

NORFOLK & PORTSMOUTH BAR ASSOCIATION

BAR BULLETIN

Volume XLII
Number 5

September –
October 2017

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See Flyers Inside for
Event Details and
Registration Information

Preregistration required
for all NPBA Events.
Call 622-3152.

PRESIDENT'S MESSAGE

Out of Many, One



James R. Harvey III

We all watched in horror as hooligans filled with hate and bigotry defiled a great Virginia city with racial incitement and violence. Exploiting the worst of our collective past, small-minded voices sought to drown out the rising tide of pluralism and equality that create opportunity, prosperity and hope for all. They will fail. They will fail because their vision is abhorrent to the values of America. They will fail because our society proudly celebrates that through our different backgrounds we are a stronger nation. They will fail because through the Rule of Law, lawyers and judges safeguard the rights of the most vulnerable in society. Throughout our history, our actions have not always fully reflected our ideals, but inexorably, we move to a more inclusive, tolerant and just society. This does not just happen, but takes hard work, every day, by lawyers and judges, right here.

The World Justice Project identifies four universal principles of societies governed by the Rule of Law:

1. **Accountability:** The government and private actors are accountable under the rule of law;
2. **Just Laws:** The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights;
3. **Open Government:** The processes by which the laws are enacted, administered, and enforced are accessible, fair, and efficient; and
4. **Accessible & Impartial Dispute Resolution:** Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.

It is our responsibility to represent clients in pursuit of these universal principles. Whether in private practice or public service, representing criminal defendants or corporations in civil disputes, none of us can reliably serve our clients unless we each preserve these fundamental principles. We know that in our adversarial system of justice, laws are not evenly applied unless parties are represented by counsel. Local, state and federal laws must be probed and challenged to ensure they are just and protect all.

(Continued on page 2)

UPCOMING EVENTS

SEPTEMBER LUNCHEON

Tuesday, September 5, 2017, 11:45 AM
Hits at the Park, Harbor Park
Lieutenant Governor Ralph S. Northam
Democratic gubernatorial nominee

NPBA SOCIAL

Thursday, September 28, 2017, 5:30 - 8:30 PM
O'Connor Brewing, 211 W. 24th St, Norfolk

OCTOBER LUNCHEON

Thursday, October 19, 2017, 11:45 AM
Hits at the Park, Harbor Park
Ed Gillespie
GOP gubernatorial nominee

RSVP REQUIRED FOR EACH EVENT

Contact NPBA at 622-3152 or
npbamail@gmail.com

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(President's Message continued)

We come together as a bar association in the shared experience of advancing the rule of law. Through education, access to pro bono service opportunities, teaching our youth, meeting with judges and promoting just and ethical representation of clients, we reaffirm our commitment to the rule of law. Of all the actions we as citizens and lawyers take, none is more important than the exercise of our right to vote. Increasingly, those who write the laws and those charged to enforce them as chief executive are not lawyers. Our voices as lawyers must be heard not just in the courthouse, but also in the legislature.

I am proud that we are able to host our gubernatorial candidates this year so that you can evaluate each, and we have an opportunity to have our voices heard in Richmond. Please join us on Tuesday, September 5th to hear Lt. Gov. Ralph Northam and on Thursday, October 19th to hear Ed Gillespie. These are important events in the life of our Association, and your presence is valued. Please RSVP today.

I look forward to seeing each of you, where we can continue to reaffirm our basic value: *E Pluribus Unum*.

**DOCKET DIGEST –
RECENT NORFOLK CIRCUIT COURT OPINIONS**

Compiled and Summarized by
Dustin M. Paul and Jennifer L. Eaton, Vandeventer Black LLP

***Nancy O'Brien v. Robert Preston Midgett, II, CL15-5459*
(Va. Beach Docket) (July 26, 2017) (Judge Lannetti)**

A Final Order was entered in this Virginia Beach Circuit case, tried before a Norfolk judge, denying claims of excessive compensation to an executive at Jungle Golf, but awarding unpaid interest for an outstanding loan. The dispute arose after the death of Ms. Midgett, who had owned 70% of the stock in Jungle Golf. The remaining 30% was owned by her son, Preston, who was the chief executive of the company. The Midgett Estate filed a derivative suit alleging that Preston's compensation was excessive, and Jungle Golf should recall its loan to Preston.

The Court made two rulings of particular interest in its detailed opinion. First, it considered the "Dead Man's Statute" as to the excessive salary claims. The Court found Preston's salary was authorized by Jungle Golf's Board of Directors and its shareholders—Ms. Midgett and Preston. Although Ms. Midgett was deceased, the Court found that there was sufficient evidence to corroborate Preston's testimony that Ms. Midgett had approved his salary. The opinion helps illustrate what evidence is sufficient to corroborate testimony under the Statute.

In awarding interest on the previously interest-free loan from Jungle Golf, the Court ruled on what appears to be an issue of first impression in the state. The Court ordered Preston to pay a 7% annual interest rate on the loan—the same rate Jungle Golf was paying on a commercial loan. The Court, refused, however, to award interest during the 90-day demand period required under Va. Code § 13.1-672.1(b) for derivative actions. The Court concluded that the "ninety days to cure the alleged deficiency identified in the demand . . . [is] essentially a 'grace period.'"

Richardson v. Virginia Electrical Power Company and T-Mobile Northeast LLC, (CL-17-3408) (July 17, 2017) (Judge Martin)

This dispute involves a 1958 easement on the Plaintiff's property granted to VEPCO, on which T-Mobile has installed cellular telephone facilities. The Opinion addresses statute of limitations issues, defines claims for "ejectment," and addresses what the Court describes as an "anachronistic" right to waive tort claims to pursue an "undertaking implied by law."

Although the opinion is interesting on multiple levels, the most useful portion to litigators may be its discussion of the relationship between *res judicata* and Virginia's nonsuit statute. The Plaintiff took a nonsuit in a previous action, and the Court concluded that its previous ruling granting a plea in bar, in part, continued to have effect in this subsequent case. The Court explained that while a nonsuit generally "leaves the situation as if the earlier action had never been filed" a nonsuit only applies to "the claim and parties remaining in the case after any other claims and parties have been dismissed with prejudice or otherwise eliminated from the case." (quoting *Dalloul v. Agbey*, 255 Va. 511, 514 (1998).

ANNOUNCEMENTS

The law firm of **Swartz, Taliaferro, Swartz & Goodove** is pleased to announce that **Mark Bradford Stokes** has joined the firm as an associate. Mr. Stokes is a graduate of George Mason University and Regent University School of Law and will focus his practice in the areas of criminal defense and personal injury.

Willcox Savage attorney **Corina San-Marina** has earned the Certified Information Privacy Professional/United States (CIPP/US) credential through the International

Association of Privacy Professionals (IAPP). This designation is the leading privacy certification for professionals serving organizations in the areas of: data protection, information auditing, information security, legal compliance and risk management and demonstrates an understanding in U.S. private-sector privacy laws and regulations, and legal requirements for the responsible transfer of sensitive personal data to/from the U.S., the EU and other jurisdictions. Only 10,000 worldwide hold IAPP certification.

POSITION AVAILABLE:

Williams DeLoatch, P.C. is seeking an associate attorney with 1-3 years experience to handle personal injury matters in our rapidly growing firm with two locations in Chesapeake and on the Eastern Shore. Courtroom experience preferred, but not required. Salary is negotiable. Please send your resume and two references to our office manager, Teresa Greene, at tgreene@wd-law.com by September 25, 2017.

WELCOME NEW MEMBERS

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Joannou & Associates

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Paul Schmeding
McKenry Dancigers Dawson, P.C.

Elizabeth Wood
Elizabeth Wood, P.C.

William Riegenbach
McKenry Dancigers Dawson, P.C.

Mark B. Stokes
Swartz, Taliaferro, Swartz and Goodove, P.C.

Jackson D. Littlejohn
Regent Law student

NPBA Social

Thursday, September 28, 2017, 5:30-8:30PM

O'Connor Brewing
211 W. 24th Street, Norfolk

Cash Bar and Food Truck

Come out and enjoy casual fellowship and networking
at one of Norfolk's great breweries!

Suggestions Regarding Uncontested Affidavit Divorces in Norfolk Circuit Court

The Honorable David W. Lannetti, Judge, Norfolk Circuit Court
Catherine Donnelly, Esquire, 2016-17 Law Clerk, Norfolk Circuit Court

Norfolk Circuit Court remains a popular courthouse in which to file uncontested affidavit divorces, partly due to the efficiency with which such matters are handled. Nevertheless, entering the Final Decree of Divorce can be delayed due to mistakes in the supporting paperwork provided by attorneys. The following list, based on common mistakes the Court has observed (in no particular order), is provided with the hope that such mistakes can be avoided, thereby preventing the associated additional time and expense in correcting them.

- 1) The Complaint (or a Confidential Addendum) *shall* state *the city and/or county and state of residence of the plaintiff and the defendant*—or if the residence of the defendant is unknown, the city and/or county and state where the defendant was last known to reside—as well as *the city and/or county and state where the parties last cohabited*. Norfolk Circuit Court Order dated Mar. 7, 2017.
- 2) The statutory separation period required by Section 20-91(A)(9)(a) of the *Code of Virginia* (one year or—if there are no minor children and the parties have executed a written Separation or Property Settlement Agreement—six months) must have been satisfied *prior to filing the Complaint*. *Harrell v. Harrell*, 272 Va. 652, 656, 636 S.E.2d 391, 394 (2006).
- 3) If the defendant is an active-duty member of the military of the United States or her allies, the defendant *must* either *explicitly waive in writing his/her rights under the Servicemembers Civil Relief Act* or *sign the Final Decree of Divorce*. Of note, this waiver can be incorporated into the Waiver of Service allowed by Section 20-99.1:1 of the *Code of Virginia*.
- 4) Notary seals are *required* on a defendant's Waiver of Service and both the plaintiff's and corroborating witness's Affidavits. *Va. Code* §§ 20-99.1:1, 20-106(B). Although Virginia permits notaries to use raised seals instead of ink seals under Section 47.1-16 of the *Code of Virginia*, raised seals do not scan well and often will not show up on electronic copies (making verification of the seal difficult for the Court). The best practice therefore is to have the notary use *an ink seal*; if a raised seal is the only option, *shading over the seal with a pencil* may help make the seal visible after scanning.
- 5) If the defendant was served by order of publication, the Final Decree of Divorce normally should deny equitable distribution and spousal support to the plaintiff and *must reserve equitable distribution and spousal support to the defendant*. Equitable distribution and/or spousal support can also be reserved to the plaintiff *if the plaintiff requests such relief in the Complaint*. Norfolk Circuit Court Local Rule 1(E)(2).
- 6) When a divorce involves a Separation or Property Settlement Agreement, the Final Decree of Divorce will often state that the agreement is affirmed, ratified, and incorporated into the Final Decree as allowed by Section 20-109.1 of the *Code of Virginia*. The best practice is that the Final Decree instead state that the agreement is affirmed, ratified, and incorporated, *but not merged* into the Final Decree of Divorce. This preserves the parties' right to bring a breach of contract claim outside the divorce proceeding (in addition to the parties' right to a contempt remedy). Additionally, a copy of the agreement should be filed with the

(continued on page 5)



Parks Zeigler, PLLC would like to announce

David L. Littel

has joined our firm as a partner.

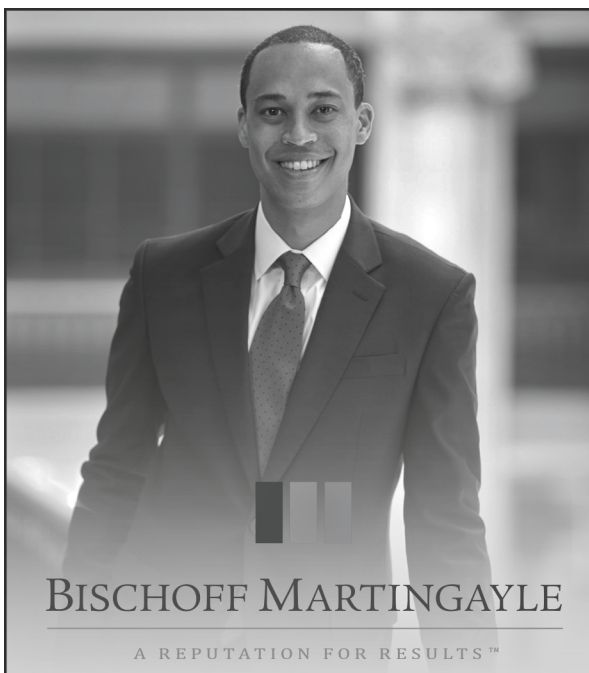
Dave has over 20 years' experience trying civil cases at the highest level, including significant experience in personal injury matters. He is a long-standing member of the I'Anson Hoffman Inn of Court and the Norfolk/Portsmouth and Virginia Beach Bar Associations. Dave has served as a volunteer with the CLASS program in Virginia Beach, assisting battered and abused persons in obtaining protective orders. We are honored to add such an accomplished attorney to Parks Zeigler and look forward to his contributions assisting our clients.

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Court (and the dates of marriage and separation in the agreement should match those in the Complaint, Affidavits, and Final Decree of Divorce).

- 7) If there is a Separation or Property Settlement Agreement and *neither party resides in Norfolk*, the Final Decree of Divorce *must* contain a transfer provision pursuant to Section 20-107.3(L) of the *Code of Virginia* that transfers all future matters concerning the agreement to the Virginia Circuit Court located in the jurisdiction where one of the parties resides. Of note, the transfer provision must name the specific court to which the matter is transferred; it is not sufficient to transfer the case to a “court with jurisdiction.”
- 8) If there are *minor children* born or adopted of the marriage, or *spousal support has been granted*, the Final Decree of Divorce must contain a transfer provision pursuant to Section 20-79(C) of the *Code of Virginia* that transfers all future matters concerning child custody, visitation, and support or spousal support (as applicable) to the Virginia Juvenile and Domestic Relations District Court located in the jurisdiction where one of the parties resides (preferably where the custodial parent resides if there are minor children). This transfer provision is *completely separate* from the transfer provision related to a Separation or Property Settlement Agreement; if there are both an agreement and minor children or spousal support, then *both* transfer provisions are required.
- 9) Sections 20-106(B)(7) and 20-106(B)(8)(e) of the *Code of Virginia* require that both the plaintiff and the corroborating witness affirm that there were no minor children born or adopted of the marriage and that *the wife is not known to be pregnant from the marriage*. Even if the marriage concerns a same-sex couple, the Affidavits should still conform to the statute; it is acceptable to state that neither party is pregnant from the marriage.
- 10) The corroborating witness’s Affidavit should include information regarding *how the witness knows the plaintiff* (e.g., “I am a friend of the plaintiff,” “I am the plaintiff’s mother”) and *how long the witness has known the plaintiff* (e.g., “I have known the plaintiff since 2005”) so the Court can verify that the witness can affirm that the parties have been separated for at least the required statutory separation period. Ideally, *the corroborating witness also would have met the defendant* to support an affirmation that the defendant is over the age of 18 and not suffering from any condition that renders the defendant legally incompetent, as required by Section 20-106(b)(8)(a) of the *Code of Virginia*.

The views advanced in this Article represent commentary “concerning the law, the legal system, [and] the administration of justice” as authorized by Virginia Canon of Judicial Conduct 4(B) (permitting judges to speak, write, lecture, teach, and otherwise participate in extrajudicial efforts to improve the legal system). These views, therefore, should not be mistaken for the official views of the Norfolk Circuit Court or the opinion of the authors in the context of any specific case.



WELCOMES
JERRAULD “JAY” JONES

Bischoff Martingayle P.C. is proud to announce Jay Jones has joined the firm as a partner. Jay graduated from the College of William and Mary in 2010 and from UVA Law School in 2015. A lifelong resident of Norfolk who is actively engaged in the civic life of his city and region, Jay will specialize in civil and commercial litigation, helping achieve positive results for clients of Bischoff Martingayle.

*Jay joins Emily Munn
in the firm's new
Norfolk location in
Monticello Arcade.*



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YOUNG LAWYERS SECTION

By Andrea Ruege, Chair

The Young Lawyers' Section has had an eventful summer! After a very successful Golf Tournament (thank you again **Kyle Martin** and **Amber Randolph**), the City of Norfolk graciously donated its box at Harbor Park to YLS on July 26. Even though the Tides lost in extra innings, it was a perfect night in downtown Norfolk to watch some really great baseball.

Our annual Summer Social was held August 17 at Luna Maya in Norfolk's historic Ghent. As usual, we had an amazing showing of young lawyers, clerks, members of the "big bar," and judges. In addition to collecting donations for the Boys and Girls Club of Southeastern Virginia, this event was co-sponsored by the newly launched mentoring program as an opportunity for mentors and mentees to meet before the



hustle and bustle of the school year begins. Special thanks to **Margaret Kelly**, **Nicholas Raffaele**, and **Jennifer Fuschetti** for their help in organizing this event and keeping our mentoring program afloat!

As busy as we were this summer, the Young Lawyers' Section is looking forward to an even more eventful fall. Please be on the lookout for information about upcoming social and service opportunities, includ-

ing our Fall Reception which Judge Hall and her husband have enthusiastically agreed to host. It is sure to be a great event!

If you are a member of NPBA and a young lawyer, we would love for you to be part of our committee. The Young Lawyers' Section meets monthly and there are plenty of opportunities to get involved and meet other local attorneys. If you are under the age of 36 or have been practicing for five years or less, I strongly encourage you to attend one of our meetings. We typically meet one Tuesday a month at 6:00 to enjoy happy hour as we manage new business. If you have questions about joining YLS or any of our programming, please do not hesitate to contact me at aruege@bertinilawfirm.com. I look forward to meeting you soon!

• • •

Help Us Rent Our Law Firm Office in Norfolk



Please help us find a tenant for our Ghent offices. Cooper Hurley Injury Lawyers moved from 2014 Granby Street to a bigger office to accommodate our growing firm. We are seeking a tenant for our 2,800 square foot office on the corner of Granby Street and 21st Street in Ghent, Norfolk.

The office was designed for our law firm three years ago. It contains a large conference room, seven offices, a kitchen, two bathrooms and a spacious reception area. The office is above the Wells Fargo bank and within close walking distance of Ghent restaurants and stores on 21st Street with good transportation links. The new tenant will have great visible signage. The building also has ample free parking. Call Jim Hurley at (757) 455-0077 or our agent Scott Godbout at (757) 525-4947.



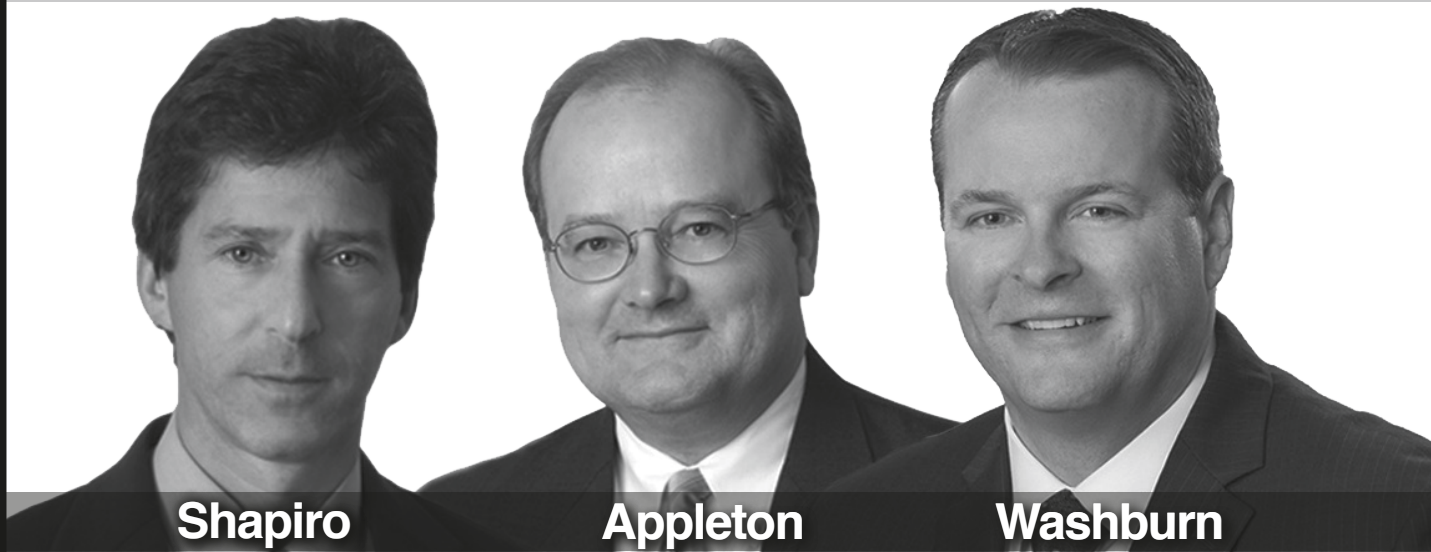
When Are Two Heads Better Than One? (Co-Counseling With Our Firm)

| Amount | Year | Co-Counsel | Type Case | Court |
|---------------|------|-----------------------|--------------|--------------------|
| 1.5M Settled | 2008 | Chris Hill (FL) | Elec. Shock | E.D. VA USDC |
| *2.3M Verdict | 2010 | David Kopstein | Medical Mal. | Norfolk Cir. Court |
| *8.6M Verdict | 2010 | Sid Gilreath (TN) | Railroad | Knoxville, TN |
| 1.5M Verdict | 2011 | Ben Saunders (LA) | Railroad | New Orleans USDC |
| 1 M Settled | 2014 | Randall Phillips (NC) | Muni. Negl. | Asheville NC |
| 2.5M Verdict | 2015 | Rob Sullivan (MO) | Prod. Defect | E.D. VA USDC |

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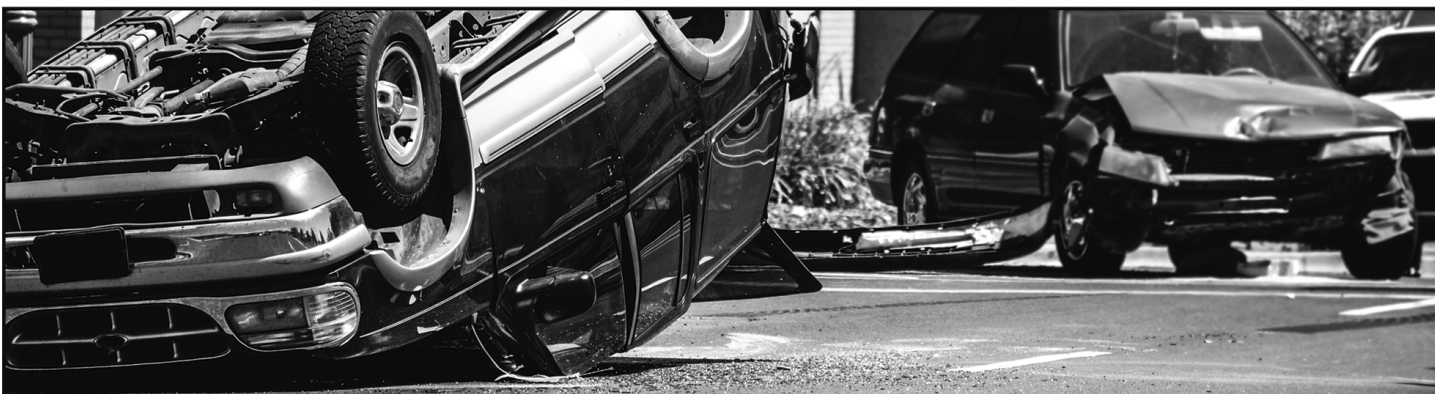
Stephen M. Smith, Esq.

Out of thousands of trial lawyers in the United States, Stephen M. Smith was one of the select few invited to be trained in the Neuro-Anatomical Dissection of the Human Brain and Spinal Cord at Marquette University College of Health Sciences. This advanced medical training, coupled with his 42 years of national and international complex medical litigation experience, provides his clients with an advantage in the court room.

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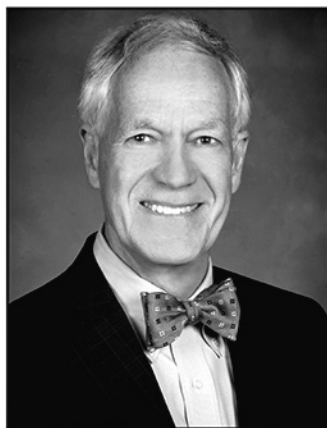
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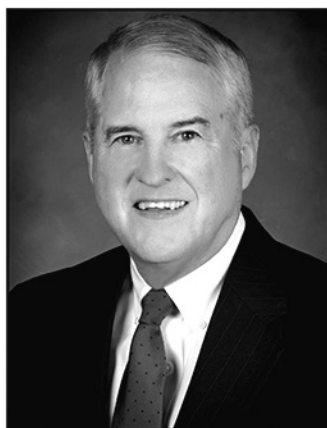
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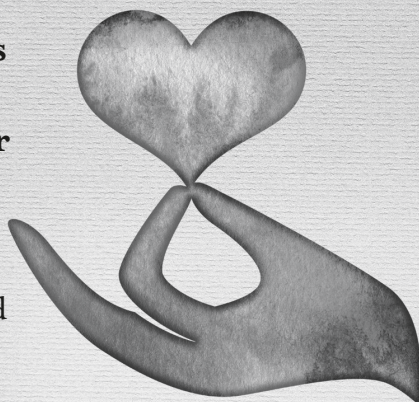
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