Welcome to 2017 – Old School, Meet New Tech

Agenda

	7:30 a.m.	Sign-in and Continental Breakfast
	8:25 a.m.	Welcome
❶	8:30 a.m.	Unsolved Mysteries of Civil Procedure – Travis J. Graham – **30 min**.
❷	9:00 a.m.	Defamation in Virginia – *Eramo v. Rolling Stone* – W. David Paxton, J. Scott Sexton, Michael J. Finney, – **60 min**.
❸	10:00 a.m.	Cybersecurity: Keeping Client and Law Firm Information Secure – Christen C. Church – **30 min.**
	10:30 a.m.	Break – 20 min.
❹	10:50 a.m.	Facts, Opinions, and More: Lay Witness Testimony –Matthew W. Broughton, Anthony M Russell, Andrew D. Finnicum – **60 min.**
	11:50 a.m.	Break to go to lunch
❺	12:00 p.m.	**Ethics** for Lunch: ESI Competence – A Rumsfeldian Approach to Ethical E-Discovery – Justin M. Lugar, Andrew O. Gay, Andrew M. Bowman – **60 min**.
❻	1:30 p.m.	Contract Negotiation and Drafting: Shifting Risk to the Other Side – Clark H. Worthy, Jonathan D. Puvak, Christopher M. Kozlowski – **60 min**.
❼	2:30 p.m.	How the General Assembly and Courts Make Law and Administer Justice – Monica T. Monday, Cynthia D. Kinser, Gregory D. Habeeb – **30 min.**
	3:00 p.m.	Break – 20 min.
❽	3:20 p.m.	Speed Kills Criminal Prosecutions (Sometimes) – Thomas J. Bondurant, Jr. – **30 min.**
❾	3:50 p.m.	**Ethics**: Extraordinary, Ethical Investigations in the Digital Age – Guy M. Harbert, Juliana F. Perry – **60 min.**
	4:50 p.m.	Cocktails and *hors d'oeuvres* until 6pm

Virginia MCLE Board

CERTIFICATION OF ATTENDANCE (FORM 2)

MCLE requirement pursuant to Paragraph 17, of Section IV, Part Six, Rules of the Supreme Court of Virginia and the MCLE Board Regulations.

INSTRUCTIONS

Certify Your Attendance Online at www.vsb.org see Member Login

Complete this Certification. Retain for two years.

MCLE Compliance Deadline - October 31. MCLE Reporting Deadline - December 15.

A $100 fee will be assessed for failure to comply with either deadline.

Member Name: _____ **VSB Member Number:** _____

Address: _____ **Daytime Phone:** _____

_____ **E-mail Address:** _____

_____

City **State** **Zip**

Course ID Number: **JEE2507**

Sponsor: **Gentry Locke Rakes Moore LLP**

Course/Program Title: **Welcome to 2017--Old School Meet New Tech**

Live Interactive * **CLE Credits (Ethics Credits):** **7.0** **(2.0)**

Date Completed: September 8, 2017 **Location:** The Hotel Roanoke & Conference Center

By my signature below I certify

___ I attended a total of _____ (hrs/mins) of **approved CLE**, of which (_____) (hrs/mins) were in **approved Ethics**. Credit is awarded for actual time in attendance (0.5 hr. minimum) rounded to the nearest half hour. (Example: 1hr 15min = 1.5hr)

___ The sessions I am claiming had written instructional materials to cover the subject.

___ I participated in this program in a setting physically suitable to the course.

___ I was given the opportunity to participate in discussions with other attendees and/or the presenter.

___ I understand I may not receive credit for any course/segment which is not materially different in substance than a course/segment for which credit has been previously given during the same completion period or the completion period immediately prior.

___ I understand that a materially false statement shall be subject to appropriate disciplinary action.

* NOTE: A maximum of 8.0 hours from pre-recorded courses may be applied to meet your yearly MCLE requirement. Minimum of 4.0 hours from live interactive courses required.

_____ _____

Date Signature

Questions? Contact the MCLE Department at (804) 775-0577

If not certified online, this form may be mailed

Virginia MCLE Board
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-0026
Web site: www.vsb.org

[Office Use Only: Live]

GENTRY LOCKE
Attorneys

Monica Taylor Monday

Managing Partner

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- Fax: 540.983.9400
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Monica Monday is Gentry Locke's Managing Partner and heads the firm's Appellate practice. Monica represents her clients in Virginia's state and federal appellate courts across a wide variety of cases, including commercial and business disputes, healthcare, personal injury, local government matters, domestic relations and more. In 2015, Monica was inducted as a Fellow of the American Academy of Appellate Lawyers — only the fifth Virginia attorney to be so honored. She has been recognized among *Virginia's Top 50 Women Lawyers* and *Virginia's Top 100 Lawyers* by the Thomson Reuters' *Virginia Super Lawyers*, and on the *Best Lawyers in America* and *Virginia Business* magazine's *Legal Elite* lists, and was a "Leaders in the Law" honoree by *Virginia Lawyers Weekly*.

Monica frequently lectures and writes on appellate issues. She currently serves as Chair of the Fourth Circuit Rules Advisory Committee, as Vice-chair of The Virginia Bar Association's Appellate Practice Section Council, and as Chair of the Appellate Practice Committee of the Virginia State Bar Litigation Section.

Before joining Gentry Locke, she clerked for the Honorable Lawrence L. Koontz, Jr., then Chief Judge of the Court of Appeals of Virginia, and now a Senior Justice on the Supreme Court of Virginia.

Education

- College of William and Mary, J.D. 1991; B.A. 1988

Experience

- In question of first impression involving social host duty to child guest, obtained affirmance of motion to strike. Lasley v. Hylton, 288 Va. 419, 764 S.E.2d 88 (2014)
- Court reversed dismissal of defamation case. Cashion v. Smith, 286 Va. 327, 749 S.E.2d 526 (2013)
- Obtained reversal of workers' compensation case because the Full Commission lacked authority to decide the case with a retired Commissioner. Layne v. Crist Electrical Contractor, Inc., 62 Va. App. 632, 751 S.E.2d 679 (2013)
- Obtained reversal of jury verdict in maritime case relating to asbestos exposure. Exxon Mobil Corp. v. Minton, 285 Va. 115, 737 S.E.2d 16 (2013)
- Obtained reversal of decision striking down water and sewer rates that town charged to out-of-town customers; won final judgment in favor of town. Town of Leesburg v. Giordano, 280 Va. 597, 701 S.E.2d 783 (2010)
- In question of first impression, obtained dismissal of domestic relations appeal based upon terms of property settlement agreement, which waived the right of appeal. Burke v. Burke, 52 Va. App. 183, 662 S.E.2d 622 (2008)
- Obtained reversal of award of writ of mandamus against municipal land development official in subdivision application case. Umstattd v. Centex Homes, G.P., 274 Va. 541, 650 S.E.2d 527 (2007)
- Secured affirmance of compensatory and punitive damages awards for breach of fiduciary duty, tortious interference, and conspiracy. Banks v. Mario Industries of Virginia, Inc., 274 Va. 438, 650 S.E.2d 687 (2007)
- Successfully defended a jury verdict for homeowners association for damages stemming from the negligent construction of a septic system. Westlake Properties, Inc. v. Westlake Pointe Property Owners Association, Inc., 273 Va. 107, 639 S.E.2d 257 (2007)
- Successfully represented an individual in a premises liability case involving a question of first impression. Taboada v. Daly Seven, Inc., 271 Va. 313, 626 S.E.2d 428 (2006), adhered to on rehearing, 641 S.E.2d 68 (2007)
- Obtained a new trial on damages for injured plaintiff in a medical malpractice case. Monahan v. Obici Medical Management Services, 271 Va. 621, 628 S.E.2d 330 (2006)

- Successfully defended decision of the Virginia Workers' Compensation Commission awarding attendant care benefits for employee who lost both arms in an industrial accident and assessing a large award of attorneys fees against opposing party. Virginia Polytechnic Institute v. Posada, 47 Va. App. 150, 622 S.E.2d 762 (2005)
- Obtained reversal of summary judgment in federal court negligence case. Blair v. Defender Services, 386 F.3d 623 (4th Cir. 2004)
- Successfully defended compensatory and punitive damages jury verdict in malicious prosecution case. Stamathis v. Flying J, Inc., 389 F.3d 429 (4th Cir. 2004)
- Obtained reversal of summary judgment in state malicious prosecution case representing chairman of a school board. Andrews v. Ring, 266 Va. 311, 585 S.E.2d 780 (2003)
- Obtained new trial for individual in medical malpractice case. Sawyer v. Comerci, 264 Va. 68, 563 S.E.2d 748 (2002)
- Successful defense of jury verdict in a construction case interpreting statutory warranty for new dwellings. Vaughn, Inc. v. Beck, 262 Va. 673, 554 S.E.2d 88 (2001)
- Successfully defended federal court's dismissal of First Amendment constitutional challenge in voting rights case. Jordahl v. Democratic Party of Virginia, 122 F.3d 192 (4th Cir. 1997), cert. denied, 522 U.S. 1077 (1998)

Administration & Litigation

- Represent physicians in obtaining restoration of Virginia medical licenses
- Represent medical providers, including physicians, veterinarians, dentists, chiropractors and nurse practitioners in disciplinary and licensure matters before the Virginia Department of Health Professions
- Represent large, national pharmacy retailer in defense of professional liability claims
- Advise medical providers on matters relating to the disclosure and retention of medical records
- Defended insureds of large, national insurance company in numerous state court jury trials in personal injury cases

Affiliations

- Member, Judicial Council of Virginia (2013-Present)
- Fourth Circuit Rules Advisory Committee; Chair (2017-Present), Virginia Representative (2013-2017)
- Member, Virginia Model Jury Instruction Committee (2012-Present)
- Chair, Appellate Committee of the Virginia State Bar Litigation Section (2009-Present)
- Vice-chair, The Virginia Bar Association Appellate Practice Section (2017-Present)
- Member, Boyd-Graves Conference (2011-Present); Member, Steering Committee (2016-Present)
- Board of Trustees, Virginia Museum of Natural History (2009-Present)
- Board of Directors, The Harvest Foundation (2015-Present)
- Member, Virginia Workers' Compensation American Inn of Court (2015-Present)
- Member, Blue Ridge Regional Library Board (2007-2011)
- Member, Virginia State Bar Professionalism Course Faculty (2013-2016)
- American Heart Association Roanoke "Go Red for Women" Luncheon; Chair (2017-2018), Co-chair (2016-2017)
- Board of Governors, The Virginia Bar Association (2011-2014); Council Member, Appellate Practice Section (2009-Present)
- Board of Directors, Virginia Law Foundation (2005-2011)
- Member, The Ted Dalton American Inn of Court (2003-2012); Secretary (2007-2012)
- Chair, Committee on Federal Judgeships, Western District, Virginia Bar Association (2004-2008, 2015-Present)
- Member, Nominating Committee, The Virginia Bar Association (2004); Membership Committee (2003-2005)
- Board of Directors, Virginia Association of Defense Attorneys (2001-04)
- Co-Chair, Judicial Screening Committee, Virginia Women Attorneys Association (2001-03)
- Member, Board of Trustees, Adult Care Center (1999-04)
- Executive Committee, Young Lawyers Division, Virginia Bar Association (1998-02)
- President, William & Mary Law School Association (2000-01)
- Law Clerk to the Honorable Lawrence L. Koontz, Jr., Chief Judge, Court of Appeals of Virginia (1991-93)

Awards

- Ranked a "Leading Individual" in 2017 by Chambers and Partners USA
- Peer rated "AV/Preeminent" as surveyed by Martindale-Hubbell
- Fellow, American Academy of Appellate Lawyers (AAAL, inducted 2015)
- Fellow, American Bar Association (inducted 2013)
- Fellow, Roanoke Law Foundation (inducted 2013)
- Fellow, Virginia Law Foundation (inducted 2011)
- Virginia State Bar Harry L. Carrico Professionalism Course Faculty (2013-2016)
- Listed in Benchmark Appellate as a Local Litigation Star (2013)
- Named to 2013 Class of "Influential Women of Virginia" by Virginia Lawyers Media
- Named one of The Best Lawyers in America in the field of Appellate Law (2009-2017)
- Named to Super Lawyers Business Edition US in the area of Appellate Law (2012-2014); Elected to Virginia Super Lawyers for Appellate Law in Super Lawyers magazine (2010-2017), Top Listed in Virginia (2013-2017), listed in Virginia Super Lawyers Top 50 Women (2015-2017) and previously was a Virginia Super Lawyers Rising Star (2007)

- Named a “Legal Eagle” for Appellate Practice by Virginia Living magazine (2012, 2015)
- Designated as one of the “Legal Elite” by Virginia Business magazine for Appellate Law (2011-2016)
- Named a “Leaders in the Law” honoree by Virginia Lawyers Weekly (2006)
- Sandra P. Thompson Award (formerly the Fellows Award), Young Lawyers Division, Virginia Bar Association (2003)
- Best Appellate Advocate, First Place Team, and Best Brief, 1991 National Moot Court Competition

Published Work

- Drafting Good Assignments of Error, VTLAppeal Volume 1 (2012).
- Lessons from the Supreme Court of Virginia in 2010 on Preserving Error and Rule 5:25, The Virginia Bar Association Appellate Practice Section, On Appeal, Vol. II No. 1 (Summer 2011).
- Editorial Board, The Revised Appellate Handbook on Appellate Advocacy in the Supreme Court of Virginia and the Court of Appeals of Virginia, 2011 Edition, Litigation Section of the Virginia State Bar.
- Co-author, **Something Old, Something New: The Partial Final Judgment Rule**, VSB Litigation News, Volume XV Number III (Fall 2010).
- Co-author, Thoughts on Trying Construction Cases: An Appellate Perspective, Virginia State Bar Construction Law and Public Contracts News, Issue No. 56 (Spring 2010).
- You May Need to Object Twice…What “A Few Good Men” Taught Us About Preserving Error of Appeal, Virginia State Bar Litigation News (Winter 2005).

Case Studies

THE RESULTS OF CLIENT MATTERS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. PAST SUCCESSES DO NOT PREDICT OR GUARANTEE FUTURE SUCCESSES.

- Dec 14, 2016 — **Supreme Court of Virginia Affirms Circuit Court Decision in Construction Claim**
- Aug 4, 2016 — **Property Owners Entitled to Relief from Zoning Administrator’s Mistake**
- Aug 3, 2016 — **Court of Appeals Affirms Finding of Desertion, Awards Appellate Attorney’s Fees**
- Aug 18, 2015 — **Fraud and Breach of Contract Claims Dismissed, Affirmed on Appeal**
- Nov 8, 2013 — **Physician Successfully Defended Before Medical Board**
- Jun 11, 2013 — **Court of Appeals Affirms Decision, Awards Attorney Fees**

GENTRY LOCKE
Attorneys

Matthew W. Broughton

Partner

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Matt Broughton is a Senior Partner and serves on the Management Committee for the firm. Matt heads the Plaintiff's/Personal Injury/Subrogation practice areas at Gentry Locke. During his decades of experience, he has tried hundreds of complex cases in the areas of personal injury, business disputes, worker's compensation, and aviation law, many involving millions of dollars. Matt is consistently noted among the *Best Lawyers in America*® for Plaintiff's Personal Injury and Products Liability litigation. He is also regularly recognized as a *Virginia Super Lawyer* in General Personal Injury litigation representing plaintiffs. Matt is Lead Worker's Compensation counsel for some of the largest and most successful companies in America including Wal-Mart and FELD Entertainment (Ringling Brothers, Monster Truck, Disney on Ice).

Education

- University of Richmond, T.C. Williams School of Law, J.D. 1985
- University of Virginia, B.A. with distinction, 1982
- Ferrum College, A.A. in Political Science, with High Honors, 1980

Experience

- $14 million settlement in a products liability accident that caused brain injury and blindness
- $75 million settlement in environmental case (coal mining related)
- $5.5 million settlement in brain injury/trucking case
- $4.5 million settlement against responsible parties for product (wash down nozzle) improperly manufactured in China
- $4 million for brain injured Plaintiff injured in bus accident case in Australia
- $3.5 million settlement in airplane crash case involving death of a passenger
- $3.4 million in expected attendant care benefits for double amputee
- $3 million in expected attendant care benefits for brain injured/blind worker
- $2.45 million settlement in motorcycle accident case involving facial injuries
- $1.6 million verdict in complex business litigation case
- $1.2 million verdict in federal court truck accident case involving fractured spine
- $1.2 million settlement in automobile crash involving brain injury and leading to appointment of guardian and conservator
- $1 million for negligently manufactured auger resulting in amputation
- $1 million settlement against responsible parties for product manufacturing case
- $1 million for ski accident case resulting in quadriplegia
- $975,000 settlement for mechanic's brain injury in automobile accident case
- $700,000 for injured worker in products liability case involving truck lift gate which fractured lower extremity
- Resolved multiple brain injury cases for $1 million or more
- Involved in multiple cases involving tractor trailer crashes
- Multiple cases tried and settled for amounts below $1 million, involving airplane crashes, medical negligence, car accidents, truck accidents, products liability and commercial matters
- Many years of experience handling complex business transactions
- Represented multiple companies in buying, selling and changing the ownership status of their businesses
- Over 25 years of experiencing handling workers' compensation cases throughout Virginia and subrogation cases arising from such injuries
- Confidential amount in a sexual assault case of a minor
- Multiple aviation related cases to include assisting parties in purchase and documentation information of entities to hold aircraft; Represented pilots in enforcement actions prosecuted by FAA

Workers' Compensation

- Tried over 1,000 workers' compensation cases and rated as one of the Best Lawyers in America for Worker's Compensation (1997-2002)
- Mediated hundreds of workers' compensation cases
- Extensive knowledge in complex workers' compensation cases involving catastrophic injuries such as brain injury and quadriplegia
- Extensive knowledge of statutory and case law of workers' compensation gained over the last 30 years
- Extensive knowledge of medicine as it relates to traumatic injuries and treatment
- Frequent lecturer on workers' compensation-related topics

Affiliations

- ATP Rated Pilot with over 5,000 flight hours in airplanes ranging from Gliders to Jets
- President, Southwest Virginia Business Development Association (2005-Present)
- Chair, VTLA Aviation Committee (2004-2010)
- Chair, Aviation Committee, Virginia Bar Association (1999-02)
- Chair, Virginia Bar Association/YLD (1995)
- Chair, Virginia Bar Association/YLD Membership Committee (1990-92)
- Plan attorney for the Airplane Owner and Pilots Association (AOPA)
- President of the IFR Pilots Club
- Member, Lawyer Pilots Bar Association
- Member, Virginia Aviation Trade Association
- Past Member, Aviation and Space Gallery, Virginia Museum of Transportation

Awards

- Named one of only thirty "Leaders in the Law" statewide, and the sole Roanoke-based recipient, by Virginia Lawyers Weekly (2013)
- Named to Virginia Super Lawyers in the area of Personal Injury Plaintiff Litigation (2010-2016) and Business Litigation (2008)
- Named a Top Rated Lawyer for Litigation & Civil law by American Lawyer Media (2013)
- "Largest Verdicts in Virginia" designation (2006) as recognized by Virginia Lawyers Weekly
- Designated as one of the Legal Elite in the Civil Litigation field by Virginia Business magazine (2003-06)
- Named "2012 Roanoke Product Liability Litigation Lawyer of the Year" and included in The Best Lawyers in America for Personal Injury Litigation/Plaintiffs (2013-2017), Product Liability Litigation/Plaintiffs (2010-2017), Best Lawyers in America Business Edition for Plaintiffs (2016), Best Lawyers in America for Workers Compensation Law (1997-2002)
- Named a "Legal Eagle" for Product Liability Litigation by Virginia Living magazine (2012)
- 1998 "Boss of the Year" Award, Roanoke Valley Legal Secretaries Association
- "Attorney of the Year" Award from a top retail entity (2001)

Published Work

- Co-author, They All Fall Down: An Overview of the Law on Deck and Balcony Collapses; "Virginia Lawyer," the official publication of the Virginia State Bar, Volume 65/Number 4 (December 2016).
- Co-author, The Law of Damages in Virginia, Chapter 11, Punitive Damages (2nd ed. 2008).

Case Studies

THE RESULTS OF CLIENT MATTERS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. PAST SUCCESSES DO NOT PREDICT OR GUARANTEE FUTURE SUCCESSES.

- Apr 23, 2013 — **Blinded Employee Agrees to $14 Million-dollar Settlement ($16.5M Payout)**
- Apr 17, 2013 — **Settlement for Medical Malpractice Injury**
- May 29, 2012 — **Settlement Approved for Girl Hit by Car**

GENTRY LOCKE
Attorneys

Thomas J. Bondurant, Jr.

Partner

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- Email: bondurant@gentrylocke.com

Tom Bondurant is a Gentry Locke Partner and Chair of the firm's Criminal & Government Investigations practice group. While serving as a Federal Prosecutor for 30 years, Tom tried more than 200 criminal jury trials, many involving complex matters including white collar fraud, tax issues, public corruption, healthcare fraud, regulatory matters and racketeering. At Gentry Locke, Tom represents corporations and individuals in all phases of the criminal process and conducts corporate internal investigations. Tom is admitted to practice in Virginia and the District of Columbia, and is a Fellow with the American College of Trial Lawyers and the Virginia Law Foundation. Tom is consistently noted among the *Best Lawyers in America* for Corporate Compliance Law and White Collar Criminal Defense. He also is regularly recognized as a *Virginia Super Lawyer* in the areas of Criminal Defense and White Collar Crime.

Education

- University of Richmond, T.C. Williams School of Law, J.D. 1979
- Emory & Henry College, B.A. cum laude, 1976

Experience

- Since entering private practice in October 2009, representation of individuals and corporations on **criminal matters** in the areas of Racketeering (RICO); Tax Evasion; Foreign Corrupt Practice Act; Espionage Act; Arms Export Control Act; Bribery; Food, Drug & Cosmetic Act (food borne illness and pharmaceutical issues); International Banking Crimes; Money Laundering; Structuring; Healthcare Fraud, Program Fraud; Customs Violations; Insurance Fraud; Mail/Wire Fraud; Mortgage Fraud; Capital Murder; Solicitation to Commit Murder; Counterfeiting; Firearms Offenses; Mine Safety & Health Act Offenses; Narcotics; and Post-Conviction Actions
- Representation of individuals and corporations on **civil matters** in the areas of the Food, Drug & Cosmetic Act (pharmaceutical issues); Internal Revenue Service matters (assessments, abatements); False Claims Act; Non-Compete Litigation; Customs Violations; Federal Chemical Regulatory Issues; Qui Tam actions; Cyber Security/Theft matters; Banking; Medical Malpractice; Healthcare Matters; Patent; Insurance Defense; Malicious Prosecution; and Defamation
- Holds Top Secret clearance with the USAO
- Conducted Internal Investigations in the Banking, Healthcare, Construction, Mortgage, and Salvage Industries involving, among other issues, the Foreign Corrupt Practice Act; Fraud; Various Banking Issues; and Embezzlement
- Employed until October 2009 as a Federal Prosecutor for 30 years in the Western District of Virginia. At varying times occupying the duties of Criminal Chief, Senior Litigation Counsel, Coordinator for Anti-Terrorism Advisory Committee and Lead Prosecuting Attorney for the Organized Crime Drug Enforcement Task Force
- Appointed as a Special Prosecutor for the Eastern District of Virginia, the District of Columbia, the Southern District of West Virginia and the Northern District of West Virginia
- Tried over 200 Jury Trials in United States District Courts and directed thousands of investigations
- Tried hundreds of Bench Trials in United States Magistrate's Court
- Argued dozens of appeals in the United States Court of Appeals for the Fourth Circuit
- Served as a Law Clerk for United States District Judge Glen Williams in Abingdon, Virginia
- Former Editor-in-Chief of the University of Richmond Law Review (1979)

Affiliations

- Member, Federal Bar Association (2011-Present)
- Member, Fourth Circuit Judicial Conference
- Member, American Bar Association Criminal Justice Section

- Member, National Association of Criminal Defense Lawyers
- Past Director, South County Lacrosse Club
- Past Director, National Association of Assistant United States Attorneys

Awards

- Fellow, American College of Trial Lawyers (inducted 2008), serves on State Committee (2011-Present)
- Fellow, Virginia Law Foundation (inducted 2015)
- Named to The National Trial Lawyers Top 100 Trial Lawyers list (2014)
- Recipient, Department of Justice Director's Award
- Recipient, numerous Commendations from the Department of Justice; Federal Bureau of Investigation; Drug Enforcement Administration; Bureau of Alcohol, Tobacco, Firearms & Explosives; Internal Revenue Service; Mine Safety & Health Administration; Department of Transportation; Social Security Administration; Department of Agriculture; Department of Labor; and, Animal Plant Health Inspection Service
- Listed in "Best Lawyers in America Business Edition" for Corporate Compliance Law and Criminal Defense: White-Collar (2017)
- Named "2012 Roanoke Criminal Defense White-Collar Lawyer of the Year" by Best Lawyers in America, listed for Corporate Compliance Law and Criminal Defense/White-Collar (2011-2016)
- Designated a Virginia Super Lawyer in the area of Criminal Defense: White Collar (2013-2017) and Super Lawyers Business Edition US in the area of Criminal Defense: White Collar (2013-2014)
- Listed as a Top Rated Attorney for Criminal Defense/White Collar by American Lawyer Media and Martindale-Hubbell (2012 & 2013)
- Designated one of the Legal Elite by Virginia Business magazine for Criminal Law (2010, 2012-2013, 2015-2016)
- Named a "Legal Eagle" for Criminal Defense: White Collar by Virginia Living magazine (2012)

Published Work

- Co-Author, **Internet Theft from Business Bank Accounts – Who Bears the Risk?**; VADA Journal of Civil Litigation, Vol. XXIII, No. 4 (Winter 2011-2012)

GENTRY LOCKE
Attorneys

Andrew M. Bowman

Associate

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Andrew Bowman focuses his practice on *qui tam* litigation, where he represents whistleblowers who report fraud against the government. Andrew joined Gentry Locke in 2015 after serving for one year as Law Clerk to the Honorable Patrick R. Johnson in Grundy, Va. He also served as Vice President of the Buchanan County Bar Association. Andrew graduated from the University of Richmond School of Law and earned his B.S. degree in Molecular Genetics from the University of Rochester in New York.

Education

- University of Richmond School of Law, J.D., Certificate in Intellectual Property with distinction, 2013
- University of Rochester, B.S. in Molecular Genetics, 2010

Experience

- Prior to joining Gentry Locke, served as law clerk to the Honorable Patrick R. Johnson of the 29th Judicial Circuit of Virginia, assisting with medical malpractice cases in the Buchanan County Circuit Court. Additionally, assisted with numerous motions and hearings in Buchanan County, Dickenson County, Russell County, and Tazewell County
- Assisted in drafting briefs and motion in patent infringement litigation
- Interned with two judges on the Patent Trial and Appeal Board at the United States Patent and Trademark Office

Affiliations

- Member, Virginia State Bar (2014-Present)
- Patent Agent, United States Patent and Trademark Office (2012-Present)
- Vice President, Buchanan County Bar Association (2013-2014)

Published Work

- Co-author, **The False Claims Act: Past, Present, and Future**; The Federal Lawyer, a publication of the Federal Bar Association (December 2016).

Case Studies

THE RESULTS OF CLIENT MATTERS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. PAST SUCCESSES DO NOT PREDICT OR GUARANTEE FUTURE SUCCESSES.

- Jun 22, 2016 — **Tragic Failure to Properly Diagnose and Treat Results in Jury Verdict for $2.75 Million**
- Jun 26, 2015 — **Settlement in Post-surgery Wrongful Death**

GENTRY LOCKE
Attorneys

Christen C. Church

Partner

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Christen Church is a Partner in the General Commercial practice group with a transactional and advisory practice focusing on mergers and acquisitions, intellectual property, commercial financings, health care regulation and compliance, data privacy and security, as well as structuring both state and federal tax credit financings/transactions (historic rehabilitation and new markets tax credits). Christen has consistently been recognized since 2014 as a *Virginia Rising Star* by *Virginia Super Lawyers*.

Education

- Washington and Lee University School of Law, J.D. 2008
- University of Virginia, B.A. 2004

Experience

Intellectual Property

- Advises clients on all aspects of securing, enforcing and protecting their intellectual property rights

Cybersecurity, Data Privacy and Security

- Assists clients with identifying and managing privacy and information security risks
- Assists clients in developing policies, standards and procedures designed to protect sensitive information
- Advises clients on the applicable response and notification obligations following a security incident

Health Care

- Advises clients on a wide range of health law topics, including health care reform, fraud and abuse, health information technology, as well as issues related to Medicare and Medicaid provider participation, billing and compliance
- Assists clients in navigating the often complex and evolving legal issues facing health care providers, employers and individuals today, including compliance with HIPAA, HITECH, and the Affordable Care Act

Tax Credit Financing

- Structures financings/transactions involving federal and state tax credits (including historic rehabilitation and new markets tax credits)
- Represents project sponsors as well as other parties participating or otherwise involved with the tax credit financings/transactions, including lenders, not for profit organizations, private developers and municipalities

Banking and Finance

- Facilitates commercial loan transactions, including secured and unsecured term and revolving credit, asset based loans, participation arrangements as well as refinance and loan modification arrangements

Business

- Advises entities and organizations, including nonprofits, through all stages of their life cycles, from formation and governance to financing to disposition
- Drafts and negotiates contracts and advises clients generally on business and transactional matters

Affiliations

- Roanoke Bar Association: Board Member (2017-Present); Chair, Young Lawyers Committee (2016-2017); Member (2009-Present)
- Member, Board of Directors for Children's Trust Foundation Roanoke Valley (2012-Present)
- Chair, Health and Law Commission, Virginia State Bar Young Lawyers Conference (2009-2011)
- Co-Chair, Virginia State Bar Southern Virginia Minority Pre-Law Conference (2009)
- Co-Chair, Virginia Bar Association Washington and Lee Law School Council (2009-2012)
- Member, American Health Lawyers Association
- Member, Virginia State Bar
- Member, The Virginia Bar Association
- Member, American Bar Association
- Member, Virginia Women Attorneys Association
- Judicial Clerk to the Honorable Jonathan M. Apgar, Roanoke City Circuit Court (2007-2008)

Awards

- Named a "Virginia Super Lawyers Rising Star" in Business/Corporate (2016-2017) and Business/Mergers & Acquisitions (2014-2015)
- Outstanding Volunteer Service Award for co-chairing the 2009 Southern Virginia Minority Pre-Law Conference, Virginia State Bar Young Lawyers Conference (2010)

GENTRY LOCKE
Attorneys

Michael J. Finney

Partner

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Michael Finney has a diverse litigation practice, focused on resolving complex business disputes. Prior to joining Gentry Locke, Mike practiced in Washington, DC, and clerked at the United States District Court in Roanoke for the Honorable James C. Turk. He was recognized three years in a row as a *Virginia Rising Star* in Business Litigation by *Virginia Super Lawyers*.

Education

- Harvard Law School, J.D. 2006
- Stanford University, B.A. 2000

Experience

Michael Finney is admitted to practice law in Virginia, the District of Columbia, and the State of California (inactive).

- Represented numerous business entities and departing individuals in non-compete, trade secret, conspiracy, defamation, and other “business divorce” cases
- Represented company President/CEO and directors in shareholder’s derivative action, where asserted claims exceeded $200 million.
- Represented international pharmaceutical company in intellectual property dispute with former employee-inventor and his competing company
- Represented national galvanizing company in open account contract dispute, obtaining trial judgment for full amount claimed
- Represent guarantor of a commercial shopping center loan in federal litigation
- Represent multiple individuals who purchased illegitimate annuities in underlying and insurance coverage actions
- Represented real estate company in dispute with its bank over significant Internet bank theft
- Associated with Latham & Watkins, LLP before joining Gentry Locke Rakes & Moore, LLP
- Federal judicial clerk for the Honorable James C. Turk, Western District of Virginia (2008-2009)

Affiliations

- Secretary, Federal Bar Association, Roanoke Chapter (2012-present)
- Chair, Corporate and Commercial Litigation, Virginia Association of Defense Attorneys (2012)
- Vice-Chair, Corporate and Commercial Litigation, Virginia Association of Defense Attorneys (2011)
- Member, Virginia State Bar
- Member, Washington DC Bar
- Member, California State Bar (inactive)
- Member, Virginia Bar Association
- Member, Roanoke Bar Association
- Member, American Bar Association

Awards

- Named a Virginia Super Lawyers Rising Star in Business/Corporate Law (2012) and Business Litigation (2013-2017)
- Designated one of the Legal Elite by Virginia Business magazine for the area of Young Lawyer (Under 40) (2015) and Civil Litigation (2016)

Published Work

- Co-author, **Rule 68 Offers of Judgment – a Useful Defense Tool**; The VADA Journal of Civil Litigation, Vol. XXIV, No. 4 (Winter 2012-2013)
- Co-Author, **Internet Theft from Business Bank Accounts — Who Bears the Risk?**; VADA Journal of Civil Litigation, Vol. XXIII, No. 4 (Winter 2011-2012)

Case Studies

THE RESULTS OF CLIENT MATTERS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. PAST SUCCESSES DO NOT PREDICT OR GUARANTEE FUTURE SUCCESSES.

- Jul 19, 2016 — **Successful Defense of Multi-Million Dollar Defamation Suit Against Newspaper**
- May 16, 2014 — **Virginia Company Prevails in Hard-Fought Labor Arbitration Case**

GENTRY LOCKE
Attorneys

Andrew D. Finnicum

Associate

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Andrew Finnicum helps people who have suffered personal injury due to negligence or workplace accidents. Prior to joining Gentry Locke, he worked with a Lynchburg firm handling workers' compensation, personal injury matters, and consumer litigation. As a law student he was a judicial extern for the Honorable Charles Dorsey, where he authored memoranda, conducted legal research, and observed Circuit Court proceedings. Andrew has appeared before the Workers' Compensation Commission, the General District Courts of Virginia, the Circuit Courts of Virginia, the Court of Appeals of Virginia, the Judicial Panel on Multidistrict Litigation, and the United States District Court for the Central District of California.

Education

- Washington & Lee University School of Law, J.D. magna cum laude, 2010
- Liberty University Helms School of Government, B.S. summa cum laude, 2007

Experience

- Mediated workers' compensation case involving traumatic electrocution injuries resulting in claimant receiving over $300,000 in benefits
- Successfully tried federal case involving tractor-trailer accident with contested liability resulting in jury verdict of $300,000 for the Plaintiff
- Successfully represented homeowner in products liability lawsuit against manufacturer and installer of home insulation product
- Mediated workers' compensation matter resulting in claimant receiving benefits totaling over $750,000
- Handled a myriad of cases from intake to trial in the Workers' Compensation Commission, the General District Courts, and the Circuit Courts of Virginia
- Handled appeals to the Worker's Compensation Commission, the Court of Appeals of Virginia, and the Supreme Court of Virginia

Affiliations

- Admitted, United States District Court for the Western District of Virginia (2013-Present)
- Virginia State Bar (2010-Present)

Awards

- Named a "Virginia Super Lawyers Rising Star" in Personal Injury General: Plaintiff (2017)
- Second Place, 2008 John W. Davis Appellate Advocacy Moot Court Competition for both Best Brief Award and Best Oralist Award
- Co-Administrator for the 2009 John W. Davis Appellate Advocacy Moot Court Competition

Case Studies

THE RESULTS OF CLIENT MATTERS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. PAST SUCCESSES DO NOT PREDICT OR GUARANTEE FUTURE SUCCESSES.

- Jan 27, 2017 — **Settlement for $125k in accident due to inattentive truck driver on I-81**

GENTRY LOCKE
Attorneys

Andrew O. Gay

Associate

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Andrew Gay is an Associate in Gentry Locke's Construction group, where he primarily focuses on assisting clients with construction contracts and construction litigation. Andrew's experience in construction began at an early age and greatly influenced his career goals. Before law school, Andrew worked as a project manager for one of America's largest, privately-held real estate companies, where he managed commercial construction projects in Florida. After law school and prior to joining Gentry Locke, Andrew served as Associate General Counsel for one of Virginia's largest general contractors. His hands-on experience in the construction industry elevates his ability to handle complex processes and assist in the challenges facing contractors and developers.

Andrew received his Bachelor of Science degree in Construction Management from Everglades University in Sarasota, Florida, and his *Juris Doctor* from Liberty University School of Law. He is licensed to practice in Virginia and Florida.

Education

- Liberty University School of Law, J.D. 2014
- Everglades University, B.S. in Construction Management 2010

Experience

- Successfully represented subsidiary company in a dispute regarding owner's claim for liquidated damages against the subsidiary. Obtained a favorable resolution for subsidiary without filing lawsuit
- Conducted multiple internal investigations of alleged employment discrimination in the workplace, all of which resulted in dismissal of the action at either the administrative or court levels
- Successfully organized the basis for a claim of additional money and time damages for subsidiary company's paving project. Oversaw outside counsel during arbitration, and obtained the entire amount sought in the claim
- Successfully investigated and defended company from a civil penalty imposed by the Department of Labor, Mine Safety & Health Administration, which was concluded by the government's vacation of the citations
- Negotiated multiple construction contracts – design build contracts, joint-venture contracts, general contracts, subcontracts – for various road, bridge, industrial, and water/waste water projects
- Represented company in multiple breach of contract actions in a variety of forums
- As general counsel for multi-million dollar construction company, protected the company, its subsidiaries and affiliates in construction contracts, and employment and labor litigation, and dispute resolution
- Assisted in matters relating to Disadvantaged Business Enterprise (DBE) Compliance
- Worked with project management staff throughout all stages of projects to ensure compliance with federal, state, and local governmental agencies
- OSHA 30 Certified

Affiliations

- Member, Roanoke Bar Association (2016-Present)
- Member, Lynchburg Bar Association (2014-Present)
- Member, Business Law Section, Corporate Counsel Section (2014-Present), Construction Law & Contracts Section (2014-2016), Virginia State Bar
- Member, Business Law and Real Property sections, The Florida Bar
- Member, Public Contracts, Forum on Construction Law, American Bar Association
- Past President, Business Transactions and Law Society, Liberty University School of Law
- Admitted to practice in Florida, Virginia, and the United States District Court for the Western District of Virginia

GENTRY LOCKE
Attorneys

Travis J. Graham

Partner

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Travis Graham joined Gentry Locke in 2007 after practicing law in Knoxville, Tennessee for a number of years. Travis represents both plaintiffs and defendants in the state and federal courts of Virginia and Tennessee, and focuses on trust and estate litigation, product liability, medical malpractice, and complex commercial litigation. He advises outdoor recreation groups on issues of access and liability, and is a frequent writer, lecturer, and consultant on issues of federal and state civil procedure.

Travis grew up in Virginia and attended Virginia Tech. He graduated from The University of Tennessee College of Law in 1998 as class valedictorian. He served as law clerk to the Honorable Glen M. Williams of the United States District Court for the Western District of Virginia in Abingdon, Va.

Education

- The University of Tennessee College of Law, J.D. with highest honors and class valedictorian, 1998
- Virginia Polytechnic Institute and State University, B.A. 1991

Experience

- Represents both estates and heirs in will contests and actions arising from administration of large estates
- Writer, speaker and consultant on issues of state and federal civil procedure
- Represents products manufacturers, major retailers and plaintiffs in product liability actions
- Represents plaintiffs in medical malpractice and catastrophic personal injury actions
- Represents plaintiffs and defendants in class action litigation
- Counsel to outdoors groups on environmental and access issues

Affiliations

- Member, Tennessee State Bar, 1998; Virginia State Bar, 2008
- Law Clerk to the Honorable Glen M. Williams, Senior United States District Judge for the Western District of Virginia, 1998-99
- Adjunct Professor, The University of Tennessee College of Law
- Co-chair, “No Bills Night” event, Young Lawyers Conference of the Virginia State Bar, 2009-2010
- Camp Volunteer and Executive Board Member, Blue Ridge Mountains Council, Boy Scouts of America

Awards

- Outstanding Volunteer Service Award, Virginia State Bar Young Lawyers Conference, 2010
- Outstanding Service Award, Knoxville Bar Association Pro Bono Project
- 1998 Class Valedictorian and Outstanding Graduate, The University of Tennessee College of Law
- Order of the Coif; Phi Kappa Phi Honor Society

Published Work

- Your Answer, Please, Virginia Lawyer Magazine, Vol. 59, No. 7, (February 2011).
- Co-author, A “Day” is a Day Again: Proposed New Rule 6 and Other Important Changes to the Federal Rules of Civil Procedure, VSB Litigation News, Volume XIV, No. III (Fall 2009).

- Co-author, Have You Made A Last-ditch, Desperate, and Disingenuous Attempt to Subvert the Legal Process Today?, Virginia Lawyer Magazine, Volume 57 (February 2009).

Case Studies

THE RESULTS OF CLIENT MATTERS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. PAST SUCCESSES DO NOT PREDICT OR GUARANTEE FUTURE SUCCESSES.

- Jun 22, 2016 — **Tragic Failure to Properly Diagnose and Treat Results in Jury Verdict for $2.75 Million**

GENTRY LOCKE
Attorneys

Gregory D. Habeeb

Partner

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- Email: habeeb@gentrylocke.com

Greg Habeeb is a litigation partner who specializes in complex business and catastrophic injury cases. Greg represents individuals and companies in courts throughout the Commonwealth of Virginia and the nation. Greg is also a Member of the Virginia House of Delegates where he represents Virginia's 8th District and serves on the Courts, Commerce & Labor, Rules and Transportation Committees, as well as on the Code Commission and the Coal & Energy Commission.

Education

- Wake Forest School of Law, J.D. 2001
- Wake Forest University, B.A. cum laude, 1998

Experience

- Obtained a $14 million settlement in a products liability accident that caused brain injury and blindness
- Represented worker injured by defective product imported from Asia resulting in multi-million dollar settlement
- Represented estate of passenger killed in an airplane crash resulting in multi-million dollar settlement
- Obtained $250,00 jury verdict in single engine plane crash case
- Obtained $155,000 jury verdict for home seller against buyer for breach of real estate contract
- Represented numerous companies and individuals in the enforcement of contracts
- Represented Fortune 500 company in successful enforcement of non-competition/non-solicitation agreement
- Represented lending institution in successful NASD arbitration
- Represented patent holder in successful patent infringement litigation
- Represented national lighting manufacturer in successful suit against former employees
- Represented landowner in successful tax assessment appeal of 3,000+ acre property
- Represented company in trade dress litigation brought by national leader in industry
- Represented numerous lending institutions in various Uniform Commercial Code litigation
- Successfully litigated Fair Credit Reporting Act and Virginia Consumer Protection Act matters
- Represented numerous injured individuals in various negligence actions worth millions of dollars
- Jury trial experience in state courts throughout the Commonwealth of Virginia and the United States District Courts for the Eastern and Western Districts of Virginia
- Appellate experience in the Virginia Supreme Court, United States Court of Appeals for the 4th Circuit and the United States Court of Appeals for the Federal Circuit

Affiliations

- Member, Virginia General Assembly
- Member, Virginia State Bar
- Member, Virginia Bar Association
- Member, American Bar Association
- Member, Roanoke Bar Association
- Co-Chair, Membership Committee, Young Lawyers Division, Virginia Bar Association
- Member, Litigation and Young Lawyers Divisions, Virginia Bar Association
- Member, Litigation and Young Lawyers Divisions, American Bar Association
- Member, Virginia Trial Lawyers Association

- Past Member, Virginia Recreational Facilities Authority
- Past Chairman, Salem Republican Committee
- Roanoke Chapter Leader, Republican National Lawyers Association
- Member, Board of Directors, Big Brothers Big Sisters of Southwest Virginia
- Member, Virginia YMCA's Model General Assembly Committee
- Past Member, Wake Forest Law Alumni Council
- Volunteer Attorney for the Military Family Support Center

Awards

- Recipient, Client Distinction Award, Martindale-Hubbell (2012)
- Named a Top Rated Lawyer for Commercial Litigation, General Practice, and Products Liability law by American Lawyer Media (2013)
- Named to the Blue Ridge Business Journal's "20 Under 40 List" of the Blue Ridge Region's up-and-coming business leaders (2010)
- Designated as one of the Legal Elite in the Young Lawyer category by Virginia Business magazine (2004 and 2009)
- Recipient, RPV Governor's Award – recognized as Best Chair throughout the Commonwealth of Virginia
- Named a Virginia Super Lawyers Rising Star in the area of Business Litigation (2008, 2010, 2012-2016), General Litigation and Personal Injury Plaintiff (2008), Commercial Litigation (2011)
- Roanoke Bar Association President's Volunteer Service Award, Bronze level, for 100-249 hours of community service in a calendar year
- "Largest Verdicts in Virginia" designation (2006) as recognized by Virginia Lawyers Weekly

Published Work

- Co-author, They All Fall Down: An Overview of the Law on Deck and Balcony Collapses; "Virginia Lawyer," the official publication of the Virginia State Bar, Volume 65/Number 4 (December 2016).

Case Studies

THE RESULTS OF CLIENT MATTERS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. PAST SUCCESSES DO NOT PREDICT OR GUARANTEE FUTURE SUCCESSES.

- Nov 22, 2016 — **$1.75 Million Settlement for Fall Victim due to Nursing Malpractice**
- Aug 18, 2015 — **Fraud and Breach of Contract Claims Dismissed, Affirmed on Appeal**
- Mar 19, 2014 — **Homeowner's Attempt to Void Mortgage Denied**
- Apr 23, 2013 — **Blinded Employee Agrees to $14 Million-dollar Settlement ($16.5M Payout)**

GENTRY LOCKE
Attorneys

Guy M. Harbert, III

Partner

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Guy Harbert chairs the Insurance practice group at Gentry Locke. For nearly 30 years, Guy has represented clients before trial and appellate courts throughout Virginia on insurance coverage, insurance defense, and white collar and other criminal defense matters. He is an active member of the Virginia Association of Defense Attorneys and a frequent lecturer and author on insurance litigation issues. Guy is consistently noted as a *Virginia Super Lawyer* in Personal Injury General: Defense, and he earned a spot on the *2016 Best Lawyers in America list* in Insurance Law.

Education

- Washington and Lee University School of Law, J.D. cum laude, 1983
- Davidson College, B.A. 1980

Experience

- Representation of insurer in $6,000,000 third-party bad faith litigation
- Representation of insurers in numerous first-party arson/fraud/bad faith litigation
- Representation of insurers in numerous declaratory judgment actions regarding nature and extent of coverage owed on liability and first-party claims
- Preparation of amicus curiae brief on behalf of the Virginia Association of Defense Attorneys in the Supreme Court of Virginia regarding the scope of the Virginia Residential Landlord Tenant Act
- Representation of the Commonwealth of Virginia as a private prosecutor in arson/murder case
- Representation of physicians, lawyers, accountants and other professionals in criminal tax prosecutions
- Representation of defendants in trials and settlements of complex wrongful death cases

Affiliations

- Former Chairman, Policy and Coverage Section, Virginia Association of Defense Attorneys
- Member, Litigation Section, The Virginia Bar Association
- Member, Litigation Section, Tort and Insurance Practice Section, American Bar Association
- Member, Property Insurance Committee, American Bar Association
- Life Member, Virginia Chapter, International Association of Arson Investigators

Awards

- Named one of The Best Lawyers in America® in Insurance Law (2012-2017), also listed in Best Lawyers in America – Business Edition (2016)
- Named to Super Lawyers Business Edition US in the area of Plaintiff Defense/General (2012-2014); also Virginia Super Lawyers in the area of Personal Injury Defense: General (2007-2008, 2010-2017)
- Named a “Legal Eagle” for Insurance Law by Virginia Living magazine (2012)
- Designated as one of the Legal Elite in the field of Criminal Law by Virginia Business magazine (2003-2006 and 2008-2009)

Case Studies

THE RESULTS OF CLIENT MATTERS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. PAST SUCCESSES DO NOT PREDICT OR GUARANTEE FUTURE SUCCESSES.

- Feb 19, 2016 — **Jury Affirms Insurance Company Decision on Roof Repair Claim**
- Mar 7, 2014 — **Defense of Explosive Products Liability Case**

GENTRY LOCKE
Attorneys

Cynthia D. Kinser

Senior Counsel

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Cynthia Kinser was the first woman Chief Justice of the Supreme Court of Virginia. Her seventeen years of distinguished service to the Court ended with her retirement in 2014. In 2015, she joined Gentry Locke as Senior Counsel, where she focuses on appeals, criminal matters, and government investigations. Before serving on the Supreme Court of Virginia, Justice Kinser served as a Chapter 7 and Chapter 13 Bankruptcy Trustee for the United States District Court for the Western District of Virginia. She later was appointed a United States Magistrate Judge for that court and served in that capacity for seven years. Prior to her tenure on the federal district court, she enjoyed being a solo practitioner in Pennington Gap, Virginia. Justice Kinser also served for four years as the Commonwealth's Attorney in Lee County, where she lives and maintains a cattle farm to this day.

Education

- University of Virginia School of Law, J.D. 1977
- University of Tennessee, B.A. with highest honors, 1974

Experience

- Represents clients in appellate matters to be brought before the United States Supreme Court and the United States Courts of Appeals. Provides legal counsel and consulting services to clients in motions practice, preservation of error, and appellate matters
- Represents clients in criminal matters, including white collar crimes, government investigations, and in matters of inquiry and charges leveled by governmental agencies
- Appointed to the Supreme Court of Virginia in 1997 and elected by her peers as Chief Justice in February of 2011, for a total of seventeen years of service
- Appointed a Magistrate Judge for the United States District Court for the Western District of Virginia; served from 1990-1997
- Served as Chapter 7 and Chapter 13 Bankruptcy Trustee for the United States District Court for the Western District of Virginia from 1984-1990
- Served as Commonwealth's Attorney for Lee County, Virginia from 1980-1984

Affiliations

- Member, Board of Directors, Mountain Empire Community College Foundation (2016-Present)
- Member, Board of Directors, Federal Magistrate Judges Association (1992-1995)
- Member, Board of Directors, Conference of Chief Justices (2012-2014)
- Member, Virginia State Bar Ninth District Ethics Committee (1982-1985)
- Member, National Association of Bankruptcy Trustees (1984-1990)
- Member, Lee County Bar Association (1990-Present), Past President (1981-1982)
- Member, Virginia State Bar
- Member, The Virginia Bar Association
- Member, Virginia Trial Lawyers Association
- Former Member, Board of Trustees, Appalachian School of Law
- Member, Board of Directors, Virginia 4-H Foundation (1987-1990)
- Member, Board of Directors, Lee County Arts Association (1987-1990)

Awards

- Fellow, Virginia Law Foundation (inducted 2016)
- Recipient, Virginia Bar Association Gerald L. Baliles Distinguished Service Award, the VBA's highest honor (2015)
- Awarded the 2014 Harry L. Carrico Outstanding Career Service Award by the Judicial Council of Virginia
- Recipient, Thomas Jefferson Foundation Medal in Law (2011)

Published Work

- Co-author, **Escobar Aftermath: Expanded Liability, Uncertainty and More Trials**; U.S. Law Week published by Bloomberg BNA (November 3, 2016).

Case Studies

THE RESULTS OF CLIENT MATTERS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. PAST SUCCESSES DO NOT PREDICT OR GUARANTEE FUTURE SUCCESSES.

- Jun 22, 2016 — **Tragic Failure to Properly Diagnose and Treat Results in Jury Verdict for $2.75 Million**

GENTRY LOCKE
Attorneys

Christopher M. Kozlowski

Associate

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Chris Kozlowski is an Associate in our General Commercial practice group. Chris focuses on advising clients in mergers and acquisitions, financings, bank regulatory matters, reporting requirements with the Securities and Exchange Commission and securities offerings. Chris also advises developers and investors in tax credit financings, including state and federal historic rehabilitation tax credits and new markets tax credits. Prior to joining Gentry Locke, Chris practiced in Stamford, Connecticut. Chris is licensed to practice in Virginia and Connecticut.

Education

- Fordham University, B.S. 2009
- Emory University School of Law, J.D. with honors, 2012

Experience

Banking

- Advises banks on mergers and acquisitions
- Assists banks with regulatory matters, including Federal Reserve, OCC and SCC requirements
- Represents banks as issuers and investors in securities offerings
- Represents banks and borrowers in commercial lending transactions

Tax Credit Financing

- Represents clients in transactions involving federal and state historic rehabilitation tax credits
- Represents clients in new markets tax credits and “twinning” transactions

Business

- Advises entities as general outside counsel
- Represents business clients on both the buy-side and sell-side in mergers and acquisitions
- Represents clients before the IRS in tax controversies

Affiliations

- Virginia State Bar (2013-Present)
- The Virginia Bar Association (2013-Present)

GENTRY LOCKE
Attorneys

Justin M. Lugar

Partner

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- Email: jlugar@gentrylocke.com

Justin Lugar is a Partner in our Litigation practice group who focuses primarily on representing individuals and corporations in connection with criminal and government investigations, as well as commercial litigation matters. Recently, the American College of Trial Lawyers awarded Justin the 2016 Chappell-Morris Award for demonstrated professionalism, high ethical and moral standards, excellent character, and outstanding trial skills. In 2014, Justin represented a former food company executive in a two-month jury trial in federal court involving several million documents and multiple federal and state government agencies. Prior to joining Gentry Locke, Justin was an associate at WilmerHale in London, UK. He made his Brexit in 2012. Justin interned with the U.S. Attorney's office in Roanoke, and served as a summer law clerk for judges in the 24th Judicial Circuit of Virginia as well as the Sixth Circuit Court of Appeals.

Education

- University of London, LLM in Dispute and Conflict Resolution, with Distinction, 2009
- Liberty University School of Law, J.D., 2008
- University of Virginia, B.A. 2004

Experience

Criminal:

- Experience representing companies and individuals in the following industries: national security, energy, healthcare, manufacturing, information technology, government contracting, the music industry, food production, tobacco, and public service
- Represented numerous clients in relation to Congressional, Grand Jury, and other federal and state investigations
- Conducted several on-site internal investigations of multi-national financial institution in relation to government investigations in Switzerland, Hong Kong, and Singapore
- Conducted numerous internal investigations and successfully prevented several indictments and subsequent criminal prosecution
- Prepared appellate briefs for Fourth Circuit Court of Appeals on federal criminal sentencing and Fourth Amendment challenges
- Prepared and argued motions to suppress and sentencing motions for federal district court
- Representation of corporate and individual parties in complex tax investigations

Civil:

- Representation of plaintiffs in several civil rights cases including Fourth and Eighth Amendment challenges
- Representation of multinational energy company in a multi-billion dollar dispute concerning a liquid natural gas sales contracts
- Representation of telecommunications company in connection with a 5.5 billion Euro shareholder dispute
- Representation of multinational manufacturing company in a dispute concerning design and performance of commercial railway cars
- Pro bono representation of individual agricultural investor alleging violations of a bilateral investment treaty by an African state

Affiliations

- Member, White Collar Crime Committee, American Bar Association
- Member, National Association of Criminal Defense Lawyers
- Member, Federal Bar Association Roanoke Executive Committee
- Corresponding Member, Emory University Center for the Study of Law & Religion
- Member, The Virginia Bar Association

- Member, Virginia State Bar
- Member, Roanoke Bar Association

Published Work

- **Andy Warholing It: A New Take on an "Old" Tool"**; The Federal Lawyer (December 2016)
- **My Journey Below the Gnat Line in United States v. Stewart Parnell: How to Pass the Long Trial Test**; American Bar Association, 2016
- Co-author, **When Bad Things Happen to Good Companies**; Performance News Summer 2012, Scott Insurance.
- Solving the §1782 Puzzle: Bringing Certainty to the Debate Over 28 U.S.C. §1782's Application to International Arbitration, 47(1) Stanford J. Int'l L. 51 (2011)
- More Uncertainty about §1782's Extension to International Arbitral Proceedings, Kluwer Arbitration Blog (2010).
- Not by the Hair of My Chinny Chin Chin: Ohio's Attempt to Combat the Big Bad Wolf of Blight, 2 Liberty L. Rev. 245 (2007).

GENTRY LOCKE
Attorneys

W. David Paxton

Partner

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David Paxton advises and represents businesses, business owners, and executives in the areas of labor & employment law, complex litigation and whistleblower claims. He chairs the firm's labor and employment practice, is a frequent guest speaker at national and regional employment law seminars, and has consistently been named to *Best Lawyers in America* for Labor & Employment law since 1999.

Education

- University of Virginia School of Law, J.D. 1980
- U.S. Naval Justice School, Honor Graduate 1980
- Hampden-Sydney College, B.A. summa cum laude 1976, Phi Beta Kappa; Omicron Delta Kappa 1975; Baker Scholar 1972-1976

Experience

Complex & Multi-Party Litigation

- Secured jury verdict for three members of insurance company's Board of Directors in defense of claims brought by Commissioner of Insurance for fraud, fiduciary duty, conspiracy and securities violations. Also later recovered more than $3 million in attorney fees on indemnity claims
- Secured summary judgment on §1981 public accommodation discrimination claims brought against large franchisee of national restaurant chain by the Washington Lawyers Committee
- Secured dismissal of anti-trust and constitutional claims brought against statewide organization that regulates public school athletics in Virginia by local media organization seeking to broadcast playoff games
- Represented President of Peanut Corporation of America in connection with congressional and criminal food safety investigations, and in lawsuit to secure D&O coverage for defense costs
- Represented national restaurant chain in connection with contrived "mouse in the soup" claims resulting in the felony criminal conviction of two persons who made allegations
- Represented college athlete on civil rights claims involving sexual assault allegations and successfully challenged the constitutionality of federal law resulting in statute being declared unconstitutional by U.S. Supreme Court

Employment Litigation

- Represents employers on a broad cross-section of industries on claims of discrimination, harassment and retaliation, as well as wage and hour disputes in federal and state courts
- Represented employers and employees in litigation involving claims of theft of trade secrets, disclosure of confidential information, violations of non-competition/restrictive covenants, and other business torts
- Represented international pharmaceutical company to successful conclusion on contract claims against former inventor who began a competing company
- Obtained $4 million jury verdict for privately held company against its former president on claim to recoup bonus paid under theory of unjust enrichment
- Represents senior executives and professionals in disputes with companies
- Represented U.S. subsidiary of large multi-national company on claims of ADEA, ADA and FMLA discrimination allegations to successful resolution
- Secured summary judgment in complex ADA case brought against Fortune 100 company
- Represented large national retailer in claims of sexual harassment by former female employee to successful resolution
- Represented national manufacturer on claims involving age and disability discrimination to successful resolution
- Represented college coaches against public universities on breach of contract, NCAA violations, etc.

- Represented publicly-traded company in contractual dispute with former employee over valuation of stock option benefits upon termination of employment resulting in favorable court settlement
- Represented senior executive in negotiation of dispute with high-tech company over vesting and valuation of stock option rights resulting in favorable out of court settlement

Labor & Employment

- Represents and advises management from a broad cross-section of industries on full range of labor and employment issues that arise on a daily basis such as hiring, E-verify, I-9s, FMLA/ADA, USERRA, wage and hour, Affirmative Action Plans, COBRA, OFCCP audits, harassment and discrimination complaints, investigation of misconduct, OSHA complaints, termination, EEO charges, DOL investigations, and union avoidance
- Represented executive management team in negotiation of executive employment contracts which included equity compensation packages in connection with a $250 million private equity deal
- Represented founder and CEO of high-tech company in negotiation of executive employment contract in anticipation of venture capital investment
- Represented U.S. based companies in establishing indigenous workforce for new operations in India
- Represents management in various industries in planning and implementing workforce reductions
- Represents local school boards and police departments on employment-related matters

Religious Organizations

- Provides general corporate advice to several non-profit and Christian organizations
- Represented Board of Directors of non-profit organization in disputes with its founder and key members of management which led to agreed-upon separation without litigation
- Represented company in acquisition of large network of Christian radio stations

Affiliations

- Fellow, Virginia Law Foundation (Inducted 2014)
- Chair, ALFA International Labor and Employment Law Section (2015-Present), Member of Labor & Employment Law Section Steering Committee (1996-Present); Member, ALFA International Board of Directors (2014-Present)
- Member, Labor & Employment Law Section, American & Virginia Bar Associations (1986-Present)
- Member, Virginia CLE Steering Committee, Labor & Employment Section (2000-2010)
- Board of Directors, VHSL Foundation, Inc. (2004-2009)
- Board of Directors, Interfaith Hospitality Network of Roanoke Valley (2005-2009)
- Member, Planning Committee, Gridiron Club, Hampden-Sydney College (2007-2011)
- Member, Church Council, St. John Lutheran (2006-2009). President (2008-2009)

Awards

- Voted Top Employment & Labor Attorney by readers in The Roanoker magazine's "Best Of" (2012)
- Named a Top Rated Lawyer for Labor and Employment law and Commercial Litigation by American Lawyer Media (2013)
- Named one of The Best Lawyers in America® for more than seventeen consecutive years in the area of Employment Law – Individuals & Management (1999-2017); Labor Law – Management (2011-2017) and Labor & Employment Litigation (2011-2017), named "2017 Roanoke Lawyer of the Year" for Labor & Employment – Litigation
- Named to the "Virginia's Top 50 List" of Virginia Super Lawyers (2007) and Virginia Super Lawyers in the area of Employment & Labor Law (2007-2017), included in Super Lawyers Corporate Counsel edition (2009-2011) and Super Lawyers Business Edition US in the area of Employment & Labor (2012-2014)
- Listed in Benchmark Litigation as a Local Litigation Star for Labor & Employment and General Commercial (2012-2015) and Insurance (2015); and Benchmark Plaintiffs for Labor & Employment (2012-2014), General Commercial, and Insurance (2014)
- Designated one of the Legal Elite in the Labor/Employment field by Virginia Business magazine (2000-2016)
- Named a "Legal Eagle" for Employment Law – Individuals, Employment Law – Management, Labor Law, and Litigation – Labor & Employment by Virginia Living magazine (2012)
- Inclusion on the Virginia Amateur Sports Wall of Honor in its inaugural year (2009)
- Navy Commendation Medal, Distinguished Legal Work (1983)

Published Work

- Co-author, **Rule 68 Offers of Judgment – a Useful Defense Tool**; The VADA Journal of Civil Litigation, Vol. XXIV, No. 4 (Winter 2012-2013)
- Co-Author, The Virginia Lawyer: A Deskbook for Practitioners, Chapter 4, Employment Law: Employee Rights and Employer Responsibilities (2000-2007)
- Co-Author, Annual Survey of Virginia Law: Labor & Employment Law, 40, University of Richmond Law Review, 241 (2005 & 2007)

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Attorneys

Juliana F. Perry

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Julie Perry practices in the area of plaintiff's personal injury. She has been representing plaintiffs primarily in medical malpractice actions for over twenty years. Julie is also experienced in the field of alternative dispute resolution, and she serves as a mediator or arbitrator in a wide variety of litigated matters.

Education

- University of Mississippi School of Law, J.D. 1986
- East Carolina University, B.S. 1983

Experience

- Represented plaintiffs in medical malpractice cases with settlement or verdicts in favor of the plaintiff in excess of $1,000,000
- Represented plaintiffs in personal injury and products liability actions
- Represented plaintiffs and defendants in court settlements throughout the Commonwealth of Virginia
- Served as a mediator and arbitrator in many types of litigated matters
- Represented the defendants as a public defender in the Office of Public Defender Roanoke, Virginia

GENTRY LOCKE
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Jonathan D. Puvak

Associate

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Jon Puvak focuses on assisting businesses, business owners, lenders, and governmental entities with corporate matters, commercial transactions, employee benefits, tax, and real estate matters. Before attending law school, Jon gained business and real estate development experience by working with NVR Inc., one of the nation's largest homebuilders. Prior to joining Gentry Locke, Jon practiced with a law firm based in Arlington, Virginia.

Education

- College of William and Mary, Marshall-Wythe School of Law, J.D. 2011
- Bridgewater College, B.A. summa cum laude, 2004

Experience

Business & Corporate

- Represented businesses in negotiation, preparation, implementation of asset and stock mergers and acquisitions
- Represented corporate clients in corporate governance matters
- Represented individuals with new business entity formation and succession planning
- Represented lenders and borrowers with lending and refinancing transactions
- Represented parties in the drafting of complex domestic and international contracts
- Represented businesses in the design, implementation, and operation of retirement plans and executive compensation plans

Real Estate/Land Use/Municipal & Local Government

- Represented businesses and individual clients in real property transactions
- Represented local governments in land use and significant environmental matters
- Assisted clients in obtaining land use approvals and regularly appears before Planning Commissions, Board of Supervisors, County Boards, City Councils, and Boards of Zoning Appeals
- Guided developers through the zoning entitlement process and coordinates with architects, engineers, and other consultants
- Conducted feasibility and due diligence analyses for commercial real estate transactions

Affiliations

- Chamber Ambassador, Roanoke Regional Chamber of Commerce (2016-Present)
- Member, Virginia State Bar: Young Lawyers Division (2011-Present); Chair, Roanoke, Professional Development Conference; VSB Young Lawyers Conference (2016-Present); Member, VSB Communications Committee (2016-Present)
- Member, American Bar Association, Young Lawyers Division
- Member, The Virginia Bar Association: Young Lawyers Division (2011-Present); Chair, Young Lawyers Division CLE Committee (2016-Present)
- Member, Roanoke Bar Association (2014-Present)
- Firm Campaign Chair, United Way of Roanoke Valley (2015-Present)
- Graduate of Leadership Arlington, Young Professionals Program (2013)
- Member, Urban Land Institute (2011-2015)

Published Work

- Note, Executive Branch Czars, Who are They? Are They Needed? Can/Should Congress do Anything About These Czars?, 19 WM. & MARY BILL RTS. J. 4 (2011).

Case Studies

THE RESULTS OF CLIENT MATTERS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. PAST SUCCESSES DO NOT PREDICT OR GUARANTEE FUTURE SUCCESSES.

- Jan 14, 2016 — **Approval for Eight Special Use Permits will Improve Wireless Communications in Montgomery County**

GENTRY LOCKE
Attorneys

Anthony M. Russell

Partner

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Tony Russell helps people who have been hurt by the carelessness of others. Tony was raised by his mother and grandparents. While he was growing up, he watched people suffer injustice because they lacked the means to protect themselves or fight back. Tony found his calling as a lawyer and dedicated himself to making a difference in their lives. Tony's intense dedication to pursuing justice for victims includes extensive investigation and research. He believes the law should exist to help make victims whole and to protect others from becoming victims.

Tony is a Partner in the firm and is consistently noted as a *Virginia Super Lawyer* in Personal Injury and Medical Malpractice Litigation for plaintiffs. He also is recognized among the *Best Lawyers in America* in several categories for plaintiffs, including Mass Tort Litigation/Class Actions, Medical Malpractice Law, Personal Injury and Product Liability Litigation, and in 2016 was named the "Roanoke Lawyer of the Year" for Medical Malpractice Law – Plaintiffs.

Education

- University of Virginia School of Law, J.D. 1999
- University of Virginia, B.A. with distinction, Phi Beta Kappa, 1996

Experience

- Represented numerous plaintiffs before the Supreme Court of Virginia including Sawyer v. Comerci, Monahan v. Obici Medical Management Servs., Inc., May v. Caruso, Taboada v. Daily Seven, and Rascher v. Friend
- Represented four plaintiffs in obtaining a recovery of $7,500,000
- Represented many plaintiffs in obtaining recoveries of $1,000,000 or more
- Represented many plaintiffs in obtaining recoveries of $500,000 or more
- Represented numerous plaintiffs in cases that received media publicity including Terry v. Harron ($700,000 jury verdict in a medical malpractice case); Swanson v. Carilion ($1,000,000 settlement); Shumate v. Meincke ($1,300,000 jury verdict in a medical malpractice case); Neaves v. Sugerman ($250,000 jury verdict in a medical malpractice case); Andrews v. Gray (confidential settlement in a medical malpractice case involving wrong site surgery that was resolved as the jury was deliberating); Shupe v. Carilion Healthcare Corporation ($2,000,000 jury verdict in a medical malpractice case)
- Represented plaintiffs in state courts throughout the Commonwealth of Virginia including Wise County, Smyth County, Washington County, Giles County, Montgomery County, Radford, Danville, Martinsville, Roanoke, Roanoke County, Salem, Botetourt County, Alleghany County, Richmond, Suffolk, Norfolk, Alexandria, Fredericksburg, Augusta County, Rockingham County, Charlottesville, Greene County, Arlington, Lynchburg, Rockbridge County, Buena Vista, Tazewell County, Russell County, Bedford County, Bristol, Campbell County, Carroll County, Dickenson County, Fairfax, Franklin County, Grayson County, Halifax, Hampton, Henrico County, Henry County, Lee County, Prince William County, Pulaski County, Radford, Scott County
- Tried over fifty jury trials in state courts throughout the Commonwealth of Virginia from as far west as Scott County, Virginia, to as far east as Norfolk, Virginia, to as far north as Alexandria, Virginia, and to as far south as Danville, Virginia
- Represented plaintiffs in federal courts throughout the Commonwealth of Virginia including the United States District Court for the Western District of Virginia, Roanoke Division, Big Stone Gap Division, and Abingdon Division, as well as the United States District Court for the Eastern District of Virginia, Alexandria Division and Richmond Division
- Tried several jury trials in federal courts including the United States District Court for the Western District of Virginia, Roanoke Division, Big Stone Gap Division, and Abingdon Division
- Represented plaintiffs in over fifty mediations
- Represented plaintiffs in over ten arbitrations
- Represented plaintiffs in cases pending in courts in North Carolina and Tennessee

- Represented plaintiffs in cases involving medical malpractice, wrongful death, legal malpractice, product liability, dog attacks, car accidents, defamation (slander and libel), veterinary malpractice, assault and battery, pedestrian accidents, contract disputes, employment disputes, tractor trailer accidents, dental malpractice, nursing home malpractice/abuse
- Participated in several continuing legal education courses including as a presenter and preparing written materials

Affiliations

- Barrister, The Ted Dalton American Inn of Court (2010-Present); Associate (2007-2010)
- Board of Directors, New Vision: President (2017-Present), Member (2014-2016)
- Planning Commission for the City of Roanoke (2015-Present)
- Member, American Board of Trial Advocates (2009-Present)
- Member, American Association of Justice
- Member, Virginia Trial Lawyers Association
- Member, Virginia State Bar
- Member, Roanoke Bar Association
- Member, Etheridge Society (2009-Present)
- Member, American Legion Post 3

Awards

- Named one of The Best Lawyers in America® in the areas of Mass Tort Litigation/Class Actions – Plaintiffs, Medical Malpractice – Plaintiffs, Personal Injury Litigation – Plaintiffs (2013-2017), and Product Liability Litigation – Plaintiffs (2017), also listed in Best Lawyers in America – Business Edition (2016), named “2017 Roanoke Lawyer of the Year for Personal Injury Litigation – Plaintiffs”
- Designated as a National Trial Lawyers Top 40 Under 40 (2012)
- Recipient, Client Distinction Award, Martindale-Hubbell (2012)
- Named a Top Rated Lawyer for Medical Malpractice, Personal Injury, and Legal Malpractice law by American Lawyer Media (2013)
- Named to the Blue Ridge Business Journal’s “20 Under 40 List” of the Blue Ridge Region’s up-and-coming business leaders (2010)
- Barrister, The Ted Dalton American Inn of Court (2009-2012) and Associate (2007-2010)
- Elected to Virginia Super Lawyers for Personal Injury/Medical Malpractice: Plaintiffs in Virginia Super Lawyers magazine (2016-2017) and was previously named a Rising Star 2007, 2009-2015)
- Roanoke Bar Association Volunteer Service Award for 25+ hours of pro bono & community service (2000-2006)
- Designated one of the “Legal Elite” in the Young Lawyer (2010), Civil Litigation (2016), and Legal Services/Pro Bono category (2006) by Virginia Business magazine
- Pro-Bono of the Year Award, Blue Ridge Legal Services, Inc. (2004-2005)

Published Work

- **Surviving the Defense Medical Examination**; The Journal of the Virginia Trial Lawyers Association, Volume 25 Number 1, 2014.

Case Studies

THE RESULTS OF CLIENT MATTERS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. PAST SUCCESSES DO NOT PREDICT OR GUARANTEE FUTURE SUCCESSES.

- Aug 5, 2017 — **Wrongful death surgery "blame game" results in verdict of over $8.75M**
- Apr 3, 2017 — **Gentry Locke attorneys secure settlement for orphaned toddler**
- Aug 24, 2015 — **Preventable Amputation Results in Settlement of $1M to Vietnam Veteran in Federal Tort Claims Act Case**
- Aug 14, 2015 — **$300,000 Jury Verdict in Greenway Collision**
- Jul 20, 2015 — **Orthopedic Doctor Re-breaks Unhealed Broken Arm, Jury Awards Victim $700k**
- Jun 12, 2015 — **Jury Awards $1.1M to Victim of Severely Debilitating Condition Caused by Podiatrist**
- Jan 28, 2015 — **Feeding Tube Error Case Resolved for Widow**
- Nov 15, 2014 — **Victim of Surgeon's Wrongful Cutting and Failure to Timely Treat Awarded $1M by Jury**
- Sep 29, 2013 — **Arbitration Result in Favor of Taxicab Accident Victim**
- Sep 27, 2013 — **Plaintiff in Multi-vehicle Accident Receives Over $225,000**
- Jul 17, 2013 — **$660,000 Verdict for Family in Wrongful Death Case**
- Jun 27, 2013 — **$1 Million Jury Verdict for Victim of Medical Malpractice**
- Jan 4, 2012 — **Settlement on Uninsured Motorist Accident**
- Dec 28, 2011 — **Maximum Awarded for Head-on Accident with Tractor-trailer**

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Attorneys

J. Scott Sexton

Partner

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Scott Sexton, Senior Litigation Partner, is always neck-deep in some large and complicated lawsuit. He is truly at home in the courtroom, and his work ethic is unsurpassed. His partners and clients value his creative energy, hard work, persistence and ability to communicate complicated issues in simple terms. Scott practices law with the fundamental belief that there are many paths to victory, and most are not obvious or easy. For him, "no" is not an answer, just an invitation to find another way – or try harder.

Scott's cases include complex commercial litigation, products liability, toxic torts, significant property disputes, mineral cases, catastrophic injuries, mass torts, and multi-district litigation. He chairs the firm's Mineral, Energy and Natural Resources section, has been recognized by his peers as a *Leader in the Law* for his role in developing the law in Virginia, is a charter member of the International Institute of Environmental, Energy and Natural Resources Law, a member of the Energy and Mineral Law Foundation, and a Senior Fellow in the Litigation Counsel of America. Combining an understanding of business and industry with decades of experience in the law, Scott is known as an aggressive but fair advocate for his clients' positions. He is frequently called on by his law partners and lawyers outside the firm for assistance and advice with challenging cases. And, he is consistently voted by his peers as a *Virginia Super Lawyer*, and ranked as one of Virginia's *Legal Elite* and one of the *Best Lawyers in America*.

Education

- Southern Methodist University School of Law, J.D. 1988
- University of Dallas, B.A. with honors, 1985

Experience

In 2010, Scott Sexton was named a "Leader in the Law" for his role as "Developer of the Law on Virginia Mineral Rights." In addition to trial work in this area, his focus in this field has taken him to the Virginia Supreme Court on numerous occasions over the past decade. Scott also focuses on ***Products Liability*** *and* ***Catastrophic Injury*** *cases.*

Energy Cases: Mineral, Energy, and Land Rights

- Obtained judgment for over $23 million against Peabody Energy Corporation subsidiary
- Represented coal owner interests in **federal class action over competing property rights** in coal bed methane
- Represented long-time property owners against claims that prior conveyances were invalid
- Represented surface property owner against **aggressive claims by multi-national limestone producer**
- Negotiated favorable resolution to complicated regulatory claims against contract miner in West Virginia
- Defended large gas company against **multi-million dollar claims**
- Represented southwest Virginia local governments in negotiations with the coal industry regarding severance taxes
- Obtained **75 million dollar settlement** on behalf of mineral owners regarding claims of unauthorized dumping in old mine works
- Obtained largest jury verdict on record in the United States District Court for the Western District of Virginia on behalf of mineral owners regarding deductions from royalty
- Obtained **summary judgment liability ruling** that coal operator had no right to dump mine wastewater in mine works where plaintiffs owned coal
- **Judicially overturned arbitration decision** denying coal owner clients' claims that coal operator had caused coal to become "lost or threatened" under terms of coal lease
- Obtained **ruling by Virginia Supreme Court** that coal company had no legal right to dump mine waste in old mine works

- Obtained **ruling by Virginia Supreme Court** that gas company could not block construction of a competing gas pipeline when CNX asserted that it had the “exclusive” right to construct pipelines under its gas lease with the 20,000 acre property owner
- Argued landmark decision at trial court and before the Virginia Supreme Court determining ownership of Coalbed Methane gas in Virginia
- Successfully defended manufacturer in defective pipeline case
- Successfully defended gas production company’s property interests in gas storage facility
- Represented numerous parties in various disputes involving Joint Operating Agreements
- Successfully defended gas transportation company in claims related to contract for construction of pipeline
- Successfully defended gas distribution company in claims related to gas explosion
- Successfully obtained reversal of temporary injunction issued against gas production company related to construction of and access to pipeline facility
- Represented gas production company in anti-trust and business conspiracy case against competitor
- Represented mineral owners before Virginia Gas and Oil Board
- Represented gas production company before Virginia Gas and Oil Board
- Successfully defended mineral owners against claim by others alleging competing title to coalbed methane gas and royalties
- Represented mineral owners in claims for over-deduction from royalties (ongoing)
- Represented gas production company in claims by injured pipeline worker
- Represented former shareholder in gas production company regarding dispute over payments due under buy-out
- Represented gas production company in dispute with another mineral leaseholder on large tract of gas producing property
- Represented holder of 27,000 acres of mineral interests in dispute arising out of alleged damage to its minerals
- Represented holder of 12,000 acres of mineral interests in dispute arising out of alleged damage to its minerals
- Advised large gas production company in dispute over joint operating agreement and related rights
- Successfully represented vendor of supplies and services in connection with claims for unpaid invoices against a large national pipeline construction contractor, obtaining payment
- Defended gas production and distribution company against claims by pipeline construction company, successfully obtaining jury verdict on counterclaim
- Successfully defended large gas production company against claims by coal operator related to construction and operation of a gas transportation pipeline
- Successfully resolved claims against former shareholder of large coal company arising out of stock redemption
- Represented parties opposed to permit sought to allow large coal operator to discharge waste mine water into mines and local waterway
- Represented gas production company in connection with issues related to conflicts with coal operators under Virginia Gas and Oil Act
- Represented various parties in connection with numerous issues related to mineral leases and deeds

Commercial Litigation

- Obtained jury verdict in favor of client accused of breach of fiduciary duty, interference with contract, and other business torts. Jury granted judgment on counterclaim in favor of client for conversion
- Successfully represented real estate developer in enforcing contract for purchase of resort acreage where final contract had not yet been fully executed
- Obtained jury verdict in favor of seller of large farm in Shenandoah Valley
- Successfully resolved litigation asserting claims against purchaser of $275 million real estate portfolio
- Successfully represented national bank on claims against former shareholder/director for fraud
- Successfully represented minority shareholders in shareholder derivative lawsuit
- Represented trademark holder against infringer, obtaining judgment for damages associated with pirated products
- Represented numerous parties in D&O Claims arising out of corporate governance
- Represented minority shareholder in claims against majority shareholder who had allegedly diluted stock
- Represented Officer, Director and former Shareholder in claims by bankrupt corporation
- Represented Trust beneficiary in claims against trustees of large estate
- Represented numerous parties in estate litigation

Catastrophic Injury

- Successfully represented many clients in claims arising from contaminated steroid injections
- Obtained jury verdict in favor of client in complicated construction case
- Negotiated global settlement on behalf of Virginia injured parties in Multi-District Litigation case

Affiliations

- Member, Boyd Graves Society
- Barrister, The Ted Dalton American Inn of Court
- Faculty, Virginia State Bar Professionalism course
- Member, Business Law Section, Virginia Bar Association

- Member, Intellectual Property Section, Virginia Bar Association
- Member, Civil Litigation Section, Virginia Bar Association
- Past Member, 8th District Ethics Committee, Virginia State Bar
- Senior Fellow, Trial Lawyer Honorary Society, Litigation Counsel of America

Awards

- Named a Virginia Leader in the Law in 2010 by Virginia Lawyers Weekly
- Named one of The Best Lawyers in America® in the fields of Commercial Litigation (2008-2017) and Oil & Gas Law (2009-2017), also listed in Best Lawyers in America – Business Edition (2016)
- Named to Virginia Super Lawyers in the area of Business Litigation (2007-2017), included in Super Lawyers Corporate Counsel edition (2010) and Super Lawyers Business Edition US in the area of Business Litigation (2012-2014)
- Named a “Legal Eagle” for Commercial Litigation and Oil & Gas Law by Virginia Living magazine (2012)
- Designated as one of the Legal Elite in the field of Civil Litigation (2008-2010, 2012-2015) and Intellectual Property (2003-06) by Virginia Business magazine

GENTRY LOCKE
Attorneys

Clark H. Worthy

Partner

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Clark Worthy has a B.S. in Finance from the University of Virginia, McIntire School of Commerce and has spent over 20 years working with individuals on their personal financial matters, and with private corporations on governance, merger and acquisition, real estate and financing matters. For the past 10 years, Clark has primarily devoted his practice to commercial real estate matters including purchases, sales, leases, tax-free exchanges, financings and, most recently, retail net lease properties. A Partner in the firm, Clark is recognized among the *Best Lawyers in America* for Real Estate Law.

Education

- Washington and Lee University School of Law, J.D. magna cum laude, 1992
- University of Virginia, McIntire School of Commerce, B.S. in Finance, 1986

Experience

- Work with developers in Blacksburg and Smith Mountain Lake who specialize in residential and commercial subdivisions
- Worked on both the acquisition by and the sale of commercial properties to local banks for the location of new branch banks
- Worked with a national developer to close a land lease that was a critical piece of a larger phased retail development
- Worked on the acquisition and sale of several local businesses including a veterinary practice, dental practices and manufacturing companies
- Worked on several estate administrations and assisted beneficiaries with post-mortem planning
- Worked with individuals and corporations in 1031 Like-Kind and Reverse Like-Kind Exchange transactions
- Assist a large non-profit organization with its low-income housing projects, general corporate work and loan programs
- Corporate counsel for several local businesses including physician practices, a landscaper and developer, insurance agents, contractors and subcontractors, provider of assistance programs to disabled individuals and a mortgage broker
- Assisted a wireless communications provider and a tower company in obtaining Special Use Permits for the construction of cellular towers

Affiliations

- Member and Former Board Chair, Apple Ridge Farm
- Past Board Chairman, Presbyterian Community Center in Roanoke
- Past Board Member, Roanoke Regional Chamber of Commerce
- Graduate, Leadership Roanoke Valley
- Law Clerk to the Honorable H. Emory Widener, Jr., U.S. Court of Appeals, 4th Circuit, 1992-1993

Awards

- Named one of The Best Lawyers in America® in Real Estate Law (2012-2017)
- Named a “Legal Eagle” for Real Estate Law by Virginia Living magazine (2012)

Unsolved Mysteries of Civil Procedure

Travis J. Graham

1

UNSOLVED MYSTERIES OF CIVIL PROCEDURE

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Gentry Locke Seminar
September 8, 2017

I. Responsive Pleadings and Removal

Federal Rule:

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

. . .

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

. . .

(g) Joining Motions.

(1) ***Right to Join*.** A motion under this rule may be joined with any other motion allowed by this rule.

(2) ***Limitation on Further Motions*.** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) ***When Some Are Waived.*** A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) ***When to Raise Others.*** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in a pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

. . .

1. Which defenses can be waived, and when?

- You waive objections to personal jurisdiction, venue, improper service, and improper process unless these defenses are made in the first thing you file.

- You waive the right to file a motion under Rule 12(b)(6) and 12(b)(7) if you answer or make another Rule 12(b) motion, but you can raise these same defenses via a motion for judgment on the pleadings later.

- You waive the right to file a motion for a more definite statement or a motion to strike if you answer.

- You never waive the right to object to lack of subject matter jurisdiction.

2. How do responsive pleadings and removal work together?

- You can remove a case to federal court before being served. Thereafter, you do not have to file a responsive pleading until you are served.

- You must respond to a state court complaint within 21 days after service. You have 30 days after service to remove to federal court. If you miss the 21-day deadline in state court, you are in default regardless of whether you then remove the case.

- If you remove after service, you must respond within the longer of 21 days after receiving a copy of the initial pleading, 21 days after service, or 7 days after removing.

- You do not waive objections to personal jurisdiction by removing to federal court. You do waive objections to venue.

II. Nonsuits, Voluntary Dismissals, and Tolling Statutes

Federal Rule:

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) ***By the Plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal-or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

. . .

State Rule:

Virginia Code § 8.01-380. Dismissal of action by nonsuit; fees and costs.

A. A party shall not be allowed to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding, unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision.

. . .

B. Only one nonsuit may be taken to a cause of action or against the same party to the proceeding, as a matter of right, although the court may allow additional nonsuits upon reasonable notice to counsel of record for all defendants and upon a reasonable attempt to notify any party not represented by counsel, or counsel may stipulate to additional nonsuits. The court, in the event additional nonsuits are allowed, may assess costs and reasonable attorney's fees against the nonsuiting party. When suffering a nonsuit, a party shall inform the court if the cause of action has been previously nonsuited. Any order effecting a subsequent nonsuit shall reflect all prior nonsuits and shall include language that reflects the date of any previous nonsuit together with the court in which any previous nonsuit was taken.

. . .

D. A party shall not be allowed to nonsuit a cause of action, without the consent of the adverse party who has filed a counterclaim, cross claim or third-party claim which arises out of the same transaction or occurrence as the claim of the party desiring to nonsuit unless the counterclaim, cross claim or third-party claim can remain pending for independent adjudication by the court.

State Tolling Statute:

Virginia Code § 8.01-229. Suspension or tolling of statute of limitations; effect of disabilities; death; injunction; prevention of service by defendant; dismissal, nonsuit or abatement; devise for payment of debts; new promises; debts proved in creditors' suits.

. . .

E. Dismissal, abatement, or nonsuit.

1. Except as provided in subdivision 3 of this subsection, if any action is commenced within the prescribed limitation period and for any cause abates or is dismissed without determining the merits, the time such action is pending shall not be computed as part of the period within

which such action may be brought, and another action may be brought within the remaining period.

. . .

3. If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation, or within the limitation period as provided by subdivision B 1, whichever period is longer. This tolling provision shall apply irrespective of whether the action is originally filed in a federal or a state court and recommenced in any other court, and shall apply to all actions irrespective of whether they arise under common law or statute.

. . .

1. Where is the federal tolling statute?

- There isn't one.

2. When and how can I take a voluntary dismissal in federal court, and be sure that I can refile my action?

- In federal court, voluntary dismissal can occur in three ways:

  a. the plaintiff may file a notice at any time before any defendant files an answer or a motion for summary judgment;

  b. after an answer or motion for summary judgment has been filed, the case may be voluntarily dismissed by the filing of a stipulation signed by all parties who have appeared;

  c. otherwise, the dismissal can only occur with the permission of the court.

- The res judicata effect of a voluntary dismissal varies according to the circumstances:

  - Dismissal by notice, stipulation, or court order is presumed to be without prejudice, unless the order provides otherwise.

  - However, if a plaintiff has previously dismissed any action, whether in state or federal court, which included or was based on the same claims, the second dismissal by notice is with prejudice. This is called the "2 dismissal" rule.

- A second dismissal by stipulation is not with prejudice unless the order says so.

- If the first case was in state court, and the second is dismissed in federal court, the "2 dismissal" rule applies.

- If the first case was in federal court, and the second case is dismissed in state court, state law governs.

- If a case is barred by the "2 dismissal" rule in federal court, it is also barred in state court.

- If a defendant has pleaded a counterclaim, the plaintiff may obtain a dismissal over the defendant's objections only if the counterclaim may remain pending for adjudication. **[NOTE: NEVER DO THIS]**

3. When and how can I take a nonsuit in state court, and be sure that I can refile my action?

- A plaintiff may take one nonsuit as a matter of right at any time before (a) a motion to strike is sustained, (b) the jury retires, or (c) the action is submitted to the court for decision, either after trial or on a dispositive motion.

- Additional nonsuits may be had only if (a) the court allows it or (b) all counsel stipulate.

- The 2007 amendment to § 8.01-380 provides that "when suffering a nonsuit, a party shall inform the court if the cause of action has been previously nonsuited." A failure to do so may render the nonsuit ineffective, which may prevent the nonsuiting party from taking advantage of the savings statute.

III. Use of Depositions at Trial

Federal Rule:

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions.

(1) ***In General.*** At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

- **(A)** the party was present or represented at the taking of the deposition or had reasonable notice of it;
- **(B)** it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and
- **(C)** the use is allowed by Rule 32(a)(2) through (8).

(2) ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) ***Deposition of Party, Agent, or Designee.*** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) ***Unavailable Witness.*** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

- **(A)** that the witness is dead;
- **(B)** that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;
- **(C)** that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;
- **(D)** that the party offering the deposition could not procure the witness's attendance by subpoena; or
- **(E)** on motion and notice, that exceptional circumstances make it desirable —in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.

. . .

State Rule:

Rule 4:7. Use of Depositions in Court Proceedings

(a) *Use of Depositions.* –At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

. . .

(2) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(3) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 4:5(b)(6) or 4:6(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose in any action upon a claim arising at law, issue heard by an advisory jury empaneled pursuant to Code § 8.01-336(E), or hearing ore tenus upon an equitable claim if the court finds: (A) that the witness is dead; or (B) that the witness is at greater distance than 100 miles from the place of trial or hearing, or is out of this Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) that the witness is a judge, or is a superintendent of a hospital for the insane more than 30 miles from the place of trial, or is a physician, surgeon, dentist, chiropractor, or registered nurse who, in the regular course of his profession, treated or examined any party to the proceeding, or is in any public office or service the duties of which prevent his attending court provided, however, that if the deponent is subject to the jurisdiction of the court, the court may, upon a showing of good causes or sua sponte, order him to attend and to testify ore tenus; or (F) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

1. How does all this work?

- It's simple:

Did the opposing party have notice of the deposition?

YES **NO** → can't use

↓

Is the deposition (1) being used for impeachment, (2) a party admission, (3) the statement of a person who is dead, over 100 miles from the courthouse, unavailable because of age, illness, infirmity, imprisonment, or outside the reach of a subpoena, or (4) (in state court only), the deposition of a doctor or another person listed in the rule?

YES **NO** → can't use

↓

The deposition transcript then becomes the equivalent of a live witness, and is admissible just as if the deponent were testifying.

2. Are there any big differences between the federal and state rule?

- The federal rule contains no provision like 4:7(a)(4)(E) referring to judges, physicians, etc.

3. What are the rules on expert depositions?

- An expert is not a party or agent of a party, and so his or her statements are not party admissions. The law pretends that experts are impartial witnesses.

- If a deposition can be read into evidence under the rules set out above, that is the end of the inquiry. There are not supposed to be any other issues. There is no distinction between a "proof" deposition and a "discovery" deposition in either federal or state law, and no special rules about experts. So, if you meet the requirements of Rule 32 or Rule 4:7, you can:

    - use the deposition of your expert;

    - use the deposition of an expert hired by a party that has been dismissed from the case;

    - use the deposition of an opposing party's expert;

    - use the other party's examination of an expert;

- subpoena an expert, depose him or her, and use the transcript.

But, you cannot:

- force someone to offer an expert opinion against his or her will;
- read an opposing party's expert report into evidence, unless you find a way around the hearsay rule;
- hire away the opposing party's expert.

- Neither Virginia nor federal law recognizes the existence of a "de bene esse" deposition. This concept survives only because there might be times when a deposition could not be read into evidence under the rules, but the parties agree that it can. And because we really like Latin phrases and refuse to embrace change.

Defamation in Virginia

Eramo v. Rolling Stone

W. David Paxton
J. Scott Sexton
Michael J. Finney

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DEFAMATION IN VIRGINIA -- *ERAMO V. ROLLING STONE*

W. David Paxton, J. Scott Sexton, and Michael J. Finney
Gentry Locke Seminar
September 8, 2017

I. Introduction.

A. On November 19, 2014, Rolling Stone published "A Rape on Campus" (the "Article"), both in its print magazine and online. The Article began in shocking fashion—the gang-rape of "Jackie" at a University of Virginia fraternity. It went on to explore issues of sexual assault at college—campus culture, Title IX obligations, administration response, etc.—using Jackie's story as the primary prism.

B. The Article was an immediate firestorm, due to the brutality of Jackie's reported assault, the description of UVA culture, and the lack of action against Jackie's alleged perpetrators.

C. In the weeks that followed, however, Jackie's account of her alleged gang-rape was shown to be unreliable, leading Rolling Stone to apologize, commission an investigation by the Columbia School of Journalism, and then officially withdrew the Article in conjunction with its publication of Columbia's report.

D. Three defamation lawsuits were filed in the Article's wake: by the fraternity, by three individual fraternity members, and by then Associate Dean Nicole Eramo—the UVA administration's primary point of contact with Jackie.

E. Only Eramo's lawsuit went to trial. It took place over three weeks last Fall, in Charlottesville federal court.

F. We represented the Defendants—the Rolling Stone entities that published the Article, as well as its author, Sabrina Rubin Erdely.[1]

G. This program will provide an overview of defamation law in Virginia, examine a few legal issues that ended up being of particular significance, and (during the presentation) share some stories from the case.

[1] In addition to the Article, certain post-Article statements also were at issue in the litigation. Here we will focus only on the Article statements.

II. Overview of Defamation Law.[2]

A. "In Virginia, when a plaintiff alleges defamation by publication, the elements are (1) publication of (2) an actionable statement with (3) the requisite intent." *Schaecher v. Bouffault*, 772 S.E.2d 589, 594 (Va. 2015) (quotation omitted). Damages are also required, with the level of proof depending on whether the alleged statement constitutes defamation *per se*.

B. Publication. The statement must be heard/read by a third-party, *i.e.*, someone other than the plaintiff, and understood to be "of or concerning" the plaintiff.[3]

1. The fact of publication is generally only an issue with a verbal defamation claim.

   a. "It is sufficient to show that, when the defendant addressed the defamatory words to the plaintiff, another person was present, heard the words spoken, and understood the statement as referring to the plaintiff." *Food Lion v. Melton*, 458 S.E.2d 580, 584 (Va. 1995).

2. To be "of or concerning" a plaintiff, the statement need not refer to the plaintiff by name. It suffices if the publication was intended to refer to the plaintiff and this would be understood by the audience:

   a. "[A defamation] plaintiff must show that the alleged [defamation] was published 'of or concerning' him. He need not show that he was mentioned by name in the publication. Instead, the plaintiff satisfies the 'of or concerning' test if he shows that the publication was intended to refer to him and would be so understood by persons reading [or hearing] it who knew him . . . . But if the publication on its face does not show that it applies to the plaintiff, the publication is not actionable, unless the allegations and supporting contemporaneous facts connect the [defamatory] words to the plaintiff." *WJLA-TV v. Levin*, 564 S.E.2d 383, 390 (Va. 2002) (quoting *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 738 (Va. 1985) (brackets in original).

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[2] In Virginia, there is no legal distinction between libel and slander, but rather a single cause action for "defamation." *See, e.g.*, *Fleming v. Moore*, 275 S.E.2d 632, 635 (Va. 1981).

[3] Even assuming "publication," if the communication was "only between persons on a subject in which the persons have an interest or duty," a qualified privilege attaches that can defeat a defamation claim. *Cashion v. Smith*, 749 S.E.2d 526, 532 (Va. 2013) (quotation omitted). *See also Tomlin v. IBM Corp.*, 84 Va. Cir. 280, 287 (Fairfax Co. 2012) ("The Virginia Supreme Court has long held that 'a communication, made in good faith, on a subject matter in which the person communicating has an interest or owes a duty, legal, moral, or social, is qualifiedly privileged if made to a person having a corresponding interest or duty.'") (quoting *Taylor v. Grace*, 166 Va. 138, 144 (1936)).

C. Actionable statement.

1. To be "actionable," a statement must be "both false and defamatory." *Schaecher*, 772 S.E.2d at 594.

2. Falsity—fact v. opinion.

   a. To be false, a statement "must 'have a provably false factual connotation and thus [be] capable of being proven true or false.'" *Schaecher*, 772 S.E.2d at 597 (quoting *Cashion v. Smith*, 749 S.E.2d 526, 531 (Va. 2013) (brackets in original). *See also Schaecher*, 772 S.E.2d at 597 (the "verifiability of the statement in question [is] a minimum threshold issue") (quoting *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1288 (4th Cir. 1987)) (brackets in original) (emphasis added); *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 44, 670 S.E.2d 746, 749 (2009) (a statement must be "subject to empirical proof").

   b. Thus, "rhetorical hyperbole" cannot be defamatory. *Schaecher*, 772 S.E.2d at 600.

   c. By contrast, "[w]hen a statement is relative in nature and depends largely on a speaker's viewpoint, that statement is an expression of opinion." *Cashion*, 749 S.E.2d at 531 (emphasis added).

   d. "[P]ure expressions of opinion' are constitutionally protected and 'cannot form the basis for a defamation action.'" *Tharpe v. Saunders*, 737 F.E.2d 890, 893 (Va. 2013) (emphasis added) (quotations omitted).

   e. An "opinion," however, may still be actionable if it implies an assertion of objective fact. *Schaecher*, 772 S.E.2d at 600. But when the facts underlying such an opinion are fully disclosed—and the stated facts are not themselves false/defamatory—then the opinion is not actionable because it "reasonably could be understood only as [the speaker's] personal conclusion about the information presented." *Id*. at 601 (quoting *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 730 (1st Cir. 1992).

   f. "To determine whether a statement can be reasonably understood as stating or implying actual facts [and] whether those statements are verifiable . . . [courts] must examine them in context." *Schaecher*, 772 S.E.2d at 595 (emphasis added). *See also id*. (a "publication must be taken as a whole, and in the sense in which it would be understood by the readers to whom it was addressed") (quotation omitted).

   g. The fact/opinion issue is determined by the court as a matter of law. *Hyland*, 670 S.E.2d at 750 ("[B]efore submitting a defamation claim to a jury, a trial judge must determine as a matter of law whether the allegedly defamatory

statements contain provably false factual statements or are merely statements of opinions.") (citing cases).

3. Defamatory meaning.

   a. "Defamatory words are those 'tend[ing] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Schaecher*, 772 S.E.2d at 594 (quoting Restatement (Second) of Torts § 559).

   b. There must be a defamatory "sting," meaning that the language "tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous." *Schaecher*, 772 S.E.2d at 594 (quotation omitted).

   c. In other words, to be defamatory, "a statement must be more than merely unpleasant or offensive; it must make the plaintiff appear odious, infamous, or ridiculous." *Chapin v. Greve*, 787 F. Supp. 557, 562 (E.D. Va. 1992), *aff'd sub nom. Chapin v. Knight-Ridder, Inc*., 993 F.2d 1087 (4th Cir. 1993) (internal quotation marks omitted).

   d. There are also certain categories of defamatory words that are actionable as "defamation *per se*":

      > (1) Those which impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished.
      >
      > (2) Those which impute that a person is infected with some contagious disease, where if the charge is true, it would exclude the party from society.
      >
      > (3) Those which impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment.
      >
      > (4) Those which prejudice such person in his or her profession or trade.
      >
      > *Tronfeld v. Nationwide Mut. Ins. Co.*, 636 S.E.2d 447, 449-50 (Va. 2006)

   e. "Virginia law requires that the potential defamatory meaning of statements be considered in light of the plain and ordinary meaning of the words used in context as the community would naturally understand them." *Wells v. Liddy*, 186 F.3d 505, 523 (4th Cir. 1999).

f. It is an "essential gatekeeping function of the court" to "[e]nsur[e] that defamation suits proceed only upon statements which actually may defame a plaintiff, rather than those which merely may inflame a jury to an award of damages." *Webb v. Virginian-Pilot Media Cos.*, S.E.2d 808, 811 (Va. 2014).

4. Recent case example addressing the dual "actionable statement" inquiries: *Va. Citizens Def. League v. Couric*, No. 3:16cv757, 2017 U.S. Dist. LEXIS 83308 (E.D. Va. May 31, 2017).

   a. Earlier this year, the Eastern District of Virginia dismissed a defamation lawsuit against Katie Couric and the distributors/producers of a 2016 film, *Under the Gun*, that that included an interview with members of the Virginia Citizens Defense League ("VCDL").

   b. "At one point during the interview, *Under the Gun* shows VCDL's members apparently stumped when an interviewer asks how to keep felons and terrorists from getting guns without background checks." *Couric*, 2017 U.S. Dist. LEXIS 83308, at *2.

   c. In response to that question, the film showed eight seconds of silence, with the VCDL members shifting their gaze, but not speaking. *Id*. at *6-7. This clip apparently was shot before the interview began, when "Couric asked the VCDL members to sit in silence for ten seconds to allow for calibration of the recording equipment." *Id*. at *3.

   d. The court granted the defendant's motion to dismiss. First, it held that the interview scene as depicted in the film was not false:

      > *Under the Gun* portrays members of the VCDL not answering the question posed by Couric. In reality, members of the VCDL did not answer the question posed by Couric. They talked about background checks and gun laws generally, but <u>did not</u> answer the question of how to prevent felons or terrorists from purchasing guns without background checks. The editing simply dramatizes the sophistry of the VCDL members.
      >
      > *Id*. at *8 (emphasis in original).

   e. The court then held that the footage "does not, on its face, carry the defamatory sting required by Virginia law." *Id*. at *11. In part, the court reasoned as follows:

      > As presented by *Under the Gun*, members of the VCDL answered a handful of questions about guns and background checks, but then sat silently in the face of a question about how to prevent felons and terrorists from purchasing guns without the use of background

> checks. At worst, this shows artistically that they either cannot or will not answer the question. Their verbal responses during the interview showed the same thing. Either way, not having an answer to a question on a difficult and complex issue is not defamatory. It does not lower these plaintiffs in the estimation of the community to the extent and with the sting required.
>
> *Id*. at *11-12.

D. "Requisite intent."

1. The level of intent required by a defendant depends on whether the plaintiff is a private or public person.

2. Public officials/public figures.

   a. Given the First Amendment's protection of "free speech," and a desire to protect "uninhibited, robust, and wide-open" debate on public issues, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), both a higher level of intent and higher burden of proof is required to defame "public" persons.

   b. To "carve out an area of 'breathing space' so that protected speech is not discouraged," when the plaintiff is a public official or public figure, he/she must prove that a statement was published with "actual malice," *a.k.a.* "*New York Times* malice." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989).

   c. "Actual malice" is a subjective inquiry, requiring a plaintiff to prove that the defendant published a false statement either "with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (quoting *New York Times*, 376 U.S. at 279-80). *See also* C*ACI Premier Technologies. v. Rhodes, Inc.*, 536 F.3d 280, 295-304 (4th Cir. 2008) (actual malice must be proven for each allegedly defamatory statement). In this context, "reckless disregard means "that the defendant actually had a high degree of awareness … of probable falsity." *Harte-Hanks*, 491 U.S. at 688.

   d. As an additional First Amendment safeguard, actual malice must be proven by "clear and convincing" evidence. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255-57 (1986).

3. Private individuals.

   a. In contrast to the high standard and burden for claims against public persons, a private plaintiff need only show, by a preponderance of the evidence, that a defendant published the defamatory statement negligently:

> In an action brought by a private individual to recover actual, compensatory damages for a defamatory publication, the plaintiff may recover upon proof by a preponderance of the evidence that the publication was false, and that the defendant either knew it to be false, or <u>believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the publication was based</u> . . . . In addition, . . . such liability may be based upon negligence, whether or not the publication in question relates to a matter of public or general concern.
>
> *WJLA-TV*, 564 S.E.2d at 391 (emphasis added) (quoting *Gazette*, 325 S.E.2d at 724-25).

E. <u>Damages.</u>

1. Damages are required element for a *prima facie* defamation claim.

2. Recoverable damages are broader than for most torts, and include injury to reputation, humiliation, and embarrassment. *See Askew v. Collins*, 722 S.E.2d 249, 251 (Va. 2012). But "[i]t is difficult, if not impossible, to prove with mathematical precision the quantum" of these types of damages. *Id*.

3. For this reason, in defamation *per se* claims, the usual standard of proof is absent—"compensatory damages for injury to reputation, humiliation, and embarrassment are presumed." *Id*.

4. On the other hand, "[w]here a plaintiff does not prevail on a claim of defamation *per se*, and has not alleged or stated proof of special damages, the plaintiff may not proceed. *Schaecher*, 772 S.E.2d at 598. *See also Fleming v. Moore*, 275 S.E.2d 632, 639 (Va. 1981) (a plaintiff must show "[s]pecial damages . . . as a prerequisite to recovery where the defamatory words are not actionable *per se*").

III. Key Rulings in the *Rolling Stone* Case

A. <u>Eramo was a limited-purpose public figure</u>.

1. The parties filed summary judgment cross-motions on whether Eramo was a public official or limited-purpose public figure, and thus whether she would be required to prove "actual malice" by clear and convincing evidence.

2. The Court held that "defendants have met their burden of establishing that, at the time of publication, Eramo warranted the limited-purpose public figure

designation." *Eramo v. Rolling Stone, LLC*, No. 3:15cv23, Sep. 22, 2016 Opinion. (S.J. Op.) at 9 (attached as **Exhibit 1**).[4]

3. "A limited-purpose public figure is one who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.'" *Id*. at 6 (quoting *Gertz v. Welch*, 418 U.S. 323, 361 (1974). To satisfy this standard, a defendant must prove the following:

> (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation.
>
> S.J. Op. at 6 (quoting *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982).

4. In its opinion, the Court focused on the second and third factors, which it described as "the heart of the inquiry." S.J. Op. at 6. It held that "a fair reading of the Article suggests that the controversy at issue is UVA's response to allegations of sexual assault," and that "Eramo voluntarily assumed a position of 'special prominence' on this issue." *Id*. at 7.

B. Defamation by implication.

1. In addition to five express statements, Eramo also contended that the Article defamed her by implication.

2. When "a plaintiff alleges that [s]he has been defamed not by statements of fact that are literally true but by an implication arising from them, the alleged implication must be reasonably drawn from the words actually used." *Webb*, 752 S.E.2d at 811. *See also Chapin*, 993 F.3d at 1092 ("A defamatory implication must be present in the plain and natural meaning of the words used.").

3. In other words, an allegedly defamatory publication must "reasonably capable of the defamatory meaning" ascribed to it. *Webb*, 752 S.E.2d at 811 (Va. 2014). The Supreme Court of Virginia then explained how to conduct this inquiry:

> In determining whether the words and statements complained of in the instant case are reasonably capable of the meaning ascribed to them by innuendo, every fair inference that may be drawn from the pleadings must be resolved in the plaintiff's favor. However, the

[4] The Court thus did "not decide whether Eramo was a public official." S.J. Op. at 9, n.1.

> meaning of the alleged defamatory language can not, by innuendo, be extended beyond its ordinary and common acceptation. The province of the innuendo is to show how the words used are defamatory, and how they relate to the plaintiff, but it can not introduce new matter, nor extend the meaning of the words used, or make that certain which is in fact uncertain.
>
> *Id*. (quoting *Carwile v. Richmond Newspapers, Inc.*, 82 S.E.2d 588, 592 (Va. 1954)

4. Further, "[t]he language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference." *Chapin*, 993 F.2d at 1092-93. *See also Pendleton v. Newsome*, 772 S.E.2d 759, 765 (Va. 2015) (a defamation by implication plaintiff must show that "the statements were designed and intended by the defendants to imply" the defamatory innuendo complained of).

5. Shortly before trial, Eramo asserted that the Article's defamatory implication was as follows:

> Plaintiff alleges that the Rolling Stone article "A Rape on Campus," taken as a whole and viewed in context with its headlines, illustrations, captions and promotional material, implies and insinuates that Nicole Eramo acted as a false friend to Jackie, pretending to be on her side while at the same time discouraging Jackie from pursuing a formal complaint or police investigation regarding her rape allegations in order to suppress the assault and protect the University's reputation.

6. At the close of Eramo's evidence, defendants moved the Court for judgment as a matter of law on all claims. The Court granted the motion as to the defamation by implication claim, holding that:

> no reasonable juror could find that "A Rape of Campus," read as a whole and in context of the contemporaneous promotional material, reasonably implies that Eramo was a false friend to Jackie who pretended to be on Jackie's side while seeking to suppress sexual assault reporting. Similarly, based on the evidence adduced, the court further believes that no reasonable juror could find that plaintiff has established by a preponderance of the evidence that defendants designed and intended this defamatory implication.
>
> *Eramo v. Rolling Stone, LLC*, No. 3:15cv23, Oct. 31, 2016 Opinion. (Rule 50 Op.) at 4-5 (attached as **Exhibit 2**).

C. "Republication" of the Article.

1. During the litigation, Eramo developed a theory that the content of Article was "republished" on December 5, 2014 (approximately three weeks after the Article was published) when an "Editor's Note" was appended to the top of the online version of the Article.

2. The Editor's Note read as follows:

> *TO OUR READERS:*
>
> *Last month,* Rolling Stone *published a story titled "A Rape on Campus" by Sabrina Rubin Erdely, which described a brutal gang rape of a woman named Jackie at a University of Virginia fraternity house; the university's failure to respond to this alleged assault — and the school's troubling history of indifference to many other instances of alleged sexual assaults. The story generated worldwide headlines much soul-searching at UVA. University president Teresa Sullivan promised a full investigation and also to examine the way the school responds to sexual assault allegations.*
>
> *Because of the sensitive nature of Jackie's story, we decided to honor her request not to contact the man she claimed orchestrated the attack on her nor any of the men she claimed participated in the attack for fear of retaliation against her. In the months Erdely spent reporting the story, Jackie neither said nor did anything that made Erdely, or* Rolling Stone*'s editors and fact-checkers, question Jackie's credibility. Her friends and rape activists on campus strongly supported Jackie's account. She had spoken of the assault in campus forums. We reached out to both the local branch and the national leadership of the fraternity where Jackie said she was attacked. They responded that they couldn't confirm or deny her story but had concerns about the evidence.*
>
> *In the face of new information, there now appear to be discrepancies in Jackie's account, and we have come to the conclusion that our trust in her was misplaced. We were trying to be sensitive to the unfair shame and humiliation many women feel after a sexual assault and now regret the decision to not contact the alleged assaulters to get their account. We are taking this seriously and apologize to anyone who was affected by the story.*
>
> *Will Dana*
> *Managing Editor*

3. On summary judgment, the Court found that, in general, the "single publication rule . . . dictates that defamatory forms of mass communication or aggregate publication support only a single cause of action." S.J. Op. at 24.

4. The Court also found, however, that there was a "republication exception . . . meant to give plaintiffs an additional remedy when a defendant edits and retransmits the defamatory material or redistributes the material with the goal of reaching a new audience." *Id.* (emphasis added) (citing In re Davis, 347 B.R. 607, 611 (W.D. Ky. 2006).

5. "Stated differently," the Court found that a "republication occurs when the speaker has 'affirmatively reiterated' the statement. *Id*. (quoting *Clark v. Viacom Int'l Inc.*, 617 Fed. Appx 495, 505 (6th Cir. 2015).

6. The legal significance of a "republication" is typically to reset the statute of limitations.[5] In this case, it was far more impactful.

    a. As indicated above, a key issue was whether Eramo was a public official/public figure. If so, Eramo would have to prove by clear and convincing evidence that Defendants published an alleged defamatory statement with "actual malice": actual knowledge of falsity or "reckless disregard" of the truth or falsity—*i.e.*, a subjective "high degree of awareness" that it was probably false.

    b. On summary judgment, the Court ruled that Eramo was a limited-purpose public figure, meaning that she had to prove that each Defendant published the Article's alleged defamatory statements with actual malice on November 19, 2014.

    c. But at the time of the alleged December 5, 2014 "republication," the Defendants' subjective knowledge about the truth or falsity of the Article's alleged defamatory statements was quite different. In fact, the Editor's Note was posted because they doubted Jackie.

    d. Thus, the December 5 "republication" had the potential to be the basis for liability against a Defendant where that same Defendant was found not liable for the November 19 publication, due to differing "actual malice" determinations.

7. The Court submitted the republication issue to the jury over Defendants' objection, and gave following instruction:

[5] The statute of limitations for defamation is short—"one year after the cause of action accrues.". Va. Code. § 8.01-247.1

Republication

Nicole Eramo claims that by appending the "Editor's Note" to the top of the existing online article on December 5, 2014, defendants "republished" the content of the original article.

In order to find that defendants "republished" the original article on December 5, 2014, you must find that by adding the "Editor's Note" to the top of the online article, defendants affirmatively reiterated the content of any allegedly false and defamatory statements with an intent to reach a new audience.

In assessing her claim, you must consider the content of the "Editor's Note" and all other evidence you find that bears on the issue to be decided.

(Liability Jury Instructions (Partial) at 41, attached as **Exhibit 3**.)

8. Defendants argued that the Editor's Note was an apology and effectively a retraction, and that it served as a warning readers ("there now appear to be discrepancies in Jackie's account, and we have come to the conclusion that our trust in her was misplaced"). Thus, Defendants argued that its posting could not "affirmatively reiterate[]" the Article's alleged defamatory statements, "with an intent to reach a new audience."

9. The jury found against the Rolling Stone Defendants.

10. This republication theory ended up being the sole basis of liability against the Rolling Stone Defendants. The jury found that the magazine did not publish any alleged defamatory statement with actual malice, prior to the Article's December 5 republication. *See, e.g.*, Jury Verdict Form, Special Verdict Form Number Two (attached as **Exhibit 4**.) The jury ended up awarded $1 million against the magazine. *Id*., Special Verdict Form Number Four.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

NICOLE P. ERAMO,

Plaintiff,

v.

ROLLING STONE, LLC, et al.,

Defendants.

Civil Action No. 3:15-CV-00023

MEMORANDUM OPINION

By: Hon. Glen E. Conrad
Chief United States District Judge

Nicole Eramo filed this defamation action against defendants Rolling Stone, LLC ("Rolling Stone"), Sabrina Rubin Erdely, and Wenner Media LLC ("Wenner Media"). The case is presently before the court on plaintiff's motion for partial summary judgment and defendants' motion for summary judgment. For the reasons set forth below, the motions will be granted in part and denied in part.

Factual Background

A grant of summary judgment is appropriate only when "the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." Phoenix Savings and Loan, Inc. v. The Aetna Cas. and Surety Co., 381 F.2d 245, 249 (4th Cir. 1967). When faced with cross-motions for summary judgment, the court considers each motion separately and resolves all factual disputes and "any competing, rational inferences in the light most favorable to the party opposing the motion." Rossignol v. Voorhaar, 316 F.3d 516, 523 (4th Cir. 2003) (quoting Wightman v. Springfield Terminal Ry. Co., 100 F.3d 228, 230 (1st Cir. 1996)). Accordingly, the following facts from the record are either undisputed or presented in the light most favorable to the nonmoving party.

Nicole P. Eramo ("Eramo") is an Associate Dean of Students at the University of Virginia ("UVA"). Rolling Stone and Wenner Media are the publishers of Rolling Stone magazine. Sabrina Rubin Erdely ("Erdely") worked as a reporter and Contributing Editor for Rolling Stone.

On November 19, 2014, defendants published an article written by Erdely and entitled "A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA" (the "Article"). Compl. ¶ 45. The Article contained a graphic depiction of the alleged gang-rape of a UVA student, referred to as "Jackie," at a Phi Kappa Psi fraternity party. According to the Article, Jackie's mother informed an academic dean that Jackie had a "bad experience" at a party. Id. ¶ 56. The academic dean then put Jackie in touch with Eramo.

At the time, Eramo's duties at UVA included performing intake of sexual assault complaints and providing support to purported victims. In this position, Eramo also participated in panel discussions and attended conferences on sexual assault. She also provided quotations for articles appearing in the Cavalier Daily, UVA's student-run newspaper, was interviewed on WUVA regarding UVA's sexual misconduct policy, and gave brief interviews to local news channels. Pl.'s Resp. to Defs.' First Set of Interoggs. Nos. 1-3. On campus, Eramo was seen as "an expert in all issues related to sexual assault" and the "point person" for reports of sexual misconduct. 30(b)(6) Dep. of Alan Groves, 82:7-11, 333:16-18.

In her pitch to Rolling Stone, Erdely stated that her article would "focus on a sexual assault case on one particularly fraught campus … following it as it makes its way through university procedure to its resolution, or lack thereof." "Campus Rape" by Erdely, Dkt. 116, Ex. 7. The Article describes Jackie's interactions with Eramo, including how Jackie shared information about two other victims of the same fraternity. Throughout her investigation, Erdely

spoke with a number of students about sexual assault at UVA; her notes reflect that several students communicated their admiration of Eramo. Erdely Reporting Notes, RS004381, RS004165, Dkt. 104, Ex. 15. As publication neared, some students expressed to Erdely concerns that her portrayal of Eramo was inaccurate. Dep. of Sara Surface 118:18-119:18.

Erdely relied heavily on the narrative Jackie provided in writing the Article, so much so that she did not obtain the full names of Jackie's assailants or contact them. Nor did Erdely interview the individuals who found Jackie the night of her alleged gang-rape. Similarly, Erdely did not obtain certain corroborating documents Jackie claimed to have access to and was unable to confirm with Jackie's mother Jackie's assertion that her mother had likely destroyed the dress Jackie wore on the night of the alleged rape. Additionally, Erdely was not granted an interview with Eramo to ask about the university's policies. Instead, Eramo's superiors made UVA President, Teresa Sullivan, available.

After its release, the Article created a "media firestorm" and was viewed online more than 2.7 million times. Rolling Stone issued a press release contemporaneously with the Article, and on November 26, 2014, Erdely appeared on the Brian Lehrer Show and the Slate DoubleX Gabfest podcast. On these shows, Erdely discussed the allegations made in the Article.

The complaint asserts that the Article and subsequent media appearances destroyed Eramo's reputation as an advocate and supporter of victims of sexual assault. She was attacked by individuals on television and the internet, and she received hundreds of threatening, vicious emails from members of the public. As a result, Eramo suffered "significant embarrassment, humiliation, mental suffering and emotional distress." Compl. ¶ 207.

Upon further investigation by independent entities, it was reported that the Article, and key components of Jackie's story, could not be substantiated. Within two weeks of the Article's

publication, the fraternity where Jackie's alleged attack took place produced evidence demonstrating that no social gathering was held on the night in question and that no member of the fraternity matched the description given by Jackie for her primary attacker. Id. ¶ 90. Additionally, The Washington Post ran an article addressing the fact that Erdely did not contact Jackie's accused assailants.

On December 5, 2014, Rolling Stone issued a statement (the "Editor's Note") that acknowledged the discrepancies in Jackie's account, blamed Jackie for misleading Erdely, and claimed that its trust in Jackie had been "misplaced." Id. ¶ 91. This statement appeared appended to the online Article, and also by itself on a separate URL. On March 23, 2015, four months after the Article was published, the Charlottesville Police Department issued a report regarding its investigation of Jackie's assault. The report stated that Jackie had told Eramo a wholly different tale of sexual assault than the story published in the Article. Ultimately, the police concluded that there was no substantive basis in fact to conclude that an incident occurred consistent with the facts in the Article. In April 2015, after a report by the Columbia Journalism Review described the Article as a "journalistic failure" and concluded that defendants "set aside or rationalized as unnecessary essential practices of reporting," Rolling Stone "officially retracted" and removed the Article from its website. Id. ¶ 14. Eramo granted a limited interview to the Columbia Journalism Review as part of their investigation for the report.

On May 12, 2015, Eramo filed a six-count defamation action arising not only from the allegations in the Article but also from other statements made by the defendants in subsequent media appearances. On May 29, 2015, defendants removed the instant action from the Circuit Court for the City of Charlottesville pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. Following the close of discovery, plaintiff moved for partial summary judgment and defendants moved for

summary judgment. The court held a hearing on the motions on August 12, 2016. The motions have been fully briefed and are now ripe for disposition.

Standard of Review

An award of summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether a genuine dispute of material fact exists, the court must "view the facts and all justifiable inferences arising therefrom in the light most favorable to the nonmoving party." Libertarian Party of Va. v. Judd, 718 F.3d 308, 313 (4th Cir. 2013). "When faced with cross-motions for summary judgment, [courts] consider each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." Bacon v. City of Richmond, 475 F.3d 633, 636-37 (4th Cir. 2007). "The court must deny both motions if it finds that there is a genuine dispute of material fact, but if there is no genuine issue and one or the other party is entitled to prevail as a matter of law, the court will render judgment." Sky Angel U.S., LLC v. Discovery Commc'ns., LLC, 95 F. Supp. 3d 860, 869 (D. Md. 2015) (citations omitted).

Discussion

I. Public Official or Limited-Purpose Public Figure

Both sides have moved for summary judgment on the issue of whether Eramo was a public official or a limited-purpose public figure. If Eramo was a public official or limited-purpose public figure at the time of publication, as part of her defamation case, she must prove by clear and convincing evidence that defendants acted with actual malice. New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964); Gertz v. Robert Welch, 418 U.S. 323, 342 (1974). The issue of whether Eramo was a public official or limited-purpose public figure is a

question of law to be resolved by the court. Wells v. Liddy, 186 F.3d 505, 531 (4th Cir. 1999). The court starts with a presumption that Eramo was a private individual at the time of publication, subject to defendants' burden of proving that plaintiff was a public official or limited-purpose public figure. Foretich v. Capital Cities/ABC, 37 F.3d 1541, 1553 (4th Cir. 1994).

A limited-purpose public figure is one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." Gertz v, 418 U.S. at 361. Importantly, these individuals are subject to the actual malice standard for two reasons: (1) because of "their ability to resort to the 'self-help' remedy of rebuttal" as these individuals "usually enjoy significantly greater access [to the media] than private individuals"; and (2) because they have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood." Foretich, 37 F.3d at 1552. To determine whether a plaintiff is a private person or a limited-purpose public figure in relation to a particular public controversy, defendants must prove the following:

> "(1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation."

Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982); Foretich, 37 F.3d at 1553 (noting defendant's burden of proof). The second and third factors are often combined and are the heart of the inquiry: "whether the plaintiff had voluntarily assumed a role of special prominence in a public controversy by attempting to influence the outcome." Foretich, 37 F.3d at 1553.

The scope of the controversy thus becomes a threshold determination. See Hatfill v. The New York Times Co., 532 F.3d 312, 322 (4th Cir. 2008) (stating that the court "first address[es] the nature of the 'particular public controversy' that gave rise to the alleged defamation"). Significantly, it "would be inappropriate to shrink all controversies to the specific statements of which a plaintiff complains." Nat'l Life Ins. Co. v. Phillips Pub., Inc., 793 F. Supp. 627, 637 (D.S.C. 1992). Instead, the court defines the scope through a fair reading of the Article in its entirety. See Hatfill, 532 F.3d at 323 ("[I]t stands to reason that we should look to the scope of the message conveyed in ... the articles ... [plaintiff] is challenging.").

Here, a fair reading of the Article suggests that the controversy at issue is UVA's response to allegations of sexual assault. The record warrants the determination that Eramo voluntarily assumed a position of "special prominence" on this issue: she took advantage of her access to local media, specifically by appearing on WUVA, providing input to The Cavalier Daily, and speaking to local affiliates of national news networks. See Carr v. Forbes, 259 F.3d 273, 281 (4th Cir. 2001) (finding plaintiff voluntarily assumed a prominent public presence and attempted to influence the outcome because he attended public meetings, wrote editorials for the local press, and was quoted in the local media). Furthermore, the volume of her media appearances, and in some instances their depth, supports the conclusion that Eramo attempted to influence the outcome of the controversy. In 2013, for instance, Eramo authored an opinion piece regarding the University's process for handling sexual assault complaints. See Faltas v. State Newspaper, 928 F. Supp. 637, 645 (D.S.C. 1996) (finding that a teacher and Public Health physician voluntarily assumed a role of special prominence and attempted to influence the outcome because she authored an opinion piece and several letters on the issue and had appeared

on various radio programs). The court thus concludes that defendants have met their burden as to the second and third factors. Foretich, 37 F.3d at 1553 ("Typically, we have combined the second and third requirements, to ask 'whether the plaintiff had voluntarily assumed a role of special prominence in a public controversy by attempting to influence the outcome of the controversy.'") (citing Reuber v. Food Chemical News, Inc., 925 F.2d 703, 709 (4th Cir. 1991)).

Regarding the fourth and fifth factors, Eramo's numerous local media appearances and their temporal proximity to the Article, in addition to the Office of Civil Rights investigation UVA was under at the time, indicate that the controversy at issue, UVA's response to allegations of sexual assault, existed prior to publication of the Article. See Fitzgerald, 691 F.2d at 669 ("The public controversy existed before and after publication of the alleged defamatory article.... The plaintiff had been interviewed for another article in the previous year."). The record also supports the determination that Eramo retained "public figure" status at the time of the alleged defamation: she remained in her position when the article was published. Only several months later was she moved to a different position within the UVA community. Fitzgerald, 691 F.2d at 668 (listing that "the plaintiff retained public-figure status at the time of the alleged defamation" as the fifth factor in determining limited-purpose public figure status).

Plaintiff argues that defendants are unable to show that she had access to effective communication, the first factor, because the Family Educational Rights and Privacy Act ("FERPA") prevented her from speaking to the media. Additionally, UVA would not allow Eramo to speak with Erdely prior to publication. The court is unpersuaded. While FERPA may have precluded Eramo from speaking about Jackie's case, the court cannot agree that it prevented her from speaking about UVA's policy regarding sexual assault allegations in a general sense. Likewise, UVA's unwillingness to allow Eramo to contact the media may have

put her in the difficult position of deciding between her job and her reputation. However, the court believes that, despite this prohibition, Eramo still had greater access to The Cavalier Daily or other local news outlets than private citizens, satisfying the first factor. See Fiacco v. Sigma Alpha Epsilon Fraternity, 528 F.3d 94, 100 (1st Cir. 2008) (finding a university administrator had greater access to media when he had been mentioned by name in eleven newspaper articles over the past year). Her access becomes even more apparent upon consideration of the limited interview Eramo granted to the Columbia Journalism Review several months after the Article's publication and without the permission of her superiors. Thus, the court's analysis of the five requirements for limited-public figure status, and its overall review of the record, lead to the conclusion that defendants have met their burden of establishing that, at the time of publication, Eramo warranted the limited-purpose public figure designation.[1]

II. Actual Malice

A public official, public figure, or limited-purpose public figure may recover for a defamatory falsehood only on a showing of "actual malice." New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). At summary judgment, "the appropriate ... question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986). Defendants ask the court to decide, as a matter of law, that plaintiff has failed to forecast evidence that would support a jury determination in plaintiff's favor.

Actual malice "requires at a minimum that the statements were made with reckless disregard for the truth." Harte-Hanks Commc'ns., Inc. v. Connaughton, 491 U.S. 657, 667

[1] Because limited-purpose public figures and public officials both must prove actual malice, the court need not decide whether Eramo was a public official.

(1989). Reckless disregard means that defendants must have "entertained serious doubts as to the truth of [their] publication." St. Amant v. Thompson, 390 U.S. 727, 730 (1968). The court evaluates "the factual record in full." Connaughton, 491 U.S. at 688. Furthermore, because actual malice is a subjective inquiry, a plaintiff "is entitled to prove the defendant's state of mind through circumstantial evidence." Id. at 668.

It is helpful to review what other courts have determined is and is not sufficient evidence. For example, it is well settled that "failure to investigate will not alone support a finding of actual malice." Connaughton, 491 U.S. at 692; see also Biro v. Conde Nast, 807 F.3d 541, 546 (2d Cir. 2015) ("We recognize that although failure to investigate does not in itself establish bad faith, reliance on anonymous or unreliable sources without further investigation may support an inference of actual malice."). Similarly, departure from journalistic standards is not a determinant of actual malice, but such action might serve as supportive evidence. Reuber v. Food Chemical News, Inc., 925 F.2d 703, 712 (4th Cir. 1991) (en banc), cert. denied, 501 U.S. 1212 (1991). "Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted." Goldwater v. Ginzburg, 414 F.2d 324, 337 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970) (stating that repetition is one factor that may be probative of actual malice); see also St. Amant, 390 U.S. at 732 ("[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant."). Furthermore, while actual malice cannot be inferred from ill will or intent to injure alone, "[i]t cannot be said that evidence of motive or care never bears any relation to the actual malice inquiry." Connaughton, 491 U.S. at 688; see also Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 315 n. 10 (5th Cir. 1995) ("[E]vidence of ill will can often bolster an inference of actual malice."). Finally, "evidence that

a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story is evidence of actual malice, and may often prove to be quite powerful evidence." Harris v. City of Seattle, 152 F. App'x 565, 568 (9th Cir. 2005).

Here, as in most similar cases, plaintiff largely relies on circumstantial evidence. See Herbert v. Lando, 441 U.S. 153, 170 (1979) ("It may be that plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself."). Although failure to adequately investigate, a departure from journalistic standards, or ill will or intent to injure will not singularly provide evidence of actual malice, the court believes that proof of all three is sufficient to create a genuine issue of material fact. Plaintiff, however, goes further. Pointing to Erdely's own reporting notes, plaintiff also forecasts evidence that could lead a reasonable jury to find that Erdely had "obvious reasons to doubt [Jackie's] veracity" or "entertained serious doubts as to the truth of [her] publication." Goldwater, 414 F.2d at 337; St. Amant, 390 U.S. at 731.

First, plaintiff offers evidence that could lead a jury to determine that Erdely had a preconceived story line and may have consciously disregarded contradictory evidence. See Harris, 152 F. App'x at 568 (noting that evidence of a preconceived story line can speak to whether defendant acted with actual malice). A jury could conclude from Erdely's pitch for the Article that Erdely expected to find inaction from the university's administration. She described how the Article would highlight "the various ways colleges have resisted involvement on the issue of sexual assault on campus; [and how it would] focus on a sexual assault case on campus … following it as it makes its way through university procedure to its resolution, or lack

thereof." "Campus Rape" by Erdely, Dkt. 116, Ex. 7. Erdely had also previously published five similar articles, and deposition testimony suggests that students felt that Erdely did not listen to what they told her about Eramo. Dep. of Sara Surface 110:25-111:3; Dep. of Alex Pinkerton 190:5-15.

Second, plaintiff has produced evidence supporting the inference that Erdely should have further investigated Jackie's allegations. See Biro, 807 F.3d at 546 (stating that failure to investigate further, in certain circumstances, may support an finding of actual malice). The record suggests that Erdely knew the identity of at least one of the individuals who found Jackie the night of her alleged rape. Erdely Reporting Notes RS004261, Dkt. 104, Ex. 7. Erdely, however, did not seek to contact this individual. Plaintiff cites evidence that could lead a factfinder to determine that others at Rolling Stone knew Erdely did not reach out to these individuals to corroborate Jackie's story. Dep. of Sean Woods 135-136. Additionally, Jackie never provided the full names of her assailants. Consequently, Erdely was unable to test the reliability of Jackie's story with them. The record also supports a finding that Rolling Stone knew that Erdely had not approached these purported wrongdoers. Dep. of Elisabeth Garber-Paul 153:14-154:8. Erdely's notes similarly reveal that Jackie had told Elderly she possessed, or at least had access to, certain documents that could have corroborated her story of the rape. Erdely never received a copy of these documents, and Erdely's notes imply inconsistencies in Jackie's claims about them. Erdely Reporting Notes RS004483, RS004476, Dkt. 104, Ex. 7 (noting that Jackie's mother had these documents, that Jackie likely did not tell her mother about these documents, and that Jackie later told Erdely that her mother had the documents). Finally, Erdely, despite trying, did not speak with Jackie's mother to confirm Jackie's claim that her mother had destroyed the blood-stained dress Jackie wore the night of the alleged rape. From

these facts, a reasonable jury could conclude that Erdely should have investigated further, and that her failure to do so could imply that Erdely acted with actual malice.

Third, plaintiff has presented evidence suggesting that Erdely had reasons to doubt Jackie's credibility. E.g., Erdely Reporting Notes RS004404, RS004118, RS004115, Dkt. 104, Ex. 7 (Erdely noted disbelief about Jackie's assertion as to the identities of the two other victims; Erdely was put on notice that Jackie's alleged rape, by individuals supposedly being recruited into the fraternity, occurred several months before fraternity recruitment events; and that Erdely found Jackie's story of three women being gang-raped at the same fraternity "too much of a coincidence"). Erdely was aware that Jackie's account of her alleged rape had changed but, nonetheless, did not press Jackie to explain the inconsistencies. Dep. of Emily Renda 36:17-24 (stating a different number of assailants were involved than what Erdely reported in the article); Dep. of Sabrina Rubin Erdely 37:8-14; see Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1071 (5th Cir. 1987) ("[C]ourts have upheld findings of actual malice when a defendant failed to investigate a story weakened by inherent improbability, internal inconsistency, or apparently reliable contrary information.") (citing sources). Rolling Stone's fact checker was also cognizant of Jackie's inconsistent stories. Dep. of Elisabeth Garber-Paul 290:13-17 (affirming that she knew Jackie's story of sexual assault changed over time). Moreover, a jury could find that Rolling Stone knew that Jackie's version of the story had not been vetted. Dep. of Elisabeth Garber-Paul 77:19-78:3; 104:20-24 (stating she knew that Rolling Stone had not reached out to certain individuals who were quoted in the Article and alleged to have found Jackie on the night of the rape, in part, because Jackie refused to provide their contact information). The court believes this evidence, taken in a light most favorably to the nonmoving party, could support a finding that Erdely and Rolling Stone were cognizant of Jackie's inconsistencies and credibility

problems at the time of publication.

Fourth, plaintiff offers evidence suggesting that at least three individuals advised Erdely that her portrayal of Eramo was inaccurate. Dep. of Sara Surface 118:18-119:18; Dep. of Alex Pinkerton 144:11-21; see St. Surin v. Virgin Islands Daily News, Inc., 21 F.3d 1309, 1318 (3d Cir. 1994) (denying summary judgment on the issue of actual malice when a source's testimony "flatly contradicted" what the article portrayed); Bressler v. Fortune Magazine, 971 F.2d 1226, 1252 (6th Cir. 1992) (Batchelder, J., dissenting) (asserting that the reporters exhibited reckless disregard when their own notes did not support the article's statements and the reporters also relied on a second-hand source over a firsthand account that described the event differently). In addition, Erdely's notes show that one student reported that the administration did a better job investigating her sexual assault allegations than the police. Erdely Reporting Notes RS004190, Dkt. 104, Ex. 7. Another individual told Erdely that Eramo was "passionate" about obtaining punishment and "making sure ... something punitive ... sticks." Id. RS004147. Jackie disclosed to Erdely that Eramo "wasn't as shocked as you might think" upon hearing of the two other victims, but then "got pissed at the frat" and suggested that the fraternity could lose its charter. Id. RS004312; see Zerangue, 814 F.2d at 1071 ("A verdict for the plaintiff has been upheld when a reporter's own notes showed that she was aware of facts contradicting her story.") (citing Golden Bear Distrib. Sys. of Texas, Inc. v. Chase Revel, Inc., 708 F.2d 944, 950 (5th Cir. 1983)). Erdely's notes also indicate that Jackie's version of how she met Eramo may have been incorrect, a fact which could support a finding that Erdely should have investigated further in the face of her source's seemingly wavering consistency.

Fifth, plaintiff points to deposition testimony from which a jury could reasonably infer that Erdely harbored ill will for Eramo or intended to injure the administration. Connaughton,

491 U.S. at 667-68 (suggesting that motive can support an ultimate finding of actual malice). Erdely told a student that she hoped the Article would bring changes to the structure of UVA's administration. When a student attempted to provide Erdely with Eramo's "point of view," Erdely referred to that student as an "administrative watchdog." Dep. of Sara Surface 162:10-17; cf. Guccione v. Flynt, 618 F. Supp. 164, 166 (S.D.N.Y. 1985) (finding plaintiff had presented sufficient circumstantial evidence, including evidence of derogatory comments, to survive summary judgment on the issue of actual malice). While ill will or intent to injure alone is insufficient to show actual malice, plaintiff has also advanced evidence indicating Erdely had a preconceived story line, did not adequately investigate in the face of contradictory information, and had a reasonable basis upon which she would likely understand that her portrayal of Eramo was inaccurate. The court believes that a reasonable jury could infer actual malice in light of this record.

Finally, plaintiff offers evidence regarding how, between the November 18 publication date and the December 5th Editor's Note, Rolling Stone, through internal conversations and discussions with outside sources, concluded that their trust in Jackie had been "misplaced." A jury could determine that this evidence also supports a finding of actual malice. See David Elder, Defamation: A Lawyer's Guide § 7.7 (July 2016) (discussing how "some types of evidence [] relate back and provide inferential evidence of defendant's knowing or reckless disregard of falsity at the time of publication"); Franco v. Confel, 311 S.W.3d 600, 607 (Tex. App. 2010) ("Circumstantial evidence showing reckless disregard may derive from the defendant's words or acts before, at, or after the time of the communication.'") (quoting Clark v. Jenkins, 248 S.W.3d 418, 435 (Tex. App. 2008)). Conversely, the post-publication process

could speak to defendants' good faith in publishing the original article. Elder, supra § 7.7; Hoffman v. Washington Post Co., 433 F. Supp. 600, 605 (D.D.C. 1977), aff'd, 578 F.2d 442 (D.C. Cir. 1978) (suggesting that a prompt retraction can negate an inference of actual malice). The court believes a jury should determine the proper effect of this evidence. Gunning v. Cooley, 281 U.S. 90, 94 (1930) ("Issues that depend on the credibility of the witnesses, and the effect or weight of evidence, are to be decided by the jury.").

Arguably, a reasonable jury could find that none of the evidence presented independently supports a finding of actual malice by clear and convincing evidence. Taken as a whole, however, a jury could conclude otherwise. Tavoulareas v. Piro, 817 F.2d 762, 790 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 200 (1987) ("[A] plaintiff may prove the defendant's subjective state of mind through the cumulation of circumstantial evidence."). Therefore, the court heeds the Fourth Circuit's admonition that summary judgment should be employed carefully when addressing a party's subjective state of mind. See Nat'l Life Ins. Co. v. Phillips Pub., Inc., 793 F. Supp. 627, 632 (D. Md. 1992) (citing Herold v. Hajoca Corp., 864 F.2d 317, 319 (4th Cir. 1988)) ("[W]here possibly subjective evaluations are at issue, as here where a determination of whether Defendants acted with actual malice is at issue, the Fourth Circuit has cautioned against a Court taking those determinations away from a jury."); see also Henry v. Nat'l Ass'n of Air Traffic Specialists, Inc., 836 F. Supp. 1204, 1211 (D. Md. 1993), aff'd, 34 F.3d 1066 (4th Cir. 1994) ("Because the question of actual malice involves subjective evaluations, the Court is reluctant to take the malice determination from a jury."); Denny v. Seaboard Lacquer, Inc., 487 F.2d 485, 491 (4th Cir. 1973) ("Where state of mind is at issue, summary disposition should be sparingly used."). The court will thus deny defendants' motion for summary judgment as to actual malice.

III. The Challenged Statements

Both sides have also moved for summary judgment on the issue of whether the challenged statements are actionable. "In Virginia, the elements of libel are (1) publication of (2) an actionable statement with (3) the requisite intent." Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092 (4th Cir. 1993). To be actionable, a statement must contain a "provably false factual connotation," must be "of or concerning" the plaintiff, and must "tend[] to harm the reputation [the plaintiff]." WJLA-TV v. Levin, 264 Va. 140, 156 (2002); Gazette, Inc v. Harris, 229 Va. 1, 37 (1985); Chapin, 993 F.2d at 1093. It is for the court to decide whether a statement has a provably false factual connotation or is protected opinion and whether a statement is capable of having a defamatory meaning, that is, tending to harm the plaintiff's reputation. CACI Premier Tech., Inc. v. Rhodes, 536 F.3d 280, 294 (4th Cir. 2008); Hatfield v. New York Times Co., 416 F.3d 320, 330 (4th Cir. 2005).

In deciding whether statements convey a factual connotation or are protected opinion, the court looks to "the context and tenor of the article," whether the language is "loose, figurative, or hyperbolic language which would negate the impression that the writer" is making a factual assertion, and whether the statement is "subject to objective verification." Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 184 (4th Cir. 1998). Even when a statement is subject to verification, the statement will remain protected if it is "clear to all reasonable listeners that [the statement is] offered ... as exaggerated rhetoric intended to spark the debate" or "the opinion of the author drawn from the circumstances related." CACI, 536 F.3d at 301; Chapin, 993 F.2d at 1093. "Locating the line separating constitutionally protected speech from actionable defamation can be difficult and requires consideration of the nature of the language used and the context and general tenor of the article to determine whether the statement can reasonably be

viewed as an assertion of actual fact." Choi v. Kyu Chul Lee, 312 F. App'x 551, 554 (4th Cir. 2009). If "a reasonable factfinder could conclude that the statements ... imply an assertion [of fact]," the statements are not protected. Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990). Additionally, "factual statements made to support or justify an opinion can form the basis of an action for defamation." WJLA-TV, 264 Va. at 156; see also AvePoint, Inc. v. Power Tools, Inc., 981 F. Supp. 2d 496, 506 (W.D. Va. 2013).

Merely because the statements may be deemed to have a false factual connotation, however, is not sufficient to support a defamation action. See Katz v. Odin, Feldman & Pittleman, P.C., 332 F. Supp. 2d 909 (E.D. Va. 2004) ("[T]he fact that some of the alleged statements may have been false, without more, is not sufficient to maintain a cause of action for defamation."). The statements must also be capable of having a defamatory meaning. See Perry v. Isle of Wight Cty., No. 2:15cv204, 2016 WL 1601195, at *3 (E.D. Va. April 20, 2016). A statement that "tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" has a defamatory meaning. Chapin, 993 F.2d at 1092; see also Restatement (Second) of Torts § 559, cmt. b ("Communications are often defamatory because they tend to expose another to hatred, ridicule or contempt."); Moss v. Harwood, 102 Va. 386, 387 (1904) ("It is sufficient if the language tends to injure the reputation of the party,... [or] to hold him up as an object of scorn, ridicule, or contempt."). In determining whether a statement is capable of having a defamatory meaning, the court considers the plain and natural meaning of the words in addition to the inferences fairly attributable to them. Pendleton v. Newsome, 290 Va. 162, 172 (2015) (citing Wells v. Liddy, 186 F.3d 505, 503 (4th Cir. 1999)); Vaile v. Willick, No.6:07cv00011, 2008 WL 2754975, at *4 (W.D. Va. July 14, 2008) ("Because a defamatory charge may be made 'by inference,

implication or insinuation,' the Court must look not only to the actual words spoken, but also to all inferences fairly attributable to them.") (quoting Carwile v. Richmond Newspapers, 196 Va. 1, 7 (1954)). However, whether the plaintiff was actually defamed remains a question to be resolved by the factfinder. Pendleton, 290 Va. at 172.

Defendants argue that the challenged statements are not actionable because, as a matter of law, they are protected opinion and not capable of harming Eramo's reputation. In contrast, plaintiff contends that the challenged statements are factual and defamatory per se. "[A] statement is defamatory per se if it, among other circumstances,... 'impute[s] to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment.'" CACI, 536 F.3d at 292-93 (quoting Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 7 (1954)).

After reviewing the Article, the court believes that it is not "clear to all reasonable listeners" that all twelve statements targeted by the plaintiff are "exaggerated rhetoric" or "the opinion of the author." CACI, 536 F.3d at 301. Unlike the regularly-published advice column in Biospherics, "A Rape on Campus" is described as a "Special Report" on the front cover of the magazine. 151 F.3d at 181. Contrary to the talk-show host in CACI, Erdely has not admitted to "making frequent use of hyperbole." On the contrary, Erdely has written at least five other similarly-styled, solemn and fact-intensive articles about rape. These circumstances support the notion that "A Rape on Campus" was largely a report of a factual occurrence. Likewise, the characterization of the article as an investigation in subsequent interviews bolsters the court's understanding that the general tenor of the Article, and reasonable understanding of it, is one of factual assertion. Compl. Ex. C (describing the Article as an "investigation of campus rape" on the Brian Lehrer show); Biospherics, 151 F.3d at 184 (looking to the general tenor of the article

to determine whether the statements were assertions of fact or opinion).

Looking to each statement, only one, the "deck" of the article, can fairly be characterized as hyperbole and not factual.[2] The use of the phrase "a whole new kind of abuse" is similar to the term "hired-killers" to describe military contractors. CACI, 536 F.3d at 301. Like the phrase "hefty mark-up" in Chapin, the challenged statement is "just too subjective a word to be proved false." 993 F.2d at 1093. While the question is close, when looking to the general tenor of the Article, the court believes the challenged phrase "consists of terms that are either too vague to be falsifiable or sure to be understood as merely a label for the labler's underlying assertions." Dilworth v. Dudley, 75 F.3d 307, 309 (7th Cir. 1996). Erdely seemingly used "exaggerated or figurative language to drive home an underlying factual assertion." Cashion v. Smith, 286 Va. 327, 341 (2013) (McClanahan, J., dissenting). This figurative language remains protected while the underlying factual assertions do not. Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.2d 122, 129-132 (1st Cir. 1997) (finding one challenged statement to be hyperbole and another to be an assertion of fact); Williams v. Garraghty, 249 Va. 224, 233 (1995) (finding plaintiff's statements about a specific event and subsequent receipt of derogatory notes to be factual assertions but plaintiff's expression that she believed the notes and event were sexual harassment to be opinion).

As to the remaining statements, the court is persuaded that a reasonable understanding is that they assert factual connotations regarding Eramo and the administration's actions. See Tronfeld v. Nationwide Mut. Ins. Co., 272 Va. 709, 715-16 (2006) (finding that statements relating that plaintiff "just takes people's money" contained "a provably false factual

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[2] The "deck" refers to the phrases just below the headline of an article and above the first sentences. In "A Rape on Campus," the deck stated: "Jackie was just starting her freshman year at the University of Virginia when she was brutally assaulted by seven men at a frat party. When she tried to hold them accountable, a whole new kind of abuse began."

connotation"). For example, a jury could find that the "trusted UVA dean" either did or did not discourage Jackie from sharing her story, that Eramo did or did not tell Jackie that "nobody wants to send their daughter to the rape school," and that Eramo did or did not have a nonreaction to Jackie's assertion that two other individuals were raped at the same fraternity. Fuste v. Riverside Healthcare Ass'n, 265 Va. 127, 133 (2003) ("In other words, [the statements] are capable of being proven true or false."). Even the statements asserting that the administration should have acted in light of Jackie's allegation that two other individuals were raped at the Phi Kappa Psi fraternity is capable of conveying a verifiable fact: that the administration did not act. See Milkovich, 497 U.S. at 18 ("[E]xpressions of 'opinion' may often imply an assertion of objective fact."); Restatement (Second) of Torts § 566, cmt. b (Am. Law Inst. 1965) (describing "an opinion in form" that is "apparently based on facts ... that have not been stated"). Therefore, the court finds the remaining challenged statements impart what a reasonable reader would believe to be factual.

Similarly, considering all reasonable inferences, the court believes that the statements are capable of having a defamatory meaning. Chapin, 993 F.2d at 1092, 1104-05 (statements are capable of a defamatory meaning if they tend to harm the plaintiff's reputation, hold her up as an object of scorn, ridicule or contempt, or otherwise make her appear "odious, infamous, or ridiculous") (citing McBride v. Merrell Dow and Pharmaceuticals, Inc., 540 F. Supp. 1252, 1254 (D.D.C. 1982) and Adams v. Lawson, 58 Va. 250, 255-56 (1867)); Wells, 186 F.3d at 523 ("We look not only to the actual words spoken, but also to inferences fairly attributable to them.") (citations omitted). A reasonable factfinder could conclude that the challenged statements imply the defamatory meaning plaintiff ascribes to them: that Eramo discouraged Jackie from sharing her story, including filing a formal complaint; that Eramo had no reaction to Jackie's story of

two other victims; and that the administration did nothing in light of these allegations. Restatement (Second) of Torts § 614(2) (stating that the "jury determines whether a communication, capable of a defamatory meaning, was so understood"); Chapin v. Greve, 787 F. Supp. 557, 564 (E.D. Va. 1992) ("The dispositive question presented is whether or not a reasonable factfinder could conclude that the article or statements in the article state or imply, in their plain and natural sense, the defamatory meanings ascribed to them by plaintiffs.").

Plaintiff, however, asks the court to further find that the challenged statements are defamatory per se. Stamathis v. Flying J, Inc., 389 F.3d 429, 440 (4th Cir. 2004) ("The critical distinction between defamation per se and other actions for defamation is that a person so defamed is presumed to have suffered general damages, and any absence of actual injury is considered only in diminution of damages."). As with actual malice, it is instructive to review what other courts have found to be defamatory per se. For example, in Cretella v. Kuzminkski, the district court found the assertions that plaintiff caused embarrassment to his employer and was in danger of losing his professional license to be defamatory per se. 640 F. Supp. 741, 763 (E.D. Va. 2009). Similarly, in Carwile v. Richmond Newspapers, statements implying that the plaintiff was guilty of conduct for which "the plaintiff could and should be subject to disbarment proceedings" were held to be defamatory per se. 196 Va. 1, 8 (1954). Here, however, the court believes that the alleged defamatory meaning ascribed to the challenged statements does not give rise to presumed damages. This is not to imply that Eramo has or has not been damaged; it is to keep the determination of damages, and the determination of whether the statements actually defamed Eramo, with the factfinder.[3] Pendleton, 290 Va. at 172 (stating that whether the statements defamed plaintiff is a question for the jury).

[3] Or, otherwise, as the parties may agree to stipulate.

Next, plaintiff asks the court to conclude, as a matter of law, that all twelve statements are "of or concerning" Eramo. Defendants do not contest plaintiff's contention that the statements are "of and concerning" Eramo except in regards to the "deck" of the Article. The court, however, finds that the deck is hyperbole, not subject to verification, and therefore not actionable. Thus, it is irrelevant whether the deck is of or concerning Eramo. As to the other statements, there is no dispute that these statements are of or concerning Eramo. Cf. Magill v. Gulf & Western Indus., Inc., 736 F.2d 976, 979 (4th Cir. 1984) (stating that summary judgment is inappropriate if there is a dispute as to the conclusions to be drawn from undisputed facts). Thus, with the exception of the "deck" of the Article, the court will grant plaintiff's motion for partial summary judgment on the issue of whether the other statements are of or concerning Eramo. The court will deny plaintiff's motion for partial summary judgment as to whether the statements are defamatory per se, and will deny defendants' motion for summary judgment regarding whether the statements are protected opinion and not capable of having a defamatory meaning. The court believes that the latter question, as to whether the statements actually have a defamatory meaning, is properly committed to the jury.

IV. Republication

Plaintiff asks the court to find that Rolling Stone's December 5th statement acknowledging discrepancies in Jackie's account (the "Editor's Note") was a republication published with actual malice. Plaintiff asserts that the addition of an appendix to the original Article affected substantive changes such to render the combined Editor's Note and Article a "republication" under the law. In contrast, defendants contend that the December 5th Editor's Note is not a republication because it did not reaffirm the substance of the Article. Instead, defendants urge the court to view the Editor's Note as an "effective retraction."

While the Virginia Supreme Court has not yet faced the issue, the Fourth Circuit has upheld the application of the single publication rule, which dictates that defamatory forms of mass communication or aggregate publication support only a single cause of action. See Morrissey v. William Morrow & Co., Inc., 739 F.2d 962, 967-68 (4th Cir. 1984). Jurisdictions that have adopted the single publication rule are "nearly unanimous" in applying it to internet publications. Atkinson v. McLaughlin, 462 F. Supp. 2d 1038, 1051-52 (D.N.D. 2006). It is less clear how the republication exception to the single publication rule applies in the context of electronic media. In re Philadelphia Newspapers, LLC, 690 F.3d 161, 174 (3d Cir. 2012).

The republication exception is meant to give plaintiffs an additional remedy when a defendant edits and retransmits the defamatory material or redistributes the material with the goal of reaching a new audience. In re Davis, 347 B.R. 607, 611 (W.D. Ky. 2006). Stated differently, republication occurs when the speaker has "affirmatively reiterated" the statement. Clark v. Viacom Int'l Inc., 617 F. App'x 495, 505 (6th Cir. 2015). In the context of internet articles, other courts have held that "a statement on a website is not republished unless the statement itself is substantively altered or added to, or the website is directed to a new audience." Yeager v. Bowlin, 693 F.3d 1076, 1082 (9th Cir. 2012); see also Davis, 347 B.R. at 612 ("[W]here substantive material is added to a website, and that material is related to defamatory material that is already posted, a republication has occurred.").

Under Virginia defamation law, the question of whether plaintiff has proved the element of publication is a factual one for the jury. Thalhimer Bros. v. Shaw, 156 Va. 863, 871 (1931) (finding sufficient evidence to submit to the jury the question of publication). It follows, then, that republication is also for the factfinder to determine.[4] Woodhull v. Meinel, 202 P.3d 126,

[4] Generally, republications are separate torts. WJLA-TV v. Levin, 264 Va. 140, 153 (2002). In consequence, the court believes that republication only satisfies the first element of a defamation claim. Plaintiff

131 (N.M. Ct. App. 2008) ("The question of whether an Internet republication has occurred is highly factual in that it turns on the content of the second publication as it relates to the first."); Weaver v. Lancaster Newspaper, Inc., 926 A.2d 899, 907 (Pa. 2007) (finding a genuine issue of fact regarding whether there was a republication).

Here, it is not disputed that defendants appended the original Article. However, a reasonable jury could find that the defendants did not act with intent to recruit a new audience. Likewise, there is a genuine dispute regarding whether defendants "affirmatively reiterated" the challenged statements. See Clark, 617 F. App'x at 505 (stating that republication occurs when the speaker "affirmatively reiterates" the statement and that the doctrine of republication "focuses upon audience recruitment"). From deposition testimony, the court believes a reasonable jury could determine that the December 5th Editor's Note "effectively retracted" only the statements regarding the alleged rape, not the statements about Jackie's interactions with Eramo. Dep. of Erdely 282:6-10; Dep. of William Dana 308:6-15; cf. Nevada Independent Broadcasting Corp. v. Allen, 664 P.2d 337, 345 (Nev. 1983) (finding that an attempted correction could be considered a republication). Conversely, a factfinder could determine that the challenged statements were either "substantially altered or added to" or that they were not. Yeager, 693 F.3d at 1082. Accordingly, in the court's view, there remains a genuine issue of fact warranting jury consideration. The court will deny plaintiff's motion for partial summary judgment on the issue. Consequently, the court declines to reach the question of whether there was a republication made with actual malice.

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must again prove the other elements of defamation, namely actionable statements and intent. Chapin, 993 F.2d at 1092 (listing the Virginia elements of defamation). In this instance, the effect of the Editor's Note will be relevant in determining whether the statements are actionable and whether the defendants had the requisite intent, should a jury find defendants republished the challenged statements.

Conclusion

For the foregoing reasons, the court will grant in part and deny in part the parties' motions for summary judgment and partial summary judgment. The Clerk is directed to send copies of this memorandum opinion and the accompanying order to all counsel of record.

DATED: This 22d day of September, 2016.

Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

NICOLE P. ERAMO,	)	
	)	
	)	Civil Action No. 3:15-CV-00023
Plaintiff,	)	
	)	**MEMORANDUM OPINION**
v.	)	
	)	Hon. Glen E. Conrad
ROLLING STONE LLC, et al.,	)	Chief United States District Judge
	)	
Defendants.	)	

From October 17, 2016 through October 28, 2016, a bifurcated jury trial was conducted on plaintiff's claims of defamation and defamation by implication. At the close of plaintiff's evidence, defendants moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). The case is currently before the court on defendants' motion as to plaintiff's defamation by implication claim and plaintiff's motion to clarify her claim. For the following reasons, the court will grant defendants' motion.

Standard of Review

Rule 50(a) of the Federal Rules of Civil Procedure permits a party to submit a motion for judgment as a matter of law after the opposing party has been fully heard. "Pursuant to Rule 50(a), the court will not submit an issue to the jury unless sufficient evidence exists to justify, as a legal matter, a finding in favor of the proponent. In other words, if the judge concludes that the plaintiff's case is, as a matter of law, so weak that no rational jury could find in favor of the plaintiff, the judge has the authority to enter judgment in favor of the defendant[s]." Belk, Inc. v. Meyer Corp., U.S., 679 F.3d 146, 160 (4th Cir. 2012).

Discussion

The facts of this case are outlined in detail in the court's memorandum opinion granting in

part and denying in part the parties' cross motions for summary judgment. See Eramo v. Rolling Stone, No. 3:15CV23, 2016 WL 5234688 (W.D. Va. Sept. 22, 2016). In her complaint, plaintiff did not expressly include a count for defamation by implication. Defendants, however, acknowledged that plaintiff's "complaint already asserts claims under a theory of defamation by implication." Email from Alison Schary to Libby Locke (March 16, 2016 6:13 p.m.). At a hearing held on October 11, 2016, defendants requested that plaintiff specify the defamatory meaning she claimed defendants implied. Hearing Tr. 42-43, Dkt. 263. Plaintiff agreed to do so and, sometime thereafter, provided a statement delineating the alleged defamatory implication. Id. Plaintiff asserted "that the Rolling Stone article 'A Rape on Campus,' taken as a whole and viewed in context with its headlines, illustrations, captions and promotional material, implies and insinuates that Nicole Eramo acted as a false friend to Jackie, pretending to be on her side while at the same time discouraging Jackie from pursuing a formal complaint or police investigation regarding her rape allegations in order to suppress the assault and protect the University's reputation." After resting and prior to the defendants' presentation of evidence, plaintiff moved to clarify her defamatory implication claim.

In Virginia, a defamation by implication plaintiff must demonstrate that "the statements were designed and intended by the defendants to imply [the defamatory innuendo of which the plaintiff complains.]" Pendleton v. Newsome, 290 Va. 162, 175 (2015). When a plaintiff alleges that she has been defamed by implication, "the alleged implication must be reasonably drawn from the words actually used." Webb v. Virginia-Pilot Media Cos., LLC, 287 Va. 84, 89 (2014) (citing Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092-93 (4th Cir. 1993)); see also Carwile v. Richmond, 196 Va. 1, 9 (1954) ("The meaning of the alleged defamatory language cannot, by innuendo, be extended beyond its ordinary and common acceptation. The province of the innuendo is to show how the words used are defamatory, and how they relate to the plaintiff, but it cannot introduce new matter, nor extend the meaning of the words used, or make that certain which is in

fact uncertain.").

Claims for defamation are subject to notice pleading requirements set forth in Federal Rule of Civil Procedure 8(a). Nonetheless, a defamation plaintiff "ought to specify the defamatory statements, even under the liberal federal pleading regime." Johnson v. Lantz, 2:02CV00120, 2002 WL 1821610, at *1 (W.D. Va. Aug. 8, 2002). For example, in Compel v. Citi Mortgage Inc., the district court dismissed a defamation claim when the complaint failed "to identify which specific statements plaintiff consider[ed] defamatory or libelous." 1:04CV01377, 2005 WL 4904816, at *1 (E.D. Va. Feb. 23, 2005).

Trial courts have consistently relied upon the innuendo alleged in the plaintiff's complaint in determining whether a plaintiff has sufficiently stated a claim. See e.g., Chapin v. Greve, 787 F. Supp. 557, 564 (E.D. Va. 1992) ("The dispositive question presented is whether or not a reasonable factfinder could conclude that the article or statements in the article state or imply, in their plain and natural sense, the defamatory meanings ascribed to them by plaintiffs in their complaint.") (citing Milkovich v. Loraine Journal Co., 497 U.S. 1, 20-21 (1990)); Pendleton, 290 Va. at 175 (concluding that the statements at issue were "reasonably capable of conveying the defamatory innuendo of which plaintiff complains"); Webb, 287 Va. at 89 ("Thus, the question for the circuit court when ruling on the demurrer was whether, as a matter of law, the article is reasonably capable of the defamatory meaning [plaintiff] ascribed to it). For example, in Pendleton v. Newsome, plaintiff alleged that defendants "falsely implied, inferred, and/or insinuated, through relevant facts, and use of innuendo, that [a child's] death was caused by [her mother's] alleged inactions." 290 Va. at 167. In its opinion reversing and remanding, the Supreme Court of Virginia stated that plaintiff would bear the burden of proving "that the statements . . . were designed and intended . . . to imply that the plaintiff was responsible for her child's death." Id. at 175.

Here, the court believes that plaintiff met her federal notice pleading requirement when plaintiff delivered to defendants her statement of implication after the October 11, 2016 hearing. At that point in time, defendants had enough information to "understand the defenses available to [them] and how [they] should proceed." Compel, 2005 WL 4904816, at *2. Moreover, only upon delineating the defamatory implication could plaintiff attempt to prove that the implication was a false factual assertion that defendants "designed and intended," as required by Virginia law. See Pendleton, 290 Va. at 171-75. Thus, the court concludes that it must use the defamatory meaning as alleged by the plaintiff in evaluating whether the inference could be "reasonably drawn from the words actually used" and whether the defendants intended such an implication. Webb, 287 Va. at 89.

After resting her case, plaintiff now seeks to clarify or amend her claim so as to allege a different implication. While leave to amend a complaint is "freely given when justice so requires," the court should deny granting leave where good reason exists, such as when the amendment would be "prejudicial to the opposing party." Hoback v. Doe, 7:14CV00711, 2015 WL 5553745, at *1 (W.D. Va. Sept. 18, 2015) (citing Fed. R. Civ. P. 15(a)). The federal rules contemplate notice pleading so that the other party has the opportunity to defend itself. See Everett v. Prison Health Servs, 412 F. App'x 604, 606 (4th Cir. 2011). Here, the court believes that allowing plaintiff to amend on the eve of defendants' case would not provide defendants with sufficient time to develop their defense, causing prejudice.[1] Therefore, the court will deny the plaintiff's motion to clarify.

Having heard the evidence, the court believes that no reasonable juror could find that "A Rape on Campus," read as a whole and in context of the contemporaneous promotional material, reasonably implies that Eramo was a false friend to Jackie who pretended to be on Jackie's side while seeking to suppress sexual assault reporting. Similarly, based on the evidence adduced, the

[1] This is especially true in a case such as this in which plaintiff called many of the witnesses identified by defendants as adverse witnesses.

court further believes that no reasonable juror could find that plaintiff has established by a preponderance of the evidence that defendants designed and intended this defamatory implication. Therefore, the court will grant defendants' motion for judgment as a matter of law in relation to plaintiff's defamation by implication allegations. In so holding, the court denies plaintiff's motion for leave to clarify or amend her claim.

Conclusion

For the reasons stated, defendants' motion for judgment as a matter of law as to plaintiff's defamation by implication claim is granted and plaintiff's motion to clarify is denied. The Clerk is directed to send certified copies of this memorandum opinion and the accompanying order to all counsel of record.

ENTER: This 31st day of October, 2016.

Chief United States District Judge

CIVIL JURY TRIAL FINAL INSTRUCTIONS

Judge Glen E. Conrad

Ladies and gentlemen of the jury, now that you have heard the evidence and the arguments of counsel it becomes my duty to give you the instructions as to the law applicable to this case. It is your duty as jurors to follow the law as stated in the instructions that I will give you and to apply the rules of law so given to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court. Similarly, it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case or what that opinion is. It is not my function to determine the facts. Instead, you are the sole judges of fact in the case.

At this time, I am going to ask the marshal to give each of you a copy of the verdict forms, which will be provided to you when you are sent out to deliberate. I want to make reference to the forms as I instruct you as to the law which governs the particular case before us today. Your verdict on the questions posed must be based on the facts as you find them and on the law contained in all of these instructions.

This is a defamation case. The case arises from an article published by Rolling Stone magazine entitled "A Rape on Campus," as well as several statements that the magazine and the author of the article made to the media. The plaintiff in this case is Nicole Eramo, a University of Virginia administrator who is named in the article. Ms. Eramo claims that the article, and other statements made by the defendants, defamed her. The defendants are Sabrina Rubin Erdely, the author of the article; Rolling Stone, LLC, the magazine in which the article was published; and Wenner Media, LLC, the parent company of Rolling Stone, LLC.

It is undisputed that Sabrina Rubin Erdely is an independent contractor of Rolling Stone.

A person or entity who hires an independent contractor is not liable for the independent contractor's actions and is not assumed to have the same knowledge as the independent contractor, and vise versa. Because Sabrina Rubin Erdely is an independent contractor and not an employee of Rolling Stone, Ms. Erdely's knowledge and actions may not automatically be imputed to Rolling Stone or Wenner Media. Similarly, Rolling Stone and Wenner Media's knowledge and actions are not imputed to Ms. Erdely. You should consider what knowledge each defendant possessed at the time, as demonstrated by the evidence.

Claims at Issue

Nicole Eramo had asserted defamation claims against the defendants. I will briefly review the statements that are still at issue in this case. These statements are also set forth in your Special Verdict Form, and they have been highlighted and identified in the binder provided to you.

First, Plaintiff alleges that each of the following statements (Statement One through Statement Three in your jury book) from the article titled "A Rape on Campus," published on November 19, 2014, are false and defamatory of her:

1. "Lots of people have discouraged her from sharing her story, Jackie tells me with a pained look, including the trusted UVA dean to whom Jackie reported her gang-rape allegations more than a year ago."

2. "Like most colleges, sexual-assault proceedings at UVA unfold in total secrecy. Asked why UVA doesn't publish all its data, President Sullivan explains that it might not be in keeping with 'best practices' and thus may inadvertently discourage reporting. Jackie got a different explanation when she'd eventually asked Dean Eramo the same question. She says Eramo answered wryly, 'Because nobody wants to send their daughter to the rape school.'"

3. "A bruise mottling her face, Jackie sat in Eramo's office in May 2014 and told her about the two others. One, she says, is a 2013 graduate, who'd told Jackie that she'd been gang-raped as a freshman at the Phi Kappa Psi house. The other was a first-year whose worried friends had called Jackie after the girl had come home wearing no pants. Jackie said the girl told her she'd been assaulted by four men in a Phi Psi bathroom while a fifth watched. (Neither woman was willing to talk to RS.) As Jackie wrapped up her story, she was disappointed by Eramo's nonreaction. She'd expected shock, disgust, horror. ... Of all her assailants, Drew was the one she most wanted to see held accountable – but with Drew about to graduate, he was going to get away with it. Because, as she miserably reminded Eramo in her office, she didn't feel ready to file a complaint. Eramo, as always, understood."

The Court has determined that Statement Four in your jury book is no longer at issue in this case, and thus it will not be considered further by you.

Second, Plaintiff alleges that the following statement, Statement Five in your jury book, made by reporter Sabrina Rubin Erdely on the Brian Lehrer Show on November 26, 2014, is false and defamatory of her:

5. "[J]ackie was kind of brushed off by her friends and by the administration. . . . And eventually, when she did report it to the administration, the administration did nothing about, they did nothing with the information. And they even continued to do nothing when she eventually told them that she had become aware of two other women who were also gang raped at the same fraternity."

Third, Plaintiff alleges that the following statements, Statements Six through Statement Nine in your jury book, made by reporter Sabrina Rubin Erdely on the Slate DoubleX podcast on November 26, 2014, are false and defamatory of her:

6. "[J]ackie had eventually kind of mustered up the courage to tell the administration that she had been brutally gang raped, and that the University did nothing with this information that they continued to do nothing even when she told them that she had become aware of two other women that were also gang raped at that fraternity."

7. "It is incredibly extreme. I mean whether this was perpetrated by a serial rapist who has many victims – I mean it seems like no matter what, this is an incredibly messed up situation. But it was absolutely a violent crime and I think what was really telling was the idea that – and this really underscores the entire article; is the student body and the administration doesn't really treat rape as a crime, as a violent crime . . . Even in this case, right, exactly. And this is why this case blew my mind, that Jackie's situation blew my mind; that even in a situation that was so extreme and so obviously within the realm of criminal, that they would seek to suppress something like this because that's really what they did. Not only did they not report it to the police, but really I feel she was sort of discouraged from moving this forward."

8. "She's particularly afraid of Drew who she's assigned a tremendous amount of power in her own mind. ... So I think that the idea of [Jackie] facing him or them down in any way is really just emotionally crippling for her. She's having a hard time facing up to that, and I think that she needs a lot of support if she's going to get to the place where she can actually confront them. When she does actually run into some of her alleged assailants on campus sometimes, just the sight of them, obviously it's a shock but it also tends to send her into a depression. So it just goes to show sort of the emotional toll something like this would take. I just think it would require a great deal of support for her to move forward into any of

these options to resolve her case and that's something that's been completely absent. She really hasn't had any of that support from her friends, from the administration, nor from her family."

9. "What I found is that UVA is a place where their culture is one of extreme loyalty, so I guess it shouldn't have surprised me that the community of survivors, they're totally devoted to the University, even as they're not very happy with the way that their cases are handled. They totally buy into the attitude that radiates from the administration that doing nothing is a fine option. You know, if you unburden yourself to the Dean and take care of your own mental health, then that's good enough. They created this support group, which is great for them and they do activism, they do bystander support seminars, I mean intervention seminars and things like that which is great, but really what they're doing is affirming one another's choices not to report, which is, of course, an echo of their own administration's kind of ethos."

Fourth, Plaintiff alleges that the following statement made to The Washington Post on November 30, 2014, is false and defamatory of her:

10. "As I've already told you, the gang-rape scene that leads the story is the alarming account that Jackie – a person whom I found to be credible – told to me, told her friends, and importantly, what she told the UVA administration, which chose not to act on her allegations in any way – i.e., the overarching point of the article. THAT is the story: the culture that greeted her and so many other UVA women I interviewed, who came forward with allegations, only to be met with indifference."

Finally, Plaintiff alleges that the following statement, Statement Eleven in your jury book, provided by representatives of Rolling Stone and Wenner Media in response to press inquiries on December 1, 2014, is false and defamatory of her:

11. "The story we published was one woman's account of a sexual assault at a UVA fraternity in October 2012 – and the subsequent ordeal she experienced at the hands of the University administrators in her attempts to work her way through the trauma of that evening. The indifference with which her complaint was met was, we discovered, sadly consistent with the

experience of many other UVA women who have tried to report such assaults. Through our extensive reporting and fact-checking, we found Jackie to be entirely credible and courageous and we are proud to have given her disturbing story the attention it deserves."

Defamation

The special verdict forms you have been provided make reference to each of the statements on which the plaintiff's claims for defamation are based. There is a special verdict form for each defendant. On the special verdict forms, you are asked to determine whether each statement is actionable against a particular defendant, and, if so, whether the defendant acted with the requisite intent.

In order to establish that one or more statements is actionable, plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

(1) That the defendant made the statement;

(2) That the statement was seen, read, or heard by someone other than the plaintiff;

(3) That the statement is of or concerning the plaintiff, Nicole Eramo;

(4) That the statement is false and defamatory; and

(5) That the plaintiff was damaged as a result of the statement.

On all of these issues, the plaintiff has the burden of proof. To prevail against a defendant on a particular statement, the plaintiff must prove each of these elements, by a preponderance of the evidence, as to that defendant and that statement.

Because of earlier rulings that the court has made in this case, including that Ms. Eramo is a public figure, in addition to the elements set forth above, in order to prevail on any one or more of the statements, plaintiff also has the burden of establishing by clear and convincing evidence that the defendant made the statement with actual malice.

I will now undertake to instruct you in more detail as to these issues.

Defamatory Meaning

Defamation is a false factual statement that concerns and harms the plaintiff or the plaintiff's reputation. A person has a right to an uninterrupted enjoyment of his or her reputation.

To be defamatory, an oral or written statement must be more than merely insulting, offensive, unpleasant, or inappropriate. It must have made Nicole Eramo appear odious, infamous, or ridiculous. Said otherwise, a defamatory statement must be a false statement that harms a person's reputation rendering her contemptible or ridiculous in the public's estimation, and exposing her to public hatred, ridicule, or contempt.

In determining whether any statement made by any defendant is defamatory, you must read that statement in the context of the article as a whole, or in the context of the interview or statement as a whole, as applicable. This means you may not seize on any one word, phrase, or image, or consider only one particular statement, phrase, or passage in isolation. Words alleged to be defamatory are to be taken in their plain and natural meaning, and to be understood as other people would understand them, and according to the sense in which they appear to have been used.

Publication

I tell you that a defamatory statement is deemed published, or "made" by the defendant, whenever it is communicated to and understood by a person other than the plaintiff. Publication may be proven by direct or circumstantial evidence. The plaintiff need not identify the person to whom the defamatory words were published, and need not place in evidence testimony from a third party regarding what the person heard and understood.

Of or Concerning

Generally, a libel plaintiff must show that the alleged libel was published "of or concerning" her. In order for the statement made by the defendant to be of or concerning the plaintiff, it is not necessary that the plaintiff be designated by name in the statement. It is a sufficient designation of or reference to the plaintiff if, under all the surrounding circumstances, those who hear or read the statement would reasonably believe that the plaintiff was the person referred to. Moreover, statements or publications by the same defendant regarding one specific subject or event and made over a relatively short period of time, some of which clearly identify the plaintiff and others which do not, may be considered together for the purpose of establishing that the plaintiff was the person "of or concerning" whom the alleged defamatory statements were made.

You are instructed that a magazine and its reporter, just like any other American citizen, has the right to criticize the actions and statements of any state government agency, including the University of Virginia, and to criticize actions taken or not taken by that state government agency.

The U.S. Constitution does not permit the University of Virginia, or any other state or federal government agency, to sue for defamation. In this regard, it is important to remember that the University of Virginia is not the plaintiff in this action. If you decide that any of the statements at issue are about actions, statements or positions taken by the University of Virginia or others who work for UVA, and not about Nicole Eramo personally, then you must find for the defendants with respect to those statements. The plaintiff must prove by a preponderance of the evidence that the statement is specifically directed at her. However, it is sufficient if there is evidence that, under all the surrounding circumstances, those who hear or read the statement would reasonably believe that the plaintiff is the person referenced or designated.

Falsity

The plaintiff may only recover for provably false statements of fact. No matter how inflammatory or hurtful a statement may be, no matter what the defendants' motive in writing or publishing it, if the plaintiff fails to prove by a preponderance of the evidence that the statement, if it exists, is false, you must render a verdict for the defendant as to that statement.

You must remember that there is no burden on the defendants to prove the truth of any statement at issue. Defendants were free to offer proof of truth, but by doing so they did not assume the burden of convincing you of the truth of these statements. The burden remains on the plaintiff, Nicole Eramo. She bears the burden of proving that a statement is false in an important, material respect.

Damage

The plaintiff must also prove an element of damage. To damage the plaintiff, a statement must be more than merely insulting, offensive, unpleasant, or inappropriate. It must harm plaintiff's reputation rendering her contemptible or ridiculous in the public's estimation.

Actual Malice

In addition to the foregoing elements plaintiff must prove, plaintiff also has the burden of demonstrating by clear and convincing evidence that a defamatory statement was made by one or more defendants with actual malice, that is, with knowledge of the statement's falsity or with reckless disregard of whether or not it is false.

Reckless disregard means that the defendant had a high degree of awareness of the probable falsity or must have in fact entertained serious doubts as to the truth of the publication.

Actual malice is a subjective inquiry that focuses on the defendant's state of mind at the time the statements were published.

Clear and Convincing Evidence

The plaintiff must prove the existence of "actual malice" by clear and convincing evidence as to every statement and for each defendant. Clear and convincing evidence is that degree of proof which will produce in your mind a firm belief or conviction that a defendant acted with knowledge of the falsity of the statements or reckless disregard for whether the statement is false or not. As I defined earlier, "clear and convincing" is more than a preponderance of the evidence but less than proof beyond a reasonable doubt.

Actual malice is not negligence. Reckless conduct is not measured by whether a reasonably prudent person would have published, or would have investigated further before publishing.

A failure to investigate does not establish actual malice. It is not enough for plaintiff to prove that defendant did not conduct a thorough investigation of the facts or that a defendant was careless in the way the defendant wrote or edited the article. Likewise, it is not enough for plaintiff to prove that the defendant departed from accepted standards of journalism in the reporting, editing, or fact-checking of the article. In order to recover, plaintiff must prove that the defendant knew that the complained of statements were false or in fact entertained serious doubts as to whether they were false or not.

However, if there is evidence that defendants failed to investigate when doubts were created because the story was weakened by inherent improbability, internal inconsistency, or apparently reliable contradictory information, you are permitted to infer from such evidence that a defendant acted with actual malice.

Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted. When a defendant relies on a source for a statement alleged to be defamatory and has subjective doubt as to the truthfulness of a source, you may infer that a defendant acted with actual malice by making a deliberate decision not to follow up out of a desire to avoid conflicting information. Conversely, you may find defendant's reasons for not investigating further credible and not motivated out of purposeful avoidance of the truth.

If you find that the information in a defendant's possession at the time of publication did not support the statements that the defendant made, or that a defendant was aware of facts contradicting those statements, you may infer that the defendant was purposefully avoiding the truth out of awareness of the probable falsity of the statements. However, if you find that defendants

believed their sources and believed in the accuracy of the statements when published, you must find in favor of the defendants.

I tell you that the term "actual malice" should not be confused with the more common meaning of the word "malice," such as ill will or hatred. Actual malice is not established merely because a journalist or magazine publisher was motivated by ill will, prejudice, hostility, hatred, contempt, or even a desire to injure the plaintiff.

The fact that an article is one sided or fails to include as many positive features about the subject as negative ones is not indicative of actual malice. Publishers and reporters are entitled to publish unfair, one-sided attacks on public figures, provided they believe the attacks to be true. Neither is actual malice established merely because a defendant selectively chose which facts to present and which facts to omit in advancing a particular viewpoint. I remind you that the issue is whether the publisher recklessly or knowingly published false material.

Similarly, a journalist may express a viewpoint that is one among a number of possible rational interpretations of ambiguous sources or facts. Even if the interpretation chosen is wrong or ill-conceived, such expression does not amount to actual malice absent knowledge that the interpretation is false or a reckless disregard of whether the interpretation is false or not.

Again, actual malice is a subjective inquiry that focuses on the defendant's state of mind at the time of publication. A plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence. You are entitled to consider failures to investigate, departures from journalistic standards, evidence of ill will or intent to injury, and evidence of a preconceived storyline in determining whether a defendant had a high degree of awareness of the probable falsity of the statements. You may not, however, rely on any one of these factors alone in determining whether a defendant acted with actual malice.

It is for you to decide, considering all the evidence taken as a whole, whether the defendant did in fact make each statement knowing that it was false or with serious doubts as to the truth of the statement.

Defendants contend that they have retracted the statements in "A Rape on Campus" that Ms. Eramo alleges are defamatory. Whether or not a defendant has retracted a statement is not relevant in determining whether the statements are actionable in the first place.

However, if you determine that a defendant retracted an allegedly defamatory statement, you may consider that retraction, and the circumstances in which it was made, in determining whether a defendant acted without actual malice.

In any event, I tell you that in this context, as with all determinations of fact, it is for you to decide whether a retraction occurred, and if so, its significance.

Republication

Nicole Eramo claims that by appending the "Editor's Note" to the top of the existing online article on December 5, 2014, defendants "republished" the content of the original article.

In order to find that defendants "republished" the original article on December 5, 2014, you must find that by adding the "Editor's Note" to the top of the online article, defendants affirmatively reiterated the content of any allegedly false and defamatory statements with an intent to reach a new audience.

In assessing her claim, you must consider the content of the "Editor's Note" and all other evidence you find that bears on the issue to be decided.

If you find that a republication has occurred, you must also determine, as with the other statements, whether the plaintiff has met all the elements of defamation in regards to the republished article. Like with the original statements, you shall consider the context of the republished statements to determine whether they are defamatory and made with actual malice. In making this determination, you must focus on the same three statements from the article published on November 19, 2014 of which plaintiff complains.

Keep in mind what the court instructed you at the beginning of trial: the timeline of this case is important. Thus, if you find by a preponderance of the evidence that a republication occurred on December 5, 2014, the context of the republication becomes important. If you determine a republication occurred, you will find it necessary to consider the facts known at the time, whether plaintiff has established that the referenced statements are actionable under the instructions the court has provided you, and whether those statements were made with actual malice.

In just a few moments it will be time for you to retire to the jury room to begin your deliberations. Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesman here in court. A verdict form has been prepared for your responses. You will take this form to the jury room. I tell you that in answering the questions and inquiries on the verdict form, it is necessary that each of you agree as to the response. Your verdict as to each question must be unanimous.

The verdict must represent the considered judgment of all of you. It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment.

You must each decide the case for yourself but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But, do not surrender your honest convictions as to the weight or effect of the evidence solely because others among you may disagree or for the mere purpose of returning a verdict. Your sole interest is to seek the truth from the evidence of the case.

Once again, when you enter your jury room, your first responsibility will be to elect a foreperson. You will then begin your deliberations. I again tell you that your answer to each of the questions on the verdict form must be unanimous. I plan on sending the exhibits introduced into evidence to the jury room with you. Once you begin your deliberations, you should not have contact with any person other than the marshal.

If you recess during your deliberations, follow all of the instructions that the court has given you about your conduct during the trial. If you want to communicate with me at any time, please give a written message or question to the marshal, who will bring it to me. I will then respond as promptly as possible either in writing or by having you brought into the courtroom so that I can address you orally. I will always first disclose to the attorneys your question and my response before I answer your question.

You should not let anyone know, including the court or the marshal, how you stand on your deliberations either numerically or on the questions before you, until after you have reached a unanimous verdict.

Mr. Marshal, if you will, deliver the official verdict form to the jury. Mr. Marshal, if you would please take the jury out into the hall but not all the way into the jury room and let me converse with counsel for just a few moments before we send the jury to deliberate.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

NICOLE P. ERAMO ,	)	
	)	
Plaintiff,	)	Civil Action No. 3:15-CV-00023
	)	
v.	)	**SPECIAL VERDICT FORM**
	)	**NUMBER ONE**
ROLLING STONE, LLC, et. al,	)	**SABRINA RUBIN ERDELY**
	)	
Defendants.	)	By: Hon. Glen E. Conrad
	)	Chief United States District Judge

This special verdict form includes each of the statements on which plaintiff bases her claim of defamation against Sabrina Rubin Erdely. Answer the questions in accordance with the court's instructions.

1. As to this statement appearing in the November 19, 2014 print and online editions of "A Rape on Campus":
"Lots of people have discouraged her from sharing her story, Jackie tells me with a pained look, including the trusted UVA dean to whom Jackie reported her gang-rape allegations more than a year ago."

1(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Sabrina Rubin Erdely**?

ANSWER YES OR NO. Yes
If you answered question 1(a) "no," proceed to question 2.

1(b). If you answered "yes" to question number 1(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Sabrina Rubin Erdely** acted with actual malice in making this statement?

ANSWER YES OR NO. Yes

2. As to this statement appearing in the November 19, 2014 print and online editions of "A Rape on Campus":
"Like most colleges, sexual-assault proceedings at UVA unfold in total secrecy. Asked why UVA doesn't publish all its data, President Sullivan explains that it might not be in keeping with 'best practices' and thus may inadvertently discourage reporting. Jackie got a different explanation when she'd eventually asked Dean

Eramo the same question. She says Eramo answered wryly, 'Because nobody wants to send their daughter to the rape school.'"

2(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Sabrina Rubin Erdely**?

ANSWER YES OR NO. Yes
If you answered question 2(a) "no," proceed to question 3.

2(b). If you answered "yes" to question number 2(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Sabrina Rubin Erdely** acted with actual malice in making this statement?

ANSWER YES OR NO. NO

3. As to this statement appearing in the November 19, 2014 print and online editions of "A Rape on Campus":

"A bruise mottling her face, Jackie sat in Eramo's office in May 2014 and told her about the two others. One, she says, is a 2013 graduate, who'd told Jackie that she'd been gang-raped as a freshman at the Phi Kappa Psi house. The other was a first-year whose worried friends had called Jackie after the girl had come home wearing no pants. Jackie said the girl told her she'd been assaulted by four men in a Phi Psi bathroom while a fifth watched. (Neither woman was willing to talk to RS). As Jackie wrapped up her story, she was disappointed by Eramo's nonreaction. She'd expected shock, disgust, horror.... Of all her assailants, Drew was the one she most wanted to see held accountable—but with Drew about to graduate, he was going to get away with it. Because, as she miserably reminded Eramo in her office, she didn't feel ready to file a complaint. Eramo, as always, understood."

3(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Sabrina Rubin Erdely**?

ANSWER YES OR NO. Yes
If you answered question 3(a) "no," proceed to question 4.

3(b). If you answered "yes" to question number 3(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Sabrina Rubin Erdely** acted with actual malice in making this statement?

ANSWER YES OR NO. Yes

4. As to this statement made on the Brian Lehrer show on November 26, 2014:
"[J]ackie was kind of brushed off by her friends and by the administration . . . And eventually, when she did report it to the administration, the administration did nothing about, they did nothing with the information. And they even continued to do nothing when she eventually told them that she had become aware of two other women who were also gang raped at the same fraternity."

4(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Sabrina Rubin Erdely**?

ANSWER YES OR NO. Yes
If you answered question 4(a) "no," proceed to question 5.

4(b). If you answered "yes" to question number 4(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Sabrina Rubin Erdely** acted with actual malice in making this statement?

ANSWER YES OR NO. Yes

5. As to this statement made on the Slate DoubleX Gabfest podcast on November 26, 2014:
"[Jackie] had eventually kind of mustered up the courage to tell the administration that she had been brutally gang raped and that the University did nothing with this information and that they continued to do nothing even when she eventually then told them that she had become aware of two other women who were also gang raped at that same fraternity."

5(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Sabrina Rubin Erdely**?

ANSWER YES OR NO. Yes
If you answered question 5(a) "no," proceed to question 6.

5(b). If you answered "yes" to question number 5(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Sabrina Rubin Erdely** acted with actual malice in making this statement?

ANSWER YES OR NO. NO

6. As to this statement made on the Slate DoubleX Gabfest podcast on November 26, 2014: *"It is incredibly extreme. I mean whether this was perpetrated by a serial rapist who has many victims – I mean it seems like no matter what, this is an incredibly messed up situation. But it was absolutely a violent crime and I think what was really telling was the idea that – and this really underscores the entire article; is the student body and the administration doesn't really treat rape as a crime, as a violent crime . . . Even in this case, right, exactly. And this is why this case blew my mind, that Jackie's situation blew my mind; that even in a situation that was so extreme and so obviously within the realm of criminal, that they would seek to suppress something like this because that's really what they did. Not only did they not report it to the police, but really I feel she was sort of discouraged from moving this forward."*

6(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Sabrina Rubin Erdely**?

ANSWER YES OR NO. Yes
If you answered question 6(a) "no," proceed to question 7.

6(b). If you answered "yes" to question number 6(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Sabrina Rubin Erdely** acted with actual malice in making this statement?

ANSWER YES OR NO. Yes

7. As to this statement made on the Slate DoubleX Gabfest podcast on November 26, 2014: *"She's particularly afraid of Drew who she's assigned a tremendous amount of power in her own mind. . . . So I think that the idea of [Jackie] facing him or them down in any way is really just emotionally crippling for her. She's having a hard time facing up to that, and I think that she needs a lot of support if she's going to get to the place where she can actually confront them. When she does actually run into some of her alleged assailants on campus sometimes, just the sight of them, obviously it's a shock but it also tends to send her into a depression. So it just goes to show sort of the emotional toll something like this would take. I just think it would require a great deal of support for her to move forward into any of these options to resolve her case and that's something that's been completely absent. She really hasn't had any of that support from her friends, from the administration, nor from her family."*

7(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Sabrina Rubin Erdely**?

ANSWER YES OR NO. Yes
If you answered question 7(a) "no," proceed to question 8.

7(b). If you answered "yes" to question number 7(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Sabrina Rubin Erdely** acted with actual malice in making this statement?

ANSWER YES OR NO. Yes

8. As to this statement made on the Slate DoubleX Gabfest podcast on November 26, 2014: *"What I found is that UVA is a place where their culture is one of extreme loyalty, so I guess it shouldn't have surprised me that the community of survivors, they're totally devoted to the University, even as they're not very happy with the way that their cases are handled. They totally buy into the attitude that radiates from the administration that doing nothing is a fine option. You know, if you unburden yourself to the Dean and take care of your own mental health, then that's good enough. They created this support group, which is great for them and they do activism, they do bystander support seminars, I mean intervention seminars and things like that which is great, but really what they're doing is affirming one another's choices not to report, which is, of course, an echo of their own administration's kind of ethos."*

8(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Sabrina Rubin Erdely**?

ANSWER YES OR NO. Yes
If you answered question 8(a) "no," proceed to question 9.

8(b). If you answered "yes" to question number 8(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Sabrina Rubin Erdely** acted with actual malice in making this statement?

ANSWER YES OR NO. NO

9. As to this statement emailed to a Washington Post Reporter on November 30, 2014: *"As I've already told you, the gang-rape scene that leads the story is the alarming account that Jackie – a person whom I found to be credible – told to me, told her friends, and importantly, what she told the UVA administration, which chose not to act on her*

allegations in any way – i.e., the overarching point of the article. THAT is the story: the culture that greeted her and so many other UVA women I interviewed, who came forward with allegations, only to be met with indifference."

9(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Sabrina Rubin Erdely**?

ANSWER YES OR NO. Yes
If you answered question 9(a) "no," proceed to question 10.

9(b). If you answered "yes" to question number 9(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that such defendant(s) acted with actual malice in making this statement?

ANSWER YES OR NO. Yes

10. Do you find by a preponderance of the evidence that **Sabrina Rubin Erdely** republished the article, "A Rape on Campus" on December 5, 2014?

ANSWER YES OR NO. NO
If you answered question 10 "no," stop.
If you answered question 10 "yes," answer question 11, 12, and 13.

11. As to this statement republished on December 5, 2014:
"Lots of people have discouraged her from sharing her story, Jackie tells me with a pained look, including the trusted UVA dean to whom Jackie reported her gang-rape allegations more than a year ago."

11(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Sabrina Rubin Erdely**?

ANSWER YES OR NO. N/A
If you answered question 11(a) "no," proceed to question 13.

11(b). If you answered "yes" to question number 12(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Sabrina Rubin Erdely** acted with actual malice in republishing this statement?

ANSWER YES OR NO. N/A

12. As to this statement republished on December 5, 2014:
"Like most colleges, sexual-assault proceedings at UVA unfold in total secrecy. Asked why UVA doesn't publish all its data, President Sullivan explains that it might not be in keeping with 'best practices' and thus may inadvertently discourage reporting. Jackie got a different explanation when she'd eventually asked Dean Eramo the same question. She says Eramo answered wryly, 'Because nobody wants to send their daughter to the rape school.'"

12(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Sabrina Rubin Erdely**?

ANSWER YES OR NO. N/A
If you answered question 12(a) "no," proceed to question 14.

12(b). If you answered "yes" to question number 13(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Sabrina Rubin Erdely** acted with actual malice in republishing this statement?

ANSWER YES OR NO. N/A

13. As to this statement republished on December 5, 2014:
"A bruise mottling her face, Jackie sat in Eramo's office in May 2014 and told her about the two others. One, she says, is a 2013 graduate, who'd told Jackie that she'd been gang-raped as a freshman at the Phi Kappa Psi house. The other was a first-year whose worried friends had called Jackie after the girl had come home wearing no pants. Jackie said the girl told her she'd been assaulted by four men in a Phi Psi bathroom while a fifth watched. (Neither woman was willing to talk to RS). As Jackie wrapped up her story, she was disappointed by Eramo's nonreaction. She'd expected shock, disgust, horror.... Of all her assailants, Drew was the one she most wanted to see held accountable—but with Drew about to graduate, he was going to get away with it. Because, as she miserably reminded Eramo in her office, she didn't feel ready to file a complaint. Eramo, as always, understood."

13(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Sabrina Rubin Erdely**?

ANSWER YES OR NO. N/A
If you answered question 13(a) "no," stop.

13(b). If you answered yes to question number 14(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Sabrina Rubin Erdely** acted with actual malice in republishing this statement?

ANSWER YES OR NO. N/A

Continue to Special Verdict Form Number Two

11/4/16
DATE

SIGNATURE OF FOREPERSON

Deborah J. Parmelee
PRINTED NAME OF FOREPERSON

FILED IN OPEN COURT
DATE: 11/4/2016
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

NICOLE P. ERAMO ,	)	
	)	
Plaintiff,	)	Civil Action No. 3:15-CV-00023
	)	
v.	)	**SPECIAL VERDICT FORM**
	)	**NUMBER TWO**
ROLLING STONE, LLC, et. al,	)	**ROLLING STONE, LLC**
	)	
Defendants.	)	By: Hon. Glen E. Conrad
	)	Chief United States District Judge

This special verdict form includes each of the statements which plaintiff alleges to have been made by Rolling Stone, LLC. Answer the questions in accordance with the court's instructions.

1. As to this statement appearing in the November 19, 2014 print and online editions of "A Rape on Campus":
"Lots of people have discouraged her from sharing her story, Jackie tells me with a pained look, including the trusted UVA dean to whom Jackie reported her gang-rape allegations more than a year ago."

1(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Rolling Stone, LLC**?

ANSWER YES OR NO. Yes
If you answered question 1(a) "yes," proceed to question 1(b).

1(b). If you answered "yes" to question number 1(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Rolling Stone, LLC** acted with actual malice in making this statement?

ANSWER YES OR NO. NO

2. As to this statement appearing in the November 19, 2014 print and online editions of "A Rape on Campus":
"Like most colleges, sexual-assault proceedings at UVA unfold in total secrecy. Asked why UVA doesn't publish all its data, President Sullivan explains that it might not be in keeping with 'best practices' and thus may inadvertently discourage reporting. Jackie got a different explanation when she'd eventually asked Dean

Eramo the same question. She says Eramo answered wryly, 'Because nobody wants to send their daughter to the rape school.'"

2(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Rolling Stone, LLC**?

ANSWER YES OR NO. Yes
If you answered question 2(a) "no," proceed to question 3.

2(b). If you answered "yes" to question number 2(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Rolling Stone, LLC** acted with actual malice in making this statement?

ANSWER YES OR NO. NO

3. As to this statement appearing in the November 19, 2014 print and online editions of "A Rape on Campus":

"A bruise mottling her face, Jackie sat in Eramo's office in May 2014 and told her about the two others. One, she says, is a 2013 graduate, who'd told Jackie that she'd been gang-raped as a freshman at the Phi Kappa Psi house. The other was a first-year whose worried friends had called Jackie after the girl had come home wearing no pants. Jackie said the girl told her she'd been assaulted by four men in a Phi Psi bathroom while a fifth watched. (Neither woman was willing to talk to RS). As Jackie wrapped up her story, she was disappointed by Eramo's nonreaction. She'd expected shock, disgust, horror.... Of all her assailants, Drew was the one she most wanted to see held accountable—but with Drew about to graduate, he was going to get away with it. Because, as she miserably reminded Eramo in her office, she didn't feel ready to file a complaint. Eramo, as always, understood."

3(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Rolling Stone, LLC**?

ANSWER YES OR NO. Yes
If you answered question 3(a) "no," proceed to question 4.

3(b). If you answered "yes" to question number 3(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Rolling Stone, LLC** acted with actual malice in making this statement?

ANSWER YES OR NO. NO

4. As to this statement emailed to a Washington Post Reporter on November 30, 2014:
"As I've already told you, the gang-rape scene that leads the story is the alarming account that Jackie – a person whom I found to be credible – told to me, told her friends, and importantly, what she told the UVA administration, which chose not to act on her allegations in any way – i.e., the overarching point of the article. THAT is the story: the culture that greeted her and so many other UVA women I interviewed, who came forward with allegations, only to be met with indifference."

4(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Rolling Stone, LLC**?

ANSWER YES OR NO. NO
If you answered question 4(a) "no," proceed to question 5.

4(b). If you answered "yes" to question number 4(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that such defendant(s) acted with actual malice in making this statement?

ANSWER YES OR NO. NA

5. As to this statement first released in a press release on December 1, 2014 and circulated between December 1 and December 4, 2014:
"The story we published was one woman's account of a sexual assault at a UVA fraternity in October 2012 – and the subsequent ordeal she experienced at the hands of the University administrators in her attempts to work her way through the trauma of that evening. The indifference with which her complaint was met was, we discovered, sadly consistent with the experience of many other UVA women who have tried to report such assaults. Through our extensive reporting and fact-checking, we found Jackie to be entirely credible and courageous and we are proud to have given her disturbing story the attention it deserves."

5(a) Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Rolling Stone, LLC**?

ANSWER YES OR NO. Yes
If you answered question 5(a) "no," proceed to question 6.

5(b) If you answered "yes" to question number 5(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Rolling Stone, LLC** acted with actual malice in making this statement?

ANSWER YES OR NO. NO

6. Do you find by a preponderance of the evidence that **Rolling Stone, LLC** republished the article, "A Rape on Campus" on December 5, 2014?

ANSWER YES OR NO. Yes
If you answered question 6 "no," stop.
If you answered question 6 "yes," answer question 7, 8, and 9.

7. As to this statement republished on December 5, 2014:
"Lots of people have discouraged her from sharing her story, Jackie tells me with a pained look, including the trusted UVA dean to whom Jackie reported her gang-rape allegations more than a year ago."

7(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Rolling Stone, LLC**?

ANSWER YES OR NO. Yes
If you answered question 7(a) "no," proceed to question 8.

7(b). If you answered "yes" to question number 7(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Rolling Stone, LLC** acted with actual malice in republishing this statement?

ANSWER YES OR NO. Yes

8. As to this statement republished on December 5, 2014:
"Like most colleges, sexual-assault proceedings at UVA unfold in total secrecy. Asked why UVA doesn't publish all its data, President Sullivan explains that it might not be in keeping with 'best practices' and thus may inadvertently discourage reporting. Jackie got a different explanation when she'd eventually asked Dean Eramo the same question. She says Eramo answered wryly, 'Because nobody wants to send their daughter to the rape school.'"

8(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Rolling Stone, LLC**?

ANSWER YES OR NO. Yes
If you answered question 8(a) "no," proceed to question 9.

8(b). If you answered "yes" to question number 8(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Rolling Stone, LLC** acted with actual malice in republishing this statement?

ANSWER YES OR NO. Yes

9. As to this statement republished on December 5, 2014:
"A bruise mottling her face, Jackie sat in Eramo's office in May 2014 and told her about the two others. One, she says, is a 2013 graduate, who'd told Jackie that she'd been gang-raped as a freshman at the Phi Kappa Psi house. The other was a first-year whose worried friends had called Jackie after the girl had come home wearing no pants. Jackie said the girl told her she'd been assaulted by four men in a Phi Psi bathroom while a fifth watched. (Neither woman was willing to talk to RS). As Jackie wrapped up her story, she was disappointed by Eramo's nonreaction. She'd expected shock, disgust, horror.... Of all her assailants, Drew was the one she most wanted to see held accountable—but with Drew about to graduate, he was going to get away with it. Because, as she miserably reminded Eramo in her office, she didn't feel ready to file a complaint. Eramo, as always, understood."

9(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Rolling Stone, LLC**?

ANSWER YES OR NO. Yes
If you answered question 9(a) "no," stop.

9(b). If you answered "yes" to question number 9(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Rolling Stone, LLC** acted with actual malice in republishing this statement?

ANSWER YES OR NO. Yes

Continue to Special Verdict Form Number Three

11/4/16
DATE

SIGNATURE OF FOREPERSON

Deborah T. Parmelee
PRINTED NAME OF FOREPERSON

FILED IN OPEN COURT
DATE: 11/4/16
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

NICOLE P. ERAMO ,	)	
	)	
Plaintiff,	)	Civil Action No. 3:15-CV-00023
	)	
v.	)	**SPECIAL VERDICT FORM**
	)	**NUMBER THREE**
ROLLING STONE, LLC, et. al,	)	**WENNER MEDIA, LLC**
	)	
Defendants.	)	By: Hon. Glen E. Conrad
	)	Chief United States District Judge

This special verdict form includes each of the statements which plaintiff alleges to have been made by Wenner Media, LLC. Answer the questions in accordance with the court's instructions.

1. As to this statement appearing in the November 19, 2014 print and online editions of "A Rape on Campus":
"Lots of people have discouraged her from sharing her story, Jackie tells me with a pained look, including the trusted UVA dean to whom Jackie reported her gang-rape allegations more than a year ago."

1(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Wenner Media, LLC**?

ANSWER YES OR NO. Yes
If you answered question 1(a) "no," proceed to question 2.

1(b). If you answered "yes" to question number 1(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Wenner Media, LLC** acted with actual malice in making this statement?

ANSWER YES OR NO. NO

2. As to this statement appearing in the November 19, 2014 print and online editions of "A Rape on Campus":
"Like most colleges, sexual-assault proceedings at UVA unfold in total secrecy. Asked why UVA doesn't publish all its data, President Sullivan explains that it might not be in keeping with 'best practices' and thus may inadvertently discourage reporting. Jackie got a different explanation when she'd eventually asked Dean

Eramo the same question. She says Eramo answered wryly, 'Because nobody wants to send their daughter to the rape school.'"

2(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Wenner Media, LLC**?

ANSWER YES OR NO. Yes
If you answered question 2(a) "no," proceed to question 3.

2(b). If you answered "yes" to question number 2(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Wenner Media, LLC** acted with actual malice in making this statement?

ANSWER YES OR NO. NO

3. As to this statement appearing in the November 19, 2014 print and online editions of "A Rape on Campus":

"A bruise mottling her face, Jackie sat in Eramo's office in May 2014 and told her about the two others. One, she says, is a 2013 graduate, who'd told Jackie that she'd been gang-raped as a freshman at the Phi Kappa Psi house. The other was a first-year whose worried friends had called Jackie after the girl had come home wearing no pants. Jackie said the girl told her she'd been assaulted by four men in a Phi Psi bathroom while a fifth watched. (Neither woman was willing to talk to RS). As Jackie wrapped up her story, she was disappointed by Eramo's nonreaction. She'd expected shock, disgust, horror.... Of all her assailants, Drew was the one she most wanted to see held accountable—but with Drew about to graduate, he was going to get away with it. Because, as she miserably reminded Eramo in her office, she didn't feel ready to file a complaint. Eramo, as always, understood."

3(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Wenner Media, LLC**?

ANSWER YES OR NO. Yes
If you answered question 3(a) "no," proceed to question 4.

3(b). If you answered "yes" to question number 3(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Wenner Media, LLC** acted with actual malice in making this statement?

ANSWER YES OR NO. NO

4. As to this statement emailed to a Washington Post Reporter on November 30, 2014:
"As I've already told you, the gang-rape scene that leads the story is the alarming account that Jackie – a person whom I found to be credible – told to me, told her friends, and importantly, what she told the UVA administration, which chose not to act on her allegations in any way – i.e., the overarching point of the article. THAT is the story: the culture that greeted her and so many other UVA women I interviewed, who came forward with allegations, only to be met with indifference."

4(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Wenner Media, LLC**?

ANSWER YES OR NO. NO
If you answered question 4(a) "no," proceed to question 5.

4(b). If you answered "yes" to question number 4(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that such defendant(s) acted with actual malice in making this statement?

ANSWER YES OR NO. N/A

5. As to this statement first released in a press release on December 1, 2014 and circulated between December 1 and December 4, 2014:
"The story we published was one woman's account of a sexual assault at a UVA fraternity in October 2012 – and the subsequent ordeal she experienced at the hands of the University administrators in her attempts to work her way through the trauma of that evening. The indifference with which her complaint was met was, we discovered, sadly consistent with the experience of many other UVA women who have tried to report such assaults. Through our extensive reporting and fact-checking, we found Jackie to be entirely credible and courageous and we are proud to have given her disturbing story the attention it deserves."

5(a) Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Wenner Media, LLC**?

ANSWER YES OR NO. Yes
If you answered question 5(a) "no," proceed to question 6.

5(b) If you answered "yes" to question number 5(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Wenner Media, LLC** acted with actual malice in making this statement?

ANSWER YES OR NO. NO

6. Do you find by a preponderance of the evidence that **Wenner Media, LLC** republished the article, "A Rape on Campus," on December 5, 2014?

ANSWER YES OR NO. Yes
If you answered question 6 "no," stop.
If you answered question 6 "yes," answer question 7, 8, and 9.

7. As to this statement republished on December 5, 2014:
"Lots of people have discouraged her from sharing her story, Jackie tells me with a pained look, including the trusted UVA dean to whom Jackie reported her gang-rape allegations more than a year ago."

7(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Wenner Media, LLC**?

ANSWER YES OR NO. Yes
If you answered question 7(a) "no," proceed to question 8.

7(b). If you answered "yes" to question number 7(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Wenner Media, LLC** acted with actual malice in republishing this statement?

ANSWER YES OR NO. Yes

8. As to this statement republished on December 5, 2014:
"Like most colleges, sexual-assault proceedings at UVA unfold in total secrecy. Asked why UVA doesn't publish all its data, President Sullivan explains that it might not be in keeping with 'best practices' and thus may inadvertently discourage reporting. Jackie got a different explanation when she'd eventually asked Dean Eramo the same question. She says Eramo answered wryly, 'Because nobody wants to send their daughter to the rape school.'"

8(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Wenner Media, LLC**?

ANSWER YES OR NO. Yes
If you answered question 8(a) "no," proceed to question 9.

8(b). If you answered "yes" to question number 8(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Wenner Media, LLC** acted with actual malice in republishing this statement?

ANSWER YES OR NO. Yes

9. As to this statement republished on December 5, 2014:
"A bruise mottling her face, Jackie sat in Eramo's office in May 2014 and told her about the two others. One, she says, is a 2013 graduate, who'd told Jackie that she'd been gang-raped as a freshman at the Phi Kappa Psi house. The other was a first-year whose worried friends had called Jackie after the girl had come home wearing no pants. Jackie said the girl told her she'd been assaulted by four men in a Phi Psi bathroom while a fifth watched. (Neither woman was willing to talk to RS). As Jackie wrapped up her story, she was disappointed by Eramo's nonreaction. She'd expected shock, disgust, horror.... Of all her assailants, Drew was the one she most wanted to see held accountable—but with Drew about to graduate, he was going to get away with it. Because, as she miserably reminded Eramo in her office, she didn't feel ready to file a complaint. Eramo, as always, understood."

9(a). Do you find by a preponderance of the evidence that this statement is actionable, by satisfying each of the elements set forth on page 23 of the instructions, against **Wenner Media, LLC**?

ANSWER YES OR NO. Yes
If you answered question 9(a) "no," stop.

9(b). If you answered "yes" to question number 9(a), answer the following question: do you find that plaintiff has established by clear and convincing evidence that **Wenner Media, LLC** acted with actual malice in republishing this statement?

ANSWER YES OR NO. Yes

11/4/16
DATE

SIGNATURE OF FOREPERSON

Deborah J. Parmelee
PRINTED NAME OF FOREPERSON

FILED IN OPEN COURT
DATE: 11/7/2016
Susan Moody
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

NICOLE P. ERAMO, Plaintiff, v. ROLLING STONE, LLC, et al., Defendants.	)	Civil Action No. 3:15-CV-00023 **SPECIAL VERDICT FORM NUMBER FOUR** By: Hon. Glen E. Conrad Chief United States District Judge

This special verdict form includes each of the statements which you have already found were actionable and made with actual malice. Answer the questions in accordance with the court's instructions.

As to the following statements:

Appearing in the article, "A Rape on Campus," on November 19, 2014:

> *"Lots of people have discouraged her from sharing her story, Jackie tells me with a pained look, including the trusted UVA dean to whom Jackie reported her gang-rape allegations more than a year ago."*

* * *

> *"A bruise mottling her face, Jackie sat in Eramo's office in May 2014 and told her about the two others. One, she says, is a 2013 graduate, who'd told Jackie that she'd been gang-raped as a freshman at the Phi Kappa Psi house. The other was a first-year whose worried friends had called Jackie after the girl had come home wearing no pants. Jackie said the girl told her she'd been assaulted by four men in a Phi Psi bathroom while a fifth watched. (Neither woman was willing to talk to RS). As Jackie wrapped up her story, she was disappointed by Eramo's nonreaction. She'd expected shock, disgust, horror.... Of all her assailants, Drew was the one she most wanted to see held accountable—but with Drew about to graduate, he was going to get away with it. Because, as she miserably reminded Eramo in her office, she didn't feel ready to file a complaint. Eramo, as always, understood."*

Made on the Brian Lehrer show on November 26, 2014:

> *"[J]ackie was kind of brushed off by her friends and by the administration . . . And eventually, when she did report it to the administration, the administration did nothing about, they did nothing with the information. And they even continued to do nothing when she eventually told them that she had become aware of two other women who were also gang raped at the same fraternity."*

Made on the Slate DoubleX Gabfest podcast on November 26, 2014:

> *"It is incredibly extreme. I mean whether this was perpetrated by a serial rapist who has many victims – I mean it seems like no matter what, this is an incredibly messed up situation. But it was absolutely a violent crime and I think what was really telling was the idea that – and this really underscores the entire article; is the student body and the administration doesn't really treat rape as a crime, as a violent crime . . . Even in this case, right, exactly. And this is why this case blew my mind, that Jackie's situation blew my mind; that even in a situation that was so extreme and so obviously within the realm of criminal, that they would seek to suppress something like this because that's really what they did. Not only did they not report it to the police, but really I feel she was sort of discouraged from moving this forward."*

* * *

> *"She's particularly afraid of Drew who she's assigned a tremendous amount of power in her own mind. . . . So I think that the idea of [Jackie] facing him or them down in any way is really just emotionally crippling for her. She's having a hard time facing up to that, and I think that she needs a lot of support if she's going to get to the place where she can actually confront them. When she does actually run into some of her alleged assailants on campus sometimes, just the sight of them, obviously it's a shock but it also tends to send her into a depression. So it just goes to show sort of the emotional toll something like this would take. I just think it would require a great deal of support for her to move forward into any of these options to resolve her case and that's something that's been completely absent. She really hasn't had any of that support from her friends, from the administration, nor from her family."*

Emailed to a Washington Post Reporter on November 30, 2014:

> *"As I've already told you, the gang-rape scene that leads the story is the alarming account that Jackie – a person whom I found to be credible – told to me, told her friends, and importantly, what she told the UVA administration,*

which chose not to act on her allegations in any way – i.e., the overarching point of the article. THAT is the story: the culture that greeted her and so many other UVA women I interviewed, who came forward with allegations, only to be met with indifference."

1. As against **Sabrina Rubin Erdely** and based on the foregoing statements, state the amount of damages, if any, you believe plaintiff has proven, by the preponderance of the evidence, that she is entitled to recover.

$ 2 million

As to these statements republished on December 5, 2014:

"Lots of people have discouraged her from sharing her story, Jackie tells me with a pained look, including the trusted UVA dean to whom Jackie reported her gang-rape allegations more than a year ago."

* * *

"Like most colleges, sexual-assault proceedings at UVA unfold in total secrecy. Asked why UVA doesn't publish all its data, President Sullivan explains that it might not be in keeping with 'best practices' and thus may inadvertently discourage reporting. Jackie got a different explanation when she'd eventually asked Dean Eramo the same question. She says Eramo answered wryly, 'Because nobody wants to send their daughter to the rape school.'"

* * *

"A bruise mottling her face, Jackie sat in Eramo's office in May 2014 and told her about the two others. One, she says, is a 2013 graduate, who'd told Jackie that she'd been gang-raped as a freshman at the Phi Kappa Psi house. The other was a first-year whose worried friends had called Jackie after the girl had come home wearing no pants. Jackie said the girl told her she'd been assaulted by four men in a Phi Psi bathroom while a fifth watched. (Neither woman was willing to talk to RS). As Jackie wrapped up her story, she was disappointed by Eramo's nonreaction. She'd expected shock, disgust, horror.... Of all her assailants, Drew was the one she most wanted to see held accountable—but with Drew about to graduate, he was going to get away

with it. Because, as she miserably reminded Eramo in her office, she didn't feel ready to file a complaint. Eramo, as always, understood."

2(a). Do you find, by a preponderance of the evidence, that plaintiff suffered separate and additional harm resulting from the republication of these statements?

ANSWER YES OR NO. Yes
If you answered "no," stop.

2(b). If you answered "yes" to question 2(a), state the amount of damages, if any, you believe plaintiff has proven, by the preponderance of the evidence, that she is entitled to recover against **Rolling Stone, LLC** and **Wenner Media, LLC** based on the republication of these statements.

$ 1 million

11/7/16
DATE

SIGNATURE OF FOREPERSON

Deborah J Parmelee
PRINTED NAME OF FOREPERSON

Cybersecurity

Keeping Client and Law Firm Information Secure

Christen C. Church

3

CYBERSECURITY: KEEPING CLIENT AND LAW FIRM INFORMATION SECURE

Christen C. Church
Gentry Locke Seminar
September 8, 2017

"Law Firm Cybersecurity Breach Opens Door to Lawsuit"
- ABA Litigation News March 30, 2017

"Law Firm DLA Piper Reels Under Cyber Attack, Fate of Files Unclear"
- Fortune June 29, 2017

"Law Firm Data Breaches Demonstrate Expanding Scope of Cyber Attacks"
- The National Law Review January 18, 2017

"It's not if, but when" is a phrase that is increasingly used in connection with cybersecurity. We have come to realize there will always be individuals, companies, or even countries who want information and/or to cause damage and disorder, and sometimes these actors will be more innovative and faster to capitalize on vulnerabilities than software companies and end users will be able to respond.

There is also another phrase, "to err is human." When it comes to unauthorized access, use or disclosure of sensitive information, your obligations (including notification requirements) related to an incident will rarely turn on the intent behind the actions. Cybersecurity incidents resulting from mistakes and inadvertent disclosures may have no malicious intent but they can still cause harm to the individuals whose information was compromised and the companies experiencing the incident.

Lawyers and law firms have always felt both the privilege and burden of being entrusted with our clients' most valuable and private information and our duty of confidentiality is a fundamental duty that we owe to our clients. As attorneys, we regularly have in our care sensitive personal information and often process or hold significant sums of money on behalf of others.

Security has always been important. We would never leave our file rooms unlocked and open to the public. If you ever experienced a break-in you would want to know that you took all reasonable steps to protect the sensitive information you were entrusted with. You would immediately notify authorities and begin taking steps to mitigate the harm and limit the potential risk to your clients.

Adding the element of technology does not change our duty as lawyers, our duty to protect the information with which we are entrusted remains the same. What does change is that now someone can break into your file room from 6,000 miles away. And whereas before it

would have taken a criminal days to copy all of your client files (or at the least a few hours and a moving truck), that same criminal can copy (and delete) all of your files with a few key strokes.

I. What is Cybersecurity?

"Cybersecurity" is defined in Merriam-Webster as "measures taken to protect a computer or computer system (as on the Internet) against unauthorized access or attack."

The term "cybersecurity" entered our collective lexicon nearly 30 years ago, but we still struggle with what exactly cybersecurity should look like for a given individual or company. In the 1980s and 1990s, when computer viruses began popping up across the Internet, the industry responded by taking what had been a reasonable position for hundreds of years "an ounce of prevention is worth a pound of cure." Virus scanning software and other preventative products thrived.

Then, time and innovation (on all sides) sped up. Having the most recent version of scanning software did not make you immune to experiencing a cybersecurity incident. We have moved from receiving software updates in physical form that could take months to prepare and disseminate to electronic updates and patches that could be pushed out daily. Even with these advances, the "bad guys" are always working to be one step ahead and no software can provide 100% protection from ourselves and inadvertent activity that could lead to a cybersecurity incident.

Over the past few years (and without losing sight of the importance of having preventative measures in place) the information technology industry began to realize that absolute prevention is not currently possible. Innovation began to focus on identifying cybersecurity incidents, mitigating the harm, and assisting affected companies and individuals in responding to these incidents. We are currently in the middle of this time of innovation.

II. Examples of Cybersecurity Related Laws, Regulations and Rules Applicable to Attorneys

The laws, regulations and rules that will be applicable during a cybersecurity incident may be influenced by a number of factors including: what information is involved, the form of the information involved (electronic, paper, encrypted, etc), where the individuals reside, where the information is held, in what capacity the law firm is acting and who the law firm is representing, and the nature of any incident.

1. Virginia Code §18.2-186.6[1]. Breach of personal information notification

Excerpts:

> "Breach of the security of the system" means the unauthorized access and acquisition of unencrypted and unredacted computerized data that compromises the security or confidentiality of personal information maintained by an individual or entity as part of a database of personal information regarding multiple individuals and that causes, or the individual or entity reasonably believes has

[1] see Exhibit A enclosed with this outline for Virginia Code §18.2-186.6 in its entirety

caused, or will cause, identity theft or other fraud to any resident of the Commonwealth…"

"…Notice required by this section shall include a description of the following:
(1) The incident in general terms;
(2) The type of personal information that was subject to the unauthorized access and acquisition;
(3) The general acts of the individual or entity to protect the personal information from further unauthorized access;
(4) A telephone number that the person may call for further information and assistance, if one exists; and
(5) Advice that directs the person to remain vigilant by reviewing account statements and
monitoring free credit reports…."

"…Personal information" means the first name or first initial and last name in combination with and linked to any one or more of the following data elements that relate to a resident of the Commonwealth, when the data elements are neither encrypted nor redacted:
1. Social security number;
2. Driver's license number or state identification card number issued in lieu of a driver's license number; or
3. Financial account number, or credit card or debit card number, in combination with any required security code, access code, or password that would permit access to a resident's financial accounts…."

2. **Virginia State Bar Rules of Professional Conduct. Rule 1.6[2]. Confidentiality of Information**
Excerpts:

"Rule 1.6 (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule."

"Acting Reasonably to Preserve Confidentiality
[19] Paragraph (d) requires a lawyer to act reasonably to safeguard information protected under this Rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the

[2] See Exhibit B enclosed with this outline for VSB Rule 1.6 in its entirety

reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the employment or engagement of persons competent with technology, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

[19a] Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other laws, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of this Rule.

[20] Paragraph (d) makes clear that a lawyer is not subject to discipline under this Rule if the lawyer has made reasonable efforts to protect electronic data, even if there is a data breach, cyber-attack or other incident resulting in the loss, destruction, misdelivery or theft of confidential client information. Perfect online security and data protection is not attainable. Even large businesses and government organizations with sophisticated data security systems have suffered data breaches. Nevertheless, security and data breaches have become so prevalent that some security measures must be reasonably expected of all businesses, including lawyers and law firms. Lawyers have an ethical obligation to implement reasonable information security practices to protect the confidentiality of client data. What is "reasonable" will be determined in part by the size of the firm. See Rules 5.1(a)-(b) and 5.3(a)-(b). The sheer amount of personal, medical and financial information of clients kept by lawyers and law firms requires reasonable care in the communication and storage of such information. A lawyer or law firm complies with paragraph (d) if they have acted reasonably to safeguard client information by employing appropriate data protection measures for any devices used to communicate or store client confidential information.

To comply with this Rule, a lawyer does not need to have all the required technology competencies. The lawyer can and more likely must turn to the expertise of staff or an outside technology professional. Because threats and technology both change, lawyers should periodically review both and enhance their security as needed; steps that are reasonable measures when adopted may become outdated as well.

[21] Because of evolving technology, and associated evolving risks, law firms should keep abreast on an ongoing basis of reasonable methods for protecting client confidential information, addressing such practices as:

(a) Periodic staff security training and evaluation programs, including precautions and procedures regarding data security;

(b) Policies to address departing employee's future access to confidential firm data and return of electronically stored confidential data;

(c) Procedures addressing security measures for access of third parties to stored information;
(d) Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused;
(e) The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and
(f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity."

3. **Other examples of laws and regulations that may apply?**
    - **VSB Rule 1.1** Maintaining Competence
    - **HIPAA** (Were you acting as a Business Associate to a Covered Entity?)
    - **Contract Law** (Engagement Letters, Data Security Addenda, Terms of Service, etc)
    - **Federal Trade Commission Rules and Regulations** (Health Breach Notification Rule; Gramm-Leach-Bliley)

III. So, what does Cybersecurity look like for law firms today?

There is no one size fits all, as outlined above, what is "reasonable" cybersecurity will vary based on the information that a law firm maintains as well as the size of, the resources of, and the burdens placed on a law firm in protecting the information.

Importantly, what is "reasonable" will also continue to change over time as the threats and available technology continues to evolve. i.e. What is "reasonable" as to encryption of data at rest and in motion, software patching, physical safeguards, etc, is constantly evolving.

This evaluation process can be a daunting (and never-ending) task. One resource that is intended to focus efforts and allow you to respond to these changes in threats and technology is the National Institute of Standards and Technology (NIST) Framework for Improving Critical Infrastructure Cybersecurity (the "NIST Framework"). The NIST Framework was initially designed for use with protecting critical US infrastructure, but it allows for flexibility for use by organizations of varying sizes and capabilities. Additional information regarding the NIST Framework is available at https://www.nist.gov/cyberframework.

Version 1.0 of the NIST Framework was published February 12, 2014, and is currently undergoing updates to, among other things, focus on supply chain risk management (SCRM). A draft Version 1.1 of the NIST Framework was published on January 10, 2017 and is available at: https://www.nist.gov/cyberframework/draft-version-11

IV. NIST Framework Core Functions[3]:

1. **Identify**
2. **Protect**
3. **Detect**
4. **Respond**
5. **Recover**

This analysis structure is useful in performing a self-analysis on your law firm and can also be used when advising clients. All Core Functions should be ongoing and are overlapping.

1. **Identify**: Identify information and obligations and control who has access to the information in your care. Develop an understanding of the information you hold to better understand and manage the cybersecurity risk to your systems and data.

   Examples of questions to consider/action items:

   i. What types of information do you maintain?
   - E.g. Health Information, Financial information, trade secrets, IP

   ii. Have you agreed to any specific security requirements?
   - E.g. Business Associate Agreement, Terms of Representation, etc

   iii. Who has access to firm and client information?
   - Look at both internal and third party vendors, physical access and virtual access

   iv. What agreements govern access to information?
   - E.g. firm policies, vendor contracts, confidentiality agreements, etc

   v. Do you have the ability to track who specifically has accessed information?

   vi. Can you limit access of certain information or files?

   vii. What vetting is conducted of companies and individuals who have access to sensitive data?

   viii. Do you have sufficient policies and procedures in place governing access to and use of information?

[3] For a more in-depth walk through of the NIST Framework Core Functions, see the NIST Framework at https://www.nist.gov/cyberframework and *NISTIR 7621 Revision 1 Small Business Information Security: The Fundamentals at:* http://nvlpubs.nist.gov/nistpubs/ir/2016/NIST.IR.7621r1.pdf (included in this Outline as **Exhibit C**)

ix. When you take information do you have a process in place to identify specific protections?

Note: There is increasing focus on risk shifting with regards to data security and supply chain risk management. Increasingly data security, breach notification, and related indemnification obligations are included in third party vendor contracts, and corporations and insurance companies are increasingly requiring vendors and subcontractors to sign data security addenda (including law firms).

2. **Protect**: Protect the information you maintain, in order to limit the exposure or likelihood of a cybersecurity incident and to limit the impact of a potential cybersecurity incident. Develop safeguards to allow you to protect and ensure continued access to your critical data.

   Examples of questions to consider/action items:

   i. Have you limited access to information where practicable?
   ii. Do you have a procedure in place to immediately terminate a user's access to sensitive information if needed?
   iii. Do you have sufficient physical security? Are you tracking access to information?
   iv. Do you have a plan to respond to power outages or damage to or the malfunction of your electronic systems? Are backups available offsite? Do you have a data recovery plan?
   v. How frequently are you checking for and installing software application patches?
   vi. Are you using wireless networking? Is your router using WPA-2? Do guests use a separate network?
   vii. Are you utilizing firewalls and is your server (data at rest) encrypted?
   viii. What email and website filtering software do you use?
   ix. Can you send data in an encrypted manner?
   x. What security protections are on your computer equipment and phones? How do you dispose of devices that are damaged or have reached the end of their useful life?
   xi. Training – Have initial and ongoing training regarding how to handle and protect data. Revisit policies and procedures to bring up to date with current practice. Put in place an incident response plan and data recovery plan and educate employees on what to do in order to respond to an emergency or cybersecurity incident.

3. **Detect**: Timely discover cybersecurity incidents. Develop and implement the appropriate processes and procedures and utilize reasonable technology to quickly identify a cybersecurity incident.

   Examples of questions to consider/action items:

   i. Update all incident detection software (anti-virus, anti-spyware, anti-malware)
   ii. Maintain and monitor logs generated by your software and also related to information access.
   iii. Have clear procedures in place and a point person(s) for employees or clients to notify of suspicious emails or contact received.

iv. Consider cybersecurity assessment/testing/monitoring; conduct cost/benefit analysis

4. **Respond**: Respond to any cybersecurity incident to contain the incident and reduce any negative impact.

   Examples of questions to consider/action items:

   i. Do you have an Incident Response Plan in place? Develop a plan when you are not in the middle of an emergency to lead your response to an incident.
      i. What constitutes an incident that triggers activation of the Incident Response Plan?
      ii. To whom are incidents immediately reported?
      iii. Who is on the response team, both internally and what third party vendors?
      iv. What notification obligations are triggered? How can you help those impacted further mitigate risk and harm?

   ii. Develop a plan to isolate intrusions to the extent possible.

   iii. Do you have cybersecurity/data breach insurance? What are the terms of coverage? Are there any limitations on vendors you may use for coverage?

5. **Recover**: Recover from a cybersecurity incident and resume normal operation.

   Examples of questions to consider/action items:

   i. Do you have backups of your information?
      i. Are backups maintained offsite?
      ii. Is there the potential a cybersecurity incident could compromise your system as well as backups or are backups isolated from the network?
      iii. How quickly can you restore normal function while regaining and maintaining the integrity of the system?

   ii. Do you have cybersecurity/data breach insurance? What coverage is provided to assist with recovery and preparation for recovery?

   iii. Review existing policies and procedures to reduce the likelihood of a repeat incident, implement additional training if needed. Identify ways to improve your processes and response.

Exhibit A

Code of Virginia
Title 18.2. Crimes and Offenses Generally
Chapter 6. Crimes Involving Fraud

§ 18.2-186.6. Breach of personal information notification

A. As used in this section:

"Breach of the security of the system" means the unauthorized access and acquisition of unencrypted and unredacted computerized data that compromises the security or confidentiality of personal information maintained by an individual or entity as part of a database of personal information regarding multiple individuals and that causes, or the individual or entity reasonably believes has caused, or will cause, identity theft or other fraud to any resident of the Commonwealth. Good faith acquisition of personal information by an employee or agent of an individual or entity for the purposes of the individual or entity is not a breach of the security of the system, provided that the personal information is not used for a purpose other than a lawful purpose of the individual or entity or subject to further unauthorized disclosure.

"Encrypted" means the transformation of data through the use of an algorithmic process into a form in which there is a low probability of assigning meaning without the use of a confidential process or key, or the securing of the information by another method that renders the data elements unreadable or unusable.

"Entity" includes corporations, business trusts, estates, partnerships, limited partnerships, limited liability partnerships, limited liability companies, associations, organizations, joint ventures, governments, governmental subdivisions, agencies, or instrumentalities or any other legal entity, whether for profit or not for profit.

"Financial institution" has the meaning given that term in 15 U.S.C. § 6809(3).

"Individual" means a natural person.

"Notice" means:

1. Written notice to the last known postal address in the records of the individual or entity;

2. Telephone notice;

3. Electronic notice; or

4. Substitute notice, if the individual or the entity required to provide notice demonstrates that the cost of providing notice will exceed $50,000, the affected class of Virginia residents to be notified exceeds 100,000 residents, or the individual or the entity does not have sufficient contact information or consent to provide notice as described in subdivisions 1, 2, or 3 of this definition. Substitute notice consists of all of the following:

a. E-mail notice if the individual or the entity has e-mail addresses for the members of the affected class of residents;

b. Conspicuous posting of the notice on the website of the individual or the entity if the individual or the entity maintains a website; and

c. Notice to major statewide media.

Notice required by this section shall not be considered a debt communication as defined by the Fair Debt Collection Practices Act in 15 U.S.C. § 1692a.

Notice required by this section shall include a description of the following:

(1) The incident in general terms;

(2) The type of personal information that was subject to the unauthorized access and acquisition;

(3) The general acts of the individual or entity to protect the personal information from further unauthorized access;

(4) A telephone number that the person may call for further information and assistance, if one exists; and

(5) Advice that directs the person to remain vigilant by reviewing account statements and monitoring free credit reports.

"Personal information" means the first name or first initial and last name in combination with and linked to any one or more of the following data elements that relate to a resident of the Commonwealth, when the data elements are neither encrypted nor redacted:

1. Social security number;

2. Driver's license number or state identification card number issued in lieu of a driver's license number; or

3. Financial account number, or credit card or debit card number, in combination with any required security code, access code, or password that would permit access to a resident's financial accounts.

The term does not include information that is lawfully obtained from publicly available information, or from federal, state, or local government records lawfully made available to the general public.

"Redact" means alteration or truncation of data such that no more than the following are accessible as part of the personal information:

1. Five digits of a social security number; or

2. The last four digits of a driver's license number, state identification card number, or account number.

B. If unencrypted or unredacted personal information was or is reasonably believed to have been accessed and acquired by an unauthorized person and causes, or the individual or entity reasonably believes has caused or will cause, identity theft or another fraud to any resident of the Commonwealth, an individual or entity that owns or licenses computerized data that includes personal information shall disclose any breach of the security of the system following discovery or notification of the breach of the security of the system to the Office of the Attorney General and any affected resident of the Commonwealth without unreasonable delay. Notice required by this section may be reasonably delayed to allow the individual or entity to determine the scope of the breach of the security of the system and restore the reasonable integrity of the system. Notice required by this section may be delayed if, after the individual or entity notifies a law-

enforcement agency, the law-enforcement agency determines and advises the individual or entity that the notice will impede a criminal or civil investigation, or homeland or national security. Notice shall be made without unreasonable delay after the law-enforcement agency determines that the notification will no longer impede the investigation or jeopardize national or homeland security.

C. An individual or entity shall disclose the breach of the security of the system if encrypted information is accessed and acquired in an unencrypted form, or if the security breach involves a person with access to the encryption key and the individual or entity reasonably believes that such a breach has caused or will cause identity theft or other fraud to any resident of the Commonwealth.

D. An individual or entity that maintains computerized data that includes personal information that the individual or entity does not own or license shall notify the owner or licensee of the information of any breach of the security of the system without unreasonable delay following discovery of the breach of the security of the system, if the personal information was accessed and acquired by an unauthorized person or the individual or entity reasonably believes the personal information was accessed and acquired by an unauthorized person.

E. In the event an individual or entity provides notice to more than 1,000 persons at one time pursuant to this section, the individual or entity shall notify, without unreasonable delay, the Office of the Attorney General and all consumer reporting agencies that compile and maintain files on consumers on a nationwide basis, as defined in 15 U.S.C. § 1681a (p), of the timing, distribution, and content of the notice.

F. An entity that maintains its own notification procedures as part of an information privacy or security policy for the treatment of personal information that are consistent with the timing requirements of this section shall be deemed to be in compliance with the notification requirements of this section if it notifies residents of the Commonwealth in accordance with its procedures in the event of a breach of the security of the system.

G. An entity that is subject to Title V of the Gramm-Leach-Bliley Act (15 U.S.C. § 6801 et seq.) and maintains procedures for notification of a breach of the security of the system in accordance with the provision of that Act and any rules, regulations, or guidelines promulgated thereto shall be deemed to be in compliance with this section.

H. An entity that complies with the notification requirements or procedures pursuant to the rules, regulations, procedures, or guidelines established by the entity's primary or functional state or federal regulator shall be in compliance with this section.

I. Except as provided by subsections J and K, pursuant to the enforcement duties and powers of the Office of the Attorney General, the Attorney General may bring an action to address violations of this section. The Office of the Attorney General may impose a civil penalty not to exceed $150,000 per breach of the security of the system or a series of breaches of a similar nature that are discovered in a single investigation. Nothing in this section shall limit an individual from recovering direct economic damages from a violation of this section.

J. A violation of this section by a state-chartered or licensed financial institution shall be enforceable exclusively by the financial institution's primary state regulator.

K. A violation of this section by an individual or entity regulated by the State Corporation

Commission's Bureau of Insurance shall be enforced exclusively by the State Corporation Commission.

L. The provisions of this section shall not apply to criminal intelligence systems subject to the restrictions of 28 C.F.R. Part 23 that are maintained by law-enforcement agencies of the Commonwealth and the organized Criminal Gang File of the Virginia Criminal Information Network (VCIN), established pursuant to Chapter 2 (§ 52-12 et seq.) of Title 52.

M. Notwithstanding any other provision of this section, any employer or payroll service provider that owns or licenses computerized data relating to income tax withheld pursuant to Article 16 (§ 58.1-460 et seq.) of Chapter 3 of Title 58.1 shall notify the Office of the Attorney General without unreasonable delay after the discovery or notification of unauthorized access and acquisition of unencrypted and unredacted computerized data containing a taxpayer identification number in combination with the income tax withheld for that taxpayer that compromises the confidentiality of such data and that creates a reasonable belief that an unencrypted and unredacted version of such information was accessed and acquired by an unauthorized person, and causes, or the employer or payroll provider reasonably believes has caused or will cause, identity theft or other fraud. With respect to employers, this subsection applies only to information regarding the employer's employees, and does not apply to information regarding the employer's customers or other non-employees.

Such employer or payroll service provider shall provide the Office of the Attorney General with the name and federal employer identification number of the employer as defined in § 58.1-460 that may be affected by the compromise in confidentiality. Upon receipt of such notice, the Office of the Attorney General shall notify the Department of Taxation of the compromise in confidentiality. The notification required under this subsection that does not otherwise require notification under this section shall not be subject to any other notification, requirement, exemption, or penalty contained in this section.

2008, cc. 566, 801;2017, cc. 419, 427.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Exhibit B

Paragraph (c) is substantially the same as DR 2-105(C). EC 2-22 provided that "[c]ontingent fee arrangements in civil cases have long been commonly accepted in the United States," but that "a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee...."

With regard to paragraph (d), DR 2-105(C) prohibited a contingent fee in a criminal case. EC 2-22 provided that "contingent fee arrangements in domestic relation cases are rarely justified."

With regard to paragraph (e), DR 2-105(D) permitted division of fees only if: "(1) The client consents to employment of additional counsel; (2) Both attorneys expressly assume responsibility to the client; and (3) The terms of the division of the fee are disclosed to the client and the client consents thereto."

There was no counterpart to paragraph (f) in the *Virginia Code*.

Committee Commentary

The Committee believes that DR 2-105 placed greater emphasis than the *ABA Model Rule* on the Full Disclosure of Fees and Fee Arrangements to Clients and therefore added language from DR 2-105(A) to paragraph (a) and from DR 2-105(D)(3) to paragraph (e). The Comment to paragraph (d)(1) reflects the Committee's conclusion that the public policy concerns which preclude contingent fee arrangements in certain domestic relations cases do not apply when property division, support matters or attorney's fee awards have been previously determined. Paragraph (e) eliminates the requirement in the *Virginia Code* that each lawyer involved in a fee-splitting arrangement assume full responsibility to the client, regardless of the degree of the lawyer's continuing participation. The requirement in the *Virginia Code* was deleted to encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement. However, such an arrangement is acceptable only if the client consents after full disclosure, which must include a delineation of each lawyer's responsibilities to the client.

The amendments effective January 1, 2004, added paragraph (f).

Rule 1.6

Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential;

(7) such information to prevent reasonably certain death or substantial bodily harm.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or

(2) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

Comment

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The common law recognizes that the client's confidences must be protected from disclosure. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[2a] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that clients usually follow the advice given, and the law is upheld.

[2b] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[3] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

[3a] The rules governing confidentiality of information apply to a lawyer who represents an organization of which the lawyer is an employee.

[4] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

[5] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[5a] Lawyers frequently need to consult with colleagues or other attorneys in order to competently represent their clients' interests. An overly strict reading of the duty to protect client information would render it difficult for lawyers to consult with each other, which is an important means of continuing professional education and development. A lawyer should exercise great care in discussing a client's case with another attorney from whom advice is sought. Among other things, the lawyer should consider whether the communication risks a waiver of the attorney-client privilege or other applicable protections. The lawyer should endeavor when possible to discuss a case in strictly hypothetical or abstract terms. In addition, prior to seeking advice from another attorney, the attorney should take reasonable steps to determine whether the attorney from whom advice is sought has a conflict. The attorney from whom advice is sought must be careful to protect the confidentiality of the information given by the attorney seeking advice and must not use such information for the advantage of the lawyer or a third party.

[5b] Compliance with Rule 1.6(a) might include fulfilling duties under Rule 1.14, regarding a client with an impairment.

[5c] Compliance with Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.

[6] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6a] Lawyers involved in insurance defense work that includes submission of detailed information regarding the client's case to an auditing firm must be extremely careful to gain consent from the client after full and adequate disclosure. Client consent to provision of information to the insurance carrier does not equate with consent to provide the information to an outside auditor. The lawyer must obtain specific consent to disclose the information to that auditor. Pursuant to the lawyer's duty of loyalty to the client, the lawyer should not recommend that the client provide such consent if the disclosure to the auditor would in some way prejudice the client. *Legal Ethics Opinion #1723, approved by the Supreme Court of Virginia, September 29, 1999.*

Disclosure Adverse to Client

[6b] The confidentiality rule is subject to limited exceptions. However, to the extent a lawyer is required or permitted to disclose a client's confidences, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

[7] Several situations must be distinguished.

[7a] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. *See* Rule 1.2(c). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(c) to avoid assisting a client in criminal or fraudulent conduct.

[7b] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(c), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[7c] Third, the lawyer may learn that a client intends prospective criminal conduct. As stated in paragraph (c)(1), the lawyer is obligated to reveal such information if the crime is reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another. Caution is warranted as it is very difficult for a lawyer to "know" when proposed criminal conduct will actually be carried out, for the client may have a change of mind. If the client's intended crime is perjury, the lawyer must look to Rule 3.3(a)(4) rather than paragraph (c)(1).

[8] When considering disclosure under paragraph (b), the lawyer should weigh such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the nature of the client's intended conduct, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take appropriate action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

[8a] Paragraph (b)(7) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.

Withdrawal

[9] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

[9a] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[9b] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning a Lawyer's Conduct

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[10a] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary

proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

[11] If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the attorney-client privilege when it is applicable. Except as permitted by Rule 3.4(d), the lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[12] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. *See* Rules 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Attorney Misconduct

[13] Self-regulation of the legal profession occasionally places attorneys in awkward positions with respect to their obligations to clients and to the profession. Paragraph (c)(2) requires an attorney who has information indicating that another attorney has violated the Rules of Professional Conduct, learned during the course of representing a client and protected as a confidence or secret under Rule 1.6, to request the permission of the client to disclose the information necessary to report the misconduct to disciplinary authorities. In requesting consent, the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure.

[14] Although paragraph (c)(2) requires that authorized disclosure be made promptly, a lawyer does not violate this Rule by delaying in reporting attorney misconduct for the minimum period of time necessary to protect a client's interests. For example, a lawyer might choose to postpone reporting attorney misconduct until the end of litigation when reporting during litigation might harm the client's interests.

[15 - 17] *ABA Model Rule* Comments not adopted.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated.

Acting Reasonably to Preserve Confidentiality

[19] Paragraph (d) requires a lawyer to act reasonably to safeguard information protected under this Rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the employment or engagement of persons competent with technology, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards

adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

[19a] Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other laws, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of this Rule.

[20] Paragraph (d) makes clear that a lawyer is not subject to discipline under this Rule if the lawyer has made reasonable efforts to protect electronic data, even if there is a data breach, cyber-attack or other incident resulting in the loss, destruction, misdelivery or theft of confidential client information. Perfect online security and data protection is not attainable. Even large businesses and government organizations with sophisticated data security systems have suffered data breaches. Nevertheless, security and data breaches have become so prevalent that some security measures must be reasonably expected of all businesses, including lawyers and law firms. Lawyers have an ethical obligation to implement reasonable information security practices to protect the confidentiality of client data. What is "reasonable" will be determined in part by the size of the firm. See Rules 5.1(a)-(b) and 5.3(a)-(b). The sheer amount of personal, medical and financial information of clients kept by lawyers and law firms requires reasonable care in the communication and storage of such information. A lawyer or law firm complies with paragraph (d) if they have acted reasonably to safeguard client information by employing appropriate data protection measures for any devices used to communicate or store client confidential information.

To comply with this Rule, a lawyer does not need to have all the required technology competencies. The lawyer can and more likely must turn to the expertise of staff or an outside technology professional. Because threats and technology both change, lawyers should periodically review both and enhance their security as needed; steps that are reasonable measures when adopted may become outdated as well.

[21] Because of evolving technology, and associated evolving risks, law firms should keep abreast on an ongoing basis of reasonable methods for protecting client confidential information, addressing such practices as:

(a) Periodic staff security training and evaluation programs, including precautions and procedures regarding data security;

(b) Policies to address departing employee's future access to confidential firm data and return of electronically stored confidential data;

(c) Procedures addressing security measures for access of third parties to stored information;

(d) Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused;

(e) The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and

(f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity.

Virginia Code Comparison

Rule 1.6 retains the two-part definition of information subject to the lawyer's ethical duty of confidentiality. EC 4-4 added that the duty differed from the evidentiary privilege in that it existed "without regard to the nature or source of information or the fact that others share the knowledge." However, the definition of "client information" as set forth in the *ABA Model Rules*, which includes all information "relating to" the representation, was rejected as too broad.

Paragraph (a) permits a lawyer to disclose information where impliedly authorized to do so in order to carry out the representation. Under DR 4-101(B) and (C), a lawyer was not permitted to reveal "confidences" unless the client first consented after disclosure.

Paragraph (b)(1) is substantially the same as DR 4-101(C)(2).

Paragraph (b)(2) is substantially similar to DR 4-101(C)(4) which authorized disclosure by a lawyer of "[c]onfidences or secrets necessary to establish the reasonableness of his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."

Paragraph (b)(3) is substantially the same as DR 4-101(C)(3).

Paragraph (b)(4) had no counterpart in the *Virginia Code*.

Paragraphs (c)(1) and (c)(2) are substantially the same as DR 4-101(D).

Paragraph (c)(3) had no counterpart in the *Virginia Code*.

Committee Commentary

The Committee added language to this Rule from DR 4-101 to make the disclosure provisions more consistent with current Virginia policy. The Committee specifically concluded that the provisions of DR 4-101(D) of the *Virginia Code*, which required broader disclosure than the *ABA Model Rule* even permitted, should be added as paragraph (c). Additionally, to promote the integrity of the legal profession, the Committee adopted new language as paragraph (c)(3) setting forth the circumstances under which a lawyer must report the misconduct of another lawyer when such a report may require disclosure of privileged information.

The amendments effective January 1, 2004, added present paragraph (b)(4) and redesignated former paragraphs (b)(4) and (5) as present (b)(5) and (6); in paragraph (c)(3), at end of first sentence, deleted "but only if the client consents after consultation," added the present second sentence, and deleted the former last sentence which read, "Under this paragraph, an attorney is required to request the consent of a client to disclose information necessary to report the misconduct of another attorney."; added Comment [5b] and [6a]; rewrote Comment [13].

The amendments effective March 1, 2016, added paragraph 1.6 (d); added "*Acting Reasonably to Preserve Confidentiality*" before adding Comments [19], [19a], [20] and [21] paragraphs "a" through "f".

The amendments effective December 1, 2016, added paragraph (7); in paragraph (c)(1) added the language "reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another", and rewrote the last sentence of the paragraph; deleted former paragraph (2) and redesignated former paragraph (3) as present paragraph (2); added the language to comment [7c] "if the crime is reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another", substituted the language "Caution" is "warranted" in place of "Some discretion is involved", and added the last sentence; in Comment [8] deleted the language "The lawyer's exercise of discretion requires consideration of" and replaced it with "When considering disclosure under paragraph (b), the lawyer should weigh", and added the language "and with those who might be injured by the client"; added Comment [8a]; and in Comments [13] and [14] substituted the language "(c)(3)" with "(c)(2)".

Rule 1.7

Exhibit C

NISTIR 7621
Revision 1

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Patricia Toth

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National Institute of
Standards and Technology
U.S. Department of Commerce

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Applied Cybersecurity Division
Information Technology Laboratory

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Reports on Computer Systems Technology

The Information Technology Laboratory (ITL) at the National Institute of Standards and Technology (NIST) promotes the U.S. economy and public welfare by providing technical leadership for the Nation's measurement and standards infrastructure. ITL develops tests, test methods, reference data, proof of concept implementations, and technical analyses to advance the development and productive use of information technology. ITL's responsibilities include the development of management, administrative, technical, and physical standards and guidelines for the cost-effective security and privacy of other than national security-related information in Federal information systems.

Abstract

NIST developed this interagency report as a reference guideline about cybersecurity for small businesses. This document is intended to present the fundamentals of a small business information security program in non-technical language.

Keywords

small business; information security; cybersecurity; fundamentals

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The authors, Celia Paulsen and Patricia Toth wish to thank Richard Kissel and Dr. Hyunjeong Moon for their extensive contributions to this publication. Since 2002, NIST along with the Small Business Administration and the Federal Bureau of Investigation's InfraGard program, has conducted research and outreach to small businesses – much of this publication is thanks to their generous time and effort. The authors would like to thank their partners and the small businesses who contributed to this work. In addition, they would like to thank those colleagues and reviewers who contributed to the document's development.

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Foreword

Small businesses are an important part of our nation's economic and cyber infrastructure. According to the Small Business Administration, there are approximately 28.2 million small businesses in the United States. These businesses produce approximately 46 % of our nation's private-sector output and create 63 % of all new jobs in the country [SBA FAQ]. The Small Business Administration has the responsibility for defining small businesses; the definition varies for each industry sector [SBA SBSStds]. This publication uses the most recent Small Business Administration definitions. For this publication, the term "Small business" is synonymous with Small Enterprise or Small Organization and includes for-profit, non-profit[1], and similar organizations.

For some small businesses, the security of their information, systems, and networks might not be their highest priority. However, an information security or cybersecurity incident can be detrimental to their business, customers, employees, business partners, and potentially their community. It is vitally important that each small business understand and manage the risk to information, systems, and networks that support their business.

Purpose

This NIST Interagency Report (NISTIR) provides guidance on how small businesses can provide basic security for their information, systems, and networks.

This NISTIR uses the *Framework for Improving Critical Infrastructure Cybersecurity* [CSF14] as a template for organizing cybersecurity risk management processes and procedures. Although the Cybersecurity Framework, created through collaboration between government and the private sector, was originally developed specifically for critical infrastructure organizations, it has proven useful to a variety of audiences and is used in this publication to organize information and cybersecurity best practices in an accepted and logical format. For more information about the Cybersecurity Framework, see Appendix C.

Revision 1 of this publication reflects changes in technology and a reorganization of the information needed by small businesses to implement a program to help them understand and manage their information and cybersecurity risk.

[1] The U.S. Small Business Administration does not include non-profit in its definition for Small Businesses.

1 Background: What is Information Security and Cybersecurity?

All businesses use information – for example, employee information, tax information, proprietary information, or customer information. Information is vital to the operation of a business. If that information is compromised in some way, the business may not be able to function. Protecting the information an organization creates, uses, or stores is called "Information Security."

Information Security is formally defined as "The protection of information and information systems from unauthorized access, use, disclosure, disruption, modification, or destruction in order to provide confidentiality, integrity, and availability" [44USC].

Information security encompasses people, processes, and technologies. It concentrates on how to protect:

- **Confidentiality** - protecting information from unauthorized access and disclosure. *For example, what would happen to your company if customer information such as usernames, passwords, or credit card information was stolen?*
- **Integrity** - protecting information from unauthorized modification.

  For example, what if your payroll information or a proposed product design was changed?
- **Availability** - preventing disruption in how you access information.

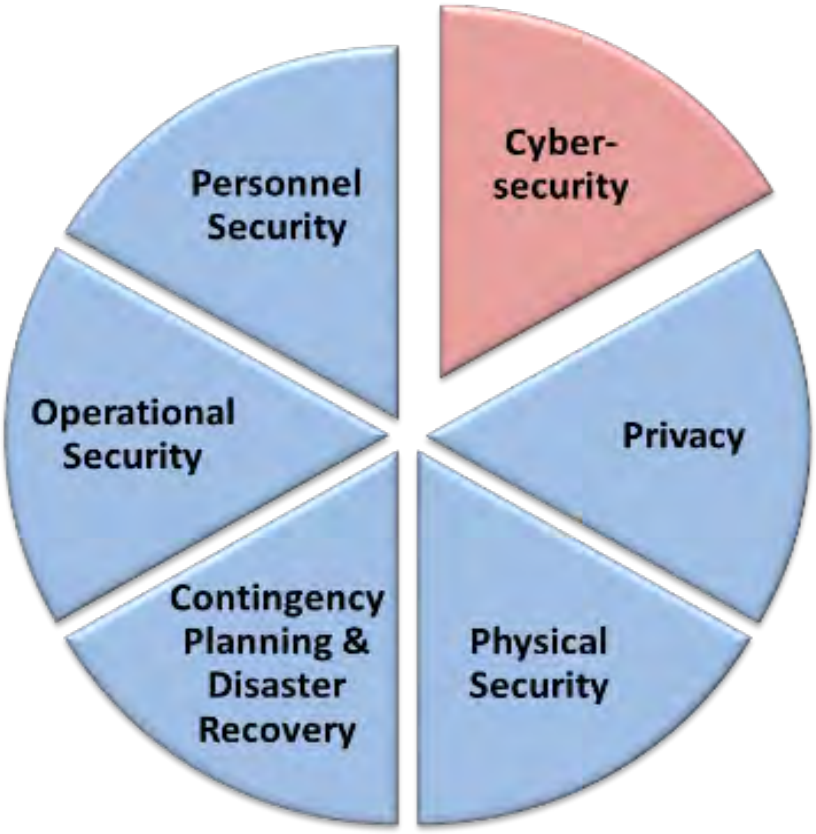
  For example, what if you couldn't log in to your bank account or access your customer's information, or your customers couldn't access you?

As more and more information becomes digitized - digitally stored, processed, and communicated - cybersecurity has become a key component of information security. Cybersecurity means protecting electronic devices and electronically stored information.

Cybersecurity is formally defined as "Prevention of damage to, protection of, and restoration of computers, electronic communications systems, electronic communications services, wire communication, and electronic communication, including information contained therein, to ensure its availability, integrity, authentication, confidentiality, and nonrepudiation" [CNSSI4009][HSPD23].

As part of information security, cybersecurity works in conjunction with a variety of other security measures, some of which are shown in Figure 1. As a whole, these information security components provide defense against a wide range of potential threats to your business's information. Although much of this publication involves electronic devices and solutions, it is not limited to cybersecurity and typically refers to "information security" as a whole.

Figure 1: *Key Components of Information*



- **Physical Security** – the protection of property, e.g. using fences and locks;
- **Personnel Security** – e.g. using background checks;
- **Contingency Planning and Disaster Recovery** – how to resume normal operations after an incident, also known as Business Continuity Planning;
- **Operational Security** – protecting business plans and processes, and
- **Privacy** – protecting personal information.[2]

Lacking any one of these components diminishes the effectiveness of the others. For example, good physical security measures mean little if the personnel you hire intend to harm your business (poor personnel security). Or, strong privacy policies can depend on cybersecurity practices that protect customer information that is electronically stored.

[2] Personal information includes "information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc. alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc." [OMBM-07-16].

1.1 Why Small Businesses?

Many businesses in the United States have been putting resources—including people, technology, and budgets—into protecting themselves from information security and cybersecurity threats. As a result, they have become a more difficult target for malicious attacks from hackers and cyber criminals. Consequently, hackers and cyber criminals are now successfully focusing more of their unwanted attention on less secure businesses.

Because small businesses typically don't have the resources to invest in information security the way larger businesses can, many cyber criminals view them as soft targets. Your small business may have money or information that can be valuable to a criminal; your computer may be compromised and used to launch an attack on somebody else (i.e., a botnet), or your business may provide access to more high-profile targets through your products, services, or role in a supply chain.

It is important to note that criminals aren't always after profit. Some may attack your business out of revenge (e.g. for firing them or somebody they know), or for the thrill of causing havoc. Similarly, not all events that affect the confidentiality, availability, or integrity of your information (called "information security events") are caused by criminals. Environmental events such as fires or floods, for example, can severely damage computer systems.

The overall impact of an incident could include:

- damage to information or information systems;
- regulatory fines and penalties / legal fees;
- decreased productivity;
- loss of information critical in running your business;
- an adverse reputation or loss of trust from customers;
- damage to your credit and inability to get loans from banks, or
- loss of business income.

Unfortunately, in one respect, small businesses often have more to lose than larger organizations simply because an event—whether a hacker, natural disaster, or business resource loss—can be extremely costly. Small businesses are often less prepared to handle these events than larger businesses, but with less complex operational needs, there are many steps a small business may be able to take more easily. Thus, it is vitally important that you consider how to protect your business.

Small businesses often see information security as too difficult or that it requires too many resources to do. It is true that there is no easy, one-time solution to information security – it takes time and careful consideration with all relevant stakeholders. However, when viewed as part of the business's strategy and regular processes, information security doesn't have to be intimidating.

A strong information security program can help your organization gain and retain customers, employees, and business partners. Customers have an expectation that their sensitive information will be protected from theft, disclosure, or misuse. Protecting your customers' information is an

example of good customer service and shows your customers that you value their business, potentially increasing your business opportunities.

Similarly, employees have an expectation that their sensitive personal information will be appropriately protected, and a comprehensive information security program can help employees feel valued and help improve their knowledge, skills, and abilities. Also, other business partners want assurance that *their* information, systems, and networks are not put at risk when they connect to and do business with your business; demonstrating to potential business partners that you have a method to protect their information can help strengthen and grow your business relationship. Developing or improving your information security program will also make it easier for your organization to innovate – taking advantage of new technologies that can lower costs while delivering better services to your customers [EY14][Grady05].

It is not possible for any business to be completely secure. Nevertheless, it is possible—and reasonable—to implement a program that balances security with the needs and capabilities of your business. This publication provides small businesses with basic practices and tools needed to develop an information security program to protect your business's information.

1.2 Organization of this Publication

The rest of this publication is organized as follows:

- Section 2 describes how an information security program can be implemented.
- Section 3 discusses those key actions small businesses can take to develop or improve their information security and cybersecurity.
- Section 4 identifies several key practices directed towards users which you can implement immediately and which will protect your system and information.
- Appendix A provides a glossary of key terms and acronyms used in this publication.
- Appendix B contains sources referenced throughout this publication.
- Appendix C contains a description of the NIST *Framework for Improving Critical Infrastructure Cybersecurity* [CSF14].
- Appendix D provides worksheets useful in conducting a risk analysis.
- Appendix E contains example information security policy and procedure statements.

2 Understanding and Managing Your Risks

Risk is a function of threats, vulnerabilities, the likelihood of an event, and the potential impact such an event would have to the business. Most of us make risk-based decisions every day. While driving to work, we assess threats and vulnerabilities such as weather and traffic conditions, the skill of other drivers on the road, and the safety features and reliability of the vehicle we drive.

By understanding your risks, you can know where to focus your efforts. While you can never completely eliminate your risks, the goal of your information security program should be to provide reasonable assurance that you have made informed decisions related to the security of your information.

It is impossible to completely understand all of your risks perfectly. There will be many times when you will have to make a reasonable effort when trying to understand threats, vulnerabilities, potential impact and likelihood. For this reason, it is important to utilize all resources available to you, including information sharing organizations (e.g., [US-CERT], [ISACA], etc.), relevant stakeholders, and knowledge experts.

2.1 Elements of Risk

In information security, a *threat* is anything that might adversely affect the information your business needs to run. These threats might come in the form of personnel or natural events; they can be accidents, or intentional. Some of the most common information security threats include:

- **Environmental** (e.g. fire, water, tornado, earthquake);
- **Business Resources** (e.g. equipment failure, supply chain disruption, employees), and
- **Hostile Actors** (e.g. hackers, hacktivists, criminals, nation-state actors).

When looking at these types of threats, many people do not understand how they relate to information security. It is helpful to consider what would happen in the event of, for example, a flood. Computers, servers, and paper documents can easily be destroyed by even a small amount of water. If it is a large flood, you may not be allowed in the area to protect or collect the information your business needs to run.

A *vulnerability* is a weakness that could be used to harm the business. Any time or situation where information is not being adequately protected represents a vulnerability. Most information security breaches can be traced back to only a few types of common vulnerabilities. Section 3 and Section 4 of this publication are geared towards minimizing your vulnerabilities and reducing the impact of a security incident should one happen.

Some threats affect businesses and industries differently. For example, an online retailer may be more concerned about website defacement than a business with little or no web presence. *Likelihood* is the chance that a threat will affect your business and helps determine what types of protections to put in place.

Similarly, most businesses have different types of information. If a marketing pamphlet is leaked online, it will probably not harm the business nearly as much as if, for example, sensitive customer information or proprietary business data was leaked. The *impact* an event could have depends on the information affected, the business, and the industry.

Figure 2 shows the relationship between *threats, vulnerabilities, impact,* and *likelihood*.

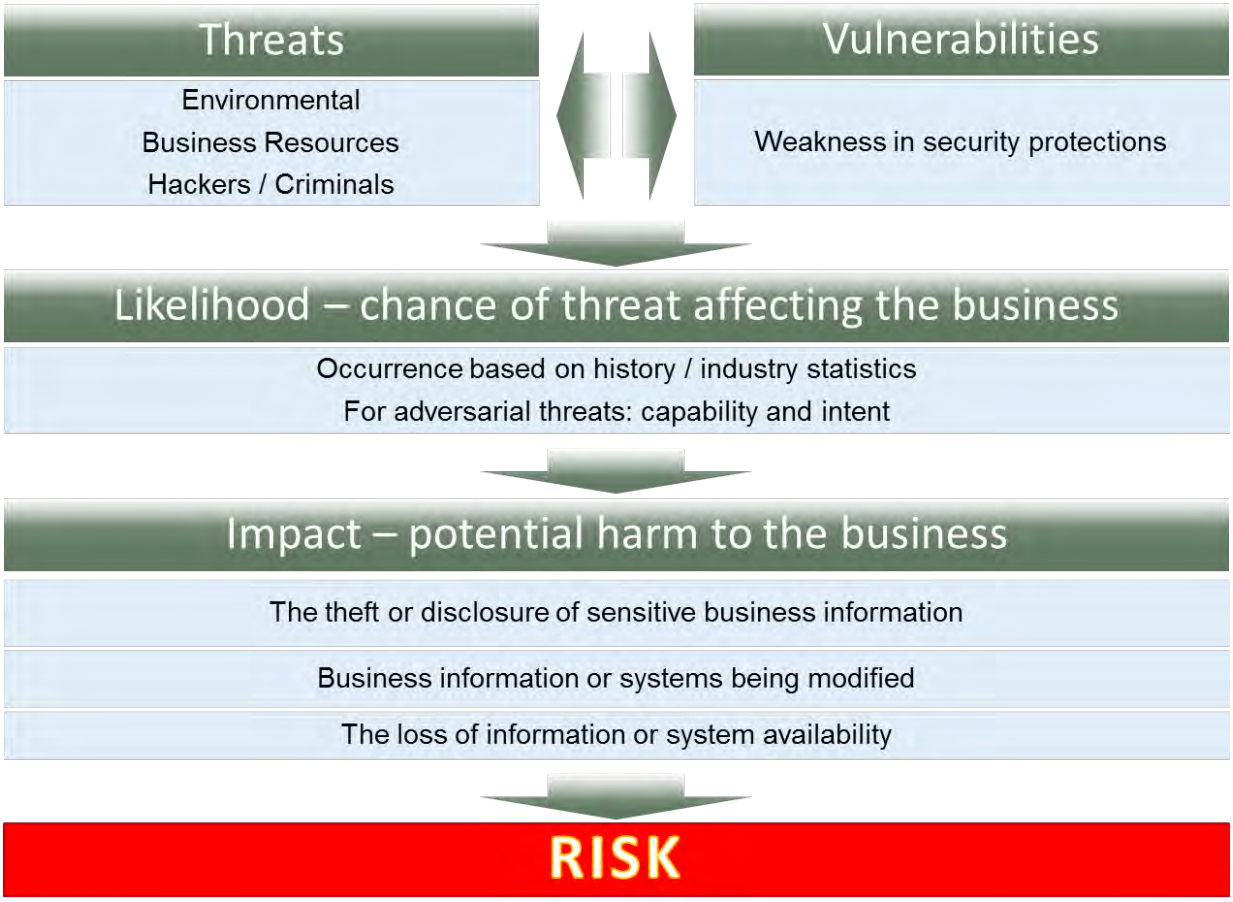


Figure 2: *How Risk is determined from Threats, Vulnerabilities, Likelihood, and Impact*

2.2 Managing Your Risks

The activity of identifying what information requires what level of protection, and then implementing and monitoring that protection, is called "risk management"[3]. This section contains simple steps for creating a risk-based information security program to help you manage risk.

This process will likely require the input and collaboration of a broad array of personnel within the business to be successful. You should bring together those personnel in your business that can help make informed decisions, for example project managers, executives, legal, and IT personnel. In addition, you may want to consider including customers, particularly you do a significant amount of business with, and use them as an additional resource.

You should review and update your risk management plan at least annually and whenever you may be considering any changes to the business (e.g. beginning a new project, a change in procedure, or purchasing a new IT system). Also, if you hear that something happened to one of your business partners, suppliers (including makers of any computer equipment or software you may use), customers, or employees, use this exercise to make sure you are still adequately protected.

- *Identify what information your business stores and uses*

  Because it is unreasonable to protect every piece of information your business uses against every possible threat, it is important to identify what information is most valuable to your business or to others. This first step is often the most challenging and most important part of risk management.

  Start by listing all of the types of information your business stores or uses. Define "information type" in any useful way that makes sense to your business. You may want to have your employees make a list of all the information they use in their regular activities. List everything you can think of, but you do not need to be too specific. For example, you may keep customer names and email addresses, receipts for raw material, your banking information, or other proprietary information.

- *Determine the value of your information*

  Go through each information type you identified and ask these key questions:

  - What would happen to my business if this information was made public?
  - What would happen to my business if this information was incorrect?

[3] NIST SP 800-30 Rev. 1, *Guide for Conducting Risk Assessments*, provides more detail on how to conduct a risk analysis [SP800-30].

- What would happen to my business if I/my customers couldn't access this information?

These questions relate to *confidentiality*, *integrity*, and *availability*, as discussed in Section 1.1 and help determine the potential *impact* of an event. *Table 1* below shows a template worksheet or spreadsheet you can adapt and use to identify the value of your information. *Table 1* also includes some additional, helpful questions to consider what would happen to your business reputation, your productivity, and your legal liabilities.

You may not be able to assign a dollar value amount for many types of information, so instead, consider using use a scale of 0 to 3 or "none," "low," "moderate," and "high." Note that one person alone may not know how a piece of information is used throughout the business – a team effort will likely be required.

Using the answers to these questions, rank how critical each type of information is to the continued operations of your business. When calculating an overall ranking or risk score for an information type, either add the values to give a total value or use the highest value or score given. For example, if the information type has one "high" rating, the entire information type should be rated as "high". Information that has a higher score needs to be more protected than information with a low score. Higher-rated information types may warrant use of the techniques identified in Section 3 of this publication, depending on the relevant threats and vulnerabilities.

Table 1 on the next page is an example worksheet showing how this information can be gathered. The worksheet includes a worked example shown in italics. The worksheet is also available in Appendix D.

Table 1: *Identify and Prioritize Information Types*

	Example: Customer Contact Information	Info type 1	Info type 2	Info type 3	…
Cost of revelation (Confidentiality)	*Med*				
Cost to verify information (Integrity)	*High*				
Cost of lost access (Availability)	*High.*				
Cost of lost work	*High*				
Fines, penalties, customer notification	*Med*				
Other legal costs	*Low*				
Reputation / public Relations costs	*High*				
Cost to identify and repair problem	*High*				
Overall Score:	*High*				

- *Develop an inventory*

  Identify what technology comes in contact with the information you listed in *Table 1*. Complete *Table 2* to include the technology you use to store, access, process, and transmit that information. This can include hardware (e.g. computers) and software applications (e.g. browser email). Make sure to include the make, model, serial numbers, and other identifying information; this information is necessary for identifying the product in case of maintenance, repair, or insurance purposes. Every information type should have at least one hardware / software technology listed. Where applicable, include technologies outside of your business (e.g., "the cloud") and any protection technologies you have in place such as firewalls.

  You should also track where each product is located. For software, identify what machine(s) the software has been loaded on to. You may also want to include the owner of the technology, if applicable.

  Evaluate the impact of the information, as decided in *Table 1*—this will help you determine the most appropriate security controls needed to protect the information. You may choose to add up impact scores for all types of information the product comes in

contact with, or only use the highest score. Update this list at least annually. This table is also included in Appendix D.

Table 2: *Inventory*

	Description (e.g. nickname, make, model, serial number, service ID, other identifying information)	Location	Type of information the product comes in contact with.	Overall Potential Impact
1	*Dr. J. Smith's cell phone; Type – Sonic; Version – 9.0 ID – "Police Box"*	*Mobile T&S Network*	*Email; Calendar; Customer Contact Information; Photos; Social Media; Locations; Medical Dictionary Application*	*High*
2				
3				
4				
5				

- *Understand your threats and vulnerabilities*

  All businesses face information security and cybersecurity threats and vulnerabilities. While certain categories of threats and vulnerabilities may be consistent across businesses, some may be specific to your industry, location, and business. You should regularly review what threats and vulnerabilities your business may face and estimate the likelihood that you will be affected by that threat or vulnerability. This can help you identify specific strategies to protect against that threat or vulnerability.

  Table 3 provides an example of how to determine the likelihood of an incident based on the information you collected in *Tables 1 and 2*. The left-hand column of the table lists some example threat events or scenarios—you should create a list that is specific to the threats and vulnerabilities your business faces. Evaluate the likelihood of the threat to your business in the bottom row. Use the highest value or score given. For example, if the information type has one "high" rating, the entire information type should be rated as "high". See Appendix D for more information on this worksheet.

Table 3: *Identify Threats, Vulnerabilities, and the Likelihood of an Incident*

	Example: Customer Contact Information on Dr. J. Smith's cell phone	Info type / Technology	Info type / Technology	Info type / Technology	…
Confidentiality					
Theft by criminal	*Med (encrypted; password-protected)*				
Accidental disclosure	*Med (has previously lost phone twice)*				
Integrity					
Accidental alteration by user / employee	*Med*				
Intentional alteration by external criminal / hacker	*Low*				
Availability					
Accidental Destruction (fire, water, user error)	*Med (Regular backups)*				
Intentional Destruction	*Low*				
Overall Likelihood:	*Med*				

Your business likely already has some processes and procedures in place which help to protect from these threats. It is useful to record these protections as you go through this exercise (e.g. the destruction of information may be mitigated or protected by regular backups). Information about threats and common vulnerabilities can be found through your local InfraGard chapter [InfraGard], [US-CERT], your local SCORE[4] chapter, hardware or software vendor announcements, your local police department and many other places (e.g., the National Vulnerability Database [NVD]).

Vulnerabilities found in software applications are the most common avenue of attack for hackers. Because of the broad range of vulnerabilities possibly found within a network or

[4] Originally known as the Service Corps of Retired Executives, it is now simply referred to as SCORE [SCORE].

system, a vulnerability scan or analysis should be minimally conducted once a year by a professional and again whenever you make major changes to your computers or network. The prices for this service can vary widely—from free to thousands of dollars—depending on the specific actions performed and the size or nature of the business being assessed.

You may want to consider conducting a penetration test against your business. This test simulates an attack in order to identify weaknesses. The test should include physical, social engineering, and cyber-based attacks. Other tests may also be useful—work with a cybersecurity professional to identify what is appropriate for your situation.

The information gathered in *Tables 1 - 3* provide the information necessary to identify the areas where you need to focus your information security efforts. *Table 4* below shows an example of how the value of your information types or "impact" (*Tables 1 and 2*) and the potential likelihood of an attack (*Table 3*) can be combined to help you prioritize your information security efforts.

Table 4: *Prioritize Resolution Action*

Impact	High	**Priority 3** – Schedule a resolution. Focus on *Respond* and *Recover* solutions.	**Priority 1** – Implement immediate resolution. Focus on *Detect* and *Protect* solutions.
	Low	No action needed	**Priority 2** – Schedule a resolution. Focus on *Detect* and *Protect* solutions.
		Low	High
		Likelihood	

Using the previous example, Dr. J. Smith's Cell Phone, which contains customer contact information, may be a Priority 3 device due to the High impact and Low Likelihood.

As you review the practices in Section 3 and 4 of this document, look at what technologies and services you may need to purchase. When you develop a budget, apply the information from this exercise to help you select, obtain and implement systems and services that are commensurate with your risk.

2.3 When you need help

No one is an expert in every business and technical area. You may choose to outsource some of your technology and information security needs to companies that provide these services. Here are a few tips which can help you find a provider that's right for your business:

- **Ask for recommendations**. You can ask your business partners, local Chamber of Commerce, Better Business Bureau, colleges or universities, or SCORE Office for referrals.
- **Request quotes**. Make sure to have a clear list of actions or outcomes that you want to achieve. This may be done with the potential provider, depending on whether or not you want their opinion of what actions or outcomes your business should have.
- **Check past performance**. Often providers will have reviews posted online. Check for complaints with the Better Business Bureau or Federal Trade Commission. If possible, request a list of past customers and contact each to see if the customer was satisfied with the company's performance and would hire them again for future work. Find out how long the company has been in business and whether or not there have been recent or several changes in management – this can be an indicator of future difficulties.
- **Find out who will be doing your work**. Ask for the professional qualifications of the personnel who will be handling the project – including those working directly with you or on your systems as well as any personnel that will be overseeing the project. Look for recognized professional certifications and relevant experience.

Recognize that anyone you hire to perform a service for you may not know your business or industry. Any large decisions – including any changes in processes or technologies used - should be made in collaboration with business executives, project leaders, and other relevant personnel.

In some cases, larger organizations will help their small business suppliers analyze their risks and develop an information security program. If you have a business partners or large customers that depend on your organization, consider asking for their input or participation in your risk management process.

3 Safeguarding Your Information

This publication uses the *Framework for Improving Critical Infrastructure Cybersecurity* (the "Cybersecurity Framework") to organize the processes and tools that you should consider to protect your information [CSF14]. Appendix C contains more information about the Cybersecurity Framework. This is not a one-time process, but a continual, on-going set of activities. Although the Cybersecurity Framework was originally developed specifically for critical infrastructure organizations, it has proven useful to a variety of audiences as it provides a simple, common language for helping organizations to identify, assess, and manage cybersecurity risks.

This section provides activities you can implement in your business. In addition, Section 4 of this publication lists some common practices you and your employees can implement to help keep your business safe. The specific mitigation activities in this section are grouped into the five broad categories of the Cybersecurity Framework, as pictured in Figure 3. Some of the activities in this publication are suggestions for consideration. This means that those activities are recommended when a higher level of assurance (confidentiality, integrity, or availability) is needed to protect the information and meet business needs than is provided by the more basic practices.

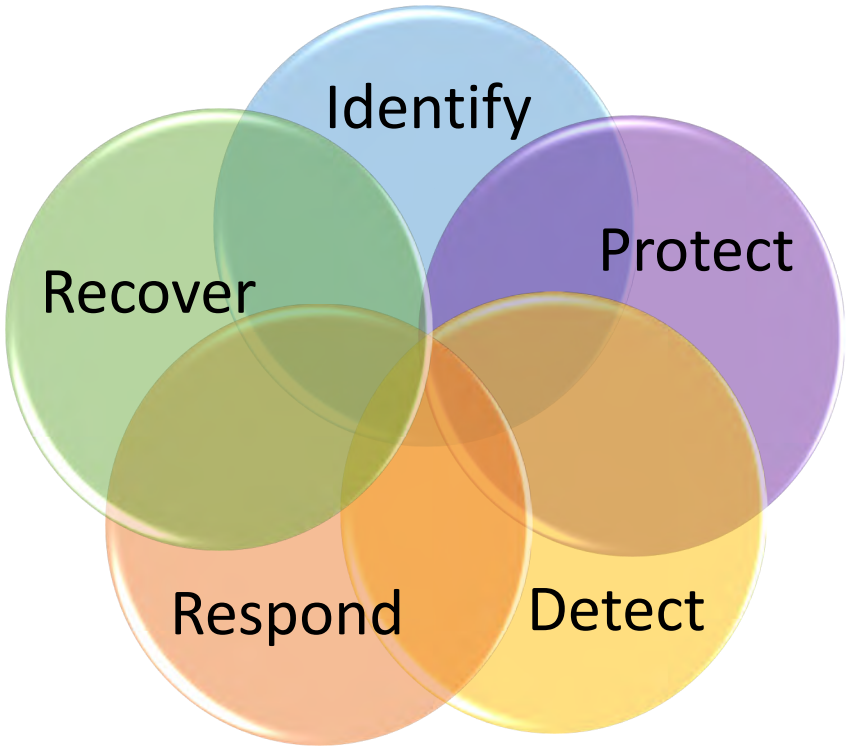


Figure 3: *The Cybersecurity Framework Categories*

3.1 Identify

As described in the Cybersecurity Framework, the activities in the Identify Function help increase an organization's understanding of their resources and risks.[5]

- *Identify and control who has access to your business information*

  Determine who has or should have access to your business's information and technology. Include whether or not a key, administrative privilege, or password is required. To help collect this information, review your list of accounts and what privileges those accounts have.

  Be aware of anyone who has access to your business. Do not allow unknown or unauthorized persons to have physical access to any of your business computers. This includes cleaning crews and maintenance personnel. Do not allow computer or network repair personnel to work on systems or devices unsupervised. No unrecognized person should be able to enter your office space without being questioned by an employee. If a criminal gains physical access to an unlocked machine, they can relatively easily steal any private or sensitive information on that machine.

  Physically lock up your laptops and other mobile devices when they are not in use. You should also utilize the session lock feature included with many operating systems, which locks the screen if the computer is not used for a specified period of time (e.g. 2 minutes). Use a privacy screen or position each computer's display so that people walking by cannot see the information on the screen.

- *Conduct Background Checks*

  Do a full, nationwide, criminal background check, sexual offender check, and if possible a credit check on all prospective employees (especially if they will be handing your business funds). You can request one directly from the FBI or an FBI-approved Channeler [FBI].

  In addition, consider doing a background check on yourself. Many people become aware that they are victims of identity theft only after they do a background check on themselves and find reported arrest records and unusual previous addresses where they never lived. This can be an indication that your identity has been stolen.

  If prospective employees are applying for a job with educational requirements, call the schools they attended and verify their actual degree(s), date(s) of graduation, and GPA(s). If they provided references, call those references to verify the dates they worked for a company and other specifics to ensure the employee is being honest.

[5] The Cybersecurity Framework includes those processes found in section 2 of this publication in the "Identify" function of the Framework [CSF14].

- *Require individual user accounts for each employee.*

  Set up a separate account for each user (including any contractors needing access) and require that strong, unique passwords be used for each account. Without individual accounts for each user, you may find it difficult to investigate data loss or unauthorized data manipulation. Ensure that all employees use computer accounts without administrative privileges to perform typical work functions. This will hinder any attempt—intentional or not—to install unauthorized software. Consider using a guest account with minimal privileges (e.g. internet access only) if needed for your business.

- *Create policies and procedures for information security*

  Policies and procedures are used to identify acceptable practices and expectations for business operations, can be used to train new employees on your information security expectations, and can aid an investigation in case of an incident. These policies and procedures should be readily accessible to employees – such as in an employee handbook or manual.

  The scope and breadth of policies is largely determined by the type of business and the degree of control and accountability desired by management. Have a legal professional familiar with cyber law review the policies to ensure they are compliant with local laws and regulations.

  Policies and procedures for information security and cybersecurity should clearly describe your expectations for protecting your information and systems. These policies should identify the information and other resources that are important and should clearly describe how management expects those resources to be used and protected by all employees. See Appendix E for sample policy and procedure statements. Other examples are readily available online or a legal, insurance, or cybersecurity professional may have example policies.

  All employees should sign a statement agreeing that they have read the policies and relevant procedures, that they will follow the policies and procedures. If there are penalties associated with the policies and procedures, employees should be aware of them. The signed agreement should be kept in the employee's HR file.

  Policies and procedures should be reviewed and updated at least annually and as there are changes in the organization or technology. Whenever the policies are changed, employees should be made aware of the changes and sign the new policy acknowledging their understanding. This can be done in conjunction with annual training activities (see Section 3.2).

3.2 Protect

The Protect Function supports the ability to limit or contain the impact of a potential information or cybersecurity event.[6]

- *Limit employee access to data and information*

  Where possible, do not allow any employee to have access to all of the business's information or systems (financial, personnel, inventory, manufacturing, etc)[7]. Allow employees to access only those systems and only the specific information that they need to do their jobs. Likewise, do not allow a single individual to both initiate and approve a transaction (financial or otherwise). This includes executives and senior managers.

  Insiders – employees or others who work for a business – are a main source of security incidents. Because they are already known, trusted, and have been given access to important business information and systems, they can easily harm the business (deliberately or unintentionally). Unfortunately, these types of events can be difficult to detect, so protecting against them is very important.

  When an employee leaves the business, ensure they no longer have access to the business's information or systems. This may involve collecting their business ID, deleting their username and account from all systems, changing any group passwords or combination locks they may have known, and collecting any keys they were given.

- *Install Surge Protectors and Uninterruptible Power Supplies (UPS)*

  Surge protectors prevent spikes and dips in power from damaging your electronic systems. Uninterruptible Power Supplies (UPS) provide a limited amount of battery power to allow you to work through short power outages and provide enough time to save your data when the electricity goes off. UPS's often provide surge protection as well. The size and type of UPS should be sufficient to meet the needs of your particular business.

  Ensure each of your computers and critical network devices are plugged into a UPS. Plug less sensitive electronics into surge protectors. Test and replace UPSs and surge protectors as recommended by the manufacturer.

[6] The Cybersecurity Framework specifies cybersecurity events only, but can be applied to information security events [CSF14].

[7] The "process of granting access to information system resources only to authorized users, programs, processes, or other systems" is called "access control" [SP800-32].

- *Patch your operating systems and applications*

  Any software application including operating systems, firmware, or plugin installed on a system could provide the means for an attack. Only install those applications that you need to run your business and patch/update them regularly. Many software vendors provide patches and updates to their supported products in order to correct security concerns and to improve functionality. Ensure that you know how to update and patch all software on each device you own or use.

  When you purchase new computers, check for updates immediately. Do the same when installing new software. You should only install a current and vendor-supported version of software you choose to use. Vendors are not required to provide security updates for unsupported products. For example, Microsoft ended support for Windows XP on April 8, 2014 and no new patches will be provided for that operating system, even though it has known vulnerabilities [Msoft WLFS].

  It may be useful to assign a day each month to check for patches. There are products which can scan your system and notify you when there is an update for an application you have installed. If you use one of these products, make sure it checks for updates for every application you use. You can check for updates directly with the original manufacturers of the applications you have installed.

- *Install and activate software and hardware firewalls on all your business networks*

  Firewalls can be used to block unwanted traffic such as known malicious communications or browsing to inappropriate websites, depending on the settings. Install and operate a hardware firewall between your internal network and the Internet. This may be a function of a wireless access point/router, or it may be a function of a router provided by the Internet Service Provider (ISP) of the small business. There are many hardware vendors that provide firewall wireless access points/routers, firewall routers, and separate firewall devices. Ensure there is antivirus software installed on the firewall.

  For these devices, change the administrative password upon installation and regularly thereafter. Consider changing the administrator's log-in as well. The default values are typically known or easily guessed, and, if not changed, may allow hackers to control your device and thus, to monitor or record your communications and data via the Internet.

  In addition, install, use, and regularly update a software firewall on each computer system used in your small business (including smart phones and other networked devices if possible). If given the option, ensure logging is enabled which will aid in the investigation of an event by providing evidence. Many operating systems include a firewall, but you should ensure that the firewall is operating and logging activity [8].

[8] See Microsoft's *Safety & Security Center* [Msoft SSC] and Apple's OSX support page [Apple16].

You should only use a current (updated), authentic, and vendor-supported version of the hardware and software firewall.

It is necessary to have firewalls on each of your computers and networks even if you use a cloud service provider or a virtual private network (VPN). If employees are allowed to do any kind of work at home, ensure that their home network and systems have hardware and software firewalls installed and operational, and that they are regularly updated.

In addition to a basic hardware firewall, you may want to consider installing an Intrusion Detection / Prevention System (IDPS). These devices analyze network traffic at a more detailed level and can provide a greater level of protection.

- *Secure your wireless access point and networks*

  If you use wireless networking, set up your router as follows (view the owner's manual for directions on how to make these changes):

  - Change the administrative password that was on the device when you received it.
  - Set the wireless access point so that it does not broadcast its Service Set Identifier (SSID).
  - Set your router to use WiFi Protected Access 2 (WPA-2), with the Advanced Encryption Standard (AES) for encryption. **Do not use WEP (Wired-Equivalent Privacy)** as it is not considered secure.

  If your business provides wireless internet access to customers, ensure that it is separated from your business network.

  Avoid connecting to unknown or unsecured / guest wireless access points, even for performing non-business activities. Access only those wireless access points that you own or trust (i.e. are assured of their security).

  If you or your employees must connect to unknown networks or conduct work from home, you may want to consider implementing an encrypted virtual private network (VPN) capability, which will allow for a more secure connection.

- *Set up web and email filters*

  Email filters can help remove emails known to have malware attached and prevent your inbox from being cluttered by unsolicited and undesired (i.e. "spam") email. Email providers may offer this capability. If your business hosts your own email servers, use filtering if possible.

  Similarly, many web browsers allow web filtering – notifying the user if a website may contain malware and potentially preventing them from accessing that website. Enable this option if available.

You may want to consider blocking employees from going to websites that are frequently associated with cybersecurity threats. This may include sites with pornographic content or social media. This can help prevent employees from accidentally downloading malware, wasting business resources, and conducting illicit activity using business resources. Many firewalls and routers can be set up to block certain addresses (blacklist), or allow only certain addresses (whitelist). Blacklists can be downloaded online or obtained as part of a service.

- *Use encryption for sensitive business information*

  Encryption is a process of making your electronically stored information unreadable to anyone not having the correct password or key[9]. Use full-disk encryption—which encrypts all information on the storage media – on all of your computers, tablets, and smart phones. Many systems come with full-disk encryption capabilities. Not all mobile devices provide this capability.

  Do not forget your encryption password or key! If you lose or forget your key, you will lose your information. Save a copy of your encryption password or key in a secure location separate from where your backups are stored.

  If, in your business, you send sensitive documents or emails, you may want to consider encrypting those documents and/or emails. Many document, and email applications provide for this capability. Typically, the receiver will need to have the same application to de-crypt the message or document as you used to encrypt it. If you need to send them a password or key, give it to them via phone or other method. Never send it in the same email as the encrypted document.

- *Dispose of old computers and media safely*

  Small businesses may sell, throw away, or donate old computers and media. When disposing of old business computers, first electronically wipe the hard drive(s). Many operating systems provide this capability and there are several downloadable applications that can also do this. If you can't wipe the hard drive for any reason, consider degaussing the hard drive.

  After wiping the hard drive(s), remove them and have them physically destroyed. You can sell, donate, or recycle the machine after the hard drive has been removed. Many companies will crush or shred them for you. Consider choosing companies that will allow you to watch the process.

[9] NIST SP 800-101 Rev. 1, *Guidelines on Mobile Device Forensics*, defines encryption as "Any procedure used in cryptography to convert plain text into cipher text to prevent anyone but the intended recipient from reading that data" [SP800-101].

Install a remote-wiping application on your computer, tablet, cell phone, and other mobile device. If the device is lost or stolen, you can use these applications wipe all information from the device.

When disposing of old media (CDs, floppy disks, USB drives, etc), first delete any sensitive business or personal data. Then destroy the media either by shredding it or taking it to a company that will shred it for you. When disposing of paper containing sensitive information, destroy it by using a crosscut shredder.

You may want to consider incinerating paper and other media that contains very sensitive information.

- *Train your employees*

  Train employees immediately when hired and at least annually thereafter about your information security policies and what they will be expected to do to protect your business's information and technology. Ensure they sign a paper stating that they will follow your policies, and that they understand the penalties for not following your policies.

  Train employees on the following:

  - What they are allowed to use business computers and mobile devices for, such as if they are allowed to use them to check their personal email.
  - How they are expected to treat customer or business information, for example whether or not they can take that information home with them.
  - What to do in case of an emergency or security incident (see Section 3.4).
  - Basic practices as contained in Section 4 of this document.

  You may be able to obtain training from various organizations, such as your local Small Business Development Center (SBDC), SCORE Chapter, community college, technical college, or commercial training vendors. In addition, the Small Business Administration (SBA) and Federal Trade Commission (FTC) produce videos and topic-specific tips and information which can be used for training [SBA LC] [FTC].

  Continually reinforce the training in everyday conversations or meetings. Monthly or quarterly training, meetings, or newsletters on a specific subject can help reinforce the importance of security and develop a culture of security in your employees and in your business.

3.3 Detect

The activities under the Detect Function enable timely discovery of information security or cybersecurity events.

- *Install and update anti-virus, -spyware, and other –malware programs*

  Malware (short for Malicious Software or Malicious Code) is computer code written to steal or harm[10]. It includes viruses, spyware, and ransomware. Sometimes malware only uses up computing resources (e.g. memory), but other times it can record your actions or send your personal and sensitive information to cyber criminals.

  Install, use, and regularly update anti-virus and anti-spyware software on every device used in your business (including computers, smart phones, and tablets).

  It may be useful to set the anti-virus and anti-spyware software to automatically check for updates at least daily (or in "real-time", if available), and then set it to run a complete scan soon afterwards. Many businesses run their anti-virus programs at some scheduled time each night (e.g. 12:00 midnight) and schedule a virus scan to run about half an hour later (e.g. 12:30 am); then they run their anti-spyware software (e.g. 2:30 am) and run a full system scan (e.g. 3:00 am). This assumes that you have an always-on, high-speed connection to the Internet. Regardless of the actual scheduled times for the above updates and scans, schedule them so that only one activity is taking place at any given time.

  If your employees do any work from home computers or personal devices, obtain copies of your business anti-malware software for those systems or require your employees to use anti-virus and anti-spyware software.

  You may want to consider using two different anti-virus solutions from different vendors. This can improve the chances a virus will be detected. Often routers, firewalls, and Intrusion Detection / Prevention Systems will have some anti-virus capabilities, but these should not be exclusively relied upon to protect the network.

- *Maintain and monitor logs*

  Protection / detection hardware or software (e.g. firewalls, anti-virus) often has the capability of keeping a log of activity. Ensure this functionality is enabled (check the operating manual for instructions on how to do this). Logs can be used to identify suspicious activity and may be valuable in case of an investigation. Logs should be

[10] CNSSI 4009-2015 and NIST SP 800-53 Rev. 4 define Malicious Code as: "Software or firmware intended to perform an unauthorized process that will have adverse impact on the confidentiality, integrity, or availability of an information system. A virus, worm, Trojan horse, or other code-based entity that infects a host. Spyware and some forms of adware are also examples of malicious code." [CNSSI4009, p.79] [SP800-53, p.B-13]

backed up and saved for at least a year; some types of information may need to be stored for a minimum of six years[11].

You may want to consider having a cybersecurity professional review the logs for any unusual or unwanted trends, such as a large use of social media websites or an unusual number of viruses consistently found on a particular computer. These trends may indicate a more serious problem or signal the need for stronger protections in a particular area.

3.4 Respond

The Respond Function supports the ability to contain or reduce the impact of an event.

- *Develop a plan for disasters and information security incidents*

  Develop a plan for what immediate actions you will take in case of a fire, medical emergency, burglary, or natural disaster.

  The plan should include the following:

  - **Roles and Responsibilities**. This includes who makes the decision to initiate recovery procedures and who will be the contact with appropriate law enforcement personnel.

  - **What to do with your information and information systems in case of an incident.** This includes shutting down or locking computers, moving to a backup site, physically removing important documents, etc.

  - **Who to call in case of an incident**. This should include how and when to contact senior executives, emergency personnel, cybersecurity professionals, legal professionals, service providers, or insurance providers. Be sure to include relevant contact information in the plan.

    Many states have "notification laws," requiring you to notify customers if there is a possibility any of their information was stolen, disclosed, or otherwise lost. Make sure you know the laws for your area and include relevant information in your plans.

    Include when to notify appropriate authorities. If there is a possibility that any personal information, intellectual property, or other sensitive information was stolen, you should contact your local police department to file a report. In addition, you may want to contact your local FBI office [DoJ15].

[11] E.g., Patient health records have a retention requirement of "at least 6 years from date of last entry, and longer if required by State statute." 42 C.F.R. §491.10(c), *Patient health records.* Available at: http://www.ecfr.gov/cgi-bin/text-idx?SID=8575b14705ead743d3cbeb9b04fc6896&mc=true&node=se42.5.491_110&rgn=div8 (accessed 10/13/2016).

- **Types of activities that constitute an information security incident**. This should include activities such as your business website being down for more than a certain length of time or evidence of information being stolen.

You may want to consider developing procedures for each job role that describe exactly what the employee in that role will be expected to do if there is an incident or emergency. Appendix E discusses what a procedure document should contain.

3.5 Recover

The Recover Function helps an organization resume normal operations after an event.

- *Make full backups of important business data/information*[12]

  Conduct a full, encrypted backup of the data on each computer and mobile device used in your business at least once a month, shortly after a complete virus scan. Store these backups away from your office location in a protected place so that if something happens to your office (fire, flood, tornado, theft, etc), your data is safe. Save a copy of your encryption password or key in a secure location separate from where your backups are stored.

  Backups will let you restore your data in case a computer breaks, an employee makes a mistake, or a malicious program infects your system. Without data backups, you may have to recreate your business information manually (e.g. from paper records). Data that you should backup includes (but is not limited to) word processing documents, electronic spreadsheets, databases, financial files, human resources files, accounts receivable/payable files, system logs, and other information used in or generated by your business. Back up only your data, not the software applications themselves.

  You can easily store backups on removable media, such as an external USB hard drive, or online using a Cloud Service Provider. If you choose to store your data online, do your due diligence when selecting a Cloud Service Provider. It is recommended that you encrypt all data prior to storing it in the Cloud.[13]

  If you use a hard drive, ensure it is large enough to hold all of your monthly backups for a year. It is helpful to create a separate folder for each of your computers. When you connect the external disk to your computer to make your backups, copy your data into the appropriate designated folder.

[12] The Cybersecurity Framework defines making backups as a "Protect" activity, and restoring from a backup as a "Recover" activity. For this document, both making and restoring from the backups is listed under "Recover" for simplicity [CSF14].

[13] The Cloud Security Alliance (CSA) provides information and guidance for using the Cloud safely [CSA11].

Test your backups immediately after generating them to ensure that the backup was successful and that you can restore the data if necessary.

- *Make incremental backups of important business data/information*[14]

  Conduct an automatic incremental or differential backup of each of your business computers and mobile devices at least once a week. This type of backup only records any changes made since the last backup. In some cases, it may be prudent to conduct backups every day or every hour depending on how much information is changed or generated in that time and the potential impact of losing that information. Many security software suites offer automated backup functions that will do this on a regular schedule for you.

  These backups should be stored on:

  - removable media (e.g. external hard drive);
  - a separate server that is isolated from the network, or
  - online storage (e.g. a cloud service provider).

  In general, the storage device should have enough capacity to hold data for 52 weekly backups[15], so its size should be about 52 times the amount of data that you have. *Remember this should be done for each of your computers and mobile devices*. You may choose to store your backups in multiple locations (e.g. one in the office, one in a safety deposit box across town, and one in the cloud). This provides additional security in case one of the backups becomes destroyed.

  Periodically test your backed up data to ensure that you can read it reliably. If you don't test your backups, you will have no grounds for confidence that you can use them in the event of a disaster or security incident.

  You may want to consider encrypting your backups. Many software applications will allow you to encrypt your backups. This provides an added layer of security and is important if your backups contain any sensitive personal or business information. Make sure to keep a copy of your encryption password or key in a secure location separate from where you keep your backups.

- *Consider cyber insurance*

  Cyber insurance is similar to other types of insurance (e.g. flood, fire) that you may have for your business. Cyber insurance may help you respond to and recover from a security incident. In some cases, cyber insurance companies may also provide cybersecurity

[14] The Cybersecurity Framework defines making backups as a "Protect" activity, and restoring from a backup as a "Recover" activity. For this document, both making and restoring from the backups is listed under "Recover" for simplicity [CSF14].

[15] Various industries may have specific requirements for how long data backups should be kept, but for cybersecurity, 52 weekly backups provide ability to both recover from and track incidents that weren't noticed immediately.

expertise and help you identify where you are vulnerable, what kinds of actions you need to take to protect your systems, and help you investigate an incident and report it to appropriate authorities.

As you might with any type of insurance, perform due-diligence when considering cyber insurance. Determine your risks (see Section 2) before purchasing a policy. Research the company offering protection, the services they provide, the type of events they cover, and ensure that they have a good reputation and will be able to meet their contractual agreement.

- *Make improvements to processes / procedures / technologies*

  Regularly assess your processes, procedures, and technology solutions according to your risks (see Section 2). Make corrections and improvements as necessary.

  You may want to consider conducting training or table-top exercises which simulate or run-through a major event scenario in order to identify potential weaknesses in your processes, procedures, technology, or personnel readiness. Make corrections as needed.

4 Working Safely and Securely

Many incidents can be prevented by practicing safe and secure business habits. Unlike the previous section, which looked at programmatic steps you can take within your business, this section focuses on every-day activities you and your employees can do to help keep your business safe and secure. While criminals are becoming more sophisticated, most criminals still use well-known and easily avoidable methods. This section provides a list of recommended practices to help protect your business. Each employee should be trained to follow these basic practices.

- *Pay attention to the people you work with and around*

  Get to know them and maintain contact with your employees, including any contractors your business or building may employ (e.g. for cleaning, security, or maintenance).[16] Watch for unusual activity or warning signs such as the employee mentions financial problems, begins working strange hours, asks for a lot of overtime, or becomes unusually secretive. In most cases, this activity is benign, but occasionally it can be an indicator that the employee is or may begin stealing information or money from the business, or otherwise damaging the company.

  Watch for unusual activity near your place of business or in your industry. Similarly, know if other businesses in your area perform any activities which may pose an environmental or safety risk. An event that affects your neighbors may affect your business as well, or indicate new risks in your area, so it is important to remain aware.

- *Be careful of email attachments and web links*

  One of the more common means of distributing malware is via email attachments or links embedded in email. Usually the malware is attached to emails that pretend to be legitimate or from someone you know ("phishing" or "spear phishing" attacks). Links and attachments can be disguised to appear legitimate but in reality download malware onto your computer.

  Do not click on a link or open an attachment that you were not expecting. If it appears important, call the sender to verify they sent the email and ask them to describe what the attachment or link is.

  Before you click a link (in an email or on social media, instant messages, other webpages, or other means), hover over that link to see the actual web address it will take you to (usually shown at the bottom of the browser window). If you do not recognize or trust the address, try searching for relevant key terms in a web browser. This way you can find the

[16] Current or former employees, contractors, or other business partners who have or had authorized access to an organization's network, system, or data and intentionally misused that access to negatively affect the confidentiality, integrity, or availability of the organization's information or information systems is called "insider threat" (Software Engineering Institute CERT, https://www.cert.org/insider-threat/).

article, video, or webpage without directly clicking on the suspicious link. Train employees to recognize phishing attempts and who to notify when one occurs.

- *Use separate personal and business computers, mobile devices, and accounts*

  As much as possible, have separate devices and email accounts for personal and business use. This is especially important if other people such as children use your personal devices. Do not conduct business or any sensitive activities (e.g. online business banking) on a personal computer or device and do not engage in activities such as web surfing, gaming, downloading videos, etc., on business computers or devices. Do not send sensitive business information to your personal email address.

  Personal or home computers and electronics may be less secure than business systems. Personal devices may be used for web surfing to untrustworthy sites and have untrustworthy applications installed such as games which are not required for work and which add vulnerabilities that a hacker could exploit.

  Some businesses may want to consider using a separate computer that is not connected to any network for certain business functions or for extremely sensitive information. Because most cyber attacks require network connectivity, disconnecting extremely sensitive information from the network prevents these kinds of attacks.

- *Do not connect personal or untrusted storage devices or hardware into your computer, mobile device, or network.*

  Do not share USB drives or external hard drives between personal and business computers or devices. Do not connect any unknown / untrusted hardware into your system or network and do not insert any unknown CD, DVD, or USB drive. These devices may have malware on them. Criminals are known to place USB drives in public places where their target business's employees gather, knowing that curious individuals will pick them up and plug them in. What is on them is generally malware which will spy on or take control of the computer.

  Disable the AutoRun feature for the USB ports and optical drives like CD and DVD drives on your business computers to help prevent such malicious programs from installing on your systems.

- *Be careful downloading software*

  Do not download software from an unknown web page.

  Only those web pages belonging to reputable businesses with which you have a business relationship should be considered reasonably safe for downloading software.

Be very careful if you decide to download and use freeware or shareware. Most of these do not come with technical support and some do not have the full functionality you might believe will be provided.

- *Do not give out personal or business information*

  Social engineering is an attempt to obtain physical or electronic access to your business information by manipulating people. A very common type of attack involves a person, website, or email that pretends to be something it's not. A social engineer will research your business to learn names, titles, responsibilities, and any personal information they can find. Afterwards, the social engineer usually calls or sends an email with a believable, but made-up, story designed to convince the person to give them certain information.

  If you receive an unsolicited phone call asking for personal information from a company you recognize (such as from your bank or doctor's office), ask for identifying information that only a person associated with the organization would know. If this is not possible, ask the person for their name and office or division and tell them you will call them right back. Call the company using the information from their website or on your contract or bill – do not use any phone number provided by the person who called you. Then ask for the representative who called you.

  Never respond to an unsolicited phone call from a company you do not recognize that asks for sensitive personal or business information. Employees should notify their management whenever there is an attempt or request for sensitive business information.

  Never give out your username or password. No company should ask you for this information for any reason. Also beware of people asking what kind of operating system you use, what brand firewalls you have, what internet browser you use, or what applications you have installed. This is all information that can make it easier for a hacker to break in to your system.

- *Watch for harmful pop-ups*

  When connected to and using the Internet, do not respond to popup windows requesting that you click "OK" for anything. Use a popup blocker and only allow popups on websites you trust.

  If a window pops up on your screen unexpectedly, *DO NOT* close the popup window, either by clicking "okay" or by selecting the X in the upper right corner of the popup window, especially if the pop up is informing you that your system has a virus and suggesting you download a program to fix it. Do not respond to popup windows informing you that you have to download a new codec, driver, or special program for the web page you are visiting. Some of these popup windows are actually trying to trick you into clicking on "OK" which will allow it to download and install spyware or other malware onto your computer. Be aware that some of these popup windows are

programmed to interpret any mouse click anywhere on the window as an "OK" and act accordingly.

If you encounter this kind of pop-up window, disconnect from the network and force the browser to close (in Windows, hit "ctrl + alt + del" and delete the browser from running tasks. In OSX, right-click the application in the bar and select "force close"). You should save any files you have open and reboot the computer, then run your anti-virus software.

- *Use strong passwords*

  Good passwords consist of a random sequence of letters (upper case and lower case), numbers, and special characters, and are at least 12 characters long[17]. For systems or applications that have important information, use multiple forms of identification (called "multi-factor" or "dual factor" authentication). For example, when a user logs in with a password, they may be sent a text message with a code they have to enter as well. Biometrics (e.g. fingerprint scanners) and other devices may be used, but can be expensive and difficult to install or maintain.

  Many devices come with default administration passwords – these should be changed immediately when installing and regularly thereafter. Default passwords are easily found or known by hackers and can be used to access the device. The manual or those who install the system should be able to show you how to change them.

  Passwords that do not change for long periods of time allow hackers time to crack them and may be shared and become common knowledge to an individual user's coworkers. Therefore, passwords should be changed at least every 3 months[18]. Consider configuring systems and devices to require users to change their passwords every 3 months if possible.

  Passwords to devices and applications that deal with business information should not be re-used. If a hacker gains access to one account, they will have access to all others that share that password. It may be difficult to remember a number of different passwords so a password management system may be an option. However, these systems place all passwords into one place which may be lost or compromised. Carefully compare password management solutions before purchasing.

  You may want to consider using a password management application to store your passwords for you. Ensure the application encrypts all passwords stored on it. Use a strong password on the application and change the password regularly.

[17] NIST SP 800-63-2, *Electronic Authentication Guideline* discusses password entropy [SP800-63].

[18] Ibid.

- *Conduct online business more securely*

  Online business/commerce/banking should only be done using a secure browser connection. This will normally be indicated by a small lock visible in the lower right corner or upper left of your web browser window.

  Erase your web browser cache, temporary internet files, cookies, and history regularly. Make sure to erase this data after using any public computer and after any online commerce or banking session. This prevents important information from being stolen if your system is compromised. This will also help your system run faster. Typically, this is done in the web browser's "privacy" or "security" menu. Review your web browser's help manual for guidance.

  If you do online business banking, you may want to consider having a dedicated computer which is used ONLY for online banking. Do not use it for Internet searches, personal banking, or email. Use it only for online banking for the business and disconnect it when not in use.

Appendix A—Glossary and List of Acronyms

Application [CNSSI4009]	A software program hosted by an information system.
Availability [44USC]	Ensuring timely and reliable access to and use of information.
Backup [SP800-34]	A copy of files and programs made to facilitate recovery if necessary.
Blacklist [CNSSI4009] [SP800-94]	A list of discrete entities, such as hosts or applications that have been previously determined to be associated with malicious activity.
Compact Disc (CD) [SP800-88]	A class of media from which data are read by optical means.
Confidentiality [44USC]	Preserving authorized restrictions on information access and disclosure, including means for protecting personal privacy and proprietary information.
Cybersecurity [CNSSI4009]	Prevention of damage to, protection of, and restoration of computers, electronic communications systems, electronic communications services, wire communication, and electronic communication, including information contained therein, to ensure its availability, integrity, authentication, confidentiality, and nonrepudiation.
A Digital Video Disc (DVD) [SP800-88]	Has the same shape and size as a CD, but with a higher density that gives the option for data to be double-sided and/or double-layered.
Encryption [CNSSI4009] [ISO7498-2]	The process of changing plaintext into ciphertext.
FTC	Federal Trade Commission
Firewall [SP800-32] [CNSSI4009]	A gateway that limits access between networks in accordance with local security policy.

Impact [SP800-53]	The effect on organizational operations, organizational assets, individuals, other organizations, or the Nation (including the national security interests of the United States) of a loss of confidentiality, integrity, or availability of information or an information system.
Information Security [44USC]	The protection of information and information systems from unauthorized access, use, disclosure, disruption, modification, or destruction in order to provide confidentiality, integrity, and availability.
Insider [CNSSI4009, adapted]	Any person with authorized access to business resources, including personnel, facilities, information, equipment, networks, or systems.
Integrity [44USC]	Guarding against improper information modification or destruction, and includes ensuring information non-repudiation and authenticity.
Intrusion Detection / Prevention System (IDPS) [SP800-61]	Software that automates the process of monitoring the events occurring in a computer system or network and analyzing them for signs of possible incidents and attempting to stop detected possible incidents.
Inventory	A listing of items including identification and location information.
Likelihood [SP800-30] [CNSSI4009, "likelihood of occurrence"]	A weighted factor based on a subjective analysis of the probability that a given threat is capable of exploiting a given vulnerability or a set of vulnerabilities.
Malware [SP800-53, "malicious code"]	Software or firmware intended to perform an unauthorized process that will have adverse impact on the confidentiality, integrity, or availability of an information system. A virus, worm, Trojan horse, or other code-based entity that infects a host. Spyware and some forms of adware are also examples of malicious code.
Operating System [SP800-44]	The software “master control application” that runs the computer. It is the first program loaded when the computer is turned on, and its main component, the kernel, resides in memory at all times. The operating system sets the standards for all application programs (such as the Web server) that run in the computer. The applications communicate with the operating system for most user interface and file management operations.

Password [SP800-57]	A string of characters (letters, numbers and other symbols) that are used to authenticate an identity, to verify access authorization or to derive cryptographic keys.
Policy [SP800-95]	Statements, rules or assertions that specify the correct or expected behavior of an entity. For example, an authorization policy might specify the correct access control rules for a software component.
Risk [SP800-53]	A measure of the extent to which an entity is threatened by a potential circumstance or event, and typically a function of: (i) the adverse impacts that would arise if the circumstance or event occurs; and (ii) the likelihood of occurrence.
Risk Management [SP800-53]	The program and supporting processes to manage information security risk to organizational operations (including mission, functions, image, reputation), organizational assets, individuals, other organizations, and the Nation, and includes: (i) establishing the context for risk-related activities; (ii) assessing risk; (iii) responding to risk once determined; and (iv) monitoring risk over time.
Service Set Identifier (SSID) [SP800-48, adapted]	A name assigned to a wireless access point that allows stations to distinguish one wireless access point from another.
Small business	Small businesses are defined differently depending on the industry sector. For this publication, the definition of a small business includes for-profit, non-profit, and similar organizations with up to 500 employees. Synonymous with “Small Enterprise or Small Organization”. See the SBA website www.sba.gov for more information.
SBA	Small Business Administration
SBDC	Small Business Development Center
Spam [CNSSI4009]	Electronic junk mail or the abuse of electronic messaging systems to indiscriminately send unsolicited bulk messages.
Surge Protector	A device designed to protect electrical devices from voltage spikes or dips.

Threat [SP800-53]	Any circumstance or event with the potential to adversely impact organizational operations (including mission, functions, image, or reputation), organizational assets, individuals, other organizations, or the Nation through an information system via unauthorized access, destruction, disclosure, modification of information, and/or denial of service.
Uninterruptible Power Supply (UPS)	A device with an internal battery that allows connected devices to run for at least a short time when the primary power source is lost.
Universal Serial Bus (USB)	Type of standard cable, connector, and protocol for connecting computers, electronic devices, and power sources.
Vulnerability [SP800-53]	Weakness in an information system, system security procedures, internal controls, or implementation that could be exploited or triggered by a threat source.
Wired-Equivalent Privacy (WEP)	Security protocol specified in the IEEE Wireless Fidelity (Wi-Fi) standard 802.11b.
Whitelist [CNSSI4009, "whitelisting"]	An approved list or register of entities that are provided a particular privilege, service, mobility, access or recognition.
WiFi Protected Access 2 (WPA-2)	Wireless Fidelity (Wi-Fi) security protocol and certification program developed by the Wi-Fi Alliance.

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Appendix C—About the *Framework for Improving Critical Infrastructure Cybersecurity*

The *Framework for Improving Critical Infrastructure Cybersecurity* [CSF14] is voluntary guidance, based on existing standards, guidelines, and practices, for critical infrastructure organizations to better manage and reduce cybersecurity risk. [19] It provides a common language to address cybersecurity risk management and is especially helpful in improving communications both within and outside of an organization. It includes the five Framework Core Functions defined below. These Functions are not intended to form a serial path, or lead to a static desired end state. Rather, the Functions can be performed concurrently and continuously to form an operational culture that addresses the dynamic cybersecurity risk.

- **Identify** – Develop the organizational understanding to manage cybersecurity risk to systems, assets, data, and capabilities.

  Understanding the business context, the resources that support critical functions, and the related cybersecurity risks enables an organization to focus and prioritize its efforts, consistent with its risk management strategy and business needs. Examples of outcome Categories within this Function include: Asset Management; Business Environment; Governance; Risk Assessment; and Risk Management Strategy.

- **Protect** – Develop and implement the appropriate safeguards to ensure delivery of critical infrastructure services.

  The Protect Function supports the ability to limit or contain the impact of a potential cybersecurity event. Examples of outcome Categories within this Function include: Access Control; Awareness and Training; Data Security; Information Protection Processes and Procedures; Maintenance; and Protective Technology.

- **Detect** – Develop and implement the appropriate activities to identify the occurrence of a cybersecurity event.

  The Detect Function enables timely discovery of cybersecurity events. Examples of outcome Categories within this Function include: Anomalies and Events; Security Continuous Monitoring; and Detection Processes.

- **Respond** – Develop and implement the appropriate activities to take action regarding a detected cybersecurity event.

  The Respond Function supports the ability to contain the impact of a potential cybersecurity event. Examples of outcome Categories within this Function include: Response Planning; Communications; Analysis; Mitigation; and Improvements.

- **Recover** – Develop and implement the appropriate activities to maintain plans for resilience and to restore any capabilities or services that were impaired due to a cybersecurity event.

  The Recover Function supports timely recovery to normal operations to reduce the impact from a cybersecurity event. Examples of outcome Categories within this Function include: Recovery Planning; Improvements; and Communications.

[19] For additional information, see NIST's Cybersecurity Framework homepage: http://www.nist.gov/cyberframework/.

Appendix D—Worksheets

The worksheets in this document are designed to be customizable to your business needs. It is suggested that you replicate, customize, and edit these worksheets in an electronic spreadsheet format so that it will be easily scalable and updateable for your business needs.

- *Identify and prioritize your information types*

  1) List all of the information types used in your organization (define "information type" in any way that makes sense in your business). Think about all the information used by and in your business.

  2) Enter *estimated* costs for each of the categories on the left. If you are unable to assign a dollar amount, use a scale such as low-medium-high, or 1-10. Avoid using a range (e.g. $2,500 to $50,000) and simply enter a best-guess average.

  3) Based on the estimated costs, prioritize your information types in the bottom row. You may do this by calculating an overall ranking or risk score for each information type. Either add the values to give a total value or use the highest value or score given. For example, if the information type has one "high" rating, the entire information type should be rated as "high".

Table 1: *Identify and Prioritize Information Types*

	Info type 1	Info type 2	Info type 3	…
Cost of revelation (Confidentiality)				
Cost to verify information (Integrity)				
Cost of lost access (Availability)				
Cost of lost work				
Fines, penalties, customer notification				
Other legal costs				
Reputation / public Relations costs				
Cost to identify and repair problem				
PRIORITY:				

- *Develop an Inventory*

  1) List what technology comes in contact with (accesses, processes, transmits or stores) your information. This can include hardware (e.g. computers) and software applications (e.g. browser email).

  2) In the first column, include identifying information such as the make, model, nickname, title, version, owner, and serial number.

  3) Identify where that product is located. For software, identify what machine(s) the software has been loaded on to.

  4) List the information type(s) that the hardware / software technology comes in contact with.

  5) Review the information types and identify the highest priority level of the information (from *Table 1*).

Table 2: *Inventory*

	Description (e.g. nickname, make, model, serial number, service ID, other identifying information)	Location	Type of information the product comes in contact with.	Overall Potential Impact
1				
2				
3				
4				
5				
6				
…				

- *Identify Threats, Vulnerabilities, and the Likelihood of an Incident*

    1) Identify any threats or vulnerabilities your business may have. Information about threats and common vulnerabilities can be found through the media, industry-specific news, your local Infragard chapter, US-CERT[20], your local SCORE[21] chapter, hardware or software vendor announcements, and your local police department.

    2) Develop a list of threat events or scenarios based on the threats and vulnerabilities you identified. This example organizes scenarios by "Confidentiality", "Integrity", and "Availability" in the left-hand column. It does not include all scenarios your business is likely to face.

    3) List your information types (from *Table 1*) and the technologies that come in contact with that information (from *Table 2*) in the column headers. You may wish to combine or group technologies or information types that are essentially similar (e.g. all mobile devices may be grouped together, or all information that has the same impact score).

    4) Identify the likelihood that the threat event will happen to each Information type / Technology. Consider any existing protections you may have (such as firewalls, backups, fire extinguishers, etc.) and also any special vulnerabilities (broken locks, past history of problems, unpatched software vulnerability, etc.) which may alter the likelihood score you assign.

    5) Calculate total likelihood scores in the bottom row. Either add the values to give a total value or use the highest value or score given. For example, if the information type has one "high" rating, the entire information type should be rated as "high".

[20] United States Computer Emergency Readiness Team, https://www.us-cert.gov/.

[21] Originally known as the Service Corps of Retired Executives, it is now simply referred to as SCORE, https://www.score.org/.

Table 3: *Identify Threats, Vulnerabilities, and the Likelihood of an Incident*

	Info type / Technology	Info type / Technology	Info type / Technology	…
Confidentiality				
Theft by criminal				
Accidental disclosure				
Integrity				
Accidental alteration by user / employee				
Intentional alteration by external criminal / hacker				
Availability				
Accidental Destruction (fire, water, user error)				
Intentional Destruction				
Overall Likelihood:				

- *Prioritize your mitigation activities*

    1) Compare the scores from *Tables 1 and 3* to the table below. Information Types from *Table 1* with a high impact score and a high likelihood score from *Table 3* (with any technology) should be assigned a "Priority 1", meaning you should immediately invest in processes or solutions to better secure this information.

    2) List your priorities.

    3) Identify potential solutions (see Section 3) according to those priorities.

    4) Develop a resolution plan, including funding, to implement the solutions you identified.

Table 4: *Prioritize Resolution Action*

Impact	High	**Priority 3** – schedule a resolution. Focus on *Respond* and *Recover* solutions.	**Priority 1** – Implement immediate resolution. Focus on *Detect* and *Protect* solutions.
	Low	No action needed	**Priority 2** – schedule a resolution. Focus on *Detect* and *Protect* solutions.
		Low	High
		Likelihood	

Appendix E—Sample Policy & Procedure Statements

A security policy states, in writing, requirements for protecting your business information. A security policy specifies:

1) The information you care about (see *Table 1*)
2) Why the information needs to be protected (see *Table 3*)
3) Who is responsible for the implementation of the policy
4) To whom does the policy apply

Common policy topics include:

- Acceptable use (of information technology)
- Training and awareness
- Physical security
- Password
- Contingency planning

Example policy statements:

- *All employee personnel data will be protected from viewing or changing by unauthorized persons.*
- *All computer users will have their own account and password.*
- *Passwords are not to be shared with anyone!*
- *All computer users will read and sign an access and use agreement*
- *Information Types A, B, C, D, E, and F will be backed up regularly in accordance with their determined priority/criticality*

Employees should be required to read the business's policies and sign a statement stating that they understand and will comply. Employees should receive annual training on the policies.

Procedures support policies. They specify the details for implementing a policy, including answering questions such as who, what, when, where, and how, and how often. Procedures can be updated more frequently than policies as business processes and technologies change. They

can be useful for conducting employee training and supervisors should periodically check to ensure the procedures are being followed.

Example procedure supporting a policy:

Policy: *All computer users will have their own account and password.*

Procedure:

1. *Supervisor completes/signs account creation request form for new user and sends it to the system administrator [Note that the account request form would be part of the procedure];*
2. *System administrator creates new account with unique identifier;*
3. *System administrator assigns a temporary password to new account;*
4. *System administrator notifies the new user of the unique account identifier and temporary password;*
5. *New user logs into the new account and is prompted to immediately change the password;*
6. *System administrator reviews user accounts monthly.*

Facts, Opinions, and more

Lay Witness Testimony

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4

FACTS, OPINIONS, AND MORE: LAY WITNESS TESTIMONY

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In November of 1970, the community of Florence, Oregon faced a very large problem. The beached carcass of a 45-foot, 16,000 pound whale lay decaying on the shoreline, and the stench was quickly becoming unbearable. Unsure how to properly rid the beach of the large corpse, the community turned to an expert highway engineer employed by the Oregon Highway Department. After surveying the scene, the expert determined there was one surefire way to remove the whale—twenty cases of dynamite strategically placed under the carcass.

The unusual problem and its proposed dramatic solution drew media attention. The crowds of spectators soon followed. The expert engineer and his crew placed the explosives and then moved the gathering crowd away from the pending explosion. Once the expert determined the proper clearance had been established, he detonated the whale. The crowd cheered at the sight and sound of the explosion, and then they ran in terror as chunks of rotting whale rained down from the sky. Although serious injuries were avoided, one nearby car was smashed by a three-foot piece of falling blubber.

The use of expert witnesses is a vital part of every trial lawyer's practice. However, like the engineer who dynamited the Oregon whale, experts are sometimes overkill, causing more problems than they solve. The use of expert witnesses inflates the cost of litigation, injects "hired gun" issues of bias and credibility into the trial, and overcomplicates common sense issues in the case. An attorney who understands the rules of evidence governing the use of lay opinion testimony can get helpful opinions admitted into evidence while avoiding an expert unintentionally dynamiting the client's case.

More than merely avoiding the potentially harmful elements of expert testimony, however, lay opinion testimony also provides some of the most memorable and impactful testimony in a trial. The unbiased eyewitness who testifies to visibility is simply more compelling than the hired expert. The investigating law enforcement officer who directly contradicts a truck driver's version of the accident is more believable than a hired gun reconstructionist. The lay witness who opines in the language and culture of the local community connects with jurors more than the intellectual who spent a lifetime avoiding that culture and community. The friend or family member who describes a

disability is more meaningful than a therapist with a medical chart. When used properly, lay opinion testimony is not only admissible, it is powerful and poignant.

To assist in the development and admission of such testimony, these materials discuss and illustrate the rules governing the use of lay opinion testimony in Virginia and in the federal court system, including non-exclusive lists of lay opinion testimony previously found admissible.

Lay Opinion Testimony in Virginia

The Old Rule

In Virginia, the general prohibition against lay opinion testimony has often been overstated as if it was a total prohibition. See e.g. Southern Ry. v. Mauzy, 98 Va. 692, 694 (1900) ("No principle of law is better settled than that the opinions of witnesses are in general inadmissible, that witnesses can testify to facts only, and not to opinions or conclusions based upon the facts."). The Supreme Court of Virginia has stated as follows:

> The [opinion] rule also precludes characterizing acts or conduct as careful, careless, cautious, dangerous, good management, in the line of duty, necessary, negligent, omitting anything possible, practicable, proper, prudent, reasonably safe, skillful, usual or unusual.

Davis v. Souder, 134 Va. 356, 362 (1922), *quoting* 22 Corpus Juris 512.

The New Rule

However, the recent enactment of Virginia's written rules of evidence demonstrate a long-term shift in the prohibition against lay opinion testimony. Rule 2:701 of the Rules of the Supreme Court of Virginia now provides:

> Opinion testimony by a lay witness is admissible if it is reasonably based upon the personal experience or observations of the witness and will aid the trier of fact in understanding the witness' perceptions. Lay opinion may relate to any matter, such as -- but not limited to -- sanity, capacity, physical condition or disability, speed of a vehicle, the value of property, identity, causation, time, the meaning of words, similarity of objects, handwriting, visibility or the general physical situation at a particular location. However, lay witness testimony that amounts only to an opinion of law is inadmissible.

See Va. Sup. Ct. R. 2:701.

Thus, the modern Virginia rule provides an extensive, yet still not exclusive, list of admissible lay opinions, while also providing a lay opinion is generally admissible so long as it has a reasonable basis in personal experience and/or observation and aids the trier of fact. As discussed in more detail below, the current Virginia rule may actually be more liberal than the modern Federal rule.

What Works

Many of the specific admissible opinions listed in Rule 2:701 were also previously developed as exceptions to the earlier general prohibition against lay opinion testimony by the applicable case law.

a. Mental Capacity: A lay witness is permitted to express an opinion upon the issue of sanity or mental capacity. Pace v. Richmond, 231 Va. 216 (1986); McComb v. Farrow, 128 Va. 455 (1920). The Court's reception to such testimony is justified upon the grounds that the opinion of a layman who has been closely associated with the person in question is more valuable than that of an expert who has had no such opportunity for personal observation. Cropp v. Cropp, 88 Va. (13 Hans.) 753 (1892). It must be noted the "mental capacity" as to which laypersons can testify is general mental capacity. A layperson cannot provide legal opinions.

b. Demeanor: A lay witness may testify as to the attitude and demeanor of a person. Herbin v. Commonwealth, 28 Va. App. 173 (1998). However, a lay witness may not express an opinion as to the existence of a particular mental disease. Id.; *see also* Mullis v. Commonwealth, 3 Va. App. 564 (1987)(holding the fact the witness was familiar with the term "paranoid" did not qualify witness to render an opinion someone was in fact paranoid).

c. Value: A lay witness may testify as to the value of property, but in order to do so he/she must have had some opportunity to become familiar with the property in question and form an opinion about its value. Haynes v. Glenn, 197 Va. 746 (1956); *see also* Stainback v. Stainback, 11 Va. App. 13 (1990).

d. Identity: A lay witness may offer an opinion as to the identity of a person. Tyler v. Sites, 90 Va. 539 (1894); Jordan v. Commonwealth, 66 Va. (25 Gratt.) 943, 945-46 (1874).

e. Physical Condition: A lay witness may offer an opinion as to the physical condition of an individual. Speller v. Commonwealth, 2 Va. App. 437, 441 (1986)(A lay witness who is familiar with a person, and has had an opportunity to observe that person, can render an opinion as to "the general health, strength, and the bodily vigor of such person, his feebleness or apparent illness, or changes in his apparent state of health or physical condition…."). Such testimony is limited to statements as to general health, the presence or absence of illness, or changes in physical condition observed from time to time by the witness. This would include lay witnesses testifying a person is ill or is suffering or nervous. Shenandoah Valley Loan & Trust Co. v. Murray, 120 Va. 563 (1917). Also, this would include lay witnesses testifying a person appeared to be permanently disabled. Blue Ridge Light & Power Co. v. Price, 108 Va. 652 (1908). Lay witnesses may not testify as to the existence or non-existence of a particular disease. Phillips v. Stewart, 207 Va. 214 (1966); Pepsi-Cola Bottling Co. v. McCullers, 189 Va. 89 (1949).

f. Similarity of Objects or Persons: A lay witness may testify as to the similarity or identity of objects and persons. Jones v. Commonwealth, 228 Va. 427 (1984)("We see no logic in a rule that would exclude the testimony of a lay witness that a common object he saw at one place was identical to or different from one he saw at another place…such testimony is…admissible for whatever weight the fact finder cares to give it."); Claud v. Commonwealth, 217 Va. 794 (1977)(holding police officer could testify as to similarity of tire treads and tracks without qualifying as an expert witness).

g. Causation: A lay witness may testify as to the causation of injuries, at least in certain circumstances (mostly automobile accidents). Peterson v. Neme, 222 Va. 477 (1981)(We have consistently held that "lay testimony of causal connection between an automobile accident and injury is admissible…even when medical testimony fails to establish causal connection expressly."); *see also* Parker v. Elco Elevator Corp., 250 Va. 278 (1995)(applying the same principle in a case involving injuries in an elevator).

h. Speed: A lay witness may testify as to the speed of a moving object. Tyler v. Sites, 90 Va. 539 (1894); Shrader v. Commonwealth, 2 Va. App. 287 (1986). Any person with "knowledge of time and distance" may give an estimate including a non-driver. Moore v. Lewis, 201 Va. 522, 525 (1960)("An estimate of the speed at which an automobile was moving at a given time is generally viewed as a matter of common observation rather than expert opinion, and it is accordingly well settled that any person of ordinary experience, ability, and intelligence having the means or opportunity of observation, whether an expert or nonexpert, and without proof of further qualification may express an opinion as to how fast an automobile which came under his observation was going at a particular time. The fact the witness had not owned or operated an automobile does not preclude him from so testifying. Speed of an automobile is not a matter of exclusive knowledge or skill, but anyone with a knowledge of time and distance is a competent witness to give an estimate; the opportunity and extent of observation goes to the weight of the testimony.").

i. Distance: A lay witness may testify as to distance estimates. Beasley v. Barnes, 201 Va. 593 (1960); Barb v. Lowe, 196 Va. 1014 (1955).

j. Visibility: A lay witness may testify as to the visibility of an object. New York P. & N. R.R. v. Wilson, 109 Va. 754 (1909).

k. Handwriting: A lay witness may testify as to handwriting. Adams v. Ristine, 138 Va. 273, 287 (1924)("In Virginia, a lay witness may only offer an opinion as to the authenticity of an alleged writing of a particular person where the witness has seen and is familiar with that person's writing."). The familiarity may be acquired either by the witness having seen the person write or having seen writings known to be those of the person. Id.; Cody v. Conly, 68 Va. (27 Gratt.) 313 (1876); Pepper v. Barnett, 63 Va. (22 Gratt.) 405 (1872).

l. Physical Descriptions: A lay witness may testify as to the general physical situation at a particular location. Robinson v. Commonwealth, 197 Va. 754 (1956).

The Evolving Rule

The full breadth of lay opinion testimony admissible under Rule 2:701 is still being determined by the courts, most notably in Harman v. Honeywell Int'l, Inc., 288 Va. 84, 98, 758 S.E.2d 515, 523 (2014) and Toraish v. Lee, 797 S.E.2d 760, 765 (Va. 2017).

"To summarize Rule 2:701 permits lay witness opinion testimony if (1) 'it is reasonably based upon the personal experience or observations of the witness; and (2) it 'will aid the trier of fact in understanding the witness' perceptions.'" See Harman v. Honeywell Int'l, Inc., 288 Va. 84, 98, 758 S.E.2d 515, 523 (2014). The first prong of Rule 2:701 requires personal knowledge. See id. The second prong of Rule 2:701 speaks to the necessity or helpfulness of lay opinion testimony. See id. (Lay witness opinion testimony is necessary when the information "cannot be adequately conveyed to the court by a detailed recital of the specific facts upon which the opinion is based."). Thus, a lay witness can offer opinions on the differences in flying two types of airplanes because those facts cannot be communicated without also using comparative opinions, but a lay witness cannot opine a pilot used bad judgment because the jury could so determine based on factual testimony alone. See id., 288 Va. at 99-100, 758 S.E.2d at 524.

There is also an apparent conflict in recent case law regarding how close a lay medical witness can approach to offering hypothetical opinion testimony. In Toraish v. Lee, the Supreme Court of Virginia applied Rule 2:701 to a defendant physician testifying as a lay witness in a medical malpractice case. Toraish v. Lee, 797 S.E.2d 760 (Va. 2017). The Court first stated the familiar principle that a lay witness can offer opinion testimony that was "reasonably based upon [his] personal experience or observations." Id. at 765 (citing Rule 2:701 and Harman). Then, the Court permitted the defendant doctor to provide lay opinion testimony that he "would not have recommended surgery had he known about the consanguineous marriage or predeceased siblings[.]" See id. The Supreme Court of Virginia held this testimony was not an expert opinion because it was based on the doctor's personal knowledge and experience, and it was an opinion as to what he would personally do, not what a reasonable prudent physician would do. See id.; contrast Bailey v. Erdman, 2015 Va. Unpub. LEXIS 14, *5 (Va. Dec. 30, 2015)("Because Dr. Klevan did not testify as an expert, it was not permissible for him to render an opinion on a hypothetical question or draw from facts outside of his personal knowledge.")

Practice Pointers to Gain Admissibility of a Lay Opinion in Virginia Courts

1. Preparation: Determine what lay opinions you want to introduce and prepare specific questions to lay the foundation with the lay witness.

2. Basis: Lay the foundation for the reasonable basis based upon the personal experience or observations of the witness through direct examination.

3. Question: Ask the lay opinion question based on the foundation already laid.

4. Argument: If challenged with an objection, argue to the court on the record:

    a. the reasons why the witness cannot adequately convey the information by factual testimony alone;

    b. the reasons the lay opinion would be helpful to the jury rather than invading the province of the jury.

5. Proffer: If the objection is sustained, be sure to proffer the evidence to the court on the record in order to preserve error.

Lay Opinion Testimony in the Federal System

In the Federal system, lay opinion testimony is governed by Rule 701 of the Federal Rules of Evidence, which provides as follows:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

USCS Fed Rules Evid R 701.

While lay opinion testimony was traditionally more accepted in Federal courts, the addition of Rule 701(c) in the 2000 amendments was intended "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." See USCS Fed Rules Evid R 701, Notes of Advisory Committee on 2000 amendments. Unlike Virginia Rule 2:701, the Federal Rule 701, "does not distinguish between expert and lay witnesses, but rather between expert and lay testimony." See id. Thus, "[I]t is possible for the same witness to provide both lay and expert testimony in a single case." See id.[1]

Applying the Federal Rule

Examples of admissible lay opinion testimony in the federal courts abound, including, but not limited to, the following:

[1] The mixing of expert and lay opinion testimony also occurs in Virginia courts. See e.g., Banks v. Mario Indus., 274 Va. 438, 650 S.E.2d 687 (2007)(Gentry Locke for the Plaintiff).

a. Theft and Drug Use: A witness may offer a lay opinion that certain below-market goods were stolen and that a business's customers were frequent drug users. United States v. Baraloto, 535 F. App'x 263 (4th Cir. 2013) ("When persons known to be drug addicts repeatedly entered Fast Money with thousands of dollars worth of OTCs and HBAs, and proceeded to sell such items for pennies on the dollar, any reasonable observer could conclude, as a matter of common sense, that the goods were stolen."); but see id. at 277 (Gregory, J. dissenting)(arguing the majority allowed blatant stereotypes to be admitted into evidence).

b. Profits: A witness may offer a lay opinion on the calculation of profits based on records kept and prepared by her in her capacity as bookkeeper. See MCI Telecomms. Corp. v. Wanzer, 897 F.2d 703, 706 (4th Cir. 1990).

c. Knowledge of Policies: A witness may offer a lay opinion that a coworker would know the rules and policies of the employer. See United States v. Fowler, 932 F.2d 306, 312 (4th Cir. 1991)(permitting lay opinion that coworker knew rule for handling and disclosing classified budget documents).

d. Duties: A witness may offer a lay opinion on their understanding of the meaning of a fiduciary duty. See United States v. Chapman, 209 F. App'x 253 (4th Cir. 2006).

e. Sincerity: A witness may offer a lay opinion, based on his prior perceptions, of the sincerity of another's testimony. See United States v. Jaensch, 552 F. App'x 206, 213 (4th Cir. 2013).

f. Value of Land: A witness may offer a lay opinion concerning the value of his land. See Justice v. Pennzoil Co., 598 F.2d 1339, 1344 (4th Cir. 1979).

g. Identity: A witness may offer a lay opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding the witness is more likely to correctly identify the defendant from the photograph than is the jury. See United States v. Robinson, 804 F.2d 280, 282 (4th Cir. 1986).

h. Drunkenness and Other Intoxication: A witness may offer a lay opinion concerning drunkenness, and in some cases, the impact of other intoxicants. See Singletary v. Sec'y of Health, Educ. & Welfare, 623 F.2d 217, 219 (2d Cir. 1980)("[T]estimony of lay witnesses has always been admissible with regard to drunkenness."); see Zuniga v. TMF, Inc., 261 F. Supp. 2d 518, 524 n.8 (E.D. Va. 2003) (permitting lay opinion testimony on the impact of marijuana use, sleep deprivation and stress on the mental status of a coworker).

i. Character for Truthfulness: A witness may offer a lay opinion about the character for truthfulness or untruthfulness of a witness. See United States v. Turning Bear, 357 F.3d 730, 734 (8th Cir. 2004).

j. Industry Practices: A witness may offer a lay opinion based upon extensive experience in an industry. See Glob. Comput. Enters. v. United States, 88 Fed. Cl. 52, 67 (2009) (allowing lay opinion testimony on standard industry practices); United States v. Walker, 495 F. Supp. 230 (W.D. Pa. 1980)(applying same to lay opinion testimony on prostitution).

k. Value of Damages: A witness may offer a lay opinion testimony on the value of damages. See Neponset Landing Corp. v. Nw. Mut. Life Ins. Co., 902 F. Supp. 2d 166, 171 (D. Mass. 2012)("[L]ay witness opinions on such matters as damages may be admissible 'not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business.'"); Conrail v. Grand Trunk W. R.R. Co., 963 F. Supp. 2d 722 (E.D. Mich. 2013)(allowing lay opinion regarding value of lost freight due to breach of traverse rights); Malloy v. Monahan, 73 F.3d 1012, 1016 (10th Cir. 1996)(permitting plaintiff to testify and introduce an exhibit showing projected future profits that had been lost as a consequence of the injuries he sustained when attacked by the police).

l. Discriminatory Practices: A witness may offer a lay opinion on discriminatory practices of a defendant. Gossett v. Okla. ex rel. Bd. of Regents for Langston Univ., 245 F.3d 1172 (10th Cir. 2001)(permitting lay witness to testify a university defendant discriminated against male students).

m. Physical Disability: A witness may offer a lay opinion on the extent of plaintiff's physical disabilities. Gallimore v. Newman Mach. Co., 301 F. Supp. 2d 431 (M.D.N.C. 2004).

n. Grief: A witness may offer a lay opinion on the extent and sincerity of a person's grief. United States v. Meling, 47 F.3d 1546 (9th Cir. 1995).

o. Legitimacy of Claim: A witness may offer a lay opinion on the legitimacy of an insured's claim. See Fireman's Fund Ins. Cos. v. Alaskan Pride Pshp., 106 F.3d 1465, 1467 (9th Cir. 1997)(permitting lay opinion of claims manager that claim was "a legitimate loss" and that he "was very upset" about the denial of coverage).

p. Handwriting: A witness may offer a lay opinion on the handwriting of a signatory. See Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1261 (11th Cir. 2004)(experience with handwriting of signatory "must be identified with particularity. Moreover, the lay witness must provide detailed information regarding his or her relationship with the signatory--whether it be familial, professional, or otherwise personal.").

q. Accident Related Opinions: A witness may offer a lay opinion concerning events in a vehicle accident. See Robinson v. Bump, 894 F.2d 758, 762 (5th Cir. 1990)(permitting eyewitness to testify truck driver was in total control of the truck prior to the collision); Dogan v. Hardy, 587 F. Supp. 967 (N.D. Miss. 1984) (permitting investigating officer to give lay opinion on where impact between car and tractor-trailer occurred); Heritage Mut. Ins. Co. v. Reck, 127 F. App'x 194 (6th Cir. 2005)(permitting eyewitness to testify to whether accident was avoidable); Ferguson v. Nat'l Freight, Inc., Civil Action No. 7:14-

CV-00702, 2016 U.S. Dist. LEXIS 77663, at *17 (W.D. Va. June 15, 2016)(permitting investigating Virginia State Trooper to testify to conclusions he reached as a result of his accident scene investigation).[2]

r. Impact of Safety Features: A witness may offer a lay opinion of whether a safety feature would have prevented an accident. See Dewick v. Maytag Corp., 324 F. Supp. 2d 889, 893 (N.D. Ill. 2004)(permitting parents to testify safety feature would have prevented accident based on knowledge of the physical capabilities of their son and their knowledge of the physical characteristics of the product); Fecho v. Eli Lilly & Co., 914 F. Supp. 2d 130, 142 (D. Mass. 2012)(permitting lay opinion about standard medical practice in rural area and whether additional medication warnings would have altered use of drug).

s. Sanity: A witness may offer a lay opinion on the issue of sanity. See United States v. Lawson, 653 F.2d 299, 303 (7th Cir. 1981)("There is no question that the Government (or the defense, for that matter) may introduce lay testimony on the issue of sanity.").

t. Causation: A witness may offer a lay opinion on causation. See Lang v. Tex. & Pac. Ry. Co., 624 F.2d 1275 (5th Cir. 1980)(permitting railroad foreman to offer lay opinion on cause of death when coworker run over by train car).

u. Cell Phone Location: A witness may offer a lay opinion on location of cell phone calls. See United States v. Ransfer, 749 F.3d 914, 937 (11th Cir. 2014)(permitting Metro PCS records custodian to explain how cell phone towers record "pings" from each cell phone number and how he mapped the cell phone tower locations for each phone call).

v. Mental and Emotional State: A witness may offer a lay opinion on the mental and emotional status of the plaintiff. See Farfaras v. Citizens Bank & Tr., 433 F.3d 558 (7th Cir. 2006) (permitting lay opinion testimony coworker was depressed after occurrence of sexual harassment).

Practice Pointers to Gain Admissibility of a Lay Opinion in Federal Courts

1. Preparation: Determine what lay opinions you want to introduce and prepare specific questions to lay the foundation with the lay witness.

2. Basis: Lay the foundation for the reasonable basis based upon the personal experience or observations of the witness through direct examination. Beware laying a foundation that will trigger prohibition of the opinion under Rule 701(c) as an expert opinion clothed as a lay opinion.

3. Question: Ask the lay opinion question based on the foundation already laid.

4. Argument: If challenged with an objection, argue to the court on the record:

[2] Ferguson v. Nat'l Freight, Inc., is currently on appeal to the U.S. Court of Appeals for the Fourth Circuit on this issue. (Gentry Locke for the Plaintiff-Appellee).

a. the reasons why the witness cannot adequately convey the information by factual testimony alone;

b. the reasons the lay opinion would be helpful to the jury rather than invading the province of the jury;

c. the reasons the lay opinion is not based on scientific, technical, or other specialized knowledge, but rather on the witness's personal perceptions and experience.

5. Proffer: If the objection is sustained, be sure to proffer the evidence to the court on the record in order to preserve error.

Practice Pointer: Discovery of Lay Opinions

Lay opinions are not automatically subject to the mandatory disclosure rules and pre-trial scheduling orders covering expert testimony. As a result, counsel should use discovery requests and depositions to seek advance disclosure of any lay opinions that may be introduced at trial. In Virginia, this will be especially important in medical malpractice cases where Toraish v. Lee, 797 S.E.2d 760 (Va. 2017), apparently allows a defendant treating doctor to ambush the plaintiff with lay opinions based upon the defendant's personal experience in practicing medicine.

Conclusion

Although lay opinion testimony was historically disfavored, modern changes to both Virginia and Federal rules of evidence now provide that lay opinion testimony is generally admissible under the confines of Rule 2:701 and Rule 701, respectively. In many circumstances, opinion testimony provided by a lay witness will be less expensive, less biased, and simpler for the jury to understand. Because lay opinions are not governed by expert disclosure rules and traditional scheduling orders, they also provide an element of potential surprise at trial. Thus, lay opinion testimony is now an invaluable part of a trial lawyer's presentation of the client's case.

≈ ETHICS FOR LUNCH ≈

ESI Competence

A Rumsfeldian Approach to Ethical E-discovery

Justin M. Lugar
Andrew O. Gay
Andrew M. Bowman

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A RUMSFELDIAN APPROACH TO ETHICAL E-DISCOVERY:

Knowing Known Knowns, Known Unknowns, and Unknown Unknowns

(*i.e.* how to fulfill your ethical obligations under the new technology rules)

Justin M. Lugar, Andrew M. Bowman, and Andrew O. Gay
Gentry Locke Seminar
September 8, 2017

I. Introduction

> "[T]here are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know. . . . [I]t is the latter category that tend to be the difficult ones."[1]
>
> - Former Secretary of Defense Donald Rumsfeld

[1] News Transcript, DoD News Briefing – Secretary Rumsfeld and Gen. Myers (Feb. 12, 2002), available at http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636.

For many practitioners, electronic discovery ("e-Discovery") is an unknown unknown. Lawyers know the term "e-Discovery" but may not fully understand what e-Discovery is or that it is present in virtually ***every*** case. The goal of this outline is to cast light on the unknown unknowns; to make e-Discovery a known known or, at worst, a known unknown. Therefore, this outline addresses the implications of e-Discovery in the context of contemporary litigation: (1) what is e-Discovery; (2) what legal and ethical rules apply; and (3) common e-Discovery issues that arise. The three key ethical rules at play with regard to e-Discovery are:

1) **Competence – the known knowns.** Under Rule 1.1, technology is a critical tenet of a lawyer's competency in providing legal services to the client. *See* Comment 6 to Virginia Rule 1.1. E-Discovery is a type of technology that is present in ***every*** case. Therefore, ***every*** lawyer should understand e-Discovery, the associated benefits, and risks.

2) **Outsourcing and e-Discovery Vendors – the known unknowns.** Common practice is for lawyers to outsource e-Discovery to non-lawyer technology professionals. Under Rules 5.1 and 5.3, ***every*** lawyer should know their responsibilities when overseeing non-lawyer e-Discovery vendors and contract attorneys assisting with e-Discovery.

3) **Confidentiality – the unknown unknowns.** Under Rule 1.6, a "lawyer shall not reveal information protected by the attorney-client privilege" or other confidential information and "shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of" protected information. *See* Virginia Rule 1.6 (a, d). Inadvertent disclosure of privileged or confidential information is a ***serious*** risk with e-Discovery. Therefore, ***every*** lawyer should understand this risk and what steps should be taken to protect privileged information.

Every lawyer in the modern practice of law knows the buzzword: e-Discovery. While once endemic to multi-billion dollar civil litigation involving the world's largest law firms, e-Discovery is now the norm in every case, big and small, civil and criminal, in both state and federal court. The breadth of this topic is vast. E-Discovery has spawned its own vernacular, its own body of law, and perhaps most important, its own twist on the most basic of ethical rules. To complicate matters even further, e-Discovery is "inherently complex, involving multifaceted and ever changing technology."[2] There are pitfalls, both ethical and legal, at every corner with real world consequences.

As a matter of practice, competence with e-Discovery has four basic components:

1) Realizing that ***all discovery*** is e-Discovery.

2) Preserving and producing the client's electronically stored information.

    a. Litigation Hold Notice – make sure that it:

        i. covers the common sources of electronically stored information (*e.g.*, email, computers, cell phones);

[2] *Huff v. Winston*, 89 Va. Cir. 429, 433 (Roanoke Cty. 2015).

ii. covers the uncommon sources of electronically stored information (*e.g.*, computer servers and electronic access records); and

iii. is sent to all key players as well as the peripheral players.

b. Clawback Agreement – before producing electronically stored information, enter into a clawback agreement with the opposing party that protects privilege in the event of the inadvertent disclosure of privileged, protected, or confidential information.

3) Efficiently and effectively obtaining ESI from the other side.

a. Make sure discovery requests cover electronically stored information.

b. Search Terms – select terms that are likely to lead to relevant electronically stored information.

c. Date Range – narrowing the scope of e-Discovery searches by the dates (even times) at issue.

4) Using EBI in depositions and at trial is no different than a paper document.

a. New dog; old tricks

i. An email is no different than a paper letter.

ii. A Microsoft Word document is no different than a paper memo.

b. Electronically stored information can be even more powerful than a paper document.

i. Metadata may indicate precisely when the document was written, who edited it, what edits were made, when it was printed or emailed, and when the email was received or the document viewed.

II. <u>What is e-Discovery?</u>

A. **Definition:** e-Discovery is the process of identifying, locating, preserving, collecting, reviewing, and producing electronically stored information in the context of the legal process.[3]

1. At the most basic level, e-Discovery is no different than classic document discovery. Like standard discovery, e-Discovery generally encompasses two aspects of the legal process: (i) pre-litigation document retention; and (ii) the exchange of documents during the course of litigation. Instead of preserving or exchanging paper documents, however, parties are exchanging electronic documents and information.

[3] The Sedona Conference Glossary E-Discovery & Digital Information Management, at 18 (4th Ed. July 2014) (the "Sedona Conference Glossary"), available at https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Glossary.

B. **Electronically Stored Information ("ESI"):** a catch-all term for information that is stored electronically, regardless of the media or whether it is in the original format in which it was created, as opposed to stored on paper.[4]

1. Lawyers automatically think of ESI as emails and computers, but the term encompasses so much more: cell phone data (*e.g.*, usage data, text messages, pictures, video, GPS information); social media (*e.g.*, Facebook, Twitter, Instagram, LinkedIn); internet usage data (*e.g.*, browsing history, cookies, download/upload history, cloud storage), and many, many more.

2. Examples of other ESI:

   a. Social Media – internet applications which permit individuals or organization to interact and communicate.[5]

      i. Facebook – Activity Log keeps a record of every post, like, comment, and friend request.

      ii. Twitter

      iii. Instagram

      iv. LinkedIn

   b. Cell Phone Records

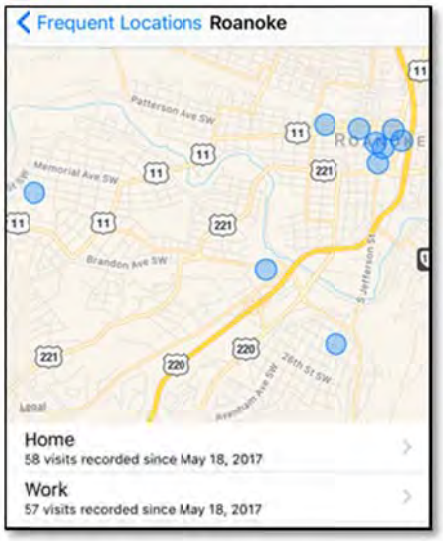
      i. Cell phone companies maintain a record of when a cell phone is in use and how it is being used (*i.e.*, telephone call, text message, or data usage).

      ii. ESI harvested from cell phones can prove important to a typical personal injury case to establish that the defendant was distracted when he caused an automobile collision. Did the driver's cell phone data usage show that he was browsing Facebook at the time of the crash? Did the driver just send a text message? If the driver was using an iPhone, the phone even records when he is typing a text message.

      iii. ESI from cell phones can similarly prove important to a criminal case. Cell phone GPS data can establish a person's location with pinpoint accuracy. GPS data can be combined with pictures, voice records, and other information to establish a person's whereabouts on a particular date.

[4] *Id.*

[5] *Id.* at 46.



With an iPhone, go to Settings\Privacy\Location Services\System Services\Frequent Locations to show a list of locations, dates, and times.

c. Electronic Access Records

i. Virtually every device that we use creates an electronic record of each use: digital breadcrumbs that can be pieced together to establish facts. For example, VoIP phone systems (*i.e.*, the Cisco IP Phone used in virtually every office) maintains a record of each call, who placed the call, who received the call, the date, time, and duration. Keycards (*i.e.*, the card used to swipe into a building) create a record of each use: the date, time, location (which door), and the identity of the registered user of that card.

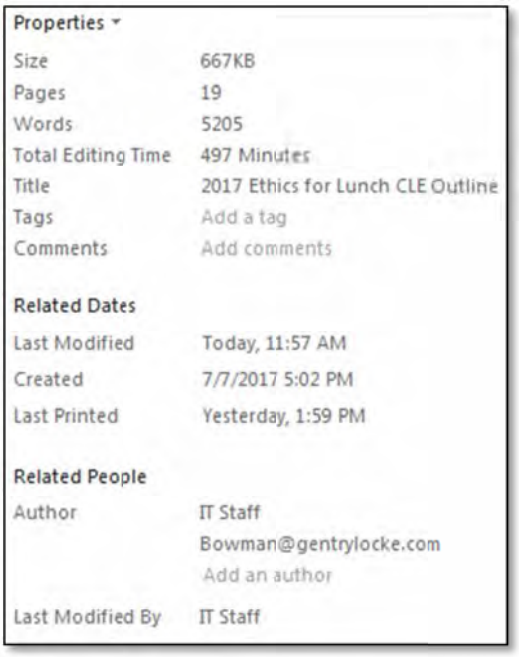
ii. In the context of a medical malpractice case, audit trails in electronic medical records can establish who looked at a patient's medical records, the date, time, and what records were viewed. This ESI can be used to establish whether a doctor actually viewed a radiology film before performing an operation.

3. Metadata: all other information stored in ESI aside from its ordinarily useful contents. Metadata provides information on the electronic document's history, author, source, tracking, and management. Metadata is frequently referred to as "data about data."[6]

a. Metadata implicates an array of additional ethical concerns.[7]

[6] *Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350, 354 (S.D.N.Y. 2008) (quoting *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 647 (D. Kan. 2005)); *see also* Sedona Conference Glossary at 32.

[7] *See generally* The Sedona Conference, *Commentary on Ethics & Metadata* (2013).



4. **Takeaway:** ESI is everywhere; cell phone records, GPS data, electronic access records, ATM withdraws, and all other forms of ESI are important evidence can be compiled into a digital timeline.

   a. Medical Malpractice Case Study: use electronic access records and other ESI to establish that a doctor did not review radiology records before performing surgical procedure.

   b. Criminal Case Study: combine cell phone GPS data, cell phone call records, photographs from ATM machines, and other ESI to establish that the alleged crime could not have occurred.

III. What are a lawyer's ethical obligations with regard to e-Discovery?

A. E-Discovery is viewed as one of the core competencies in the digital age. Courts have begun to expect that attorneys are versed in e-Discovery and related issues.[8] Similarly, the **Virginia State Bar recently amended the Rules of Professional Conduct to make explicit reference to technology as one aspect of competent legal representation**.

B. **Virginia Rule 1.1: Competence**

[8] *Cf. RECP IV WG Land Investors, LLC v. Capital One Bank (USA), N.A.*, 93 Va. Cir. 282, 327 (Fairfax 2016) ("[T]he effective management of existing electronic discovery is necessary and expected from the attorneys . . . .").

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[9]

C. **Comment 6 to Virginia Rule 1.1**

As of March 1, 2016, the Virginia State Bar amended Comment 6 to include:

"Attention should be paid to the benefits and risks associated with relevant technology."[10]

D. **ABA Model Rule 1.1 Competence**

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

E. **Comment 8 to ABA Model Rule 1.1**

"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, ***including the benefits and risks associated with relevant technology***, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

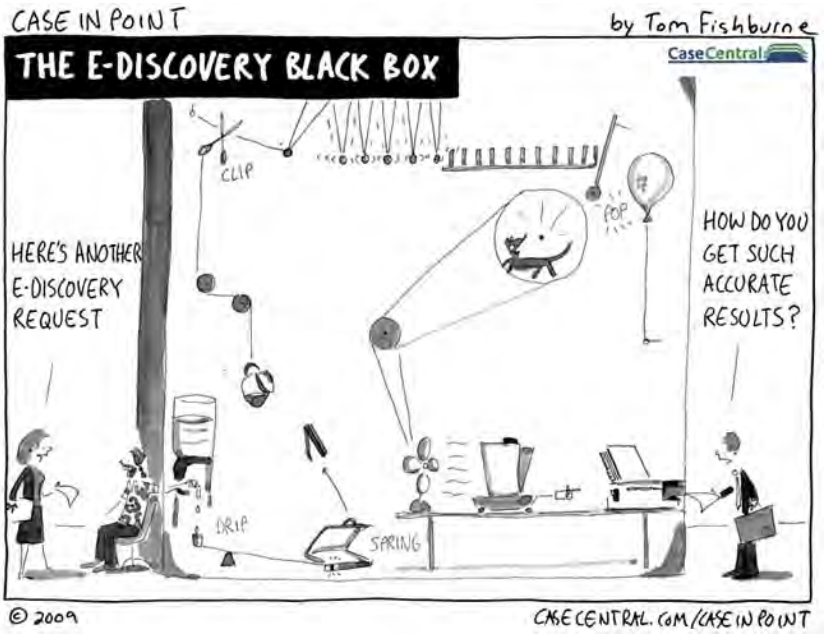
[9] Virginia Rule of Professional Conduct 1.1.

[10] Comment 6 to Virginia Rule of Professional Conduct 1.1.

IV. What Every Attorney Needs to Know About e-Discovery[11]

A. There is no one-size-fits-all solution for e-Discovery. Like standard document discovery, e-Discovery is a conversation that often starts before a case is filed, continues through the discovery period, and lasts through trial.

B. The e-Discovery needs of each case are different: a complex civil case may involve hundreds of thousands of electronic documents, while a personal injury case may have only a few, highly important documents.



C. Ability to assess e-Discovery needs and issues at the outset of litigation.[12]

1. **Talk to the client**. The client is often the best resource when determining where e-Discovery begins. The client will likely know the relevant people (known as "custodians") and identify the potential ESI at play.

2. Identify potential ESI custodians.

a. Who might have relevant ESI?

i. Key custodians – persons directly involved in the facts at issue (*e.g.*, person who drafted the document or drove the car).

[11] *See generally* Formal Opinion Interim No. 11-0004, Standing Committee on Professional Responsibility and Conduct, State Bar of California.

[12] The Western District of Virginia has admonished that every Rule 26(f) conference should include a meaningful discussion and plan for addressing ESI. *See Hanwha Azdel, Inc. f/k/a/ Azdel, Inc. v. C&D Zodiac, Inc.*, No. 6:12-cv-23 (Dec. 27, 2012).

ii. Peripheral custodians – persons who, while not directly involved, may have tangentially acquired ESI (*e.g.*, person who was carbon copied on an email or received a text message).

3. Identify potential sources of ESI.

a. E-Discovery is more than just emails. Computer systems, servers, and other modes of storing ESI are often extremely complex and far beyond the scope of a lawyer's knowledge. Identifying, understanding, and analyzing potential sources of ESI often requires experts (*i.e.*, IT professionals). *See* Part IV (discussion of ethical implications of employing nonlawyer professionals).

D. Implement appropriate ESI preservation procedures.

1. Discuss and advise client on preservation of potential ESI:

a. *E.g.*, client should not delete anything.

b. *E.g.*, disable document retention policies that may automatically delete sources of ESI (*i.e.*, emails).

2. Litigation Hold Notices – establish a written record of the lawyer's and client's actions to preserve ESI.[13]

a. Make sure the litigation hold notice specifically addresses ESI, metadata, and document families.

i. Document Family: a collection of documents that represents a single communication, *e.g.*, email and all attachments.[14]

b. Don't just send a notice to your client; ***send a litigation hold notice to the opposing party*** or their counsel that specifically addresses ESI. If the party is not already on notice of potential litigation, this notice will trigger the opposing party's duty to preserve responsive ESI. *See* Part VII.

3. Determine whether proactive document preservation measures are needed.

a. Collect cell phones; create forensic copies of hard drives; and preserve information stored on computer servers.

E. Collect Responsive ESI.

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[13] *See Pension Comm. Of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) (holding "the failure to issue a ***written*** litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.").

[14] Sedona Conference Glossary, at 17.

1. Initial efforts to preserve ESI will likely be over-inclusive. We create massive amounts of ESI on a daily basis each time they make a phone call, send a text message, receive an email, or edit a document. Narrowing this large body of ESI into a subset of relevant documents is often a burdensome ***and costly*** task.

2. Discuss and negotiate the ESI review process with opposing counsel. Develop a plan and engage in a continuing dialog on how to identify relevant ESI while managing the associated costs.

    a. Think long term; you may have to explain and justify decisions to the court at a later time (*i.e.*, if things go wrong).

3. Keyword Search: the process of identifying potentially responsive ESI by comparing a body of preserved ESI against specific search terms.[15]

    a. Search Terms: a list of words, or combination of words, selected in order to identify potentially responsive ESI.

    b. Date Limitations: use date restrictions to narrow the body of potentially responsive ESI.

4. Document Review: manual vs. technology-assisted

    a. Manual review: the old-fashioned review of documents by a lawyer, paralegal, or legal assistant.

    b. Technology-assisted review: the use of computers to identify, prioritize, and code documents as responsive or non-responsive.

        i. Predictive Coding (a.k.a. adaptive review): a type of technology-assisted review whereby computer algorithms attempt to replicate the human judgment process.

        ii. When technology-assisted review is utilized, a lawyer may not actually review all documents. Instead, the lawyer reviews a small subset, and the algorithm extrapolates the human's responsive/non-responsive judgments to the larger body of documents.[16]

        iii. Technology-assisted review implicates a host of ethical concerns beyond the purview of this presentation.[17] Courts have

[15] *Id.* at 28.

[16] *See Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 183-84 (S.D.N.Y. 2012).

[17] *See generally* John Barkett, *More on the Ethics of E-Discovery: Predictive Coding and Other Forms of Computer – Assisted Review* (2013), available at https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_jointcle_materials/writtenmaterials/p1_2_more_on_the_ethics_of_ediscovery.authcheckdam.pdf.

only just begun to approve of technology-assisted review as a permissible means to identify relevant ESI.

5. Preserve the integrity of ESI (*i.e.*, keep metadata and document families)

F. Producing ESI to Opposing Parties

1. Types of document production:

a. Native Format: ESI as created by the original computer application. Typically, native format requires the original application to view the document. For example, a Microsoft Word document would be produced in *.doc or *.docx format and would require the Microsoft Word application to view.[18]

b. Image Format; a digital picture of a document, typically in *.tiff or *.pdf format. A document image shows a picture of how the document would appear when opened with the original application yet, typically, does not contain any of the associated metadata.[19]

2. Redaction: intentionally removing/obscuring a part of a document to preserve a privilege or protection.

a. When redacted, a document is only produced in image format with the appropriate redactions; the document would not be produced in native format.

3. Clawback Agreements: an "agreement outlining procedures to be followed if documents or [ESI] are inadvertently produced; typically used to protect against the waiver of privilege."[20]

a. Inadvertent production of privileged ESI is addressed in greater detail later in this outline. *See* Part VI.

[18] *See* Sedona Conference Glossary at 33.

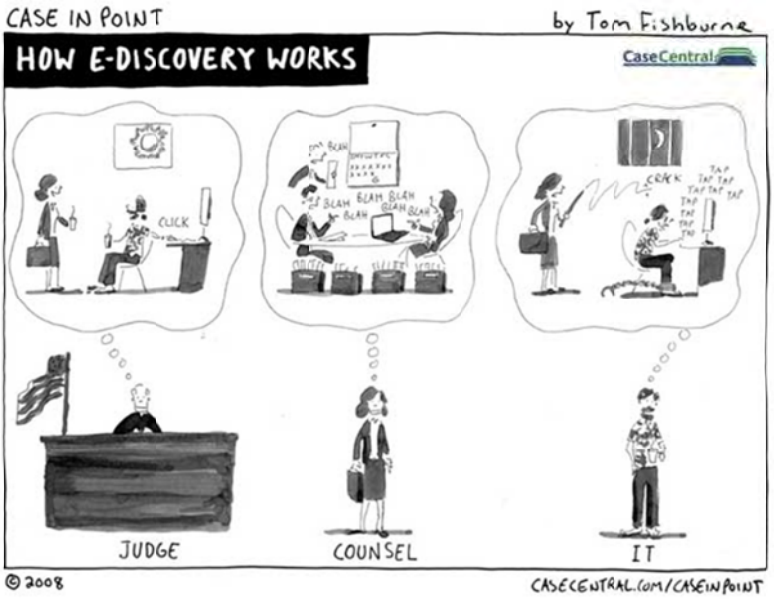
[19] *See id.* at 25.

[20] *Id.* at 9.

V. Outsourcing: What are a lawyer's ethical obligations when employing others to assist with e-Discovery?

A. E-Discovery often involves complex and rapidly changing technology that is far beyond the purview of most lawyers. The common practice among lawyers and firms is to outsource e-Discovery to specialized companies that are experts in this field. E-Discovery experts typically are Information Technology ("IT") professionals. Increasingly, however, lawyers have begun focusing on e-Discovery and are employed specifically to assist with e-Discovery issues in a case.

B. This practice, however, implicates a number of ethical rules that could impose responsibility on the lawyer for the conduct of the e-Discovery professional, whether lawyer or nonlawyer.



C. **Virginia Rule 5.3: Responsibilities Regarding Nonlawyer Assistants**

"With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner or lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at the time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

D. **Virginia LEO 1735: Attorney Rendering Professional Services for Clients of a Law Firm When Attorney is an Independent Contractor Rather than an Employee or Partner of the Law Firm**

1. It is permissible to employ another attorney as an independent contractor to assist with the provision of services to a client, such as e-Discovery.

2. Client Disclosure and Consent: whether or not a firm need disclose the existence of the independent contractor-attorney depends on the level of supervision by the firm over the contractor.

   a. If the independent contractor will work under the ***direct supervision*** of an attorney at the Firm, then the contractor need not be disclosed to the client and the client need not consent.[21]

   b. If the independent contractor will ***work independently*** of the Firm, then the independent contract must be disclosed to the client, and the client's consent must be obtained.[22]

      i. Be aware of unauthorized practice of law issues.

   c. **Best Practice:** Disclose the existence of an e-Discovery attorney that may assist you with your case and obtain the client's informed consent.[23]

3. Conflicts of Interest: Rules 1.7 and 1.9 always apply when another independent contractor-attorney is involved with a client matter, regardless of the level of the contractor's involvement and level of supervision by the firm.[24]

[21] LEO 1735, at 4 ("If the contract lawyer will work on the client's matter under the direct supervision of an attorney associated with the Firm, the Firm will ordinarily not have to disclose to the client the fact that a contract attorney is working on that client's matter.").

[22] LEO 1735, at 4 ("if the contract attorney will work independently, without close supervision by an attorney associated with the Firm, then the client must be informed of the contract attorney's participation in the client's case and the client's consent must be obtained.").

[23] LEO 1735, at 4 ("Normally, when a law firm associates another attorney outside the firm to work on a client's matter, the client must be informed and consent to the arrangement.")

a. The independent contractor-attorney should run a conflicts check on the client.

4. Confidentiality: Similarly, Rule 1.6 always applies to the contractor.[25]

a. E-Discovery typically involves a client's confidential information. Therefore, the client's informed consent is typically ***required*** before disclosing any information.

b. Client consent is required regardless of whether the e-Discovery vendor is a lawyer or nonlawyer.

E. **Virginia LEO 1850: Outsourcing of Legal Services**

1. The VSB directly addressed some of the ethical issues surrounding using both lawyers and nonlawyers to assist with e-Discovery, including document retention database creation and reviewing discovery materials.[26]

2. Due Diligence: the lawyer seeking to employ lawyer/nonlawyer services in the area of e-Discovery must ensure that an e-Discovery vendor is competent and possesses both the "appropriate training and skills to perform the tasks requested."[27]

3. Supervision

a. Nonlawyers (*e.g.*, IT professionals): "the lawyer must accept complete responsibility for the nonlawyer's work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the nonlawyer's work and then vet the nonlawyer's work and ensure its quality."[28]

i. The supervising attorney has an ***ongoing duty*** to ensure that the nonlawyer's work product is accurate, reliable, and in the client's interest.[29]

ii. "The lawyer remains ***ultimately responsible*** for the conduct and work product of the nonlawyer."[30]

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[24] LEO 1735, at 2 ("[Independent contractor-a]ttorney and Firm shall be bound by the requirements of confidentiality and the conflicts of interest rules in the same manner as if [independent contractor] were associated with the Firm.").

[25] *Id.*

[26] Virginia LEO 1850, at 1 ("Outsourcing takes many forms: reproduction of materials, document retention database creation, conducting legal research, drafting legal memoranda or briefs, reviewing discovery materials, conducting patent searches, and drafting contracts, for example.").

[27] Virginia LEO 1850, at 4.

[28] Virginia LEO 1850, at 5.

[29] *Id.*

4. Confidentiality

a. "If confidential client information will be shared with a lawyer or nonlawyer outside of the law firm . . . the lawyer must secure the client's consent in advance."[31]

i. Implied authorization generally ***does not extend to entities outside the law firm***, such as e-Discovery vendors. Therefore, the client's informed consent is required before sharing confidential information.

b. Written confidentiality agreements with outside vendors.

i. The VSB stated "[w]ritten confidentiality agreements are ***strongly advisable***" when employing outside vendors to provide legal services, such as e-Discovery.[32]

F. **The Takeaway**

1. From the outset, a lawyer should use due diligence in selecting qualified individuals to assist with e-Discovery.

2. The lawyer should have the e-Discovery professional perform a conflicts check: ensure that the professional is not performing legal services to parties adverse to the client.

3. The lawyer must obtain the client's consent before disclosing confidential information to the e-Discovery professional.

a. e-Discovery inherently involves confidential information. Therefore, the client's informed consent should be obtained.

4. The lawyer should supervise the e-Discovery professional at all times: (i) defining and staying within the scope of the work; (ii) ensure that the professional's conduct complies with the lawyer's ethical duties; and (iii) quality control of the e-Discovery professional's work product.

VI. Ethical Issues Surrounding Privilege and Clawback of ESI

A. E-Discovery inherently involves large volumes of documents. Individuals and companies create large quantities of ESI on a daily basis, both in their personal (*e.g.*, emails, text messages, social media usage) and professional (*e.g.*, emails, documents, computer databases) lives.

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[30] *Id.* (citing Rule 5.3(c)).

[31] *Id.* at 7.

[32] *Id.* at 8.

1. Lawyers are humans: mistakes will inevitably happen, and a client's confidential, privileged, or protected information will get disclosed.

    a. **Inadvertent production of privileged ESI is a normal part of e-Discovery.**

2. A lawyer who inadvertently produces confidential ESI is not *per se* unethical.

    a. Ethical e-Discovery requires that a lawyer make ***reasonable efforts*** to prevent inadvertent disclosure. Rule 1:6 does not mandate perfection.

B. **Virginia Rule 1:6(d): Confidentiality of Information**

A lawyer shall make ***reasonable efforts*** to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.[33]

1. Comment 19: What constitutes a reasonable effort to prevent the inadvertent disclosure of ESI?[34]

2. The Virginia State Bar enunciated several factors to be considered in determining what constitutes a "reasonable effort":

    a. the sensitivity of the information;

    b. the likelihood of disclosure if additional safeguards are not employed;

    c. ***the employment or engagement of persons competent with technology***;

    d. the cost of employing additional safeguards;

    e. the difficulty of implementing the safeguards; and

    f. the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[35]

C. When considering whether an attorney acted reasonably to protect privileged ESI, the Virginia State Bar will consider technological competency.

D. What are "reasonable efforts" to prevent inadvertent disclosure of privileged ESI?

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[33] Virginia Rules of Professional Conduct 1.6.

[34] Comment 19 to Virginia Rule 1:6 ("The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure.")

[35] Comment 19 to Virginia Rule 1:6 (emphasis added).

1. What is "reasonable" depends on the case.

    a. In a small contract case with only 100 documents of ESI, it is likely reasonable for a lawyer to review all documents for privilege.

    b. In a large patent case with 1.5 million pages of ESI, human review seems less realistic (*e.g.*, reading at 100 pages an hour, 2000 hours per year, it will take a single person 7.5 years to review all ESI).

2. Two absolutely basic steps to protect against inadvertent disclosure and to mitigate its impact are: (i) manually review ESI involving lawyers; and (ii) enter into a clawback agreement.

    a. Identify ESI involving lawyers and perform a manual review.

        i. Search terms – search the client's preserved ESI for the lawyer's name and email address as well as those of paralegals and legal assistants.

        ii. Date range – search ESI for dates when meetings with lawyers occurred to identity any documents discussing or conveying legal advice.

    b. Clawback agreements typically provide that the inadvertent disclosure of a privileged or protected document does not constitute a waiver of the attorney-client privilege or other protection from discovery.

        i. ***Clawback agreements are the new normal***. Every case should have an ESI clawback agreement because every case involves ESI.

        ii. Negotiate a clawback agreement with all parties ***before*** producing ESI.

E. ***If you inadvertently disclose confidential information***, immediately notify the recipient (*i.e.*, opposing counsel) and instruct them to destroy the document.

F. ***If you inadvertently receive confidential information***:

1. Promptly notify the party that disclosed the confidential information;

2. Sequester or destroy the document until the claim of privilege or protection is resolved.

3. "A lawyer's duty to represent his client diligently . . . does not allow the lawyer who inadvertently received the privileged information to use the information to his client's benefit."[36]

G. A lawyer's obligations regarding inadvertently disclosed confidential information apply regardless of when the disclosure occurred: (i) prelitigation; (ii) during the discovery process; (iii) after a matter is resolved.[37]

H. **Virginia State Inadvertent Disclosure: Rule 4:1(b)(6)(ii)**

If a party believes that a document or ***electronically stored information*** that has already been produced is privileged or its confidentiality is otherwise protected the producing party may ***notify any other party*** of such claim and the basis for the claimed privilege and protection. Upon receiving such notice, any party holding a copy of the designated material ***shall sequester or destroy*** its copies thereof, and ***shall not duplicate or disseminate*** such material pending disposition of the claim of privilege or protection by agreement, or upon motion by any party.

I. **Federal Inadvertent Disclosure: Rule 26(b)(5)(B)**

If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party ***must promptly return, sequester, or destroy*** the specified information and any copies it has; ***must not use or disclose*** the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

J. **Issues surrounding Waiver of Privilege**

1. "The inadvertent production of a privileged document is a specter that haunts every document intensive case" . . . especially cases involving e-Discovery.[38]

2. What is an inadvertent disclosure?[39]

a. A disclosure resulting from the failure to exercise proper precaution to safeguard the privileged document (*i.e.*, knowingly, but mistakenly producing a document).

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[36] Virginia LEO 1871, at 1.

[37] Virginia LEO 1871, at 2 ("Outside of the discovery process, the requirements of LEO 1702 fully apply.")

[38] *Walton v. Mid-Atlantic Spine Specialists, P.C.*, 280 Va. 113, 126, 694 S.E.2d 545, 551 (2010) (quoting *New Bank of New England v. Marine Midland Realty Corp.*, 138 F.R.D. 479, 479-80 (E.D. Va. 1991)).

[39] *Id.*

b. Not a disclosure resulting from criminal activity or bad faith.

3. Has there been a waiver of the attorney-client privilege?[40]

a. Failure to take reasonable measures to ensure and maintain the document's confidentiality; or

b. Failure to take prompt and reasonable steps to rectify the error.

c. Factors the Supreme Court of Virginia considers:

i. the reasonableness of the precautions to prevent inadvertent disclosures (*e.g.*, conducting a privilege review prior to document production; keeping the privileged document separate from non-privileged documents; marking the document as privileged; as well as the total number or documents and any time constraints)

ii. the time taken to rectify the error (*e.g.*, days, weeks, months, years, or longer);

iii. the scope of the discovery (*e.g.*, "massive exchange of documents" versus a few documents, any time constraints on document production);

iv. the extent of the disclosure (*e.g.*, how widely was the document disseminated?); and

v. the interests of justice: whether the party asserting the claim of privilege or protection for the communication has used its unavailability for misleading or otherwise improper or overreaching purposes in the litigation, making it unfair to allow the party to invoke confidentiality under the circumstances.[41]

d. Federal courts have considered the existence of a ESI Clawback Agreement that specifically addresses the inadvertent production of privileged documents and provides that such a production shall not be a waiver of the attorney-client privilege.[42]

[40] *Id.* at 127, 694 S.E.2d at 552.

[41] *See generally id.* at 128-131, 694 S.E.2d at 553-554.

[42] *See Adair v. EQT Production Co.*, No. 1:10-cv-37 (W.D. Va. May 31, 2012).

K. **Best Practices:**

1. Don't disclose privileged ESI (duh).

   a. Identify the types of ESI which may be subject to a claim of privilege: emails to and from counsel (in house or litigation); electronic documents prepared by attorneys, paralegals, or others at the direction of an attorney; or any documents created in anticipation of litigation.

   b. Perform a manual review of potentially privileged ESI. Don't rely on search terms or computer assisted review to determine which ESI ***is*** and (most importantly) ***is not*** privileged.

2. If you inadvertently disclose privileged ESI, immediately notify the recipient and instruct the recipient to destroy the copy.

3. If you inadvertently receive privileged ESI, immediately notify the disclosing party, sequester or destroy your copy of the document, and ***do not use the document***.

VII. Breakdowns in e-Discovery: Sanctions

A. Aside from ethical issues regarding technological competency, failures in e-Discovery can have serious implications for the client. Courts, including those here in Southwest Virginia[43], have indicated an increasing willingness to impose sanctions on parties for failures in the e-Discovery process.

B. **Rule 37(e): Failure to Preserve Electronically Stored Information.**

"If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party ***failed to take reasonable steps to preserve*** it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

   (A) presume that the lost information was unfavorable to the party;

[43] *See Huff v. Winston*, 89 Va. Cir. 429, 433 (Roanoke Cty. 2015) ("Last, I deny Plaintiff's request for attorney's fees in connection with her Motion. I do not feel that Defendant or his counsel have been unreasonable and/or acted in bad faith — to date. Going forward, however, I will not be so dismissive of a request for attorney's fees from either party arising out of a discovery dispute — ESI or otherwise — particularly if I conclude that either party has not conducted himself, herself, or itself reasonably and in good faith regarding a resolution of any future issues that may arise.").

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment."[44]

C. Case Studies

1. *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 803 F. Supp. 2d 469 (E.D. Va. 2011)

a. Defendant had a duty to preserve ESI once it was notified that litigation had commenced.[45]

i. Defendant's ESI preservation obligations included "issuing a litigation hold order to 'key employees' likely to have relevant documents or materials and ensuring that these employees follows such instructions."[46]

b. Defendant breached its duty to preserve ESI when those key employees deleted files and emails from their computers after having knowledge that litigation had commenced and their duty to preserve relevant ESI.[47]

i. Defendant's key employees intentionally, and in bad faith, breached their duty to preserve when they held a meeting to discuss what ESI needed to be deleted.[48]

c. Court imposed sanctions by awarding attorneys' fees and costs as well as an adverse inference instruction.[49]

i. Default judgment was not warranted because (i) the Defendant corporation sent out litigation hold notices to the key employees; (ii) much of the deleted ESI was recoverable; and (iii) the plaintiff was able to develop its case with the recovered ESI.

d. **Takeaway**: litigation hold notices are sometimes not enough; employees may delete critical information ***because*** it is relevant to a case for the purpose of interfering with the litigation. A single employee's subsequent bad act may be costly (attorneys' fees and litigation strategy) in the long run.

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[44] Fed. R. Civ. P. 37(e) (emphasis added).

[45] *E.I. du Pont de Nemours*, 803 F. Supp. 2d at 500.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 501.

[49] *Id.* at 510.

i. Document preservation techniques – such as imaging computers and servers at the outset of litigation – would help to mitigate the practical impact of an untoward employee.

2. *Jenkins v. Woody*, No. 3:15-cv-355, 2017 U.S. Dist. LEXIS 9581 (E.D. Va. Jan. 21, 2017)

Contract Negotiation and Drafting

Shifting Risk to the Other Side

Clark H. Worthy
Jonathan D. Puvak
Christopher M. Kozlowski

6

CONTRACT NEGOTIATION AND DRAFTING: SHIFTING RISK TO THE OTHER SIDE

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Commercial attorneys spend their careers toiling with contracts of various types. Often the contracts are related to some form of transaction, purchase of goods, purchase of equipment, real estate, or corporate transactions. While there is no contract that can cover all situations, there are common elements that appear in most contracts. When armed with a thorough understanding of the transaction, an attorney can "win" the negotiation of the contract through the allocation of risks and drafting the key provisions to benefit the client. This outline is separated into three related parts, Part 1 addresses commercial leases, Part 2 addresses the negotiation of contracts, and Part 3 delves deeper into several essential contract clauses. This Part 1 discusses a number of key provisions that appear in most commercial leases.

Part 1: COMMERCIAL LEASES

OVERVIEW OF KEY PROVISIONS

TERM AND PREMISES

A. There must be a fixed or determinable commencement, duration, and end.

B. Existing premises delivered "as is": a period beginning on _____, 20___ and expiring on _____, 20___."

Note: "expiration" is the natural end of the term, "termination" is the early end of the term because of, e.g., a default or catastrophe.

C. Office premises to be prepared for the tenant:

1. In a turnkey format, the landlord prepares the premises according to an agreed space plan (or layout of the premises) using building standard materials and finishes, and turns them over to the tenant.

2. In an office lease, a work letter sets forth the landlord's and tenant's responsibilities. The tenant is given an allowance by the landlord for the cost of planning and preparing the premises. The allowance is used to change the premises from the base building condition to the condition required for tenant's use. The base building is the

condition in which the premises are delivered to the tenant and includes the landlord's work (if any) before the allowance is used, and is very important:

a. When the landlord builds, the tenant has time frames for responses to space planning and design proposals and the landlord delivers the premises "as soon as it can," subject to delays (especially permitting). The tenant is penalized for delays caused by its responses or its change orders while the work progresses.

b. When the tenant builds – which is a risky proposition usually undertaken only by sophisticated tenants – the landlord's time frames are a bit more lax and the permitting risk lies with the tenant. The tenant saves the landlord's construction overhead and profit but may have supervision fees but will have its own contractor's overhead and profit.

c. When the budget of the agreed work exceeds the allowance, the tenant may deposit the excess or pay pro-rata as the work progresses (that is, if the allowance is $1,000,000 and the budget is $1,250,000, the tenant pays 20% of each progress payment). The goal is for the rent and the use of the premises to occur at the same time at no more than the allowance (but the allowance is never enough).

D. Shopping center premises are delivered (with or without allowance):

1. "as is."

2. "wet shell": utilities available at perimeter.

3. "warm shell": HVAC is installed.

4. "vanilla shell": walls, roof, sprinklers, utility connections, and concrete slab.

5. "turnkey": (Note: these terms are not always used in the same way.):

a. The allowance is paid upon opening and delivery of lien waivers or in-progress payments.

b. There is a fixturing period of 60 to 120 days for the tenant to prepare its premises (if not turnkey). Rent begins on the earlier of the end of the fixturing period or the date on which the tenant opens for business.

c. The commencement date may be tied to a co-tenancy condition, that is, a stated percentage of the shopping center open and operating, or stated co-tenants open and operating, or both. Until the condition is satisfied, the tenant may pay no rent, or percentage of sales.

d. The shopping center tenant will want its term to end in January after the holiday season.

E. Failure to deliver the premises: Landlords prefer to postpone the commencement and expiration dates. Tenants prefer a credit against rent (especially if they have a holdover charge at their existing premises) and an outside date at which they can cancel the lease (and perhaps recover their out of-pocket costs).

F. Early occupancy. Tenants occasionally ask for early occupancy:

1. While lease negotiations are going on, the tenant agrees to remove (or pay the cost for the landlord to) its improvements if the lease is not agreed to and thus loses negotiating strength. The agreement is expressed either (A) by a revocable license that sets forth the relevant progressions of the lease including standards for alterations, mechanics liens, insurance and indemnification, or early occupancy is allowed or (B) subject to the terms of the lease (or the lease form if it is not yet agreed) except for the payment of rent, and in either event, on the condition that the early occupancy does not interfere with the landlord's work and is at tenant's risk.

2. When the premises are nearly ready for occupancy so that the tenant can install furniture, fixtures, equipment, cabling, and inventory.

G. Surrender or early termination:

1. Leases occasionally provide for early termination:

a. At the tenant's request for any reason upon payment of a termination fee (usually the unamortized allowance and leasing commissions) and two or more month's rent to allow for releasing.

b. At the tenant's – and rarely the landlord's – request because of insufficient sales (a kickout provision) with a termination fee.

2. The tenant surrenders the premises in the condition required by the lease.

3. The rights and obligations that have not accrued or do not survive the lease end.

4. Note: Landlord's lender's approval may be required by the terms of its loan or a subordination, non-disturbance, and attornment agreement signed by the landlord and tenant.

RENT

A. Different Types of Rent Payable by Tenant:

1. Gross: Tenant pays "all in" rent to Landlord:

a. Tenant's Perspective:

i. Tenants love gross deals because of their predictability.

ii. Be sure to address utilities specifically (are they included?).

b. Landlord's Perspective:

i. Landlords hate gross deals because landlords must absorb unexpected costs such as increased taxes, snow removal, etc.

ii. Landlords must reserve the right to allocate rent toward taxes, operating expenses, etc., as they see fit.

iii. Also, eliminate any tenant audit rights from lease.

2. Triple Net: Tenant pays a base or minimum rent, plus Tenant's share of taxes, maintenance, and insurance:

a. Calculation of Tenant's Share:

i. Usually expressed as a fraction, the numerator of which is the area of Tenant's premises.

ii. If you represent a tenant, pay careful attention to deductions from the denominator (e.g., a denominator that includes only leasable area in the building, or leased and occupied area, etc.); sometimes, tenants negotiate a floor on the denominator (e.g., 80%).

b. Taxes:

i. Exclusions: usually, everyone agrees that income-related and transfer-related taxes are excluded.

ii. Other Items Discussed: special assessments, rent taxes, business improvement district taxes, change of ownership increases.

iii. Taxes are rarely capped.

c. Operating Expenses:

i. In retail leases, caps for controllable expenses are relatively common (e.g., controllable expenses will not increase by more than 3% - 5% per year; pay attention to whether the first year's operating expenses are capped).

ii. Non-controllable expenses generally include taxes, insurance and utilities; some landlords try to make snow removal, security, union labor, and other items non controllable as well.

iii. If operating expenses are not capped, the parties generally have a lengthy discussion regarding inclusions and exclusions, especially

capital expenses, costs required to comply with law, reserves, administrative, and management fees, etc.

d. Insurance:

i. Insurance costs are often rolled into operating expenses in a triple net lease.

ii. If you agree to pay for insurance as a tenant, be sure that the landlord is actually obligated to carry insurance pursuant to the lease.

3. Percentage Rent:

a. In the retail context, tenants sometimes pay percentage rent.

b. Percentage rent is usually expressed as a percentage of gross sales over a certain threshold, or "breakpoint".

c. Breakpoint calculations:

i. A "natural" breakpoint is calculated by dividing the annual rent by the percentage rent rate (e.g., if tenant pays $100,000 in annual rent and the percentage rent rate is 5%, then the natural breakpoint is $2,000,000).

ii. An unnatural breakpoint is negotiated by the parties (in the above example, an unnatural breakpoint might be $2,500,000 instead).

d. Definition of gross sales:

i. For purposes of determining percentage rent that is payable, the parties must agree what constitutes "gross sales."

ii. Discussion is similar to the operating expense discussion in the sense that landlords want the definition to be as broad as possible, and tenants want as many exclusions and deductions as possible.

iii. Common exclusions and deductions include credit card fees (landlords generally ask for these to be capped), employee discounts and free meals, services that tenants offer at no profit (e.g., alterations or gift-wrapping), etc.

iv. Hottest issue right now is whether internet sales should be included in gross sales; tenants insist that they have no way of attributing those items to a particular store, while landlords don't want their real estate to be used to fulfill orders for which they receive no credit.

TENANT OPTIONS

A. Options To Extend Term:

1. Notice:

a. Notice period:

i. Minimum notice - typically 6-12 months.

ii. Maximum notice - "No earlier than…"

b. “Time is of the essence.”

c. Non-forfeiture clause.

d. Irrevocability of exercise notice.

2. Rent:

a. Fixed rate or formula-based (e.g., CPI).

b. Fair market rent (FMR):

i. Definition of FMR.

ii. Floor (e.g., no less than rent in previous year).

iii. Cap (e.g., 95% of FMR).

iv. Dispute resolution process (e.g., “baseball” arbitration).

3. Miscellaneous Issues:

a. Conditions:

i. No default (at time of exercise or commencement of extension term).

ii. No material adverse change in financial condition; Minimum net worth.

iii. No sublease or assignment.

b. Operating expense base year or stop.

c. Partial extension.

B. Expansion Options:

1. "True" Expansion Option:

a. Unilateral tenant option.

b. Expansion space:

i. Specifically identified space.

ii. Then-available space.

c. Exercise window(s).

d. Terms:

i. Then-current lease terms.

ii. Market terms.

2. Right of First Offer:

a. Trigger:

i. Space becoming available.

ii. Landlord decision to market space.

b. Exercise notice period.

c. Terms - typically based on market terms.

d. Determination of market terms:

i. Landlord determination (i.e., "take it or leave it").

ii. Third party dispute resolution.

e. One-time or rolling right? "Spring back" rights?

f. Exclusions (e.g., vacant space at time of execution).

3. Right of First Refusal:

a. Trigger - Third party deal for expansion space.

b. Exercise notice period.

c. Terms - typically match third party deal terms.

d. One-time or rolling right? “Spring back” rights?

e. Exclusions (e.g., existing tenant rights, right to renew tenants in place).

4. Conditions - similar to Options to Extend.

C. Early Termination & Contraction Options:

1. Conditional or Unconditional Option?

2. Examples of Conditions:

a. Adverse change in tenant's business.

b. Failure to meet sales/financial benchmarks.

c. Loss of critical contract/funding.

3. Exercise Timing:

a. One-time option.

b. Fixed intervals.

c. Rolling option.

4. Notice Period- typically 180-365 days.

5. Termination/Contraction Fee:

a. Unamortized costs (TIs, commissions, free rent, legal fees).

b. Rent.

c. Timing of payment.

6. Contraction Issues:

a. Marketable space issues.

b. Adjustments to lease (e.g., pro rata share of expenses, # of parking spaces).

D. Purchase Options:

1. Option Period(s).

a. One-time right or fixed option periods.

b. Rolling option.

2. Purchase Price:

    a. Fixed rate or formula-based.

    b. Fair market value:

        i. Encumbered or unencumbered by lease?

        ii. Tenant-made improvements.

        iii. Dispute resolution process.

3. Sale & Closing Terms.

4. Conditions (e.g., no default, no assignment or sublease).

5. Period between Option Exercise and Closing.

6. Other Issues:

    a. Transactions excluded from option.

    b. Tax issues.

ASSIGNMENT AND SUBLEASING

A. Background:

1. In the absence of a restriction in the lease, leases are freely transferable.

2. Landlord concerns regarding transferability:

    a. Payment of rent.

    b. Tenant mix.

    c. Profits from future transfers.

3. Tenant concerns regarding transferability:

    a. Exit strategy.

    b. Ongoing liability.

B. Definition of Transfer:

1. Most common types of transfers are traditional assignments and subleases.

2. Other types of transfers:

    a. Leasehold mortgages.

    b. Transfer by operation of law (e.g., a merger).

    c. Other related party transfers.

    d. Sale of all or substantially all assets.

    e. Be sure to define the term “transfer” to include all prohibited transactions.

C. Standards of Approval:

1. Tenants want certain types of transfers to be permitted without consent.

2. Where consent is required, tenants want landlords to agree:

    a. It will not be unreasonably withheld, conditioned or delayed.

    b. It will be deemed given after a certain time period.

3. Even if landlords agree that consent will not be unreasonably withheld (or will not be required with respect to related-party transfers), landlords want to impose conditions on transfers, even related-party transfers:

    a. Notice of transfer.

    b. Net worth test.

    c. Transferee has not been negotiating with landlord for other space in the Building.

    d. Character or reputation of transferee.

    e. Transfer documentation provided to landlord.

D. Release:

1. In the absence of a specific release, tenants remain liable for obligations under a lease.

2. Tenants generally request release.

3. Landlords often refuse to agree to a release unless a net worth test is met:

    a. Pay attention to whether guarantor is also released.

b. Note whether the net worth is based on "tangible" net worth (which excludes good will).

c. If tenant is not released, be especially careful about an assignment; a tenant that remains liable following an assignment of the lease should be sure to limit its liability to the landlord with respect to future obligations to which the assignee agrees and to which tenant does not consent (e.g., an extension of the term, increase in rent, etc.).

E. Other Issues:

1. Recapture:

a. Landlords often want the right to recapture space upon a tenant transfer.

b. Should not apply to transfers permitted without landlord's consent.

c. Tenant should have the right to rescind the request for consent if landlord elects to recapture.

d. If tenant agrees to give landlord a recapture right, consider whether landlord should be required to pay tenant for the unamortized cost of its improvements.

2. Profit-sharing:

a. Landlords often ask tenants to share amounts that a transferee pays in excess of the rents payable under the lease.

b. If landlords recapture 100% of the difference, a tenant is not incentivized to collect more than the amount payable under the lease.

c. Landlords and tenants often agree to split the difference.

d. Prior to sharing the excess with landlord, tenants want to recoup the costs associated with the transfer (e.g., brokers' commissions, legal fees and, possibly, the unamortized cost of the tenant improvements).

e. Tenant should limit their obligation to amounts paid by the transferee, not the amounts payable.

INSURANCE

A. Introduction:

1. A property owner bears all the risks of ownership such as damage to its property and injury of a person on the property.

2. A property owner (a landlord) with a tenant allocates those risks between it and the tenant.

3. The one that can control the risk should bear the risk; naturally, this principle recurs in the indemnification provisions.

4. Insurance follows the allocated risk – no risk, no insurance.

5. Risks can be retained or avoided (by prohibiting explosives) or allocated (between landlord and tenant) or transferred (which is where insurance enters).

B. Terminology:

1. Insurance terms are confusing:

a. CGL means comprehensive general liability (which does not exist) and commercial general liability (which does).

b. "all risk" property coverage (which does not exist) did not cover all risks.

2. "Additional insured" is not the same as "co-insured" and neither is the same as "named insured."

3. A "casualty" results from a sudden, unexpected or unusual cause. It is not limited to property damage and more commonly refers to personal injury such as war casualties.

4. "Excess coverage" and "surplus lines" are not the same.

5. An "exclusion" limits coverage, but an "exception to an exclusion" enlarges coverage.

6. The ISO promulgate forms in general use: the forms are identified by footers in the lower left corner CG for liability policies and CP for property policies followed by two pairs of numbers that identify the policy or endorsement and two more pairs that identify the date of last revision.

7. The National Board for Fire Underwriters has not existed for more than 50 years.

C. The Coverages:

1. The most important coverages in commercial real estate leases are the property and liability coverages. A business owner policy (or BOP) may cover both in one policy.

2. Property insurance is first party insurance; it pays the insured for its loss. Liability insurance is third-party insurance; it pays an injured person for his or her loss (and holds the insured harmless).

3. Property insurance is based on the expected loss if damage occurs and is based on the data of loss experience. Liability insurance is based on the expected frequency of loss based on the nature of the business, the loss history of that business, and the insured's loss history.

4. Property insurance often involves several endorsements to the policy unlike liability insurance that has incorporated many of the former endorsements in the policy.

D. Property Insurance:

1. Basic Form: insures named perils (now called "causes of loss") and is like the obsolete "fire and extended coverage," and includes fire, lightening, sandstorm or hail, explosion, smoke, riot and civil commotion, damages by aircraft or vehicle, sprinkler leakage, sinkhole collapse, volcanic action, vandalism and malicious mischief.

2. Broad Form: adds to Basic Form, loss from falling objects, weight of snow, sleet or ice, water damage from appliances that contain water (but not flood) and glass breakage.

3. Special Form: covers "all risks" except the ones that are excluded. If a loss occurs, the insured gets paid so long as the cause of loss is not excluded. [SPECIAL FORM IS BY FAR THE PREFERRED AND MOST COMMON FORM IN COMMERCIAL REAL ESTATE LEASES.] There are other coverages such as "Business Personal Property" that the tenant may carry for its own benefit covering its furniture, fixtures, equipment, and inventory.

4. Amount Of Coverage:

a. ACV (actual cash value) or insurable value: replacement cost less physical depreciation (not book value).

b. Replacement cost: cost at time of loss, not original cost ("new for old") Agreed value: an agreed amount sufficient to avoid co-insurance.

c. Inflation guard: an agreed amount that adjusts annually by a stated percentage.

d. An insured with replacement value insurance that does not replace the damaged property gets ACV.

5. Coinsurance:

a. Coinsurance arises when the insured does not fully insure its property or insure it to the fraction of its full value that the insurer allows (usually 80% to 90% of full value). The insurer pays up to 80% or 90% of the loss and the insured pays the balance. But if the insured has a $1,000,000

building with 80% coinsurance requirement (or $800,000) and only insures for $600,000, and a $300,000 loss occurs, the insurer will pay $600,000 / $800,000 x $300,000 or $225,000 instead of $300,000.

6. Primary, Secondary And Contributing Policies:

   a. If both the landlord and tenant (both of whom have insurable interests in the premises) insure, the insurers would pay more than the loss. To avoid this, policies are either primary (in which event they pay first) or secondary (in which event they pay any loss remaining after the primary policy pays) or contributing (in which event they share either "pro-rata" [a fraction of the loss that each policy bears to the sum of the limits of the policies] or by their "limits of liability" [a fraction of the loss that each insurer's limit of liability for the loss would be]).

7. Business Interruption:

   a. Business Income Coverage: BI - formerly called business interruption coverage – is an important endorsement to the property policy. The tenant is protected against consequential losses from a covered cause of loss – such as lost profits, ongoing rent and operating costs, and expenses whose contracts require continuous payments. The landlord uses "Business Income/Rental Value" to continue its rental income if the tenant's rent is abated on account of a covered cause of loss. If rent is not abated, the tenant's protection is with its BI coverage.

   b. Many leases provide for rent abatement "if the loss is not the tenant's fault." The tenant should resist this because it has paid for the insurance in its rent or "pass throughs" and the landlord's policy pays regardless of fault.

8. Waiver Of Subrogation:

   a. When an insured loss occurs, the insurer pays the insured and assumes the rights of the insured against the party who caused the loss – and is subrogated to the insured's claims.

   b. Subrogation is predominantly a property policy concept, it arises in workers compensation policies, but rarely with liability policies.

   c. A waiver of subrogation is the insured's agreement made on behalf of its insurer – and only if the insured has allowed it – that the insurer will not pursue its subrogation claims against the third party. The ISO forms allow the insured to waive subrogation.

   d. Commercial real estate leases typically have mutual waiver of subrogation by the landlord and tenant. The goal is for the insurers – not the parties –

to bear insurance losses. When a tenant subleases its premises, the landlord and subtenant must waive subrogation.

e. The waiver has nothing to do with fault and is not properly limited to claims for which the third party is not at fault.

E. Liability Insurance:

1. Types:

a. "Claims made policies" cover claims made during the term of the policy.

b. "Occurrence policies" cover claims that arise during the term of the policy. Do not throw away occurrence policies when the term ends.

2. Limit Of Liability:

a. A $1,000,000 limit of liability means the insurer will pay a total of $1,000,000 (e.g., one $1,000,000 claim or five $200,000 claims). This differs from the limits before 1986.

3. Coverages:

a. Bodily injury and property damage (Coverage A): bodily injury, sickness or disease, and damage to tangible property (excluding liquor-related losses, employee injuries [presumably under workers' comp.], pollution, and automobile-related losses [presumably under auto policy].

b. Personal and Advertising Injury (Coverage B): false arrest, malicious prosecution, wrongful eviction, and defamation.

c. Medical payments (Coverage C): medical expenses for injuries occurring in or on ways next to the insured's leased or owned premises.

d. Contractual liability coverage covers claims for bodily injury or property damage that an insured assumes by contract, e.g., an indemnity.

e. Fire legal (or property damage) liability insurance covers fire damage to premises rented to the insured. (The limits are low so that it does not replace a property policy.)

f. The landlord will be an additional insured.

4. The Insureds:

a. Named insured: pays the premium and controls the policy and claims. Additional insured: has primary non-contributing coverage on the policy (almost exclusively used with liability policies) and is added by an endorsement.

b. Loss payee: gets the proceeds of a property loss and is added by endorsement.

c. As their interests may appear: is used when there are several insureds in a property policy.

5. Certificates:

a. Certificates are often incorrect and state very clearly that the recipient has no rights under it with regard to cancellation for example, courts uniformly enforce this disclaimer. The recipient must get the policy to know the coverages and its rights; at least it must get the declaration page attached to a certificate.

b. The Certificate of Liability Insurance is the ACORD 25.

c. The Evidence of Commercial Property Insurance is the ACORD 28.

LENDER ISSUES

A. Lender Concerns:

1. Protecting Cash Flows:

a. No advance payment of rent.

b. Limiting offset rights.

c. Notice & cure rights for landlord defaults.

d. Limiting lease modifications/termination without lender consent.

2. Protection in Case of Borrower Default:

a. Subordination & attornment.

b. Limitations on successor landlord liability/obligations:

i. Tenant improvements, allowances.

ii. Prior landlord defaults, offsets, defenses.

iii. Lease modifications without lender consent.

B. Typical Documents:

1. Subordination, Non-Disturbance & Attornment Agreement (SNDA).

2. Estoppel Certificate.

Part 2: NEGOTIATING A CONTRACT TO COMPLETION

Commercial attorneys spend their careers toiling with contracts of various types. Often the contracts are related to some form of transaction, purchase of goods, purchase of equipment, real estate, or corporate transactions. While there is no contract that can cover all situations, there are common elements that appear in most contracts. When armed with a thorough understanding of the transaction, an attorney can "win" the negotiation of the contract through the allocation of risks and drafting the key provisions to benefit the client. This Part 2 provides practical advice for working through a contract negotiation from start to finish.

I. **Develop a Plan:**

a) Sit down with your client early in the process.

b) It is crucial that both client and lawyer understand the client's expectation of the deal. If there is a minimum dollar amount your client is looking for, it is important to know that now.

c) Hammer out important deal terms that have meaning to your client. This will help avoid hurdles in the late stages of the transaction when that one seemingly innocuous provision could crater the deal.

II. **Know the other side:**

a) Identify the material characteristics of the transaction from the other side's perspective.

b) Analyze how the other side's perspective comports with or contrasts with the client's expectations.

c) Identify the key players on the other side, including the decision makers.

d) Thoroughly analyze the relationships between the parties and the relationship between the other side and the lawyers involved on your side. Do you have a conflict of interest?

e) If a conflict of interest exists, ensure to obtain a conflict waiver from all necessary parties.

III. **Conduct a failure analysis:**

a) What can go wrong during the negotiation and pre-closing process?

b) What can go wrong post-closing?

c) Determine how to manage the anticipated problems and risks.

IV. **Use the techniques of interest-based negotiations and risk management analysis:**

a) What interests are the other side trying to advance or protect.

b) How can both sides advance their respective interests?

c) Define the risks the parties are trying to manager or allocate.

d) Focus on the problems and not the people; ensure that emotions do not play a large role.

e) Be creative; invent options for mutual gain.

f) Parties are much more likely to come to a mutually satisfactory outcome when their respective interests are met than they are when one side "wins."

V. **Draft a comprehensive Letter of Intent (LOI):**

a) Ensure that every important term is included in the LOI. Adding major deal terms later in the transaction can halt negotiations and allow parties to back-track on previously agreed to terms. This is where determining the client's expectations at an early stage will be beneficial.

b) LOIs help facilitate negotiations around major dealt points.

c) Determine which terms of the LOI will be binding and non-binding.

d) A good LOI can act as a shield against liability. See, e.g. Marketplace Holdings, Inc. v. Camellia Food Stores, Inc., 64 Va. Cir. 144 (Cir. Ct. 2004). In Marketplace, clear language that the parties did not intend the LOI to be binding protected a party who presumably changed its mind about whether to complete a transaction.

e) A good LOI can act as a sword to protect a party against unfair dealing. Again, see Marketplace Holdings, Inc., 64 Va. Cir. 144. In Marketplace a confidentiality provision and a non-solicitation provision were specifically made binding by the parties. The court held that the party alleging breach of these provisions had

pleaded sufficient facts to support its breach allegations under these provision, but not the remainder of the LOI, which as noted above was specifically non-binding.

VI. **Become the example of honesty, straight shooting, promise keeping, and sound analysis.**

a) For both sides.

b) Your goals should be to have everyone want to hire you when the transaction is finished.

c) Do not let people lie, ever, about anything.

d) Correct any fact mistakes.

e) Correct any misstatements or misinterpretations.

f) Uncorrected misinterpretations or assumptions can lead to big picture problems close to closing.

VII. **Do not allow back-tracking or backsliding.**

Document any concessions and tradeoffs. Then you can go back to the other side and show the other side that they already traded away whatever point they are trying to recover.

VIII. **Drafting the deal documents:**

a) Use plain direct language to state exactly what you mean on the critical points in the agreement. Use language carefully and know when to clear up ambiguity. In Galloway Corp. v. S.B. Ballard Constr. Co., 250 Va. 493 (1995), ambiguity in a contract was used to allow extrinsic evidence to the detriment of subcontractors in a "pay when paid" dispute.

b) Identify who will be responsible for drafting each document early in the process.

c) Identify the responsible parties in the closing checklist.

d) Set dates for completion of drafts and production of other documents and include these dates in the closing checklist.

e) It is important to hold all parties (including your deal team and your client) to all deadlines set in the closing checklist.

f) When sending documents subject to comment from multiple parties, send those documents in pdf form. Multiple parties revising word documents can get unwieldy.

g) Keep drafts of documents. Date every draft.

h) Keep track of comments made by each party.

i) When incorporating comments, explain why certain changes were or were not made. Explain why in writing.

IX. **Understand that surprises are bad for everyone:**

a) Get the issues on the table.

b) Do not be cute.

c) Tricks never work.

d) Consider the tax consequences (again).

X. **Be ready to say no for principled reasons:**

a) The other side will probably concede the point.

b) Be comfortable with the appropriate level of risk.

XI. **Prepare for the home stretch:**

a) Expect the final days of the deal leading up to closing to be difficult.

b) Know that there will be last minute problems.

c) Addressing big picture problems at the outset will eliminate last minute problems that may stall the deal.

Part 3: CRITICAL CONTRACT CLAUSES

Commercial attorneys spend their careers toiling with contracts of various types. Often the contracts are related to some form of transaction, purchase of goods, purchase of equipment, real estate, or corporate transactions. While there is no contract that can cover all situations, there are common elements that appear in most contracts. When armed with a thorough understanding of the transaction, an attorney can "win" the negotiation of the contract through the allocation of risks and drafting the key provisions to benefit the client. This Part 3 discusses several important contractual clauses, including indemnification, limitation of liability, and disclaimers of warranties.

I. Indemnification – Indemnification clauses are an integral part of a number of contractual agreements and may be utilized when a party (or all parties) to an agreement believe that one or more parties should be obligated to compensate the other party for losses or damages. Indemnification clauses are another tool to dictate and shift the liabilities of the respective parties and in some cases limited only to losses arising from third party claim. There are important distinctions between indemnification for third party claims and losses between the parties to the contract. In all cases, indemnification clauses are separate and distinct from other contractual recoveries between the parties and there can be contract liability without indemnification.

A. **Issues and Elements for Drafting Indemnification Clauses:**

1. **Determine if Indemnification is appropriate –** Although indemnification provisions are regularly suggested and proposed, it is not commercially reasonable to expect that indemnification will apply in all contracts. The relative bargaining strengths and positions of the parties will factor into this consideration.

2. **Identify the entity or person that has the obligation to indemnify –** The indemnified party (or indemnitee) is the entity or person entitled to protection, while the indemnifying party (indemnitor) will be responsible for payment. The obligation will depend on the nature of the agreement, such as a stock or asset purchase agreement, lease agreement, manufacturing agreement, construction contract, supply agreement, professional services agreement, or entity formation document to name just a few. In some agreements, such as lease agreements, the indemnification obligation may be mutual, but in transactional situations, typically the entity that is selling the stock or assets will have a duty to indemnify the purchaser. In other agreements, a customer or client may require an indemnification by a service provider or manufacturer.

3. **Think about what triggers indemnification and at what point the indemnified party be entitled to recover –** Indemnification is a recovery of losses, but the losses can arise from a breach of a representation and warranty (as discussed more fully below) or some other specific source of losses. Depending on the nature of the agreement, the indemnification obligation may only arise when there are third party claims for specific

matters. The agreement must specifically identify the situations in which the indemnification obligation will arise. Indemnification clauses may contain limits as to the timing of indemnification. For example, a common practice in commercial transactions is to agree upon a dollar value threshold that must be reached by either party before an indemnification obligation can be pursued. The threshold amount ensures that only meaningful losses and claims will be elevated to indemnification obligations. The threshold can be drafted in such a way that it functions like a deductible for which the indemnified party will be responsible for that initial amount or a first dollar indemnification obligation once the threshold is reached.

4. **Define the losses to be covered –** Defining what "Losses" are subject to reimbursement is critical in each agreement. An agreement may include a definition of "Losses" that is expansive and includes all damages, legal fees, etc. Some indemnification clauses will specifically exclude consequential, incidental, indirect, special, punitive, or exemplary damages, as well as lost profits, business, and goodwill. The definition of losses is always important, but should be carefully negotiated and drafted if only third party claims are to give rise to indemnification obligations.

5. **Agree upon limits –** All parties will want to understand the total exposure and the indemnifying party will push for caps on losses. In some situations, a party will be reluctant to place a limit on certain losses, such as those arising from intellectual property issues. In stock and asset transactions, it is typical to reserve some portion of the purchase price to satisfy indemnification obligations. The time duration of the indemnification obligation is also a significant limitation and may pressure an indemnified party to work hard to identify any potential claims as quickly as possible before the obligation expires. For example, if an indemnification obligation will remain for only one year after an agreement is put in place, a party may be more inclined to escrow a larger dollar amount, but on the other hand, a three-year indemnification period will cause the indemnifying party to continue to worry about risks for a number of years. Further, claims for indemnification can be limited by any applicable insurance recoveries or other proceeds so that an indemnified party is not unjustly enriched and allowed to recover twice for the same losses. Also bear in mind that Virginia law places some limitations on certain provisions of indemnification agreements (See e.g., Virginia Code §11-4.1 for construction agreements, or Virginia Code § 56-119, with respect to common carriers).

6. **Determine if any exclusion should apply –** In some situations, it may be appropriate for a party to identify some conduct by the indemnified party that will negate a claim for indemnification. The exclusions could include fraud or some forms of negligence.

7. **Outline a process for resolving indemnification claims –** If the indemnification obligation includes direct losses and not just third-party

claims, the process may be very different. Direct losses may be subject to the dispute resolution procedures, but when dealing with third party claims, decisions will need to be made about defending the claim and deciding the proper course of action or maybe that a claim should be settled. The indemnifying party should want the opportunity to control and defend the third party claim, subject to some oversight by the indemnified party.

8. **Use indemnification clause with other remedies –** The parties must decide if indemnification will be the sole recovery under an agreement, or if all other legal and equitable remedies will remain available. If indemnification is to be the sole and exclusive remedy, the agreement must expressly say so and the indemnified party must be sure that specified amounts or limitations will be sufficient to cover any unforeseen risks and damages.

B. **Example Indemnification Clause (Third-party claims only)**

Company shall defend, indemnify and hold harmless Customer and its officers, directors, employees, and agents from and against any and all claims, liability, losses, damages, expenses, settlement, or costs (including reasonable attorneys' fees and expenses), that Customers might incur in connection with any third-party claim, action, or proceeding arising out of or relating to (i) a breach of the confidentiality provisions, or (ii) the Company's gross negligence.

C. **Virginia Judicial Treatment of Indemnification Agreements**

1. *Am. Spirit Ins. Co. v. Owens,* 261 Va. 270 (2001); *Seaboard R.R. v. Richmond-Petersburg Tpk. Auth*., 202 Va. 1029 (1961) – Virginia courts apply the well-established principles of contract interpretation when construing indemnification agreements. "Where the terms of the contract are clear and unambiguous, we will construe those terms according to their plain meaning" (citing *Bridgestone/Firestone v. Prince William Square*, 250 Va. 402, 407 (1995).

2. *Virginia Electric & Power Co. v. Wilson*, 221 Va. 979, 981-982 (1981) – affirming that indemnity must grow out of a contractual relationship.

3. *C & P Telephone v. Sisson and Ryan, Inc*., 234 Va. 492 (1987) – Indemnification of losses resulting from beach not limited to third-party claimant.

II. Limitation of Liability – A limitation of liability reduces the financial risk posed by a contract. This places a "cap" on the amount of damages that could be claimed as a result of a breach of the contract.

A. <u>Issues and Elements for Drafting Limitation of Liability Clauses</u>:

1. **Apply to Types and/or Amounts** – The clause can limit the types of liability and the dollar amount of liability. For example, the limitation would only allow direct damages and excludes indirect damages. Sometimes the distinction between direct and indirect may not be clear, so it will be more effective to spell out the kinds of indirect damages, (for example, specifically exclude claims for lost profits).

2. **Reasonable Limitation** – Should the limitation apply to the contract value or some multiplied value of the contract? In services contracts, it is common to limit the dollar amount to the value over some prior period of time. Also need to consider insurance. If insurance will be available, is the recovery limited to value of insurance?

3. **Relate to Indemnification Clauses** – While all contract provisions must work together, limitation of liability is usually closely aligned with indemnification provisions. The parties will need to decide if indemnification claims should be subject to the limitation of liability. Questions to consider include: are indemnification claims limited to third-party claims? What about third-party claims for injury, death, and property damage?

4. **Conspicuous –** Under the Virginia Uniform Commercial Code, these provisions are to be conspicuous. Recommend using all CAPS, and/or **bold font**. Va. Code § 8.2-316.

5. **Exceptions –** Consider if it is appropriate to have exceptions to the limitation of liability. This can get confusing for the contracting parties as you are preparing an exception to a limitation clause. Typical exceptions include: third-party claims (indemnification), breach of confidentiality provisions, gross negligence, wilful misconduct, and fraud.

B. <u>Example Clauses</u>

1. **Limitation of types of potential liability** (Excluding potential liability for indirect damages):

IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND ARISING FROM THE USE OF OR FAILURE TO USE THE PRODUCT(S), WHETHER IN CONTRACT, WARRANTY, TORT, NEGLIGENCE, STRICT

LIABILITY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO LOSS OF PROFITS OR REVENUE, LOSS OF USE OF PRODUCT(S), DELAYS, OR CLAIMS OF CUSTOMERS OF PURCHASER OR OTHER THIRD PARTIES FOR SUCH OR OTHER DAMAGES.

2. **Limitations (or cap on amount of potential liability):**

SELLER'S LIABILITY ON ALL CLAIMS, WHETHER IN CONTRACT, NEGLIGENCE, TORT, STRICT LIABILITY, OR OTHERWISE FOR ANY LOSS OR DAMAGE ARISING OUT OF, OR CONNECTED WITH AN ORDER, OR FROM THE DESIGN OR MANUFACTURE OF PRODUCTS, SHALL IN NO CASE EXCEED THE PURCHASE PRICE.

III. Disclaimer of Warranties for Sale of Products/Services – These provisions are separate from representations and express warranties made by the parties:

A. <u>Issues and Elements for Drafting Disclaimer Clauses</u>

1. **Standard Commercial Practice** – The custom is to include disclaimers of all implied warranties. This will quantify and limit the potential risks of a contract.

2. **Express v. Implied** – Express warranties are affirmative promises about the products or services. However, implied warranties are those that are not mentioned. The two implied warranties created under the UCC are "merchantability" and "fitness for a particular purpose." Va. Code § 8.2-314 (Merchantability); Va. Code § 8.2-315 (Fitness for particular purpose).

3. **Remember the UCC –** The Virginia Uniform Commercial Code explicitly provides for modifications of warranties. Va. Code § 8.2-316.

B. <u>Example Clause</u> (disclaimer of implied warranties)

THIS WARRANTY IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES EXPRESSED OR IMPLIED, AT LAW OR IN EQUITY, WITH RESPECT TO THE PRODUCTS, ANY RELATED SERVICES OR LABOR OR THEIR CHARACTERISTICS, QUALITY OR PERFORMANCE, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT OF ANY INTELLECTUAL PROPERTY RIGHTS OF THIRD PARTIES, AND ANY AND ALL SUCH WARRANTIES AND REPRESENTATIONS ARE HEREBY DISCLAIMED.

IV. Practical Tips – These tips relate to the drafting and negotiation of indemnification, limitations of liability, and disclaimers:

A. Analyze transactions.

B. Analyze the relative bargaining power of each side of the transaction – Is Seller a manufacturer that is eager to make a sale? Does the Buyer have any other options other than the Seller?

C. Analyze the industry custom.

D. Draft and negotiate these terms based on the transaction and with an appreciation of all the potential risks.

E. From Buyer's perspective:

1. Desire broad express warranties.
2. Desire broad indemnification language.
3. Attempt to negotiate narrow or no limitation of liability or have broad exceptions to the limits of liability.
4. Consider if liquidated damages are important.

F. From Seller's perspective:

1. Desire narrow express warranties and no implied warranties.
2. Desire narrow indemnification – limited to third parties and those items that damages (injuries and property damage) for which it is likely to have insurance.
3. Negotiate for a limitation of liability with a cap on damages and no or relatively few exclusions.
4. Consider if liquidated damages are acceptable and preferred as the buyer's remedy for late delivery.

How the General Assembly and Courts Make Law and Administer Justice

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Gregory D. Habeeb

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HOW THE GENERAL ASSEMBLY AND COURTS MAKE LAW AND ADMINISTER JUSTICE

JUDICIAL INTERPRETATION v. LEGISLATIVE RESPONSES "The Wars of the Roses"

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I. INTRODUCTION

The Wars of the Roses were a series of wars for control of the throne of England fought between supporters of two rival branches of the royal House of Plantagenet: the House of Lancaster (associated with a red rose), and the House of York (whose symbol was a white rose).

The movie "War of the Roses" was a 1989 dark comedy starring Michael Douglas, Kathleen Turner, and Danny DeVito. It chronicled the destructive separation of a wealthy couple – the Roses – each bitterly determined to maintain possession of the opulent marital home in the divorce. The resulting "war" of these Roses made a great cinematic splash in one of the 1980's most popular films.

Some commentators have described the struggle between the judicial and legislative branches of government either as a war or a comedy. Perhaps neither description is accurate, or perhaps both are fitting. Nevertheless, whatever the viewpoint, the doctrine of separation of powers provides the judiciary and the legislature each with a unique role that can place the two branches of government at odds.

Attorneys need to be mindful of the doctrine of separation of powers and its effect on questions of statutory interpretation.

II. SEPARATION OF POWERS

A. "The Constitution of Virginia declares fundamental powers in three branches of government." *Moreau v. Fuller*, 276 Va. 127, 136, 661 S.E.2d 841, 846 (2008). Executive power is vested in a Governor, Va. Const. art. V, §1; legislative power is vested in a General Assembly, Va Const. art. IV, § 1; and judicial power is vested in a Supreme Court and in such other courts as the General Assembly may establish from time to time. Va. Const. art. VI, § 1.

B. Article III, § 1 guarantees the separation of these powers – the "legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others." Va. Const. art. III, § 1.

C. The unique roles allocated to the three departments of government are central to the separation of powers. *Moreau*, 276 Va. at 136, 661 S.E.2d at 846. For example, the Governor and the judiciary cannot assume the function of statutory enactment; and the Governor and the General Assembly cannot assume or abridge the essential function of the judiciary to "render[] judgment in matters properly before it." *Id*.

III. STATUTORY INTERPRETATION – PREROGATIVE OF THE JUDICIARY

A. "[P]ure statutory interpretation is the prerogative of the judiciary." *Sims Wholesale Co. v. Brown-Forman Corp.*, 251 Va. 398, 404, 468 S.E.2d 905, 908 (1996). "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60, 73 (1803).

Statutory interpretation is a pure question of law that is reviewed de novo on appeal. *Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse Servs.*, 268 Va. 187, 192, 597 S.E.2d 202, 204 (2004).

B. The separation of powers doctrine, however, places boundaries on the judiciary's statutory interpretation. In accordance with the doctrine, the primary objective of statutory interpretation is always to ascertain and give effect to the legislature's intent. *See Melanson v. Commonwealth*, 261 Va. 178, 183, 539 S.E.2d 433, 435 (2001).

1. The legislative intent must be "deduced from the words used, unless a literal interpretation would result in a manifest absurdity." *Crawford v. Haddock*, 270 Va. 524, 528, 621 S.E.2d 127, 129 (2005). When a statute's text is "clear and unambiguous, courts may not interpret [it] in a way that amounts to a holding that the legislature did not mean what it actually has expressed. In other words, courts are bound by the plain meaning of clear statutory language." *Id.*

2. Courts must "presume that the legislature chose, with care, the words it used when it enacted the relevant statute," *Zinone v. Lee's Crossing Homeowners Ass'n*, 282 Va. 330, 337, 714 S.E.2d 922, 925 (2011); and "that the legislature says what it means and means what it says." *In re Woodley*, 290 Va. 482, 491, 777 S.E.2d 560, 565 (2015). Courts must determine

"the legislative intent by what the statute says and not by what [they] think it should have said." *Carter v. Nelms*, 204 Va. 338, 346, 131 S.E.2d 401, 406-07 (1963).

3. If a statute is ambiguous – subject to more than one interpretation – courts are required to "apply the interpretation that will carry out the legislative intent behind the statute." *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007).

4. Courts assume that statutory amendments are purposeful and necessary. Courts also presume that the legislature acts with full knowledge of the law as it stood when it amends a statute. *See Cape Henry Towers, Inc. v. Nat'l Gypsum Co.*, 229 Va. 596, 600-601, 331 S.E.2d 476, 479 (1985).

5. "[A]ll actions of the General Assembly are presumed to be constitutional." *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 52, 392 S.E.2d 817, 820 (1990). Courts must construe a statute "in such a manner as to avoid a constitutional question wherever this is possible." *Eaton v. Davis*, 176 Va. 330, 339, 10 S.E.2d 893, 897 (1940).

6. Courts presume that statutes are not to be intended to abrogate the common law. "[A] statutory provision will not be held to change the common law unless the legislative intent to do so is plainly manifested. Statutes in derogation of the common law are strictly construed and not to be enlarged in their operation by construction beyond their express terms. . . . When an enactment does not encompass the entire subject covered by the common law, it abrogates the common-law rule only to the extent that its terms are directly and irreconcilably opposed to the rule." *Isbell v. Commercial Inv. Assocs.*, 273 Va. 605, 613-614, 644 S.E.2d 72, 75 (2007) (internal quotation marks and citations omitted).

7. Criminal laws are construed strictly against the Commonwealth. *See Harris v. Commonwealth*, 274 Va. 409, 415, 650 S.E.2d 89, 92 (2007).

8. Remedial statutes, such as the Workers' Compensation Act, are entitled to a liberal construction. *See Morris v. Morris*, 238 Va. 578, 584, 385 S.E.2d 858, 862 (1989).

IV. STATUTORY ENACTMENT – PREROGATIVE OF THE LEGISLATURE

A. The legislature determines matters of policy through its statutory enactments. *See Ligon v. County of Goochland*, 279 Va. 312, 317, 689 S.E.2d 666, 668-69 (2010). The General Assembly's legislative power, however, is always subject to the "paramount authority" of the Constitution of the United States and the Constitution of Virginia, and "may not violate rights secured or guaranteed" by either constitution. *Mugler v. Kansas*, 123 U.S. 623, 663 (1887); *see also S. Ry. Co. v. Commonwealth*, 159 Va. 779, 787, 167 S.E. 578, 580 (1933).

B. When the legislature concludes that a court's interpretation of a statute is erroneous, the legislature can amend the relevant statute and, thus, affect the outcome of future cases. *See, e.g.*, *Cape Henry Towers*, 229 Va. at 599-602, 331 S.E.2d at 478-80.

C. As with the judiciary, the doctrine of separation of powers means that the legislature must enact statutes in accord with certain principles.

1. When the General Assembly amends and reenacts a statute, a "reenacted" statute is not applied retroactively unless the bill or act of assembly "explicitly and unequivocally meets the requirements of" Virginia Code § 1-238 (formerly Virginia Code §1-13.39:3). *Berner v. Mills*, 265 Va. 408, 413, 579 S.E.2d 159, 161 (2003). Virginia Code § 1-238 states:

> "Reenacted," when used in the title or enactment of a bill or act of the General Assembly, means that the changes enacted to a section of the Code of Virginia or an act of the General Assembly are in addition to the existing substantive provisions in that section or act, and *are effective prospectively unless the bill expressly provides that such changes are effective retroactively on a specified date*. (Emphasis added.).

2. When the General Assembly amends a statute, it is presumed that it intended to effect a substantive change in the law. *W. Lewinsville Heights Citizens Ass'n v. Bd. of Supervisors*, 270 Va. 259, 265, 618 S.E.2d 311, 314 (2005). However, there is also "a presumption that a recodified statute does not make a substantive change in the former statute unless a contrary intent plainly appears in the recodified statute." *Waldrop v. Commonwealth*, 255 Va. 210, 214, 495 S.E.2d 822, 825 (1998).

3. When the General Assembly acts in an area in which one of Virginia's appellate courts has already spoken, the General Assembly is presumed to know the law as the court has stated it and to acquiesce therein. If the General Assembly intends to countermand the appellate decision, it must do so explicitly. *Weathers v. Commonwealth*, 262 Va. 803, 805, 553 S.E.2d 729, 730 (2001).

4. "[T]he General Assembly is presumed to have knowledge of the Attorney General's interpretation of statutes, and the General Assembly's failure to make corrective amendments evinces legislative acquiescence in the Attorney General's interpretation." *City of Winchester v. Am. Woodmark Corp.*, 250 Va. 451, 458, 464 S.E.2d 148, 153 (1995).

5. When the General Assembly enacts language substantially similar to that of another jurisdiction's regulation, a presumption arises that the legislature intended to adopt the interpretation placed upon the language by the other promulgating authority. *Va. Dep't of Labor & Indus. v. Westmoreland Coal Co.*, 233 Va. 97, 104, 353 S.E.2d 758, 763 (1987).

V. THE WARS – LEGISLATIVE RESPONSES TO JUDICIAL DECISIONS

A. ***Thorsen v. Richmond SPCA*, 292 Va. 257, 786 S.E.2d. 453 (2016)**

The Richmond SPCA ("RSPCA") sued Attorney Thorsen for malpractice. The RSPCA claimed that it was a third-party beneficiary of the attorney-client relationship between Thorsen and Alice Dumville.

In 2003, Thorsen prepared Dumville's will. At that time, Dumville was 43 years old, and her mother was alive. Dumville instructed Thorsen to draft a will conveying all of her property to her mother if her mother survived her, but if her mother predeceased her, then the RSPCA would receive Dumville's estate.

Dumville died in 2008, with her mother having predeceased her. The estate was valued at over $600,000. However, Thorsen had made a drafting error, which meant that the RSPCA was only entitled to the tangible personal property in the estate, which was valued at approximately $70,000. The bulk of the estate, which was the intangible personal property, passed to Dumville's heirs at law.

Within three years of Dumville's death, the RSPCA filed a malpractice action against Thorsen. Thorsen filed a plea in bar alleging that the three-year statute of limitations had expired. The trial court held that the statute of limitations had not expired, and

that the RSPCA was a third-party beneficiary of the attorney-client relationship between Thorsen and Dumville. At trial, the parties stipulated that Thorsen had a duty to incorporate Dumville's intent into her will accurately and that he did not do so as to the disposition of real property to the RSPCA. The trial court entered judgment for the RSPCA.

Thorsen appealed to the Supreme Court of Virginia, which affirmed the trial court's decision.

The Supreme Court first held that Virginia Code § 55-22 did not apply to an oral contract between an attorney and a testator. That statute addresses when a person not a party may take or sue under an instrument. Although the statute applies to written instruments, it does not abrogate the common law principle that third-party beneficiaries may sue upon oral contracts.

Second, the Court held that the RSPCA had standing to sue as a third-party beneficiary. In order to proceed on the third-party beneficiary contract theory, the party claiming the benefit must show that the parties to a contract clearly and definitely intended to confer a benefit upon him; incidental beneficiaries do not have standing. Whether a residuary beneficiary is a third-party beneficiary is a fact-intensive question. Dumville clearly informed Thorsen of her intention to designate the RSPCA as her sole beneficiary in the event that her mother predeceased her. Thus, the facts established that the RSPCA became an intended beneficiary of the attorney-client contract.

Third, the Court held that the statute of limitations did not begin to run until Dumville died because Dumville could have changed her will during her lifetime and the RSPCA did not suffer any harm until Dumville died. As the action was brought within the three year statute of limitations for oral contracts, it was timely filed.

Justice McClanahan dissented. She reasoned that the RSPCA lacked standing to sue for breach of the legal services agreement between Dumville and Thorsen because the rule of strict privity in legal malpractice actions has not been abolished in Virginia, and "[t]he determination of whether to abolish the common law privity requirement is a policy decision that should be made by the General Assembly, not this Court."

Legislative response to *Thorsen*

In *Thorsen*, the General Assembly amended Virginia Code § 64.2-520 (Action for goods carried away, or for waste, destruction of, or damage to estate of decedent), and enacted a new statute, Virginia Code § 64.2-520.1 (Action for damages from legal malpractice concerning estate planning).

The new statute provides that the statute of limitations for legal malpractice related to estate planning is five years if the legal representation was based on a written contract and three years if the legal representation was based on an unwritten contract. Va. Code § 64.2-520.1(C). Further, the accrual date for such an action is the date of completion of the representation during which the malpractice occurred. Va. Code § 64.2-520.1(A). The new law also provides that a person who is not a party to the representation shall have standing to maintain such an action only if there is a "written agreement between the individual and the defendant that expressly grants standing to a person who is not a party to the representation by specific reference to this subsection." Va. Code § 64.2-520.1(B). The new statute also recodifies the former provisions of Virginia Code § 64.2-520 that (1) "no such action shall be based upon damages that may reasonably be avoided or that result from a change of law subsequent to the representation upon which the action is based" (Va. Code § 64.2-520.1(D)) and (2) that the action for malpractice survives under Code § 8.01-25 (Va. Code § 64.2-520.1(E)).

B. ***Evans v. Evans*, 290 Va. 176, 772 S.E.2d 576 (2015)**

Douglas Evans and Wanda Evans, husband and wife, obtained title to real property, known as the Fairway Drive property, in 1973 as tenants by the entireties with right of survivorship. In 1976, Douglas executed a general warranty deed purporting to convey to Wanda "all his interest" in the Fairway Drive property in exchange for "love and affection" and "ten dollars, cash-in-hand paid." Douglas was the sole grantor in the 1976 deed, and Wanda was named only as the grantee.

The 1976 deed was not recorded in the land records until 1979. There was no evidence to establish whether, prior to its recordation, Wanda accepted physical delivery of the 1976 deed or caused the deed to be recorded.

Douglas and Wanda had three sons, William Evans, Lloyd Evans, and Wayne Evans. Wayne had two children, Lisa Evans and Jason Evans. In 1993, Wanda executed a trust agreement creating a revocable inter vivos trust. The pertinent trust provisions distributed Wanda's assets upon her death in this manner: (1) $25,000 each to Lisa and Jason; (2) a life estate to Douglas in the Fairway Drive property, if he survived Wanda; and (3) the remainder of the assets, including the Fairway Drive property, to William.

Contemporaneous with the creation of the trust, Wanda executed a deed purporting to convey to herself as trustee of the trust "all her interest in" the Fairway Drive property. The 1993 deed identifies the property as "the same interest in real estate conveyed to" Wanda by the deed from Douglas.

Wanda died in 1994. Douglas lived in the Fairway Drive property until his death in 2012. Thereafter, William, in his capacity as trustee of the trust, filed a declaratory judgment action against Wayne, individually and as personal representative of

Douglas' estate, Lloyd, Lisa, and Jason, seeking to quiet title in the Fairway Drive property.

The circuit court concluded that the 1976 deed failed to show the requisite intent to jointly convey the Fairway Drive property to Wanda in fee simple. Because that deed was ineffective, the 1993 deed was likewise ineffective to convey any interest to the trust. The court entered judgment for Wayne, and the Supreme Court of Virginia awarded an appeal to William.

The issue on appeal, one of first impression, was whether "under any circumstance one spouse (the 'grantor-spouse') may effectively convey all of his or her interest in property held in a tenancy by the entirety to the other spouse (the 'grantee-spouse') who does not join in the deed as grantor." Noting that the best practice was for both spouses to join as grantors in such a deed, the Supreme Court, nevertheless, concluded that there was sufficient evidence of the grant-spouse's intent to make the conveyance, and of the grantee-spouse's voluntary acceptance of the conveyance.

Douglas' unilateral execution of the 1976 deed established his intent to divest himself of his tenancy by the entirety ownership in the Fairway Drive property. Wanda's execution of the 1993 deed and trust was evidence of her affirmative intent to accept the 1976 deed and her consent to dissolve the tenants by the entireties estate to create her fee simple ownership of the property. The evidence thus established the mutual consent of Douglas and Wanda to convert their tenants by the entireties estate in the Fairway Drive property to the fee simple ownership by Wanda. Therefore, the Supreme Court reversed the judgment of the circuit court, holding that the 1976 and 1993 deeds were each effective to accomplish its respective objective.

Legislative response to *Evans*

Although *Evans* did not involve any statutory interpretation by the circuit court or the Supreme Court, the General Assembly amended Virginia Code § 55-20.2 in response to the *Evans* decision. That statute pertains to tenants by the entireties in real and personal property. The General Assembly added subsection B, which states:

> Except as otherwise provided by statute, no interest in real property held as tenants by the entireties shall be severed by written instrument unless the instrument is a deed signed by both spouses as grantors.

The amendment negates any precedential value of the decision in *Evans*. A severance of real property held as tenants by the entireties can now be accomplished only by a deed executed by both spouses as grantors. The amendment does not address severance of a tenants by the entireties estate in personal property.

C. ***Chacey v. Garvey*, 291 Va. 1, 781 S.E.2d 357 (2015)**

This case involved the interpretation of Virginia Code § 55-332, which sets forth the procedure for determining damages in cases involving timber trespass.

Valerie Garvey, and Allan and Susan Chacey owned adjacent parcels of real property. The Chaceys had an easement over Garvey's property for purposes of ingress and egress to their property.

In 2012, Garvey filed a complaint against the Chaceys and a forestry consulting company, alleging timber theft, trespass, and property damage. She also sought an injunction against the Chaceys and prescriptive termination of the easement.

At trial, Garvey sought damages for, among other things, "legal costs," including attorney's fees, that she claimed were directly associated with the trespass. The Chaceys objected to evidence about Garvey's attorney's fees. The trial court held that the term "legal costs" in Virginia Code § 55-332 included attorney's fees and awarded Garvey $165,135 in "directly associated legal costs incurred by [Garvey] as a result of the trespass, including attorney's fees, in the amount of $150,000.

On appeal to the Supreme Court of Virginia, one of the Chaceys' assignments of error challenged the trial court's ruling that the phrase "directly associated legal costs" in Virginia Code § 55-332(B) included attorney's fees. The Supreme Court agreed and reversed the trial court's award of attorney's fees.

Because an award of attorney's fees is in derogation of common law, the Court strictly construed the plain language of that statute. Noting that the Code of Virginia contains more than 200 instances where the General Assembly has authorized a prevailing party to recover "attorney's fees and costs" or "costs and attorney's fees," the Court concluded that the General Assembly did not include the right to recover attorney's fees in crafting Virginia Code § 55-332(B). Thus, Garvey was not entitled to recover attorney's fees as part of the directly associated legal costs incurred as a result of the trespass.

Legislative response to *Chacey*

Prior to its amendment in 2016, Virginia Code § 55-332(B) provided that "[a]ny person who (i) severs or removes any timber from the land of another without legal right or permission or (ii) authorizes and directs the severing or removal of timber or trees from the land of another without legal right or permission shall be liable to pay to the rightful owner of the timber" certain damages including "any directly associated legal costs incurred by the owner of the timber as a result of the trespass." The General Assembly amended that subsection to include attorney fees. Now, a person liable for the trespass must pay "directly associated legal costs, *and reasonable attorney fees* incurred by the owner of the timber as a result of the trespass." Va. Code § 55-332(B) (emphasis added).

D. ***Allstate Prop. & Cas. Ins. Co. v. Ploutis*, 290 Va. 226, 776 S.E.2d 793 (2015)**

In this breach of contract action, Jennifer Ploutis sought payment of losses claimed under her homeowner's insurance policy issued by Allstate Property and Casualty Insurance Company. The loss occurred in March 2010, and Ploutis filed a complaint in March 2012, within two years of the loss. Upon Ploutis' request, the circuit court entered an order of nonsuit in February 2013.

Ploutis re-filed her complaint in August 2013, more than two years after the damage was sustained. The Allstate insurance policy required that actions be brought within two years "after the inception of loss or damage." Allstate filed a demurrer, arguing the Ploutis failed to comply with the conditions precedent under the policy.

The circuit court overruled the demurrer on the basis that the limitations period was tolled pursuant to Virginia Code § 8.01-229(E)(3), which tolls "the statute of limitations" with regard to nonsuited actions. The circuit court reasoned that the policy language establishing the limitations period was "substantively" the same as that included in the Virginia standard policy form set forth in Virginia Code § 38.2-2105(A). Thus, the circuit court concluded that the limitations period was "the Virginia statute of limitations," and therefore subject to tolling.

On appeal to the Supreme Court of Virginia, Allstate argued that the period of limitation set forth in the policy was not a statute of limitations subject to the tolling provisions of Virginia Code § 8.01-229(E)(3). The Supreme Court agreed and reversed the circuit court's judgment.

In its prior decision in *Massie v. Blue Cross & Blue Shield of Virginia*, 256 Va. 161, 500 S.E.2d 509 (1998), the Court had held that the "plain meaning" of the tolling provision in Code § 8.01-229(E)(3) meant that after a voluntary nonsuit, only a "statute of limitations" was tolled, not a "contractual period of limitations." Applying *Massie*, the Court explained that the circuit court's ruling in Ploutis' case arose from its faulty premise that Virginia Code § 38.2-2105(A) was "the Virginia statute of limitations" for fire insurance policies. The Court concluded that neither Virginia

Code § 38.2-2105 nor the contractual period of limitations in Allstate's policy was a "statute of limitations" within the meaning of Virginia Code § 8.01-229(E)(3).

Legislative response to *Ploutis*

Although the Supreme Court decided *Massie* in 1998, the General Assembly did not amend Virginia Code § 8.01-229(E)(3) until after the decision in *Ploutis*. The 2016 amendment made the tolling provision applicable to both a statute of limitations and a contractual limitation period. As pertinent, subsection (E)(3) now provides:

> If a plaintiff suffers a voluntary nonsuit as prescribed in [Virginia Code] § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, *regardless of whether the statute of limitations is statutory or contractual*, and the plaintiff may recommence his action within six months from the date of the order entered by the court . . . .

Va. Code § 8.01-229(E)(3) (emphasis added).

E. ***Wroblewski v. Russell*, 63 Va. App. 468, 759 S.E.2d 1 (2014)**

In this suit for divorce, the wife filed a complaint requesting, in part, "support and maintenance, *pendente lite*, as well as permanent periodic support and maintenance, lump-sum support, and/or a reservation to petition for same *in futuro*. The husband filed an answer and counterclaim. The wife's answer to the husband's counterclaim did not include a request for spousal support.

At the conclusion of the wife's evidence at trial, the circuit court granted the husband's motion to strike the wife's bill of complaint because the wife failed to offer any evidence to support entry of a final decree of divorce in her favor. The circuit court granted the husband a divorce based on his counterclaim. On the issue of support, the husband argued that, because the court granted his motion to strike the wife's complaint, it should likewise strike the wife's request for spousal support. The circuit court, however, concluded it would consider the wife's request for spousal support. The court reasoned that "[n]either case law nor the applicable statute require[s] the *prevailing* party to raise the issue in its pleading, only that at least one of the parties raise the support issues to allow the subject to be adjudicated."

On appeal, the Court of Appeals of Virginia reversed the circuit court's judgment awarding the wife spousal support. Citing established case law, the Court explained that a court cannot base its judgment upon a right that has not been pleaded and claimed. The circuit court's decision to strike the wife's complaint had the effect of withdrawing any claims rooted in that pleading from consideration by the court. The wife's request for spousal support abated with the dismissal of her complaint.

Legislative response to *Wroblewski*

The General Assembly amended Virginia Code § 20-107.1, which pertains to decrees for maintenance and spousal support. Subsection A now states that a trial court "may make such further decree as it shall deem expedient concerning the maintenance and support of the spouses, *notwithstanding a party's failure to prove his grounds for divorce, provided that a claim for support has been properly pled by the party seeking support.*" Va. Code § 20-107.1(A) (emphasis added).

Although this amendment is limited to matters of maintenance and spousal support, does it signal the General Assembly's disagreement with other cases in which the Supreme Court has denied specific relief because a party failed to request such relief? *See, e.g.*, *Jenkins v. Bay House Assocs., L.P.*, 266 Va. 39, 43, 581 S.E.2d 510, 512 (2003) ("A litigant's pleadings are as essential as his proof, and a court may not award particular relief unless it is substantially in accord with the case asserted in those pleadings.").

VI. FUTURE WARS

A. The authority of trial courts to defer dispositions in criminal cases has been the subject of several cases in the Supreme Court of Virginia and the Court of Appeals of Virginia. *See, e.g.*, *Starrs v. Commonwealth*, 287 Va. 1, 752 S.E.2d 812 (2014); *Hernandez v. Commonwealth*, 281 Va. 222, 707 S.E.2d 273 (2011); *Moreau*, 276 Va. 127, 661 S.E.2d 841; *White v. Commonwealth*, 67 Va. App. 599, 798 S.E.2d 818 (2017); *Harris v. Commonwealth*, 63 Va. App. 525, 759 S.E.2d 29 (2014); *Taylor v. Commonwealth*, 58 Va. App. 435, 710 S.E.2d 518 (2011).

A petition for appeal in *White* is pending in the Supreme Court of Virginia.

In the 2012 legislative session, a bill was introduced in response to the decision in *Hernandez*. The bill proposed to add a new section to the Code of Virginia, stating:

> No court shall have the authority, upon a plea of guilty or nolo contendere or after a plea of not guilty, when the facts found by the court would justify a finding of guilty, to defer proceedings or to defer entry of a final order of guilty or to dismiss the case upon completion of terms and conditions unless (i) such deferred judgment is provided for by statute or (ii) all parties agree to such deferred judgment.

The bill did not pass.

B. In *Manu v. GEICO Cas. Co.*, 798 S.E.2d 598, 2017 Va. LEXIS 73 (2017), the Supreme Court of Virginia held that "a duty of good faith arises in the context of UM [uninsured motorist] policies only after a judgment has been obtained . . . . [Virginia] Code § 8.01-66.1(D)(1) does not create a duty for UM carriers to settle a case prior to trial, but rather creates a remedy for the conduct of UM carriers that refuse in bad faith to pay once the insured has obtained judgment."

Virginia Code § 8.01-66.1(D)(1) states:

> 1. Whenever a court of proper jurisdiction finds that an insurance company . . . denies, refuses or fails to pay to its insured a claim of more than $3,500 in excess of the deductible, if any, under the provisions of a policy of motor vehicle insurance issued by such company to the insured and it is subsequently found by the judge of a court of proper jurisdiction that such denial, refusal or failure to pay was not made in good faith, the company shall be liable to the insured in the amount otherwise due and payable under the provisions of the insured's policy, plus interest on the amount due at double the rate provided in [Virginia Code] § 6.2-301 from the date that the claim was submitted to the insurer or its authorized agent, together with reasonable attorney's fees and expenses.

Will the General Assembly amend this statute to effect a change in future cases similar to *Manu?*

C. The admissibility of expert testimony pursuant to Virginia Code § 8.01-401.1 was the subject of the decision in *Toraish v. Lee*, 797 S.E.2d 760, 2017 Va. LEXIS 61 (2017). There, the Supreme Court of Virginia concluded that an expert's testimony was not admissible because it was based on an assumption that had no basis in fact.

Virginia Code §§ 8.01-401.1 and -401.3, and the admissibility of expert testimony has been the subject of several decisions in recent years. *See, e.g.*, *Holiday Motor Corp. v. Walters*, 292 Va. 461, 790 S.E.2d 447 (2016); *Hyundai Motor Co., Ltd. v. Duncan*, 289 Va. 147, 766 S.E.2d 893 (2015).

Much discussion has occurred with regard to whether the General Assembly will respond with legislative changes.

VII. PRACTICE POINTERS

A. When a case involves interpretation of a statute, an attorney should:

1. Read the statute. Read the statute. Then, read the statute. Ideally, you would have access to an annotated code; however, the plain text of the code is available online as is the federal code.

2. Look at the legislative history and determine if the General Assembly has amended the statute, and if so, was the amendment in response to a particular court decision, *see, e.g.*, *J.W. Woolard Mech. & Plumbing, Inc. v. Jones Dev. Corp.*, 235 Va. 333, 336-39, 367 S.E.2d 501, 503-05 (1988); or to a study by the Virginia Code Commission. *See, e.g.*, *Revi, LLC v. Chicago Title Ins. Co.*, 290 Va. 203, 209-13, 776 S.E.2d 808, 811-13 (2015).

3. Pick out the key language responsive to your situation.

4. Keep in mind the question you are trying to answer.

5. Check for definitions of relevant terms. Sometimes a term will be defined within the same code section; however, many code sections are passed as part of an act or piece of legislation that contains a separate "definitions" section.

6. Research federal or state case law to see if any court has interpreted the code section or any word, phrase or term at issue in your fact pattern.

7. Determine if you are dealing with a Virginia statute that is administered by an agency. If so, check the Virginia Administrative Code (VAC). The VAC is available online. The VAC contains 24 titles, from "Administration" to "Transportation and Motor Vehicles." The titles are then broken down into "agencies" and "chapters." Among other things, regulations may define or interpret terms. Regulations created by state agencies in accordance with the Administrative Process Act have the force of law, as long as they do not conflict with the enabling legislation passed by the General Assembly. *See Manassas Autocars, Inc. v. Couch*, 274 Va. 82, 87, 645 S.E.2d 443, 445-46 (2007). Similarly, federal regulations are contained in the Code of Federal Regulations ("CFR").

8. Determine if the relevant statute is administered by a state or federal agency. If so, check the opinions or rulings made by the agency. Most Virginia agencies have websites that allow text searches of opinions or rulings. Agency websites may have "Frequently Asked Questions" sites as well.

9. Remember that when the language of a statute is unambiguous, courts are bound by the plain meaning of the statutory language. *See Haislip v. S. Heritage Ins. Co.*, 254 Va. 265, 268, 492 S.E.2d 135, 137 (1997). The statute's plain meaning must be accepted without resort to extrinsic evidence and the rules of construction. *Ambrogi v. Koontz*, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982). However, "reference to the legislation printed in the Acts of Assembly upon enactment does not offend the well-established rule against considering rules of statutory construction, legislative history, or extrinsic evidence, which applies when the statue is clear and unambiguous." *Verizon Online LLC v. Horbal*, 293 Va. 176, 183, 796 S.E.2d 409, 412 (2017) (internal quotation marks omitted).

B. If the meaning of the statute remains unclear, ask whether the statute is ambiguous.

1. "Language is ambiguous if it admits of being understood in more than one way or refers to two or more things simultaneously. An ambiguity exists when the language is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness." *Brown v. Lukhard*, 229 Va. 316, 321, 324, 330 S.E.2d 84, 87 (1985).

2. When statutory language is ambiguous, courts may resort to extrinsic evidence and the rules of construction to determine legislative intent, which is the object of statutory construction. *Westmoreland Coal*, 233 Va. at 101-02, 353 S.E.2d at 762.

C. Certain rules of statutory construction apply when a statute is ambiguous.

1. When the General Assembly uses different words in a statute, the words are presumed to mean different things. *See Parker-Smith v. Sto Corp.*, 262 Va. 432, 439, 551 S.E.2d 615, 619 (2001). In contrast, when the General Assembly uses the same term in different sections of a statute, courts "give it the same meaning in each instance unless there is a clear indication the General Assembly intended a different meaning." *Eberhardt v. Fairfax Cnty. Emps. Ret. Sys. Bd. of Trs.*, 283 Va. 190, 195, 721 S.E.2d 524, 526 (2012). Also, when the General

Assembly employs "specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code," courts assume "that the difference in the choice of language was intentional." *Zinone*, 282 Va. at 337, 714 S.E.2d at 925.

2. If the definition of a relevant term is not provided in the statute, rely on a dictionary for the term's "commonly accepted" meaning. *Clark v. Strother*, 238 Va. 533, 541, 385 S.E.2d 578, 582 (1989).

3. The interpretation placed upon a statute by an administrative agency charged with the duty of construing and effectuating the statute may be given great weight, but a court does not defer to an administrative interpretation. *See Nielson Co. (US), LLC v. Cty. Bd. of Arlington Cty.*, 289 Va. 79, 88, 767 S.E.2d 1, 5 (2015). However, "the doctrine of administrative interpretation will not be allowed to change the plain meaning of the statute." *Commonwealth v. Appalachian Elec. Power Co.*, 193 Va. 37, 45, 68 S.E.2d 122, 126-27 (1951) (internal quotation marks omitted).

4. Although, "punctuation is said to be the most fallible of all standards by which to interpret a statute," in some instances it can be useful in determining legislative intent. *Harris v. Commonwealth*, 142 Va. 620, 624, 128 S.E. 578, 579 (1925). "[R]ules of grammar will not be permitted to defeat the purpose" of a statute. *Id.*

5. Generally, the word "shall" creates a mandatory requirement, whereas "may" is permissive. *But see Jamborsky v. Baskins, 247 Va. 506, 511, 442 S.E.2d 636, 638 (1994).*

6. *Expressio unius est exclusio alterius* – The expression or inclusion of one thing implies the exclusion of others. *FFW Enters. v. Fairfax Cty.*, 280 Va. 583, 590 n.4, 701 S.E.2d 795, 799 n.4 (2010).

7. *Ejusdem generis* – "[W]hen a particular class of persons or things is enumerated in a statue and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words. *Martin v. Commonwealth*, 224 Va. 298, 301, 295 S.E.2d 890, 892 (1982).

8. The rule of last antecedent means that, "[a]bsent a contrary intent, a qualifying word or phrase should be read as modifying only the last noun or phrase that immediately precedes it, i.e., the last antecedent." *Coffman v. Commonwealth*, 67 Va. App. 163, 168-69, 795 S.E.2d 178, 180 (2017).

9. A statute should be construed in light of the act, chapter or section as a whole. Courts interpret "the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal." *Va. Elec. & Power Co. v. Bd. of Cnty. Supervisors*, 226 Va. 382, 387-88, 309 S.E.2d 308, 311 (1983).

10. Courts construe statutes "in pari materia" or, of common subject matter, "in such a manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation." *Lucy v. Cty. of Albemarle*, 258 Va. 118, 129-30, 516 S.E.2d 480, 485 (1999).

11. If two statutes appear to be conflicting, they must be construed as harmonious to give effect to both, if possible. *Phipps v. Liddle*, 267 Va. 344, 346, 593 S.E.2d 193, 195 (2004).

VIII. CONCLUSION

The outcome of many cases turn on statutory interpretation. The roles of enacting legislation and interpreting statutes reflect the separate powers afforded the legislature and the judiciary. Each are bound by certain principles that guide the exercise of its respective constitutional authority.

The goal of statutory construction is always to determine and give effect to the legislature's intention. When that intention is apparent from the words used, i.e., the statute is not ambiguous, no other analysis is allowed. A court may resort to extrinsic evidence and rules of construction only when a statute is ambiguous.

An attorney must keep these general principles in mind when addressing the interpretation of a statute. Also, remember that when the General Assembly disagrees with a judicial determination, it can amend the relevant statute to affect the outcome of future cases.

So, is it a war or a comedy?

Speed Kills Criminal Prosecutions (Sometimes)

Thomas J. Bondurant, Jr.

8

SPEED KILLS CRIMINAL PROSECUTIONS (SOMETIMES)

Using The Federal Speedy Trial Act As An Offensive Tool in Criminal Defense

Thomas J. Bondurant, Jr.[1]

Gentry Locke Seminar
September 7, 2017

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime has been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause if the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Historical Underpinnings of the Federal Constitutional Right to a Speedy Trial:

1) Magna Carta Clause 40 ("[T]o no one will we deny or delay right or justice").

2) 14th century common law Commission of Jail Delivery (twice a year jails were emptied and prisoners were either convicted and punished or delivered from custody).

3) English Habeas Corpus Act of 1680.

4) Virginia Declaration of Rights of 1776.

Rationale for Constitutional Right to a Speedy Trial:

1) Prevent undue incarceration.

2) Minimize anxiety of public accusation.

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3) Preserve evidence (*e.g.* length of time may lead to loss of witnesses through death or loss of memory).

4) Persons in jail pending trial must be supported at considerable public expense.

5) Defendants on bond may commit other crimes.

6) Delay often retards the deterrent and rehabilitative effects of criminal law.

Practical Effect of the Constitutional Right to a Speedy Trial:

Except in the most extreme circumstances cases were never dismissed for a violation of the Constitutional Right to a Speedy Trial.

The Speedy Trial Act of 1974:[2]

1) In an attempt to put "teeth" in the Constitutional Right to a Speedy Trial, Congress passed the Speedy Trial Act of 1974 (*effective* 1980).

2) Under the Federal Speedy Trial Act it is mandated that a defendant has the right to go to trial within 70 days of his/her first appearance in Court after being indicted.

3) However, periods of time is excluded for 16 different reasons under the statute including pending motions yet to be ruled on; attorneys need time to prepare; any delay associated with a co-defendant; and, the always obscure finding by the Court that a continuance would serve the "ends of justice."

4) As a result there is rarely any federal criminal case, no matter how simple, in the WDVa (or anywhere else in the country) that is tried within the 70 day period.

5) The complicated cases are set out a year or more after the return of the Indictment.

6) Often it is the criminal defense lawyers who try to push the cases out as long as possible.

7) As one commentator observed: "The Speedy Trial Act of 1974 (STA) occupies a peculiar place in the criminal justice system. Very few pieces of

[2] *See Attachment A.*

> legislation can lay claim to protecting both the rights of criminal defendants and the public's significant interest in timely justice, while reducing the cost of judicial administration. The STA formerly accomplished these lofty aims by reducing pretrial delays. . . . both prosecutors and defense attorneys have subverted the STA's goals by routinely moving for continuances. . . . [The STA] has been effectively marginalized . . . . The reason this happens is simple: no actor in the criminal justice system has an incentive to follow it. Prosecutors and defense attorneys alike rely on delays in the system; and overburdened district courts . . ., have failed to enforce it as written. . . . The institutional inertia that pulls courts away from the STA's commands has led to a predictable result: an increase in pretrial delays, the very ill that Congress intended to cure with the Act.[3]

Pragmatic Timing Considerations of a Complex Federal Criminal Jury Trial:

1) The prosecution is never fully prepared to try a complicated, lengthy, multi-defendant case within 70 days of the Indictment – you know it will be continued for a year or more and it is extraordinarily difficult to schedule dozens or more witnesses in a 70 day window for an event that you know is not going to happen.

2) Defense counsel is often not prepared ***at all*** to try a complicated, lengthy, multi-defendant case within 70 days of the Indictment because most of these endeavors involve millions of documents in discovery and dozens or more if multi-faceted witnesses.

3) Both sides know that 90%+ of these cases will be resolved by a Plea Agreement and there is no need to do all this work in preparation for a Jury Trial.

4) Ever since I became a criminal defense lawyer in 2009 (after 30 years as a federal prosecutor) I always wanted to invoke the Speedy Trial Act and force the 70 day trial window, but every time I chickened out – deciding I had no desire to be accused of ineffective assistance of counsel for going to trial on a case that I did not understand the facts and had no real idea what the best defense was to be employed.

5) But this year in the case of *United States v. Beam Brothers, et.al.,* the perfect storm of events occurred which allowed a team of defense lawyers, including Justin Lugar and myself, to force the setting of a complicated 2+ month jury trial within the 70 day period.

[3] *See Attachment B*: Hopwood, *The Not So Speedy Trial Act*, 89 Washington Law Review 709 (2014).

Beam Brothers – The Perfect Storm:

Beam Brothers Trucking of Mt. Crawford, VA, was the largest contract trucking company for the United States Postal Service east of the Mississippi River – employing over 600 people and keeping approximately 500 trucks on the road covering up to 91 million miles per year. The primary owners were Jerry and Garland Beam with their son Sean as a minority owner and Operations Manager. The business began decades ago when they started hauling hay off their Rockingham County farm for the Ringling Brothers circus.

In 2010 the Beams became the focus of a regulatory investigation by the Department of Transportation concerning hours of service violations and by the Department of Labor on wage issues. Basically federal regulations require that a person only drive a commercial vehicle a certain number of hours in a certain time frame (commonly called 'Hours of Service" or "HOS") – the government said the Beams violated these regulations and then covered it up. Under a contract with the Postal Service federal regulations mandate that truck drivers are paid under a certain calculation – the government claimed the Beams thumbed their nose at this requirement. The investigation expanded to tax matters with the IRS and allegations of false statements in the United States Post Office fuel program.

The case took a criminal turn with a 2013 federal search warrant executed at the Beam Brothers headquarters. After much Grand Jury activity, the Beams were indicted on March 16, 2017 in a 126 count Indictment alleging various conspiracies, false statements, fraudulent schemes and money laundering concerning mostly regulatory violations of HOS under the Department of Transportation and the wage issues under Labor.[4] The sentencing guidelines for the individuals called for double digit years of incarceration. The Postal Service fuel allegations became the subject of a separate civil case. The tax allegations disappeared.

The most immediate concern for the Beams was a $40 million forfeiture count in the Indictment which caused the bank holding the Company's line of credit desirous of withdrawing the financing. The Beams thought if they could resolve the criminal case in a couple of months the bank would give them that leeway or they could arrange for alternate financing for such a short period of time. This was a family business for decades and they did not want to see it go under.

Although we had received no discovery, the decision was made to push for the 70 day Speedy Trial window for a jury trial. The clients wanted it for financial reasons, the lawyers felt confident because of the work we did in the couple of

[4] *See Attachment C.*

years prior to Indictment and because of the law firms involved we were able to rapidly staff the effort.

Justin Lugar and I represented Shaun Beam with Jenny DeGraw and Mia Yugo providing office legal support. My Legal Assistant Sharon Roseberry was tapped to organize and marshal the exhibits for all the defendants during trial. Toby Vick and Richard Cullen of McGuire Woods in Richmond, and their army of associates, represented Garland Beam. Senator Mark Obenshain of Harrisonburg represented Gerry Beam. Ralph Caccia and Kevin Muhlendorf of Wiley Rein in DC represented the COO and former AUSA and DEA Chief of Staff Mike Gill represented the Company.

On March 30, 2017 the defendants appeared for their Initial Appearance and demanded a Speedy Trial. The prosecution was stunned but gamely said that, if possible, they would be ready. After some haggling in the ensuing couple of weeks, the Jury Trial was set for June 5th – just shy of the 70 day window. On the calendar we were set for two months – but all the parties agreed we would go past that deadline.

Starting with the Initial Appearance and continuing until a few weeks before the June 5th trial date the government showered us with a little less than one terabyte of documents and approximately 40,000 audio recordings between the truck drivers and dispatchers. A terabyte of documents is equal to approximately 85 million pages of WORD documents and the 40,000 recordings ranged in length from 45 seconds to 20 minutes. From the return of the Indictment on March 16th until May 16th, I know Justin and I literally worked on this case seven days a week and I believe that is true for all the other lawyers. Also, we had to hire some contract lawyers for document review and to listen to the recordings.

While the defense was scrambling and not sure if we were ready for trial, it became clear that the government was not ready. To add to the government's misery we discovered the government had overlooked a potential flaw in its hours of service analysis that could cast great doubt on its computer generated evidence. The government simply did not have time to correct or come up with an excuse for its mistake. The defense also filed a prosecutorial misconduct motion for Grand Jury abuse that threw the prosecution off its game.

On May 8th the government finally cried "Uncle" and moved for a continuance of the jury trial.[5] In support of its Motion, the government argued 1) the case is so complicated it would be impossible for anyone to get ready in 70 days; 2) defense counsels' complicated pre-trial motions required more time for a response; and, 3) that Judge Urbanski needed more time to study the case in order to make the appropriate rulings.

[5] *See Attachment D.*

Defense counsel responded 1) the government had been investigating the Beams since 2010 and shame on them if they could not get ready for trial in seven years; 2) the defense had been working almost non-stop since March 16th, is ready for trial and it would be extremely prejudicial to start the process all over again a year from now; and, 3) defense counsel was confident that Judge Urbanski is capable of understanding the case and make the appropriate rulings.[6]

Judge Urbanski ruled that he was capable of understanding the case and make the appropriate rulings, and denied the government's motion for continuance.

Back in 2015 there were discussions about resolving the case with misdemeanor pleas for the individuals and a felony plea for the Company with a $6 million forfeiture. In the couple of years leading up to the Indictment we reiterated our misdemeanor offers, only to be met with derision by the prosecutors.

On May 12th the lawyers and clients met in Harrisonburg and decided to make the make the misdemeanor offer yet once again. As I was driving back that Friday afternoon I called the government at 3 PM and offered up my misdemeanors. Again I was told in no uncertain terms that I did not understand the importance of the case and the strength of the government's case and that it would never be settled with misdemeanors – the prosecution demanded felonies with periods of incarceration. At 5 PM I got a call back from the prosecution saying that perhaps misdemeanors could be a factor in the resolution of the matter.

From that Friday night until the next Monday afternoon there were intense negotiations on the phone and in person. On Tuesday, the Beams appeared in the Harrisonburg Federal Court and the individuals pled guilty to one count of misdemeanor conspiracy to violate a Department of Transportation regulation – it was agreed they would not be fined nor required to pay any restitution or forfeiture. The sentencing guideline range is the lowest possible at 0 to 6 months, which will probably result in one year or less of probation when they are sentenced in October.

The Company plead guilty to one felony with an agreed monetary penalty of approximately $3 million. The deal was structured so approximately 1/3 of that amount is subject to a tax write-off.

Postscript:

Despite their best efforts the bank pulled the finances due to the unjustified $40 million forfeiture allegation and the Beams were forced to sell this decades-old family business. I can't discuss the details but it was financially rewarding for the Beams.

[6] *See Attachment E.*

In a twist of irony, throughout their existence Beam Brothers Trucking was always ranked by the Department of Transportation in the top 10% of the safest trucking companies in the United States. The company the Beams were forced to sell to has been consistently ranked by the Department of Transportation in the bottom 10% regarding safety.

So, a family business was destroyed and I-81 is less safe.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION
MARCH 2017 SESSION

UNITED STATES OF AMERICA	:	**Criminal No. 5:17-CR-00007**
	:	
v.	:	
	:	
BEAM BROS. TRUCKING, INC.,	:	**In Violation of:**
BEAM BROS. HOLDING CORPORATION LLC,	:	**Title 18, United States Code, §§ 2(a), 2(b)**
GERALD C. BEAM,	:	**Title 18, United States Code, § 371**
GARLAND W. BEAM,	:	**Title 18, United States Code, § 1001**
SHAUN C. BEAM, and	:	**Title 18, United States Code, §§ 1343, 1349**
NICKOLAS KOZEL	:	**Title 18, United States Code, § 1519**
	:	**Title 18, United States Code, §§ 1956(h), 1957**

INDICTMENT

The Grand Jury charges that at all times material to this Indictment:

Introduction

Beam Bros. Trucking, Inc.

1. Defendant BEAM BROS. TRUCKING, INC. ("BEAM TRUCKING") was a privately held trucking company headquartered and with its principal place of business in Mount Crawford, Virginia in the Western District of Virginia. BEAM TRUCKING's primary business was the hauling of mail under contracts with the United States Postal Service ("USPS"). Over the past ten years USPS paid BEAM TRUCKING more than half a billion dollars to transport mail.

2. Defendant BEAM BROS. HOLDING CORPORATION, LLC ("BEAM HOLDING") was the sole owner of BEAM TRUCKING.

3. Defendants GERALD C. BEAM ("GERALD BEAM") and GARLAND W. BEAM ("GARLAND BEAM") were the primary owners of BEAM HOLDING. GERALD BEAM was

the President and Chief Executive Officer of BEAM TRUCKING, and GARLAND BEAM was its Vice-President and Chief Operating Officer. Defendant SHAUN BEAM was BEAM TRUCKING's Operations Manager, and Defendant NICKOLAS KOZEL ("KOZEL") was its Chief Financial Officer.

United States Postal Service

4. The USPS is an independent agency of the United States, explicitly authorized by the United States Constitution and responsible for providing postal service in the United States. To execute its mission, the USPS entered into contracts with private motor carriers ("motor carriers") to provide ground transportation and services related to the transportation of mail ("mail contracts").

5. Each mail contract required the motor carrier to, among other things:

a. Protect and safeguard the mail from loss, theft, or damage and to prevent unauthorized persons from having access to the mail;

b. To comply with all applicable federal, state and local laws and regulations;

c. To faithfully discharge all duties and obligations imposed by all applicable federal, state and local laws and regulations; and

d. To acknowledge and certify under penalty of law that it would comply with the provisions of the McNamara-O'Hara Service Contract Act of 1965, 41 U.S.C. §§ 351-358, and its implementing regulations ("SCA").

The USPS would not award a mail contract to a motor carrier who did not agree to these standard provisions.

6. While each mail contract specified the time of pick-up from and delivery to postal facilities, the motor carrier was solely responsible for ensuring that each trip/route driven by a

motor carrier's drivers was set up, scheduled and staffed so that the drivers could comply with all applicable federal, state and local laws and regulations.

Federal Motor Carrier Safety Administration and Federal Motor Carrier Safety Regulations

7. The Federal Motor Carrier Safety Administration ("FMCSA"), is an administration of the United States Department of Transportation ("DOT") responsible for regulating and providing safety oversight of companies operating commercial motor vehicles ("CMVs"). Its mission is to reduce crashes, injuries and fatalities involving CMV's and buses. Through powers delegated to it by the Secretary of Transportation, the FMCSA issues and enforces safety regulations to promote the safe operation of CMVs, to minimize dangers to the health of operators of CMVs and other employees whose employment directly affects motor carrier safety, and to ensure increased compliance with traffic laws and with the CMV safety and health regulations and standards prescribed under the law. 49 U.S.C. §§ 31131, 31136(a); see also, 49 U.S.C. § 1.87 (delegating authorities vested in the Secretary of Transportation to the FMCSA Administrator). The United States Congress specifically directed that the FMCSA's highest priority is "the furtherance of the highest degree of safety in motor carrier transportation." 49 U.S.C. § 113(b).

8. To implement this directive, the FMCSA prescribed highway safety regulations, 49 C.F.R. Parts 350-399 ("FMCSA Safety Regulations"). The FMCSA Safety Regulations impose a duty on all motor carrier employers and employees to "be knowledgeable of and comply with" FMCSA highway safety regulations. 49 C.F.R. §§ 390.3(e)(1), 392.1, and 396.1. In addition, the FMCSA Safety Regulations make it clear that whenever a duty or prohibition is imposed upon a driver, "it shall be the duty of the motor carrier to require observance of such duty or prohibition." 49 C.F.R. § 390.11. The FMCSA Safety Regulations also warn that "[a] person who violates the rules … may be subject to civil or criminal penalties." 49 C.F.R. § 390.37.

9. Under the FMCSA Safety Regulations:

a. "Motor carrier" means a person engaged in the transportation of goods or passengers for compensation or a person who provides transportation of property or passengers, by commercial motor vehicle, not for compensation. The term includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories and "any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it." 49 C.F.R. §§ 390.5, 390.5T; 49 U.S.C. § 13102(14), (15).

b. "Commercial motor vehicle" includes "any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle…has a gross vehicle weight rating or gross combination weight rating, or gross vehicle weight or gross combination weight, of 4,536 kg (10,001 pounds) or more, whichever is greater, and a "highway" includes "any road, street, or way, whether on public or private property, open to public travel." 49 C.F.R. § 390.5.

c. "No person shall aid, abet, encourage, or require a motor carrier or its employees to violate …" any FMCSA Safety Regulations. 49 C.F.R. § 390.13.

d. "No motor carrier, its agents, officers, representatives, or employees shall make or cause to make …. [a] fraudulent or intentionally false entry on any … record required to be used, completed, or retained, to comply with any requirement of

…" the FMCSA Safety Regulations. 49 C.F.R. § 390.35. This applies to CMV driver records of duty status required to be completed and maintained by 49 C.F.R. § 390.8.

e. "Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated." 49 C.F.R. § 392.2.

f. "No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle." 49 C.F.R. § 392.3.

g. "No motor carrier shall schedule a run nor permit nor require the operation of any commercial motor vehicle between points in such period of time as would necessitate the commercial motor vehicle being operated at speeds greater than those prescribed by the jurisdictions in or through which the commercial motor vehicle is being operated." 49 C.F.R. § 392.6.

h. "Every motor carrier shall require its drivers to report, and every driver shall prepare a report in writing at the completion of each day's work on each vehicle operated … The report shall cover at least the following parts and accessories: (i) Service brakes, including trailer brake connections; (ii) Parking brake; (iii) Steering mechanism; (iv) Lighting devices and reflectors; (v) Tires; (vi) Horn; (vii) Windshield wipers; (viii) Rear vision mirrors; (ix) Coupling devices; (x) Wheels and rims; (xi) Emergency equipment." 49 C.F.R. § 396.11. This inspection and report is often referred to as the "post-trip inspection."

i. "Before driving a motor vehicle, the driver shall: (a) Be satisfied that the motor vehicle is in safe operating condition; (b) Review the last driver vehicle inspection report; and (c) Sign the report, only if defects or deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed." 49 C.F.R. § 396.13.

j. No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order: service brakes (including trailer brake connections), parking (hand) brake, steering mechanism, lighting devices and reflectors, tires, horn, windshield wipers, rear-vision mirror or mirrors and coupling devices. 49 C.F.R. § 392.7. This inspection is often referred to as a "pre-trip inspection."

10. To fulfill its safety mission, as part of its safety regulations, the FMCSA restricts the hours of service for CMV drivers in 49 C.F.R., Part 395 ("FMCSA HOS safety regulations"). Under the FMCSA HOS safety regulations (49 C.F.R. § 395.3) no motor carrier "shall permit or require" any driver used by it to drive a property-carrying CMV, nor shall any such driver drive a property-carrying CMV unless the driver complies with the following requirements:

> (1) **Start of work shift.** A driver may not drive without first taking 10 consecutive hours off duty;
>
> (2) **14-hour period.** A driver may drive only during a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty. The driver may not drive after the end of the 14-consecutive hour period without first taking 10 consecutive hours off duty; and
>
> (3) **Driving time.** A driver may drive a total of 11 hours during the 14-hour period specified [above].

11. In addition, no motor carrier shall "permit or require" a CMV driver to drive a property-carrying CMV for any period after having been on duty 70 hours in any period of 8 consecutive days if the motor carrier operates CMVs every day of the week. 49 C.F.R. § 395.3(b).

12. The FMCSA HOS safety regulations require motor carriers and CMV drivers to make and retain a true and accurate written or electronic record of duty status (also known as "driver logs, "paper logs," "electronic logs" or "elogs") that includes the time each CMV driver spent "Driving," "On-duty not driving" (also known as "On-Duty"), in the "Sleeper Birth," or "Off-Duty" for each 24-hour period. 49 C.F.R. §§ 395.8, 395.15.

13. The FMCSA HOS safety regulations define "Driving time" (also known as "Driving") as "all time spent at the driving controls of a commercial motor vehicle in operation." 49 C.F.R. § 395.2.

14. The FMCSA HOS safety regulations define "On-duty time" to include "all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work." It further describes, in relevant part, on-duty time to include:

a. All time at a plant, terminal, facility, or other property of a motor carrier or shipper, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier;

b. All time inspecting, servicing, or conditioning any commercial motor vehicle at any time;

c. All driving time as defined in the term driving time;

d. All time in or on a commercial motor vehicle, other than time spent resting in or on a parked vehicle or time spent resting in a sleeper berth;

e. All time loading or unloading a commercial motor vehicle, supervising, or assisting in the loading or unloading, attending a commercial motor vehicle being loaded or unloaded, remaining in readiness to operate the commercial motor vehicle, or in giving or receiving receipts for shipments loaded or unloaded;

f. All time repairing, obtaining assistance, or remaining in attendance upon a disabled commercial motor vehicle;

g. All time spent providing a breath sample or urine sample;

h. Performing any other work in the capacity, employ, or service of, a motor carrier; and

i. Performing any compensated work for a person who is not a motor carrier.

49 C.F.R. § 395.2.

15. A motor carrier may permit driving a CMV while not on duty only for purely personal use under very limited circumstances, such as to drive "short distances from a driver's en route lodgings (such as en route terminals or motels) to restaurants in the vicinity of such lodgings." This would be shown on the driver's record of duty status as "Off-Duty time" (sometimes this is referred to as "Off-Duty Driving"). A driver may only drive a CMV while "Off-Duty Driving" when the driver is completely relieved from all work or any responsibility for performing work. In addition, "Off-Duty Driving" may never be used if the CMV is carrying any cargo. 49 C.F.R. § 395.8 (Regulatory Guidance for 49 C.F.R. § 395.8, Question 26, 62 Fed. Reg. 16,370, 16,426 (April 4, 1997).

16. Every CMV driver is required to certify that all entries on his/her record of duty status were true and correct. 49 C.F.R. §§ 395.8(f)(7), 395.15(h). Each driver is required to keep a copy

of his/her record of duty status for each day and the "previous 7 consecutive days which shall be in his/her possession and available for inspection when on duty." Each motor carrier is required to keep all driver records of duty status and all supporting documents for each driver it employed for a period of "not less than six months." 49 C.F.R. § 395.8(k).

17. The motor carrier has primary responsibility for ensuring compliance with the FMCSA Safety Regulations with regard to its own employees. The FMCSA Safety Regulations require that whenever a duty or prohibition is imposed on a driver, "it shall be the duty of the motor carrier to require observance of such duty or prohibition." In addition, the FMCSA HOS safety regulations specifically require that "no motor carrier shall permit or require any driver" to violate the FMCSA HOS safety regulations. 49 C.F.R. §§ 390.11, 395.3.

18. The FMCSA enforces the FMCSA Safety Regulations by conducting onsite motor carrier compliance investigations as well as through roadside compliance inspections. Both onsite motor carrier investigations and roadside compliance inspections depend upon true, correct, and complete driver records of duty status and other records to ensure compliance with the FMCSA Safety Regulations, including the FMCSA HOS safety regulations.

19. The FMCSA has the authority to impose significant penalties for a driver's violation of the FMCSA's Safety Regulations, including the FMSCA's HOS safety regulations, including placing the driver out of service, imposing fines, issuing adverse safety ratings, and prohibiting the motor carrier from operating a CMV. A driver or motor carrier who fails to complete or preserve records of duty status entries, or who makes a false record of duty status entries related to a driver's duty activities may be prosecuted for a criminal violation. 49 C.F.R. §§ 390.37, 395.8(e).

20. The defendants were aware of both the FMCSA's onsite motor carrier investigations, roadside compliance inspections, and the need for true, correct, and complete driver records of duty status and other records to conduct these enforcement activities.

21. In 2004, 2007 and 2010, the FMCSA conducted onsite compliance investigations/reviews of BEAM TRUCKING for violations of the FMCSA Safety Regulations, including violations of the FMCSA HOS safety regulations.

Service Contract Act/Fair Labor Standards Act and Compensation for "Hours Worked"

22. The SCA requires contractors and subcontractors performing services under contracts with the United States government in excess of $2,500 to pay their employees for each hour or portion of an hour worked at a rate no less than a prevailing minimum wage rate as determined by the United States Department of Labor ("DOL"). 41 U.S.C. §§ 6701-6707; 29 C.F.R. § 4.151. The SCA applies to all service employees working on or in connection with the contract, either performing the specific services called for by its terms or in performing other duties necessary to the performance of the contract. 29 C.F.R. § 4.150. The SCA specifically applies to truck drivers engaged in "mail hauling." 29 C.F.R. § 4.130(a)(31).

23. The SCA requires employers to compute the hours worked by employees under the contract in each workweek. 29 C.F.R. § 4.178. "In general, the hours worked by an employee include all periods in which the employee is suffered or permitted to work whether or not required to do so, and all time during which the employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace." The regulation further directs that an employer must apply the principles set forth in the Fair Labor Standards Act, ("FLSA"), 29 U.S.C. §§ 201-219 and 29 C.F.R. Part 785 ("FLSA regulations"), which include the requirement that "[a]n employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed

or ascertainable period of time he is regularly required to spend on duties assigned to him." 29 C.F.R. § 785.47.

24. The FLSA regulations, applicable to contractors and subcontractors subject to the SCA, include:

a. Waiting time, is considered to be "on-duty" and are unpredictable periods of inactivity, usually of short duration, in which the employee is unable to use the time for his/her own purposes because it belongs to and is controlled by the employer. 29 C.F.R. § 785.15.

b. "Off-duty" refers to periods during which an employee is completely relieved from duty, and the period is long enough to enable him/her to use the time effectively for his/her own purposes. An employee is not completely relieved from duty and cannot use the time effectively for his/her own purposes unless he/she is definitely told in advance that he/she may leave the job and that he/she will not have to commence work until a definitely specified hour has arrived. 29 C.F.R. § 785.16.

c. The following example is specifically applicable to truck drivers:

A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washington, DC to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6

p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged. 29 C.F.R. § 785.16.

d. Rest periods of short duration running from 5 minutes to about 20 minutes, are common in industry and must be counted as hours worked. 29 C.F.R. § 785.18.

e. Bona fide meal periods, in which the employee is completely relieved from duty for the purpose of eating regular meals are not worktime. An employee's meal period must be counted as time worked if the employee is "required to perform any duties, whether active or inactive, while eating." Bona fide meal periods do not include coffee breaks or time for snacks since these are rest periods and must be counted as time worked. 29 C.F.R. § 785.19.

f. An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. 29 C.F.R. § 785.21.

g. Work not requested but suffered or permitted is work time, because the employer knows or has reason to believe that the employee is continuing to work. 29 C.F.R. § 785.11.

h. Work performed away from the premises or the job site, or even at home is work time if the employer knows or has reason to believe that the work is being performed, 29 C.F.R. § 785.12.

25. The SCA also requires contractors and subcontractors performing services under contracts with the United States government to pay certain fringe benefits to employees for the first forty hours worked in each pay period. 41 U.S.C. § 6703. It also requires that hourly wages and fringe benefits be paid "promptly and in no event later than one pay period following the pay period in which they are earned." 29 C.F.R. § 4.165(a)(1).

26. The SCA also requires a contractor and subcontractors to maintain, for three years, certain records, including time sheets showing the "number of daily and weekly hours so worked by each employee," that must be made available for inspection by representatives of the Wage and Hour Division of the Employment Standards Administration of the DOL. 29 C.F.R. §§ 4.6(g)(1), 4.185.

27. "A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the ... [SCA], and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor." 29 C.F.R. § 4.188(b)(4).

28. The DOL (Wage and Hour Division) conducts compliance investigations to ensure that employers compensate their employees as required by the SCA. In conducting its compliance investigations, the DOL relies upon the availability of true, accurate, and complete time sheets.

29. The defendants were aware of the DOL (Wage and Hour Division) compliance investigations and the need for true, accurate, and complete time sheets because in 1991 and 2001, investigators conducted significant onsite compliance investigations of BEAM TRUCKING for underpaying its CMV drivers in violation of the SCA.

COUNT ONE

(Conspiracy to Obstruct a Lawful Function of Government)

30. Paragraphs 1 through 29 of this indictment are re-alleged and incorporated by reference as if fully set forth herein.

31. Beginning as early as in or about June 1999, the exact date being unknown to the Grand Jury, and continuing to on or about the date of this indictment, in the Western District of Virginia and elsewhere, the defendants, **BEAM BROS. TRUCKING, INC., BEAM BROS. HOLDING CORPORATION LLC, GERALD BEAM, GARLAND BEAM, SHAUN BEAM, NICKOLAS KOZEL,** did knowingly and willfully conspire, combine, confederate, and agree

together and with each other and with other individuals both known and unknown to the Grand Jury, to defraud the United States for the purpose of impeding, impairing, obstructing, and defeating the lawful Government functions of:

a. The DOT and the FMCSA in promoting the safe operation of CMVs, minimizing the dangers to the health of CMV drivers, and ensuring increased compliance with traffic laws and FMCSA Safety Regulations;

b. The DOL in accomplishing its mission to ensure that covered employees are properly paid for all hours worked under the SCA, the FLSA and their related regulations ("SCA/FLSA"); and

c. The USPS in obtaining the transportation and delivery of the mail by motor carriers who would (1) operate legally by complying with all applicable federal, state and local laws and regulations, and faithfully discharge all duties and obligations imposed by all applicable federal, state and local laws and regulations; including the FMCSA safety compliance regulations and the SCA/FLSA and (2) not impede, impair, obstruct its right to have its business and its affairs, and particularly the process of bidding and awarding of contracts and contract renewals for the ground transportation of mail, conducted honestly and impartially, free from corruption, fraud, dishonesty, unlawful impairment and obstruction.

Manner and Means

32. The defendants and their co-conspirators carried out the objects of the conspiracy by various means, at various times, including:

a. Aiding, abetting, encouraging, requiring and permitting BEAM TRUCKING employees to violate the FMCSA Safety Regulations, including, but not limited to, the FMCSA HOS safety regulations;

b. Making trip/route schedules for BEAM TRUCKING CMV drivers and CMV drivers of its sub-contractors that could not be legally completed within the FMCSA HOS safety regulations as scheduled;

c. Making trip/route schedules for BEAM TRUCKING CMV drivers and CMV drivers of its sub-contractors that aided, abetted, encouraged, required and permitted such drivers to violate the FMCSA HOS safety regulations;

d. Aiding, abetting, encouraging, requiring and permitting BEAM TRUCKING CMV drivers and other employees to make false statements on the drivers' records of duty status;

e. Aiding, abetting, encouraging, requiring and permitting BEAM TRUCKING CMV drivers to exceed the legal speed limit to make it falsely appear on their records of duty status that the trips/routes had been completed in compliance with the FMCSA HOS safety regulations;

f. Aiding, abetting, encouraging, requiring and permitting BEAM TRUCKING CMV drivers to falsify their records of duty status by:

(1) Falsely recording their duty status as "Off-Duty" when in fact their true status was "On-Duty" while performing work under the mail contracts, including pre-trip and/or post-trip inspections of their tractors/trailers and required paperwork;

(2) Falsely recording their duty status as "Off-Duty Driving" when in fact their true status was "Driving;"

(3) Failing to sign onto or to sign off of the electronic record of duty status system so that their records of duty status would falsely appear to be "Off-Duty" when their drivers' true status was "Driving" and/or "On-Duty;"

(4) Falsely recording their duty status as "Off-Duty" when in fact their true duty status was "On-Duty" and/or "Driving;" and

(5) Falsely certifying that their record of duty status was accurate when in fact it was not accurate.

g. Manipulating the electronic Record of Duty Status system to make it falsely appear that BEAM TRUCKING CMV drivers were "Off-Duty" or "On-Duty" when in fact their true status was "Driving," and to make it falsely appear that the drivers were "Off-Duty" when in fact their true status was "On-Duty" and/or "Driving;"

h. Aiding, abetting, encouraging, requiring and permitting BEAM TRUCKING CMV drivers to operate CMVs while their driving ability and alertness were so impaired and likely to become impaired through fatigue, illness, and any other cause, as to make it unsafe for the CMV drivers to begin or continue to operate the commercial motor vehicle;

i. Failing to ensure that BEAM TRUCKING employees comply with all FMCSA Safety Regulations;

j. Aiding, abetting, encouraging, causing and requiring BEAM TRUCKING CMV drivers to falsify their time sheets to report fewer hours worked than they actually worked, in violation of the SCA/FLSA and the mail contracts;

k. Aiding, abetting, encouraging, causing and requiring BEAM TRUCKING CMV drivers to falsify their time sheets to report fewer hours worked than they

actually worked by instructing the drivers that their time sheets should match the false records of duty status, in violation of SCA/FLSA and the mail contracts;

l. Falsely and fraudulently representing to BEAM TRUCKING CMV drivers that they were entitled to be paid only for a pre-set fixed amount of time, often referred to as "standard hours," for completing a trip/route, even if the trip/route took more time to complete than the "standard hours," and even when the drivers were paid less than they were entitled to be paid under the mail contracts and the SCA/FLSA;

m. Falsely and fraudulently representing to BEAM TRUCKING CMV drivers that they were permitted only to report "standard hours" on their time sheets even when the actual hours worked were greater;

n. Telling BEAM TRUCKING CMV drivers that they would not be paid for short rest periods, for time remaining in readiness to operate a CMV, for time waiting for their trailers to be loaded or unloaded at postal facilities, for time spent assisting or supervising the loading or unloading of their trailers at postal facilities, for time waiting at a relay location for the arrival of another driver, and for the time during mechanical breakdowns, weather delays, accident delays, and traffic delays;

o. Failing to inform BEAM TRUCKING CMV drivers of the pay requirements of the mail contracts and the SCA/FLSA;

p. Preventing BEAM TRUCKING CMV drivers who were aware of the pay requirements of the mail contracts and the SCA/FLSA, as well as BEAM TRUCKING's practice of paying drivers less than required under the

SCA/FLSA, from sharing that information with other drivers, DOL, DOT, and any other government agency in an effort to conceal the ongoing conspiracy;

q. Creating an "Over Hours List audit program" that identified drivers who reported on their time sheets more time than the "standard hours," and contacting these drivers to convince them to report the "standard hours" or less time on future time sheets to conceal the fact that BEAM TRUCKING CMV drivers were being underpaid in violation of the SCA/FLSA and driving in violation of the FMCSA HOS safety regulations;

r. Failing to inform the BEAM TRUCKING employees responsible for implementing the Over Hours List audit program how the BEAM TRUCKING CMV drivers were required to be paid under the SCA/FSLA and the mail contracts;

s. Directing the BEAM TRUCKING employees responsible for implementing the Over Hours List audit program to implement the program to pay BEAM TRUCKING CMV drivers in violation of the SCA/FSLA and the mail contracts;

t. Failing to review and consider BEAM TRUCKING CMV drivers' requests for additional pay;

u. Failing to pay BEAM TRUCKING CMV drivers as required under the SCA/FLSA and mail contracts;

v. Falsely promising the USPS in mail contracts that BEAM TRUCKING would comply with all applicable federal, state and local laws and regulations and faithfully discharge all duties and obligations imposed by all applicable federal,

state and local laws and regulations, including the FMCSA Safety Regulations and the SCA/FLSA;

w. Failing to comply during the course of the mail contracts with all applicable federal, state and local laws and regulations and failing to faithfully discharge all duties and obligations imposed by all applicable federal, state and local laws and regulations, including the FMCSA safety compliance regulations and the SCA/FLSA; and

x. Obtaining an improper and unfair competitive advantage over other potential mail contract competitors who intended to comply with all applicable federal, state and local laws and regulations and too faithfully discharge all duties and obligations imposed by all applicable federal, state and local laws, including the FMCSA safety compliance regulations and the SCA/FLSA.

Overt Acts

33. In furtherance of the conspiracy, and to effect the objects thereof, the following overt acts, among others, were committed in the Western District of Virginia, and elsewhere.

34. Each factual allegation of Counts Three through One Hundred and Six of this indictment are re-alleged and incorporated by reference as if fully set forth herein, and each allegation separately constitutes an overt act in furtherance of the conspiracy charged in this Count.

35. In violation of Title 18, United States Code, Section 371.

COUNT TWO

(Conspiracy to Commit an Offense Against the United States)

36. Paragraphs 1 through 29 of this Indictment are re-alleged and incorporated by reference as if fully set forth herein.

37. Beginning as early as in or about June 1999, the exact date being unknown to the Grand Jury, and continuing to on or about the date of this indictment, in the Western District of Virginia and elsewhere, the defendants, **BEAM BROS. TRUCKING, INC., BEAM BROS. HOLDING CORPORATION LLC, GERALD BEAM, GARLAND BEAM, SHAUN BEAM, NICKOLAS KOZEL,** did knowingly and willfully conspire, combine, confederate, and agree together and with each other and with other individuals both known and unknown to the Grand Jury, to commit an offense against the United States, namely:

a. Knowingly altered, concealed, covered up, and falsified, a record or document, namely, a CMV driver's record of duty status ("record of duty status") and a "BEAM Bros. Trucking INC BI-WEEKLY TIME SHEET" ("time sheet"), with intent to impede, obstruct and influence the investigation and proper administration of, and in contemplation of and in relation to, any matter within the jurisdiction of any department or agency of the United States, namely, the DOT, the FMCSA and the DOL, in violation of 18 U.S.C. § 1519; and

b. Knowingly and willfully, made and used any false writing and document, namely, a record of duty status and a time sheet, knowing the same to contain any materially false, fictitious, and fraudulent statement and entry, in a matter within the jurisdiction of the executive branch of the government of the United States, namely, the DOT, the FMCSA and the DOL, in violation of 18 U.S.C. § 1001.

Manner and Means

38. The defendants and their co-conspirators carried out the objects of the conspiracy by various means, at various times during the conspiracy, including:

a. Aiding, abetting, encouraging, permitting or requiring BEAM TRUCKING employees to violate the FMCSA Safety Regulations, including the FMCSA HOS safety regulations;

b. Making trip/route schedules for BEAM TRUCKING CMV drivers and CMV drivers of its sub-contractors that could not be legally completed within the FMCSA HOS safety regulations as scheduled;

c. Making trip/route schedules for BEAM TRUCKING CMV drivers and CMV drivers of its sub-contractors that aided, abetted, encouraged, required or permitted such drivers to violate the FMCSA HOS safety regulations;

d. Aiding, abetting, encouraging, requiring and permitting BEAM TRUCKING CMV drivers and other employees to make false statements on the drivers' records of duty status;

e. Aiding, abetting, encouraging, requiring and permitting BEAM TRUCKING CMV drivers to exceed the legal speed limit to make it falsely appear on the records of duty status that the trip/route had been completed in compliance with the FMCSA HOS safety regulations;

f. Aiding, abetting, encouraging, requiring and permitting BEAM TRUCKING CMV drivers to falsify their records of duty status by:

(1) Falsely recording their duty status as "Off-Duty" when in fact their true status was "On-Duty" while performing work under the mail contracts, including pre-trip and/or post-trip inspections of their tractor/trailer and required paperwork;

(2) Falsely recording their duty status as "Off-Duty Driving" when in fact their true status was "Driving;"

(3) Failing to sign onto or to sign off of the electronic record of duty status system so that their records of duty status would falsely appear to be "Off-Duty" when their drivers' true status was "Driving" and/or "On-Duty;"

(4) Falsely recording their duty status as "Off-Duty" when in fact their true duty status was "On-Duty" and/or "Driving;" and

(5) Falsely certifying that their record of duty status was accurate when in fact it was not accurate.

g. Manipulating the electronic record of duty status system to make it falsely appear that BEAM TRUCKING CMV drivers were "Off-Duty" or "On-Duty" when in fact their true status was "Driving," and to make it falsely appear that the drivers were "Off-Duty" when in fact their true status was "On-Duty" and/or "Driving;"

h. Failing to ensure that BEAM TRUCKING employees comply with all FMCSA Safety Regulations;

i. Aiding, abetting, encouraging, causing and requiring BEAM TRUCKING CMV drivers to falsify their time sheets to report fewer hours worked than they actually worked, in violation of the SCA/FLSA and the mail contracts;

j. Aiding, abetting, encouraging, causing and requiring BEAM TRUCKING CMV drivers to falsify their time sheets to report fewer hours worked than they actually worked by instructing the drivers that their time sheets should match the false records of duty status described above, in violation of SCA/FLSA and the mail contracts;

k. Fraudulently representing to BEAM TRUCKING CMV drivers that they were entitled to be paid only for a pre-set fixed amount of time, often referred to as

"standard hours," for completing a trip/route, even if the trip/route took more time to complete than the "standard hours," and even when the drivers were paid less than they were entitled to be paid under the mail contracts and the SCA/FLSA;

l. Falsely and fraudulently representing to BEAM TRUCKING CMV drivers that they were permitted only to report "standard hours" on their time sheets even when the actual hours were greater;

m. Telling BEAM TRUCKING CMV drivers that they would not be paid for short rest periods, for time waiting for their trailers to be loaded or unloaded at postal facilities, for time spent assisting or supervising the loading or unloading of their trailers at postal facilities, for time waiting at a relay location for the arrival of another driver, and for the time during mechanical breakdowns, weather delays, accident delays, and traffic delays;

n. Failing to inform BEAM TRUCKING CMV drivers of the pay requirements of the mail contracts and the SCA/FLSA;

o. Preventing BEAM TRUCKING CMV drivers who were aware of the pay requirements of the mail contracts and the SCA/FLSA, as well as BEAM TRUCKING's practice of paying drivers less than required under the SCA/FLSA, from sharing that information with other drivers, DOL, DOT, and any other government agency in an effort to conceal the ongoing conspiracy;

p. Creating an "Over Hours List" audit program that identified drivers who reported on their time sheets more time than the "standard hours," and contacting these drivers to convince them to report the "standard hours" or less time on future time sheets to conceal the fact that BEAM TRUCKING CMV

drivers were being underpaid and driving in violation of the FMCSA HOS safety regulations;

q. Failing to inform the BEAM TRUCKING employees responsible for implementing the Over Hours List audit program how the BEAM TRUCKING CMV drivers were required to be paid under the SCA/FSLA and the mail contracts;

r. Directing the BEAM TRUCKING employees responsible for implementing the Over Hours List audit program to implement the program to pay BEAM TRUCKING CMV drivers in violation of the SCA/FSLA and the mail contracts;

s. Failing to review and consider BEAM TRUCKING CMV drivers' requests for additional pay; and

t. Failing to pay BEAM TRUCKING CMV drivers as required under the SCA/FLSA and the mail contracts.

Overt Acts

39. In furtherance of the conspiracy, and to effect the objects thereof, the following overt acts, among others, were committed in the Western District of Virginia, and elsewhere.

40. Each factual allegation of Counts Three through One Hundred and Six of this indictment are re-alleged and incorporated by reference as if fully set forth herein, and each allegation separately constitutes an overt act in furtherance of the conspiracy charged in this Count.

41. In violation of Title 18, United States Code, Section 371.

COUNTS THREE TO FORTY-SEVEN

(Falsification of Records in Contemplation of Federal Matter)

42. Paragraphs 1 through 29 of this Indictment are re-alleged and incorporated by reference as if fully set forth herein.

43. On or about the dates set forth below, as to each count, in the Western District of Virginia and elsewhere, the defendants, **BEAM BROS. TRUCKING, INC., BEAM BROS. HOLDING CORPORATION LLC, GERALD BEAM, GARLAND BEAM, SHAUN BEAM, NICKOLAS KOZEL,** and others known and unknown to the grand jury, did knowingly alter, conceal, cover up, and falsify, as set forth below, a record or document, namely, a CMV driver's Record of Duty Status, for the BEAM TRUCKING driver identified by his/her initials, with intent to impede, obstruct and influence the investigation and proper administration of any matter and in contemplation of and in relation to any such matter within the jurisdiction of the United States Department of Transportation and the United States Federal Motor Carrier Safety Administration, a department and administration of the United States.

44. On or about the stated dates, in the Western District of Virginia and elsewhere, the defendants, **BEAM BROS. TRUCKING, INC., BEAM BROS. HOLDING CORPORATION LLC, GERALD BEAM, GARLAND BEAM, SHAUN BEAM, NICKOLAS KOZEL,** and others known and unknown to the grand jury, (1) were members of a conspiracy as described in Count Two of this indictment, (2) the offense of falsification of records in contemplation of a federal matter was committed or was caused to be committed by a member of and during the conspiracy, (3) the member of the conspiracy committed or caused the offense to be committed while a member of and during the existence of the conspiracy, and (4) the offense was committed in furtherance of the conspiracy.

Count	Date (On or About)	Driver & Falsifications
		DRIVER TB
3.	9/29/12	a. TB was Off-Duty between 00:00 and 06:37 when he was actually On-Duty during some or all of that period of time. b. TB was Off-Duty Driving between 06:37 and 06:58 when he was actually Driving during some or all of that period of time. c. TB was Off-Duty between 20:11 and 20:35 when he was actually On-Duty during some or all of that period of time. d. TB was Off-Duty Driving between 20:35 and 20:44 when he was actually Driving during some or all of that period of time. e. TB was Off-Duty between 20:44 and 00:00 when he was actually On-Duty during some or all of that period of time. f. TB's total Driving time was 10 hours and 57 minutes when it was actually approximately 11 hours and 27 minutes. g. TB did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
4.	3/7/13	a. TB was Off-Duty between 00:00 and 06:39 when he was actually On-Duty during some of that period of time. b. TB was Off-Duty Driving between 06:39 and 07:03 when he was actually Driving during some or all of that period of time. c. TB was Off-Duty between 07:03 and 08:14 when he was actually On-Duty during some or all of that period of time. d. TB was Off-Duty Driving between 20:16 and 20:24 when he was actually Driving during some or all of that period of time. e. TB was Off-Duty between 20:24 and 20:50 when he was actually On-Duty during some or all of that period of time. f. TB was Off-Duty Driving between 20:50 and 21:02 when he was actually Driving during some or all of that period of time. g. TB was Off-Duty between 21:02 and 00:00 when he was actually On-Duty during some or all of that period of time. h. TB's total Driving time was 11 hours when it was actually approximately 11 hours and 44 minutes. i. TB did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
		DRIVER JM
5.	9/22/12	a. JM was Off-Duty Driving between 02:37 and 03:03 when he was actually Driving during some or all of that period of time. b. JM was Off-Duty between 03:03 and 03:36 when he was actually On-Duty during some or all of that period of time. c. JM was Off-Duty Driving between 17:03 and 17:27 when he was actually Driving during some or all of that period of time.

		d. JM's total Driving time was 10 hours and 49 minutes when it was actually approximately 11 hours and 39 minutes. e. JM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
6.	3/9/13	a. JM was Off-Duty Driving between 02:13 and 02:35 when he was actually Driving during some or all of that period of time. b. JM was Off-Duty Driving between 16:40 and 17:01 when he was actually Driving during some or all of that period of time. c. JM's total Driving time was 10 hours and 40 minutes when it was actually approximately 11 hours and 23 minutes. d. JM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
		DRIVER KC
7.	9/15/12	a. KC was Off-Duty between 00:00 and 03:31 when she was actually Driving and On-Duty during some or all of that period of time. b. KC was Off-Duty Driving between 03:31 and 04:18 when she was actually Driving during some or all of that period of time. c. KC was Off-Duty Driving between 17:51 and 18:04 when she was actually Driving during some or all of that period of time. d. KC was Off-Duty between 18:16 and 00:00 when she was actually On-Duty some or all of that period of time. e. KC's total Driving time was 10 hours and 54 minutes when it was actually approximately 12 hours and 13 minutes. f. KC did not drive a CMV after 14 consecutive hours after coming On-Duty when she actually did drive a CMV after 14 consecutive hours after coming On-Duty.
8.	2/9/13	a. KC was Off-Duty between 00:00 and 02:51 when she was actually On-Duty during some or all of that period of time. b. KC was Off-Duty Driving between 02:51 and 03:13 when she was actually Driving during some or all of that period of time. c. KC was Off-Duty Driving between 17:05 and 17:21 when she was actually Driving during some or all of that period of time. d. KC was Off-Duty between 17:21 and 00:00 when she was actually On-Duty some or all of that period of time. e. KC's total Driving time was 10 hours and 40 minutes when it was actually approximately 11 hours and 18 minutes. f. KC did not drive a CMV after 14 consecutive hours after coming On-Duty when she actually did drive a CMV after 14 consecutive hours after coming On-Duty.
9.	8/16/14	a. KC was On-Duty or Off-Duty between 06:31 and 06:45, between 06:52 and 07:29, between 09:35 and 09:53, between 13:12 and 13:31, between 13:31 and 14:06 and between 19:33 and 20:09 when she was actually Driving for some period of time during some or all of those periods of time.

		b. KC's total Driving time was 10 hours and 59 minutes when it was actually more than 11 hours.
		DRIVER TM
10.	9/22/12	a. TM was Off-Duty between 00:00 and 02:42 when he was actually Driving and On-Duty during some or all of that period of time. b. TM was Off-Duty between 16:33 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. TM drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. d. TM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
11.	12/21/12	a. TM was Off-Duty between 00:00 and 03:22 when he was actually Driving and On-Duty during some or all of that period of time. b. TM was Off-Duty between 17:18 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. TM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
12.	3/21/13	a. TM was Off-Duty between 00:00 and 02:45 when he was actually On-Duty during some or all of that period of time. b. TM was Off-Duty between 16:21 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. TM drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. d. TM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
		DRIVER RM
13.	9/19/12	a. RM was Off-Duty between 00:00 and 04:06 when he was actually Driving and On-Duty during some or all of that period of time. b. RM was Off-Duty between 10:03 and 12:11 when he was actually On-Duty during some or all of that period of time. c. RM was Off-Duty between 17:37 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. d. RM's total Driving time was 10 hours and 57 minutes when it was actually approximately 11 hours and 55 minutes. e. RM drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. f. RM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a commercial motor vehicle after 14 consecutive hours after coming On-Duty.
14.	3/22/13	a. RM was Off-Duty and Off-Duty Driving between 00:00 and 04:12 when he was actually Driving and On-Duty during some or all of that period of time. b. RM was Off-Duty Driving between 09:48 and 09:57 when he was actually Driving during some or all of that time.

		c. RM was Off-Duty between 09:57 and 12:08 when he was actually On-Duty during some or all of that period of time. d. RM was Off-Duty and Off-Duty Driving between 17:45 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. e. RM's total Driving time was 10 hours and 58 minutes when it was actually approximately 11 hours and 27 minutes. f. RM drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. g. RM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a commercial motor vehicle after 14 consecutive hours after coming On-Duty.
		DRIVER RL
15.	9/22/12	a. RL was Off-Duty between 00:00 and 02:19 when he was actually Driving and On-Duty during some or all of that period of time. b. RL was Off-Duty between 15:52 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. RL's total Driving time was 10 hours and 52 minutes when it was actually approximately 11 hours and 12 minutes. d. RL did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a commercial motor vehicle after 14 consecutive hours after coming On-Duty.
16.	1/18/13	a. RL was Off-Duty and Off-Duty Driving between 00:00 and 02:24 when he was actually Driving and On-Duty during some or all of that period of time. b. RL was Off-Duty and Off-Duty Driving between 16:24 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. RL's total Driving time was 10 hours and 54 minutes when it was actually approximately 11 hours and 25 minutes. d. RL did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a commercial motor vehicle after 14 consecutive hours after coming On-Duty.
		DRIVER DP
17.	9/21/12	a. DP was Off-Duty between 00:00 and 02:57 when he was actually Driving and On-Duty during some or all of that period of time. b. DP was Off-Duty between 16:46 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. DP's total Driving time was 11 hours when it was actually approximately 11 hours and 28 minutes. d. DP did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a commercial motor vehicle after 14 consecutive hours after coming On-Duty.
18.	12/19/12	a. DP was Off-Duty between 00:00 and 04:28 when he was actually Driving and On-Duty during some or all of that period of time. b. DP was Off-Duty between 19:57 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. DP's total Driving time was 10 hours and 57 minutes when it was actually approximately 11 hours and 30 minutes.

		d. DP drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. e. DP did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a commercial motor vehicle after 14 consecutive hours after coming On-Duty.
		DRIVER GR
19.	12/30/12	a. GR was Off-Duty between 00:00 and 01:40 when he was actually On-Duty during some or all of that period of time. b. GR was Off-Duty Driving between 07:13 and 07:22, between 07:33 and 07:41, and between 08:31 and 08:39 when he was actually Driving for some period of time during some or all of those periods of time. c. GR was Off-Duty between 07:02 and 07:13, between 07:41 and 08:31, and between 08:48 and 09:20 when he was actually On-Duty for some period of time during some or all of those periods of time. d. GR was Off-Duty between 14:57 and 00:00 when he was actually On-Duty during some or all of that period of time. e. GR's total Driving time was 10 hours and 50 minutes when it was actually approximately 11 hours and 15 minutes.
20.	2/6/13	a. GR was Off-Duty between 00:00 and 01:40 when he was actually On-Duty during some or all of that period of time. b. GR was Off-Duty Driving between 07:38 and 07:44, between 07:51 and 08:11, and between 09:09 and 09:19 when he was actually Driving for some period of time during some or all of those periods of time. c. GR was Off-Duty between 07:25 and 07:38, between 08:11 and 09:09, and between 09:25 and 09:59 when he was actually On-Duty for some period of time during some or all of those periods of time. d. GR was Off-Duty between 15:11 and 00:00 when he was actually On-Duty during some or all of that period of time. e. GR's total Driving time was 10 hours and 46 minutes when it was actually approximately 11 hours and 22 minutes.
		DRIVER CS
21.	9/18/12	a. CS was Off-Duty Driving between 07:24 and 07:30 when he was actually Driving during some or all of that period of time. b. CS was Off-Duty Driving between 08:35 and 09:17 when he was actually Driving during some or all of that period of time. c. CS was Off-Duty Driving between 11:49 and 12:01 when he was actually Driving during some or all of that period of time. d. CS was Off-Duty between 14:50 and 00:00 when he was actually On-Duty during some or all of that period of time. e. CS's total Driving time was 10 hours and 56 minutes when it was actually approximately 11 hours and 56 minutes.
22.	3/8/13	a. CS was Off-Duty Driving between 03:08 and 03:14 when he was actually Driving during some or all of that period of time. b. CS was Off-Duty Driving between 08:43 and 09:20 when he was actually Driving during some or all of that period of time.

		c. CS was Off-Duty Driving between 10:26 and 10:35 when he was actually Driving during some or all of that period of time. d. CS was Off-Duty between 16:41 and 00:00 when he was actually On-Duty during some or all of that period of time. e. CS's total Driving time was 10 hours and 49 minutes when it was actually approximately 11 hours and 41 minutes.
		DRIVER RK
23.	9/25/13	a. RK was Off-Duty between 00:00 and 02:32 when he was actually Driving and On-Duty during some or all of that period of time. b. RK was Off-Duty between 08:44 and 09:34 when he was actually On-Duty during some or all of that period of time. c. RK was Off-Duty Driving between 09:34 and 10:34 when he was actually Driving during some or all of that period of time. d. RK was Off-Duty between 15:01 and 00:00 when he was actually On-Duty during some or all of that period of time. e. RL was On-Duty or Off-Duty between 02:32 and 02:38, between 02:51 and 03:06, and between 08:44 and 09:34, when he was actually Driving for some period of time during some or all of those periods of time. f. RK's total Driving time was 10 hours and 18 minutes when it was actually approximately 11 hours and 18 minutes.
24.	9/26/13	a. RK was Off-Duty between 00:00 and 02:15 when he was actually Driving and On-Duty during some or all of that period of time. b. RK was Off-Duty between 07:45 and 08:49 when he was actually On-Duty during some or all of that period of time. c. RK was Off-Duty Driving between 08:49 and 09:49 when he was actually Driving during some or all of that period of time. d. RK was Off-Duty between 15:06 and 00:00 when he was actually On-Duty during some or all of that period of time. e. RK was On-Duty or Off-Duty between 07:45 and 07:54, between 07:54 and 08:49, between 11:20 and 11:41, and between 14:59 and 15:06, when he was actually Driving for some period of time during some or all of those periods of time. f. RK's total Driving time was 10 hours and 19 minutes when it was actually approximately 11 hours and 19 minutes.

		DRIVER SG
25.	10/21/12	a. SG was Off-Duty between 00:00 and 01:25 when he was actually Driving and On-Duty during some or all of that period of time. b. SG was Off-Duty Driving between 14:53 and 15:19 when he was actually Driving during some or all of that period of time. c. SG was Off-Duty between 15:19 and 00:00 when he was actually On-Duty during some of that period of time. d. SG's total Driving time was 10 hours and 53 minutes when it was actually approximately 11 hours and 54 minutes. e. SG did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
26.	4/14/13	a. SG was Off-Duty between 00:00 and 01:35 when he was actually Driving and On-Duty during some or all of that period of time. b. SG was Off-Duty between 14:40 and 15:01 when he was actually On-Duty during some or all of that period of time. c. SG was Off-Duty Driving between 15:25 and 15:32 when he was actually Driving during some or all of that period of time. d. SG was Off-Duty between 15:32 and 15:38 when he was actually On-Duty during some or all of that period of time. e. SG was Off-Duty Driving between 15:38 and 16:00 when he was actually Driving during some or all of that period of time. f. SG was Off-Duty between 16:00 and 00:00 when he was actually On-Duty during some or all of that period of time. g. SG's total Driving time was 10 hours and 55 minutes when it was actually approximately 11 hours and 47 minutes. h. SG did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
		DRIVER AM
27.	9/15/12	a. AM was Off-Duty between 00:00 and 00:53 when he was actually On-Duty during all or some of that period of time. b. AM was Off-Duty Driving between 00:53 and 01:16 when he was actually Driving during some or all of that period of time. c. AM was Off-Duty between 01:16 and 01:35 when he was actually On-Duty during some or all of that period of time. d. AM was Off-Duty Driving between 01:35 and 01:58 when he was actually Driving during some or all of that period of time. e. AM was Off-Duty between 07:08 and 08:36 when he was actually On-Duty during some or all of that period of time. f. AM's total Driving time was 10 hours and 48 minutes when it was actually approximately 11 hours and 34 minutes. g. AM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.

28.	4/25/13	a. AM was Off-Duty between 00:00 and 01:01 when he was actually On-Duty during all or some of that period of time. b. AM was Off-Duty Driving between 01:01 and 01:26 when he was actually Driving during some or all of that period of time. c. AM was Off-Duty between 01:26 and 01:35 when he was actually On-Duty during some or all of that period of time. d. AM was Off-Duty between 07:14 and 08:45 when he was actually On-Duty during some or all of that period of time. e. AM was Off-Duty Driving between 15:05 and 15:17 when he was actually Driving during some or all of that period of time. f. AM was Off-Duty between 15:17 and 00:00 when he was actually On-Duty during some or all of that period of time. g. AM's total Driving time was 10 hours and 58 minutes when it was actually approximately 11 hours and 48 minutes. h. AM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
		DRIVER JH
29.	12/18/12	a. JH was Off-Duty between 00:00 and 03:48 when he was actually On-Duty during some or all of that period of time. b. JH was Off-Duty Driving between 03:48 and 04:06 when he was actually Driving during some or all of that period of time. c. JH was Off-Duty between 04:06 and 04:51 when he was actually On-Duty during some or all of that period of time. d. JH was Off-Duty Driving between 04:51 and 05:02 when he was actually Driving during some or all of that period of time. e. JH was Off-Duty Driving between 11:12 and 11:18 when he was actually Driving during some or all of that period of time. f. JH was Off-Duty between 17:31 and 00:00 when he was actually On-Duty during some or all of that period of time. g. JH's total Driving time was 10 hours and 54 minutes when it was actually approximately 11 hours and 29 minutes.
30.	3/26/13	a. JH was Off-Duty between 00:00 and 03:54 when he was actually On-Duty during some or all of that period of time. b. JH was Off-Duty Driving between 03:54 and 04:06 when he was actually Driving during some or all of that period of time. c. JH was Off-Duty between 04:06 and 04:42 when he was actually On-Duty during some or all of that period of time. d. JH was Off-Duty Driving between 04:42 and 04:50 when he was actually Driving during some or all of that period of time. e. JH was Off-Duty Driving between 10:50 and 10:55 when he was actually Driving during some or all of that period of time. f. JH was Off-Duty between 17:39 and 00:00 when he was actually On-Duty during some or all of that period of time. g. JH's total Driving time was 10 hours and 59 minutes when it was actually approximately 11 hours and 24 minutes.

		DRIVER MB
31.	12/20/12	a. MB was Off-Duty between 00:00 and 07:01 when she was actually Driving and On-Duty during some of that period of time. b. MB was Off-Duty Driving between 19:12 and 19:52 when she was actually Driving during some or all of that period of time. c. MB was Off-Duty between 19:52 and 00:00 when she was actually On-Duty during some or all of that period of time. d. MB's total Driving time was 10 hours and 43 minutes when it was actually approximately 11 hours and 41 minutes.
		DRIVER JC
32.	12/12/12	a. JC was Off-Duty between 00:00 and 05:32 when he was actually Driving and On-Duty during some of that period of time. b. JC was Off-Duty between 17:28 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. JC's total Driving time was 11 hours and 21 minutes when it was actually approximately 12 hours and 20 minutes.
		DRIVER RT
33.	12/22/12	a. RT was Off-Duty between 00:00 and 09:04 when he was actually Driving and On-Duty during some or all of that period of time. b. RT was Off-Duty between 20:37 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. RT's total Driving time was 10 hours and 59 minutes when it was actually approximately 12 hours and 15 minutes. d. RT drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. e. RT did not drive a commercial vehicle after 14 consecutive hours after coming On-Duty when he actually did drive a commercial vehicle after 14 consecutive hours after coming On-Duty.
34.	12/23/12	a. RT was Off-Duty between 00:00 and 08:26 when he was actually Driving and On-Duty during some or all of that period of time. b. RT was Off-Duty between 18:15 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. RT's total Driving time was 8 hours and 41 minutes when it was actually approximately 16 hours and 16 minutes. d. RT drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. e. RT did not drive a commercial vehicle after 14 consecutive hours after coming On-Duty when he actually did drive a commercial vehicle after 14 consecutive hours after coming On-Duty.
35.	2/20/14	a. RT was Off-Duty between 15:41 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. b. RT was On-Duty or Off-Duty between 02:36 and 02:52, between 06:18 and 07:23, between 08:56 and 09:25, between 12:41 and 12:46, between 12:52 and 13:50 and between 15:22 and 15:34, when he was actually Driving for some period of time during some or all of those periods of time.

		c. RT's total Driving time was 10 hours when it was actually approximately 11 hours and 13 minutes. d. RT did not drive a commercial vehicle after 14 consecutive hours after coming On-Duty when he actually did drive a commercial vehicle after 14 consecutive hours after coming On-Duty
		DRIVER WB
36.	10/26/12	a. WB was Off-Duty between 00:00 and 06:31 when he was actually Driving and On-Duty during some of that period of time. b. WB was Off-Duty Driving between 13:24 and 14:01 when he was actually Driving during some or all of that period of time. c. WB was Off-Duty between 14:01 and 23:24 when he was actually Driving and On-Duty during some of that period of time. d. WB's total Driving time was 5 hours and 59 minutes when it was actually approximately 7 hours and 4 minutes.
37.	10/27/12	a. WB was Off-Duty between 04:56 and 16:29 when he was actually Driving during some or all of that period of time. b. WB's total Driving time without a ten-hour rest period was 15 hours and 54 minutes when it was actually approximately 24 hours and 52 minutes. c. WB drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. d. WB did not drive a commercial vehicle after 14 consecutive hours after coming On-Duty when he actually did drive a commercial vehicle after 14 consecutive hours after coming On-Duty.
38.	11/24/12	a. WB was Off-Duty between 05:12 and 15:15when he was actually Driving during some or all of that period of time. b. WB's total Driving time without a ten-hour rest period was 17 hours and 27 minutes when it was actually approximately 21 hours and 15 minutes. c. WB drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. d. WB did not drive a commercial vehicle after 14 consecutive hours after coming On-Duty when he actually did drive a commercial vehicle after 14 consecutive hours after coming On-Duty.
39.	12/21/12	a. WB was Off-Duty between 00:00 and 09:17 when he was actually Driving and On-Duty during some of that period of time. b. WB's total Driving time was 10 hours and 53 minutes when it was actually approximately 11 hours and 10 minutes.
40.	12/22/12	a. WB was Off-Duty Driving between 07:34 and 08:34 when he was actually Driving during some or all of that period of time. b. WB's total Driving time without a ten-hour rest period was 19 hours and 59 minutes when it was actually approximately 21 hours and 16 minutes. c. WB drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. d. WB did not drive a commercial vehicle after 14 consecutive hours after coming On-Duty when he actually did drive a commercial vehicle after 14 consecutive hours after coming On-Duty.

		DRIVER KS
41.	12/7/12	a. KS was Off-Duty Driving between 00:47 and 01:17 when he was actually Driving during some or all of that period of time. b. KS was Off-Duty Driving between 09:27 and 09:45 when he was actually Driving during some or all of that period of time. c. KS was Off-Duty between 09:45 and 10:48 when he was actually On-Duty during some or all of that period of time. d. KS's total Driving time without a ten-hour rest period was 14 hours and 19 minutes when it was actually approximately 15 hours and 7 minutes. e. KS drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. f. KS did not drive a commercial vehicle after 14 consecutive hours after coming On-Duty when he actually did drive a commercial vehicle after 14 consecutive hours after coming On-Duty.
		TM EDITS
42.	11/5/12	On or about November 5, 2012, TM edited BEAM TRUCKING Driver DP's electronic Record of Duty Status for November 2, 2012 to falsely show that: a. DP was "Off-Duty Driving" between 16:43 and 17:04 when DP's November 2, 2012 Record of Duty Status originally showed that DP was actually Driving during this period of time. b. DP did not drive a CMV after 14 consecutive hours after coming On-Duty when DP's November 2, 2012 Record of Duty Status originally showed that DP actually did drive a CMV after 14 consecutive hours after coming On-Duty.
43.	11/5/12	On or about November 5, 2012, TM edited BEAM TRUCKING Driver AM's electronic Record of Duty Status for November 3, 2012 to falsely show that: a. AM was "Off-Duty Driving" between 00:50 and 01:04 when AM's November 3, 2012 Record of Duty Status originally showed that AM was actually Driving during this period of time. b. AM's total Driving time was 10 hours and 53 minutes when it was actually 11 hours and 18 minutes.
44.	2/19/13	On or about February 19, 2013, TM edited BEAM TRUCKING Driver KC's electronic Record of Duty Status for February 19, 2013 to falsely show that: a. KC was "Off-Duty Driving" between 06:39 and 07:01 when KC's February 19, 2013 Record of Duty Status originally showed that KC was actually Driving during this period of time. b. KC's total Driving time was 10 hours and 54 minutes when it was actually 11 hours and 16 minutes.
45.	4/25/13	On or about April 25, 2013, TM edited BEAM TRUCKING Driver JM's electronic Record of Duty Status for April 25, 2013 to falsely show that: a. JM was "Off-Duty Driving" between 02:45 and 03:06 when JM's April 25, 2013 Record of Duty Status originally showed that JM was actually Driving during this period of time. b. JM's total Driving time was 10 hours and 51 minutes when it was actually 11 hours and 20 minutes.

		DRIVER KDS
46.	2/8/17	a. KDS was Off-Duty between 00:00 and 04:21 when he was actually On-Duty during some or all of that period of time. b. KDS drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. c. KDS did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On Duty.
47.	2/10/17	a. KDS was Off-Duty between 00:00 and 05:59 when he was actually On-Duty during some or all of that period of time. b. KDS did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On Duty.

45. In violation of Title 18, United States Code, Sections 1519, 2(a), and 2(b).

COUNTS FORTY-EIGHT TO NINETY-TWO

(False Statements)

46. Paragraphs 1 through 29 of this Indictment are re-alleged and incorporated by reference as if fully set forth herein.

47. On or about the dates set forth below, as to each count, in the Western District of Virginia and elsewhere, the defendants, **BEAM BROS. TRUCKING, INC., BEAM BROS. HOLDING CORPORATION LLC, GERALD BEAM, GARLAND BEAM, SHAUN BEAM, NICKOLAS KOZEL,** and others known and unknown to the grand jury, willfully and knowingly, made and used any false writing and document, namely, a commercial motor vehicle driver's record of duty status the BEAM TRUCKING driver identified by his/her initials, knowing the same to contain any materially false, fictitious, and fraudulent statement and entry in a matter within the jurisdiction of the executive branch of the government of the United States, namely, the United States Department of Transportation and the United States Federal Motor Carrier Safety Administration.

48. On or about the stated dates, in the Western District of Virginia and elsewhere, the defendants, **BEAM BROS. TRUCKING, INC., BEAM BROS. HOLDING CORPORATION LLC, GERALD BEAM, GARLAND BEAM, SHAUN BEAM, NICKOLAS KOZEL,** and others known and unknown to the grand jury, (1) were members of a conspiracy as described in Count Two of this indictment, (2) the offense of making and using a false record was committed or was caused to be committed by a member of and during the conspiracy, (3) the member of the conspiracy committed or caused the offense to be committed while a member of and during the conspiracy, and (4) the offense was committed in furtherance of the conspiracy.

Count	Date (On or About)	Driver & Falsifications
		DRIVER TB
48.	9/29/12	a. TB was Off-Duty between 00:00 and 06:37 when he was actually On-Duty during some or all of that period of time. b. TB was Off-Duty Driving between 06:37 and 06:58 when he was actually Driving during some or all of that period of time. c. TB was Off-Duty between 20:11 and 20:35 when he was actually On-Duty during some or all of that period of time. d. TB was Off-Duty Driving between 20:35 and 20:44 when he was actually Driving during some or all of that period of time. e. TB was Off-Duty between 20:44 and 00:00 when he was actually On-Duty during some or all of that period of time. f. TB's total Driving time was 10 hours and 57 minutes when it was actually approximately 11 hours and 27 minutes. g. TB did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
49.	3/7/13	a. TB was Off-Duty between 00:00 and 06:39 when he was actually On-Duty during some of that period of time. b. TB was Off-Duty Driving between 06:39 and 07:03 when he was actually Driving during some or all of that period of time. c. TB was Off-Duty between 07:03 and 08:14 when he was actually On-Duty during some or all of that period of time. d. TB was Off-Duty Driving between 20:16 and 20:24 when he was actually Driving during some or all of that period of time. e. TB was Off-Duty between 20:24 and 20:50 when he was actually On-Duty during some or all of that period of time.

		f. TB was Off-Duty Driving between 20:50 and 21:02 when he was actually Driving during some or all of that period of time. g. TB was Off-Duty between 21:02 and 00:00 when he was actually On-Duty during some or all of that period of time. h. TB's total Driving time was 11 hours when it was actually approximately 11 hours and 44 minutes. i. TB did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
		DRIVER JM
50.	9/22/12	a. JM was Off-Duty Driving between 02:37 and 03:03 when he was actually Driving during some or all of that period of time. b. JM was Off-Duty between 03:03 and 03:36 when he was actually On-Duty during some or all of that period of time. c. JM was Off-Duty Driving between 17:03 and 17:27 when he was actually Driving during some or all of that period of time. d. JM's total Driving time was 10 hours and 49 minutes when it was actually approximately 11 hours and 39 minutes. e. JM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
51.	3/9/13	a. JM was Off-Duty Driving between 02:13 and 02:35 when he was actually Driving during some or all of that period of time. b. JM was Off-Duty Driving between 16:40 and 17:01 when he was actually Driving during some or all of that period of time. c. JM's total Driving time was 10 hours and 40 minutes when it was actually approximately 11 hours and 23 minutes. d. JM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
		DRIVER KC
52.	9/15/12	a. KC was Off-Duty between 00:00 and 03:31 when she was actually Driving and On-Duty during some or all of that period of time. b. KC was Off-Duty Driving between 03:31 and 04:18 when she was actually Driving during some or all of that period of time. c. KC was Off-Duty Driving between 17:51 and 18:04 when she was actually Driving during some or all of that period of time. d. KC was Off-Duty between 18:16 and 00:00 when she was actually On-Duty some or all of that period of time. e. KC's total Driving time was 10 hours and 54 minutes when it was actually approximately 12 hours and 13 minutes. f. KC did not drive a CMV after 14 consecutive hours after coming On-Duty when she actually did drive a CMV after 14 consecutive hours after coming On-Duty.
53.	2/9/13	a. KC was Off-Duty between 00:00 and 02:51 when she was actually On-Duty during some or all of that period of time.

		b. KC was Off-Duty Driving between 02:51 and 03:13 when she was actually Driving during some or all of that period of time. c. KC was Off-Duty Driving between 17:05 and 17:21 when she was actually Driving during some or all of that period of time. d. KC was Off-Duty between 17:21 and 00:00 when she was actually On-Duty some or all of that period of time. e. KC's total Driving time was 10 hours and 40 minutes when it was actually approximately 11 hours and 18 minutes. f. KC did not drive a CMV after 14 consecutive hours after coming On-Duty when she actually did drive a CMV after 14 consecutive hours after coming On-Duty.
54.	8/16/14	a. KC was On-Duty or Off-Duty between 06:31 and 06:45, between 06:52 and 07:29, between 09:35 and 09:53, between 13:12 and 13:31, between 13:31 and 14:06, and between 19:33 and 20:09 when she was actually Driving for some period of time during some or all of those periods of time. b. KC's total Driving time was 10 hours and 59 minutes when it was actually more than 11 hours.
		DRIVER TM
55.	9/22/12	a. TM was Off-Duty between 00:00 and 02:42 when he was actually Driving and On-Duty during some or all of that period of time. b. TM was Off-Duty between 16:33 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. TM drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. d. TM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
56.	12/21/12	a. TM was Off-Duty between 00:00 and 03:22 when he was actually Driving and On-Duty during some or all of that period of time. b. TM was Off-Duty between 17:18 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. TM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
57.	3/21/13	a. TM was Off-Duty between 00:00 and 02:45 when he was actually On-Duty during some or all of that period of time. b. TM was Off-Duty between 16:21 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. TM drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. d. TM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.

		DRIVER RM
58.	9/19/12	a. RM was Off-Duty between 00:00 and 04:06 when he was actually Driving and On-Duty during some or all of that period of time. b. RM was Off-Duty between 10:03 and 12:11 when he was actually On-Duty during some or all of that period of time. c. RM was Off-Duty between 17:37 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. d. RM's total Driving time was 10 hours and 57 minutes when it was actually approximately 11 hours and 55 minutes. e. RM drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. f. RM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a commercial motor vehicle after 14 consecutive hours after coming On-Duty.
59.	3/22/13	a. RM was Off-Duty and Off-Duty Driving between 00:00 and 04:12 when he was actually Driving and On-Duty during some or all of that period of time. b. RM was Off-Duty Driving between 09:48 and 09:57 when he was actually Driving during some or all of that time. c. RM was Off-Duty between 09:57 and 12:08 when he was actually On-Duty during some or all of that period of time. d. RM was Off-Duty and Off-Duty Driving between 17:45 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. e. RM's total Driving time was 10 hours and 58 minutes when it was actually approximately 11 hours and 27 minutes. f. RM drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. g. RM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a commercial motor vehicle after 14 consecutive hours after coming On-Duty.
		DRIVER RL
60.	9/22/12	a. RL was Off-Duty between 00:00 and 02:19 when he was actually Driving and On-Duty during some or all of that period of time. b. RL was Off-Duty between 15:52 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. RL's total Driving time was 10 hours and 52 minutes when it was actually approximately 11 hours and 12 minutes. d. RL did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a commercial motor vehicle after 14 consecutive hours after coming On-Duty.
61.	1/18/13	a. RL was Off-Duty and Off-Duty Driving between 00:00 and 02:24 when he was actually Driving and On-Duty during some or all of that period of time.

		b. RL was Off-Duty and Off-Duty Driving between 16:24 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. RL's total Driving time was 10 hours and 54 minutes when it was actually approximately 11 hours and 25 minutes. d. RL did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a commercial motor vehicle after 14 consecutive hours after coming On-Duty.
		DRIVER DP
62.	9/21/12	a. DP was Off-Duty between 00:00 and 02:57 when he was actually Driving and On-Duty during some or all of that period of time. b. DP was Off-Duty between 16:46 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. DP's total Driving time was 11 hours when it was actually approximately 11 hours and 28 minutes. d. DP did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a commercial motor vehicle after 14 consecutive hours after coming On-Duty.
63.	12/19/12	a. DP was Off-Duty between 00:00 and 04:28 when he was actually Driving and On-Duty during some or all of that period of time. b. DP was Off-Duty between 19:57 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. DP's total Driving time was 10 hours and 57 minutes when it was actually approximately 11 hours and 30 minutes. d. DP drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. e. DP did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a commercial motor vehicle after 14 consecutive hours after coming On-Duty.
		DRIVER GR
64.	12/30/12	a. GR was Off-Duty between 00:00 and 01:40 when he was actually On-Duty during some or all of that period of time. b. GR was Off-Duty Driving between 07:13 and 07:22, between 07:33 and 07:41, and between 08:31 and 08:39 when he was actually Driving for some period of time during some or all of those periods of time. c. GR was Off-Duty between 07:02 and 07:13, between 07:41 and 08:31, and between 08:48 and 09:20 when he was actually On-Duty for some period of time during some or all of those periods of time. d. GR was Off-Duty between 14:57 and 00:00 when he was actually On-Duty during some or all of that period of time. e. GR's total Driving time was 10 hours and 50 minutes when it was actually approximately 11 hours and 15 minutes.
65.	2/6/13	a. GR was Off-Duty between 00:00 and 01:40 when he was actually On-Duty during some or all of that period of time.

		b. GR was Off-Duty Driving between 07:38 and 07:44, between 07:51 and 08:11, and between 09:09 and 09:19 when he was actually Driving for some period of time during some or all of those periods of time. c. GR was Off-Duty between 07:25 and 07:38, between 08:11 and 09:09, and between 09:25 and 09:59 when he was actually On-Duty for some period of time during some or all of those periods of time. d. GR was Off-Duty between 15:11 and 00:00 when he was actually On-Duty during some or all of that period of time. e. GR's total Driving time was 10 hours and 46 minutes when it was actually approximately 11 hours and 22 minutes.
		DRIVER CS
66.	9/18/12	a. CS was Off-Duty Driving between 07:24 and 07:30 when he was actually Driving during some or all of that period of time. b. CS was Off-Duty Driving between 08:35 and 09:17 when he was actually Driving during some or all of that period of time. c. CS was Off-Duty Driving between 11:49 and 12:01 when he was actually Driving during some or all of that period of time. d. CS was Off-Duty between 14:50 and 00:00 when he was actually On-Duty during some or all of that period of time. e. CS's total Driving time was 10 hours and 56 minutes when it was actually approximately 11 hours and 56 minutes.
67.	3/8/13	a. CS was Off-Duty Driving between 03:08 and 03:14 when he was actually Driving during some or all of that period of time. b. CS was Off-Duty Driving between 08:43 and 09:20 when he was actually Driving during some or all of that period of time. c. CS was Off-Duty Driving between 10:26 and 10:35 when he was actually Driving during some or all of that period of time. d. CS was Off-Duty between 16:41 and 00:00 when he was actually On-Duty during some or all of that period of time. e. CS's total Driving time was 10 hours and 49 minutes when it was actually approximately 11 hours and 41 minutes.
		DRIVER RK
68.	9/25/13	a. RK was Off-Duty between 00:00 and 02:32 when he was actually Driving and On-Duty during some or all of that period of time. b. RK was Off-Duty between 08:44 and 09:34 when he was actually On-Duty during some or all of that period of time. c. RK was Off-Duty Driving between 09:34 and 10:34 when he was actually Driving during some or all of that period of time. d. RK was Off-Duty between 15:01 and 00:00 when he was actually On-Duty during some or all of that period of time. e. RL was On-Duty or Off-Duty between 02:32 and 02:38, between 02:51 and 03:06, and between 08:44 and 09:34, when he was actually Driving for some period of time during some or all of those periods of time. f. RK's total Driving time was 10 hours and 18 minutes when it was actually approximately 11 hours and 18 minutes.

69.	9/26/13	a. RK was Off-Duty between 00:00 and 02:15 when he was actually Driving and On-Duty during some or all of that period of time. b. RK was Off-Duty between 07:45 and 08:49 when he was actually On-Duty during some or all of that period of time. c. RK was Off-Duty Driving between 08:49 and 09:49 when he was actually Driving during some or all of that period of time. d. RK was Off-Duty between 15:06 and 00:00 when he was actually On-Duty during some or all of that period of time. e. RK was On-Duty or Off-Duty between 07:45 and 07:54, between 07:54 and 08:49, between 11:20 and 11:41, and between 14:59 and 15:06, when he was actually Driving for some period of time during some or all of those periods of time. f. RK's total Driving time was 10 hours and 19 minutes when it was actually approximately 11 hours and 19 minutes.
		DRIVER SG
70.	10/21/12	a. SG was Off-Duty between 00:00 and 01:25 when he was actually Driving and On-Duty during some or all of that period of time. b. SG was Off-Duty Driving between 14:53 and 15:19 when he was actually Driving during some or all of that period of time. c. SG was Off-Duty between 15:19 and 00:00 when he was actually On-Duty during some of that period of time. d. SG's total Driving time was 10 hours and 53 minutes when it was actually approximately 11 hours and 54 minutes. e. SG did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
71.	4/14/13	a. SG was Off-Duty between 00:00 and 01:35 when he was actually Driving and On-Duty during some or all of that period of time. b. SG was Off-Duty between 14:40 and 15:01 when he was actually On-Duty during some or all of that period of time. c. SG was Off-Duty Driving between 15:25 and 15:32 when he was actually Driving during some or all of that period of time. d. SG was Off-Duty between 15:32 and 15:38 when he was actually On-Duty during some or all of that period of time. e. SG was Off-Duty Driving between 15:38 and 16:00 when he was actually Driving during some or all of that period of time. f. SG was Off-Duty between 16:00 and 00:00 when he was actually On-Duty during some or all of that period of time. g. SG's total Driving time was 10 hours and 55 minutes when it was actually approximately 11 hours and 47 minutes. h. SG did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.

		DRIVER AM
72.	9/15/12	a. AM was Off-Duty between 00:00 and 00:53 when he was actually On-Duty during all or some of that period of time. b. AM was Off-Duty Driving between 00:53 and 01:16 when he was actually Driving during some or all of that period of time. c. AM was Off-Duty between 01:16 and 01:35 when he was actually On-Duty during some or all of that period of time. d. AM was Off-Duty Driving between 01:35 and 01:58 when he was actually Driving during some or all of that period of time. e. AM was Off-Duty between 07:08 and 08:36 when he was actually On-Duty during some or all of that period of time. f. AM's total Driving time was 10 hours and 48 minutes when it was actually approximately 11 hours and 34 minutes. g. AM did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.
73.	4/25/13	a. AM was Off-Duty between 00:00 and 01:01 when he was actually On Duty during all or some of that period of time. b. AM was Off-Duty Driving between 01:01 and 01:26 when he was actually Driving during some or all of that period of time. c. AM was Off-Duty between 01:26 and 01:35 when he was actually On-Duty during some or all of that period of time. d. AM was Off-Duty between 07:14 and 08:45 when he was actually On-Duty during some or all of that period of time. e. AM was Off-Duty Driving between 15:05 and 15:17 when he was actually Driving during some or all of that period of time. f. M was Off-Duty between 15:31 and 00:00 when he was actually On-Duty during some or all of that period of time. g. AM's total Driving time was 10 hours and 58 minutes when it was actually approximately 11 hours and 48 minutes. h. AM did not drive a CMV after 14 consecutive hours after coming on duty when he actually did drive a CMV after 14 consecutive hours after coming on duty.
		DRIVER JH
74.	12/18/12	a. JH was Off-Duty between 00:00 and 03:48 when he was actually On-Duty during some or all of that period of time. b. JH was Off-Duty Driving between 03:48 and 04:06 when he was actually Driving during some or all of that period of time. c. JH was Off-Duty between 04:06 and 04:51 when he was actually On-Duty during some or all of that period of time. d. JH was Off-Duty Driving between 04:51 and 05:02 when he was actually Driving during some or all of that period of time. e. JH was Off-Duty Driving between 11:12 and 11:18 when he was actually Driving during some or all of that period of time. f. JH was Off-Duty between 17:31 and 00:00 when he was actually On-Duty during some or all of that period of time.

		g. JH's total Driving time was 10 hours and 54 minutes when it was actually approximately 11 hours and 29 minutes.
75.	3/26/13	a. JH was Off-Duty between 00:00 and 03:54 when he was actually On-Duty during some or all of that period of time. b. JH was Off-Duty Driving between 03:54 and 04:06 when he was actually Driving during some or all of that period of time. c. JH was Off-Duty between 04:06 and 04:42 when he was actually On-Duty during some or all of that period of time. d. JH was Off-Duty Driving between 04:42 and 04:50 when he was actually Driving during some or all of that period of time. e. JH was Off-Duty Driving between 10:50 and 10:55 when he was actually Driving during some or all of that period of time. f. JH was Off-Duty between 17:39 and 00:00 when he was actually On-Duty during some or all of that period of time. g. JH's total Driving time was 10 hours and 59 minutes when it was actually approximately 11 hours and 24 minutes.
		DRIVER MB
76.	12/20/12	a. MB was Off-Duty between 00:00 and 07:01 when she was actually Driving and On-Duty during some of that period of time. b. MB was Off-Duty Driving between 19:12 and 19:52 when she was actually Driving during some or all of that period of time. c. MB was Off-Duty between 19:52 and 00:00 when she was actually On-Duty during some or all of that period of time. d. MB's total Driving time was 10 hours and 43 minutes when it was actually approximately 11 hours and 41 minutes.
		DRIVER JC
77.	12/12/12	a. JC was Off-Duty between 00:00 and 05:32 when he was actually Driving and On-Duty during some of that period of time. b. JC was Off-Duty between 17:28 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. JC's total Driving time was 11 hours and 21 minutes when it was actually approximately 12 hours and 20 minutes.
		DRIVER RT
78.	12/22/12	a. RT was Off-Duty between 00:00 and 09:04 when he was actually Driving and On-Duty during some or all of that period of time. b. RT was Off-Duty between 20:37 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. RT's total Driving time was 10 hours and 59 minutes when it was actually approximately 12 hours and 15 minutes. d. RT drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. e. RT did not drive a commercial vehicle after 14 consecutive hours after coming On-Duty when he actually did drive a commercial vehicle after 14 consecutive hours after coming On-Duty.

79.	12/23/12	a. RT was Off-Duty between 00:00 and 08:26 when he was actually Driving and On-Duty during some or all of that period of time. b. RT was Off-Duty between 18:15 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. c. RT's total Driving time was 8 hours and 41 minutes when it was actually approximately 16 hours and 16 minutes. d. RT drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. e. RT did not drive a commercial vehicle after 14 consecutive hours after coming On-Duty when he actually did drive a commercial vehicle after 14 consecutive hours after coming On-Duty.
80.	2/20/14	a. RT was Off-Duty between 15:41 and 00:00 when he was actually Driving and On-Duty during some or all of that period of time. b. RT was On-Duty or Off-Duty between 02:36 and 02:52, between 06:18 and 07:23, between 08:56 and 09:25, between 12:41 and 12:46, between 12:52 and 13:50 and between 15:22 and 15:34, when he was actually Driving for some period of time during some or all of those periods of time. c. RT's total Driving time was 10 hours when it was actually approximately 11 hours and 13 minutes. d. RT did not drive a commercial vehicle after 14 consecutive hours after coming On-Duty when he actually did drive a commercial vehicle after 14 consecutive hours after coming On-Duty
		DRIVER WB
81.	10/26/12	a. WB was Off-Duty between 00:00 and 06:31 when he was actually Driving and On-Duty during some of that period of time. b. WB was Off-Duty Driving between 13:24 and 14:01 when he was actually Driving during some or all of that period of time. c. WB was Off-Duty between 14:01 and 23:24 when he was actually Driving and On-Duty during some of that period of time. d. WB's total Driving time was 5 hours and 59 minutes when it was actually approximately 7 hours and 4 minutes.
82.	10/27/12	a. WB was Off-Duty between 04:56 and 16:29 when he was actually Driving during some or all of that period of time. b. WB's total Driving time without a ten-hour rest period was 15 hours and 54 minutes when it was actually approximately 24 hours and 52 minutes. c. WB drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. d. WB did not drive a commercial vehicle after 14 consecutive hours after coming On-Duty when he actually did drive a commercial vehicle after 14 consecutive hours after coming On-Duty.
83.	11/24/12	a. WB was Off-Duty between 05:12 and 15:15 when he was actually Driving during some or all of that period of time. b. WB's total Driving time without a ten-hour rest period was 17 hours and 27 minutes when it was actually approximately 21 hours and 15 minutes.

		c. WB drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. d. WB did not drive a commercial vehicle after 14 consecutive hours after coming On-Duty when he actually did drive a commercial vehicle after 14 consecutive hours after coming On-Duty.
84.	12/21/12	a. WB was Off-Duty between 00:00 and 09:17 when he was actually Driving and On-Duty during some of that period of time. b. WB's total Driving time was 10 hours and 53 minutes when it was actually approximately 11 hours and 10 minutes.
85.	12/22/12	a. WB was Off-Duty Driving between 07:34 and 08:34 when he was actually Driving during some or all of that period of time. b. WB's total Driving time without a ten-hour rest period was 19 hours and 59 minutes when it was actually approximately 21 hours and 16 minutes. c. WB drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. d. WB did not drive a commercial vehicle after 14 consecutive hours after coming On-Duty when he actually did drive a commercial vehicle after 14 consecutive hours after coming On-Duty.
		DRIVER KS
86.	12/7/12	a. KS was Off-Duty Driving between 00:47 and 01:17 when he was actually Driving during some or all of that period of time. b. KS was Off-Duty Driving between 09:27 and 09:45 when he was actually Driving during some or all of that period of time. c. KS was Off-Duty between 09:45 and 10:48 when he was actually On-Duty during some or all of that period of time. d. KS's total Driving time without a ten-hour rest period was 14 hours and 19 minutes when it was actually approximately 15 hours and 7 minutes. e. KS drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. f. KS did not drive a commercial vehicle after 14 consecutive hours after coming On-Duty when he actually did drive a commercial vehicle after 14 consecutive hours after coming On-Duty.
		TM EDITS
87.	11/5/12	On or about November 5, 2012, TM edited BEAM TRUCKING Driver DP's electronic Record of Duty Status for November 2, 2012 to falsely show that: a. DP was "Off-Duty Driving" between 16:43 and 17:04 when DP's November 2, 2012 Record of Duty Status originally showed that DP was actually Driving during this period of time. b. DP did not drive a CMV after 14 consecutive hours after coming On-Duty when DP's November 2, 2012 Record of Duty Status originally showed that DP actually did drive a CMV after 14 consecutive hours after coming On-Duty.

88.	11/5/12	On or about November 5, 2012, TM edited BEAM TRUCKING Driver AM's electronic Record of Duty Status for November 3, 2012 to falsely show that: a. AM was "Off-Duty Driving" between 00:50 and 01:04 when AM's November 3, 2012 Record of Duty Status originally showed that AM was actually Driving during this period of time. b. AM's total Driving time was 10 hours and 53 minutes when it was actually 11 hours and 18 minutes.
89.	2/19/13	On or about February 19, 2013, TM edited BEAM TRUCKING Driver KC's electronic Record of Duty Status for February 19, 2013 to falsely show that: a. KC was "Off-Duty Driving" between 06:39 and 07:01 when KC's February 19, 2013 Record of Duty Status originally showed that KC was actually Driving during this period of time. b. KC's total Driving time was 10 hours and 54 minutes when it was actually 11 hours and 16 minutes.
90.	4/25/13	On or about April 25, 2013, TM edited BEAM TRUCKING Driver JM's electronic Record of Duty Status for April 25, 2013 to falsely show that: a. JM was "Off-Duty Driving" between 02:45 and 03:06 when JM's April 25, 2013 Record of Duty Status originally showed that JM was actually Driving during this period of time. b. JM's total Driving time was 10 hours and 51 minutes when it was actually 11 hours and 20 minutes.
		DRIVER KDS
91.	2/8/17	a. KDS was Off-Duty between 00:00 and 04:21 when he was actually On-Duty during some or all of that period of time. b. KDS drove a CMV after taking 10 consecutive hours Off-Duty when he actually drove a CMV without taking 10 consecutive hours Off-Duty. c. KDS did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On- Duty.
92.	2/10/17	a. KDS was Off-Duty between 00:00 and 05:59 when he was actually On-Duty during some or all of that period of time. b. KDS did not drive a CMV after 14 consecutive hours after coming On-Duty when he actually did drive a CMV after 14 consecutive hours after coming On-Duty.

49. In violation of Title 18, United States Code, Sections 1001, 2(a), and 2(b).

COUNTS NINETY-THREE TO NINETY-NINE

(Falsification of Records in Contemplation of Federal Matter)

50. Paragraphs 1 through 29 of this Indictment are re-alleged and incorporated by reference as if fully set forth herein.

51. On or about the dates set forth below, as to each count, in the Western District of Virginia and elsewhere, the defendants, **BEAM BROS. TRUCKING, INC., BEAM BROS. HOLDING CORPORATION LLC, GERALD BEAM, GARLAND BEAM, SHAUN BEAM, NICKOLAS KOZEL,** and others known and unknown to the grand jury, did knowingly alter, cover up, falsify and make a false entry, namely, the driver identified by his initials, stated that he worked fewer hours than he actually worked, in a record or document, namely, a time sheet, as set forth below, with intent to impede, obstruct and influence the investigation and proper administration of, and in contemplation of and in relation to, any matter within the jurisdiction of the United States Department of Labor, a department of the United States.

52. On or about the stated dates, in the Western District of Virginia and elsewhere, the defendants, **BEAM BROS. TRUCKING, INC., BEAM BROS. HOLDING CORPORATION LLC, GERALD BEAM, GARLAND BEAM, SHAUN BEAM, NICKOLAS KOZEL,** and others known and unknown to the grand jury, (1) were members of a conspiracy as described in Count Two of this indictment, (2) the offense of falsification of records in contemplation of a federal matter was committed or was caused to be committed by a member of and during the conspiracy, (3) the member of the conspiracy committed or caused the offense to be committed while a member of and during the conspiracy, and (4) the offense was committed in furtherance of the conspiracy.

Count	Bi-Weekly Timesheet Pay Roll Period Dates (On or About)	Driver
93.	2/3/2013 – 2/16/2013	TB

94.	10/28/2012 – 11/10/2012	CW
95.	1/6/2013 – 1/19/2013	KC
96.	11/25/2012 – 12/8/2012	RL
97.	1/6/2013 – 1/19/2013	RM
98.	12/9/2012 – 12/22/2012	TM
99.	11/11/2012 – 11/24/2012	JM

53. In violation of Title 18, United States Code, Sections 1519, 2(a), and 2(b).

COUNTS ONE HUNDRED TO ONE HUNDRED AND SIX

(False Statements)

54. Paragraphs 1 through 29 of this Indictment are re-alleged and incorporated by reference as if fully set forth herein.

55. On or about the dates set forth below, as to each count, in the Western District of Virginia and elsewhere, the defendants, **BEAM BROS. TRUCKING, INC., BEAM BROS. HOLDING CORPORATION LLC, GERALD BEAM, GARLAND BEAM, SHAUN BEAM, NICKOLAS KOZEL,** and others known and unknown to the grand jury, willfully and knowingly, made and used any false writing and document, namely, a time sheet, as set forth below, knowing the same to contain any materially false, fictitious, and fraudulent statement and entry, namely, the driver identified by his initials stated that he worked fewer hours than he actually worked, in a matter within the jurisdiction of the executive branch of the government of the United States, namely, the United States Department of Labor, as set forth below.

56. On or about the stated dates, in the Western District of Virginia and elsewhere, the defendants, **BEAM BROS. TRUCKING, INC., BEAM BROS. HOLDING CORPORATION LLC, GERALD BEAM, GARLAND BEAM, SHAUN BEAM, NICKOLAS KOZEL,** and others known and unknown to the grand jury, (1) were members of a conspiracy as described in

Count Two of this indictment, (2) the offense of making and using a false record was committed or was caused to be committed by a member of and during the conspiracy, (3) the member of the conspiracy committed or caused the offense to be committed while a member of and during the conspiracy, and (4) the offense was committed in furtherance of the conspiracy.

Count	Bi-Weekly Timesheet Pay Roll Period Dates (On or About)	Driver
100.	2/3/2013 – 2/16/2013	TB
101.	10/28/2012 – 11/10/2012	CW
102.	1/6/2013 – 1/19/2013	KC
103.	11/25/2012 – 12/8/2012	RL
104.	1/6/2013 – 1/19/2013	RM
105.	12/9/2012 – 12/22/2012	TM
106.	11/11/2012 – 11/24/2012	JM

57. In violation of Title 18, United States Code, Sections 1001, 2(a), and 2(b).

COUNT ONE HUNDRED AND SEVEN

(Conspiracy to Commit Wire Fraud)

58. The allegations set forth in paragraphs 1 through 29 of the indictment are re-alleged and incorporated by reference as if set out in full.

59. Beginning as early as in or about June 1999, the exact date being unknown to the Grand Jury, and continuing to on or about the date of this indictment, in the Western District of Virginia and elsewhere, the defendants, **BEAM BROS. TRUCKING, INC., BEAM BROS. HOLDING CORPORATION LLC, GERALD BEAM, GARLAND BEAM, SHAUN BEAM, NICKOLAS KOZEL,** did knowingly and willfully conspire, combine, confederate, and agree together and with each other and with other individuals both known and unknown to the Grand Jury, to commit wire fraud, in violation of Title 18, United States Code, Section 1343, that is to

devise and intend to devise a scheme to defraud the United States Postal Service ("USPS") and drivers employed by BEAM TRUCKING and to obtain money and property by means of false and fraudulent pretenses, representations and promises, and transmitted and caused to be transmitted by means of wire in interstate commerce, any writings, signs, signals, pictures, and sounds for the purpose of executing such scheme.

The Scheme and Artifice to Defraud

60. The defendants and their co-conspirators carried out the objects of the conspiracy by various means, at various times, including:

a. Representing and promising in mail contracts and renewal contracts ("mail contracts") that BEAM TRUCKING would comply with all applicable federal, state and local laws and regulations and would faithfully discharge all duties and obligations imposed by such laws and regulations, including the FMCSA Safety Regulations, the FMCSA HOS safety regulations, all speed limits, and the SCA/FLSA, even though the defendants had no intention of complying with these requirements at the time they made the representations and promises as well as during the life of the mail contracts.

b. Concealing from the USPS prior to the award of the mail contracts the fact that BEAM TRUCKING had not complied with all applicable federal, state and local laws and regulations and had not faithfully discharged all duties and obligations imposed by such laws and regulations, including the FMCSA Safety Regulations, the FMCSA HOS safety regulations, all speed limits, and the SCA/FLSA and its governing regulations, thereby depriving the USPS of vital information that it would have considered in deciding whether to award mail contracts to BEAM TRUCKING or one of its competitors.

c. Defrauding the USPS of (1) USPS money paid to BEAM TRUCKING under the mail contracts; (2) USPS's intangible property right to award mail contracts to fully qualified motor carriers; (3) USPS's intangible property right to control USPS money and assets as it saw fit; (4) USPS's intangible property right to conduct a fair bidding and contracting process, and (5) USPS's intangible property right to control its risk of loss.

d. After fraudulently obtaining USPS money and property through false promises, representations and omissions, failing to pay the BEAM TRUCKING CMV drivers as required under the SCA/FLSA and the mail contracts.

e. Concealing the pay requirements of the SCA/FLSA and the mail contracts from BEAM TRUCKING CMV drivers.

f. Aiding, abetting, encouraging, requiring and permitting BEAM TRUCKING CMV drivers to falsify their time sheets and their records of duty status to report fewer hours worked than they actually worked, in violation of the SCA/FLSA and the mail contracts.

g. Aiding, abetting, encouraging, causing and requiring BEAM TRUCKING CMV drivers to falsify their time sheets to report fewer hours worked than they actually worked by instructing the drivers that their time sheets should match the false records of duty status in violation of SCA/FLSA and the mail contracts.

h. Falsely and fraudulently representing to BEAM TRUCKING CMV drivers that they were entitled to be paid only for a pre-set fixed amount of time, often referred to as "standard hours," for completing a trip/route, even if the trip/route took more time to complete than the "standard hours," and even when the

drivers were paid less than they were entitled to be paid under the mail contracts and the SCA/FLSA.

i. Falsely and fraudulently representing to BEAM TRUCKING CMV drivers that they were permitted only to report "standard hours" on their time sheets even when the actual hours were greater.

j. Telling BEAM TRUCKING CMV drivers that they would not be paid for short rest periods, for time remaining in readiness to operate a CMV, for time waiting for their trailers to be loaded or unloaded at postal facilities, for time spent assisting or supervising the loading or unloading of their trailers at postal facilities, for time waiting at a relay location for the arrival of another driver, and for the time during mechanical breakdowns, weather delays, accident delays, and traffic delays.

k. Preventing BEAM TRUCKING CMV drivers who were aware of the pay requirements of the mail contracts and the SCA/FLSA, as well as BEAM TRUCKING's practice of paying drivers less than required under the SCA/FLSA, from sharing that information with other drivers, DOL, DOT, and any other government agency in an effort to conceal the ongoing scheme and conspiracy.

l. Creating an "Over Hours List audit program" that identified drivers who reported on their time sheets more time than the "standard hours," and contacting these drivers to convince them to report the "standard hours" or less time on future time sheets to conceal the fact that BEAM TRUCKING CMV drivers were being underpaid and driving in violation of the FMCSA HOS safety regulations and the SCA/FLSA.

m. Failing to inform the BEAM TRUCKING employees responsible for implementing the Over Hours List audit program how the BEAM TRUCKING CMV drivers were required to be paid under the SCA/FSLA and the mail contracts.

n. Directing the BEAM TRUCKING employees responsible for implementing the Over Hours List audit program to implement the program to pay BEAM TRUCKING CMV drivers in violation of the SCA/FSLA and the mail contracts.

o. Failing to review and consider BEAM TRUCKING CMV drivers' requests for additional pay.

p. Failing to pay BEAM TRUCKING CMV drivers as required under the SCA/FLSA and mail contracts.

Overt Acts

61. In furtherance of the conspiracy, and to effect the objects thereof, the following overt acts, among others, were committed in the Western District of Virginia, and elsewhere.

62. Each factual allegation of Counts One Hundred and Eight through One Hundred and Twenty-Five of this indictment are re-alleged and incorporated by reference as if fully set forth herein, and each allegation separately constitutes an overt act in furtherance of the conspiracy charged in this Count.

63. In violation of Title 18, United States Code, Section 1349.

COUNTS ONE HUNDRED AND EIGHT TO ONE HUNDRED AND TWENTY-FIVE
(Wire Fraud)

64. Paragraphs 1 through 29 and the factual allegations of Count One Hundred and Seven (Wire Fraud Conspiracy) of this Indictment describing the scheme and artifice to defraud are re-alleged and incorporated by reference as if fully set forth herein.

65. On or about the dates set forth below, as to each count, in the Western District of Virginia, and elsewhere, the defendants, **BEAM BROS. TRUCKING, INC., BEAM BROS. HOLDING CORPORATION LLC, GERALD BEAM, GARLAND BEAM, SHAUN BEAM, NICKOLAS KOZEL,** and others known and unknown to the grand jury, did knowingly, and with intent to defraud, devise and intend to devise a scheme and artifice to defraud, and to obtain money and property from the USPS and BEAM TRUCKING CMV drivers by means of materially false and fraudulent pretenses, representations, and promises, knowing that the pretenses, representations and promises were false and fraudulent when made.

66. On or about the stated dates, in the Western District of Virginia and elsewhere, the defendants, **BEAM BROS. TRUCKING, INC., BEAM BROS. HOLDING CORPORATION LLC, GERALD BEAM, GARLAND BEAM, SHAUN BEAM, NICKOLAS KOZEL,** and others known and unknown to the grand jury, (1) were members of a conspiracy as described in Count One Hundred and Three of this indictment, (2) the offense of wire fraud was committed or was caused to be committed by a member of the conspiracy during the conspiracy (3) the member of the conspiracy committed or caused the offense to be committed while a member of and during the existence of the conspiracy, and (4) the offense was committed in furtherance of the conspiracy.

USE OF THE WIRES

67. On or about the dates set forth as to each count below, in the Western District of Virginia, and elsewhere, and for the purpose of executing the scheme and artifice to defraud described in Count One Hundred and Seven (Wire Fraud Conspiracy) of this Indictment, and attempting to do so, the defendants, **BEAM BROS. TRUCKING, INC., BEAM BROS. HOLDING CORPORATION LLC, GERALD BEAM, GARLAND BEAM, SHAUN BEAM, NICKOLAS KOZEL**, and others known and unknown to the grand jury, caused to be transmitted by means of wire communication in interstate commerce, certain writings, signs, signals, and sounds described below for each count, each transmission constituting a separate count:

Count	Date (On or About)	Nature of Wire
108.	3/27/15	BEAM TRUCKING Email & Attachments from Mount Crawford, VA to USPS in Maryland, transmitting documents related to USPS Renewal Contract 240AE including "TRANSPORTATION SERVICES RENEWAL CONTRACT FOR REGULAR SERVICE" signed by **GERALD BEAM.**
109.	6/23/14	BEAM TRUCKING Email & Attachments from Mount Crawford, VA to USPS in Maryland, transmitting documents related to USPS Renewal Contract 207L4 including "TRANSPORTATION SERVICES RENEWAL CONTRACT FOR REGULAR SERVICE" signed by **GERALD BEAM.**
110.	3/29/12	BEAM TRUCKING Email & Attachments from Mount Crawford, VA to USPS in Washington, D.C., transmitting documents related to USPS Renewal Contract 233L5 including "TRANSPORTATION SERVICES RENEWAL CONTRACT FOR REGULAR SERVICE" signed by **GERALD BEAM.**
111.	10/6/11	BEAM TRUCKING Email & Attachments from Mount Crawford, VA to USPS in Maryland, transmitting documents related to USPS Contract 192M8 including "TRANSPORTATION SERVICES PROPOSAL & CONTRACT FOR REGULAR SERVICE" and "ADDENDUM TO TERMS AND CONDITIONS" signed by **GERALD BEAM.**
112.	8/19/11	BEAM TRUCKING Email & Attachments from Mount Crawford, VA to USPS in Maryland, transmitting documents related to USPS Contract 274Y1 including "TRANSPORTATION SERVICES PROPOSAL &

		CONTRACT FOR REGULAR SERVICE" signed by **GERALD BEAM.**
113.	5/12/11	BEAM TRUCKING Email & Attachments from Mount Crawford, VA to USPS in Maryland, transmitting documents related to USPS Renewal Contract 240AE including "TRANSPORTATION SERVICES RENEWAL CONTRACT FOR REGULAR SERVICE" signed by **GERALD BEAM.**
114.	4/21/11	BEAM TRUCKING Email & Attachments from Mount Crawford, VA to USPS in Maryland, transmitting documents related to USPS Renewal Contract 011L1 including "TRANSPORTATION SERVICES RENEWAL CONTRACT FOR REGULAR SERVICE" signed by **GERALD BEAM.**
115.	4/6/11	BEAM TRUCKING Email & Attachments from Mount Crawford, VA to USPS in Texas, transmitting documents related to USPS Contract 300ZE including "TRANSPORTATION SERVICES PROPOSAL & CONTRACT FOR REGULAR SERVICE" signed by **GERALD BEAM.**
116.	4/4/11	BEAM TRUCKING Email & Attachments from Mount Crawford, VA to USPS in Maryland, transmitting documents related to USPS Renewal Contract 275L6 including "TRANSPORTATION SERVICES RENEWAL CONTRACT FOR REGULAR SERVICE" signed by **GERALD BEAM.**
117.	9/7/10	BEAM TRUCKING Email & Attachments from Mount Crawford, VA to USPS in Washington, D.C., transmitting documents related to USPS Renewal Contract 208L5 including "TRANSPORTATION SERVICES PROPOSAL & CONTRACT FOR REGULAR SERVICE" signed by **GARLAND BEAM.**
118.	5/22/09	BEAM TRUCKING Email & Attachments sent from Mount Crawford, VA to USPS in New York, transmitting documents related to USPS Renewal Contract 10423 including "TRANSPORTATION SERVICES RENEWAL CONTRACT FOR REGULAR SERVICE" signed by **GERALD BEAM.**
119.	2/15/2013	TB's faxed "BI-WEEKLY TIME SHEET" for Pay Period 2/3/2013 – 2/16/2013; Faxed from Georgia to Mount Crawford, Virginia
120.	11/24/2012	JM's faxed "BI-WEEKLY TIME SHEET" for Pay Period 11/11/2012 – 11/24/2012; Faxed from Georgia to Mount Crawford, Virginia
121.	1/21/2013	KC's faxed "BI-WEEKLY TIME SHEET" for Pay Period 1/6/2013 – 1/19/2013; Faxed from Georgia to Mount Crawford, Virginia
122.	12/8/2012	RL's faxed "BI-WEEKLY TIME SHEET" for Pay Period 11/25/2012 – 12/8/2012; Faxed from West Virginia to Mount Crawford, Virginia

123.	1/20/2013	RM's faxed "BI-WEEKLY TIME SHEET" for Pay Period 1/6/2013 – 1/19/2013; Faxed from West Virginia to Mount Crawford, Virginia
124.	12/24/2012	TM's faxed "BI-WEEKLY TIME SHEET" for Pay Period 12/9/2012 – 12/22/2012; Faxed from North Carolina to Mount Crawford, Virginia
125.	11/10/2012	CW's faxed "BI-WEEKLY TIME SHEET" for Pay Period 10/28/2012 – 11/10/2012; Faxed from Kentucky to Mount Crawford, Virginia

68. In violation of Title 18, United States Code, Sections 1343, 2(a), and 2(b).

COUNT ONE HUNDRED AND TWENTY-SIX

(Conspiracy to Engage in Monetary Transactions in Property Derived from Specified Unlawful Activity)

69. The allegations set forth in paragraphs 1 through 29, and the factual allegations of Count One Hundred and Seven (Wire Fraud Conspiracy) and Counts One Hundred and Eight through One Hundred and Twenty-Five (Wire Fraud), of the indictment are re-alleged and incorporated by reference as if set out in full.

70. Beginning as early as in or about June 1999, the exact date being unknown to the Grand Jury, and continuing to on or about the date of this indictment, in the Western District of Virginia and elsewhere, the defendants, **BEAM BROS. TRUCKING, INC., BEAM BROS. HOLDING CORPORATION LLC, GERALD BEAM, GARLAND BEAM, SHAUN BEAM,** and **NICKOLAS KOZEL,** did willfully and knowingly conspire to violate Title 18, United States Code, Section 1957(a), that is, to knowingly engage, attempt to engage, cause, and aid and abet others to engage, within the United States, in monetary transactions in criminally derived property of a value greater than $10,000 derived from specified unlawful activity, that is, wire fraud, in violation of Title 18, United States Code, Section 1343.

71. In violation of Title 18, United States Code, Section 1956(h).

NOTICE OF FORFEITURE

72. Upon conviction of one or more of the felony offenses alleged in this Indictment, the defendant shall forfeit to the United States:

a. Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of Title 18, United States Code, Sections, 1343, and/or 1349, pursuant to Title 18, United States Code, Section, 981(a)(1)(C) and Title 28, United States Code, Section, 2461(c).

b. Any property, real or personal, involved in a violation of Title 18, United States Code, Section, 1956 and 1957, or any property traceable to such property, pursuant to Title 18, United States Code, Section, 982(a)(1).

73. The property to be forfeited to the United States includes but is not limited to the following property:

a. **Money Judgment**

Not less than $ 40,000,000.00 (Forty Million Dollars) in United States currency and all interest and proceeds traceable thereto, in that such sum in aggregate was obtained directly or indirectly as a result of said offenses or is traceable to such property.

A TRUE BILL this 16th day of March, 2017.

s/ Grand Jury Foreperson
FOREPERSON

RICK A. MOUNTCASTLE
ACTING UNITED STATES ATTORNEY

THE NOT SO SPEEDY TRIAL ACT

Shon Hopwood*

Abstract: The Speedy Trial Act (STA) of 1974 occupies a peculiar place in the criminal justice system. Very few pieces of legislation can lay claim to protecting both the rights of criminal defendants and the public's significant interest in timely justice, while reducing the cost of judicial administration. The STA formerly accomplished these lofty aims by reducing pretrial delays. But for the past two decades legal scholars have ignored the STA, and both prosecutors and defense attorneys have subverted the STA's goals by routinely moving for continuances. And although the Act categorically applies in every federal criminal case, it has been effectively marginalized by federal district and circuit courts. The reason this happens is simple: no actor in the criminal justice system has an incentive to follow it. Prosecutors and defense attorneys alike rely on delays in the system; and overburdened district courts, which have opposed the STA since its inception, have failed to enforce it as written. Appellate courts, too, prefer to thwart the STA's requirements rather than reverse a conviction obtained by otherwise constitutional means. The institutional inertia that pulls courts away from the STA's commands has led to a predictable result: an increase in pretrial delays, the very ill that Congress intended to cure when it passed the Act. This Article highlights and examines the ways in which federal courts undermine the STA and details a number of open circuit court conflicts involving the Act. The Article then proposes a comprehensive, but non-Congressional, fix that prescribes how every actor in the criminal justice system can comply with the Act as Congress intended.

* The author worked on *Wasson v. United States*, cited below, with the University of Virginia School of Law Supreme Court Clinic, which represented Mr. Wasson before the Supreme Court of the United States. The author was a William H. Gates Public Service Law Scholar at the University of Washington School of Law where he received his J.D. Thanks to Professors Tom Cobb, Mary Fan, and Jacqueline McMurtrie for their helpful comments. I also would like to thank my lovely wife, Ann Marie, for making it possible for me to write this article while raising two young children, and my constitutional law professor, Ronald K.L. Collins, who has graciously provided me with more mentorship and friendship than any student is realistically entitled to. Lastly, I would like to thank Bruce McWilliams, who provided some of the source material; rest in peace, Bruce.

INTRODUCTION

It is an idea as old, if not older, than Magna Carta: "justice delayed is justice denied."[1] That principle is a vital component of any equitable system of criminal justice. It is vital for a reason: delays in justice are destructive to defendants' rights and to the public good.[2] For this reason, Congress passed the Speedy Trial Act of 1974[3] (STA or Act) to reduce delays between a criminal defendant's arraignment and trial. Congress believed the STA would protect the public's significant interest in timely justice, both as a matter of fairness and as a way to reduce the financial burden of judicial administration.[4]

Given the enormous public interest involved in speedy trials, one would think that federal trial and appellate courts would follow the strict structures of the Act;[5] those structures were designed precisely to

1. *See* MAGNA CARTA cl. 40 (1215), *translation reprinted in* J.C. HOLT, MAGNA CARTA app. 6, at 461 (2d ed. 1992) ("[T]o no one will we deny or delay right or justice."); United States v. Wilson, 27 C.M.R. 472, 477 (1959) (Ferguson, J., dissenting) ("From the historic day at Runnymede, in 1215, when the English barons exacted the Magna Carta from King John, a guiding principle in English, and later American, jurisprudence has been that justice delayed is justice denied."). The quote "justice delayed is justice denied" has been attributed to the British Statesman William E. Gladstone. THE YALE BOOK OF QUOTATIONS 312 (Fred R. Schapiro ed., 2006).

2. Barker v. Wingo, 407 U.S. 514, 522 (1972).

3. 18 U.S.C. §§ 3161–3174 (1976).

4. S. REP. NO. 96-212, at 6–7 (1979).

5. 18 U.S.C. § 3161 (2012).

prevent pretrial delays and the concomitant weakening and expense of the federal criminal justice system.[6] Although the STA has now been in place for over thirty years, federal courts continue, whether through inadvertence or intention, to skirt its statutory text and purpose. Lower federal courts also routinely flout the Supreme Court's repeated admonishments that courts must abide by the STA as it is written—without adding judicial gloss.[7] Twice the Supreme Court has admonished lower courts not to impose their own extra-textual limitations onto the Act. Yet, as will be shown in Parts III through V, lower federal courts have failed to heed the Court's commands. The frequency of these end-runs around the STA are problematic because they lead to unreasonable delays in criminal cases which, in turn, create a detriment to criminal defendants and to the public interest.

So what can be done? This Article argues that the legal academy, lawyers, and federal courts at all levels can ensure—through scholarship, advocacy, and statutory interpretation—that the Act's text and central purpose are faithfully followed, and consequently, that unacceptably long pretrial delays will be an anomaly and not the growing norm. Part I summarizes the interests animating the STA, how it operates, and the judiciary's initial response to it. The next four Parts cover specific STA issues. Part II highlights how district courts continue to disregard the Supreme Court's decision about when STA rights can be waived by criminal defendants. Part III details how lower courts continue to undermine the STA through erroneous interpretations and applications of the ends-of-justice provision. Parts IV and V discuss how federal courts mistakenly apply the doctrines of judicial estoppel and ineffective assistance of counsel to claims implicating the STA. And Part VI explains the reasons why courts undermine the STA and provides a comprehensive approach for resolving such problems so far as they affect every actor in the criminal justice system, from defense attorneys to the legal academy, to the courts.

Then Assistant Attorney General (and later Chief Justice of the United States Supreme Court) William H. Rehnquist, may have said it best—or at least most directly—when he considered the solution to

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6. The speedy trial legislation achieved three goals simultaneously: it strengthened public safety while at the same time lowering costs and protecting the rights of criminal defendants. *See* SUSAN N. HERMAN, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 205 (2006); Richard S. Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 668–69 (1976).

7. *See, e.g.*, Bloate v. United States, 559 U.S. 196, 213 (2010); Zedner v. United States, 547 U.S. 489, 502 (2006).

pretrial delays in federal courts. He declared, "[I]t may well be . . . . that the whole system of federal criminal justice needs to be shaken by the scruff of its neck, and brought up short with a relatively peremptory instruction to prosecutors, defense counsel, and judges alike that criminal cases must be tried within a particular period of time."[8] That boldness indicated severity of the problem. The lingering question, however, was what, if anything, was to be done about the problem of justice delayed?

I. UNACCEPTABLE DELAY

A. The Interests Animating the Speedy Trial Act and the Judiciary's Initial Response

The right to a speedy trial has roots going back to the Magna Carta.[9] From those early roots it began to sprout in the colonial Bill of Rights where George Mason wrote that "a man has a right . . . to speedy trial."[10] The right was considered so essential that in the early period of our history, several states guaranteed a speedy trial in their bill of rights.[11] Not only does the right occupy a precious position in the Sixth Amendment today, but it also shares space in all fifty State Constitutions.[12] And the Supreme Court has labeled the right "fundamental" and "one of the most basic rights preserved by our Constitution."[13]

But while the speedy trial right's importance was undeniable, Congress had recognized by the mid-1970s that the right required some teeth in order to prevent the considerable pretrial delays that plagued federal courts.[14] Congress noted that "both the defense and the prosecution rely upon delay as a tactic in the trial of criminal cases,"[15] and that those delays had a "detrimental effect on the rights of

8. *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 92d Cong. 107 (1971) (statement of William H. Rehnquist, Assistant Att'y Gen. of the United States), *reprinted in* A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 226–27 (Fed. Judicial Center 1980).

9. Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

10. *See* Virginia Declaration of Rights § 8 (1776).

11. *Klopfer*, 386 U.S. at 225.

12. *Id.* at 225–26.

13. *Id.* at 226.

14. H.R. REP. NO. 93-1508 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7407.

15. *Id.* at 7407–08.

defendants."[16]

Congress, however, was not just concerned with the effect of pretrial delays on defendants' rights but also with how those delays impacted the public interest. Such delays are dangerous within the criminal justice system because a testifying witness' memory may fade with the passage of time.[17] Delays further weaken the system by creating large backlogs of cases, enabling criminal defendants to better negotiate for lenient plea bargains that lead to substantial sentencing disparities for defendants who commit similar crimes.[18] In cases where the defendant is granted bail, long pretrial delays create a tempting opportunity for the defendant to escape from the charging jurisdiction or commit new crimes.[19] If that were not enough, pretrial delays erode the public's confidence in the criminal justice system[20] and burden the government with additional costs that are ultimately borne by taxpayers.[21]

Recognizing the sizeable dangers that delays pose to the public interest and acknowledging that the Supreme Court's interpretation of the Sixth Amendment right to a speedy trial had not provided "adequate guidance"[22] to lower courts, Congress enacted the Speedy Trial Act to "give real meaning" to a defendant's Sixth Amendment right to a speedy trial[23] and "to assist in reducing crime and the danger of recidivism by requiring speedy trials."[24]

Although Congress recognized the negative effects of pretrial delays as a significant problem,[25] the STA engendered significant opposition from the courts.[26] The Judicial Conference of the United States opposed

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16. *Id.* at 7407.

17. Barker v. Wingo, 407 U.S. 514, 532 (1972).

18. *Id.* at 519.

19. *See* H.R. REP. NO. 93-1508 (1974), *reprinted in* 1974 U.S.C.C.A.N at 7409.

20. Zedner v. United States, 547 U.S. 489, 501 (2006).

21. *See* H.R. REP. NO. 93-1508, *reprinted in* 1974 U.S.C.C.A.N at 7408–09 (pretrial delays "create[ ] a financial as well as an administrative burden on the taxpayer"); AMANDA PETTERUTI & NASTASSIA WALSH, JUSTICE POLICY INST., JAILING COMMUNITIES: THE IMPACT OF JAIL EXPANSIONS AND EFFECTIVE PUBLIC SAFETY STRATEGIES 18 (2008), *available at* http://www.justicepolicy.org/images/upload/08-04_REP_JailingCommunities_AC.pdf (noting that the average daily cost to the county of incarcerating one pretrial detainee is $58.64, for a minimum of $21,403 if pretrial detention lasts a year).

22. H.R. REP. NO. 93-1508, *reprinted in* 1974 U.S.C.C.A.N at 7405.

23. *Id.* at 7404.

24. Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076.

25. *See* STANDARDS RELATING TO SPEEDY TRIAL (AM. BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, Approved Draft 1968); John C. Godbold, *Speedy Trial—Major Surgery for a National Ill*, 24 ALA. L. REV. 265 (1972).

26. H.R. REP. NO. 96-390, *reprinted in* 1979 U.S.C.C.A.N. 805, 808 (1979) ("[B]oth the

the bill and asked the Congress to postpone its enactment until the judiciary could first evaluate the effectiveness of its rules in reducing pretrial delays.[27] After Congress passed the Act anyway, thirteen district courts recommended that it be repealed.[28] Other criticisms were voiced in the case law.[29]

Perhaps the most significant judicial opposition centered on the STA's district court reporting requirements,[30] which mandated that each district court convene a planning group "responsible for the initial formulation of all district plans."[31] The STA required district court clerks to assemble speedy trial information, including statistics on the number and length of delays.[32] That information, the Act stated, was to be made available to the Circuit Council and the Administrative Office of the United States Courts,[33] the latter of which must then submit periodic reports to Congress based on this information.[34] Many district courts nevertheless failed to comply with the reporting requirements.[35]

B. The Speedy Trial Act

The Speedy Trial Act "sets forth a basic rule" that a defendant must be tried within seventy days of indictment or the date the defendant first appears in court, whichever is later.[36] But not every pretrial day counts toward the seventy-day total. Rather, the STA "excludes" eight categories of time from the speedy trial calculation;[37] only seventy days of *nonexcludable* time triggers a STA violation. If a defendant is not

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Department of Justice and the Judicial Conference opposed enactment of the legislation in 1974, and information available to the committee leads us to the conclusion that, 5 years later, opposition within the Justice Department and the courts has not entirely withered away.").

27. Letter from Rowland F. Kirks, Dir. of the Admin. Office of the United States Courts, to the Hon. Peter W. Rodino, Jr., Chairman of the House Judiciary Comm. (Nov. 8, 1974), *reprinted in* H.R. REP. NO. 93-1508 (1974), *reprinted in* 1974 U.S.C.C.A.N. at 7446.

28. ADMIN. OFFICE OF THE UNITED STATES COURTS, SIXTH REPORT ON THE IMPLEMENTATION OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 52 (1980).

29. *See* United States v. Howard, 440 F. Supp. 1106, 1109 (D. Md. 1977); United States v. Martinez, 538 F.2d 921, 923 (2d Cir. 1976).

30. Robert L. Misner, *District Court Compliance with the Speedy Trial Act of 1974*, ARIZ. ST. L.J. 1, 15–25 (1977).

31. 18 U.S.C. § 3168(a) (Supp. IV 1976).

32. 18 U.S.C. § 3170(a) (Supp. IV 1974).

33. *Id.* § 3170(c).

34. *Id.* § 3167.

35. Misner, *supra* note 30, at 25 nn.117–19.

36. United States v. Tinklenberg, __ U.S. __, 131 S. Ct. 2007, 2011 (2011).

37. *See* 18 U.S.C. § 3161(h) (2012).

tried within the requisite period and the defendant timely files a motion to dismiss,[38] a court must dismiss the indictment, with or without prejudice.[39]

Section 3161(h)(1) is littered with eight enumerated subcategories of time that are excludable.[40] Those subcategories include delay resulting from: issues involving the defendant's mental incompetency,[41] interlocutory appeals,[42] the filing of pretrial motions and their consideration by the court,[43] transferring a case or the removal of defendants from another district;[44] transporting defendants from other districts or from hospitalization;[45] and consideration by the court of proposed plea agreements.[46] While this may seem like an abundance of exceptions, all but one—the exception for pretrial motions—do not apply in the run-of-the-mill criminal case.

The part of the Act that is routinely employed, and that provides district courts with a level of flexibility, is the ends-of-justice continuance. That provision excludes any delay resulting from a continuance where a judge concludes "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."[47]

But just because a judge grants an ends-of-justice continuance does not mean the continuance automatically constitutes excludable time under the Act; no such period of delay is excludable "unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial."[48] To put it differently, under the Act it is not enough for a court to merely cite to the ends-of-justice provision; instead, a court must state its reasons on the record as to why granting a continuance is in the best interest of the public and the defendant. This is an important

38. *Id.* § 3162(a)(2).

39. Under the Act, district courts possess discretion to dismiss the indictment with or without prejudice. *See* United States v. Taylor, 487 U.S. 326, 333 (1988).

40. 18 U.S.C. §§ 3161(h)(1)(A)–(H).

41. *Id.* § 3161(h)(1).

42. *Id.* § 3161(h)(1)(C).

43. *Id.* § 3161(h)(1)(D) & (h)(1)(H).

44. *Id.* § 3161(h)(1)(E).

45. *Id.* § 3161(h)(1)(F).

46. *Id.* § 3161(h)(1)(G).

47. *Id.* § 3161(h)(7)(A).

48. *Id.*

statutory feature that this Article will highlight in detail below.[49]

Among the factors that a district court must consider in deciding whether to grant an ends-of-justice continuance are a defendant's need for reasonable time to obtain counsel, continuity of counsel, and effective preparation of counsel.[50] Conversely, courts are altogether barred from granting ends-of-justice continuances "because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."[51] The ends-of-justice provision thus grants courts substantial flexibility to continue trials, yet it nevertheless limits that flexibility by providing procedural safeguards that courts must satisfy before such a continuance will comply with the Act.

II. WAIVER OF SPEEDY TRIAL ACT RIGHTS

Lower federal courts have found that, just like most legal rights, defendants can waive their right to a speedy trial.[52] The question has become when waiver is appropriate. In *Zedner v. United States*,[53] the Supreme Court largely answered that question.

The case began when the government indicted the defendant in April of 1996. The district court granted several ends-of-justice continuances[54] before the defendant requested a continuance of his own. Prior to granting the defendant's continuance, the court instructed the defendant to sign a preprinted waiver form and waive his speedy trial rights "for all time,"[55] which the defendant promptly did. A few months later, the court granted yet another continuance, so that defendant could attempt to authenticate evidence the prosecution planned to present at trial.[56] In granting the last continuance, the court made no finding that the ends of justice outweighed the best interest of the public and the defendant in a speedy trial as required by the STA. In fact, the court made no mention of the Act,[57] and yet the continuances totaled four years of delays

49. *See infra* text accompanying notes 79–88.

50. 18 U.S.C. § 3161(h)(7)(B)(iv).

51. *Id.* § 3161(h)(7)(C).

52. *See* United States v. Kucik, 909 F.2d 206, 211 (7th Cir. 1990); United States v. Pringle, 751 F.2d 419, 434–35 (1st Cir. 1984).

53. 547 U.S. 489 (2006).

54. *Id.* at 493.

55. *Id.* at 494.

56. *Id.* at 495.

57. *Id.*

between indictment and trial.[58] When the defendant filed a motion to dismiss the indictment, the court denied it on grounds that defendant had waived his speedy trial rights. The defendant was ultimately convicted and the Second Circuit affirmed.[59]

Writing for a unanimous Court, Justice Samuel Alito first considered whether a defendant might prospectively waive the application of the Act. Looking to the text of the statute, Justice Alito noted that § 3161(h) contains no provision providing for prospective waivers, and this omission by Congress, he concluded, "was a considered one."[60] Justice Alito next emphasized that a waiver would run counter to one of the Act's core purposes: safeguarding the public interest "by, among other things, reducing defendants' opportunity to commit crimes while on pretrial release and preventing extended pretrial delay from impairing the deterrent effect of punishment."[61] To allow prospective waivers would seriously undercut the Act, Justice Alito explained, "because there are many cases . . . in which the prosecution, the defense, and the court would all be happy to opt out of the Act, to the detriment of the public interest."[62] The Court went on to hold that defendants can waive the Act's application by failing to file a timely motion to dismiss prior to the start of trial.[63]

Although the *Zedner* Court in 2006 unambiguously held that criminal defendants are unable to prospectively waive their rights under the Act,[64] defense lawyers continue to assert broad, open-ended speedy-trial waivers on behalf of their clients,[65] and district courts continue to accept those waivers.[66]

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58. *Id.*

59. *Id.* at 495–96.

60. *Id.* at 500.

61. *Id.* at 501.

62. *Id.* at 502.

63. *Id.* at 502–03 (citing 18 U.S.C. § 3161(a)(2)).

64. *Id.* at 506.

65. Wildwood Partners sent me motions to waive Speedy Trial Act rights filed by criminal defense lawyers, post-*Zedner*, in the following federal districts: Middle District of Florida; Southern District of Florida; District of Nevada; Central District of California; Northern District of Indiana; and the District of Oregon. *See* E-mail from Wildwood Partners to author (Dec. 22, 2012, 15:48 PST) (on file with author).

66. *E.g.*, Reid v. United States, 871 F. Supp. 2d 324, 336 (D. Del. 2012) (noting that the district court granted defendant's multiple waivers of STA rights); United States v. Beals, 755 F. Supp. 2d 757, 760 (S.D. Miss. 2010) (granting waiver, but in ruling on a motion to dismiss the court recognized that STA rights cannot be waived); United States v. Reddick, CRIM. 09-MJ-2001 JS, 2010 WL 5253527 (D.N.J. Dec. 17, 2010) (holding that defense counsel had authority to waive STA rights for defendant, even where defendant desired a speedy trial); United States v. Dean,

The district court in *United States v. Gates*,[67] for example, faced a motion to dismiss after the court had accepted the defendant's waiver of speedy-trial rights and granted a number of continuances. The defendant argued that because he had not agreed to his defense counsel's request for continuances, the time that elapsed from those continuances did not constitute excludable time and thus his STA rights were violated.[68] The court rejected the defendant's argument in part "because waiver of speedy trial rights may be made by the lawyer without the knowledge of the defendant."[69] Conspicuously absent from the court's discussion was mention of *Zedner*'s holding that the STA does not allow prospective waivers, let alone prospective waivers made by counsel without notice to the defendant.

Another way that district courts circumvent *Zedner* is by converting waivers of STA rights into ends-of-justice continuances months after the court has granted the waivers. In *Reid v. United States*,[70] a defendant argued that his lawyer committed ineffective assistance of counsel by failing to file a motion to dismiss under the STA.[71] The district court acknowledged that it had granted the defendant's waiver, but the court still found that it had cited the ends-of-justice provision in granting the waiver and continuing the trial for fifteen months.[72] The court therefore concluded that the continuance was based on the ends-of-justice provision and not the waiver.[73]

Retroactively converting waivers into ends-of-justice continuances is no less an anathema to *Zedner* than is a prospective waiver. *Zedner* itself forbids such a move: "We see little difference between granting a defendant's request for a continuance in exchange for a promise not to move for dismissal and permitting a prospective waiver."[74] At least one district court, the District of the District of Columbia, has explicitly rejected the argument that a court may conceal a mistakenly granted

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3:05CR25/LAC, 2010 WL 3958673 (N.D. Fla. Sept. 7, 2010) *report and recommendation adopted*, 3:05CR25/LAC, 2010 WL 3958668 (N.D. Fla. Oct. 7, 2010) (granting defendant's waiver of STA rights and finding no STA violation, in part, because of defendant's waiver).

67. 650 F. Supp. 2d 81, 85 (D. Me. 2009).

68. *Id.* at 84.

69. *Id.* at 85.

70. 871 F. Supp. 2d 324 (D. Del. 2012).

71. *Id.* at 336.

72. *Id.*

73. *Id.*

74. Zedner v. United States, 547 U.S. 489, 505 (2006).

waiver by converting it into an ends-of-justice continuance.[75]

Lastly, one entire federal district continued to accept STA waivers long after *Zedner*. The Southern District of Florida continued, by local rule, to allow district courts to accept waivers of STA rights by defendants, and the district did not change its local rule until 2011, five years after the Supreme Court's decision in *Zedner*.[76]

Seven years after the *Zedner* Court unanimously held that defendants may not opt out of the Act by waiving speedy trial rights, defense lawyers continue to file waiver motions and district courts continue to grant broad waivers, which, almost always, result in lengthy delays. This is precisely the result the Supreme Court meant to prevent.

III. THE ENDS-OF-JUSTICE CONTINUANCE

As noted above, district courts employ the ends-of-justice continuance to delay trials for reasons such as defendant's need for reasonable time to obtain counsel, continuity of counsel, and effective preparation of counsel.[77] Because the ends-of-justice continuance provides district courts with flexibility and a degree of subjectivity about the need for pretrial delays, the continuance has been one of the most frequently abused provisions of the STA.

A. The Need to Provide On-the-Record Reasons for Ends-of-Justice Continuances

The STA provides in unmistakable language that a district court must make a finding that the ends of justice are warranted before a continuance under § 3161(h)(7) counts as excludable time. A district court must also "se[t] forth, in the record of the case, [] its reasons" for finding that the ends of justice outweigh other interests.[78]

The *Zedner* Court noted that the Act's procedural requirements (i.e., ends-of-justice findings and placing reasons on the record) serve an important purpose:

> The exclusion of delay resulting from an ends-of-justice continuance is the most open-ended type of exclusion recognized under the Act and, in allowing district courts to grant

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75. *See* United States v. Ferguson, 574 F. Supp. 2d 111, 114 (D.D.C. 2008).

76. *See* S.D. FLA. CT. R. 88.5, Comments (2011) ("Amended [in 2011] to eliminate authority of Court to accept a waiver of Speedy Trial rights." (citing *Zedner*, 547 U.S. 489)).

77. 18 U.S.C. § 3161(h)(7)(B)(iv) (2012).

78. *Id.* § 3161(h)(7)(A).

> such continuances, Congress clearly meant to give district judges a measure of flexibility in accommodating unusual, complex, and difficult cases. But it is equally clear that Congress, knowing that the many sound grounds for granting ends-of-justice continuances could not be rigidly structured, saw a danger that such continuances could get out of hand and subvert the Act's detailed scheme. The strategy of § 3161(h)([7]), then, is to counteract substantive open-endedness with procedural strictness. This provision demands on-the-record findings and specifies in some detail certain factors that a judge must consider in making those findings.[79]

So what constitutes valid reasons? The Court in *Zedner* held that the Act was not satisfied by the trial court's mere "passing reference to the case's complexity" in its ruling on defendant's motion to dismiss.[80] The D.C. Circuit has taken that to mean that implicit findings are not enough.[81] If passing references to the listed factors and implicit findings do not suffice, it is likely that courts must generate genuine reasons as to why a continuance should be granted and then place those reasons on the record.[82]

It is not an exaggeration to say that district courts have given short shrift to the STA's requirement of providing on-the-record reasons to justify ends-of-justice continuances. One way that courts pretend to comply with the Act is by granting the requested continuance and signing an order stating that the ends of justice outweigh the interests of the public and the defendant in a speedy trial, even though the court does not actually make such a finding or provide reasons for the finding on the record.[83] Some courts have also cited the ends-of-justice provision in minute orders with no indication as to how the ends-of-justice provision applies to the case at hand.[84] These courts appear to believe that saying

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79. *Zedner*, 574 U.S. at 508–09.

80. *Id.* at 507.

81. *See* United States v. Bryant, 523 F.3d 349, 360 (D.C. Cir. 2008) (holding that "implicit" findings are insufficient to invoke the ends-of-justice exclusion).

82. *See* Bloate v. United States, 559 U.S. 196, 210 (2010) ("Subsection (h)(7) provides that delays 'resulting from a continuance granted by any judge' *may* be excluded, but only if the judge finds that 'the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial' and records those findings." (emphasis in original)).

83. *See, e.g.*, Order at 1, United States v. Anderson, No. 5:09-cr-34-Oc-10GRJ (M.D. Fla. Oct. 20, 2009).

84. *E.g.*, Minutes of Court, United States v. Gearhart, No. 4:06-cr-40004 (S.D. Ill. Jan. 3, 2007), ECF No. 114; Minutes of Court, United States v. Gearhart, No. 4:06-cr-40004 (S.D. Ill. Jan. 31, 2007), ECF No. 119; Minutes of Court, United States v. Gearhart, No. 4:06-cr-40004 (S.D. Ill. Apr. 19, 2007), ECF No. 144; Minutes of Court, United States v. Gearhart, No. 4:06-cr-40004 (S.D. Ill.

the magic words "ends-of-justice" and citing to the United States Code are valid substitutes for making real findings and providing those findings on the record.

Another way that courts avoid providing on-the-record reasons is through the use of a check-the-box form. These courts employ an "Order of Excludable Delay" form that provides a list of common excludable time provisions that can be used to justify a delay. One court in particular, the United States District Court for the District of Massachusetts, uses this type of form, and when it grants an ends-of-justice continuance, the court checks a box labeled: "Continuance granted in the interest of justice."[85] That is it. No other reasons are provided, other than a simple check in a box citing to the ends-of-justice provision. Once again, merely citing to the ends-of-justice provision alone is not enough.[86]

A number of district courts employ a different means for granting ends-of-justice continuances without providing on-the-record findings. These courts state no reasons at all because they understand that their circuit courts will infer the reasons from the context, i.e., from the reasons provided by the parties in a motion to continue.[87] The standard of review that allows reviewing courts to infer reasons from context will be addressed in the next section.

Congress, through the enactment of the ends-of-justice provision, sought to allow judicial flexibility combined with uniformity; but above all else, Congress sought certainty: the certainty that an ends-of-justice continuance was indispensable to protect the public interest and the defendant's rights, and the certainty that a judge would place that fact on the record for the public, defendant, and reviewing courts to see and scrutinize. But the courts described above thwart Congressional design by acting as if the on-the-record reasoning requirement is a nice

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May 3, 2007), ECF No. 150; Minutes of Court, United States v. Gearhart, No. 4:06-cr-40004 (S.D. Ill. July 9, 2007), ECF No. 185 (minute orders granting continuances, stating that continuances would serve the "ends of justice" but with no indication of the factors employed in the ends of justice determination).

85. *See* Order of Excludable Delay, United States v. Brown, No. 1:10cr10101-RGS (D. Mass. Jan. 20, 2011).

86. *See* United States v. Toombs, 574 F.3d 1262, 1271 (10th Cir. 2009) ("A record consisting of only short, conclusory statements lacking in detail is insufficient."); *Bryant*, 523 F.3d at 360 (holding that a "passing reference to the 'interest of justice' made by the trial judge at the . . . status hearing does not indicate that the judge seriously considered the 'certain factors' that § 3161(h)(7)(A) specifies" and the time period is therefore not excluded).

87. *See* United States v. Levis, 488 F. App'x 481 (2d Cir. 2012), *cert. denied*, __ U.S. __, 133 S. Ct. 2020 (2013); United States v. Wasson, 679 F.3d 938 (7th Cir. 2012), *cert. denied*, __ U.S. __, 133 S. Ct. 1581 (2013).

suggestion, or something that can be satisfied by a routine check in a box, as opposed to an authoritative command requiring actual reasoning and analysis. These courts are wrong.

B. Finding Reasons from Context Instead of Explicit Findings

Although *Zedner* made clear that the STA requires "express" findings before an ends-of-justice continuance counts as excludable time,[88] several circuit courts hold that implied findings are enough. These courts hold that the STA is satisfied if a reviewing court can gather from context a conceivable basis upon which the district court possibly granted the continuance.[89] That context can take many forms, but courts generally rely on the reasons provided by the parties in the motions to continue.[90] And one court went so far as to impute to the district court reasons that would have complied with the STA, all while acknowledging that the court had failed to set forth such reasons.[91] These circuits, in effect, conduct the equivalent of fact-finding, before concluding that because the record may support ends-of-justice findings, district courts cannot be faulted for failing to make a finding on the record.[92]

Such decisions undercut the Act's text, undermine its purposes, and do major damage to its intended application. To begin with, the STA's plain language simply does not allow appellate courts to rely upon the reasons provided by the parties or upon some amorphous "context" derived from the lower court proceedings.[93] Rather, the STA states that

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88. Zedner v. United States, 547 U.S. 489, 507 (2006).

89. *See, e.g.*, *Wasson*, 679 F.3d at 947; United States v. Napadow, 596 F.3d 398, 405 (7th Cir. 2010); United States v. Pakala, 568 F.3d 47, 59–60 (1st Cir. 2009); United States v. Edelkind, 525 F.3d 388, 397 (5th Cir. 2008); United States v. Thomas, 272 F. App'x 479, 484 (6th Cir. 2008); United States v. Lucas, 499 F.3d 769, 782–83 (8th Cir. 2007); United States v. Gamboa, 439 F.3d 796, 803 (8th Cir. 2006); United States v. Bruckman, 874 F.2d 57, 62 (1st Cir. 1989).

90. *Wasson*, 679 F.3d at 947.

91. United States v. Whitfield, 590 F.3d 325, 358 (5th Cir. 2009) (affirming conviction and holding that since "this case is facially and actually complex," the ends-of-justice continuance satisfies the STA, "even if the district court did not explicitly state as much when granting the continuance").

92. Currently, there is a circuit split on the question of whether explicit findings are needed. *Compare Wasson*, 679 F.3d at 938, *with* United States v. Larson, 627 F.3d 1198, 1206–07 (10th Cir. 2010) (implicit findings not enough); United States v. Lloyd, 125 F.3d 1263, 1268, 1269 (9th Cir. 1997) (same); United States v. Toombs, 574 F.3d 1262, 1271 (10th Cir. 2009) (same); United States v. Bryant, 523 F.3d 349, 360 (D.C. Cir. 2008) (same); United States v. Lewis, 611 F.3d 1172, 1176 (9th Cir. 2010) (same).

93. *Wasson*, 679 F.3d at 947.

"the court"—meaning the trial court—must set forth "its reasons."[94] Congress, of course, could have said that the parties, reviewing courts, or even the trial court's deputy clerk can make the ends-of-justice finding and place the reasons for that finding on the record.[95] But this it did not do. As with the other features of the STA, "this omission was a considered one."[96]

Nor does the STA allow appellate courts to rely on implied findings. The STA specifically states that "[n]o such period of delay resulting from [an ends-of-justice] continuance granted by the court . . . shall be excludable" unless a district court "sets forth" its reasons "in the record."[97] The STA thus conditions ends-of-justice continuances upon certain findings before such a continuance counts as excludable time.[98] This was the *Zedner* Court's understanding when it concluded that the Act requires express findings and also that a district court's "passing reference to the case's complexity" did not suffice.[99] When a reviewing court, in effect, finds and provides the ends-of-justice reasons for a trial judge, it renders the second sentence of § 3161(h)(7) "insignificant, if not wholly superfluous,"[100] destroying the procedure that Congress intended.

Congress, in fact, had a specific purpose in mind when it required the particular procedure that courts place express reasons on the record. Congress wanted to ensure that a district judge would give careful consideration when balancing the need for delay against the interest of the defendant and of society in achieving a speedy trial.[101] Congress also added the requirement to provide appellate courts with an adequate record to review.[102] Without a well-defined record, appellate courts are left to guess as to the reasons a trial court felt the need to grant a continuance, and holding trial courts' feet to the fire by requiring express findings eliminates that guesswork.

Congress expected that ends-of-justice continuances would be needed

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94. 18 U.S.C. § 3161(h)(7) (2012).

95. *See* United States v. Carrasquillo, 667 F.2d 382, 385 (3d Cir. 1981) ("We think the statutory language strongly suggests that Congress intended the trial judge, not his deputy clerk, to decide whether to grant a continuance.").

96. Zedner v. United States, 547 U.S. 489, 500 (2006).

97. 18 U.S.C. § 3161(h)(7)(A).

98. United States v. Tinklenberg, __ U.S. __, 131 S. Ct. 2007, 2019 (2011).

99. *Zedner*, 547 U.S. at 507.

100. Duncan v. Walker, 533 U.S. 167, 174 (2001).

101. S. REP. NO. 93-1021, at 41 (1974).

102. *Id.*

to provide trial courts with flexibility, but it also believed such continuances would be a "rarely used" tool, employed only after a court balanced the competing interests and provided on-the-record findings.[103] Contrary to this expectation, circuit courts have approved delays of several years[104] without explicit findings from trial courts stating the reasons why such significant delays were needed in the first place.

C. Open-Ended Continuances

Despite the Congressional belief that the ends-of-justice continuances would be a highly circumscribed and rarely used process, several courts of appeals have held that trial courts may grant open-ended ends-of-justice continuances. The First Circuit allows open-ended continuances, reasoning that while "it is generally preferable to limit a continuance to a definite period for the sake of clarity and certainty," it is still "inevitable" that a trial court will need to grant a continuance "without knowing exactly how long the reasons supporting the continuance will remain valid."[105] The Fifth Circuit, too, permits open-ended continuances where "it is impossible, or at least quite difficult for the parties or the court to gauge the necessary length of an otherwise justified continuance."[106] And some circuits add one proviso: a reasonableness requirement. The Third Circuit will permit open-ended continuances as long as "they are reasonable in length."[107] Other circuits have followed suit.[108]

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103. S. REP. NO. 93-1021, at 39–41 (1974), *reprinted in* A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 163 n.108 (Fed. Judicial Center 1980).

104. United States v. Wasson, 679 F.3d 938, 942 (7th Cir. 2012), *cert. denied*, __ U.S. __, 133 S. Ct. 1581 (2013).

105. United States v. Rush, 738 F.2d 497, 508 (1st Cir. 1984).

106. United States v Jones, 56 F.3d 581, 586 (5th Cir. 1995); *see also* United States v. Westbrook, 119 F.3d 1176, 1188 (5th Cir. 1997) (finding that a five month open-ended continuance was not unreasonable and collecting cases to support the finding).

107. United States v. Lattany, 982 F.2d 866, 868 (3d Cir. 1992).

108. United States v. Sabino, 274 F.3d 1053, 1065 (6th Cir. 2001) ("[W]e will follow the rule of the First, Third, Fifth, and Tenth Circuits and hold that open-ended ends-of-justice continuances for reasonable time periods are permissible in cases where it is not possible to preferably set specific ending dates."), *amended on other grounds en banc*, 307 F.3d 446 (6th Cir. 2002); United States v. Spring, 80 F.3d 1450, 1458 (10th Cir. 1996) ("We agree with the First, Third, and Fifth Circuits that, while it is preferable to set a specific ending date for a continuance, there will be rare cases where that is not possible, and an open-ended continuance for a reasonable time period is permissible."). *But see* United States v. Gambino, 59 F.3d 353, 358 (2d Cir. 1995) (reasoning that by granting an open-ended continuance for complexity, a district court "risks having the exclusion used 'either as a calendar control device or as a means of circumventing the requirements of the Speedy Trial Act'" (internal quotation omitted)); United States v. Clymer, 25 F.3d 824, 829 (9th Cir. 1994) ("The Speedy Trial Act and its amendments are the product of a series of delicate

Open-ended continuances are potentially the device most destructive to the STA's goals. With such continuances there is a grave danger that courts will commit an end-run around the Act by granting one long ends-of-justice continuance. Allowing a continuance for an uncertain period of time also "would dissociate the period of exclusion from the specific delay which occasioned the exclusion."[109] The Supreme Court in *Zedner* was unwilling to allow a defendant to waive STA rights for all time given the great public interest at stake in speedy trials; open-ended continuances perform the very same harm to that public interest as a prospective waiver does.

Open-ended continuances also seem contrary to the STA's statutory language. For one, the STA commands that once a defendant is charged with an offense, a trial court shall, "at the earliest practicable time," set the case for trial "so as to assure a speedy trial."[110] But a judge who orders an open-ended continuance is by definition *not* setting a case for trial. Additionally, a trial judge must, for "[a]ny period of delay," set forth reasons for each "such continuance."[111] The STA thus seems to indicate that if a trial judge needs additional time for delay, the proper procedure would be to order several continuances limited to a particular period of time with additional findings provided for each such continuance.[112]

If a trial court is unable to know when a trial can take place, the solution is not to grant an open-ended continuance at the beginning of the case that lasts until the court or the parties decide on an appropriate trial date. The better solution, and the one most consistent with the STA, is for a court to grant, say, a seventy-day continuance at the end of which the court could reconsider whether an additional continuance is necessary. Such a procedure is less likely to subvert the important public interest in speedy trials because it would force courts to examine

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legislative compromises. . . . This delicate balance could be seriously distorted if a district court were able to make a single, open-ended ends of justice determination early in a case, which would 'exempt the entire case from the requirements of the Speedy Trial Act altogether.'" (internal quotation omitted)); United States v. Jordan, 915 F.2d 563, 565 (9th Cir. 1990) (open-ended ends-of-justice continuances impermissible); United States v. Pollock, 726 F.2d 1456, 1461 (9th Cir. 1984) (same).

109. *Pollock*, 726 F.2d at 1461.

110. 18 U.S.C. § 3161(a) (2012).

111. *Id.* § 3161(h)(7)(A).

112. *Jordan*, 915 F.2d at 565–66 (holding that to prevent "one early 'ends of justice' continuance [from] exempt[ing] the entire case from the requirements of the Speedy Trial Act altogether," the district court must provide for each continuance "findings supported by the record"); *Gambino*, 59 F.3d at 358 ("The length of an exclusion for complexity must be not only limited in time, but also reasonably related to the actual needs of the case.").

whether further delays are warranted—rather than ignoring the STA's requirements altogether, which is what occurs when courts grant open-ended continuances.

Although the STA provides that in the ideal case a trial should commence no later than seventy days after indictment or arraignment, the circuit courts have approved considerably longer delays resulting from open-ended continuances. In *Sabino*, the Sixth Circuit approved a 350-day continuance.[113] In *Lattany*, the Third Circuit upheld a 425-day continuance,[114] and in *Rush*, the First Circuit approved an approximately 540-day open-ended continuance.[115] The judicial approval of these lengthy delays provokes the question whether the STA's commands are actually taken seriously.

D. Non-Contemporaneous Ends-of-Justice Findings

The Speedy Trial Act does not explicitly address the timing for when a district court must put forth its reasons on the record. But the statute does state that an ends-of-justice finding will not count as excludable time unless the court sets forth "reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interest of the public and the defendant in a speedy trial."[116] Some courts have taken this to mean that a judge cannot grant an ends-of-justice continuance absent these findings only to then create them retroactively at a later date.[117] Or, to put it differently, while ends-of-justice findings "may be *entered on the record* after the fact, they may not be *made* after the fact."[118]

The Supreme Court in *Zedner* added to the uncertainty as to when the

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113. 274 F.3d at 1063.

114. 982 F.2d 866, 868 (3d Cir. 1992).

115. 738 F.2d 496, 506 (1st Cir. 1984).

116. 18 U.S.C. § 3161(h)(7)(A).

117. *See, e.g.*, United States v. Crane, 776 F.2d 600, 606 (6th Cir. 1985) ("A district judge cannot wipe out violations of the Speedy Trial Act after they have occurred by making the findings that would have justified granting an excludable delay continuance before the delay occurred." (quotation omitted)); United States v. Tunnessen, 763 F.2d 74, 77 (2d Cir. 1985); United States v. Carey, 746 F.2d 228, 230 (4th Cir. 1984) (holding that "retroactive continuances that are made after expiration of [speedy trial clock] for reasons the judge did not consider before lapse of the allowable time are inconsistent with the Act"); United States v. Frey, 735 F.2d 350, 353 (9th Cir. 1984) (holding that "the district court erred by making *nunc pro tunc* findings to accommodate its unwitting violation of the Act"); United States v. Richmond, 735 F.2d 208, 216 (6th Cir. 1984) (reversing because the "district court cannot fairly be said to have granted the continuance . . . based on the findings that it set forth" nearly a month later).

118. United States v. Doran, 882 F.2d 1511, 1516 (10th Cir. 1989) (emphasis in original).

findings must be set forth:

> Although the Act is clear that the findings must be made, if only in the judge's mind, before granting the continuance (the continuance can only be "granted . . . on the basis of [the court's] findings"), the Act is ambiguous on precisely when those findings must be "se[t] forth, in the record of the case." However this ambiguity is resolved, at the very least the Act implies that those findings must be put on the record by the time a district court rules on a defendant's motion to dismiss under § 3162(a)(2).[119]

The Court also noted that the "best practice, of course, is for a district court to put its findings on the record at or near the time when it grants the continuance."[120]

Seizing upon this permissive language from *Zedner*, courts have taken the invitation to delay setting forth ends-of-justice findings on the record until defendants have filed motions to dismiss. The procedures used in *United States v. Smith*[121] illustrate this paradigm of STA procedure. There, the district court granted a continuance on October 25, 2005, but failed to make an ends-of-justice finding.[122] Almost a year later, the court "memorialized" its ends-of-justice findings.[123] Acknowledging that such a procedure was not ideal, the court nevertheless concluded that a late ends-of-justice finding was acceptable, even though by the time the court "memorialized" it's finding, the seventy-day STA time limit had long since expired.[124] This retroactive memorializing of findings is a common way for courts to justify ends-of-justice continuances, and other courts routinely employ the same maneuvers.[125]

In contrast, there are very few cases where a district court confesses a failure to make an ends-of-justice finding when asked by the government to memorialize its prior findings.[126] Facing a motion to dismiss the

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119. Zedner v. United States, 547 U.S. 489, 506–07 (2006).

120. *Id.* at 507 n.7.

121. No. 05-cr-30133-07-DRH, 2007 WL 118123 (S.D. Ill. Jan. 11, 2007).

122. *Id.* at *1.

123. *Id.*

124. *Id.*

125. *See, e.g.*, United States v. McNealy, 625 F.3d 858, 863 (5th Cir. 2010) (upholding district court's reasons provided only after a motion to dismiss was filed); United States v. Sain, No. 2:08 CR 214, 2010 WL 2776185, at *2 (N.D. Ind. July 13, 2010); United States v. Allen, No. 06-40056-01-SAC, 2008 WL 4511035, at *2–3 (D. Kan. Sept. 30, 2008); United States v. Hardimon, No. 2:07-CR-47 PPS-PRC-17, 2008 WL 141511, at *2 (N.D. Ind. Jan. 11, 2008); United States v. Mudd, No. 1:06CR-57-R, 2007 WL 2815841, at *2 (W.D. Ky. Sept. 24, 2007).

126. I could only find two examples of this phenomenon: *United States v. Estrada*, No. 08-CR-

indictment in *United States v. Estrada*,[127] District Judge J.P. Stadtmueller of the Eastern District of Wisconsin could have simply created findings and claimed that they were made when the court granted the ends-of-justice continuance. Instead, Judge Stadtmueller admitted that to do so "would confuse validly granted continuances which are later substantiated during the speedy trial time period with retroactive continuances forbidden under the Act."[128] Other courts have not been so forthcoming.[129]

Allowing district courts to wait until a motion to dismiss is filed before providing on-the-record reasons is problematic. As noted, very few judges have the wherewithal to acknowledge that they failed to make a proper record of reasons for granting a continuance by the time a defendant moves for dismissal.[130] Delayed record making thus invites abuse.[131]

There are also practical reasons judges should not postpone providing on-the-record findings. In some districts, it is a magistrate judge who grants the continuance but a district court that rules on the motion to dismiss. In these cases, a district court would need to either infer the reasons or provide the reasons after the fact—a procedure several circuits prohibit.[132] Another problematic scenario occurs when the judge has not provided reasons on the record and, by the time the motion to dismiss is filed, the judge can no longer provide the reasons due to death or disability.[133]

Finally, there is an even better reason district courts should not delay in providing on-the-record reasons. Trials that do not take place within seventy days must be dismissed, and unless a period of time is excludable, once the seventy days is up, a defendant can move for

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231, 2011 WL 1696262 (E.D. Wis. May 4, 2011) and *United States v. Shanahan*, No. 04-cr-126-04-PB, 2007 WL 2332727, at *4–5 (D.N.H. Aug. 15, 2007).

127. No. 08-CR-231, 2011 WL 1696262 (E.D. Wis. May 4, 2011).

128. *Id.* at *6.

129. *See supra* note 125.

130. *See supra* note 121.

131. *See* United States v. Janik, 723 F.2d 537, 544–45 (7th Cir. 1983) ("If the judge gives no indication that a continuance was granted upon a balancing of the factors specified by the Speedy Trial Act until asked to dismiss the indictment for violation of the Act, the danger is great that every continuance will be converted retroactively into a continuance creating excludable time, which is clearly not the intent of the Act.").

132. *See supra* note 90.

133. *Cf.* United States v. Tomkins, No. 07 CR 227, 2011 WL 4840949, at *13 (N.D. Ill. Oct. 12, 2011) ("Finally, the Court notes the obvious difficulty in a second judge deciphering the circumstances—including the mindset of the previously assigned judge—at the time that a prior continuance was granted.").

dismissal.[134] Although a judge has the power to grant a continuance at any time, a continuance does not become an ends-of-justice continuance, and thus count as excludable time, until the judge sets forth reasons on the record.[135] A judge who waits until after the seventy days have passed without providing on-the-record reasons, therefore, runs the risk, under the plain language of the statute, that the indictment must be dismissed.[136] Indeed, this was the understanding of the Congress when it passed the STA.[137]

IV. JUDICIAL ESTOPPEL

In *Zedner*, the Supreme Court, for a time, stopped circuit courts from employing a broad form of judicial estoppel with every defendant who requested a continuance and then later challenged a district court's decision to grant the continuance. The Government had argued in *Zedner* that since defendant's waiver had led the district court to grant a continuance without making an ends-of-justice finding, the defendant's speedy trial claim was barred by the doctrine of judicial estoppel.[138] Under that doctrine, when a party assumes a certain position in a legal proceeding and that position is successful, the party may not put forth a contrary position in another legal proceeding, especially if it prejudices the other party.[139]

Justice Alito, writing for the Court, noted that in order for judicial estoppel to apply, the defendant's current position had to be "clearly inconsistent" with its prior position in the district court.[140] Justice Alito then noted that there were three possible positions that the defendant

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134. 18 U.S.C. §§ 3161(c)(1), 3161(h), 3162(a)(2) (2012).

135. *Id.* § 3161(h)(7)(A).

136. *See* United States v. Rivera Constr. Co., 863 F.2d 293, 297 (3d Cir. 1988) (holding that trial judges can delay articulating their on-the-record reasons for granting the continuance if those reasons are entered before the Act's seventy-day limit would have otherwise expired).

137. S. REP. NO. 93-1021, at 39–41 (1974), *reprinted in* A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 161 (Fed. Judicial Center 1980) ("[T]he new provision allows a judge to grant a continuance only where he finds that the 'ends of justice' outweigh the best interest of the public and the best interest of the defendant in speedy trial. This means that in each case where a continuance is requested, . . . the judge must determine before granting the continuance that society's interest in meeting the 'ends of justice' outweighs the interest of the defendant and of society in achieving speedy trial. Furthermore the judge must set out in writing his reasons for believing that in granting the continuance he strikes the proper balance between these two societal interests.").

138. Zedner v. United States, 547 U.S. 489, 503 (2006).

139. *Id.* at 504 (quoting New Hampshire v. Maine, 532 U.S. 742, 749 (2001)).

140. *Id.* (quoting New Hampshire v. Maine, 532 U.S. 742, 750–51 (2001)).

could have taken in the district court: 1) defendant's promise not to move for dismissal on STA grounds; 2) defendant's implied position waiving his STA rights; and 3) defendant's claim that his counsel needed additional time to research the authenticity of certain bonds that would be used as evidence at trial.[141]

Though Justice Alito did not explicitly rule out applying judicial estoppel to claims under the Act, he did find that under any of the three positions, estoppel did not apply.[142] Justice Alito expressly declined to apply a broad application of estoppel for to do so "would entirely swallow the Act's no-waiver policy."[143] Additionally, even though defendant requested a continuance on the basis of defense counsel's need to authenticate evidence of bonds, the Court found that estoppel was not applicable because the district court never addressed that reason in granting the continuance.[144] For this reason, defendant's position at the continuance hearing was not "clearly inconsistent" with his position that the district court failed to comply with the Act's requirements for an ends-of-justice continuance.[145]

Justice Alito, however, did provide an escape hatch for circuit courts looking to bar defendants that move for continuances from later challenging them. He stated:

> This would be a different case if petitioner had succeeded in persuading the District Court at the January 31 status conference that the factual predicate for a statutorily authorized exclusion of delay could be established—for example, if defense counsel had obtained a continuance only by falsely representing that he was in the midst of working with an expert who might authenticate the bonds.[146]

Clutching to this language, one circuit has held that judicial estoppel applies to STA claims, and another circuit is poised to do the same in the appropriate case. In *Pakala* the First Circuit concluded that since the defendant moved for an ends-of-justice continuance and the trial court accepted his reasons for the continuance, the defendant could not later challenge the continuance on the ground that the trial court failed to set forth its reasons on the record.[147] In doing so, the First Circuit had to

141. *Id.* at 504–05.

142. *Id.* at 505.

143. *Id.*

144. *Id.* at 505–06.

145. *Id.* at 506.

146. *Id.* at 505.

147. 568 F.3d 47, 60 (1st Cir. 2009).

dismiss the fact that even though the trial court may have relied on Pakala's reasons for needing a continuance, the court failed to set forth those reasons on the record.[148] Likewise, the Seventh Circuit stated that although it was reserving judgment on the question, it believed that a defendant who asked for one continuance and did not contest a government-requested continuance had a clearly inconsistent position in later challenging those continuances on appeal.[149]

So when exactly did the *Zedner* Court intend for judicial estoppel to apply? To answer that question it is important to clarify the two types of challenges to ends-of-justice continuances under the STA. First, a defendant can challenge whether a district court complied with the STA's procedural requirements (i.e., when a court fails to make findings and set them forth on the record).[150] As with any question of legal error, appeals courts review such challenges de novo.[151] Second, a defendant can challenge the sufficiency or merits of the trial judge's reasons, but to prevail the defendant must establish an abuse of discretion.[152] In this second type of challenge, a defendant can argue that a trial court granted an ends-of-justice continuance for an improper reason, such as "general congestion of the court's calendar."[153] The defendant in *Pakala*, for example, challenged the district court's failure to comply with the Act's requirement of making express findings on the record (a procedural challenge).[154] The defendant did not challenge the district court's reasons for granting the continuance (a merits challenge), because again, the district court failed to provide reasons.

This distinction between procedure and merits goes to the heart of the question of when judicial estoppel applies. Judicial estoppel could apply, as the *Pakala* court held, anytime a defendant successfully requests a

148. *Id.* ("[W]e stress that the far better course for the district court would have been to articulate its reasons for granting the 'ends of justice' continuances.").

149. United States v. Wasson, 679 F.3d 938, 948–49 (7th Cir. 2012) ("So although we reserve judgment on the question of when estoppel prevents a plaintiff from challenging continuances under the Act, we note that Wasson's support for the continuances certainly does little to enhance his position on appeal."), *cert. denied*, __ U.S. __, 133 S. Ct. 1581 (2013).

150. *See Zedner*, 547 U.S. at 507.

151. *See* United States v. Rollins, 544 F.3d 820, 829 (7th Cir. 2008) (citing United States v. Parker, 508 F.3d 434, 438 (7th Cir. 2007)).

152. *See* United States v. Larson, 627 F.3d 1198, 1203 (10th Cir. 2010) (citing United States v. Toombs, 574 F.3d 1262, 1268 (10th Cir. 2009)); United States v. Jean, 25 F.3d 588, 594 (7th Cir. 1994) (quoting United States v. Marin, 7 F.3d 679, 683 (7th Cir. 1993)).

153. 18 U.S.C. § 3161(h)(7)(C) (2012).

154. United States v. Pakala, 568 F.3d 47, 57 (1st Cir. 2009); *see also Zedner*, 547 U.S. at 507 ("Thus, without on-the-record findings, there can be no exclusion under § 3161(h)([7]).").

continuance and the defendant later challenges it, no matter the type of challenge.[155] Or, it could apply when a defendant convinces a trial court to grant a continuance for a particular reason and the court does so, but the defendant later argues that the court was wrong in granting the continuance for that particular reason (a merits challenge).

There are a number of reasons why judicial estoppel should apply to the latter but not the former. First, if judicial estoppel applied every time a defendant filed a motion to continue, such a rule would amount to waiver, which *Zedner* explicitly forbids.[156] In fact, the *Zedner* Court stressed that since the STA is animated by a powerful public-interest purpose, defendants may not opt out of the Act simply by failing to assert their rights prior to filing a motion to dismiss.[157] For this reason, some defendants who have filed multiple motions to continue trial have nonetheless succeeded in challenging a district court's failure to set forth proper ends-of-justice findings without running into trouble with the doctrine of judicial estoppel.[158]

Second, contrary to the panel decision in *Pakala*, the defendant there did not convince the district court that the factual predicates for an ends-of-justice continuance existed.[159] Rather, as the *Pakala* panel acknowledged, the district court never provided on the record the reasons why the continuance was needed; instead, the court merely stated that the ends of justice were best served by granting a continuance.[160] And that is the point: a defendant cannot convince a court to do something it never did.

Third, *Pakala*'s position at the continuance hearing was not clearly inconsistent with his position on appeal. At the continuance hearing, Pakala's attorney argued that he needed additional time to prepare, whereas on appeal, he argued that the trial judge failed to make that finding of additional preparation time and failed to set forth that reason on the record.[161] The two types of challenges were separate and not clearly inconsistent.[162]

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155. *Pakala*, 568 F.3d at 60.

156. *Zedner*, 547 U.S. at 500 ("If a defendant could simply waive the application of the Act whenever he or she wanted more time, no defendant would ever need to put [the § 3161(h)(7)] considerations before the court under the rubric of an ends-of-justice exclusion.").

157. *Id.* at 500–01.

158. *See, e.g.*, United States v. Larson, 627 F.3d 1198, 1205–07 (10th Cir. 2010).

159. *Pakala*, 568 F.3d at 60.

160. *Id.*

161. *Id.*

162. *See* United States v. Oberoi, 547 F.3d 436, 445 (2d Cir. 2008) ("As a result, Oberoi's earlier position (ignoring the Speedy Trial Act) is not 'clearly inconsistent' with his later position

What the *Zedner* Court was concerned about was the situation in which a defendant argues before a trial judge that the case is complex, the judge makes such a finding, and then the defendant challenges the judge's finding of complexity on appeal.[163] What *Zedner* did not say was that judicial estoppel applies whenever a defendant requests a continuance; indeed, it was the defendant who requested the continuance in *Zedner*.[164]

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Because many district courts and defense attorneys ignore the STA, criminal defendants often raise ineffective assistance of counsel (IAC) claims arguing that their attorneys erroneously failed to file a motion to dismiss on STA grounds. In order to prevail on an IAC claim, a defendant must establish that: (1) trial counsel's performance fell below objective standards for reasonable effective representation (deficient performance prong); and (2) the lawyer's errors affected the outcome of the proceedings (prejudice prong).[165]

A. Ineffective Assistance of Counsel: Deficient Performance

How district courts cope with IAC claims raising STA deficiencies largely mirrors how they handle motions to dismiss on STA grounds; except there is even more reluctance to find an STA violation at the post-conviction stage, after the judicial system has devoted an enormous amount of resources into obtaining a conviction. Courts, therefore, struggle to find that an attorney's failure to raise an STA claim amounts to constitutionally deficient performance, even when such a claim has merit.

Cooper v. United States[166] is one such model of judicial apathy toward a defense attorney's failure to follow the Supreme Court's commands. In that case, the defendant claimed that his lawyer had

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(invoking the Speedy Trial Act)."), *vacated*, 559 U.S. 999 (2010), *and abrogated by* Bloate v. United States, 559 U.S. 196 (2010).

163. *See* Zedner v. United States, 547 U.S. 489, 505 (2006) ("This would be a different case if petitioner had succeeded in persuading the District Court at the January 31 status conference that the factual predicate for a statutorily authorized exclusion of delay could be established—for example, if defense counsel had obtained a continuance only by falsely representing that he was in the midst of working with an expert who might authenticate the bonds.").

164. *Id.*

165. Strickland v. Washington, 466 U.S. 668, 687–94 (1984).

166. No. 09-162-DRH, 2012 WL 996947 (S.D. Ill. Mar. 23, 2012).

committed ineffective assistance in advising him to sign an STA waiver, which resulted in lengthy pretrial delays.[167] The court found that counsel's performance was not unreasonable because it appeared the defendant was going to enter into plea negotiations, and "[p]erhaps [defense counsel] believed that no speedy trial violation had occurred but he wanted to try and curry favor with the government by filing a waiver of his speedy trial rights, whether valid or not, as they entered into plea negotiations."[168] The court thus concluded that counsel's performance in waiving the defendant's STA rights was not unreasonable,[169] even though counsel's performance directly contravened *Zedner*.[170]

Similarly, in *East v. United States*,[171] a case decided five years after *Zedner*, a district court concluded that trial counsel's failure to file an STA motion to dismiss did not constitute ineffective assistance of counsel. The court concluded that since East had signed a waiver of speedy trial rights and the court had granted that waiver, there was no STA violation, and hence, counsel was not ineffective for failing to file a meritless motion to dismiss.[172] Other courts have held similarly.[173]

In another case, a district court flipped the law on its head in order to avoid declaring that it or defense counsel was wrong about an STA issue. In *United States v. Smith*,[174] a district court acknowledged with the benefit of decisions from the Tenth Circuit that, "it appears likely that my open-ended [continuance order] was not sufficient *per se* to have warranted a nearly three-year continuance of the trial and that the significant lapse of time between the filing and resolution of many of the numerous motions submitted in this case was not entirely excludable either."[175] Still the court found no ineffective assistance of counsel because "[t]he fact that neither defendant's seasoned co-counsel nor any

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167. *Id.* at *13.

168. *Id.* at *15.

169. *Id.*

170. *See* 547 U.S. 489, 500 (2006).

171. No. 11-3239-CV-S-RED, 2011 WL 5404160 (W.D. Mo. Nov. 8, 2011).

172. *Id.* at *3.

173. *See* United States v. Gates, 650 F. Supp. 2d 81, 85 (D. Me. 2009) ("In sum, because waiver of speedy trial rights may be made by the lawyer without the knowledge of the defendant and because Gates's previous lawyer did seek the delays in question, Gates's argument under the Speedy Trial Act fails.").

174. Order Denying Michael D. Smith's Verified 28 U.S.C. § 2255 Habeas Petition to Vacate Judgment of Conviction and Set Aside Sentence, United States v. Smith, No. 08-cv-01438-REB (D. Colo. May 26, 2010), ECF No. 1818.

175. *Id.* at 6 (emphasis in the original).

of the other able attorneys or, indeed, this court, perceived a speedy trial issue strongly suggests that the lapse, if such there was, was not outside the boundaries of competence at the time the case was tried."[176] Or, to put it somewhat differently, how can counsel be faulted for providing unreasonable assistance by missing an STA issue if a supposedly infallible federal court was unable to spot it?

As these cases demonstrate, courts are hesitant if not downright hostile to the idea of reversing a conviction based on ineffective assistance, even where it is plain that the lawyer overlooked or outright missed a meritorious STA claim.[177]

B. Ineffective Assistance of Counsel: Prejudice

A criminal defendant must also establish prejudice in order to succeed on an IAC claim.[178] To establish *Strickland*[179] prejudice, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[180] For ineffective assistance of trial counsel claims, the relevant standard is whether there is a reasonably probability that a defendant would have been acquitted but for counsel's errors.[181]

In other contexts, the *Strickland* prejudice standard adapts to the proceeding at issue. In *Hill v. Lockhart*[182] the Supreme Court evaluated a defendant's claim that his attorney's errors led to the imprudent acceptance of a guilty plea.[183] The Court there required the defendant to show "that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial."[184] In *Evitts v. Lucey*[185] the Court concluded that criminal defendants are guaranteed the effective assistance of counsel on

176. *Id.*

177. *See also* United States v. Osborne, No. 4:05CR00109-12 JLH, 2010 WL 5283297, at *8–12 (E.D. Ark. Dec. 16, 2010) (finding no ineffective assistance of counsel, and thus no STA violation, because the *nunc pro tunc* ends-of-justice continuances "neither rewrote history nor substantially changed Osborne's rights under the Speedy Trial Act.").

178. Strickland v. Washington, 466 U.S. 668, 687 (1984).

179. *Id.*

180. *Id.* at 694.

181. *Id.*

182. 474 U.S. 52 (1985).

183. *Id.* at 57.

184. *Id.* at 59.

185. 469 U.S. 387 (1985).

appeal,[186] and in order to establish prejudice on appeal a defendant must show that the "omitted issue 'may have resulted in a reversal of the conviction, or an order for a new trial.'"[187] The Court has yet to address the appropriate inquiry when a defendant claims that his lawyer failed to file a meritorious motion to dismiss on speedy trial grounds.

Several circuits, however, have addressed such claims. The Tenth Circuit in *United States v. Rushin*[188] concluded that a defendant could not establish *Strickland* prejudice unless he could show that but for his attorney's deficient performance the indictment would have been dismissed *with* prejudice under STA.[189] In doing so, the court noted that it would not confine "proceeding" to only the particular indictment at issue.[190] Instead, the court decided that "proceeding" meant the entire case, and thus in order to establish *Strickland* prejudice the defendant needed to show that the government would be unable to re-indict him.[191] Several other circuits hold the same.[192]

But that cannot be right: *Strickland* prejudice is not synonymous with establishing that a dismissal with prejudice under the STA would have occurred. In determining whether the outcome of the proceeding would have been different absent an attorney's deficient performance, the Supreme Court has looked to the particular proceeding at issue, not whether the entire case must be dismissed never to be retried. The Court in *Glover v. United States*[193] considered a sentencing IAC claim, and there the Court discussed the prejudice inquiry in terms of the particular proceeding at issue—sentencing, not the entire case.[194] Similarly, the

186. *Id.* at 396.

187. Mason v. Hanks, 97 F.3d 887, 893 (7th Cir. 1996) (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)); *see also* Kitchen v. United States, 227 F.3d 1014, 1021 (7th Cir. 2000).

188. 642 F.3d 1299 (10th Cir. 2011), *cert. denied*, __ U.S. __, 132 S. Ct. 1818 (2012).

189. *Id.* at 1309–10.

190. *Id.* at 1309.

191. *Id.* at 1309–10.

192. *See, e.g.*, Chambliss v. United States, 384 F. App'x 897, 899 (11th Cir. 2010); United States v. Thomas, 305 F. App'x 960, 964 (4th Cir. 2009); United States v. Fowers, 131 F. App'x 5, 6–7 (3d Cir. 2005); Campbell v. United States, 364 F.3d 727, 731 (6th Cir. 2004); Clark v. United States, Nos. 4:02-cr-17, 4:10-cv-39, 2012 WL 3991066, at *8 (E.D. Tenn. Sept. 11, 2012); Namur-Montalvo v. United States, No. 1:05-CR-477-16-CC-GGB, 2012 WL 3758152, at *6 (N.D. Ga. Aug. 8, 2012), *report and recommendation adopted*, 1:05-CR-477-16-CC, 2012 WL 3758133 (N.D. Ga. Aug. 28, 2012); United States v. De La Cruz, No. CRIM.2001-10118-JLT, 2012 WL 769761, at *8 (D. Mass. Feb. 21, 2012), *report and recommendation adopted*, CIV.A. 01-10118-JLT, 2012 WL 773617 (D. Mass. Mar. 5, 2012); United States v. Osborne, No. 4:05CR00109-12 JLH, 2010 WL 5283297, at *11 (E.D. Ark. Dec. 16, 2010).

193. 531 U.S. 198 (2001).

194. *Id.* at 204.

Court in *Hill* considered whether counsel had provided ineffective assistance at the defendant's guilty plea proceedings, and in assessing prejudice, the Court asked whether the defendant would have insisted on going to trial had counsel been effective.[195] What the Court did not do is ask whether the defendant would have been found guilty anyway. Even in a run-of-the-mill trial IAC claim, to prove *Strickland* prejudice the defendant must only show there was a reasonable probability of acquittal, not that the defendant would have been acquitted *and* that the government would not have been allowed to retry the defendant[196] The Court has thus defined proceedings, for *Strickland*-prejudice purposes, to the proceeding at issue, not the case as a whole.

Moreover, if a defendant had to show that the entire case would have to be dismissed with no chance for re-indictment or retrial, then defendants would rarely, if ever, succeed on appellate ineffective assistance claims. A defendant would need to show both that the lawyer failed to raise a meritorious claim that would have resulted in a reversal on appeal *and* that the government could not bring a retrial upon remand. This is something no court has ever required—except, it seems, in the STA context. And it would be anomalous indeed if a defendant could prevail on an ineffective assistance of appellate counsel claim due to a lawyer's failure to raise a meritorious STA issue on appeal (i.e., because counsel's error affected the appellate proceedings), and yet lose on a pretrial IAC claim because the defendant was unable to show both that a motion to dismiss would have been granted *and* that the government would be unable to retry the defendant in a new proceeding.

One purpose of an IAC claim is to put the defendant back in the position one would have occupied had one been represented by competent counsel.[197] The Supreme Court in fact recently considered a case where the defense lawyer's incompetence resulted in the defendant rejecting a plea bargain.[198] There, the Court said that prejudice can be shown when the defendant "lose[s] benefits he would have received in the ordinary course but for counsel's ineffective assistance."[199] Applying that doctrine to the *Rushin* case, had the defendant there received effective assistance, his counsel would have filed a motion to dismiss the

195. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

196. *See* Kimmelman v. Morrison, 477 U.S. 365, 382 (1986).

197. *See* United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994) (concluding that the remedy for counsel's ineffective assistance "should put the defendant back in the position he would have been in if the Sixth Amendment violation had not occurred").

198. Lafler v. Cooper, __ U.S. __, 132 S. Ct. 1367, 1385 (2012).

199. *Id.* at 1388.

indictment. Then the court would have ordered dismissal (albeit without prejudice), and the defendant would have received vindication of his speedy trial rights regardless of whether the government could have re-indicted him.

Even if an indictment is dismissed without prejudice, that is not a toothless sanction because "it forces the Government to obtain a new indictment if it decides to reprosecute, and it exposes the prosecution to dismissal on statute of limitations grounds."[200] The defendant may also derive some benefit from a dismissal without prejudice: "the time and energy that the prosecution must expend in connection with obtaining a new indictment may be time and energy that the prosecution cannot devote to the preparation of its case."[201] And, if the defense lawyer knows that an STA violation has occurred, the lawyer could use the threat of dismissal as a bargaining chip with the government. Defendants who do not receive competent counsel with regard to STA claims, therefore, miss out on important procedural rights and benefits that the STA provides.

And by forcing defendants raising STA ineffective assistance claims to show that their indictment would be dismissed with prejudice, courts in effect make such claims unwinnable. In determining whether to dismiss the case with or without prejudice, § 3162(a)(2) requires the district court to consider each of the following factors: "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution . . . on the administration of justice." Because it is the rare federal case that does not qualify as a serious offense, very few federal cases are dismissed with prejudice.[202]

Once again, one cannot help but get the feeling that federal circuit courts are unreceptive if not downright antagonistic to the notion of reversing a conviction on STA grounds.

VI. SOLUTIONS: THE ACADEMY, ADVOCACY, AND THE COURTS

A. Why Is this Happening?

STA violations occur with such regularity because there is no real

200. United States v. Taylor, 487 U.S. 326, 342 (1988).

201. Zedner v. United States, 547 U.S. 489, 503 n.5 (2006).

202. United States v. Clark, 577 F.3d 273, 282 n.1 (5th Cir. 2009) (citing cases holding that even nonviolent property crimes are "serious" for STA purposes).

incentive for anyone to follow the Act.[203] Delay is a federal prosecutor's friend. The longer the delay, the greater the chance a prosecutor has to flip a co-defendant into a cooperating witness through a negotiated plea deal. Defense attorneys also desire and create delays. Trials take an enormous amount of preparation, so defense lawyers often will defer trials as long as possible out of convenience. For those defense lawyers who bill by the hour or are paid per CJA-appointment,[204] there can be a direct correlation between delays and larger profits, and as a result, defense attorneys are sometimes incentivized to create delay. Defense attorneys may also act as proxies for defendants who wish to delay their trials as long as possible in order to avoid the consequences of a guilty verdict.

With increasing federal criminal prosecutions, district court dockets are teeming with cases, and the courts are ill equipped to monitor pretrial delays in every case that comes before them. And, as this article has illustrated, there are few incentives for trial courts to follow the Act because they can rest assured that their actions will be upheld by reviewing courts in all but the most egregious abuses. Appellate courts also prefer to look the other way when it comes to the Act's requirements rather than reverse an otherwise error-free conviction.

Because the STA is not a sexy source for scholarship, critical analysis of the STA's application is nearly non-existent; the last batch of scholarship from the legal academy comprehensively covering the STA occurred in the 1980s.[205] That is a problematic development because scholarship can often have the effect of calling attention to court decisions that lack analytical rigor and can act as a check on those decisions that run contrary to congressional design.

Without probing scholarship, without incentives to prevent delays, and without judicial fealty to the Act's text, the STA has been watered down to the point where it no longer has any taste.

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203. *See* A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 16 (Fed. Judicial Center 1980) ("[W]hile it is in the public interest to have speedy trials, the parties involved . . . do not feel any pressure to go to trial. The court, defendant, his attorney, and the prosecutor may have different reasons not to push for trial, but they all have some reason." (quoting 120 CONG. REC. 41618 (1974))).

204. *See* 18 U.S.C. § 3006A(d) (2012).

205. *See, e.g.*, George S. Bridges, *The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation*, 73 J. CRIM. L. & CRIMINOLOGY 50 (1982); Suzanne Isaacson, *Speedy Trial Act of 1974—Dismissal Sanction for Noncompliance with the Act: Defining the Range of District Courts' Discretion to Dismiss Cases with Prejudice* United States v. Taylor, *108 S. Ct. 2413 (1988)*, 79 J. CRIM. L. & CRIMINOLOGY 997 (1988); Martha L. Wood, *Determination of Dismissal Sanctions Under the Speedy Trial Act of 1974*, 56 FORDHAM L. REV. 509 (1987).

B. The Legal Academy, Defense, and Prosecution

Although there is an institutional inertia pulling courts away from the STA's requirements, there are ways to ensure that the criminal justice system is protecting the public's interest by enforcing the STA as Congress intended.

The legal academy could help solve the problem associated with STA noncompliance by actually calling attention to it. The academy could conduct empirical studies on pretrial delays in various districts. In particular, academics could conduct a study comparing a district court in, say, the Seventh Circuit, which takes a lax approach to enforcing the STA,[206] to a district court in the Tenth Circuit, which takes a more text-based approach to interpreting the STA[207] Such a study could perhaps convince circuit courts that their interpretations of the STA create real-world effects in the form of pretrial delays. Other studies could reveal the average length of delay in criminal cases in various federal districts. In addition, the academy could address the many areas where courts effectively disregard the STA, including those areas not covered by this Article.

While prosecutors play no particular role in ensuring that courts comply with the STA, if the STA's requirements are not met, the prosecution suffers the consequences when an indictment is dismissed. Moreover, where a prosecutor has played a role in the violation, the court must consider that information when determining whether to grant a dismissal with prejudice.[208] In many of the cases discussed above, the prosecution either contributed to the delay or argued for a result contrary to the STA's plain language or to the Supreme Court's interpretation of the Act.[209] Prosecutors must begin to act as guardians of the STA and

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206. *See* United States v. Wasson, 679 F.3d 938, 947 (7th Cir. 2012), *cert. denied*, __ U.S. __, 133 S. Ct. 1581 (2013).

207. *See* United States v. Toombs, 574 F.3d 1262, 1271 (10th Cir. 2009).

208. United States v. Ramirez, 973 F.2d 36, 39 (1st Cir. 1992) (citing United States v. Hastings, 847 F.2d 920, 925 (1st Cir. 1988)).

209. *See, e.g.*, United States v. Mathurin, 690 F.3d 1236, 1242 (11th Cir. 2012) ("For its waiver argument, the government advances the novel theory that the failure to raise a pre-indictment delay objection prior to the return of the indictment constitutes a waiver of that claim." (quotation omitted)); United States v. Ferguson, 574 F. Supp. 2d 111, 114–15 (D.D.C. 2008) (noting that government argued for waiver of STA rights and failed to provide evidence for why it needed an ends-of-justice continuance); United States v. Jarzembowski, No. 07-122, 2007 WL 2407275, at *3 n.1 (W.D. Pa. Aug. 20, 2007) ("The court is aware that the government has in other cases taken the route of seeking to have a Magistrate Judge enter a *nunc pro tunc* order excluding time in the ends of justice in an attempt to cure Speedy Trial Act violations resulting from similar waivers to those filed in this case. The government should be advised that should the court be presented with the issue in an appropriate case in the future, it will be constrained to find such *nunc pro tunc* orders as

conduct themselves in accordance with their unique obligation to protect the public interest.

Prosecutors can protect the public interest primarily by ensuring that the STA is followed. Specifically, prosecutors should: 1) limit the number of pretrial continuances they request; 2) argue for courts to seriously evaluate any continuance request made by defense counsel; and 3) ask courts to place their ends-of-justice findings on the record, so that appellate courts possess an adequate record to review in deciding whether the public interest was best served by the trial court granting a continuance. By following the procedures Congress intended, prosecutors can reduce pretrial delays, thus protecting the public interest entrusted to their office.

It is safe to say that many of the deficiencies in STA application lay at the feet of the defense. Defense attorneys should start by familiarizing themselves with the STA, for it should not be the case that defense attorneys continue to file waivers of STA rights seven years after the Court unanimously declared that the STA is unwaivable.[210]

Defense attorneys also need to understand that delays can negatively impact their client's case and potential sentence. Exculpatory witnesses and police records, for example, can be lost through the passage of time.[211] In addition, when defense lawyers create delays between the time the offense occurred and the time the defendant is sentenced, criminal defendants will sometimes face a longer sentence than they would have otherwise faced without the delays.[212] This result occurs when the U.S. Sentencing Commission occasionally amends the U.S. Sentencing Guideline range for a particular offense in between a defendant's indictment and sentence.[213] Given these potential harmful consequences, defense counsel should file for continuances only when necessary, and in doing so, defense counsel must request that courts provide a specific end date for all continuances, lest one continuance lead to years of delays.[214]

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invalid as the initial waivers.").

210. *See* United States v. Qureshi, No. 09-CR-0102-CVE, 2009 WL 3104042 (N.D. Okla. Sept. 21, 2009); *supra* Part III.

211. *See* Dickey v. Florida, 398 U.S. 31, 38 (1970).

212. *See* Peugh v. United States, __ U.S. __, 133 S. Ct. 2072, 2078 (2013) (finding that a sentencing court violates the Ex Post Facto Clause by using the U.S. Sentencing Guidelines in effect at the time of sentencing, rather than the Guidelines in effect at the time of the offense, to increase a defendant's guideline range).

213. *See Proposed Amendments to the Guidelines Manual*, U.S. SENTENCING COMM'N, http://www.ussc.gov/guidelines-manual/amendments-guidelines-manual (last visited Apr. 4, 2013).

214. It should be noted, however, that there is one instance where defense-caused delays may

In terms of advocacy the defense bar has come up short. A quick perusal of the briefs filed in some of the cases examined above shows that STA issues are treated as afterthoughts on appeal. Even when those issues are litigated with some depth, many attorneys fail to argue for a faithful application of the Act's text supported by the enormous body of legislative history that Congress produced in passing the STA. Also, many of the circuit conflicts involving the STA have not been—but should be—appealed to the U.S. Supreme Court for resolution, because that Court, unlike the lower courts, has staunchly interpreted the Act according to its text and purposes. In sum, defense counsel has an obligation to understand the STA, to enforce clients' rights under the STA at all levels of the judiciary, and not to delay trial for convenience reasons unrelated—and possibly detrimental—to the client's best interests.

C. District Courts

District courts can comply with the Act's requirements without exerting a significant amount of extra effort. First, when deciding whether to grant a continuance, courts need to inquire into the reasons the continuance is being requested. If district courts start conducting a more searching review of continuance motions, that approach would require the parties to provide more "extensive and specific information about the need for a continuance,"[215] which could inhibit routine filings based on questionable motives. Courts, moreover, should treat ends-of-justice continuances as the exception, not the norm.

Second, in determining the need for delay, a district court must give significant weight to the public's interest in a speedy trial, which is generally served by strict adherence to the STA's requirements.[216] That strict adherence requires a court to place its reasons for granting an ends-of-justice continuance on the record. And this procedure need not consume the court's time—the court can create a record in a few sentences at a continuance hearing, so long as it is clear that the court considered the factors contained in the STA. Or, if the court is so inclined, it can provide a written record explaining why it granted an ends-of-justice continuance.

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work to benefit the defendant: when the defendant is released on bond and has a chance to exhibit post-conviction rehabilitation prior to sentencing.

215. *Qureshi*, 2009 WL 3104042, at *1 (rejecting continuance due to defense counsel scheduling conflict).

216. *See* United States v. Toombs, 547 F.3d 1262, 1273 (10th Cir. 2009).

One district court in particular has exemplified strict adherence to the STA. In granting or denying a motion for an ends-of-justice continuance, District Judge Claire V. Eagan of the Northern District of Oklahoma provides a written record of her decision-making. In one case, Judge Eagan concluded that delays in discovery and the need to locate relevant defense witnesses justified a continuance.[217] In another case, Judge Eagan found that requiring defendant to stand trial for speedy trial "would deny him the opportunity to prepare for trial and could impair his ability to assist in his own defense due to his physical condition."[218] Judge Eagan, therefore, granted a "limited ends of justice continuance . . . necessary to ensure that defendant is physically capable of standing trial and assisting in his defense."[219] But in a third case, Judge Eagan found defense counsel's need for a continuance wanting, in light of the significant public interest implicated by speedy trials.[220] While such a detailed record is not necessary in every case, Judge Eagan's approach in these cases is surely the best practice for complying with the STA's commands.[221]

Third, district court judges should provide their ends-of-justice findings contemporaneously with the granting of continuances. A court, for example, could provide a few sentences explaining the reasons for granting the continuance in its minute orders. By employing this procedure, courts can ensure that ends-of-justice findings are not made after the fact, preventing another trial court from having to infer findings in circumstances where the case has changed robes. Courts also would be well advised to place these procedures into their local rules to ensure consistent compliance within the district.[222]

D. Circuit Courts

Circuit courts simply need to better police trial courts by reversing

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217. United States v. Carvajal-Mora, No. 08-CR-0059-CVE, 2008 WL 2079454, at *1 (N.D. Okla. May 15, 2008).

218. United States v. Gregory, No. 08-CR-0125-CVE, 2008 WL 4601573, at *2 (N.D. Okla. Oct. 16, 2008).

219. *Id.*

220. *Qureshi*, 2009 WL 3104042, at *2.

221. It comes as no surprise that judges located in the Tenth Circuit take a serious approach to enforcing the Act as written. The Tenth Circuit has strictly interpreted the Act and, unlike other circuits, has not added judicial gloss to the statute. *See, e.g.*, United States v. Larson, 627 F.3d 1198, 1206–07 (10th Cir. 2010); *Toombs*, 574 F.3d at 1271.

222. *See* Greg Ostfeld, *Speedy Justice and Timeless Delays: The Validity of Open-Ended "Ends-of-Justice" Continuances Under the Speedy Trial Act*, 64 U. CHI. L. REV. 1037, 1064 (1997).

convictions—no matter how painful—that fail to follow the procedures outlined in the Act. The Ninth and Tenth Circuits have done an admirable job of interpreting the Act as written.[223] And it is important to note that those courts have not witnessed their federal districts drown in STA procedure. Rather, district court judges, such as Judge Eagan, have faithfully followed the Act as written even where to do so requires additional written orders.[224]

Many of the circuits have open questions regarding STA issues such as judicial estoppel, IAC, and whether explicit ends-of-justice findings are required. The Supreme Court has indicated that lower courts must be vigilant in enforcing the statute as intended, regardless of whether faithful application leads to reversal of convictions. And, as this article argues, courts can apply the Act as Congress intended without needlessly burdening federal district courts and sacrificing judicial economy.

E. The U.S. Supreme Court

The Supreme Court needs to reign in circuit courts that either disregard the Act's text and purposes or impermissibly add to the Act's text. The Court might even need to hand down a strongly worded opinion, given that lower courts continue to disregard the Court's decisions interpreting the Act.

In particular, the Court should address the ends-of-justice provision because the circuits are divided on what constitutes proper on-the-record reasons and on the issue of open-ended continuances.[225] These two circuit conflicts would seem to merit the Court's attention because the ends-of-justice provision is one of the most frequently used STA provisions and because circuit conflicts affecting a large number of cases are generally considered important federal questions for the Court to review.[226] And without review, there is a real danger that lower courts will continue to ignore the procedural protections contained in § 3161(h)(7)(A)—what Congress labeled the "heart" of the STA.[227]

The Court also could resolve some STA issues through the device of

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223. *Larson*, 627 F.3d at 1206–07; United States v. Lewis, 611 F.3d 1172, 1176 n.2 (9th Cir. 2010); *Toombs*, 574 F.3d at 1271; United States v. Lloyd, 125 F.3d 1263, 1268–69 (9th Cir. 1997).

224. United States v. Carvajal-Mora, No. 08-CR-0059-CVE, 2008 WL 2079454, at *1 n.1 (N.D. Okla. May 15, 2008); *Gregory*, 2008 WL 4601573.

225. *See* Ostfeld, *supra* note 222, at 1038 n.5; J. Andrew Read, *Open-Ended Continuances: An End Run Around The Speedy Trial Act*, 5 GEO. MASON L. REV. 733, 736–37 (1997).

226. *See* SUP. CT. R. 10.

227. S. REP. NO. 93-1021, at 39 (1974).

summary reversal rather than consuming the Court's precious plenary review resources.[228] For example, prime candidates for summary reversal are the Sixth Circuit's decisions holding that in order to prevail on the basis of an STA violation "a defendant must show 'actual prejudice.'"[229] Such a holding runs headfirst into the *Zedner* Court's view that harmless-error review is inapplicable with regard to a district court's failure to make ends-of-justice on-the-record findings.[230] It is also contrary to the STA's text, which says that a trial not commencing within the seventy-day period "shall be dismissed" without the need for defendants to establish actual prejudice.[231]

CONCLUSION

For the past fifteen years lower federal courts have diluted the STA's requirements, resulting in considerable delays between criminal defendants' arraignments and trials. As Congress has explicitly found, justice delayed is not only justice denied but also justice at a higher price. Such delays were once tolerated, but in enacting the STA, Congress sought to cure the disease of delayed justice.

The Act can only reduce those delays if the criminal justice system as a whole begins to staunchly follow the Act's provisions. To begin with, the Academy must evaluate delays between indictment and trial, and then bring it to the attention of both federal courts and practitioners. Prosecutors must move to uphold the STA, even where courts are willing to forego its procedures. Defense lawyers, in turn, must only request delays where such a move complies with the Act and benefits their clients. Finally, federal courts must faithfully follow and interpret the Act according to what Congress intended, even where it would require the court to reverse a conviction and even where it would force courts to make additional findings. If these actors within the criminal justice system are dedicated to upholding the STA as written, criminal defendants, and the public alike, will benefit.

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228. Kevin Russell, *An Increase in the Court's Summary Docket*, SCOTUSBLOG, (Feb. 16, 2010, 11:03 AM), http://www.scotusblog.com/2010/02/an-increase-in-the-court's-summary-docket/ ("Summary reversals tend to be directed at correcting an error in a particular case, rather than resolving circuit conflicts or establishing general principles of law, which is what the Supreme Court spends the vast majority of its time doing in its typical argued cases.").

229. United States v. Stewart, 628 F.3d 246, 254 (6th Cir. 2010) (citing and quoting United States v. Gardner, 488 F.3d 700, 718 (6th Cir. 2007)).

230. Zedner v. United States, 547 U.S. 489 (2006).

231. 18 U.S.C. § 3162(a)(2) (2012).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA	:	**Criminal No. 5:17-CR-00007**
	:	
v.	:	
	:	
BEAM BROS. TRUCKING, INC.,	:	
BEAM BROS. HOLDING CORPORATION LLC,	:	
GERALD C. BEAM,	:	
GARLAND BEAM,	:	
SHAUN C. BEAM, and	:	
NICHOLAS KOZEL	:	

GOVERNMENT'S MOTION TO CONTINUE TRIAL DATE,
AND TO CERTIFY CASE AS COMPLEX UNDER THE SPEEDY TRIAL ACT

The United States of America, by its undersigned counsel, and respectfully moves this Court to continue the trial date, and in so doing, certify this case as "complex" under the Speedy Trial Act, 18 U.S.C. § 3161(h)(7)(B)(ii). In filing this motion, the government respectfully requests that the parties and the Court convene in a conference call as soon as possible to address the issues raised below. In support, the United States provides the following:

I. Background

On March 16, 2017, the six defendants – four individuals and two corporate entities – were charged in a 126-count indictment alleging multiple counts of conspiracy spanning from "June 1999 . . . and continuing to on or about the date of this indictment" as well as substantive counts of falsification of records in contemplation of federal investigation, false statements, and wire fraud. Indictment (Dkt. No. 1). The nature and the circumstances of the conspiracy are detailed at length in the 61-page indictment returned by a grand jury sitting in the Western District of Virginia.

At their initial appearance, the defendants asserted their rights under the Speedy Trial Act and asked for a trial within 70 days. In support of their request, the defendants stated that they sought a speedy trial because Beam Bros. Trucking, Inc. would not survive with a trial that occurred beyond the 70-days allowed under the Speedy Trial Act. Because the government was sensitive to the representations that Beam Bros. Trucking would not survive without a quick trial, the government did not object to its request for a trial within 70 days, and it did not seek to certify the case as complex at that time. The Court scheduled a trial for May 22, 2017, which has since been postponed to June 5, 2017.

The defendants' basis for needing a trial within 70 days of their indictment is no longer a concern. As of May 1, 2017, the defendants sold their company to another motor carrier for the sum of $26 million dollars, and Beam Brothers Trucking has transferred all of their mail contracts to the new motor carrier. According to defendants, Beam Bros. Trucking is no longer operating. See Defendants' Motion to Dismiss (Dkt. No. 84) at 4. Moreover, the defendants have made clear that they no longer have a pressing need for an immediate trial by filing 10 pretrial motions, raising at least 23 separate legal issues, and tolling the Speedy Trial Clock indefinitely. See 18 U.S.C. § 3161(h)(1)(D)(computation of time within which trial should commence excludes "delay resulting from any pretrial motions, from the filing of the motion through the hearing on . . . such motion"). All of the defendants were released on their personal recognizance with minimal conditions.

II. The Speedy Trial Act

The Speedy Trial Act gives the district court broad discretion to grant a continuance when necessary to allow for further preparation for trial. United States v. Rojas–Contreras, 474 U.S. 231, 236, 106 S.Ct. 555, 558, 88 L.Ed.2d 537 (1985). This Court may schedule a trial beyond the

70-day limit of the Speedy Trial Act where "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). In determining whether the ends of justice are so served, this Court shall consider:

> Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

18 U.S.C. § 3161(h)(7)(B)(ii); United States v. Reavis, 48 F.3d 763, 771 (4th Cir. 1995). All of these considerations are present in the instant case, and the defendants concede in their pretrial motions that the instant case is complex. Accordingly, this Court has the authority to render appropriate a trial date outside the normal Speedy Trial limits.

III. The Government's Motion for a Continuance

The Government respectfully requests that this Court grant a continuance pursuant to 18 U.S.C. § 3161(h)(7)(A) because the ends of justice served by a continuance outweigh the best interest of the public and the defendant in a speedy trial.

After review of the motions filed by the defendants, the government respectfully requests that this Court continue the trial, currently scheduled for June 5, 2017, so that the government may provide a fulsome response, and to provide the Court a meaningful opportunity to rule. The defendants have elected to make sweeping allegations against the prosecution that necessarily implicate the grand jury record in its entirety. See generally Defendants' Motion to Dismiss Based on Grand Jury Misconduct (Dkt. No. 85). They claim that the prosecution committed misconduct by imposing its own personal beliefs on the grand jury, and deliberately mis-instructed the grand jury on the relevant law. See id. Putting aside the bombastic nature of this claim, the defendants' motion effectively serves as a *de facto* request for a continuance by the defendants

because its resolution cannot occur under the schedule as it currently stands. As an initial matter, to place the defendants' claims in context, any response by the government will necessarily include all of the grand jury testimony for the Court's review, which will demonstrate that defendants' claims are baseless but will nevertheless require the Court to become intimately familiar with the grand jury investigation, the facts underlying indictment, and the relevant regulatory framework. Moreover, in their motion, the defendants alternatively request (at 28) that this Court take the extraordinary step of ordering disclosure of the entire grand jury record to defendants (or at least have the Court to review it *in camera*), even though no such transcripts have been prepared and – by itself – could delay resolution on the motion for several weeks. In light of the seriousness of the allegations by defendants, the government should have the time and opportunity to respond and meet every baseless claim, and the Court should have whatever amount of time it deems necessary to review the full grand jury record in context.

In addition, in a second motion to dismiss, the defendants shotgun at least six, legally distinct claims that the Indictment should be dismissed, either in whole or in part. See generally Joint Motion to Dismiss Indictment (Dkt. No. 84). The defendants argue that the Indictment should be dismissed in its entirety, citing problems with due process, and that many of the individual counts should be dismissed for various reasons such as multiplicity and statute of limitations. (id.). Finally, the defendants have also filed six motions in limine seeking to exclude critical evidence at trial, many of which will require a significant amount of time for the government to be able to provide the factual and legal background that is necessary for the Court to rule.

In sum, in consideration of (1) the defendants' motions and allegations of misconduct, which will require extensive briefing by the government and examination of the record by the

Court, (2) the absence of prejudice to defendants given their status on personal recognizance, and that their basis for needing a resolution within 70 days is no longer a concern, the government respectfully moves this Court to grant a continuance of the trial in finding that "the ends of justice served by a continuance outweigh the best interest of the public and the defendant in a speedy trial." See 18 U.S.C. § 3161(h)(7)(A).

IV. This is a Complex Case within the Meaning of the Speedy Trial Act.

In deciding whether to grant such a continuance, under 18 U.S.C. § 3161(h)(7), a district court shall consider a number of factors, including:

> Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

18 U.S.C. § 3161(h)(7)(B)(ii); United States v. Reavis, 48 F.3d 763, 771 (4th Cir. 1995). Without question, this case is "complex" for purposes of the Speedy Trial Act due to the number of defendants, the nature of the prosecution, and the novel questions of fact or law.

The strongest advocates of the complex nature of this prosecution are the defendants themselves. According to the defendants, "[t]he Indictment the grand jury returned is complex." Defendants' Motion in Limine to Exclude "Illegal" (Dkt. No. 83) at 2. In fact, in their pretrial motions, the defendants repeatedly trumpet the complexities of the Indictment and the underlying regulatory schemes at issue in this case. See e.g., Defendants' Motion to Dismiss (Dkt. No. 84) at 8 (referring to "[t]he complex, contradictory regulatory schemes that form the basis of the charges"); at 11 (referring to DOT's "complex regulatory scheme"); Defendants' Motion to Dismiss for Grand Jury Misconduct (Dkt. No. 85) at 1 (claiming grand jury was misinstructed "on the complex [DOT] and [DOL] regulations that underpin this Indictment."); at 4 ("[T]he DOL and DOT regulations at issue in this case are complicated"); at 15 (comparing regulations at issue in

this case to "similarly complicated Securities and Exchange Commission regulations"); Defendants' Motion in Limine to Exclude "Illegal" (Dkt. No. 83) at 2 (referring to the "nuanced DOL and DOT regulations" at issue); at 4 (referring to the "complex theories of liability" in the Indictment). The defendants cannot meaningfully claim that this case is not complex for purposes of the Speedy Trial Act after repeatedly saying otherwise in their motions.

In addition to any complexities posed by the Indictment or the regulatory schemes, the complex nature of the case is even more apparent upon taking into consideration the number of defendants, the voluminous amount of discovery, the anticipated number of witnesses and trial exhibits, and the unique legal issues posed. As noted above, the defendants' pretrial motions have also presented multiple novel questions of fact or law that will require the Court to become intimately familiar with the grand jury investigation and the facts underlying the allegations in the indictment. With every factor weighing in favor, there is no question that this case is sufficiently "complex" within the meaning of 18 U.S.C. § 3161(h)(7)(B)(ii), as the defendants repeatedly concede in their pretrial motions. Accordingly, the government respectfully requests that this Court find that this case is complex within the meaning of the Speedy Trial Act, and grant a continuance based on a finding that the ends of justice as so served.

WHEREFORE, for the foregoing reasons, the United States respectfully requests that this Court grant the government's motion to continue and to certify this case as complex.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2017, I electronically filed the foregoing motion with the Clerk of the Court using CM/ECF system, which will send notification of such filing to all counsel of record.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA	:	**Criminal No. 5:17-CR-00007**
	:	
v.	:	
	:	
BEAM BROS. TRUCKING, INC.,	:	
BEAM BROS. HOLDING CORP.	:	
GERALD BEAM,	:	
GARLAND BEAM,	:	
SHAUN BEAM, and	:	
NICKOLAS KOZEL	:	

PROPOSED ORDER

After consideration of the Government's Motion to Continue Trial Date, and To Certify Case as Complex Under the Speedy Trial Act, any responses thereto, and argument by the parties, it is a finding of this Court that:

Pursuant to 18 U.S.C. § 3161(h)(7)(B)(ii), that the case before the Court is so unusual or so complex, due to the number of defendants, the nature of the prosecution, and the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceeding or for the trial itself within the time limits established by 18 U.S.C. § 3161; and

That the ends of justice served by granting a continuance outweigh the best interest of the public and the defendants in a speedy trial.

Accordingly, it is hereby **ORDERED** that the government's motion is **GRANTED**.

Entered this ___ day of May 2017.

The Honorable Michael F. Urbanski
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

UNITED STATES OF AMERICA	)	
v.	)	**Criminal No. 5:17-CR-00007**
BEAM BROS. TRUCKING, INC. ET AL.	)	
Defendants.	)	

DEFENDANTS' JOINT OPPOSITION TO THE
GOVERNMENT'S MOTION TO CONTINUE TRIAL DATE

Defendants Beam Bros. Trucking, Inc. ("BBT"), Beam Bros. Holding Corporation LLC, Gerald W. Beam, Garland C. Beam, Shaun C. Beam and Nickolas Kozel (collectively the "Defendants"), by counsel, respectfully submit this Opposition to the Government's Motion to Continue the Trial Date And To Certify Case As Complex Under the Speedy Trial Act.

By its own admission, the government began its investigation into the Defendants in 2010. After three years of investigation, the government executed a search warrant in a dramatic dawn raid of BBT headquarters on February 12, 2013. So began four years of uncertainty and suspicion as the government continued to search for some crime. Federal agents executed a second search warrant of BBT's off-site storage location on November 14, 2013. The government demanded documents from Defendants – both through voluntary productions and in response to grand jury subpoenas dated February 11, 2013 (two subpoenas), June 12, 2013, October 24, 2013, May 17, 2016 and November 18, 2016, not to mention a Civil Investigative Demand dated December 28, 2015. It issued document subpoenas to multiple third parties. And it conducted more than a hundred witness interviews, ultimately putting 49 witnesses before the grand jury.

In February 2015, the government told defense counsel[1] that it had overwhelming evidence and would prepare an indictment by March 2015. Since that time, the government stated on multiple occasions that indictment was imminent. The government finally filed a 126 count indictment on March 16, 2017, four years, one month and four days after it raided BBT's headquarters – and two years after it first told the Defendants to be ready to answer these charges. Now, the government claims it *still* needs more time. The Defendants object. Enough is enough.

1. This Court Anticipated Robust Pre-Trial Motions Practice and Set the Schedule Accordingly.

The government first requests a continuance due to the fact that Defendants filed pre-trial motions. (Gov't Mot. to Continue (ECF No. 90) at 3). This should not have been a surprise. During a scheduling conference on April 5, 2017, the Court stated that it anticipated a number of pre-trial motions in this case – including motions to dismiss, motions to suppress, and motions *in limine*. Accordingly, the Court set a briefing schedule to accommodate meaningful motions practice. That the Defendants indeed filed motions to dismiss and motions *in limine* does not warrant alteration of the existing schedule.

The government's argument that the trial must be delayed so the Court can read all of the grand jury transcripts is simply not true. As the Defendants did, the government can identify for the Court the relevant passages of the grand jury transcripts that it feels refute the Defendants' allegation of misconduct. As to the time needed for the government to order the grand jury instructions, the Defendants are quite confident that if the government were to order them now, they would be available for production if and when the Court orders the government to do so.

[1] This does not include counsel for Nickolas Kozel. The government made these statements to counsel for Beam Bros. Trucking, Inc., Gerald, Garland, and Shaun Beam. At the time, the government indicated that an indictment might include additional defendants but declined to identify them. The government informed counsel for Mr. Kozel that he was a target of the investigation less than a month before the indictment.

2. After Seven Years of Investigation, the Government Does Not Need More Time to Prepare for Trial.

The government also requests a continuance on the grounds that this is "a complex case" for purposes of the Speedy Trial Act. (Gov't Mot. at 5). The government points to complexities in the "Indictment and the underlying regulatory schemes" as well as "the number of defendants, the voluminous amount of discovery, the anticipated number of witnesses and trial exhibits, and the unique legal issues posed." (*Id.* at 6). In short, the government identifies all the reasons why the *Defendants* might seek a continuance in this case. The government has had seven years to figure this out. It chose the timing of the indictment and it is now time for the government to present its proof.

The fact that a case is "complex" is not sufficient to merit a continuance. *See United States v. Perez-Reveles*, 715 F.2d 1348, 1352 (9th Cir. 1983) ("The mere conclusion that the case is complex is insufficient."). Instead, the case must be so complex as to preclude adequate preparation within the Speedy Trial period. 18 U.S.C. § 3161(h)(7)(B)(ii). That is not the case here. The government states that ends of justice require a continuance because the Defendants raise "multiple novel questions of fact or law" in their motions. (Gov't Mot. at 6). But many of these issues – especially those implicated by Defendants' Motion to Dismiss (ECF No. 84) – have been raised by various defense counsel with the prosecutors during the course of the investigation. The government should not need additional time to learn the law or nuances of the regulatory regimes at issue. *See* 18 U.S.C. § 3161(h)(7)(C) (no continuance permitted due to "lack of diligent preparation . . . on the part of the attorney for the Government").

If anything, the government has worked to undermine the Defendants' Speedy Trial Rights. Despite telling the Court it expected to complete discovery within 7 to 10 days of the April 5 hearing, (Minute Entry (ECF No. 54) at 1), the government requested an extension until April 26.

(Gov't Mot. Seeking Leave of Court for Addt'l Time for Discovery (ECF No. 68)). Defendants actually received this discovery two days later, on April 28. While those materials include approximately 250,000 identifiable, Bates numbered documents, they also include over 2 million unnumbered native files. These files contain no easily discernable custodian information, and the metadata is not populated consistently or systematically. Despite these challenges, Defendants have worked round the clock to search and review the government's data dump in order to be ready for trial.

What is more, during the April 5 hearing, the Court invited the government to make this motion, which they have now done only after defense counsel spent hundreds of hours preparing for trial. At bottom, this case has dragged on for years. The government should have been fully prepared when it elected to indict the case.

3. Defendants Continue to Suffer Prejudice From a Delayed Trial.

After putting Beam Bros. Trucking out-of-business merely by virtue of the allegations in the indictment, the government now seeks to use the company's ruin to benefit its trial preparations. Nothing could be further from the "ends of justice." 18 U.S.C. § 3161(h)(7)(A). The Defendants agree with the government that they invoked their Speedy Trial rights primarily in an attempt to keep the company in operation. However, even the protections of the Speedy Trial Act proved insufficient to prevent the company's demise. Faced with bankruptcy, Defendants were forced to sell the company's assets to another motor carrier. This was the only way keep the mail running and prevent more than 600 employees from losing their jobs.[2] That the government thinks it should benefit from this calamity is the height of shamelessness.

[2] The government vastly oversimplifies the transaction it forced upon Defendants. While Defendants sold assets of the company for a total of $26 million, the amount of any personal benefit to the principals is far, far less. Most of the money which has been received to date from the transaction went to debt service and to make sure the employees were properly paid. The remaining sales proceeds are suspended due to the

Even though the company is out-of-business, the Defendants retain a substantial interest in proceeding to trial as scheduled. First, they have lived under a cloud of suspicion and accusation for years and are eager for the opportunity to have their day in court. More importantly, with the collapse of the company, the individual Defendants no longer have jobs. It would be virtually impossible for any of them to find employment while this indictment hangs over their heads. Prompt resolution is especially important for Mr. Kozel and Shaun Beam who are young men who want and need to move forward with their careers. Additionally, delay prejudices Gerald Beam and Garland Beam both of whom are in their sixties. All Defendants, therefore, must get this case behind them as soon as possible to resume their lives and earn a living.

4. A Lengthy Continuance Would Unreasonably Deny Defendants Continuity of Counsel.

This Court has already made tremendous efforts to re-schedule its docket to establish the current trial schedule. Likewise, defense counsel have all made substantial personal commitments to enable them to try this case as currently scheduled. As it is, the government now suggests that its case-in-chief – originally set for four weeks – will now take 6-8 weeks. (Gov't Mot. Seeking Leave of Court Regarding Trial Procedures (ECF No. 88) at 2). With a two week defense case – plus jury instruction and deliberation time – this trial may take almost three months. A continuance would imperil the ability of current defense counsel to try the case, effectively denying Defendants continuity of counsel. *See* 18 U.S.C. § 3161(h)(7)(B)(iv) (in considering ends of justice, court should consider whether continuance "would unreasonably deny the defendant or the Government

pending forfeiture count. The sale of the trucks and trailers will not be finalized until the forfeiture issue is fully resolved, freeing up the remaining funds that will then be used to satisfy a significant amount of debt on Beam Bros. Trucking's trucks and trailers. Far from enriching themselves through this transaction, Defendants have lost their business and the forfeiture remains a cloud over finalizing the sales transaction. Further, it should also be mentioned that Mr. Kozel does not own any portion of the business and is not entitled to receive any sales proceeds, should any remain at the conclusion of this case.

continuity of counsel"). Should the trial schedule change substantially, counsel for Defendants do not anticipate all being available for trial again until March 2018 at the earliest. Even then, Defendants would lose the benefits of counsels' extensive preparations to-date. In sum, Defendants absolutely oppose any continuance to provide the government with yet more time to prepare a case seven years in the making.

WHEREFORE, for the foregoing reasons, the Defendants respectfully request that this Court deny the government's Motion to Continue the Trial Date And To Certify Case As Complex Under the Speedy Trial Act and maintain the existing trial schedule.

Date: May 8, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 8th day of May, 2017, a copy of the foregoing was filed via CM/ECF, which will send a notification of such filing to all counsel of record.

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18 USCS § 3161

Current through PL 115-42, approved 6/27/17

United States Code Service - Titles 1 through 54 > TITLE 18. CRIMES AND CRIMINAL PROCEDURE > PART II. CRIMINAL PROCEDURE > CHAPTER 208. SPEEDY TRIAL

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)

(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate [United States magistrate judge] on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)

(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) [*18 USCS § 3161(h)*] are excluded in computing the time limitations specified in this section. The sanctions of section 3162 [*18 USCS § 3162*] apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action

occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) [*18 USCS § 3161(h)*] are excluded in computing the time limitations specified in this section. The sanctions of section 3162 [*18 USCS § 3162*] apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter [*18 USCS § 3163*][,] the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter [*18 USCS § 3163(b)*], the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b) [*18 USCS § 3161(b)*] or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this *title [18 USCS § 3292*], has been made for evidence of any such offense and that it reasonably

appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 [*18 USCS § 3161*] because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161 [*18 USCS § 3161*] on the day the order permitting withdrawal of the plea becomes final.

(j) (1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly--

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)

(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

History

(Added Jan. 3, 1975,*P.L. 93-619*, Title I, § 101, *88 Stat. 2076*; Aug. 2, 1979, *P.L. 96-43*, §§ 2-5, *93 Stat. 327*; Oct. 12, 1984, *P.L. 98-473*, Title II, Ch XII, Part K, § 1219, *98 Stat. 2167*; Nov. 18, 1988, *P.L. 100-690*, Title VI, Subtitle IV, § 6476, *102 Stat. 4380*; Oct. 13, 2008, *P.L. 110-406*, § 13, *122 Stat. 4294*.)

≈ ETHICS ≈

Extraordinary, Ethical Investigations in the Digital Age

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EXTRAORDINARY, ETHICAL INVESTIGATIONS IN THE DIGITAL AGE

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I. Introduction.

1. "As a general rule, the most successful man in life is the man who has the best information."[1]

2. Lawyers commonly use many different kinds of investigative techniques to gather information for their clients.

3. Great lawyers actively determine what probably happened, then use investigations to either prove or disprove their factual theories. This allows the lawyer to focus his or her search on the most relevant information, rather than simply attempting to wade through vast amounts of information.

4. New technologies have added to the many different methods of gathering information; websites such as Facebook, Twitter, and Instagram now provide investigators with cheap and easy access to potentially important information.

5. Using investigative techniques also implicates lawyers' ethical duties under the Rules of Professional Conduct.

6. How and when should lawyers use these, and other investigative techniques, and what ethical limits apply?

7. This program will review lawyers' ethical responsibilities as applied to investigating facts in Virginia. This program provides hypotheticals, using Virginia Legal Ethics Opinions and the Virginia Rules of Professional Conduct ("VRPC") as references to analyze the issues involved in gathering factual information consistent with the ethical rules. Topics will be analyzed using rules or opinions of the American Bar Association ("ABA") and other jurisdictions where the Virginia State Bar ("VSB") has either declined or not yet been presented with the opportunity to issue guidance on a specific topic.

[1] Benjamin Disraeli, former British Prime Minister (1804-81).

II. Social Media.

1. Lawyers are charged with competently and diligently representing their clients. To fulfill this role, it may be tempting for lawyers to use any avenue possible in preparation for litigation, such as "friending" witnesses, parties, and jurors though Facebook to collect personal information. Ethical guidelines restrict these activities, however. Lawyers must be careful not to engage in unethical behavior even if it would benefit the client.

2. Recently, the Virginia State Bar ("VSB") approved certain changes to their Rules of Professional Conduct in order to address the impact of new technologies on the legal profession. One of these changes updates Rule 1.1—the duty to provide competent representation—and Comment 6 to that Rule. Providing competent representation to clients now not only requires that one stay on top of changes to the law in a lawyer's practice area, but also obligates lawyers to remain current on "the benefits and risks associated with technology" as well.

A. HYPOTHETICALS:

1. May a lawyer access public information online to acquire information about jurors, plaintiffs, or defendants?

2. May a lawyer access a webpage on Facebook with privacy restrictions, which allow only "friends" to see such nonpublic content?

3. May a lawyer, or someone working under the direction of the lawyer, try to become someone's "friend" in order to gain such "private" access?

4. May a lawyer advise his client regarding the content he posts on Facebook?

B. RULES OF PROFESSIONAL CONDUCT TO CONSIDER:

1. VRPC 3.4 governs a lawyer's conduct towards an opposing party, including their counsel. The rule states that a lawyer shall not "[o]bstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act."

2. VRPC 4.2 applies to a lawyer's communications with persons represented by counsel, and states that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer . . . ."

3. VRPC 4.3 applies where a lawyer is dealing with unrepresented persons, and states that, "[i]n dealing . . . with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should

know that the unrepresented person misunderstands the lawyer's role . . . the lawyer shall make reasonable efforts to correct the misunderstanding."

4. VRPC 4.4 applies to lawyer's relationships with third parties. The rule states that "a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

5. Under VRPC 8.4(a), these same prohibitions extend to any agents (secretaries, paralegals, private investigators, etc.) who may act on a lawyer's behalf.

C. DISCUSSION OF ETHICAL ISSUES WHEN OBTAINING SOCIAL MEDIA EVIDENCE IN DISCOVERY

1. Social media websites—such as Facebook, Twitter, and Instagram—can be valuable sources of information for lawyers. While there is no ethical issue in viewing publicly available information on an individual's Facebook page,[2] attempting to view and collect this information in other contexts may present ethical issues. The VSB has not directly addressed the issue, but many ethics committees have issued opinions addressing the ethical boundaries when gathering factual information from these websites. For example:

2. The Colorado Bar Association Ethics Committee has provided the following guidelines:[3]

   a. Evidence that is publicly available may be gathered freely and used in any matter allowed by law or by the Rules of Professional Conduct.[4]

   b. Information that is not public, and is protected by a user's privacy setting or otherwise restricted from public view, can be gathered only when the lawyer has determined whether the user is represented by counsel, in compliance with the requirements of RPC 4.2 (concerning direct contact with represented parties) and RPC 8.4(c) (prohibiting dishonest conduct).[5]

   c. If the user is represented by counsel, opposing counsel must get consent from the user's counsel to view the social media posts and comments.[6]

   d. If unrepresented, counsel may ask the user to access the private content, commonly via a "friend request," only with a full disclosure by first identifying himself or herself as a lawyer and disclosing the nature of the matter in which plaintiff's counsel represents his or her client.[7]

[2] That was the conclusion reached by Oregon Ethics Opinions 2013-189 and 2005-164, which analogized viewing public social media content to reading a magazine article or a published book.
[3] Colorado Bar Association Ethics Committee Opinion 127 (2015).
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

e. Finally, having a third party, such as a paralegal or private investigator, make the request is not an acceptable way to circumvent the Rules; Rule 8.4(a) prohibits a lawyer from violating the Rules of Professional Conduct "through the acts of another."[8]

3. Although a majority of committees addressing these issues appear to agree that public social media postings are fair game for use in gathering factual information, most also warn that using deceptive tactics to gain information contained on private accounts can run afoul of a lawyer's ethical obligations.

D. DISCUSSION OF PRESERVATION AND SPOLIATION ISSUES WITH SOCIAL MEDIA EVIDENCE

1. Evidence available on social media websites is subject to the same duty to preserve as other types of electronically stored information. VRPC 3.4 prohibits a lawyer from unlawfully altering or destroying evidence and from assisting others in doing so. The VSB has not implemented a rule specifically addressing the issue of advising clients on social media posts, however, some states have.

2. The New York State Bar Association has implemented "Social Media Ethics Guidelines," which specifically address a lawyer's duty to properly advise a client on preservation of social media evidence:[9]

   a. "A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well as to what content may be 'taken down' or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information."[10]

   b. Furthermore, "unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject to a duty to preserve."[11]

3. Although Virginia has not implemented its own guidelines, a Virginia court has sanctioned both a plaintiff and his lawyer for spoliation of social media evidence.[12]

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[8] *Id.* Of the other jurisdictions that have addressed this issue, the consensus appears to be that a lawyer may not attempt to gain access to non-public social media content by using subterfuge, trickery, dishonesty, deception, pretext, false pretenses, or an alias. For example, ethics opinions in Oregon (Op. 2013-189), Kentucky (Op. KBA E-434), New York State (Op. 843), and New York City (Op. 2010-2) concluded that lawyers are not permitted (either themselves or through agents) to engage in false or deceptive tactics to circumvent social media users' privacy settings to reach non-public information. Ethics opinions by other bar associations, including the Philadelphia Bar Association (Op. 2009-02) and the San Diego County Bar Association (Op. 2011-2), have gone one step further and concluded that lawyers must affirmatively disclose their reasons for communicating with the third party. Furthermore, the Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02, concluded that lawyers and/or agents of lawyers could friend opposing parties to secure information, however, the identity and purpose of the "friending" must be made known.

[9] New York State Bar Association, Social Media Ethics Guidelines (2014), No. 5.A.

[10] *Id.*

[11] *Id.*

[12] *Lester v. Allied Concrete Co.*, 83 Va. Cir. 308 (2011), aff'd, 285 Va. 295 (2013).

E. PRACTICAL IMPLICATIONS:

1. Lawyers should advise clients not to post information that may affect their cases to their social media websites.

2. Lawyers should not advise clients to remove information from their social media websites if that information is subject to a duty to preserve.

3. Lawyers should not use deceptive tactics to gain information from private social media websites.

4. Lawyers may review jurors', plaintiff's, and defendant's information on the internet, so long as the information is publicly available.

III. Undisclosed Recordings.

1. Recordings of conversations made without the knowledge of all of the persons involved create both problems and opportunities for lawyers. A client may approach his lawyer with a recorded conversation between the client and an opposing party. What can the lawyer do? Use the recording? Destroy the recording? What is ethical?

A. HYPOTHETICALS:

1. Can a lawyer, or an agent under the lawyer's direction, ethically tape record the conversation of a third party, without that party's knowledge?

2. Can a lawyer record a conversation of an expert when the lawyer is paying the expert for his opinion?

3. If a client comes to a lawyer in possession of an unauthorized recording of a defendant doctor making statements, may the lawyer listen to that statement(s) and/or use the recording in evidence?

B. RULES OF PROFESSIONAL CONDUCT TO CONSIDER:

1. VRPC 8.4 states that "it is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another . . ."

2. VRPC 5.3 governs a lawyer's responsibilities regarding nonlawyer assistants, and provides that "a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if . . . the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved . . . ."

C. DISCUSSION:

1. Virginia is a "one-party consent" state.[13] Thus, it is a crime to intercept or record any "wire, oral, or electronic communication" unless one party to the conversation consents.

2. Lawyers, however, appear to be held to stricter standards.

3. In 1989, the Virginia Supreme Court held that the recordation, by a lawyer or by his authorization, of conversations between third persons, *to which he is not a party*, without the consent or prior knowledge of each party to the conversation, is conduct involving dishonesty, fraud, or deceit.[14]

    a. The Supreme Court of Virginia made clear that it was not deciding whether "one-party consent recording" would be unethical for a lawyer.

4. The VSB has issued various opinions that suggest a lawyer who engages in undisclosed recordings is unethical. However, the prohibition is not absolute.

    a. **Attorney Participation in Electronic Recording:**

        (1) "[*Gunter*] demonstrate[s] the need for limited exceptions [to the *per se* rule against undisclosed recordings]. While *Gunter* was cited as authority for the opinions holding that one-party consent tape recordings by an attorney are unethical, the committee believes that the holding in *Gunter* should be limited to the facts in that case."[15]
        (2) The committee went on to state that, "the committee is of the opinion that Rule 8.4 does not prohibit a lawyer engaged in a criminal investigation or a housing discrimination investigation from making otherwise lawful misrepresentations necessary to conduct such investigations. The committee is further of the opinion that it is not improper for a lawyer engaged in such an investigation to participate in, or to advise another person to participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, as long as the recording is otherwise lawful. Finally, the committee opines that it is not improper for a lawyer to record a conversation involving threatened or actual criminal activity when the lawyer is a victim of such threat."[16]

    b. **Advising Clients on the Use of Lawful Undisclosed Recording:**

        (1) Lawyers are "required to balance a lawyer's duty to competently and diligently advise a client regarding lawful means by which to conduct an investigation against the Virginia State Bar's and the Court's disapproval of undisclosed recording[s]."[17]

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[13] *See* VA. CODE ANN. § 19.2-62.
[14] *Gunter v. Virginia State Bar*, 385 S.E.2d 597 (1989).
[15] VA Legal Eth. Op. 1738 (2000).
[16] *Id.*
[17] VA Legal Eth. Op. 1802 (2010).

(2) A lawyer may advise, suggest or recommend that a client lawfully record her conversation with another person, without disclosing to the other person that their conversation is being recorded in two specific scenarios: (1) a client seeking evidence of a fathers sexual abuse of the client, which the father has admitted during previous telephone calls with the client; and (2) a corporate employee's effort to prove sexual harassment by a co-worker, which could be captured by the employee's wearing of a recording device at work. [18]

(a) The opinion reasoned that these proposed undisclosed recordings were not only lawful (in a "one-party consent" state, it is not unlawful for either of these individuals themselves to record the conversation); but also

(b) could very well have been the only means by which the client could have obtained the relevant information.

D. PRACTICAL IMPLICATIONS:

1. Only undisclosed recordings are generally considered unethical—there is no ethical prohibition on lawyers recording conversations where *every* party consents.

2. Lawyers in Virginia are not subject to a *per se* rule against participating in undisclosed recordings.

3. It is ethical for a lawyer to use undisclosed recordings in the client's possession provided the lawyer was not a conspirator or an accessory to the illegal or improper obtaining of the evidence.[19]

4. Lawyers may record conversations involving threatened or actual criminal activity when the lawyer is a victim of such threat.

5. Lawyers engaged in criminal investigations or housing discrimination investigations may make otherwise lawful misrepresentations necessary to conduct such investigations.

   a. Lawyers engaged in such investigations may participate in, or advise another person to participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, as long as the recording is otherwise lawful.

IV. Use of Third Parties.

1. Lawyers often use third parties, such as private investigators, to gather information. On one hand, these third parties are valuable assets to lawyers because of what they are—experts at gathering information efficiently and effectively. On the other, these third

[18] *Id.*
[19] VA LE Op. 1324 (1990).

parties are valuable because of something they are not—lawyers. People may have a natural tendency to hesitate when speaking with, or around, a lawyer. The presence of a lawyer can stifle an otherwise successful investigation. The use of these third parties assists lawyers in making the investigative process easy. Additionally, lawyers are subject to various ethical rules that prohibit them from engaging in certain types of conduct. Nonlawyer investigators, however, are not confined by such boundaries. Is using a third party to gather information ethical? What are the limits?

A. HYPOTHETICALS:

1. Can a private investigator, on behalf of a lawyer, misrepresent his true identity to a telephone service provider in order to obtain telephone records for use in an investigation?

2. Can a private investigator, on behalf of a lawyer, pose as a customer and seek to purchase goods to support an infringement claim?

3. Can a lawyer instruct a third party to "friend" an adverse witness on Facebook to obtain private information?

4. Can a lawyer tell a client to make an appointment with a potential defendant doctor without revealing that the doctor may be involved in future litigation?

5. Can a lawyer make a list of questions for a client to ask a doctor during an appointment?

B. RULES OF PROFESSIONAL CONDUCT TO CONSIDER:

1. VRPC 4.1(a) provides that "a lawyer shall not knowingly. . . make a false statement of material fact or law to a third party."

2. VRPC 4.2 provides that a Lawyer shall not communicate "about the subject matter of a representation with a person who the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

3. VRPC 5.3 provides that "[a] lawyer is responsible for another person's violation through involvement, knowledge, or supervisory authority if the lawyer orders, directs, or ratifies the conduct."

4. VRPC 8.4(a) provides that a lawyer cannot circumvent ethical prohibitions "through acts of another."

5. VRPC 8.4(c) states that it is "professional misconduct" for a lawyer "to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

6. ABA Model Code DR 7-102(A)(5) states that "[a] lawyer shall not misrepresent his or her identity while engaged in the practice of law."

C. DISCUSSION:

1. The VRPC make clear that using the services of a third party cannot be a means of circumventing the lawyer's personal ethical obligations.

    a. The VRPC apply whether the prohibited conduct is undertaken directly by a lawyer or by another person acting at the lawyer's direction.

2. When acting under a lawyer's direction, third parties and their actions are effectively governed by the VRPC.

    a. The third party usually won't be chastised for any violations of the VRPC; rather, the conduct of the third party will be attributed directly to the lawyer.

D. PRACTICAL IMPLICATIONS:

1. Lawyers should not use third parties to engage in conduct that would be unethical for the lawyer to engage in.

2. Lawyers should educate third parties acting under their direction about the limitations the VRPC imposes.

3. Lawyers and third parties acting under the direction of the lawyer cannot gather information by misrepresenting their identities.

4. If a lawyer insists that a third party, acting under the direction of the lawyer, should directly gather information from another unrepresented third party source, the lawyer should instruct the third party agent to make full disclosures to the unrepresented party ("I represent X").

5. Third parties may be less likely to provide information where these rules are followed.

V. Surveillance.

1. Defense lawyers frequently defend cases brought by plaintiffs claiming serious injuries. In some cases, these lawyers suspect that plaintiffs are lying about the extent of their injuries. Surveillance is a practical way for these lawyers to confirm their suspicions. What types of surveillance techniques are ethical?

A. HYPOTHETICALS:

1. Can a lawyer arrange for an investigator to drive by a plaintiff's house and videotape the plaintiff engaged in such outdoor activities as mowing the lawn, climbing a ladder to clean gutters, playing sports, etc.?

2. Can a lawyer videotape a plaintiff or defendant's activities?

3. Can a lawyer look over a hedge on the plaintiff's property line and take pictures?

4. Can a lawyer use a camera to look through a window into the plaintiff's home to record plaintiff's activity in her home?

5. Can a lawyer use a special infrared camera focusing on the plaintiff's bedroom to determine the validity of his "loss of consortium" claim?

B. RULES OF PROFESSIONAL CONDUCT TO CONSIDER:

1. VRPC 5.3 governs a lawyer's responsibilities regarding nonlawyer assistants, and provides that "a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if . . . the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved . . . ."

2. VRPC 8.4 states that "it is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another . . ."

C. DISCUSSION:

1. There is no rule that directly addresses surveillance techniques.

2. Investigations and surveillance efforts are constrained by state and federal laws that provide private causes of action for invasions of privacy.

3. So long as a lawyer does not go beyond the bounds of these laws, the surveillance technique is arguably permissible.

4. Virginia has repeatedly rejected the concept of a general "invasion of privacy" tort. Virginia law simply prohibits one from using a person's "name, portrait, or picture" for commercial purposes.[20]

5. There are also laws which criminalize the videotaping or photography of non-consenting individuals who are totally nude, partially undressed or wearing undergarments in places one would have a reasonable expectation of privacy. Under Virginia Code §18.2-386, this would include places such as public dressing rooms, bathroom stalls, hotel rooms, public locker rooms, tanning booths, bedrooms and other sensitive areas.

[20] *See* Va. Code § 8.01-40.

6. Trespass laws set a firm prohibition on what conduct is permissible. If a surveillance technique is sufficient to constitute a trespass claim, the surveillance technique is not ethical.

7. Registered private investigators are often afforded more leeway with some types of crimes; using them in conducting surveillance may mitigate potential liabilty.[21]

D. PRACTICAL IMPLICATIONS:

1. Lawyers should educate investigators about what state laws the investigators must abide by in conducting their surveillance.

2. Lawyers should use registered private investigators in conducting surveillance, as they are often exempt from various state laws, mitigating potential risk to lawyers and clients.

3. Lawyers can always use surveillance techniques in public areas to confirm suspicions of persons exaggerating personal injuries.

4. Lawyers should be careful in using intrusive surveillance techniques to conduct surveillance.

VI. Contacting Former Employees

1. Lawyers are often involved in litigation with parties that employ large numbers of people. While litigation is pending, employees may be laid off, fired, or might even terminate their employment with the corporation voluntarily. Lawyers recognize that initiating *ex parte* contact with employees can be helpful in gathering information for a case. Is this conduct ethical?

A. HYPOTHETICALS:

1. May a lawyer contact a former employee of a corporation that has adverse interests toward the lawyer's client?

2. May a lawyer ask the former employee about what he or she discussed with the corporation's general counsel?

B. RULES OF PROFESSIONAL CONDUCT TO CONSIDER:

1. VRPC 1.6 provides that a lawyer "shall not reveal information protected by the attorney-client privilege . . . ."

2. VRPC 4.2 states that "a lawyer shall not communicate about the subject [of a client's] representation with a person the lawyer knows to be represented by another lawyer in the

[21] *See* Va. Code Ann. § 18.2-60.3 (excepting law enforcement officers and registered private investigators acting the course of their legitimate business from stalking offenses).

matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

a. Comment [7] states that "[i]n the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in *Upjohn v. United States*, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits *ex parte* communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate *ex parte* with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule."

3. VRPC 4.3 states that "[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding . . . A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client."

4. VRPC 4.4 prohibits a lawyer from using means that have no purpose other than to embarrass, delay, or burden a third person.

C. DISCUSSION:

1. There is nothing unethical about a lawyer communicating with employees of a corporation with adverse interests to his client, so long as (1) the lawyer first discloses his adversarial role in the litigation (Rule 4.3); and (2) "the employee does not occupy a position within the corporation such that he or she could commit the organization or corporation to specific courses of action that would lead one to believe the employee is the corporation's alter ego (the "control group")."[22]

a. Once an employee who is also a member of the control group separates from the corporate employer by voluntary or involuntary termination, the restrictions on direct contact cease to exist because the former employee no longer speaks for the corporation or binds it by his or her acts or admissions.[23]

[22] VA LE Op. 530 (Communications with Adverse Party).
[23] VA LE Op. 1670 (Contact with Former Employee of Adverse Party).

2. VRPC 4.4 prohibits an attorney from obtaining evidence in a manner that violates the rights of a third party. The corporation has a right to confidentiality for the attorney-client communications involving this former employee. A lawyer would violate that right if he were to ask the former employee to disclose the content of those attorney-client discussions (this would be a violation of VRPC 1.6).

D. PRACTICAL IMPLICATIONS:

1. Lawyers may contact former employees of a corporation with interests adverse to his client, so long as the lawyer discloses his or her adversarial role in the process.

2. A lawyer cannot contact a member of the organization's "control group" (i.e., persons who have the authority to bind the corporation).

3. Lawyers must refrain from questioning an employee about any information that may be privileged or confidential under applicable state law.

4. Lawyers should clarify whether a former employee is represented by legal counsel to forego potential violations of other ethical rules of conduct (contacting representing persons, etc.).

VII. Using Misleading Statements to Acquire Information.

1. It's often easier for a lawyer to gather information by appearing to be a third-party neutral or even acting in furtherance a third party's interest's. If a third party believes that they may be involved in future litigation, the third party will often refuse to communicate. What ethical limitations apply to these situations?

A. HYPOTHETICAL:

1. Is it ethical for a lawyer to contact a physician, tell him that the litigation does not involve him, and ask for information regarding a client's prior treatments when it's entirely possible that the physician may be involved in the litigation at a later time?

B. RULES OF PROFESSIONAL CONDUCT TO CONSIDER:

1. VRPC 4.1 states that "a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person; or . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

   a. Comment [1] states that "[a] misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false."

2. VRPC 4.3 states that "[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding . . . A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client."

C. DISCUSSION:

1. When gathering information, a lawyer cannot cause (directly or indirectly) a third party to believe that the lawyer is a third-party neutral or acting in furtherance of that third party's interests.[24]

2. During communications with a third party, the third party must be aware that the lawyer has the interests of the lawyer's own client in mind.[25]

3. VRPC 4.3 requires a lawyer to make reasonable efforts to correct the misunderstanding when an unrepresented person misunderstands the lawyer's role in a matter.[26]

4. In providing this information to the third party, the third party may decide not to communicate with the lawyer at all.[27]

5. Informing a treating physician that he is not involved directly in pending litigation—if in fact, he may well be—is misleading. Failing to disclose that possibility tends to represent to the physician that the lawyer represents a neutral role. This conduct is directly prohibited by VRPC 4.3.

D. PRACTICAL IMPLICATIONS:

1. Lawyers should disclose their representation of a client when communicating with a third party.

2. Lawyers should not cause third parties to believe that they are disinterested.

3. A lawyer should correct a third party's misunderstanding about the lawyer's role in any communications.

[24] https://www.ribar.com/UserFiles/3rd%20Party%20Rules%20Larry%20Cohen.pdf.
[25] *Id.*
[26] *Id.*
[27] *Id.*

VIII. Paying Fact Witnesses.

1. Witness preparation is generally understood to be a professional obligation under the Rules of Professional Conduct. Another common ethical dilemma is whether it is appropriate to compensate a fact witness. This issue frequently arises where a key witness has retired, moved on to another employer, or where the client is no longer an operating company. Under such circumstances, the witness may have little incentive to allow a lawyer to prepare them to testify at a deposition or trial and may request compensation for doing so.

A. HYPOTHETICALS:

1. A lawyer's client recently downsized its upper management. Unfortunately, the lawyer now finds that he is in need of testimony from several retired senior executives. Perhaps a bit bitter about being laid off, several of the executives have demanded that the lawyer reimburse them for their travel expenses and time.

    a. May a lawyer reimburse the executives for their travel expenses?

    b. One of the retired executives has started a consulting firm. May a lawyer agree to his demand that he be paid for the time he spends preparing for his testimony at the hourly rate he charges his consulting clients?

    c. May a lawyer pay the same rate for the time that the retired executive spends actually testifying in a deposition or at the trial?

    d. Another retired executive moved to Florida and plays golf, fishes, or relaxes every day. Can a lawyer pay him an hourly rate for the time he spends preparing for his testimony?

    e. Another retired executive has found a job with a competitor. In addition to being reimbursed for his travel expenses, this fact witness has demanded $5,000 "to tell the truth" when he testifies. Can a lawyer pay him $5,000 to "tell the truth"?

B. RULES OF PROFESSIONAL CONDUCT TO CONSIDER:

1. The general rule is that witnesses are entitled to an attendance fee and travel expenses under 28 U.S.C. § 1821 for testifying at a trial, hearing, or deposition. In addition, many state and ethical rules allow for compensation of a fact witness for time and expenses incurred by the witness in the preparation of his or her testimony (although some jurisdictions consider this type of payment improper).

2. VRPC 3.4(c) states "[a] lawyer shall not . . . [f]alsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay: (1) reasonable expenses incurred by a witness in

attending or testifying; (2) reasonable compensation to a witness for lost earnings as a result of attending or testifying; (3) a reasonable fee for the professional services of an expert witness.

C. DISCUSSION

1. Some states, like Virginia, added "reasonable" language to their rules after the ABA recognized that payment to a witness may "affect[], even unintentionally, the content of a witness's testimony."[28]

2. Rule 3.4 has been interpreted broadly, allowing for payment of expenses "[a]s long as it is made clear to the witness that the payment is not being made for the substance or efficacy of the witness's testimony, and is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony in litigation in which the witness is not a party."[29]

3. The rule also permits lawyers to compensate witnesses for their time spent in preparation for testifying at trial or in a deposition.[30]

D. WHAT IS A "REASONABLE" PAYMENT?

1. Whether a payment is "reasonable" depends on the specific facts of a given case.

2. For example, the ABA considers:

   a. whether the witness has sustained a "direct loss of income" in the form of hourly wages or professional fees, and;

   b. in situations where the witness has not sustained a direct loss of income, "the reasonable value of the witness's time based on all relevant circumstances."[31]

3. Nonmonetary benefits offered to a witness may also be considered in determining whether a payment was reasonable.

   a. Agreements to protect a former employee from liability, which are made to secure the employee's cooperation as a fact witness, may be found to constitute "the equivalent of making cash payments to the witness as a means of making him sympathetic and securing his testimony."[32]

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[28] *Id.*
[29] ABA Standing Comm. On Ethics and Professional Responsibility, Formal Op. 96-402 (1996).
[30] *Id.*
[31] *Id.*
[32] John K. Villa, Paying Fact Witnesses, ACCA Docket 19, Oct. 2001, at 112, 113 (footnotes omitted).

E. ATTACHING CONDITIONS TO TESTIMONY.

1. Even if a payment seems reasonable, any condition attached to the payments that may be viewed as influencing the testimony of the witness is suspect. For example, where payment is:

   a. conditioned on the giving of testimony in a certain way, especially if conditioned on "truthful testimony;"

   b. made to prevent the witness's attendance at trial; or

   c. contingent to any extent on the outcome of the case;

the payment will be deemed unethical.[33]

F. PRACTICAL IMPLICATIONS:

1. Lawyers should be able to rationally justify payment amounts made to witnesses.

2. Lawyers should make clear to witnesses that any payment is not being made for the substance or efficacy of the witness's testimony, but is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony.

3. Lawyers should never attach conditions to a witness's testimony or make witness payments contingent to any extent on the outcome of a case.

4. Lawyers should take nonmonetary benefits offered to a witness into account when considering whether a witness's payment is reasonable.

IX. Paying for Information.

1. Occurrence witnesses will often refuse to provide lawyers with information. When this situation occurs, a lawyer may want to encourage a witness to talk by offering money in exchange for the information. Do the ethical responsibilities of a lawyer prevent him from encouraging a witness to comply?

A. HYPOTHETICAL:

1. Is it ethical for a lawyer to pay an occurrence witness for information?

B. RULES OF PROFESSIONAL CONDUCT TO CONSIDER:

1. VRPC 3.4(c) states that "[a] lawyer shall not . . . [f]alsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay: (1) reasonable expenses incurred by a

[33] *Id.*

witness in attending or testifying; (2) reasonable compensation to a witness for lost earnings as a result of attending or testifying; (3) a reasonable fee for the professional services of an expert witness.

C. DISCUSSION:

1. Payments made to witnesses expected to testify at trial are subject to VRPC 3.4. Payments made to witnesses not expected to testify at trial are often considered separately.

2. Virginia has not addressed this issue, however, some states have found that such payments are unethical. For example, the Florida Supreme Court has concluded that "paying an individual who has personal knowledge of the facts is to pay a witness, whether or not that person is expected to testify."[34]

   a. Witnesses in these states are subject to rule 3.4 (or its equivalent).

3. Other states disagree. The Committee on Professional Ethics of the New York State Bar Association has concluded that "a lawyer is not prohibited from employing an individual to assist in the fact-finding process, even though that individual might later be designated a testifying witness." The Committee specifically stated that "the attorney may pay an individual whatever amount the client consents to for pre-trial fact-finding services that the individual provides."[35]

4. Regardless of which approach a lawyer's state bar has adopted, a lawyer is never permitted to make a payment that is made for the substance or efficacy of the witness's testimony.

D. PRACTICAL IMPLICATIONS:

1. Lawyers should be aware of their jurisdiction's position on paying witnesses not expected to testify at trial; these approaches can vary drastically.

2. Lawyers should always make clear—to any kind of witness—that payment is not made for the substance or efficacy of the witness's testimony, but merely to compensate the witness for his or her time.

X. Conclusion.

A. Lawyers use many different investigative techniques to gather factual information for their clients. How and when these investigative techniques are employed may conflict with a lawyer's ethical responsibilities under the Rules of Professional Conduct. Great lawyers must be aware of these ethical limits, and be prepared to apply them in practice.

[34] *Fla. Bar v. Wohl*, 842 So. 2d 811 (Fla. 2003).
[35] NYSBA Op. 668 (1994).

ETHICS IN INVESTIGATION ATTACHMENT:

VIRGINIA RULES OF PROFESSIONAL CONDUCT

Rule 1.1. Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comments

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[2a] Another important skill is negotiating and, in particular, choosing and carrying out the appropriate negotiating strategy. Often it is possible to negotiate a solution which meets some of the needs and interests of all the parties to a transaction or dispute, i.e., a problem-solving strategy.

[3] In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. Attention should be paid to the benefits and risks associated with relevant technology. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client’s interests in the event of the representing lawyer’s death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential;

(7) such information to prevent reasonably certain death or substantial bodily harm.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but

before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or

(2) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

(b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:

(1) reasonable expenses incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for lost earnings as a result of attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

(f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

(h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the information is relevant in a pending civil matter;

(2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and

(3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of fact or law; or

(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Comments

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another

person that the lawyer knows is false. Misrepresentations can also occur by failure to act or by knowingly failing to correct false statements made by the lawyer's client or someone acting on behalf of the client.

Rule 4.2. Communication with Persons Represented By Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Comments

[7] In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in *Upjohn v. United States*, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits *ex parte* communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate *ex parte* with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Rule 4.3. Dealing with Unrepresented Persons

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

Rule 4.4. Respect for Rights of Third Persons

In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
    (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
    (2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law;
(d) state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official; or
(e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.