

Hon. Henry E. Hudson, Hon. John A. Gibney, Jr. and Hon. M. Hannah Lauck
United States District Court Judges for the Eastern District of Virginia, Richmond Division
and
Hon. David J. Novak and Hon. Roderick C. Young
United States Magistrate Judges for the Eastern District of Virginia, Richmond Division

In its continued effort to promote the administration of justice in the Richmond area and to facilitate cooperation between the bench and the bar, the Administration of Justice Committee recently concluded its annual interviews with the Honorable Judges for the Eastern District of Virginia, Richmond Division. As in years past, the Judges were gracious with their time and spoke with candor to Committee members regarding settlement conferences, discovery matters and familiarity with Local Rules.

The Honorable Henry E. Hudson

As Judge Hudson enters his 15th year on the federal bench, he continues to observe that the local bar is a model for collegiality and professionalism in terms of attorneys' interactions with each other and with the Court. He regularly sees practitioners act as both friends and cordial adversaries, which makes him proud to sit on the local bench.

Judge Hudson has observed a significant decrease in the number of trials over the last 15 years. After assuming office in 2002, Judge Hudson oversaw approximately 25 trials during his first year. Today, he oversees approximately four criminal trials each year and one civil trial every two years.

Judge Hudson attributes the continued decline in the number of civil trials to the ability of local practitioners to resolve their clients' differences through settlement. He further believes that there is a direct correlation between the increased use of alternative dispute resolution (ADR) and the decreasing number of civil trials. Judge Hudson noted that the Eastern District of Virginia provides civil litigants with a number of resources designed to foster early settlements, including free neutral case evaluators who frequently assist parties with settlement discussions. In general, Judge Hudson is pleased with the caliber and work quality of the attorneys who appear before him. The briefs he reviews are typically well-written, and the Clerk's Office reports broad adherence to the Local Rules, with most violations being inadvertent and easily corrected. Judge Hudson encourages brevity and conciseness with respect to all filings. He also noted his preference to rule on Fed. R. Civ. P. 12(b)(6) motions without oral argument.

With respect to the limited number of trials that Judge Hudson oversees, he reports that most local attorneys do very good trial work. Judge Hudson cautioned against the use of PowerPoint presentations (or similar technology) during trial, unless the trial involves highly complex issues. Judge Hudson further discouraged the practice of providing the judge with a trial outline.

Judge Hudson strives to keep his docket progressing efficiently and recently updated his standard Pretrial Order. If necessary, and upon a showing of good cause, he will sometimes

grant counsel some flexibility and latitude to modify discovery schedules to fit the circumstances of a given case.

Judge Hudson urges more lawyers to get involved in pro bono work. Although he sometimes calls upon certain local attorneys to accept pro bono matters, he expressed an interest in having a list of local attorneys who are willing to provide pro bono services, organized by subject matter. With trial opportunities so diminished these days, he views pro bono matters as one of the best ways for younger practitioners to develop and sharpen their legal skills through motions practice, oral argument, and occasionally trial.

The Honorable John A. Gibney, Jr.

Judge Gibney reports that he has “the best job in the world.” He maintains that attorneys from the Richmond Bar generally are very cooperative, very well prepared, and do a very good job for their clients. He states that the attorneys, for the most part, cultivate civility and notes that it can hurt a case to spar with one another simply for sparring’s sake. Judge Gibney requests more feedback from the Bar and invites lawyers to come and see him and let him know how he is performing. He states that he would like to know if and when he is making things difficult and invites attorneys to call his chambers. He also is willing to provide feedback to counsel.

When asked about problem areas, Judge Gibney notes that he has seen an increase in unnecessary motions to dismiss. He finds that these motions are often not helpful—they are not going to educate the Court about the issues of the case and they waste the Court’s and counsel’s time. Judge Gibney does not typically refer discovery matters to the magistrate judges. Upon receipt of a discovery motion, he will usually request that counsel have a conference call with him to discuss the dispute, or, if he is able to understand the root of the problem from the motion, he may enter an order immediately.

In discussing motions practice, Judge Gibney states that most motions are now decided on the papers, unless they involve complicated issues. He added that, if counsel wants oral argument in order for a young attorney to get experience in federal court, counsel should call his chambers and he will allow the argument. He also wants to remind attorneys that when oral argument is allowed, he has read the briefs submitted by counsel, identified the issues that trouble him, and knows what he wants counsel to address during argument. He stated that a good starting point for any argument before him is to ask what questions the Court has regarding the parties’ positions. Additionally, he noted that counsel should be nimble with their oral argument script or PowerPoint and be able to move to the point he asks about.

Judge Gibney recognizes that, because the vast majority of cases settle, it can be difficult for your lawyers to get trial experience. He recommends that lawyers volunteer for court appointed cases in state court in order to gain trial experience.

Judge Gibney suggests that lawyers defending criminal cases before him propose a sentencing plan that does not involve incarceration or that supplants part of a defendant’s incarceration. In appropriate cases, he will consider such alternative plans and options.

Lastly, Judge Gibney believes the Court's technology aids the trial process. He stated that attorneys can make an appointment with his courtroom clerk to learn about the various technologies available to them in the courtroom and to practice with those technologies.

The Honorable M. Hannah Lauck

Judge Lauck continues to speak highly of our local federal bar, viewing the "Rocket Docket" as striking an appropriate balance between maintaining a swift litigation pace and a prevailing attitude of professionalism by practitioners. The Court fosters these dynamics through a hands-on approach in which the Court is meaningfully involved in litigation. To that end, Judge Lauck expects both local and lead counsel to attend hearings and pre-trial scheduling conferences. While many out-of-state lawyers are used to participating telephonically in hearings, Judge Lauck strongly prefers live attendance, with telephonic participation being the exception, not the rule.

Judge Lauck understands that flying across the country to attend a brief scheduling conference is a burden and an expense to which non-Virginia counsel may not be accustomed. She feels, however, that in a jurisdiction that typically sets trials to occur just months after Rule 16 conferences, requiring live appearances sets the proper tone early on in the litigation. Aside from affording counsel an opportunity to meet each other face to face, this approach also allows counsel to meet law clerks and other chambers personnel with whom they will be working. In addition, it gives counsel the chance to discuss case-management concerns with the Court, and Judge Lauck finds that face-to-face dialogue is often more transparent and productive.

Regarding discovery disputes, Judge Lauck would like to remind counsel of Local Civil Rule 26(C), which requires counsel to serve objections to written discovery within 15 days of service of the discovery requests. She views this Rule as serving two key purposes. First, distinguishing between objections and responses should be a reminder of the obligation to respond substantively to discovery separately from serving any objections a party might have. This discourages the practice of "resting on objections" in a jurisdiction in which efficient discovery progress is critical. Second, the Rule forces parties to identify discovery disputes early, which, in turn, should promote meet-and-confer efforts that might eliminate—or at least narrow—objections before the deadline for serving substantive responses.

In the event counsel are unable to resolve a discovery dispute after good-faith efforts, Judge Lauck generally handles discovery motions herself and, again, prefers a collaborative, hands-on approach. In her standard scheduling order, Judge Lauck requires parties to file a "Joint Statement" within 11 days after a discovery motion is filed. The Joint Statement must be submitted in chart form, with the parties detailing and itemizing: (1) each discovery request in dispute, (2) the objecting party's specific objection/answer (along with the factual basis, relevant rule citations, and associated legal support, without "boilerplate" language), (3) the requesting party's response to each objection (with factual and legal support), and (4) a separate column for the Court's ruling.

In Judge Lauck's experience, the process of jointly creating a chart to illustrate all disputed issues not only saves time and effort associated with a full set of discovery briefing, but also facilitates compromises between counsel. When counsel step back and think hard about the basis for each discovery request and objection, they will often re-think their request/objection and identify alternative requests (or narrowed objections) to which the other party will be more receptive. To the extent disputed issues remain after the Joint Statement is submitted, having all of the information presented in a chart aids the Court in preparing for a hearing and conveying its rulings.

In the rare occasion that a discovery dispute proceeds to a hearing, Judge Lauck encourages counsel to arrange for a client representative to attend. Judge Lauck finds that this gives clients a better appreciation for the importance of discovery obligations. Having clients present to hear the Court's perspective (and rulings) can limit future discovery disputes and result in more active client participation in the discovery process.

Judge Lauck also shared thoughts on motions to seal. She recognizes that certain types of documents or information may be genuinely commercially sensitive to the point that a business would likely be harmed in its competitive position if a public disclosure were made. With that said, it is important for practitioners and clients alike to appreciate that what might qualify as "confidential" under the terms of a protective order does not necessarily meet the standard for sealing under Fourth Circuit law. Particularly in a jurisdiction like the Eastern District of Virginia (which has had a number of high-profile terrorism cases involving matters of national security with extreme sensitivity), judges will not simply "rubber-stamp" a request for sealing, particularly if the only apparent basis for the request is that public disclosure would be embarrassing to a party. Rather, the material must legitimately qualify for that treatment given the general presumption in favor of the public's access to court records and due process considerations.

Lastly, Judge Lauck shared a pointer about written submissions. Generally speaking, she is widely impressed with the caliber of briefs submitted to the Court. Counsel are almost always sensible in the facts, case law, statutes, rules, and other authority they cite. Although a fine line exists between effective advocacy and not "hiding the ball," she does urge counsel to err on the side of directly addressing adverse case law (particularly cases in the Fourth Circuit or Eastern District of Virginia) or bad facts. Doing so proactively is far more beneficial than it is risky.

The Honorable David J. Novak

Judge Novak appreciates that the Richmond Bar continues to show professionalism and courtesy when practicing before him. Judge Novak relies upon local lawyers who serve as local counsel to advise out-of-state lawyers on the practices of the Eastern District.

Many members of the bar that regularly practice in the Richmond Division of the Eastern District of Virginia already know about Judge Novak's approach to conducting settlement conferences. Nevertheless, Judge Novak has a few remarks that he believes will aid all practitioners who appear before him for court-ordered settlement conferences.

Judge Novak stresses that counsel should educate their respective clients about the nature of his settlement conferences. First and foremost, it is crucial for clients to understand that the magistrate judge's role in such conferences differs from a private mediator's role. The magistrate judge's role is to settle cases quickly and efficiently to lighten the dockets of district judges. The process is time-sensitive, as magistrate judges must allocate a limited amount of time between leading settlement conferences and managing their daily criminal docket. As Judge Novak explains, there is not much time for the usual introductory "dance" of unrealistic settlement offers and demands. Counsel should prepare their clients for the settlement conference-equivalent of speed dating. Judge Novak expects the parties to get to the point. To facilitate the process, Judge Novak often employs what he calls the "nuclear option" when the parties reach a logjam. Judge Novak often develops a sense of where a case will, or should, settle. To break a standoff, Judge Novak will state to a party the settlement amount that he believes will resolve the case and then tell one of the parties that, if they move to that number, he will give them his word that he will not ask them to move another penny and that it will be a "take it or leave" number for the other side. Judge Novak emphasizes that this promise is backed by his word and that he will keep it. Should the party agree to move to the amount proposed by Judge Novak under the "nuclear option," Judge Novak will then work with the other party to resolve the matter at that amount without any more compromising or counteroffers.

Judge Novak also indicated that lawyers, who have not regularly appeared in federal court, should feel comfortable doing so, because the Court is user friendly. Counsel should, though, appreciate its speed as compared to state court litigation. Judge Novak also emphasizes the importance of written submissions in federal court, as they typically require more detail and time than state court pleadings.

Finally, Judge Novak adds that Local Rule 37's meet and confer requirement requires a legitimate conference held in good faith before filing a discovery motion with the Court. Judge Novak has little tolerance for discovery hearings when the parties have not truly and sincerely conferred in good faith to narrow the area(s) of disagreement beforehand.

The Honorable Roderick C. Young

Judge Young is pleased with the caliber of the attorneys that appear before him from the Richmond Bar, stating that the attorneys are professional, treat one another with civility and are well-prepared. He states that attorneys have been helpful to him on the bench by preparing thoughtful and well-written submissions.

Judge Young recommends that attorneys come to his courtroom having read his pretrial order. Particularly, Judge Young points to the portion of his pretrial order governing settlement conferences and the requirement for the parties to make a demand and/or counter-offer. Judge Young would like to remind attorneys that when his law clerk contacts them, they should consider that a direct contact from him and should respond accordingly.

Judge Young also states that the better prepared attorneys are for settlement conferences and other matters before the court, the better those appearances will go. Particularly with regard to settlement conferences, Judge Young believes attorneys need a good memorandum, a good

understanding of the law, a clear understanding of the strengths and weaknesses of their case, and to have had a good conversation with their client regarding realistic expectations for the settlement conference.

Judge Young cautions attorneys regarding discovery motions. He believes that counsel for both sides should be able to work out most discovery disputes between them without resorting to motions practice. Where possible, he attempts to assist the parties in resolving discovery disputes without a court ruling using the tools available to the parties in the Federal Rules of Civil Procedure, such as protective orders.