

2015 Agenda

- 7:30am Sign-in and Continental Breakfast
- 8:25am Welcome and Introduction **Matt Broughton**
- 8:30am The Hiring and Firing of Professionals **Klockenbrink, Huff** (:20)
- 8:50am Winning Medical Malpractice Cases **Russell, Byrd, Chen** (:30)
- 9:20am Know Your Judge and the Rules of Court – the Craft of Persuading a Judge
Kinser, Habeeb (:30)
- 9:50am Getting to Closing: The Impossible Deal **Gust, Church, Kozlowski** (:30)
- 10:20am **Break** (:10)
- 10:30am Keeping “Death” Cases Alive **Broughton, Henshaw, Roberts** (:30)
- 11:00am Swords and Shields: Contract Rules You Need to Know **Wiegard, Puvak** (:30)
- 11:30am The Criminalization of Everything **Bondurant, Austin** (:30)
- Noon **Ethics for Lunch: Inadvertent Disclosures** **Moliterno** (:60 Ethics)
- 1:30pm When Your State Court Case Gets Hijacked by the Federal Court
Sexton, Stephenson (:30)
- 2:00pm Don’t Get Caught Naked; Get Covered **Harbert, Irot** (:30)
- 2:30pm Shepherd the Herd: Law Firm Governance and Management
Monday, Keller (:25)
- 2:55pm **Break** (:15)
- 3:10pm Blood, Sweat and Tears: Using Technology in Litigation **Finney, Arthur** (:20)
- 3:30pm Identifying and Litigating False Claims Act Cases **Haley, Thomas** (:20)
- 3:50pm **Ethics: Some Things Never Change (But Others Do)** **Morgan, Sullivan, Murchison** (:60 Ethics)
- 4:45pm **Cocktails and hors d’oeuvres until 6:00pm**



GENTRY LOCKE
Attorneys

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September 18, 2015

Welcome to Gentry Locke's 2015 annual CLE Seminar for Gentry Locke attorneys and guests. We are humbled by the growth of the Seminar as we now utilize three rooms here at The Hotel Roanoke.

This CLE has become a tradition, which gives us an opportunity to teach each other and provide continuing legal education to those attorneys with whom we have developed a close referral association and friendship.

We hope you find this Seminar meets both your intellectual and State Bar needs. We have designed this Seminar in such a way that it is fast paced and covers multiple areas of the law. We hope this format will appeal to all of our attorneys and guests.

If you have any suggestions to help improve future seminars, we hope you will share them with us.

We thank you for joining us and we look forward to spending the day with you, as well as the opportunity to work with you in the future.

Very truly yours,

GENTRY LOCKE

Matthew W. Broughton
Seminar Chair



Paul G. Klockenbrink

Partner

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Paul Klockenbrink is a Partner in Gentry Locke's Labor & Employment law group. Paul advises and represents employers throughout Virginia regarding employment law issues, as well as the litigation of non-compete agreements, insurance defense matters and business-related claims. Paul is a frequent speaker at national and regional employment law seminars and also leads the firm's Restaurant & Hospitality practice group. Paul publishes the *Virginia Hospitality Law* blog at www.vahospitalitylaw.com. During his 20+ years with Gentry Locke, Paul has brought cases to trial that involve discrimination, retaliation, sexual harassment, non-competition, defamation, malicious prosecution, premises liability and commercial motor vehicle accidents, among others. Paul is consistently noted as a *Virginia Super Lawyer* in Employment & Labor Law, and he earned a spot on the *2016 Best Lawyers in America list* in Employment Law – Management and Litigation – Labor and Employment.

Education

- University of San Diego School of Law, J.D. cum laude, 1988
- University of Vermont, B.A. 1985

Experience

- Represent management and companies in broad cross section of industries on labor and employment issue that arise on a daily basis such as hiring, union avoidance, leave issues under FMLA/ADA, wage and hour issues, investigation of misconduct, termination issues, unemployment claims and EEO Complaints
- Extensive litigation experience involving claims of theft and trade secrets and disclosure of confidential information in violation of noncompetition/nondisclosure agreements
- Representation of companies before EEOC, Department of Labor, and other agencies, including mediation
- Representation of management and training of supervisors regarding union activity
- Obtained defense verdict in federal jury trial for manufacturing company in sexual harassment/battery case
- Obtained dismissal of claims on behalf of company in sexual harassment/retaliation case in Federal Court
- Obtained summary judgment on behalf of manufacturer in race discrimination case in Federal Court
- Obtained summary judgment on behalf of manufacturer in ADA discrimination case in Federal Court
- Representation of publicly traded company in alleged discrimination matter and Sarbanes Oxley claim along with separation issues involving former executive
- Representation of local school board in connection with termination issues and separation package

Affiliations

- Member, Labor & Employment Section, Virginia Bar Association
- Member, Labor & Employment Section, American Bar Association

- Member, Virginia State Bar
- Member, California State Bar (inactive) Member, Society for Human Resource Management, National, Roanoke, Lynchburg
- American Jurisprudence Awards in Torts (1986) and Evidence (1987)
- Member, University of San Diego Law Review, 1987-1988
- Co-Chair (2000-present) and Former Chair (1998-1999), Roanoke Jingle Bell Run for Arthritis Foundation (1998-1999)
- Vice President, Valley Association Football Club, Inc. (2003-2004)
- Member, Board of Directors, Arthritis Foundation – Virginia Chapter (1999-2005)
- Frequent speaker for business groups throughout region

Awards

- Named one of The Best Lawyers in America® in the field of Employment Law – Management (2009-2016) Labor & Employment Litigation (2011-2016)
- Named to Virginia Super Lawyers in the area of Employment & Labor (2007-2015), included in Super Lawyers Corporate Counsel edition (2009) and Super Lawyers Business Edition US in the area of Employment & Labor (2012-2014)
- Named a “Legal Eagle” for Employment Law – Management and Litigation – Labor & Employment by Virginia Living magazine (2012)
- Designated one of Virginia’s Legal Elite in Labor & Employment Law by Virginia Business magazine (2007)

Case Results

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

- May 29, 2015 — [University Prevails on Motion to Dismiss Claims by Former Employee](#)
- Apr 23, 2015 — [Company Prevails Twice in Hostile Work Environment Claim](#)



GENTRY LOCKE
Attorneys



Catherine J. Huff

Associate

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Cate Huff practices in the Insurance, Workers' Compensation, and Employment practice groups and has litigated in federal and state courts throughout Virginia. She is a contributing author to Gentry Locke's *Virginia Hospitality Law* blog at www.vahospitalitylaw.com. Cate graduated *magna cum laude* from Virginia Tech and received her J.D. from Liberty University.

Education

- Virginia Polytechnic Institute and State University, B.A., magna cum laude, 2006
- Liberty University School of Law, J.D., 2009

Experience

- Representation of insurers in numerous auto liability and premises liability litigation
- Representation of insurers in fire and other property damage litigation
- Argued motions in state and federal court on the topics of defamation, spoliation of evidence, bifurcation and various other matters
- Handled infant settlements and wrongful death settlements throughout the state
- Handled various misdemeanor charges and assisted with the defense of felony charges throughout the state
- Litigation experience in general district and circuit courts throughout the state
- Negotiated settlements in various personal injury actions

Affiliations

- Volunteer, Blue Ridge Legal Services Pro Bono Hotline
- Volunteer, Wills for Heroes
- Roanoke Children's Theater Board of Directors
- Member, Virginia State Bar
- Member, Virginia Association of Defense Attorneys
- Member, Young Lawyers Division, Virginia Bar Association
- Member, Roanoke Bar Association

Awards

- Named a Virginia Super Lawyers Rising Star in Workers' Compensation (2015)

Published Work

- Co-author, [When Bad Things Happen to Good Companies](#); Performance News Summer 2012, Scott Insurance.

Case Results

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

- May 29, 2015 — [University Prevails on Motion to Dismiss Claims by Former Employee](#)
- Apr 23, 2015 — [Company Prevails Twice in Hostile Work Environment Claim](#)
- Nov 7, 2013 — [Family Member's Estate Protected in Slip & Fall Case](#)
- Apr 23, 2013 — [Blinded Employee Agrees to \\$14 Million-dollar Settlement \(\\$16.5M Payout\)](#)



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. Comerc*i, *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

- 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)

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 (2013-2016), and Product Liability Litigation – Plaintiffs (2016)
- 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 Super Lawyers Rising Stars for Personal Injury/Medical Malpractice: Plaintiffs category in Super Lawyers magazine (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) 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 Results

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 14, 2015 — [\\$300,000 Jury Verdict in Greenway Collision](#)
- Jan 28, 2015 — [Feeding Tube Error Case Resolved for Widow](#)

- 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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Benjamin D. Byrd

Partner

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Ben Byrd is a Partner and trial lawyer representing injured people in medical malpractice, wrongful death, and personal injury cases across Virginia. His practice is devoted entirely to litigating cases in state and federal courts. This has taken Ben from Wise to Fairfax and practically everywhere in between. He has handled a wide variety of cases including car crashes, trucking accidents, products liability and medical malpractice cases involving surgical errors, failure to diagnose cancer and medication errors. Ben represents people who have been injured or lost loved ones as a result of the careless actions of others. This has given him the opportunity to speak for those who are unable to speak for themselves.

For the past four years, he has been noted by *Virginia Super Lawyers* as a “Virginia Rising Star” in the practice of Personal Injury General: Plaintiff, placing him among the up-and-coming attorneys in the state.

Education

- Washington and Lee University School of Law, J.D. cum laude, 2008
- College of Charleston, B.A. magna cum laude, 2003

Experience

- Represented plaintiffs in cases involving medical malpractice, personal injury, car accidents, trucking accidents, products liability, nursing home malpractice, dog attacks, sexual assault and wrongful death
- Tried a sexual assault case resulting in a \$1,000,000 jury verdict in the City of Staunton; verdict was included in the Virginia Lawyers Weekly “Virginia’s Largest Verdicts of 2013” list
- Represented a plaintiff in recovering in excess of \$500,000 in a trucking accident case
- Tried a medical malpractice case resulting in a jury verdict in excess of \$375,000 (total recovery of over \$450,000)
- Tried a wrongful death case resulting in a \$400,000 jury verdict in Wise County
- Tried a medical malpractice case resulting in a jury verdict in excess of \$300,000 in Tazewell County
- Tried a trucking accident case resulting in a \$200,000 jury verdict in Roanoke County
- Tried car accident, trucking accident, medical malpractice, personal injury, sexual assault and wrongful death cases in Virginia state courts
- Successfully represented a car accident victim in arbitration proceeding
- Represented plaintiffs in cases that received media publicity, including medical malpractice matters against the major healthcare corporation in the region
- Represented plaintiffs in state courts throughout the Commonwealth including Amherst County, Appomattox County, Augusta County, Bedford County, Botetourt County, Brunswick County, Carroll County, Charlottesville, Danville, Dickenson County, Fairfax County, Floyd County, Franklin County, Grayson County, Henrico County, King William County, Lynchburg, Martinsville, Montgomery County, Norfolk, Pulaski County, Richmond, Roanoke City, Roanoke County, Rockbridge County,

Rockingham County, Russell County, Salem, Stafford County, Staunton, Tazewell County, Washington County, Winchester, and Wise County

- Represented plaintiffs in a trucking accident case in Louisiana state court
- Represented plaintiffs in over a dozen mediations in state and federal courts in Virginia
- Argued numerous motions in state and federal courts on the topics of charitable immunity, the collateral source rule, spoliation of evidence and other matters
- Participated in continuing legal education courses as a presenter and in preparing written materials
- Assisted with a motion to reconsider sentence for a criminal defendant serving life without parole
- Assisted the Virginia Capital Case Clearinghouse at Washington & Lee with several high-profile capital cases
- Served the United States District Court for Western Virginia during internship

Affiliations

- Member, American Association for Justice
- Member, Virginia State Bar
- Member, The Virginia Bar Association
- Member, Roanoke Bar Association
- Member, Friends of the Roanoke Public Libraries, Raleigh Court Chapter

Awards

- Included in the Virginia Lawyers Weekly list of "Virginia's Largest Verdicts" (2013)
- Named a Virginia Super Lawyers Rising Star in Personal Injury: Plaintiff (2012-2015)
- Vice-President, Student Law Council of The Virginia Bar Association at Washington & Lee
- Washington & Lee University Honor Advocate

Case Results

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- Jun 26, 2015 — [Settlement in Post-surgery Wrongful Death](#)
- Jun 10, 2015 — [Patient Prevails, Receives Settlement in Cancer Misdiagnosis Case](#)
- Jan 28, 2015 — [Feeding Tube Error Case Resolved for Widow](#)
- May 21, 2014 — [Client Awarded Over \\$387,000 for Surgical Injury](#)
- Nov 21, 2013 — [Medical Hardship Ignored by Physician Results in \\$300,000+ Award](#)
- Sep 29, 2013 — [Arbitration Result in Favor of Taxicab Accident Victim](#)
- Sep 27, 2013 — [Plaintiff in Multi-vehicle Accident Receives Over \\$225,000](#)
- Apr 4, 2013 — [Million-dollar Verdict Awarded to Home Health Care Nurse](#)
- Jul 26, 2012 — [Unnecessary Procedure Leads to Wrongful Death](#)
- May 29, 2012 — [Settlement Approved for Girl Hit by Car](#)
- Jan 4, 2012 — [Settlement on Uninsured Motorist Accident](#)
- Dec 28, 2011 — [Maximum Awarded for Head-on Accident with Tractor-trailer](#)



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, 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

- 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)



Gregory D. Habeeb

Partner

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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, 2012-2015), 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

Case Results

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 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)**



W. William Gust

Partner

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Bill Gust is a Senior Tax Partner with Gentry Locke and serves as a consultant with Gentry Locke's subsidiary, Corporate Capital Resources, LLC. For more than 30 years, Bill has worked with closely held business owners relative to tax, corporate and sophisticated estate planning matters. With his expertise in implementing business succession strategies, Bill has assisted in the successful transition of many privately held businesses, through sales, mergers and implementation of numerous ESOPs. A member of the American College of Trust and Estates Counsel, *National Center for Employee Ownership (NCEO)* and the ESOP Association, Bill is a frequent lecturer on estate, business and tax planning as well as IRS and DOL compliance matters. As a part of his corporate practice, Bill also is active in the purchase and sale of fixed and rotary wing aircraft and regularly advises aircraft owners and aviation companies relative to aircraft purchase, leasing, and FAR Part 91 and Part 135 operations. He is consistently noted as a *Virginia Super Lawyer* in Tax Law, based on his high degree of peer recognition and professional achievement, and he earned a spot on the 2016 *Best Lawyers in America* list in Employee Benefits (ERISA) Law and Tax Law.

Education

- Georgetown University Law Center, LL.M in Taxation, 1983
- George Mason University School of Law, J.D. with distinction, 1981
- Virginia Polytechnic Institute and State University, B.A. 1977

Experience

- Successfully represented numerous companies in tax controversies involving coal excise tax disputes in United States District Court, United States Tax Court, and the Court of Federal Claims, resulting in substantial taxpayer recoveries
- Represented numerous professional and other corporations in the design and implementation of qualified retirement plans and unqualified deferred compensation arrangements for key employees
- Represented numerous corporations in the negotiation and implementation of mergers and other restructuring with transaction values in excess of \$170 million
- Serves as a Consultant of **Corporate Capital Resources LLC**, a wholly owned consulting subsidiary of Gentry Locke; established to provide fee-only business succession consulting services to owners of closely held companies
- Represents numerous public and private companies in the adoption and operation of Employee Stock Ownership Plans (ESOPs) and subsequent stock purchases from public and private shareholders
- Structured and implemented numerous acquisitions of turbine and rotary aircraft for U.S. and foreign companies; oversees compliance with FAR Part 91 and Part 135 operations
- Represents many individuals and families in the structuring and implementation of sophisticated estate plans, designed to minimize the negative impact of state and federal taxes

Affiliations

- Member, Roanoke-Blacksburg Regional Airport Commission (past Chairman)
- Past Chair, Board of Governors, Trusts and Estates Section, Virginia State Bar
- Fellow, American College of Trust and Estate Counsel
- Member, Tax, Trusts and Estates, Health Care, Business Law Sections, Virginia State Bar
- Member, Tax, Employee Benefits, Corporate Sections, American Bar Association
- Member, Roanoke Valley Estate Planning Council
- Member, ESOP Association; NCEO, Mid-Atlantic Chapter of ESOP Associations



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, low-income housing and new markets tax credits). Christen was recognized for the second year in a row as a *Virginia Rising Star* in Corporate/Mergers & Acquisitions 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

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

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 personal information
- Advises clients on the applicable response and notifications obligations following a data breach

Tax Credit Financing

- Structures financings/transactions involving federal and state tax credits (including historic rehabilitation, low-income housing as well as 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

- 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, Board of Directors for Children's Trust Foundation Roanoke Valley (2012-Present)
- Member, American Health Lawyers Association
- Member, Virginia State Bar
- Member, Roanoke Bar Association
- Member, The Virginia Bar Association
- Member, American Bar Association
- Member, Virginia Women Attorneys Association
- Judicial Clerk to the Honorable Jonathan M. Appgar, Roanoke City Circuit Court (2007-2008)

Awards

- Named a "Virginia Super Lawyers Rising Star" in 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)



Christopher M. Kozlowski

Associate

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- Fax: 540.983.9400
- Email: kozlowski@gentrylocke.com

Chris Kozlowski is an Associate in our General Commercial practice group. Chris focuses on advising businesses in general corporate matters, tax matters, securities and banking regulation and compliance, as well as in a broad range of commercial transactions. Chris is a contributing author to the *Virginia Hospitality Law* blog at www.vahospitalitylaw.com. 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

- Representation of corporate and individual clients in transfers of entity ownership
- Representation of corporate and individual clients in asset and real property purchases
- Representation of placement agents in exempt securities offerings
- Representation of hedge funds in securities compliance matters
- Representation of corporate clients in corporate governance matters
- Conducts research on various corporate law subjects

Affiliations

- Fairfield County Bar Association (2012-2013)
- Fairfield County Bar Association Young Lawyers Section (2012-2013)
- Connecticut Bar Association (2012-2013)

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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.

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, 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
- 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

- President, Southwest Virginia Business Development Association
- Chair, VTLA Aviation Committee (2004-Present)
- 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
- ATP Rated Pilot

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 (2010-2015) 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 (2013-2016), Product Liability Litigation/Plaintiffs (2010-2016), and 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, The Law of Damages in Virginia, Chapter 11, Punitive Damages (2nd ed. 2008).

Case Results

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](#)

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Christena L. Roberts, MD
CJ Consulting of America, LLC
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cj-consulting@live.com

FORENSIC EXPERIENCE:

Established Jan/07	CJ Consulting of America, LLC Forensic pathology consulting and private autopsies
12/ 2007 – 9/2010	Assistant Chief Medical Examiner Office of the Chief Medical Examiner Roanoke, VA
7/2005 – 7/2007	Associate Medical Examiner District 5 Medical Examiners Department, Leesburg FL

EDUCATION:

2004 – 2005	Hillsborough County Medical Examiners Office University of South Florida College of Medicine, Tampa, Florida Forensic Pathology Fellowship
2002 - 2004	University of Florida, Gainesville, Florida Anatomic Pathology Residency Program
2000 - 2002	University of South Florida College of Medicine, Tampa, Florida Anatomic and Clinical Pathology Residency Program
1995 - 2000	University of South Florida College of Medicine, Tampa, Florida Doctor of Medicine Received Excellence in Forensic Pathology Annual Award
1992 - 1995	University of Florida, Gainesville, Florida
1984 - 1985	Bachelor of Science, Interdisciplinary Studies Major - Biochemistry and Molecular Biology Minor - Chemistry Graduated with High Honors, Phi Beta Kappa

ADDITIONAL FORENSIC EXPERIENCE:

2010	Member of Advisory Board, American Institute of Forensic Education
2001	Associate Medical Examiner Appointment, Hillsborough County, FL Dr. Vernard Adams, Medical Examiner (6 months, as part of residency credentialing year). All aspects of death investigation, including crime scene, autopsy and court testimony
1994 - 1995	Forensic Anthropology - Volunteer Human Osteology Course Dr. William Maples, CA Pound Human Identification Lab, Univ. of Florida
1984 - 1985	Forensic Anthropology - Lab Assistant Dr. William Maples, Florida Museum of Natural History, Univ. of Florida On-site crime scene investigation and reconstruction of skeletal remains.

LICENSES:

Medical License, State of Florida
Medical License, Commonwealth of Virginia

EMPLOYMENT:

1987 - 1993	CH2M Hill – International Environmental Engineering Firm, Project Assistant. Worked directly with clients in all aspects of their multi-million dollar projects including contract and technical documents and project budgeting. Coordinated and presented at meetings on local, state and national level.
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CJ Consulting of America, LLC

- RESEARCH:** 1994 - 1995
Genetics research – Preliminary Linkage Analysis to map the gene responsible for a novel form of X-linked mental retardation.
Principal Investigator: Thomas Yang, Ph.D.
Affiliation: Department of Biochemistry, University of Florida
- PUBLICATIONS:**
Rosenberg AS, Langee CL, Morgan MB. (2002). Malignant peripheral nerve sheath tumor with perineural differentiation: "malignant perineuroma". *J Cutan Pathol*; 29: 362-367.
- PRESENTATIONS:**
Consulting a Forensic Pathologist. IDS Capital & Serious Felony Training. Charlotte, NC. December 15, 2011
Child Death Investigation. IDS Capital & Serious Felony Training. Durham, NC. March 1, 2012.
Motor Vehicle Accidents, Medical Records and Autopsy Reports; Driver vs. Passenger. As part of "Forensics: From Crime Scene to Courtroom". North Carolina Advocates for Justice (NCAJ). Raleigh, NC. April 13, 2012.
Medical Death Investigation: Time of Death; Time Since Injury. IDS Capital & Serious Felony Training. Asheville, NC. May 17, 2012
Forensic Science: DNA and Pathology. Pathology topics included: *Shaken Baby Syndrome/Child Death Investigation; Time of Death and Interplay of a Crime Scene, DNA and Pathology.* North Carolina Advocates for Justice and the Forsyth County Criminal Defense Trial Lawyers Association. Winston-Salem, NC. September 28, 2012.
Variety of educational presentations in Florida to medical students and residents; Department of Children and Family Services and Elder Services, District 5, FL ; and to Marion County Sheriff's Officer Education Program
Postmortem morphine concentrations – Are they meaningful? American Academy of Forensic Sciences, 56th Annual Meeting, Forensic Toxicology Section. Dallas, TX, February 2004.
Principal Investigators: Bruce A. Goldberger¹, Ph.D. and Julia Martin², MD
Affiliations:¹ University of Florida, Department of Pathology, Immunology and Laboratory Medicine. ² District 5 Medical Examiner's Office, FL
- TEACHING:**
Intern training of residents and medical students in Forensic Pathology
Office of the Chief Medical Examiner
Roanoke, VA
- TRIALS:**
Previously qualified as an expert witness in multiple Florida, Virginia and North Carolina courts on a variety of case types.

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Timothy James Henshaw

Professional experience	2001-present	Bradley Free Clinic	Roanoke, VA
	Medical Consultant and Staff Rheumatologist		
	1997-2001	Lewis-Gale Clinic	Roanoke, VA
	Staff Rheumatologist		
	1993-1997	Goldsboro Rheumatology	Goldsboro, N.C.
	Founder of practice		
Education	1991 - 1993	University of Florida	Gainesville, FL
	Fellowship in Rheumatology		
	1990 - 1991	Bangkla Baptist Hospital	Bangkla, Thailand
	Volunteer Missions Physician		
	1988 - 1990	Penn State University Hospital	Hershey, PA
	Residency in Internal Medicine		
	1987 - 1988	Penn State University Hospital	Hershey, PA
	Internship in Internal Medicine		
	1983 - 1987	Medical College of Virginia	Richmond, VA
	Medical School		
	1979 - 1983	Bridgewater College	Bridgewater, VA
	Bachelor of Arts, Biology		
Publications	Henshaw TH, Malone C, Gabay J, Williams RC.		
	"Elevations of Neutrophil Proteinase 3 in Serum of Patients with Wegener's Granulomatosis and Polyarteritis Nodosa." Arthritis and Rheumatism 1994, 37:104-112		

Board Certification Internal Medicine: American Board of Internal Medicine 1991
Rheumatology: American Board of Internal Medicine 1993
Recertified in both specialties 2001



Spencer M. Wiegard

Partner

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Spencer Wiegard is a Partner and a member of Gentry Locke's Construction Law and Commercial Litigation practice groups. Spencer focuses his practice in the areas of construction law and construction litigation. He represents general contractors, subcontractors, trade contractors, suppliers and design professionals. Spencer is a member of the Board of Governors for the Virginia State Bar Construction Law and Public Contracts Section and a member of both the Legislative Committee and the Executive Committee for the Roanoke/SW Virginia District of the Associated General Contractors of Virginia. He currently serves as Second Vice President of the Roanoke District of the AGCVA. Spencer writes for two blogs: [Virginia Construction Law Update](#) and [Virginia OSHA Law News](#). Spencer has been recognized as a *Virginia Rising Star* in Construction Litigation by Super Lawyers.

Spencer counsels and advises his clients concerning a range of legal issues, including contract drafting and negotiation, mechanic's liens, surety bond claims, professional and occupational licensing issues, and OSHA issues and claims. Spencer's construction litigation practice involves breach of contract disputes, payment disputes, claims, construction defect disputes, design defect disputes, mechanic's lien enforcement actions, payment bond claims, OSHA enforcement actions, professional licensure, and regulatory matters.

Education

- College of William and Mary, Marshall-Wythe School of Law, J.D. 2004
- University of Virginia, B.A. 2001

Experience

- Representation of a Virginia firearm retailer in a Federal Lawsuit filed by the City of New York in the Eastern District of New York
- Representation of a Virginia firearm retailer in a products liability action in Richmond, Virginia
- Counseled and assisted major retailer in setting its firearms carry policy for all United States stores
- Representation of a major steel fabricator in contract negotiations for the World Trade Center/Freedom Tower project in New York City
- Representation of a national energy company in Federal Black Lung matters before the United States Department of Labor, the Office of Administrative Law Judges, and the Benefits Review Board
- Representation of a subcontractor for mediation of a multi-million dollar construction defect claim involving a major Virginia university
- Drafted and negotiated prime and subcontracts on behalf of a Virginia based general contractor
- Representation of numerous general contractors, subcontractors, and material suppliers in the preparation of, filing of and litigation of complex mechanic's lien matters throughout the Commonwealth of Virginia for dollar amounts in excess of one million dollars

Affiliations

- Statewide coordinator for Pro Bono Hotlines, The Virginia Bar Association Young Lawyers Division (2008-Present); Co-chair of Pro Bono Hotline for the Roanoke Valley (2006-2008)
- Member, Board of Directors, Military Family Support Centers, Inc. (2006-present)
- Associated General Contractors of Virginia (Associate Member, 2006-present), Legislative Committee (Member, 2007-Present)
- Member, Executive Committee, Associated General Contractors, Roanoke District; Second Vice President (2015-Present)
- Secretary, Roanoke City Republican Committee (2008-Present)
- Member, William and Mary Environmental Law and Policy Review
- Member, The Virginia Bar Association
- Member, Virginia State Bar
- Member, American Bar Association
- Member, Roanoke Bar Association

Awards

- Named a Virginia Super Lawyers Rising Star in the area of Construction Litigation (2010-2015)
- Roanoke Bar Association Volunteer Service Award for over 25 hours of pro bono and community service (2006)

Published Work

Read Spencer's blogs at www.VaConstructionLawUpdate.com and www.VaOSHALawNews.com

- Co-Author, [Deal...or No Deal? Identifying and Addressing Gray Areas in Construction Contracting](#), The Construction Lawyer, Journal of the ABA Forum on the Construction Industry, Volume 33 No. 3 (Summer 2013).
- Co-Author, [Key Points to Consider in Filing and Challenging a Mechanic's Lien](#), Virginia Lawyer magazine, Volume 59 (October 2010).
- The Brownfields Act: Providing Relief for the Innocent or New Hurdles to Avoid CERCLA Liability, William and Mary Environmental Law and Policy Review, Vol. 28, Number 1, Fall 2003.
- Contributing Editor – Virginia Section – Tort Law Desk Reference- A Fifty State Compendium (2005 and 2006 Editions).



Jonathan D. Puvak

Associate

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Jon Puvak is an Associate in our General Commercial, Real Estate, and Environmental Law practice groups. Jon focuses on assisting businesses, business owners, and governmental entities with a range of general corporate matters, commercial transactions, real estate, and environmental 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 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 corporate clients in corporate governance matters
- Represented individuals with new business entity formation and succession planning
- Represented businesses in negotiation, preparation, implementation of asset and stock mergers and acquisitions
- Represented businesses with lending and refinancing transactions
- Represented parties in the drafting of complex domestic and international contracts

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

- Member, The Virginia Bar Association, Young Lawyers Division
- Member, American Bar Association, Young Lawyers Division
- Graduate of Leadership Arlington, Young Professionals Program (2013)

- Member, Urban Land Institute

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).



Thomas J. Bondurant, Jr.

Partner

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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
- 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 (2013-2015) 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)
- 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)



E. Scott Austin

Partner

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Scott Austin is a member of Gentry Locke's Criminal & Government Investigations practice group. Scott has tried numerous criminal and civil jury trials in both Federal and State courts throughout Virginia, handling complex litigation matters including white collar fraud, public corruption and tax evasion. Recently, Scott represented a former food company executive in a nationally publicized, two-month jury trial in federal district court. Scott performs corporate internal investigations and is Chair of the firm's Workers' Compensation practice group. Scott is admitted to practice law in both Virginia and the District of Columbia.

Education

- College of William and Mary, Marshall-Wythe School of Law, J.D. 1997
- University of Richmond, B.A. honors graduate, 1994

Experience

- Representation of numerous individual and corporate criminal defendants in federal and state courts
- Representation of former food company executive in a two-month jury trial in federal court involving several million documents and multiple federal and state government agencies
- Representation of State of Oregon in litigation arising from tobacco settlement
- Representation of individual and corporate defendants in RICO case arising from allocation of FEMA disaster relief funds
- Representation of individual in alleged domestic terrorism case
- Representation of a County Administrator charged with embezzlement
- Representation of an individual in complex, multi-million dollar wrongful death action
- Representation of physician in case involving alleged euthanasia
- Representation of defendant in large mortgage fraud conspiracy
- Representation of defendant in alleged murder for hire
- Representation of building contractors in Federal RICO action
- Representation of a national trucking client in Federal qui tam action

Affiliations

- Chair, Board of Directors, Council of Community Services (2006-2008)
- Executive Board, Council of Community Services (2002 to 2010)
- Member, [Virginia Association of Defense Attorneys](#)

- Member, Association of Certified Fraud Examiners
- Member, Criminal Law Section, Virginia Bar Association
- Member, National Moot Court Competition Board, Virginia Bar Association (2001)
- Member, American Bar Association
- Member, The Virginia Bar Association
- Member, Roanoke Bar Association
- Member, Virginia State Bar
- Member, District of Columbia Bar

Awards

- Named in “Top Attorneys in the Roanoke Valley” by Roanoker Magazine (2011-2012)
- Named to Super Lawyers Business Edition US in the area of Criminal Defense/White Collar (2012)
- Designated as a Virginia Super Lawyer in the Criminal Defense White Collar category by Super Lawyers magazine(2011)
- Designated as one of the Virginia’s Legal Elite in the Young Lawyer category (2006) and Criminal Law category (2007) by Virginia Business magazine
- Named in “Best Lawyers in the Roanoke Valley” by Roanoker Magazine (2006)

Published Work

- Managing White Collar Legal Issues, Chapter 13, Tools for Combating White Collar Crime: Utilizing the FBI and the Sarbanes-Oxley Act, Thompson Reuters/Aspatore (2008).
- Co-author, When are Your Premises “Vacant” for Purposes of Insurance Coverage?, J. Civ. Lit., Spring 2008.

Case Results

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

- Mar 7, 2014 — [Defense of Explosive Products Liability Case](#)



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 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.

Energy Cases: Mineral, Energy, and Land Rights

- 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 Consolidation Coal Company had no legal right to dump mine waste in old mine works

- Obtained [ruling by Virginia Supreme Court](#) that CNX 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

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
- 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 (2008-2016) and Oil & Gas Law (2009-2016)
- Named to Virginia Super Lawyers in the area of Business Litigation (2007-2015), 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, 2012-2014) and Intellectual Property (2003-06) by Virginia Business magazine

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GENTRY LOCKE
Attorneys



Scott A. Stephenson

Associate

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Scott Stephenson focuses on commercial disputes involving contractual and mineral rights in Gentry Locke's Commercial Litigation group. Prior to joining Gentry Locke, Scott was a summer associate at the firm, and also served as a judicial intern for judges on both the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit. A graduate of the Georgetown University Law Center, Scott grew up in nearby Salem, VA and is pleased to return to the area to practice.

Education

- Georgetown University Law Center, J.D. 2014
- Roanoke College, B.A. 2008

Experience

- Prepared real estate and construction contracts and drafted articles of incorporation and corporate bylaws for the Office of the General Counsel for a major university foundation
- Drafted opinions for the Honorable Edward J. Damich, United States Court of Federal Claims
- Prepared legal research and drafted opinions involving patent and government contracts issues for the Honorable Jimmie V. Reyna, United States Court of Appeals for the Federal Circuit
- Conducted legal research and contributed to drafting briefs and motions during complex multi-party litigation in Federal Court
- Participated in drafting appellate briefs
- Drafted briefs and legal memoranda in various commercial disputes involving property, contractual, and natural gas rights

Affiliations

- Member, Virginia State Bar (2014-Present)
- Member, Litigation Section, Virginia State Bar (2014-Present)
- Saint Thomas Moore Society (2013-Present)

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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 (2012-2016)

- 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, 2010-2015)
- 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 Results

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

- Mar 7, 2014 — [Defense of Explosive Products Liability Case](#)



GENTRY LOCKE
Attorneys



Peter G. Irot

Partner

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Peter Irot is a Partner in Gentry Locke's Insurance practice group, and has wide-ranging experience in handling personal injury, workers' compensation, and commercial litigation matters. He represents both defendants and plaintiffs across Virginia and has handled cases involving negligence, tortious interference with business relations, fraud, contract disputes, liens, defamation, false imprisonment, and cybersquatting. Pete is licensed in both Texas and Virginia, and worked as a commercial litigator in Texas before moving to Roanoke.

Education

- The University of Texas School of Law, J.D. with honors, 2007
- Rice University, B.A. 2000

Experience

- Obtained court order for plaintiff/appellee for award of attorneys' fees for post-verdict and appellate work in cybersquatting and trademark infringement suit where final judgment was for over \$1,000,000
- Achieved favorable settlement for defendant resort and restaurant in breach of contract and copyright infringement suit
- Represented general contractor in obtaining a mechanic's and materialman's lien for which client collected over \$300,000
- Obtained and collected on international arbitration award for American electronics company against Australian firm in breach of contract dispute
- Obtained temporary restraining order against foreign consulate in landlord-tenant dispute
- Represented restoration services company in contract dispute resulting in collecting over \$450,000 for client in connection with restoring building damaged by Hurricane Ike
- Successfully defended against plaintiff's multiple requests for temporary restraining order in breach of contract and deceptive trade practices case
- Collected on out-of-state judgment by garnishing bank accounts, obtaining charging order against limited liability company, and obtaining a temporary restraining order against defendant

Affiliations

- Recipient, Leadership Rice Mentorship (1999)

Case Results

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

- May 16, 2014 — [Virginia Company Prevails in Hard-Fought Labor Arbitration Case](#)



Monica Taylor Monday

Managing Partner

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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. Monica has been recognized among *Virginia's Top 50 Women Lawyers* and *Virginia's Top 100 Lawyers* by the Thomson Reuters' *Super Lawyers*, and on the *Best Lawyers in America* and *Virginia Business* magazine's *Legal Elite* lists.

Monica frequently lectures and writes on appellate issues. She currently serves on the Virginia Bar Association's Appellate Practice Section Council as Virginia's representative on the Fourth Circuit Rules Advisory Committee, 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. *Umstatt 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. Commerci*, 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)
- Virginia Representative, Fourth Circuit Rules Advisory Committee (2013-Present)
- Member, Virginia State Bar Professionalism Course Faculty (2013-Present)
- Member, Virginia Model Jury Instruction Committee (2012-Present)
- Chair, Appellate Committee of the Virginia State Bar Litigation Section (2009-Present)
- Member, Boyd-Graves Conference (2011-Present)
- Board of Trustees, Virginia Museum of Natural History (2009-Present)
- Board of Directors, The Harvest Foundation (2015-Present)
- 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, Blue Ridge Regional Library Board (2007-2011)
- 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

- Peer rated "AV/Preeminent" as surveyed by Martindale-Hubbell
- 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 one of The Best Lawyers in America in the field of Appellate Law (2009-2016)
- 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 (2010-2015, Top Listed in Virginia 2013-2015) and a Super Lawyers Rising Star (2007)
- Named a "Legal Eagle" for Appellate Practice by Virginia Living magazine (2012)
- Designated as one of the Legal Elite by Virginia Business magazine for Appellate Law (2011-2014)
- 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 Results

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 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**

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Herschel V. Keller

Partner

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Herschel Keller is a Partner with Gentry Locke, representing businesses, governmental entities, and institutions in Lynchburg and across the Commonwealth through his practice of Corporate and Business Law, Commercial Construction Law and Litigation, and Complex Contract Drafting and Negotiation. Originally from Ft. Wayne, Indiana, Herschel now lives in Lynchburg, where he has practiced law for the past 15 years. Herschel heads up Gentry Locke's Lynchburg office. He is active in the community, including serving as past president of the Central District Committee for the Virginia Associated General Contractors. Prior to joining Gentry Locke, he was Assistant Commonwealth's Attorney for the City of Lynchburg, and later rose to the role of a principal and an officer of a Lynchburg law firm.

Education

- Dickinson College, B.A. 1993
- University of Richmond, T.C. Williams School of Law, J.D. 1997

Experience

- Represents one of the oldest pipeline and utility contractors in the Commonwealth of Virginia in all aspects of its business, including procurement issues, contract negotiations, disputes, employment issues, and OSHA compliance
- Represented steel erector in litigation arising as a result of construction of Virginia Tech's Lane Stadium West Sideline Expansion
- Assisted in formation of \$400,000,000 joint venture for construction of heavy manufacturing facility in Norfolk, Virginia
- Negotiated contract with Italian firm for construction of concrete manufacturing plant in West Virginia
- Assisted in organization of community bank in Lynchburg, Virginia
- Successfully negotiated acquisition of woodworking supply catalogue business by publically traded competitor
- Negotiated and drafted numerous joint venture and teaming agreements to allow minority contractors to participate in government contracts
- Negotiated contractor's withdrawal from mixed used development that failed after the 2008 financial collapse
- Negotiated multiple agreements to facilitate CEO transitions
- Obtained zoning approvals and conditional use permits for cellular telephone tower developer
- Obtained conditional use permit to allow for construction of 235,000 square feet office park in residential zoned district in Lynchburg, Virginia
- Assisted in establishing numerous successful construction businesses in Central Virginia
- Investigated and resolved numerous employment discrimination claims
- Lobbied before Virginia General Assembly in support of contractors seeking to limit the use of competitive negotiation to procure construction.

- Conducted numerous employee sexual harassment trainings
- Drafted and negotiated numerous commercial leases for landlords and tenants
- Acted as both issuers' and borrowers' counsel for tax-exempt bond issues
- Successfully defended patent infringement litigation against one of the largest patent firms in the United States
- Drafted numerous heavy equipment leases, rent to own agreements, and other agreements for use in the heavy equipment rental and sales industry
- Frequent speaker for business groups throughout region

Affiliations

- Virginia Associated General Contractors; Central District Committee; President (2011-2012), State Legislative Committee (2007-Present), Safety Alliance Board (2007-2010)
- Counsel to the Virginia State Crime Commission (1998-2000)
- Assistant Commonwealth's Attorney for the City of Lynchburg; Project Exile Prosecutor (2000-2001)
- Former Staff Chair, Senate Joint Resolution 220 Advisory Panel: Legislative Study Aimed at Protecting Children from Sexually Violent Predators, (1997-1998)
- Former Staff Chair, Legislative Task Force Examining More Severe Sanctions for DUI Offenses (1997-1998)



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 two 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 (2013-2015)

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 Results

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

- May 16, 2014 — [Virginia Company Prevails in Hard-Fought Labor Arbitration Case](#)



GENTRY LOCKE
Attorneys



Gregory J. Haley

Partner

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Greg Haley focuses his practice on commercial litigation and disputes involving local government. Greg has extensive experience in disputes involving contract claims, UCC issues, and corporate governance. Greg represents local government attorneys and businesses in all matters involving local government law.

Greg brings an exceptional level of skill, intensity, engagement, and innovative thinking to his work. He believes the best results can be achieved by extra effort, leveraging expertise, early and accurate case evaluations, accessibility, and good communication. Greg analyzes legal matters not just as a lawyer, but also based on what the client needs as a business or local government solution.

Education

- College of William and Mary, J.D. 1984
- Hampden-Sydney College, B.A. cum laude, Phi Beta Kappa, 1981

Experience

Commercial Litigation:

Greg has tried cases to verdict or decision with favorable outcomes involving contract disputes including UCC issues, property management, land development, employment, tax disputes, zoning and subdivision matters, civil rights claims, government contracting and procurement disputes, construction disputes, professional malpractice and liability claims, and noncompetition and non-solicitation agreements.

- Represented manufacturers of industrial equipment in litigation matters involving breach of contract, payment, claimed defect issues, and Uniform Commercial Code issues
- Represented equipment manufacturers in defending claims involving alleged defects in design, manufacturing, and installation of industrial equipment
- Represented seller in dispute under an asset purchase agreement involving post-closing adjustments and environmental indemnification claims
- Represented bank in litigation involving lender liability claims of bad faith loan administration and improper foreclosure
- Represented bank in litigation involving a check-kiting scheme
- Represented bank in litigation involving an intercreditor dispute
- Represented tax consulting client in accounting malpractice claim against an international accounting firm
- Represented seller in the enforcement of a real estate purchase and sale contract to require buyer to specifically perform the contract involving large parcel for planned waterfront development
- Represented seller of airplanes in specific performance and breach of contract claims against buyer

- Represented numerous employers in enforcement of noncompetition agreements, customer nonsolicitation agreements, and nondisclosure agreements
- Represented shareholders in corporate governance disputes
- Represented corporate management in shareholder derivative claims litigation
- Represented several engineering firms in professional liability claims
- Represented several entities, including a community hospital and large manufacturing company, in real estate and other tax disputes with local governments
- Represented general contractors in defense of extra work claims by subcontractors in construction projects
- Represented owners of property in construction disputes with general contractors
- Represented owners of property in condemnation proceedings involving commercial and agricultural properties
- Represented owner in litigation involving the termination of a general construction contract

Transactions:

- Represented a variety of manufacturers in developing and implementing contract formation practices and managing transaction risk through use of favorable terms of sale
- Represented shareholders in sale of stock in large manufacturing company
- Represented buyer in asset purchase transaction involving an animation technology service company
- Represented sellers in real estate transactions involving significant development properties and convenience stores
- Represented European equipment manufacturer in establishing United States operations including the formation of a U.S. subsidiary, establishing business and contract formation practices, and other related matters
- Represented parties in contract manufacturing, cooperative licensing and marketing agreements involving custom industrial equipment
- Represented manufacturer in the sale of a product line and related intellectual property rights
- Represented manufacturers in the development of international sales and marketing agreements

Local Government:

- Represented numerous local governments in litigation matters involving zoning, subdivision, utility extensions, public contracting and procurement, contract disputes, construction disputes, condemnation proceedings, and personnel matters
- Represented real estate development companies in numerous matters involving land use regulations and citizen challenges to development approvals by local governments
- Represented local governments in matters involving municipal boundary changes and interlocal revenue sharing and land use regulation agreements
- Represented local governments in land use litigation matters involving shopping centers, subdivisions, zoning appeals, utility extensions, vested rights, nonconforming uses, conditional use permits, economic development agreements and incentives, downzonings, code enforcement, wind energy facilities, intensive livestock operations and other matters

Appellate:

- Significant appellate experience before the Supreme Court of Virginia in commercial disputes and local government matters

Affiliations

- Member, Professionalism Faculty, Virginia State Bar (2002-2005); Virginia State Bar Law School Professionalism Faculty (2003-2006)
- Chairman, Litigation Section, Virginia State Bar (2009-2010); Member, Board of Governors (2004-2012); Secretary (2007)
- Member, Construction Law Section, Virginia State Bar
- Former Chairman and Member, Local Government Law Section, Virginia State Bar
- Former Member, Board of Governors, Environmental Law Section, Virginia State Bar
- Adjunct Professor, Land Use Law, Masters of Urban & Regional Planning Program, Virginia Polytechnical Institute and State University (2006)

- Local Government Attorneys of Virginia
- Member, Program Committee, Roanoke Bar Association (2001-2003)

Awards

- Named one of the Best Lawyers in America® for Municipal Litigation (2007-2016), Commercial Litigation (2008-2016), Eminent Domain and Condemnation Law, Government Relations, and Land Use and Zoning Litigation (2011-2016)
- Distinguished Service Award (1988) and Meritorious Service Award (1989), Office of the Attorney General of Virginia
- Elected a 2009 Top Attorney: Local Government by Roanoke-area attorneys surveyed by the Roanoker Magazine
- Named to Virginia Super Lawyers in the area of Business Litigation (2008, 2010-2015), 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, Eminent Domain & Condemnation Law, Government Relations Practice, and Litigation – Land Use & Zoning by Virginia Living magazine (2012)
- Designated as one of Virginia's Legal Elite by Virginia Business magazine in the Legislative/Regulatory field (2003, 2004, 2012) and Real Estate/Land Use (2007, 2010 & 2014)

Published Work

- Co-author, [Assessing the Assessor: Practical Points for Defending a Real Estate Tax Assessment Case](#); Journal of Local Government Law, Vol. XXIV, No. 3 (Winter 2014).
- You Can't Fight City Hall – So Here's How to Get What You Want Without the Fight; Gentry Locke Seminar (September 2014).
- Co-author, Trying and Defending Breach of Contract Cases: Ten Recurring Themes and Techniques in Defending Breach of Contract Cases; Virginia CLE. Advanced Business Litigation Institute, (June 2014).
- Twelve Ways for Local Governments to Stay Out of Trouble in Contract Matters; 16th Annual Governmental Conference, Brown Edwards (January 2013).
- Co-author, How to Obtain Preliminary and Permanent Injunctions and Temporary Restraining Orders; Gentry Locke Seminar, (September 2012).
- Co-author, Managing Your Land Use Regulations to Avoid Vested Rights Problems and Other Unforeseen Circumstances; Local Government Attorneys Association (June 2011).
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Associate

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John Thomas advises and represents businesses and individuals in a wide array of commercial and corporate matters, employment disputes and whistleblower litigation. John is Gentry Locke's point person for *qui tam* litigation, where whistleblowers uncover and report fraud against the government. John is also a U.S. Marine Corps judge advocate, with significant experience in prosecuting and defending courts-martial and advising commanders on the laws of war.

Education

- U.S. Naval Justice School, 2009
- University of Georgia School of Law, J.D. 2007
- The University of the South, B.A. cum laude, 2004

Experience

Commercial & Corporate Litigation

- Represented contract mining corporation at arbitration over contract dispute, winning \$23.5 million award
- Represented leading telecommunications company in lawsuit from consumer, resulting in verdict for company
- Represented owners of a closely-held corporation in dissolution lawsuit brought by minority shareholders, resulting in favorable settlement
- Represented car dealership on claims of false advertising, resulting in summary judgment for business
- Represented insurance carriers in multiple coverage matters, resulting in declarations of no coverage
- Represented property management company at trial on personal injury claims, resulting in verdict for the property manager
- Represented multiple businesses in efficiently collecting unpaid debts and obligations

Employment Litigation

- Represented multiple companies in Title VII lawsuits for sexual harassment and discrimination based upon race, gender and age, religion and wrongful retaliation. Successfully obtained summary judgment in multiple cases
- Represented Fortune 500 company in trade secrets matter involving former senior executive, obtaining favorable settlement
- Successfully represented trucking company on FLSA claims at trial, obtaining verdict for defendant trucking company
- Represented individual in FLSA case for unpaid wages against nursing care provider, resulting in verdict for individual and award of attorney fees and costs
- Represented company on state law claims of unlawful termination and retaliation, obtaining favorable settlement

Military Litigation

- Served as Marine Corps defense counsel, representing Marines and sailors at General and special courts-martial accused of a variety of crimes, including attempted murder, aggravated assault, rape, negligent homicide, theft of government property, drug distribution, computer crimes and numerous other offenses
- Served as a Marine Corps prosecution team leader, managing a trial team that prosecuted numerous crimes, including a capital case involving crimes against children
- Served as judge advocate for 3d Battalion, 9th Marines in Marjah, Afghanistan, advising the battalion commander on a variety of issues, including detention operations, law of war, rules of engagement, fiscal regulations involving reconstruction funding, military justice and internal investigations
- Currently serves as the Assistant Senior Defense Counsel for the National Capital Region

Qui Tam Litigation

- Consulted and advised whistleblowers in fraud cases involving the defense industry, government procurement, health care industry and educational institutions
- Represents multiple whistleblowers in qui tam litigation involving tens of millions of dollars

Litigation for Individuals

- Assisted in representing a man injured by a defective CNC machine and tool bit, resulting in \$16.5 million settlement
- Represented executive in dispute over severance agreement, resulting in favorable settlement
- Represented homeowner on wrongful death claims arising from visitor falling down stairs, resulting in summary judgment for homeowner
- Represented homeowner on claims arising from dog bite, resulting in verdict for homeowner
- Represented individuals in dispute with former employer over non-compete agreement

Affiliations

- Captain, U.S. Marine Corps Reserve
- Member, The Virginia Bar Association
- Member, Federal Bar Association
- Member, Roanoke Bar Association

Published Work

- The Federal Courts' Jurisdiction and Venue Clarification Act of 2011, The VADA Journal of Civil Litigation, Vol. XXV, No. 4, (Winter 2013-2014).

Case Results

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

- May 16, 2014 — [Virginia Company Prevails in Hard-Fought Labor Arbitration Case](#)



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Dan Sullivan is an Associate with Gentry Locke's Business Litigation team whose work extends across several different litigation practice groups. His litigation experience includes business, insurance, product liability, and professional liability lawsuits. Dan represents public and closely-held businesses in both straightforward and complex cases in state and federal courts. Dan is fluent in Spanish.

Education

- University of Virginia School of Law, J.D., 2010
- University of South Dakota, B.A., Political Science/Spanish; Phi Beta Kappa, 2006

Experience

- Represented Fortune 500 manufacturing client defending a products liability lawsuit in federal court
- Represented international web services company defending breach of contract and business tort lawsuit dispute in state court
- Represented closely held business in minority shareholder dispute in state court
- Represented closely held business in breach of insurance contract dispute in federal court
- Represented publicly held mining and energy company in land and mineral rights dispute pending in three jurisdictions
- Represented closely held business in breach of contract and maritime law dispute with former business partner in federal court
- Represented construction firm in federal dispute with regional water authority over multi-million dollar contract
- Advised closely held and public businesses on pre-litigation matters, including E-Discovery
- Represented insurance clients in defending multiple federal and state court product liability lawsuits throughout Virginia and the east coast

Affiliations

- Member, Federal Bar Association, Virginia Bar Association, Virginia State Bar, and Roanoke Bar Association (2011–Present)
- Board Member, Federal Bar Association Moot Court Committee (2014–present)
- Graduate, National Trial Advocacy College of University of Virginia School of Law (2015)
- Member, St. Andrew's Catholic Church, Adult Ministry
- Volunteer, Roanoke Bar Association Barrister Book Buddies

Case Results

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 18, 2015 — [Fraud and Breach of Contract Claims Dismissed, Affirmed on Appeal](#)
- Mar 19, 2014 — [Homeowner's Attempt to Void Mortgage Denied](#)
- Mar 7, 2014 — [Defense of Explosive Products Liability Case](#)



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Amanda M. Morgan is Of Counsel to Gentry Locke's Lynchburg office, where she focuses on municipal, civil, and business litigation. A *magna cum laude* graduate of the University of Richmond Law School, Amanda served as an intern in the Office of the Chief Staff Attorney of the Supreme Court of Virginia, the United States Attorney's Office, and the Virginia Office of the Attorney General in Richmond. She subsequently honed her skills in insurance defense, civil litigation, and local government matters with law firms in Danville and South Boston, Virginia.

Education

- University of Richmond, The T.C. Williams School of Law, Richmond, Virginia, J.D. magna cum laude 2005
- University of North Carolina, Chapel Hill, North Carolina, B.A. 2000

Experience

- Represented insurers in declaratory judgment actions regarding the nature and extent of coverage in liability and first-party claims
- Represented insurers and their insureds in liability claims
- Represented local governments in personnel, tax, zoning, real estate, procurement and code enforcement matters
- Represented various employers and individuals in defending charges of discrimination before the EEOC and federal courts
- Assisted local community services boards in personnel and compliance matters
- Represented the Danville Redevelopment and Housing Authority in contract and discrimination litigation involving a HUD Hope VI project

Affiliations

- Admissions:
 - U.S. District Court Eastern District of Virginia (2007)
 - U.S. District Court Western District of Virginia (2006)
 - U.S. Court of Appeals 4th Circuit (2008)
 - U.S. Supreme Court (2011)
- Young Lawyers Conference Circuit Representative, Past Circuit Representative for 10th Judicial Circuit
- Member, Halifax Bar Association

Awards

- Member, McNeil Law Society (2005)
- Senior Staff Member, University of Richmond Law Review (2003-2005)



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Abigail Murchison practices in the firm's Commercial Litigation group. Prior to joining Gentry Locke, she clerked for the Honorable Mary Grace O'Brien in Virginia's 31st Judicial District. Other professional experience includes editing William & Mary's *Bill of Rights Journal* and interning at a business consulting firm in Phnom Penh, Cambodia.

Education

- William & Mary Law School, J.D., 2010
- Princeton University, A.B., English Literature, cum laude, 2005

Experience

- A native of Lexington, Va., Abigail received her J.D. degree from the William & Mary School of Law in Williamsburg, Va., in 2010 and her undergraduate degree in English literature from Princeton University in Princeton, N.J., in 2005
- As a Student Legal Services volunteer, Abigail offered legal guidance to William & Mary undergraduates. In addition, she helped raise money for students working in the public interest as a Public Service Fund Volunteer. Prior to working at Gentry Locke, Abigail clerked for the Honorable Mary Grace O'Brien of the Prince William County Circuit Court

Affiliations

- News editor, The Marshall-Wythe Press
- Intellectual Property Society; Environmental Law Society
- Articles editor, William & Mary Bill of Rights Journal

Awards

- Goodwin Memorial Fund Merit Scholarship
- Thesis Research Scholarship, Class of 1969 Fund

Published Work

- Co-Author, [Deal...or No Deal? Identifying and Addressing Gray Areas in Construction Contracting](#), The Construction Lawyer, Journal of the ABA Forum on the Construction Industry, Volume 33 No. 3 (Summer 2013).

Case Results

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

- Sep 27, 2013 — [Plaintiff in Multi-vehicle Accident Receives Over \\$225,000](#)
- Jul 26, 2012 — [Unnecessary Procedure Leads to Wrongful Death](#)



The Hiring and Firing of Professionals

A Legal Perspective

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Presented at The Hotel Roanoke & Conference Center in Roanoke, Virginia on September 18, 2015.

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I. Hiring and Terminating Professional Employees – An Introduction

The hiring and firing of professional employees from a legal standpoint is no different than the employment decisions for non-professionals. However, the practical implications are often far different, in part because of raised expectations on both sides of the equation for professional employees. In the hiring process, most problems can be avoided if more time is taken up front to expressly address the key issues of compensation and circumstances under which the employee can be terminated. The failure to take the extra time up front (or just being sloppy) often results in an unhappy work marriage. So, the quick takeaway: take the time to address the key issues that will form the basis of a solid employment relationship or, at the very least, will provide the ability to legally and gracefully terminate the relationship.

Terminations of professional employees can be extremely difficult – again because of the expectations and emotions. Obviously, the best terminations are ones that are not a surprise, but that is not always possible. Because the termination is often met with so much angst and/or anger on both sides, every effort has to be made to handle it in a dignified way – reducing the likelihood of a contentious and litigious response. The manner in which the termination is handled is critically important. As with the hiring, it is imperative to take the time to prepare for the termination and be thoughtful as to how it will be handled. A well drafted separation agreement can go a long way towards managing the surprise termination of a professional employee.

II. The Hiring and Selection Process.

There are a number of Federal, State and Local laws and rules related to hiring employees. Though ideally companies want to have a strong, well-trained human resources department to assist in dealing with these laws and the many pitfalls they present, small companies do not always have that luxury. Accordingly, it is important to have an understanding of some guidelines and helpful tips to assist in navigating these issues. Many seemingly innocent or innocuous pre-employment questions may be illegal. Always bear in mind the cardinal rule: all pre-employment inquiries should focus on an applicant's skills and ability to do the job. Remember that rejected applicants will assume that you used all information that they provided to you.

A. Failure to Hire Discrimination Claims.

Rejected applicants may bring so-called "failure to hire" discrimination claims. Such claims usually are filed under Title VII, the ADEA or the ADA. To defend such a case, an employer will need to show that there was a legitimate, nondiscriminatory reason for rejecting the applicant.

B. Pre-Employment Inquiries Under the ADA.

The ADA is unique because it expressly prohibits certain questions or examinations at the interview or pre-offer stage of the hiring process. The EEOC has issued detailed guidance regarding permissible and impermissible inquiries under the ADA. As a general matter, the EEOC reiterates the basic principle that employers may ask questions about an applicant's abilities, but not about an applicant's disabilities. You cannot ask questions that are "likely to elicit information about a disability."

C. Fair Credit Reporting Act.

If an employer uses a third party to obtain credit reports or other consumer reports and relies on the information in such reports to make hiring or employment decisions, the employer is required to comply with the Fair Credit Reporting Act. The Act requires employers to provide specific disclosures and authorizations to applicants and employees.

D. Avoiding Discriminatory Questions

Under Title VII of the Civil Rights Act of 1964, employers must disregard information regarding an applicant's race, religion, creed, sex, marital status, national origin, and ancestry. Other federal statutes like the Pregnancy Discrimination Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act also prohibit specific forms of discriminatory hiring practices. Employers should define job-related requirements for the position, and develop a list of candidate qualifications based on these requirements. This list may then be used as a uniform standard for evaluating all applicants for the same position.

Interviewers should think twice about questions that concern personal matters. Inquiries about overtime, working at home, weekend work, and travel often blur the line between job requirements and private lifestyles. Employers can and should alert candidates about job requirements that may cut into their personal lives, but if an interviewer asks only married women or older men about whether they could handle overtime and travel demands, discrimination charges could result. Rephrase questions to emphasize characteristics of the position rather than the candidate; i.e., "The job requires x. Will you be able to do x?"

1. Specific Problem Areas.

- a. Disability. When interviewing job applicants with disabilities, keep the focus on the applicant's abilities and stick to a structured interview plan. While interviewers often judge an applicant by social skills, someone with a disability may not have learned these skills, so they may not be the best indicator of whether the applicant can do the job.

- Don't be embarrassed if you use words such as "see" with a blind person, or "hear" with a deaf person.

- If the applicant has brought along an interpreter or attendant, speak directly to the applicant, not the interpreter, and maintain eye contact.
 - Respect the applicant's personal space.
 - Do not ask how the disability occurred.
- b. Pre-Employment Offer Inquiries Into Disability. Direct inquiries about the existence, nature, or severity of a disability are forbidden until after a conditional employment offer is made. The EEOC's Guidance on this topic is Attachment 2.

In addition, an employer may not require a medical examination at the pre-offer stage, even if the employer intends to ignore the answers to the inquiries or results of the examination until the post-offer stage.

The employer may state the physical requirements of a job and ask if an applicant can satisfy these requirements, with or without reasonable accommodation. An employer may also ask an applicant to describe or demonstrate how the applicant would perform job-related tasks with or without reasonable accommodation.

Example: The employer may ask: "This job requires an employee to move a twenty pound piece of repair equipment from a vehicle, down two flights of steps, to a processing unite. Can you perform this function?"

- c. Examples of Improper Pre-Employment Offer Inquiries Into Disability.

Are you in good health?

Would you describe your health as excellent, good, fair, or poor?

How are you feeling today?

Is there any health-related reason you may not be able to perform the job for which you are applying?

How many days were you absent from work because of illness last year?

Do you have any physical defects which preclude you from performing certain kinds of work? If yes, describe such defects and specific work limitations.

Do you have any disabilities or impairments which may affect your performance in the position for which you are applying?

Have you ever filed for workers' compensation insurance?

- d. Post-Employment Offer Inquiries Into Disability. Job offers may be made conditional on results of medical examination and disability-related inquiries. If a conditional job offer is withdrawn as a result of a medical examination or disability-related inquiry, the employer must be able to show that the exclusion is job-related and consistent with business necessity.
- e. National Origin. An employer must show a legitimate non-discriminatory reason for the denial of an employment opportunity because of characteristics related to an individual's national origin, such as accent or manner of speaking. Consequently, requiring applicants to be fluent in English may violate Title VII if the rule is adopted to exclude individuals of a particular national origin and is not related to job performance.

i. Potentially Unlawful Interview Questions Regarding National Origin.

How long have you been a citizen?

What country are your parents from?

What is your maiden name?

Of what country are you a citizen?

When did your [parents, spouse] become citizens?

How did you acquire your fluency in this foreign language?

- f. Age. It is unlawful for an employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, tenors, conditions, or privileges of employment, because of such individual's age" under the Age Discrimination in Employment Act ("ADEA").

A pre-employment inquiry for information related to "Date of Birth" or "Age" on an application form is not, in itself, a violation of the AREA. Since such requests may tend to deter older applicants from applying,

however, pre-employment inquiries which request such information are closely scrutinized. In addition, help-wanted notices and advertisements mentioning specific age categories are closely scrutinized, and a bona fide occupational qualification ("BFOQ") based on age must be established before such designations are allowed.

If pre-employment inquiries are to be made regarding age, the employer should include a reference on its application form stating that the employer does not discriminate on the basis of age. In addition, the hiring manager should explain to each applicant the BFOQ justifying the inquiry.

i. Potentially Unlawful Interview Questions Related to Age.

How close are you to retirement?

Is your spouse retired?

Did you bring your birth certificate with you?

Do you have grandchildren?

When do you plan to retire?

Is your spouse retired?

What is your date of birth?

g. Pregnancy. The Pregnancy Discrimination Act ("PDA") is an amendment to Title VII which forbids discrimination "on the basis of sex" or "because of sex": The PDA applies to discrimination based on pregnancy, including unwed pregnancy.

i. Potentially Unlawful Interview Questions Related to Pregnancy.

Are you planning to have a family?

If offered this job, how will you handle day care?

How does your spouse feel about leaving your children with day care?

Do you have children?

- h. Religion. Employers are required to provide reasonable accommodations for religious practices, unless to do so would create an undue hardship upon the employer. "Reasonable accommodations" include flexible scheduling, voluntary substitutions or swapping, job reassignments, and lateral transfers. Accommodations must also be considered for scheduling of employee selection activities, such as interview or testing.

Pre-employment inquiries on an applicant's availability will not be a Title VII violation if the employer can show that it did not have an exclusionary effect on prospective employees needing an accommodation for religious practices; or was otherwise justified by business necessity.

i. Potentially Unlawful Interview Questions Related to Religion.

Do you attend religious services or church?

What religion are you?

Didn't you know that this is a [Catholic-Protestant-Jewish-Muslim] organization?

What day of the week is your Sabbath?

Would it be possible to get a recommendation from your pastor?

- i. Other Problem Areas. Other problem topics that can come up during an interview are:
- *Children and child care.* Avoid asking: "Do you have any children?" "How old are your children?" "Have you made provisions for child care?" "Do you plan to have children?" Better to ask: "Can you handle the last minute changes in work scheduling that our variable production schedules demand?" "The position requires someone with dependable job attendance and the ability to work overtime. Can you meet these requirements?"
 - *Marital status.* Avoid asking: "Are you married, single, divorced, widowed, or separated?" "Do you prefer to be identified as Mrs., Miss, or

Ms.?" "What is your maiden name?" "What is your spouse's name and occupation?" These questions commonly are asked only of female applicants and may lead to charges of sex discrimination. In addition, Virginia law prohibits employers from using marital status as a basis of hiring decisions.

- *Arrest record.* Avoid asking: "Have you ever been arrested?" Research has shown that members of some minority groups are arrested more often than whites in proportion to their numbers in the population. Consequently, questions about arrest records can be viewed as a roundabout way of screening out applicants on the basis of race. Questions should be limited to convictions.
- *Criminal convictions.* Employers can ask: "Have you ever been convicted of a felony or misdemeanor?" It is important to explain that a "yes" answer is not automatic grounds for rejection. Employers should consider the type, number, and recent date of convictions along with the applicant's fitness for the particular job.
- *Driver's license.* Avoid asking "Do you have a driver's license?" except when the job requires one. In light of the various disability laws, this question may be considered discriminatory unless a driver's license is a bona fide occupational qualification. Requiring a driver's license may also disqualify otherwise qualified minorities and women who may be less likely to have licenses.
- *Salary.* Avoid asking: "What is the lowest salary you will accept?" Paying women less than men for the same job is illegal. An employer may ask: "What are your salary expectations?"

E. Writing Up the Interview

After the interview, some people make the mistake of jotting notes on an application to help them remember who an applicant is, such as "tall, blonde girl." This type of note is the proverbial "smoking gun" if an applicant charges discrimination, since a court might assume that the identifying information, which often refers to race, age, or sex, influenced the hiring decision.

Make sure that notes on the application or interview evaluation form do not create future problems. Limit reasons for rejection to specific observations or neutral, job-related factors. For instance, rather than saying someone is "unqualified for the job," state exactly what qualifications the person does not meet. Rather than saying "applicant was not professional,"

specify that the applicant arrived 15 minutes late or dressed inappropriately for the interview. Specifics will help justify a decision not to hire if it is later questioned.

F. General Principles of the *BONA FIDE* Occupational Qualification ("BFOQ")

Although Title VII, ADA and the ADEA prohibit discrimination in employment on the basis of sex, age, disability, religion, and national origin, the bona fide occupational qualification ("BFOQ") exception justifies such discrimination in instances where sex, age, disability-free, religion and national origin is a BFOQ that is reasonably necessary to the normal operation of the particular job function for which the exception is claimed. A BFOQ does not exist under any circumstance for race or color. The only exception to this rule is for employers with affirmative action requirements, where minorities may sometimes receive preference. Affirmative action, however, is a racial distinction and is therefore an "inherently suspect" form of discrimination. An employer's assertion of a BFOQ exception is closely scrutinized to ensure that the exception is not being used as a pretext for discrimination.

G. Final Selection and Job Offers

A. Importance of Documenting Decisions. An employer's hiring practices can be challenged long after the selection process has ended. Consequently, thorough documentation is essential. Documentation should include maintaining records of the specific reasons for selecting or rejecting each candidate. Remember that written records offer the best evidence of how hiring decisions were reached. A manager's statements about job terms or conditions are always suspect, and a court or jury may dismiss these statements as reasons the manager thought up after the applicant complained. Keep in mind that a jury may someday see the notes or documents on potential applicants, so it is important to avoid "smoking gun" references to topics which may be later seen as bias. Make sure the reasons given are as fair and objective as possible.

B. Making and Documenting the Final Decision. The hiring manager, is the person most familiar with the position, will have the most input into the final decision on who to hire. The Human Resources manager should be involved in all hiring to make sure the ultimate decision is not based on unlawful motivations. The hiring manager will contact the successful candidate to make a job offer, including information on salary terms. This offer should be reduced to writing and approved by Human Resources before being sent. If the offer is accepted, notifying the other applicants who did not get the job is a matter of courtesy and good public relations.

The following tips on job offer communications (both oral and written) will help an employer avoid making commitments that could haunt the company if it later wanted to lay off or fire an employee:

- *Salary.* State the salary in weekly or monthly amounts. Naming an annual salary may allow the employee to argue the employment was intended to be for at least a year.
- *Job Security.* Avoid assurances of job security, such as "You'll have a job as long as you perform well," or "The position is a permanent, full-time job," or "You will not be fired without good cause." Even vague references to a lack of layoffs or employees as "family" can be interpreted as inferring employees will not be fired except for cause.
- *Deferred payments or benefits.* Do not state that a part of compensation, such as moving expenses or a bonus, will be paid "a year from your hire date." Instead state that the person will be eligible for those amounts "if you are still employed a year from your hire date."
- *Time commitments.* Avoid long-term commitments, such as "The project will last a minimum of three years."
- *Conditions of employment.* State clearly any conditions upon which the offer hinges. If references or background checks have not been completed, or if the person will need to pass pre-employment tests, spell out the "conditions" in the offer. Employers can be held liable for revoking job offers based on contingencies about which the applicant was never informed.

H. Immigration Reform and Control Act

The Immigration Reform and Control Act ("IRCA") says that employers must not hire aliens who are not authorized to work in the United States. To avoid civil and criminal penalties, employers should verify and document each new hire's right to work.

The form that IRCA requires for each new hire, but not for each job applicant, is Form I-9, "Employment Eligibility Verification." Although employers do not have to send I-9 forms to the INS, they must keep these forms on file for at least three years from the date of hire. For employees still with a company after three years, the employer must keep the I-9s until one year after the person leaves the company. Representatives of the INS or Department of Labor can review an employer's I-9 forms, provided they give the employer at least three days' notice.

I. Rejecting Applicants

Telling a candidate that she/he was not suitable for the job is a tricky business in light of increases in employment litigation. The following list offers legitimate business reasons for rejecting a candidate.

- No position available.
- Not qualified for the position available (make sure this is true).
- A more qualified person was hired (make sure this is true).
- Did not have the job-related experience required for the position.
- Omitted information on the application form.
- Misrepresented job skills or experience.
- Unsatisfactory work history.
- Could not or would not work the hours required by the position (if they decline because of religious beliefs/reasons, make certain you expressed your willingness to reasonably accommodate).
- Unable to communicate effectively in English, if such communication is a bona fide requirement for the position.
- Cannot perform essential functions of the job, even with reasonable accommodation.
- Disqualified by criminal conviction which is substantially related to the position applied for.
- Cannot/will not provide documentation necessary to complete I-9 form.
- Failed to complete the pre-employment process (e.g., drug screen, showing up for interview, supplying requested information).

J. Hiring: Practice Pointers/Takeaways

1. Have a list of questions that are the same for all applicants. That way, you can ensure that each applicant is receiving fair treatment, regardless of any external factors that might come into play.
2. Be careful when you hire family members or close friends. Scenarios where friends and family work together can be fraught with conflict – and it is often difficult to take adverse action against someone you are close to.
3. Determine whether an Employment Agreement is necessary. Especially when hiring high-level professionals, there are certain aspects of employment that you need to set forth in writing. For example:
 - i. Non-compete Clause
 - ii. Deferred Compensation
 - iii. Term of employment and potential for buyout, if applicable
 - iv. Procedure if the employee is terminated “for cause.”
 - v. Mandatory arbitration clause
 - a. In EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003), an applicant was refused employment by the defendant law firm because he refused to

sign an agreement to arbitrate disputes. He claimed it was unfair because he needed to retain his civil liberties, including the right to a jury trial and redress of grievances through the government process. The law firm advised the applicant that the arbitration agreement was a non-negotiable condition of employment. After the applicant still refused to sign, the law firm withdrew its offer. The 9th Circuit held that the Civil Rights Act of 1991 could not be read to suggest that it intended to preclude compulsory arbitration. The court further noted that if an employer could compel its employees to submit to arbitration, there was nothing to suggest that retaliation would be involved in the employer's exercise of such right.

III. Terminations

The termination of professional employees presents unique issues and challenges that do not otherwise exist with non-professionals. Right or wrong, an employee's expectations are often different once the employee reaches a "professional" level of experience. These expanded expectations result in terminations that typically require more attention. While this topic is far too broad to be adequately covered by this outline or a relatively short presentation, below are a few pearls of *termination* wisdom based on litigation experience from the employment law battleground:

- A. **Dignity.** The manner in which a termination is handled is often equally or more important than the actual reasons for the termination. Treat a professional like you would expect to be treated, be straight and figure out a way to make the transition as smooth as possible.
- B. **Resignation in Lieu of Termination.** The best defense to any "risky" termination is to get the former employee employed. Why wouldn't an employer allow an employee to resign in lieu of termination? Only in rare circumstances is it really necessary to flat out terminate an employee. Resignation allows for a softer landing even if it looks completely contrived. It allows the employee to represent to future employers that he or she resigned. Further, a forced resignation does not prevent the employee from getting unemployment because termination is still involuntary.
- C. **EPLI Insurance.** If you have a high-risk termination, make sure you have employment practices liability insurance (EPLI) in place before you terminate the employee. Securing EPLI is critically important in terms of capping exposure. The market for these policies has been relatively soft and allows for a good value for the employer.

- D. Separation Agreements.** These are obviously a critical tool in allowing for an amicable (or as amicable as possible) separation between the professional and his/her employer. One size does not fit all and the necessary time needs to be devoted to tailor agreements to make sure the critical issues are properly addressed. Attached as Addendum 5 are some points to consider in a separation agreement.
- E. Identify what existing agreements exist.** The employer needs to make sure it has a clear handle on what employment agreements actually exist with the employee, if any. If the employer is looking to have the terminated employee enter into a separation agreement, then it needs to be clear as to what pre-existing agreements exist and they are not operating at cross purposes.
- F. Retaliation.** This is the most common claim asserted by terminated employees. Professionals are no different. The employer needs to consider why it is choosing **now** to terminate the employee as opposed to some other time. In other words, what is so compelling about today that the employer concluded that it needs to terminate the employee? Is there a catalyst for the termination? The employer needs to ask whether the employee has recently engaged in protective activity that could create a potential claim for retaliation. The employer needs to analyze the temporal proximity between the employee's complaint or actions that constitute protected activity and the timing of termination.
1. See Dow v. Donovan, 150 F.Supp.2d 249 (D. Mass 2001). The female plaintiff employee was an associate attorney at the defendant law firm, a limited liability partnership. Consistent with state law, a single vote of any partner was effective to deny admission to the partnership. After a meeting among the managing attorneys, the plaintiff employee was not made a partner and her employment was terminated. She sued for discrimination. The court found that she did not need to find a similarly-situated male employee comparator to show that the adverse action was a result of her gender. Instead, the court stated that her burden was simply to show that, after her termination, the partnership continued to have a need for someone to perform the same work. Therefore, the case survived a motion to dismiss. Of importance to the court were inconsistencies in the partners' notes about the plaintiff's mixed strengths and weakness and vitriolic attack affidavits submitted by the partners in opposition to the plaintiff's lawsuit.
- G. Non-Compete / Non-Solicitation.** While non-competes are not enforceable for attorneys, for other professionals well drafted non-competes and non-solicitation provisions are enforceable. The protection of trade secrets and client information are typically critical when terminating a professional and safeguards need to be put in place before the termination. When drafting restricted covenants the employer needs to make sure it is only protecting that which is most important. Overreaching is fatal to restrictive covenants – protect only that which really matters.

H. Do Not Sugarcoat The Reasons for Termination. Generally we do not recommend putting the reasons for termination in a letter. However, during the meeting with the employee, the reasons for termination should not be glossed over. While not every nitty-gritty detail needs to be covered, the key reasons for termination need to be summarized. The employer does not want to be in a position of asserting new or additional reasons when subsequently defending a claim. In other words, if the employer “changes” the reasons from the time the employee was terminated, that looks and smells like pretext (i.e. fabricated reasons for the termination). Therefore, it is critically important that the real reasons be discussed with the employee during the termination meeting.

I. Prepare, Prepare, Prepare Some More. When thinking about a termination, remember the phrase “haste makes waste.” Time and time again, employers have an epiphany and want to immediately terminate an employee. While sometimes that may be the acceptable strategy, rushing into these matters is often a critical mistake. Employers, particularly with professionals, need to prepare and think through the issues. For example:

- (a) What will other employees be told in the company about the termination?
- (b) How will references be handled?
- (c) Does the professional hold any other position such as officers or directors?
Any equity interest?
- (d) What existing agreements exist that dictate compensation, deferred or otherwise?
- (e) How will the company secure access to the company computers? How will the company deny the employee access to the company’s technology and computers?
- (f) Will the employee be escorted from the property? Will that be dignified or will that be viewed as disrespectful? Do you care?
- (g) Does the employer care about challenging unemployment?
- (h) Is non-disparagement or potentially mutual non-disparagement an issue?
- (i) What will you tell the employee during the termination meeting? Who will attend and who is the decision maker?

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KEYS TO WINNING MEDICAL MALPRACTICE CASES.

1. Know the law.

Medical malpractice cases are generally highly technical and require an in-depth understanding of various legal issues including:

- Expert qualification.
- Sufficiency of expert designations.
- Use of medical literature.
- Recoverable damages.
- Hearsay.
- Admissibility of medical and other records.

2. Know the facts.

In medical malpractice cases, you have to know the facts of the case (the medical records, the expenses and the deposition testimony) better than anyone else in the courtroom.

- You must know the facts better than your client.
- You must know the facts better than the other lawyer.
- You must know the facts better than your expert.
- You must know the facts better than the opposing party's expert.

3. Know the medical literature.

You must know what the medical literature says. Medical literature will often make the difference in your case.

If you have helpful literature, you can win.

If the other side has all the literature and you have none, it is almost a certainty that you will lose.

IMPORTANT THINGS TO REMEMBER.

The initial case review:

It is important to make an initial determination as to whether your case is one for medical malpractice.

Review the statutes and the case law to determine if your defendant meets the definition of a health care provider.

Review the statutes and case law to determine if your case involves malpractice. This may get you around the cap on damages. Va. Code § 8.01-581.15 places limits on the amount recoverable against a health care provider “in an action for malpractice.” If the action is not one for “malpractice” then the cap won’t apply.

Having a good working knowledge of when the health care provider-patient relationship applies and does not apply will help you determine how to pursue your case.

The following section provides answers to many of the factual situations that may arise as you investigate your potential medical malpractice case.

Further, a good working knowledge of the damages you can recover will help you decide whether to pursue a case as a survival action or a wrongful death case.

Preparing the case for trial:

From the start, get the medical records and expenses.

Get them from the provider your client thinks committed malpractice.

Get them from the providers your client saw after the malpractice took place.

Take time to thoroughly review the records and begin a medical literature search as soon as you can.

This will help you weed out cases which involve accepted “risks of the procedure”.

Google or other search engines can be used to obtain a lot of this information.

PubMed.gov (<http://www.ncbi.nlm.nih.gov/pubmed>) also helps. It contains a great deal of literature, some of which can be accessed for free.

When you determine there is malpractice, research the potential defendants.

Search the potential defendants’ background:

Google or other search engines;

The Virginia Board of Medicine
(<http://www.vahealthprovider.com/search/asp>);

Department of Health Professionals Online Services
(<https://dhp.virginiainteractive.org/>); and

Court websites for the cities and counties where the doctor practices.

Utilize the State Corporation Commission website to get the proper legal name of the corporate defendant (<http://www.scc.virginia.gov/>).

Be aware of the law regarding identification of expert witnesses in state and federal court.

Research any applicable choice of law principles and any potential pre-suit notice requirements for cases that occurred in states other than Virginia. You don't want your case dismissed.

Issues to look out for at trial:

The defense will try and raise issues at trial they may have lost pre-trial or that the court has not yet ruled on.

Be ready for the defense to bring up *McMunn* and *John Crane* constantly.

Some attorneys will not make proper legal objections and will instead make speaking objections based on some vague "fairness" doctrine.

Review all of the prior legal issues from this outline and be ready to argue them.

If you have motions that the court has not yet ruled on, ask the court to instruct the opposing party to not raise those issues in front of the jury until the court has heard the evidence and had a chance to rule on it.

Don't forget the word "mistrial" should it become necessary.

Take the time well in advance of trial to review the scheduling order to make sure that all of the deadlines have been met.

Oftentimes the Uniform Pretrial Scheduling Order will be modified, particularly regarding the identification of non-party depositions to be used at trial.

Failure to comply with that disclosure deadline may result in the exclusion of key testimony.

Make sure that you have all the witnesses necessary to authenticate any record you want admitted into evidence if the opposing party will not agree to the records being admitted.

When the trial starts, it is imperative that you know the facts better than anyone in the courtroom.

THE BASIC LEGAL ISSUES IN MEDICAL MALPRACTICE CASES.

1. Elements of a medical malpractice case.

a. Duty:

i. Definition of health care provider:

1) Virginia Code § 8.01-581.1 defines “health care provider” to be:

(i) a person, corporation, facility or institution licensed by this Commonwealth to provide health care or professional services as a physician or hospital, dentist, pharmacist, registered nurse or licensed practical nurse or a person who holds a multistate privilege to practice such nursing under the Nurse Licensure Compact, optometrist, podiatrist, physician assistant, chiropractor, physical therapist, physical therapy assistant, clinical psychologist, clinical social worker, professional counselor, licensed marriage and family therapist, licensed dental hygienist, health maintenance organization, or emergency medical care attendant or technician who provides services on a fee basis; (ii) a professional corporation, all of whose shareholders or members are so licensed; (iii) a partnership, all of whose partners are so licensed; (iv) a nursing home as defined in § 54.1-3100 except those nursing institutions conducted by and for those who rely upon treatment by spiritual means alone through prayer in accordance with a recognized church or religious denomination; (v) a professional limited liability company comprised of members as described in subdivision A 2 of § 13.1-1102; (vi) a corporation, partnership, limited liability company or any other entity, except a state-operated facility, which employs or engages a licensed health care provider and which primarily renders health care services; or (vii) a director, officer, employee, independent contractor, or agent of the persons or entities referenced herein, acting within the course and scope of his employment or engagement as related to health care or professional services.

ii. General duty:

1) The decision as to whether a physician-patient relationship exists “is a question of fact, turning upon a determination whether the patient entrusted his treatment to the physician and the physician accepted the case.” *Lyons v. Grether*, 218 Va. 630, 633, 239 S.E.2d 103, 105 (1977). “A physician's duty arises only upon the creation of a physician-patient relationship; that relationship springs from a consensual transaction, a contract, express or implied, general or special.” *Id.*; accord *Washburn v. Klara*, 263 Va. 586, 590, 561 S.E.2d 682, 685 (2002) (“[T]he physician-patient relationship is a consensual one.”) (citing *Pugsley v. Privette*, 220 Va. 892, 899, 263 S.E.2d 69, 74 (1980)); see also *Harris v. Kreutzer*, 271 Va. 188, 198, 624 S.E.2d 24, 30 (2006); *Didato v. Strehler*, 262 Va. 617, 626, 554 S.E.2d 42, 47 (2001). *Gray v. INOVA Health Care Servs.*, 257 Va. 597, 599-600, 514 S.E.2d 355, 356 (1999) (physician had no duty of

care to the mother of a patient because the mother was not the physician's patient upon whom the procedure was being performed and any negligence was a breach of duty to the patient, not the mother); *Bulala v. Boyd*, 239 Va. 218, 230, 389 S.E.2d 670, 676, 6 Va. Law Rep. 1399 (1990) (stating that “the father, of course, was not the [obstetrician's] ‘patient,’ within the meaning of the Act”); *Dehn v. Edgecombe*, 384 Md. 606, 865 A.2d 603, 615 (Md. 2005) (“A duty of care does not accrue purely by virtue of the marital status of the patient alone; some greater relational nexus between doctor and patient’s spouse must be established.”). *See also Harris*, 271 Va. at 199-200, 624 S.E.2d at 30-31 (finding a limited physician-patient relationship exists in the context of a Rule 4:10 examination because the physician expressly consents to the relationship when he agrees to conduct the examination and the patient’s consent is implied); *Prosise v. Foster*, 261 Va. 417, 423, 544 S.E.2d 331, 334 (2001) (refusing to impose a duty of care on an on-call physician in a teaching hospital in the absence of proof that the doctor agreed to accept responsibility for the care of the patient). “As we recognized in *Didato*, a physician can, in certain circumstances, affirmatively undertake to provide health care to an individual, who prior to that moment was not the physician's patient, and thereby assume the duty to comply with the applicable standard of care. *But see* Code § 8.01-225. Such a scenario is in contrast to the more traditional situation where the patient ‘knowingly and voluntarily seeks the professional assistance of the physician, and the physician knowingly agrees to treat the patient.’ *Kelley v. Middle Tenn. Emergency Physicians, P.C.*, 133 S.W.3d 587, 593 (Tenn. 2004). Nevertheless, in the former circumstance, the physician-patient relationship arises by implication because ‘the doctor takes affirmative action to participate in the care and treatment of a patient.’ *Sterling v. Johns Hopkins Hosp.*, 145 Md. App. 161, 802 A.2d 440, 455 (Md. Ct. Spec. App. 2002); *see also Lownsbury v. VanBuren*, 94 Ohio St. 3d 231, 2002 Ohio 646, 762 N.E.2d 354, 360 (Ohio 2002) (‘[A] physician-patient relationship, and thus a duty of care, may arise from whatever circumstances evince the physician's consent to act for the patient's medical benefit.’). In *Didato*, the trial court sustained the defendants' demurrers, so we based our decision solely on the plaintiffs' pleadings. 262 Va. at 630, 554 S.E.2d at 49. We have not had the occasion before today to decide whether particular evidence adduced at trial was sufficient to prove a physician undertook to provide health care to a non-patient, thereby assuming the duty to comply with the standard of care. We agree with the holding in *Jenkins v. Best*, 250 S.W.3d 680, 693 (Ky. Ct. App. 2007), requiring a physician to ‘personally engage [] in some affirmative act amounting to a render[ing of] services to another.’ *Id.* at 693 (second alteration in original; internal quotation marks omitted); *see also Stanley v. McCarver*, 208 Ariz. 219, 92 P.3d 849, 853 (Ariz. 2004) (in the absence of the traditional physician-patient relationship, the court nevertheless imposed a duty of care because the physician undertook, for consideration,

to interpret the patient's x-rays); *Dekens v. Underwriters Laboratories Inc.*, 107 Cal. App. 4th 1177, 132 Cal. Rptr. 2d 699, 702 (Cal. Ct. App. 2003) (in applying the 'negligent undertaking doctrine,' the actor 'must specifically have undertaken to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative duty to perform that undertaking carefully')." *Fruiterman v. Granata*, 276 Va. 629, 645-646 (2008).

iii. Assumption of duty:

- 1) This Court has recognized on many occasions that "[i]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Nolde Bros. v. Wray*, 221 Va. 25, 28, 266 S.E.2d 882, 884 (1980) (quoting *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275, 276 (N.Y. 1922)). We recently restated this principle in *Fruiterman v. Granata*, 276 Va. 629, 645, 668 S.E.2d 127, 136 (2008) and *Didato v. Strehler*, 262 Va. 617, 628, 554 S.E.2d 42, 48 (2001). *accord Ring v. Poelman*, 240 Va. 323, 326, 397 S.E.2d 824, 826 (1990); *Cofield v. Nuckles*, 239 Va. 186, 192, 387 S.E.2d 493, 496, 6 Va. Law Rep. 1150 (1990). In *Didato*, we observed that HN8 the common law principle of assumption of a duty is embodied in the Restatement (Second) of Torts § 323:

"One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

"(a) his failure to exercise such care increases the risk of such harm, or

"(b) the harm is suffered because of the other's reliance upon the undertaking."

Didato, 262 Va. at 629, 554 S.E.2d at 48.

b. Negligence (breach of duty or malpractice):

- i. Code § 8.01-581.1 defines "malpractice" to mean "any tort action or breach of contract action for personal injuries or wrongful death, based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient."
- ii. Code § 8.01-581.20 defines the standard of care as "that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth[.]"
- iii. V. M. J. I. No. 35.000 instructs juries as follows:

A healthcare provider has a duty to use the degree of skill and diligence in the care and treatment of a patient that a reasonably prudent healthcare provider in this State would have used under the circumstances of this case. If the defendant failed to perform this duty, then he/she was negligent.

- iv. Whether there is malpractice is generally determined by expert witnesses.
 - 1) In almost all medical malpractice cases, expert testimony is necessary to assist a jury in determining a health care provider's appropriate standard of care and whether there has been a deviation from that standard. *Raines v. Lutz*, 231 Va. 110, 113, 341 S.E.2d 194, 196 (1986); *Bly v. Rhoads*, 216 Va. 645, 653, 222 S.E.2d 783, 789 (1976). In certain rare cases, however, when the alleged negligent acts or omissions clearly lie within the range of a jury's common knowledge and experience, expert testimony is unnecessary. *Beverly Enterprises v. Nichols*, 247 Va. 264, 267, 441 S.E.2d 1, 3 (1994); *accord Jefferson Hospital, Inc. v. Van Lear*, 186 Va. 74, 41 S.E.2d 441 (1947).
 - 2) “The question whether a witness is qualified to testify as an expert is largely within the sound discretion of the trial court.” *Lloyd v. Kime*, 275 Va. 98, 108, 654 S.E.2d 563, 569 (2008) (internal quotations omitted); *accord Perdieu v. Blackstone Family Practice Ctr.*, 264 Va. 408, 418, 568 S.E.2d 703, 709 (2002). “A decision to exclude a proffered expert opinion will be reversed on appeal only when it appears clearly that the witness was qualified.” *Perdieu*, 264 Va. at 418, 568 S.E.2d at 709 (quoting *Noll v. Rahal*, 219 Va. 795, 800, 250 S.E.2d 741, 744 (1979)); *see also Sami v. Varn*, 260 Va. 280, 284, 535 S.E.2d 172, 174 (2000) (“we will reverse a holding that a witness is not qualified to testify as an expert when it appears clearly from the record that the witness possesses sufficient knowledge, skill, or experience to make him competent to testify as an expert on the subject matter at issue”).
- c. Proximate causation.
 - i. V. M. J. I. No. 5.000 defines proximate cause as follows:

A proximate cause of an injury, damage, or death is a cause which in natural and continuous sequence produces the injury, damage, or death. It is a cause without which the injury, damage, or death would not have occurred. There may be more than one proximate cause of an injury, damage, or death.
 - ii. Proximate cause of a medical condition must generally be proven by an expert witness.
 - 1) An opinion concerning the causation of a particular physical human injury is a component of a diagnosis, which is part of the practice of medicine. *Combs v. Norfolk & W. Ry. Co.*, 256 Va. 490, 496, 507 S.E.2d 355, 358 (1998). The expert was a licensed psychologist, not a medical doctor. Therefore, since the expert was not a medical doctor, he was not qualified

to state an expert medical opinion regarding the cause of the plaintiff's injury. We note that in *Velazquez v. Commonwealth*, 263 Va. 95, 557 S.E.2d 213 (2002), we recognized an exception to the general rule that only a medical doctor may render an opinion regarding the cause of a physical human injury. There, in a trial on an indictment alleging rape, a Sexual Assault Nurse Examiner (SANE) qualified as an expert witness on the subject of sexual assault injuries. The record showed that the SANE had been a registered nurse for 26 years, had received special training to qualify as a SANE, and had examined approximately 500 victims of sexual assault. We held, in relevant part, that although the SANE was not a medical doctor, she was qualified under the facts presented to render an expert opinion concerning the "causation of injuries in the context of an alleged sexual assault." *Id.* at 104, 557 S.E.2d at 218. Because our holding in *Velazquez* is limited to the unique context of a SANE's expert opinion concerning the causation of injuries in a sexual assault case, that holding does not change the general rule stated above that only a medical doctor may give an expert opinion about the cause of a physical human injury. *See Combs*, 256 Va. at 496-97, 507 S.E.2d at 358-59.

2) Lay persons, however, may render opinions.

- a) It has been stated by many Virginia Supreme Court decisions that opinions by lay witnesses are inadmissible: "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." *Southern Ry. v. Mauzy*, 98 Va. 692, 694 (1900). This is often stated as an unqualified rule, without any discussion of the applicability of rule or the possible exceptions to it under the facts of each case. *See, e.g., A.H. v. Rockingham Pub. Co., Inc.*, 255 Va. 216 (1998); *Lopez v. Dobson*, 240 Va. 421 (1990). For example, the Virginia Supreme Court 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.

b) "Opinion" versus "fact":

- i) 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 or condition. *Id.*; *see*

also Mullis v. Commonwealth, 3 Va. App. 564 (1987) (held that the fact that the witness was familiar with the term “paranoid” did not qualify witness to render an opinion that someone was in fact paranoid).

- ii) 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). You will not find the scarcity of caselaw on this subject and this is likely due to the fact that lawyers and courts view the identity of a person as a “fact” rather than an “opinion”.
- iii) 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 that 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 that 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). Also, a lay opinion as to a person’s age has been held inadmissible, but the decision announcing this rule was decided in 1884 when the “opinion rule” was applied much more rigidly than it is today. *Valley Mutual Life Ass’n v. Teewalt*, 79 Va. (4 Hans.) 421 (1884).
- iv) 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).

d. Damages.

- i. The medical malpractice cap:

- 1) Virginia Code § 8.01-581.15 “caps” damages in medical malpractice cases:

In any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after August 1, 1999, which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed the following, corresponding amount:

August 1, 1999, through June 30, 2000	\$1.50 million
July 1, 2000, through June 30, 2001	\$1.55 million
July 1, 2001, through June 30, 2002	\$1.60 million
July 1, 2002, through June 30, 2003	\$1.65 million
July 1, 2003, through June 30, 2004	\$1.70 million
July 1, 2004, through June 30, 2005	\$1.75 million
July 1, 2005, through June 30, 2006	\$1.80 million
July 1, 2006, through June 30, 2007	\$1.85 million
July 1, 2007, through June 30, 2008	\$1.925 million
July 1, 2008, through June 30, 2012	\$2.00 million
July 1, 2012, through June 30, 2013	\$2.05 million
July 1, 2013, through June 30, 2014	\$2.10 million
July 1, 2014, through June 30, 2015	\$2.15 million
July 1, 2015, through June 30, 2016	\$2.20 million
July 1, 2016, through June 30, 2017	\$2.25 million
July 1, 2017, through June 30, 2018	\$2.30 million
July 1, 2018, through June 30, 2019	\$2.35 million
July 1, 2019, through June 30, 2020	\$2.40 million
July 1, 2020, through June 30, 2021	\$2.45 million
July 1, 2021, through June 30, 2022	\$2.50 million
July 1, 2022, through June 30, 2023	\$2.55 million
July 1, 2023, through June 30, 2024	\$2.60 million
July 1, 2024, through June 30, 2025	\$2.65 million
July 1, 2025, through June 30, 2026	\$2.70 million
July 1, 2026, through June 30, 2027	\$2.75 million

July 1, 2027, through June 30, 2028 \$2.80 million
July 1, 2028, through June 30, 2029 \$2.85 million
July 1, 2029, through June 30, 2030 \$2.90 million
July 1, 2030, through June 30, 2031 \$2.95 million

In any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after July 1, 2031, which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed \$3 million. Each annual increase shall apply to the act or acts of malpractice occurring on or after the effective date of the increase.

Where the act or acts of malpractice occurred prior to August 1, 1999, the total amount recoverable for any injury to, or death of, a patient shall not exceed the limitation on recovery set forth in this statute as it was in effect when the act or acts of malpractice occurred.

In interpreting this section, the definitions found in § 8.01-581.1 shall be applicable.

- ii. Damages in medical malpractice cases for personal injuries (excluding death cases):
 - 1) V. M. J. I. No. 9.000:

If you find your verdict for the plaintiff, then in determining the damages to which he is entitled, you shall consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendant:

- (1) any bodily injuries he sustained and their effect on his health according to their degree and probable duration;
- (2) any physical pain [and mental anguish] he suffered in the past [and any that he may be reasonably expected to suffer in the future];
- (3) any disfigurement or deformity and any associated humiliation or embarrassment;
- (4) any inconvenience caused in the past [and any that probably will be caused in the future];
- (5) any medical expenses incurred in the past [and any that may be reasonably expected to occur in the future];
- (6) any earnings he lost because he was unable to work at his calling;

- (7) any loss of earnings and lessening of earning capacity, or either, that he may reasonably be expected to sustain in the future;
- (8) any property damage he sustained.

Your verdict shall be for such sum as will fully and fairly compensate the plaintiff for the damages sustained as a result of the defendant's negligence.

2) V. M. J. I. No. 9.010:

The burden is on the plaintiff to prove by the greater weight of the evidence each item of damage he claims and to prove that each item was caused by the defendant's negligence. He is not required to prove the exact amount of his damages, but he must show sufficient facts and circumstances to permit you to make a reasonable estimate of each item. If the plaintiff fails to do so, then he cannot recover for that item.

3) If there is a permanent injury, life expectancy may be proven through Va. Code § 8.01-419. *See also* V. M. J. I. No. 9.120 (Mortality Table).

iii. Damages in wrongful death cases:

1) Va. Code § 8.01-52:

The jury or the court, as the case may be, in any such action under § 8.01-50 may award such damages as to it may seem fair and just. The verdict or judgment of the court trying the case without a jury shall include, but may not be limited to, damages for the following:

- 1. Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent;
- 2. Compensation for reasonably expected loss of (i) income of the decedent and (ii) services, protection, care and assistance provided by the decedent;
- 3. Expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death;
- 4. Reasonable funeral expenses; and
- 5. Punitive damages may be recovered for willful or wanton conduct, or such recklessness as evinces a conscious disregard for the safety of others.

Damages recoverable under 3, 4 and 5 above shall be specifically stated by the jury or the court, as the case may be. Damages recoverable under 3 and 4 above shall be apportioned among the creditors who rendered such services, as their respective interests may appear. Competent expert testimony shall be admissible in proving damages recoverable under 2 above.

The court shall apportion the costs of the action as it shall deem proper.

2) V. M. J. I. No. 9.100:

If you find your verdict for the plaintiff, then in determining the damages to which he is entitled, you shall include, but are not limited to, any of the following which you believe by the greater weight of the evidence were caused by the negligence of the defendant as damages suffered by the beneficiaries:

- (1) any sorrow, mental anguish, and loss of solace suffered by the beneficiaries. Solace may include society, companionship, comfort, guidance, kindly offices, and advice of the decedent;
- (2) any reasonably expected loss in income of the decedent suffered by the beneficiaries;
- (3) any reasonably expected loss of services, protection, care, and assistance which the decedent provided to the beneficiaries;
- (4) any expenses for the care, treatment, and hospitalization of the decedent incident to the injury resulting in his death; and
- (5) reasonable funeral expenses.

If you award damages under paragraphs (1), (2), and (3) above, you may distribute these damages among [between] (name of spouse, children, and children of any deceased child or decedent) or (names of surviving statutory beneficiaries).

If you award damages under (4) and (5) above, you shall specifically state the amount of damages for each.

3) The mortality table may be used to determine life expectancy in death cases as well.

- iv. Proving medical expenses:
- 1) *See McMunn v. Tatum*:
 - a) “[A] plaintiff may offer medical bills through the plaintiff’s testimony alone if he lays a foundation showing (1) that the bills are regular on their face, and (2) that they appear to relate to treatment, the nature and details of which the plaintiff has explained. If the defendant challenges the authenticity of the bills, they will be insufficient in themselves to create a jury issue, and independent proof of authenticity will be necessary. If the defendant challenges only their quantitative reasonableness, a jury issue is created on that question. The jury may then consider the bills as ‘some evidence’ of their quantitative reasonableness, to be weighed against such evidence as the defendant may present on that question. If the defendant contests their medical necessity or causal relationship and further represents to the court that the defense will offer evidence on those issues, the bills will be insufficient in themselves to create a jury issue, and expert foundation testimony will be prerequisite to their admission.”
 - b) “We now hold that where the defendant objects to the introduction of medical bills, indicating that the defendant’s evidence will raise a substantial contest as to either the question of medical necessity or the question of causal relationship, the court may admit the challenged medical bills only with foundation expert testimony to establish medical necessity or causal relationship, or both, as appropriate.”
 - 2) *See Va. Code § 8.01-413.01*:
 - A. In any action for personal injuries, wrongful death, or for medical expense benefits payable under a motor vehicle insurance policy issued pursuant to § 38.2-124 or § 38.2-2201, the authenticity of bills for medical services provided and the reasonableness of the charges of the health care provider shall be rebuttably presumed upon identification by the plaintiff of the original bill or a duly authenticated copy and the plaintiff’s testimony (i) identifying the health care provider, (ii) explaining the circumstances surrounding his receipt of the bill, (iii) describing the services rendered and (iv) stating that the services were rendered in connection with treatment for the injuries received in the event giving rise to the action. The presumption herein shall not apply unless the opposing party or his attorney has been furnished such medical records at least twenty-one days prior to the trial.
 - B. Where no medical bill is rendered or specific charge made by a health care provider to the insured, an insurer, or any other person, the usual and customary fee charged for the service rendered may be established by the testimony or the affidavit of an expert having knowledge of the usual and customary fees charged for the services

rendered. If the fee is to be established by affidavit, the affidavit shall be submitted to the opposing party or his attorney at least twenty-one days prior to trial. The testimony or the affidavit is subject to rebuttal and may be admitted in the same manner as an original bill or authenticated copy described in subsection A of this section.

- v. Proving lost wages and lessening of earning capacity.
 - 1) This may be proven through lay witness testimony. *See Peterson v. Neme*, 222 Va. 477, 483 (1981) (“It is implicit in our holding in *Sumner v. Smith*, 220 Va. 222, 257 S.E.2d 825 (1979), that lay testimony of causal connection between an automobile accident and injury is admissible for whatever weight the fact finder may choose to give it, even when medical testimony fails to establish causal connection expressly.”).
 - 2) Expert witnesses in the field of vocational rehabilitation are often utilized.
 - 3) A reduction of future damages (such as lost wages or loss of services) to present day value is *not* required.
 - a) A reduction to present day value is similar to mitigation of damages and must be asserted by the defense. *See CSX Transportation, Inc. v. Casale*, 247 Va. 180, 186 (1994).
 - b) The ultimate burden of proof for damages remains with the plaintiff. *Id.* Once the plaintiff makes a *prima facie* case of damages, has the burden “of going forward with evidence to reduce those damages.” *Stohlman v. S&B Ltd. P’Ship*, 249 Va. 251, 256 (1995).
 - c) The defense must put on evidence “to enable the fact finder to make a rational determination” of present day value. *CSX Transportation, Inc.*, 247 Va. at 186.

DEVELOPING THE CASE FROM INTAKE TO EXPERT DISCLOSURES.

1. Putting the Case Together.

a. Certification letters.

- i. A certification letter is required to be able to serve the Complaint on any defendants in the case. This letter must be signed by an expert witness and generally state that the defendant who is to be served with process deviated from the standard of care and that such deviations were a proximate cause of the injuries and damages claimed.
 - 1) If service of process is requested without this certification letter, the case may be dismissed with prejudice.
 - 2) Certification letters are not always required.
 - 3) The statutes dealing with the specific requirements of certification letters are Virginia Code §§ 8.01-20.1 and 50.1.

ii. Va. Code § 8.01-20.1 provides:

Every motion for judgment, counter claim, or third party claim in a medical malpractice action, at the time the plaintiff requests service of process upon a defendant, or requests a defendant to accept service of process, shall be deemed a certification that the plaintiff has obtained from an expert witness whom the plaintiff reasonably believes would qualify as an expert witness pursuant to subsection A of § 8.01-581.20 a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed. This certification is not necessary if the plaintiff, in good faith, alleges a medical malpractice action that asserts a theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience.

The certifying expert shall not be required to be an expert witness expected to testify at trial nor shall any defendant be entitled to discover the identity or qualifications of the certifying expert or the nature of the certifying expert's opinions. Should the certifying expert be identified as an expert expected to testify at trial, the opinions and bases therefor shall be discoverable pursuant to Rule 4:1 of the Rules of Supreme Court of Virginia with the exception of the expert's status as a certifying expert.

Upon written request of any defendant, the plaintiff shall, within 10 business days after receipt of such request, provide the defendant with a certification form that affirms that the plaintiff had obtained the necessary certifying expert opinion at the time service was requested or affirms that the plaintiff did not need to obtain a certifying expert witness opinion. The court, upon good cause shown, may conduct an in camera review of the certifying expert opinion

obtained by the plaintiff as the court may deem appropriate. If the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff requested service of process on a defendant as required under this section, the court shall impose sanctions according to the provisions of § 8.01-271.1 and may dismiss the case with prejudice.

iii. Va. Code § 8.01-50.1 provides:

Every motion for judgment, counter claim, or third party claim in any action pursuant to § 8.01-50 for wrongful death against a health care provider, at the time the plaintiff requests service of process upon a defendant, or requests a defendant to accept service of process, shall be deemed a certification that the plaintiff has obtained from an expert witness whom the plaintiff reasonably believes would qualify as an expert witness pursuant to subsection A of § 8.01-581.20 a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed. This certification is not necessary if the plaintiff, in good faith, alleges in his wrongful death action a medical malpractice theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience.

The certifying expert shall not be required to be an expert expected to testify at trial nor shall any defendant be entitled to discover the identity or qualifications of the certifying expert or the nature of the certifying expert's opinions. Should the certifying expert be identified as an expert expected to testify at trial, the opinions and bases therefor shall be discoverable pursuant to Rule 4:1 of the Rules of Supreme Court of Virginia with the exception of the expert's status as a certifying expert.

Upon written request of any defendant, the plaintiff shall, within 10 business days after receipt of such request, provide the defendant with a certification form which affirms that the plaintiff had obtained the necessary certifying expert opinion at the time service was requested or affirms that the plaintiff did not need to obtain a certifying expert opinion. The court, upon good cause shown, may conduct an in camera review of the certifying expert opinion obtained by the plaintiff as the court may deem appropriate. If the plaintiff did not obtain a necessary certifying expert opinion at the time the plaintiff requested service of process on a defendant, the court shall impose sanctions according to the provisions of § 8.01-271.1 and may dismiss the case with prejudice.

b. Selecting an expert.

- i. Choosing the right expert will be critical for the success of your case. Not only do you want an expert who will make a good impression at trial, but you want an expert who will actually be able to qualify to testify at trial.
 - 1) To begin with, just because someone is a doctor doesn't mean they can testify to any issue at trial.
 - a) Remember Justice Sotomayor's recent statement: "But just because a purported expert says something does not make it so." *Glossip v. Gross*, 576 U.S. ____ (2015) (Sotomayor, J., dissenting).
 - b) It is very helpful to have a stack of medical literature handy to support what your expert testified to.
 - c) This will allow you to argue in closing that it wasn't just a paid expert who said something, but unbiased medical literature.
 - 2) If the experts are going to testify to standard of care, there are specific statutory requirements they must meet before they can testify at trial. These are more fully discussed below.
- ii. Qualification of an expert is governed by Code § 8.01-581.20:

A. In any proceeding before a medical malpractice review panel or in any action against a physician, clinical psychologist, podiatrist, dentist, nurse, hospital or other health care provider to recover damages alleged to have been caused by medical malpractice where the acts or omissions so complained of are alleged to have occurred in this Commonwealth, the standard of care by which the acts or omissions are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth and the testimony of an expert witness, otherwise qualified, as to such standard of care, shall be admitted; provided, however, that the standard of care in the locality or in similar localities in which the alleged act or omission occurred shall be applied if any party shall prove by a preponderance of the evidence that the health care services and health care facilities available in the locality and the customary practices in such locality or similar localities give rise to a standard of care which is more appropriate than a statewide standard. Any physician or nurse who is licensed to practice in Virginia shall be presumed to know the statewide standard of care in the specialty or field of medicine in which he is qualified and certified. This presumption shall also apply to any physician who is licensed in some other state of the United States and meets the educational and examination requirements for licensure in Virginia. This presumption shall also apply to any nurse licensed by a state participating in the Nurse Licensure Compact. An expert witness who is familiar with the statewide standard of care shall not have his testimony excluded on the ground that he does not practice in this Commonwealth. A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert

knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards and if he has had active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action.

The provisions of this section shall apply to expert witnesses testifying on the standard of care as it relates to professional services in nursing homes.

B. In any action for damages resulting from medical malpractice, any issue as to the standard of care to be applied shall be determined by the jury, or the court trying the case without a jury.

C. In any action described in this section, each party may designate, identify or call to testify at trial no more than two expert witnesses per medical discipline on any issue presented. The court may permit a party, for good cause shown, to designate, identify, or call to testify at trial additional expert witnesses. The number of treating health care providers who may serve as expert witnesses pursuant to § 8.01-399 shall not be limited pursuant to this subsection, except for good cause shown. If the court permits a party to designate, identify, or call additional experts, the court may order that party to pay all costs incurred in the discovery of such additional experts. For good cause shown, pursuant to the Rules of Supreme Court of Virginia, the court may limit the number of expert witnesses other than those identified in this subsection whom a party may designate, identify, or call to testify at trial.

iii. Prerequisites to testify.

1) The “knowledge requirement”:

- a) With regard to the “knowledge” requirement, the proponent of the expert witness has the initial burden to “show, among other things, that the ‘specialty or field of medicine in which the expert is qualified and certified’ is the same as the defendant’s specialty or a related field of medicine.” *Lloyd*, 275 Va. at 109, 654 S.E.2d at 569-70 (quoting Code § 8.01-581.20). This requirement can be shown by evidence that the standard of care, as it relates to the alleged negligent act or treatment, is the same for the proffered expert's specialty as it is for the defendant doctor's specialty. *Sami*, 260 Va. at 283-84, 535 S.E.2d at 174; [**168] *see also Griffett v. Ryan*, 247 Va. 465, 472-73, 443 S.E.2d 149, 153-54, 10 Va. Law Rep. 1233 (1994) (holding that an internist was qualified to testify as an expert because the evidence demonstrated that the standard of care applicable to the internist did not vary from the standard of care in the defendant’s specialty, gastroenterology, a subspecialty of internal medicine).
- b) In *Sami*, this Court held that a trial court abused its discretion by holding that an expert witness whose specialty was in obstetrics-gynecology did not demonstrate knowledge of the standard of care applicable to the defendant’s specialty in emergency medicine. 260 Va. at 284, 535 S.E.2d at 174. We explained:

[The expert's] lack of knowledge regarding certain procedures of emergency medicine might disqualify him from rendering expert testimony as to those procedures, but that lack of knowledge does not preclude him from giving expert testimony on procedures which are common to both emergency medicine and the field of obstetrics-gynecology and are performed according to the same standard of care.

Id. at 284, 535 S.E.2d at 174; *see also Wright*, 267 Va. at 522, 593 S.E.2d at 313 (whether an expert has knowledge of the standard of care for a defendant's specialty must be determined by reference to the relevant medical procedure at issue in a particular case).

- 2) The "active clinical practice requirement":
 - a) To qualify as an expert, a person needs an "active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of [the] action." *Sami*, 260 Va. at 283, 535 S.E.2d at 174 (quoting Code § 8.01-581.20). In *Sami*, this Court addressed the application of the phrase "related field of medicine" contained in Code § 8.01-581.20. There, we stated that "[t]he purpose of the requirement in § 8.01-581.20 that an expert have an active practice in the defendant's specialty or a related field of medicine is to prevent testimony by an individual who has not recently engaged in the actual performance of the procedures at issue in a case." 260 Va. at 285, 535 S.E.2d at 175. We therefore concluded that "in applying the 'related field of medicine' test for the purposes of § 8.01-581.20, it is sufficient if in the expert witness' clinical practice the expert performs the procedure at issue and the standard of care for performing the procedure is the same." *Id.*

c. Choosing venue.

- i. Selecting where to file the Complaint is one of the most important decisions you will make.
 - 1) Take the time to familiarize yourself with the venue statutes and cases interpreting them.
 - 2) This can be the difference between being stuck in a place like Botetourt or getting into a much more favorable jurisdiction like Alleghany County or Roanoke City.
 - 3) Choosing the wrong venue can leave you with:
 - a) A conservative jury that favors doctors;
 - b) A conservative jury that will not award much in damages; and/or
 - c) The wrong judge.

ii. The venue statutes are intended to have “every action ... commenced and tried in a forum convenient to the parties and witnesses, where justice can be administered without prejudice or delay.” Va. Code § 8.01-257.

1) Venue is *not* jurisdictional. Va. Code § 8.01-258 (“No order, judgment, or decree shall be voidable, avoided, or subject to collateral attack solely on the ground that there was improper venue[.]”).

iii. Where cases may be filed:

1) Category A or preferred venue:

In the actions listed in this section, the forums enumerated shall be deemed preferred places of venue and may be referred to as "Category A" in this title. Venue laid in any other forum shall be subject to objection; however, if more than one preferred place of venue applies, any such place shall be a proper forum. The following forums are designated as places of preferred venue for the action specified:

1. In actions for review of, appeal from, or enforcement of state administrative regulations, decisions, or other orders:

a. If the moving or aggrieved party is other than the Commonwealth or an agency thereof, then the county or city wherein such party:

(1) Resides;

(2) Regularly or systematically conducts affairs or business activity; or

(3) Wherein such party's property affected by the administrative action is located.

b. If the moving or aggrieved party is the Commonwealth or an agency thereof, then the county or city wherein the respondent or a party defendant:

(1) Resides;

(2) Regularly or systematically conducts affairs or business activity; or

(3) Has any property affected by the administrative action.

c. If subdivisions 1 a and 1 b do not apply, then the county or city wherein the alleged violation of the administrative regulation, decision, or other order occurred.

2. Except as provided in subdivision 1 of this section, where the action is against one or more officers of the Commonwealth in an official capacity, the county or city where any such person has his official office.

3. The county or city wherein the subject land, or a part thereof, is situated in the following actions:

a. To recover or partition land;

b. To subject land to a debt;

c. To sell, lease, or encumber the land of persons under disabilities;

d. [Repealed.]

e. To sell wastelands;

f. To establish boundaries;

g. For unlawful entry or detainer;

h. For ejectment; or

i. To remove clouds on title.

4. [Reserved.]

5. In actions for writs of mandamus, prohibition, or certiorari, except such as may be issued by the Supreme Court, the county or city wherein is the record or proceeding to which the writ relates.

6. In actions on bonds required for public contract, the county or city in which the public project, or any part thereof, is situated.

7. In actions to impeach or establish a will, the county or city wherein the will was probated, or, if not probated at the time of the action, where the will may be properly offered for probate.

8., 9. [Repealed.]

10. In actions on any contract between a transportation district and a component government, any county or city any part of which is within such transportation district.

11. In attachments,

a. With reference to the principal defendant and those liable with or to him, venue shall be determined as if the principal defendant were the sole defendant; or

b. In the county or city in which the principal defendant has estate or has debts owing to him.

12. [Repealed.]

13. a. In any action for the collection of state, county, or municipal taxes, any one of the following counties or cities shall be deemed preferred places of venue:

(1) Wherein the taxpayer resides;

(2) Wherein the taxpayer owns real or personal property;

(3) Wherein the taxpayer has a registered office, or regularly or systematically conducts business; or

(4) In case of withdrawal from the Commonwealth by a delinquent taxpayer, wherein venue was proper at the time the taxes in question were assessed or at the time of such withdrawal.

b. In any action for the correction of an erroneous assessment of state taxes and tax refunds, any one of the following counties or cities shall be deemed preferred places of venue:

(1) Wherein the taxpayer resides;

(2) Wherein the taxpayer has a registered office or regularly or systematically conducts business;

(3) Wherein the taxpayer's real or personal property involved in such a proceeding is located; or

(4) The Circuit Court of the City of Richmond.

14. In proceedings by writ of quo warranto:

a. The city or county wherein any of the defendants reside;

b. If the defendant is a corporation, the city or county where its registered office is or where its mayor, rector, president, or other chief officer resides; or

c. If there is no officer or none of the defendants reside in the Commonwealth, venue shall be in the City of Richmond.

15. In proceedings to award an injunction:

a. To any judgment or judicial proceeding of a circuit court, venue shall be in the court in the county or city in which the judgment was rendered or such proceeding is pending;

b. To any judgment or judicial proceeding of a district court, venue shall be in the circuit court of the county or city in which the judgment was rendered or such proceeding is pending; or

c. To any other act or proceeding, venue shall be in the circuit court of the county or city in which the act is to be done, or being done, or is apprehended to be done or the proceeding is pending.

16. [Repealed.]

17. In disbarment or suspension proceedings against any attorney-at-law, in the county or city where the defendant:

a. Resides;

b. Has his principal office or place of practice when the proceeding is commenced;

c. Resided or had such principal office or place of practice when any misconduct complained of occurred; or

d. Has any pending case as to which any misconduct took place.

18. In actions under the Virginia Tort Claims Act, Article 18.1 (§ 8.01-195.1 et seq.) of Chapter 3 of this title:

a. The county or city where the claimant resides;

b. The county or city where the act or omission complained of occurred; or

c. If the claimant resides outside the Commonwealth and the act or omission complained of occurred outside the Commonwealth, the City of Richmond.

19. In suits for annulment, affirmance, or divorce, the county or city in which the parties last cohabited, or at the option of the plaintiff, in the county or city in which the defendant resides, if a resident of this

Commonwealth, and in cases in which an order of publication may be issued against the defendant under § 8.01-316, venue may also be in the county or city in which the plaintiff resides.

20. In distress actions, in the county or city when the premises yielding the rent, or some part thereof, may be or where goods liable to distress may be found.

2) Category B or permissible venue:

In any actions to which this chapter applies except those actions enumerated in Category A where preferred venue is specified, one or more of the following counties or cities shall be permissible forums, such forums being sometimes referred to as "Category B" in this title:

1. Wherein the defendant resides or has his principal place of employment or, if the defendant is not an individual, wherein its principal office or principal place of business is located;
2. Wherein the defendant has a registered office, has appointed an agent to receive process, or such agent has been appointed by operation of the law; or, in case of withdrawal from the Commonwealth by such defendant, wherein venue herein was proper at the time of such withdrawal;
3. Provided there exists any practical nexus to the forum including, but not limited to, the location of fact witnesses, plaintiffs, or other evidence to the action, wherein the defendant regularly conducts substantial business activity, or in the case of withdrawal from the Commonwealth by such defendant, wherein venue herein was proper at the time of such withdrawal;
4. Wherein the cause of action, or any part thereof, arose;
5. In actions to recover or partition personal property, whether tangible or intangible, the county or city:
 - a. Wherein such property is physically located; or
 - b. Wherein the evidence of such property is located;
 - c. And if subdivisions a and b do not apply, wherein the plaintiff resides.
6. In actions against a fiduciary as defined in § 8.01-2 appointed under court authority, the county or city wherein such fiduciary qualified;

7. In actions for improper message transmission or misdelivery wherein the message was transmitted or delivered or wherein the message was accepted for delivery or was misdelivered;

8. In actions arising based on delivery of goods, wherein the goods were received;

9. If there is no other forum available in subdivisions 1 through 8 of this category, then the county or city where the defendant has property or debts owing to him subject to seizure by any civil process; or

10. Wherein any of the plaintiffs reside if (i) all of the defendants are unknown or are nonresidents of the Commonwealth or if (ii) there is no other forum available under any other provisions of § 8.01-261 or this section.

2. Discovery.

- a. **Designating and identifying expert witness is a crucial element of your case. The designation should be all-encompassing and say as much as possible. Failure to disclose expected testimony may result in your expert not being able to testify to that issue. This can have drastic consequences including:**
 - i. Your expert's opinions being struck;
 - ii. Not being able to put on evidence about damages at trial; and
 - iii. Having your case dismissed.
 - 1) Your case can be dismissed if your case is one that requires expert testimony and, because your expert has been struck, you have no expert to establish negligence, causation and damages.
 - 2) At that point, it would be proper for a court to grant a motion for summary judgment because there are no longer any material facts genuinely in dispute.
- b. You cannot spend enough time working on your expert designation.
 - i. While it is not required that your expert review and sign it prior to serving it on defense counsel in state court, it is the best practice to have the expert review it before you do.
 - 1) This is more common with new experts who do not testify regularly and those who are generally more conservative in their opinions.
 - ii. In order to prepare your expert designation, carefully review:
 - 1) The medical records;
 - 2) The depositions; and
 - 3) The medical literature.
 - iii. It is always good to include catch-all language in your designation to allow room for your expert to discuss additional topics not entirely called out in the designation.
 - 1) Include language that indicates your expert will discuss the contents of the medical records, depositions, etc.

- 2) It is also helpful to say that your expert will respond to the opinions of defense witnesses and discuss the general medical issues in the case.
- 3) This gives the judge leeway to allow additional testimony from an expert that may not be fully set forth in the designation.

c. Disclosure of expert witnesses.

i. See Rule 4:1(b)(4)(A)(i):

A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

ii. Rule 1:18, the Uniform Pretrial Scheduling Order.

If requested in discovery, all information discoverable under Rule 4:1(b)(4)(A)(i) of the Rules of the Supreme Court of Virginia shall be provided or the expert will not ordinarily be permitted to express any nondisclosed opinions at trial.

iii. Expert witnesses are not required to sign their expert designations, nor are they required to review the designations before they are served upon the opposing party.

iv. *John Crane, Inc. v. Jones*, 274 Va. 581 (2007) is often cited for the proposition that all opinions offered at trial not included in an expert's designation must be excluded as a matter of law.

- 1) The actual holding of *Crane* is, like most things, more nuanced.
- 2) The case started with analysis of Rule 4:1:
 - a) "[A]ny application of this rule begins with determining whether the opinion at issue was disclosed in any form."
 - b) "Rule 4:1(b)(4)(A)(i) requires the substance of opinions to be rendered be disclosed."
- 3) The Court ultimately held that the decision whether to exclude or admit an expert's testimony is within the discretion of the trial court and subject to an abuse of discretion standard:
 - a) "In summary, we conclude that the trial court did not abuse its discretion in refusing to allow the testimony at issue because Crane did not disclose that Dr. Roggli would render an opinion on asbestos in the ambient air and did not identify the substance of Buccigross' opinion as required by Rule 4:1(b)(4)(A)(i)."

v. *Condo Servs. v. First Owners' Assn' of Fort Six Hundred Condo.*, 281 Va. 561 (2011) narrowed *Crane*.

- 1) “Although FOA did not itemize the specific amounts of penalties and interest, the interrogatory response disclosed that it was Reitberger’s opinion that CSI’s failures results in underpayment of taxes and FOA incurring interest and penalties. It was within the discretion of the circuit court to determine whether the interrogatory response sufficiently disclosed the subject matter on which Reitberger was going to testify, the substance of Reitberger’s opinions and a summary of the grounds for Reitberger’s opinions.”
- 2) “Compare *John Crane, Inc.*, 274 Va. at 592-93, 650 S.E.2d at 856-57 (expert designations were insufficient because opinion was not disclosed in any form).”

d. Opinion testimony from treating health care providers.

i. Va. Code § 8.01-399:

A. Except at the request or with the consent of the patient, or as provided in this section, no duly licensed practitioner of any branch of the healing arts shall be permitted to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity.

B. If the physical or mental condition of the patient is at issue in a civil action, the diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action. In addition, disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice. However, no order shall be entered compelling a party to sign a release for medical records from a health care provider unless the health care provider is not located in the Commonwealth or is a federal facility. If an order is issued pursuant to this section, it shall be restricted to the medical records that relate to the physical or mental conditions at issue in the case. No disclosure of diagnosis or treatment plan facts communicated to, or otherwise learned by, such practitioner shall occur if the court determines, upon the request of the patient, that such facts are not relevant to the subject matter involved in the pending action or do not appear to be reasonably calculated to lead to the discovery of admissible evidence. Only diagnosis offered to a reasonable degree of medical probability shall be admissible at trial.

C. This section shall not (i) be construed to repeal or otherwise affect the provisions of § 65.2-607 relating to privileged communications between physicians and surgeons and employees under the Workers' Compensation

Act; (ii) apply to information communicated to any such practitioner in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug; or (iii) prohibit a duly licensed practitioner of the healing arts, or his agents, from disclosing information as required by state or federal law.

D. Neither a lawyer nor anyone acting on the lawyer's behalf shall obtain, in connection with pending or threatened litigation, information concerning a patient from a practitioner of any branch of the healing arts without the consent of the patient, except through discovery pursuant to the Rules of Supreme Court as herein provided. However, the prohibition of this subsection shall not apply to:

1. Communication between a lawyer retained to represent a practitioner of the healing arts, or that lawyer's agent, and that practitioner's employers, partners, agents, servants, employees, co-employees or others for whom, at law, the practitioner is or may be liable or who, at law, are or may be liable for the practitioner's acts or omissions;

2. Information about a patient provided to a lawyer or his agent by a practitioner of the healing arts employed by that lawyer to examine or evaluate the patient in accordance with Rule 4:10 of the Rules of Supreme Court; or

3. Contact between a lawyer or his agent and a nonphysician employee or agent of a practitioner of healing arts for any of the following purposes: (i) scheduling appearances, (ii) requesting a written recitation by the practitioner of handwritten records obtained by the lawyer or his agent from the practitioner, provided the request is made in writing and, if litigation is pending, a copy of the request and the practitioner's response is provided simultaneously to the patient or his attorney, (iii) obtaining information necessary to obtain service upon the practitioner in pending litigation, (iv) determining when records summoned will be provided by the practitioner or his agent, (v) determining what patient records the practitioner possesses in order to summons records in pending litigation, (vi) explaining any summons that the lawyer or his agent caused to be issued and served on the practitioner, (vii) verifying dates the practitioner treated the patient, provided that if litigation is pending the information obtained by the lawyer or his agent is promptly given, in writing, to the patient or his attorney, (viii) determining charges by the practitioner for appearance at a deposition or to testify before any tribunal or administrative body, or (ix) providing to or obtaining from the practitioner directions to a place to which he is or will be summoned to give testimony.

E. A clinical psychologist duly licensed under the provisions of Chapter 36 (§ 54.1-3600 et seq.) of Title 54.1 shall be considered a practitioner of a branch of the healing arts within the meaning of this section.

F. Nothing herein shall prevent a duly licensed practitioner of the healing arts, or his agents, from disclosing any information that he may have acquired in attending, examining or treating a patient in a professional capacity where such disclosure is necessary in connection with the care of the patient, the protection or enforcement of a practitioner's legal rights including such rights with respect to medical malpractice actions, or the operations of a health care facility or health maintenance organization or in order to comply with state or federal law.

- ii. Seminal cases.
 - 1) *Pettus v. Gottfried*, 269 Va. 69 (2005):
 - a) This case analyzed the purpose of Code § 8.01-399. It held that the practitioners may discuss the diagnosis or treatment plan of a practitioner along with facts communicated to the treating physician and other facts learned by the treating physician. It did state that diagnoses must be given to a reasonable degree of medical probability.
 - 2) *Graham v. Cook*, 278 Va. 233 (2009):
 - a) This case analyzes the difference between “diagnostic” testimony and “factual” testimony. It stands for the proposition that factual testimony does not need to be given to a reasonable degree of probability, but that diagnoses must be given to that degree.
 - 3) *Holmes v. Levine*, 273 Va. 150 (2007):
 - a) This case discussed the difference between present medical expert opinion and one formed during the time of treatment. Health care providers are not required to give *present* medical opinions, but must testify to opinions they held during the course of caring for and treating a patient.
- e. Discovery regarding expert witnesses.
 - i. Rule 4:1(b) governs discovery generally as well as discovery regarding expert witnesses.
 - ii. Rule 4:1(b)(4):
 - 1) Trial Preparation: Experts; Costs – Special Provisions for Eminent Domain Proceedings. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this Rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the

expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) A party may depose any person who has been identified as an expert whose opinion may be presented at trial, subject to the provisions of subdivision (b)(4)(C) of this Rule concerning fees and expenses. (iii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this Rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent and expenses incurred in responding to discovery under subdivisions (b)(4)(A)(ii), (b)(4)(A)(iii), and (b)(4)(B) of this Rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(iii) of this Rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this Rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

- f. Expert discovery in federal court.
 - i. Expert discovery is governed by Rule 26 of the Federal Rules of Civil Procedure.
 - ii. There are two basic types of experts in federal cases, those who must provide a written report and those who do not provide a written report.
 - iii. Experts who must provide a written report:
 - 1) Rule 26(a)(2)(B) provides that witnesses who are “retained or specifically employed to provide expert testimony in the case” must provide a written report “prepared and signed by the witness.”
 - 2) The report must include:
 - a) A complete statement of all opinions the witness will express and the basis and reasons for them;
 - b) The facts or data considered by the witness in forming them;
 - c) Any exhibits that will be used to summarize or support them;
 - d) The witnesses’s qualifications, including a list of all publications authored in the previous 10 years;
 - e) A list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

- f) A statement of the compensation to be paid for the study and testimony in the case.
- iv. Expert who do not provide a written report:
 - 1) This encompasses people who are not retained to provide expert testimony such as treating health care providers, police who responded to the scene of a collision and the like.
 - 2) For these witnesses, an expert disclosure similar to one prepared in state court is all that is required.
 - 3) The disclosure for these experts must include:
 - a) The subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
 - b) A summary of the facts and opinions to which the witness is expected to testify.
- v. Supplementing disclosures is not a problem.
 - 1) Rule 26 (e)(2) sets forth how to supplement an expert's disclosure and the timing by which it must be done.

TRYING THE CASE

1. Particular Incidents of Trial.

a. *Voir dire.*

i. Va. Code § 8.01-358:

The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.

A juror, knowing anything relative to a fact in issue, shall disclose the same in open court.

b. Evidence.

i. See Va. Sup. Ct. R. 2.101, *et seq.*

ii. See Va. Code § 8.01-385, *et seq.* and 8.01 generally.

c. Medical literature.

i. Va. Code § 8.01-401.1:

In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to

or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation, shall not be excluded as hearsay. If admitted, the statements may be read into evidence but may not be received as exhibits. If the statements are to be introduced through an expert witness upon direct examination, copies of the specific statements shall be designated as literature to be introduced during direct examination and provided to opposing parties 30 days prior to trial unless otherwise ordered by the court.

If a statement has been designated by a party in accordance with and satisfies the requirements of this section, the expert witness called by that party need not have relied on the statement at the time of forming his opinion in order to read the statement into evidence during direct examination at trial.

- ii. Important cases:
 - 1) *Budd v. Punyanitya*, 273 Va. 583 (2007) (held that when a party intends to introduce into evidence statements from published literature during the cross-examination of an opposing expert, but wishes to avoid the possibility that the opposing expert will not acknowledge that literature as a reliable authority on a particular matter at issue by having the party's own expert establish the literature as a reliable authority on direct examination, the party must provide opposing counsel with copies of the statements in the literature 30 days before trial).
 - 2) *May v. Caruso*, 264 Va. 358 (2002) (held that trial court did not abuse discretion in refusing to permit a party to have its expert introduce statements from literature because the party failed to identify for opposing counsel the specific statements relied upon therein).
- d. General principles regarding expert testimony.
 - i. An expert's opinion may not be based upon a mere assumption lacking evidentiary support. *Lawson v. Doe*, 239 Va. 477 (1990).

- 1) Expert testimony is inadmissible if it is speculative or founded on assumptions with no basis in fact. *Tarmac Mid-Atlantic, Inc. v. Smiley Block Co.*, 250 Va. 161 (1995)
 - ii. Expert testimony should not be admitted unless the court is satisfied that the expert considered all variable bearing on the inferences to be drawn from the facts. *Tarmac*, 250 Va. 161.
 - iii. Expert testimony may be based upon hearsay. *Bowers v. Huddleston*, 241 Va. 83 (1991).
 - 1) But hearsay opinion testimony is not admissible during direct examination. *McMunn v. Tatum*, 237 Va. 558 (1989).
 - 2) The recitation of an absent physician's opinion is inadmissible hearsay. *CSX Transp., Inc. v. Casale*, 247 Va. 180 (1994).
- e. *Ad damnum*.
- i. Va. Code § 8.01-379.1:

Notwithstanding any other provision of law, any party in any civil action may inform the jury of the amount of damages sought by the plaintiff in the opening statement or closing argument, or both. The plaintiff may request an amount which is less than the ad damnum in the motion for judgment.
 - ii. *Smith v. McLaughlin*, 2015 Va. LEXIS 23 (Feb. 26, 2015) (held that it was error to allow plaintiff's counsel to request from the jury an amount which exceeded the *ad damnum* clause in the Complaint).
 - iii. *Wakole v. Barber*, 283 Va. 488, 494 (2012) (held that "as long as there is evidence to support an award of non-economic damages, plaintiff is allowed to break the lump sum amount into its component parts and argue a 'fixed amount' for each element of damages claimed as long as the amount is not based on a per diem or other fixed basis.").
 - 1) This case also held that "just as counsel can argue for a total amount requested by the plaintiff, there is no principled reason why a plaintiff should not be able to request a specific amount for each element of damages sought as long as there is evidence in the record to support each element of damages claimed *and the total requested is no more than the ad damnum*." *Id.* (emphasis added).
 - iv. *Powell v. Sears, Roebuck & Co.*, 231 Va. 464, 469 (1986) (held that "In Virginia, a plaintiff cannot recover more than he sues for though he can recover less.").
- f. Jury instructions.
- i. A party is entitled to an instruction which is a correct statement of the law provided there is more than a scintilla of evidence introduced on the particular subject. *Gravitt v. Ward*, 258 Va. 330, 335 (1999).
 - ii. Of late, defendants are seeking instructions on "illegality," "assumption of the risk" and contributory negligence.
 - iii. It is important to keep in mind the following if such defenses are asserted:

- 1) Regarding illegality, it must be established that the asserted illegal act was a legal proximate cause of the claimed injuries. *Johnson v. Campbell*, 258 Va. 453, 457 (1999).
- 2) Regarding assumption of the risk, one person cannot assume the risk of another's negligence. See *Terry v. Fagan*, 209 Va. 642, 647 (1969) (holding that a passenger could not assume the risk of a driver's negligence); *Young v. Lambert*, 253 Va. 237 (1997); *Stephens v. Ford Motor Co.*, 226 Va. 415 (1938); *McClanahan v. California Spray Corp.*, 194 Va. 842 (1953).
 - a) Another key case is *Fiorucci v. Chinn*, 764 S.E.2d 85, 87 (Va. 2014), where the Supreme Court held "while a patient may consent to [treatment], a patient does not consent to negligence." (internal quotation omitted.)
- 3) Regarding contributory negligence, that defense is only applicable if the plaintiff's/decedent's negligence concurred with that of the defendant. *Ponirakis v. Choi*, 262 Va. 119, 125 (2001).

g. The Golden Rule.

- i. See *Seymour v. Richardson*, 194 Va. 709 (1953):
 - 1) At trial, counsel for the plaintiff made the following statement, "All Mrs. Richardson asks you gentlemen to do when you retire to your jury room is to apply the Golden Rule. 'Do unto her as you wish that you would be done.'" The defendant objected to this and, on appeal, the Supreme Court held that the argument was "improper and should not be repeated." 194 Va. at 715.
 - 2) The jury is to decide the case before it "according to the evidence, not according to how its members might wish to be treated. *Lorillard Co. v. Clay*, 127 Va. 734, 752, 104 S.E. 384, 390." *Id.*
 - 3) The Court added that "[t]he important rule so attempted to be invoked was designed to regulate the conduct of men among themselves before they bring their controversy to a jury." *Id.*

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GENTRY LOCKE
Attorneys

Know Your Judge and the Rules of Court

The Craft of Persuading a Judge

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There is no substitute for preparation. All competent counsel understand that adequate preparation concerning the law and facts relevant to a particular case is the essence of what it means to be a professional. Yet, when well-prepared counsel spar over the facts and law, the edge often goes to the one who best knows the tribunal deciding the case. Despite this reality, the time invested in studying the judge or justices who will decide the case and in using that knowledge to form more persuasive arguments is often lacking. Drawing from their vast and diverse experience, each of the authors have individually contributed to these materials. To better equip the reader to persuade an attorney's most challenging audience—the judiciary—the authors begin with a series of specific practice pointers, followed by an attached review of important appellate procedure.

PRACTICE POINTERS IN THE TRIAL COURT

1. Be intentional about your trial judge—when you can.

Upon accepting representation of a client in a litigation matter, one of the first decisions that must be made involves selecting the trial court that will hear the case. For counsel representing the plaintiff, “the plaintiff [is] the master of the claim[.]” *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (U.S. 1987). The defendants sued, the claims pled, the law upon which the plaintiff relies, and the amount for which the plaintiff sues are all decisions that should be made with the preferred trial court in mind. For counsel representing the defendant, the initial choice will be made by the plaintiff (or prosecutor in a criminal case), but the defendant may, where appropriate, notice removal to federal court, request remand to state court, or move for a change in venue.

2. Know the rules and procedure of the trial court, whether it is across the street or across the Commonwealth.

Counsel must be familiar with local rules and procedure. The sometimes severe consequences of filing in a remote location without being familiar with local rules were highlighted this year when the Supreme Court of Virginia affirmed the Circuit Court of Powhatan County in an unpublished Order. *See Landini v. Bil-Jax, Inc.*, Record No. 140591 (Va. Jan. 30, 2015). In *Landini*, an attorney or staff member called the local clerk's office to determine the local filing fee, errantly assuming that the fee would be identical in other parts of the state. Unfortunately, the filing fee was in fact two dollars deficient. *Id.* As a result, a potentially large products liability case was dismissed with prejudice, forever ending the case.

Landini is hardly the sole example of the importance of local procedural rules. The Supreme Court of the United States has warned that “inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute ‘excusable’ neglect[.]” *See Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 392 (1993). The United States Court of Appeals for the Fourth Circuit is likewise unmoved by counsel's unawareness of local rules. *See United States v. Williams*, 986 F.2d 86, 88 (4th Cir. Va. 1993) (“The district court in this case followed its established local practice in using the jury box system and was under no obligation to inform

Williams' counsel of the intricacies of that system before the jury was empaneled, particularly given that appellant's Florida counsel had associated local counsel, who presumably was familiar with the district's customs.”). Similar rulings have occurred in the United States District Courts of Virginia. *See, e.g., Matthews v. Johnson*, 2007 U.S. Dist. LEXIS 6483, *16 (E.D. Va. Jan. 30, 2007) (Unfamiliarity with the legal system, youth, lack of education, ignorance, and misconception are no excuse for procedural default); *Hood v. Johnson*, 2007 U.S. Dist. LEXIS 11583 (E.D. Va. Feb. 16, 2007) (same); *see also, Nasser v. WhitePages, Inc.*, 2014 U.S. Dist. LEXIS 90960, *27 (W.D. Va. Apr. 30, 2014) (quoting *McNeil v. United States*, 508 U.S. 106, 113 (1993) (“[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.”)). This is no new development in Virginia. When “great injustice has been done a defendant by a verdict and judgment against him at law, [that] is the result either of the defendant's own negligence, or of his counsel's ignorance or bad management, a court of equity can give him no relief.” *See Peers v. Barnett*, 53 Va. 410, 424 (1855). Thus, there is no substitute for knowledge of the procedural rules that will govern the case.

3. Educate yourself about the trial judge as early as possible.

Counsel should learn about the trial judge as soon as the local rules establish who the judge will be. In the United States District Court for the Western District of Virginia, for example, Standing Order No. 2015-1 explains the current assignment of cases. *See* Standing Order No. 2015-1, available at <http://www.vawd.uscourts.gov/media/1479/divisionofcases.pdf>. In the federal trial courts, judges with significant experience on the bench generally have enough published opinions to garner substantial helpful information. While Lexis and other online services provide databases for judicial background searches, there is no substitute for actual familiarity with a judge.

When dealing with an unfamiliar judge—especially in the state circuit courts—local, experienced counsel can be a valuable resource. Local, experienced counsel can assist with background information on the judge, explanations of the judicial temperament and style, and other valuable information. Former law clerks and current court staff can be additional sources of information concerning the judge and individualized courthouse procedure.

In state court, learn early in the case whether the judge handling the case has a law clerk, whether he/she rides a circuit, and whether he/she is actually based in the courthouse where you will be filing your pleadings. Educate yourself on the judge’s career background. Learn from the clerk, the bailiffs, and local counsel whether the judge is comfortable with the use of technology in the courtroom.

4. Be intentional in your motions practice.

The most persuasive counsel will also carefully sift the number of motions filed with the trial judge. Not every motion that can be made must be made. Not every motion your client wants filed is actually in his/her best interests. *See, e.g., Fairfax County Bd. of Supervisors v. Weaver*, 44 Va. Cir. 412, 415 (Va. Cir. Ct. Fairfax Co. 1998) (Court sanctioned party and counsel for filing at least eighteen post-trial motions following an unfavorable trial); *see, also, Boyce v.*

Pruitt, 80 Va. Cir. 590, 599 (Va. Cir. Ct. Patrick Co. 2010) (Sanctioning client and counsel for filing frivolous lawsuit and repeating a worthless argument at direction of client).

For example, in some courts, a motion for sanctions against an opposing party or counsel may draw the ire from the bench. Judge Weckstein, in *Robison v. McLeod & Co.*, cautioned as follows:

A request for relief that accuses opposing counsel of violating § 8.01-271.1 impugns the attorney's professional integrity. It thus should be made only after the most sober consideration. Those who make such a request should, I suggest, satisfy themselves that they have a solid good-faith objectively reasonable belief that the opponent's claim is groundless, unreasonable or frivolous. Just last November, the Supreme Court reminded trial judges that "an award of attorney's fees as a sanction should never be 'a routine matter.'" *Tonti v. Akbari*, 262 Va. 681, 685, 553 S.E.2d 769 (2001). No harm was done here, but I fear that the invocation of § 8.01-271.1 has slipped into the "routine" prayers for relief of too many good lawyers.

Robison v. McLeod & Co., 59 Va. Cir. 154, 162 (Va. Cir. Ct. Roanoke City 2002).

The filing of discovery motions, sanctions motions, and even some dispositive motions can cause more harm than good depending on the local customs of the court. Counsel who proceed unaware of these customs put themselves and their clients at risk of being far less persuasive on the issues that really matter.

5. Understand the utility of denial.

Being intentional in motions practice does not mean filing only motions that have a strong likelihood of success. Negative outcomes are not always negative events. Reasons for filing motions that will likely be denied include:

- Educating the judiciary on an unusual legal issue.
- Providing the Court with the framework and controlling precedent of important issues you expect to develop later in the case.
- Educating your client on the strength or weakness of the case to promote settlement.
- Giving the judge the opportunity to address the clients directly concerning discovery, settlement, or alternative dispute resolution.
- Preserving an important issue for appeal.

6. Prepare persuasively for motions hearings.

Persuasion starts with preparation. Persuasively arguing a motion to the trial judge is the end goal of the research and preparation started long before the first motion is filed. Motions are not handled uniformly across the commonwealth. Never assume that the practice familiar to you in

your local court will be used in an unfamiliar jurisdiction. Counsel should verify several important issues ahead of time to guide their preparation, including:

- Whether specific, focused time is being dedicated to your motion or, instead, your motion will be heard among a cattle call of other motions from other cases.
- Whether a set judge is already handling the case or the case will rotate among judges for motions hearings.
- Whether the judge will be somewhat familiar with the file or seeing it for the first time.
- Whether the judge reviews briefs before the hearing, waits until after the hearing, or reads ahead of time only what is sent directly to chambers by traditional mail or e-mail.
- Whether the judge expects counsel to provide a hearing notebook with copies of pleadings and tabbed exhibits.
- Whether the judge allows sur-reply briefs.

One issue that too frequently arises is how to handle allegedly newly discovered authority that is unmentioned in the briefs but is paraded at the hearing. If opposing counsel uses this tactic in a hearing and the allegedly authoritative case does appear to be relevant, proceed with caution. If you have properly prepared, you may have already known about the “new” authority and have a prepared response. If you are unfamiliar with the case, explain to the judge that you continue to rely upon the arguments previously briefed, demonstrate the prejudice of responding to authority revealed for the first time at the hearing, and request a short period of additional time to respond in writing. While the instinct to respond fully in the heat of the moment is strong, attempting a full response after momentary review of the case allows the opposition to choose the terrain for the fight. Do not cede that ground.

If you discover favorable new authority after briefs have been filed but prior to the hearing, notify opposing counsel as soon as possible of the authority and your intention to present the authority to the Court. When you appear at the hearing, provide the Court and opposing counsel with identically highlighted copies of the case, clearly displaying the relevant holdings upon which you intend to rely.

7. Know the tools available to get a decision if the judge delays.

Delay of rulings on important issues can cause increased costs and unnecessary prejudice to the litigants and attorneys involved in a case. Thus, the Canons of Judicial Conduct require that a judge “shall dispose promptly of the business of the court.” *See* Va. Sup. Ct. R. pt. 6, sec. III, Canon 3(B)(8). The Canons further require that the chief judge of a circuit “take reasonable measures to assure the prompt disposition of matters before the court.” Va. Sup. Ct. R. pt. 6, sec. III, Canon 3(C)(3).

While the Canons address promptness generally, the Code of Virginia speaks far more directly. “In any civil action, a judge of a circuit court who fails to act on any matter, claim, motion, or

issue that has been submitted to the court for a decision or render a final decision in the action shall report, in writing, to the parties or their counsel on any such matter, claim, motion, issue, or action held under advisement for more than 60 days after such submission stating an expected time of a decision.” Code § 17.1-107(A). If a judge fails to report or fails to render a decision within the expected time stated in the report, “any party or their counsel may notify the Chief Justice of the Supreme Court.” *Id.* Once the Chief Justice receives written notice, the Chief Justice shall inquire into the cause of the delay, and, if necessary, shall designate a judge or retired judge of a court of record to assist the regular judge in the performance of his duties. *See id.* Although all notices made to the Chief Justice are absolutely privileged, complaints should be made cautiously.

8. Use motions for reconsideration tactically.

A motion for reconsideration should never be used merely to argue with the judge about why he/she is wrong. Particularly in situations where you achieved partial victory, motions for reconsideration can cause more harm than good. A recent case in the Western District of Virginia exemplifies the peril of moving for reconsideration without responding to the trial judge’s prior concerns. In *County of Grayson v. Ra-Tech Services*, the plaintiffs filed a complaint against the defendants and alleged four causes of action—namely, (1) fraud, (2) constructive fraud, (3) fraud in the inducement, and (4) breach of contract. *See County of Grayson v. Ra-Tech Servs.*, 2013 U.S. Dist. LEXIS 161323 (W.D. Va. Nov. 12, 2013). Judge Conrad dismissed all counts against the individual defendants and dismissed the counts of fraud and constructive fraud against the corporate defendant, but permitted the fraud in the inducement and breach of contract counts to continue. *See id.* at *11.

Plaintiffs filed a motion for reconsideration. Upon reconsideration, Judge Conrad noted that the plaintiffs had misunderstood the court’s reasoning, and Judge Conrad concluded that, upon further review, the Court questioned its earlier ruling allowing the fraud in the inducement claim against the corporate defendant to continue. *See County of Grayson v. RA-Tech Servs.*, 2014 U.S. Dist. LEXIS 33172, *8 (W.D. Va. Mar. 12, 2014). After permitting the plaintiffs an opportunity to fortify their complaint with another amendment, Judge Conrad dismissed the fraud in the inducement count in its entirety. *See County of Grayson v. RA-Tech Servs.*, 2014 U.S. Dist. LEXIS 73945, *11 (W.D. Va. May 29, 2014)(affirmed, *sub nom.*, *County of Grayson v. Spane*, 2015 U.S. App. LEXIS 11464 (4th Cir. July 2, 2015)).

In contrast, a well-prepared written motion to reconsider is generally the best method to use to persuade a trial judge to reconsider his or her decision. A properly crafted motion for reconsideration can also be used as a tool to preserve error in certain circumstances. The motion and/or memorandum in support of the motion should present new arguments and/or authorities not already heard and considered by the trial judge, for example a new appellate court opinion that impacts the trial judge’s decision. Please remember, however, that a motion to reconsider cannot be used to raise for the first time objections that must be made contemporaneously during a trial, for example a hearsay objection or a motion for a mistrial.

A motion to reconsider that does nothing more than repeat arguments already made and ruled on is usually not persuasive and not well-received by the trial judge. However, if previously made arguments and authorities were presented orally without a court reporter present, then a written

motion to reconsider may be an appropriate means to preserve those arguments for appeal. *See* Code § 8.01-384 (“Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statement of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.”). On the other hand, a motion to reconsider will probably not be an effective tool to preserve arguments made during an unrecorded “side bar” conference. The better practice in that situation is to have the court reporter record the “side bar” argument, if at all possible. It is certainly permissible to ask the trial judge to allow the court reporter to do so and, if the judge refuses, note your objection on the record. Also, ask the trial judge for leave to state on the record the arguments made during the “side bar” conference. Again, if the trial judge refuses, note your objection.

One of the hurdles in filing a motion to reconsider is ensuring that the trial judge is aware of the motion and has an opportunity to rule on it, and that the record so reflects. Under Rule 4:15(d), “[o]ral argument on a motion for reconsideration . . . shall be heard orally **only at the request of the court.**” (Emphasis added.). In contrast, “upon request of counsel of record for any party, . . . the court shall hear oral argument” on other types of motions. Rule 4:15(d).

The motion to reconsider should be filed in the clerk’s office, with a copy to opposing counsel and a copy sent directly to the trial judge’s chambers. If the trial judge has not entered a final order, the final order should include language stating the trial judge’s ruling on the motion, thereby preserving for appeal the arguments and issues raised in the motion to reconsider. Objections on the final order should include language incorporating the reasons set forth in the motion to reconsider.

If the trial judge has entered a final order, the motion to reconsider must be filed within 21 days. *See* Rule 1:1. Also, consider asking the trial judge to modify, vacate, or suspend the final judgment to allow time to review and rule on the motion to reconsider. If the trial judge will not modify, vacate, or suspend the final judgment and does not request oral argument on the motion to reconsider or otherwise enter an order within the 21 days ruling on the motion to reconsider, it is imperative that the trial court record clearly demonstrates that the trial judge was aware of the motion to reconsider and had an opportunity to rule on it. *See Brandon v. Cox*, 284 Va. 251, 256 (2012)(Holding that merely filing a motion for reconsideration in the clerk’s office of a circuit court does not properly preserve a litigant’s argument for appeal when the record fails to reflect that the trial court had the opportunity to rule upon that motion.). Documenting in the trial court record that the motion to reconsider was sent directly to the trial judge’s chambers is perhaps one way to accomplish that objective.

A possible alternative is filing a motion for entry of an order ruling on the motion to reconsider and scheduling that motion for a hearing. While you cannot present oral argument or request a hearing on the motion to reconsider itself under Rule 4:15(d), you would be entitled to a hearing on a motion for the limited purpose of entering an order that disposes of the motion for reconsideration. But, again, such an order must be entered by the trial judge with 21 days of the final order. You might also be able to have opposing counsel endorse an order overruling the motion and present that order to the trial court judge for entry within the 21 days.

Finally, if the trial judge does enter an order within the 21 days that does nothing more than overrule the motion to reconsider, the appellate deadlines for filing a notice of appeal and petition for appeal run from entry of the final order, not from the date of the order overruling the motion to reconsider.

9. Get to know your courtroom long before trial.

Trial practice is stressful enough without preventable anxiety over the basic details. Travel to the courthouse ahead of time. Learn where to park and whether that parking will likely be available on a busy court day. Find out what restaurants are available nearby to find lunch during breaks. Ask about the schedule of the court, how early you can arrive, how willing the judge is to allow the trial to go past 5:00 p.m., and how late you can stay to prepare for the next day. Personally examine the technology available in the courtroom and test its compatibility with your devices. Examine counsel's table and determine whether it is large enough to fit the party representative and the team of litigators. Determine the location of the jury box and witness stand. Verify which side of the courtroom the judge expects you to use. Practice logging in to Wi-Fi.

The goal is to avoid surprises, to become comfortable with the terrain, and to master the use of the available tools, so that you can best tell your client's story to the judge and jury.

PRACTICE POINTERS IN THE APPELLATE COURT

1. Write your petition persuasively for the appropriate audience.

To be persuasive, the petition should marshal the facts, present them in a logical fashion, and provide specific references to the record. Assignments of error should be carefully sifted, as unnecessary assignments will distract the panel from your best points and minimize the time that the panel has for your strongest arguments. The Court views cases as opportunities for either error correction or law development, so explain why the decision appealed from either is plainly wrong, conflicts with existing law, or provides an opportunity to develop or harmonize existing law. For the respondent, the brief in opposition should rephrase the issues to the respondent's advantage and point out any procedural or jurisdictional defect in the petition. These defects should also be raised separately in a motion to dismiss.

2. Take full advantage of the opportunity to persuade the Panel at oral argument.

Oral argument should always be presented in person, and should virtually never be waived. Persuasive counsel will know the record and their argument and will never read their argument to the Panel. Counsel must respond to the questions asked by the Justices. Remember, it only takes one vote to get your Petition granted. Oral argument should be limited to the most important points and arguments, but the Panel's questions may inform counsel which points are really the most important.

3. Understand the unique opportunities and challenges of a petition for rehearing if your petition for appeal or assignment of cross-error is denied.

A petition for rehearing can be filed after refusal of a petition for appeal, refusal of one or more assignments of cross-error, or upon disposition of an original jurisdiction petition. *See* Rule 5:20. Unlike the petition for appeal, which is considered by a panel of three and can include up to two retired Justices, petitions for rehearing will be considered by all the current Justices, not just the panel of Justices who heard the petition for appeal. It takes only one Justice to grant the petition for rehearing, the petition for appeal, or assignment(s) of cross-error.

Nevertheless, petitions for rehearing are seldom granted. Thus, it is imperative that you explain in the first few paragraphs precisely why the appeal or assignments of cross-error should have been granted. You cannot simply refer to the petition for appeal or make the same arguments. In other words, you need to capture the attention of the Justices immediately and present a compelling reason why the petition for appeal or assignments of cross-error should have been granted. The Court receives hundreds of petitions for rehearing during a year. Thus, your petition for rehearing must stand out from all the rest in the opening sentence.

4. Write your brief persuasively in a manner that conveys your competence, credibility, and control of the facts and law to the Court.

Remember to whom you are writing in everything that you write in a brief. Do not refer to the parties as Appellant and Appellee. Choose terms that clearly designate the role the parties played in the case. “Shepardize” all your cases multiple times. Citing bad law goes to the essence of credibility. Start with your strongest arguments, and show the Court the narrowest grounds upon which it can decide in your favor. Include the standard of review, and specify precisely the relief you want. Throwing in the kitchen sink does not win you any friends on the bench. Do not include facts that are not in the record; the Court will not consider them.

5. Update your brief if new relevant authority is handed down by a Court.

Pursuant to Rules 5:6A and 5A:4A, which became effective July 1, 2015, a party that discovers “pertinent and significant authorities” may “promptly advise the clerk by letter, with a copy to all other parties[.]” The letter must set forth the citation or citations, explain the reasons for the supplemental citations, “referring either to the page of the brief or to a point argued orally.” Rules 5:6A and 5A:4A. The body of the letter cannot exceed 350 words and any response must be made promptly and also cannot exceed 350 words. In its discretion, the appellate court “may refuse to consider the supplemental authorities if they unfairly expand the scope of the arguments on brief, raise matters that should have been previously briefed, appear to be untimely, or are otherwise inappropriate to consider.” Rules 5:6A and 5A:4A.

6. Choose carefully what you are asking the Court to do and be specific about that request.

Be specific about the relief you are requesting. Know whether you seek reversal, remand, final judgment, a new trial in part, or a completely new trial. Make the relief you seek clear to the Court. *See Egan v. Butler*, 2015 Va. LEXIS 86 (Va. June 4, 2015) (Holding that, because of the assignments of error and an admission at oral argument, the procedure on remand would include partial reversal with final judgment denying punitive damages against a corporate defendant, require reversal and remand for a new trial on the issue of compensatory damages, and “not disturb” the circuit court’s judgment concerning the issues of liability and punitive damages awards against the individual defendant.)

Be specific about what you ask the Court to do with prior precedent. Generally, appellate courts prefer to decide cases on the narrowest grounds possible. To the extent that precedent or a decision of the Court of Appeals can be distinguished rather than overruled or reversed, respectively, explain that rationale both on brief and in oral argument.

If a decision in your favor is only possible by overruling precedent, then be candid about that fact and do not be timid in asking the appellate court to do so. Using the recognized principles designed to test the costs of reaffirming and overruling a prior case, explain to the appellate court why overruling precedent is warranted despite the rule of *stare decisis*. *See Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992). Also, if a dissenting opinion in the prior case is helpful to your argument, do not hesitate to cite it even if the author of the dissent is hearing the case.

Reversing a decision of the Court of Appeals will be less problematic for the Supreme Court of Virginia than overruling its own precedent, even though some of the Justices formerly sat on the Court of Appeals. In many instances, the Supreme Court has reversed the Court of Appeals. You must always be prepared to answer questions that explore the ramifications of overruling precedent or reversing the Court of Appeals in the context of other hypothetical cases. The Justices are rightfully concerned about the “unintended consequences” of any decision.

Be clear about the difference between controlling and persuasive authority. If you cite a case as persuasive, explain why it is persuasive and applicable. In evidentiary law, for example, the Virginia Rules of Evidence were adopted to implement established evidentiary principles under the common law and not to change existing case law rendered prior to the adoption of the Rules. *See* Rule 2:102. Thus, it is appropriate and persuasive to rely on established Virginia case law in interpreting and applying the Rules of Evidence in a given case. If a particular federal rule of evidence corresponds to a Virginia rule, it is permissible and can be persuasive to cite to relevant federal cases. Those cases are not, however, binding precedent.

7. Use oral argument as your opportunity to be a part of the Court’s discussion of the case.

Persuasive counsel know the facts, the record, the case law, and any relevant statutes. Be aware that the Court sees many of the same counsel repeatedly. At this stage, the Court will be familiar

with the case and the facts, so do not waste time reciting facts unnecessarily. Practice repeatedly alone and in moot court settings. Practice with a timer, but be aware that questions will likely take a portion of your time. Do not bring a large file or stack of papers to the podium. Flipping papers only distracts the advocate and the Court. Do not read the brief to the Court; the Justices have already read the brief multiple times.

Remember the audience. Appellate argument is not the time to wander from the lectern, present dramatic jury arguments, and display trial theatrics. Respond immediately to the questions asked by the Court. The Justices, not the advocate, decide when it is time to address an issue. Credibility is everything. Do not misstate the law or facts. It is better to admit ignorance than to argue dishonestly. Address the Court appropriately. Importantly, the Supreme Court of Virginia does not have “Associate” Justices. The Court is the Chief Justice and Justices.

8. Be aware of the opportunity to petition the Court for rehearing after its decision, but use that opportunity only when appropriate.

A petition for rehearing can be filed after consideration of an appeal by the full Supreme Court of Virginia. *See* Rule 5:37. Please note that the procedures for filing a petition for rehearing in the Court of Appeals of Virginia are different in some respects. *See* Rules 5A:15, 5A:15A, 5A:32, 5A:33, 5A:34, and 5A:35.

After a case is considered by the full Court, a petition for rehearing should only be filed when you can demonstrate that the Court was clearly mistaken in some respect. Some examples include the Court overlooking relevant authority that compels a different result or misunderstanding the facts and/or the law. At this stage, it is rare for a petition for rehearing to be granted. Only a Justice who joined the majority opinion can grant a petition for rehearing. If a decision was 4 to 3, the chances of persuading one Justice who was in the majority are perhaps better than when the majority opinion has more support. However, do not jeopardize your credibility with the Court by filing petitions for rehearing that have no genuine merit.

9. Educate yourself about your audience before writing or speaking to them.

Especially when arguing before the Supreme Court of Virginia, counsel has ample opportunity to prepare for their audience with the Court. Persuasive counsel will be aware whether a current member of the Court authored an opinion that is key in the case, whether any of the members of the Court have particular expertise with the issues in the appeal, and whether any individual members of the Court typically rule a particular way in this type of case. The appellate advocacy website developed by William & Mary Law School contains helpful information about each of the current Justices and an extensive video interview with several current and former Justices. *See* www.appellate.law.wm.edu.

10. Do not hesitate to seek assistance from experienced appellate counsel.

As you can ascertain from this outline, an appeal starts at the trial court and can be lost there if error is not preserved. Parts Five and Five A of the Rules of the Supreme Court of Virginia, which govern proceedings before the Supreme Court of Virginia and the Court of Appeals of Virginia, respectively, are not intended to be “traps” for the inexperienced appellate attorney, but they are, nevertheless, complicated. *See* the attached “Brief Review of Appellate Procedure” for a selective review of important appellate procedural rules. Many of the Rules are jurisdictional, and failure to follow those particular Rules requires the appeal to be dismissed. *See* Rules 5:1A(a) and 5A:1A(a). Examples of such Rules include Rules 5:9(a) and 5A:6(a) requiring a notice of appeal to be filed within 30 days after entry of final judgment and Rules 5:17(a) and 5A:12(a) setting forth the time periods in which a petition for appeal must be filed. If failure to comply with the Rules results in a dismissal of an appeal, the Court may report the attorney to the Virginia State Bar. *See* Rules 5:1A(b) and 5A:1A(b). Such reporting does indeed occur. Thus, a thorough understanding of the Rules is required even by a trial attorney.

A successful appeal requires not only preservation of error and compliance with the Rules, but also persuasive framing of the issues. An appellate court is more likely to grant compelling and carefully drafted assignments of error and assignments of cross-error. Experience as an appellate attorney provides unique insight in that regard and also in determining what issues should be pursued on appeal. Not every issue is going to get the appellate court’s attention. Because of the various page limits applicable at different stages of an appeal, an experienced appellate attorney understands how to utilize that limited space to present the issues and arguments most effectively. The same understanding is equally valuable at oral argument either on a petition for appeal or on the merits before the full appellate court.

Whether handling an appeal or acting as a consultant, an experienced appellate attorney can provide a level of expertise even at the trial stage that will prove valuable. We must all remember that Rule 1.1 of the Virginia Rules of Professional Conduct require an attorney “to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

CONCLUSION

The skills and methods at issue in persuading judges differ in distinct ways from the skills and methods used in persuading lay people and jurors. Equally important to counsel, the relationships and reputations built with the judiciary are long-term. Successful counsel will be practicing repeatedly before the same jurists in the same tribunals. Every appearance before a judge or justice is an opportunity to bolster—or diminish—one’s reputation for candor, credibility, and professionalism. There are no shortcuts to persuading the judiciary, but there are tried and true methods for professional persuasion. Cases and clients will come and go. But much of your career will be determined by how well you can master and marshal the facts and law and combine them with the credibility of a true professional to persuade individuals sitting on the other side of the bench. Take each opportunity seriously, and the bench will take you and the positions you advocate seriously.

BRIEF REVIEW OF APPELLATE PROCEDURE

Preserving Error

Knowing your audience on appeal begins with preserving error at trial. When the trial judge rules against the client on an issue, counsel's audience immediately changes to the appellate court. This change in audience mandates preserving error even when the immediate audience—the trial judge—may no longer want to hear the argument. Virginia Rule 5:25 provides "No ruling of the trial court, disciplinary board, or commission before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review." See *Hilton v. Fayen*, 196 Va. 860, 866, 86 S.E.2d 40, 43 (1955). Rule 5:25 exists "to protect the trial court from appeals based upon undisclosed grounds, to prevent the setting of traps on appeal, to enable the trial judge to rule intelligently, and to avoid unnecessary reversals and mistrials." See *Fisher v. Commonwealth*, 236 Va. 403, 414 (1988) *cert. denied*, 490 U.S. 1028 (1989). Counsel must present all arguments to the trial court on each ruling with which they disagree, as arguments not presented to the trial court will not be considered on appeal. See *Buck v. Jordan*, 256 Va. 535, 545-46, 508 S.E.2d 880, 885-86 (1998).

By statute, formal exception to rulings and orders of the Court are no longer necessary to preserve error, at least in theory. Virginia Code § 8.01-384(A) provides as follows:

Formal exceptions to rulings or orders of the court shall be unnecessary; but for all purposes for which an exception has heretofore been necessary, it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal. No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court. No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.

However, the best practice is still to object to the Order in writing and list your reasons. Moreover, the timeliness of an objection remains of vital importance, and the contemporaneous objection rule continues to be an important issue that draws fine distinctions between preserved and waived error. Recently, in *Maxwell v. Commonwealth*, our Supreme Court ruled on consolidated appeals from the Court of Appeals concerning the contemporaneous objection rule.

See Maxwell v. Commonwealth, 287 Va. 258 (2014). The Supreme Court ruled that defense counsel preserved error when counsel had no opportunity to make a contemporaneous objection to the circuit court's consideration of the jury questions because the defendant and his counsel were absent from the courtroom with the court's permission, and the circuit court did not inform them that the jury submitted questions to the court or that the court was going to provide an answer. *See id.*, 287 Va. at 266. Counsel objected when he became aware of the alleged error. *Id.* In contrast, defense counsel waived error when the Commonwealth presented allegedly improper closing argument, defense counsel requested opportunity to make a motion outside the presence of the jury, and defense counsel accepted the trial court's preference to "deal with it when the jury goes out to retire[.]" *Id.* at 269. The Court demonstrated the fine line between preservation and waiver of error through its dissenting Justices. Two Justices dissented, concluding that both defendants had preserved their appeal, while one Justice dissented, concluding that neither defendant preserved his appeal.

The same day as the *Maxwell* opinion, the Supreme Court decided *Commonwealth v. Amos*, 287 Va. 301 (2014). In *Amos*, a complaining witness at a show cause hearing suddenly found herself in the role of defendant when the trial court dismissed the rule to show cause and "summarily held Ms. Amos in contempt of court pursuant to Code § 18.2-456, sentenced her to jail for ten days, remanded her into custody, and called the next case." *See id.*, 287 Va. at 304. The Court of Appeals, *en banc*, reversed the conviction in a 6-5 decision. *See id.* at 305. The Commonwealth appealed, arguing that Ms. Amos "failed to preserve the issues she raised on appeal because she did not object at the time the trial court held her in contempt and she did not get a ruling on her motion for reconsideration or show that the trial court was made aware of her arguments[.]" *Id.* The Supreme Court affirmed the *en banc* Court of Appeals. *Id.* at 307 (Concluding that "a person who had no opportunity to object at the time a ruling is made may be able to and may choose to file a motion to reconsider. It may even be wise to do so. Such a step, however, is not required under Code § 8.01-384(A) in order to preserve an issue for appellate review.").

To preserve an objection to testimony and exhibits, state the specific grounds for objection when the testimony is elicited or the exhibit is proffered. If an objection against the proponent's testimony is sustained, the proponent must make a complete and thorough proffer of the testimony for the record. "Without such a proffer, [the Court] cannot determine the admissibility of the proposed testimony and, if admissible, whether the [...] exclusion of that evidence prejudiced" the appellant. *Holles v. Sunrise Terrace*, 257 Va. 131, 135 (1999).

A jury instruction "given without objection and exception" becomes "the law of this case and is binding on the litigants and this court." *See Shamblee v. Virginia Transit Co.*, 204 Va. 591, 594-595 (1963). Instructions given without objection "are binding upon us, irrespective of their correctness." *See Babbitt v. Miller*, 192 Va. 372, 378 (1951). When objecting to an instruction, counsel must state all specific grounds for the objection. Mere citation to cases "does not satisfy the requirement that an objection be stated 'with reasonable certainty at the time of the ruling.'" *See*

Morgen Indus. v. Vaughan, 252 Va. 60, 68 (1996). If the trial judge rejects a proposed instruction, counsel must proffer the rejected instruction, or appeal is waived. *See Cherrix v. Com.*, 257 Va. 292, 311, 513 S.E.2d 642, 654 (1999).

Noticing Appeal of a Final Order

The next step in knowing your audience on appeal is properly getting the Petition for Appeal before the Court. To even be appealable, a judgment must be final as to all parties, unless the interests of defendants are severable and the result of an appeal will not affect determination of remaining issues. *See Wells v. Whitaker*, 207 Va. 616, 628-29, 151 S.E.2d 422, 432-33 (1966); *Bowles v. City of Richmond*, 147 Va. 720, 725, 129 S.E. 489, 489-90 (1925). More recently, however, the Supreme Court clarified the issue of multi-party cases in Rule 5:8A, which states:

Rule 5:8A. Appeal From Partial Final Judgment in Multi-Party Cases.

(a) *When Available.* When claims for relief are presented in a civil action against multiple parties – whether in a complaint, counterclaim, cross-claim, or third-party claim – the trial court may enter final judgment as to one or more but fewer than all of the parties only by entering an order expressly labeled "Partial Final Judgment" which contains express findings that (i) the interests of such parties, and the grounds on which judgment is entered as to them, are separate and distinct from those raised by the issues in the claims against remaining parties, and (ii) the results of any appeal from the partial final judgment cannot affect decision of the claims against the remaining parties, and (iii) decision of the claims remaining in the trial court cannot affect the disposition of claims against the parties subject to the Partial Final Judgment if those parties are later restored to the case by reversal of the Partial Final Judgment on appeal.

(b) *Time to Appeal.* Entry of an order of Partial Final Judgment as provided in subparagraph (a) of this Rule commences the period for filing a notice of appeal from such Partial Final Judgment under Rule 5:9 and a petition for appeal under Rule 5:17, subject to the provisions of Rule 1:1 and these Rules.

(c) *Refusal of Partial Final Judgment.* No appeal shall lie from a refusal by the trial court to enter a Partial Final Judgment under this Rule.

(d) *Other Dispositions Adjudicating Claims Against Fewer than All Parties.* In the absence of the entry of a Partial Final Judgment order as provided in subparagraph (a) of this Rule, any order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties in the action is not a final judgment.

Thus, in multi-party cases, counsel should pay particular attention to orders affecting only some defendants to determine whether the order qualifies as a Partial Final Judgment under Rule 5:8A.

According to Rule 1:1, "All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer.... The date of entry of any final judgment, order, or decree shall be the date it is signed by the judge either on paper or by electronic means in accord with Rule 1:17." Accordingly, "[n]either the filing of post-trial or post-judgment motions, nor the court's taking such motions under consideration, nor the pendency of such motions on the twenty-first day after final judgment, is sufficient to toll or extend the running of the 21-day period prescribed by Rule 1:1 or the 30-day period prescribed

by Rule 5:9.” *School Bd. v. Caudill Rowlett Scott, Inc.*, 237 Va. 550, 556 (1989) (internal citations omitted). “The running of time under those rules may be interrupted only by the entry, within the 21-day period after final judgment, of an order suspending or vacating the final order.” *Id.* Any order entered by the trial court after the 21-day period is a nullity, and failure to file a notice of appeal with the clerk of the trial court within 30 days after entry of the final order, as required by Rule 5:9, is jurisdictional and mandatory. *Id.* However, if an order sustains a demurrer, and gives the plaintiff leave to amend, it does not become final “until after the time limited therein for the plaintiff to amend his bill has expired.” *See Norris v. Mitchell*, 255 Va. 235, 239 (1998).

The mere entry by the trial judge of an Order retaining jurisdiction is insufficient to retain jurisdiction. *See Super Fresh Food Mkts. of Va. v. Ruffin*, 263 Va. 555 (2002). In *Super Fresh Food Markets*, a jury trial on April 21, 2000, ended in a plaintiff’s verdict. *See id.* at 558. Following post-trial motions, on August 23, 2000, the trial court entered an “Opinion and Order” declining remittitur and entering “judgment consistent with that returned by the jury.” *See id.* at 559. Eight days later, on August 31, 2000, the defendant moved for reconsideration and requested an order “retaining jurisdiction of the action[.]” *Id.* On September 12, 2000, twenty days after the August 23, 2000, Opinion and Order, the trial court “entered an order stating that ‘this court shall retain jurisdiction over this action until such time as this court may consider and rule on’ Super Fresh’s motion for reconsideration.” *Id.* The trial court then entered a “Final Order” dispensing of the motion for reconsideration on March 26, 2001, and the defendant noted appeal 26 days later on April 21, 2001. *Id.* The Supreme Court held “that the language of the September 12, 2000 order purporting to extend the period of the trial court’s jurisdiction beyond the post-judgment twenty-one day time period of Rule 1:1 was ineffective because that order did not modify, vacate, or suspend the final judgment rendered by the August 23, 2000 order.” *Id.* at 563. The trial court’s subsequent actions were void for want of jurisdiction, and the Supreme Court lacked jurisdiction to consider any appeal from the judgment rendered in the August 23, 2000 order. *See id.* The Supreme Court continued:

Having resolved this particular appeal, we take this opportunity to emphasize that the provisions of Rule 1:1 are mandatory in order to assure the certainty and stability that the finality of judgments brings. Once a final judgment has been entered and the twenty-one day time period of Rule 1:1 has expired, the trial court is thereafter without jurisdiction in the case. Thus, only an order within the twenty-one day time period that clearly and expressly modifies, vacates, or suspends the final judgment will interrupt or extend the running of that time period so as to permit the trial court to retain jurisdiction in the case. Finally, we also stress that a judgment which has been properly vacated or suspended under Rule 1:1 does not become a final judgment thereafter without a subsequent order confirming it as originally entered or as modified.
Id. at 563-64 (internal citation omitted) (emphasis in original).

Thus, in contrast to the issue of error preservation that is a fine line where reasonable minds—even reasonable minds on the Court—often differ, the issue of notice of appeal following a final order is a bright line with predictable consequences for the party that fails to properly file the notice in time.

The Rules governing the filing of the Notice of Appeal are as follows:

Rule 5:9. Notice of Appeal.

(a) *Filing Deadline; Where to File.* No appeal shall be allowed unless, within 30 days after the entry of final judgment or other appealable order or decree, or within any specified extension thereof granted by this Court pursuant to Rule 5:5(a), counsel for the appellant files with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel. A notice of appeal filed after the court announces a decision or ruling – but before the entry of such judgment or order – is treated as filed on the date of and after the entry.

(b) *Content.* The notice of appeal shall contain a statement whether any transcript or statement of facts, testimony and other incidents of the case will be filed. In the event a transcript is to be filed, the notice of appeal shall certify that a copy of the transcript has been ordered from the court reporter who reported the case or is otherwise already in the possession of appellant, or was previously filed in the proceedings.

(c) *Separate Cases.* Whenever two or more cases were tried together in the trial court, one notice of appeal and one record may be used to bring all of such cases before this Court even though such cases were not consolidated by formal order.

(d) *Special Provision for Cases Involving a Guardian Ad Litem.* No appeal shall be dismissed because the notice of appeal fails to identify a guardian ad litem or to provide notice to a guardian ad litem. Upon motion for good cause shown or by sua sponte order of this Court, the notice of appeal may be amended to identify the guardian ad litem and to provide notice to such guardian.

Rule 5:14. Notice of Appeal; Certification.

(a) *Notice of Appeal.* No appeal from a judgment of the Court of Appeals which is subject to appeal to this Court shall be allowed unless, within 30 days after entry of final judgment or order denying a timely petition for rehearing, a notice of appeal is filed with the clerk of the Court of Appeals.

(b) *Notice of Certification.* Whenever this Court shall certify a case pending in the Court of Appeals for review by this Court, notice of certification shall be given by the clerk of this Court to all counsel and to the clerk of the Court of Appeals. A case certified for review by this Court shall proceed as if a petition for appeal had been granted by this Court on the date of the certification for review, except as otherwise ordered.

(c) *Bail Pending Appeal in Criminal Cases.* In criminal cases, either party may appeal an order of the Court of Appeals affirming, reversing, or modifying a circuit court order regarding bail pending appeal as provided by this Rule, Rule 5:15 and Rule 5:17.

The Petition for Appeal - Timing

In an appeal from the Court of Appeals, the Petition for Appeal must be filed with the clerk of the Supreme Court of Virginia within the same 30 days after entry of the judgment appealed from or a denial of a timely petition for rehearing. Rule 5:17(a)(2). In the case of an appeal direct from a trial court, the Petition for Appeal must be filed with the clerk of the Supreme Court of Virginia “not more than three months after entry of the order appealed from[.]” Rule 5:17(a)(1). These timelines, too, are mandatory and jurisdictional requirements which cannot be waived. *See Condrey v. Childress*, 203 Va. 755, 757 (1962).

Rule 5:5(c) provides:

(c) *How to File by Mail in a Timely Manner.* Any document required to be filed with the clerk of this Court shall be deemed to be timely filed if (1) it is transmitted expense pre-paid to the clerk of this Court by priority, express, registered, or certified mail via the United States Postal Service, or by a third-party commercial carrier for next-day delivery, and (2) if the official receipt therefor be exhibited upon demand of the clerk of this Court or any party and it shows such transmission or mailing within the prescribed time limits. This rule does not apply to documents to be filed in the office of the clerk of the trial court or clerk of the Virginia Workers' Compensation Commission or clerk of the State Corporation Commission.

Moreover, “The times prescribed for filing the notice of appeal (Rules 5:9(a), 5:14(a) and 5:21(c)), a petition for appeal (Rules 5:17(a) and 5:21(g)), a petition for review pursuant to Code § 8.01-626 (Rule 5:17A) and a petition for rehearing (Rules 5:20 and 5:37), are mandatory.” Rule 5:5(a). However, “A single extension not to exceed thirty days may be granted if at least two Justices of the Supreme Court of Virginia concur in a finding that an extension for papers to be filed is warranted by a showing of good cause sufficient to excuse the delay.” Rule 5:5(a).

The Petition for Appeal – Contents

“Under a heading entitled “Assignments of Error,” the petition shall list, clearly and concisely and without extraneous argument, the specific errors in the rulings below upon which the party intends to rely, or the specific existing case law that should be overturned, extended, modified, or reversed.” Rule 5:17(c)(1). “An exact reference to the page(s) of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court or other tribunal from which the appeal is taken shall be included with each assignment of error.” *Id.* If the petition for appeal does not contain assignments of error, the petition shall be dismissed. If the respondent seeks to assign cross-error, the brief in opposition must contain an assignment or assignments of cross-error, and the cover of the brief must so indicate by being styled, “Brief in Opposition and Assignment of Cross-Error.” Rule 5:18(c). Importantly, if the appellant files a reply brief, oral argument is waived unless the reply brief responds solely to assignments of cross-error. Rule 5:19.

“When appeal is taken from a judgment of the Court of Appeals, only assignments of error relating to assignments of error presented in, and to actions taken by, the Court of Appeals may

be included in the petition for appeal to this Court.” Rule 5:17(c)(1)(ii). An assignment of error that does not address a finding or ruling of a “[t]ribunal from which an appeal is taken” is insufficient, and “[i]f the assignments of error are insufficient, the petition for appeal shall be dismissed.” *See* Rule 5:17(c)(1)(iii). “By prescribing dismissal of the appeal, [Rule 5:17(c)(1)(iii)] established that the inclusion of sufficient assignments of error is a mandatory procedural requirement and that the failure to comply with this requirement deprives this Court of its active jurisdiction to consider the appeal.” *See Davis v. Commonwealth*, 282 Va. 339, 339 (2011). In *Davis*, the Defendant-Appellant failed to “assign error to the Court of Appeals’ holding that his guilty plea waived non-jurisdictional defects” and, thereby, waived his appeal to the Supreme Court. *See id.*

However, Petitioners and Appellants need not include a “because” clause in each assignment of error to properly preserve error. *See Findlay v. Commonwealth*, 287 Va. 111, 116 (2014). Thus, an assignment of error stating, “The Petitioner/Appellant assigns as error the trial court’s denial of his Motion to Suppress all of the seized videos that came from the defendant’s computer, and his computer hard drive, and all derivatives thereof” and providing exact reference to the error in the record is sufficient. *Id.* at 113.

The Record on Appeal

“In cases on appeal from the Court of Appeals and those certified for review, the record in this Court shall consist of the record as filed in the office of the clerk of the Court of Appeals and, in addition, all other documents relating to the case which have been filed in the office of the clerk of the Court of Appeals, including any opinion or memorandum decision in cases decided by the Court of Appeals.” Rule 5:15(a). Rule 5:10 governs the record on appeal from a trial court as follows:

Rule 5:10. Record on Appeal: Contents.

(a) *Contents.* The following constitute the record on appeal from the trial court:

- (1) the documents and exhibits filed or lodged in the office of the clerk of the trial court, including any report of a commissioner in chancery and the accompanying depositions and other papers;
- (2) each instruction marked “given” or “refused” and initialed by the judge;
- (3) each exhibit offered in evidence, whether admitted or not, and initialed by the trial judge (or any photograph thereof as authorized by § 19.2-270.4 (A) and (C)). (All non-documentary exhibits shall be tagged or labeled in the trial court and the tag or label initialed by the judge.);
- (4) the original draft or a copy of each order entered by the trial court;
- (5) any opinion or memorandum decision rendered by the judge of the trial court;
- (6) any deposition and any discovery material encompassed within Part Four offered in evidence (whether admitted or rejected) at any proceeding; and

(7) the transcript of any proceeding or a written statement of facts, testimony, and other incidents of the case when made a part of the record as provided in Rule 5:11, or the official videotape recording of any proceeding in those circuit courts authorized by this Court to use videotape recordings. This Court may require that any videotape proceedings be transcribed, in whole or in part, and made a part of the record as provided in Rule 5:11, except that the transcript shall be filed within 60 days after the entry of the order requiring such transcript; and

(8) the notice of appeal.

(b) *Disagreement on Contents*. If disagreement arises as to the contents of any part of the record, the matter shall, in the first instance, be submitted to and decided by the trial court.

“The transcript of any proceeding in the case that is necessary for the appeal shall be filed in the office of the clerk of the trial court within 60 days after entry of judgment.” Rule 5:11. But, note, “When the appellant fails to ensure that the record contains transcripts or a written statement of facts necessary to permit resolution of appellate issues related to the assignments of error, any assignments of error affected by the omission shall not be considered.” Rule 5:11(a)(1). Thus, a petitioner must order the transcript as soon as possible, because a tardy court reporter could prevent the Court from considering an issue on appeal. While Rule 5:11 also allows for a written statement in lieu of a transcript, a transcript is always better than a written statement of facts.

Failure to timely file a portion of the transcript may be remedied by motion to the circuit court and entry of an order correcting an "oversight" or "inadvertent omission" under Code § 8.01-428(B). *See Belew v. Commonwealth*, 284 Va. 173, 179 (2012). Whether the court reporter's error involves specific correction of a word within a transcript or the omission of the transcript of an entire day of proceedings “is a distinction without a difference.” *Id.* at 180. Additionally, the plain language of Rule 5A:8(a) provides a party 90 days from the entry of final judgment within which to file a motion to extend the 60-day period within which to file transcripts, and a temporarily *pro se* litigant's reliance on errant information received from the court reporter is good cause to grant the extension. *See LaCava v. Commonwealth*, 283 Va. 465, 471 (2012).

Failure to properly file a transcript, which can be remedied, should not be confused with failure to create the record in the trial court, which is fatal waiver of error. Thus, when all the relevant discussions related to an issue were held off the record in a sidebar conference, error was waived. *See Galumbeck v. Lopez*, 283 Va. 500, 508 (2012). A unilateral statement by counsel to the court reporter after court has adjourned and outside the presence of opposing counsel is not a proffer to preserve error. *See id.* Only informed acquiescence of the opposing side, mutual stipulations, or testimony given in the absence of the jury and made a part of the record in the manner prescribed by the Rules of Court shall constitute a proper proffer. *See id.*

The Appendix

The Appendix is governed by Rule 5:32.

Rule 5:32. Appendix.**(a) Responsibility of the Appellant.**

(1) Contents of the Appendix. The appellant must prepare and file an appendix. The appendix shall contain:

- (i) the initial pleading (as finally amended), unless other versions are necessary to consider the assignments of error;
- (ii) final judgments of all tribunals that have considered the case, including the judgment appealed from, and any opinion relating to such judgments;
- (iii) testimony and other incidents of the case germane to the assignments of error;
- (iv) exhibits necessary for an understanding of the case that can reasonably be reproduced;
- (v) the granted assignments of error and cross-error;
- (vi) other parts of the record to which the parties wish to direct this Court's attention; and
- (vii) a table of contents as described in paragraph (d) below.

(2) Assumptions and Excluded Material. It will be assumed that the appendix contains everything germane to the granted assignments of error and, if any, assignments of cross-error. Memoranda of law in the trial court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by this Court or the parties even though not included in the appendix.

(3) Time to File; Number of Copies.

- (i) Generally. The appellant must file 3 printed copies and an electronic copy of the appendix with the appellant's brief, and must serve an electronic copy on counsel for each party separately represented. This Court may by order require the filing or service of a different number. The appendix shall be filed in the manner prescribed by the Guidelines and User's Manual, using the Virginia Appellate Courts eBriefs System (VACES). The Guidelines are located on the Court's website at www.courts.state.va.us/online/vaces/resources/guidelines.pdf.

(b) Responsibility of All Parties.

(1) Determining the Contents of the Appendix. The parties are encouraged to agree on the contents of the appendix. Within 15 days after the date of the

certificate of the clerk of this Court issued pursuant to Rule 5:23, counsel for appellant shall file in the office of the clerk of this Court a written statement signed by all counsel setting forth an agreed designation of the parts of the record on appeal to be included in the appendix. In the absence of an agreement, the appellant must, within 15 days after the date of the certificate of appeal issued by the clerk of this Court pursuant to Rule 5:23, file with the clerk of this Court and serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix. The appellee may, within 15 days after receiving the designation, file with the clerk of this Court and serve on the appellant a designation of additional parts of the record the appellee deems germane. The appellant must include the parts designated by the appellee in the appendix, together with any additional parts the appellant considers germane. The parties must not engage in an unnecessary designation of parts of the record, because the entire record is available to the Court. [....]

Conclusion

Do not wait to master the appellate rules until you are considering filing a notice of appeal. Proper appellate procedure must be considered during motions practice, discovery, trial, and post-trial motions. Procedural errors can be terminal to your appeal and could result in the appellate court referring you to the Virginia State Bar. But if you learn and follow the rules, you can play a vital role in representing your clients, achieving justice, and developing the law of Virginia.

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GENTRY LOCKE
Attorneys

Getting to Closing

The Impossible Deal

W. William Gust gust@gentrylocke.com

Christen C. Church church@gentrylocke.com

Christopher M. Kozlowski kozlowski@gentrylocke.com

Presented at The Hotel Roanoke & Conference Center in Roanoke, Virginia on September 18, 2015.

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“If the road is easy, you’re likely going the wrong way.”

- Terry Goodkind

Each business transaction is unique and presents its own challenges. Even smaller transactions can have twists and turns that require a great deal of attorney management. If you find no significant hurdles in a transaction, it will be necessary to reassess your process to ensure that mole hills don’t turn into mountains on the day of closing.

The purpose of this outline is to set a baseline process for handling transactions, large or small. This outline is not intended to help attorneys avoid problems, rather, we hope to help attorneys *manage* the inevitable problems that arise. Avoiding problems now only causes headaches one, two and three years down the road. This outline should serve to be useful step-by-step guide to help attorneys attack and confront the problems inherent in each deal that comes through the door:

STEP 1. 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.

STEP 2. 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.

STEP 3. 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.

STEP 4. 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.”

STEP 5. Consider the tax consequences.

- a) Analyze them again.
- b) Consider the tax consequences to everyone in the transaction.

STEP 6. 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.
- f) A sample LOI is included at the end of this outline.

STEP 7. 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.

STEP 8. Assemble your deal team.

- a) Identify material aspects of the transaction (tax, real estate, employee benefits, etc.)
- b) Identify individuals who can assist in these aspects.
- c) Set out expectations of the deal team and timelines at the start of the process.
- d) Assign deal team members special risk management tasks. For example, use your real estate team member to deal with access rights and determine what language should be used in the finalized agreements.

STEP 9. Identify the path to closing.

- a) Perhaps the most important document in any transaction is the closing checklist.
- b) The closing checklist must be thorough and include all diligence items, closing documents, and post-closing action items.
- c) Update the closing checklist often.

- d) As you get closer to the closing date, consider creating a “short list” of the few items left outstanding.

STEP 10. Have a system in place for effective legal due diligence and decision making.

- a) Make clear assignments of due diligence obligations.
- b) Involve paralegals and assistants. Don't underestimate the value of paralegals and assistants.
- c) When your group makes a decision with respect to a transaction point, document that decision in writing, even if it takes the form of an email.

STEP 11. Take care of the items requiring lead time.

- a) Notices.
- b) Meetings.
- c) Shareholder and director consents.
- d) Resolutions.
- e) Third-party consents.
- f) Complete the schedules.

STEP 12. Again: be honest.

- a) Do not let people lie, ever, about anything.
- b) Correct any fact mistakes.
- c) Correct any misstatements or misinterpretations.
- d) Uncorrected misinterpretations or assumptions can lead to big picture problems close to closing.

STEP 13. 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.

STEP 14. Be organized.

- a) Identify a work room or commandeer a conference room to keep track of all deal documents.
- b) Ensure that all documents, drafts, notes and other items are kept in the file and easily accessible.
- c) There is no such thing as having too many folders.

STEP 15. 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.
- f) Keep drafts of documents. Date every draft.
- g) Keep track of comments made by each party.
- h) When incorporating comments, explain why certain changes were or were not made. Explain why in writing.

STEP 16. 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).

STEP 17. 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.

STEP 18. Understand the indemnity provisions.

- a) Use as a device to allocate risk between the parties.
- b) Know what “market” is. For example, refer to BNA reports, which will explain what typical deals use. These reports will help attorneys understand what the terms “commercially reasonable” and “in accordance with industry practice” will mean.

STEP 19. Understand the contract provisions.

- a) Always have a clear understanding of each provision in the documents.
- b) Use the ALI/ABA model SPA and APA books, which provide detailed commentary explaining the meaning and importance of typical purchase and sale agreement terms.

STEP 20. 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.

STEP 21. Mind the closing logistics.

- a) Consider whether closing will be done in person or electronically.
- b) The trend is to close via pdf or faxed signature pages. Do not release your signature pages early or without client consent.

- c) Again: never underestimate paralegal and assistant support.
- d) If the closing is in person, ensure that there is enough space and that all required persons attend.

STEP 22. Post-closing.

- a) Prepare a detailed post-closing memorandum, setting out every item to be completed post-closing.
- b) Consider writing a narrative in plain English discussing the main deal points and how the parties got to closing. This narrative will serve an important role if issues arise one, two or three years after closing.
- c) Carefully prepare a post-closing binder and include all documents in a logical order.
- d) Complete the narrative as soon as possible after the deal. Do not let the details get stale.
- e) Say thank you to everyone involved in the deal.

Sample Asset Purchase Letter of Intent

September 18, 2015

Asset Seller, Inc.
Attention: James Smith, President
123 Main Street
Roanoke, Virginia 24011

RE: Acquisition of Assets of Asset Seller, Inc.

Dear Mr. Smith:

Asset Purchaser, Inc. (“Buyer”) is pleased to offer our Letter of Intent (this “Letter”) to your company relative to our interest in the possible acquisition of the assets of Asset Seller, Inc. (“Seller”).

We would make the following proposal, subject to the terms and conditions of this Letter:

Part 1 – Non-Binding Provisions

1. Nonbinding Effect/Definitive Agreement. Part 1 of this Letter is not intended to have the force and effect of a binding contract. It is, however, intended to set forth a general understanding between Buyer and Seller upon which a binding agreement may ultimately be based, and all of the Parties acknowledge that this Letter does not set forth all matters upon which agreement must be reached in order to proceed to closing. Therefore, Part 1 of this Letter and all rights and obligations to the Parties respecting the subject matter of Part 1 of this Letter are subject to, and conditioned upon, the negotiation, preparation and execution of a definitive agreement and related documents (the “Asset Purchase Agreement”), in form and substance approved by each of us and our respective legal counsel.

2. Prospective Transaction. The Parties have expressed a mutual interest in a transaction in which Seller will sell to Buyer, or its affiliate, all of Seller’s assets including but not limited to the following: raw goods inventory, finished goods inventory, work in process, equipment and fixtures, accounts receivable, goodwill and intellectual property, including Seller’s names and trade names, the intellectual property related to the process used to manufacture Seller’s existing products and all other assets used in the course of Seller’s business (the “Purchased Assets”).

3. Liabilities of Seller. Buyer will not assume any liabilities of Seller unless expressly assumed in the definitive Asset Purchase Agreement. Buyer anticipates assuming:

(a) Seller's obligations under its current lease agreement with Landlord, Inc. (the "Lease") under which Seller leases its warehouse facility; and

(b) Seller's obligations under certain Equipment Leases to be further detailed in the Asset Purchase Agreement.

Seller would remain liable for any (known or unknown) liabilities or obligations not expressly assumed by Buyer which arose before the consummation of the definitive Asset Purchase Agreement and Seller would pay and discharge all known liabilities and obligations prior to closing of the transaction.

4. Purchase Price. The Parties anticipate that Buyer would pay Seller the aggregate sum of \$1,000,000.00 for the Purchased Assets, subject to adjustment based on the results of Buyer's due diligence. Buyer would pay the purchase price in one lump sum at the closing of the transaction, subject to any escrow arrangements, as will be detailed in the Asset Purchase Agreement.

5. Environmental Escrow. Buyer would pay \$200,000.00 of the purchase price into an escrow account to be governed by an escrow agreement to be drafted by the Parties. The escrowed funds would be used to pay any environmental remediation costs incurred by Buyer within 12 months of the closing of the transaction. The escrowed funds, if any are remaining, would be released to Seller 12 months after the closing of the transaction.

6. Contingencies. The consummation of the transaction contemplated by this Letter is contingent upon: (1) the execution and delivery of a definitive Asset Purchase Agreement containing customary covenants, conditions, representations and warranties; (2) Buyer's satisfaction with its due diligence review (including environmental review); (3) authorization and approval from Landlord, Inc. under the Lease for Buyer to assume such lease; and (4) negotiation of certain employment contracts.

Part 2 – Binding Provisions

The following provisions of this Letter are legally binding and enforceable agreements of the Parties hereto:

7. Due Diligence. From the date of this Letter and pending preparation and execution of the Asset Purchase Agreement, Buyer, its consultants and other representatives shall be afforded reasonable access to all of the books and records of Seller and will be entitled to inspect and analyze the Purchased Assets until the closing of the transaction or the termination of this Letter. Seller agrees to provide all reasonable information requested by Buyer and Buyer agrees to execute a Confidentiality Agreement limiting the ability of Buyer to contact Seller's customers or suppliers.

8. Exclusivity. In consideration for the time and expense involved in drafting this Letter and preparing for and conducting due diligence, for a period of 60 days after the last signature is affixed to this Letter, Seller shall not solicit or entertain offers from or negotiate, discuss or consider any proposal of any other person to purchase the Purchased Assets.

9. Public Announcements and Confidentiality. The Parties agree not to release any information to the public with regard to this Letter or any potential agreement without the separate written consent of all Parties involved. All Parties agree that the terms of this Letter and any negotiations related to this Letter shall remain confidential between the Parties and their counsel.

10. Authority to Enter Letter of Intent. The Parties executing this Letter affirm they are an authorized representative of their respective companies and have authority to enter into this Letter.

11. Closing and Termination of this Letter. Provided all contingencies are satisfied under this Letter, closing of the transaction should occur no later than 120 days after the date the last signature is affixed to this Letter. This Letter shall terminate if closing does not occur within 120 days of after the date the last signature is affixed to this Letter or within any extension of the closing date agreed to by the Parties. Notwithstanding the foregoing, Section 9 shall survive the termination of this Letter.

12. Expenses. The Parties agree to bear their own expenses related to this Letter, the due diligence process, and any other matters related to the transaction contemplated by this Letter.

13. Governing Law. This Letter shall be governed by the laws of the Commonwealth of Virginia, without regard to conflicts of law principles.

Very truly yours,

Asset Purchaser, Inc.

By: _____
Name:
Title:

The undersigned hereby acknowledges and accepts the terms of the above non-binding Letter of intent this ____ day of September, 2015.

Asset Seller, Inc.

By: _____
Title: _____

FORM OF NONDISCLOSURE AND CONFIDENTIALITY AGREEMENT

THIS AGREEMENT is made as of the ____ day of _____, 2015, between **DISCLOSER, INC.**, a Virginia corporation (the “Disclosing Party”), and **RECEIVER, INC.**, a Virginia corporation (the “Receiving Party”). For purposes of this Agreement, Disclosing Party and Receiving Party may also be referred to individually as a “party” and collectively as the “parties.”

Disclosing Party will provide to Receiving Party, and Receiving Party will have access to, confidential information related to proprietary business processes, intellectual property, books, records, and other financial documents relating to the business of the Disclosing Party (the “Business”) for the purpose of evaluating potential business and transactional opportunities between Disclosing Party and Receiving Party (the “Purpose”). All information relating to the Business has been developed by the Disclosing party, and all such information is deemed confidential or proprietary in nature by Disclosing Party. In consideration of and as a condition to Disclosing Party’s disclosure to Receiving Party of certain information for the Purpose, the parties agree as follows:

1. CONFIDENTIAL AND PROPRIETARY NATURE OF THE INFORMATION

Except as set forth in Section 3 of this Agreement and in this Section 1, without Disclosing Party’s prior written consent, Receiving Party shall not, at any time or in any manner, either directly or indirectly, divulge, disclose or communicate to any person or entity, nor in any way use to its or anyone else’s benefit, including without limitation, any officer, director, shareholder, employee, business partner or agent of Receiving Party or any relative of any officer, director, shareholder, employee, business partner or agent of Receiving Party, any Confidential Information (as defined below). Notwithstanding the foregoing, Receiving Party may disclose Confidential Information to Receiving Party’s officers, directors, shareholders, employees, business partners, agents, attorneys, accountants, consultants or other representatives (the Receiving Party’s “Representatives”), who are required to have such Confidential information in order for Receiving Party to review and evaluate the Business and potential transactional opportunities, provided that the Receiving Party’s Representatives have been informed of the confidential nature of the Confidential Information and have been advised, and agree, to keep such information confidential and that such information shall be used only for the Purpose. Receiving Party acknowledges the confidential and proprietary nature of the Confidential Information, shall hold and keep the same as provided in this Agreement, and shall adhere to each and every restriction and obligation in this Agreement.

2. CONFIDENTIAL INFORMATION

For purposes of this Agreement, “Confidential Information” means any and all information about Disclosing Party and the Business obtained by Receiving Party and Receiving Party’s Representatives during its interactions and communications with Disclosing Party, including all information and communications disclosed prior to the date hereof, including without limitation, confidential information relating to assets and liabilities, customer lists, accounts

receivable and payable, information regarding current and pending litigation, business plans, financial data or other information concerning the Business of Disclosing Party, Disclosing Party's manner of operation, marketing and advertising concepts, plans, processes or other data, without regard to whether any of the foregoing would be deemed confidential, material or important (the parties agreeing that as between them, the same are important, material and confidential and that any breach of the terms of this Agreement shall be deemed a material breach of this Agreement). Regardless of the foregoing, information shall not be considered Confidential Information if (a) such information is already known to others not bound by a duty of confidentiality with respect thereto, (b) such information is or becomes publicly available through no fault of Receiving Party or its officers, directors, shareholders, employees, business partners or agents, or (c) the furnishing or use of such information is compelled by or disclosed in connection with legal proceedings.

3. RESTRICTED USE OF CONFIDENTIAL INFORMATION

Confidential Information will be kept confidential by Receiving Party and will be revealed only to Receiving Party's Representatives for the Purpose. Receiving Party shall instruct all Receiving Party's Representatives to maintain the confidentiality of the Confidential Information and shall take all reasonable steps to avoid unauthorized use or disclosure of the Confidential Information. Receiving Party agrees that it shall be solely responsible for any breach of this Agreement by any of Receiving Party's Representatives. Furthermore, no Confidential Information shall be shared with any potential business partner contacted by the Receiving Party unless the Disclosing Party receives from the Receiving Party in advance of such disclosure a Nondisclosure and Confidentiality Agreement, executed by the potential business partners, in a form similar to, and at least as restrictive as, this Agreement, including a requirement that the potential business partner must return or destroy Confidential Information in a manner similar to the manner set forth in Section 4 of this Agreement.

4. RETURN OF CONFIDENTIAL INFORMATION

Upon the request of Disclosing Party, (a) Receiving Party (i) will promptly deliver to Disclosing Party all documents, work product, agreements, data, financial or other information and materials obtained by Receiving Party and Receiving Party's Representatives relating to the Business, whether or not constituting Confidential Information, without retaining any copies, and (ii) will destroy material generated by it or that is in electronic or other format not practicable to return, in either case that includes or refers to any part of the Confidential Information, without retaining a copy of any such material, or (b) in the alternative, if Disclosing Party requests or gives its prior written consent, Receiving Party will destroy, or cause to be destroyed, all documents or other matters constituting Confidential Information in the possession or under the control of Receiving Party and Receiving Party's Representatives. Any such destruction pursuant to the foregoing must be confirmed by Receiving Party in writing to Disclosing Party, accompanied by a list of the destroyed materials.

5. TERM; SURVIVAL

The prohibitions in this Agreement are intended to be total and complete and shall remain binding upon Receiving Party until released in writing by Disclosing Party, regardless of the termination of the Purpose.

6. INDEMNITY; REMEDIES

Receiving Party shall indemnify and hold Disclosing Party harmless from any damages, loss, cost, or liability (including reasonable legal fees and other costs of enforcing this indemnity) arising out of or resulting from any unauthorized use or disclosure by it of Confidential Information or any other violation of this Agreement. Because an award of money damages (whether pursuant to the foregoing sentence or otherwise) would be difficult, if not impossible, to ascertain and inadequate for any breach of this Agreement, and because any such breach would cause irreparable harm, Disclosing Party may, in the event of any breach or threatened breach of this Agreement, without posting a bond or other security, seek and obtain equitable relief, including injunctive relief and specific performance. Such remedies will be in addition to all other remedies available at law or equity.

7. NO ADDITIONAL AGREEMENT

Except as stated herein, this Agreement shall not give rise to any legal or binding obligation on either of the parties hereto.

8. MISCELLANEOUS

(a) Modification. This Agreement may be modified only by a separate writing signed by the parties.

(b) Waiver. The rights and remedies of the parties are cumulative and not alternative. Neither the failure nor any delay by any party in exercising any right, power, or privilege under this Agreement will operate as a waiver of such right, power, or privilege; and no single or partial exercise of any such right, power, or privilege or the exercise of any other right, power, or privilege shall be deemed a waiver of any right, power, or privilege provided for herein or otherwise available to a party under applicable law. To the maximum extent permitted by applicable law, (i) no claim or right arising out of this Agreement can be discharged by a party, in whole or in part, by a waiver or renunciation of the claim or right unless in writing signed by such party; (ii) no waiver that may be given by a party will be applicable except in the specific instance for which it is given; and (iii) no notice to or demand on one party will be deemed to be a waiver of any obligation of such party or of the right of the party giving such notice or demand to take further action without notice or demand unless specifically required in this Agreement.

(c) Person. The term “person” means any individual, corporation (including a corporation not for profit), general or limited partnership, limited liability company, joint venture, estate, trust, association, organization, labor union, other foreign entity or governmental body.

(d) Severability. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement, all of which shall remain in full force and effect. If any provision of this Agreement is determined to be unenforceable by reason of its extent, duration, scope or otherwise, the parties intend and request that the court making such determination shall reduce such extent, duration, scope or if necessary, strike such provision and enforce this Agreement as modified.

(e) Costs. If a party is held by any court of competent jurisdiction to be in violation, breach, or nonperformance of any of the terms of this Agreement, such party shall pay all costs of such action or suit, including reasonable attorneys' fees, incurred by the nonbreaching party.

(f) Section Headings, Construction. The headings of sections in this Agreement are provided for convenience only and will not affect its construction or interpretation. All references to "Section" or "Sections" refer to the corresponding section or sections of this Agreement unless otherwise specified. All words used in this Agreement will be construed to include such genders or numbers as the circumstances require. Unless otherwise expressly provided, the word "including" does not limit the preceding words or terms.

(g) Governing Law. This Agreement shall be governed by the laws of the Commonwealth of Virginia without regard to its conflicts of laws principles.

(h) Jurisdiction; Service of Process. Any action or proceeding seeking to enforce any provision of or based on any right arising out of this Agreement shall be brought against either party in the courts of the City of Roanoke, Virginia or the County of Roanoke, Virginia, or the United States District Court for the Western District of Virginia, Roanoke Division. Each party consents and submits to the jurisdiction of such courts (and the appropriate appellate courts) in any such action or proceeding and waives objection to venue laid therein. Process in any action or proceeding may be served on any party anywhere in the world.

(i) Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, the parties and their respective heirs, personal representatives, successors and assigns.

(j) Counterparts. This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original copy of this Agreement, but all of which, taken together, shall be deemed to constitute one and the same Agreement. The exchange of copies of this Agreement and of signature pages by facsimile or electronic mail transmission shall constitute effective execution and delivery of this Agreement as to the parties and may be used in lieu of the original Agreement for all purposes. Signatures of the parties transmitted by facsimile or electronic mail shall be deemed to be their original signatures for all purposes.

(k) No Party Deemed Drafter. No party will be deemed the drafter of this Agreement and, if this Agreement is construed by a court, such court will not construe any provision of this Agreement against any party as its drafter.

[Signature page immediately follows]

WITNESS the following duly authorized signatures as of the date hereof.

DISCLOSING PARTY:

DISCLOSER, INC.

By: _____

Name: _____

Title: _____

[Signature Page of Disclosing Party]

RECEIVING PARTY:

RECEIVER, INC.

By: _____

Name: _____

Title: _____

[Signature Page of Receiving Party]



GENTRY LOCKE
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Keeping “Death” Cases Alive

Virginia Law of Autopsies, Exhumation, and Other Common Issues in Wrongful Death Cases

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Presented at The Hotel Roanoke & Conference Center in Roanoke, Virginia on September 18, 2015.

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I. INTRODUCTION.

Benjamin Franklin lived from 1706 to 1790. One of his many contributions to the United States was his service as Ambassador to France during the height of the American Revolution. Interestingly, he coordinated key loans from France to fund the Continental Army. This, of course, was long after his success with experiments involving electricity.

It was in a letter to Frenchman, Jean-Baptiste Le Roy that he wrote the famous quote:

“Our new constitution is now established, everything seems to promise it will be durable; but, in this world, nothing is certain except death and taxes.”

Death was certain for Benjamin Franklin, as it has been for so many others and for each one of us, and all of our clients. Despite the sobering reality of this statement, it is our jobs, as counselors, to prepare ourselves, and our clients, for that which is inevitable and for which advance preparation can be immensely helpful.

This outline provides a combination of the statutory law and practical guidelines we have adopted over years of handling death cases in both personal injury and estate matters.

This outline is by no means exhaustive. However, it should provide the practitioner with helpful, step-by-step information so that when the grim reaper comes calling, we can render helpful and appropriate advice to our clients and their families.

1) CLAIMS FOR WRONGFUL DEATH.

- a) Va. Code §§ 8.01-50 and 8.01-244.
 - i) When a family member dies as a result of the neglect or wrongful action of another, the personal representative of the decedent may bring a lawsuit for damages within two years after the death of the injured person.
- b) Va. Code § 8.01-52.
 - i) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent;
 - ii) Compensation for reasonably expected loss of (i) income of the decedent and (ii) services, protection, care and assistance provided by the decedent;
 - iii) Expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death;
 - iv) Reasonable funeral expenses; and
 - v) Punitive damages may be recovered for willful or wanton conduct, or such recklessness as evinces a conscious disregard for the safety of others.

2) REQUESTING AN AUTOPSY.

- a) Who can request an autopsy?
 - i) In the event that a client or a loved one dies and an autopsy is needed, the family has the right to request that an autopsy.
 - ii) Virginia law prioritizes certain persons with the right to consent or refuse that an autopsy be performed.
- b) Va. Code § 32.1-309.1.
 - i) Upon the death of any person:
 - (1) The person or institution with initial custody of the body shall make good faith efforts to identify the decedent and notify next of kin of the decedent's death.
 - (2) If the next of kin of the decedent or other person authorized by law is willing and able to claim the body, the body may be claimed for disposition, and the claimant shall bear the expenses of such disposition.
 - (3) No body that is the subject of an investigation or autopsy shall be transferred for purposes of disposition until such investigation or autopsy has been completed.
- c) Va. Code § 54.1-2973.
 - i) Before the body is disposed, any of the following persons listed below in order of priority may authorize a autopsy, so long as:
 - (1) No person in a higher class exists or no person in a higher class is available at the time authorization or consent is give;
 - (2) There is no actual notice of contrary indications by the decedent; and
 - (3) There is no actual notice of opposition by a member of the same or a prior class.
 - ii) Order of priority:
 - (1) Any person designated by the decedent in a signed and notarized writing to make arrangements for the disposition of the decedent's remains upon his death;
 - (2) The spouse;
 - (3) An adult son or daughter;
 - (4) Either parent;
 - (5) An adult brother or sister;
 - (6) A guardian of the person of the decedent at the time of his death; or
 - (7) Any other person authorized or under legal obligation to dispose of the body.
- d) When must a hospital comply with a request for an autopsy?
 - i) The persons authorized by statute may authorize or consent to the autopsy after death or before death.
 - ii) A physician must honor the request for an autopsy if it complies with the requirements set forth above.
 - iii) A pathologist with the hospital may perform the autopsy, or the family may arrange for the remains to be transferred to a private pathologist to perform the autopsy.

- iv) If the physician has actual notice of contrary indications by the decedent or of opposition to an autopsy by a member of the same or a prior class, the autopsy shall not be performed.
- e) What happens to the decedent's remains pending autopsy?
 - i) If the family anticipates requesting an autopsy, they may instruct the hospital to move the decedent's remains to the hospital morgue pending the autopsy.
- f) May a family hire a pathologist to perform an autopsy?
 - i) Once the decedent's remains are secured by the family for burial, or held at the hospital morgue, the family may hire a private forensic pathologist to perform an autopsy.
- g) If a wrongful death claim is contemplated, must the family give notice to potential adverse parties?
 - i) The family's attorney should notify adverse parties or their counsel of the date, time, and location of the autopsy and allow a representative of such parties to attend.
- h) How should the autopsy be documented for litigation?
 - i) The pathologist should prepare a detailed, written report of her findings and conclusions.
 - ii) The pathologist should preserve any tissue samples, blood samples, fluid samples, organ samples, or anything else removed from the body for purposes of testing, and keep such items until the conclusion of litigation.
 - iii) The pathologist should videotape the autopsy to preserve evidence of how the autopsy was conducted and the results thereof for any future review by experts for the adverse parties.

3) PETITIONING THE COURT FOR AN AUTOPSY.

- a) What if a designee refuses to request an autopsy?
 - i) If the designee refuses to authorize an autopsy, but an autopsy is warranted, then a member of the family or spouse of the deceased may petition the circuit court to order an autopsy.
 - ii) The petitioner pays the costs of the autopsy.
 - iii) A private pathologist may perform the autopsy.
- b) Va. Code § 32.1-285(A)
 - i) A member of the immediate family or the spouse of the deceased may file a petition with the circuit court to request an autopsy in a case of death by injury.
 - ii) The court may grant the petition upon a showing of good cause.
 - iii) The petitioner must provide notice and an opportunity to be heard to the Commonwealth's Attorney in the jurisdiction where the injury contributing to or causing the death was sustained or where the death occurred.
- c) Va. Code § 32.1-285(A).
 - i) If ordered, the autopsy report must be filed with the medical examiner.

- ii) A copy must be provided to the court and the Commonwealth's Attorney upon request.

4) AUTOPSIES MANDATED BY VIRGINIA LAW.

A) When is an autopsy required by law?

- I) An autopsy may be required upon the death of a person due to injury, trauma, or other under unusual circumstances.

b) Va. Code § 32.1-283.

- i) A physician, law enforcement officer, or any other person shall notify the medical examiner upon the death of any person by:
 - (1) Trauma, injury, violence, poisoning, accident, suicide or homicide, or suddenly when in apparent good health, or when unattended by a physician, or in jail, prison, other correctional institution or in police custody, or who is an individual receiving services in a state hospital or training center operated by the Department of Behavioral Health and Developmental Services, or suddenly as an apparent result of fire, or in any suspicious, unusual or unnatural manner
- ii) The medical examiner shall:
 - (1) Take charge of the dead body
 - (2) Investigate the cause and manner of death
 - (3) Prepare a report based on physical examination, review of the decedent's medical records, and any other pertinent information
- iii) The report shall be delivered to the Commonwealth's Attorney and the appropriate law enforcement agency investigating the death.
- iv) Upon request, the medical examiner shall release the autopsy report to:
 - (1) The decedent's attending physician
 - (2) The personal representative or executor of the decedent
- v) At the discretion of the medical examiner, the autopsy report may be released to:
 - (1) The spouse of the decedent
 - (2) An adult son or daughter of the decedent
 - (3) Either parent of the decedent
 - (4) An adult sibling of the decedent
 - (5) Any other adult relative of the decedent in order of blood relationship

5) VIRGINIA MEDICAL EXAMINERS.

A) Office of the Chief Medical Examiner.

I) Va. Code § 32.1-277.

- (1) Supervises state central office in the City of Richmond and oversees district and local offices of medical examiners.

II) Va. Code § 32.1-278.

- (1) The chief medical examiner shall be a forensic pathologist licensed to practice medicine in the Commonwealth.
- b) Assistant Chief Medical Examiners.
 - i) Va. Code § 32.1-279.
 - (1) Licensed forensic pathologists who are tasked with administering the district offices.
- c) Medical Examiners.
 - i) Va. Code § 32.1-282(A).
 - (1) One or more medical examiners appointed for each county and city.
 - (2) Must be licensed as a doctor of medicine or osteopathic medicine, a physician assistant, or a nurse practitioner in the Commonwealth.
- d) Per Diem Medicolegal Investigators.
 - i) Va. Code § 32.1-282.1.
 - (1) Forensic pathologist appointed on a per diem basis to assist with medicolegal death investigations.

6) EXHUMATIONS.

- a) Who may request an exhumation?
 - i) In limited circumstances, a private person who has an interest in a case involving death by injury may petition the circuit court with jurisdiction over the place of interment to order the body exhumed upon a showing of sufficient cause.
- b) Va. Code § 32.1-286(B).
 - i) A private person with an interest in a case of death may petition the judge of the circuit court exercising jurisdiction over the place of interment and, upon proper showing of sufficient cause, such judge may order the body exhumed.
 - ii) Such petition or exhumation or both shall not require the participation of the Chief Medical Examiner or any Assistant Chief Medical Examiner.
 - iii) Costs shall be paid by the party requesting the exhumation.
- c) *Johnston v. McAvoy*, 87 Va. Cir. 130 (Shenandoah County 2013).
 - i) Facts: In 2002, Raymond Wine hired Dolly McAvoy as a caretaker. Within five years, he gave her his general power of attorney. Then, he executed a will naming her sole beneficiary. Mr. Wine passed away at the age of 94 years old. However, there was evidence that he died within hours of Ms. McAvoy's last visit to him and physical injury could not be ruled out. No autopsy was performed. A will contest followed. Mr. Wine's sister sought disinterment to investigate the cause of death.
 - ii) Issue: Whether sufficient cause justifies exhumation.
 - iii) Holding: Yes.
 - iv) Analysis: Pursuant to Virginia Code §32.1-286(B), the Court found sufficient cause to justify ordering exhumation of Mr. Wine's body for examination. The Court held

that “[t]his may be, as the defendant suggests, a fishing expedition, but it appears at this time that the defendant may have stocked the pond.” Mr. Wine’s sister was ordered to pay the costs of the disinterment.

7) CIVIL DISCOVERY.

- a) Va. Code § 32.1-283.4 (A):
 - i) The records received and prepared by the Office of the Chief Medical Examiner are not subject to FOIA
 - ii) The records received and prepared by the Office of the Chief Medical Examiner are not discoverable by subpoena, subpoena *duces tecum*, or discovery, except the records and information shall not be immune from discovery if available from other sources.

8) RULES OF EVIDENCE.

- a) Va. Code § 8.01-390.2.
 - i) Medical examiner’s reports, records, photographs, laboratory findings, and certified reports of autopsies shall be received as evidence in any court or other proceeding.
 - ii) It is unnecessary to submit proof of the official character of the copies or the person whose name is signed thereto.
- b) Va. Code § 19.2-188.
 - i) Medical examiner’s reports, records, photographs, laboratory findings, and certified reports of autopsies shall be received as evidence in any court or other proceeding.
 - ii) It is unnecessary to submit proof of the official character of the copies or the person whose name is signed thereto.
 - iii) Any statement of fact or of opinion concerning the physical or medical cause of death and not alleging any conduct by the accused shall be admissible as evidence of the cause of death in any preliminary hearing.

9) WORKERS’ COMPENSATION.

- a) Va. Code § 65.2-607(C) – “The employer or the Commission may in any case of death require an autopsy at the expense of the party requesting the same. Such autopsy shall be performed upon order of the Commission, and anyone obstructing or interfering with such autopsy shall be punished for contempt.”

Please refer to the *Practitioner’s Checklist in Wrongful Death Cases* on the next page.

Practitioner's Checklist in Wrongful Death Cases

Below is a checklist to help clients make appropriate arrangements to pursue a claim for wrongful death in the event of the death of a loved one:

Locate any Will and all Codicils

- ☐ It is important to locate any will. The will likely contains instructions pertaining to funeral services and the disposition of his or her remains. The will may be in a safety deposit box, in which case a court order may be necessary, depending on the applicable bank regulations and the relationship to the decedent.

Gather pertinent identification information:

- ☐ Full legal name, date of birth, place of birth, address at time of death, and place of death.
- ☐ Social security number, Medicare/Medicaid number, VA number, Employer ID number, and Military I.D. number.
- ☐ Insurance policies and policy numbers for home, auto, casualty, health, group, Medicare, life, fire, group, etc.
- ☐ Bank, checking, saving, pension, and brokerage account numbers.
- ☐ Name, address, and phone number of decedent's employers, physicians, accountants, insurance agents, current and any former spouses, and children.
- ☐ Marriage certificates for any surviving spouse, any divorce paperwork for any former spouses, and birth certificates for surviving children.

Disposition of the body:

- ☐ In Virginia, the person designated by the decedent has authority to determine to make arrangements for the disposition of the body, followed in order of priority by the surviving spouse, surviving children, surviving siblings, surviving guardian, and any other person authorized or under legal obligation to dispose of the body.
- ☐ Locate a deed to any burial plot.
- ☐ Determine if the decedent has authorized a gift of the body or any organs.

Continued other side

Autopsy:

- ☐ In Virginia, an autopsy is not performed in the case of every death.
- ☐ If an autopsy is requested, the person authorized to dispose of the body should request that the hospital retain the body while arrangements are made through the hospital, or with a private pathologist, to perform an autopsy.
- ☐ In certain circumstances, the local medical examiner may be contacted to secure the body to perform an investigation and autopsy depending on the circumstances that resulted in the death of the decedent. The body cannot be disposed until the medical examiner completes her investigation.
- ☐ Under Virginia workers' compensation law, an autopsy may also be required if the decedent passed away due to an injury or other illness arising in the workplace.
- ☐ If a claim for life insurance benefits is contemplated, and it is foreseeable that the cause of death might be contested by the insurance company, then an autopsy is advisable.
- ☐ If a claim for wrongful death due to the negligence of another is contemplated, then an autopsy is advisable.
- ☐ In cases of medical negligence, it is recommended that arrangements be made for an independent autopsy with a private pathologist who is not employed by the hospital. The family or their attorney should provide sufficient notice to any potential adverse parties of the date, time, and location of the autopsy. The autopsy should be videotaped to preserve evidence of the conduct of the autopsy and its results thereof.

Death Certificate:

- ☐ The family should obtain a copy of the death certificate, which will be necessary to qualify to file a wrongful death claim.

**CLE: Private Autopsy Basics
Autopsy “Emergency Kit”**

**Christena Roberts, MD
Forensic Pathologist
CJ Consulting
352-562-1397**

Authorization:

- Autopsy – Medical procedure of a family member
- Authorized by Legal Next of Kin
 - Defined by state code
 - VA Code 54.1-2801: descending order of blood relationship (legal spouse, adult child, custodial parent, noncustodial parent, adult siblings, guardian of minor child, guardian of minor siblings, grandparents....)
 - Power of Attorney ends with death
 - Health Care surrogate ends with death
- Caution: If more than one sibling all should sign

Paperwork:

- Autopsy Consent Form, minimum information needed
 - Decedent
 - Who’s authorizing (signature and relationship)
 - Complete autopsy vs. limited (restrictions)
 - Special examinations (Neuropathology)
 - Disposition of tissue
 - What is kept
 - Histology, toxicology
- Autopsy fee sheet
 - Signed by Legal Next of Kin
 - What is included in fee
 - Outline additional charges
- Release of Medical Records Forms
- Death Certificate
 - Signed by treating physician vs. pathologist

Who performs the autopsy?

- Depends on state
 - Licensed Medical Physician
- Notice to the Other Side to Attend
 - Observation only
 - Procedures ????
 - Photos ???

Autopsy Emergency Kit

Who Else Can or Should Attend?

- Other side's medical expert
- Photographer/Videographer
- Discourage family from attending
- Cultural or religious requests
 - Determined in conjunction with family and possibly religious leaders
 - May desire to perform religious ceremony

Where are Private Autopsies Performed?

- Funeral Home of families choice
 - Embalming room
 - Prep room
 - FH may charge fee for use of the facility
- In general hospitals and ME office won't allow facilities to be utilized
 - Liability concerns

When?

- As soon as possible
- Optimize preservation of tissue
 - Refrigeration slows decomposition but doesn't stop it
- Must work around FH schedule for prep room or embalming room
 - If small facility won't want pathologist there while having another families service
- Always prioritize family viewing and services schedules
- Autopsy prior to embalming

What's Kept?

- Samples for toxicology
 - Extended or indefinite hold requires request, likely fees
- Histology paraffin blocks and microscope slides
- ME office has "save cup"
 - Caution with preserving tissue from private autopsy
 - Storage issues
 - Disposition in the future (incineration, burial, cremation)
 - Legal implications



GENTRY LOCKE
Attorneys

Swords and Shields

Contract Rules You Need to Know

Spencer M. Wiegard wiegard@gentrylocke.com

Jonathan D. Puvak puvak@gentrylocke.com

Presented at The Hotel Roanoke & Conference Center in Roanoke, Virginia on September 18, 2015.

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Introductionⁱ – For any business deal or transaction, the contract is the key. The contract establishes the duties the parties owe each other and the rights and responsibilities that each party possesses. The contract sets many of the rules that govern the parties’ relationship. The contract allocates risk between the parties. Rather than leaving all decisions about risk allocation to a court of competent jurisdiction, the contract documents provide the opportunity for the contracting parties to set their own parameters, within the confines of applicable law. If a party fails to take an active role in developing, negotiating, and abiding by a contract, that party places itself at greater risk in two ways: first, it is allowing the other party to dictate the terms of the agreement so that the contract favors one party over the other; and second, that party may miss requirements and provisions that will negatively impact that party's financial situation. Thus, it is crucial that both parties to a contract or agreement be involved in establishing the guidelines for the responsibilities and risks that each party will undertake in the contractual relationship. It is equally vital that both parties understand and attempt to abide by the contract so as to minimize the risk of loss.

Below we will address a few tips and rules that will help you in reviewing or preparing an effective contract that your client can use as both a shield and a sword should a dispute arise.

- I. **Dealing with Form Contracts (AIA/EJCDC/ConsensusDOCS, etc.)** – It is rare that a client will bring you a proposed contract that is totally original, or will ask you to prepare a contract from whole cloth. Most often a proposed contract will be based upon something, either a document that the preparing party has previously used, or from a standard form document prepared by a trade group, company or organization. Some form contracts purport to be fair and reasonable. Other forms are not shy about the favoring one party over another. When considering where to begin, ask yourself if a form contract may be appropriate for this deal or transaction. If so, take a look at your options available to use. No contract document is perfect. If there was a perfect form contract, we lawyers would have much less work.
 - a. Form contracts can originate from trade groups (AIA, EJCDC, ConsensusDocs, etc.), from a company (your client or the other party), from a state entity, municipality, locality, agency, etc.
 - b. In the construction field alone, currently at least the following organizations publish standard form design and/or construction contracts:
 - i. American Institute of Architects (“AIA”);
 - ii. Associated General Contractors (“AGC”);
 - iii. American Subcontractors Association;

- iv. Engineers Joint Contract Documents Committee (“EJCDC”) (ASCE, ACEC, NSPE);
 - v. Design-Build Institute of America (“DBIA”); and
 - vi. Construction Management Association of America (“CMAA”).
- c. Each form contract includes different terms. Each form document includes different definitions of claims, deadlines for providing notice, notice requirements, roles for decision making, and procedures for dispute resolution, among other differences.
 - d. In addition to their varying terms, standard form agreements are complicated. These documents are often created by committees, teams or groups, with numerous lawyers involved in the drafting process. They are lengthy documents, some exceeding 100 pages, which include legalese and terms of art. Form contract documents frequently cross reference and incorporate the terms of other documents, that may not be available you or your client. Form contract documents often include language and terms that conflict with bids, proposals, quotes and initial discussions between the parties.
 - e. Don’t tell your client to sign a form agreement on the basis of the rationale that “everyone uses it, so it must be fair.” These form agreements often favor one party over the other, particularly if it is prepared by the company, locality or governmental entity that uses it. Read it carefully. Read all of the documents referenced in the form agreement. If you don’t have access to a document, get a copy of it and review it. Identify the most challenging clauses and propose changes to those terms. Regardless of what the other party says, most terms are negotiable.

II. **Dispute Resolution Clauses (Negotiation/Mediation/Arbitration/Litigation)** –

Litigation is expensive and time consuming. Although litigation is often lucrative for litigators, it is not always the preferred path of dispute resolution for their clients. Given the opportunity to limit the time and expense associated with litigation, many contracts specifically provide how any disputes between the contracting parties will be resolved. Some of these clauses provide that disputes will be subject to executive negotiations, mandatory mediation, or will be submitted to arbitration prior to, or instead of, going to litigation.

- a. **Negotiation** – The contract may require that the parties participate in good faith negotiations before moving forward with other dispute resolution

methods. In negotiations, the parties confer together, without a third party, and attempt to resolve the dispute(s) between them.

- b. **Mediation** – Mediation is formal, non-binding settlement negotiations with the assistance of a neutral mediator. Virginia provides for and regulates mediation. See Virginia Code § 8.01-576.4 *et seq.* and Virginia Code § 8.01-581.21 *et seq.* At mediation, the neutral third party does not resolve the dispute or decide who wins, rather the mediator facilitates negotiations between the parties with the intent of reaching an amicable resolution.
- c. **Arbitration** – Arbitration is a binding dispute resolution process which results in a winner and a loser. The parties engage in a limited discovery process which culminates in an arbitration hearing. The parties must pay an arbitrator or a panel of arbitrators to hear testimony, consider the evidence, and decide the merits of the parties' claims and defenses. There was a time that arbitration was considered a cheaper and faster alternative to litigation, however, these days arbitration may cost more and take longer than litigation, depending upon the circumstances. The losing party cannot appeal the arbitrator's decision. Arbitration agreements are enforceable per both the Virginia Arbitration Act, Virginia Code § 8.01-581.01 *et seq.*, and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*
 - i. Per Virginia Code § 2.2-4366 [Alternative Dispute Resolution], public bodies may enter into agreements to submit disputes arising from contracts entered into pursuant to [the Virginia Public Procurement Act] to arbitration and utilize mediation and other alternative dispute resolution procedures. However, such procedures entered into by the Commonwealth, or any department, institution, division, commission, board or bureau thereof, shall be nonbinding and subject to § 2.2-514, as applicable. Alternative dispute resolution procedures entered into by school boards shall be nonbinding.
 - ii. Counties may enter into arbitration agreements. Per Virginia Code § 15.2-1248 (No action against county until claim presented to governing body), no action shall be maintained by any person against a county upon any claim or demand until such person has presented his claim to the governing body of the county, unless the governing body has entered into a binding arbitration agreement or there is a provision in a written contract with the county to submit to arbitration any controversy thereafter arising. When there exists such a provision in a contract or there is a written agreement to arbitrate, the provisions of the Uniform Arbitration Act [Virginia Code § 8.01-581.01 *et seq.*] shall apply.

- d. **Litigation** - Litigation involves the initiation of a case before a court of competent jurisdiction. Litigation can be time consuming and expensive. Litigation takes the resolution of their dispute out of the parties' hands. For complex commercial disputes, it may be ill advised to put your fate in the hands of a judge or jury without special technical knowledge or expertise in the subject area of the dispute.
- e. **Multi-step ADR process** – Some dispute resolution clauses establish a multi-step dispute resolution process which may require that the parties first submit to negotiations before moving on to mediation. Some clauses require the parties to participate in mediation before moving on to arbitration. Some clauses require the parties to negotiate, mediate and arbitrate, in that order, if necessary.
- f. **Less popular ADR methods** – In addition to negotiation, mediation and arbitration, there are other, less popular, dispute resolution methods that are available to contracting parties. These methods include early neutral evaluation (the parties present their claims to an evaluator who provides a nonbinding assessment), mini-trial (the parties present their evidence to a neutral expert who then aids the parties in settlement discussions), summary jury trial (a mini-trial to a privately selected jury who render a nonbinding verdict), and conciliation (mediation without the parties meeting in the same location).
- g. **Other issues to consider** - Who pays to the cost of the mediation, litigation or arbitration? If you lose, are you required to pay the prevailing party's legal fees? Consider including a fee shifting clause that requires the loser to pay the prevailing party's legal fees and the arbitrator's fee. Review the forum selection clause to determine where you must convene mediation, arbitration or litigation. If the contract is a form document, your client may have agreed to mediate and arbitrate in California despite the deal concerning Virginia based parties and a Virginia based subject. Be careful of the notice requirements related to the selected dispute resolution method(s) and/or claims. What is the time limit on submitting notice of a claim? To whom must you provide notice of a claim? What are the content requirements for this notice? What rules apply to the chosen dispute resolution method(s)? Which state's law applies to the interpretation of the contract and any disputes arising out of the contract? Both you and your client must know the answer to each of these questions.
- h. **Preparing an ADR clause** – When preparing an ADR clause, first determine which ADR method best suits your client's needs and best addresses the

potential disputes that may arise from the deal or transaction. Don't be afraid to include multiple steps. If you select arbitration, consider the rules that shall govern the arbitration, the scope of and limitations on discovery, how many arbitrators will decide the dispute, the level of formality, the rules of evidence, limitations on the time and presentation of evidence and testimony, the appeal rights, and whether any fee shifting is appropriate.

- i. **Standard/form language available** - Consider starting with a standard ADR clause offered by an ADR organization, like the American Arbitration Association (AAA) or the International Institute for Conflict Prevention and Resolution (CPR) or one of the Virginia based provider of ADR services.

III. Fee Shifting – One of the most frequent questions that clients ask during initial consultations is “can I recover my legal fees.” In Virginia, a party may recover its attorney fees either when a statute provides for the recovery of attorney fees or where the parties include a fee shifting provision in the contract. *See Mullins v. Richlands National Bank*, 241 Va. 447, 403 S.E.2d 334 (1991). The parties to a contract may agree that, in the event of a dispute, the prevailing party may recover from the losing party its attorney fees. Virginia courts will enforce such fee shifting clauses in contracts. *See Lansdowne Dev. Co., L.L.C. v. Xerox Realty Corp.*, 257 VA. 392, 403, 514 S.E.2d 157, 162-63 (1999). Attorney fees are an element of damages to be proven by the prevailing party. *See Lee v. Mulford*, 269 Va. 565-66, 611 S.E.2d 349, 351 (2005). A party seeking to recover its attorney fees must comply with the pleading requirements Rule 3:25 of the Rules of the Supreme Court of Virginia.

IV. 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 resulting from certain events. 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 claims. In all cases, indemnification clauses are separate and distinct from other contractual recoveries between the parties. Stated differently, the other parts of the contract (representations, warranties, completion or delivery dates, etc.) can be an independent basis for liability if there is a breach; or the indemnification provision can be a separate, independent basis for liability if the conditions triggering the indemnification obligation occur.

A. Fundamental Issues and Elements for Drafting Indemnification Clauses

- a. **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, insurance contract, 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 drafted to provide mutual indemnity, but in other 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.

- b. **Think about what triggers indemnification and at what point the indemnified party be entitled to recover** – Indemnification is a recovery of losses (or expenses), 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 arise only when there are third party claims for specific subject matters. In other cases, the indemnification obligation may cover expenses resulting from a dispute between the parties to the agreement. 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.
- c. **Define the losses to be covered** – Defining the “Losses” that are subject to reimbursement is critical in each agreement. An agreement may include a definition of “Losses” that is very expansive and includes all damages, direct and indirect expenses, costs, 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. In other instances, the parties may elect to exempt certain obligations from the indemnification requirements. The definition of losses is always important, and should be carefully negotiated and

drafted, if only third party claims are to give rise to indemnification obligations.

- d. **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 may 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).
- e. **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 form of negligence, such as gross negligence.
- f. **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.
- g. **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 a specified amounts or limitations will be sufficient to cover any unforeseen risks and damages.

B. Example Indemnification Clauses¹:

a. *Indemnification of the Customer (limited to third party claims)*

- i. 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 any breach or alleged breach by Company of this Agreement.

b. *Limited Liability Company Operating Agreement*

- i. The Company shall indemnify the Managers and members to the fullest extent permitted or required by the Act, as amended from time to time, and the Company may advance expenses incurred by the Managers or member upon the approval of the Managers and the receipt by the Company of an undertaking by such Managers or member to reimburse the Company unless it shall ultimately be determined that such Manager or member is entitled to be indemnified by the Company against such expenses. The Company may also indemnify its employees and other representatives or agents up to the fullest extent permitted under the Act or other applicable law, provided that the indemnification in each such situation is first approved by the members.

c. *Commercial Lease with Mutual Indemnification:*

- i. Tenant shall indemnify and hold harmless Landlord from, and shall reimburse Landlord for all expenses, damages, or fines incurred or suffered by Landlord by reason of any breach, violation, or non-performance by Tenant, or Tenant's employees or agents, of any covenant or provision of this Lease, or arising out of the occupancy

¹ Note that these examples are provided for illustration purposes only and will not be appropriate for all types of agreements and contracts.

or use by Tenant of the Premises, or from any other cause due to the carelessness, negligence or improper conduct of Tenant or Tenant's agents employees or invitees.

- ii. Landlord shall indemnify and hold harmless Tenant from, and shall reimburse Tenant for all expenses, damages, or fines incurred or suffered by Tenant by reason of any breach, violation, or non-performance by Landlord, or Landlord's employees, agents or contractors, of any covenant or provision of this Lease, or from any other cause due to the carelessness, negligence or improper conduct of Landlord, or Landlord's agents, employees, or invitees.

d. *Purchase and Sale Agreement*

- i. Seller shall indemnify and defend each of Purchaser and its Affiliates (including the Company) and their respective Representatives (collectively, the "Purchaser Indemnitees") against, and shall hold each of them harmless from and against, and shall pay and reimburse each of them for any and all Losses incurred or sustained by, or imposed upon, the Purchaser Indemnitees based upon, arising out of, with respect to or by reason of:
 - 1. any inaccuracy in or breach of any of the representations or warranties of Purchaser or the Company contained in this Agreement;
 - 2. any breach or non-fulfillment of any covenant, agreement or obligation to be performed by Purchaser or the Company pursuant to this Agreement;
 - 3. any third party claim arising from a pre-Closing violation of Law by Purchaser or the Company;
 - 4. Liabilities, Actions or Environmental claims arising from Environmental conditions, or the import, transportation, storage, handling, sale, release or spill of Hazardous Materials existing, caused, or occurring prior to Closing or violations of Environmental Law existing, caused or occurring prior to Closing;

C. Virginia Judicial Treatment of Indemnification Agreements

- a. *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)).
- b. *Estes Express Lines, Inc. v. Chopper Express, Inc.*, 273 Va. 358, 360 (2007) –
 - i. Interpreting the indemnification provisions of a vehicle lease agreement and upholding an indemnity provision in the face of losses resulting from the negligence of the indemnified party. As the Court said:

The sole issue in this appeal is whether an indemnity provision in a vehicle lease agreement is void as against public policy insofar as the provision would entitle a party to indemnification for liability incurred as the result of personal injuries caused by its own negligence.

With no guarantee of indemnity, we think it highly unlikely that a party would neglect to exercise ordinary care simply in anticipation that it ultimately might not have to bear the burden of any liability incurred as a result of its failure to exercise ordinary care to avoid personal injury to another.

- c. *Virginia Electric & Power Co. v. Wilson*, 221 Va. 979, 981-982 (1981) – affirming that indemnity must grow out of a contractual relationship.

V. Representations and Warranties – Representations and warranties are statements of fact and assurances made by the parties and, similar to indemnification clauses, form a part of many types of contractual agreements. Representations and warranties include historical information and give shape to the subject of the transaction or

agreement and set out the items upon which the parties are relying in consummating or performing the agreement.

A. **Perspectives Matter** – Depending on the type of agreement, the perspective of the parties can be extremely divergent and dictate the approach to representations and warranties.

- a. **In a purchase and sale context**, the parties have two very different goals. The purchaser's goal is to obtain very comprehensive representations and warranties to help minimize the risk and form the basis for indemnification obligations if any of the representations and warranties lead to losses or expenses for the purchaser. On the other hand, the seller's goal is to provide as few representations and warranties as possible in order to limit the scope of facts provided.
- b. **In a commercial lease agreement**, the landlord and tenant each want to ensure that the other party fulfills its obligations without harm to the other party. Representations and warranties are used to outline the responsibilities. The landlord may want to lease property on an "as-is" basis without any representations and warranties, but a tenant may at least demand some limited representations and warranties from the landlord.
- c. **Owner/Contractor/Subcontractor** – A subcontractor may be required to indemnify the owner and contractor for losses associated with its work.

B. **Drafting and Review Strategies**

- a. *Limitations* - Terms that can significantly modify representations and warranties:
 - i. **Materiality**: Qualify a representation or warranty by what is material or what might cause a material adverse effect. This qualifier would be to the benefit of the seller in a purchase and sale context, but in other agreements, materiality can also leave room for interpretation. In some instances, it is advisable to include a dollar figure to better define materiality. If impact is likely to cause some impact above that dollar figure, it would be deemed material.
 - ii. **Knowledge**: From the seller's perspective, knowledge can be another tool to limit and modify a representation and warranty. Parties to a commercial agreement are likely to negotiate what

constitutes “knowledge” and if any affirmative investigation is required by either party. For example, a seller may desire to limit compliance with all environmental laws/permits to only its knowledge.

- iii. **Time:** Make a representation or warranty as of a specified date or to cover only a specified period. For example, compliance with laws could be as of the last calendar year. Statutes of limitation can also be used as benchmarks for time periods.
 - iv. **Disclose:** A common practice in commercial transactions is to identify certain items in appendices or schedules to an agreement. The concept is that the issue or fact is raised to the other parties so that the other party now has knowledge of the material as set forth in the schedule.
- b. *Prioritize* - When reviewing representations and warranties, counsel should be mindful of the items that matter most to your client. There are likely to be a number of representations and warranties to review and negotiate, but the most focus should be given to those with greatest financial or other significant impacts. The most significant representations and warranties should be identified and addressed early in the negotiation process. There is little need to spend time on representations and warranties that have minor impacts for your client.
 - c. *Survival* – This provision is also subject to extensive negotiation between the parties. The survival period limits the time during which claims for breaches of representations and warranties may be brought. In agreements, where a closing is contemplated a clause that expressly indicates that certain provisions will survive closing is typical. In other agreements, survival periods may shorten the default statute of limitations, but may not extend beyond applicable periods. Certain financial representations and warranties generally have the shortest survival periods, while others dealing with taxes and environmental matters often match the underlying applicable statutes of limitations and have longer survival periods. Finally, certain “fundamental” representations and warranties like authority and ownership may survive indefinitely due to the essential nature of the representations.
 - d. *Gap Period* – A number of agreement and transactions have some period of time between the execution of a formal agreement and performance. In these situations, the parties must clearly specify the time periods for which

the representations and warranties will remain accurate. If a party anticipates a change at some future time, that contingency should be addressed in the language of the applicable representations and warranties. It is customary that representations and warranties made at the time of execution of an agreement are expected to be true and accurate at the time of performance. Further, either party may demand that all representations and warranties remain true and accurate as a condition to closing.

C. **Typical Topics of Representations and Warranties** – The full text of most representations and warranties sections are too lengthy to include here, but below are a number of the topics/categories that are typically included in representations and warranties sections of commercial agreements.

a. *Purchase and Sale Agreement* – As noted above, it is typical for a purchaser and seller to each have different perspectives about representations and warranties and may employ strategies to expand or limit the representations and warranties.

i. *Typical Categories for Seller Representations and Warranties:* authority, status, and organization of the seller; condition of assets; stock capitalization and ownership/title of assets; required consents; no indebtedness; financial condition of seller; no adverse events since last financial statement date; liabilities; environmental compliance; taxes; insurance; intellectual property; legal proceedings; compliance with laws/permits; and books and records.

ii. *Typical Categories for Purchaser Representations and Warranties:* authority, status, and organization of the purchaser; required consents; financial condition of purchaser; and legal proceedings.

b. *Lease Agreement* – Landlord and tenant may each make representations about the following topics or categories: condition of premises; use of the premises; authority of the parties; organization of the parties; environmental compliance; legal compliance; no pending disputes; and parties in possession.

VI. **First Material Breach/First in Fault** – Generally, a party to a contract who first breaches the contract is not entitled to subsequently enforce the contract. *See Countryside Orthopaedics, P.C. v. Peyton*, 261 Va. 142, 153-54, 541 S.E.2d 279, 285 (2001) . The exception to this rule is when the breach is not material. *See Horton v. Horton*, 254 Va. 111, 115, 487 S.E.2d 200, 203 (1997). While Virginia has not

formally adopted § 241 of the Restatement (Second) of Contracts, it has repeatedly cited its guidelines when assessing whether a breach of contract is “material.” *See SunTrust Mortgage, Inc. v. United Guaranty Residential Insurance Co. of North Carolina*, 806 F. Supp. 2d 872 (E.D. Va. 2011) (holding that nothing in Virginia law precludes a plaintiff from simultaneously seeking contract damages and invoking the first material breach doctrine to excuse further performance under the contract), *See also Design & Prod., Inc. v. American Exhibitions, Inc.*, 820 F. Supp. 2d 727 (E.D. Va. 2011) (granting design-build firm’s claim for declaratory judgment that it was excused from further performance under its contract because its client committed the first material breach). A breach is material if it is so fundamental to the contract that it defeats an essential purpose of the contract. *See Chesapeake Builders, Inc. v. Lee*, 254 Va. 294, 300, 492 S.E.2d 141, 145 (1997).

VII. Default/notice/cure – Default, notice, and cure each have separate and distinct legal meanings, but are often viewed and used in conjunction with one another. Each of these terms is a precursor to a termination of an agreement, transaction, or relationship.

A. Definitions - The Virginia UCC defines a “fault” as a “default, breach, or wrongful act or omission.” Virginia Code §8.1A-201(17). While notice, as defined by the Virginia UCC, means actual knowledge; receipt of notification of the fact, or based on facts and circumstances, a person has reason to know the fact exists. Virginia Code §8.1A-202. Although cure is a concept applied in the UCC, no specific definition exists. According to most definitions, cure means to relieve or correct a problem. Depending on the nature of the agreement and transaction, parties may look to the UCC rules for general rules. For example, in contracts for sale of goods, the seller or supplier may have an opportunity to cure an imperfect performance. Virginia Code §8.2-508. Or in construction contracts, notice and cure provisions can be very significant for contractors and suppliers, in order to avoid termination. In all cases, agreements should dictate the terms that the parties desire to govern.

- a. **Default** – Provisions for events that give rise to violations or nonperformance should be a part of all agreements and relationships. Default provisions include triggering events and depending on the severity of the default can offer a number of remedies.
- b. **Notice** – Default provisions will often provide some time period for which the non-breaching party must provide notice of a default to the breaching party. In addition to the time period, the provisions should also include the manner and process by which notice is to be given. For example, is

written notice required, or verbal notice sufficient. Similarly, must the notice of default be sent to an affiliate of the breaching party.

- c. Cure – This is an opportunity for the breaching party to remedy the nonperformance or default. Cure can be a very useful relief, if the default can be reasonably remedied. For example, in construction contracts, a contractor desires to have a reasonable period to respond to default notices and cure the issues, prior to a termination. Neither party may desire to immediately terminate a relationship so a reasonable period of cure may lead to a better result.

B. Practical Drafting and Review Recommendations:

- a. As a general tip, parties should be wary of contractual provisions that offer no notice of default and allow an immediate termination of an agreement.
- b. The time periods should establish reasonable expectations. If it is unreasonable to demand a cure in ten (10) days, then neither party will be better served by a provision with that time period. A thirty (30) day cure period is often used.
- c. The notice mechanism should allow some flexibility, but serve the overall interests. For example, when time is of the essence, notice should probably not be sent via regular U.S. mail, but instead should be required by some expedited shipping service.
- d. Think critically about elements or triggers of default that might fit your client's situation. In some transactions and in particular those involving some financing, there may be provisions that trigger default under related agreements. Although the trigger may be the same, the consequence of default may be very different and possibly harsh.

ⁱ General Sources:

Mark D. Loftis, Remedies for Breach of Contract, in CONTRACT LAW IN VIRGINIA, Chapter 12 (John V. Little ed., Virginia CLE/Virginia Law Foundation, 2011).

John A. Keith, Resolving Contract Disputes Through Alternative Dispute Resolution, in CONTRACT LAW IN VIRGINIA, Chapter 13 (John V. Little ed., Virginia CLE/Virginia Law Foundation, 2011).

The Criminalization of Everything

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INTRODUCTION

In today's overly criminalized environment, most major corporate civil cases have potential criminal implications. The criminalization of product liability cases, product recalls, and environmental accidents has exploded in recent years and must be considered at the outset of any significant regulatory or civil case.

I. First thing to consider: Can I represent all involved?

1. Dual representations in a corporate investigation context should generally be avoided.
 - A. Investigations can turn into a criminal case—dual representations in criminal cases are rarely permissible.
 1. “The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.” Comment #23 to Rule 1.7.
 - B. Attorneys should also recognize that, in a dual representation, there is no attorney-client privilege as between the two clients. This also counsels against a dual representation whenever there is a chance that the two clients could become adverse to one another.
2. “A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.” Comment #30 to Rule 1.7 (emphasis added).

II. Can I share information with everyone at “my” company/client? How can my client be proactive?

1. The joint defense privilege/common interest doctrine can expand the scope of privileges.
 - A. Two parties—each represented by separate counsel—can share a “common interest.”
 - B. This is often documented in a joint-defense agreement, but not strictly required.
 - C. Typically, sharing confidential information with any third-party would waive the attorney-client privilege.

D. This is not the case with information shared with third-parties that have a common interest. There is no waiver of privilege.

i. *See, e.g., In re: Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (“If two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons.”).

E. This principle extends to work-product as well—so long as parties had a common interest sufficient for purposes of the attorney-client privilege, disclosure of work shared among the parties will not waive work-product protections.

i. *See, e.g., In re: Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) (“[A]s an exception to waiver, the joint defense or common interest rule . . . applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine.”); *Am. Eagle Outfitters, Inc. v. Payless Shoesource, Inc.*, No. CV 07-1675, 2009 U.S. Dist. LEXIS 105608, at *7 (E.D.N.Y. Nov. 12, 2009) (same).

2. Who can waive a privilege when separate parties share a common interest?

A. The client with the original attorney-client communication can waive his/her own privilege, even if that communication was shared with others having a common interest.

i. *See, e.g., John B. v. Goetz*, No. 3:98-0168, 2010 U.S. Dist. LEXIS 8821, at *296 (M.D. Tenn. Jan. 28, 2010) (“Any participant in the agreement, however, remains free to disclose his own communications”); *Restatement (Third) of Law Governing Lawyers* § 76 cmt. g (2000) (“In the absence of an agreement to the contrary, any member may waive the privilege with respect to that person’s own communications.”).

B. Generally, one client is not authorized to waive the privilege for another’s private communications that may have been shared pursuant to a common interest.

i. *See, e.g., Restatement (Third) of Law Governing Lawyers* § 76 cmt. g (2000).

C. As to joint communications—in effect, “common property”—all participants must agree to waive the privilege.

i. *See, e.g., United States v. Gonzalez*, 669 F.3d 974, 981 (9th Cir. 2012) (“[T]he case law is clear that one party to a JDA cannot unilaterally waive

the privilege for other holders.”); *In re: Grand Jury Subpoenas*, 902 F.2d 244, 248 (4th Cir. 1990) (“[A] joint defense privilege cannot be waived without the consent of all parties who share the privilege.”)

D. If privileged “common interest” material was disclosed without the consent of all parties, a court could prevent its admissibility against other holders of the privilege.

3. What can be done to limit my client’s exposure?

A. A company wants to waive all privileges related to an internal investigation of corporate malfeasance

i. In the course of the internal investigation, the company and its CEO (in his individual capacity) were separately represented.

ii. Confidential information was shared by the company and its CEO, and their attorneys.

iii. Work product was created.

B. The company should be able to waive all privileges that it alone held, but communicated to the CEO in his individual capacity.

i. This could be quite a broad waiver, as “any privilege that exists as to a corporate officer’s role and functions within a corporation belongs to the corporation, not the officer.” *In re Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 124 (3d. Cir. 1986).

a. Note that in *In re Bevill* only one attorney was involved. The CEO communicated to corporate counsel, but claimed that he also sought personal legal advice in these communications.

C. The company cannot waive the CEO’s privilege for private communications that the CEO shared with the company.

D. The company should not be able to alone waive common privileges, although defining the common material may prove difficult.

Inadvertent Disclosures

One-hour “Ethics for Lunch” Presentation

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The presentation materials for this section of the book will be provided separately to provide more space at the lunch table for attendees.

Please place the materials behind those included here after lunch.

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Biography

James E. Moliterno is the Vincent Bradford Professor of Law at Washington and Lee University School of Law. He has a leadership role in W&L's third year curriculum reform. For 21 years prior to joining the W&L faculty in 2009, he was the Tazewell Taylor Professor of Law, Director of the Legal Skills Program, and Director of Clinical Programs at the College of William & Mary, serving also as Vice Dean from 1997-2000. He has taught legal ethics courses and professional skills courses at six law schools over the past thirty years. A member of the American Law Institute, he has held committee leadership roles in both AALS and the ABA. He was the 2012 recipient of the Rebuilding Justice Award from the Institute for the Advancement of the American Legal System (IAALS) in recognition of his career-long legal education reform work.

He is author or co-author of ten books including the forthcoming *The AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE* (Oxford Univ. Press), *GLOBAL ISSUES IN LEGAL ETHICS* (West 2007, with G. Harris) and *CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS* (4th ed. Lexis, 2012). He is also the author of numerous articles on legal ethics and the teaching of legal ethics. The William & Mary Legal Skills Program, under his direction, was recognized as a model for the teaching of professional skills and ethics, receiving the inaugural ABA Gambrell Professionalism Award in 1991.

He has engaged in substantial international legal ethics and legal education reform work, designing new lawyer and judge ethics courses in Serbia, Armenia, Georgia, Czech Republic, Japan, Indonesia and Thailand. He has trained law professors in China, Thailand, Georgia, Armenia and Serbia. He has trained judges in Kosovo and both judges and prosecutors in Indonesia. He has worked to revise the lawyer ethics code in Thailand and Georgia and lectured extensively on international lawyer ethics topics in Spain, Czech Republic, and Slovakia. He has prepared course materials that are in use in Serbia, Armenia, Thailand, Czech Republic, Japan, Australia, Indonesia, and China.

[Summary of International Work.](#)

Admitted to practice in West Virginia; Staff Attorney and Prison Project Coordinator, West Virginia Legal Services Plan, Inc., 1980-82; Instructor, Seattle University School of Law (formerly University of Puget Sound), 1982-85; Clinical Instructor and Lecturer, West Virginia University College of Law, 1985-86; Faculty Supervisor, Federal Inmate Assistance Program, 1986-87; Director of Legal Writing and Clinical Instructor, 1986-87; Assistant Professor of Law, Texas Tech University, 1987-88; Assistant Professor of Law and Director of Legal Skills, College of William and Mary, 1988-91; Associate Professor of Law and Director of Legal Skills, 1991-93; Director of Center for Teaching Legal Ethics, 1995-98; Vice Dean, 1997-2000; Director of Clinical Programs, 2002-07; Professor of Law and Director of Legal Skills, 1993-2009; Tazewell Taylor Professor of Law, 2003-09; Vincent Bradford Professor of Law, Washington and Lee University, 2009—.

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MATERIALS: Professor James E. Moliterno used the following materials:
NUMBER 1:

CROSS, GUNTER, WITHERSPOON & GALCHUS, P.C.

**THE LEGAL ETHICS IN A WIRED WORLD:
DEVELOPING CONFIDENTIALITY ISSUES AFFECTING
ATTORNEY'S ETHICAL OBLIGATIONS IN OUR
INCREASINGLY HI-TECH LANDSCAPE**

DECEMBER 17, 2010

Carolyn Witherspoon¹

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¹ I would like to thank Travis Bo Loftis, associate at Cross, Gunter, Witherspoon & Galchus, P.C., for his assistance with this paper. Special thanks to Kathryn Kelley, a law clerk with Cross, Gunter, Witherspoon & Galchus, P.C. in Little Rock, Arkansas, for her assistance with this paper.

NUMBER 2:

ANTFARM INSURANCE *GOOD HANDS BY THE THOUSANDS*



"G'DAY MATE!"

CONFIDENTIAL LAWYER-CLIENT COMMUNICATION

Dear Arthur:

Thanks for your careful legal analysis of the Madison auto collision matter. It disturbs me no end that the plaintiffs are represented by Smith & Wesson. Those people are always shooting from the hip—loose cannons. You just never know what underhanded scheme they will pull next.

Nonetheless, I appreciate that with the new comparative negligence standard, the failure of plaintiffs to fasten the belt on their teenage son will not be a full bar to their relief. I know you will have to bluff in the negotiations with S&W, but under no circumstances will we permit this matter to come to trial. The bad press would destroy our company's hard-working, common-person image. So pay them whatever you must but get rid of this claim.

By the way, it was a treat to meet you and your wife at the insurance conference last week. You two sure know how to party! I know you were on the tipsy side by then, but I appreciated what you said about your undivided loyalty to AntFarm. I know I can always count on you to put our interests ahead of the insureds. We need more good lawyers like you.

Sam Watershed
Head Claims Administrator

NUMBER 3:

From: Arthur Parsons
Sent: Wednesday, March 23, 2011 8:52 AM
To: Adam Scalia
Subject: letter from AntFarm re Madison matter

Dear Adam Scanlon. I look forward to having your assistance in the negotiation of the Madison matter. I have appreciated having your insights since you joined the firm last month.

I am attaching a letter I received from Sam Watershed at AntFarm Insurance. We should discuss this before we head into our negotiation session with Adam Scalia from Smith & Wesson. Scalia is a slippery SOB and I need all the help I can get dealing with his dirty tricks.

Arthur Parsons
Partner
Slicem & Dicem, LLC
Richmond VA

To comply with IRS regulations, we advise you that any discussion of Federal tax issues in this e-mail was not intended or written to be used, and cannot be used by you, (i) to avoid any penalties imposed under the Internal Revenue Code or (ii) to promote, market or recommend to another party any transaction or matter addressed herein.

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NUMBER 4:

RULE DISCUSSED:

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver

When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

1. the waiver is intentional;
2. the disclosed and undisclosed communications or information concern the same subject matter; and
3. they ought in fairness to be considered together.

(b) Inadvertent disclosure.

When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

1. the disclosure is inadvertent;
2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure Made in a State Proceeding

When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

1. would not be a waiver under this rule if it had been made in a Federal proceeding; or
2. is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling effect of court orders.

A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) Controlling Effect of a Party Agreement

An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of This Rule

Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions

In this rule:

1. "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
2. "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial."

Explanatory Note on Evidence Rule 502 Prepared by the Judicial Conference Advisory Committee on Evidence Rules (Revised 11/28/2007)

This new rule has two major purposes:

- 1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product — specifically those disputes involving inadvertent disclosure and subject matter waiver.
- 2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. See, e.g., *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass “millions of documents” and to insist upon “record-by-

record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation”).

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court’s order will be enforceable. Moreover, if a federal court’s confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. See, e.g., *Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson*, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. See, e.g., *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. See Rule 502(b). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver — “ought in fairness” — is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. See generally *Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multifactor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

Subdivision (c). Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is more protective (such as where the state law is that an inadvertent

disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. See 28 U.S.C. § 1738 (providing that state judicial proceedings “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken”). See also *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is “constrained by principles of comity, courtesy, and . . . federalism”). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. See generally *Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of “claw-back” and “quick peek” arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. See *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into “so-called ‘claw-back’ agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents”). The rule provides a party with a predictable protection from a court order — predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention.

Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court’s order.

Under subdivision (d), a federal court may order that disclosure of privileged or protected information “in connection with” a federal proceeding does not result in waiver. But subdivision (d) does not allow the federal court to enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal. If a disclosure has been made in a state proceeding (and is not the subject of a state-court order on waiver), then

subdivision (d) is inapplicable. Subdivision (c) would govern the federal court's determination whether the state-court disclosure waived the privilege or protection in the federal proceeding.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.

Subdivision (f). The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(f) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101. This provision is not intended to raise an inference about the applicability of any other rule of evidence in arbitration proceedings more generally.

The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.

Subdivision (g). The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination. The definition of work product "materials" is intended to include both tangible and intangible information. See *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("work product protection extends to both tangible and intangible work product").

CROSS, GUNTER, WITHERSPOON & GALCHUS, P.C.

**THE LEGAL ETHICS IN A WIRED WORLD:
DEVELOPING CONFIDENTIALITY ISSUES AFFECTING
ATTORNEY'S ETHICAL OBLIGATIONS IN OUR
INCREASINGLY HI-TECH LANDSCAPE**

DECEMBER 17, 2010

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DEVELOPING CONFIDENTIALITY ISSUES AFFECTING ATTORNEY'S ETHICAL OBLIGATIONS IN OUR INCREASINGLY HI-TECH LANDSCAPE

I. INTRODUCTION

The legal profession is no stranger to adaptation. Indeed, the doctrine of stare decisis and the fundamental principles of the common-law are evolutionary by their very nature, and so is human technology. In the past decade or two, the attorney's ethical duty of confidentiality, the attorney-client privilege, and the work-product doctrine, have all been affected by innovations in efficiency of communication like the fax machine, computer, cellular phone, and e-mail. The legal profession's various procedural and ethical rules invariably lag behind the latest invention, and new ethical issues arising from technology disputes are common, making reluctant technophiles out of many practitioners.

The latest legal gremlin to cause mischief in litigation pertains to the inadvertent disclosure of metadata, and, to a lesser extent, pre-production deletion of metadata. The latter practice is becoming more and more common and is normally not an issue. When the metadata is under evidentiary dispute, however, deletion or "scrubbing" of this metadata may have consequences for obvious reasons. Problems also arise when a document and accompanying metadata are disclosed with confidential information contained therein. Because of the scarcity of the law in this area, inadvertent disclosures of metadata are creating ethical questions affecting the disclosing attorney's duty of confidentiality and the receiving attorney's duty of zealous representation. While this is a broad topic raising many issues, the focus of this paper is directed to ethical implications generally.

Confidentiality disclaimers in e-mail communications are used every day by virtually all participants in the online commercial marketplace and throughout the legal profession. Although no attempt to enforce this boilerplate language is currently reported, they seem to be here to stay, like the disclaimers commonly displayed on fax coversheets. This paper will also discuss the efficacy of the disclaimer and ethical issues arising from the use and non-use of them.

I. HI-TECH REALITY AND ETHICAL OBLIGATIONS

a. Metadata

Many lawyers know that electronic documents contain metadata. For the less technologically savvy attorney, metadata—also known as “data about data”—is embedded information in an electronic document.² From a more technical perspective, metadata is used by the system administration to manage the document’s storage, transfer and general handling.³ As for spreadsheets (e.g., Microsoft Excel), these files contain cells that may contain mathematical formulas or calculations in metadata form that are not seen in a printed version but may have evidentiary value.⁴ All of these files are subject to metadata inspection in an electronic copy.

An analog from the pre-electronic era is a library catalog card. The card typically contains data about the contents and location of a book in the library. Additionally, the card contains the name of the author, the title of the book, the publisher, the year of publication, the genre, the series it belongs to, and other identifiers such as ISBN numbers and Dewey Decimal system call numbers. Using metadata, a Microsoft Word or WordPerfect document is created, catalogued and retrievable in a fashion similar to the library catalog card. Metadata is immediately associated with a new document that designates the type of file, creation and edit dates, authorship and edit history.

The issue of metadata is important for attorneys because the disclosure of this information—either on purpose or not—implicates several ethical rules, as well as discovery rules. Obviously, a primary ethical rule implicated is the disclosing attorney’s duty of confidentiality under Rule 1.6 of the ABA’s Model Rules of Professional Conduct. When is metadata confidential? Metadata may also affect all attorneys’ duty to provide diligent representation to their clients under Rule 1.3. Does the interplay of these rules

² The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* 58 (2005), http://www.thesedonaconference.org/dltForm?did=7_05TSP.pdf. The Sedona Conference filled the gap with e-discovery principles that have been followed by some courts. The Sedona Conference is a non-profit legal research and education institute that holds conferences in the areas of antitrust, complex litigation, and intellectual property rights. Each conference is comprised of jurists, practitioners, and academics who prepare materials and lead discussions. The conference’s Working Groups Series completed a conference on e-discovery in 2005, and created fourteen principles to guide parties in electronic document production.

³ *Id.*

⁴ See *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640 (D. Kan. 2005).

require the disclosing attorney to delete metadata before sending? When will deleting metadata be an offense subject to discipline or sanctions? Does Rule 1.3 oblige the receiving attorney to inspect metadata that is disclosed in discovery in order to zealously represent the client? Does Rule 4.4(b) require the receiving attorney to notify the disclosing attorney when confidential information contained in metadata is inadvertently disclosed?

The hi-tech landscape and the presence of metadata information may affect the attorney-client relationship, the work-product doctrine, and the attorney's general duty of confidentiality. The imprudent attorney is in danger of waiving the first two of these doctrines by inadvertently disclosing metadata, and is in danger of violating ethical rules by breaching confidentiality in the process. The courts have adopted various approaches to the waiver of the attorney-client and work-product privileges.⁵ Most courts take a reasonableness or balancing approach to determine whether a waiver applies to these privileges.⁶

The following sections will discuss the various ethical issues from the point of view of the attorney who discloses documents to opposing counsel that may contain metadata, and then examine the ethical responsibilities of the attorney who receives documents that may contain metadata. As of the drafting of this presentation, there have been thirteen ethical opinions concerning the responsibilities of the disclosing and receiving attorney in regards to metadata; opinions from the American Bar Association,⁷ the state bar associations of Maryland,⁸ Florida,⁹ New York,¹⁰ Alabama,¹¹ Arizona,¹² Pennsylvania,¹³ Colorado,¹⁴ Maine,¹⁵ New Hampshire,¹⁶ Vermont,¹⁷ West Virginia,¹⁸ and the bar

⁵ See Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN. ST. L. REV. 381 (2005).

⁶ E.g., *Maldonado v. New Jersey*, 225 F.R.D. 120, 130-31 (D. N.J. 2004).

⁷ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. No. 442 (2006).

⁸ Maryland State Bar Opinion 2007-09 *Ethics of Viewing and/or using Metadata* (2006).

⁹ Florida Bar Prof'l Ethics Comm., Advisory Op. No. 06-2 (September 15, 2006).

¹⁰ N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. No. 749 (Dec. 14, 2001).

¹¹ Alabama State Bar Opinion 2007-02 *Ethical Propriety of Mining Metadata* (March 14, 2007)

¹² Arizona State Bar Opinion 07-03 *Confidentiality; Electronic Communications; Inadvertent Disclosure* (November 2007).

¹³ Available at 30-FEB Pa. Law. 46

¹⁴ Colorado ethics Opinion 119, *Disclosure, Review, and Use of Metadata*, (May 17, 2008)

¹⁵ Maine Board of Overseers of the Bar, Professional Ethics Commission, Opinion 196 (October 21, 2008).

¹⁶ New Hampshire Bar Assoc. Ethics Committee Opinion 2008/2009-4.

¹⁷ Vermont Bar Assoc. Professional Responsibility Section, Ethics Opinion 2009-1.

association of the District of Columbia.¹⁹ Each of the opinions agrees on the responsibilities of the sending attorney, but the opinions differ on how the receiving attorney should treat metadata received in an electronic document.

i. The Disclosing Attorney

1. ABA Model Rule 1.6 – Confidentiality of Information

Rule 1.6(a) mandates that “[a] lawyer shall not reveal information relating to the representation of a client” unless the client gives permission or other exceptions apply.²⁰ Comment 16 to Rule 1.6 states that, “[a] lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer.”²¹ Also, Comment 17 states that “the lawyer must take reasonable precautions to prevent [transmitted communications] from coming into the hands of unintended recipients.”²² How do these general rules apply to the lawyer in the ordinary course of business?

For example, Microsoft Word has features such as “Track Changes” and “Comments.” If a document is edited using “Track Changes,” and an electronic document is disclosed with the feature still activated, the receiving attorney may view every change that was made to the document.²³ Microsoft Word’s “Comments” feature allows for multiple parties (e.g., attorney and client) to add comments to a specific electronic document.²⁴ Like “Track Changes,” this feature, if not de-activated before disclosure, allows the receiving party to view any comments that were added—comments by the disclosing attorney’s client, for example.²⁵ Similar features to WordPerfect as well as other Microsoft applications, such as PowerPoint and Excel, also contain these metadata hazards.²⁶

¹⁸ West Virginia Bar Assoc. Lawyer Disciplinary Board, L.E.O. 2009-1.

¹⁹ Washington D.C. Bar Opinion 341 *Review and Use of Metadata in Electronic Documents* (September 2007).

²⁰ MODEL RULES OF PROF’L CONDUCT R. 1.6 (2004).

²¹ *Id.*

²² *Id.*

²³ Campbell C. Steele, *Attorneys Beware: Metadata’s Impact on Privilege, Work Product, and the Ethical Rules*, 35 U. MEM. L. REV. 911, 937 (2005).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*; see also *The Dangers of Document Metadata: The Risks to Corporations*, available at <http://www.metadatarisk.org>.

In addition to ethical problems arising from “Track Changes” and “Comments,” other seemingly innocent and efficient practices may be hazardous. For example, many users of electronic documents or templates will do a “save as” over a previous version, making the appropriate changes and deletions. This technique—dubbed “dupe-and-revise”—saves time but leaves intact original author information, print dates, and even hidden text.²⁷ This metadata information may contain Rule 1.6 information from current or previous clients.

All of the state ethics opinions that have addressed metadata have focused at least in part on whether the inadvertent disclosure of metadata was an ethics violation under the state’s rules. The first opinion issued was by the New York State Bar Association. It issued Ethics Opinion 782 in 2004 in order to address this issue—specifically whether the practice violated confidentiality rule DR 4-101(B), which is an analog of MRPC 1.6 (New York is one of a few states with rules based on the Model Code of Professional Responsibility). The committee concluded that “[l]awyers have a duty under DR 4-101 to use *reasonable care* when transmitting documents . . . to prevent the disclosure of metadata containing client confidences or secrets.”²⁸ Thus, the committee used a reasonableness standard and defined “reasonable care” as placing a duty on lawyers to “stay abreast of technological advances” and the potential risks involved.²⁹

The other states that have addressed this issue followed New York’s lead and enacted a reasonableness standard to determine what steps a sending attorney must take to prevent the inadvertent disclosure of metadata.³⁰ The Arizona ethics opinion provided some guidance as to what “reasonable” means in the metadata context. “What is ‘reasonable’ in the circumstances depends on the sensitivity of the information, the potential consequences of its inadvertent disclosure, whether further disclosure is restricted by statute, protective order, or confidentiality agreement, and any special instructions given

²⁷ Randy Farrar & Susan McClellan, *Metadata Management in Microsoft Office: How Firms Can Protect Themselves against Unintentional Disclosure and Misuse of Metadata*, (May 2006) available at <http://www.abanet.org/genpractice/ereport/may06/metadata.html>

²⁸ N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. No. 782 (Dec. 8, 2004) (emphasis added).

²⁹ *Id.*

³⁰ The Alabama ethics opinion includes the following language, “[t]his opinion is consistent with Formal Opinions 749 and 782 of the New York State Bar and some of the language herein is derived from that opinion. Alabama State Bar Opinion 2007-02 *Ethical Propriety of Mining Metadata* (March 14, 2007).

by the client.³¹ The New Hampshire ethics opinion suggested that appropriate training may be a component of reasonable care, stating generally that lawyers should be reasonably informed about the types of metadata that may be included in electronic documents and the resources available to remove such metadata.³²

In a 2006 article in the Journal of the Kansas Bar Association, a state court judge observed that most courts require attorneys to use “reasonable efforts” to keep client information confidential.³³ The judge reasoned that the attorney who has not taken the time to learn about metadata and to take measures to prevent its disclosure has not made a “reasonable effort.”³⁴ Otherwise, the disclosing attorney risks violating the Model Rules in addition to waiving privilege of the disputed metadata information.³⁵

This majority rule reasonableness approach to the attorney’s duty to protect confidential information within the context of the attorney-client and work-product privileges is reflected in *Maldonado v. New Jersey*.³⁶ The factors employed by the court included:

- 1) the *reasonableness of the precautions taken* to prevent inadvertent disclosure in view of the extent of the document production;
- 2) the number of inadvertent disclosures;
- 3) the extent of the disclosure;
- 4) any delay and measures taken to rectify the disclosure; and
- 5) whether the overriding interests of justice would or would not be served by relieving the party of its error.³⁷

To determine whether the attorney-client privilege applied, the court focused on the first factor and addressed the “reasonableness of the precautions taken” to protect the disputed correspondence.³⁸ Similarly, the court determined that the key question with

³¹ Arizona State Bar Opinion 07-03 *Confidentiality; Electronic Communications; Inadvertent Disclosure* (November 2007).

³² New Hampshire Bar Assoc. Ethics Committee Opinion 2008/2009-4.

³³ Hon. Steve Leben, *Considering the Inadvertent Disclosure of Metadata*, 75 J. KAN. B. ASS’N 26 (2006).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Maldonado*, 225 F.R.D. at 130–31. The plaintiff, a probation officer, filed a charge against his employer, The State of New Jersey, and his superiors for employment discrimination and retaliation. The privilege issue centered on a letter drafted by the defendant-supervisors for delivery to their attorney. The letter contained witness information and theories about the plaintiff’s various motives. A copy of the letter landed in the plaintiff’s mailbox, and he delivered it to his attorney.

³⁷ *Id.* at 128 (emphasis added).

³⁸ *Id.* at 129.

respect to the work-product privilege was whether the material was kept away from adversaries.³⁹ In the case of work-product, it is easy to see how a question of privilege may turn on the reasonableness of the measures taken to protect the work-product information. Thus, *Maldonado* outlines a helpful framework within which to analyze whether the inadvertent disclosure of metadata waives privilege, breaches the ethical duty of confidentiality, or both.

In summary, a plain reading of Rule 1.6 intuitively covers the hidden information contained in metadata. Indeed, Comment 17 requires the lawyer to take “reasonable precautions” to protect confidential information. The contemporary view outlined by *Maldonado* regarding the waiver of the attorney-client privilege reinforces the idea that “reasonableness” will be the focus of any inquiry into a breach of the attorney’s ethical duty of confidentiality when sensitive metadata is disclosed. Therefore, it is incumbent upon all practitioners to be aware of the hidden dangers posed by inadvertent metadata disclosure and to make reasonable efforts to protect the metadata information when appropriate.

2. “Scrubbing” Metadata and Preventing Inadvertent Disclosure

The ethical opinions of the various State Bar Associations demonstrate that attorneys have a duty to investigate, and, if necessary, prevent metadata from disclosure when it contains confidential information. Whether reasonableness requires the attorney to obtain scrubbing software—widely available on the market—remains an open question in virtually all jurisdictions.⁴⁰ In some cases, the deletion of metadata may be seen as comparable to shredding documents, especially if the metadata is permanently lost. In most cases, however, the use of this software will be the reasonable and safer alternative when the metadata is not under dispute or is the subject of privilege. The best alternative is for the litigants to be specific as to the form of production in their discovery conference, and to assert privilege early.

In response to discovery requests many attorneys routinely convert electronic documents into more limited electronic formats such as Adobe PDF “.pdf” or a similar file name extension called a TIFF image (“.tif”). This practice is a good way to guard against

³⁹ *Id.* at 130.

⁴⁰ J. Brian Beckham, *Production, Preservation, and Disclosure of Metadata*, 7 COLUM. SCI. & TECH. L. REV. 1 (2005).

metadata inspection and confidentiality disclosures when there is no duty to preserve the documents in original format. Problems may arise in litigation, however, when the parties involved are not clear at the outset regarding the form of discovery documents.⁴¹

3. Duty to Review Documents for Privilege and the Effect of Inadvertent Disclosure

The prevalence of metadata certainly complicates electronic discovery. If a document is disclosed that inadvertently contains metadata reflecting confidential information, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document, but possibly to other documents and to third parties. Because of this possible waiver of attorney-client privilege, disclosing attorneys may have a duty to review all outgoing documents for any material that may be privileged, including hidden metadata. This duty can involve significant time and effort sifting through electronic documents before the Fed R. Civ. Proc. 26 initial disclosure or in response to discovery requests, all in order to preserve privilege and work product. The costs of this search process in complex litigation could be anywhere from \$40,000 to \$9.75 million.⁴²

In 2005, a Maryland District Court ruled in *Hopson v. City of Baltimore*,⁴³ that this search was necessary to avoid an unwanted waiver, despite any burden or cost it might entail. The Court noted that while an agreement between the parties that inadvertently disclosed confidential material will not constitute a waiver *may* be enforceable, the parties should assume that a complete preproduction privilege review is required. A litigant would only be excused from this search if it could show with particularity that it would be unduly burdensome or expensive to do so.⁴⁴

⁴¹ See, e.g., *Hagenbuch v. 3B6 Sistemi Elettronici Industrial*, 2006 WL 665005, at *2 (N.D. Ill. Mar. 8, 2006) (holding that defendant did not comply with discovery order that was unspecific as to form of production by converting documents from original format to TIFF and PDF images); *In re Priceline.com Inc. Securities Litigation*, 233 F.R.D. 88, 89 (D. Conn. 2005) (holding that TIFF and PDF images of the documents was the best form of production because these unalterable images would prevent inadvertent alterations and accusations of alteration between the parties).

⁴² See *Rowe Entm't, Inc., v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002) (Defendants supported their motion to be protected from the burden of producing e-mail with cost estimates from computer consultants. One estimate stated it would cost \$395,944 to select, catalogue, restore, and process a limited sampling of the e-mails sought by the plaintiffs, and \$9,750,000 to do the same for all e-mail requested. Another defendant produced cost estimates ranging from \$43,110 to \$84,060 to produce requested e-mail, with an estimated cost of \$247,000 to review the e-mail for privilege and work-product prior to production. A third estimated that it would take more than two years to retrieve and catalogue all the e-mail requested by the plaintiffs).

⁴³ 232 F.R.D. 228 (2005).

⁴⁴ *Id.* at 244.

Subsequently, the state of Maryland, mainly in response to the amendments to Fed.R.Civ.P. 16, 26, 33, 34, 37, and 45 regarding electronic discovery, enacted a Suggested Protocol for Discovery of Electronically Stored Information.⁴⁵ This Protocol was developed in June 2007 and was intended to provide parties with a comprehensive framework to address and resolve a wide range of electronic discovery issues. The Protocol includes extensive guidance on metadata.

The Protocol provides that the attorney should become reasonably familiar with the clients' electronically stored information, including metadata, or identify a person who was familiar with the information that could participate in the Rule 26(f) Conference. This person should also be familiar with the client's policies regarding Metadata scrubbing. Furthermore, the Protocol recognizes that the production of metadata will likely impose substantial costs and gives guidelines to help the disclosing attorney determine whether metadata may be discovered. Some of the factors the Protocol lists are: (1) relevance of the metadata; (2) cost-benefit factors; (3) the type of metadata (mere System Metadata, which includes information such as the author, date and time of creation, is less likely to involve issues of work product or privilege); and (4) agreement between the parties concerning metadata, or a showing of a good cause by the requesting party.

4. Federal Rule of Evidence 502

Congress recently addressed both the expense associated with prescreening all electronic discovery and the issue of inadvertent disclosure of confidential material when it issued Federal Rule of Evidence 502. Rule 502 was recommended by the Committee on Rules of Practice and Procedure in September 2007 and was passed by the U.S. Senate on February 27, 2008, adding it to the Federal Rules of Evidence. The Rule took effect in September 2008. The Rule has two stated major purposes: (1) to resolve some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product; and (2) to respond to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will

⁴⁵ Available at www.mdd.uscourts.gov/news/news/ESIProtocol.pdf

operate as a subject matter waiver of all protected communications or information. Again, these costs increase exponentially when electronic discovery and metadata are involved.

Rule 502 provides several protections against waiver of privilege and work product. First, it limits the scope of waiver. Subsection (a) provides that if a waiver is found, it applies only to the information disclosed, unless the discloser intentionally misleads the recipient, making further disclosure necessary. Second, subsection (b) provides protections against inadvertent disclosure when made at the federal level, if the holder took reasonable steps to prevent such disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communication. One issue developing under Rule 502, is that the Rule does not explain “inadvertence” or “reasonable steps,” and courts will have to interpret these terms to decide whether or not privilege has been violated.⁴⁶ Third, subsection (c) of the Rule provides that if there is a disclosure of privileged communication in a state proceeding, then the admissibility in a subsequent federal proceeding is determined by the law that is most protective against waiver. Fourth, subsection (d) provides that if a court enters an order providing that a disclosure does not constitute a waiver, that order must be honored by any other federal or state proceeding. Finally, subsection (e) provides that an agreement between parties in a federal proceeding that disclosures of information will not waive privilege is binding and enforceable against the parties.

ii. The Receiving Attorney

If the sending attorney did not take precautions to protect any metadata, isn't that metadata fair game for inspection and use? The answer to that question depends on who you ask. The ABA and the various state bar associations disagree as to the propriety of searching for and using metadata in received electronic documents. The receiving attorney may also be in danger of violating the ethical rules when an electronic document's metadata is received.⁴⁷

1. ABA Rule 1.3 – Diligence

⁴⁶ Moore, Allan B., et. al. *'Oops, I Want That Back: Clawing Back Privileged Documents And New Federal Rule of Evidence 502.* Mealey's Litigation Report: Insurance, Vol. 23, #20, pg. 8 March 26, 2009.

⁴⁷ Steele, *supra*, note 23, at 945.

Rule 1.3 requires that “[a] lawyer shall act with reasonable diligence and promptness when representing a client.”⁴⁸ Comment 1 to the rule requires the lawyer to act with “zeal in advocacy” while at the same time allowing the lawyer “to exercise reasonable discretion in determining the means by which a matter should be pursued.”⁴⁹ It appears from a plain reading that an argument for the inspection and use of inadvertently disclosed metadata could be attempted under the breadth of this ethical rule. But the rule also cautions that a “lawyer is not bound . . . to press for every advantage that might be realized for a client.”⁵⁰

2. ABA Rule 4.4 Differing Opinions of State Bars and the ABA

Specific guidance for the attorney who receives email or electronic documents that may contain confidential embedded information can be found under Rule 4.4(b). Today, Rule 4.4(b) requires “[a] lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”⁵¹ Comment 2 elaborates that Rule 4.4(b) is meant to address mistakenly sent documents, and that the word “document” includes e-mail and other electronic modes of transmission subject to being read or put into readable form.”⁵² When fax machines became more commonly used, the ethical question arose: what is an attorney’s ethical duty when a fax containing confidential information is sent to the attorney inadvertently? Most bar associations determined that this information could not be used.⁵³ Today, Rule 4.4(b) covers the inadvertently sent fax and Comment 2 to the rule encompasses the errant e-mail. Thus, Rule 4.4(b) could arguably apply to the inadvertent disclosure of metadata information contained in the e-mail and to any attached document.⁵⁴ Indeed the states that have addressed this issue have all used Rule 4.4(b) as a starting point for their analysis.

On August 5, 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued Opinion 06-442, which states that a lawyer is generally permitted to review and use metadata contained in e-mail and other electronic documents.⁵⁵ The

⁴⁸ MODEL RULES OF PROF’L CONDUCT R. 1.3 (2004).

⁴⁹ *Id.*

⁵⁰ MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt.

⁵¹ MODEL RULES OF PROF’L CONDUCT R. 4.4 (2004).

⁵² *Id.*

⁵³ Steele, *supra*, note 23, at 945–46.

⁵⁴ See R. 4.4(b).

⁵⁵ ABA Comm. On Ethics and Prof’l Responsibility, Formal Op. No 442 (2006).

Committee noted that the Model Rules of Professional Conduct do not contain any specific prohibition against such use of embedded information. The Committee concluded that Rule 4.4(b) relating to a lawyer's receipt of inadvertent information was the most applicable rule concerning metadata.⁵⁶ If a transmission of metadata were to be inadvertent, under Rule 4.4(b), the only obligation that the receiving lawyer has is to promptly notify the sender. Comment three to Model Rule 4.4 indicates that the receiving lawyer may, but is not required to, return the document unread. The Committee made a point not to characterize transmission of metadata as inadvertent or advertent, but observed that the subject may be fact specific.⁵⁷ Opinion 06-442 suggests that metadata information will fall within the scope of 4.4(b) only if it is inadvertently sent. Therefore, according to the American Bar Association, an attorney would generally not commit an ethical violation by examining received documents for hidden metadata. Further details of the ABA decisions will be discussed later in this section.

3. Opinions that Prohibit Metadata Mining

Three states have agreed with the ABA ethics opinion that searching a received document for hidden metadata is not an ethics violation. The other seven states have "respectfully declined to follow the ABA position"⁵⁸ and concluded that "[t]he unauthorized mining of metadata by an attorney to uncover confidential information would..." be an ethical violation.⁵⁹ The New York ethics committee addressed the ethical obligations of the receiving attorney regarding metadata in Ethical Opinion No. 749 by answering in the negative the question: "[m]ay a lawyer ethically use available technology to surreptitiously examine and trace e-mail and other electronic documents?"⁶⁰ The committee found that the "use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work-product doctrine or that may otherwise constitute a 'secret' of another lawyer's client would violate the letter and spirit of [the rules]."⁶¹ Unlike the inadvertently sent fax, the New York Bar found that the disclosure of metadata was not inadvertent or careless, but that it was more accurately

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Arizona State Bar Opinion 07-03 *Confidentiality; Electronic Communications; Inadvertent Disclosure* (November 2007).

⁵⁹ Alabama State Bar Opinion 2007-02 *Ethical Propriety of Mining Metadata* (March 14, 2007).

⁶⁰ N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. No. 749 (Dec. 14, 2001).

⁶¹ *Id.*

described as “unwilling” or “unknowing.”⁶² The committee’s distinction between inadvertent or careless disclosures on the one hand, and unwilling or unknowing disclosures on the other hand, foreclosed any need to weigh the balance between the policy interest of encouraging more careful conduct against the policy interest in favor of confidentiality.⁶³ Therefore, the committee focused on the receiving attorney’s conduct, and it concluded that the sending attorney’s carelessness did not translate into a breach of confidentiality.⁶⁴ A controversial precedent is raised by the New York opinion. Despite the disclosing attorney being in the best position to prevent ethical problems for all parties involved, the receiving attorney is the party subject to discipline.⁶⁵

The New Hampshire ethics committee examined this issue under Rule 4.4(b) of the New Hampshire Rules, which is different from Model Rule 4.4(b), and stated that receiving attorneys may not exploit inadvertently received metadata.⁶⁶ The New Hampshire rule states that a lawyer receiving inadvertent documents “shall not examine the materials”.⁶⁷ The committee then stated that metadata must always be viewed as inadvertently sent unless counsel have mutually agreed other wise.

The issue of metadata mining was brought to the attention of the Florida Bar in 2005.⁶⁸ A distinction was sought between the potentially unethical scenario of mining metadata as a matter of course—when opposing counsel sends a letter, for example—and conducting metadata mining for forensic e-discovery purposes. The Florida Bar issued, on September 15, 2006, Advisory Opinion No. 06-2, which states in part that:

It is the recipient lawyer’s concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender’s client where the recipient knows or should know that the information is not intended for the recipient. Any such metadata is to be

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*; Steele, *supra*, note 23, at 946.

⁶⁵ Steele, *supra*, note 23, at 947.

⁶⁶ New Hampshire Bar Assoc. Ethics Committee Opinion 2008/2009-4.

⁶⁷ *Id.*

⁶⁸ Jessica M. Walker, *What’s a Little Metadata Mining Between Colleagues?* April 21, 2006, available at <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1145538533635>.

considered by the receiving lawyer as confidential information, which the sending lawyer did not intend to transmit.⁶⁹

The Committee distinguished the metadata concerns addressed in this opinion by stating “[t]his opinion does not address uses of metadata that is discoverable under applicable rules or is admissible in a trial or arbitration.”⁷⁰ Thus, the state is recognizing a distinction of contexts for the ethical and unethical uses of metadata under their rules.

4. Opinions that Endorse Metadata Mining

The Maryland Opinion, in contrast, concluded that the Maryland Rules of Professional Conduct allow the recipient lawyer to review and make use of metadata. It further states that the receiving attorney has no obligation to notify opposing counsel that there may have been an inadvertent transmittal of it.⁷¹ The Opinion does state that the receiving lawyer can, and probably should, communicate with his or her client concerning whether to notify the sending attorney and to take such action as they believe is appropriate.⁷²

The ABA Formal Opinion 06-442 also commented on a receiving lawyer’s search for metadata. The Committee declined to agree with the finding of New York and Florida that the practice is impermissible.⁷³ The Committee reiterated Rule 4.4(b)’s sole requirement that the receiving attorney provide notice to the sender, of the receipt of inadvertently sent information. The Committee concluded that this was evidence of the intention to set no other restrictions on the receiving attorney’s conduct.⁷⁴

The ABA Opinion went on to observe that counsel sending or producing electronic documents may be able to limit the likelihood of transmitting metadata in electronic documents. Computer users can avoid creating some kinds of metadata by choosing not to use redlining functions of a word processing program or not to embed comments into a document. Computer users can also eliminate or scrub some kinds of embedded information in an electronic document before sending it.⁷⁵ These comments seem to place

⁶⁹ Florida Bar Prof’l Ethics Comm., Advisory Op. No. 06-2 (September 15, 2006).

⁷⁰ *Id.*

⁷¹ Maryland State Bar Opinion 2007-09 *Ethics of Viewing and/or using Metadata* (2006).

⁷² *Id.*

⁷³ ABA Comm. On Ethics and Prof’l Responsibility, Formal Op. No 442 (2006).

⁷⁴ *Id.*

⁷⁵ *Id.*

the responsibility for confidentiality on the sending attorney, rather than the attorney who may receive electronic documents containing confidential metadata.

The Pennsylvania ethics opinion sided with the ABA and Maryland that a receiving lawyer “may generally examine and use the metadata for the client’s benefit without violating the Rules of Professional Conduct.”⁷⁶ The committee’s opinion was grounded on the lawyer’s duty under the Rules to provide competent representation. The duty of competent representation may require the attorney to disclose the information, or conversely, may require the attorney to refrain from disclosing the information. The committee stated that, upon receipt of metadata, the receiving lawyer must determine whether he may use the metadata as a matter or substantive law; must consider the potential effect on the client’s matter if the metadata is used; and should consult with the client about the appropriate course of action under the circumstances.⁷⁷

Finally, the Vermont Opinion stated that, “the Vermont Bar Association Professional Responsibility Section finds nothing to compel the conclusion that a lawyer who receives an electronic file from opposing counsel would be ethically prohibited from reviewing that file using any available tools to expose the file’s content, including metadata.” The Section suggests that such a rule would limit “the ability of a lawyer diligently and thoroughly to analyze material received from opposing counsel.”

5. A Possible Middle Ground – the D.C. and Colorado Opinions

The District of Columbia Bar Association Opinion that was issued in September of 2007 seemingly struck a middle ground between the mining permissible and mining impermissible opinions. The D.C. Opinion stated that it “agree[d] generally with the New York and Alabama Bars to the extent that they have found Rule 8.4(c) to be implicated when a receiving lawyer wrongfully ‘mines’ an opponents’ metadata.”⁷⁸ According to the D.C. Bar, however, mining opposing counsel’s documents for metadata is only a violation when the receiving lawyer has “actual prior knowledge that the metadata was inadvertently

⁷⁶ Pennsylvania Bar Ass’n Comm. On Legal Ethics and Professional Responsibility, Formal Op. 2009-100 (2009).

⁷⁷ *Id.*

⁷⁸ Washington D.C. Bar Opinion 341 *Review and Use of Metadata in Electronic Documents* (September 2007).

provided.”⁷⁹ The Opinion further concluded that because the sending lawyer has a duty to avoid the inadvertent productions of metadata, mere uncertainty on the part of the receiving lawyer as to the inadvertence of the sender does not rise to the level of an ethical obligation by the receiving lawyer to refrain from reviewing the metadata. However, if there is actual prior knowledge by the receiving lawyer that the metadata was inadvertently transmitted, then the receiving lawyer’s duty of honesty compels her to refrain from reviewing the metadata until she can consult with the sending attorney.

The D.C. Opinion goes on to list situations where the receiving attorney may have actual prior knowledge. A receiving attorney may have actual prior knowledge if she is told by the sending lawyer of the inadvertence before the receiving lawyer has reviewed the document. Knowledge may also exist where the receiving lawyer, upon review of the metadata, immediately notices that it is clear that protected information was unintentionally included. The Opinion notes that these situations will be fact specific and cautions uncertain recipients to contact the sending attorney.

These opinions attempt to strike a middle ground between the ABA and Maryland opinions on one hand, and the remaining state opinions on other. The D.C. Opinion agrees with the ABA and Maryland Opinions, in that, the review of metadata is generally not an ethical violation. This review is limited, however. While the review is not prohibited like in the other state Opinions, the receiving attorney cannot review the metadata if it has actual knowledge that the metadata was inadvertently sent.

These state bar association opinions, as well as ABA Formal Opinion 06-442, coupled with Rule 4.4(b), demonstrate that the receiving attorney enters into uncharted territory when the attorney receives an electronic document, discovers confidential information contained in its metadata, and uses the information.⁸⁰ Obviously opinions on a

⁷⁹ *Id.*

⁸⁰ See *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 665-66 (N.J. 2010)(The New Jersey Supreme Court found that attorneys for an employer violated New Jersey RPC 4.4(b), which is modeled after Rule 4.4(b), when forensic expert retrieved personal emails between a former employee and her attorney that were left on the employee’s computer. The Court found a Rule 4.4(b) violation because the attorneys failed to set aside the potentially privileged materials once they realized emails contained attorney-client communications, and because they failed to notify opposing counsel of the disclosure or seek permission from the Court to proceed further. The Court found that sanctions for violating Rule 4.4(b) were appropriate even though the use of the emails was not malicious and the attorneys had a good faith belief that the emails were not protected by privilege based on the employer’s computer policy).

lawyer's obligations with respect to confidentiality and metadata differ and this continues to be a developing area of the law.

iii. Metadata Discovery Problems

If the receiving attorney decides that metadata can be properly sought from the disclosing attorney, must the sending attorney provide the metadata for the receiving attorney's perusal? In other words, if metadata is relevant to a claim or defense of the receiving attorney, does the disclosing attorney have a duty to preserve and present its discovery documents in a form that provides the receiving attorney access? The court opinions that have addressed this issue generally hold that metadata must be provided in a discoverable document if the requesting party specifically asks for it.⁸¹ Several of them are discussed in the following section.

A recent case to tackle this issue was decided April 2, 2008, by the Northern District of Illinois in *Autotech Technologies L.P. v. Automationdirect.com, Inc.*⁸² The court held that the disclosing attorney need only disclose metadata if the receiving party specifically makes it part of its discovery request. The federal rule at issue was Fed.R.Civ.P. 34(b)(2)(E). Rule 34, which does not specifically mention metadata, controls the production of electronically stored information. The Rule provides the following three procedures for producing electronically stored documents:

- (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
- (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
- (iii) A party need not produce the same electronically stored information in more than one form.

Here the requesting party did not specify that the disclosing party must provide metadata in its documents. The discovery request demanded "[e]ach and every document identified in your responses to accompanying interrogatories and/or used or referred to in

⁸¹ Ralph c. Losey, E-Discovery, Current Trends and Cases 158-59 (2007) (summarizing the recent cases as amounting to a "lesson...that in order to obtain metadata you may need, you should specifically ask for it to begin with").

⁸² 248 F.R.D. 556 (N.D. Ill. 2008).

responding to said interrogatories.”⁸³ The disclosing party provided the appropriate documents in .pdf⁸⁴ form. The requesting party in this case argued that the documents provided were not “reasonably useable” because they did not contain the metadata which the requesting party wanted to see. The court disagreed, holding that “[o]rdinarily, courts will not compel the production of metadata when a party did not make that part of its request,”⁸⁵ and that “[i]t seem[ed] a little late to ask for metadata after documents responsive to a request have been produced in both paper and electronic format.”⁸⁶

A number of other district courts agree with the reasoning of this decision. In *D’Onofrio v. SFX Sports Group, Inc.*,⁸⁷ the plaintiff requested that the defendant provide electronic documents in “such manner as to preserve and identify the file from which they were taken.” She argued that this request “specified the form or forms in which electronically stored information is to be produced,”⁸⁸ and required the disclosing party to provide metadata. The court held this request to “preserve and identify” the file from which the documents were taken, was not a specific instruction to preserve metadata. Rather, to preserve the identity of the file, the disclosing party could either a) produce an electronic document containing the file, such as a .pdf file, or b) an alternative production, not necessarily electronic, that preserves the identity of the file from which it was taken.⁸⁹ Neither of which requires the disclosure of metadata.⁹⁰

The Southern District of New York discussed a disclosing party’s obligations in *Aguilar v. Immigration and Customs Enforcement Div.*⁹¹ Here the parties did not discuss the form in which electronic documents should be disclosed at the outset of discovery.

⁸³ *Id.* at 557

⁸⁴ .PDF-portable document form does not contain metadata.

⁸⁵ *Autotech Technologies*, 248 F.R.D. at 559; *See also* *Chapman v. Gen. Bd. of Pension and Health Benefits of the United Methodist Church*, No. 09 C 3474 (N.D. Ill. 2010). The court in *Chapman* held that sanctions under Fed. R. Civ. P. 37 were not warranted where a party had failed to provide documents containing metadata under the first discovery request. The court noted that if the form of production is not specified, the responding party must “produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.” *Id.* at 9 (citing Fed. R. Civ. P. 34(b)(2)(E)(iii)).

⁸⁶ *Autotech Technologies*, 248 F.R.D. at 559.

⁸⁷ 247 F.R.D. 43 (D.D.C. 2008).

⁸⁸ F.R.C.P. 34(b)(1)(C) provides that a discovery request may “specify the form or forms in which electronically stored information is to be produced.”

⁸⁹ *D’Onofrio*, 247 F.R.D. at 47.

⁹⁰ Compare that case with *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 374 (S.D.N.Y. 2006),⁹⁰ where the plaintiff specifically requested the electronic documents in their native format. The producing party objected, but specified no basis for the objection. The court ruled that the documents must be produced in the form requested.

⁹¹ 255 F.R.D. 350 (S.D.N.Y. 2008).

After receiving documents in .pdf form, the Plaintiff requested the documents in a form that contained the original metadata. The court held that the Plaintiff was not entitled to metadata contained in e-mails that had already been disclosed before Plaintiff's request. Plaintiff was allowed to receive the production of metadata for Word and PowerPoint documents, but was required to bear the costs of production for these materials.

iiii. Metadata and Public Records

Courts have begun deciding whether metadata can be considered a public record, which would compel disclosure. Two courts have come to different conclusions. An Arizona court decided that metadata is not a public record, under its Public Record Law, and would not compel production of the metadata. In *Lake v. City of Phoenix*,⁹² a police officer made requests for notes from several Lieutenants, and specifically for metadata, when he suspected the notes were back-dated.⁹³ The court determined that metadata did not fit in with Arizona's definition of public records, because it was not made in pursuance of the Lieutenants' duty, and the law did not require that it be created or maintained.⁹⁴ Therefore, the metadata was not considered a public record and the presumption in favor of disclosure did not apply. The court concluded that the metadata was not subject to production.⁹⁵ However, a Washington State appeals court found that metadata in an email sent from a private citizen was discoverable under its Public Records Act because the email was owned and used by the city, and the metadata fell within the broad definition of writing that the Public Records Act included.⁹⁶ Therefore, the metadata from the email had to be disclosed.

b. *E-mail Confidentiality Disclaimers: Are They Effective?*

i. A Short History of E-mail⁹⁷ and Law Practice

When e-mail communications began to gain prominence in the early to mid-nineties, a few state bars issued ethics opinions requiring encryption or advanced

⁹² 2009 WL 73256

⁹³ *Id.* at 2.

⁹⁴ *Id.* at 4.

⁹⁵ *Id.* at 6.

⁹⁶ See *O'Neill v. City of Shoreline* 145 Wash.App. 913, 187 P.3d 822 (2008).

⁹⁷ Professor David Hricik with Mercer University School of Law maintains an exhaustive website on "e-ethics" which contains a multitude of articles and links to various state bar associations' ethics committees, court and government links, and other sources pertaining primarily to technology issues facing attorneys. Links to the various state bar associations that have addressed metadata, e-mail, and other hi-tech issues are located here. See <http://www.hricik.com/business.html>.

permission from the client, believing that e-mail use violated Rule 1.6.⁹⁸ A general consensus that e-mail use was an acceptable form of communication began to materialize, however, when the technology became better understood by the state bar associations.⁹⁹ The ABA issued an ethics opinion in 1999 concluding that a lawyer may transmit *unencrypted* e-mails relating to the representation of a client without violating Rule 1.6(a), because this mode of transmission affords a “reasonable expectation of privacy.”¹⁰⁰

The ABA committee analogized that the threat of intercepted e-mail communications posed no greater threat than the interception of telephone communications or faxes.¹⁰¹ Furthermore, the committee noted that the Electronic Communications Privacy Act amended federal wiretapping laws to include “electronic communications” thereby making e-mail interception illegal.¹⁰² The committee added, however, that the attorney should consult the client pursuant to Rule 1.2(a) regarding the proper mode for transmitting highly sensitive information.¹⁰³ The ABA opinion is codified into Comment 17 of Rule 1.6, stating that the duty of confidentiality does not require special security measures—i.e., encryption—unless the sensitivity of the subject matter suggests otherwise.¹⁰⁴ In such a situation, “reasonableness” factors are listed to measure the attorney’s objective expectation of confidentiality regarding the means of communication at issue.¹⁰⁵ Moreover, Comment 17 suggests that the client may give informed consent for any means of communication that would otherwise be prohibited by the rule.¹⁰⁶ Thus, the e-mail encryption debate seems to be well settled at the moment.

ii. Are E-mail Disclaimers Worthwhile?

⁹⁸ See, e.g., Iowa Sup. Ct. Bd. of Prof’l Ethics Op. 96-1 (Aug. 29, 1996); South Carolina Bar Ethics Advisory Comm. Op. No. 94-27 (Jan. 1995); and Colorado Ethics Op. No. 90 (Nov. 14, 1992).

⁹⁹ See, e.g., State Bar Ass’n of North Dakota Ethics Comm. Op. No. 97-09 (Sept. 4, 1997); Illinois State Bar Ass’n Advisory Op. on Prof’l Conduct No. 96-10 (May 16, 1997); Arizona State Bar Ass’n Formal Op. No. 97-04 (Apr. 4, 1997); South Carolina Bar Ethics Advisory Comm. Op. No. 97-08 (June 1997) (overruling South Carolina Bar Ethics Advisory Comm. Op. 94-27); Vermont Advisory Ethics Op. No. 97-5 (1997).

¹⁰⁰ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 413 (1999).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* The Iowa Bar struck a balance between the original strict prohibition of e-mail communication and the ABA opinion after initially requiring a written authorization from the client to use e-mail. The state amended its previous opinion regarding e-mail confidentiality to allow general unencrypted e-mail communication for the representation of a client but still requiring written acknowledgment by the client when sensitive material is involved. Iowa Sup. Ct. Bd. of Prof’l Ethics Op. No. 97-01 (1997).

¹⁰⁴ MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. (2004).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

What about confidentiality statements in e-mails? Just like the disclaimers commonly seen on fax coversheets, virtually all e-mails sent throughout the commercial marketplace and throughout the legal profession contain these disclaimers, usually at the end of the e-mail. Many law firms have policies in place that require the automatic generation of a disclaimer in every new e-mail. Does the use of a disclaimer serve any purpose or is it merely useless boilerplate?

There appears to be no case law on enforcement of an e-mail or fax disclaimer. A recent article noted the same absence of guidance from the courts on the efficacy of these disclaimers.¹⁰⁷ As a practical matter, these disclaimers are merely boilerplate, but, at a minimum, they do serve notice to the recipient that the e-mail is *intended* to be confidential, which may be enough for a court.

In a 2006 article, seven lawyers from various sized markets participated in an online roundtable discussion about e-mail use.¹⁰⁸ The moderator asked the panel whether e-mail disclaimers are worthwhile and the general consensus from the panel was that the disclaimers are meaningless.¹⁰⁹ Despite the panel's make-up being predominately solo practitioners, many general points were made about the use of disclaimers.¹¹⁰ One solo practitioner stated that he did not "waste the time or [print] toner" on them, believing that the various bar rules regarding inadvertent disclosure seem to provide sufficient protection.¹¹¹ He also suggested that they were "clutter" and asked, "[w]hen's the last time anyone read the disclosure on the parking garage stub?"¹¹² Another solo practitioner observed that certain disclaimers he had seen read like a public relations effort, quipping, "[s]ee how careful I am, client?"¹¹³ A third panelist reasoned that the real question is whether the recipient is going to use the information.¹¹⁴ He added that the practical danger is not the risk of sending an e-mail to a recipient who is totally unconnected to the matter,

¹⁰⁷ Thomas E. Spahn, *Trial Practice: Litigation Ethics in the Modern Age*, GP Solo, (March 2005), available at <http://www.abanet.org/genpractice/magazine/march2005/litethics.html>.

¹⁰⁸ Jennifer J. Rose, *E-mail In the Law Office*, GP Solo, (January/February 2006), available at <http://www.abanet.org/genpractice/magazine/janfeb2006/emailinthelawoffice.html>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Rose, *supra* note 108

¹¹⁴ *Id.*

but sending it to an opposing party.¹¹⁵ This panelist suggested disabling any auto-complete feature that may be activated (in the “To” field of the e-mail), but also suggested the more common-sense practice is to always double-check that the intended recipient is displayed correctly.¹¹⁶

The only law firm partner to participate in the roundtable discussion agreed with the rest of the panel but added that lawyers who give advice on federal tax issues may be required to give certain regulatory disclaimers.¹¹⁷ The last panelist to comment also agreed with the panel about the meaninglessness of the disclaimer, adding that if a lawyer has to rely on them, then “the damage has already been done.”¹¹⁸ He also stated that the only reason he used the e-mail disclaimer was because his professional liability carrier recommended it.¹¹⁹

A British lawyer cautioned that, from a basic contract law perspective, the unilateral disclaimers are legally ineffective because the recipient does not have a chance to agree to the terms.¹²⁰ The British lawyer reasoned, however, that the efficacy of a disclaimer might be enhanced if it appears at the top of the e-mail, rather than the bottom, because the e-mail comes to the attention to the reader immediately.¹²¹ This enables the sender to argue that the recipient had an opportunity to make an informed decision whether to proceed in reading the contents.¹²² Furthermore, if the recipient has received previous e-mails from the sender, then it would be reasonable to conclude that the recipient is well aware of the standard disclaimer and should refuse to continue the exchange if the recipient suddenly becomes unwilling to accept the disclaimer’s terms.¹²³

Similar precautions have been suggested which include, not only a warning paragraph at the *top of the e-mail* for the same reasons stated above, but also differentiating between confidential communications and work-product communications.¹²⁴ In other

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Rose, *supra* note 108.

¹²⁰ Simon Halberstam, *Emails, Disclaimers and the Law*, available at http://www.weblaw.co.uk/art_faqs.php.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ J. Nick Badgerow, *Ethics and Email: Sender Beware*, 73 J. KAN. B. ASS’N 9 (January 2006).

words, a different warning notice may better protect a work-product e-mail to that effect.¹²⁵ Furthermore, the author of this article suggested that standard confidentiality disclaimers lose their impact if the disclaimers are used on every e-mail communication, be it “social, commercial, or frivolous.”¹²⁶

One of the panelists to the roundtable discussed above believed that the various bar rules already protect inadvertently sent e-mails. Intuitively, the interplay of Rule 4.4(b) and ABA Formal Opinion 437 require the lawyer who receives from opposing parties an inadvertently sent “document”—a definition which includes e-mail and other electronic modes of transmission—to promptly notify the sender. Thus, the use or non-use of a confidentiality disclaimer should not affect this duty of the recipient lawyer.

The best practice, however, may be to maintain a well-drafted disclaimer just to be on the safe side. One can easily see a disciplinary proceeding regarding the lawyer’s duty to maintain confidentiality over an errant e-mail turning on whether the lawyer took “reasonable precautions” to protect the communication under Comment 17 to Rule 1.6. There can be little doubt that e-mail disclaimers, whether legally enforceable or not, will add extra protection for the sending attorney. Without encryption, the disclaimer is best seen as a “final precaution” on top of the common-sense practice of checking the recipient’s address and carefully reviewing the e-mail’s content.¹²⁷ Also, the attorney may want to obtain informed consent from the client about e-mail use, although ongoing consent to e-mail communications over long periods of time may be insufficient.¹²⁸

II. CONCLUSION

The duty to protect attorney-client confidences almost certainly extends to the electronic netherworld of metadata. If it does not today, it almost assuredly will tomorrow, as a format subject to protection by “reasonable precautions” under Rule 1.6. The receiving attorney, too, may have a duty to notify the sender of an electronic document that contains confidential information in metadata form under Rule 4.4(b). If more states follow New York’s lead, the receiving attorney will officially have such a

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Amy M. Fulmer Stevenson, *Making a Wrong Turn on the Information Superhighway: Electronic Mail, The Attorney-Client Privilege, and Inadvertent Disclosure*, 26 CAP. U. L. REV. 347, 373–75 (1997).

¹²⁸ *Id.* at 374.

duty, not only to notify the sender but also to refrain from mining the metadata information, if any.

It appears that no lawyer has seriously attempted to enforce a confidentiality disclaimer in an e-mail—at least these attempts are not currently reported. The disclaimers seem to be important as they announce that the sender has the intention to maintain confidentiality under Rule 1.6, if nothing else. There may be a danger of drowning the recipient in a sea of standard disclaimers if the same one is used for all communications, leaving room for the recipient to argue that the disclaimer is meaningless. As for the receiving attorney, a literal reading of Rules 4.4(b) and ABA Formal Opinion No. 437 clearly encompasses the errant e-mail. In such a case, the receiving attorney has a duty to notify the sender regardless of a disclaimer. Once this duty to notify is completed, then the court may address whether the privileged information contained in the e-mail is subject to a waiver of privilege.



GENTRY LOCKE
Attorneys

The Death of Federalism

When Your State Court Case Get Hijacked by the
Federal Court

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Presented at The Hotel Roanoke & Conference Center in Roanoke, Virginia on September 18, 2015.

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This case study involves mass torts, bankruptcy, the expanding “breadth” of federal jurisdiction, and the disappearance of federalism.

So, why is it relevant to you? First, as lawyers, we should all at least share a “moment of silence” for federalism. Second, on a practical level, the pattern described in this case can happen anywhere --- and it does. Most of us would be surprised to learn that a state court case against only state court (non-bankrupt) defendants could be yanked from a local jury and whisked hundreds of miles away. The legal principles outlined here show just how this happened, and how it will happen again and again. But, there are things you can do to avoid it (and mitigate it).

I. What is Federalism? And what happened to it?

- A. Talking about “federalism” today is much like trying to imagine the geologic period when this land we are standing on was tropical coastland. Sure, we know that is true --- but it is just hard to imagine because the reality we live in is so much different. So too with “federalism.” But, at least nominally, federalism is our nation’s foundational constitutional notion that sovereign power is divided between the state and federal governments. Don’t believe me? Here’s a test:

Is there anyone in this room who actually believes: “*the powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively ...*”? (U.S. Const., Amend. 10).

Of course not. But it is a nice concept. And one to which our system still at least pays lip service.

- B. So is federalism dead? Yes.¹ But, its ghost remains to comfort or annoy us (depending on your point of view).²
1. Without a doubt, we still *talk about* federalism, even in its absence. And, often in highly deferential-sounding terms. Consider the following examples:
- a. “Federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-a-vis one another. The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.” *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). *An end in itself*? That sounds pretty strong. But, if you think about it, that’s actually pretty obvious, right? The states agreed to sign the Constitution based upon the express conditions set forth in the Bill of Rights. In this act, the states breathed life of (dare we say it) “limited” powers into the federal government.

¹ Under Virginia law, death is presumed from absence or disappearance for seven successive years. This is true even if family and friends continue to talk about the missing loved one. Va. Code Section 64.2-2300.

² Sightings of the ghost of federalism seem to occur most when it is convenient for the federal authorities. This rarely occurs in connection with any issue of substance, unless the desired goal is to punt to the states.

- b. The Court even describes “federalism” as the very source of liberty. Consider this text: “State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *New York v. United States*, 505 U.S. 144, 181 (1992).
 - c. “Federalism” is even seen as the ultimate source for governmental accountability. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012).
2. “Uncle Federalism was such a nice man. Christmas will not be the same without him ...”



Is he really gone?

3. Presently, we are accepting calls from anyone who has actually spotted federalism. The results have been discouraging. In fact, this case study reflects the negative findings of one such search party from Virginia. So let’s hear the report.

II. Factual background on NECC and Insight Health Corp.

- A. NECC was a compounding pharmacy in Massachusetts that mass manufactured steroids (among other things) – under circumstances and marketing practices that were sketchy at best. The owners and key personnel made lots of money through these practices, but are now under indictment. Needless to say, these steroids became contaminated due to an egregious lack of care in producing the drugs.
- B. Insight Health Corp. runs a pain management clinic in Roanoke, Virginia. Insight purchased compounded steroids from NECC and injected them into the spinal canals of patients. Some of these steroids were contaminated. Result: patients became seriously ill and some died.
- C. NECC had sold contaminated drugs to clinics all over the country. Other patients in other states (e.g., Ohio, Tennessee, New Jersey) also became seriously ill.
- D. Lawsuits against NECC followed taking the traditional mass tort path, with many filings within weeks.

1. Practice pointers:
 - i. It's not always best to be the first one out there with these kinds of cases. It's tempting, but there are consequences. At least think about it before rushing in.
 - ii. With these type of cases, bankruptcy of at least one party is almost always inevitable!!! (e.g., Dalcon Shield, breast implant cases (DOW Corning), Fen Phen, etc.) Plan for it.

- E. Naturally, NECC filed for bankruptcy in Massachusetts, generating an automatic stay of all litigation. The District Court for the District Court of Massachusetts was designated as the MDL forum – all lawsuits against NECC were transferred to the MDL Court.
 1. Back to the previous practice pointers:
 - i. Your client may not want to be sucked into a bankruptcy;
 - ii. Your client may not want to be sucked into an MDL;
 - iii. Your client may have perfectly good claims against state and local defendants who are not nationally exposed and are not targets for bankruptcy.
 - iv. Therefore, your client may not want to sue the manufacturer. At least he/she may not want to sue the manufacturer in the same case as the local defendants. You might want to bifurcate your proceedings against the non-diverse defendants.
 1. This may fight against your instincts as a trial lawyer – because joining a local defendant with a diverse national corporation defeats diversity and allows you to stay in state court, right? Yes and no! Not if the manufacturer is going to file bankruptcy.
 2. Practice Solution: Under these circumstances, we filed separate federal cases against only the manufacturer, NECC. We held off filing the state court cases --- waiting for the inevitable NECC bankruptcy filing. Virginia law allows plaintiffs to separately sue joint tortfeasors. Virginia Code § 8.01-443. Note that there was no diversity between the local plaintiffs and the local defendants.

- F. After the NECC bankruptcy, Gentry Locke immediately began filing Virginia state court cases (personal injury/wrongful death) against the clinic owner, INSIGHT, and the individual doctors who worked at the pain management clinic.
 1. Practice Pointer: Because NECC was in bankruptcy, the local defendants could not bring third party claims against NECC due to the automatic stay. Because of this, the NECC bankruptcy should not have gummed up the works for the cases against the local defendants.
 - i. Rule 3:13 allows third party claims;
 - ii. Rule 3:12 only requires joinder of persons who are “subject to service of process.”

- iii. The Automatic Stay prohibits service of process on the debtor. 11 U.S.C. Section 362(a)(1).
- iv. Local defendants are not prejudiced because Virginia law does not apportion fault (joint and several liability). Local defendants can later bring separate action against joint tortfeasors for contribution or indemnity. *See, Sullivan v. Robertson Drug Co. Inc.*, 273 Va. 84, 639 S.E.2d 250 (2007).

G. So, we're safe, right?

- 1. There is no diversity;
- 2. These are pure state court cases brought by Virginia plaintiffs against Virginia defendants, based on Virginia law;
- 3. There is no way to "join" the bankrupt NECC;
- 4. The cases could not have been brought in federal court; and,
- 5. Independent claims and causes of action are asserted against the local defendants.
- 6. What could go wrong? Is there any way our plaintiffs could be ground to a halt and hijacked into a Boston federal court 680 miles away? Answer: Yes. (seriously). That's how we witnessed the end of Uncle Federalism.

H. Ok. It is important not to think too hard about how all of this happened. You'll be wrapped around the axles in no time. But, the next section highlights the code sections that were ultimately used (translated, *overlooked*) for the Boston district court to issue an order to the Roanoke City Circuit Court requiring the transfer of all of the Virginia cases to federal district court in Boston. There were a couple of bright spots during the long and tortured process of resistance. For example, Judge Samuel Wilson (ret.) did seem to recall the memory of Uncle Federalism.

III. Statutory background and bankruptcy jurisdiction.

- A. Related-to Jurisdiction: 28 U.S.C. 1334(b) provides that the federal district courts have original, but not exclusive, jurisdiction over "all civil proceedings arising under title 11, or arising in *or related to* cases under title 11." (Bankruptcy cases)
- B. A civil proceeding is "related to" a bankruptcy matter if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).
- C. An action is related-to a bankruptcy proceeding "if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impact upon the handling and administration of the bankruptcy estates." *Pacor*, 743 F.2d at 994.
- D. Related-to jurisdiction can thus be very broad.
- E. BUT, there's a safe guard that we plainly met: 28 U.S.C. 1334(c)(2) provides a check on the potentially broad reach of federal related-to jurisdiction:

Upon timely motion of a party in a proceeding based upon a state law claim or state law cause of action, (☑), related to a case under title 11 but not arising under title 11 or arising in a case under title 11, (☑), with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, (☑) the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a state forum of appropriate jurisdiction. (the “Mandatory Abstention” clause).

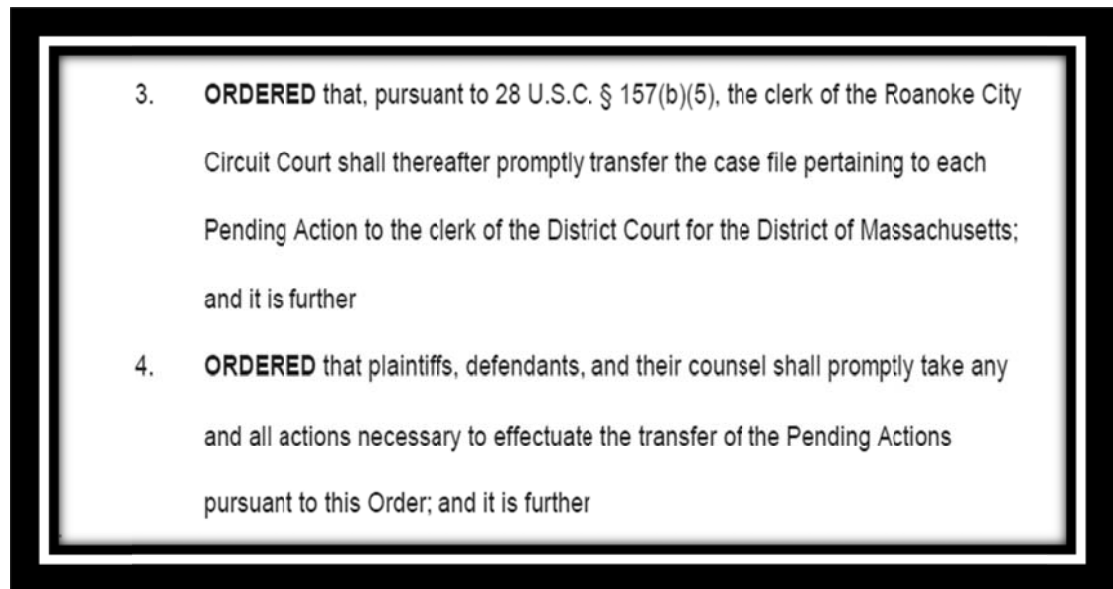
- F. This is known as mandatory abstention (note the seeming inflexibility in the term “mandatory”). The upshot is this: if a state law proceeding is based upon state law claims and the only basis for federal jurisdiction is related-to jurisdiction, the district court must abstain from hearing the proceeding and allow the claims to proceed in state court.
- G. Note the federalism connotation to this provision: let state law claims, which have only an attenuated (at best) relationship to a bankruptcy proceeding, be decided by state courts.
- H. But wait, there’s more:
 - 1. Mandatory abstention is limited by 28 U.S.C. 157(b)(4), which states that “non-core proceedings under 157(b)(2)(B) . . . shall not be subject to the mandatory abstention provisions of 1334(c)(2).”
 - 2. 157(b)(2)(B) identifies “non-core claims” as “the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims *against the estate* for purposes of distribution in a case under title 11.”
 - 3. Thus, under the plain language of the statutory framework, mandatory abstention does not apply to personal injury or wrongful death claims against the bankruptcy estate (☑ --- **the local defendants are not the bankrupt debtor**). Recall, the Virginia plaintiffs’ actions were NOT against estate; they were filed against ALL non-debtor defendants.

IV. The NECC trustee and Insight attempt(s) at removal and transfer of the Virginia cases

- A. NECC’s Trustee in Bankruptcy filed a Motion to Transfer the Virginia Plaintiffs’ state court actions in the MDL Court. Meanwhile, the Trustee had missed the deadline for “removing” these cases from state court – even assuming that he had the power to do so. Fed. R. Bankr. P. 9027 requires that such notice of removal must be filed within 30 days. By the time that the Trustee filed a motion with the Massachusetts bankruptcy court to “stay” the time period for filing notices of removal, that time period had already passed for these Virginia cases.

1. One of the local defendants, Insight, did its part to help the process. Insight filed erroneous “Notices of Removal” in the Virginia state court cases, removing them to Federal Court in the Western District of Virginia. Of course they were late, but Insight asserted that the basis for federal jurisdiction had only just emerged with the Trustee’s Motion to Transfer. The sole basis of federal jurisdiction was related-to jurisdiction.
- B. The District Court in Virginia (Wilson, J.) promptly remanded the actions to state court in a sternly worded opinion, finding that mandatory abstention applied. (See attached). Game over – right?
- C. Not so fast. There’s still the district court in Massachusetts. And that court had yet to rule on the same issues, even though the Western District of Virginia had already ruled. The Boston court then heard oral argument on the Trustee’s motion to transfer and reached a different conclusion. The Court held that mandatory abstention did not apply, finding that actions against non-debtors, who might potentially have claims of contribution or indemnification against the debtor, were essentially claims against the debtor.
- D. But, the Boston court was plainly uncomfortable with this judicial extension of the statutory law. In fact, the court stated that it was not at all sure that it had “related to” jurisdiction in the first place. But, in the same opinion, the court ruled that actions against Insight would be “equivalent to” actions against the debtor (attempting to shoehorn into the exception for claims against the debtor). This directly contradicted Judge Wilson’s opinion on the exact same issue.
1. Flawed logic: The Court doubted whether it could exercise related-to jurisdiction over the non-debtor actions in the first place. If it was not sure whether the actions were “related-to” the bankruptcy proceeding, how could such an action be “equivalent to” an action against the estate itself for purposes of mandatory abstention? It’s actually the oldest judicial doctrine --- *quoniam id aestimo, sic*. (Look it up).
 2. In the end, the court temporarily declined to exercise jurisdiction under its “discretionary abstention” authority. But noted that it would exercise jurisdiction if Insight filed a proof of claim against NECC in the future. (Huge loophole).
 3. This essentially invited Insight to file a proof of claim, as it later did.
- E. After Insight filed a proof of claim in the NECC bankruptcy, the Trustee renewed his Motion to Transfer these cases to Boston district court. There was a new round of briefing and oral argument. And.....(wait for it)....
- F. Then there was the ORDER. The Boston federal court granted the motion and issued an order that was breathtaking in its scope: (1) it ordered the Roanoke City Circuit Court to transfer all of these cases to Boston District Court; and (2) it ordered counsel for the plaintiffs to “promptly take any and all actions necessary to effectuate the

transfer...” Essentially, the cases were transferred directly from Virginia Circuit Court to Massachusetts Federal Court by way of Federal Injunction – a drastic measure. (See attached June 5, 2014 Order).³



4. Ok, did I mention that there had never been a motion filed seeking to enjoin plaintiff’s counsel to do anything? No hearing? No mention that we were possibly the targets of a future order? But, here we have an injunction from a federal court requiring us to “take any and all actions necessary to effectuate” the very thing that our clients rightfully did not want? And that Judge Wilson had already ruled they should not have?

V. Caught between a rock and a federal capias (☹️ vs. ☹️)

- A. So, now what do you do? But for the “injunction” prohibiting legal counsel from being lawyers, this would have been a PERFECT opportunity to resuscitate Uncle Federalism. But, the defibrillator was yanked from our hands ---- he was down for the count.
- B. We did the only thing we could – basically nothing direct. We had previously provided “Status Reports” to the Roanoke City Circuit Court, advising of the Boston district court’s likely actions. We continued these “reports.” Judge Dorsey may have figured out that we were none too happy about what was happening. But, we were enjoined from even arguing that the circuit court should resist the federal leviathan.
- C. How about the local Circuit Court? It was definitely in a bind as well. These were the perfect circumstances to send out an APB for Uncle Federalism, but would that have served the interests of these Virginia parties? Consider the conundrum:

³ Naturally, we noted a timely appeal to the First Circuit Court of Appeals, but it was never heard.

1. The court is charged by the Virginia Constitution to hear cases within its jurisdiction, and jury trials “ought to be held sacred.” (Va. Const. Art. 1, Sec. 10).
 2. Judge Wilson, the local federal judge, had already issued an order declaring that there was no basis for federal court jurisdiction in these cases.
 3. A federal judge 682 miles away disagreed and issued an unconventional order.
 4. A procedure unknown in the federal rules was employed to enjoin the clerk of the Roanoke City Circuit Court --- a Virginia Constitutional Officer.
 5. This fact pattern is definitely not in the judicial handbook.
- D. Alas, it was not to be. In the end, the Roanoke Circuit Court issued orders memorializing prior rulings in all of the cases, and then shipped them off to Boston. As Judge Dorsey remarked, “I’m not going to re-fight the Civil War.” (paraphrased).
1. The practical effect: the Virginia plaintiffs, would have to travel to Massachusetts to try their cases in federal court. There would be no jury of their peers.
 2. Because of the delays that would be caused, many would not live to see a trial date in any event.
 3. Financial and physical burden: many of the plaintiffs had limited means, mounting medical expenses and were still very ill from the contaminated injections.
 4. These procedural machinations could have spelled the end of their cases.

VI. Possible conclusions to be drawn:

- A. As between federal and state, federal wins.
- B. Even at the “federal level,” as between actual statutory language and expansive interpretations, the expansive (i.e., non-written) interpretation wins.
- C. So, has the rule of man triumphed over the rule of law?

VII. The bright side (happy ending):

- A. The Virginia law firms banded together in truly impressive fashion forming a unified coalition;
- B. We figured out the real reason why the Trustee wanted us in Boston in the first place --- and we used it to our advantage;
- C. We negotiated key agreements with the Trustee;
- D. We mediated the (blank) out of the cases (10 days of mediation);
- E. We refused as a unified group to accept anything less than the best settlement we could reasonably reach; and
- F. We “reached a good conclusion.” ☺ The end.⁴

⁴ But, Uncle Federalism is still dead. ☹



GENTRY LOCKE
Attorneys

Don't Get Caught Naked

Get Covered!

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Presented at The Hotel Roanoke & Conference Center in Roanoke, Virginia on September 18, 2015.

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The purpose of this program is to help lawyers and law firms improve their understanding of insurance coverage issues as those issues impact law firms, and their clients.

I. Horror stories, or why being naked isn't always as fun as it sounds.

- a. *TIG Insurance Co. v. Robertson, Cecil, King & Pruitt, LP*, 116 Fed. App'x 423 (4th Cir. 2004): A partner in a law firm misappropriated client funds, then signed a renewal application for professional liability insurance indicating that he was not aware of any "acts, errors, or omissions that could result in a professional liability claim." Two and a half months later, the partner committed suicide, after which his partners discovered his malfeasance. The malpractice carrier successfully rescinded the policy based on the dead partner's misrepresentation. In addition to the firm itself, the partners of the firm were sued individually. The takeaway here is that being an "innocent partner" will not save you: if even one partner has knowledge of a potential claim, the firm may be liable.
- b. *Duvall, Blackburn, Hale & Downey v. Siddiqui*, 243 Va. 494 (1992): In a divorce case, the wife's attorney told his client several times that a consent order directing the husband to give the wife specific support had been entered by the court, even though no such order had. The attorney's firm sued the wife for unpaid legal bills, and she counterclaimed for malpractice. The firm withdrew its claim and the case went to trial on the malpractice suit alone. Liability was so easily proved that the firm only appealed, and lost, on the amount of damages.
- c. *Hancock Park Capital, III, L.P. v. Locke Lord, L.L.P.*, 87 Va. Cir. 99 (City of Martinsville Cir. Ct. 2013): The parent company of several subsidiaries sued a law firm for failing to advise it to give employees a WARN Act notice in preparation for a plant closing. The law firm demurred, noting that its retention agreement only made it counsel for the subsidiaries. The trial court overruled the demurrer because legal advice to the subsidiaries had been given in the presence of the parent company's general counsel.
- d. *Williams v. Joynes*, 278 Va. 57 (2009): An attorney filed suit in a personal injury case after the Virginia statute of limitations had run on the cause of action. The attorney subsequently informed the client that he still "might be able to file an action against" the defendants in Maryland. The client did not file a Maryland suit and instead sued the attorney for malpractice. The trial court granted summary judgment to the attorney on the theory that the client's failure to file suit in Maryland was a "superseding cause" of his injuries. The Virginia Supreme Court reversed the summary judgment.

- e. *Shipman v. Kruck*, 267 Va. 495 (2004): Client sued bankruptcy attorney for malpractice for incorrectly assessing a trust as irrevocable rather than revocable and consequently negligently recommending filing for bankruptcy. The attorney admitted to his error, and only escaped liability because the Virginia Supreme Court ruled that the limitations period had run. Interesting side note: depending on when a malpractice cause of action against a bankruptcy attorney accrues, the malpractice suit may actually be property of the bankruptcy estate rather than the clients themselves. Thus, in some cases, bankrupt clients may not have standing to assert their own malpractice claims. *In re Richman*, 1997 U.S. App. LEXIS 16159 (4th Cir. 1997).
- f. *Admiral Ins. Co. v. Marsh*, 2013 U.S. Dist. LEXIS 90002 (E.D. Va. 2013): The Eastern District of Virginia granted a declaratory judgment against a law firm on the issue of whether it had provided written notice to its malpractice carrier as it was required to do under its policy. Thus, the insurer had no duty to defend against malpractice claims not reported in writing.
- g. *Smith v. McLaughlin*, 2015 Va. LEXIS 23 (Va. 2015): Brand-new case ruling—luckily for law firms and malpractice insurers—that failure to “correctly anticipate” a holding by the Virginia Supreme Court in a matter is not malpractice.

II. Insurer’s duty to insureds.

- a. In legal malpractice cases, the insurer’s duty to the insured is the same as in any other liability suit.
- b. Duty to defend in a legal malpractice case in Virginia: “arises whenever the complaint alleges facts, some of which would, if proved, fall within the risk covered by the policy.” *Jefferson-Pilot Fire & Casualty Co. v. Boothe, Prichard & Dudley*, 638 F.2d 670 (4th Cir. 1980).
- c. The duty to defend is broader than the duty to pay a claim. *Brenner v. Lawyers Title Ins. Co.*, 240 Va. 185 (1990).

III. Considerations in purchasing malpractice (legal professional liability) insurance.

- a. Malpractice is by far the largest insurable risk to law firms in Virginia.
- b. Malpractice insurance provides coverage for a law firm’s employees’ (including partners’) errors and omissions in carrying out their professional duties.

- c. It is easy to get sued for malpractice. You could:
 - i. Mishandle a case.
 - ii. Mishandle a transaction.
 - iii. Discuss confidential information a little too loudly at a restaurant.
 - iv. Send an email to the wrong person.
 - v. Improperly train staff.
 - vi. Make a costly mistake in detail work.
- d. Malpractice carriers are leaving the primary insurance marketplace (Liberty Mutual, Chubb).
 - i. This is due to the recent economic downturn.
 - ii. You need a professional agent or broker who understands the coverages offered.
 - 1. An agent is an independent contractor, usually one who sells policies on behalf of a particular carrier.
 - 2. A broker is someone you hire to survey the policies and premiums offered by various carriers and recommend one or more for you to purchase.
 - iii. You need a positive relationship with agent and underwriters.
 - 1. Underwriters evaluate the risk of prospective insureds.
 - 2. Thus, they often “call the shots” when it comes to agreeing to insure applicants.
- e. How much insurance do you need?
 - i. Consider the size of largest verdict or settlement you had in preceding year.
 - ii. If you are primarily transactional, consider the size of the biggest transaction you handled in preceding year.
 - iii. Real estate and personal injury practices generate highest number of claims (real estate just surpassed personal injury).

- f. What are the common exclusions for general legal work?
 - i. Trustee work is usually excluded over a certain amount.
 - ii. Accordingly, if you often act as a trustee, you may need a larger policy or a separate endorsement.
- g. Basic form can be found in Miller's Forms No. LW DS 01 03 11.

IV. Considerations in purchasing general liability insurance.

- a. It covers your premises and operations, just like any business.
- b. It does not cover liabilities arising out of your professional duties.
- c. You do not need anything special like completed operations products liability insurance.
- d. But you should strongly consider an employee benefits liability policy, which covers negligently failing to purchase life insurance or health insurance for employees.
- e. Basic form can be found in Miller's Forms No. CG DS 01 10 01.

V. Considerations in purchasing employment practices liability insurance (EPLI).

- a. This covers you in several different types of claims:
 - i. Sexual harassment.
 - ii. Racial discrimination.
 - iii. Sex discrimination.
 - iv. All EEOC complaints.
- b. Failure to buy this insurance is the biggest liability "hole" for many firms
 - i. Most small firms do not have this insurance.
 - ii. But these same small firms are also less likely to have the proper HR structure to mitigate the risk.
 - iii. It covers claims that are becoming more prevalent.

- iv. In addition, the EEOC is stepping up enforcement of these kinds of claims.

VI. Considerations in purchasing directors and officers (D&O) insurance.

- a. This covers certain decisions made by the control group of the firm that affect employees.
- b. This kind of insurance is generally not as much of a worry for smaller firms.
- c. However, in intra-firm suits (i.e., suits between firm partners: there is no coverage without this policy.

VII. Considerations in purchasing fidelity/embezzlement insurance.

- a. This provides coverage protecting you from the risk of certain crimes committed by your employees.
- b. This is also called “employee dishonesty” coverage.
- c. Note, however, that if client funds were stolen, the claim probably goes under your malpractice (LPL) policy.

VIII. Considerations in purchasing cyber insurance.

- a. This covers two major areas: general privacy and data breach.
 - i. Privacy coverage privacy impairments of both clients and employees.
 - ii. Data breach insurance provides coverage for both digital and analog breaches.
 - 1. Digital breach coverage is protection against hackers.
 - 2. Analog breach coverage mitigates the risk of, for example, leaving a hard copy of confidential employee information out in public.
- b. Cyber insurance is not expensive.
- c. It covers the cost of notifying persons whose records were stolen, etc.
- d. Every firm needs this, at a \$1,000,000 minimum policy limit.

IX. Considerations in attempting to purchase EFT insurance.

- a. Generally, this refers to electronically wiring funds mistakenly or to wrong account.
- b. Impossible to find coverage for this in negligent matters.
- c. The insurance for negligent matters is only available to financial institutions.
- d. However, intentional misrouting of wired funds is covered as embezzlement.

X. Considerations in purchasing auto coverage.

- a. An auto policy is a must-have if you have automobiles or if firm business is ever carried out in automobiles.
- b. How does coverage “shake out” for firm employees while driving on firm business?
 - i. If an accident happens in your employee’s car, employee’s auto policy steps in first.
 - ii. Accordingly, you should require employees to carry higher auto policy limits—suggest \$1,000,000.
 - iii. If the auto is hired, the non-owned policy “sits on top” (i.e. is primarily liable).
 - iv. If an accident occurs in a firm’s car, then the firm’s auto policy is primary.
- c. Basic form can be found in Miller’s Forms No. CA DS 03 03 10.

XI. Considerations in purchasing workers’ compensation insurance.

- a. This kind of a policy is a must-have if you have three or more employees. VA. CODE ANN. § 65.2-101.
- b. Workplace safety issues form the primary risk, but your insurer may be able to perform an evaluation of the safety of your workplace on request.
- c. Your biggest comp exposure is driving. Therefore, you need specific rules on:

- i. Texting
 - ii. Email
 - iii. Phone conversations without hands-free devices
 - iv. Speeding
 - v. Don't let your employees do any of these things while driving for work business.
 - vi. If propagated and enforced correctly, these rules can cut down on ultimate risk if injury occurs.
 - vii. To assist with contesting claims, the rules should be written and given to your employees. VA. CODE ANN. § 65.2-306.
- d. Do you need coverage for temporary and casual employees?
 - i. Possibly. You may be liable under Workers' Comp Act if the casual employees are involved in the business, trade, or occupation of firm.
 - ii. For instance, if you have "of counsel" attorneys, you should discuss their status with your agent.
- e. Independent contractors.
 - i. Independent contractors are not employees under Workers' Comp Act. *Richmond Newspapers, Inc. v. Gill*, 224 Va. 92 (1982).
 - ii. But you may need coverage under your general liability (GL) policy for injuries to contractors on your premises.
 - iii. Do you have attorneys engaged as independent contractors?
 - 1. You should require a certificate of insurance from them showing an adequate limit (depending on case or transaction).
 - 2. In addition, your firm should be added as a named insured to the "independent contractor" attorney's malpractice policy.

XII. Considerations in purchasing umbrella coverage.

- a. This policy sits “over” your general, auto, and workers’ comp policies.
- b. This kind of policy can also cover employee benefits liability.
- c. Umbrella premiums are based on underlying premiums, but are often very good deal.
- d. To keep things simple, you can request a “following form” umbrella policy (as distinguished from an excess policy): the umbrella carrier does not add its own exclusions.



Shepherding the Herd:

Law Firm Governance and Management

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Shepherding the Herd: Law Firm Governance and Management

Managing the “business of law” can be a daunting task for newly minted attorneys and seasoned veterans alike. In addition to providing excellent client service, developing new business, and advocating for clients, principals of law practices must manage their practice like any other business owner.

The importance of having a solid business structure “humming” in the background of law practice cannot be overstated. Our purpose is to lay a foundation for the management of a law practice to allow attorneys to focus on practicing law as much as possible. This outline discusses a range of topics, from initial considerations, such as the form of entity to create and what to put in the partnership agreement, as well as ongoing considerations, like articulating the culture of the law firm, adding partners, and dealing with social media as a firm.

I. Entity Selection for Law Practices

A. Common Options

- i. Professional Corporation
- ii. Limited Liability Partnership
- iii. Limited Liability Company
- iv. General Partnership

B. Use in Virginia

i. According to a 2011 survey conducted and published in Law Firm Organization Magazine, of 2,403 legal entities surveyed in Virginia, the organizational structure broke down as follows:

1. Professional Corporation – 1,326
2. Limited Liability Company – 748
3. General Partnership – 242
4. Limited Liability Partnership – 87

ii. Statutory requirements for professional corporations, professional limited liability companies, and registered limited liability partnerships are set forth in Virginia Code §54.1-3902.

C. Choice of Entity Drivers

i. Limited Liability

a. Limited liability is the primary motivator behind entity selection, and is a major factor behind the movement away from general partnerships to professional corporations, limited liability companies, and limited liability partnerships. Under Va. Code § 50-73.96, registered limited liability partnerships are afforded protections similar to those provided to limited liability companies.

b. Note that although professional corporations, limited liability companies and limited liability partnerships may provide protection against vicarious liability for the professional negligence of other lawyers at the law practice, each lawyer remains personally liable for his or her professional negligence.

ii. Tax Structure

a. Corporate tax structure of professional corporations.

b. Pass-through structure of limited liability companies, limited liability partnerships, and professional corporations making s-corporation elections.

iii. Historical Considerations

Traditionally, many smaller law firms were organized as professional corporations, and many newly formed small or solo practices follow this pattern.

D. Discussion of the Choices

i. Professional Corporations

a. C- Corporation Structure

Professional corporations require that management and shareholders follow corporate formalities to avoid the potential for personal liability via “piercing the corporate veil.”

A professional corporation with a Subchapter C tax structure can adapt to many different size law practices. A common thread through all sizes of entities is that the corporation must have owners (shareholders), a board of directors and officers, such as a president, secretary, and treasurer. For a solo practice, the practitioner may be the sole shareholder, sole board member, and president of the corporation. In order to avoid veil piercing, the solo practitioner needs to maintain good books and records and abide by corporate formalities to ensure that he separates the law practice from other aspects of his personal life.

Professional corporations provide flexibility when changing its ownership ranks. Shares can be issued to new shareholders and shares can be purchased by other shareholders or redeemed by the corporation to memorialize the departure of a shareholder.

The main problem area with a professional corporation taxed as a Subchapter C corporation is that the profit of the company is taxed at the corporate tax rate before it is distributed to shareholders, who are then themselves liable for taxes on their corporate gains. This double taxation structure can be a trap for the unwary.

b. S-Corporation Structure

A Subchapter S corporation is a corporation that makes an election under the internal revenue code. The main benefit to electing to be taxed as an S corporation is that there is no corporate level taxation, and the double taxation issue present with Subchapter C corporations is no longer present.

Subchapter S corporations are subject to certain restrictions under the Internal Revenue code. For example, as a general rule, only individuals (and certain specific entities/trusts) may own shares of an S corporation. Further, there must be fewer than 100 owners of an S corporation and only one class of stock is permitted.

ii. Limited Liability Companies

Limited liability companies (“LLCs”) are comparatively new, flexible entities. Owners of an LLC, or members, can either manage the business themselves or elect a manager or managers to run the business.

An LLC is a creature of contract, governed by an operating agreement. The operating agreement can cover management rights of managers and/or members, mandatory retirement dates, requirements for admission of new members and a myriad of other provisions. An operating agreement provides a certain ease of use given that all of these provisions can be contained in one comprehensive agreement.

The tax treatment of an LLC is another area where this entity form allows for flexibility. Typically, LLCs are taxed as pass-through entities for multiple members or a disregarded entity for a single member LLC. However, an LLC can also elect to be taxed as a Subchapter C corporation or a Subchapter S corporation.

iii. General Partnerships

A general partnership usually has no state filing requirements and generally does not protect its partners from personal liability. A general partnership is an entity that can be created by mistake! Multiple individuals running a business for profit may be determined to be a de facto partnership, and each partner may be liable for the other partners’ debts. See, e.g., Mahmood Sahraeyan v. Bahman Shahkarami, 89 Va. Cir. 413 (2014).

General partnerships are taxed as pass-through entities.

iv. Limited Liability Partnerships

A Limited Liability Partnership (LLP) is a partnership that affords limited liability protection to its partners. (As discussed above, see Va. Code § 50-73.96).

LLPs are taxed as pass-through entities.

E. Main Considerations

i. Firm Size

If over 100 owners, Subchapter S corporation is no longer viable. It is important to have solid partnership, shareholder or operating agreements.

ii. Liability

Determine whether the burden of state filing costs and requirements exceeds the benefits derived from limited liability.

iii. Tax

Determine which tax structure is best for your entity.

II. Practice Agreement

A strong organizational and management document is a requirement to the proper governance of a law practice. For professional corporations, these documents could include bylaws and a shareholders agreement. For partnerships (of all kinds), the document would be an all-encompassing partnership agreement. Finally, for an LLC, the governing document is an operating agreement.

These agreements are important as they anticipate issues that may arise in the future and attempt to resolve disputes before they occur, limiting uncertainty within the law firm.

The following are crucial provisions to include in these agreements.

A. Adding New Owners

i. Governance agreement must provide for possible expansion of the firm.

ii. Buy-ins/Payouts

a. Should the firm provide for buy-ins/payouts?

It is important to pay attention to the formula used to determine the buy-in, which is typically based on the overall value of the firm. It is also necessary to determine whether the law firm will provide a payout to departing owners.

b. Tiers of Owners / “Partners”

Determine the rights of, and differences between, the tiers of owners or partners. The equity/non-equity tiered partnership is becoming more common.

B. Capital Reserves

i. Capital requirements/capital reserves

- a. Startup funds
- b. Cash flow issues
- c. Importance of buy-in funds

C. Management

i. Managing Member/Owner

ii. Benefits of having a Management Committee, Executive Committee, or Board of Directors

D. Voting

i. Voting Structures

- a. One vote per owner
- b. Vote by percentage

ii. Matters that may require supermajority votes (e.g. 2/3 or 75%)

- a. Admission of Owners
- b. Mergers
- c. Dissolution
- d. Sale of Assets

e. Expansion of Offices

E. Distributions

Firms must decide how and when to allocate and distribute firm profits. Some agreements outline the terms for distributions, setting out minimums and maximums, and voting on the specific dollar amount to be distributed. Broadly describing the profit distribution system will avoid unnecessary renegotiation of the agreement whenever the compensation structure changes.

F. Aging-Out

i. Firms may choose to impose a mandatory retirement age by agreement.

ii. Firms with multiple tiers of owners or partners may require de-equitization at a certain age in lieu of or in addition to a mandatory retirement age. De-equitization can minimize the firm's risk.

G. Disability and Death

i. Disability

a. If no agreement provision specifically addresses disability, owners may tend to be over-generous, which could cause financial issues. The agreement may include increased disability insurance coverage provided by the firm, or other payments for a certain period of time to defray the disabled owner's increased expenses related to the disability.

b. The agreement should discuss both permanent disabilities and temporary disabilities. For temporary disability, the owners may simply suspend the disabled owner's practice for a certain period of time.

c. It is also important to outline how "disability" will be defined and determined. Evaluation by one or more doctors may be required.

ii. Death

a. In certain entity forms, such as partnerships, the death of an owner may cause a dissolution of the partnership. The agreement should address this issue by providing that the entity will survive the death of a partner.

b. The agreement must include a provision related to payment to the deceased owner's estate for the deceased owner's interest in the law firm. The payment can be a return of capital or a redemption of the deceased owner's ownership interest.

c. If the deceased owner's interest will be redeemed, a valuation process, which may include an appraisal, should be included in the agreement.

H. Force-outs

To protect the law firm, it may be prudent to include a provision allowing the firm to expel an underperforming owner. The agreement may set forth certain instances when expulsion is required (i.e. criminal conviction or disbarment) and instances that require a vote of the owners.

I. Resolving Disputes

The Agreement should also set forth the mechanism by which disputes will be resolved. Consider a provision that all disputes will be submitted to arbitration or must be filed in a particular court, ie, the Circuit Court for Roanoke City.

III. Culture

A. What is Culture?

"Culture" may be discussed internally and externally and most often arises when someone asks what life is like at your firm. This question raises a number of points, such as the nature of the relationships between people, the strategic focus or identity of the firm, and the unique values of the firm.

Culture is a much discussed concept, even leading Merriam-Webster to announce last year that "culture" was their 2014 Word of the Year.¹ Notwithstanding the prevalence of this term, it appears that Merriam-Webster has some difficulty capturing a definition, and instead offers six alternative definitions with several "sub-definitions." Two of these definitions include:

(1) "the integrated pattern of human knowledge, belief, and behavior that depends upon the capacity for learning and transmitting knowledge to succeeding generations"; and

(2) the set of shared attitudes, values, goals, and practices that characterizes an institution or organization."²

Presumably, the later definition is what a law firm focuses on when contemplating its purported culture, as the culture is shaped by the collective group. In other words, "culture is the way a law firm does things."³

According to the Edge International Law Firm, a firm which specializes in giving advice to law firms, four categories can be indicative of the law firm culture⁴:

¹ See <http://www.merriam-webster.com/top-ten-lists/2014-word-of-the-year/culture.html>, last accessed 6/29/2015.

² See Merriam-Webster, an Encyclopedia Britannica Company.

³ Janet Ellen Raasch, Law Firm Culture: Understand Before Joining; Embrace to Succeed, The National Law Review, March 9, 2012.

1. Collegiality: *The manner in which people within a law firm deal with each other.*
2. Strategic Focus: *The degree to which the firm has a clear identity, both to itself and in relation to other firms.*
3. Governance: *The manner in which the firm deals with its people, and the way that its lawyers and staff deal with the firm.*
4. Values: *The belief systems that represent the collective aspirations of the members of the firm.*

Within these broad categories fall more specific considerations, such as billable hour expectations, personal life versus work balance and satisfaction, nature of the legal work performed, priority on mentoring, leadership by example, career progression, and importance of diversity.

B. Why Does Culture Matter?

Within your organization – A law firm’s culture is a powerful tool to attract and retain attorneys and staff. While the management team may set the firm’s priorities, all members of the law firm are integral to determining and exemplifying the law firm’s cultural identity. Culture should matter as significant disconnects over values and priorities will inevitably lead to disputes and, sometimes, failures.⁵ From a recruitment perspective, young lawyers often evaluate law firms based on their perceived cultures and will often ask pointed questions during the interview process to learn about that culture. While some statistics are publicly available, matters such as clientele, internal governance, and politics require further investigation. When presented with these questions, members of the firm should be prepared to provide cohesive responses.

As a competitive advantage – Almost all clients are constantly working to develop and refine a competitive advantage and similarly, law firms with an identifiable culture should leverage this as a competitive advantage.

C. Developing Firm Culture

Moving behind definitions and the importance of culture, a law firm must actively develop and institute the type of attitudes, values, goals and practices that will reflect the culture of the firm. In a 2014 article of the Law Practice Magazine, Timothy M. Lupinacci, outlined a few initiatives that he employed as the managing shareholder of his law firm’s office:⁶

- Shareholder Dinners – quarterly dinners outside of the office with no specific agenda, but intended to be informal and relaxed gatherings;

⁴ See Edge International Law Firm Cultural Assessment.

⁵ Dan DiPietro, Does Culture Matter at Law Firms, Bloomberg BNA, published on 2/18/2015, available at <https://bol.bna.com/does-culture-matter-at-law-firms/>.

⁶ Timothy M. Lupinacci, Building an Award-Winning Legal Office Culture, Law Practice Magazine, Volume 40, Number 1, January/February 2014.

- Leadership Lunches – a monthly lunch was provided for everyone in the office to foster attorney and staff interaction. After lunch, Mr. Lupinacci led the group in a short discussion of several excerpts from a leadership book and fostered discussion;
- Walking the Halls – visiting with other members of the firm without an agenda;
- Fun Diversions – e.g. Wii bowling party;
- Celebrating wins – acknowledge and celebrate case decisions or attainment of financial goals.

IV. Adding Lateral Partners/Associates and Handling Conflicts

A. Applicable Rules of Professional Conduct

In recent years, lawyers have become more transient and many lawyers will change law firms several times during their careers. The addition of new lawyers to your firm, especially those with established clientele, brings the potential for conflicts of interest. As a managing or hiring partner, there are several Virginia Rules of Professional Conduct (the “Rules”) that must be examined when resolving conflicts concerning a lateral lawyer. Further, new Rule 5.8, in effect as of May 1, 2015, provides specific procedures that lawyers must follow when leaving a firm.

- Rule 1.6 requires the confidentiality of information protected by the attorney-client privilege and prevents the disclosure of that information unless the client consents after consultation.⁷
- Rule 1.7 provides the general rule for concurrent conflicts of interests and provides the mechanism for curing a conflict of interest through client consent.⁸
- Rule 1.9 relates to conflicts of interest created by a former client.
- Rule 1.10(a) imputes the conflict of interest of one lawyer to all members of a law firm.⁹
- As a related consideration, Rule 5.8 encourages cooperation between a law firm and departing lawyer and in the absence of such cooperation, provides additional guidance to ensure that clients continue to have the right to be informed and make a decision about continued representation.

B. Investigation of Possible Conflict of Interest During Preliminary Discussions or Interview Stage

When interviewing and considering a new lateral lawyer, a law firm should perform a conflicts analysis before a hiring decision is made. In 2009, the ABA expressly authorized the

⁷ Rules 1.6(b) and (c) enumerate exceptions to the confidentiality requirement.

⁸ The full text of Rule 1.7 is provided in Attachment 1.

⁹ Rule 1.10(a) states “(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).”

sharing of conflicts information during the process of hiring a lateral lawyer by issuing a formal opinion (09-455) and amending Model Rule 1.6(a) to permit such disclosure. Virginia State Bar Ethics Counsel, James M. McCauley, discussed the disclosure of conflicts information and the changes to the Model Rule relative to the Virginia Rules in an article published in July 2013,¹⁰ stating

Virginia has not adopted this amendment to Rule 1.6, however, it would seem that the lateral hire could disclose limited information under Virginia's Rule 1.6 unless the client has directed that the information not be disclosed or disclosure would likely be 'detrimental or embarrassing' to the client...the [Rules] are rules of reason and have to address the practical realities of an environment where lawyers move in between firms frequently.

Although Virginia has not adopted a rule similar to ABA Model Rule 1.6(a), the commentary above by Virginia State Bar Ethics Counsel suggests that such investigation is likely appropriate in Virginia notwithstanding a specific rule.

C. Application of the Rules to Lateral Hires

The most likely source of conflict concerning a lateral hire arises under Rule 1.9(a) or 1.9(b). Rule 1.9(a) applies when a lawyer represented a client personally at his prior firm; Rule 1.9(b) covers the situation when the lawyer's former firm represented a client and the lawyer subsequently leaves that firm. Assuming that the client represented by the lawyer at his or her prior firm does not become a client of the new firm and the lawyer-client relationship is terminated, any subsequent representation of another client by the lateral lawyer or his law firm must comply with Rule 1.9.

If a conflict of interest is identified, the Rules provide a potential cure mechanism in most instances.¹¹ If the conflict results in an imputed disqualification under Rule 1.10, subsection (c) provides that "a disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7." Similarly, a lawyer may represent another person in the same or substantially related matter when he or she represented another client pursuant to Rule 1.9, so long as "both the present and former client consent after consultation."

D. Use of a Screen to Eliminate a Conflict of Interest

The Rules discuss the use of a "Chinese Wall" or screening device only in limited circumstances to address special conflicts of interest:

1. Rule 1.11 deals with former and current government officers and employees and permits the screening of a disqualified lawyer to permit a firm to undertake or continue representation despite a conflict;

¹⁰ James M. McCauley, Changing Law Firms or "Breaking Up is Hard to Do": Ethical Issues When Lawyers Move Between Law Firms, Virginia Lawyers Magazine, July 2013.

¹¹ See Rule 1.7 for instances in which consent is insufficient to cure a conflict.

2. Rule 1.12 deals with a former judge or arbitrator that is now working as a lawyer and permits a disqualified lawyer to be screened from the matter creating the conflict;
3. Rule 1.18 permits the use of a screen in the context of a prospective client.

A common misperception is that a screening device may be an appropriate cure. However, VSB Ethics Counsel has confirmed that a screening device is only appropriate in the three circumstances described above and is not a general cure mechanism that can be used in the absence of informed client consent under Rule 1.7.¹² Much of the confusion in Virginia regarding screening devices undoubtedly arises from changes to ABA Model Rules of Professional Conduct which expressly allow for “non-consensual screening” in order to avoid the imputation of a conflict of interest.¹³ Although Virginia has not modified the Rules to adopt a non-consensual screening procedure, about half of the jurisdictions do allow this procedure.¹⁴

E. Additional Guidance and Resources

- In resolving the potential conflict of interest, it is helpful to consult the Virginia Legal Ethics Opinions (“LEOs”). Although beyond the scope of this outline, a number of LEOs consider fact patterns concerning conflicts of interest and lateral hires.
- The Virginia State Bar’s ethics hotline, (804) 775-0564 or ethicshotline@vsb.org, serves members of the bar and the public by answering questions regarding ethics and the unauthorized practice of law.
- Although written mostly for larger law firms, a helpful discussion of the processes used to screen lateral hires for conflicts can be found at James M. Fischer. 2010. Large Law Firm Later Hire Conflicts Checking, available at: http://works.bepress.com/james_fischer/3.

¹² See “Answering Your Questions about Legal Ethics”, available at http://www.vsb.org/profguides/FAQ_leos/LegalEthicsFAQs.html, last accessed 6/30/2015.

¹³ See ABA Model Rule 1.10.

¹⁴ James M. McCauley, Id. at 12.

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Blood, Sweat & Tears

Using Technology in Litigation

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I. Introduction.

- A. Technology has been described as “anything that wasn’t around when you were born.”¹ It is often intimidating, evoking the unfamiliar as much as progress.
- B. When thinking of technology and their practice, lawyers may shudder at the thought of e-discovery rules/procedures and impenetrable terminology. But soon, keeping up with technology at a basic level will likely be an explicit part of a Virginia lawyer’s competence.
- C. Ideally though, lawyers would not view technology as a hurdle, but as an opportunity. At its core, technology helps review, organize, and present information more efficiently and effectively.
- D. The purpose of this program is to review lawyer’s basic responsibilities regarding technology, and to offer a few practical examples of how we can incorporate technology into our practices and presentations.

II. Competency and Technology.

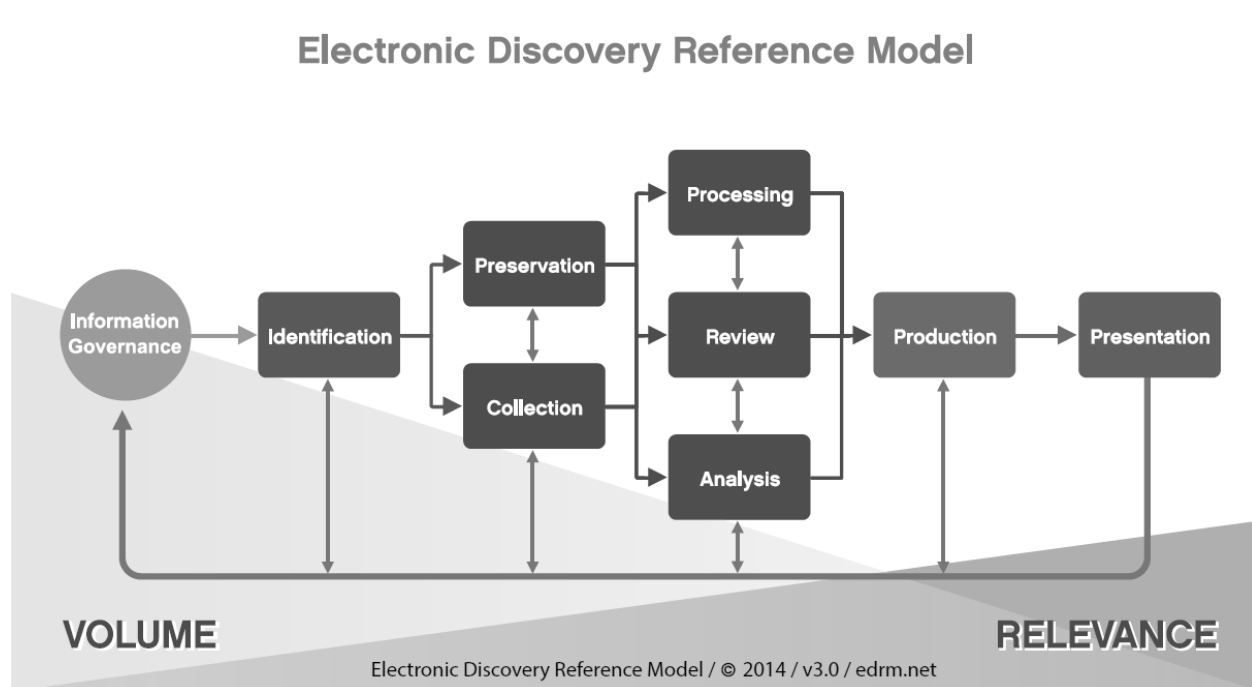
- A. The first Rule of Professional Conduct is “Competence”:
 - 1. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Va. Rules of Professional Conduct, Rule 1.1.
- B. In 2012, the ABA amended the comments to Model Rule 1.1 to address technology and the practice of law. The ABA’s “Ethics 20/20 Commission recommended the proposed amendment because it found that in order to stay abreast of changes in the law and its practice lawyers must have a basic understanding of the benefits and risks of relevant technology.” March 15, 2015 Petition of the Virginia State Bar at 3 (http://www.vsb.org/docs/prop-rules1-1_1-6_031615.pdf).
- C. Pending before the Supreme Court of Virginia is a similar amendment to Comment [6] of Virginia’s Rule 1.1:
 - 1. “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

¹ Alan Kay, computer scientist.

review has been established, the lawyer should consider making use of it in appropriate circumstances. (proposed amendment underlined).

III.E-Discovery Basics.

- A. ESI stands for “electronically-stored information.”
 - 1. Vast amounts of information and data is stored (and created) electronically.
 - 2. Documents, e-mail, social media, text messages, voice-mails, photos, access logs, etc.
- B. Courts increasingly expect lawyers to know and follow e-discovery procedures, particularly federal courts.
 - 1. ESI amendments to Federal Rules of Civil Procedure were made in 2006.
 - a. New amendments have been approved by the Supreme Court of the United States and have been submitted to Congress for approval. It is expected that they will become effective on December 1, 2015.
 - 2. ESI amendments to the Rules of the Supreme Court of Virginia were made in 2009.
- C. Rules/discovery procedures that explicitly involve ESI.
 - 1. Rule 26(f) conference (federal court only). Fed. R. Civ. P. 26(f).
 - 2. Initial disclosures (federal court only). Fed. R. Civ. P. 26(a)(1)(A).
 - 3. Discovery requests. Fed. R. Civ. P. 34; Va. Sup. Ct. R. 4:9.
 - 4. Third-Party Subpoenas. Fed. R. Civ. P. 45; Va. Sup. Ct. R. 4:9A
- D. Conceptually, the e-discovery process can be represented by the following diagram:



E. Helpful e-discovery resources

1. www.edrm.net
2. www.thesedonaconference.org
3. www.ediscoveryeducationcenter.com
4. www.ellblog.com

IV. Review Platforms.

A. Review platforms leverage technology, offering powerful tools that are much more efficient than manual/linear review.

B. We often think of this in the context of document review.

1. Functionality.
 - a. Search.
 - i. Basic keywords.
 - ii. Sophisticated search commands.
 - b. Organize/Filter by “meta-data”
 - i. Document custodian.

- ii. Sender/recipient.
 - iii. Document date.
 - c. De-duping.
 - i. Automated process that compares electronic records, removing duplicate records from the data set.
 - ii. Shrinks the volume of documents to be reviewed.
 - iii. Email is the quintessential example—many copies of the same email may be in multiple custodians' email boxes.
 - d. Tagging/Categorizing/Organization.
 - i. Responsive/Non-Responsive.
 - ii. Hot Documents.
 - iii. Privilege.
 - iv. Key litigation issues and sub-issues.
 - v. Second-review for substance/questions.
2. Review platforms can be hosted or internal.
 3. Many different platforms on the market, including:
 - a. Concordance.
 - b. Summation.
 - c. Relativity.
- C. Software/applications can also allow you to review transcripts electronically, integrating with case management software and/or generating stand-alone reports.
- D. Example—TranscriptPad®.
1. Designed to read and review transcripts.
 2. Overview of features:
 - a. Mobility—review unlimited transcripts in your iPad.
 - b. Read hands free with adjustable speed.

- c. Search for terms in one transcript, multiple transcripts from one deponent, or across an entire case, including daily transcripts from trial.
 - d. Case and matter organization.
 - e. Create and assign custom Issue Codes.
 - f. Highlight or flag text selections.
 - g. Easily prepare deposition designations.
 - h. Access case exhibits while reading, without losing your page.
 - i. Create and email/print customized reports.
 - j. Share an entire case file for backup or second review.
3. Supported file formats.
- a. Transcripts **MUST** be in .txt format for full functionality.
 - b. Exhibits in .pdf.

V. Persuasion and Advocacy.

- A. Look for opportunities throughout your case to integrate technology for a more compelling presentation.
- B. Decide what fits your case objectives. Be creative.
 - 1. Timing.
 - a. Settlement discussions/mediation.
 - b. Motions hearings.
 - c. Trial.
 - i. Opening statements.
 - ii. Witness examinations.
 - iii. Closing statements.
 - 2. Tools.
 - a. Do you already have the right technology, or do you need to make a purchase?

- i. Software—programs and applications.
 - ii. Hardware—cables, connections, etc.
 - iii. Daily e-transcripts during trial.
 - b. Will the presentation be static or dynamic?
 - i. Slideshows (PowerPoint, SlideShark) work-well when you are confident you will control the presentation flow without interruption.
 - ii. Other presentation software (like TrialPad, discussed below), allows you to react to a judge or witness on the fly.
 - c. Explore using video in unconventional ways.
 - i. Use the senses—allow your audience to hear from and observe someone directly.
 - ii. “Low-tech” recordings using your own device.
 - iii. Witness/expert interviews in pre-litigation settlement discussions.
 - iv. Videoconferencing/FaceTime.
3. People.
- a. Can you do it yourself?
 - b. Do you need an in-house colleague?
 - c. Consider outside consultants in the appropriate case.

C. Plan ahead.

- 1. You must create the raw materials for your presentation.
- 2. Confirm courtroom capabilities.
 - a. Check the court website.
 - i. For example, in the Western District of Virginia: <http://www.vawd.uscourts.gov/programs-services/courtroom-technology.aspx>.
 - b. Call the clerk/court.

- c. Schedule a test-run on-site.
- 3. Practice live, doing real dry-runs with the technology.
- 4. Back-up plans.
 - a. Technology can fail unexpectedly.
 - i. Have Plans B & C.
 - ii. Roll with the punches—your audience didn't know what you had planned.
 - b. In court, consider distributing exhibit binders, even if you plan to display the information electronically.
 - i. Jurors/judges may want to follow along by looking at different mediums.

D. Example—TrialPad®.

- 1. Presentation application specifically designed for lawyers/courtrooms, to be intuitive and easy-to-use.
- 2. Overview of features:
 - a. Organize presentation documents by witness, motion, key docs, etc.
 - b. Annotate documents—highlight, call-out, underline, laser pointer, redact.
 - i. Can do it on the fly.
 - ii. Can annotate documents ahead of time and save them.
 - c. Zoom in.
 - d. Side-by-side comparison.
 - e. Whiteboard.
 - f. Video.
 - g. Add exhibit stickers.
 - h. Control the presentation—show the audience a document after you've made the annotations you want.
 - i. Search across your documents (content only if OCR'd).

- j. Share/export documents, including annotations.
 - k. Duplicate entire case.
 - l. Mobility—keep all display material in your iPad.
3. Supported file formats.
- a. Preferred document format is .pdf.
 - i. Will also support .jpg, .png, .tif, and .txt.
 - b. All iPad compatible video and audio file formats.
 - c. Make sure you have a good quality copies of documents.
4. Necessary hardware.
- a. Projector or projection connection.
 - b. Dongles (if not using network connection). Some allow for charging during use.
 - i. VGA (no audio)—30 pin or lightning.
 - ii. HDMI (audio)—30 pin or lightning.
 - iii. Apple TV VGA dongle or direct HDMI connection
 - c. Local courtrooms (always changing):
 - i. Salem City Circuit Court—projector, screen and Apple TV or other appropriate cables will be needed.
 - ii. Roanoke City Circuit Court—courts' TVs not currently HDMI compatible but you can connect VGA.
 - iii. Franklin County Circuit Court—have TV but HDMI compatibility is not confirmed.
 - iv. Charlottesville Circuit Court—projector, screen and Apple TV or other appropriate cables will be needed.
 - v. USDC, Charlottesville Division—HDMI compatible.
 - vi. USDC, Roanoke Division—courtroom dependent on HDMI or VGA compatibility.

Why the Western District?

Identifying and Litigating False Claims Cases

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***Qui Tam* litigation is a growing field for attorneys representing both whistleblowers and institutional defendants.** While *qui tam* litigation presents significant opportunities for attorneys on both sides, it is a complex area of the law, both legally and factually. Recent *qui tam* cases demonstrate that these cases can present significant opportunities for those lawyers who can identify the issues involved and develop the expertise and capabilities to master these cases.

The importance of *qui tam* litigation as a discrete practice area has been recognized. The Federal Bar Association recently established a Qui Tam Section to improve the level of practice in this area. Gentry Locke's John Thomas was instrumental in founding the new FBA Qui Tam Section and is serving as its first Chair.

To be successful in *qui tam* litigation, attorneys must be able to analyze complex fact patterns, conduct additional investigation, and work with the U.S. Justice Department. Good cases will require significant time investment and legal research, and all cases require a detailed litigation plan covering all major phases of the case.

The Western District of Virginia is an excellent forum for litigation False Claims Act cases for a number of reasons, reviewed below.

A. What is the False Claims Act? – A Brief Refresher.

a. History

- i. Originally passed in 1863 to deal with merchants selling worthless or defective goods to the Union Army. 12 Stat. 696.
- ii. Expanded and strengthened:
 1. In 1986 (False Claims Act Amendments, Pub.L. 99-562, 100 Stat. 3153, enacted October 27, 1986);
 2. In 2009 (Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009))(signed by the President on May 20, 2009);
 3. Again in 2010 (Patient Protection and Affordable Care Act (PPACA) – signed into law on March 23, 2010.)

- b. The False Claims Act ("FCA") creates a financial incentive whistleblowers through its *qui tam* provision, allowing for **whistleblowers to share up to 30%** of the Government recovery.

c. Statute: 31 U.S.C. §§3729 – 3733

- i. Liability extends to anyone who: (31 U.S.C. §3729(a)(1))
 - A. Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
 - B. Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

- C. Conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
 - D. Has possession, custody, or control of property or money used, or to be used, by the Government and, knowingly delivers, or causes to be delivered, less than all that money or property;
 - E. Is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
 - F. Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or
 - G. Knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.
- ii. Damages (31 U.S.C. §3729(a)(1))
 - 1. Civil Penalties of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act.
 - 2. Treble Damages: “3 times the amount of damages which the Government sustains because of the act of that person.”
 - 3. Attorneys’ Fees and Costs (31 U.S.C. §3730(d)).
 - iii. Unique Procedure (31 U.S.C. § 3730)
 - 1. The relator must make a written disclosure to the Government of substantially all material evidence and information the relator possesses.
 - 2. Cases filed under seal and served only upon the Government initially.
 - 3. Government has 60 day period to evaluate the case to decide upon intervention (although in practice, the period of the seal is routinely extended to allow the Government more time to investigate).
- d. Virginia Fraud Against Taxpayers Act, Va Code Ann. §§ 8.01-216.1 *et seq.*
 - i. Similar to the Federal FCA in most respects, and amended in 2011 to match the changes in the 2009 FERA amendments.

- ii. Key differences from Federal FCA:
 - 1. Period of initial seal is 120 days, rather than 60 days. *See* Va. Code Ann. § 8.01-216.5(B).
 - 2. The VFATA allows for dismissal of an action if the relator initiated or participated in the fraud. The FCA only allows for a reduction in the relator share. *See* Va. Code Ann. § 8.01-216.7(C)
 - 3. The VFATA allows former Commonwealth employees to file claims based on knowledge obtained during employment, so long as they exhausted internal reporting procedures. Also, sovereign immunity is waived by the Commonwealth as to retaliation claims. *See* Va. Code Ann. § 8.01-216.8.
- iii. The VFATA also contains a retaliation provision similar to that found in the Federal FCA. *See Lewis v. City of Alexandria*, 287 Va. 474 (2014)(City terminated its senior project manager employee for reporting false construction invoices).

B. What are the Hottest Areas in FCA Litigation?

- a. Health Care Services. The health care services industry involves many FCA cases because of the sheer number and diversity of fraud schemes, the Government's status as a huge participant in the market, the amount of money involved, the difficulty in detecting fraud schemes (and hence the temptation to play fast and loose with the rules), and the variety of safeguards (i.e. certificates of compliance with regulatory requirements imposed as a condition of payment) the Government has developed in an attempt to control fraudulent behavior.
 - i. 80% of FCA Cases involved Health Care.
 - ii. Stark Violations.
 - iii. AKS Violations.
 - iv. Up-coding and Medicare/Medicaid Fraud.
 - v. Off-Label Marketing in Pharmaceutical Cases.
- b. Mortgage Fraud
 - i. FHA Cases.
- c. Procurement.
 - i. Although procurement and grant fraud is a smaller percentage of FCA cases than health care or financial fraud, it remains a significant area.
 - ii. Buy American Act/Trade Agreements Act (GSA).
 - 1. *U.S. ex rel. Scutellaro v. Capitol Supply*
 - a. GSA Vendor knowingly listed products on GSA Advantage Website and sold them to Government customers despite improper country of origin.
 - iii. Trinity Industries - Guard Rail Case.

1. \$663 Million judgment against guardrail manufacturer for faulty guardrails. Relator alleged that modification to end cap on guardrails made it malfunction, and continued to submit claims to government for payment.

C. How do These Cases Work in Real Life?

a. How do these cases start?

i. On the Defense Side:

1. Client will say, “I just got a CID.” (i.e. a “Civil Investigative Demand” – essentially a prelitigation subpoena issued by the Government).
2. Conduct a thorough, focused and privileged internal investigation.
3. Avoid creating more problems through retaliation.
 - a. Do not under any circumstances allow your client to fire the employee who complained about the activity.
4. FCA Case may arise out of criminal liability or other wrongdoing:
 - a. Lance Armstrong case. (*U.S. ex rel. Landis v. Tailwind Sports Corp.*, 51 F. Supp. 3d 9 (D.D.C. 2014)).
 - i. Use of performance enhancing drugs violated sponsorship agreement, giving rise to FCA liability.
 - b. Iowa AIDS Researcher (Dong-Pyou Han).
 - i. Fabrication of scientific research gave rise to criminal liability (57 months confinement) and could give rise to FCA liability for both researcher and institution.
5. What do you do if your client has apparently violated the FCA?
 - a. What is the best defense strategy?
 - i. Scorched earth defense? This is the Federal Government you are talking about.
 - ii. Does your client have a continuing business relationship with the Government? Stated differently, can you really afford to litigate with your best customer?
 - iii. Is it possible to negotiate the best deal possible as early as you can?
 - iv. The cover up can easily be worse than the original violation.

ii. On the Relator Side:

1. An employee of a company will see a lawyer (oftentimes for something completely different), and will reveal the fraud (perhaps without realizing it is a fraud).
2. Conduct an investigation.
3. Draft a Disclosure Statement (and comply with statutory notice outlined in 31 U.S.C. § 3730).

4. Draft Complaint – AND COMPLY WITH SEAL (31 U.S.C. § 3730).
5. Persuade the Government on the merits of the case.
 - a. This is the single most important and effective thing that relator’s counsel can do. If the facts are there, if the legal analysis is there, then your job is to demonstrate to the Government that it should pursue the case.
6. If the case is strong, develop a strategy for working with the Government.
7. Have a plan if the Government declines to intervene.
8. Have a plan for Fed. R. Civ. P. 12(b)(6) and 56.
 - a. FCA claims must be pled with particularity. This means the complaint must allege the “who, how, what and when of the fraud.” What was the claim for payment? What was the false statement? Who made the false statement? When? (*U.S. ex rel. Carter v. Halliburton Co.*, 2009 U.S. Dist. LEXIS 63649 (E.D. Va. July 23, 2009).
 - b. *Skinner v. Armet Armored Vehicles, Inc.*, 2015 U.S. Dist. LEXIS 61919 (W.D. Va. May 12, 2015).
 - i. The relator alleged that the defendant sold defective mine-resistant military vehicles to the Government.
 - ii. After the Government declined to intervene, the relator survived both a motion to dismiss and summary judgment.
 - iii. The relator ultimately lost at trial, underscoring the necessity of having a sound litigation plan (particularly sufficient witnesses/evidence).

D. Why is the Western District of Virginia a good forum for litigating these cases?

- a. Large Cases in Western District.
 - i. *U.S. v. Abbott Laboratories*
 1. May 2012: \$1.5B settlement to resolve both civil FCA and criminal charges for off-label marketing of medication.
 - ii. *U.S. v. Purdue Pharma*
 1. 2007: \$601M settlement to resolve civil FCA claims for off-label marketing of Oxycontin.
 - iii. W.D. Va. has handled #4 and #11 largest pharmaceutical cases in US history (between 1991 and 2012).
- b. US Attorney’s Office is Experienced.
 - i. W.D. Va. Office has handled significant, complex matters and has developed significant expertise.
 - ii. Energetic.
 - iii. Full investigative capabilities.

1. Ability to bring in assistance from wide range of government agencies.
- iv. Businesslike and professional.
- c. Western District has good judges.
 - i. Some large cases are brought in this district for this reason.
- d. Good Fourth Circuit Law.
 - i. Harrison II (*US ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003)).
 1. Scier: 4th Circuit applies the Particular Employee Knowledge Test, which means that knowledge on the part of one employee of a corporation is sufficient to impute knowledge upon the corporation. (In other words, the individual submitting the false claim need not have personally known it was false.)
 2. Materiality: 4th Circuit adopts a “capacity to influence” test for materiality. In other words, the false statement need only have had the capability to influence a funding decision. This test for materiality is now stated in 31 U.S.C. §3729(b)(4).
 - ii. Triple Canopy (*US ex rel. Badr v. Triple Canopy*, 775 F.3d 628 (4th Cir. 2015)).
 1. Triple Canopy created false marksmanship records for 40 Ugandan security guards, and then submitted invoices for their services. While Triple Canopy never submitted an invoice containing false information, the Fourth Circuit upheld the determination of liability based on the “implied certification” theory.
 2. Implied certification liability means that a defendant can be liable under the FCA for submitting claims for payment to the Government if, by doing so, they are impliedly (and falsely) certifying that they complied with material terms of the contract.
- e. Not the Eastern District.
 - i. Key to Intervention is the US Government having sufficient time to develop its case – the “Rocket Docket” is not conducive to this.

E. Key Takeaways

- a. These cases are everywhere.
- b. The Western District of Virginia (and Fourth Circuit generally) is a favorable forum to litigate these cases.
- c. This is a complex area that requires careful planning and research.



GENTRY LOCKE
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Ethics: Some Things Never Change

(But Others Do)

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Executive Summary:

Referrals and Co-Counsel Agreements: Make sure you protect yourself and your client in the agreement, and always obtain informed consent. When serving as co-counsel with an outside firm, you must always communicate, and you should have all the rules set down in writing. Everyone is responsible for deadlines.

When the Client Breaks Bad: When (and how) you should withdraw as counsel.

Social Media: Friend or Foe? Facebook (and sites like it) is an incredible tool in your litigation arsenal. It can also be your Achilles Heel. Be absolutely clear with your client on what is and is not allowed up front, and in writing. When using Facebook yourself, be smart and follow the ethics rules always.

Rule Changes: For lawyers leaving their old law firm, new Virginia rules mandate that the lawyer and the firm send a timely, joint communication to the clients so they are informed.

Virtual Offices: Whether your office is brick-and-mortar or cyberspace, the same ethical rules apply. Be careful what you hold your firm out as.

Ghostwriting: While not always unethical per se, it's almost always a terrible idea.

How Not to Become a Respondent to the Virginia State Bar: Practice the three Cs—Case selection; Competence, and Communication.

Getting Your License Back: Nobody expects to lose a license. If it happens, take responsibility, demonstrate remorse, and engage in positive activities in your in the community. Your activities, conduct, and attitude during the period after the revocation until you file the petition for reinstatement are especially important.

1) Referral, Shared Case Agreements, and working with other lawyers/firms

- a) Referral the right way can benefit you, the other firm, and the client.
 - i) Legal Ethics Opinion (LEO) 1739 sets the basic rules.
 - Not necessary that both lawyers/firms assume full responsibility for client (VRPC 1.5(e) got rid of DR 2-105(D), which required that both firms bear full responsibility).
 - But, the client must give informed consent, the fee must be reasonable, and it should all be done up front – preferably in writing
 - o VRPC 1.5(e) A division of a fee between lawyers who are not in the same firm may be made only if:
 - (1) the client is advised of and consents to the participation of all the lawyers involved;
 - (2) the terms of the division of the fee are disclosed to the client and the client consents thereto;
 - (3) the total fee is reasonable; and
 - (4) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.
 - ii) Be wary of lead-sharing organizations. They could be unethical in a number of ways.
 - LEO 1846 – participation in lead-sharing organization would result in unethical practice if, e.g., the lawyer's membership was dependent on number of leads generated, or the lawyer felt obligated to take on a case generated by the organization that the lawyer would not otherwise have taken.
 - iii) Foreign lawyers and referrals
 - Still ok, but always have agreement in writing.
- b) Shared Case Agreements – the Devil is in the Details.
 - i) Protect your client, protect yourself.
 - ii) Example of model case agreement for co-counsel
 - Responsibilities should be clear from the outset.
 - Fee Splitting, etc.
 - iii) Front end work, back end work, middle of it work.

- Communication, communication, communication
- Chain of command / shared and assigned responsibilities – establish agreed rules
- Deadlines are everyone's responsibility.

- Statutes of limitations – on everyone's calendars!

iv) Working with Co-Counsel

- Ethical issues arise when a lawyer from out of state (particularly one who has not made an appearance) influences a lawyer who is subject to the rules.
 - *In re Estrada*, 143 P.3d 731, 735-36 (N.M. 2006).
- Bottom line – it's your law license, so it's your responsibility even when you have co-counsel directing the effort. Establishing the rules early will avoid headaches later. VRPC 5.1 – supervisory responsibilities.
- If things go bad
 - breach of fiduciary duty
 - legal malpractice
 - duty to inform the client of co-counsel's breach of fiduciary/malpractice duty

2) My Client Broke Bad - How and When to Withdraw as Counsel

a) When must/may you withdraw?

i) **You must:**

- Rule 1.16 of VA Rules of Professional Conduct
 - Except as stated in paragraph (c), a lawyer . . . shall withdraw from the representation of a client if:
 1. the representation will result in violation of the Rules of Professional Conduct or other law;
 2. the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 3. the lawyer is discharged.
- Criminal – Va. Code § 19.2-163.7. Counsel in capital cases.

ii) **You may:**

- A lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
 - the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;
 - the client has used the lawyer's services to perpetrate a crime or fraud;
 - a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
 - the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - other good cause for withdrawal exists.

iii) Client not paying the bills? – doesn't always mean you can withdraw

- *Reynolds v. Reliable Transmissions, Inc.*, 2009 U.S. Dist. LEXIS 86426 (E.D. Va. 2009) (Dohnal, J.)
 - Client wasn't paying the bills, responding to counsel. Judge Dohnal held that counsel, who had made appearance and filed several motions, could not withdraw. The corporate client could not appear on its own, so counsel had to stay on.

b) You've decided to withdraw. What comes next?

- i) VRSC 1:5 – "Counsel of record shall not withdraw from a case except by leave of court after notice to the client of the time and place of a motion for leave to withdraw."
- ii) Practical pointers – always notify the client of everything.
- iii) Motion to court – examples and what not to do.
- iv) Caution: attorney/client privilege doesn't end. No disclosure to the court of privileged matters.

- Duty of zealous representation while your motion to withdraw is pending

- LEO 1530

3) Social Media: Friend or Foe?

a) Discovery issues and client profiles

- i) Relevance may be questionable – fishing expeditions
 - ii) Educate your client
 - iii) Never try to “clean up” client’s profiles after receiving discovery requests
 - *In the Matter of Matthew B. Murray*, VSB Disciplinary Board
- Murray recently finished paying off his \$544,000 sanction.

b) Lawyers and Facebook

- i) Facebook posts may qualify as advertising (don’t shill on Facebook)
 - Virginia RPC 7.2 – lawyers may advertise.
 - But, the lawyer must not include false or misleading language. VRPC 7.1
- ii) Researching the other side in a dispute?
 - If it is open and publicly viewable, it is fair game.
 - Do NOT friend the other party. VRPC 4.2 – lawyer may not communicate with a represented party about the subject of the representation.
 - If you “friend” someone for the purpose of learning information about them, you could violate VRPC 8.4(c) – pretexting.
 - Do not use someone else to friend the other party – paralegal, investigator etc. VRPC 8.4(a).

c) Best practices for you, your practice, your client

- i) Include language in representation contract about social media use.
- ii) Instruct your client to take down or temporarily disable their Facebook/other accounts during pendency of the lawsuit.
 - Pay attention to the question.
 - If the discovery requests are phrased “do you have an active account” or something similar, this could avoid the need for a discovery dispute.

- iii) Only after the other side has established the relevancy of the sought-after content should you agree to produce social media that would otherwise be discoverable (i.e. not privileged).
- iv) If you use Facebook, try to keep the shilling to a minimum – but if you do, you must follow the rules set out by VRPC.

4) Rule Changes.

- a) Procedure for Notification to Clients When a Lawyer Leaves a Law Firm or When a Law Firm Dissolves—New Rule 5:8 (Approved by the Supreme Court of Virginia on February 27, 2015, effective May 1, 2015).

- i) Summary.

It is a reality of the practice of law that lawyers leave firms and firms dissolve. The circumstances surrounding these changes can be challenging, and communication among lawyers within the firm may not be ideal. However, new Rule 5:8 requires that the lawyers communicate (or at least attempt to communicate) with each other on a joint communication to notify clients of the change before either a lawyer or the firm unilaterally contacts the clients to inform them of the change and/or to solicit business.

- ii) Departing Lawyers.

Unless there is an agreement otherwise, when a lawyer leaves a law firm, neither the firm nor the lawyer can unilaterally contact clients to notify them of the lawyer's departure or to solicit representation unless the lawyer and the firm have conferred or attempted to confer on a joint communication to the client.

If no agreement can be reached regarding a joint communication, the lawyer or law firm may unilaterally contact the client, but such communication cannot contain false or misleading information. The communication must give notice that the lawyer is leaving and provide the client with the choices of remaining a client of the firm, remaining a client of the lawyer, or selecting representation of another lawyer or firm.

If the client does not respond to the communication, the client is deemed to remain a client of the firm until the client elects otherwise or the firm terminates representation.

- iii) Dissolving Law Firms.

Unless there is an agreement otherwise, when a firm dissolves, neither the firm nor its lawyers can unilaterally contact clients unless the lawyers have conferred or attempted to confer on a notice to the clients.

If no agreement can be reached regarding the communication, lawyers in the dissolving firm may unilaterally contact clients, but such communication cannot contain false or misleading information. The communication must give notice that the firm is dissolving and provide the client with the choices of selecting representation by any member of the firm or representation of another lawyer or firm.

If the client does not respond to the communication, the client is deemed to remain a client of the lawyer who was primarily responsible for the client's services until the client advises otherwise.

iv) Provisions Applicable to Both Lawyers Leaving a Firm and Firm Dissolutions.

Timely notice must be given to clients when a lawyer leaves a firm or a firm dissolves.

The client is entitled to receive the new contact information for a lawyer.

The client is entitled to know whether the lawyer and/or the firm is willing and able to continue the representation.

Appropriate steps must be taken to transfer or safeguard the client's file and property, including funds held in trust.

When a lawyer is appointed by a court to provide representation, the appointed lawyer is responsible until relieved by the appointing court.

If a lawyer no longer represents a client involved in litigation, he must file a motion to withdraw or a motion for substitution.

If a departing lawyer continues to represent a client involved in litigation, he should notify the court and opposing counsel of the change and his new contact information.

b) Military Spouse Provisional Admission—Amended Rule 1A:8 (Approved by the Supreme Court of Virginia on February 27, 2015, effective immediately)

New Rule 1A:8 was effective July 1, 2014. It allows provisional admission to the Virginia State Bar for military spouses who are licensed in another jurisdiction. The 2015 rule change amended the sections on issuance, admission, duration and renewal.

- c) Amendment to Clients' Protection Fund Rules (Approved by the Virginia State Bar Council October 24, 2014, effective July 1, 2015)

The amendment increased the maximum payment per petitioner from \$50,000 to \$75,000 for losses incurred after July 1, 2015.

- d) Amendment to Bylaws Regarding Election Procedures (Approved by the Virginia State Bar Council on October 24, 2014, effective immediately)

The amendment changed the election procedures to permit members to vote for fewer candidates than the number of vacancies.

- e) Amendment to Reciprocity Rules—Amended Rule 1A:1 (Approved by the Supreme Court of Virginia on October 31, 2014, effective immediately)

New reciprocity rules permit admission without examination for those licensed in jurisdictions which allow Virginia attorneys to be admitted without examination. The amendment deleted the requirement that the foreign attorney must have been admitted “by examination” in the reciprocal jurisdiction.

5) **Virtual Offices.**

- a) Summary.

Advances in technology have made it increasingly easy and cost effective to conduct the practice of law from almost any location. Many clients still expect and appreciate face-to-face interactions with lawyers (and some types of representation may require such interactions). However, a growing number of clients prefer to communicate and conduct business electronically. Additionally, virtual offices and telecommuting provide flexible staffing options for lawyers and firms, which were not previously available. Whether a lawyer or firm is providing representation solely through a virtual office or is utilizing technology to supplement its “brick-and-mortar” office through remote workstations, the same ethical rules apply. Of particular importance are the rules regarding communication, diligence, and safeguarding client information as seen by the discussion below.

- b) Practice Pointers.

i) Technology vendors: If you have a good IT vendor, stick with it. If not, consider hiring a consultant to evaluate and recommend potential service providers. You or your consultant should consider asking the following questions of potential vendors:

- (1) How do you respond to subpoenas, breaches, disasters, etc.?
- (2) What safeguards are in place against hacking and viruses?
- (3) What happens to firm information after the service agreement ends?
- (4) What customers have recently terminated service agreements with the vendor and why?

- (5) What is the turnover rate for technical staff?
- (6) Who will be the technical lead on the firm's account and what are his/her qualifications?
- (7) What internal expertise will be expected of the firm's staff?
- (8) How will the vendor access the firm's system?
- (9) What is the on-boarding process and its cost?
- (10) What is the response process and typical response time?
- (11) Does the standard service agreement attempt to limit all vendor liability?
- (12) How are services priced—flat fee, hourly, etc.?
- (13) Will subcontractors be utilized?

Remember, one size does not fit all. Find a vendor with significant experience with firms of your size. Get a clear and detailed list of exactly what services will be included and which services are excluded. Be sure to get and check references. Get a confidentiality agreement! Finally, have periodic security audits performed by another vendor on your systems.

ii) Communications: Use email settings to provide confirmation that emails are received and opened. Request that clients respond to emails confirming that they understand the information conveyed. Follow up emails with telephone calls where practical.

iii) Supervision of off-site lawyers or nonlawyer staff: Establish multiple methods of communication. Implement protocol for review of work product (an attorney should review all outgoing communications before they are sent to the client or court). Use videoconferencing technology to maintain contact. Schedule regular conferences to review work product/task items.

iv) Advertising: Do not advertise office space as a location of the firm unless the space is used to provide legal services, is staffed, and has signage indicating it is an office of the firm. Where unstaffed/shared offices are utilized, it is permissible to note the office as "available meeting/conference space". Do not advertise office space to mislead the public regarding the firm's resources or geographic coverage.

c) VSB v. Sriskandarajah, Case No. CL2012-4137, VSB No. 10-022-081527 (Fairfax County, June 28, 2012), a copy of which can be found at <http://www.vsb.org/docs/Srisk-082712.pdf>.

i) A three-judge panel accepted an Agreed Disposition proposed by the Virginia State Bar and Sriskandarajah finding that the lawyer violated Rule 7.4 (Communications of Fields of Practice and Certification) and issued a Public Reprimand without Terms.

ii) Sriskandarajah was licensed to practice law in Virginia and was the owner of SRIS Law Group, P.C. The firm's advertisements implied that there were multiple attorneys working for it. However, the only employee was Sriskandarajah. The other attorneys listed were independent contractors who were paid commissions.

Sriskandarajah agreed to hire these attorneys as employees. The firm's advertisements also represented that its attorneys practiced only in limited areas of the law; however, they actually worked in a number of practice areas. Sriskandarajah agreed to revise the attorneys' profiles. The firm's advertisements also stated that it had six offices when in fact it had only one office with several unstaffed executive office suites in other locations. Sriskandarajah amended these advertisements to reflect only one office with other "client meeting locations".

d) LEO 1872. Sriskandarajah prompted Legal Ethics Opinion 1872 (issued March 29, 2013).

i) The LEO defines a "virtual law practice" as one involving "a lawyer/firm interacting with clients partly or exclusively via secure Internet portals, emails, or other electronic messaging." It notes that a virtual law practice may be combined with an executive office rental (where the attorney leases shared/non-exclusive office/conference room space), which is generally unstaffed.

ii) Virtual law practices implicate Rules 1.1 (Competence); 1.6(a) (Confidentiality of Information); 5.1(a) & (b) (Responsibilities of Partners and Supervisory Lawyers); 5.3(a) & (b) (Responsibilities Regarding Nonlawyer Assistants); 7.1 (Communications Concerning a Lawyer's Services); and Regulation 7 Governing Applicants for Admission to the Virginia Bar by Motion.

iii) The lawyer in a virtual law practice must protect the confidentiality of client information. He is not required to absolutely guarantee that a breach will not occur—he must only act reasonably. When using third party storage or data portals, the lawyer must "exercise care in the selection of the vendor, have a reasonable expectation that the vendor will keep the data confidential and inaccessible by others, and instruct the vendor to preserve the confidentiality of the information." He (or his consultant) must evaluate whether the provider's technology and terms of service provide adequate safeguards.

iv) When communicating electronically, the lawyer "may need to take extra precautions to ensure the communication is adequate and that it is received and understood by the client." The lawyer must explain the issues involved so that the client can make informed decisions regarding the representation. The lawyer should get confirmation from the client that he received the communication and understands it.

v) When utilizing virtual workspaces, a partner or other supervising attorney has the same responsibilities to supervise subordinate lawyers and nonlawyer assistants as when they are all physically present in one location.

vi) When using shared/non-exclusive executive offices/suites, the attorney must actually provide legal services from that location in order to advertise it as a location of the firm. Whether the location can be included on letterhead depends on how often the lawyer uses the space, whether it is staffed, and whether it has signage indicating it as an office of the firm/lawyer. However, the firm may not list the space in order to mislead

the public regarding the geographic practice area of the firm or the firm's resources. Steps must also be taken to protect confidential information in the shared office space.

vii) When a lawyer is admitted to practice in Virginia by motion, he is required to maintain an office in Virginia where clients can be seen. Virtual or shared offices do not satisfy this requirement.

6) **Ghost Writing.**

a) Summary.

i) Legal Ethics Opinion 1874 was issued July 29, 2014. As detailed below, the opinion marks a change in position in that it opines that ghostwriting pleadings is not a per se ethical violation. However, the LEO has received criticism from the courts, some of which have admonished that lawyers who ghostwrite pleadings are committing ethical breaches and will be subject to sanctions. Accordingly, despite the well-reasoned LEO, lawyers should decline limited-scope representation agreements for the drafting, review and/or revision of pleadings intended to be filed pro se.

b) LEO 1874—Limited Scope Representation—Reviewing Pleadings for Pro Se Litigants—Substantial Assistance and “Ghostwriting” (issued July 29, 2014)

i) This LEO addressed several questions regarding lawyers' obligations when contracted through a pre-paid legal services plan to provide limited-scope representation of clients, including review of and comment on pleadings drafted by the client.

ii) The Committee's opinion represents a change in its position on this issue and overrules several previous LEOs.

iii) The Committee determined that, in the absence of a statute, standing rule or judicial admonition requiring the disclosure of the drafter of a pleading, there is no ethical obligation to notify the court or the opposing party of a lawyer's drafting assistance to a pro se litigant.

iv) Ghostwriting does not constitute fraudulent or dishonest conduct before a tribunal.

v) A lawyer drafting pleadings for a pro se litigant retains the duty of competence and must make a reasonable inquiry into the facts and law to avoid producing a frivolous pleading.

vi) The Committee noted that ghostwriting does not lead to an unfair advantage on the part of a pro se litigant, as some have suggested on the basis that pro se pleadings are more liberally construed, because competent assistance will be readily apparent and incompetent assistance will provide no advantage.

vii) The representation agreement with the client should be clear regarding the limited scope of the representation. If the attorney believes that the case is complex and/or the client is unsophisticated such that proceeding *pro se* is not in the client's best interests, the lawyer should so advise the client. In all limited scope representations, the lawyer should explain the advantages and disadvantages of the type of representation requested.

c) Limitations of LEO 1874.

i) The Committee specifically noted that while not per se unethical, ghostwriting may be prohibited in certain forums. The lawyer has a duty to research a forum court's policies on ghostwriting.

- (1) Section 16.1-122.4 of the Code of Virginia requires that parties appearing before the Small Claims Division of General District Courts be represented by themselves.
- (2) 11 U.S.C. § 110 requires the identification of the preparer of a bankruptcy petition.
- (3) Federal Courts in Virginia have expressed disapproval of the practice of ghostwriting pleadings and have issued strongly worded opinions warning attorneys against the practice. Gholson v. Benham, No. 3:14-cv-622-JAG, 2015 U.S. Dist. LEXIS 65193 n2 (E.D. Va. (Richmond Division) May 19, 2015) ("The Court notes that the Plaintiff's pleadings are not typical of most *pro se* pleadings, suggesting the possibility that they may have been 'ghost-written' by an attorney. If so, this practice is strongly disapproved as unethical and as a deliberate evasion of the responsibilities imposed on attorneys, and this Opinion serves as a warning to that attorney that his or her actions may be unethical and could serve as the basis for sanctions."); U.S. v. Salamanca, No. 3:11CR255-HEH, 2014 U.S. Dist. LEXIS 3243, *13 (E.D. Va. (Richmond Division) Jan. 10, 2014) (noting ghost writing is improper and will not be tolerated); Greene v. U.S. Dept. of Education, No. 4:13cv79, 2013 U.S. Dist. LEXIS 143678, *26-27 (E.D. Va. (Newport News Division) Oct. 2, 2013) ("ghost-writing is in no way permissible in the Eastern District of Virginia, or any federal court for that matter"); Sejas v. MortgageIT, Inc., No. 1:11cv469 (JCC), 2011 U.S. Dist. LEXIS 66252 (E.D. Va. (Alexandria Division) June 20, 2011 (warning against ghostwriting as unethical); Couch v. Jabe, No. 7:09-cv-00434, 2010 U.S. Dist. LEXIS 35320, n1 (W.D. Va. (Roanoke Division) April 8, 2010) (noting that while a ghostwritten pleading may not have violated a legal ethics rule, it was "contrary to the spirit of the Federal Rules of Civil Procedure and the privilege of liberal construction afforded to *pro se* litigants."); Laremont-Lopez v. Southeastern Tidewater Opportunity Center, 968 F.Supp. 1075 (E.D. Va. 1997) ("the practice of lawyers ghost-writing legal documents to be filed with the Court by litigants who state they are proceeding *pro se* is inconsistent with the intent of certain procedural, ethical, and substantive rules of the Court."); In re Tucker, 516 B.R. 340 n3 (W.D. Va. (Roanoke Division) Aug. 29, 2014) ("To the extent that the practicing bar may intend to rely on LEO 1874 in the future to 'ghost-write' in this Court, all counsel should be aware that that this Court takes a different view. This Court agrees with those

courts that find, at a minimum, the practice of ghost-writing transgresses counsel's duty of candor to the Court and such practice is expressly disavowed.”).

d) Related Issues.

- i) Delivering a pleading drafted by another and signed by a pro se litigant to the court for filing as a convenience to a former client does not constitute making an appearance as counsel of record. Walker v. American Ass’n of Prof. Eye Care, 268 Va. 117, 597 S.E.2d 47 (2004).
- ii) A pro se litigant cannot authorize someone who is not licensed in Virginia to sign his pleading. Aguilera v. Christian, 280 Va. 486, 699 S.E.2d 517 (2010).
- iii) A Virginia attorney cannot authorize an attorney licensed elsewhere to file a pleading in a Virginia court on his behalf. Shipe v. Hunter, 280 Va. 480, 699 S.E.2d 519 (2010).

7) How Not to Become a Respondent to the Virginia State Bar.

a) Summary.

- i) Responding to a Bar complaint, whether it has any merit or not, is a difficult and time-consuming process. While it is impossible to guarantee that you won’t have a disgruntled present or former client file a complaint against you, it is possible to manage your practice in such a way as to minimize that risk. A review of the Virginia State Bar Disciplinary System Actions reveals the most common sources of client complaints.

b) Lessons to be Learned from 2014 VSB Disciplinary System Actions.

- i) Communicate—Talk to your clients; return phone calls, respond to emails; institute a firm policy regarding response time; instruct support staff on how to respond to communications when you are out of the office.
- ii) Be Diligent—Monitor your case files to ensure that all necessary tasks are completed in a timely and competent manner; institute a firm policy regarding file review.
- iii) Decline representation where appropriate—ensure your conflicts check protocol is effective; recognize “problem” clients early; don’t take cases when you don’t have the expertise or resources they need.
- iv) Safeguard client property and be vigilant with your client trust fund.
- v) Be Respectful and Honest with Tribunals.
- vi) Avoid substance abuse/impairment.

- vii) Avoid Disciplinary Measures in other Jurisdictions.
- viii) Utilize VSB Resources—FAQs; Ethics Hotline; Lawyers Helping Lawyers

8) Getting Your License Back – J. Cynthia Kinser

In the words of former Chief Justice Harry L. Carrico, the practice of law is an “honored” profession. When being admitted to practice law in the courts of the Commonwealth, an attorney takes an oath to “faithfully, honestly, professionally, and courteously demean yourself in the practice of law.” Abiding by that oath goes hand in hand with practicing law in accord with the Virginia Rules of Professional Conduct. By doing both, an attorney should never be in the unfortunate situation of seeking to have his or her license to practice law reinstated. Nevertheless, if you find yourself in that position, here are some suggested steps that you should take before applying for reinstatement in order to enhance your chances of having your bar license reinstated. Some of these coincide with the requirements for reinstatement set forth in Pt. 6, § IV, Para. 13-25 of the Rules of the Supreme Court of Virginia.

- a) Pay all costs and reimbursements assessed as a result of the revocation of your license to practice law.
- b) If an “Impairment” as defined in Pt. 6, § IV, Para. 13-1 of the Rules of the Supreme Court of Virginia caused problems that led to the revocation, participate in and successfully complete appropriate treatment and rehabilitation.
- c) Maintain gainful employment.
- d) Participate in community and/or statewide service projects.
- e) Attend Continuing Legal Education seminars to stay abreast of developments in the law.
- f) Take responsibility for your actions, recognize the factors that resulted in the revocation, demonstrate remorse, and engage in activities that reflect a good reputation and standing in the community. Your activities, conduct, and attitude during the period after the revocation until you file the petition for reinstatement are especially important.
- g) Obey all laws, including those of the Internal Revenue Service.
- h) The Supreme Court of Virginia considers each petition for reinstatement carefully. The recommendation of the Virginia State Bar Disciplinary Board carries weight, but it is not dispositive. The Court has not always followed the Board’s recommendation. The Court must be convinced, “by clear and convincing evidence,” that the petitioner is “a person of honest demeanor and good moral character and possesses the requisite fitness to practice law.” Pt. 6, § IV, Para. 13-25(D) of the Rules of the Supreme Court of Virginia.