



THE ROCKET DOCKET NEWS

The Newsletter of the Northern Virginia Chapter of the Federal Bar Association

DECEMBER 2009

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The Former President's Report

by John E. Coffey, Esq.



As I take pen in hand (I'm not much of a keyboard guy) to write my last President's Message, it is hard to believe that a year has already flown by. Actually, by the time this goes to press, I will technically be the Past President, as our Chapter year ended on September 30.

In all events, I have to start with a big thank you to all of our Chapter officers and directors who have so ably served you over the course of the past year. They have worked tirelessly to bring you the high quality CLE and other programs for which our Chapter has become known.

The collective efforts of our board members have also resulted in recent national recognition for our Chapter. Our Rocket Docket News newsletter for example, was recently recognized nationally by the FBA with a third consecutive Meritorious Newsletter Recognition Award. Incoming President-Elect and Newsletter Editor, Chas McAleer deserves a large share of the credit for this recognition, but he didn't do it alone. Many of our Chapter members submitted high quality articles for publication throughout the year. Chas is always looking for new material, so if you have an idea for an article you would like to submit, please feel free to contact him at the phone or e-mail address noted on our masthead.

Our Newsletter was not the only recipient of a national award this year. Our long-running Introduction to the Courthouse Program, chaired this year by new board member Caitlin Lhommedieu, received the FBA's prestigious Presidential Citation Award for outstanding activities, events or projects. This program, which provides both new and seasoned practitioners valuable instruction in the inner workings of the Courthouse and its various departments, has been an annual event for our Chapter for the past 10 years.

Following the announcement of the Newsletter and Presidential Citation awards in August, our Chapter closed its year in fine fashion with the annual Torrey Armstrong Memorial Lecture and Reception for this year's class of federal judicial law clerks. The lecturer this year was Fairfax County Circuit Court Judge R. Terrence Ney. Judge Ney's reflections on the Principles of Professionalism recently endorsed by the Virginia Supreme Court were both timely and poignant, and an appropriate reminder of the ideals which guided the practice of our colleague Torrey Armstrong.



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Members of the Northern Virginia Chapter are encouraged to submit articles or news information of interest to other members of the Northern Virginia Chapter for possible publication in the Rocket Docket News. Please submit any proposed articles or news information to the Editors at the telephone numbers and e-mail addresses listed above. The Editors reserve the right to decide on publication, and any articles accepted for publication are subject to editing.

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A YEAR IN PREVIEW

By Attison L. Barnes, III, Esq.



I enjoyed seeing so many of you at the Armstrong Lecture in September, and particularly pleased that the judges regularly attend this event to introduce their new law clerks to the Bar. On behalf of the Board, I express special thanks to our Past President Jack Coffey for hosting such a successful evening and for his tremendous leadership as President over the last year. As I mentioned at the Lecture, under Jack's guidance, our Chapter's membership *increased* last year despite an era of economic volatility. Our Board works diligently to develop and sponsor CLE programs valuable to our members, to keep the Bar informed through Chas McAleer's award-winning Rocket Docket Newsletter, and to introduce new admittees to the Alexandria Division by hosting a historically well-received Introduction to Courthouse Program (co-chaired by Sean Murphy and Caitlin Lhommedieu).

A vital role of our Chapter's leadership is to deliver value to the Bench and the Bar. With that in mind, we are taking action to increase our web presence, and we have selected our 2010 seminars to reach out to as many members and potential members as possible. Early in 2010, the Honorable Anthony J. Trenga, the newest district judge in the Alexandria Division, and the Honorable Jane M. Roush of the Fairfax Circuit Court will participate in a seminar on January 20, 2010 (3:00 p.m.), on federal and state injunction standards in light of the Fourth Circuit's recent departure from *Blackwelder*. A copy of the registration form is attached to this Newsletter. Please submit your form and check to the Chapter's Treasurer, Damon Wright, as soon as possible. While you're at it, don't forget to read the article entitled "Bye, Bye, Blackwelder" by Damon and his colleague, Shirley Steinbach, in this issue of the *Rocket Docket News*.

On February 17, 2010, we will offer an early opportunity to knock out both hours of Virginia's CLE Ethics requirement when Tom Spahn presents a 2-hour Litigation Ethics seminar. A copy of the registration form is attached to this Newsletter. Thereafter, between March and June, we expect to sponsor seminars/events on:

- Recent developments in sanctions awards in federal courts
- Alternative dispute resolution options and strategies
- New developments in patent infringement actions
- Introduction to the Courthouse
- Bench/Bar conference

I also want to thank those of you who recently volunteered to get involved in our growing Chapter. We are always interested in hearing about issues you face in your practice and whether our Chapter can assist. We welcome articles for our Newsletter. Please feel free to contact me at 202-719-7385 or at abarnes@wileyrein.com if you would like to get involved. Also, if you who are not currently a member of our Chapter but would like to be, please visit www.fedbar.org/nvirginia and remember to select the Northern Virginia Chapter.

Finally, thank you again to this year's officers Charles F.B. McAleer, Jr. (President Elect), Sean F. Murphy (Vice President), R. Scott Caulkins (Secretary), Damon W.D. Wright (Treasurer), Anne Devens (National Delegate), as well as Directors, The Honorable Ivan D. Davis, Craig C. Reilly and Caitlin Lhommedieu for their willingness to serve.



Hitting the Links: The 2009 Chapter Golf Tournament

A near-record turnout participated in the annual FBA NOVA golf outing at Army Navy Country Club on October 14, 2009. District Judges James Spencer and Claude Hilton captained exceptionally strong teams, but ultimately (and perhaps unwisely) the Winston & Strawn team led by Tom Buchanan prevailed, with an impressive score of 8 under par. Demands for an audit were immediately dismissed as jealousy. The newly-renovated course at Army Navy represented a worthy adversary for several other teams who were just happy to have a day out of the office. Congratulations to the victors, although the rest of the teams have already committed to come back stronger next year.

We look forward to seeing all of you on the links at our tourney next Fall. Remember that all skill levels are welcome. This is solely a participatory event bringing members of the bench and bar together socially on a (hopefully) sunny day.

Everything You Always Wanted to Know about the Rule Changes, But Were Afraid to Ask By Caitlin K. Lhommedieu, Esq., McGuire Woods LLP



The following changes to the Federal Rules of Civil Procedure apply in all civil cases filed after

December 1, 2009 -- and in all other cases as just and practicable. Note that the Local Rules of the Eastern District of Virginia will not be amended at this time.

I. Deadlines: How Do I Love Thee? Let Me Count the Days . . . (Rule 6)

	Old School	New Math
Counting Days	when counting fewer than eleven days, intermediate weekends and holidays were omitted	every day counts, including weekends and holidays; Rule 6(a)(1)
	if last day falls on a weekend or holiday, then the deadline is the next day that is not a weekend or a holiday	[unchanged]
Counting Hours	[not specifically addressed]	every hour counts, including weekends and holidays; Rule 6(a)(2)
		if last hour falls on a weekend or holiday, then the deadline is the next day that is not a weekend or a holiday; Rule 6(a)(2)
If Clerk's Office Is Inaccessible	[not specifically addressed]	if the last hour falls when the Clerk's Office is inaccessible, then the deadline is that time on the next day that is not a weekend or a holiday; Rule 6(a)(3)
When does the carriage turn into a pumpkin?	[not specifically addressed]	if e-filing, the last day ends at midnight in the court's time zone; Rule 6(a)(4)
		if paper filing, the last day ends when the Clerk's Office closes; Rule 6(a)(4)

The Federal Bar Association's Mission Statement:

"The mission of the Association is to advance the science of jurisprudence and to promote the welfare, interests, education, and professional growth and development of the members of the Federal legal profession."

For more information regarding the Federal Bar Association and its activities, please contact the Federal Bar Association at its national offices:

The Federal Bar Association,
1220 North Fillmore Street
Suite 444
Arlington, VA 22201
(571) 481-9100 (phone)
(571) 481-9090 (fax)



Everything You Always Wanted to Know (cont'd)

II. To Err Is Human, To Forgive Might Not Require Leave of Court (Rules 13(f) and 15(a))

Amendment of pleadings, including omitted counterclaims, may now be made:

- if no response required, then once, as a matter of course, within 21 days of service of the pleading, Rule 15(a)(1)(A); or
- if a response is required, then within 21 days of service of the response, Rule 15(a)(1)(B); or
- by leave of court, freely given, or with opponent's written consent, Rule 15(a)(2).

That is, former Rule 13(f) (which required leave of court to add omitted counterclaims) has been abrogated in favor of new Rule 15(a).

III. Just Take It One Week at a Time (Standardization of a Number of Rules)

A. Rules that previously called for 1, 3, or 5-day time periods now extend to *seven days*

- service of opposing affidavits prior to hearing, Rule 56(c)(2);
- objections to form of re-cross questions, Rule 32(d)(3)(C);
- motion for review of costs taxed, Rule 54(d)(1);
- service of written notice of application for default judgment, Rule 55(b)(2); and
- answer or respond after removal, Rule 81(c)(2)(C).

B. Most Rules that previously called for 10-day (see exceptions below), or 11-day time periods now extend to *fourteen days*

- service of written motion and notice of hearing, Rule 6(c)(1);
- response to motion for more definite statement, Rule 12(a)(4)(A)-(B);
- motion for a more definite statement, Rule 12(e);
- third-party complaint without leave of court, Rule 14(a)(1);
- petition for permission to appeal order on class certification, Rule 23(f);
- deposition taken on short notice, Rule 32(a)(5)(A);
- jury demand served after pleading on triable issue, Rule 38(b)(1);
- jury demand in response to jury demand on some issues, Rule 38(c);
- time period for clerk to tax costs, Rule 54(d)(1);
- period of wait before execution or enforcement of judgment, Rule 62(a);
- expiration maximum for temporary restraining order without notice, Rule 65(b)(2);
- offers before trial to allow judgment; accepting offer, Rule 68(a);
- offers before hearing on extent of liability, Rule 68(c);
- objections to magistrate judge rulings and party's responses, Rule 72(a), (b)(2); and
- giving public notice (*in rem*), Supp. Rule C(4).

C. Rules that previously called for 20-day time periods now extend to *twenty-one days*

- answers when service not waived or after service of counter- and cross-claims; replies to answers after order to reply, Rule 12(a)(1);
- motion to strike when responsive pleading not allowed, Rule 12(f)(2);
- amending pleading as a matter of course (see above), Rule 15(a)(1);



Everything You Always Wanted to Know (cont'd)

- perpetuating testimony: service of petition and notice, Rule 27(a)(2);
- objections to master's order, report, or recommendations, Rule 53(f)(2);
- contents of notice of complaint to condemn property, Rule 71.1(d)(2)(A)(v);
- answer due after service of complaint to condemn property, Rule 71.1(e)(2);
- answer/defenses when action removed, Rule 81(c)(2)(A)&(B);
- answer of garnishee after service (*in personam*), Supp. Rule B(3)(a);
- content of notice to known claimants (forfeiture *in rem*), Supp. Rule G(4)(b)(ii)(C);
- answer/Rule 12 motion (forfeiture *in rem*), Supp. Rule G(5)(b);
- answers or objections to interrogatories (forfeiture *in rem*), Supp. G(6)(b);
- government's response to motion to dismiss (forfeiture *in rem*), Supp. G(6)(c);
- content of summons, Form 3;
- content of summons (third-party complaint), Form 4; and
- content of notice of condemnation, Form 60.

D. Exceptions: The following Rules hat previously called for 10-day time periods, and now extend to *twenty-eight days*

- motion for new trial due after judgment as a matter of law is entered, Rule 50(d);
- motion to amend/add findings after judgment entered, Rule 52(b);
- motion for new trial due after judgment entered, Rule 59(b); and
- motion to alter/amend judgment after judgment entered, Rule 59(e).

IV. Polling the Jury (Rule 48)

The number or jurors and unanimity of the verdict have been separately broken out, and the Rules now provide for polling of the jury, but have not been greatly changed.

As previously, a jury must begin with between 6 and 12 members, and each juror must participate in the verdict unless excused, Rule 48(a);

Also as previously, the verdict must be unanimous and returned by at least 6 jurors, unless otherwise stipulated, Rule 48(b); and

After a verdict but before the jury's discharge, upon a party's request, the jurors must be polled, or may be by polled by the court sua sponte; and if the polling shows that the verdict is not unanimous or in accord with a stipulation, then the court may direct further deliberation or order a new trial, Rule 48(c).

V. Simplified Summary Judgment Briefing Schedule (Rule 56)

- A. A motion for summary judgment may be filed at any time until 30 days after the close of discovery; Rule 56(c)(1)(A).**
- B. Response is due 21 days after motion is served; Rule 5(c)(1)(B).**
- C. Reply is due 14 days after response is served; Rule 56(c)(1)(C).**



Everything You Always Wanted to Know (cont'd)

VI. Indicative Rulings on Motions after Appeal (Rule 62.1)

Under the new Rules, even if an appeal has been docketed and is pending, a district court may choose to respond to a motion as follows:

- (1) defer considering the motion;
- (2) deny the motion; or
- (3) state that it would grant the motion if remanded for that purpose, or that the motion raises a substantial issue (if the court so states, then the movant must promptly notify the circuit court clerk.) Rules 62.1(a) and (b).

VII. Law Applicable on Removal (Rule 81(d)(1)-3)

The new Rule 81(d) clarifies the definitions of laws applying after removal.

- (1) state “law” means the state’s statutes and case law;
- (2) “state” includes D.C., and any U.S. Commonwealth or territory; and
- (3) in D.C., “Federal Statute” includes any Act of Congress that applies locally to the District.

Bye, Bye, Blackwelder

By Damon W.D. Wright and Shirley May Steinbach, Venable LLP



For thirty-two years, *Blackwelder* set the standard for obtaining preliminary injunctions in this Circuit. On August 5, 2009, this pillar of Fourth Circuit law was overruled. Some may mourn the loss of *Blackwelder*. Others may say “good riddance.” But, no doubt, it was an opinion that helped to make the Fourth Circuit unique. And the end of *Blackwelder* means much has changed.

A short history lesson may help. The old *Blackwelder* standard proceeded in three steps. First, courts “balance[d] the likelihood of irreparable harm to the plaintiff [if the injunction were denied] against the likelihood of harm to the defendant [if the injunction were granted].” *Blackwelder Furniture Co. v. Seiling Mfg. Co.*, 550 F.2d 189, 195 (4th Cir.1977). If this balance-of-hardship test favored plaintiff, and plaintiff “raised questions going to the merits of the dispute that [we]re . . . fair ground for litigation,” the inquiry ended there and an injunction was granted. Only if the balance-of-hardships did not favor the plaintiff, did courts proceed to the second step of the analysis and inquire whether plaintiff was likely to succeed



Blackwelder is Dead (cont'd)

on the merits. Under *Blackwelder*, the importance of showing likelihood of success increased as the probability of irreparable harm diminished. The third step required consideration of how the “public interest” would be affected by the grant or denial of the preliminary injunction. Although the three steps theoretically proceeded after one another, *Blackwelder* was a “sliding scale” standard because these three steps were “intertwined and each affects in degree all the others.”

Now to the present. With *The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346-47 (4th Cir. 2009), the Fourth Circuit declared that *Blackwelder* is no longer the law because it stands in “fatal tension” with the U.S. Supreme Court’s decision in *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365 (2008). Applying *Winter*, the Fourth Circuit held that a preliminary injunction movant must now independently satisfy four elements: “(1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.” The era of a “sliding scale” is over.

To be sure, the new standard is not so new. It is the standard that has been applied for years in most federal courts including the Supreme Court. See, e.g., *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). In this Circuit though, it represents a monumental change. Whereas the old focus was on “balance of hardships,” the new focus is on proving a “likelihood of success on the merits.”

In many cases, it will now be harder to obtain a preliminary injunction in this Circuit. Under *Blackwelder*, because a strong showing of irreparable harm excused plaintiff from showing he was likely to succeed on the merits, plaintiffs could sometimes avoid “the painstaking determination of law from precedent and the meticulous application of that law to the particular facts of the litigation.” *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 871 (4th Cir. 2001). Now though, under *Winter*, a plaintiff must make a clear showing that he is likely to succeed on the merits. Under *Blackwelder*, a plaintiff also did not have to show irreparable harm but merely that his anticipated harm outweighed defendant’s anticipated harm. Now, under *Winter*, a plaintiff must make a clear showing that, absent injunctive relief, he is likely to be irreparably harmed. Most important, under *Blackwelder*, courts were expected to allow for the “flexible interplay” of the various factors. Under *Winter*, all four elements must be established.

Although time will tell, the death of *Blackwelder* may also make preliminary injunction decisions more vulnerable on appeal. In the past, the “flexible interplay” approach largely rested on a court’s “subjective evaluation of the relative harms that might be suffered, and the policies that will be advanced and impeded, as a result of granting or denying an injunction.” *Safety-Kleen*, 274 F.3d at 870. With *Winter*, however, a movant is required to prove likelihood of success on the merits and thus the district court is required to conduct an objective examination of the law underlying the claim. Because a decision on the law is now so important to the preliminary injunction decision, the Fourth Circuit may give more scrutiny, i.e., *de novo* review, to preliminary injunction decisions.

A plaintiff can no longer obtain a preliminary injunction by merely establishing that – absent relief – a forest will be cleared, a home will be seized, or a trade secret will be misappropriated. Instead, the plaintiff must also establish at the outset – based on the law and the then-available evidence – that it is likely to prevail in the case. This may not be an easy burden for counsel rushing to court with a client who faces an emergency situation and needs emergency relief. But there is no doubt that you must tackle the law and the evidence with vigor to have a strong case ready when you arrive. And of course, for those opposing the motion, you will want to emphasize that the moving party has a heavier burden because *Blackwelder* is no longer with us.



Realtime News From the Courthouse

In the Chapter's continuing attempt to keep members informed of any Courthouse news as soon as possible, we recently sent email blast to the membership on various Courthouse developments, including following which bears repeating:

- On November 13, 2009, the Chapter advised the membership "that the Local Rules Committee of the Eastern District of Virginia has examined the Court's local rules in light of the amendments to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure that become effective on December 1, 2009, and has decided that no amendments to the Local Rules are necessary at this time." That said, you should still study Caitlin Lhommedieu's very helpful article entitled "Everything You Always Wanted to Know about the Rule Changes, but Were Afraid to Ask" in this issue of the Rocket Docket News.



Member Spotlight: Shirley May Steinbach, Esq, Venable LLP



Shirley May Steinbach has co-written two articles for the *Rocket Docket News*. Her second article is in this issue and discusses the Fourth Circuit's summertime decision to raise the standard for winning preliminary injunctions. But writing such articles is just her side gig.

Shirley spends the majority of her time successfully resolving business disputes for clients of Venable LLP, a national law firm with local roots. She specializes in matters involving commercial tort and contract claims, shareholder disputes, intellectual property disputes, construction disputes, and professional malpractice claims.

Shirley particularly enjoys cultivating her motions practice and discovery management skills as an associate in Venable's Litigation Group.

To the rule that Washington, D.C. is a "transient" city, Shirley is the exception. Shirley grew up in Montgomery County, Maryland. Staying close to home, she attended the University of Maryland at College Park, where she earned a Bachelor of Arts in Economics and a Bachelor of Arts in Spanish Language and Literature. Putting these degrees to use, Shirley then worked for several months as a researcher at The World Bank headquarters in Foggy Bottom.

When Shirley embarked on her legal career, she did not venture far, enrolling literally across the street at The George Washington University Law School. As a student, although she lived in Arlington, Virginia, she interned for the Honorable Roger W. Titus, across what His Honor called "the Potomac Ocean" in the United States District Court for the District of Maryland. Shirley now works in Venable's Penn Quarter office.

On a pro bono basis, Shirley indulges a passion for immigration law. Most recently, she persuaded the Baltimore Immigration Court to grant her client, a young woman who had fled gang violence in El Salvador, asylum in the United States.

In addition to being a dedicated legal practitioner, Shirley is also a dedicated yoga practitioner. She also enjoys rowing, hiking and fostering big dogs in her new Columbia Heights home.

**The Federal Bar Association
Northern Virginia Chapter**



Presents:

**"Perspectives from the Bench on Federal and State
TROs and Injunctions, Including the New Fourth
Circuit Injunction Standard"**

Featuring:

**Hon. Anthony J. Trenga
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA**

**Hon. Jane Marum Roush
Circuit Court, Fairfax County, Virginia**

**Moderator:
Sean Murphy
McGuire Woods LLP**

January 20, 2010, 3:00-5:00 p.m.

**Albert V. Bryan Courthouse
401 Courthouse Square
Alexandria, Virginia
Jury Assembly Room, Third Floor**

TWO HOURS OF CLE CREDIT PENDING

-- Registration Form Attached --

**Make check payable to "Federal Bar Association, Northern Virginia Chapter,"
and mail with your registration form to the Chapter's Treasurer:**

**Damon W.D. Wright
Venable LLP
575 7th Street, N.W.
Washington, DC 20004-1601
(202) 344-4937 (direct)
(202) 344-8300 (fax)
dwdwright@venable.com**

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Jury Assembly Room, Third Floor**

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**The Federal Bar Association
Northern Virginia Chapter**



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Featuring:

THOMAS E. SPAHN, Esq.

MCGUIREWOODS LLP

NATIONAL EXPERT ON ETHICS AND PROFESSIONAL RESPONSIBILITY

February 17, 2010, 3:00-5:00 p.m.

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Alexandria, Virginia
Jury Assembly Room, Third Floor**

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**Damon W.D. Wright
Venable LLP
575 7th Street, N.W.
Washington, DC 20004-1601
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dwdwright@venable.com**

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