



# Fed Tide

May/June 2015

The Newsletter of the Hampton Roads Chapter of the Federal Bar Association

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## PRESIDENT'S MESSAGE *Mark Warmbier, Kaufman & Canoles P.C.*

Welcome to the Spring 2015 edition of the *Fed Tide*! It is hard to believe that we are already approaching the halfway mark of 2015. Since the publication of our last newsletter, there has been much activity within our Chapter. On November 18, 2014, we kicked off the new fiscal year with our Annual Meeting at the Town Point Club, where attendees received a "state of the law schools" report from our special guest, Dean Davison Douglas of William & Mary Law School. Then, we started off the new calendar year with a new Chapter name. As most of you are aware, we officially changed our name in January 2015 to the Hampton Roads Chapter of the Federal Bar Association. Also in January, our Chapter sponsored the Introduction to Federal Practice Seminar and Admission Ceremony at the Norfolk federal courthouse. Following an afternoon of insightful presentations from our local judges, federal practitioners, and court staff, 33 attorneys were admitted to practice before the Eastern District of Virginia. In March, Judge Raymond Jackson treated luncheon attendees to a well-received presentation regarding local counsel issues.

The second half of 2015 is shaping up to be just as exciting. Judge Roger Gregory of the Fourth Circuit will serve as the special guest speaker at our June 3 luncheon meeting. On July 16, our Chapter will sponsor its annual Introduction to Federal Practice Seminar at the Norfolk federal courthouse for our local summer associates and interns. A retirement event is in the works for Magistrate Judge Tommy Miller on August 14. On November 19th, we will join forces with the Historical Society for the United States District Court for the Eastern District of Virginia to co-sponsor a panel discussion on the legacy of Judge Walter Hoffman. To wrap up our fiscal year, we are finalizing details with Judge Steven Agee of the Fourth Circuit to serve as our special guest speaker for our Annual Meeting in the Fall. Please keep these dates on your radar and stay tuned for additional details.

I cannot sign off without a huge thank you to Lauren Tallent Rogers and Katie Dougherty for their outstanding work on our Chapter newsletters. Also, thank you to Chief Judge Smith for her participation in this edition's "Insights from the Bench." Despite hectic schedules and constant demands, we are fortunate to have dedicated members, judges, and court personnel who continually find the time to support our Chapter. These contributions are very much appreciated. - *Mark*

### *Inside This Edition of the FedTide:*

- Insights from The Bench – A Q&A With Chief Judge Rebecca Beach Smith
- Updates and Notices from the EDVA Clerk's Office
- A look at the Recent Changes to the EDVA Local Rules
- 2014 Statistics from the Federal Judiciary on the "Rocket Docket"
- Noteworthy Fourth Circuit Cases
- Upcoming Chapter events– including the Chapter's June 3<sup>rd</sup> Luncheon featuring Judge Roger L. Gregory of U.S. Court of Appeals for the Fourth Circuit

# Annual Chapter Luncheon - November 2014

On November 18, 2014, Dean Davison M. Douglas from William & Mary Law School spoke at the Hampton Roads Chapter's Annual Meeting at the Town Point Club and offered an optimistic presentation on the "state of law schools" in 2014. In addition, the Chapter's board members for the 2014-2015 calendar year were sworn into their new positions by the Honorable Chief Judge Smith.



*Chief Judge Rebecca Beach Smith swears in the new slate of FBA board members. From right: Chapter President Mark Warmbier, President Elect Erin Ashcroft, Vice President Susan Blackman, Treasurer John Gardner and Membership Chair Lauren Tallent Rogers*

*Dean Douglas from William & Mary Law School addressing the Hampton Roads Chapter.*



# Introduction to Federal Practice

Twice each year, the Hampton Roads Chapter hosts an Introduction to Federal Practice Seminar at the Norfolk courthouse. After being welcomed by one of the District Judges, attendees hear from a United States Magistrate Judge, representatives from the Clerk's Office, United States Probation Office, the Office of the Federal Public Defender, the United States Attorney's Office, the courthouse librarian, and other courthouse personnel. In January, the seminar is designed to familiarize lawyers newly-admitted to the Virginia State Bar to federal practice in Hampton Roads. At the conclusion of the day, the attorneys are invited to participate in a group admission ceremony, all being admitted to practice in the Eastern District of Virginia. In July, the seminar is tailored to law students who are interning, clerking, or otherwise working in the legal profession during their summer recess.

This January's Introduction to Federal Practice Seminar was well-attended with **33 new attorneys** being admitted to practice in the Eastern District of Virginia!

The summer session of the Introduction to Federal Practice seminar is currently scheduled for **July 16, 2015**. A reception will take place following the seminar. Please save the date and encourage any law students or attorneys new to federal practice to attend. Further details regarding registration to follow soon.

**SAVE THE DATE - JUNE 3, 2015**

**INFORMAL LUNCHEON SERIES FEATURING**

***Judge Roger L. Gregory, Circuit Judge***

***United States Court of Appeals for the Fourth Circuit***

*See attached flyer for further details and registration information  
Though the RSVP deadline was May 27, contact  
[mewarmbier@kaufcan.com](mailto:mewarmbier@kaufcan.com) regarding late registration by May 29, 2015*



## The Honorable Raymond A. Jackson Speaks to Chapter

On March 5, 2015, the Hampton Roads Chapter hosted an informal luncheon featuring the Honorable Raymond A. Jackson, United States District Judge for the Eastern District of Virginia. Despite the cold and rainy weather, a large group of attorneys and judges turned out to hear Judge Jackson speak about the important responsibilities assumed by attorneys serving as local counsel in the Eastern District of Virginia.



*The Honorable Raymond L. Jackson provided an informative and lively address to the Hampton Roads Chapter.*

**Insights from the Bench – a Q&A with**  
**The Honorable Rebecca Beach Smith, Chief United States District Judge for**  
**the Eastern District of Virginia**

***1. How has your life as a federal judge changed since becoming Chief Judge of the Eastern District of Virginia? What are some of your responsibilities as Chief Judge?***

My life has changed on the bench because I now wear two judicial hats in the Eastern District of Virginia, one as an active United States District Judge, and one as the Chief District Judge. As the Chief Judge of the Eastern District of Virginia, I am responsible for court governance issues, case management oversight, and administrative matters, which include submission of overall plans and reports for the court to the Circuit Judicial Council, the Judicial Conference of the United States, and the Administrative Office of the United States Courts. Reports that are routinely due include, *inter alia*, certification of judges' non-case related travel (*i.e.*, meetings, conferences, and so forth, but not personal travel), certification of senior district judges' workloads, review and monitoring of jury utilization statistics within the District and *vis à vis* other federal districts, and review and submission of District-wide budgets for the Clerk's Office and the Probation Office. The duties of the Chief Judge also include a wide array of federal court management responsibilities and oversight for the Eastern District of Virginia, which duties range from determining and implementing administrative policies, to recommending the need for new judgeship positions, to monitoring sensitive issues of judicial performance and disability, to being the final arbiter of personnel matters in the District, to being the liaison between our court and other federal courts and agencies. These Chief Judge administrative duties and management responsibilities, together with a full docket as an active District Judge in the Norfolk Division of the court, are sometimes overwhelming, given that the Eastern District of Virginia is one of the largest federal courts in the United States, both geographically and in terms of caseload. In both roles, as Chief Judge and as an active District Judge, I am committed to the continuation of our District as being one of the top and most respected in the country, both in terms of case management and quality decision-making.

***2. How would you compare the Norfolk/Newport News division to other divisions in the Eastern District of Virginia and across the country?***

All Divisions of the court have extremely heavy caseloads, both criminal and civil. The Norfolk/Newport News Divisions do have more admiralty cases than the other Divisions. The Alexandria Division, given its proximity to Washington, D.C., and the speed of the docket in the Eastern District of Virginia, tends to get more national security and terrorism cases. However, both the Richmond and the Norfolk/Newport News Divisions have likewise received a number of national security and terrorism cases in recent years, including the Hamdi case, the Somali pirate case, and a pending case in Richmond involving an alleged American recruiter for ISIS. All Divisions in the Eastern District of Virginia have both "traditional" federal court cases, as well as high-profile cases, including public corruption cases and bank and security fraud cases. The way that our court may differ from other federal judicial districts across the country is that our District, together with the Southern District of New York and a few of the other larger districts in urban areas, have a higher number of national security and terrorism cases. Also, given our central east coast and port location, our court has a high number of drug conspiracies, including international conspiracies, as well as a number of international gang-related cases. Despite a challenging caseload, our court still tries to maintain a very fast docket, adhering closely to the criminal rules for speedy trials and to granting few civil case trial continuances.

**3. *What was it like to be the first female federal judge in Virginia?***

I did not focus on being the first female federal judge in Virginia, but felt it to be a great honor to become a judge of the Eastern District of Virginia, where I have spent my entire legal career. I do focus now on there not being more female federal district judges in Virginia, since I was invested in 1989. Judge Leonie D. Brinkema came to the Alexandria Division of our court in 1993, Judge Arenda L. Wright Allen came to the Norfolk Division of our court in 2011, and Judge M. Hannah Lauck came to the Richmond Division in 2014. Therefore, we still have had only four (4) female federal district judges over the past twenty-five (25) years, while our court now has a total of eleven (11) active judges and seven (7) senior judges. The first, and the only, female federal district judge in the Western District of Virginia is Judge Elizabeth K. Dillon, who went on that bench in December 2014. I look forward to the time when we do not have to count our numbers as females or minorities on the bench and when we have become fully integrated on the federal benches across the country, which progress is now well underway.

**4. *Best advice you received about how to be an effective Judge?***

Other than evidentiary rulings during trial, which rulings must often be made quickly, do not make “snap” decisions; you need the benefit of full research, briefing, and consideration of all arguments on an issue. Then make the best decision that you can under the facts and law of that case. Keep in mind that every judge on the bench, state or federal, wants to do the best job that he or she can and make the best decision that he or she can under the circumstances. Judges take great pride and feel great responsibility for the decisions they make. Every case and every litigant are important.

**5. *What advice would you give to a young lawyer starting a legal career?***

To young lawyers, I would advise a number of things. First, be prepared whether it be going to court, meeting with a client, meeting with another attorney in your firm, or meeting with an attorney on the other side of a case. Second, enjoy your law practice. Do not get so tied up in the “trees” of a case that you cannot see the “forest,” thereby becoming overwhelmed by things that do not matter in the long run. Don’t object just to object to inconsequential matters. Always remember that facts generally win cases, and you cannot change the facts. Your duty is to represent your client zealously within the bounds of the law, and not to overstep those bounds with the court, or with opposing counsel. Do not be afraid to lose. Next, remember that you will most likely have to come back before the same judge or have a case with the same lawyer, after the current case is completed. You only have one chance to make a first impression, so make a good one. Do not engage in personal attacks on opposing counsel, witnesses, or the court, and do not take objections by counsel and rulings by the court personally. It is all about your case, not about you. Remember, you can only argue the case that you have, and in most cases there is a “winner” and a “loser.” Importantly, do not only enjoy the practice of law, but also enjoy a balanced lifestyle. Take time to be with family, because when all is said and done, they will be the most important thing to you. Take time for a hobby or recreational activities. If you have a family, sometimes your recreational activities may involve them, but in any event, make time for them and yourself. A well-rounded lifestyle will lead to being a good lawyer. Next, find a mentor. Find another lawyer, whether in your firm, or a friend, or just through bar associations, to be your mentor and to guide you as you make decisions throughout your legal career. Always choose someone who has your best interest at heart. Finally, I repeat, be prepared, do not be afraid, and enjoy being a lawyer. We are all in this legal profession together, and it is a grand calling.

**6. *What constructive comments would you provide to assist lawyers practicing before you?***

As I indicated previously, judges want to do a good job and reach the right result for each case. Judges are not your enemy; they are on the side of trying to make the best decision possible under the law and facts of the case. You can be respectful, tough, and persistent without being rude. Also, treat witnesses with respect. Neither juries nor judges like when an attorney “badgers” a witness. The witness is there because he or she has been summoned, or has an interest in the case, and even if you do not agree with what the witness says, you can disagree in a respectful, mannerly way. Plus, I repeat here all of my suggestions for young lawyers that I made in response to question five (5) above.

***7. What is the best part about being a judge? What is the worst part?***

The best part about being a judge is having the freedom to make decisions without having to advocate for a position. As previously indicated, a judge has the luxury and the freedom to decide the case the best that he or she can under the law and facts of that case. The worst part of being a judge is the isolation. Sometimes it is very lonely to be separated from the practicing bar, and to be alone in making difficult decisions. One good part, which helps with the worst part, is having law clerks who are bright and give a new perspective to your chambers each year.

***8. Memory or event from your early years that motivated you to study law?***

There was no memory or event from my early years that motivated me to study law. I became motivated to study law when I married my now-deceased husband, John L. (“Jack”) Smith, Jr., who was a lawyer. I was a city planner by profession then, but I so enjoyed talking and debating with him about the law, that I knew it was what I also wanted to do, so I changed career plans. Jack encouraged me to go to law school, and was always there for support, through law school, my early practice, my magistrate judgeship, and the first few years of my district judgeship. My current spouse, Gerald M. (“Gerry”) Zeno, continues to give me tremendous support in my judicial career, from a non-lawyer’s perspective, and he has for the past sixteen (16) years. Having a supportive spouse, partner, or friend is so important to all of us as we proceed through our professional and personal lives.

***9. Most unusual / humorous moment in your courtroom?***

One of the most unusual, perhaps humorous, moments that occurred in my courtroom was during a lengthy trial involving a very large international drug conspiracy. The top United States supplier/distributor had pled guilty and was in the process of testifying. The Assistant United States Attorney asked him if what he did was any different from any other business, since he had maintained very detailed record books and tallies of drug supplies and distributions, monies received, and monies owed, together with “employee” information. The witness candidly looked up and said “Yes. It’s just like any other business, except the retirement benefits are not so good, particularly for me at this point.” There was also the bank robber who got caught because he returned to the bank with the pack of dyed bills, after he tried to wash them in his bathtub, demanding “clean” money. The bank teller said “O.K.” and pushed her panic button, but she continued to exchange the dyed bills for clean ones until the police arrived. There have been a number of other unusual cases and humorous moments in my courtroom and, quite frankly, they sometimes add levity to an otherwise tragic situation.

***10. What changes have you seen in the practice of law since taking the bench?***

I have seen a number of changes since I started the practice of law and since taking the bench, which is now, all totaled, thirty-five (35) years. The practice of law has moved from paper filings and communications to electronic filings and communications. Many of these changes represent progress, but they also add stress to the practice of law because everything today needs to be “instantaneous.” When I first started practicing law, you really could say, “It’s in the mail.” (That meant the postal mail and not e-mail.) I am also sometimes distressed to see the lack of camaraderie amongst lawyers, and I hope that our new generation of lawyers will work hard to maintain good relations with other attorneys and the bench throughout their practices. The electronic age has reduced face-to-face communications and thereby prevents lawyers from getting to know the personal and human side of each other, as well as their own clients. We are in a human service profession, and we should all strive to make the practice of law the best it can be. From my standpoint, I truly love the law and, in retrospect, would choose no other profession for my lifelong career. I find that the law remains exciting, and never becomes stale--just when I think I have seen it all, a new case, a new set of facts, a new perspective comes along. We are all fortunate to be part of what Chaucer described as a “learned profession.” I hope that our profession will stay that way when all is said and done. Judges go, lawyers go, clients go, but the profession itself, and the people who make it up, must continue to strive for the highest level of professionalism that existed before our time, and hopefully will endure after our time passes.

# EDVA CLERK'S CORNER

*Practical Tips and Announcements  
from the Norfolk and Newport News  
Divisions Clerk's Offices*



## **New Faces in the Clerk's Office**

Relatively recently, the Clerk's Office welcomed three new staff members.

- **Eileen Price** joined the Clerk's Office in November 2014. Eileen worked in the legal community in Port Townsend, Washington before returning home to Norfolk. Eileen assists customers at the counter, opens civil cases, and manages all *pro se* civil matters.
- **Tai Brown** and **Beverly Grainger** joined the Clerk's Office eighteen months ago. Considering that most of the Clerk's Office has been with the organization ten years or more, this makes Tai and Beverly relatively new. Tai joined the Office from the Chesapeake Commonwealth's Attorney Office and Beverly worked for the City of Virginia Beach. Both ladies are case managers for civil and criminal cases. Tai manages cases ending in Case Numbers 0 & 2 and Beverly manages cases ending in Case Numbers 4 & 7. Both ladies have been a great asset to the case management section.

## **Reminder About Civil Cover Sheets**

It is important to carefully select the correct codes and properly complete the civil cover sheet so civil cases can be properly opened in the CM/ECF database. It is especially important for counsel to use **Code 375** on the civil cover sheet for all False Claims Act cases. This code helps the courts accurately account for these type of cases to the Administrative Office in Washington, DC. Counsel can find the civil cover sheet along with many other forms on the Clerk's Office website at [www.vaed.uscourts.gov](http://www.vaed.uscourts.gov).

# E.D. Va. LOCAL RULE AMENDMENTS



The Local Rules for the Eastern District of Virginia were amended on January 9, 2015. In addition to a small change to Local Civil Rule 7.1, to delete the requirement to file two copies of a financial statement, since only one is required due to electronic filing procedures, two additional Local Rules were amended more substantively. The Court added a new section to Local Civil Rule 83.1 and Local Criminal Rule 57.4 concerning undisclosed legal assistance being provided to *pro se* litigants, in keeping with the recent issuance of Virginia State Bar Legal Ethics Opinion 1874. This Opinion, issued on July 28, 2014, explored at length the practice of providing substantial assistance to *pro se* litigants and reviewing or “ghostwriting” pleadings. In brief, the Opinion concluded that the Rules of Professional Conduct do not prohibit undisclosed assistance to a *pro se* litigant, but that lawyers who do prepare or assist in the preparation of a pleading may advise the *pro se* litigant to insert a statement in the pleading disclosing that the document was prepared with the assistance of a license and active member of the Virginia State Bar.

In light of this development, the Court believed it appropriate to amend the local rules to reaffirm the Court’s previous decisions barring a *pro se* litigant from having an attorney assist in the preparation of a filing with the Court unless that assistance was disclosed in writing. As such, new subparagraph M to each of Local Civil Rule 83.1 and Local Criminal Rule 57.4 requires each document filed by a *pro se* litigant to bear a written certification declaring whether or not an attorney has prepared, or assisted in the preparation of, the document. This certification must be signed by the *pro se* litigant and, if an attorney did assist the party, must include that attorney's contact information.

A copy of Opinion 1874 can be found at: <http://www.vsb.org/docs/LEO/1874.pdf>

## SCOTUS Adopts FRCP Amendments

On April 29, 2015, The Supreme Court of the United States adopted the latest round of amendments to the Federal Rules of Civil Procedure. Absent congressional action, these amendments are set to become effective December 1, 2015. The full packet of material that the Supreme Court transmitted to Congress pursuant to the Rules Enabling act has been posted on the U.S. Courts website.

Of note, Federal Rule of Civil Procedure 4(m) is set to change to reduce the default deadline for serving process from 120 days after filing the complaint to 90 days. The fall edition of the FedTide will detail these amendments to the FRCP in more detail. We encourage our members to submit their own articles regarding these amendments and their practical impact as well!

# Magistrate Judge Tommy E. Miller

After nearly 28 years on the bench, United States Magistrate Judge Tommy E. Miller will retire this summer. Judge Miller became a United States Magistrate Judge in September 1987 and will step down effective August 31, 2015. There will be a retirement ceremony on August 14, 2015, the details of which will be forthcoming. Further, the Hampton Roads Chapter of the Federal Bar Association, in conjunction with the staff of the Courthouse, will feature Judge Miller in depth in a special edition of the *FedTide*.

Assistant United States Attorney Robert J. Krask is set to become the newest United States Magistrate Judge effective September 2015.

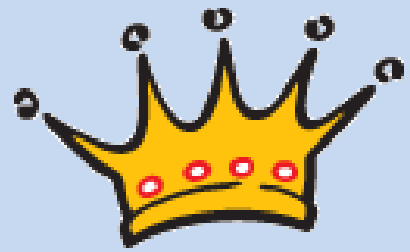
## *Upcoming National FBA Opportunities*

- 27<sup>th</sup> Annual Insurance Tax Seminar – Washington, D.C., May 28-29, 2015. Visit <http://www.fedbar.org/Education/Calendar-CLE-events/27th-Annual-Insurance-Tax-Seminar.aspx> to register.
- 2015 Women in the Law Conference – Washington, D.C., June 5, 2015. Visit <http://www.fedbar.org/Education/Calendar-CLE-events/2015-Women-in-the-Law-Conference.aspx> to register.
- 2015 Annual Meeting and Convention – Salt Lake City, Utah, September 10-12, 2015. Visit <http://www.fedbar.org/Education/Calendar-CLE-events/2015-Annual-Meeting-and-Convention.aspx> to register.

**UPCOMING FBA WEBINARS** : to find out more information about the below webinars visit <http://www.fedbar.org/Education/Webinars.aspx>

- Transfer Pricing Boot Camp for Lawyers – June 10, 2015
- Mindfulness and the Law: Using mindfulness practices to increase efficiency, effectiveness and career satisfaction – July 22, 2015
- Federal Indian Law 101 – August 19, 2015
- The U.S. Supreme Court 2015-2016 Term: Decided & Pending Cases – October 14, 2015

# The Rocket Docket Continues to Reign



The Administrative Office of the United States Courts issues its Federal Judicial Caseload Statistics (FJCS) every year after the Judicial Conference meets in March. According to the latest data (from fiscal year 2014), combined filings of civil cases and criminal defendants in district courts remained relatively stable in 2014, increasing less than 1% overall. Filings in the U.S. courts of appeals fell 3% and filings in the bankruptcy courts fell by 13%.

For the 12-month time period ending September 30, 2014, the median time interval to try a federal civil case (from the filing of the complaint until the trial is concluded) in the Eastern District of Virginia was 12.5 months. This average was by far the fastest in the United States with the next two fastest districts (the Northern District of Florida and the Southern District of Florida) averaging 13.0 months and 14.6 months respectively. The nationwide average was 24.9 months.

Interestingly, for the 12-month time period ending December 31, 2014, the median time interval from the date of filing until the date trial begins, for cases being tried by district judges, was just 11.4 months.

Because most cases are not tried, it is also important to look at the average time to disposition for federal cases. The average time to disposition for civil cases in the Eastern District of Virginia in 2014 was just 5.5 months. The national median average for disposition of a federal civil case in 2014 was 8.3 months.

Thus, the data once again places the crown on the Eastern District of Virginia “Rocket Docket” as the fastest federal civil trial court in the United States.

## ***Noteworthy Decisions from the Supreme Court, the Fourth Circuit, and the EDVA***

### **JUDGE ELIZABETH DILLON CONFIRMED**

Judge Elizabeth Dillon was confirmed by the U.S. Senate as a federal district court judge for the United States District Court for the Western District of Virginia on December 16, 2014. Judge Dillon is the first female judge in the Western District of Virginia.

### **NEW NORFOLK MAGISTRATE JUDGE APPOINTED**

Assistant U.S. Attorney Robert J. Krask has been selected to take the place of U.S. Magistrate Judge Tommy E. Miller, who is retiring effective August 31, 2015. Mr. Krask, who currently works in the Criminal Division of the United States Attorney's Office, began his career as a civil trial attorney with the Department of Justice.

#### **• Fourth Circuit En Banc Decision in *Whiteside v. U.S.***

Last year a panel of the Fourth Circuit in *Whiteside* held that an error in calculating a defendant's advisory guideline range is cognizable in a proceeding under 28 U.S.C. § 2255 and that a defendant could rely on equitable tolling to extend the one-year statute of limitations because it was filed within one year of *United States v. Simmons*. Under *Simmons*, 649 F.3d 237 (4<sup>th</sup> Cir. 2011), certain convictions are no longer considered felonies for purposes of career offender sentencing.

The Government sought rehearing and the full Fourth Circuit reversed the panel decision and affirmed the denial of *Whiteside's* 2255 motion. ***Whiteside v. U.S.*, No. 13-7152 (December 19, 2014, 4<sup>th</sup> Cir. 2014 ) (en banc)**. The en banc court (Judge Wilkinson writing) concluded that *Whiteside's* motion was not timely filed for, although it was filed within a year of the *Simmons* decision which stated new law, *Simmons* did not constitute a new "fact" that would restart the one-year statute of limitations. The en banc court went on to explain that even though it may have been futile for *Whiteside* to file a 2255 motion on these grounds before *Simmons*, other defendants had still done so (including *Simmons* himself).

Judges Gregory, Davis and Wynn dissented and noted that it was "simply unjust to deny someone the opportunity to receive a properly calculated sentence."

#### **• Trademark Law and the First Amendment—**

Last year the NAACP sued the Radiance Foundation over comments made by a blogger in a column that criticized the NAACP on its position on abortion issues. The Norfolk division of the Eastern District of Virginia held that the Foundation was not protected by the First Amendment and had no right to tarnish the NAACP trademark by calling it the "National Association for the Abortion of Colored People," even if it was in an effort to mock or criticize the NAACP's abortion position. On May 19, 2015, a three judge panel of the Fourth Circuit unanimously reversed the district court's decision and ruled in favor of the free speech rights of the Foundation.

**(continued on next page)**

## Hampton Roads Chapter Membership

Our Chapter's Membership Chair is Lauren Tallent Rogers, and she can be reached at

[ltrogers@kaufcan.com](mailto:ltrogers@kaufcan.com).

We ask our current members to encourage their colleagues or associates to join the FBA. Please contact Lauren with any membership questions!

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Members of the Hampton Roads Chapter are encouraged to submit articles or news information of interest for possible publication in the *Fed Tide*. Please submit any proposed articles or news information to the Editors at the e-mail addresses listed below. The Editors reserve the right to decide on publication, and any articles accepted for publication are subject to editing.

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## • Trademark and the First Amendment Continued–

The Fourth Circuit summarized its holding in *Radiance v. NAACP* as follows:

“The Lanham Act protects against consumer confusion about the source or sponsorship of goods or services. Persons may not misappropriate trademarks to the detriment of consumers or of the marks themselves. However, the Act’s reach is not unlimited. To find Lanham Act violations under these facts risks a different form of infringement – that of Radiance’s expressive right to comment on social issues under the First Amendment. Courts have taken care to avoid Lanham Act interpretations that gratuitously court grave constitutional concerns, and we shall do so here. We hold that Radiance is not liable for trademark infringement or dilution of defendant’s marks by tarnishment. We vacate the injunction against Radiance entered by the district court and remand with instructions that defendant’s counterclaims likewise be dismissed.”

***The Radiance Foundation, Inc. v. National Association for The Advancement of Colored People, No. 14-1568 at \*3 (May 19, 2015, 4th Cir. 2015) (J. Wilkinson).***

Although the comments clearly tarnished the NAACP’s trademark, the Lanham Act protects the use of marks that fall into the excluded category for “fair use” which includes the use of the mark in connection with “identifying and parodying, criticizing, or commenting upon the famous mark’s owner or goods and services of the famous mark’s owner.” *Id.* at 31; 15 U.S.C. § 1125(c)(3). “The most scathing speech and the most disputable commentary are also the ones most likely to draw their intended targets’ ire and thereby attract Lanham Act litigation. It is for this reason that the law does not leave such speech without protection.” *Id.* at 36.

# **LOOKING AHEAD**

**Chapter Luncheon Meeting featuring  
The Honorable Roger L. Gregory, Circuit Judge of the  
United States Court of Appeals for the Fourth Circuit  
June 3, 2015**

**Summer Associate Introduction to  
Federal Practice Seminar  
July 16, 2015**

**Portrait Unveiling and Retirement Event  
for United States Magistrate Judge Tommy E. Miller  
August 14, 2015**

**Panel Discussion on the Legacy of  
The Honorable Walter E. Hoffman**  
Co-sponsored by the Historical Society for the United States District Court for the  
Eastern District of Virginia and the Hampton Roads Chapter of the FBA  
**November 19, 2015**

**Annual Chapter Meeting at the Town Point Club  
Featuring The Honorable Steven Agee, Circuit Judge of  
the United States Court of Appeals for the Fourth Circuit  
Fall / Winter 2015**

# THE HAMPTON ROADS CHAPTER OF THE FEDERAL BAR ASSOCIATION

*Invites You to Attend the Next Installment of our 2015 Informal Luncheon Series*

**Featuring The Honorable Roger L. Gregory, Circuit Judge,  
United States Court of Appeals for the Fourth Circuit**

**WHEN:** Wednesday, June 3, 2015 at 12:00p.m.

**WHERE:** Kaufman & Canoles, P.C.  
150 West Main Street  
Norfolk, Virginia 23510  
21<sup>st</sup> Floor Tenant Room

**COST:** \$15.00 (FBA Members)  
\$20.00 (Non-FBA Members)

**LUNCH:** Pizza, Salad, Sandwiches, Soft Drinks and Dessert

To register, complete the form below, detach and return with a check payable to "Hampton Roads Chapter of the Federal Bar Association," c/o Mark E. Warmbier, Kaufman & Canoles, PC, 150 West Main Street, Suite 2100, Norfolk, Virginia 23510,  
**no later than May 27, 2015.**

*To join the FBA, please visit [www.fedbar.org](http://www.fedbar.org)*

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### **Registration for the June 3, 2015 Luncheon**

Name(s): \_\_\_\_\_

FBA Member(s):      \_\_\_\_\_ Yes      \_\_\_\_\_ No

Amount Enclosed:      \$ \_\_\_\_\_ (\$15 for FBA members/\$20 for non-FBA Members)