

Lawyers, litigants struggle at balky clerk's office in PW

BY PETER VIETH

An understaffed clerk's office in fast-growing Prince William County may have created a perfect storm for lawyers and others who had to navigate that courthouse in recent years. Multiple complaints about delays, errors and unhelpful staff suggest what can happen when clerks lack money to hire the help they need.

Criminal defense lawyers unleashed a volley of reports about erroneous docket entries and inaccessible assistants at the Prince William General District Court clerk's office.

Some relief could be in sight. A new clerk is on the job at the court this month, and she says she is planning improvements.

But judges say the solution is mainly financial. There is a statewide need for 276 additional full-time positions in district court clerks' offices, the Supreme Court says. The state budget now funds clerks' offices at 80% of need.

Multiple 'horror stories'

Lawyers used an online forum to share complaints among themselves, according to attorneys Virginia Lawyers Weekly contacted. The forum, managed by the Virginia Association of Criminal Defense Lawyers, is not open to the public or media. But a few lawyers willingly spoke about the issues or provided copies of court records.

They said the Prince William GDC is known for long waits at the windows or on the phone to get help from the clerk staff. When VLW tried to call the clerk's traffic and criminal office, the call was placed on hold for 30 minutes before we hung up.

Andi Geloo of Fairfax said she documented eight mistakes in a month, including a client whose record showed a conviction even though the charge was dismissed in court by the judge.

Geloo provided documentation of four record-keeping errors, with evidence that at least two were ultimately corrected by the clerk.

Another lawyer said a client was charged with failure to appear after being advised his court date had been continued.

M. Paul Valois of Lynchburg said he appealed a traffic case in July of last year, but never heard from either the district or circuit court. Unable to get anyone by phone or email, Valois said he traveled to the Manassas courthouse and found the clerk's office had lost the notice of appeal.

"It took me all day to get the appeal processed and the paperwork sent to circuit court," Valois said. "It was like something out of a Monty Python sketch – I kept showing them the confirmation that they received the notice in July, and they kept maintaining that they hadn't received it and refused to acknowledge the proof that they did," he explained.

"That place was a zoo!" Valois added.

One lawyer wondered whether intentional retaliation or other motives were afoot, but another attorney said her experience was simply "equal opportunity incompetence."

Critical audit reports

Lawyers are not the only ones who noticed problems at the Prince William GDC clerk's office. Clerks' offices in Virginia are audited by the state Auditor of Public Accounts.

In the most recent audit, reported on April 19, a repeated problem was discovered with voided transactions, which pose a risk for fraud. In four of 12 voided receipts tested, the clerk did not retain all copies. Two of the voided receipts lacked proper documentation about the reason for the voided transaction. The findings for voided transactions were precisely the same in an audit the year before.



Reports for fiscal years ending in 2017 and 2018 also showed the clerk failed to maintain complete supporting documentation for court-appointed attorney payments and waivers. The clerk also did not properly bill and collect court fines and costs, the audits said.

In 58 cases tested in the 2017 fiscal year, the auditor noted problems with 14:

- In two cases, charges were miscoded to the wrong locality in the court's financial system, with losses of \$750 to the applicable locality;
- In five local cases, the applicable localities were not billed for attorney fees of \$600;
- In four cases, defendants were overcharged costs totaling \$685 and
- In three cases, defendants were not assessed a total of \$96 in costs.

In the audit for fiscal year 2018, the auditor tested 84 cases for billing and collection.

- In seven cases, defendants were not assessed costs totaling \$3,920.
- In two appealed cases, costs of \$1,500 were not certified to the circuit court.

- In four cases, the clerk erroneously billed the commonwealth instead of the locality for attorneys' fees.
- In nine cases, coding errors resulted in losses to the state or local government.
- In two cases, defendants were overcharged costs of \$170.

The APA audits are not the only check on clerks' offices. Representatives of the Supreme Court's administrative office visit regularly to check on financial and internal controls and other matters.

In a Sept. 20, 2017, visit, the PWC clerk was advised to give up using a manual check register, because the automated system created an electronic check register. "The keeping of a manual check register is time consuming and inefficient," the court representative wrote in a report.

New clerk

Contacted about the reports, Chief Judge Wallace S. Covington III noted that a new clerk was on the job as of Sept. 1. Jacqueline R. "Jackie" Ward retired last month after 22 years of service.

The new head clerk – who formerly supervised the civil office – is Rhonda Ann Daley. She said she is meeting with her supervisory staff to address both "procedures" and "demeanors."

"I do have plans to some training and to do some re-arranging," Daley said.

She said lawyers with concerns should go directly to her.

District court personnel are appointed by and serve at the pleasure of the chief judge, under Virginia Code § 16.1-69.39. Asked about attorney complaints, Covington referred to a regular dialogue the judges have with members of the Prince William County Bar Association.

In November, lawyers asked about delays in scanning case files for court-appointed lawyers. The judges said the clerks faced staff shortages.

"The clerks are doing their best to keep up with scanning but there are understaffed at this time because they are not fully funded. They even have unpaid volunteers to help scan documents into their file," the judges responded, according to a summary in the bar association newsletter.

"The Court is open to input from the Bar regarding resolving some of these issues, especially case management," the summary said.

Busy court

The numbers are daunting. In four decades, Prince William County has gone from a sleepy suburb to a thriving part of the Washington metropolitan area. The population more than doubled from 1990 to 2018, when the headcount reached 468,011.

The general district court is busier than most, on a per judge basis. The five judges averaged 24,765 filings per judge in 2018, 15% above the statewide average.

The judges held 34,829 hearings in 2018, 20% more than the statewide average.

The clerk's office is "significantly understaffed," according to a state Supreme Court spokesperson. With their current staffing at 69% of the district court staffing model, the office needs an additional 15.5 full-time positions to reach 100%, the spokesperson said.

Pressure for funding

The Supreme Court has sought funding to fill clerk positions around the state, but the General Assembly has kept the purse strings drawn.

In 2018, Chief Justice Donald W. Lemons compared the effort to "battlefield triage" as the court reallocated positions from a few overstuffed offices to beef up the understaffed courts.

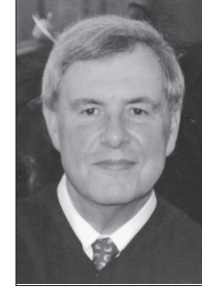
That year, collections lawyers had come to Richmond pushing a bill to impose a deadline for clerks' offices to issue process for high volume collection actions. A court representative persuaded lawmakers to block the bill, saying it would not address the underlying problem.

In the 2019 session, a budget amendment for an additional 50 deputy clerk positions in the district courts was introduced in the both the House and Senate, but no additional positions or funding were included in the final budget, the court spokesperson said.

About 50 district court clerks' offices now operate below 80% of their proper staffing level, the court spokesperson said. "The Supreme Court will again pursue funding for additional deputy clerk positions in the 2020 Session," she said.

Judge: No 'Twiqbal' standard for use of affirmative defenses

BY PETER VIETH



JUDGE CONRAD

A Roanoke federal judge said he is joining the "growing number of courts" rejecting a heightened pleading standard for affirmative defenses in civil litigation.

Plaintiffs chafing at the higher pleading hurdle imposed by Supreme Court opinions a decade ago argued that what was good for the goose should be good for the gander. If plaintiffs' initial pleadings had to pass a stiffer "plausibility" test under *Twombly*

(2007) and *Iqbal* (2009), then the same standard should apply when defendants raise affirmative defenses in response, the argument went.

In the Roanoke case, the plaintiff's lawyers argued the majority of federal district courts held that affirmative defenses are held to the same pleading standards as a plaintiff's complaint.

But U.S. District Judge Glen Conrad perceived a trend in recent years not to apply the standard from the *Twombly* and *Iqbal* cases, known popularly as "Twiqbal," to affirmative defenses.

Conrad's Aug. 30 decision is *Henderson v. General Revenue Corp.* (VLW 019-3-441).

Challenge to student loan collections

Represented by John P. Fishwick of Roanoke and lawyers at his firm, Willie Henderson sued GRC in 2017, claiming the company violated the Fair Debt Collection Practices Act in its efforts to collect student loan debts from Henderson and other former students.

In a second amended complaint, the plaintiff added Navient Portfolio Management LLC as a defendant. After NPM responded, the plaintiff moved for partial summary judgment on the defendants' affirmative defenses. In the alternative, the plaintiff moved to strike the affirmative defenses, in particular two defenses raised by NPM.

"Judged by the appropriate pleading standards of *Twombly* and *Iqbal*, all of Defendants' respective affirmative defenses fall well short of the required mark," Fishwick wrote in a brief.

Although neither the Supreme Court nor the 4th U.S. Circuit Court of Appeals has addressed the issue, Fishwick said the majority of district courts has found that affirmative defenses are subject to the same pleading standards as a plaintiff's complaint.

That approach "simply makes sense," Fishwick said. He cited an opinion from U.S. Magistrate Judge James G. Welsh finding it would be unfair to require a plaintiff to provide the defendant with "enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit the defendant under another pleading standard simply to suggest that some defense may possibly apply."

Contrary trend cited

Conrad took the opposite view.

While district courts in the 4th Circuit are divided on the question, "at least two district judges in the Western District of Virginia have declined to apply the heightened pleading standard in this context," Conrad said. He pointed to rulings by Judges Norman K. Moon and Samuel G. Wilson.

Conrad said his review of district court decisions throughout the 4th Circuit revealed a trend to reject the heightened standard for affirmative defenses.

"After reviewing decisions on both sides of the issue and the applicable Federal Rules of Civil Procedure, this court also concludes that affirmative defenses are not subject to the heightened pleading requirements of *Twombly* and *Iqbal*," Conrad wrote.

He cited the reasoning of a Georgia federal judge who said Rule 8 does not require a defendant to make a "showing" as required of a plaintiff. Instead, a defendant need only state defenses "in short and plain terms." Also, defendants have just 21 days to answer a complaint, without "the luxury of prefiling investigations," the Georgia judge said.

"For these reasons, the court joins the growing number of courts holding that the heightened pleading standard established in *Twombly* and *Iqbal* does not apply to affirmative defenses," Conrad concluded. He said the defendants' respective answers in the student loan case provided fair notice of the nature of the defenses.

In the same opinion, Conrad referred a motion to compel and a motion for sanctions to U.S. Magistrate Judge Robert S. Ballou.

"We respect Judge Conrad's decision on this point of law," Fishwick said, adding, "We continue to move this consumer protection case forward."

The defendants' legal team includes Michael A. Hass of McLean, who was unavailable for comment.