

# Opening Statement™

THE OFFICIAL PUBLICATION OF THE VBA YOUNG LAWYERS DIVISION

HELLO SUNSHINE

## Summer Festivities at the Homestead

We are pleased to present the Summer 2023 issue of the *Opening Statement*.

The annual VBA Summer Meeting is on the horizon. On July 20-22, the VBA's signature summer event will be held at the Omni Homestead Resort in Hot Springs, Virginia. All Virginia lawyers are invited to join the VBA once again for a fun-filled weekend of recreation, networking, and CLE programs. More details are available in the sidebar. The YLD will be hosting a variety of events for young lawyers, so if you have not yet become involved, the Summer Meeting is a great first step. We are always excited to see new faces at the Summer Meeting. Now, let's look at some of the highlights from this issue.

In his column on page 2, YLD Chair Patrick Bolling recaps some of the YLD's programming thus far this year and highlights opportunities to get involved with the YLD. If you have a CLE topic you would like to showcase, consider becoming more active in the YLD and participating in the YLD-sponsored CLEs. Reach out to a YLD member today to learn more.

This issue also features Graham K. Bryant's recap of the YLD's 2023 Model Judiciary Program on pages 6-7, which culminated with arguments before a panel of Virginia Supreme Court justices. We offer our warmest congratulations to Erika Kengni and Elaine Yoon, the winners of this year's program.

Troy Johnson, Jr., kicks off our selection of in-depth articles on pages 3-5, in which he discusses the expanding nature of telemedicine services in the Commonwealth and highlights key guidance documents governing the practice area. Jared A. Tuck then provides practical advice on remote depositions for Virginia litigators on pages 10-11.

On page 9, Callie Guy and Rachel Adams shine the spotlight on two other YLD members, Quinn Novak and Peter Askin, as each were selected as Richmond's Finest Honorees by the Virginia chapter of the Cystic Fibrosis Foundation.

Finally, the YLD held its Spring Meeting in Chincoteague, Virginia this past April. As the photo spread on page 8 shows, the meeting was a great success and full of adventure.

As always, thank you for reading. We trust you will enjoy this issue of the *Opening Statement*!



**Steven W. Lippman**  
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### VBA Summer Meeting

The Virginia Bar Association will hold its **133<sup>rd</sup> VBA Summer Meeting** on **July 20-22** at the Omni Homestead Resort in Hot Springs, Virginia. The Summer Meeting will feature a variety of CLE programming as well as opportunities to network, play golf, hike, and enjoy the resort's amenities.

The YLD will meet Friday afternoon to discuss programs and goals for the balance of the year, and then again on Saturday evening for the traditional front-porch social. We encourage all young lawyers to attend.

#### Featured Activities:

Thu., July 20, 6:00 p.m.–7:00 p.m.:

#### Opening Reception

Fri., July 21, 8:30 a.m.–11:15 a.m.:

#### Concurrent CLE Programs

Fri., July 21, 12:00 p.m.–1:00 p.m.:

#### YLD Business Meeting

Fri., July 21, 6:30 p.m.–9:30 p.m.:

#### Reception and Banquet

Fri., July 21, 9:30 p.m.–10:30 p.m.:

#### President's Reception

Sat., July 22, 9:00 a.m.–10:30 a.m.:

#### Concurrent CLE Programs

Sat., July 22, 11:00 a.m.–12:00 p.m.:

#### General Session: How Artificial Intelligence Will Change the Legal Profession

Sat., July 22, 7:00 p.m.–8:30 p.m.:

#### Closing Picnic

Sat., July 22, 8:30 p.m.–10:00 p.m.:

#### YLD Front Porch Social

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## MESSAGE FROM THE CHAIR

# YLD Opportunities

By R. Patrick Bolling

Happy Summer everyone! I hope that the first half of 2023 has treated you all well. We've been busy planning and implementing numerous programs and events throughout the state. Our Spring Meeting on Chincoteague Island was a success, and we're looking forward to carrying that energy into the Summer Meeting at the Homestead. I encourage you to read this entire newsletter, as well as the upcoming edition of the VBA Journal, for a recap of some of these programs. As interest in the YLD continues to grow, we are recruiting for a number of key roles. If you are interested in any of these roles, please contact me:

- **Four Executive Board Seats.** We are looking forward to filling out our ranks to meet the growing demand for in person YLD activities. Currently, there are two open Executive Board seats. As of January 2024, there will be two more. Joining the Executive Board is a wonderful way to get to know and learn from your peers, and to step into your role as a leader in the bar.
- **CLE Committee Chair.** This January, the YLD will be in need of a CLE Committee Chair. This role is responsible for planning the YLD's CLE offerings, primarily at the Spring and Fall Meetings.
- **Committee on Sponsorships.** The Chair of the Committee on Sponsorships serves a critical function in helping the YLD fund its meetings and activities.

- **Lawyer Wellness Committee.** The annual Lawyer Wellness Challenge is growing exponentially, and next year will mark the 5<sup>th</sup> edition. We are currently looking to add a member to the Committee to serve as a Chair Elect/understudy to Hetel Challa, the current Chair.

- **Section Representatives.** One of the most valuable benefits the YLD can provide is an appointment of a young lawyer to the Section Council of his or her practice area. We currently have seats open on these Section Councils:

- Administrative Law
- Appellate Practice
- Bankruptcy
- Business
- Civil Litigation
- Construction and Public Contracts
- Corporate Counsel
- Domestic Relations
- Elder Law and Special Needs
- IP/IT
- Judicial
- Taxation
- Transportation

- **National Moot Court.** Planning is underway for this year's National Moot Court Competition. The competition is tentatively scheduled for November 17-18, 2023 at the Fourth Circuit Court of Appeals in Richmond. For those of you unfamiliar

*Continued on page 12*



### R. Patrick Bolling

Principal, Woods Rogers Vandeventer Black (Lynchburg)  
YLD Chair, 2023-24

**Bio:** Patrick is part of Woods Rogers Vandeventer Black's Labor & Employment Group. He sits on the Executive Board for the Young Lawyer's Division. In the VBA, he has worked primarily with the YLD's Law School Councils, first at his alma mater Washington & Lee University School of Law, then as the Co-Chair of the Statewide Law School Councils. He lives in Lynchburg with Anna, two boys, Onex and George, and Delta the Dog.

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# Telemedicine in Virginia

By Troy R. Johnson, Jr.

Undoubtedly, the COVID-19 pandemic drastically changed how many businesses operate on a daily basis. In the spring of 2020, the pandemic brought the entire world to a halt and forced almost everyone to focus on developing technological solutions to allow society to resume operation in some capacity. The healthcare industry was on the front line in more than one capacity, and its members stepped up to treat patients using the resources available. Thanks to its flexibility, telemedicine was and still remains a vital resource creating availability of and access to healthcare.

Virginia, like many other states, had statutes and other guidance related to telemedicine in place prior to the pandemic. The pandemic spurred an increase in utilizing telemedicine which continues to offer Virginia's legislature and the Virginia Board of Medicine an opportunity to examine and revitalize their statutes, regulations, and guidance governing telemedicine as discussed below. These changes make telemedicine a great example of the ever-changing nature of healthcare.

## WHAT IS TELEMEDICINE?

The Virginia General Assembly has not established outright statutory parameters regarding the provision and delivery of telemedicine services in general. However, it has adopted legislation regarding insurance coverage of telemedicine services<sup>1</sup> and/or the prescription of controlled substances via telemedicine.<sup>2</sup>

Virginia Code § 38.2-3418.16 requires

insurers to provide coverage for health care services appropriately provided through telemedicine services. Telemedicine services means "the use of electronic technology or media, including interactive audio or video, for the purpose of diagnosing or treating a patient, providing remote patient monitoring services, or consulting with other health care practitioners regarding a patient's diagnosis or treatment."<sup>3</sup> Telemedicine services does not include an audio-only telephone, electronic mail message, facsimile transmission, or online questionnaire.<sup>4</sup>

Virginia law does not expressly permit or prohibit the provision of telemedicine services by certain healthcare practitioners. The Virginia Board of Medicine and the Virginia Joint Boards of Medicine and Nursing (collectively, "the Boards") have published guidance documents regarding telemedicine services implying that physicians, physician assistants, and nurse practitioners (otherwise known as an "advanced practice registered nurse") may provide healthcare services through telemedicine.<sup>5</sup>

## TELEMEDICINE REQUIREMENTS.

The Boards published their guidance documents regarding telemedicine services to provide their licensees with guidance in the absence of statutory governance by the General Assembly. Because there is no such governance, existing statutes and regulations must be applied to the provision of healthcare services through telemedicine with the exception of prescribing Schedule II through VI controlled substances as discussed below.

The Boards have adopted the following guidelines (excerpted below from Virginia Board of Medicine Guidance Document 85-12: Telemedicine and Virginia Joint Boards of Medicine and Nursing Guidance Document 90-64: Telemedicine for Nurse Practitioners) for practitioners utilizing telemedicine services in the delivery of patient care. A summary is provided for each topic matter with excerpted language shown in italics.

**Licensure:** A practitioner must be licensed in the state where the patient is located, and in the state where the practitioner is located depending upon insurance contracts.

*The practice of medicine occurs where the patient is located at the time telemedicine services are used, and insurers may issue reimbursements based on where the practitioner is located.<sup>6</sup> Therefore, a practitioner must be licensed by, or under the jurisdiction of, the regulatory board of the state where the patient is located and the state where the practitioner is located.<sup>7</sup>*

## Practitioner-Patient Relationship:

A provider-patient relationship may be established via telemedicine. A practitioner must verify a patient's identity and location in addition to disclosing their own credentials and receiving the patient's consent.

*The practitioner-patient relationship is fundamental to the provision of acceptable medical care, such practitioner-patient relationships may be established using telemedicine services provided the standard of care is met.<sup>8</sup> A practitioner is discouraged from rendering medical advice and/or care using telemedicine services without (1) fully verifying and authenticating the location and, to the extent possible, confirming the identity of the requesting patient; (2) disclosing and validating the practitioner's identity and applicable credential(s); and (3) obtaining appropriate consents from requesting patients after disclosures regarding the delivery models and treatment methods or limitations, including any special*



**Troy R. Johnson, Jr.**

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**Bio:** Troy is an associate at Williams Mullen where he represents health care providers and other actors in the health care industry in a range of regulatory and transactional work. Troy has experience representing health systems and hospitals, along with long-term care facilities and health care providers. He has assisted clients in various litigation matters, including professional discipline and risk management. Troy holds degrees from the University of Richmond School of Law and William & Mary.

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informed consents regarding the use of telemedicine services.<sup>9</sup> An appropriate practitioner-patient relationship has not been established when the identity of the practitioner may be unknown to the patient.<sup>10</sup>

### **Evaluation and Treatment of the Patient:**

A documented medical evaluation and collection of relevant clinical history consistent with the presentation of the patient to establish diagnoses and identify underlying conditions and/or contra-indications to the treatment recommended/provided must be obtained prior to providing treatment. Treatment made in an online setting will be held to the same standards of practice as in-person encounters.

*A documented medical evaluation and collection of relevant clinical history commensurate with the presentation of the patient to establish diagnoses and identify underlying conditions and/or contra-indications to the treatment recommended/provided must be obtained prior to providing treatment, which treatment includes the issuance of prescriptions, electronically or otherwise.<sup>11</sup> Treatment and consultation recommendations made in an online setting will be held to the same standards of appropriate practice as in-person encounters.<sup>12</sup>*

*The Boards reiterate that a practitioner should conduct all appropriate evaluations and history of the patient consistent with traditional standards of care for the particular patient's presentation.<sup>13</sup> The practitioner is responsible for determining whether telemedicine services are appropriate based upon the patient's presentation.<sup>14</sup>*

**Prescriptions:** The medication considerations for each prescription provided via telemedicine services must be evaluated by the practitioner in accordance with applicable law and current standards of practice and carries the same professional accountability as prescriptions delivered during an in-person encounter. A proper practitioner-patient relationship must be established prior to the prescription of Schedule II through VI controlled substances.

*The indication, appropriateness, and safety considerations for each prescription provided via telemedicine services must be evaluated by the practitioner*

*in accordance with applicable law and current standards of practice and consequently carries the same professional accountability as prescriptions delivered during an in-person encounter.<sup>15</sup> Where such measures are upheld, and the appropriate clinical consideration is carried out and documented, the practitioner may exercise their judgment and prescribe controlled substances as part of telemedicine encounters in accordance with applicable state and federal law.<sup>16</sup>*

*A practitioner prescribing Schedule II through VI controlled substances through telemedicine services must establish the practitioner-patient relationship as defined in Virginia Code § 54.1-3303. A prescriber may establish a bona fide practitioner-patient relationship for the purpose of prescribing Schedule II through VI controlled substances by an examination through face-to-face interactive, two-way, real-time communications services or store-and-forward technologies when all of the following conditions are met: (a) the patient has provided a medical history that is available for review by the prescriber; (b) the prescriber obtains an updated medical history at the time of prescribing; (c) the prescriber makes a diagnosis at the time of prescribing; (d) the prescriber conforms to the standard of care expected of in-person care as appropriate to the patient's age and presenting condition, including when the standard of care requires the use of diagnostic testing and performance of a physical examination, which may be carried out through the use of peripheral devices appropriate to the patient's condition; (e) the prescriber is actively licensed in the Commonwealth and authorized to prescribe; (f) if the patient is a member or enrollee of a health plan or carrier, the prescriber has been credentialed by the health plan or carrier as a participating provider and the diagnosing and prescribing meets the qualifications for reimbursement by the health plan or carrier pursuant to § 38.2-3418.16; (g) upon request, the prescriber provides patient records in a timely manner in accordance with the provisions of § 32.1-127.1:03 and all other state and federal laws and regulations; (h) the establishment of a bona fide practitioner-patient relationship*

*via telemedicine is consistent with the standard of care, and the standard of care does not require an in-person examination for the purpose of diagnosis; and (i) the establishment of a bona fide practitioner patient relationship via telemedicine is consistent with federal law and regulations and any waiver thereof.<sup>17</sup> Practitioners issuing prescriptions as part of telemedicine services should include direct contact for the prescriber or the prescriber's agent on the prescription. This direct contact information ensures ease of access by pharmacists to clarify prescription orders, and further facilitates the prescriber-patient-pharmacist relationship.<sup>18</sup>*

**Medical Records:** The medical record should include copies of all patient-related electronic communications, prescriptions, laboratory and test results, evaluations and consultations, records of past care, and informed consents obtained in connection with an encounter involving telemedicine services. The patient record established during the use of telemedicine services must be accessible to both the practitioner and the patient.

*The medical record should include, if applicable, copies of all patient-related electronic communications, including patient-practitioner communication, prescriptions, laboratory and test results, evaluations and consultations, records of past care, and instructions obtained or produced in connection with the utilization of telemedicine services.<sup>19</sup> Informed consents obtained in connection with an encounter involving telemedicine services should also be filed in the medical record.<sup>20</sup> The patient record established during the use of telemedicine services must be accessible to both the practitioner and the patient, and consistent with all established laws and regulations governing patient healthcare records.<sup>21</sup>*

### **Privacy and Security of Patient Records and Exchange of Information:**

Written policies and procedures should be maintained for documentation, maintenance, and transmission of the records of encounters using telemedicine services.

*Written policies and procedures should be maintained for documentation, maintenance, and transmission of the records of encounters using telemedicine services.<sup>22</sup> Such policies and procedures should address (1) privacy, (2) health-care personnel who will process messages, (3) hours of operation, (4) types of transactions that will be permitted electronically, (5) required patient information to be included in the communication, such as patient name, identification number and type of transaction, (6) archival and retrieval, and (7) quality oversight mechanisms.<sup>23</sup> Policies and procedures should be periodically evaluated for currency and be maintained in an accessible and readily available manner for review.<sup>24</sup>*

## COVID-19 PANDEMIC CHANGES.

From the outset of the COVID-19 pandemic, Virginia's healthcare practitioners, similar to practitioners worldwide, swiftly shifted to providing healthcare services through telemedicine. According to the Centers for Disease Control and Prevention, telehealth usage increased 154% nationwide between March 2019 and March 2020.<sup>25</sup> As of March 2022, a Virginia Telehealth Network report found that 75% of Virginia healthcare practitioners were using telemedicine. This is a dramatic shift from the approximately 70% of healthcare practitioners who responded that they were not using telemedicine before March 2020.<sup>26</sup> The pandemic forced healthcare practitioners to transition to increased utilization of telemedicine and Virginia's legislature subsequently contributed to that expansion.

During the 2020 Special Session I, the General Assembly enacted legislation permitting Medicaid coverage for healthcare services delivered through telemedicine services regardless of the patient's location.<sup>27</sup> Previous to that point, patients were required to be located within rural areas to be eligible for Medicaid-reimbursed telemedicine services.

During the 2021 Special Session I, the General Assembly enacted legislation permitting Medicaid coverage for healthcare services delivered through

audio-only services, such as telephone calls.<sup>28</sup> Unfortunately, this provision expired with the sunset provisions at the end of the pandemic.

During the 2022 Session, the General Assembly enacted legislation permitting out-of-state healthcare practitioners<sup>29</sup> and non-Virginia licensed behavioral health practitioners<sup>30</sup> who are not licensed in Virginia to continue providing services for a year after initially establishing an in-person relationship with a patient. Additionally, a bill was passed adding individuals with an acute illness to the list of people eligible for remote patient monitoring under Medicaid.<sup>31</sup>

Earlier this year, the General Assembly enacted legislation permitting a practitioner from the same practice to see a patient via telemedicine if a practitioner is unable to see a patient with whom they have a previously established relationship.<sup>32</sup> Another bill was passed permitting practitioners and practices to provide telehealth services through Medicaid if they live out-of-state as long as they already hold a license to practice in Virginia.<sup>33</sup>

Many other changes were made to relax telemedicine requirements during the pandemic, which were subject to the sunset provision and are no longer effective. Such changes included using platforms that do not meet federal privacy protections, such as Facetime and Zoom, for telemedicine appointments.

## THE FUTURE OF TELEMEDICINE IN VIRGINIA

The changes implemented during the pandemic not only enabled the General Assembly to expand telehealth services permanently but allowed the development of new virtual healthcare models. Many states have enacted legislation to join the Interstate Medical Licensure Compact, an agreement among states to allow medical providers licensed within one member state to provide care in any of the member states. Legislation was introduced in Virginia's House of Delegates in January to join, but the bill was left in committee.<sup>34</sup> More changes will come as Virginia continues to expand access and availability of virtual healthcare. Virginia Telehealth

Network has contracted with the state to develop a statewide plan to promote and integrate the use of telemedicine services in Virginia pursuant to pandemic-era legislation. Just like technology and society, the law surrounding telemedicine is ever-changing. ■

### Endnotes

1. See Va. Code Ann. § 38.2-3418.16.
2. See Va. Code Ann. § 54.1-3303.
3. Va. Code Ann. § 38.2-3418.16(B).
4. *Id.*
5. Virginia Board of Medicine Guidance Document 85-12: Telemedicine (August 19, 2021) and Virginia Joint Boards of Medicine and Nursing Guidance Document: Telemedicine for Nurse Practitioners 90-64 (August 11, 2021).
6. Guidance Document 85-12, p.2 and Guidance Document 90-64, p.2.
7. Guidance Document 85-12, p.2 and Guidance Document 90-64, p.2-3.
8. Guidance Document 85-12, p.2 and Guidance Document 90-64, p.2.
9. *Id.*
10. *Id.*
11. Guidance Document 85-12, p.3 and Guidance Document 90-64, p.3.
12. *Id.*
13. Guidance Document 85-12, p. 1 and Guidance Document 90-64, p. 1.
14. *Id.*
15. Guidance Document 85-12, p.4 and Guidance Document 90-64, p.4.
16. *Id.*
17. Va. Code Ann. § 54.1-3303(B).
18. Guidance Document 85-12, p.4 and Guidance Document 90-64, p.4.
19. Guidance Document 85-12, p.3 and Guidance Document 90-64, p.3.
20. *Id.*
21. Guidance Document 85-12, p.3 and Guidance Document 90-64, p.3-4.
22. Guidance Document 85-12, p.3 and Guidance Document 90-64, p.4.
23. Guidance Document 85-12, p.3-4 and Guidance Document 90-64, p.4.
24. Guidance Document 85-12, p.4 and Guidance Document 90-64, p.4.
25. Koonin LM, Hoots B, Tsang CA, et al. Trends in the Use of Telehealth During the Emergence of the COVID-19 Pandemic — United States, January–March 2020. *MMWR Morbidity and Mortality Weekly Report* 2020;69:1595–1599. DOI: <http://dx.doi.org/10.15585/mmwr.mm6943a3externalicon>.
26. Virginia Telehealth Network. Benchmarking Telehealth Usage in Virginia. March 2022. [https://www.ehealthvirginia.org/wp-content/uploads/2022/03/VTN\\_Long-report.pdf](https://www.ehealthvirginia.org/wp-content/uploads/2022/03/VTN_Long-report.pdf).
27. 2020 Virginia Laws 1st Sp. Sess. Ch. 44 (H.B. 5046).
28. 2021 Virginia Laws 1st Sp. Sess. Ch. 302 (S.B. 1338).
29. 2022 Virginia Laws Ch. 753 (H.B. 264).
30. 2022 Virginia Laws Ch. 275 (H.B. 537).
31. 2022 Virginia Laws Ch. 269 (S.B. 426).
32. 2023 Virginia Laws Ch. 150 (H.B. 1754).
33. 2023 Virginia Laws Ch. 112 (H.B. 1602).
34. H.B. 2073 (2023).

# Model Judiciary Program: Providing Hands-On Lawyering Experience for Nearly 50 Years

By **Graham K. Bryant**

The main courtroom of the Supreme Court of Virginia was filled with the sound of vigorous oral argument and incisive questions as a packed gallery looked on with rapt attention.

But this was not an ordinary session of Court. Although robed appellate jurists sat behind the bench, the oral advocates were high school students from across Virginia—the finalists in a statewide competition pitting the best and brightest budding legal minds against one another first in mock trials and then on appeal, culminating in final arguments before the Supreme Court of Virginia in its majestic Richmond courtroom.

The student advocates experienced this unparalleled taste of real life as a Virginia litigator through the Model Judiciary Program, a joint effort between the Virginia YMCA and the Young Lawyers Division of the Virginia Bar Association that has been providing students with the chance to work with practicing lawyers and argue before sitting judges since 1975.

## A LONGSTANDING PROGRAM

The Model Judiciary Program was the brainchild of former Executive Director of the Virginia YMCA, Fulton Johnson. In 1974, Johnson approached then-Delegate Gerald Baliles, an active member of the Virginia YMCA's Board of Directors, with the idea of creating a program

to introduce Virginia students to the judiciary through a practical, hands-on litigation experience.

This idea was inspired in part by the YMCA's Model General Assembly—by then already decades old—a program designed to introduce high schoolers to the Commonwealth's legislative process through mock committee debates culminating in floor discussions and votes on the actual Virginia Senate and House of Delegate floors. Johnson and Delegate Baliles sought to create a similarly authentic experience by engaging sitting judges and actual courtrooms for the student arguments.

With a vision firmly in mind, Delegate Baliles—an active member and leader in the VBA—worked with VBA President Gibson Harris and the Virginia YMCA to help formalize a working partnership between the two organizations to create what would become the Model Judiciary Program.

By 1975, the VBA YLD and the Virginia YMCA launched the Model Judiciary Program for the first time. This program has progressed over the years to provide high school students all across Virginia with this unparalleled hands-on educational and legal experience.

Delegate Baliles, of course, would later become Attorney General and then,

in 1986, Governor. Even as the Commonwealth's chief executive, Governor Baliles continued to work with the Virginia YMCA to ensure the success of the Model Judiciary Program.

The Model Judiciary Program has gone on to become not only a jewel in the extracurricular offerings of Virginia's high schools, but also a staple in the Supreme Court of Virginia's annual calendar. For instance, former Chief Justice Harry L. Carrico, while helping oversee the Model Judiciary Program's Supreme Court round during his tenure, said that “the Court feels this program is one of the most positive public service projects of our organization,” in reference to the work both the VBA and the YMCA had done with the Model Judiciary Program.

## EXPERIENCE AT EVERY LEVEL

The Model Judiciary Program has three rounds reflecting each level of Virginia's judiciary: trial, intermediate appellate, and appellate court of last resort. Students have the opportunity to litigate a case at all three levels.

It all begins at the trial level. Students receive a case packet with factual summary of the dispute, witness statements and other evidence, and a closed universe of statutes and authorities upon which to rely as they prepare. The teams of students then work with a local attorney to develop strategies and arguments as the trial date draws near.

On the day of trial, the students head to an actual courtroom to prosecute or defend their cases in front of local judges and senior attorneys. In addition to student advocates, other students serve as witnesses and jurors to help provide an authentic trial experience.

After the trial, students then prepare to take their case before the Court of Appeals of Virginia in a model appellate round. They review additional materials and learn the differences between advocacy in a trial court and before a panel of judges on appeal.



**Graham K. Bryant**

**Bio:** Graham K. Bryant serves as the VBA YLD's co-chair for the Model Judiciary Program. In practice, he represents the Commonwealth before state and federal appellate courts in cases that call into question a state statute's constitutionality or bear on sensitive policies of the Commonwealth. He previously led the appellate practice at a boutique civil litigation firm and served as a judicial law clerk to both the Supreme Court of Virginia and Court of Appeals of Virginia. He presently serves on the Virginia Bar

Association Appellate Practice Section Council as editor of the On Appeal newsletter and on the executive committee of Richmond's John Marshall Inn of Court. He graduated from William & Mary Law School in 2016 as a member of the Order of the Coif and has taught there as an Adjunct Professor of Law.

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Courtesy: Dustin Zuniga, Supreme Court of Virginia

Participants in the 2023 Model Judiciary Program Supreme Court Round pose for a photo in the Supreme Court's main courtroom as the Justices deliberate.

The top performers from the Court of Appeals round are then invited to the grand finale of the Model Judiciary Program: the Supreme Court round in the Supreme Court of Virginia's main courtroom.

### ARGUING BEFORE THE JUSTICES

Following a COVID-imposed three-year break during which trial-level arguments continued virtually, the Model Judiciary Program made its in-person return to the Supreme Court of Virginia on April 25, 2023. After the twelve teams of student advocates, their advisors, and their families made their way into the Supreme Court gallery, staff from the Clerk's Office provided an orientation to the courtroom, the lectern, and the timer just as they do before a normal session of Court.

Then, three knocks, "All rise," and out filed the robed jurists. Justice Cleo E. Powell presided, joined by Justices Stephen R. McCullough, Wesley G. Russell, Jr., and Thomas P. Mann, as well as Judge Lisa M. Lorish of the Court of Appeals of Virginia, all of whom volunteered their time to judge this final stage of competition.

And judge they did. The panel delivered a truly authentic appellate experience, peppering the student advocates with questions and interrogating their position throughout the ten-minute oral arguments each side delivered. The students soon learned first-hand that when fielding questions, the time allotted for oral argument flies by faster than expected.

The Court retired to deliberate after all six rounds of argument concluded, then returned to the bench to provide feedback

to the gathered students. Finally, Justice Powell announced the results, first naming the winner of each individual round and then the overall best oral advocate. Sharing this latter honor for the 2023 Model Judiciary Program were Erika Kengni of Atlee High School in Hanover County and Elaine Yoon of Patriot High School in Prince William County.

Following the competition, the Justices, students, and their families retired to the Supreme Court's courtroom foyer to mingle over a light reception provided by the VBAYLD.

Having handled a case at every level of Virginia's judiciary and met the top jurists in the Commonwealth, the Model Judiciary Program's alumni show that the future of Virginia's legal community is in good hands. ■



Courtesy: Dustin Zuniga, Supreme Court of Virginia

A panel of judges engage with a student advocate as she delivers her oral argument in the Supreme Court of Virginia's main courtroom.



Courtesy: Graham K. Bryant

Justice Stephen R. McCullough shares some pointers with student advocates over refreshments provided by the VBA YLD as Justice Thomas P. Mann and Judge Lisa M. Lorish look on.



# YLD Spring Meeting Highlights



Courtesy: VBA Staff

YLD members and their families enjoy the beautiful weather while waiting for the cruise around scenic Chincoteague and Assateague.



Courtesy: VBA Staff

It's all smiles for the cruise around Chincoteague, everyone enjoyed a much-needed break to take in the sights and sounds of coastal Virginia.



Courtesy: VBA Staff

YLD members modeling some of the VBA swag that they picked up at the Spring Meeting.



Courtesy: VBA Staff

VBA members enjoyed catching up and networking over heavy hors d'oeuvres on the opening night of the Spring Meeting.



Courtesy: VBA Staff

David Berry of Gentry Locke gives a presentation bringing the members up to speed on recent high impact appellate decisions that may effect their practice areas.



Courtesy: VBA Staff

Darius K. Davenport Sr. of Crenshaw, Ware, and Martin provides his insights on making the leap from being a great young lawyer, to a great leader of young lawyers.



Courtesy: VBA Staff

The YLD Spring Meeting provided an excellent opportunity for our members to learn from each other in a relaxed and fun atmosphere.



# YLD Members Raise Thousands to Find Cure for Cystic Fibrosis

By Callie Guy & Rachel Adams

On June 8, 2023, over 500 people gathered at the Science Museum of Virginia in Richmond to celebrate and recognize a group of outstanding young professionals and to raise money for the Cystic Fibrosis Foundation at the Foundation's tenth annual Brewer's Ball and celebration of Richmond's Finest. Of the twenty-one "Richmond's Finest" honorees, two are members of the Virginia Bar Association Young Lawyers Division – Peter Askin of Thompson McMullan and Quinn Novak of Florance Gordon Brown.

Embodying the YLD commitment to public service and collegiality, Askin and Novak each raised thousands of dollars for the Cystic Fibrosis Foundation (\$5,000 for Askin and nearly \$4,000 for Novak) and participated in a months-long program of CF education, awareness-building, and networking with other



Richmond 2023 Brewer's Ball.

Courtesy: Murphy Kerner

young professionals in the Richmond area.

## WHAT IS CYSTIC FIBROSIS?

Cystic Fibrosis is a progressive, genetic disease that affects essential systems and

organs throughout the body, including the lungs, pancreas, and gastrointestinal tract.<sup>1</sup> Common problems for people with cystic fibrosis include chronic lung infections, inflammation and respiratory failure, as well as malnutrition and liver disease.<sup>2</sup> Approximately 40,000 people in the United States are living with cystic fibrosis.<sup>3</sup>

While there is no cure for cystic fibrosis, there are a number of effective treatments available for most people living with the disease.<sup>4</sup> Significant recent breakthroughs include the development of a drug called Trikafta, which works on a defective protein receptor, and is an effective treatment for some, but not all, cases of cystic fibrosis.<sup>5</sup>

## WHAT IS THE CYSTIC FIBROSIS FOUNDATION?

Since its founding in 1955, the Cystic Fibrosis Foundation has invested in developing new treatments for cystic fibrosis, helping people with cystic fibrosis to access necessary care, and supporting them and their families through an often difficult, scary, and expensive process.<sup>6</sup>

## RICHMOND'S FINEST & BREWER'S BALL 2023

Richmond's Finest is part of a statewide campaign for the Virginia chapter of the



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**Bio:** Callie Guy focuses her commercial real estate practice on property transactions, property rights, land use, and environmental issues. She also assists health care clients with transactional and regulatory matters. In addition, Callie is the immediate past chair of the Richmond Bar's Real Estate Section, the VBA's Environmental, Natural Resources and Energy Section Young Lawyers Division Representative, and a member of the Cystic Fibrosis Foundation

Virginia Chapter Young Professionals Leadership Council. Callie has received Virginia Business magazine's Legal Elite recognition in the Real Estate/Land Use (2022) and Young Lawyer (2020-2021) categories.

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### Rachel W. Adams

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**Bio:** Rachel Adams is an associate in ThompsonMcMullan's Litigation and Energy departments. She represents businesses, government employees, and constitutional officers in civil litigation matters filed in state and federal court. She also represents clients in connection with electricity, water, telecommunications, and other public utility regulatory matters before the State Corporation Commission. Rachel graduated from American University and the University of Richmond School of Law.

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*Continued on page 12*

# What Virginia Litigators Should Know About Remote Depositions

By Jared A. Tuck<sup>1</sup>

The COVID-19 pandemic forced law firms around the world to transition their practices online.<sup>2</sup> Now, although courts have largely resumed their regular, in-person proceedings,<sup>3</sup> many lawyers and firms have kept tools from the pandemic in their toolbox. One such popular practice is the continued use of remote platforms for depositions. Recognizing that remote depositions are here to stay, this article provides an overview of the following: (1) the law on remote depositions, (2) the advantages and disadvantages of remote depositions, and (3) practical tips and advice on conducting remote depositions.

## THE LAW ON REMOTE DEPOSITIONS

### Federal Law

**Default Rule.** Federal Rule of Civil Procedure 30(b)(4) states that “[t]he parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means.” Importantly, under the plain language of Rule 30(b)(4), the default rule in federal court requires in-person depositions. Thus, in federal court, a party needs either a stipulation or court order to take a deposition by remote means.

**Breadth of the Rule.** Rule 30(b)(4) only specifically enumerates that the court may allow a deposition “by telephone;” however, the phrase “other remote means” creates a catch-all that favors broad judicial and party discretion as to the format

for taking remote depositions. The rule’s language suggests that any method of communication on a telephone could be permissible—including Twitter, Facebook, Instagram, Snapchat, or other social media platforms. However, federal courts have defined key factors that would likely prohibit such methods.

**Forcing a Remote Deposition.** A party seeking to conduct a remote deposition in federal court “should bring a Rule 26(c) motion for a protective order seeking the permission of the court to do so.”<sup>4</sup> When deciding whether to grant leave for a remote deposition, the court must consider “whether use of [remote] means would reasonably ensure *accuracy and trustworthiness*, and whether the opposing party would be *prejudiced*.”<sup>5</sup> Generally, federal courts apply a burden-shifting framework in which the party moving for a remote deposition must present a “legitimate reason” for the request before the burden shifts to the nonmoving party to show why the deposition should not be conducted remotely.<sup>6</sup>

In federal court, it is also important to keep in mind Federal Rule of Civil Procedure 1, which states that the federal rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and *inexpensive* determination of every action and proceeding.” (emphasis added). Ultimately, federal courts favor the use of remote depositions and liberally grant leave to take a deposition remotely.<sup>7</sup>

### Virginia Law

**Default Rule.** Supreme Court of Virginia Rule 4:5(b)(7) states as follows: “Unless the court orders otherwise, a deposition may be taken by telephone, video conferencing, or teleconferencing.” In Virginia, unlike in federal courts, the default rule permits remote depositions unless the court orders otherwise.

**Breadth of the Rule.** While Rule 4:5(b)(7) purports to provide an exhaustive list of permissible methods for conducting a remote deposition, the Virginia rules are more liberal than they initially appear. Supreme Court of Virginia Rule 4:7A(a) clarifies that the list in Rule 4:5(b)(7) is not actually exhaustive: “Any depositions permitted under these Rules may be taken by audio-visual means including, *but not limited to*, videoconferencing and teleconferencing . . .” (emphasis added).

**Preventing a Remote Deposition.** Under Virginia law, no motion is necessary to take a remote deposition because the rules expressly allow remote depositions unless the court orders otherwise.<sup>8</sup> To prevent opposing counsel from taking a remote deposition, the form of the motion is a motion for a protective order.<sup>9</sup>

### Summary: Federal vs. Virginia Courts

Federal courts are the best fora for those seeking to conduct traditional, in-person depositions. However, federal courts still tend to favor remote depositions when parties litigate the issue. Virginia courts are the better fora for those seeking to conduct remote depositions. The limited Virginia case law suggests that parties rarely seek a court order for an in-person deposition.<sup>10</sup>

## ADVANTAGES AND DISADVANTAGES OF REMOTE DEPOSITIONS

The primary advantages of remote depositions are lower costs, relative convenience, and increased control over documents and exhibits. Reduced travel costs can be particularly significant for attorneys working on a flat or contingency fee basis. Screen



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**Bio:** Jared is a member of Gentry Locke’s Plaintiff group, where he focuses his practice on representing individuals and families of those who are catastrophically injured or killed due to another’s negligence. He also has experience defending personal injury matters on behalf of businesses and insurance companies. He graduated *summa cum laude* from William & Mary Law School in 2022. Jared’s hobbies include fishing,

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sharing is another advantage of remote platforms because the lawyer has greater control over what part of a document or exhibit the witness reviews.

On the other hand, remote depositions present clear disadvantages, such as difficulty of observing the demeanor of witnesses and opposing attorneys, risk of disadvantage to remote counsel, technology and connection issues, and logistical issues. It can be much harder to observe a witness's body language remotely, and remote platforms can facilitate malfeasance, such as improper coaching of a witness.

## PRACTICAL TIPS AND ADVICE

Attorneys should ensure that any remote depositions they conduct take place efficiently, effectively, and without prejudice to either party. Be sure that all participants know the correct timezone for the deposition. Mute your microphone before and after the deposition and during breaks and be just as careful about your words as in an in-person deposition—even when muted. If defending a deposition, keeping your microphone unmuted may help you timely voice your objections. Ensure that you are well-lit and positioned clearly within your camera's frame, with no distractions in the background. Test your connection and

other key functions before the deposition begins.

Many practitioners advise recording remote depositions.<sup>11</sup> Other precautions are often prudent, such as asking the witness to agree not to communicate with anyone but the attorneys and the court reporter during the deposition and limiting the witness's means of such communication. When defending a deposition, in-person depositions are preferable due to improved witness comfort and increased ability to manage objections, witness responses, and documents. It is always wise to discuss logistics, such as camera positioning, with opposing counsel prior to any remote deposition.

Love or hate them, remote depositions are a continuing reality for modern lawyers. Virginia practitioners should remain conscious of the law governing remote depositions and differences in relevant federal and state law. Likewise, it is critical to stay informed of best practices for conducting and defending remote depositions to serve one's clients as effectively as possible. ■

### Endnotes

1. I would like to thank Teddy B. Paisley, III for his assistance in drafting and editing this article. Teddy is a Summer Associate at Gentry Locke Attorneys and a rising 3L at Liberty University

School of Law.

2. See, e.g., Debra Cassens Weiss, *More BigLaw Firms Close or Require Remote Work Because of Coronavirus Threat*, ABA Journal (March 16, 2020), <http://www.abajournal.com/news/article/more-biglaw-firms-close-or-require-remote-work-because-of-coronavirus-threat>.

3. See, e.g., Kevin Brueninger, *Supreme Court Will Resume In-Person Arguments This Fall After Switching to Phones During Covid*, CNBC (Sep. 8, 2021), <https://www.cnbc.com/2021/09/08/supreme-court-will-return-to-in-person-arguments-in-the-fall-after-covid-changes.html>.

4. *Impulsora De Marcas E Intangibles v. Dos Amigos*, No. 6:19-CV-00453-ADA-JCM, 2020 U.S. Dist. LEXIS 145434, at \*2 (W.D. Tex. June 26, 2020).

5. *Cressler v. Neuenschwander*, 170 F.R.D. 20, 21 (D. Kan. 1996) (emphasis added).

6. *Id.*; *Jahr v. IUI Int'l Corp.*, 109 F.R.D. 429, 431 (M.D.N.C. 1986).

7. *Brown v. Carr*, 253 F.R.D. 410, 412 (S.D. Tex. 2008) ("Generally, leave to take depositions by remote electronic means should be granted liberally.").

8. See VA. SUP. CT. R. 4:1; *Lemus v. Talbert*, 108 Va. Cir. 1, 1 (2021).

9. See *Lemus*, 10 Va. Cir. at 1.

10. Only four Virginia cases cite Rule 4:5(b) (7), and in none did the parties litigate whether a deposition should be in-person or remote. See *Gillespie v. Davis*, 410 S.E.2d 613 (Va. 1991); *Lemus*, 108 Va. Cir. at 1; *Commonwealth Transp. Comm'r v. Cogil Corp.*, 67 Va. Cir. 398 (2005); *In re Instrumentation Servs. v. Town of Victoria*, 60 Va. Cir. 92 (2002).

11. Both federal and state courts permit recording remote depositions. See FED. R. CIV. P. 30(b) (3)(A); VA. SUP. CT. R. 4:7A(d)(1).

## Advertise in the Opening Statement

The VBA YLD is pleased to announce that we are accepting advertisements for publication in the *Opening Statement*. The *Opening Statement* is highly visible within the VBA. It is published and distributed to all members of the YLD four times per year. With such high visibility, what better way to reach your peers? Funds from advertisement purchases will be used to help support the operations of the VBA YLD and its numerous programs, including the *Opening Statement*. If you are interested in purchasing advertising space in the *Opening Statement*, please contact us at [editors@openingstatement.org](mailto:editors@openingstatement.org).

## Support the VBA Foundation

The VBA Foundation funds numerous programs, including the *Ask A Lawyer Project*, the *Pro Bono Hotlines*, the *Model Judiciary Project*, the *Veterans Issues Task Force*, and *Regional Mentoring Programs*. To donate or to learn more, visit: [vba.org/foundation](http://vba.org/foundation).



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with this event, the YLD hosts the Region IV competition round, the winners from which move on to compete nationally. The YLD is always looking for attorneys to serve as appellate judges for the competition. If you are interested in serving as a judge, please let me know.

- **Fall Meeting.** The YLD is excited to travel to Lynchburg, Virginia for

a joint meeting with the Board of Governors for its Fall Meeting. The meeting will be held at The Virginian Hotel on October 27-29, 2023. The meeting promises to include multiple CLEs and social activities appropriate for the whole family. Please mark your calendars—I hope to see you there.

- **Other Leadership opportunities.** We have open leadership roles on the Law School Councils for Appalachian, Liberty, Regent, and William & Mary, the Membership Committee, the Pro Bono Committee, and a number of open Regional Social Chair roles. Please contact me if you are interested in serving in any of those roles. ■

## Opportunities to Get Involved

Are you looking for an opportunity to get involved with the VBA Young Lawyers Division? You can read about the YLD's multiple projects and committees at: [vba.org/yldactivities](https://vba.org/yldactivities). Just reach out to the project or committee chair to learn more. In addition, the YLD always welcomes ideas for new projects. Just reach out to anyone on the YLD Executive Board to share your proposal: [vba.org/yld](https://vba.org/yld).

## YLD Members Raise Thousands to Find Cure for Cystic Fibrosis, continued from page 9

Cystic Fibrosis Foundation that includes a similar event and campaign in the Charlottesville area. The Foundation solicits nominations for outstanding young professionals who demonstrate leadership in their industries and communities, embody a commitment to public service, and have a strong sense of fun. It is unsurprising, therefore, that members of the YLD are often selected as Finest Honorees. The authors of this article are both alumni of the campaign (Callie Guy, 2020; Rachel Adams, 2021), are currently involved with the Richmond Chapter's Young Professionals Leadership Council, and chaired (Guy) and vice-chaired (Adams) the 2023 Richmond's Finest campaign. In addition, current and past YLD members who have been recognized as Richmond's Finest include Andy Mathews (2018), Andrea Harlow (2017), and Laura Windsor (2011).<sup>7</sup>

Together with the rest of the 2023 cohort, Askin and Novak raised over \$187,000 (a record-setting amount) since January of this year in support of the Cystic Fibrosis Foundation, and the Richmond's Finest campaign has raised over \$2 million since its inception in 2010.

Given the track record of leadership and community involvement represented in the YLD, the Richmond's Finest Committee would not be surprised to see

future generations of YLD members continuing to help find a cure for Cystic Fibrosis. ■

*Editor's note: Readers who would like to learn more can contact Callie ([cguy@cblaw.com](mailto:cguy@cblaw.com)) or Rachel ([radams@t-mlaw.com](mailto:radams@t-mlaw.com)).*

### Endnotes

1. Cystic Fibrosis Foundation, *About Cystic Fibrosis*, CFF.ORG, <https://www.cff.org/intro-cf/about-cystic-fibrosis> (last visited June 6, 2023).
2. *Id.*
3. *Id.*

4. Cystic Fibrosis Foundation, *Path to a Cure: Many Routes, One Mission*, CFF.ORG, <https://www.cff.org/research-clinical-trials/path-cure-many-routes-one-mission> (last visited June 6, 2023).
5. Theresa Carvahlo, *Trikafta for CF*, CYSTIC FIBROSIS NEWS TODAY (June 1, 2023), <https://cysticfibrosisnewstoday.com/trikafta/>.
6. Cystic Fibrosis Foundation, *About Us*, CFF.ORG, <https://www.cff.org/about-us> (last visited June 6, 2023).
7. Cystic Fibrosis Foundation, *Alumni*, FINEST.CFF.ORG, <https://finest.cff.org/Richmond/Static/Alumni> (last visited June 6, 2023).



Quinn Novak, Alex Rendon, Kerrigan O'Malley & Briggs Cocke have fun in the photo booth.

Courtesy: Cystic Fibrosis Foundation, Virginia Chapter



Rachel Adams and Callie Guy toast to a successful Brewer's Ball.

Courtesy: Rachel Adams