
7:30-9:30 PM **Women's Section Dinner**
Cobalt Grille

Sponsored by:



9:30-11:00 PM **Late Night**
Cavalier Beach Grill

Sponsored by:



Friday, October 27

6:30-7:15 **Oceanside Yoga, Sponsored by the VADA Wellness Committee**
West Lawn

8:00-8:45 AM **Breakfast with the Judiciary**
Seaside Ballroom

Sponsored by: **InQuis**
Evidence-Based Rehab Experts

Visit the buffet before joining the conversation at a table of your choice.

Judges expected to attend the breakfast (subject to change).

- Hon. Dominique A. Callins, *Court of Appeals of Virginia*
- Hon. David Carson, *Roanoke City Circuit Court*
- Hon. Junius Fulton, *Court of Appeals of Virginia*
- Hon. Glenn Huff, *Court of Appeals of Virginia*
- Hon. Daniel Ortiz, *Court of Appeals of Virginia*
- Hon. John Tran, *Fairfax County Circuit Court*

8:45-9:00 AM **General Session**
Seaside Ballroom

- Community Service Project
- Wellness Activity Winners
- Sponsors' Raffle

9:00-10:00 AM **Direct Negotiation Strategies for Resolving Cases, 1.0 HR**
Seaside Ballroom

Take your negotiation skills to the next level through our exploration of direct negotiation strategies and tactics. Most cases, particularly personal injury claims, are resolved through direct settlement negotiations (i.e., without a mediator). Learn more about discovering your best alternative to negotiated agreement (BATNA) and the zone of possible agreement (ZOPA), along with using distributive negotiation tactics, to reach better settlement results for your clients.

Bryn L. Clegg, *Willcox Savage*
Joseph Moriarty, *Willcox Savage*

10:00-11:00 AM **Common Trial Mistakes and How to Avoid Them: A Judge's Perspective, 1.0 HR**
Seaside Ballroom

This session will be a panel discussion on common jury trial mistakes and how to avoid them from a judge's perspective. This presentation will range from conversations inside of chambers to presentations in front of the jury. Within this topic, the panel will focus on client and expert presentation to the jury – including the effective use of literature, demonstratives, managing complex technical issues, and cross examination, and how the Judges believe that these tactics and mistakes impact juries and ultimately verdicts.

Hon. David B. Carson, *Roanoke City Circuit Court*
Hon. Mary Jane Hall, *Norfolk City Circuit Court*
Hon. John M. Tran, *Fairfax County Circuit Court*
Moderator: Matthew E. Kelley, *Frith Anderson + Peake*

11:00-11:15 AM **Break**
Seaside Lobby

11:15-12:15 PM **Preventing Nuclear Verdicts 1.0 HR**
Seaside Ballroom

This session will teach you how to combat, defeat or reverse nuclear verdicts through strategies and tactics. You will learn what nuclear verdicts are, how we got here and most importantly - what defense attorneys can do to prevent nuclear verdicts.

Robert F. Tyson, Jr., *Tyson and Mendes*

12:15-1:15 PM **Remote Work is Here to Stay: Maintaining Data Security, Ethics and Your Wellbeing in the New Era of Practicing Law, 1.0 HR Ethics**
Seaside Ballroom

In this section, we will look at how remote work has changed the way we address professional and ethical concerns and requirements, particularly those regarding data security and attorney competence. We will discuss strategies to ensure we are upholding our ethical requirements as we transition to remote work and tips to maintain an effective and professional practice while working remotely.

Taylor Brewer, *Moran Reeves & Conn*

Matt Daly, *MGC Law*

Shyrell Reed, *Moran Reeves & Conn*

Hon. Beverly Snukals (Ret.), *The McCammon Group*

1:15 PM **Adjourn and Box Lunches**
Seaside Lobby