



**GENTRY LOCKE**  
Attorneys

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September 16, 2016

Welcome to Gentry Locke's 2016 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



# Table of Contents

WE HAVE BEEN APPROVED FOR 7.5 CLE CREDITS, OF WHICH 2.0 ARE FOR ETHICS (**BLUE MCLE SHEET PROVIDED**)

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- 1** Attorney bios in order of presentation
- 2** 8:30 a.m. The High Intensity Land Use and Development Process: Dealing with Everything from Special Use Permits to “NIMBY” neighbors – Max Wiegard and Jon Puvak – 30 minutes
- 3** 9:00 a.m. Everything Expert Witness – Tony Russell and Matt Broughton – 50 minutes
- 4** 9:50 a.m. What Every Attorney Should Know About Whistleblower and Qui Tam Cases – Greg Haley, John Thomas, and Andrew Bowman – 30 minutes
- 10:20 a.m. Break
- 5** 10:30 a.m. The Supreme Word: Review of Supreme Court Decisions and Related Issues – Justice Kinser and Monica Monday – 30 minutes
- 6** 11:00 a.m. Trying Cases in Federal Court vs. State Court (through the lens of the *Ferguson* case) – Greg Habeeb and Andrew Finnicum – 30 minutes
- 7** 11:30 a.m. Government Incentives and Creative Financing for Rehabilitation and Redevelopment Projects – Christen Church and Chris Kozlowski – 30 minutes
- 8** 12:00 p.m. Ethics for Lunch: The *Reedy* Case – Tom Bondurant and Justin Lugar – 60 minutes
- 9** 1:30 p.m. Litigating the Impossible Case: Eagle Mining – Scott Sexton and Scott Stephenson – 30 minutes
- 10** 2:00 p.m. The Medical Malpractice Case: from Accident to Courtroom – Trey Smith, Evans Edwards, Jennifer B. Chen, MD, and Medical Specialist Jessica Perry – 50 minutes
- 2:50 p.m. Break
- 11** 3:00 p.m. Succession Planning – Bill Gust and Clark Worthy – 30 minutes
- 12** 3:30 p.m. Trying the Employment Case to Verdict – Paul Klockenbrink and Cate Huff – 30 minutes
- 13** 4:00 p.m. Ethics: Confidentiality, Cyber Security and Technical Competence Rule – Mike Finney, Dan Sullivan and Les Bowers – 60 minutes
- 5:00 p.m. Cocktails and *hors d'oeuvres*



# Virginia MCLE Board

## CERTIFICATION OF ATTENDANCE (FORM 2)

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

### INSTRUCTIONS

**Certify Your Attendance Online at [www.vsb.org](http://www.vsb.org) see Member Login**

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\_\_\_\_\_  
City State Zip

Course ID Number: **JDD2705**

Sponsor: **Gentry Locke Rakes Moore LLP**

Course/Program Title: **It's All About You: The Things You Need to Run Your Law Business and Provide Excellent Service to Your Clients**

Live Interactive \*CLE Credits (Ethics Credits): **7.5 (2.0)**

Date Completed: September 16, 2016 Location: The Hotel Roanoke & Conference Center, Roanoke, VA

#### By my signature below I certify

- I attended a total of \_\_\_\_\_ (hrs/mins) of **approved CLE**, of which (\_\_\_\_\_) (hrs/mins) were in **approved Ethics**.  
Credit is awarded for actual time in attendance (0.5 hr. minimum) rounded to the nearest half hour. (Example: 1hr 15min = 1.5hr)  
 The sessions I am claiming had written instructional materials to cover the subject.  
 I participated in this program in a setting physically suitable to the course.  
 I was given the opportunity to participate in discussions with other attendees and/or the presenter.  
 I understand I may not receive credit for any course/segment which is not materially different in substance than a course/segment for which credit has been previously given during the same completion period or the completion period immediately prior.  
 I understand that a materially false statement shall be subject to appropriate disciplinary action.

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

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

If not certified online, this form may be mailed

Virginia MCLE Board

Virginia State Bar

1111 East Main Street, Suite 700

Richmond, VA 23219-0026

Web site: [www.vsb.org](http://www.vsb.org)





## *Maxwell H. Wiegard*

Partner

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Max Wiegard is a Partner in Gentry Locke's Environmental Law practice group. Max's practice is focused primarily on assisting clients in connection with environmental, real estate, land use and zoning, mergers, acquisitions, and business and commercial matters. Representing corporate and individual clients in environmental litigation and administrative proceedings, environmental compliance and permitting matters, contaminated site transactions, brownfield redevelopment and adaptive land reuse matters, real estate transactions and litigation, and zoning and land use administrative proceedings, Max is licensed to practice in Virginia, Maryland, and the District of Columbia.

### Experience

- Representation of corporate and individual clients in environmental litigation and administrative proceedings
- Representation of corporate and individual clients in environmental compliance and permitting matters
- Representation of corporate and individual clients in contaminated site transactions
- Advising corporate and individual clients in Brownfield Redevelopment and adaptive land reuse matters
- Defense of corporate and individual clients in environmental enforcement actions
- Representation of corporate and individual clients in criminal investigations related to environmental matters
- Representation of corporate and individual clients in commercial real estate transactions
- Representation of corporate and individual clients in real estate and land use litigation matters
- Representation of corporate utility client in regulatory and administrative proceedings
- Representation of corporate and individual clients in zoning and land use matters and proceedings
- Representation of telecommunications carriers in zoning, land use, real estate, and litigation matters
- Representation of corporate and individual clients in merger and acquisition transactions
- Representation of title insurance carriers and their insureds in real estate litigation matters
- Representation of landowners and lenders in property rights litigation matters
- Representation of corporate and individual clients in commercial litigation matters
- Representation of corporate clients in franchise agreement negotiations

### Affiliations

- Secretary, Board of Governors of the Environmental Section, Virginia State Bar (2013-Present)
- Secretary/Treasurer, Executive Council of the Real Estate Section, The Virginia Bar Association (2013-Present)
- Member, Executive Council of the Environmental Section, The Virginia Bar Association (2013-Present)
- The Virginia Bar Association Young Lawyers Division: Member, Executive Council; Chair, Mentorship Program
- Member, Virginia Association of Defense Attorneys
- Member, District of Columbia Bar
- Member, Maryland State Bar
- Member, Virginia State Bar
- Member, Roanoke Bar Association
- Member, American Bar Association
- Elder, Raleigh Court Presbyterian Church

### Awards

- Designated one of the Legal Elite by Virginia Business magazine for the area of Environmental Law (2015)

## Published Work

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



## *Jonathan D. Puvak*

Associate

- Office: 540.983.9399
- Fax: 540.983.9400
- Email: [puvak@gentrylocke.com](mailto:puvak@gentrylocke.com)

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

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

## Published Work

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



## Matthew W. Broughton

Partner

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Matt Broughton is a Senior Partner and serves on the Management Committee for the firm. Matt is head Worker's Compensation counsel for some of the largest and most successful companies in America including Wal-Mart and FELD Entertainment (Ringling Brothers, Monster Truck, Disney on Ice). 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, with High Honors, 1980

### Experience

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

- Multiple aviation related cases to include assisting parties in purchase and documentation information of entities to hold aircraft; Represented pilots in enforcement actions prosecuted by FAA

## Workers' Compensation

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

## Affiliations

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

## Awards

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

## Published Work

- Co-author, The Law of Damages in Virginia, Chapter 11, Punitive Damages (2nd ed. 2008).

## Case Studies

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

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



## Anthony M. Russell

Partner

- Office: 540.983.9319
- Fax: 540.983.9400
- Email: [russell@gentrylocke.com](mailto:russell@gentrylocke.com)

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

## Published Work

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

## Case Studies

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

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



## *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 (2007-2017), Commercial Litigation (2008-2017), Eminent Domain and Condemnation Law, Government Relations, and Land Use and Zoning Litigation (2011-2017), and in the Best Lawyers in America Business Edition (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, 2010-2016), 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).
- Co-author, A Sign of the Times: Billboard Valuations and Ownership Issues in Eminent Domain Proceedings; CLE International Annual Conference, Eminent Domain (April 2011).
- Co-author, Assessing Business License Taxes on Contractors; Virginia Association of Local Tax Auditors (August 2010).
- Co-author, Winning Your Locality's Zoning Litigation Before the Lawsuit Ever Gets Filed (or Afterwards); Local Government Attorneys Association Regional Seminar (June 2010).
- Co-author, Winning Zoning Litigation Before the Lawsuit is Filed: Measuring Success by Things that Do Not Happen; Journal of Local Government Law, Vol. XXIII, No. 3 (Winter 2013).
- Co-author, Caught Between a Rock and a Hard Place: Modifying Local Government Contracts Without Violating the VPPA – A Cautionary Tale; Journal of Local Government Law (Vol. XXI No. 1, Summer 2010).
- Co-author, Addressing and Correcting Zoning Administrator and Staff Mistakes; Virginia Association of Zoning Officials (September 2009).
- Special Topics in Site Plan Review; Virginia Association of Zoning Officials Annual Conference (September 2009).
- Local Government Land Use Concerns and the Right to Farm Act; Virginia Association of Zoning Officials Annual Conference (September 2009).
- Vested Rights and Nonconforming Uses. Virginia Association of Zoning Officials. Annual Conference. (September 2009).
- Co-author, Taking Your Practice to the Next Level: The Ethics of Building Your Practice and Establishing Your Reputation; Virginia State Bar Young Lawyers Conference Professional Development Conference (September 2009).
- Co-author, From Courtroom to Conference Room, Reflections of Mediation; 57 Virginia Lawyer 28 (February 2009).
- Co-author, Materials. The Bermuda Triangle of New Litigation Pitfalls: Sanctions, Waivers, and Pleadings; Virginia State Bar Annual Meeting. Litigation Section (June 2008).
- Co-author, Survey of Recent Cases; Local Government Attorneys Association (October 2006).
- Conducting the Deposition of an Expert Witness; Gentry Locke Rakes & Moore, LLP (January 2007).
- Ten Lessons Learned From a Year of Local Government Litigation, Survey of Significant Recent Cases; Local Government Attorneys Conference (October 2006).
- In Search of Whales Not Minnows: Casting the Noncompete Net After Omnplex; Gregory J. Haley and Scott C. Ford; 54 Virginia Lawyer 28 (February 2006).
- The Life Cycle of a Professional Malpractice Case; Gentry Locke Rakes & Moore (March 2005).
- It's the Sneaking Around that Gets You in Trouble: The Key to Unlocking Fiduciary Duty Litigation Claims; 53 Virginia Lawyer 39 (December 2004).
- Virginia State Bar Professionalism Course for Law Students; Washington & Lee University School of Law (2004 – 2006).
- Section 1983 Local Government Liability: An Overview and General Principles ; Virginia CLE/Virginia Law Foundation (2004).
- Practical Issues in Responding to Procurement Protests; Virginia CLE/Virginia Law Foundation (2004).
- Ten Ways to Stay Out of Trouble When Serving as an Expert in Litigation; Virginia Society of Certified Public Accountants (Oct. 2004).
- Ten or More Ways to Stay Out of Trouble; Virginia Certified Planning Association and Zoning Conference (Oct. 2004).
- Contractor Claims on Public Projects; Qui Tam Comes to Virginia: The Virginia Fraud Against Taxpayers Act; Practical Issues Regarding Procurement Protests; Gregory J. Haley and J. Barrett Lucy; Public Contracts and Competitive Bidding in Virginia (Aug. 2004).
- How to Obtain and Maintain Clients: The Lawyer's Role as a Business Person and Counselor at Law ; Virginia State Bar Professionalism Course (Fall 2004, 2003, 2002)
- Ten or More Ways to Stay out of Trouble; Virginia Association of Zoning Officials (January, 2002).
- Managing Risk to Promote Effective Emergency Response Efforts; Legal Issues Related to a Local Government Response to Natural Disasters and Emergency Situations; Virginia Emergency Management Conference, Virginia Emergency Management Association, Virginia Department of Emergency Management; (Williamsburg, March, 2002).
- Managing Ethical Issues & Practical Problems in Local Government Representation; Local Government Attorneys of Virginia, Abingdon (August, 2002).
- Taking the Heat: Practical Issues in Responding to Procurement Protests; Journal of Local Government Law (Fall, 2002).
- The World Can Change in the Blink of an Eye: Local Government Response to Natural Disasters; Local Government Attorneys of Virginia, Roanoke (September, 2001).
- Eye of Toad, Tail of Newt, Stirring the Soup of Creative Lawyering; Gentry Locke Rakes & Moore (March, 2000).
- Moneta Building Supply: Building an Addition to the Virginia Corporate Governance Rules; Litigation News, Virginia State Bar (Spring, 2000).

- Ten Ways to Stay Out of Trouble; The Legal Foundations of Planning; Virginia Certified Planning Commissioner's Program (June, 2000).
- Section 1983 Local Government Liability; (W. David Paxton & Gregory J. Haley); Virginia CLE, Virginia Law Foundation (May, 1999).
- A Lawyer's Guide to Nonverbal Communication; Gentry Locke Rakes & Moore (October, 1999).
- What a Tangled Web We Weave; Sovereign Immunity and Special Purpose Authorities; (Gregory J. Haley and Lori D. Thompson); Journal of Local Government Law (1998).
- Contract Drafting: An Eye to Litigation to Avoid Litigation; Gentry Locke Rakes & Moore (May, 1998).
- Annual Survey of State and Federal Litigation: Recent Developments: Constitutional Law and Freedom of Association; Local Government Attorneys of Virginia (October, 1998).
- Trips, Traps & Tumbles: Eight Points to Consider in Settling Cases; Virginia Lawyer (October, 1997).
- The Troubled Business Transaction: A Tragic Comedy in Three Acts; Gentry Locke Rakes & Moore (May, 1997).
- Lender Liability Issues Resolved; Gentry Locke Rakes & Moore (May, 1996).
- The Duty, The Client, The Privilege; The Local Government Attorney and the Virginia Attorney-Client Privilege; Local Government Attorneys of Virginia (April, 1995).
- Confidentiality of Law Enforcement Records; Virginia Association of Chiefs of Police; Executive Development Program; Radford University (June, 1995).
- Update on Local Land Use and Development; Local Government Law Section, Virginia State Bar (June, 1995).
- From There to Here to Where: Developments in Virginia Land Use Law; Journal of Local Government Law (November, 1995).
- Protected First Amendment Rights of Government Employees; (W. David Paxton & Gregory J. Haley); Local Government Attorneys of Virginia, Blacksburg, Virginia (April, 1994).
- Procedural Due Process and Government Employment; (W. David Paxton & Gregory J. Haley); Local Government Attorneys of Virginia, Blacksburg, Virginia (April, 1994).
- Qualified Immunity: Issues in Federal Civil Rights Litigation Involving Government Employees; (W. David Paxton & Gregory J. Haley); Local Government Attorneys of Virginia, Blacksburg, Virginia (April, 1994).
- The Judging of Judges: The Defense of Proceedings Initiated By the Judicial Inquiry and Review Commission; (William R. Rakes & Gregory J. Haley); Judicial Conference of Virginia (May, 1994).
- Annual Survey of State and Federal Litigation; Constitutional Law and Freedom of Association; Local Government Attorneys of Virginia (September, 1994).



## *John Reed Thomas, Jr.*

Partner

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John Thomas is a national leader in False Claims Act (FCA) litigation, where whistleblowers uncover and report fraud against the government. John litigates cases throughout the country involving procurement fraud, health care fraud, medical device fraud, and grant fraud. John is the founder and Chair of the Federal Bar Association Qui Tam Section and a frequent writer and speaker on FCA topics. In addition to his work in the *qui tam* arena, John is a national voice in science policy. He is a contributor to the blog *Retraction Watch* and has published in *The Scientist*. He advises researchers and academics in research administration issues.

Prior to joining Gentry Locke, John served as a judge advocate in the U.S. Marine Corps. He prosecuted and defended Marines and Sailors in courts-martial and deployed to Helmand Province, Afghanistan to advise commanders on the law of war. John is a Major in the U.S. Marine Corps Reserve.

### Education

- University of Georgia School of Law, J.D. 2007
- The University of the South, B.A. cum laude, 2004

### Military Education

- Expeditionary Warfare School (2015-Present)
- Intelligence Law Course, TJAGSLC (2010)
- Basic Operational Law Course, TJAGSLC (2010)
- Naval Justice School (2009)
- The Basic School (2008)
- Officer Candidates School (2005)

### Experience

#### 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

#### Commercial & Corporate Litigation

- Represented contract mining company at arbitration over contract dispute, winning \$23.5 million award
- 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 leading telecommunications company in lawsuit from consumer, resulting in verdict for the 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

### **Litigation for Individuals**

- Represented a man injured by a defective CNC machine and tool bit, resulting in \$16.5 million settlement
- 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 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

### **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

### **Affiliations**

- Major, U.S. Marine Corps Reserve
- Member, Federal Bar Association; Founder and Chair, FBA Qui Tam Section (2015-Present)
- Member, The Virginia 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 Studies**

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

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



## Andrew M. Bowman

Associate

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

### Education

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

### Experience

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

### Affiliations

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

### Case Studies

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

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





## Monica Taylor Monday

Managing Partner

- Office: 540.983.9405
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Monica Monday is Gentry Locke's Managing Partner and heads the firm's Appellate practice. Monica represents her clients in Virginia's state and federal appellate courts across a wide variety of cases, including commercial and business disputes, healthcare, personal injury, local government matters, domestic relations and more. In 2015, Monica was inducted as a Fellow of the American Academy of Appellate Lawyers — only the fifth Virginia attorney to be so honored. She has been recognized among *Virginia's Top 50 Women Lawyers* and *Virginia's Top 100 Lawyers* by the Thomson Reuters' *Super Lawyers*, and on the *Best Lawyers in America* and *Virginia Business* magazine's *Legal Elite* lists, and was a "Leaders in the Law" honoree by *Virginia Lawyers Weekly*.

Monica frequently lectures and writes on appellate issues. She currently serves 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. Comerci*, 264 Va. 68, 563 S.E.2d 748 (2002)
- Successful defense of jury verdict in a construction case interpreting statutory warranty for new dwellings. *Vaughn, Inc. v. Beck*, 262 Va. 673, 554 S.E.2d 88 (2001)
- Successfully defended federal court's dismissal of First Amendment constitutional challenge in voting rights case. *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192 (4th Cir. 1997), cert. denied, 522 U.S. 1077 (1998)

## Administration & Litigation

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

## Affiliations

- Member, Judicial Council of Virginia (2013-Present)
- 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); Member, Steering Committee (2016-Present)
- Board of Trustees, Virginia Museum of Natural History (2009-Present)
- Board of Directors, The Harvest Foundation (2015-Present)
- Member, Blue Ridge Regional Library Board (2007-2011)
- Co-Chair, American Heart Association 2016-2017 Roanoke "Go Red for Women" Luncheon
- 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, Virginia Workers' Compensation American Inn of Court (2015-Present)
- 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 Academy of Appellate Lawyers (AAAL, inducted 2015)
- Fellow, American Bar Association (inducted 2013)
- Fellow, Roanoke Law Foundation (inducted 2013)
- Fellow, Virginia Law Foundation (inducted 2011)
- Virginia State Bar Harry L. Carrico Professionalism Course Faculty (2013-2016)
- Listed in Benchmark Appellate as a Local Litigation Star (2013)
- Named to 2013 Class of "Influential Women of Virginia" by Virginia Lawyers Media
- Named one of The Best Lawyers in America in the field of Appellate Law (2009-2017)
- Named to Super Lawyers Business Edition US in the area of Appellate Law (2012-2014); Elected to Virginia Super Lawyers for Appellate Law in Super Lawyers magazine (2010-2016, 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, 2015)

- 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 Studies

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

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





## Cynthia D. Kinser

Senior Counsel

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

### Education

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

### Experience

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

### Affiliations

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

## Awards

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

## Case Studies

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

- Jun 22, 2016 — [Tragic Failure to Properly Diagnose and Treat Results in Jury Verdict for \\$2.75 Million](#)



## *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, 2012-2016), General Litigation and Personal Injury Plaintiff (2008), Commercial Litigation (2011)
- Roanoke Bar Association President's Volunteer Service Award, Bronze level, for 100-249 hours of community service in a calendar year
- "Largest Verdicts in Virginia" designation (2006) as recognized by Virginia Lawyers Weekly

## Case Studies

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

- Aug 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 \(\\$16.5M Payout\)](#)



## Andrew D. Finnicum

Associate

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

### Education

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

### Experience

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

### Affiliations

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

### Awards

- Second Place, 2008 John W. Davis Appellate Advocacy Moot Court Competition for both Best Brief Award and Best Oralist Award
- Co-Administrator for the 2009 John W. Davis Appellate Advocacy Moot Court Competition





## 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
- Roanoke Bar Association: Chair, Young Lawyers Committee (2016-Present); Member (2009-Present)
- 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) and Business/Corporate (2016)
- 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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Chris Kozlowski is an Associate in our General Commercial practice group. Chris focuses on advising clients in mergers and acquisitions, financings, bank regulatory matters, reporting requirements with the Securities and Exchange Commission and securities offerings. Chris also advises developers and investors in tax credit financings, including state and federal historic rehabilitation tax credits and new markets tax credits. Prior to joining Gentry Locke, Chris practiced in Stamford, Connecticut. Chris is licensed to practice in Virginia and Connecticut.

### **Education**

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

### **Experience**

#### **Banking**

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

#### **Tax Credit Financing**

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

#### **Business**

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

#### **Affiliations**

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





## 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
- Listed in "Best Lawyers in America Business Edition" for Corporate Compliance Law and Criminal Defense: White-Collar (2017)
- Named "2012 Roanoke Criminal Defense White-Collar Lawyer of the Year" by Best Lawyers in America, listed for Corporate Compliance Law and Criminal Defense/White-Collar (2011-2016)
- Designated a Virginia Super Lawyer in the area of Criminal Defense: White Collar (2013-2016) and Super Lawyers Business Edition US in the area of Criminal Defense: White Collar (2013-2014)
- Listed as a Top Rated Attorney for Criminal Defense/White Collar by American Lawyer Media and Martindale-Hubbell (2012 & 2013)
- Designated one of the Legal Elite by Virginia Business magazine for Criminal Law (2010, 2012-2013, 2015)
- 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)



## *Justin M. Lugar*

Partner

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

### Education

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

### Experience

#### Criminal:

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

#### Civil:

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

## Affiliations

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

## Published Work

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



## 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. Scott also focuses on Products Liability and Catastrophic Injury cases.*

### Energy Cases: Mineral, Energy, and Land Rights

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

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

## Commercial Litigation

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

## Catastrophic Injury

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

## Affiliations

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

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

## Awards

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





## *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, Virginia and is pleased to return to the area to practice.

### Education

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

### Experience

- In a case involving limestone and surface rights, successfully appealed a critical ruling by the United States District Court for the Western District of Virginia holding a deed reservation void to the Court of Appeals for the Fourth Circuit, resulting in the reversal of the district court's decision on the issue
- Assisted Scott Sexton in successfully obtaining judicial confirmation of a 23 million-dollar arbitration award in a complex coal mining case against a subsidiary of Peabody Energy Corporation. Assisted in the related federal court litigation and a second arbitration that followed the arbitration award
- In a gas rights matter in Southwest Virginia, assisted Scott Sexton and Kathleen Wright in representing the rights of individual property owners to the gas on their tracts. Currently pending motions for summary judgment in the United States District Court for the Western District of Virginia
- Assisted Greg Haley in successfully defending a Roanoke-based company in action for breach contract in Virginia Circuit Court. Obtained summary judgment and the dismissal of a breach of contract claim based on the adequacy of notice provided pursuant to the contract, and later obtained final judgment for the company
- In a coal bed methane class action, assisted with Scott Sexton and Kathleen Wright in representing a company's rights to coal bed methane in Southwest Virginia. Pending motion for summary judgment in the United States District Court for the Western District of Virginia
- 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

### Affiliations

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





## Charles H. Smith, III

Partner

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Trey Smith is a Partner at Gentry Locke who focuses his practice on the representation of plaintiffs in personal injury and wrongful death cases. Over his 24 years with Gentry Locke, Trey has taken to trial cases involving medical malpractice, products liability, premises liability, private and commercial motor vehicle accidents, defamation, malicious prosecution, and toxic exposure, among others.

### Education

- College of William and Mary, Marshall-Wythe School of Law, J.D. 1991
- University of Virginia, B.A. 1987

### Experience

- Attained 1.1 million dollar verdict in Tazewell County, Virginia for 59 year old female plaintiff in case involving the failure to diagnose colon cancer
- Successfully represented parents of 27 year old, mentally handicapped young man who died of complications of pneumonia less than 3 weeks after his family admitted him to a State rehabilitation facility
- Successfully represented 87 year old female at trial who, when undergoing surgery to repair her fractured hip, awoke to find that the doctor pinned and plated the wrong hip
- Represented optometrist in federal court asserting RICO claims against former employees and office manager who misappropriated her patient list and solicited her patients to the practice of a competing optometrist
- Represented restaurant owner in federal court contract action against national insurance company which denied fire loss coverage subsequent to accidental fire which destroyed steakhouse in Winston Salem, N.C.
- Represented parents of 53 year old, incompetent man who sustained numerous falls at defendant rehabilitation facility resulting in severely comminuted knee fracture and loss of mobility
- Received favorable verdict on behalf of truck driver for large-chain grocery store who was injured in a 3-car accident
- Represent family of 41 year old coal miner killed while operating a remotely controlled, continuous miner manufactured by Joy Mining, Inc.
- Drafted Brief Amicus Curiae for VTLA in matter of Bostic v. Kuney which was successfully appealed to Virginia Supreme Court

### Affiliations

- Virginia Trial Lawyers Association
- American Association for Justice

### Awards

- Designated as one of the Legal Elite by Virginia Business magazine (2006)

### Case Studies

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

- Jun 22, 2016 — [Tragic Failure to Properly Diagnose and Treat Results in Jury Verdict for \\$2.75 Million](#)





## Evans G. Edwards

Associate

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Evans Edwards is an attorney in Gentry Locke's Workers' Compensation group. Evans previously served as an associate attorney with several law firms. He also served as an attorney advisor with the FBI's National Security Law Branch. Since joining Gentry Locke, Evans has handled dozens of workers' compensation claims for both employers and injured workers. Evans has become increasingly involved in Gentry Locke's Plaintiffs Practice Group, assisting on medical malpractice, product liability, and other personal injury matters.

A native of Roanoke, Evans earned his law degree from Yale Law School and graduated *summa cum laude* with honors from Washington & Lee University with a B.A. degree in Economics. While at Washington & Lee, he was 1st Team Academic All-America in Football.

### Education

- Yale Law School, J.D. 1996
- Washington & Lee University, B.A. in Economics, *summa cum laude* with honors and class salutatorian, 1993

### Experience

- Handled numerous claims on behalf of injured workers who have suffered catastrophic traumatic brain injuries
- Representation in matters where firefighters and EMS personnel have been injured in the line of duty, and claims on behalf of the dependents of workers who perished in fatal workplace accidents
- Successfully defended employers through hearing and review by the Workers' Compensation Commission against claims involving wide range of orthopedic injuries
- Obtained favorable judgments or settlements for individuals in a variety of personal injury actions arising from motor vehicle accidents
- Member of defense team that successfully suppressed edited audiotapes in labor racketeering case which ended in an acquittal of client on all counts. U.S. v. Wardlaw, 977 F. Supp. 1481 (N.D. Ga. 1997)
- Prior to joining the FBI, was senior associate in defense of corporate controller in prosecution brought by federal Corporate Fraud Task Force that resulted in acquittal of controller on all counts at trial
- Participated in numerous internal investigations and corporate compliance reviews.  
Past litigation experience includes federal criminal defense, products liability, employment, and antitrust matters

### Affiliations

- Member, Virginia State Bar
- Former Member, State Bar of Georgia (1996-2010)





## W. William Gust

Partner

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Bill Gust is a Senior Tax Partner with Gentry Locke. For more than 30 years, Bill has worked with closely held business owners relative to tax, employee benefits, 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

## Awards

- Designated one of the Legal Elite by Virginia Business magazine for the area of Taxes/Estates/Trusts/Elder Law (2015)
- Named “2017 Roanoke Lawyer of the Year for Employee Benefits (ERISA) Law” Best Lawyers in America



## Clark H. Worthy

Partner

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

### Education

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

### Experience

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

### Affiliations

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

### Awards

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





## 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](http://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 (2009-2017) Labor & Employment Litigation (2011-2017)
- Named to Virginia Super Lawyers in the area of Employment & Labor (2007-2016), 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 Studies

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

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



## Catherine J. Huff

Associate

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Cate Huff practices in the Employment, Insurance, and Workers' Compensation 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](http://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 companies before the EEOC, Department of Labor, and other agencies
- Extensive litigation experience involving Title VII, defamation, wage and hour issues and other employment-related issues
- Provide advice to management and companies involving day-to-day labor and employment issues regarding hiring, firing, leave and disability issues, wage and hour issues, unemployment, EEOC complaints and other matters
- 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 regarding 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 (2015-2016)

### Published Work

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

### Case Studies

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

- 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 \(\\$16.5M Payout\)](#)



## *Michael J. Finney*

Partner

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- Fax: 540.983.9400
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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 (2013-2016)
- Designated one of the Legal Elite by Virginia Business magazine for the area of Young Law (Under 40) (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 Studies

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

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



## *Les S. Bowers*

Partner

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- Fax: 540.983.9400
- Email: [bowers@gentrylocke.com](mailto:bowers@gentrylocke.com)

Les Bowers is a Partner and trial lawyer who focuses his practice representing individuals injured in products liability and medical malpractice cases. Utilizing his past experience working at some of the world's largest law firms, Les understands the defenses and strategies available to defendants and their large corporate insurance companies and uses that knowledge to appropriately evaluate cases, conduct extensive investigation, and pursue only the most meritorious cases. Les is careful to limit his cases to ensure that each client receives the utmost in personal attention and guidance. Les's intense drive and attention to detail have resulted in numerous accolades, including the largest medical malpractice verdict in Virginia in 2014, numerous peer review awards, and the opportunity to give back to the profession by writing in peer reviewed journals and speaking at educational seminars. Les is admitted to practice law in Virginia and North Carolina.

### Education

- University of Virginia School of Law, J.D. 2008
- University of Virginia, McIntire School of Commerce, B.S. 2005

### Experience

#### Civil Litigation

Les focuses his practice on representing plaintiffs at trial in products liability, personal injury, and medical malpractice actions in Virginia, North Carolina, and elsewhere. Highlights include:

- Representation of numerous clients suffering from severe brain and spinal cord injuries
- Representation of numerous families suffering from the untimely loss of loved ones due to others' negligence
- Representation of individuals in medical malpractice actions involving a wide array of issues, including birth injuries, surgical and procedural errors, failures to diagnose and treat life-threatening conditions, and improper administration of medications
- Representation of individuals in complex products liability actions in both state and federal court
- Litigation of various complex tort actions, including:
  - Negligent hiring and negligent retention claims stemming from workplace sexual assault
  - Catastrophic industrial workplace explosions
  - Mold exposure
  - Mass tort action stemming from improperly washed surgical instruments
- Litigation of various consumer protection claims involving major financial institutions, including:
  - Fraud and constructive fraud actions
  - Real Estate Settlement Procedures Act (RESPA), Equal Credit Opportunity Act (ECOA), Fair Credit Reporting Act (FCRA)
  - Unfair and Deceptive Trade Practices
  - Contested foreclosure and post-foreclosure deficiency actions

#### Criminal Litigation

Though his civil practice takes up the majority of his time, Les is occasionally called upon to obtain justice for individuals improperly charged with criminal offenses or who were wronged by the criminal justice system and prison systems. His experience in this regard includes:

- Representation of client at trial in a 28 U.S.C. § 2255 habeas corpus proceeding in the Eastern District of Virginia arising out of the ineffective assistance of counsel in investigation of public authority defense
- Advised federal firearms dealers, manufacturers, and their individual clients regarding compliance with various federal and state laws and regulations, including the National Firearms Act (NFA), Gun Control Act (GCA), Export Administration Regulations (EAR), and International Traffic in Arms Regulations (ITAR)
- Advised various clients regarding internal investigations and participation in grand jury investigations
- Represented clients in various criminal proceedings in both the General District and Circuit Courts of Virginia
- Representation of various individuals in 18 U.S.C. § 1983 cases involving civil rights violations by police and prison officials

## Affiliations

- Virginia Trial Lawyers Association (VTLA)
- VTLA Amicus Committee
- VTLA Publications Committee
- VTLA Fundraising Committee
- VTLA Tort Law Legislative Committee
- American Association for Justice
- North Carolina Advocates for Justice
- Roanoke Bar Association
- Virginia Bar Association
- North Carolina Bar Association

## Awards

- Named a Virginia Super Lawyers Rising Star in Personal Injury: Plaintiff (2015-2016)

## Case Studies

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

- Aug 24, 2015 — [Preventable Amputation Results in Settlement of \\$1M to Vietnam Veteran in Federal Tort Claims Act Case](#)
- Jul 20, 2015 — [Orthopedic Doctor Re-breaks Unhealed Broken Arm, Jury Awards Victim \\$700k](#)
- Mar 7, 2014 — [\\$6.4 Million Verdict for Faulty Injection Causing Permanent Paralysis](#)



## *Daniel R. Sullivan*

Associate

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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

- Successfully defended an international motor parts supplier on a \$500,000 business defamation lawsuit filed by a contractor in federal court. Upon receiving the motion to dismiss under Federal Rule 12(b)(6), the plaintiff voluntarily withdrew the lawsuit
- 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 Studies

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

- Feb 19, 2016 — [Jury Affirms Insurance Company Decision on Roof Repair Claim](#)
- 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](#)

# The High Intensity Land Use & Development Process

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Dealing with Everything from Special Use Permits  
to “NIMBY” Neighbors

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September 16, 2016

SECTION

2



“Growth is inevitable and desirable, but destruction of community character is not. The question is not whether your part of the world is going to change. The question is how.”<sup>1</sup>

“Zoning ordinances are devices of recent invention and are intended to conserve those elements which make life in cities livable. Necessarily private rights and public interests sometimes clash. Such conflict is as old as law itself. *Sic utere tuo*, etc., is an ancient maxim, whose applicability is constantly being extended at the expense of private interests.”<sup>2</sup>

Zoning and land use are important components of real estate law. The typical fact pattern is as follows: your client calls (or emails) and explains that they have an idea to build project “X” in locality “Y” and perhaps they have already negotiated a deal for the property. You are ready to help get the deal closed and project built. Depending on the characteristics and intensity of the proposed project, it is possible that some form of zoning and land use approval will be required, ranging from a variance, special use permit, or maybe a rezoning. For litigation attorneys that regularly practice in state and federal courts, the procedures are normally similar. However, in the world of land use and zoning, two neighboring localities may have very different approaches to review and approval of land use and zoning permit applications. For projects that are likely to raise some opposition, a good development team and land use and zoning attorney can ensure that you navigate the process efficiently and effectively.

This outline summarizes the laws governing zoning and land use and the best practices for working through the land use development process and related zoning and land use approval processes. The zoning and land use attorneys at Gentry Locke have extensive experience assisting developers and property owners in this area of the law. Through this experience, we have identified and refined the processes and strategies that position projects for the greatest chance of success.

## I. Introduction

### A. What is zoning?

1. Zoning is the exercise of a locality's police power to govern the use and development of privately owned property.
2. Two opposing views: (i) an unwanted public infringement of the right to own and enjoy private property or (ii) an essential protection of the community against the reckless exercise of liberties by the individual (concept of personal liberty v. good of the community).
3. Land use regulations also include subdivision ordinances, erosion and sediment control, comprehensive plan, and the Uniform Statewide Building Code.
4. Subdivision ordinances provide for the orderly division of land.
5. Adequate roads, sidewalks, water, sewer, and other public infrastructure.

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<sup>1</sup> Edward T. McMahon

<sup>2</sup> *West Brothers Brick Co. v. Alexandria*, 169 Va. 271 (1937).

6. Mitigation of adverse effects of potentially incompatible uses of property on nearby areas.

## II. Legal Framework and General Principles

A. Constitutions of the United States and Commonwealth of Virginia.

1. The Authority given to localities to pass zoning ordinances is constitutional as an exercise of the police power of the state. *Nusbaum v. Norfolk*, 151 Va. 801 (1928).

B. Statutes and Codes.

1. Land use decisions are increasingly impacted by federal statutes.

2. In Virginia, land use and zoning decisions are made within the context of a highly articulated legal framework. Zoning is a legislative power vested in the Commonwealth and delegated by it, in turn, to various local governments for the enactment of local zoning ordinances. *Hurt v. Caldwell*, 222 Va. 91 (1981).

3. Virginia adheres to the Dillon Rule which limits the powers of local governments, and, consequently, in developing land use and zoning ordinances, localities must take care not to exceed the powers granted to them by the General Assembly. *Augusta Co. v. Countryside*, 258 Va. 497 (1999).

C. Local Zoning Ordinances, as discussed more fully below.

D. Case law.

1. Federal Courts.

2. Supreme Court of Virginia.

3. Virginia Circuit Courts.

## III. How Does Zoning Work/Zoning Ordinances Generally

A. Creation of zones/districts - Districts are established, typically segregated by the type of uses allowed in each. It is common for sub-districts to be created in each district, with varying levels of restrictiveness. For example, a residential district might include a single-family residential area and a multi-family residential area. There may also be mixed-use districts, which are hybrid districts in which some elements of a variety of districts may be permitted (e.g., residential and commercial together). The districts (and subdistricts) are represented on a map showing their respective boundaries.

B. Use restrictions - The Zoning Ordinance will set forth for each district (and sub-district, as applicable) the uses allowed in that district (§ 15.2-2280). There are typically two kinds of uses set forth:

1. Permitted uses - These are uses allowed “of right” or “by right” in a particular district. Zoning Ordinances generally provide this information as a list or in table format. Zoning regulations shall be uniform for each class or kind of buildings and uses throughout each district. The regulations in one district, however, may differ from those in other districts.

2. Conditional uses, Special Exceptions, Special Uses - These are uses allowed in a district only after compliance with certain conditions, usually involving at least an application process and review and approval by a planning commission, board of supervisors, town council, city council or other governing body. As discussed later, this is the realm of most high intensity or less desirable uses.

C. Physical restrictions/requirements - Like the use restrictions, each zoning district will have its own design restrictions and requirements governing where and how structures are to be built (e.g., height limitation, area requirements and setback requirements), parking requirements, signage limitations and other similar regulations. The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses; or

#### IV. **Statutory Purposes of Zoning** (§ 15.2-2283)

A. Provide for adequate light, air, convenience, access and safety;

B. Reduce congestion in the public streets;

C. Facilitate the creation of a convenient, attractive and harmonious community;

D. Facilitate the provision of adequate police and fire protection, transportation, water, sewage, flood protection, schools, parks, playgrounds, recreational facilities, airports and other public requirements;

E. Protect against destruction or encroachment of historic areas;

F. Protect against overcrowding;

G. Encourage economic development;

H. Promote the creation and preservation of affordable housing;

I. Provide reasonable protection against encroachment upon military bases, military installations, and military airports.

#### V. **Comprehensive Plans**

A. Every locality space in the Commonwealth must have a comprehensive plan. (§ 15.2-2223).

1. Prepared and recommended by the planning commission and adopted by the governing body.

2. Must be reviewed by the local planning commission at least once every five years. (§ 15.2-2230).

3. Without a comprehensive plan, a locality's zoning ordinance is void. *Town of Jonesville v. Powell Valley Village, LP*, 254 Va. 70 (1997).

B. Purpose and mandatory requirements of comprehensive plan:

1. To guide coordinated, and harmonious development in accordance with present and probable future needs and resources and to promote the health, safety, morals, order, convenience, prosperity and general welfare of citizens. (§ 15.2-2223).

2. Shall designate the general or approximate location, character and extent of each feature shown on the plan and shall indicate where existing lands or facilities are proposed to be extended, relocated, vacated, changed in use, etc. (§ 15.2-2223).

C. The plan and accompanying maps may include (§ 15.2-2223):

1. The designation of public and private land uses, such as residential, business, industrial, etc.

2. The designation of a system of transportation facilities such as streets, highways, railways, bridges, airports, etc.

3. The designation of a system of community facilities such as parks, schools, playgrounds, public buildings, community centers, waterworks, sewage disposal or waste disposal areas.

4. The designation of historic and urban renewal areas.

5. The designation of areas for ground water protection.

D. The comprehensive plan is implemented through (§ 15.2-2224.B):

1. Official map;
2. Capital improvements program;
3. Subdivision ordinance;
4. The zoning ordinance; and
5. The zoning district maps.

E. Legal status of plan

1. The plan controls the general or approximate location, character and extent of each feature shown on the plan. (§ 15.2-2232.A.)

a) After the plan is adopted, no street or connection to an existing street, park or other public area, public building or public structure, public utility facility or public service corporation facility other than a railroad facility, whether publicly or privately owned, shall be constructed or established until the general location or proximate location has been submitted to and approved by the planning commission as being substantially in accord with the plan. (§ 15.2-2232.A.)

b) In connection with making this determination, the commission may hold a public hearing. (§ 15.2-2232.A.)

c) Decisions of the planning commission are appealable to the governing body. (§ 15.2-2232.B.)

d) Telecommunications companies must submit their proposed tower sites for comprehensive plan approval even when the proposed tower site is leased from VDOT. *Board of Supervisors v. Washington*, 258 Va. 558 (1999).

2. Paving, repair or reconstruction of streets, drainage or similar work, and normal service extensions of public utilities do not require comprehensive plan approval. (§ 15.2-2232.C.)

3. The Comprehensive Plan is both a sword and a shield for local government land use decisions.

a) If the land use decision is consistent with the Comprehensive Plan, then the decision is harder to challenge. *Loudoun Co. v. Lerner*, 221 Va. 30 (1980).

b) If the land use decision is inconsistent with the Comprehensive Plan, then the Comprehensive Plan is only a guide or suggestion.

## VI. **Types of Land Use Review**

A. Depending on the nature of the application the approving or governing body, could be the planning commission, board of zoning appeals, town council, city council, or board of supervisors. In making land use decisions, planning commissioners, members of local governing bodies and staff planners balance public vs. private interests.

B. Types of Review:

1. Administrative Decisions – some discretionary decision making is permitted. No notices or hearing are required. This is typically done by the staff.

a) e.g. subdivision ordinances allowing discretionary review of “adequate drainage.” *Board of Supervisors v. Greengael*, 271 Va. 266, 284 (2006).

b) Standards for granting exceptions to certain requirements of the subdivision ordinance. *Logan v. City Council of City of Roanoke*, 275 Va. 483 (2008).

2. Quasi-judicial Decisions – limited discretion typically to determine compliance with specified criteria. There could be hearings and notice to the public. These type of decisions are typically performed by the planning commission or board of zoning appeals.

3. Legislative Decisions – policy making with all public hearings, appeal rights, and notice to the public. The planning commission will make a recommendation to the governing body for decision. Typically these are rezonings and certain special uses.

C. Public Hearing Procedures:

1. Staff Report and Presentation – report will be available to the public a certain period of the time prior to the hearing
2. Applicant’s Presentation
3. Public Hearing including testimony by interested parties – proponents and opponents
4. Applicant Rebuttal
5. Questions and discussion from the governing body
6. Applicant may have the right to and opponents may have a right to request a continuance, and if granted, the governing body will refrain from making a decision at that meeting. The grant of the continuance is normally within the discretion of the governing body.

## VII. Types of Applications

### A. Special Exceptions/Special Uses

1. A zoning ordinance may provide for the granting of special exceptions under suitable regulations and safeguards. (§ 15.2-2286.A.3).
2. The terms special use permit, conditional use permit, and special exception are interchangeable.
3. Exists to address certain uses that require additional regulation above and beyond that applicable to a particular zoning district. Examples: fast-food restaurants, salvage and recycling facilities, halfway houses, and telecommunications facilities.
4. The grant or denial of special exceptions may be the responsibility of the governing body or delegated to the Board of Zoning Appeals. (See §§ 15.2-2286.A.3. and 15.2-2309(6)).
5. Conditions may be imposed.
  - a) Need not be voluntary or proffered.
  - b) Any conditions must be reasonable and related to the requested use or development. For example, on or off site road improvements may not be required unless the need for the improvements is substantially generated by the development at issue. *Cupp v. Board of Supervisors*, 227 Va. 580 (1984).
6. Standard of review as to grant or denial of special exceptions.
  - a) Grant or denial is a legislative act just as the decision on a rezoning.

b) The Supreme Court treats the grant or denial of special exceptions the same as a rezoning decision. *County Board v. Bratic*, 237 Va. 221 (1989).

**B. Conditional Zoning/Rezoning/Zoning Map Amendment**

1. Authorized by §§ 15.2-2296 through 15.2-2303.1.

2. Provides a more flexible and adaptable zoning method whereby a rezoning may be allowed subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to the similarly zoned.

3. Zoning amendment may or may not also require a comprehensive plan amendment. If a plan amendment is required the review process could be quasi-judicial or legislative.

4. Standard conditional zoning (§15.2-2297):

- a) The rezoning itself must give rise to the conditions;
- b) The conditions shall have a reasonable relation to the rezoning;
- c) The conditions must relate to the physical development or physical operation of the property; and
- d) All conditions shall comply with the comprehensive plan.

5. Prohibited:

- a) Cash contributions (subject to certain exceptions);
- b) Mandatory dedication of property for public facilities;
- c) Payment for construction of offsite improvements.

6. Typical Criteria for a Conditional Zoning/Rezoning/Zoning Map Amendment – the proposal shall be consistent with the goals and policies of the comprehensive plan, that public facilities and services (water, sewer, storm drainage, transportation, schools, police and fire protection) are presently capable of supporting the uses allowed by the zone, or can be made available; service shall be sufficient to support the range of uses and development allowed by the zone, the land uses authorized by the proposal are consistent with the existing or planned surrounding uses.

7. 2016 Amendment to §15.2-2303.4 – (SB 549 – Proffer Reform Bill). Makes it illegal for a locality to request or accept an “unreasonable proffer” as defined by the Code for certain residential developments. Goal of the legislation was to reform and stop abuse of the proffer system as a means to raise general revenues. Proffers are to address impact that is “specifically attributable” to proposed use.

C. VariANCES

1. Variances from the terms of the zoning ordinance may be allowed when due to special conditions a literal enforcement of the ordinance would result in unnecessary hardship. (§ 15.2-2309(2)). Typically approved by a board of zoning appeals which are appointed by the jurisdiction's circuit court judges.

2. The property owner must show that he acquired the property in good faith and that strict application of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property on one of the following grounds:

- a) Exceptional narrowness, shallowness, size or shape; or
- b) Exceptional topographic conditions; or
- c) Extraordinary situation or condition of the property; or
- d) The condition, situation or development of property immediately adjacent to the applicant's property; or
- e) The board is satisfied that the granting of the variance will alleviate a clearly demonstrable hardship approaching confiscation.

3. No variance shall be granted unless the board of zoning appeals finds:

- a) Strict application of the ordinance would produce undue hardship;
- b) The hardship is not generally shared by other properties in the same zoning district and the same vicinity; and
- c) Authorization of the variance will not be of substantial detriment to adjacent property and the character of the district will not be changed by the granting of the variance.

4. Variances may not be granted on the following grounds:

- a) Desire to enhance profits or adverse economic impact on the owner. *Prince William County BZA v. Bond*, 225 Va. 177 (1983);
- b) Preference or convenience of the land owner. *Packer v. Hornsby*, 221 Va. 117 (1980);
- c) Self-inflicted hardship; for example, where the owner violates the zoning ordinance and then seeks relief from the consequences. *Steele v. Fluvanna County BZA*, 246 Va. 502 (1993).

5. Conditions may be imposed on a variance as to the location, character and other features of the proposed structure or use, and a guarantee or bond may be required. (§ 15.2-2309(2)).

6. Standard of review as to variance decisions:

- a) The board of zoning appeals is a quasi-judicial body, and its decisions on variances are entitled to a presumption of correctness.
- b) The appellant must prove that the board applied an erroneous principles of law or was plainly wrong and in violation of the purposes and intent of the zoning ordinance.
- c) The circuit court may decide the matter on the basis of the record from the board of zoning appeals or it may allow evidence to be presented.

### **VIII. Typical Participants/Stakeholders**

- A. Landowner/Developer/Contract Purchaser/Applicant
- B. Citizens/Neighbors
- C. Zoning Administrator and Staff Planner(s)
- D. Planning Commission
- E. Governing body
- F. Board of Zoning Appeals
- G. Judge

### **IX. Handling the Difficult and Controversial Applications/Projects**

- A. Anticipate the Problem
  - 1. High Impact Projects
    - a) Big Box Retail
    - b) Asphalt Plant/Solid Waste Disposal Facility/Rock Quarry
    - c) Communication towers/wind turbines/solar power facilities
    - d) Methadone clinics/drug rehabilitation centers
    - e) Live music venues
    - f) Industrial facilities
  - 2. Likable uses, but undesirable side effects (e.g. Chik-fil-A, churches).

### 3. Other Challenging Uses

B. Expectation Setting - your client will arrive at your office eager to discuss the new project and may believe (erroneously) that everyone is going to love the project (“What’s not to love about...”).

C. Review the Ordinance - Not all ordinances are created equal. It is likely that the proposed use may not neatly fit into the zoning ordinance definition. This allows room for interpretation. In the Commonwealth, governing bodies may delegate certain interpretations and administration of the zoning ordinance to the Zoning Administrator.

1. Zoning verification or confirmation letter - The zoning authority can provide a verification letter, which sometimes may be required by a lender or other governmental licensing bodies. The verification letter confirms the zoning of the proposed site and whether the proposed use is allowed in that zoning district. This may not be as comforting as you think, however, as the Zoning Administrator may limit his or her decision.

a) See *Board of Supervisors v. Crucible, Inc.*, 278 Va. 152, 677 S.E.2d 283 (2009), holding that a zoning verification letter was not a significant affirmative governmental act to give rise to vested rights. See also *Board of Supervisors v. McQueen*, 287 Va. 122 (2014) relying on the *Crucible* decision to reach a similar result.

#### D. Timing of Application Process

1. Should you wait to file until after an upcoming election?

2. Do you have enough time to have the zoning application reviewed and approved before contractual due diligence or option period expires?

3. Can you simultaneously pursue a rezoning application and any application for a special or conditional use?

4. Do you have to have the property rezoned to make the proposed use work?

E. Initial Meetings with Staff and Governing Bodies - Most zoning ordinances will require some initial meeting with staff before an application can be filed and processed. Depending on the jurisdiction, these initial meetings could also extend to meetings with planning commissioners and elected officials. Note, that planning commissioners and elected officials will often be hesitant to meet with applicants earlier in the process. At the initial stages, your client is looking for feedback, but the planning commissioners and elected officials will want to allow time for the application to be vetted. Also, elected officials will also need to meet in small groups to avoid constituting a quorum and a public meeting.

1. *There are many potential benefits to initial meetings:*

a) Staff can provide insight not only into what the zoning ordinance provides, but how the municipality actually enforces the zoning ordinance.

b) They can also help identify details you might have missed in your review such as overlay districts, historic district restrictions, moratoriums that may be in place and other similar matters.

c) Staff can advise you of any upcoming changes in the zoning ordinance or other laws or regulations that may impact your development.

d) They can help guide you through the zoning review and approval procedure and be a resource during that process.

e) Perhaps most importantly, it never hurts to know someone involved in the decision making process. Also, this meeting serves to gauge feedback and initial reactions to the application and proposal.

2. *But there could also be some negative consequences:*

a) Your client could be nervous about revealing plans or a strong initial negative reaction.

b) Clients may expect their professionals to know the applicable zoning and believe that zoning regulations are written in such a way that there is a clear answer to every question. However, you should explain to the client the reasons why you are asking for guidance.

c) Clients are also concerned about revealing their plans to the government for fear that it will make the process much more complicated - the "better to ask forgiveness than permission" approach. A snag on zoning can needlessly complicate all of the other approvals. It is generally better to work out any questions with the regulatory authorities before they become problems. Although some jurisdictions have reputations for being difficult, most are hungry for development and will be willing to work with an applicant.

F. Community/Public Outreach - Many jurisdictions will schedule community meetings for certain applications, like rezonings. The applicant should coordinate with staff prior to these meetings to understand who will take the lead, what material will be presented, who is expected to attend, etc. If no community meeting is scheduled, the applicant may want to consider hosting a meeting with the local homeowners' association or other civic group. An initial offer and outreach may go along way and at least eliminate the public from later claiming that they did not have sufficient notice of the application. There are benefits of outreach, including disarming the opposition and opportunity to identify likely problems and possibly fix before the public hearings. With this step, you are trying to prevent speakers from stating "they did not even have the courtesy to come talk to us" at the public hearing.

G. Prepare (and overprepare) for the Public Hearings - The normal procedures of the locality will often dictate the type of presentation and level of detail.

1. Some jurisdictions may rely solely on the applicant to make its case to the governing body.

2. Alternatively, staff may conduct a thorough review and make a recommendation on the application. The governing body is not bound by the recommendation but it generally does help to have a favorable staff recommendation.
3. Determine if other consultants, like engineers, architects, traffic specialists, should attend the meeting. Be sure that these consultants understand their role and the scope of information that each should relay. Try to give them some sort of script if necessary. Also, you need to learn their material in case they cannot make it or end up being a very poor or ineffective public speaker.

H. Ensure that the Locality follows all rules – Opponents (and their counsel) will be looking for any excuse as to why the governing body must deny (or delay) the application. The Virginia Code and zoning ordinances dictate specific requirements for providing public notice, advertisements and conducting public hearings. Be sure and double check staff to ensure that a detail is not missed and allows the land use decision to be challenged for a procedural defect.

#### X. **Additional Resources**

- A. Gentry Locke attorneys (Max Wiegard, Jon Puvak, Greg Haley)
- B. Greg Kamptner’s “The Albemarle Land Use Law Handbook” – this resource provides quick answers to most zoning questions. It is available online.
- C. Local Government Association (LGA) Handbook – zoning chapter.

#### XI. **Notable Zoning and Land Use Acronyms**

- A. **LULU** – “Locally Undesirable Land Use
- B. **BANANA** – “Build Absolutely Nothing Anywhere Near Anything”
- C. **CAVE** – “Citizens Against Virtually Everything”
- D. **NIMBY** – “Not In My Backyard”
- E. **NOPE** – “Not On Planet Earth”
- F. **NIMTOO** – “Not In My Term Of Office”

# Everything Expert Witness

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## What Evidence Can be Presented Through an Expert?

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SECTION

3



In civil cases in Virginia, the use of expert witnesses becomes necessary in the vast majority of cases with a value larger than \$25,000. Essentially, unless you are in General District Court, your case is going to become a battle of the experts to some degree. The mishandling of expert testimony by lawyers and trial judges remains fertile ground for reversal on appeal, often leading to a further delay of justice and resolution in the important cases we handle for our clients. Improper selection or ineloquent use of an expert can quickly take a case out of the hands of the jury and deprive our clients of their day in court. In this presentation, we explain several types of evidence that can be presented through an expert and demonstrate how to properly present that evidence.

### **ISSUE 1: HOW DO I KNOW WHEN AN EXPERT IS NEEDED?**

One of the first questions that any trial lawyer must ask early in the litigation is what elements of the case will require expert testimony. Determining whether to retain experts and which experts to retain is vital to the success of complex cases, and even simpler cases can be derailed by a bad expert witness. For plaintiffs' lawyers, who are often advancing the costs of litigation, decisions regarding expert witnesses are filled with risk. Thus, it is paramount that plaintiffs' counsel be able to successfully predict the likely admissibility of the evidence for which the expert will be used. Because this analysis begins with the applicable rules of evidence, we have included for your convenience a side-by-side comparison of the Virginia and Federal rules governing expert witnesses on the immediately following pages.

## Commonwealth of Virginia

- **Rule 2:702 TESTIMONY BY EXPERTS**  
(Rule 2:702(a)(i) derived from Code § 8.01-401.3(A))
- (a) *Use of Expert Testimony.*
  - (i) In a civil proceeding, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
  - (ii) In a criminal proceeding, expert testimony is admissible if the standards set forth in subdivision (a)(i) of this Rule are met and, in addition, the court finds that the subject matter is beyond the knowledge and experience of ordinary persons, such that the jury needs expert opinion in order to comprehend the subject matter, form an intelligent opinion, and draw its conclusions.
- (b) *Form of opinion.* Expert testimony may include opinions of the witness established with a reasonable degree of probability, or it may address empirical data from which such probability may be established in the mind of the finder of fact. Testimony that is speculative, or which opines on the credibility of another witness, is not admissible.

## Federal Court

- **Rule 702. TESTIMONY BY EXPERT WITNESSES**
- A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
  - **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
  - **(b)** the testimony is based on sufficient facts or data;
  - **(c)** the testimony is the product of reliable principles and methods; and
  - **(d)** the expert has reliably applied the principles and methods to the facts of the case.

## Commonwealth of Virginia

- **Rule 2:703 BASIS OF EXPERT TESTIMONY** (Rule 2:703(a) derived from Code § 8.01-401.1)
- (a) *Civil cases.* In a civil action an 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 the witness 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.
- (b) *Criminal cases.* In criminal cases, the opinion of an expert is generally admissible if it is based upon facts personally known or observed by the expert, or based upon facts in evidence.

## Federal Court

- **Rule 703. Bases of an Expert**
- An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

## Commonwealth of Virginia

- **Rule 2:704 OPINION ON ULTIMATE ISSUE** (Rule 2:704(a) derived from Code § 8.01-401.3(B) and (C))
- (a) *Civil cases*. In civil cases, no expert or lay witness shall be prohibited from expressing an otherwise admissible opinion or conclusion as to any matter of fact solely because that fact is the ultimate issue or critical to the resolution of the case. But in no event shall such witness be permitted to express any opinion which constitutes a conclusion of law. Any other exceptions to the “ultimate fact in issue” rule recognized in the Commonwealth remain in full force.
- (b) *Criminal cases*. In criminal proceedings, opinion testimony on the ultimate issues of fact is not admissible. This Rule does not require exclusion of otherwise proper expert testimony concerning a witness' or the defendant's mental disorder and the hypothetical effect of that disorder on a person in the witness' or the defendant's situation.

## Federal Court

- **Rule 704. Opinion on an Ultimate Issue**
- (a) **In General — Not Automatically Objectionable**. An opinion is not objectionable just because it embraces an ultimate issue.
- (b) **Exception**. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

## Commonwealth of Virginia

- **Rule 2:705 FACTS OR DATA USED IN TESTIMONY** (Rule 2:705(a) derived from Code § 8.01-401.1)
- (a) *Civil cases*. In civil cases, an expert may testify in terms of opinion or inference and give 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.
- (b) *Criminal cases*. In criminal cases, the facts on which an expert may give an opinion shall be disclosed in the expert's testimony, or set forth in a hypothetical question.

## Federal Court

- **Rule 705. Disclosing the Facts or Data Underlying an Expert**
- Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

In Virginia, “[E]xpert testimony is admissible only when specialized skill and knowledge are required to evaluate the merits of a claim. Issues of this type generally arise in cases involving the practice of professions requiring advanced, specialized education, such as engineering, medicine, and law, or those involving trades that focus upon scientific matters, such as electricity and blasting, which a jury cannot understand without expert assistance.” *See Board of Supervisors v. Lake Servs.*, 247 Va. 293, 297 (1994)(internal citations omitted)(Holding that expert testimony on standard of care was unnecessary because a jury was capable of understanding the standard of care for dredging a cove where water levels fluctuated and underwater obstructions were present.).

In contrast, expert testimony is inadmissible “regarding matters of common knowledge or subjects such that [persons] of ordinary intelligence are capable of comprehending them, forming an intelligent opinion about them, and drawing their own conclusions therefrom. Thus, when the question presented can be resolved by determining what precautions a reasonably prudent person would have taken under like circumstances, no expert testimony is required or permitted.” *See id.* (internal citations omitted); *see also Grasty v. Tanner*, 206 Va. 723, 726 (1966)(“It is settled law in Virginia that expert evidence is inadmissible on matters of common knowledge or those as to which the jury are as competent to form an intelligent and accurate opinion as is the witness.”)(Holding that expert testimony as to speed based on the condition of a car after an accident invaded the province of the jury.).

A non-exhaustive list of accepted matter of expert testimony includes:

a. Standard of Care in Medical Malpractice Cases - *Little v. Cross*, 217 Va. 71(1976); *Bly v. Rhoads*, 216 Va. 645 (1976); *see also* Va. Code § 8.01-581.20.

b. Need to Hospitalize Sooner - *Commercial Distribs. Inc. v. Blankenship*, 240 Va. 382 (1990)(Holding that jury verdict in favor of plaintiff must be reversed when plaintiff failed to present expert testimony that failure of adult home to “hospitalize” suicidal patient was violation of standard of care.).

c. Cause of Injury or Death - *Franconia Assocs. v. Clark*, 250 Va. 444 (1995) (Holding expert could testify concerning appropriate speed that door should shut); *Johnson v. Commonwealth*, 111 Va. 877 (1911) (murder trial, cause of death); *Neal v. Spencer*, 181 Va. 668 (1934) (wrongful death case, cause of death).

d. Valuation of Pension - *Clements v. Clements*, 10 Va. App. 580 (1990).

e. Value of Business - *Marion v. Marion*, 11 Va. App. 659 (1991).

f. Accident Reconstruction - *Hubbard v. Commonwealth*, 12 Va. App. 250 (1991) (Holding that Steven Chewning could testify concerning expert opinion on speed based on yaw marks), *superseded by Hubbard v. Commonwealth*, 243 Va. 1, 9 (1992) (Expressing no opinion on admissibility of Chewning’s testimony because defendant waived any objection by introducing evidence of the same character); *see also* below for cases excluding similar testimony.

g. Future Dangerousness of a Defendant in a Criminal Case - *Saying v. Commonwealth*, 239 Va. 534, *cert. denied*, 493 U.S. 887 (1990) (Holding that clinical psychologist could testify as to defendant’s future dangerousness).

h. Life Expectancy of Plaintiff - *Poliquin v. Daniels*, 254 Va. 51(1997)(Holding that economic damages expert may opine on economic damages based on life expectancy in Code § 8.01-419 even though other evidence in the case suggests a much shorter life expectancy).

i. Lost Profits in Breach of Contract Case - *R.K. Chevro Inc. v. Hayden*, 253 Va. 50 (1997)(Holding accountant could testify that employee quitting and accepting similar position with competitor caused employer’s lost profits).

j. Handwriting authenticity - *Updike v. Texas Co.*, 147 Va. 208 (1927).

k. Grief in Death Cases - *Kennedy v. Burns Foods, Inc.*, Civil Action No. 98-CV4 (W.D. Va. March 16, 1999); *Falletti v. AAA Disposal Service, Inc.*, (Fairfax County, Judge Bruce Bach); *Sperry v. Schuyler Enterprises, Inc.*, 31 Va. Cir. 200, 201-05 (Warren County Circuit Court 1993); *Johnson v. Bass*, Case No. CL05-000020 (Orange Circuit Court, Judge Daniel R. Bouton January 6, 2006).

A few areas where expert testimony has been held inadmissible include:

- a. Credibility of Witnesses - *Davison v. Commonwealth*, 18 Va. App. 496 (1994)(Holding expert testimony intended to bolster credibility of minor victim after victim recanted was inadmissible); see *James v. Commonwealth*, 254 Va. 95, 98 (1997)(“The settled law of this Commonwealth simply does not permit a defendant to ask a witness to opine whether another witness is ‘capable of lying.’”).
- b. Accident Reconstruction - *Brown v. Corbin*, 244 Va. 528, 531 (1992)(Holding that Steven Chewning’s reconstruction testimony was “largely irrelevant to any legitimate area of inquiry, repeatedly invaded the jury’s province as factfinder, and offered speculation in the guise of scientific opinion which, when presented through the testimony of an expert, prejudiced Brown’s case.”); *Grasty v. Tanner*, 206 Va. 723 (1966) (Engineer cannot testify concerning speed of vehicle based upon damage done to the vehicle); *Venable v. Stockner*, 200 Va. 900 (1959) (A witness may describe tire marks, skid marks, or cuts which he has observed on the pavement at or near the place of an automobile accident, but the inference to be drawn from such testimony “is solely the province of the jury”). More on this below.
- c. Opinions of Other Physicians - *Todd v. Williams*, 242 Va. 178 (1991) (Holding that expert witness cannot state the opinions of other experts he has talked to about the case).
- d. Average Response Times - *Keese v. Donigan*, 259 Va. 157 (2000) (Holding Chewning (again) inadmissible on average response times for driver to react to tree limb in road).
- e. Medical Opinion on Contested Non-medical Fact - *David A. Parker Enters. v. Templeton*, 251 Va. 235 (1996) (Medical opinions invaded province of jury by stating lacerations were caused by rotating propeller in boating accident case where rotation of propeller was sharply contested).

Thus, with several exceptions, an expert can be used in almost any situation where expertise would be of assistance to the judge or jury and the value of that assistance outweighs the cost to the client.

### **How Do I Find an Expert?**

Available resources include:

1. Publications
2. Word of mouth
3. Conferences
4. Expert locators
5. Other experts
6. Conversations
7. Trade organizations
8. Internet search engines

## **ISSUE 2: “WHAT DO I CARRY WITH ME WHEN I GO TO MEET THE EXPERT?”**

Once counsel and the client decide to incur the cost of retaining an expert, the usefulness of that expert in getting evidence admitted and persuading the judge or jury depends highly upon preparation of counsel and the expert. If possible, counsel should meet personally with the expert early in the litigation process. This meeting should always occur prior to the expert’s deposition and should often occur prior to the expert’s designation. In order to obtain maximum utility from this meeting, counsel should bring all the relevant information to the meeting. A selective list of materials to bring includes:

1. A complete copy of all information that has been previously provided to the expert to consider for his/her opinions;
2. A copy of the designation, if done. If not yet done, then a draft of the designation that you want the expert to adopt;
3. Literature you want the expert to consider;
4. Additional information you want the expert to consider, such as photographs, depositions, additional medical records, *etc.*; and
5. A copy of the expert’s CV so that you can go over it with him/her to assure that everything is true, accurate and complete.

Counsel should also bring an outline or memorandum of talking points to prepare the expert for the upcoming deposition. This document should be prepared so that it is suitable to give to the expert for additional review as the deposition date draws closer. While complete copies of our expert preparation memoranda are privileged, proprietary work product, illustrative examples include the following:

An instruction regarding “friendly” defense counsel might state:

### **Friendly Defense Counsel** –

- a. Sometimes defense counsel can come across as “very friendly.”
- b. Keep in mind that despite how friendly defense counsel may be, he/she is **not** a friend for purposes of this litigation.
- c. Instead, he/she is a skilled interrogator with one goal in mind – to undermine your opinions and to serve the interest of her client.
- d. Defense counsel will ask whatever questions are necessary to get you to say that the Defendant did not cause the patient any injuries or damages.
- e. Do not chat with them off the record.
- f. A remark that is obviously funny or sarcastic when delivered in person, loses all traces of humor and sarcasm in the dry transcript that will follow.
- g. Do not use colorful language in answering questions. A skilled lawyer could make you wish you did not when he repeats it to you later at trial.

An explanation concerning standard of care in a medical malpractice case might state:

### **Standard of Care** –

- a. “Standard of care” is defined as what a reasonably prudent health care provider in the field of practice or specialty in this Commonwealth would do under the same or similar circumstances
- b. A deviation from the standard of care is defined as negligence, whereas if a health care provider meets or exceeds the standard of care then he is not negligent.

- c. The standard of care is not what most health care providers would do, but it is what a reasonably prudent health care provider would do.
  - 1) If asked whether other practitioners would disagree with your opinions in this case, the answer is that reasonably prudent practitioners would not disagree with your opinions; however, practitioners who are not reasonably prudent may disagree with your opinions
- d. The standard of care is a national standard of care:
  - 1) National textbooks
  - 2) National certification
  - 3) National examinations
  - 4) National publications
  - 5) What a reasonably prudent health care provider would do does not change with a state's borders.
- e. You know the standard of care in Virginia:
  - 1) You are licensed to practice medicine in a neighboring state and you meet the educational and examination requirements to be licensed to practice medicine in the Commonwealth of Virginia.
  - 2) You treat patients from Virginia.
  - 3) You know, interact with, and consult with Virginia doctors in your specialty.
  - 4) You teach/interact with medical students/interns/residents/fellows who have gone on to practice in Virginia.
  - 5) You have authored articles that are published in Virginia.
  - 6) You receive referrals from Virginia practitioners.
  - 7) You have attended medical courses in Virginia.
  - 8) You have taught medical courses in Virginia.
  - 9) You review publications authored by Virginia practitioners.
  - 10) You have been accepted by courts in the Commonwealth of Virginia as an expert in your field.
- f. Standard of care does not differ based on location, experience, or resources.
  - 1) Defense counsel will try in many different ways to get you to say that you do not know the standard of care applicable to the defendant based on different factors (resources, experience, type of practice, and the like) and you must emphasize that the standard of care applicable to the defendant is the same standard applicable to you and by which you practice.
  - 2) For example, if the defendant health care provider does not have the necessary experience or resources, then the standard of care requires the health care provider to refer the patient to someone with adequate experience or resources.
  - 3) For example, the defendant health care provider may be a sole practitioner while you are in a practice with several health care providers and you specialize—you must emphasize that the same standard of care applies no matter how many health care providers are in your practice or the fact that you may specialize.

A preparatory memorandum should include additional topics, such as: an explanation of the purpose of a deposition, warnings about specific words and questions frequently used by defense counsel, warnings about understanding the question, an explanation of the details of causation, advice on how to explain the issue of fees, a review of testimonial history, a review of qualifications, advice on handling medical literature, cautions about agreeing with opposing counsel, and advice on hypothetical questions, among other similar issues.

### ISSUE 3: HOW DO I PRESENT THE OPINION TESTIMONY OF MY EXPERT?

Once you decide to pursue expert testimony on an issue, the ability to present opinion testimony from that expert will largely depend on two things: (1) the qualifications of the expert; and, (2) the substance of her opinions.

First, the expert must be qualified individually as a witness. The starting point of this analysis is Virginia Code § 8.01-401.3(A) and Virginia Rule 2:702(a)(i), which permit an individual who is qualified by "knowledge, skill, experience, training, or education" to testify as an expert. However, the law does not require that an expert must have been formally educated in the field and/or currently engaged in it as an occupation. "To be an expert the witness need not be a specialist, or be licensed by an examining board, or be engaged in any particular profession or calling." *The Law of Evidence in Virginia and West Virginia* § 129, p. 227 (Nash ed. 1954); *see also Neblett, Adm'r v. Hunter*, 207 Va. 335, 339 (1966)(Allowing expert to testify concerning decedent's Blood Alcohol Content and the effects thereof) ("An expert's testimony is admissible not only when scientific knowledge is required, but when experience and observation in a special calling gives the expert knowledge of a subject beyond that of persons of common intelligence and ordinary experience."). The expert's knowledge may be the product of home study or of practice experience, however obtained. *Griffett v. Ryan*, 247 Va. 465 (1994)(Internist qualified to testify concerning standard of care for a gastroenterologist); *Noll v. Rahal*, 219 Va. 795 (1979)("study alone or experience, or both")(Study of general pediatric issues insufficient to qualify doctor specializing in infant care to opine on standard of care for defendant treating 11-year-old child). "The witness need not have all the knowledge possible for one in his class to entitle him to speak, but he may testify as an expert if it is shown that he has sufficient knowledge of his subject to give value to his opinion." *Norfolk & W. R. Co. v. Anderson*, 207 Va. 567, 571 (1966)(Both individual with 55 years of experience raising and canning tomatoes and USDA county supervisor were qualified to give opinions on reasons for crop failure).

Virginia law does not recognize degrees of qualification. A witness is either qualified or not qualified and all that is necessary is that the expert is better qualified than the jury to form an opinion from the facts. *Callahan v. Commonwealth*, 8 Va. App. 135, 138 (1989)("[A] witness who by education, training, or experience has knowledge beyond that of most lay men, may be qualified before the court as an expert witness and allowed to state an opinion to the factfinder on matters not within their common knowledge or experience.")(Arson expert qualified to testify but cannot invade province of jury). "All that is necessary is that he be better qualified than the jury to form an inference from the facts." *Aster v. Gross*, 7 Va. App. 1, 7 (Va. Ct. App. 1988) (Accountant qualified to evaluate business in divorce proceedings) (quoting C. Friend, *The Law of Evidence in Virginia* § 215, p. 461 (2d ed. 1983)).

While the standard for qualification of the individual is relatively low, the test of the substance of the actual opinions proffered by the expert is more scrutinous. An expert witness may not render an opinion based on speculation or incorrect or incomplete information. *Thorpe v. Commonwealth*, 223 Va. 609 (1982)(Record contained too many missing variables to permit the expert to give his opinion as to speed); *Waite v. Commonwealth*, 207 Va. 230 (1966)(Expert without any knowledge of the victim could not testify that child was fantasizing or hallucinating about alleged rape by step-father). Similarly, an expert witness may not base testimony on a mere assumption which has no evidentiary support. *CSX Transp. Co., Inc. v. Casale*, 250 Va. 359 (1995)(Expert's lost wage opinion inadmissible when unaware that plaintiff had already returned to work); *Tarmac Mid-Atlantic, Inc.*

*v. Smiley Black Co.*, 250 Va. 161 (1995)(Expert opinion on quality of slag admissible because there was no evidence of alteration or foreign materials); *Lawson v. John Doe*, 239 Va. 477 (1990)(Reconstruction expert cannot testify concerning speed of vehicle when all facts would have to be assumed). An expert witness may not offer an opinion based upon a hypothesis raised by his/her own testimony. *Doughty v. Commonwealth*, 204 Va. 240 (1963)(Medical doctor could not testify that symptoms of concussion and drunkenness were similar when there was no evidence defendant suffered a blow to the head). An expert's opinion is not admissible if the expert has failed to consider all the variables that bear upon the inferences to be deduced from the facts observed. *Tittsworth v. Robinson*, 252 Va. 151 (1996) (Defense experts could not testify comparing automobile accident with prior crash tests when there was no proof that tests were done under similar circumstances and experts had only reviewed pictures of the damaged vehicles).

Virginia Code § 8.01-401.1 and Virginia Rule 2:703 provide that an expert witness may render an opinion based upon data made known to or perceived by such witness at or before the hearing or trial. The data, if of a type normally relied upon by others in the particular field of expertise in forming opinions, need not be admissible in evidence. Va. Code § 8.01-401.1; *see, also*, Rule 2:703(a). Thus, an expert may permissibly base an opinion on hearsay sources. *Bowers v. Huddleston*, 241 Va. 83 (1991)(Although opinion may be admissible though based on factual hearsay information, expert's handwriting testimony was speculative); *Swiney v. Overby*, 237 Va. 231 (1989)(Expert can base opinion on factual hearsay, but must consider all variables). Where an expert conducts tests, there must be proof that the conditions existing at the time of the tests and at the time relevant to the facts at issue are substantially similar. *Tittsworth*, 252 Va. 151 (1996).

It is, however, normally error to permit an expert witness to state that the expert has spoken with others who agree with his view. *Todd v. Williams*, 242 Va. 178 (1991). In *Todd*, the trial judge impermissibly allowed a defense expert to testify concerning conversations with other absent doctors who agreed with him; the judge also allowed another defense expert to describe the trend of articles in the last ten years that agreed with him. *See id.* at 180-182. The Supreme Court held that these errors caused the plaintiff to suffer "overwhelming unfairness." *See id.* at 183.

### **Introducing Scientific or Technical Opinions—*Daubert* or *Spencer*?**

Introducing scientific or technical opinion testimony in federal court requires clearing additional hurdles. In federal court, the trial judge is the gate-keeper charged with keeping junk science out of the courtroom. *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993). The federal court must consider: (1) whether the expert's theory can be or has been tested; (2) whether the theory has withstood peer review and publication; (3) whether there is a known or potential rate of error; (4) whether standards exist for the application of the theory; and (5) whether the theory has been generally accepted by the relevant scientific community. *Burns v. Anderson*, 123 Fed. Appx. 543, 549 (4th Cir. 2004). However, at least one court has argued that *Daubert* is no longer good law due to modern changes to Federal Rule 702. *See Phillips v. C.R. Bard, Inc.*, 2014 U.S. Dist. LEXIS 174506, \*8-9 (D. Nev. Dec. 16, 2014) ("The relevant standard is not found in the *Daubert* line of cases, however, but in the latest version of Evidence Rule 702, which has superseded those cases' interpretations of the original 1975 version of the rule.").

In Virginia state courts, this stricter "gate-keeper" analysis of *Daubert* has not officially been required. Instead, the preeminent line of Virginia precedent flows from *Spencer v. Commonwealth*, 240 Va. 78 (1990). As the Court explained in *Spencer*:

When scientific evidence is offered, the court must make a threshold finding of fact with respect to the reliability of the scientific method offered, unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, such as fingerprint analysis; or unless it is so unreliable that the considerations requiring its exclusion have ripened into rules of law, such as "lie-detector" tests; or unless its admission is regulated by statute, such as blood-alcohol test results.

In making the threshold finding of fact, the court must usually rely on expert testimony. If there is a conflict, and the trial court's finding is supported by credible evidence, it will not be disturbed on appeal. Even where the issue of scientific reliability is disputed, if the court determines that there is a sufficient foundation to warrant admission of the evidence, the court may, in its discretion, admit the evidence with appropriate instructions to the jury to consider the disputed reliability of the evidence in determining its credibility and weight.

[...] Wide discretion must be vested in the trial court to determine, when unfamiliar scientific evidence is offered, whether the evidence is so inherently unreliable that a lay jury must be shielded from it, or whether it is of such character that the jury may safely be left to determine credibility for itself.

*Spencer v. Commonwealth*, 240 Va. 78, 97-98 (1990)(internal citations omitted).

However, the line between *Spencer* and *Daubert* was blurred earlier this year when our Supreme Court cited a 1997 case from the Supreme Court of the United States as authoritative because it was "decided under the version of Fed. R. Evid. 702 which the General Assembly adopted, verbatim, in current Code § 8.01-401.3(A)." *Hyundai Motor Co. v. Duncan*, 766 S.E.2d 893, 897 (Va. Jan. 8, 2015). According to the Supreme Court of Virginia:

Although experts may extrapolate opinions from existing data, a circuit court should not admit expert opinion "which is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). [...] Mahon's opinion that the vehicle was unreasonably dangerous was based on his *ipse dixit* assumption that the side airbag would have deployed in Gage's crash if the sensor had been located on the B-pillar. But the "analytical gap" between the data Mahon relied upon from Hyundai's location study and the opinion he proffered was "simply too great." *Id.* Therefore, Mahon's opinion was inadmissible, and the circuit court abused its discretion in admitting it.

*Hyundai Motor Co. v. Duncan*, 766 S.E.2d 893, 897-898 (Va. Jan. 8, 2015)

In contrast, three months later the Court of Appeals of Virginia held that it remained reversible error for a Virginia trial court to apply *Daubert* rationale. *Padula-Wilson v. Wilson*, 2015 Va. App. LEXIS 123, \*23 (Va. Ct. App. Apr. 14, 2015)(noting that the Virginia General Assembly and the Virginia Supreme Court have conspicuously declined to adopt *Daubert*). The General Assembly responded promptly to the *Duncan* opinion with House Bill 1476. See 2014 Bill Text VA H.B. 1476 (Lexis); see also Virginia Acts of Assembly Chapter 295, H1476, available at <http://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+CHAP0295+pdf> (last visited July 8, 2015). Acts of Assembly 295 H1476 states, in bold, "**2. Nothing in this act, § 8.01-401.2:1, or § 8.01-401.3 shall be construed as a codification of Rule 702 of the Federal Rules of Evidence as presently construed.**" (emphasis in original). Note that the General Assembly's response will not easily be found in a hard copy of the Code of Virginia and that it does not appear in a standard Shepard's result for *Duncan*. Thus, it is incumbent on the plaintiffs' bar to

challenge the use of *Daubert* and *Duncan* in the state trial courts and fully preserve error if the Circuit Court uses *Daubert* and/or *Duncan* to prohibit expert testimony.

**Practice Tip:**

Thus, if the opinion you are presenting into evidence is scientific or technical, the best practice in state court is to establish that the foundation of the opinion would survive the *Daubert* elements—without actually referencing *Daubert* as authority—if the expert has the ability to make such a showing. If the expert might struggle to pass *Daubert* scrutiny and the defendant or judge is using *Daubert* and/or *Duncan* to oppose or exclude your expert, carefully preserve error by arguing that neither the General Assembly nor the Supreme Court of Virginia has accepted *Daubert*, demonstrating that any implied acceptance of *Daubert* has been strongly rejected by the General Assembly, and make a proffer of your expert’s qualifications, her opinions, and the support for her opinions, demonstrating how those opinions are admissible under the *Spencer* line of cases.

**How to Make a Proffer When the Judge Excludes Your Expert Testimony**

If the trial court excludes your expert’s opinion testimony—or any other evidence you intended to get into evidence through the expert—the evidence must be properly proffered if you intend to raise the issue on appeal. In Virginia, there are three ways to properly proffer evidence into the record. See *Galumbeck v. Lopez*, 283 Va. 500, 508 (2012).

1. “[A] unilateral avowal of counsel, if unchallenged”
  2. “[A] mutual stipulation of the testimony expected” or
  3. “[The] testimony has been given in the absence of the jury and made a part of the record[.]”
- Id.*

Remember that the proffer must be made on the record to be reviewable. In *Galumbeck*, two evidentiary challenges were discussed off the record in side bar conferences. See *id.* at 504. Defense counsel sought to introduce two exhibits, a surgical log that rebutted plaintiff’s evidence and documents showing the defendant had never been paid for the fatal surgery. See *id.* The judge ruled against the defendant in both instances. After court adjourned for the day, defense counsel summarized his arguments to the court reporter. The defendant later argued that this summary was a proffer that properly preserved the record for appeal. *Id.* at 507-08.

The Supreme Court ruled that Dr. Galumbeck’s summary did “not qualify as a proper proffer” because it was “recorded after court had adjourned for the day and outside of the presence of opposing counsel.” See *id.* at 508. Lopez could not acquiesce or stipulate to a statement that he was unaware Dr. Galumbeck was making. See *id.*

## Unique Issues in Medical Malpractice Cases

The Virginia Code provides a few additional restrictions on expert testimony in medical malpractice cases. Virginia Code § 8.01-581.20 states as follows:

Standard of care in proceeding before medical malpractice review panel; expert testimony; determination of standard in action for damages.

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.

[...]

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.

Under Virginia Code § 8.01-401.2:1, “A podiatrist shall not be permitted to testify as an expert witness against a doctor of medicine or osteopathic medicine in connection with a medical malpractice civil court proceeding or a medical malpractice review panel in any case where the doctor or osteopath is a defendant in such proceeding.”

The requirements of Virginia Code § 8.01-581.20 apply only to testimony concerning standard of care; they “do not address whether an expert witness is qualified to testify on proximate causation.” *See Lloyd v. Kime*, 275 Va. 98, 112 (2008). However, for standard of care experts, both the “knowledge requirement” and the “active clinical practice requirement” are mandatory. *See Hinkley v. Koehler*, 269 Va. 82, 88 (2005). Thus, counsel should verify that any expert who may testify regarding standard of care meets the “clinical practice requirement” at the earliest stages of litigation. Failure to ensure that the expert has proper clinical experience can be fatal to the case.

### **Testimony to the *n*th Degree**

Opinion testimony is inadmissible if it is mere speculation. *See, e.g., Blue Ridge Serv. Corp. v. Saxon Shoes, Inc.*, 271 Va. 206 (2006). An expert medical opinion that is speculative in nature is inadmissible because it is not stated to a reasonable degree of medical probability. *See Pettus v. Gottfried*, 269 Va. 69, 78 (2005). “A medical opinion based on a ‘possibility’ is irrelevant, purely speculative and, hence, inadmissible. In order for such testimony to become relevant, it must be brought out of the realm of speculation and into the realm of reasonable probability; the law in this area deals in ‘probabilities’ and not ‘possibilities.’” *See Spruill v. Commonwealth*, 221 Va. 475, 479 (1980).

However, the reasonable degree of probability requirement can be waived. *See Bitar v. Rahman*, 272 Va. 130, 139-141 (2006) (Holding that an objection based on the fact that a medical expert's opinion is not stated to a reasonable degree of medical probability, lacks an adequate factual foundation, or fails to consider all the relevant variables is a challenge to the admissibility of evidence rather than the sufficiency of evidence. Challenges to admissibility are waived if not timely raised during or immediately after direct examination.). A “reasonable degree of medical probability” is, in and of itself, an undefined term. *See, e.g., Lagumen v. Richardson*, 80 Va. Cir. 51, 53 (Va. Cir. Ct. City of Chesapeake 2010) (Holding, “Whether or not the holding of *Spruill* [*v. Commonwealth*] (a criminal case), *Fairfax [Hosp. Sys. v. Curtis]* (a medical malpractice case), or *Hoffman [v. Carter]* (a workers' compensation case) are specific to their respective areas of law, it is clear that the phrasing “within a reasonable degree of medical certainty” has resulted in interpretations that have changed the threshold to a “more probable than not” standard.”). The phrase “a reasonable degree of medical certainty” is at least partially self-contradicting. *See id.*

At least in regards to workers' compensation cases, the Court of Appeals has repeatedly declared that it “will not substitute form over substance by requiring a physician to use the magic words ‘to a reasonable degree of medical certainty.’” *See Commonwealth v. Bakke*, 46 Va. App. 508, 527 (Va. Ct. App. 2005). In federal court, the speculative possibilities contained in an expert's conclusions are not saved by the use of the phrase “reasonable degree of medical certainty.” *See Sharpe v. United States*, 230 F.R.D. 452, 461 (E.D. Va. 2005).

Although our Supreme Court has not squarely addressed the issue of form versus substance, the best practice is for counsel to have the witness establish both form and substance. Counsel should specifically ask his/her own expert on direct whether the expert's opinions are to a reasonable degree of medical—or scientific, accounting, mathematical, as the relevant adjective may be—probability and prepare the expert to provide the easy answer. Yet, the incantation of the phrase “reasonable degree of medical probability” is not a talisman that guarantees admissibility. Counsel and expert must work together to actually lay the foundation showing why the expert's opinions are to the reasonable degree of probability required by law. If defense counsel objects based on “reasonable degree” grounds, counsel should explain how reasonable degree was established, argue waiver if the objection was not promptly made, and remedy any deficiency while the witness remains on the stand if the objection was properly made.

On cross-examination of defense experts, counsel should strategically work to move the defense expert from the realm of reasonable probability into the realm of possibility and speculation. *Hyundai Motor Co. v. Duncan* provided an unfortunate example of how well this tactic can work. As Justice Powell noted in her dissent, the Supreme Court rejected the entirety of Duncan's expert's testimony based on speculation that was adduced on cross-examination concerning a subject that was not even mentioned on direct examination. See *Hyundai Motor Co. v. Duncan*, 766 S.E.2d 893, 899 (Va. 2015) (Powell, J. dissenting). In footnote four of her dissent, Justice Powell expressed her concern that “given the way in which the testimony about the Proposed Location was adduced at trial, the majority opinion could potentially lead to parties purposefully asking opposing experts about untested alternative theories that relate to the subject matter at issue and then using this testimony as a means of disqualifying those experts.” See *id.* at 900 (Powell, J. dissenting).

In a publically available review of *Duncan*, one prominent association of defense counsel highlighted the strategies the case endorsed on cross-examination. See Appellate Advocacy Annual Case Law Update, page 20, publicly available at <http://www.vada.org/admin/library/cle/Appellate%20Advocacy.pdf> (last visited July 8, 2015). Again, the plaintiffs' bar should avoid citing *Duncan* as authoritative because it was arguably overruled by the General Assembly. At the same time, however, the Supreme Court issued a \$14 million invitation for off-topic cross-examination, and the local defense bar has highlighted its awareness of that invitation. Counsel should, thus, be prepared to demonstrate on cross-examination that defense experts are relying on possibilities and speculation, even on issues only tangentially related to the ultimate opinions offered by the expert.

### ***Ore Tenus*, Videoconference or *De Bene Esse* Presentation**

As alternatives to the traditional live courtroom testimony, expert testimony can also be presented by “electronic audio and video communication system,” pursuant to § 17.1-513.2, or by *de bene esse* video deposition, pursuant to Supreme Court Rules 4:7 and 4:7A. See also, Fed. R. Civ. Pro. 43(a) (“For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.”). As long as the courtroom has the proper technology, video conferencing customarily works well from a technological perspective. Higher profile cases can create technological challenges, as seen during the George Zimmerman trial when members of the television audience hijacked testimony presented by Skype. See Paresh Dave, *Skype Blunder Interrupts George Zimmerman Trial*, L.A. TIMES July 3, 2013, available at <http://www.latimes.com/business/technology/la-fi-tn-george-zimmerman-trial-interrupted-by-skype-calls-20130703-story.html> (last visited September 14, 2015). Counsel should never attempt to present testimony via technology with which they are insufficiently familiar.

The persuasiveness of the technology as compared with live testimony has yet to be determined. Insofar as the Center of Legal and Court Technology, William & Mary School of Law has been able to ascertain, remote appearances appear to be treated by courtroom participants just as if those persons were physically in the courtroom. See Frederic Lederer, *The Legality And Practicality of Remote Witness Testimony*, *The Practical Litigator*, Sept 2009 at 21-22, available at <http://www.legaltechcenter.net/download/articles/The+Legality+And+Practicality+Of+Remote++Witness+Testimony.pdf> (last visited September 14, 2015). Thus, while videotaped depositions remain the more frequently used substitute for live courtroom testimony, live videoconferencing remains a viable option in the right circumstances.

#### **ISSUE 4: HOW DO I PRESENT LITERATURE THROUGH AN EXPERT?**

Outside of their actual opinions, one of the most important pieces of evidence that can be admitted through an expert is statements from published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art. This issue arises so frequently that it merits its own code section and rule of evidence.<sup>1</sup>

The Law in State Court:

**Virginia Code § 8.01-401.1.** Opinion testimony by experts; hearsay exception (subsection (a) of Supreme Court Rule 2:703, subsection (a) of Supreme Court Rule 2:705, and subsection (a) of Supreme Court Rule 2:706 derived from this section).

[...]

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

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<sup>1</sup> The introduction of literature in Federal Court is governed as a hearsay exception by Federal Rule of Evidence 803(18), which states as follows:

(18) Statements in Learned Treatises, Periodicals, or Pamphlets.

A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

the statement at the time of forming his opinion in order to read the statement into evidence during direct examination at trial.

**Rule 2:706 USE OF LEARNED TREATISES WITH EXPERTS** (Rule 2:706(a) derived from Code § 8.01-401.1)

(a) *Civil cases.* 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 rule, 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.

(b) *Criminal cases.* Where an expert witness acknowledges on cross-examination that a published work is a standard authority in the field, an opposing party may ask whether the witness agrees or disagrees with statements in the work acknowledged. Such proof shall be received solely for impeachment purposes with respect to the expert's credibility.

Under Virginia Code § 8.01-401.1, “[t]o the extent . . . 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.” *See also* Va. Sup. Ct. R. 2:706(a) (same). If admitted, the statements may be read into evidence but may not be received as exhibits. Va. Code § 8.01-401.1. If the statements are to be introduced through an expert witness on direct examination, they must be designated as literature to be introduced and provided to opposing parties at least 30 days before trial. *Id.*

In effect, Virginia Code § 8.01-401.1 creates “an exception to the hearsay rule in order to permit the introduction of authoritative literature as substantive evidence.” *Budd v. Punyanita*, 273 Va. 583, 593, 643 S.E.2d 180, 185 (2007). This is a familiar “learned-treatise” exception to the hearsay rule recognized by the Federal Rules of Evidence and the evidentiary rules of many states. *See, e.g.*, Fed. R. Evid. 803(18).

**“Authentication” of learned treatises**

Virginia Code § 8.01-401.1 establishes an exception to the rule against hearsay. “Because Code § 8.01-401.1 is in derogation of the common law, we must strictly construe the statute and be careful not to enlarge it beyond its express terms.” *Harman v. Honeywell Int’l, Inc.*, 758 S.E.2d 515, 520 (2014). But the Code does not explicitly address the authentication of the learned treatise.

According to the Virginia Supreme Court, “[T]he statements must be:

- (a) contained in a published treatise, periodical or pamphlet;
  - (b) on a subject of history, medicine or other science or art; and
  - (c) established as "a reliable authority" by testimony or by stipulation."
- Id.*

"Learned treatises have sufficient indicia of trustworthiness because their authors have no bias in any particular case and are aware that their work will be read and evaluated by others in their field." *Id.* at 521. Thus, a four and one-half page accident investigation report prepared by the plane's manufacturer while the author was a defendant in the case was not proven reliable. *Id.* A report prepared for litigation purposes was not subjected to peer review or public scrutiny, and it was not written primarily for professionals with the reputation of the writer at stake. *Id.* Documents prepared specifically for use in litigation are "dripping with motivations to misrepresent" and are therefore inadmissible hearsay. *Id.*

Other jurisdictions appear to hold that learned treatises are authenticated when an expert witness identifies the literature and testifies that it is a reliable authority. *See e.g., Hrynkiw v. Trammell*, 96 So. 3d 794, 810 (Ala. 2012); *Jones v. Bloom*, 388 Mich. 98, 133-134 (1972).

### **Types of learned treatises—publications relating to history, medicine, or "other science or art."**

Outside the Commonwealth, "Other science or art" is broadly interpreted. Learned treatises have included:

Truck Driver's Handbook: In a motor-vehicle accident case, the court held that a truck driver's handbook published by the American Trucking Association was a learned treatise admissible under Utah Rule of Evidence 803(18).<sup>2</sup> *See Paulos v. Covenant Transp., Inc.*, 86 P.3d 752, 754-57 (Utah Ct. App. 2004).

FAA Training Video: In an action against an aircraft manufacturer arising from a crash, the court held that an FAA training video was admissible under Arizona Rule of Evidence 803(18)<sup>3</sup>. *See Schneider v. Cessna Aircraft Co.*, 150 Ariz. 153, 159-62, 722 P.2d 321, 327-30 (Ariz. Ct. App. 1986).

The American Standard Safety Code: In a products-liability case involving a cotton compress, the Court of Appeals for the Fifth Circuit held that a district court had committed reversible error by excluding portions of the American Standard Safety Code and other

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<sup>2</sup> At the time of the decision, Utah's Rule was materially identical to Code § 8.01-401.1. It read: "To the extent . . . 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 . . ." *Id.* at 755.

<sup>3</sup> At the time of the decision, Arizona's Rule was materially identical to Code § 8.01-401.1. It read: "To the extent . . . relied upon [by an 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 the testimony or admission of the witness or by other expert testimony or by judicial notice." *Id.* at 159-60, 722 P.2d at 327-38 (emphasis removed).

publications, which were properly admissible under Federal Rule of Evidence 803(18). See *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 609 F.2d 820, 823 (5th Cir. 1980).

United States Department of Transportation Reports: In a products-liability case involving an allegedly defective car, the court affirmed the admission of two reports prepared for the United States Department of Transportation concerning automobile crashworthiness under Federal Rule of Evidence 803(18).<sup>4</sup> See *Dawson v. Township of Pennsauken*, 630 F.2d 950, 960-61 (3d Cir. 1980).

Emergency Vehicle Operator's Course: In a case where an ambulance ran a red light and collided with a civilian vehicle, the court considered the Emergency Vehicle Operator's Course among other pieces of evidence when deciding whether the plaintiff had presented sufficient evidence of recklessness to survive summary judgment. While the court did not directly analyze the Course as a learned treatise, it would make little sense to consider inadmissible evidence on a motion for summary judgment. See *Aliazarov v. Joiner*, No. 05-00-01593, 2001 Tex. App. LEXIS 7077 (Tex. Ct. App. Oct. 22, 2001).

### **Timing of Designating Medical Literature**

Virginia Code § 8.01-401.1 provides that when parties comply with the requirements of the statute—identify specific statements of literature at least 30 days prior to trial—then the statements shall not be excluded as hearsay. As a result, many circuit courts allow designations of medical literature thirty days prior to trial. Some attorneys elect to disclose literature on the permissible last day to afford opposing counsel with the shortest amount of time to preview the literature and find literature in response.

Some attorneys will move in limine to exclude medical literature on the grounds that it was not disclosed in the party's expert designation and/or the expert testified he did not rely on literature when he formed his opinions. However, in 2013, the General Assembly amended Virginia Code § 8.01-401.1 by adding:

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.

When facing these types of motions, you must remind the court of the recently added language in the statute and the corresponding evidentiary rules.

### **Can a Party Use an Expert's Deposition to Exclude Him in a Motion in Limine?**

No, not unless the parties agree to use it. Under Virginia law, a party may not seek exclusion of an expert witness based on the expert's deposition testimony. In *Parker v. Elco Elevator Corp.*, 250 Va. 278, 280 (1995), the defendant filed a motion *in limine* seeking the exclusion of the plaintiff's expert

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<sup>4</sup> At the time of the decision, the Federal Rule was materially identical to Code § 8.01-401.1. It read: "To the extent . . . relied upon by [an 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 the testimony or admission of the witness or by other expert testimony or by judicial notice." *Id.* at 961.

witness on the ground that the expert was not competent to testify on the standard of care, and the basis of the defendant's motion *in limine* was the expert's deposition testimony. The trial court sustained the defendant's motion *in limine*. *Id.* The plaintiff appealed to the Supreme Court of Virginia. *Id.* The Court reversed the judgment and remanded the case. *Id.* The Court held that the trial court had erred in excluding the plaintiff's standard of care expert based on his deposition testimony because the plaintiff had the right to establish his expert's competence through *voir dire*: "Furthermore, because Meese's competence was considered based solely on excerpts from his discovery deposition, Parker had no opportunity to establish Meese's qualification through *voir dire*. Under these circumstances, we conclude that the trial court erred in excluding Meese from testifying as Parker's expert on elevator maintenance and safety." *Id.* at 281.

### **Can a Party Use a Motion in Limine in Place of a Motion for Summary Judgment?**

No, well-established Virginia law prohibits a party from using a motion *in limine* in a manner that is functionally a motion for summary judgment. In *Lloyd v. Kime*, 275 Va. 98, 105 (2008) the trial court excluded the plaintiff's standard of care expert witness based on his deposition testimony (the use of which the plaintiff did not object), and then moved for summary judgment on the ground that the plaintiff did not have an expert witness. The trial court granted the defendant's motion for summary judgment. *Id.* The plaintiff appealed to the Supreme Court of Virginia arguing, in part, that the trial court erred in excluding his expert witness based on deposition testimony without allowing the plaintiff the opportunity to qualify his expert during *voir dire* at trial and then entering summary judgment. *Id.* The Court held that the defendant's motion *in limine* seeking exclusion of the plaintiff's expert witness was functionally the equivalent of a motion for summary judgment for which deposition testimony could not be used, unless the parties agreed. *Id.* at 107 ("In such a case, the motion in limine is functionally a motion for summary judgment. Rule 3:20 and Code § 8.01-420 therefore apply to Dr. Kime's motion to exclude Dr. Corkill's testimony in this case. Deposition could not be used to support the motion in limine unless Lloyd acquiesced."). However, the Court found that the plaintiff had acquiesced to the defendant's use of deposition testimony for the purpose of the motion *in limine*. *Id.* 107-08.

In state civil cases,<sup>5</sup> there are five ways to read statements from learned treatises into evidence over a hearsay objection:

1. Have the expert on direct testify that the literature is reliably authoritative and read in the statements through the expert (note that the expert no longer need have relied on the statements at the time of forming the expert's opinion in order to read the statements into evidence during direct examination). This requires identification of the statements in the literature at least 30 days prior to trial. Va. Code § 8.01-401.1; Va. R. Evid. 2:706(a).
2. Have the expert on direct testify that the literature is reliably authoritative and wait to read in the statements until cross of the defendants' expert. This requires you to identify the statements in the literature at least 30 days prior to trial per Va. Code § 8.01-401.1 (*see also* Va. R. Evid. 2:706(a)) according to *Budd v. Punyanitya*, 273 Va. 583 (2007).
3. Use the literature on the cross-examination of the opposing party's expert but to do so the opposing party's expert would have to recognize the literature as reliably

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<sup>5</sup> In criminal cases, Rule 2:706(b) permits the use of learned treatises during cross-examination, after the witness acknowledges the work as a standard authority in the field, solely for the purpose of impeachment with respect to the expert's credibility

authoritative. This does not require you to identify the statements in the literature before trial. Va. Code § 8.01-401.1; Va. R. Evid. 2:706(a).

4. Use literature written by the opposing party's expert as impeachment. This does not require you to identify the statements in the literature before trial but this also means that the statements are not being offered for the truth. Va. R. Evid. 2:613(b); Va. R. Evid. 2:607(a)(vi).

5. Use literature to test an expert's knowledge, reading, and accuracy in a field of expertise. Common law of Virginia allows statements from authoritative literature to be used "solely for the purpose of testing an expert's knowledge, reading, and accuracy in a field of expertise, and are not read directly or indirectly to the jury as substantive evidence regarding the contents of the literature or the opinions of its author, neither the hearsay rule nor the exception thereto found in Code section 8.01-401.1 is implicated." *Budd v. Punyanitya*, 273 Va. 583 (2007) (citing *Hopkins v. Gromovsky*, 198 Va. 389 (1956)). The common law also requires the expert to admit on cross-examination that the literature is a "standard authority on the subject to which they relate." *Hopkins v. Gromovsky*, 198 Va. 389, 394 (1956). Because of the similarity between the common law's and 8.01-401.1's requirement for literature to be read during cross-examination, there appears to be a limited use for the common law method of cross-examining literature. One potential use could be during the voir dire of the expert witness.

Thus, the applicable rules provide ample opportunity to have learned treatises read into evidence.

### **Practice Tip: Watch Out for Fake Journals!**

When reviewing literature that supports or opposes your client's position, be aware of the rise of fraudulent research. For example, 157 different allegedly scholarly journals accepted for publication a phony cure for cancer. See John Bohannon, "Who's Afraid of Peer Review?" *Science* Vol. 324 pp. 60-65, available at <http://www.sciencemag.org/content/342/6154/60.full> (last visited July 8, 2015). Bohannon wrote the intentionally fake paper using a fake name, claiming to be from a non-existent medical institute, intentionally including errors that "[a]ny reviewer with more than a high-school knowledge of chemistry and the ability to understand a basic data plot should have spotted[,] and celebrating experiments "so hopelessly flawed that the results are meaningless." See *id.* A list of myriad questionable publishers and journals can be found at <https://scholarlyoa.com/publishers/> (last visited July 8, 2015).

### **ISSUE 5: HOW DO I ADMIT BIAS EVIDENCE THROUGH A DEFENSE EXPERT?**

Because the so-called battle of the experts is rarely, one-sided, some of the most important evidence admissible through expert testimony will come into evidence through cross-examination of the defense experts. In addition to the admission of literature through cross-examination discussed above, vital evidence of bias is admissible during cross-examination. Because credibility and bias are squarely within the province of the jury, counsel can present evidence to the jury for means of demonstrating bias even though that evidence would rarely be appropriate for any other means.

The Supreme Court of Virginia has been clear about the ability to introduce bias evidence, its oft-repeated holding is as follows:

*The bias of a witness, like prejudice and relationship, is not a collateral matter.* The bias of a witness is always a relevant subject of inquiry when confined to ascertaining previous relationship, feeling and conduct of the witness . . . [O]n cross-examination great latitude is allowed and . . . the general rule is that *anything tending to show the bias on the part of a witness may be drawn out.*

*Henning v. Thomas*, 235 Va. 181, 187-188 (1988) (quoting *Henson v. Commonwealth*, 165 Va. 821, 825-26 183 S.E. 435, 437 (1936)) (emphasis and omissions in *Henning*).

When counsel in *Henning* protested that “the obvious intent and sole purpose of this proposed line of questioning [was] for the jury to draw some adverse, clandestine inference” from the expert’s associations, the Supreme Court summed up its response in one word: “Precisely.” *Id.* Opposing counsel is entitled to attempt to persuade the jury that an expert is a “doctor for hire[.]” *Id.* at 188.

### **Can Liability Insurance Be Referenced If It Demonstrates Bias?**

Yes, under certain situations. The Supreme Court further advanced the right to introduce bias evidence in *Lombard v. Rohrbaugh*, holding that “testimony concerning liability insurance may be elicited for the purpose of showing bias or prejudice of a witness if there is a substantial connection between the witness and the liability carrier.” *Lombard v. Rohrbaugh*, 262 Va. 484, 497 (2001). References to liability insurance are generally forbidden. Yet, if a substantial connection between the carrier and the witness is demonstrated, the “probative value concerning potential bias or prejudice outweighs any prejudice to the defendant resulting from the jury’s knowledge that the defendant carries liability insurance[.]” and counsel is free to question the expert witness about his relationship with the carrier in the presence of the jury. *See id.* In *Lombard*, the Court found that the defense expert had a substantial connection to Allstate because the expert had received payments in excess of \$100,000 per year from Allstate for two consecutive years.

Indeed, the right to expose bias is so strong that the plaintiff is entitled to cross-examine the defendant’s expert witness “to show that he had previously testified as an expert witness on behalf of [the defendant doctor] and that he had been compensated.” *Sawyer v. Comerci*, 264 Va. 68, 79-80 (2002). “The probative value concerning this potential bias outweighed any prejudice to [the defendant doctor] resulting from the jury’s knowledge that she had been a defendant in an unrelated lawsuit.” *Id.*

*Lombard* and *Sawyer* were successfully used recently in the Circuit Court for Rockbridge County. *See Arthur v. Pannabecker*, Case No. CL13-64 (Rockbridge Co. Circuit Court, August 27, 2015 Order). In *Arthur*, Judge Irvine held that a substantial connection existed between State Farm and the defendant’s medical expert because State Farm had paid the expert \$260,000 over five years and State Farm comprised ten percent of the expert’s medical/legal work. *See id.* As a direct result of this ruling, State Farm withdrew the medical expert prior to trial.

In federal court, evidence of bias is similarly admissible. “[P]laintiffs may, and should, cross-examine” defense experts “with regard to his potential bias in this case, [and] evidence of his pre-existing professional relationship” with the defendant. *See Patricia Ann Green, administrator of the Estate of Herman Michael Green v. Ford Motor Co.*, 2001 U.S. Dist. LEXIS 19883, \*22-23 (W.D. Va. Nov. 26, 2001). Because evidence of bias goes to the weight, not the admissibility, of the testimony, the questioning must happen in the presence of the jury. *See id.* Additionally, allowing the introduction of evidence relating to defense expert’s compensation received from an entity entirely unrelated to the case was relevant and probative as general impeachment and bias evidence consistent with the Federal Rules of Evidence. *See Bilenky v. Ryobi Techs., Inc.*, 2015 U.S. Dist. LEXIS

83564, \*36 (E.D. Va. June 25, 2015). Although the probative value of specific instances of misconduct may be outweighed by the prejudicial effect such information would likely have if revealed to the jury, counsel may cross-examine an expert witness concerning previous testimony where he lied under oath. *See Green*, 2001 U.S. Dist. LEXIS 19883, \*22. Such evidence is admissible concerning the expert's character for truthfulness. *Id.* at 20-21.

Defense counsel and trial judges—many of whom *were* defense counsel in their prior lives—reflexively react to questions that are brought by plaintiffs' counsel precisely for the purpose of inviting, or even inciting, the jury to conclude that an expert witness is really a biased, expert liar. But this is exactly what plaintiffs' counsel has a right to do. Any ruling prohibiting counsel from exposing the bias of an expert witness is a potential abuse of discretion inviting appellate review.

#### **ISSUE 6: HOW DO I PRESENT "HEARSAY" THROUGH AN EXPERT?**

Virginia law specifically permits experts to base their opinions on inadmissible hearsay. Virginia Code §8.01-401.1, entitled "Opinion testimony by experts; hearsay exception," states, in part:

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 thereof 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.

Virginia Code §8.01-401.1

Virginia Rule 2:703(a) parrots:

(a) *Civil cases.* In a civil action an 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 the witness 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.

Virginia Rule 2:705(a) concurs:

(a) *Civil cases.* In civil cases, an expert may testify in terms of opinion or inference and give 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.

An expert can permissibly testify concerning his opinions that may be based on inadmissible hearsay. Yet, for a variety of procedural and strategic reasons, counsel may desire to use direct examination of the expert to introduce the facts and opinions that provided the foundation for his opinions. However, in *McMunn v. Tatum*, the Supreme Court of Virginia held "that Code § 8.01-401.1

does not authorize the admission in evidence, upon the direct examination of an expert witness, of hearsay matters of opinion upon which the expert relied in reaching his own opinion, notwithstanding the fact that the opinion of the expert witness is itself admitted, and notwithstanding the fact that the hearsay is of a type normally relied upon by others in the witness' particular field of expertise." See *McMunn v. Tatum*, 237 Va. 558, 566 (1989). In *Commonwealth v. Wynn*, the Court extended the rule in *McMunn* to also prohibit the introduction of factual hearsay by direct examination of an expert witness. See *Commonwealth v. Wynn*, 277 Va. 92, 100 (2009) ("Whether an expert relies upon the opinions of others or allegations of sexual misconduct in formulating an opinion, both constitute hearsay. While certain information may be of the type routinely used by experts in a given field of expertise when formulating their opinions, a litigant, nevertheless, should not be required to contend with such hearsay information because the trier of fact cannot observe the demeanor of the speaker and the statements cannot be tested by cross-examination.").

While *McMunn* and *Wynn* clearly establish that both fact and opinion hearsay are inadmissible on direct examination, creative counsel may still find ways to get the desired facts or opinions into evidence, even on direct examination. Primarily, the expert witness can review the opinions of prior medical providers and adopt those opinions as his own opinion at trial based on review of the medical records. For example, the Supreme Court of Virginia approved the procedure of having a psychiatrist causally relate all prior treatment of a plaintiff even though it included prior treatment "from hospitals, radiologists, family practitioners, neurologists, emergency room physicians, and other health care providers[.]" See *Norfolk Bev. Co. v. Cho*, 259 Va. 348, 353 (2000).

Traditional hearsay exceptions apply in the context of expert witnesses as well. Thus, any hearsay that is excepted from the prohibition against hearsay is admissible on direct examination of an expert. One frequently arising exception is admission by party-opponent. See Virginia Rule 2:803(0); See e.g. *Chewing v. Commonwealth*, 2014 Va. App. LEXIS 82 (Va. Ct. App. Mar. 11, 2014)(Text messages were statement of party opponent). Another relevant exception is the present sense impression. See Va. Rule 2:803(1); see, e.g., *Green v. St. Francis Hosp. Inc.*, 791 A.2d 731 (Del. 2002) (Holding under Delaware Rule of Evidence 803(1) that nurse employed by defendant hospital could testify concerning nurse supervisor's statements following patient's alleged fall). Additional exceptions to keep in mind are "then existing mental, emotional, or physical conditions" (Va. Rule 2:803(3)), statements for purposes of medical treatment (Va. Rule 2:803(4)), and business records. (Va. Rule 2:803(6)).

Counsel should be prepared to argue one or multiple of these exceptions to support admissibility on direct examination.

Additional access to hearsay is available in cross-examination of defense experts. Pursuant to the rules cited above, the Supreme Court has never extended *McMunn* to apply to cross-examination. See *Holmes v. Levine*, 273 Va. 150, 164-165 (2007).

In *Holmes*, upon remand, the Administrator was free to cross-examine the defense expert about whether he relied on a death certificate in formulating his opinions and, if not, why he discounted the information contained in the death certificate. *Id.*

Concerning hearsay involving other related instances in a product liability case, the Court ruled that the defendant "would be entitled to cross-examine [plaintiff's] experts at trial as to the basis for each opinion, including whether, in formulating such opinion, the expert relied on occurrences not shown to be substantially similar to the [...] fire." See *Funkhouser v. Ford Motor Co.*, 285 Va. 272, 293 (2013). Accord. *Young v. Waddell*, 60 Va. Cir. 264, 264 (Va. Cir. Ct. 2002) ("Section 8.01-401.1 permits an expert witness to render an opinion that is based on data that may not be admissible in

evidence. The section expressly provides that the opposing attorney may, during cross-examination, question the witness regarding the language or content of the data underlying the witness's opinion.”).

## **ISSUE 7: HOW DO I PRESENT DEMONSTRATIVE EVIDENCE THROUGH MY EXPERT?**

In Virginia, the use of demonstrative evidence to illustrate testimony is a matter entrusted to the sound discretion of the trial court. *Muhammad v. Commonwealth*, 269 Va. 451, 518-519 (2005). Likewise, in federal court, evidentiary rulings on demonstrative evidence are reviewed for abuse of discretion. *United States v. Beckford*, 2000 U.S. App. LEXIS 6752, \*18 (4th Cir. Va. Apr. 13, 2000). In both state and federal court, the foundational analysis for the trial judge is a balance of relevance versus unfair prejudice. Thus, as the proponent of the evidence, counsel should use the expert to maximize the relevance of the demonstrative and minimize any unfair prejudice. Demonstrative evidence is "inadmissible" if it is highly prejudicial and without significant probative value. *Mackall v. Commonwealth*, 236 Va. 240,254,372 S.E.2d 759, 768 (1988).

### **a. Medical Illustrations**

Medical illustrations are generally admissible as demonstrative evidence. The primary challenges against medical illustrations are to their authenticity, their relevance, or their alleged creation of unfair prejudice. Each of these challenges can be largely preempted by a well-laid foundation on direct examination of the expert.

To authenticate the illustration, the expert should identify what the illustration portrays, testify that it is reasonably anatomically correct, and agree that the illustration was carefully and accurately prepared. Authentication is rarely a difficult hurdle for a well-prepared team of counsel and expert witness.

To demonstrate relevance, the expert should testify that the illustration will help her explain and help the jury understand the nature of the injuries and/or treatment in the case. Importantly, the expert should briefly explain how the illustration will provide assistance beyond what she can describe without the illustration, as it was not reversible error for the trial court to reject the admission of x-ray films into evidence when no necessity was shown for the introduction of the proposed x-ray pictures into evidence. *See Lugo v. Joy*, 215 Va. 39, 42 (1974).

To diminish the appearance of unfair prejudice, the expert can testify that the illustration is actually less graphic than the reality the plaintiff endured due to the lack of blood, smell, etc. Remember that under both Virginia Rule 2:403 and Federal Rule of Evidence 403, the prohibition is only against *unfair* prejudice. “Evidence that is highly probative invariably will be prejudicial to the [opposing party].” Virginia Rule of Evidence 2:403(a) only authorizes the trial court to exclude relevant evidence when the probative value is substantially outweighed by the danger of *unfair* prejudice.” *Egan v. Butler*, 2015 Va. LEXIS 86, \*8-9 (Va. June 4, 2015) (quoting *United States v. Grimmond*, 137 F.3d 823, 833 (4th Cir. 1998)). Thus, the mere fact that an illustration effectively causes the jury to understand the severity of the injuries the defendant caused does not weigh against its display to the jury.

The second stage of the fight over medical illustrations is getting the illustration admitted so that the jury can have it in the jury room. In *United States v. Natale*, the Seventh Circuit stated, “So long

as the court is 'evenhanded' in ruling on the evidence, it has "wide discretion" in determining whether to allow the jury to take an exhibit to the jury room." *United States v. Natale*, 719 F.3d 719, 743-744 (7th Cir. Ill. 2013). The permitting of demonstratives in the jury room did not have the impermissible effect of "transporting" the expert witness into the jury room during deliberations. *Id.* However, the illustration must actually be admitted into evidence to be sent to the jury room. *See Baugh v. Cuprum S.A. De C.V.*, 730 F.3d 701, 708 (7th Cir. Ill. 2013)(exemplar ladder used during trial by the defense expert witness to illustrate his oral testimony, but never admitted, could not be sent to the jury room).

### **b. Re-enactments**

While the technology involved has greatly changed, the law in Virginia concerning re-enactment demonstratives is long-standing. "Where the conditions are substantially similar in essential particulars, the evidence is admissible, and its weight is to be determined by the jury." *Norfolk & W. R. Co. v. Henderson*, 132 Va. 297, 323 (Va. 1922); *see also Mackall v. Commonwealth*, 236 Va. 240, 253-254 (1988) (Medical examiner's insertion of a knitting needle into a styrofoam model of a human head to illustrate the course of the bullet was permissible).

However, in *Portsmouth Transit Co. v. Brickhouse*, the Court held it to be error to admit into evidence a map made by an engineer illustrating an alleged line of vision of a bus driver who struck an infant because the height and posture of the person driving the bus involved in the accident were unknown, making the actual view of the driver very different from the hypothetical view produced by the experiment. *See Portsmouth Transit Co. v. Brickhouse*, 200 Va. 844, 848, 108 S.E.2d 385, 388 (1959).

The test is similar in federal court. "A videotaped demonstration that amounts to an re-enactment of the accident must be substantially similar to the conditions at the time of the accident." *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1051 (4th Cir. 1984). The "substantial similarity" requirement can be extended to computer-animated video as well. *Hinkle v. City of Clarksburg*, 81 F.3d 416, 425 (4th Cir. 1996).

### **c. Computer Animation**

Demonstrative computer animation in Virginia is likely subject to the more stringent test explained in *Brown v. Corbin*, a 1992 case involving a staged photograph purporting to depict the circumstances existing at the time of an accident. *See Brown v. Corbin*, 244 Va. 528, 531 (1992). Because a staged photograph is "in the nature of a test or experiment [...] the party who offers such evidence must show that the reconstruction or recreation is substantially similar, although not necessarily identical, to the actual event in all of its essential particulars." *Id.* Testimony that the photograph was "somewhat similar" was insufficient when neither the defendant nor his expert enumerated the differences or similarities between the photograph and the actual scene. *Id.*

In federal court, computer animations that purport to recreate events at issue in trial should be held to the "substantially similar" test previously applied to staged videotape. *Hinkle v. City of Clarksburg*, 81 F.3d 416, 425 (4th Cir. 1996). "In contrast to videotaped recreations, demonstrations of experiments used merely to illustrate principles forming an expert's opinion are not subject to the substantial similarity requirement." *Green v. Ford Motor Co.*, 2001 U.S. Dist. LEXIS 20680, \*4 (W.D. Va. Dec. 10, 2001). However, it is rare to encounter video evidence that is either wholly demonstrative or reconstructive. *Id.* at \*5. Thus, counsel should be prepared to argue and have the expert explain the similarities between the animation and the facts of the case.

## **ISSUE 8: HOW DO I PRESENT RECONSTRUCTION EVIDENCE THROUGH MY EXPERT?**

Accident reconstruction testimony is disfavored in state court. Because expert testimony is inadmissible on any subject on which the ordinary lay person of average intelligence is equally capable of reaching his or her own conclusion, the Virginia Supreme Court repeatedly has held that accident reconstruction expert testimony is rarely admissible in Virginia because it invades the province of the jury. *Brown v. Corbin*, 244 Va. 528, 531-532 (1992)(internal citations omitted). Expert testimony as to the speed of vehicles in automobile-related cases has been repeatedly excluded. *Id.* That said, *rarely* admissible does not equal *never* admissible. Examples where reconstruction evidence was admissible include:

### Providing Context for Weather and Tire Tread Depth Data:

Expert testimony was appropriate to aid the jury in putting factual evidence of weather and tire tread depth into an appropriate context from which the jury could draw its own conclusions. *Holmes v. John Doe*, 257 Va. 573, 578 (1999).

### Effects of Frozen Brake Adjuster:

Expert testimony was admissible when it was offered merely to explain the effect a frozen brake adjuster has on the operation and performance of a vehicle. *See Breeden v. Roberts*, 258 Va. 411, 414 (1999).

### Specialized Trucking Industry Standards:

The testimony offered by the plaintiff, such as the proper adjustment of mirrors and use of the Jake brake, and trucking industry standards for drivers fall into the category of admissible "specialized" or "technical" principles that the ordinary lay person may not know, but expert may not testify about what effect these factors had in causing the accident in this case, as the jury should be able to reach their own conclusions on this issue. *See Zoll v. Werner Enters.*, 74 Va. Cir. 172, 174 (Va. Cir. Ct. 2007).

## **Federal Court**

The opportunity for accident reconstruction is much broader in federal court. Once his analysis passes *Daubert* gatekeeping, an accident reconstruction expert can apply his knowledge to the facts of the case and opine that the defendant failed to carry out certain precautionary practices, taking the stand to offer his expert opinion as to what happened. *Hatten v. Sholl*, 2002 U.S. Dist. LEXIS 2583, \*12-13 (W.D. Va. Feb. 13, 2002). An accident reconstruction expert is more than adequately qualified to testify as an expert with regard to vehicle body and component structural design and vehicle crash worthiness. *Florists Mut. Ins. v. Ludvig Svensson, Inc.*, 2003 U.S. Dist. LEXIS 7337, \*52-53 (W.D. Va. Feb. 13, 2003); *see also Fields v. General Motors Corp.*, 1993 U.S. App. LEXIS 14652 (4th Cir. June 16, 1993) (Virginia State Trooper could testify as reconstruction expert that evidence revealed plaintiff in products liability case fell asleep while driving).

## ISSUE 9: HOW DO I PRESENT COMPUTER SIMULATIONS EVIDENCE THROUGH MY EXPERT?

Unlike computer animations, which are almost always demonstrative displays used to help a human expert explain her testimony, computer simulations often involve potentially substantive evidence that is similar to the computer itself testifying. Because authentication remains a requirement, a human expert is needed to assist the computer's testimony. The human expert will need to authenticate at least the computer hardware, the software, and the data set entered.

In Virginia, failure to properly authenticate computerized opinions can be fatal to the admission of the evidence. For example, in *John v. Im*, the Virginia Supreme Court affirmed the trial court's exclusion of quantitative electroencephalogram (QEEG) test results because the human expert could not identify the person who actually performed the QEEG test, the testing conditions and procedures, the testing variables involving the patient's use of certain medications, and the testing variable of patient's drowsiness. *John v. Im*, 263 Va. 315, 320-321 (2002). A computer's conclusion of the "G-force" occurring in an automobile accident was inadmissible when the human experts data set was speculative, was founded upon assumptions lacking a sufficient factual basis, relied upon dissimilar tests, and contained too many disregarded variables. *Tittsworth v. Robinson*, 252 Va. 151, 155 (1996). See, also, *Boyer v. Dabinett*, 74 Va. Cir. 19 (Va. Cir. Ct. 2007)(excluding Defendant's learned treatise because it inappropriately applied motor vehicle crash software to simulate the human birth process).

### Federal Court

In contrast, some federal courts have found that the data used in a computer simulation "goes to the weight of the evidence, not its admissibility." *Lynn v. Yamaha Golf-Car Co.*, 894 F. Supp. 2d 606, 618 (W.D. Pa. 2012). Thus, "a court will not strike an expert's testimony where the simulation program used by the expert itself passes the *Daubert* test but an objection remains as to the data inputs utilized by the expert." *Id.* (citing *Burke v. TranSam Trucking, Inc.*, 617 F. Supp. 2d 327, 334-35 (M.D. Pa. 2009); *In re Yamaha Motor Corp. Rhino ATV Prods. Liability Litigation*, 816 F. Supp. 2d 442, 461-62 (W.D. Ky. 2011); *Shadow Lake Management Co. Inc. v. Landmark American Ins. Co.*, 2008 U.S. Dist. LEXIS 86838, 2008 WL 2510121 (E.D. La. June 17, 2008)). Accordingly, any concerns about the factual basis of an expert's reports and opinions are best resolved by "vigorous cross-examination and the presentation of contrary evidence." *Id.* Contrast, *Valente v. Textron, Inc.*, 931 F. Supp. 2d 409 (E.D.N.Y. 2013)(holding same expert and software to be excluded under *Daubert*).

A very recent case from the Fourth Circuit, however, illustrates that, at least in extreme cases, an expert's completely unreasonable data set can result in excluded testimony. See *EEOC v. Freeman*, 778 F.3d 463, 466-468 (4th Cir. Md. 2015). In *Freeman*, the EEOC put forward an "industrial/organizational psychologist" to testify that Freeman's use of credit checks and criminal background check's had a disparate impact on black and male applicants. See *id.* at 465. The Court's analysis begins by referencing "an alarming number of errors and analytical fallacies" making it impossible to rely on any of the expert's conclusions. *Id.* The Court then referenced a "'mind-boggling' number of errors and unexplained discrepancies" in the expert's database. *Id.* Worse, the Court determined that the expert "introduced these errors into his own analysis." *Id.* When the government attempted to rehabilitate its expert with supplemental reports, the Court found that the expert misrepresented the corrections he claimed to make. *Id.* The expert also "'managed to introduce fresh errors into his new analysis[.]'" *Id.*

Least one feel sympathy for a party whose case was unexpectedly destroyed by an incompetent expert, Judge Agee wrote separately, faulting the EEOC for continuing to use an expert who had been discredited by the Sixth Circuit as using “a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself.” *Id.* at 471 (Agee, J. concurring) (quoting *EEOC v. Kaplan Higher Education Corp.*, 748 F.3d 749, 754 (6th Cir. 2014)). The same expert had been severely criticized by the Second Circuit, the Eleventh Circuit, and the Western District of Wisconsin. *Id.* Judge Agee concluded that due to the expert’s “record of slipshod work, faulty analysis, and statistical sleight of hand” *Daubert’s* gatekeeper instruction mandated that the expert testimony was inadmissible as a matter of law. *Id.* Under these set of facts, the EEOC’s contention that the reliability of the expert’s data went to weight and not admissibility “was not simply meritless, but unsupported and without a legal foundation.” *Id.* at 472 (Agee, J. concurring). Thus, any practitioner arguing for the reliability of the data to be a jury issue in the federal courts of Virginia should be prepared to (1) distinguish *Freeman* and (2) provide the persuasive authority that does, in fact, provide legal foundation for the position.

#### **ISSUE 10: HOW DO I PRESENT ELECTRONICALLY STORED INFORMATION (ESI) EVIDENCE THROUGH MY EXPERT?**

“There is a dearth of Virginia case law on the subject of ESI discovery.” *Huff v. Winston*, 2015 Va. Cir. LEXIS 2, \*4 (Va. Cir. Ct. Jan. 15, 2015). As Virginia case law is only beginning to develop regarding the *discovery* of ESI, guidance from the Virginia courts on the *admissibility* of ESI is essentially non-existent. Virginia Rules 4:1(a), 4:1(b)(1), and 4:1(b)(7) “contemplate that parties may discover ESI that is relevant or reasonably calculated to lead to the discovery of admissible evidence [...] unless the responding party establishes that the ESI is not reasonably accessible because of undue burden or cost.” *Id.* at \*4-5. According to Judge Carson:

[I]n assessing what discovery will proceed and how it shall be paid for, the inquiries [the Court] will make are as follows:

1. Is the contemplated discovery reasonably calculated to lead to the discovery of admissible evidence?
2. Is the discovery reasonably narrow in its scope?
3. If the responding party is objecting to the discovery on the basis that it is burdensome or costly, what is the burden to the responding party as compared to the potentially prejudicial effect to the requesting party if the discovery is limited or quashed?
4. After some showing by the responding party regarding the estimated cost of production, is it most reasonable to leave the costs associated with production with the responding party; or is some shifting of costs more reasonable; or in a particular case is it most reasonable to simply determine that production costs are a taxable cost that the court can award to the prevailing party at the conclusion of the litigation?
5. Finally, in their dealings leading up to their appearance in court, have the parties conferred and reasonably attempted to resolve their dispute as specifically contemplated by Rule 4:12(a)(2)?  
*Id.* at \*5-6.

With a 2015 Virginia Circuit Court case providing the sole detailed analysis of ESI discovery, the issue of ESI admissibility in the courts of the Commonwealth is an area for the plaintiffs' bar to develop the law in favor of their clients. However, as indicated in Judge Carson's analysis, trial courts are wary of being pulled into yet another area of contentious disagreement between counsel. Thus, counsel who act with utmost professionalism and work diligently to narrow the issues that require intervention from the Court will likely find a more friendly audience when the fights over admissibility inevitably percolate into the courts of Virginia.

## Federal Court

In the federal courts, the law governing ESI discovery and admissibility is further developed. In fact, Magistrate Judge Grimm of the District of Maryland has become a regional leader in developing the relevant issues. His 2007 opinion, *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007), is a fifty-nine page (on Lexis .pdf), eighty-five headnote treatise on ESI admissibility that already claims nineteen positive citations from federal courts in the First, Third, Fourth, and Seventh Circuits, as well as state courts in Connecticut, Delaware, Indiana, Maryland, New Hampshire, Ohio, and the Virginia Court of Appeals. All counsel who intend to handle ESI in their practice would be well advised to invest the admittedly significant time involved in reading the opinion in its entirety.

Magistrate Judge Grimm launches his treatise with a warning about ESI discovery—"Be careful what you ask for, the saying goes, because you might actually get it." *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 537 (D. Md. 2007). Magistrate Judge Grimm referenced the collection of evidence rules that present themselves "like a series of hurdles to be cleared" before ESI is admissible. The progressive hurdles are:

1. **Relevance** as determined by Rule 401 (Does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be);
  2. **Authenticity** as required by Rule 901(a) (Can the proponent show that the ESI is what it purports to be);
  3. **Hearsay** as governed by Rule 801, 803, 804, and 807 (If the ESI is offered for its substantive truth, is it hearsay, and if so, is it covered by an applicable exception);
  4. **Originality** as defined by Rules 1001-1008 (Is the form of the ESI that is being offered as evidence an original or duplicate under the original writing rule, or if not, is there admissible secondary evidence to prove the content of the ESI);
  5. **Unfair Prejudice** as prohibited by Rule 403 (Is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or one of the other factors, such that it should be excluded despite its relevance).
- Id.* at 538.

For our purposes, expert testimony is primarily used to address the second hurdle of authenticity. The proponent of the evidence must be prepared to authenticate the evidence twice, in two different procedures under two different standards. As Magistrate Judge Grimm noted, the court is charged with making a preliminary determination of authenticity, but the jury ultimately resolves whether evidence admitted for its consideration is that which the proponent claims. *Id.* at 540. This creates a two-step process; the in camera hearing addressing authenticity does not replace the presentation of authenticating evidence before the jury. *Id.* Thus, even though the district court may have ruled that the proponent had presented sufficient evidence to support a finding of

authenticity, evidence that would support the same ruling must be presented again, to the jury, before the ESI may be admitted. *Id.*

Because a party seeking to admit an exhibit need only make a prima facie showing that it is what he or she claims it to be, the hurdle of authenticity is not “a particularly high barrier to overcome.” *Id.* at 542. However, “counsel often fail to meet even this minimal showing when attempting to introduce ESI, which [...] almost always is a self-inflicted injury which can be avoided by thoughtful advance preparation.” *Id.* Authentication of ESI under Rule 901(b)(1) requires “that the authenticating witness provide factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so, as opposed to boilerplate, conclusory statements that simply parrot the elements of the business record exception to the hearsay rule [...] or public record exception[.]” *Id.* at 545-546.

Although authentication of ESI can be shown by testimony (Rule 901(b)(1)), comparison (Rule 901(b)(3)), or circumstantial evidence (Rule 901(b)(4)), as well as other means, a party that seeks to introduce its own electronic records may have just as much difficulty authenticating them as one that attempts to introduce the electronic records of an adversary because it is so common for multiple versions of electronic documents to exist, and the adverse party can easily object that the proffered version is not the legally operative version, given the production in discovery of multiple versions. As a result, expert witnesses can be used to create and verify “hash values” during extensive document production to authenticate documents at a later date. *Id.* at 546-547. Experts can also identify and authenticate documents by the use of metadata “hidden or embedded” within a document. *Id.* Because metadata shows the date, time and identity of the creator of an electronic record, as well as all changes made to it, expert testimony concerning metadata can establish “distinctive characteristic[s] of all electronic evidence that can be used to authenticate it under Rule 901(b)(4).” *Id.* at 547-548.

Expert testimony can be used to authenticate e-mails by comparing them with e-mails that are authenticated exemplars. *Id.* at 555. Expert testimony can also be used to authenticate website evidence, including archived websites from the cleverly-titled Wayback Machine. *Id.* at 555-556. If computer records are vital to a case, counsel should have an expert prepared to testify that:

1. The business uses a computer.
  2. The computer is reliable.
  3. The business has developed a procedure for inserting data into the computer.
  4. The procedure has built-in safeguards to ensure accuracy and identify errors.
  5. The business keeps the computer in a good state of repair.
  6. The witness had the computer readout certain data.
  7. The witness used the proper procedures to obtain the readout.
  8. The computer was in working order at the time the witness obtained the readout.
  9. The witness recognizes the exhibit as the readout.
  10. The witness explains how he or she recognizes the readout.
  11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.
- Id.* at 558 (internal citations omitted).

Further, an expert can authenticate computer simulations by testifying that (1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate

(and disclosed to the opposing party, so that they may challenge them); and (3) the program is generally accepted by the appropriate community of scientists. *Id.* at 560.

A computer expert is also able to authenticate digitally enhanced images and establish the reliability of “Photoshopped” pictures. Expert authentication of digitally enhanced images is as follows:

1. The witness is an expert in digital photography;
  2. The witness testifies as to image enhancement technology, including the creation of the digital image consisting of pixels and the process by which the computer manipulates them;
  3. The witness testifies that the processes used are valid;
  4. The witness testifies that there has been “adequate research into the specific application of image enhancement technology involved in the case”;
  5. The witness testifies that the software used was developed from the research;
  6. The witness received a film photograph;
  7. The witness digitized the film photograph using the proper procedure, then used the proper procedure to enhance the film photograph in the computer;
  8. The witness can identify the trial exhibit as the product of the enhancement process he or she performed.
- Id.* at 562 (internal citation omitted).

To prepare properly to address authentication issues associated with electronically generated or stored evidence, a lawyer must identify each category of electronic evidence to be introduced, determine what courts have required to authenticate this type of evidence, and investigate the type of expertise needed to meet the requirements of authentication. *See id.* While the remainder of Magistrate Judge Grimm’s exposition is beyond our scope, counsel involved in a case where ESI is of significant importance should familiarize themselves with the entire opinion, and be prepared to use it as a sword, a shield, or even a teaching tool to usefully submit early in an ESI-dominated case if the particular court hearing the case is not on the forefront of handling ESI-related litigation.

## CONCLUSION

Expert witnesses can be used to introduce myriad different types of evidence on innumerable issues. Particularly in state courts where the standards of admissibility are lower, creative, well-prepared teams of counsel and expert witnesses can work together to tell the plaintiff’s story to the jury in a compelling, articulate way. Made-for-TV forensics shows and battles of the experts in highly publicized trials have likely increased the potential jurors’ expectations for great expert testimony.

Additionally, changes in technology are quickly diminishing the ability of lay witnesses to properly authenticate vital evidence. The admissibility of photographs and documents will more frequently require expert testimony as these traditional types of evidence are created, stored, produced, filed with the court, and published to the jury in technological ways. The developing battle with defendants regarding the discovery of ESI and metadata in medical malpractice and other major cases will have little merit unless that information can also be admitted into evidence and published to the jury in a meaningful way. Thus, the trial lawyers privileged to represent plaintiffs in state and federal courts across the Commonwealth must be themselves experts on the law of experts. With proper preparation, expert witnesses remain a key tool of trial lawyers in their quest for justice.



# What Every Attorney Should Know About Whistleblower & Qui Tam Cases

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Making the False Claims Act Case Work  
for Your Client

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SECTION

4



Litigation under the False Claims Act (“FCA”) is a growth area for lawyers; more cases are being filed and the stakes are high for everyone. FCA issues are a classic example of an area in which lawyers overlook significant issues. Also, once a FCA case is filed, the risk and reward analysis for the parties is completely different from other types of business litigation.

On the plaintiff’s (or relator’s) side, a lawyer may not recognize a good case when a possible relator walks in the door. If a claim has merit, and it is recognized, the relator has a good chance of collecting a substantial award and to accomplish some good in the process.

At the early stages, relator’s counsel works with the investigation and evaluation of the case and makes sure that the relator complies with the unique procedural requirements for filing an FCA action. Once an action is filed, relator’s counsel works with the Government to persuade the Government that the case has merit and that the Government should intervene.

On the defense side, a business lawyer may not recognize that an issue raised by a client may reflect the critical need to advise the client to prevent, manage, or stop business activity that risks violating the FCA. As discussed below, some business activities in the Government contracting world have developed over time and the contractor may not even recognize that it is acting improperly. This risk is particularly important in connection with the expanding issue of “implied certification” liability, discussed below.

Business counsel can help their clients recognize, avoid and manage the risk of FCA liability resulting from questionable business practices. If an FCA action is brought against business clients, counsel must recognize that the risk analysis is critically different from other contract disputes. Understanding this reality early in the process will have a significant effect on the client’s defense strategy.

## A. FCA Litigation Hot Spots

1. **Health Care Services.** The health care services industry involves the majority of FCA cases because of the sheer number and diversity of fraud schemes, the Government’s status as a huge participant in the market, the huge 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 applicable safeguards. Some of these safeguards include certification (express or implied) by the contractor that it is in compliance with regulatory requirements.
  - a. 80% of FCA cases involve health care.
  - b. Stark violations – The Stark Act is a federal statute that prohibits physicians from receiving kickbacks for the referral of lab tests. *See*, for example: *United States ex. rel. Drakeford v. Toumey*, C.A. No. 13-2219 (4th Cir., July 2, 2015) (Fourth Circuit affirmed \$237 million jury verdict under FCA against a hospital based on Stark Law violations).
  - c. Anti-Kickback Statute violations – The Anti-Kickback statute is a federal statute enacted to prohibit financial kickbacks for physicians referrals.
  - d. Up-coding and Medicare/Medicaid fraud – physicians and hospitals charging for more expensive procedures that do not accurately describe treatment.

- e. Off-label marketing in pharmaceutical cases – pharmaceutical companies marketing drugs for “off label” uses in violation of Medicare/Medicaid regulations.

## 2. Mortgage Fraud

- a. FHA cases – Federal Housing Administration-backed mortgage transaction documents containing false information.

## 3. Procurement/Grant Fraud

- a. Although procurement and grant fraud is a smaller percentage of FCA cases than health care or financial fraud, it remains a significant area. (approximately 20%). Procurement can include large purchase agreements, construction projects, defense spending, and all other forms of federal purchasing.
- b. Buy American Act/Trade Agreements Act (GSA) – federal statutes enacted to require the federal government to purchase from American companies (or Trade Agreement Act compliant countries).
  - i. *U.S. ex rel. Scutellaro v, Capitol Supply* (D.D.C; C.A. No. 10-cv-01094).
    - a) GSA vendor knowingly listed products on GSA Advantage Website and sold them to Government customers despite improper country of origin.

## B. What is the False Claims Act? – A Brief Refresher.

### 1. History

- a. Originally passed in 1863 to deal with merchants selling worthless or defective goods to the Union Army. 12 Stat. 695.
- b. Expanded and strengthened:
  - i. In 1986 (False Claims Act Amendments, Pub.L. 99-562,100 Stat 3153, enacted October 27,1986),
  - ii. In 2009 (Fraud Enforcement and Recovery Act of 2009, Pub. L. No, 111-21, § 4,123 Stat. 1617,1621 (2009);
  - iii. 3 Again in 2010 (Patient Protection and Affordable Care Act (PPACA)).

- 2. **The Relator’s Share.** 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.

3. **Statute: 31 U.S.C. §§3729 – 3733. Overview**

The trigger for liability under the FCA is a “false claim.” A “claim” is any request for payment a contractor makes to the Government. A claim is false if it includes a false statement or if the contractor uses a false record in making the claim. The false statement or false record must be “material” to the claim. Liability can also be triggered if a contractor conceals an obligation it has to the Government.

a. (31 U.S.C. §3729(a)) Liability extends to anyone who:

- i. Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- ii. Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- iii. Conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
- iv. 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;
- v. 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;
- vi. 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
- vii. 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.

b. **Damages (31 U.S.C. §3729 (b)).**

Damages under the FCA are strong medicine. The defendant can be liable for treble damages – three times the amount of “single damages” incurred by the Government. A defendant can be liable for substantial penalties for each violation. Finally, a defendant can be liable for the relator’s attorney’s fees and other litigation expenses.

- i. Civil Penalties of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act.

(This adjustment has recently occurred; as of 8/2/2016 the penalties are doubled to between \$10,781.40 and maximum of \$21,562.80.)

- ii. Treble Damages of “the amount of damages which the Government sustains because of the act of that person.”
- iii. Attorneys’ Fees and Costs.

**c. Unique Procedure (31 U.S.C. § 3730).**

FCA cases follow a unique procedural process whereby the relator initiates the case by submitting a disclosure statement to the Government, filing the complaint under seal, and the Government retains authority over the case.

- i. Relators must initiate the case with a disclosure statement served upon the Government.
- ii. The relator then files the complaint under seal and serves the complaint only on the Government initially.
- iii. Government has a 60 day period to evaluate the case to decide upon intervention. 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. The VFATA is similar to the federal FCA in most respects The General Assembly amended the VFATA in 2011 to match the changes in the 2009 FERA amendments.
- ii. Key differences from Federal FCA:
  - a) Period of initial seal is 120 days, rather than 60 days. *See* Va. Code Ann. § 8.01-216.5(B).
  - b) The VFATA allows for dismissal of an action if the relator initiated or participated in the fraud. The FCA provides for a reduction in the relator share. *See* Va. Code Ann. § 8.01-216.7(C)
  - c) The VFATA allows former Commonwealth employees to file claims based on knowledge obtained during employment, so long as they exhausted internal reporting procedures.
  - d) 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)(

Code § 8.01–216.8, the VFATA's anti-retaliation provision, creates a cause of action for wrongful termination resulting from the reporting of potential false claims against the Commonwealth and its subsidiaries).

### C. How do These Cases Work?

#### 1. How do these cases start?

##### a. On the Defense Side:

- i. Client will say, "I just got a CID." (i.e. a "Civil Investigative Demand" – essentially a prelitigation subpoena issued by the Government).
  - a) Counsel will have to manage the client's response to the CID.
- ii. Conduct a thorough, focused and privileged (hopefully) internal investigation with the assistance of counsel.
- iii. Avoid creating more problems through retaliation.
  - a) Do not under any circumstances allow your client to fire the employee who complained about the activity.
- iv. Identify any problematic activity (and false claims) and make sure it stops.
- v. A 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.
- vi. 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 continuous 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?

**b. On the Relator Side:**

- i. 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).
- ii. The attorney and potential relator should conduct an investigation.
  - a) Ensure the investigation does not illegally or improperly “steal” documents.
- iii. Draft a Disclosure Statement (and comply with statutory notice outlined in 31 U.S.C. § 3730).
  - a) Disclosure statement should include all information and documents in relator’s possession.
- iv. Draft Complaint – COMPLY WITH THE FILING UNDER SEAL REQUIREMENT (31 U.S.C. § 3730).
  - a) Complaint must comply with Rule 9(b) requirements for particularity.
- v. 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 counsel’s job is to demonstrate to the Government that it should pursue the case.
- vi. If the case is strong, develop a strategy for helping the Government.
- vii. Have a plan if the Government declines to intervene.
- viii. Have a plan for Fed. R. Civ. P. 12(b)(6) and 56.**
  - a) FCA claims must be pled with Rule 9(b) 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. We understand that the court excluded the relator's expert and the relator was left with trying to prove the case using primarily the defendant's employees as witnesses.
- iv. The relator ultimately lost at trial, underscoring the necessity of having a sound litigation plan (particularly sufficient witnesses/evidence).

**D. FCA cases are different than other business litigation cases.**

1. **Risk factors.** The risk factors are completely different with the FCA: for both relators and defendants.
2. **Frequent violations.** Government contractors tend to violate the FCA frequently. The frequency of violations is related to the factors discussed below.
3. **Poor contract administration.** The Government agency sometimes does a poor job in administering and monitoring contract performance. The Government relies on the contractor to perform honestly. If the contractor acts in violation of the FCA, the Government agency does not detect violation and it continues.
  - a. The "OPM" Effect – "Other People's Money."
4. **Large stakes.** There is often a large amount of money involved because of high number of transactions over a long period of time.
5. **Large Government programs.** The fact patterns often involve large Government programs and projects.
6. **The culture of Government contractors.** The Government contracting world often involves a limited number of players.
  - a. A closed, insular group.
  - b. The inability of the Government agency to regulate and police its contractors.

7. **More culture.** Government contractors seem to develop a sense of entitlement over time. The contractors get used to how the business is done and do not even see that their practices are objectionable.
8. **Government investigation.** The Government has broad powers to investigate potential FCA violations.
  - a. CID/document requests
  - b. Depositions
  - c. Agency investigations
  - d. As a result, Government will often have an information advantage over the contractor.
9. **The Relator Effect.** Any third party has standing to be a relator. There is no privity of contract or individualized standing required.
  - a. There is little risk to a relator in initiating an FCA disclosure in good faith.
  - b. There is a potential substantial benefit to relator (the relator's share).
  - c. The FCA protects whistleblowers from retaliation.
10. **Limited Defense Strategies.** There are limited defense strategies available.
  - a. The contractor often has a continuing contractual relationship with the Government. It is difficult for contractor to aggressively litigate with the Government while doing business with the government.
  - b. If the contractor resists the Government's investigation, it may just encourage to government to be more aggressive.
  - c. The Government may decide to pursue individual managers as well as the corporate entity.
  - d. During seal period, there is limited activity visible to the defendant.
  - e. The Government is a formidable adversary that has many advantages in FCA litigation.
  - f. FCA cases are very expensive to defend.
  - g. FCA case law favors the Government.
    - i. Falsity: Law recently expanded in Escobar decision to allow for "implied certification" as an additional theory of liability.

- ii. **Scienter:** Fourth Circuit recognizes imputed liability to corporations based upon a single employee's knowledge.

#### **11. Punitive Remedies.**

- a. Treble damages,
- b. Significant penalties for each violation. (Now \$10-20K)
- c. Attorney fees and costs awarded to the relator.

#### **12. Potential for Individual Liability**

Counsel must also consider the possibility that the Government will assert a claim for FCA liability not just against the entity, but also against individual managers involved in the business activity.

#### **E. How to make the FCA work for your clients.**

##### **1. Recognize an FCA case when it walks in the door:**

- a. Casual comment – “Something does not seem right.”
- b. Employee retaliated against by employer for uncovering wrongdoing.
- c. Disgruntled employee.
- d. Friends and family who are aware of fraud.
- e. Competitors/bidders – business competitors may serve as relators.
- f. Partners in the same business.

##### **2. Know the Fact Patterns:**

- a. Upcoding – overcharging for Medicare/Medicaid procedures.
- b. Services never provided.
- c. No testing.
- d. Failure of delivered goods to meet contract requirements.
- e. Buy-American Act/Trade Agreements Act.
- f. Large buying programs.
- g. Duplication in large contracts.

h. Consultants to “improve profits.”

i. Grants being misused/misspent.

**3. Once you think you may have something:**

a. Check statutes and cases

i. Administrative regulations may be the basis for false claims, such as Medicare/Medicaid regulations.

b. Factual Investigation

i. Analyze the four FCA elements:

a) Falsity

b) Scierter

c) Materiality

d) Damages

e) Plus: Is there a claim?

c. Legal Analysis

i. Is the defendant a proper defendant? (Cannot generally be an arm of a state government).

ii. Were the allegations of fraud “publicly disclosed?”

iii. Statute of limitations problems? (6 years is SOL).

iv. Are the false statements material to Government funding?

**F. Key Takeaways:**

1. These cases are everywhere.

2. The Western District of Virginia (and Fourth Circuit generally) is a favorable forum to litigate these cases.

3. This is a complex area that requires careful planning and research.

# The Supreme Word

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## Review of Supreme Court Decisions and Related Issues

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SECTION

5



## I. HEADLINES – “READ ALL ABOUT IT”

A. Supreme Court of Virginia declares that Governor McAuliffe’s Executive Order restoring voting rights to approximately 206,000 Virginians who had been convicted of a felony but who had completed their sentences of incarceration violates the Constitution of Virginia. *Howell v. McAuliffe*, 2016 Va. Lexis 107 (2016).

B. Supreme Court of the United States vacates Governor McDonnell’s convictions and remands for further proceedings. *McDonnell v. United States*, 2016 U.S. Lexis 4062 (2016).

## II. EDITORIAL – TRENDS AND CHANGES

These cases, and others, made the headlines during this past year. They contain important legal analyses and establish principles of law that will be applicable in other cases. They also provide a platform from which to cogitate on some trends and changes in both courts.

### A. Supreme Court of Virginia

1. Importance of Oral Argument – The Supreme Court of Virginia heard oral argument in *Howell* on July 19, 2016. Three days later, on July 22, 2016, the Court released a 32-page majority opinion authored by Chief Justice Lemons. Justice Mims authored a lengthy dissent, as did Justice Powell, which Justice Goodwyn joined. The opinion totaled 63 pages. As some commentators observed, the short time frame in which the Court released the opinion coupled with the length of the opinion suggest that the Court discussed and decided the case before it heard oral argument. The same conclusion can be drawn from the short time frame between oral argument in *Commonwealth ex rel. Bowyer v. Sweet Briar Inst.*, 2015 Va. Unpub. Lexis 22 (2015) and release of that opinion.

While nothing precludes the Court from following that process, it brings into question the importance of oral argument. Appellate judges have always expressed differing views about how often oral argument changes their view of a case and to what extent it effects their ultimate decision. The lesson for appellate attorneys is that a well-written and persuasive brief continues to be essential to the success of an appeal, and may have added importance for cases decided on an expedited basis.

2. Release Date of Opinions – The Supreme Court of Virginia had an impressive tradition of releasing opinions on the last day of each Court Week. The tradition involved a ceremonial “handing down” of opinions. Each Justice (in order of seniority) read the names of the opinions that he/she had authored, announced the decisions, and then physically handed the opinions down to the Clerk of the Court. With few exceptions, the opinions released on that day were for the cases in which the Court had heard oral argument during the previous Court Week. For lawyers and litigants, the practice meant that they could reasonably expect to know the outcome of an appeal in about seven weeks (the usual time between Court Weeks except during the summer months).

This past year, the Court changed its traditional practice. It no longer “hands down” opinions on the last day of Court Week. Instead, the Clerk of the Court releases any opinion that is ready each Thursday. In some cases – usually the less complicated ones – the lawyers and litigants will learn the outcome sooner than under the prior procedure. But,

looking at the release dates of many opinions in relation to the oral argument dates of the cases reveals that lawyers and litigants are waiting longer for decisions in some instances.

3. Dissents – In the early days of the Supreme Court of Virginia, the justices never rendered written opinions or gave reasons for their decisions. Edmund Pendleton, the “President” of the Court (now titled the Chief Justice) believed that the policy of no written opinions preserved a semblance of unity for the Court and provided more credence to the Court’s decisions.

Whether his view was valid can be debated. Regardless, the current prevalence of dissents provides insights about the members of the Court.

The author of a majority opinion is writing for at least three other Justices. Thus, the opinion may not reflect the sole views of the author. There are often concessions in wording and rationale in order to maintain a majority for the opinion. In contrast, a dissent reflects the author’s particular views. While the author of a dissent is eager to have other justices join the dissent, it is not necessary. Thus, as appellate attorneys, we may be able to glean more about a particular justice’s judicial philosophy and viewpoints by studying his/her dissents.

Further, in a case decided by a four-to-three vote, a persuasive dissent may prove helpful in seeking a rehearing in the case. A dissent may also provide a new legal theory that can be used successfully in a future case. The views expressed in a dissent sometimes become the rationale of a subsequent majority opinion.

Finally, a large number of dissents by the same justices may reflect divisions in the Court on particular issues. As appellate attorneys, we can use that knowledge to structure arguments that may persuade particular justices.

## B. Supreme Court of the United States

1. Unanimous Decisions – The *McDonnell* decision is notable because the Court, which is often viewed as closely divided between conservative and liberal ideologies, reached an unanimous decision. For a Court that is sometimes known for its many concurrences and dissents, this term ended with a record number of unanimous decisions, about two-thirds of the cases fully decided. But, many of those cases did not raise ideologically charged questions. Some commentators suggest that the record number of unanimous decisions resulted from Chief Justice Robert’s attempt to have cases decided on the narrowest possible ground.

It will be interesting to watch whether the outcome of the *McDonnell* case affects Virginia’s newly enacted statutes placing caps on various gifts to elected officials.

2. Four-to-Four Split Decisions – Since the death of Justice Scalia, the Court has decided 54 cases, but only four of those cases were decided on a four-to-four vote, meaning the lower court judgment was affirmed by an evenly divided Court. Some of those cases, however, were noteworthy. *See, e.g., United States v. Texas*, No. 15-674 (U.S. June 23, 2016) (challenging President Obama’s immigration plan). Decisions by an eight-person Court are not unusual. Due primarily to recusals or illness, about 18% of the cases heard since 1946

were decided by eight Justices. Remarkably, only about 7% of those cases ended in a tie vote. Unfortunately, the Supreme Court of the United States does not have “Senior Justices” like we have in Virginia, who can sit when a vacancy exists, or when a justice recuses himself/herself or is ill.

3. Lack of Diversity – The current members of the Supreme Court of the United States all graduated from an Ivy League law school. And, the law clerks they hire graduated from the same law schools. In addition to the lack of educational diversity, no current justice has ever held an elected office. A December 2014 Reuters report, available at [www.reuters.com/investigates/special-report/scotus](http://www.reuters.com/investigates/special-report/scotus), also demonstrated that a small group of elite lawyers have a disproportionate chance of getting a case before the Court. Thus, the Reuters Report described the Court as an “Echo Chamber.”

In some respects, there is a lack of diversity on the Supreme Court of Virginia. Although in recent years the Court has had gender diversity and some racial diversity, only one of the current members has a professional background that does not include service on a state court. In other words, six of the seven justices came to the Supreme Court of Virginia through the ranks of the state judicial system.

An appellate bench, however, benefits from justices who have diverse legal and professional backgrounds. Diversity brings viewpoints to the conference table that benefit the development of the law.

### III. NEWS – THE CASES

Our goal today is not to discuss the “headline” cases decided by the Supreme Court of Virginia and the Supreme Court of the United States or to editorialize about the courts. Instead, we will discuss cases decided during the past year that are important to the practice of law generally. The cases probably were not in the headlines of many newspapers, if at all, but they resolved important legal principles and, in some instances, established new law.

#### 1. **The Importance of Pleading the Relief Sought**

##### ***Devine v. Buki, 289 Va. 162 (2015)***

This was a fraud case seeking rescission of a contract to sell real estate. An evidentiary hearing was held before a commissioner in chancery, who found that the purchasers of the property had been fraudulently induced into entering into the contract. Based upon the commissioner’s report, the trial court awarded rescission, restitution, attorney’s fees and prejudgment interest.

The Supreme Court reversed the trial court’s award of prejudgment interest. The award of prejudgment interest is part of the actual damages sought to be recovered and, like other damages, must be requested in a pleading before it can be awarded by a trial court. Because the plaintiffs’ complaint did not request prejudgment interest, the trial court erred in awarding it.

##### ***Alexandria Redevelopment & Housing Authority v. Walker, 772 S.E.2d 297 (2015)***

Walker was employed by the ARHA for several years before being discharged for gross violations of ARHA’s absenteeism and tardiness policies. Walker filed a grievance. The grievance process progressed to the point where arbitration was required upon the

employee's request. Walker requested arbitration, but then failed to communicate with ARHA about the process and steps for the arbitration within the time frame established by ARHA's grievance policy. When Walker failed to communicate and missed the 30-day deadline for selecting the arbitrators, ARHA treated her request for arbitration as withdrawn.

One year later, Walker sued ARHA in circuit court challenging ARHA's decision that her request for arbitration had been withdrawn. Walker sought money damages and reinstatement. Her complaint did not seek to compel the arbitration that she claimed was improperly short-circuited.

On ARHA's motion for summary judgment, the trial court denied Walker's claim for money damages and reinstatement. However, it ordered ARHA to arbitrate Walker's grievance, finding that the parties had a miscommunication regarding the selection of the arbitrator selection process, rather than a noncompliance issue. The circuit court entered a final order terminating the court proceeding. ARHA appealed.

The Supreme Court held that the trial court erred in ordering ARHA to arbitrate Walker's grievance. The trial court could not set aside Walker's compliance violation; by statute, Walker failed to comply with the 30-day deadline in the grievance procedure and also failed to timely appeal the determination that she was not in compliance. Code §15.2-1507(A)(7)(b).

Further, Walker did not request an order of arbitration in her complaint, and the Court noted that "this alone would ordinarily be enough to put in question the circuit court's arbitration order." The Supreme Court has long held that "pleadings are as essential as proof, and no relief should be granted that does not substantially accord with the case as made in the pleading." Therefore, "no court can base its decree upon facts not alleged, nor render its judgment upon a right, however meritorious, which has not been pleaded and claimed." However, because ARHA only challenged the trial court's ruling on the 30-day statutory deadline, the Court had to reach the merits of the issue presented in the appeal.

## 2. **Non-suits**

### ***Anheuser-Busch Companies, Inc. v. Cantrell*, 770 S.E.2d 499 (2015) (published order)**

This case involved mesothelioma litigation against multiple defendants. Defendants filed demurrers to the Plaintiff's complaint. The court held a hearing on the demurrers, and informed the parties that it would take the demurrers under advisement. Several weeks later, the court informed the parties that its decision on the demurrers would be forthcoming. Two days later, the Plaintiff moved to nonsuit the case under Code § 8.01-380. The defendants opposed the motion, arguing that the case had been "submitted to the court for decision" within the meaning of Code § 8.01-380(A). The court granted the motion for a nonsuit, and the defendants appealed.

The Supreme Court held that the trial court erred in granting the motion for a nonsuit after the parties had completed their briefing and argument on the demurrers. Under Code § 8.01-380(A), "[a] party shall not be allowed to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding, unless he does so . . . before the action has been submitted to the court for decision." Under the Supreme Court's prior case law, an action is

submitted to the court for decision when the case “is in the hands of the trial judge for final disposition, either on a dispositive motion or upon the merits.”

A demurrer is a dispositive motion. As neither the parties nor the court anticipated any further proceedings on the demurrer, the matter was therefore committed to the court for its ruling when the Plaintiff moved to nonsuit the case. The nonsuit was improperly granted.

### **3. Products Liability: Causation and Evidence**

#### ***Dorman v. State Indus., 2016 Va. LEXIS 77 (2016)***

Plaintiffs brought a products liability action against the manufacturer of an atmospheric-vented gas fired hot water heater. Plaintiffs are college students living in an apartment in Blacksburg. They were exposed to toxic levels of carbon monoxide emitted from the hot water heater.

Plaintiffs’ expert testified that the heater was unreasonably dangerous because of a design defect in the draft hood and its susceptibility to slight changes of pressure within the apartment, which prevented it from venting properly. The defense was permitted to cross-examine plaintiffs’ expert on his disclosed opinions that the property owners negligently selected and installed the hot water heater. By contrast, Defendant’s expert testified that there was not enough air for the heater to vent properly because the property owners installed new carpet which reduced the airflow in the apartment; the hood of the heater did not make it unreasonably dangerous; the property owners negligently installed an atmospheric hot water heater when the building design called for an electric one and failed to comply with the applicable codes; and the property owners failed properly maintain and inspect the heater.

Over Plaintiffs’ objection, the trial court granted a superseding cause instruction. The jury returned a defense verdict, and Plaintiffs appealed. The Supreme Court affirmed.

The Supreme Court held that the trial court properly granted the superseding cause instruction. It instructed the jury that: “A superseding cause is an independent event, not reasonably foreseeable, that completely breaks the connection between the defendant’s negligent act and the plaintiff’s injury. A superseding cause breaks the chain of events so that the defendant’s original negligent act is not a proximate cause of the plaintiffs’ injury in the slightest degree.” This was a correct statement of the law. A defendant may be negligent and still not be liable for the resulting injury if there is a sufficient intervening act.

The Court recognized the importance of evidence as to other potential causes in products liability cases. In light of the defense expert’s testimony, there was more than a scintilla of evidence from which the jury could find that Defendant’s negligence, if it existed, was superseded by another cause.

The Court also held that the trial court did not err in admitting evidence of the number of atmospheric heaters sold in the United States (60 million). That evidence was not linked to the safety record of the heaters or evidence of prior injuries caused by the heaters. Further, it was relevant to the issues whether the heater breached an implied warranty of merchantability and whether it was unreasonably dangerous. Specifically, the number of heaters sold was directly related to the issue whether the atmospheric heater would “pass without objection in the

trade,” as to whether a “significant segment of the buying public” would object to buying the product.

#### 4. Unlawful Detainer Actions

##### ***Parrish v. Federal National Mortgage Association, 2016 Va. LEXIS 76 (2016)***

The homeowners owned real property they conveyed by deed of trust to a trustee. The substitute trustee conveyed the parcel by trustee’s deed to Fannie Mae to secure the note. Fannie Mae sent the homeowners a notice to vacate and filed an unlawful detainer action in general district court. The homeowners claimed that the foreclosure was invalid because they timely completed the loss mitigation application. They also alleged that Fannie Mae breached the deed of trust. The general district court ruled in favor of Fannie Mae, and awarded it possession of the property.

The homeowners appealed to the circuit court. Fannie Mae asserted that the circuit court should exclude any defense contesting the validity of the foreclosure from which the trustee’s deed arose because the general district court lacked subject matter jurisdiction to try title in a proceeding on an unlawful detainer, and the circuit court similarly lacked jurisdiction to determine title because it derived its appellate jurisdiction from the general district court. The trial court agreed with Fannie Mae and awarded it possession of the property. The homeowners appealed.

The Supreme Court held that a general district court loses subject matter jurisdiction over an unlawful detainer case when the defendant homeowner raises a *bona fide* question of title. General district courts have subject matter jurisdiction to try actions for unlawful detainer, but do not have subject matter jurisdiction to try title to real property. Further, the circuit court also lacked subject matter jurisdiction to try the issues of title to real property. When exercising its appellate jurisdiction in a *de novo* appeal, the circuit court’s subject matter jurisdiction is derivative of the court not of record from which that appeal is taken.

Whether a plaintiff in an unlawful detainer action has a right of possession will not always present a question of title, and will never arise where the plaintiff’s right is based on prior actual possession. However, a plaintiff who claims a right of possession acquired after the defendant’s original, lawful entry, must show the validity of that right. When a plaintiff’s after-acquired right of possession is based on a claim of title, as it is in a foreclosure context, the plaintiff may be required to establish the validity of that title.

A court will lose jurisdiction to try the unlawful detainer, however, only when there is a legitimate question of title raised by the homeowner. Because a court always have jurisdiction to determine whether it has subject matter jurisdiction, it has the authority to explore the allegations to determine whether, if proven, they are sufficient to state a *bona fide* claim that the foreclosure sale and trustee’s deed could be set aside in equity (i.e., the claims would survive a demurrer). Thus, if the general district court determines that the allegations are insufficient, it retains jurisdiction over the action. If, however, the court determines that the allegations are sufficient, it lacks subject matter jurisdiction over the case and must dismiss the case without prejudice.

Here, the homeowner's claims are sufficient to raise a *bona fide* issue of title. Therefore, neither the general district court nor the circuit court had subject matter jurisdiction over the unlawful detainer action. Consequently, the judgment is vacated and the parties are restored to their status before the action was filed.

## 5. **Reinstatement of Cases on the Court's Docket**

### ***JSR Mechanical, Inc. v. Aireco Supply Co., 291 Va. 377 (2016)***

JSR Mechanical filed an action in circuit court against Aireco Supply alleging breach of contract and negligence. Aireco filed an answer, and then there were no further proceedings for four years. Relying on Virginia Code § 8.01-335(B), the circuit court then entered a final order discontinuing the case and striking it from the docket. Within one year of the entry of the final order, JSR moved to reinstate the case. The court denied the motion, finding that it lacked good cause. JSR appealed.

The Supreme Court reversed. Virginia Code § 8.01-335(B) provides:

Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case. *Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.*

The Court found the italicized portion of the statute to be ambiguous because it could be understood in more than one way. It found that the term "good cause" is used 46 times in Title 8.01 of the Code, demonstrating that the legislature knew how to use the term, but chose not to use it in this statute. Further, a prior version of section 8.01-335 had included a requirement of cause for reinstatement, but that requirement had been stricken in later amendments to the statute.

Thus, the Court held that the statute does not require a showing of good cause for reinstatement and does not permit the circuit court to exercise its discretion in considering a timely motion for reinstatement where the parties have been given statutory notice.

## 6. **Guardianships**

### ***Lopez-Rosario v. Habib, 785 S.E.2d 214 (2016)***

Lopez-Rosario is an incapacitated adult who functions as a six-year-old. Her parents were appointed her co-guardians. The order appointing the parents as legal guardians directed the guardians to be responsible for their daughter's personal affairs. It gave the guardians the right to make personal decisions for their daughter, including decisions relating to her health, safety, treatment and care, and provided that they shall have authority to make decisions regarding the support, care, health, safety, habilitation, therapeutic treatment and residence of Lopez-Rosario.

Lopez-Rosario had her gallbladder removed. Alleging that her surgeon committed an error during the surgery, Lopez-Rosario brought a medical malpractice action in her own name against surgeon Dr. Habib and Dr. Habib's employer. The defendants filed a plea in bar asserting that the action should have been brought in the name of her guardians. The trial court sustained the plea and dismissed the action. Lopez-Rosario appealed.

The Supreme Court affirmed. If a fiduciary is appointed for a ward, the ward loses the right to file an action in her own name. Va. Code § 64.2-2025 ("Subject to any conditions or limitations set forth in the order appointing the fiduciary, the fiduciary shall prosecute or defend all actions or suits to which the incapacitated person is a party at the time of qualification of the fiduciary . . .") Given the language of the order appointing them guardians, Lopez-Rosario's parents were her fiduciaries. That order gave them full authority as guardians, and did not limit the guardians' powers to making just medical decisions for her. Therefore, the suit had to be brought in the name of the guardians.

## **7. Virginia Tort Claims Act**

### ***Phelan v. Commonwealth, 781 S.E.2d 567 (2016)***

Phelan was an inmate incarcerated at a correctional facility. After slipping on a zucchini while working at the Southampton Complex, she gave notice to the Commonwealth of her claim. In her notice, she identified herself as an inmate of the Deerfield Correctional Center, and identified the location of the injury and the persons involved. She later filed a complaint against the Commonwealth of Virginia and two individuals. The trial court dismissed the claims against the individuals because they were not timely filed. It then dismissed the claim against the Commonwealth on the ground that Phelan did not fulfill the statutory notice requirements of the Virginia Tort Claims Act because she failed to expressly identify the agency involved in the incident in her notice of claim.

On appeal, the Supreme Court affirmed. Virginia Code § 8.01-195.6(A) states: "Every claim cognizable against the Commonwealth . . . shall be forever barred unless the claimant or his agent, attorney or representative has filed a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred and the agency or agencies alleged to be liable, within one year after such cause of action accrued." Here, the Plaintiff failed to expressly identify the agency alleged to be liable. Therefore, her notice of claim was insufficient and the claim was properly dismissed.

## **8. Third-party Beneficiaries**

### ***Thorsen v. Richmond SPCA, 786 S.E.2d 453 (2016)***

The Richmond SPCA sued Attorney Thorsen for malpractice. It claimed that it was a third-party beneficiary of the attorney-client relationship between Thorsen and Alice Dumville.

In 2013, Thorsen prepared Dumville's will. Dumville had instructed Thorsen to draft a will conveying all of her property to her mother if her mother survived her, but if her mother predeceased her, then the Richmond SPCA would receive Dumville's estate. Dumville died in 2008, with her mother having predeceased her. The estate was valued at over \$600,000. However, Thorsen had made a drafting error, such that the SPCA was only entitled to approximately \$70,000 for the tangible personal property in the estate. Within three years

of Dumville's death, the SPCA filed a malpractice action against Thorsen. The trial court held that the SPCA was a third-party beneficiary of the attorney-client relationship entered into between Thorsen and Dumville. Thorsen appealed.

The Supreme Court affirmed. The Court first held that Virginia Code § 55-22 did not apply to an oral contract between an attorney and a testator. That statute addresses when a person not a party make take or sue under an instrument. Although the statute applies to written instruments, it does not abrogate the common law principle that third-party beneficiaries may sue upon oral contracts.

The Court further held that the SPCA had standing to sue as a third-party beneficiary. In order to proceed on the third-party beneficiary contract theory, the party claiming the benefit must show that the parties to a contract clearly and definitely intended to confer a benefit upon him; incidental beneficiaries do not have standing. Whether a residuary beneficiary is a third-party beneficiary is a fact-intensive question. Dumville clearly informed Thorsen of her intention to designate the SPCA as her sole beneficiary in the event that her mother predeceased her. Thus, the facts established that the SPCA became an intended beneficiary of the attorney-client contract.

Third, the Court held that the statute of limitations did not begin to run until Dumville died because Dumville could have changed her will during her lifetime and the SPCA did not suffer any harm until Dumville died. As the action was brought within the three year statute of limitations for oral contracts, it was timely filed.

## 9. **Fourth Amendment**

### ***Birchfield v. North Dakota*, 136 S. Ct. 614, 2015 U.S. Lexis 7877 (2015)**

The issue decided in this case was "whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream." The Supreme Court of the United States concluded "that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving" and thus a warrant is not needed in that particular situation.

The case involved three defendants, two of whom were charged under North Dakota law. The third defendant was charged under Minnesota law. Like most states, North Dakota and Minnesota have implied consent laws. In both states, refusal to take a test to determine blood alcohol content (BAC) exposes a motorist arrested for drunk driving to criminal penalties.

The defendant Birchfield was charged under North Dakota law for driving while impaired. The arresting officer advised Birchfield that under North Dakota law, he was obliged to undergo BAC testing and that refusal to take the test would expose him to criminal penalties. Birchfield refused to take a blood test and entered a conditional guilty plea to a misdemeanor violation of the refusal statute. The North Dakota Supreme Court affirmed the judgment of conviction.

The defendant Bernard was arrested under Minnesota law for driving while impaired. The arresting officers informed Bernard that it is a crime in Minnesota to refuse to submit to a

legally required BAC test. Bernard refused to take a breath test and was charged with refusal in the first degree because of prior drunk driving convictions. The Minnesota Supreme Court affirmed the judgment of conviction, holding that police did not need a search warrant to require a test of Bernard's breath.

The defendant Beylund was also arrested under North Dakota law for driving while impaired. After being advised of North Dakota's implied consent law making refusal to take a BAC test a crime, Beylund agreed to undergo a blood test. Based on the results of the test, Beylund's driver's license was administratively suspended for two years. The North Dakota Supreme Court affirmed.

The Supreme Court concluded that the Fourth Amendment permits warrantless breath tests incident to arrest for drunk driving. However, because blood tests are more intrusive and because their reasonableness must be judged in light of the available, less intrusive breath test, the Supreme Court concluded "the search incident to arrest doctrine does not justify the warrantless taking of a blood sample" when a motorist is arrested for drunk driving.

The Supreme Court also addressed the argument that a warrantless taking of a blood sample is justified based on a driver's legally implied consent to submit to BAC tests. Although its prior opinions generally approved implied-consent laws that impose civil penalties or evidentiary consequences for refusal to comply, the Supreme Court, however, concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain off committing a criminal offense."

Finding no basis on which to justify the warrantless test of Birchfield's blood, the Supreme Court reversed the North Dakota Supreme Court judgment affirming his conviction. Because Bernard was convicted of refusing a warrantless breath test, which was a permissible search incident to Bernard's arrest, the Supreme Court affirmed the Minnesota Supreme Court judgment affirming his conviction. Finally, because Beylund's consent to undergo a blood test was based on the erroneous officer's advisory that the State could permissibly compel both blood and breath tests, the Supreme Court vacated the North Dakota Supreme Court judgment and remanded for further proceedings to determine the voluntariness of Beylund's consent based on the totality of all the circumstances.

***Utah v. Strieff*, 136 S. Ct. 27, 2015 U.S. Lexis 4685 (2015)**

Sometimes in enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the link between the unconstitutional police conduct and a search revealing evidence "is too attenuated to justify suppression" under the exclusionary rule. The question decided in this case was "whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest." In other words, did the discovery of the pre-existing arrest warrant sufficiently attenuate the connection between the unlawful stop and the evidence seized during the search incident to the arrest to make the evidence admissible?

Based on an anonymous tip reporting drug activity at a particular house in South Salt Lake City, a police officer conducted intermittent surveillance of the house for about a week. He observed frequent visitors who stayed only a few minutes at the house and thus suspected

ongoing drug dealing. The officer observed the defendant Strieff exit the house and walk to a convenience store. The officer stopped Strieff and asked Strieff what he was doing at the house. During the stop, the officer asked Strieff for identification. Strieff provided his Utah identification card, and the officer relayed the information to the police dispatcher. The dispatcher reported that Strieff had an outstanding warrant for a traffic violation. The officer arrested Strieff based on that warrant and searched Strieff incident to the arrest. The officer found a baggie of methamphetamine and drug paraphernalia on Strieff's person. Strieff entered a conditional guilty plea to reduced charges of attempted possession of a controlled substance and possession of drug paraphernalia. The Utah Supreme Court reversed the judgment of conviction, holding that the evidence was inadmissible because only a voluntary act of a defendant's free will is sufficient to break the connection between an illegal search and the discovery of evidence.

The Supreme Court of the United States reversed the Utah Supreme Court's judgment. The attenuation doctrine is one of three recognized exceptions to suppression of evidence considered "fruit of the poisonous tree." Contrary to the Utah Supreme Court, the attenuation doctrine is not limited to circumstances involving an independent act of the defendant like confessing to a crime and consenting to a search. Three factors are relevant to application of the attenuation doctrine: (1) the "temporal proximity' between the unconstitutional conduct and the discovery of evidence;" (2) the "presence of intervening circumstances;" and (3) the "purpose and flagrancy of the official misconduct." Although the temporal proximity between the unlawful stop and the search favored suppression of the evidence, the Supreme Court, nevertheless, concluded that the evidence was admissible "because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant."



# Trying Cases in Federal Court vs. State Court

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Penguins in a Minefield: Surviving & Thriving in  
Plaintiff's Practice in Federal Court

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SECTION

6



In the eighteenth and early nineteenth centuries, European whalers and sealers frequently established operations on the Falkland Islands off the coast of modern-day Argentina. In their quest for whale and seal oil, they also coveted a reliable, easily accessible source of fuel for the fires necessary to convert blubber into oil. Because the Falklands were largely barren of timber, the Europeans turned to an unlikely fuel source—the penguins native to the islands.<sup>1</sup> Penguins, they learned, are apparently easily caught and highly flammable. This practice, combined with unregulated hunting and egg gathering, eventually decimated the local penguin populations.

In 1982, for reasons completely unrelated to our flightless protagonists, Argentina invaded the Falkland Islands in defiance of the United Kingdom’s claim of sovereignty over the territory. The British responded with an amphibious assault, and the resulting “Falklands War” lasted a mere ten weeks before Argentina surrendered.<sup>2</sup> However, the Argentinian military left an unpleasant surprise for the victorious British—approximately 25,000 land mines buried in the pastures and shorelines of the islands. For a variety of economic and political reasons, those minefields went largely undisturbed for decades.



Penguins, it turns out, are not heavy enough to trigger landmines. Thus, the Argentinian military accidentally created one of the best-secured penguin sanctuaries in the world. Left undisturbed, the penguin population in the Falklands has again thrived with an estimated population in excess of 1 million penguins.<sup>3</sup>

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<sup>1</sup> See “The Penguin Population That Thrives on Falklands’ Minefields” available at <http://www.amusingplanet.com/2015/03/the-penguin-population-that-thrives-on.html>.

<sup>2</sup> See Key Facts: Falklands War, available at <http://news.bbc.co.uk/2/shared/spl/hi/guides/457000/457033/html/>.

<sup>3</sup> See <http://www.falklandsconservation.com/wildlife/penguins>.



Like our protagonist penguins, plaintiffs, by their counsel, must learn to navigate hidden dangers to survive and thrive under hostile conditions. Because plaintiffs bear the burden of proof, they are (allegedly) the masters of their complaint, and many plaintiffs’ lawyers endeavor to use a well-pleaded complaint to avoid the perceived or assumed dangers of federal court. Armed with seemingly bottomless litigation budgets and well-run, well-funded, anti-plaintiff public relations campaigns, the defense bar often seeks to force the plaintiff into federal court, where some of the defendants’ favorite traps—forum shopping, Rule 12(b) motions, *Daubert* motions, summary judgment and complex federal and local rules—lurk just below the surface waiting for plaintiffs and their counsel to make some fatal misstep.<sup>4</sup> To continually succeed in a system of ever-encroaching federal jurisdiction,

<sup>5</sup> plaintiffs’ counsel must not run from these dangers, but instead learn to thrive among them, using several unique elements of federal practice against the defendants. Plaintiffs must adapt to thrive in the minefield.<sup>6</sup>

These materials discuss important things that a plaintiff can do to use federal jurisdiction against the defendant. Plaintiffs should aggressively use the federal pre-trial discovery system to keep the case moving towards motions practice and trial. Also, plaintiffs should engage in active motions practice, using Rule 12, *Daubert*, Rule 56 and spoliations motions against the defendant. Whenever possible, plaintiffs should use the unique practical opportunities of federal trials to tip the scales of justice in their favor.

### Pre-Trial Discovery

Whether a case is initially filed in or properly removed to federal court, plaintiffs’ counsel should immediately prepare to use the unique pre-trial discovery in federal court, particularly the required disclosure rules, in preparation for motions practice and trial.

### Initial Disclosures

Federal Rule of Civil Procedure 26(a)(1) governs mandatory initial disclosures as follows:

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

<sup>4</sup> “When you have no basis for an argument, abuse the plaintiff.” *Pro Flacco*, Cicero.

<sup>5</sup> See, e.g. Statement of the U.S. Chamber of Commerce, Sept. 29, 2015, available at [https://www.uschamber.com/sites/default/files/documents/files/final\\_fraudulent\\_joiner\\_testimony\\_9.29.15.pdf](https://www.uschamber.com/sites/default/files/documents/files/final_fraudulent_joiner_testimony_9.29.15.pdf) (showing the defense lobby’s push for dramatically increased federal jurisdiction).

<sup>6</sup> Interestingly, the top recommended Google search starting with the phrase “Why do plaintiff...” is “Why do plaintiffs prefer state court?”

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

*See* Fed. R. Civ. P. 26(a)(1).

Plaintiffs can tactically use the initial disclosures. Plaintiffs can prepare their initial disclosures in advance, knowing that the requirement is coming. Pressing the issue of initial disclosures and promptly complying with the Rule 26 requirements keeps the defendant in reactive mode and demonstrates that the plaintiff will not be intimidated by being in federal court. If the initial disclosures occur promptly, plaintiffs' counsel may also be able to use the initial disclosures to demonstrate the basis for a Rule 12(f) motion discussed more below.

### **Expert Disclosures**

Rule 26 also requires defendants to make more substantial expert disclosures than is required in state court. The rule mandates:

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) 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

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) **Witnesses Who Do Not Provide a Written Report.** Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) **Time to Disclose Expert Testimony.** A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) **Supplementing the Disclosure.** The parties must supplement these disclosures when required under Rule 26(e).

*See* Fed. R. Civ. P. 26(a)(2).

The required expert reports make it easier for plaintiffs' counsel to determine whether a discovery deposition of the expert is necessary. Moreover, if a report is poorly drafted or improperly supported, a *Daubert* motion can be brought against the defense expert before the expert explains his opinions and the grounds thereof in more detail at a deposition. See, e.g., *Ferguson v. Nat'l Freight, Inc.*, Civil Action No. 7:14-CV-00702, 2016 U.S. Dist. LEXIS 37487 (W.D. Va. Mar. 22, 2016) (Judge Conrad limiting defense expert accident reconstructionist testimony based upon content of expert's Rule 26(a)(2) report).

### **Pre-Trial Motions**

Deep-pocketed defendants in federal cases are largely uninhibited in the volume of motions they can file. From first response to post-trial practice, the motions and their lengthy briefs in support come in a steady stream. Knowing that a federal case will require extensive time for research and drafting of pleadings opposing this litany of motions, plaintiff's counsel should also invest the time necessary to take federal motions practice on the offense. Many of the defendants' favorite motions can be used just as effectively against them.

## Rule 12(f)

The Rule 12(b) motions are highlighted in legal education practice seminars and regularly filed in practice. However, Rule 12 also contains a lesser-known, less-used and admittedly less judicially-endorsed motion that belongs more specifically to the plaintiffs. Rule 12(f) provides:

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

The United States Court of Appeals for the Fourth Circuit has stated that “Rule 12(f) motions are generally viewed with disfavor because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic.” *See Waste Mgmt. Holdings v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001)(internal quotations omitted). Yet, the Fourth Circuit agreed that “a defense that might confuse the issues in the case and would not, under the facts alleged, constitute a valid defense to the action can and should be deleted.” *See id.* The United States District Court for the Western District of Virginia further explained that defenses may be stricken from pleadings following a Rule 12(f) motion if the defenses are insufficient as a matter of law, if they potentially serve only to cause delay, if they have no possible relation to the controversy, if they would require unnecessary time and money litigating invalid, spurious issues, or if they *fail to meet the pleading requirements of Rules 8 and 9*. *See Palmer v. Oakland Farms, Inc.*, Civil Action No. 5:10cv00029, 2010 U.S. Dist. LEXIS 63265, at \*4-5 (W.D. Va. June 24, 2010) (emphasis added) (internal citations omitted) (Magistrate Judge Welsh striking eleven defenses from defendant’s Answer). Notably, at least in *Palmer*, the Court held that the same heightened pleading standard so often used against the plaintiff’s Complaint should also apply to affirmative defenses. *See id.* at \*15.

Thus, any affirmative defense asserted by the defendant must contain “[a]t a minimum, [...] some statement of the ultimate facts underlying the defense [...] [I]ts non-conclusory factual content and the reasonable inferences from that content[] must plausibly suggest a cognizable defense available to the defendant.” *See id.* at 17. Note, however, that there is ongoing disagreement among the federal courts as to whether the heightened pleading standard from *Bell Atl. v. Twombly*, 550 U.S. 544 (2007), and in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), apply to the pleading of affirmative defenses. *See Info. Planning & Mgmt. Serv. v. Dollar Gen. Corp.*, No. 2:15cv206, 2016 U.S. Dist. LEXIS 883, at \*10-12 (E.D. Va. Jan. 5, 2016)(Highlighting splits within the Eastern District of Virginia, Western District of Virginia, other district courts within the Fourth Circuit, and district courts nationwide concerning whether the *Twombly/Iqbal* standard applies to affirmative defenses). Thus, depending on the prior rulings of the particular judge on this issue, the plaintiff may be able begin offensive use of federal motions practice from the moment the defendant files responsive pleadings.

## Daubert Motions

Imposing the federal system’s “gatekeeping” function, as initially expressed in *Daubert* and *Kumho Tire* is one of the frequent reasons that defendants force plaintiffs into federal court. Arguably, however, there is a misconception that *Daubert* is a defense-friendly rule. Admittedly, plaintiffs’ experts are more frequently subject to *Daubert* challenges—likely because of the financial

imbalances between the parties. Yet, research conducted by PricewaterhouseCoopers (PwC) revealed that when plaintiffs do raise *Daubert* challenges against defense experts, they are just as likely as defendants to be successful in that challenge.<sup>7</sup> In fact, PwC concluded that when plaintiffs file a *Daubert* motion, the defense expert is either partially or completely precluded from testifying between 40 and 50 percent of the time.

Consistent with the PwC data, there are multiple examples of judges excluding defense expert testimony in the Western and Eastern Districts of Virginia. *See, e.g., Kristensen v. Spotnitz*, No. 3:09-cv-00084, 2011 U.S. Dist. LEXIS 107027 (W.D. Va. Sep. 21, 2011)(Judge Moon excluding opinion from plaintiff's prior treating physician); *Tunnell v. Ford Motor Co.*, 330 F. Supp. 2d 731 (W.D. Va. 2004) (then-Magistrate Judge Urbanski excluding defense experts' opinions because expert's "speculation as to the presence of high alcohol content liquor is as unduly prejudicial as it is baseless" and expert "wholly lacks qualifications, application of any methodology or an appropriate level of knowledge concerning the issue."); *Roberts v. Sunbelt Rentals, Inc.*, Civil Action No. 5:14-cv-00040, 2016 U.S. Dist. LEXIS 41897 (W.D. Va. Mar. 30, 2016)(Judge Dillon excluding part of defense expert's testimony); *Scott v. Mid-Atl. Cable, Installation, LLC*, No. 1:05cv970 (JCC), 2006 U.S. Dist. LEXIS 50767 (E.D. Va. July 25, 2006) (Judge Cacheris excluding in part defense medical expert); *Payne v. Wyeth Pharms., Inc.*, Civil Action No. 2:08cv119, 2008 U.S. Dist. LEXIS 106771 (E.D. Va. Nov. 14, 2008)(Judge Jackson excluding defense expert testimony as to causation of injuries). Thus, plaintiffs' counsel must invest the time in pursuing challenges against the defense experts, particularly when those challenges net such a high success rate.

### Summary Judgment

Summary judgment under Rule 56 is often seen as the bane of federal plaintiffs cases. Summary judgment is drastically different in federal court as compared to Virginia courts for multiple reasons, the greatest two being the federal emphasis in favor of summary judgment and the significant use of deposition testimony in summary judgment proceedings in federal court.<sup>8</sup> Much has been written and could be written again about the defense-led attack on the right to trial by jury. However, if plaintiffs must operate in a system that encourages summary judgment, plaintiffs should prepare as early as possible not only to oppose defendants' predictable summary judgment motion, but also to file and support summary judgment motions against the defendants.

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<sup>7</sup> *See* PricewaterhouseCoopers, "2000-2007 Financial expert witness *Daubert* challenge study," available at [https://www.pwc.com/us/en/forensic-services/assets/2000\\_2007\\_daubert\\_study.pdf](https://www.pwc.com/us/en/forensic-services/assets/2000_2007_daubert_study.pdf); *see also* PricewaterhouseCoopers, "*Daubert* challenges to financial experts: A yearly study of trends and outcomes 2000-2015," available at <http://www.pwc.com/us/en/forensic-services/publications/assets/pwc-daubert-study-whitepaper.pdf>.

<sup>8</sup> *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"); *Thompson Everett, Inc. v. Nat'l Cable Advert., L.P.*, 57 F.3d 1317, 1322-23 (4th Cir. 1995)("The summary judgment practice does not become disfavored simply because a case is complex. Rather, it is favored as a mechanism to secure the "just, speedy and inexpensive determination" of a case, *see* Fed. R. Civ. P. 1, when its proper use can avoid the cost of trial."); *Nw. Nat'l Ins. Co. v. Corley*, 503 F.2d 224, 230 (7th Cir. 1974)("We continue to adhere to the view that resort to summary judgment is a salutary procedural device, utilization of which in all appropriate cases should be encouraged rather than discouraged by appellate courts.") (internal quotations omitted).

Extensive research done by the Federal Judicial Center (FJC), reviewing nearly 140,000 cases that terminated in fiscal year 2006, reveal several findings of interest with regards to federal summary judgment practice:<sup>9</sup>

- Across all case types, defendants file motions for summary judgment roughly three times as often as plaintiffs.
- In tort claims where at least one summary judgment motion is filed, only 13% of summary judgment motions are filed by the plaintiffs.
- In tort claims where at least one summary judgment motion is filed, motions for summary judgment are denied (16-17%), granted in whole (17-19%), granted in part (4-7%), and end with no disposition (55-60%).
- In tort claims, motions for summary judgment were filed in only 10-12% of cases.
- Plaintiffs filed motions for summary judgment in only 2% of tort cases.
- Only 2-4% of all tort cases have at least one motion for summary judgment granted in whole.
- Only 3-5% of all tort cases have at least one motion for summary judgment granted in whole or in part.
- Only 1-3% of tort cases were terminated by summary judgment.

Thus, at least according to FJC data, defendants have actually had minimal success in using summary judgment against plaintiffs in tort cases. Additional research by FJC revealed that from 1975-2000, 25% of motions for summary judgment filed in tort cases by plaintiffs resulted in either a full or partial grant of summary judgment.<sup>10</sup> Defendants obtained 40% whole or partial grants during the same period. Even if plaintiffs' motions for summary judgment are unlikely to succeed, it can be very helpful later in the case to have the defendants on record pleading that certain contested issues are matters for the jury to decide.

## **Spoliation**

Motions regarding spoliation of evidence have long been another tool of the defense. However, the proliferation of electronic data recorders in newer automobiles and the virtually universal use of "smartphones" and other personal electronic devices mean that spoliation is now a potentially valuable motion for the plaintiff to pursue in an increasing number of cases.

The United States Court of Appeals for the Fourth Circuit first addressed spoliation in its 1995 opinion in *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995) (Explosion of boat causing severe burns and death). In *Vodusek*, the plaintiff's expert, aided by plaintiff's sons, tore apart a section of the boat with a chain saw and sledge hammer. The Fourth Circuit held, "[W]hen a

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<sup>9</sup> See Cecil, J. and Cort, G., The Federal Judicial Center, "Report on Summary Judgment Practice Across Districts with Variations in Local Rules" available at [http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/\\$file/sujulrs2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/$file/sujulrs2.pdf).

<sup>10</sup> See Cecil, J. et. al., The Federal Judicial Center, "Trends in Summary Judgment Practice: 1975-2000" available at [http://www.fjc.gov/public/pdf.nsf/lookup/trsjpr07.pdf/\\$file/trsjpr07.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/trsjpr07.pdf/$file/trsjpr07.pdf).

proponent's intentional conduct contributes to the loss or destruction of evidence, the trial court has discretion to pursue a wide range of responses both for the purpose of leveling the evidentiary playing field and for the purpose of sanctioning the improper conduct." *Id.*, 71 F.3d at 156.

The United States Court of Appeals for the Fourth Circuit next considered spoliation in *Cole v. Keller Industries, Inc.*, 132 F.3d 1044 (4th Cir. 1998). In *Cole*, the plaintiff was injured when a step on a ladder broke underneath him. Again, the plaintiff's expert destroyed part of the evidence. The district court entered summary judgment for the manufacturer based in part on its spoliation defense. On appeal, the Fourth Circuit reversed, stating the defense had not been overly prejudiced in developing its theory of the ladder's failure. *See id.* at 1047. The court then turned to the issue of bad faith. The court noted that in *Vodusek*, it only addressed the absence of bad faith in the context of an adverse inference instruction, not the more severe sanction of summary judgment. The court then observed that "the vast weight of authority, including the Virginia Supreme Court, [sic] holds that absent bad faith conduct applying a rule of law that results in dismissal on the grounds of spoliation of evidence is not authorized." *See id.*

In *Silvestri v. General Motors*, the Fourth Circuit upheld a trial court's dismissal of an action for spoliation. *See Silvestri v. GMC*, 271 F.3d 583 (4th Cir. 2001). In *Silvestri*, the plaintiff borrowed his landlady's car, got intoxicated, drove off the road, crashed through a wooden fence and struck a utility pole at high speed. *See id.* at 586. Plaintiff then allowed the title owner of the vehicle to sell the car for salvage. The Fourth Circuit held, "The duty to preserve material evidence arises not only during litigation but also extends to that period before litigation when a party should reasonably know that the evidence may be relevant to anticipated litigation." *Id.* at 591. "If a party cannot fulfill this duty because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence." *Id.*

As a matter of first instance, the *Silvestri* Court declared that "the federal law of spoliation applies" because the power to sanction for spoliation comes from the inherent power of the court, not substantive law. *See id.* at 590. Although the Court acknowledged that dismissal of the plaintiff's claim was a severe sanction, the Court held that even when plaintiff's conduct was "less culpable," i.e. not in blatant bad faith, dismissal could still be appropriate "if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case." *See id.* at 593. Thus, for dismissal to be appropriate in federal court, one of two situations must occur: (1) the spoliator's conduct must be so egregious as to amount to a forfeiture of his claim or defense, or (2) the effect of the spoliator's conduct must be so prejudicial that it substantially denied the opposing party the ability to make or defend the claim. *See id.*

Later cases since *Silvestri* have not significantly changed the spoliation analysis within the Fourth Circuit. In *Hodge v. Wal-Mart Stores*, the Fourth Circuit rejected plaintiff's argument for an adverse inference sanction against the defendant when the defendant's manager failed to obtain a witness statement from an eyewitness to a premises liability accident. *See Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446 (4th Cir. 2004). In *King v. Am. Power Conversion Corp.*, the Fourth Circuit again affirmed the complete dismissal of a plaintiff's case when the plaintiff's consultant destroyed an Uninterrupted Power Source unit that was the key evidence in a products liability case. *See King v. Am. Power Conversion Corp.*, 181 F. App'x 373 (4th Cir. 2006). In *Buckley v. Mukasey*, the Fourth Circuit remanded a discrimination case against the Attorney General with instruction for the district court to consider an adverse inference instruction regarding the defendant's deleting of electronic records. *See Buckley v. Mukasey*, 538 F.3d 306, 322-23 (4th Cir. 2008). *See also Turner v.*

*United States*, 736 F.3d 274 (4th Cir. 2013)(District court did not err in refusing adverse inference against the United States Coast Guard when the Coast Guard allowed emergency calls to be recorded over before it had notice of potential litigation against it); *Blue Sky Travel & Tours, LLC v. Al Tayyar*, 606 F. App'x 689 (4th Cir. 2015)(Sanctions against defendant vacated and remanded because magistrate judge erred in holding that defendant had duty to preserve all electronic records regardless of relevance to the case).

At the district court level, Virginia plaintiffs have had limited success in pursuing spoliation motions in federal court. *See, e.g., McDonald v. Wal-Mart Stores E., LP*, Civil Action No. 3:07cv425, 2008 U.S. Dist. LEXIS 2626 (E.D. Va. Jan. 14, 2008)(Court granted adverse inference when defendant discarded clear plastic wrap upon which minor child had slipped and fallen). Comparatively, the vast majority of spoliation motions are brought against plaintiffs. However, the time has come for more aggressive use of spoliation motions against defendants in tort cases.

The rapid rise of electronic data recording in automobiles, trucks, boats and other equipment plus the explosion of smartphone use by the American public means that every case has a potential spoliation issue. Plaintiffs' counsel need to place defendant and their insurers on notice as early as possible that any data recorded by the defendant's vehicle or equipment is presumed relevant to the litigation and must be retained until plaintiff's expert has an opportunity to examine it. If defendant's location, speed or distraction is relevant, plaintiff should put defendants on notice to preserve their phones and all information contained therein, and plaintiffs should seek access to the physical phone during discovery. Because many conversations that used to occur in person or by telephone call—unrecorded methods—now occur by texting, social media messenger or other application-based communication, plaintiff should seek access to all such communication that may be relevant, including the metadata of whether defendant attempted to delete those communications. If defendant uses Snapchat or a similar self-destructive form of communication to discuss the case with anyone not covered by privilege, such communication may be spoliation *per se*, particularly if it occurs during litigation.

The intentional, offensive deployment of Rule 12, *Daubert*, Rule 56 and spoliation motions against the defendant can help rebut the defendant's assumption that federal court is a defense-friendly venue and advance the plaintiff's case toward successful resolution.

## **Jury Trial**

As with pretrial discovery and motions practice, plaintiffs' counsel should prepare to use trial opportunities unique to federal court to further advance their client's cause. Overall, plaintiffs' success rates in jury trials, on the average, appear to track relatively closely between state and federal jury trials. In 2000, the Congressional Budget Office gathered data contrasting plaintiffs' verdicts in federal courts against plaintiffs' verdicts in state-court trials in the 75 largest counties.<sup>11</sup> The results of that research, though now somewhat dated, may be surprising:

- Plaintiffs won 45.8% of all federal tort trials, compared to winning 48.2% of all state court tort trials reviewed.
- Plaintiffs won 59.7% of all federal automobile accident cases, 2.2% higher than the state court success rate.

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<sup>11</sup> See <https://www.justia.com/injury/docs/us-tort-liability-primer/settlement-versus-trial.html>.

- Plaintiffs won 39.8% of federal medical malpractice trials, 16.4% higher than the success rate in state court trials.
- Plaintiffs, however, did significantly better in state court trials than federal court trials regarding asbestos and other product liability cases.

Thus, there is limited evidence that federal jurors are any more hostile to plaintiffs than state court jurors, at least on a nationwide scale.

### **Conclusion**

Corporate defendants and their insurers constantly try to force cases into federal court, ever attempting to expand federal jurisdiction. While the fight against removal is sometimes justified, proper representation of our clients requires plaintiffs' counsel not only to survive, but also to thrive in the federal court system. The research discussed herein illustrates that, at least in tort cases, the defendants have likely exaggerated the extent of the pro-defense elements of federal practice. By fully using the available pre-trial discovery and motions practice, well prepared plaintiffs' counsel can regain the advantage for their clients in their pursuit of justice.

# Found Money?

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## Government Incentives and Creative Financing for Rehabilitation and Redevelopment Projects

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SECTION

7



Your client recently purchased an old, worn down building. Your client would like to renovate the building and comes to you for advice. Her main objective is to rehab the building while remaining within a predetermined budget.

What if you could tell your client she could use someone else's money? Although the rules and regulations related to these funding sources are vast and complex, lawyers experienced in handling tax credit and grant fund transactions can navigate the landmines associated with these projects, bringing these matters to a successful conclusion.

The purpose of this outline is to identify the many types of alternative financing which may be available to your client which may ease the inevitable pressure on the project budget.

**I. Develop a Plan.**

- a) Sit down with your client early in the process.
- b) Be sure to fully understand the project. Understand the purpose for the rehabilitation and understand the history of the building to be renovated and its prior usage.
- c) Identify all possible funding sources.
- d) Collaborate with accountants and other specialized professionals (architectural historians, cost certification accountants, etc) to identify issues early and develop a plan of action moving forward.

**II. Examples of Potential Funding Sources.**

- a) Federal Historic Tax Credits
- b) State Historic Tax Credits
- c) New Markets Tax Credits
- d) TROF Grants
- e) Commonwealth Opportunity Fund Grants (formerly Governor's Opportunity Fund)
- f) Enterprise Zone Grants
- g) Local Government Incentive Programs

**III. Federal Historic Tax Credits**

- a) The federal historic tax credit provides a dollar for dollar credit against the tax due by certain participants in a historic rehabilitation of a qualified structure.

- b) As a practical matter, the real estate subject to rehabilitation is owned in a partnership (or LLC taxed as a partnership). In a single tier structure, the partners in the partnership (or members of the LLC) are allocated the federal historic tax credit in proportion to their percentage interest in the partnership or LLC. In a two-tier (master lease structure) the property is leased to another partnership and the owner of the property makes a IRC Section 50 election to pass the credits through to the lessee partnership. The credits are then allocated to the partners or member of the lessee partnership.
- c) Calculating the credit.
  - i) Credit based on the “qualified rehabilitation expenditures” (QREs) of the project. QREs include amounts incurred by a taxpayer in connection with the rehabilitation that are capitalized to the building and depreciated using either a 27.5 or 39 year recovery period. For example, the expenditures for the purchase price of the building are excluded, but cost of the restoration of a historic stairwell will be included. QREs also include certain soft costs, such as architectural fees and legal fees.
  - ii) Credit is 10% of the QREs on building built before 1935
  - iii) Credit is 20% credit on buildings listed in the national register or located in a Registered Historic District and listed as being of significance to that district (see attached map of Roanoke’s historic districts).
  - iv) 20% credit most common; limited practical benefits from 10% credit.
- d) Certain states (including Virginia) also have a historic tax credit. Tax credits can be structured to be federal only, state only, or combined federal and state.
- e) Rehabilitation must be a “certified rehabilitation.” Defined as any rehabilitation of a certified historic structure which the Secretary of the Interior (NPS) has certified as being consistent to the historic character of such property or the district in which such property is located. There is a three part application process involved in obtaining such certification (See attached state and federal credit application checklist).
- f) Beware of rehabilitation limitations, use limitations and other pitfalls.
  - i) For example, except under limited circumstances, the building may not be used by tax-exempt entities.
- h) Monetizing the credit.
  - i) Developer may not be able to fully utilize the credits (typical situation includes credit against passive income).

ii) Consider partnering with investors who would benefit the project and who would be able to fully utilize the tax credits.

iii) Typically investors will make investments based on a percentage of the credits generated by the project. The credits will be passed through the structure to the investor.

### **III. Virginia Historic Rehabilitation Tax Credits (See Va Code Ann. §58.1-339.2)**

a) As noted above, Virginia also has a historic rehabilitation tax credit. The Virginia tax credit could be used on its own or, if appropriate, combined with the federal historic tax credit to further benefit the project.

b) Calculating the credit.

i) The Virginia Rehabilitation Credit is equal to 25% of “eligible rehabilitation expenses,” meaning those expenses incurred in the material rehabilitation of a certified historic structure and added to the property’s capital account.

ii) For a rehabilitation to be satisfy the “material rehabilitation” requirement, the improvements or reconstruction must be consistent with “The Secretary of the Interior’s Standards for Rehabilitation,” (just as required for the Federal Historic Tax Credit) and the cost of such improvements must amount to at least fifty percent of the assessed value of such building for local real estate tax purposes for the year prior to the initial expenditure of any rehabilitation expenses, unless the building is an owner-occupied building (owner-occupied only applies to personal residence), in which case the cost shall amount to at least twenty-five percent of the assessed value of such building for local real estate tax purposes for the year prior to the initial expenditure of any rehabilitation expenses.

c) Process. The rehabilitation expenditures must be certified by the Virginia Department of Historic Resources (requiring a Part I, Part II and Part III application; See attached state and federal credit application checklist), however, while the work must be consistent with The Secretary of the Interior’s Standards for Rehabilitation, the National Park Service is not required to approve or certify the eligible expenditures for the Virginia Rehabilitation Tax Credit.

d) Monetizing the credit.

i) As outlined above with the federal tax credit, there may be instances when a developer is unable to fully realize the benefit of the tax credit or the project would be better served by partnering with an investor who be in a position to fully utilize the credits.

**IV. New Markets Tax Credit Financing (See [www.cdfifund.gov/nmtc](http://www.cdfifund.gov/nmtc) and attached Fact Sheet)**

- a) Community Development Financial Institutions Fund (CDFI Fund) was created in 1994 to increase economic opportunity and promote community development investments for underserved populations and in distressed communities in the United States.
- b) CDEs apply to the CDFI Fund, through a competitive process, for an allocation of New Markets Tax Credit (NMTC) authority. CDEs are the entities through which investors invest capital (generally through a subsidiary of the CDE) to participate in a NMTC financing.
- b) NMTCs provide a credit against Federal income taxes for these investors who make Qualified Equity Investments (QEIs) in CDEs.
- c) CDEs use QEIs to make Qualified Low-Income Community Investments (QLICIs), typically in the form of a business loan to a Qualified Low-Income Community Business (QALICB), located in a low-income community. These loans will be more flexible and offer better interest rates and terms than are traditionally available.
- d) The NMTC is taken over a seven year period, 5% for the first three years, and 6% for the remaining four years, for a total of 39% of the QEI.
- e) On December 18, 2015, President Obama signed the “Protecting Americans from Tax Hikes Act of 2015” (the “PATH Act”). The PATH Act extended the NMTC Program for 5 years (2015-2019), at \$3.5 Billion in allocations per year. The CDFI anticipates it will award Seven Billion in allocations to CDEs in 2016.
- f) Participating in the Program.
  - i) If a party is interested in participating in the New Markets Tax Credit Program it will be important to determine if the business itself, including an analysis of the purpose of the business and the location of the business, is eligible to participate in the program. A business may be eligible if the business is a QALICB and meets the stringent QALICB requirements. For example, a QALICB must earn at least 50% of its total gross income within a low-income community and a QALICB must use at least 40% of its tangible property within the low-income community (this threshold is increased to 50% if the QALICB intends to satisfy the Gross Income Test above through a higher percentage of tangible property in a low-income community).
  - ii) If the project is eligible, it will need to find a CDE that is willing to commit a portion of the CDE’s New Markets Tax Credit allocation to the

project. Each CDE has its own geographic footprint and areas of focus. Typically, a developer will locate a CDE that operates in the QALICBs market and deliver a package of information to that CDE explaining by the QALICBs mission meets the CDEs project guidelines.

iii) Participating in a New Markets Tax Credit financing is exceedingly complex, and is not for the faint of heart, but for the right businesses and projects the benefits can far outweigh the time consuming process.

**V. TROF Grants (See Va Code Ann. §3.2-3100 et seq.)**

- a) Purpose of the TROF Grant program is to provide performance-based monetary grants to localities in Virginia's tobacco producing region (as defined by the Tobacco Commission) to assist in the creation of new jobs and investments, whether through new business attraction or existing business expansion.
- b) Available to political subdivisions.
- c) Grants are made to the community at the discretion of the Tobacco Region Revitalization Commission.
- d) Projects eligible for TROF require a minimum private capital investment of \$1 million within 36 months and a minimum of 10 jobs created within 36 months.
- e) The grant amounts are the result of negotiation between the developer and the Tobacco Commission, but are awarded commensurate with the project's impact on the community in which it will be located.
- f) Awards are memorialized by a performance agreement which outlines the required use of grant funds and benchmarks which need to be met by the developer.
- g) Determination of the award is based on the following: local unemployment rates, prevailing wage rates, number of new jobs, capital investment levels, industry type and the possibility of related economic multiplier effect.

**VI. Commonwealth Opportunity Fund Grants (See Va Code Ann. §2.2-115)**

- a) Legislation was changed effective January 1, 2016 (program formerly known as Governor's Development Opportunity Fund).
- b) Available to political subdivisions.

- c) State and local matching funds are provided to support new job creation and capital investment,
- d) Requires a performance agreement between the political subdivision and benefitting businesses.
- e) The Virginia Economic Development Partnership (VEDP) considers the projects and makes recommendations. There are certain thresholds for minimum investment and new jobs.

**VII. Enterprise Zone Grants (See Va Code Ann. §59.1-538 et seq.)**

- a) Consists of a job creation grant and a real property investment grant.
- b) Job Creation Grant
  - i) Businesses are eligible for the job creation grant if the business creates at least four net new permanent full-time positions which meet wage and health benefit requirements (excludes retail, personal service and food and beverage jobs).
  - ii) Available for a five consecutive year term for net new permanent full-time positions above the four-job threshold which meet the wage and health benefit requirement.
  - iii) Job creation grant may be up to \$800/year per net new permanent full-time position earning at least 200% of federal minimum wage with health benefits.
  - iv) The Virginia Economic Development Partnership (VEDP) considers the projects and makes recommendations. There are certain thresholds for minimum investment and new jobs.
- c) Real Property Investment Grant
  - i) Available to commercial, industrial, or mixed used buildings
  - ii) At least \$100,000 in expenses must be incurred for rehabilitation or expansion of real property.
  - iii) For new construction, at least \$500,000 in expenses must be incurred.
  - iv) Up to \$100,000 in grant funds per building or facility for qualifying real property investments of less than \$5 million and Up to \$200,000 in grant funds per building or facility for qualifying real property investments of more than \$5 million.

## **VIII. Local Government Incentive Programs**

- a) Some localities have incentive programs for specific types of development projects. These programs are often targeted for redevelopment, rehabilitation, historic conservation, and similar projects. Some of these localities have established written policies, guidelines, and procedures governing the award of incentives. Other localities consider projects on an individual basis.
- b) These programs often have a strong infrastructure component. Improvements eligible for incentives may be limited to improvements that will be transferred to the locality, such as streets, sidewalks, curb and gutter, streetlights, water and sewer lines, and other infrastructure items.
- c) Localities generally require the developer to enter into a “Performance Agreement.” These agreements require the developer to construct specific improvements on a set schedule.
- d) The incentive payments generally reach the developer through the local industrial development authority or economic development authority.
  - i) The locality will calculate the incremental new tax revenues from the project.
  - ii) The locality then appropriates a portion of the new tax revenues to the IDA or EDA.
  - iii) The IDA/EDA then makes a grant to the developer.
  - iv) This type of program allows the developer to recover infrastructure costs over time.





# NEW MARKETS TAX CREDIT PROGRAM

# COMMUNITY

Revitalization by Rewarding Private **INVESTMENT**

Over the past decade, our nation's low-income communities have suffered due to factors such as dormant manufacturing facilities, inadequate education and healthcare services, vacant commercial properties, and lower property values. As a result, many of these communities find it difficult to attract the necessary capital from private investors. The New Markets Tax Credit Program (NMTC Program) helps economically distressed communities attract private capital by providing investors with a Federal tax credit. Investments made through the NMTC Program are used to finance businesses, breathing new life into neglected, underserved low-income communities.

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## **HOW DOES THE NMTC PROGRAM WORK?**

Through the NMTC Program, the CDFI Fund allocates tax credit authority to Community Development Entities (CDEs) through a competitive application process. CDEs are financial intermediaries through which private capital flows from an investor to a qualified business located in a low-income community. CDEs use their authority to offer tax credits to investors in exchange for equity in the CDE. Using the capital from these equity investments, CDEs can make loans and investments to businesses operating in low-income communities on better rates and terms and more flexible features than the market.

In exchange for investing in CDEs, investors claim a tax credit worth 39 percent of their original CDE equity stake, which is claimed over a seven-year period.

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## **HOW DO COMMUNITIES BENEFIT?**

The NMTC Program has supported a wide range of businesses including manufacturing, food, retail, housing, health, technology, energy, education, and childcare. Communities benefit from the jobs associated with these investments, as well as greater access to community facilities and commercial goods and services. Since 2003, the NMTC Program has created or retained an estimated 197,585 jobs. It has also supported the construction of 32.4 million square feet of manufacturing space, 74.8 million square feet of office space, and 57.5 million square feet of retail space. In addition, as these communities develop, they become even more attractive to investors, catalyzing a ripple effect that spurs further investments and revitalization.

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## **HOW DO BUSINESSES BENEFIT?**

The NMTC Program helps businesses with access to financing that is flexible and affordable. Investment decisions are made at the community level, and typically 90 to 97 percent of NMTC investments into businesses involve more favorable terms and conditions than the market typically offers. Terms can include lower interest rates, flexible provisions such as subordinated debt, lower origination fees, higher loan-to-values, lower debt coverage ratios and longer maturities.

To see which CDEs have received NMTC allocation authority, please visit our searchable awards database at [www.cdfifund.gov/awards](http://www.cdfifund.gov/awards).

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## **AN EFFICIENT AND EFFECTIVE USE OF FEDERAL DOLLARS**

For every \$1 invested by the Federal government, the NMTC Program generates over \$8 of private investment. The NMTC Program catalyzes investment where it's needed most – over 75 percent of New Markets Tax Credit investments have been made in highly distressed areas. These are communities with low median incomes and high rates of unemployment, and the NMTC investments can have a dramatic positive impact.

## **FIND OUT MORE**

Visit our website: [www.cdfifund.gov/nmtc](http://www.cdfifund.gov/nmtc)

Learn about CDE Certification: [www.cdfifund.gov/cde](http://www.cdfifund.gov/cde)

Call our help desk for support: (202) 653-0421

Email us your questions: [cdfihelp@cdfi.treas.gov](mailto:cdfihelp@cdfi.treas.gov)

# The Reedy Case and Other Tales from the Pro Bono Bar

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Evolving Ethical Implications of Lawyers in  
Providing *Pro Bono* Services

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ETHICS: SECTION

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**This presentation will focus on pro bono representation and the lawyer's role in seeking justice: what qualifies as pro bono, why it is important, what rules apply, etc. We will also cover several examples of the presenters' own meaningful *pro bono* services, from wrongful convictions to Eighth Amendment challenges, and everything in between.**

“[T]he test of a civilization is the way that it cares for its helpless members.”  
Pearl S. Buck, from *Christmas Day in the Morning*

The ethical obligations of a lawyer in providing pro bono services to clients who cannot pay is evolving. One important aspect of this evolution is the increasing attention paid to the representation of persons who were wrongfully convicted of a crime. The case involving Davey Reedy is a startling and important example of pro bono representation addressing a wrongful conviction.

The Davey Reedy case stems from the 1987 fire at Mr. Reedy's residence that resulted in the death of his 2-year-old and 4-year-old children. Mr. Reedy suffered third degree burns over much of his body and barely survived the fire. Fire investigators deemed the cause of the fire to be arson, resulting in Mr. Reedy being charged with arson and felony murder of his two children. Mr. Reedy proclaimed his innocence, and at trial testified that he fell asleep and awoke to a “big poof” and an “explode sound” and tried to rescue his children to no avail. Based largely on circumstantial evidence and what we now know is bad science, Mr. Reedy was ultimately convicted of arson and sentenced to two life sentences.

At his sentencing, Mr. Reedy maintained his innocence: “[O]ne way or another I'm going to prove my innocence if it takes the rest of my life. And I don't care what it costs me. I'm going to prove it one way or another. Even if it kills me, I'm going to prove it.” Though poverty stricken and uneducated by most measures, Mr. Reedy recognized the core concepts of our judicial system and presented an ethical and moral challenge to all of society, a realization that is at the very center of our ethical duty to engage in *pro bono* service: “I just want a fair shake. What's wrong with everybody? Is everybody ... scared to give me a fair shake? Are they afraid that I might win and prove my innocence? That's all I want. I don't see where in the God I'm asking for so much. Because you can mark my words, if there's a God in heaven, if I stay in here much longer, there ain't going to be nothing left of me. I'm not trying to get no pity or nothing. I'm speaking pure honesty. I just want a chance is all I want. And I know with all my heart and all my belief on my children's grave, before it's over with I will prove my innocence if I survive....”

And Mr. Reedy faced almost insurmountable challenges. Uneducated, without resources, and without legal assistance for years, Mr. Reedy plowed forward and kept his case alive. After reading a news article in the Roanoke Times in 1998, Roberta “Bert” Bondurant began investigating his conviction. After approaching numerous active lawyers about taking Mr. Reedy's case, Mrs. Bondurant, a former public defender and full-time mother, decided to reactivate her law license for the sole purpose of representing Mr. Reedy. Over the next decade, Mrs. Bondurant enlisted the help of arson experts across the country to evaluate Mr. Reedy's case. These experts determined that the fire in 1987 was not an arson at all, but was instead a result of an accidental fire that led to a flashover (i.e., the “big poof” and “explode sound” Mr. Reedy described at trial). More recent fire

science explains how accidental fires resulting in a flashover were erroneously interpreted as arson pursuant to now debunked scientific theories used to convict Mr. Reedy. During her representation of Mr. Reedy, Mrs. Bondurant tirelessly presented these findings in *habeas* petitions and through a Writ of Actual Innocence. Though the law afforded no relief for such non-DNA cases, Mrs. Bondurant ultimately convinced the parole board to grant Mr. Reedy parole, which may be the only instance of a convicted double child murderer being granted parole in the Commonwealth.

But, securing Mr. Reedy's release did not accomplish Mr. Reedy's ultimate goal: a formal recognition of his innocence. When Mrs. Bondurant's husband, Thomas J. Bondurant, Jr., moved to Gentry Locke from the U.S. Attorney's Office in 2009, Gentry Locke joined the representation and sought the only remedy left for Mr. Reedy: a pardon. Over the next half decade, Tom and Gentry Locke managed to convince a retired state police investigator, among others, that the fire was accidental. Governor Bob McDonnell then commissioned the parole board to look into the merits of a potential pardon. Current governor Terry McAuliffe continued the review and notified Mr. Reedy around Christmas in 2015 that he had been fully pardoned.

The Reedy case is an illustration of the importance of *pro bono* service, as well as the profundity associated with such a meaningful experience. Without the assistance of the Bondurants and Gentry Locke, Davey Reedy might still be sitting in a cell waiting to die. Others have been put to death based on the same demonstrably erroneous fire science (e.g., Cameron Todd Willingham, as detailed in PBS Frontline's *Death by Fire*). The Reedy case is a case study of what *pro bono publico* means and how to approach and actually handle a *pro bono* matter, whether it is challenging a wrongful conviction or assisting with medical directives.

## I. The Virginia Rules of Professional Conduct

### A. Preamble: A Lawyer's Responsibilities

- Lawyer's role: representative of clients; neutral third party; officer of the law; public citizen
- Advisor, advocate, negotiator, intermediary, third party neutral, evaluator
- "While it is a lawyer's duty, when necessary, to **challenge the rectitude of official action**, it is also a lawyer's duty to **uphold legal process**."
- "As a public citizen, a lawyer should **seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession**. As a member of a learned profession, a lawyer **should cultivate knowledge of the law beyond its use for clients**, employ that knowledge in **reform of the law** and **work to strengthen legal education**. A lawyer should **be mindful of deficiencies in the administration of justice** and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf."

- “The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to **assure that its regulations are conceived in the public interest** and not in furtherance of parochial or self-interested concerns of the bar.”
- “Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.”

**B. Rule 6.1: Voluntary Pro Bono Publico Service – The lawyer’s ethical obligation.**

Rule 6.1 sets forth the aspirational goal for each lawyer to devote at least two percent of his time annually to pro bono services. The Rule also explains how a lawyer may satisfy this pro bono responsibility through the direct provision of legal services. The Rule further provides that direct financial support of pro bono programs is an alternative method for fulfilling a lawyer’s pro bono responsibility.

- (a) A lawyer should render at least two percent per year of the lawyer’s professional time to pro bono publico legal services. Pro bono publico services include **poverty law, civil rights law, public interest law, and volunteer activities designed to increase the availability of pro bono legal services.**
- (b) A law firm or other group of lawyers may satisfy their responsibility collectively under this Rule.
- (c) Direct financial support of programs that provide direct delivery of legal services to meet the needs described in (a) above is an alternative method for fulfilling a lawyer’s responsibility under this Rule.

**C. Comments to Rule 6.1**

- [1] Every lawyer, regardless of professional prominence or professional work load, has a personal responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The Council for the Virginia State Bar urges all Virginia lawyers to contribute a minimum of two percent of their professional time annually to pro bono services. **Pro bono legal services consist of any professional services for which the lawyer would ordinarily be compensated, including dispute resolution as a mediator or third party neutral.**
- [2] Pro bono services in **poverty law** consist of free or nominal fee professional services for people who do not have the financial resources to compensate a lawyer. Private attorneys participating in legal aid referral programs are typical examples of “poverty law.” Legal services for persons whose incomes exceed legal aid guidelines, but who nevertheless have insufficient resources to compensate counsel, would also qualify as “poverty

law,” provided the free or nominal fee nature of any such legal work is established in advance.

- [3] Pro bono publico legal services in civil rights law consists of free or nominal fee professional services to assert or protect rights of individuals in which society has an interest. **Professional services for victims of discrimination based on race, sex, age or handicap would be typical examples of “civil rights law,”** provided the free or nominal fee nature of any such legal work is established in advance.
- [4] Free or nominal fee provision of legal services to religious, charitable or civic groups in efforts such as setting up a shelter for the homeless, operating a hotline for battered spouses or providing public service information would be examples of **“public interest law.”**
- [5] Training and mentoring lawyers who have volunteered to take legal aid referrals or helping recruit lawyers for pro bono referral programs would be examples of **“volunteer activities designed to increase the availability of pro bono legal services.”**

#### **D. Collective Fulfillment of Pro Bono Publico Service**

- [7] Although every lawyer has an individual responsibility to provide pro bono publico services, some legal matters require the application of considerably greater effort and resources than a lawyer, acting alone, could reasonably provide on a pro bono basis. In fulfilling their obligation under this Rule, a **group of two or more lawyers may pool their resources** to ensure that individuals in need of such assistance, who would otherwise be unable to afford to compensate counsel, receive needed legal services. The designation of one or more lawyers to work on pro bono publico matters may be attributed to other lawyers within the firm or group who support the representation.

#### **E. What is Not Pro Bono?**

- Legal services provided on a contingent fee basis do not satisfy Rule 6.1.
- Legal services for which fees are uncollected do not satisfy Rule 6.1.
- “Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free or nominal fee legal services is essential.” Comment [6] to Rule 6.1.

#### **F. Financial Support in Lieu of Direct Pro Bono Services**

- Lawyers who are unable to fulfill their pro bono obligation through direct, legal representation should support programs that provide legal services for poverty law, civil rights law, public interest law, and volunteer activities to increase the availability of pro bono legal services.

- An attorney's support for these pro bono activities may be through financial contributions in proportion to his professional income.

### G. Virginia Code Comparison

- There was no direct counterpart to this Rule in the Disciplinary Rules of the *Virginia Code*. Ethical Consideration ("EC") 2-27 stated that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. . . . Every lawyer, regardless of professional prominence or professional work load, should find time to participate in **serving the disadvantaged.**" EC 8-9 stated that "**[t]he advancement of our legal system** is of vital importance in maintaining the rule of law . . . [and] lawyers should **encourage, and should aid in making, needed changes and improvements.**" EC 8-3 stated that "[t]hose persons unable to pay for legal services should be provided needed services."

## II. ABA Model Rule 6.1: Voluntary Pro Bono Publico Service

### A. Rule 6.1

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

**(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:**

**(1) persons of limited means or**

**(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and**

**(b) provide any additional services through:**

**(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;**

**(2) delivery of legal services at a substantially reduced fee to persons of limited means; or**

**(3) participation in activities for improving the law, the legal system or the legal profession.**

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

**B. Comment**

- [1] Every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.
- [2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. **Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means.** The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.
- [3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. **Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means.** The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.
- [6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include **First Amendment claims, Title VII claims and environmental protection claims.** Additionally, a wide range of

organizations may be represented, including social service, medical research, cultural and religious groups.

- [8] Paragraph (b)(3) recognizes **the value of lawyers engaging in activities that improve the law, the legal system or the legal profession.** Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

### C. Model Code Comparison

- There was no counterpart of this Rule in the Disciplinary Rules of the Model Code. Ethical Consideration (“EC”) 2-25 stated that the “basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . . Every lawyer, regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged.” EC 8-9 stated that “[t]he advancement of our legal system is of vital importance in maintaining the rule of law . . . [and] lawyers should encourage, and should aid in making, needed changes and improvements.” EC 8-3 stated that “[t]hose persons unable to pay for legal services should be provided needed services.”

## III. Virginia State Bar

### A. Statistics

- [http://www.vsb.org/site/pro\\_bono](http://www.vsb.org/site/pro_bono)
- “Nationwide, 50% of the potential clients who request legal assistance from legal aid are turned away due to a lack of resources. People seeking assistance with family law cases were turned away 80% of the time.”
- “Rule 6.1 of the Virginia Rules of Professional Conduct every lawyer, regardless of professional prominence, should devote 2% of his or her professional time to pro bono legal services activity (or approximately 40 hours per year).”
- **“If Virginia lawyers were in compliance with this aspirational goal, we should be providing over 900,000 hours of pro bono.”**
- **“According to the best available data, Virginia lawyers are providing just 80,000 hours of pro bono.”**

## **IV. Recent Developments**

### **A. Virginia Access to Justice Commission Proposal to Virginia State Bar**

- On July 1, 2016, the Virginia Access to Justice Commission forwarded a final proposal to the Virginia State Bar to consider adopting “annual attorney self-reporting of pro bono hours and pro bono-related financial support.”
- “Studies consistently show that about 80% of the civil legal needs of low-income citizens go unmet, both nationwide and in Virginia. The data also consistently demonstrate that having legal representation significantly improves the outcomes for civil litigants in a variety of legal matters (e.g., matters implicating housing, benefits, custody and immigration status). In the Commonwealth, where half of the one million citizens living at or below the poverty line are likely to require civil legal assistance in any given year, this means that civil legal outcomes are being adversely impacted for 400,000 needy Virginians annually, due solely to their inability to pay for a lawyer.”
- “Currently, however, there is no mechanism to collect data to measure the VSB’s progress against this goal [of at least 2% of attorney professional time being devoted to pro bono annually]. Moreover, efforts to estimate the contributions of VSB members toward closing the Access to Justice Gap (based upon the very limited and admittedly incomplete data available) suggest the Bar provides less than 10% of its 2% pro bono hours goal. Thus, either the Bar is falling well short of its stated pro bono goal, or the lack of data regarding pro bono hours results in a dramatic underreporting of actual pro bono work performed, or both. Requiring licensed attorneys to annually self-report pro bono hours and pro bono-related financial contributions will provide data that can help to solve either problem.”

# Litigating the Impossible Case

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Eagle Mining

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SECTION

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**I. What makes a case impossible?**

Recognizing impossibility before the verdict is a subjective determination. One lawyer's impossible could be another's bread and butter. But, at some point, disaster can rear its head in many forms --- objectively. It can show up in a number of areas; and, if you happen to have two or more of those areas, you probably have a case that could easily become *impossible*. After the verdict, everyone's an expert. Knowing and addressing these elements before the verdict is hard work.

This presentation will use a case study to go through some of the impossibility warning signs --- and offer some pointers on how to deal with them.

**A. So where do the elements of impossibility commonly arise?**

1. The parties, your side and/or the other side (what if they're all liars?);
2. Bad fee agreement vs. Good fee agreement (proper boundaries and incentives can make all the difference);
3. The opposing lawyer(s);
4. The Facts;
5. The Witnesses;
6. The Law;
7. The Judge/Court System.<sup>1</sup>

**B. The Case Study:**

So let's look at these in more detail, through a case study (which, by the way, registered pretty negative scores on 6 of the 7 elements listed above). But, first, let's look at the basic facts of the case study – Eagle Mining v. Peabody Coal.

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<sup>1</sup> There are other impossibility factors that can sometimes come into play. For example, (a) intervention/opposition/hostility from the government, and/or (b) the economy (i.e., is your defendant going to go bankrupt? Insurance carrier going bankrupt? Huge recession, etc.). These factors are not addressed in this outline.

1. Our client, Eagle Mining, was a two-member LLC formed and run by two would-be coal miners from Kentucky. We say “would-be” because neither of them had much coal mining experience before forming Eagle. There was “never a dull moment” with these two.
2. The defendant, Peabody Energy, was, at the time, the world’s largest private sector coal company. Peabody suffered from a long, chronic case of profound arrogance. As the biggest bully on the block, they were accustomed to getting their way.
3. Peabody leased extensive coal reserves in Boone County, West Virginia. Peabody hired Eagle to surface mine those reserves. After a brief courtship, the parties signed a mining contract for Eagle to mine Peabody’s coal and be paid on a formula.
4. But, the honeymoon was short. It did not take long for Peabody to decide to “interpret” the Contract in such a way as to pay Eagle less. Eagle’s accountants eventually figured this out. What happened next was in dispute, but Eagle claimed that Peabody was improperly calculating the payments; and Peabody denied anything of sort (even though the Contract was actually pretty clear on this point).
5. Side note: pretty late in the game, Peabody managed to create a second big cause of action for Eagle by directing Eagle not mine “lucrative” coal reserves that Eagle had the exclusive right to mine under the Contract.
6. Eagle had a laundry list of “other complaints” going back to the beginning of time. It felt strongly that these were significant claims --- and we disagreed.

**C. The parties, your side and/or the other side.**

1. Perhaps the most important determiners in most cases are the parties.
  - i. Who do you represent?
  - ii. Can you trust them/him/her?
  - iii. Will her/she make a good witness? (Really? Watch out for those first impressions --- they can fool you.)
2. What if the parties on both sides are “less than perfect”? Is their bad worse than your bad? Is there a way to soften your bad and focus on theirs?

**Case Study Parties:**

1. From a size standpoint, this was truly a David vs. Goliath.
2. From a good vs. evil standpoint, probably not so much. Put it this way: there were facts that we hoped would never come out.
3. But, as the investigation of the case progressed, we saw that the key players for the defense might have their own warts and might not present very well to a fact finder.
4. Plainly, this was a case that both parties should have wanted to settle, so we pursued that approach at the beginning --- and it didn't last long.

**Solution:** Super strong fee agreement. Deletion of many of the claims that Plaintiff wanted to pursue --- which would have highlighted our warts (and which we would have lost). Limited, precise focus on limited precise issues --- with legal fees established at the time of the first decision. Earned fee up front, to offset contingency risk. The Fee Agreement turned out to be the ONLY indicator that we had in our favor ---- and it was extremely helpful.

**D. The opposing lawyer(s).**

1. It doesn't take long in this business to figure out that having the wrong lawyer on the other side can make any case HELL. Don't be that kind of lawyer --- really. If for no other reason, it simply does not work.
2. Difficult lawyers cause mischief for no strategically sound reason:
  - i. Scheduling;
  - ii. Motions;
  - iii. Order of witnesses;
  - iv. General hostility;
  - v. Confusion to the court.

**Case Study Lawyers:**

1. Ok, if you called "Central Casting" and asked for them to send you the difficult corporate lawyer who always represented the same difficult corporate client --- we got him. Whining, refined to an art form.

**Solution:** Use it to your advantage (nobody likes a whiny jerk); and don't take the boatloads of bait thrown out everywhere. But, don't let your pleasant style leave you as a sucker. Prepare for tricks and never assume that your opponent will simply do the right thing. These guys are waiting for you to overlook some deadline or filing requirement. It is the rarified air where they thrive. Be vigilant.

**E. The Facts.**

1. In almost every case, there are good facts, bad facts, and neutral facts. The existence of "bad" facts is not fatal to your case. No case is perfect. In our opinion, the key is to highlight the good, embrace the bad (don't flee from bad facts that you know are going to come out), and try to convert the neutral facts into bad facts for the other side. Cakewalk.
  - a. One of the most helpful things to do is to sort out the facts of any case and categorize them in one of these three groups.
  - b. Avoid situations where bad facts are likely to come out or be relevant. "Bad" facts often come out when you try to make your case into something that it isn't and/or your witness is under the stress of cross-examination. This is particularly true if your witness tends to veer from the question or is overly defensive in answering. Thus, this indicator ties closely with the "witness" category.
  - c. If there is something bad to say, own it. But, trials present only small portions of the overall "evidence" that could potentially come into play. Try to limit the scope to only relevant material.
2. Know the facts: Particularly if you have already determined that you have a less than perfect or less than reliable witness "telling you" the facts, you must know the facts **as they appear in the documents and records** (not necessarily as recounted to you by your client). There is no substitute for this knowledge. If you don't want to do this step, you are probably going to lose.
3. Once you know the facts and have categorized them, select the facts you will need to present --- and make sure that you designate exhibits and prepare witnesses accordingly. Nothing is worse than realizing that you have the perfect document that you did not designate. (Same with literature).

**Case Study Facts:**

1. Our case was potentially loaded with bad facts for our side. Many of the things that our clients wanted to routinely complain about were simply not supported by the facts --- or they presented an opportunity for the defendant to blame other third parties outside of its control.
2. Many of the things we had been told for years turned out to be false, simply because the clients were misremembering. (e.g., our client submitted invoices to Peabody for years, using Peabody's faulty methodology).
3. The facts were hard to understand. Lots of spreadsheets and data.

**Solution:** We limited the causes of action to simpler ones where we could present at least some strong facts. We avoided cluttering our case with black-hole claims where our chance of success was not good. (We failed on one relatively minor claim in doing this, but the defendant ended up focusing so much time and attention on that claim that it was ultimately counter-productive for the defense.) We managed the clients' "concern" about these deleted claims by specifically stating in the Engagement Agreement that such claims were not within the scope of the engagement. Otherwise, we would have almost certainly been whipsawed by clients who refused to take our advice as to such issues. We carefully selected the key witness for the plaintiff and then prepared him, and prepared him, and prepared him. (See below). We prepared for the "bad" facts and treated them like they were business as usual (e.g., What else was Eagle supposed to do but use the methodology that Peabody insisted upon? Otherwise they would have never been paid.)

**F. The Witnesses.**

1. Every successful case requires a witness, right? Someone has to be the face of the party --- and has to tell the story.
2. If your own fact witnesses are shaky, this is a problem. But, it is not usually insurmountable.
3. The Hippocratic Oath comes into play here. The first rule for your witness is "Do No Harm."
4. Witness preparation is critical. Let the witness know that he/she does not have to have an answer for everything. After listening to the witness, point out the solid core "TRUNK" facts, and compare the more speculative "TWIG" facts. Trunk facts are safe;

Twig “facts” are deadly. Teach the witness to stay with the Trunk facts, and avoid all Twigs.

5. Opposing witnesses are also critical. Who will make a good impression on behalf of your opponent? Who will not? The answers to these questions dictate much of the approach to use on cross-examination. The opposing witness who presents well should not be handled like the know-it-all jerk.
6. Lying witnesses (which is to say almost all witnesses in one way or another) present particular challenges. Listen for the lies. There are often “liar tells” that will sometimes give away even the most formidable liar. Sometimes simply pointing these out goes a long way.
7. Don’t forget appearance. Be pushy here. It is your job to tell the witnesses (particularly your client) how to dress in court. Polite rules of society do not apply here.

### **Case Study Witnesses:**

1. For our facts, we had two choices. We initially thought that our “star” witness would be Bubba #1. Oddly, this assumption persisted for quite some time --- until it became apparent that he simply did not wear very well --- particularly when he was under stress and particularly when he was questioned for long periods of time.
  - a. So, we chose Bubba #2, who we had initially dismissed as the less articulate of the two. He turned out to be a potential rock star, after 8 days of witness preparation.
  - b. Bubba #2 tended to wear large jewelry, and flashy (rock star-type) clothes. This was toned down substantially.
  - c. But, we were still concerned that he needed to see another witness on the stand before he actually testified. (See solution below).
2. We also had a really strong expert to handle all questions about damages, so we were able to divert most damages questions.
3. As for the other side, there was one humble seeming witness, and one jerk. The humble witness was a lower level employee, and he had limited knowledge. The jerk was a know-it-all, and he hated our clients. We correctly suspected that he would lie about just about anything.

- a. So, we called both as the first witnesses in our case. We knew that they would be called again as part of the defendant's case, so we limited our questions to just nailing down the key facts and timelines. There were some surprises.
- b. As it turns out, the "jerk" witness had an answer for everything that helped him and a poor memory for everything that didn't. On key issues, his testimony was obviously rehearsed compared with other areas of questioning. In the end, his "liar tell" was an excessive (impossible) level of detail about a key fact (particularly when contrasted with the paucity of his memory on surrounding issues from the same time period). He was eventually busted on cross-examination three days later. He lost all credibility.
- c. We also obtained a transcript of the testimony from the first day, and used it to further prepare Bubba #2. Watching the adverse witness examinations helped Bubba #2 prepare to be interrogated. The same transcript was used to cross-examine the "jerk" witness when he took the stand later in the week.

**Solution:**

- Be willing to change your strategy with witnesses.
- Most importantly, prepare your witnesses. You do not want your witness to be rehearsed, so you do not want to "teach them lines." However, you want your witness to be confident on reasonable things where he/she should be confident. Your witness should not be defensive. If he/she does not know, that is a perfectly good answer. So many witnesses are plagued by the false notion that they have to have an answer for anything. Avoid this.
- Listen hard to your witness and all opposing witnesses. Capitalize on discrepancies, and point out obvious "liar tells."
- If your witness is tricked into saying something he did not mean, deal with it aggressively.
- Hope for a defendant who wants to have an answer for everything! (a pretty big percentage).

**G. The Law.**

1. The law is important, but it is not everything. If you are dead on the law, odds are that you (and the judge) will know that long before trial.
2. For all other cases (i.e., those where there is a legal pulse), sometimes trial strategy can overcome weaknesses in the law.

3. Parties make decisions about which aspects of the case will be emphasized. It is difficult to simultaneously launch a vigorous factual defense to a particular point while also arguing that you legally win that point anyway (regardless of the facts). If the defendant makes it a fact issue, then it is a fact issue. No fact finder wants to hear an entire case only to be told that the answer to the key question doesn't matter. In our opinion, the more the defense fights a particular fact, the less likely it is that a legal defense will be successful as to that fact.

**Case Study Law Weakness:**

1. For our facts, we had a really strong case as to the interpretation of the key portions of contract. We were right and the defense was on the ropes with its proposed interpretation. In our opinion, they should have focused on the key legal issue where we were weak.
  - a. We were weak on the legal issue as to whether we had given proper and timely notice of our objection under the contract.
  - b. We found a pretty obscure case that held that "actual notice" was sufficient. But, the effect of that was to delete entire sections of the contract. Here, the defense could have done much better. Instead, they attempted to have it both ways --- claiming that there had been no actual notice, and also claiming that, if there was, it was inadequate. They sought to ride both horses.
  - c. The defense also attempted to create another fact-oriented defense by claiming that the wording of the contract was a mistake in drafting. (But, they failed to call the attorney who drafted it). Opening up this "missing in action" witness problem decimated any strength they had on this point.

**Solution:** We got lucky. By the end of the trial, the KEY fact question that had dominated everything was whether or not the defendant received actual notice. This entire inquiry came down to the credibility of the "jerk" witness, who had been vigorously cross-examined on this particular issue. He had no credibility.

As a result, we won the case, getting a \$23.5 million award. But, the battle was far from over.

**H. The Judge/Court system.**

1. Judges can have a huge impact on the outcome of a case. Sometimes delay in getting motions resolved or orders entered can be a huge problem. On some of these issues, there are simply no good options.
2. However, there are a few safe rules that will hopefully serve you well in keeping a good relationship with even the most difficult jurist.
  - i. Always be straight with the court (it only takes one incident to lose your credibility).
  - ii. Make all reasonable attempts to “get along” with the opposing counsel. Even if the other side is wrong, disputes will often tarnish both sides equally. (Why is that?)
  - iii. Be prepared, so you don’t waste the court’s time.



# Medical Errors & the Medical Malpractice Case

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From Accident to Courtroom

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SECTION

10



Representation of victims of medical malpractice is at the core of Gentry Locke's plaintiff's practice.

1. We currently have 12 attorneys, 2 registered nurse medical specialists, and an internist/rheumatologist with a pharmacy background who work on medical malpractice cases.
2. These cases are extremely labor intensive at the intake/evaluation stage. Expertise in review of the medical records and evaluation of the injuries incurred is imperative.
3. Oftentimes, a personal injury attorney, or an attorney who practices primarily in another field, is approached by an existing or potential client who will identify suspected medical malpractice.
4. Every medical malpractice actions requires proof of:
  - a. The applicable standard of care;
  - b. Deviation from (breach of) the applicable standard of care
  - c. Proximate causation (the deviation from the standard of care caused plaintiff's injuries); **and**
  - d. Sufficient damages to warrant pursuing a medical malpractice action.

See Va. Code § 8.01-581.1 (medical "malpractice" defined).

Today we want to talk with you about medical errors and the malpractice case – specifically, the frightening prevalence and consequences of medical errors and the investigation of medical errors in the evaluation and preparation of a potential medical malpractice lawsuit.

### A) What are medical errors?

1. Malpractice *crisis*?
  - a. Medical errors are **3<sup>RD</sup> LEADING CAUSE OF DEATH IN THE US!**
  - b. **250,000** deaths per year (U.S. News and World Report, May 3, 2016)
    1. After heart disease and cancer
  - c. Injuries related to malpractice probably exceed 1,000,000 per year.
2. Compare to:
  - a. Motor vehicle deaths: 38,300 in 2015 according to National Safety Council.
  - b. Work place deaths: 5,000 per year average approximately according to the Department of Labor.
  - c. Gun deaths (all causes): 30,000-35,000 roughly per year
3. Terminology:
  - a. Medical error – The failure of a planned action to be completed as intended (an error of execution) or the use of the wrong plan to achieve an aim (an error of planning).<sup>1</sup>
  - b. Adverse event - Unintended injury to patients caused by medical management (rather than the underlying condition of the patient) that results in measurable disability, prolonged hospitalization or both.<sup>2</sup>

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<sup>1</sup> Reason J. *Human error*. Cambridge: Cambridge University Press; 1990.

1. Not all adverse events are related to medical errors.
- c. Potentially compensable event - An event due to medical management that resulted in disability, which led to or prolonged a hospitalization.<sup>3</sup>
- d. Negligence – failure to meet standard of care by reasonably prudent practitioner.
4. Unsettling fact: The vast majority of medical errors do NOT result in injury to the patient, because
  - a. The error was identified and mitigated in time;
  - b. The patient was resilient;
  - c. Simple “good luck.”
5. Not all medical errors are malpractice, but all malpractice is due to medical error. The distinction is whether the error was preventable AND resulted in a “potentially compensable event.”
6. Types of errors:
  - a. Diagnostic
    1. Wrong or missed diagnosis
    2. Delay in diagnosis
    3. Failure to order necessary tests;
    4. Ordering wrong tests
    5. Failure to act on results of tests
    6. Failure to communicate test results
  - b. Treatment
    1. Operative errors
    2. Delay in treatment
    3. Error in administering treatment
    4. Dosing mistakes
    5. Medication errors
    6. Inappropriate or incomplete care
  - c. Preventive
    1. Failure to provide prophylactic care
    2. Failure to monitor or follow-up
  - d. Communication
    1. Failure to refer
    2. Failure to communicate test results to other providers
    3. Failure to advise patient
    4. Failure to document
    5. Lack of informed consent

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<sup>2</sup> Incidence of adverse events and negligence in hospitalized patients. Results of the Harvard Medical Practice Study I. Brennan TA, Leape LL, Laird NM, Hebert L, Localio AR, Lawthers AG, Newhouse JP, Weiler PC, Hiatt HH. *N Engl J Med.* 1991 Feb 7; 324(6):370-6.

<sup>3</sup> Mills DH, Boyden JS, Rubamen DS. *Report on The Medical Insurance Feasibility Study.* San Francisco (CA): Sutter Publications; 1977.

- e. Other
  - 1. Equipment malfunction
  - 2. "Systemic failure"

## **B) What happened?**

### 1. Perspectives on Medical Errors

#### a. Patient vs. Physician

- 1. Physician
- 2. To tell or not to tell?
- 3. Incentive to cover-up
  - a. Institutional
  - b. Personal/reputational
- 4. Legal or Ethical obligation to disclose?

#### b. Patient

- 1. What went wrong?
- 2. Where did everybody go?
- 3. Conspiracy of silence

### 2. JCAHO

#### a. Joint Commission on Accreditation of Healthcare Organizations

- 1. Mandatory reporting of "sentinel events"
- 2. Sentinel Event - any unanticipated event resulting in death or serious physical or psychological injury to a patient or patients, not related to the natural course of the patient's illness.
- 3. Reporting Requirements:
  - a. "the licensed independent practitioner responsible for managing the patient's care, treatment, and services, or his or her designee, informs the patient about unanticipated outcomes of care, treatment, and services." Joint Commission Standard RI.01.02.01
- 4. Penalties for failure to report
  - a. JCAHO does not create right of action for patient
  - b. Medicare \$\$\$ at stake if hospital loses accreditation

### 3. Physician Ethical Requirement to disclose to Patient?

#### a. AMA Code of Medical Ethics

- 1. In cases in which "a patient suffers significant medical complications that may have resulted from a physician's mistake. . . the physician is ethically required to inform the patient of all the facts necessary to ensure understanding of what has occurred."<sup>4</sup>
  - a. What does it really mean?

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<sup>4</sup> American Medical Association. Patient information. In: Code of medical ethics of the American Medical Association: current opinions with annotations. 2010–2011 ed. Chicago (IL): AMA; 2010. p. 280–3.

- i. Was complication *significant*?
- ii. Will physician consider it a *mistake*?

4. M&M Conferences:

- a. Historically about understanding what went wrong and why;
- b. To educate other practitioners and prevent recurrence
  - 1. Not about advising the patient
- c. Top secret
- d. Peer Review privileges – Protect discussion and results from disclosure to patient
  - 1. Va. Code § 8.01-581.17
    - a. Protects from disclosure “all communications, both oral and written, originating in or provided to” committees reviewing medical mistakes.
    - b. “Facts” not protected:
      - i. “Nothing in this section shall be construed as providing any privilege to any health care provider, emergency medical services agency, community services board, or behavioral health authority with respect to any factual information regarding specific patient health care or treatment, including patient health care incidents, whether oral, electronic, or written.”
  - 2. 42 U.S.C. § 299b-22. Federal Patient Safety and Quality Improvement Act Privilege.
    - a. Protects “patient safety work product” developed for production to a Patient Safety Organization.

5. Reasons Physicians/Hospitals/Providers do not disclose medical errors

- a. Hard for me to say “I’m sorry.”
- b. Personalities and big egos
  - 1. Some subspecialties less “apologetic” than others
- c. Fear of consequences
  - 1. Reporting
  - 2. Insurance won’t pay for procedure
  - 3. Restriction of privileges
  - 4. Malpractice claim
  - 5. Have no fear:
    - a. Va. Code § 8.01-581.20:1
      - i. “Apologies” and any “general sense of benevolence” inadmissible as an admission or to establish liability.

6. How do Patients find out what happened?

- a. Medical Records DO NOT tell the whole story
  - 1. Rarely describe error occurred
  - 2. Never describe how error occurred

3. Don't forget – your client, friends and family who were present, or medical records from other providers may contradict the defendant provider's records.
  - b. Rarely a subsequent provider will say: "this should not have happened."
  - c. Rarely a nurse will say: "you should go see a lawyer."
  - d. Most often silence and suspicion bring the patient to an attorney
  - e. Where to look for mistakes in the digital age:
    1. Electronic Medical Records (EMR)
      - a. Less information on more pages
        - i. (Major pitfall – Less direct communication between physicians since they assume each are accessing and reviewing the EMR)
    2. Attorneys must understand how information is input into EMR.
      - a. The hard copy of the EMR does **NOT** look like what the provider sees when inputting information into the record.
        - i. ON/OFF toggles (if not ON, not in EMR), drop down menus, direct links to other screens/tools.
        - ii. Autopopulated fields vs. free text fields.
      - b. Delay between dictation/transcription/uploading to system.
      - c. Discrepancies between handwritten records (they still exist) and EMR for same visit.
      - d. Who can access the system? (Hospital record – unaffiliated physician at his office).
    3. Late Entries, Altered Entries, and Availability to Other Providers.
      - a. Metadata.
        - i. Audit trail/audit log. Who accessed record, when, any changes made (original and new values).
          - Information added to or deleted from original record.
          - Was audit tracking ever disabled?
  - f. Also consider:
    1. Archived Voice Mails
    2. Text Messages
    3. Deposition of corporate designee regarding electronic data issues. Rule 4:5(b)(6).
    4. Electronic access records (swipe cards).
7. Obstacles for the malpractice Plaintiff:
- a. Certification of merit – Va. Code § 8.01-20.1 requires a signed expert opinion by provider who would "qualify as expert witness" that defendant deviated from standard of care **and** that deviation caused the injuries claimed. (§ 8.01-50.1 requires same for malpractice causing wrongful death).
    1. Required at time service of process requested.
  - b. Standard of Care expert – Va. Code §8.01-581.20

1. the standard of care ... [is] that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth[.]
  2. Any physician 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.
  3. 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.
  4. 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.
  5. 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
  6. **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.
- c. VMJI 35.05 – jury restricted to expert testimony in considering standard of care:
1. “You must determine the degree of care that was required of the defendant by considering **only** the expert testimony on that subject.”
- d. Proximate cause of injury must be proven by expert testimony – a doctor.
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 (1998).
- e. Experts
1. Expense
  2. Disclosure deadlines
  3. Sufficiency of disclosure issues:
    - a. *John Crane, Inc. v. Jones*, 274 Va. 581 (2007) - opinions not fully disclosed pretrial will be excluded at trial.
    - b. Active clinical practice challenges
    - c. Similar field of medicine challenges
    - d. *Daubert*-type challenges
- f. Treating physicians reluctant to criticize peers
1. Va. Code §8.01-399
- g. Malpractice Cap – Va. Code § 8.01-581.15
1. the total amount recoverable for any injury to, or death of, a patient shall not exceed the following, corresponding amount:
    - a. July 1, 2015, through June 30, 2016 \$2.20 million
    - b. July 1, 2016, through June 30, 2017 \$2.25 million

- c. July 1, 2017, through June 30, 2018 \$2.30 million
- d. July 1, 2018, through June 30, 2019 \$2.35 million
- h. Pressure on physicians to REFUSE to appear or be identified as expert for Plaintiffs
  - 1. From employers
  - 2. From insurance carriers
  - 3. From professional specialty societies
- i. Privileges – Peer Review
  - 1. Confidentiality
  - 2. Federal and State protections
- j. Provider apologies inadmissible. Va. Code § 8.01-581.20:1.
- k. Data Bank Reporting requirements

### C) The truth.

- 1. Injured patients rarely file lawsuits.
- 2. Despite the critical number of medical errors, there are comparatively few malpractice claims pursued and even fewer cases filed by injured patients; *and* the number of malpractice cases filed is declining.
  - a. An estimated 2,500 malpractice trials in all of US in 2005<sup>5</sup>
  - b. Account for less than 2% of all civil cases filed
  - c. Number of cases filed declining because of “reform”
  - d. Best estimate from sampling done by Center for State Courts is less than 20,000 malpractice cases *filed* each year
  - e. Number of filings plummeting in states implementing “reform:”
    - 1. In **Tennessee**, malpractice filings plummeted from 638 cases filed in 2006, before reform, to 374 in 2008, to 329 in 2009.<sup>6</sup>
    - 2. **North Carolina** averaged about 600 malpractice cases filed each year between 2000-2003. In the years since “reform,” less than 300 cases per year filed.<sup>7</sup>
  - f. Malpractice trials last twice as long as other civil cases; and
  - g. Plaintiffs win less than 25% of the time at trial.
  - h. Cases are expensive and technical
- 3. National Practitioner Data Bank Statistics
  - a. Between 2004 – 2014
    - 1. Approximately 365,000 licensed practitioners in the U.S.

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<sup>5</sup> National Center for State Courts: Court Statistics Project ([http://www.courtstatistics.org/~media/Microsites/Files/CSP/Highlights/18\\_1\\_Medical\\_Malpractice\\_In\\_State\\_Courts.ashx](http://www.courtstatistics.org/~media/Microsites/Files/CSP/Highlights/18_1_Medical_Malpractice_In_State_Courts.ashx)); Bureau of Justice Statistics (<http://www.bjs.gov/index.cfm?ty=tp&tid=4511#pubs>).

<sup>6</sup> Annual Reports of the Tennessee Judiciary 2004-2010 ([http://www.tsc.state.tn.us/sites/default/files/docs/2009-2010\\_annual\\_report\\_of\\_the\\_tennessee\\_judiciary.pdf](http://www.tsc.state.tn.us/sites/default/files/docs/2009-2010_annual_report_of_the_tennessee_judiciary.pdf))

<sup>7</sup> North Carolina Lawyers Weekly, July 24, 2015 (“Latest data show state’s tort reform act delivered a knock-down blow”)

2. Approximately 11,600 licensed practitioners in Virginia
3. Number of malpractice claims PAID in U.S. declined from 18,000 in 2004 down to 12,000 in 2014
4. In Virginia, number of malpractice claims PAID declined from 242 in 2004 down to **149** in 2014<sup>8</sup>
5. \$58,000,000 in total malpractice payments in Virginia in 2004
6. \$52,000,000 in total malpractice payments in Virginia in 2014
7. Average payment per claim in 2004 in Virginia was \$240,000
8. Average payment per claim in 2014 in Virginia was \$348,000
9. Adjusted for inflation, the average malpractice payment has declined nationwide

4. Malpractice Litigation Crisis?

“The data on medical malpractice case filings and trials in state courts reveal little evidence of a “litigation crisis.” Courts do not appear to be overwhelmed by a flood of medical malpractice lawsuits. As data cited earlier from the Institute of Medicine show, very few injured patients ever file suit and even fewer take their cases to trial. Only a small minority of medical malpractice plaintiffs win at trial. Although median damage awards to successful plaintiffs are higher in medical malpractice cases than in other personal injury cases, the injuries in medical malpractice cases tend to be more severe.” (National Center for State Courts, Court Statistics Project; “Medical Malpractice Litigation in State Courts,” Vol. 18. #1, April 2011).

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<sup>8</sup> This number does not reflect malpractice payments made on behalf of clinics, hospitals or group practices in which an individual practitioner was not identified as the responsible party or defendant.

# Considerations for the Transfer of the Closely Held Business

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(You Ain't Taking it With You)

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SECTION

11



I. Importance of Adopting a “Succession Plan” for the Transfer of the Closely Held Business.

- A. For many successful business owners, a large portion of their individual wealth will be directly related to their stock ownership in a closely held corporation.
- B. The existing estate tax structure may result in a tax loss of 40% or more for individuals with taxable estates in excess of the current exclusion amount of \$5,450,000 (2016). The loss to estate tax is often higher where assets such as an interest in a closely held business are illiquid and no means of converting the asset to cash is available other than by a forced sale/liquidation. The applicable estate tax credit amount of \$5,450,000 (2016) is indexed each year for inflation. To the extent the aggregate value of the estate is under the applicable credit amount in effect for the year in which a death occurs, the unused portion may be claimed by a surviving spouse under the “portability” rules.
- C. Under current rules the tax basis of stock, LLC partnership or other business interest will generally “step up” to its fair market value determined as of the date of death for purposes of calculating gain upon sale.
- D. The forced sale of a business interest may adversely affect job security for key employees, and financial security of the remaining owners, or their spouse or children.
- E. The need to adopt an affirmative succession plan emphasizes action rather than reaction.

II. Essential Components of a Business Succession Plan.

- A. Ensure that the business owner and family members have a clear understanding of how the estate tax and income tax rules may impact upon a proposed lifetime or postmortem transfer of a business interest. For example, professional corporations such as engineering or medical face different challenges than other entities. In addition, planning for the transfer of a service business is often approached differently than the transfer of a manufacturing business.
- B. Force recognition that the failure to establish a succession plan for the transfer of a business interest during the lifetime of an owner will often result in a reduction in the value of the business interest transferred at death or retirement. Such value differential may be due to the absence of the continuity of management, failure to aggressively expand into new markets, product development or to identify a third party purchaser willing to pay a fair market value for stock.
- C. Establish a realistic and defensible value of the underlying business or business interest through the efforts of third parties such as accountants, lawyers and qualified business appraisers.
- D. Identify the most likely options for the business owner to ensure continuity of ownership such as buy-sell agreements, family partnerships, life insurance programs, Employee Stock Ownership Plans and further identify and adopt an integrated plan

whereby the various planning options work in conjunction with each other to maximize tax efficiency.

- E. Establish a realistic timetable for the implementation of the selected options. For example three (3) to five (5) years for transition.

### III. General Considerations in Establishing the Direction of a Succession Plan.

- A. Liquidity. The business owner may have a concern about maintaining a sufficient level of cash:

- 1. to permit the business owner to maintain a lifestyle or begin converting illiquid stock equity into a diversified portfolio. The Employee Stock Ownership Plan provides a unique opportunity to convert illiquid stock to cash using pre-tax corporate dollars.

- 2. to pay estate tax. Consideration should be given to establishing a buy-sell agreement with other co-owners to be funded by insurance or reserves established at the entity level.

- 3. to provide income to a surviving spouse where predeath income was derived from salary or dividends from the business. The use of an Employee Stock Ownership Plan in conjunction with proper life insurance, a Charitable Remainder Trust or Family Foundation may provide an income and estate tax efficient program to achieve this goal.

- 4. to fulfill specific bequests to family members or charitable entities.

- B. Continuity Among Family Members. Minimize disputes among family members following the retirement or death of a significant stockholder regarding:

- 1. business direction; creation of Family Limited Partnership, first-to-die or survivor life insurance in conjunction with an Employee Stock Ownership Plan offers opportunity to determine how control of a business may transition while exacting cash on a pre-tax basis;

- 2. compensation of remaining family members working in the business; and

- 3. control. Key employee retention often becomes a critical factor. The use of executive deferred compensation plans funded by tax deferred cash value of life insurance is often a necessary component in many succession plans.

- C. Shift of Responsibility to the Next Generation of Owners. Address the desirability of transferring a significant percentage of an owner's interest in the closely held business to the next generation.

- 1. Compare the effects of this proactive objective to the reactive planning most often evidenced by the adoption of a traditional buy-sell agreement. Better to shift value in a controlled and orderly fashion during life than pay death tax on increasing equity value.

2. Consider the financial impact on key employees if the business continues to grow without lifetime transfers by key owners to younger employees or family members in order to ensure appropriate management continuity and shift of future appreciation.
3. If no family members are working in the business or desire to continue working after a business owners retirement or death, consider the importance of identifying key employees to take over ownership (build a buyer).

IV. Alternatives for Consideration in Implementing a Business Succession Plan.

A. Buy-Sell Arrangements.

1. Redemption Agreements.

- a. Traditionally referred to as “entity repurchase” or “redemption” agreements.
- b. May be used to negotiate the sale or transfer of corporate interests at an agreed value (beware of agreements among family members to define purchase price).
- c. Often funded by corporate owned life insurance. Despite non-taxable status of life insurance proceeds, may be subject to the Alternative Minimum Tax at the corporate level. Premiums are paid with after tax dollars!
- d. Stock redemption is generally not tax advantageous to a corporation and may not result in capital gains tax treatment to seller (beware of the “phantom basis” rule resulting in ordinary income treatment) depending upon amount of shares purchased.
- e. No “step up” in tax basis to the remaining stockholders where corporation redeems stock.

2. Cross Purchase Agreement.

- a. Between individual stockholders rather than the corporation and owner.
- b. Often unfunded or funded in the event of death by the cross purchase of individual life insurance policies. Premiums paid by the stockholders with after tax dollars!
- c. May result in ownership of multiple life insurance policies where numerous owners are involved unless “trusteed” cross purchase format adopted.

- d. More tax advantageous to remaining stockholders due to “cost” basis for stock acquired.

3. Hybrid Agreement.

- a. Combines elements of 1 and 2 and above.
- b. Permits a combination of purchase by stockholders and redemption by the corporation depending upon available cash flow.
- c. Permits IRC § 303 tax treatment (capital gain on sale of stock to company) to an estate where stock of a deceased stockholder is to be redeemed by the corporation to raise cash to pay taxes and administrative expenses.
- d. Where an Employee Stock Ownership Plan exists, the ESOP may assume a stockholder or corporations obligation to purchase shares. Such ESOP purchase will be made with pre-tax dollars!

B. Corporate Separations Under IRC § 355.

- 1. Where multiple unrelated stockholders or dominant family stockholder wishes to divide a corporation conducting multiple business operations in order to provide separate businesses for individual family members or unrelated stockholders, it is often possible for the stockholders to divide the corporation into several new corporations on a tax free basis. Following the division of the corporation into its component businesses, it is possible for several stockholders to each end up with a separate corporation.
- 2. In order to accomplish the division of the corporation, the corporation establishes as many subsidiaries as necessary to hold the number of separate businesses. Following the establishment of the subsidiary, the assets of the separate businesses are transferred to the new company and the stock of the new corporation is distributed to a separate stockholder (or a group of stockholders) in exchange for all of such stockholder’s stock in the parent corporation.
- 3. In order to qualify for tax free treatment, certain preconditions must be met, including a finding that the transaction will have a legitimate business purpose and that the separation not be a device for distributing the retained earnings of the corporate parent.
- 4. Corporate separations may take the form of a “spin off” (creation of a subsidiary to be continually owned by a parent corporation), a “split off” (creation of a brother/sister controlled group of corporations with uniform ownership of each), or a “split up” (division of separate corporations among differing stockholders).

C. Sale/Leaseback of Corporate Assets.

1. A corporation may distribute assets to a significant stockholder in lieu of a cash payment in exchange for a pre-existing stockholder loan or the redemption of stock; or the sale of such assets to the stockholder in exchange for an installment note.
2. Assets are leased back to the corporation by the stockholder thereby creating future cash flow to the owner after transfer of some or all of his stock to an ESOP, key employees or family members by gift or sale.
3. Amounts paid as “rent” by the corporation to the stockholder will be deductible if “ordinary and necessary” business expenses. Rents, to be deductible and not characterized as a “constructive dividend,” must be reasonable in light of rents charged for comparable property in the marketplace.
4. Rental income received by the business owner will be considered “unearned” income for self-employment tax purposes.

D. Deferred Compensation Arrangements.

1. Consider using a Nonqualified Deferred Compensation Plan to provide income to a stockholder in order to offset or supplement the purchase price of the owner’s stock, regardless of whether the stock is to be redeemed by the corporation, sold to an Employee Stock Ownership Plan or transferred by gift or sale to other family members.
2. If stock is to be gifted by a significant stockholder to family members, the deferred compensation income can replace the loss of “sweat equity” transferred to the next generation.
3. If a total “payment package” is determined after combining the deferred compensation income with the reduced purchase price for stock, what difference does it make where the cash comes from? Payments received from a Deferred Compensation Plan are considered ordinary income whereas payments received in exchange for the sale of stock may, if properly structured, be eligible for capital gains (20% and possibly 3.8% medicare surtax) treatment.
4. Payments from a Deferred Compensation Plan are deductible to the corporation when includable in the employee’s income. Whereas, payments from a corporation to a stockholder for the redemption of stock are not deductible. Often, the deductibility of deferred compensation payments will permit a larger aggregate payment to the business owner over time than if all payments were to be used by the corporation solely for the redemption of stock.

5. The combination of a deferred compensation plan payment from a corporation to a significant stockholder in conjunction with the sale by the stockholder of his interest to key employees, or family members at a reduced purchase price, results in a lower “cost” basis to the key employees or younger family members purchasing the stock. This may result in an increased capital gain to the key employee or family members when the stock is subsequently sold for its true value. However, the key employee or family members will have the luxury of deciding if and when to sell, rather than a mandatory sale to pay death taxes. If an Employee Stock Ownership Plan is in place, the sole number of shares of the ESOP may be made on a tax deferred base via §1042 at a “fair market value”. The deferred compensation payments are fully deductible by the corporation when paid.

E. Employee Stock Ownership Plan (“ESOP”).

1. An ESOP may offer the most favorable tax benefits for both the retiring or deceased stockholder and the remaining stockholders or family members.
2. An ESOP is a form of qualified retirement plan governed by §§ 401(a) and 4975 of the Internal Revenue Code. It is referred to as a “Defined Contribution Plan” similar in nature to a profit sharing plan but unlike a regular profit sharing plan, an ESOP is permitted to invest primarily in company stock. The stock purchased from a retiring or deceased stockholder is acquired by the Plan with pre-tax employer contributions and held by the Plan Trustee for the benefit of company employees.
3. Company contributions made to the ESOP are used to purchase some or all of the stock of the retiring or deceased stockholder. Company contributions may be accumulated over time (referred to as “cash warehouse ESOP”) and used to purchase stock from a retiring or estate of a deceased stockholder in a lump sum or may be used by the ESOP to service debt incurred by an ESOP to purchase (a “leveraged ESOP”). Contributions by a corporation to a “leveraged” ESOP of a regular corporation are fully deductible and the amount may exceed 25% of the total payroll of the employees eligible for participation in the plan. Contributions by a company which is an “S” corporation for income tax purposes are limited to 15% of payroll of plan participant. If contributions are made to an ESOP for purposes of accumulating cash in anticipation of a future purchase, (“cash warehouse”) the contribution limit is 25% of eligible payroll.
4. Unlike conventional financing, where the corporation establishes an ESOP to repurchase stock of a deceased or retiring stockholder and has the ESOP engage in a loan with a third party, the total debt service to the third-party bank (including principal) is fully deductible by the corporation as it is considered a contribution to a retirement plan. Where the corporation borrows the funds directly from a third-party lender directly for the purpose of redeeming its stock, it may only deduct the interest payments. The repayment of principal must be made by the corporation with after tax dollars.

5. Another significant advantage of selling stock to an ESOP is that the gain on the sale of the stock, (if the corporation is a “C” corporation for tax purposes and the stock has been held for three years prior to the sale) can be deferred by the selling stockholder where the proceeds are reinvested within twelve (12) months from the date of sale, in “qualified domestic securities”. This will permit the selling stockholder who desires to begin withdrawing his equity from the corporation to diversify his investments by reinvesting the proceeds of the sale of the stock into other marketable securities. (IRC § 1042.) As a precondition to the favorable tax treatment to the selling stockholder, the ESOP must own 30% of the corporation after the sale. Furthermore, none of the selling stockholder, and any members of his family or any other stockholder owning 25% of the stock can receive future ESOP allocations for a period of ten (10) years following the date of the sale.
6. Following the sale to the ESOP of the stock of a retiring stockholder or the estate of a deceased stockholder, the remaining stockholders may, subject to the provisions of the Internal Revenue Code and ERISA, continue to control the stock sold to the ESOP by agreeing to serve as the ESOP Trustee. Certain statutory limitations may, under certain circumstances, require the Trustee to permit the employees to direct it as to the vote of certain shares of the ESOP stock allocated to their individual accounts in the event of a major corporate event (i.e., merger, liquidation, sale of substantially all assets, etc.).

F. Charitable Gifts of Corporate Stock.

1. An older stockholder desiring to reduce his interest in a corporation or convert some stock to cash may wish to consider the making of a charitable gift of stock in order to minimize the income tax consequences associated with a sale of the stock as well as satisfy any personal charitable interest that he may have.
2. By transferring stock directly to a charity or indirectly for the use of a charity through a charitable lead or charitable remainder trust, the stockholder obtains a charitable income tax deduction while at the same time eliminating the tax on the capital gain that he would otherwise realize if the stock were sold to a third party and the proceeds subsequently transferred to a charity.
3. By establishing a Charitable Remainder Trust the stockholder (and his spouse) may retain an income stream for life, plus receive a current charitable income tax deduction for the remainder interest. Often, the stockholder will utilize the tax sheltered income available as a result of the income interest being sheltered by a portion of the income tax charitable deduction to purchase wealth replacement life insurance to be held by an irrevocable life insurance trust. The life insurance trust ensures that the proceeds of the insurance are not includable in the deceased stockholder’s estate thereby preserving additional wealth for a surviving spouse or family.
4. As a practical matter, a charitable trust that becomes the owner of an interest in the corporation will be required to find a buyer for the stock in order to convert it to cash. Most often, it will sell the stock back to the corporation or to

the younger generation of stockholders who desire to increase their interest in the corporation. In either event, the sale by the trust to the corporation or younger stockholders will not require the payment of any capital gains tax on the appreciation of the stock. Care must be taken in structuring the sale of the stock from the charitable trust to the corporation in order to ensure the tax exempt status of the sale. Where the corporation is obligated to redeem the stock, but the charity is not obligated to sell the stock to the corporation, the transaction will not be viewed by the IRS as a “step” transaction resulting in capital gains treatment. D.D. Palmer (62 T.C. 685; Rev. Rul. 78-197 (1978-1 C.B. 83)). However, where the corporation or existing stockholder purchases the stock from the charitable trust, after tax dollars must be used. Where an ESOP purchases the stock from the charitable trust pre-tax dollars may be used.

G. Use of Family Limited Partnerships and Family Limited Liability Companies (“L.L.C.”)

1. Where a large stockholder wishes to shift value to the next generation of owners or among family members but also desires to retain control of the underlying stock or other property, consideration should be given to the use of entities such as the Family Limited Partnership or Family Limited Liability Company (“LLC”).
2. The use of the Family Limited Partnership or LLC permits a stockholder to contribute stock in a closely held corporation to the entity while retaining management control as general partner or LLC Manager. In addition, the individual may transfer the value of the partnership or LLC to or among family members such as children and/or grandchildren by making gifts of limited partnership interests or LLC member interests utilizing the annual \$14,000 per donee gift tax exclusion and \$5,450,000 (for 2016) lifetime gift/estate tax exclusion.
3. The key element of the Family Limited Partnership and LLC is the “leverage” factor derived from applying certain valuation discounts available to the donor.
4. Valuation discounts ranging from 20% to 40% may be available for transfers of limited partnership and LLC interests to family members based upon the minority status and lack of marketability of the interest being transferred.
5. The shift of ownership of the limited partnership or LLC to the younger generation also shifts income (allocated prorata among partners or LLC members in proportion to ownership) as well as future appreciation.
6. Stock transferred to the Family Limited Partnership or LLC may be purchased by an ESOP with pre-tax dollars. The selling entity may elect to defer recognition of capital gain to the extent the ESOP owns 30% of the outstanding shares following the purchase.

# Trying the Employment Case to Verdict

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Ten Lessons from Three Trials

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SECTION

12



In the last fifteen months, we have had three jury trials in employment cases. Each of these cases involved former employees suing their employer for discrimination. Two of the cases resulted in defense verdicts and one case was dismissed at the close of plaintiff's evidence.

Generally, employers are reluctant to run the risk of trying these cases because of the defense costs and the disruption to senior management and operations. Nonetheless, with the right facts and circumstances, taking a case to trial is often the better option. So, here are ten things we have learned from these three trials:

**1. Evaluating the case at the beginning.**

Most cases are not given a thorough and truly accurate evaluation at the beginning. Because the costs/fees (on both the plaintiff and the defendant) invested in these cases can be substantial, taking the time and expending more resources at the beginning are critical in the evaluation of a case to determine whether it is one that should be defended through trial. The lawyer defending or prosecuting the case can absolutely influence the client's decision as to whether to take the case through trial. The lawyer must be well prepared and have a well thought out strategic plan for the case – which in turn will give the client more confidence. Once it is determined that the case can and should be defended, then it is incumbent upon the attorney to provide a clear explanation to the client of the estimated costs/fees associated and the non-monetary impact.

Part of the early evaluation is truly understanding the jury instructions. Preparing jury instructions, at the beginning of a case, is often overlooked. In employment cases, it is critical to not only understand the jury instructions, but to actually get them drafted early as it will serve as the ultimate guide through discovery and all pretrial matters.

**2. Pretrial Conference and Motions in Limine**

Schedule pretrial conferences early and often (if necessary). It is important to file motions in limine and raise other pre-trial issues far enough in advance so that you can prepare your witnesses and evidence accordingly. There is a tendency to wait until close to trial to cull through the evidence and potential objections, but having this information determined and motions decided in advance makes a big difference in how you prepare for trial. Otherwise, you are preparing for three different outcomes – admission, exclusion or a hybrid that might prove ineffective for your case.

Similarly, learn to use the courtroom technology well in advance of trial. Most courts are more than happy to oblige if you call and schedule a time to come in and meet

with the clerk or other courtroom official to have him or her show you how to operate the technology. The last thing you want to do is have technology fail during your presentation at trial. Be sure to have backup technology – or (*gasp*) paper – in the event you have to change tactics quickly.

**3. Remain Flexible.**

Beginning with voir dire, expect the unexpected. Whether it be bench rulings, witness issues, or decisions made by opposing counsel, it is critical that you remain flexible and be able to adjust on the fly. This is particularly true in employment cases where emotions run high and witnesses can be incredibly unpredictable – as alliances often shift. Part of this flexibility goes hand in hand with thinking outside of the box. The judge is going to make rulings that impact your case and the evidence that it either excluded or admitted. While you may have a set plan as to how you wish to introduce your evidence, the ability and more importantly, the willingness to make changes midstream is critical.

**4. Jury Instructions**

A. Start with Good Instructions

When you file instructions with the Court, make sure those are the instructions you want if the court adopts them in their entirety. Do not rush through preparation of instructions – every word matters. Check jury instructions given by your judge in other, similar cases and expect that if the judge was not reversed on those instructions, he or she will wish to use them again. While you should try to adopt what you can from what the judge has used previously, do not hesitate to modify an instruction or submit a new instruction if you believe it accurately states the law and helps your case.

B. Argue, Argue, Argue

If you disagree with certain language in an instruction offered by the opposing party or the court, speak up! You cannot preserve your record for appeal if you allow yourself to be bullied into agreeing with an instruction. Better yet, submit written objections to opposing counsel's instructions prior to trial. You can prepare for your argument while at the same time preserving the record. Equally important is to know when you should not object to an instruction offered by the opposing party. If an instruction is offered that you disagree with, but do not believe it will ultimately affect the outcome of your case, it may be prudent not to object to the instruction and thereby avoid giving your opposition a potential appeal point.

## 5. Witness Preparation

### A. Organization is Key

Get your witnesses emotionally invested in the case. Alliances are fleeting in employment cases, but you need to get your witnesses to buy in. As soon as you know your trial date, reach out to your witnesses to tell them when the trial will be, where, and how long in advance of trial you will want to meet with the witness to prepare him or her. Not only does this help you to organize your case well in advance, it helps the witness plan his or her schedule and gives the witness confidence in your preparation and organization. Further, if a witness believes you are cognizant of his or her schedule, they will be more inclined to cooperate with you.

Make individual folders or notebooks for each of your witnesses. Every time you obtain a document relating to the witness, put it in the witness's folder. Similarly, if you think of a motion *in limine* or line of questioning related to the witness, place it in the folder so you have everything in one place. The folder should also include the witness's contact information and your own observations of the witness and how he or she will present at trial.

### B. Practice Sometimes Does Not Make Perfect

Before you meet with a witness to prepare him or her for trial, create an outline of what you expect to ask the witness, the points you need to make with that witness and the exhibits you plan to use. Do not turn your witnesses into robots. You want them to testify with conviction and be genuine. Do *not* create a rigid script to use with the witness. Oftentimes, attorneys fall into a trap of following a script too closely and either lose an important point that the witness is trying to make or fail to hear an answer altogether. When you meet with a witness prior to trial, do a run-through of the questions you plan to ask the witness, but explain to the witness that things can change quickly during trial and you might end up asking more or fewer questions. During trial, your strategy can change in real time, requiring counsel to alter the questions planned for a witness or, in extreme cases, requiring counsel to forgo calling a particular witness altogether. Warn the witness that this may occur in advance so he or she is not left with lingering questions following trial.

Equally important is preparing your witness for cross-examination. Naturally, how long is spent on this aspect of preparation depends on the witness, but ensuring witnesses are prepared for questions the other side may ask is key. Further, if your witness was

involved in disciplining or terminating the plaintiff, make sure the witness is aware of the company's reasons for doing so. If the witness recalls different reasons, be certain to understand why so you can investigate and prepare well in advance for questioning at trial. Showing the witness exhibits you anticipate opposing counsel will use during cross-examination is also helpful to prepare the witness, even if you are uncertain how the exhibit will be used.

If possible, show the witness what the courtroom looks like in advance and where he or she will testify. The more information the witness has in advance, the better. Walking the witness through what will occur when he or she enters the courtroom is also important. Unless you tell the witness where to walk, how to raise his or her hand when being sworn, and where to sit, the witness will likely be more nervous and less focused on the information they are there to provide.

## **6. Voir Dire**

The importance of jury selection – especially in employment cases – cannot be overstated. Every juror has held a job, been fired or knows someone who has. Every juror has employment “baggage” – bad or good. Take the opportunity in voir dire to present your case and let the jurors get to know you. Ask at least a few questions that get the jurors committed to your theme or position in the case and be mindful of sensitive issues in your case. If you have a sexual harassment case with foul language, you have to decide whether to introduce the jurors to that language in voir dire, or wait. When should you lessen the sting?

In nearly 100% of employment cases, jurors bring their own work experiences to bear when deciding their verdict, giving the factual evidence in the case a backseat. They are very interested in knowing the company's motivation for its actions and the character of those involved, as they themselves may have been subject to unfair treatment or a prickly co-worker. By accepting the fact that jurors have certain perceptions and tailoring your case to those perceptions, defending your case becomes easier. The best defenses are designed with jurors' attitudes and experiences in mind. Even if a juror may generally trend away from sympathizing with a company, that same juror may disagree with a plaintiff who has been unfair or appears greedy.

Judge Mark Bennett, of the United States District Court for the Northern District of Iowa, developed an entertaining and insightful list of 101 jury selection tips that he took

from his 35 years of experience on the bench. All 101 tips are attached as ***Attachment A***.

Some takeaway tips (both from Judge Bennett and elsewhere) include:

- Do not mispronounce a juror's name. If you have the slightest doubt, ask the juror how to pronounce his or her name.
- Do not take notes while you are conversing with the jurors - have someone else make notes.
- Get to the courthouse early so jurors do not see you arrive. They will miss you smoking, picking your nose, hanging with your entourage, or other annoying behavior.
- Be very careful of legal jargon and technical terms.
- Actually listen to the juror's answer to help formulate your next question.
- Use a bullet-point outline instead of listing your questions verbatim.
- Ask open-ended questions, i.e., "what do you think about . . .?" or "how do you feel about . . .?"
- Never apologize for doing your job.
- Be very organized. Jurors notice everything you do.
- Exercise more challenges for cause.
- Do not waste time. Talk less, listen more.
- Carefully watch the body language of your jurors. This is most important when another juror says something hostile or negative about your claims – you can learn to tell who agrees and disagrees. Also, you will know when you have reached the end of the jurors' patience with your questioning.
- Use jurors you know you are going to strike as foils to make your points.
- The best question you have never asked is "what type of evidence are you expecting to see and hear in this case?"
- Another good question to ask is whether the jurors know any of their fellow jurors. This way, you can establish if certain jurors are more likely to stick together.
- Ask the jurors to put themselves in the shoes of your client and ask them if they would be happy with a juror like themselves on the jury. This can sometimes lead to a successful challenge for cause.
- Have a purpose with every question you ask – do not just ask questions because you have heard other lawyers ask the same question.

- Do not be afraid to question a juror out of the presence of the other jurors. If you are addressing a sensitive issue, the juror may appreciate the courtesy and you can delve deeper into the answer without seeming offensive.

7. **Pay attention to your jury.**

You invested the time to pick a jury, now invest the time to watch the jury during the trial. Recognize when they are tired and try to gauge how they are receiving different arguments and evidence. Often their body language reveals how they view a witness or exhibit. These cues may reduce the amount of evidence you offer into the case – including substantially reducing the number of witnesses you call. Understandably, jurors take their role in the process very seriously and the failure to recognize body language and cues you are receiving from them can often be the difference in winning and losing the case.

8. **Opening Statements**

Employment cases are effectively “Divorce in the Workplace.” By their very nature, these are highly charged and emotional cases on both sides. Your opening statement is obviously critical and you will only have a few minutes to capture the jury with the central theme or themes in your case. Do not squander this opportunity and do not waste time. Give a quick overview of what you think this case is about weaving in your themes and argument. Tell the story and use a timeline because the jury is completely unfamiliar with the names of the key players and all the facts that you have poured over during the last months and weeks leading up to trial. As they say, keep it simply stupid. Don’t be afraid to argue your case right from the outset. While it is important to get the jury to find you and your client to be credible at the outset, it is also okay in these types of case to show emotions early on provided it is not overdone.

Avoid legalese and technical terms. For instance, in an Americans with Disabilities Act discrimination case, a jury will better identify with counsel explaining how the company tried to work with the individual to find work or a reasonable accommodation than if you tell the jury that the company “engaged in the interactive process.” Remember to humanize your witnesses and draw out relevant facts that show your witnesses are fair, reasonable, and similar to the jurors themselves.

Do. Not. Overpromise. This is something attorneys learn in Trial Advocacy 101 but consistently fail to accomplish. Listen to opposing counsel’s opening statement and write down all of the promises made about evidence the jury will hear and what “proof” the other

side will offer. When they inevitably fail to keep their promises, it is cheap ammunition for closing argument.

Similarly, do not use gimmicks that will fall flat with a jury. A bad joke or poorly used technology can be worse than failing to give an opening statement at all. Opening is your first chance to connect with the jury after voir dire. If you irritate jurors during your opening statement, they will not forget it. Authenticity and belief in your cause will get you much farther than a witty joke or an elaborate PowerPoint presentation.

#### **9. Cross-Examination**

Cross-examination is an art – pure and simple. Effective cross-examination can win or lose your case. Every cross-examination is different and knowledge of the witness’s past testimony is key. While it is difficult to summarize all of the helpful tips for an effective cross-examination here, attached as **Attachment B** is Irving Younger’s often-cited 10 Commandments of Cross-Examination. Though developed in 1975, the principles hold true today.

#### **10. Closing Argument**

Finally, you’ve reached the end of a long and tiresome trial. Both sides are exhausted. The jury is exhausted too and thinking of all of the catch-up that will have to be done while their lives and work have been on hold. The first few minutes of your closing argument count. Do not waste time thanking the jurors profusely for their service and the time they have spent. One thank you is sufficient. Be gracious and succinct. The jury will appreciate both your gratitude and your brevity.

Do not give the jury instructions short shrift. Most of the time, jurors have no prior understanding of the law of the case. As important as the jury instructions are to prepare, it is equally important that the jury understands how they apply to the facts. If there are specific instructions that are: (1) crucial to your case or (2) confusing or complicated, take the time to explain them to the jury and walk them through how to apply the evidence to the law. For instance, the often-used *McDonnell Douglas* burden-shifting approach to discrimination cases is confusing to follow. Take the focus off of the complexity of the instructions and educate the jury.

One closing tactic (perhaps obvious, but overlooked) that can also be effective in employment cases is to talk about what evidence was missing. You can call it “missing in action.” If applicable, ask the jury to consider why they didn’t hear certain testimony or why they didn’t hear from a particular witness? Or ask them why there wasn’t a particular

email, text, document or whatever it might be. Directing focus on what was missing from your opponents case can be very effective and gets the jury engaged with you during your closing.

Focus on fairness. Counsel and clients often spend years in litigation on a case and are so far “in the weeds” by the time of trial that they forget that jurors want to be fair and impartial. Generally, they try to do the right thing.

Finally, remember that you are not giving a speech. You are having a conversation with the jury. Respond to jurors’ body language and notice when they are getting bored or annoyed. Like in your opening statement, if you plan to use technology, make sure that it works and works effectively.

## 101 Jury Selection Tips: 35 Years of Experience U.S. District Court Judge Mark W. Bennett

*Mark W. Bennett was appointed a United States District Court Judge in the Northern District of Iowa on August 26, 1994. On January 1, 2000, he became Chief Judge of the Northern District and served in this capacity for seven years. From 1991 Judge Bennett previously served as a United States Magistrate Judge in the Southern District of Iowa.*

The term "juror(s)" used throughout as a shorthand description for "potential jurors."

1. Be sincere —not some of the time, not most of the time, but 100% of the time.
2. Make eye contact with each juror.
3. Smile on occasion, or more often.
4. Learn the names of the courtroom staff like the bailiff, court reporter, clerk, etc. Introduce them by name if no one else has. Do not use last names for security reasons.
5. Be honest.
6. Be unfailingly polite to all.
7. Call each juror by their formal name.
8. Do not mispronounce a juror's name.
9. If you have the slightest doubt, ask the juror how to pronounce his/her name.
10. Do not take notes while you are in conversation with jurors.
11. Have someone else take the notes.
12. Use a great seating chart to ensure you are talking to the juror to whom you think you are.
13. Develop an easy system for the person taking notes to chart and track the information you elicit from the jurors.
14. Do not wear ultra expensive clothes.
15. Leave your Rolex and expensive jewelry at home.
16. Buy a Timex or inexpensive watch to wear at trials.
17. Your shoes should not be scuffy and super-worn.
18. Your shoes should not be "spit" shined or expensive and high-end — no Prada, Jimmy Choos, Gucci, or Bally. The same is true of your client.
19. Monogrammed clothing makes you appear snobbish to some.
20. Park your Jag, BMW, or Mercedes-equivalent automobile where no juror will ever see you getting into or out of it.
21. Get to the courthouse very early before any juror can see you arrive. They will miss you smoking, picking your nose, hanging out with your entourage, or other annoying behavior.
22. Same goes for your client.
23. If you appear nervous, tell them that and explain why.
24. Embrace your vulnerable feelings and share them with the jury. "I am nervous." "I am scared." "I am worried."
25. Be self-deprecating.
26. Do not overdo #25.
27. There is no Federal Rule of Procedure that requires you to be boring.
28. If you make a mistake, use appropriate humor. (I once spilled a whole pitcher of water on my notes and pants and, without missing a beat, exclaimed, "No wonder my mother wanted me to take swimming lessons!" —the jurors laughed.)

29. If nobody has yet introduced your opposing counsel or their client, seize the moment.
30. Use a demonstrative chart, graph, timeline, or photo.
31. Leave your Scrabble-winning vocabulary in your Mercedes next to your monogrammed shirt or blouse and bottle of Dom.
32. Never, ever, talk down to jurors.
33. Be very careful of legal jargon or technical terms.
34. Resist overwhelming urges to be sarcastic.
35. Be unfailingly respectful of all including, actually especially, those you perceive to be trailer park trash.
36. Never, ever, argue with a juror.
37. Ask short questions.
38. Use simple words.
39. Actually listen to the juror's answer to help formulate your next question (looping).
40. Never write or type your questions out verbatim.
41. Use a bullet point outline.
42. Try using PowerPoint for part of jury selection.
43. Modulate your voice.
44. If you are going to refer to "opposing counsel" or the "judge" use their names (e.g. "Ms. Gill" and "Judge Bennett") — it reflects confidence and control.
45. Ask lots of "What do you think about ....." questions.
46. Ask lots of "How do you feel about....." questions.
47. Studies indicate most lawyers favor the right or left sides -make sure you pick targets from all over.
48. Do not question straight down a row of jurors.
49. Keep the jurors guessing as to who will be next. It will cut down on the day-dreaming.
50. Be friendly.
51. Do not be overly friendly.
52. Try and memorize the jurors' names so you do not need notes.
53. If you are unable to do #52, have a good seating chart.
54. If you do rely on notes, do not let them interfere with excellent eye contact.
55. Never apologize for doing your job.
56. Be very organized.
57. Act as if you like your client and, if you do not, you'd better deal with that because it will come through.
58. Do not tell the jury panel you are looking for 12 "fair and impartial" jurors, because you'd better not be!
59. Remember, you are looking for jurors who are predisposed to rule in your client's favor.
60. Remember, you are looking to challenge or strike jurors who are predisposed to rule in favor of your opponent.
61. Exercise more challenges for cause.
62. Learn how to gracefully remove for cause even the worst jurors for your client.
63. Consult with your client before you exercise your strikes or challenges for cause.
64. When doing this, put your arm around your client or otherwise show to the jurors you like your client.
65. Do not waste time.
66. Jurors value their time as much, or more, than you value yours.
67. Always remember the jurors did not volunteer to come to the courthouse.

68. Carefully watch the body language of the jurors.
69. This is most important when another juror says something hostile or negative about your claims—you can learn to tell who agrees and disagrees.
70. Use jurors you know you are going to strike as foils to make your points.
71. The notion that a juror's hostile answer is going to "poison" the panel is utter nonsense.
72. No juror changes a strongly held belief or opinion because a total stranger sitting 8 chairs down expresses a contrary opinion.
73. "There is no such thing as a stupid question" is baloney. Just ask any person who has had to sit through jury selection. Eliminate your stupid questions.
74. Resist the urge to ask about favorite TV shows, fast foods, colors, hand puppets or where their spouse worked 10 years ago.
75. Telling the jurors at the outset that you do not intend to invade their privacy marks you as a phony, a liar, or both.
76. The best question you have never asked: "What type of evidence are you expecting to see and hear in this case?"
77. Resist the urge to patronize the jurors.
78. You learn a lot more with your ears than your mouth. Talk less, listen more.
79. If you have the option of sitting or standing during voir dire, get off your butt.
80. Resist the urge to drink unless the jurors have something to drink, too.
81. Do not do a magic trick for their viewing enjoyment. (I actually had this happen).
82. Remember the jurors' favorite subjects are themselves—keep on this subject.
83. It is perfectly acceptable to remind the jurors that they have an equal duty not to serve if they cannot be fair and impartial.
84. Be sure to inquire if a juror knows any other jurors in the pool, and how serving on the same jury might affect them.
85. Ask for the qualities that make an excellent juror for this case.
86. Ask if they meet these qualities.
87. The #1 generic question I have seen work to establish challenges for cause, is to ask the jurors to put themselves in the shoes of your client and ask them if they would be happy with a juror like themselves on this jury. I am shocked at the number of times this leads to a successful challenge for cause.
88. Practice, in everyday conversation, asking simple, short questions, listening to the answers, and looping the answers into your next question.
89. Do waste your client's money on a jury consultant. One exception—theme development.
90. You need to figure out what scares or terrifies you the most about your case, and ask questions that reveal the jurors' opinions on these issues.
91. Videotape yourself doing a practice voir dire to analyze your annoying habits. Ask a lay person or two to watch and give you feedback.
92. Talk to lawyers that have done voir dire before the assigned judge to learn something about the boundaries.
93. The boundaries of voir dire are in a wide gray zone. If the judge does not stop you, keep pressing the envelope. The courtroom floor does not open up if you get stopped. Say thank you, apologize only if needed, and move on with a smile.
94. Do not ask a question, e.g. "What magazines do you read?" simply because other lawyers asked that same question.
95. Dare to be different.

96. Have a distinct purpose in mind for every question you ask.
97. Try not to process the information you receive through your gut feelings, stereotypes, generalizations, and explicit and implicit biases.
98. Do not call your client, or anyone else, by their first name. Embrace the dignity of the federal court. Using first names in this formal setting does not "humanize" your client, it cheapens the moment and reinforces your image as a used car salesperson.
99. Be sure your client understands that the jurors may be observing him/her at all times in the courthouse, and even outside the courthouse, when court is not in session (e.g. parking lot, restaurants, etc.).
100. Use jury selection to break the ice for a later request for a large amount of damages.
101. Always honor the feelings of jurors even when you do not like the answers and they are toxic to your case.

## IRVING YOUNGER'S 10 COMMANDMENTS OF CROSS EXAMINATION

### 1. **BE BRIEF**

Be brief, short, and succinct. Why? Reason #1: The chances are that you are screwing up. The shorter the time spent, the less you screw up. Reason #2: A simple cross that restates the important part of the story in your terms is more easily absorbed and understood by the jury. You should never try to make more than three points on cross examination. Two points are better than three, and one point is better than two.

### 2. **USE PLAIN WORDS**

The jury can understand short questions and plain words. Drop the 50-dollar word in favor of the two-dollar word. "Drive your car" instead of "operate your vehicle."

### 3. **USE ONLY LEADING QUESTIONS**

The law forbids questions on direct examination that suggest the answer. The lawyer is not competent to testify. On cross examination, however, the law permits questions that suggest the answer and that allow the attorney to put his words in the witness's mouth. Cross examination, therefore, specifically permits you to take control of the witness, take the witness where you want to go, and tell your important point to the jury through the witness.

Not asking controlled leading questions leaves too much wiggle room. "What happened next?" "I would like to clear up a couple of points you made on direct examination. . . ." These questions/statements are the antithesis of an effective cross examination. Any questions that permit the witness to restate, explain, or clarify the direct examination are a mistake. Instead, you should put the witness on autopilot so that all of the answers are a series of "yes," "yes," "yes."

### 4. **BE PREPARED**

Never ask a question to which you do not know the answer. Cross examination is not a fishing expedition in which you uncover new facts or new surprises at trial.

### 5. **LISTEN**

Listen to the witness's answer. For some, cross examination of an important witness causes stage fright. It confuses the mind, and panic sets in. Some might have a hard time even getting the first question out, and a nervous examiner might generally be thinking about the next question, rather than listening to the answer. Often a witness's answer contains an incredibly valuable nugget, but if the examiner is not listening, then the treasure is lost!

### 6. **DO NOT QUARREL**

Do not quarrel with the witness on cross examination. When the witness answers your question with a response that is absurd, false, irrational, or contradictory, you should stop and sit down! Resist the temptation to respond by asking, "How can you say that?" or "How dare you make such an outrageous claim!" The answer to the question often elicits a response, which then explains away the absurdity and rehabilitates the witness.

**7. AVOID REPETITION**

Never allow a witness to repeat on cross examination what he said on direct examination. Why? The more times it is repeated, the more likely the jury is to believe it. Cross examination should involve questions that have nothing to do with direct examination. The examination should not follow the script of the direct examination.

**8. DISALLOW WITNESS EXPLANATION**

Never permit the witness to explain anything on cross examination. That is the job of the opposing attorney, not the witness.

**9. LIMIT QUESTIONING**

Don't ask the one question too many! Stop when you have made your point. Leave the argument for the jury.

**10. SAVE FOR SUMMATION**

Save the ultimate point for summation (closing argument). A prepared, clear, and simple leading cross examination that does not argue the case can best be brought together in final summation.

*Summarized from The Art of Cross-Examination by Irving Younger, from a speech given by Mr. Younger at the ABA Annual Meeting in Montreal, Canada, in August, 1975.*

# Confidentiality, Cyber Security, and the Technical Competence Rule

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ETHICS: SECTION

13



## **I. Introduction.**

- A. Technology often evokes change; it has been described as “anything that wasn’t around when you were born.”<sup>1</sup>
- B. Technology has, and will continue to, fundamentally change the practice of law: communication, presentation, storage of information, ESI and e-discovery, mobile devices, etc.
- C. Recently, there has been a firestorm of news coverage over “cybersecurity,” how companies, organizations and governments prevent and respond to online attacks. Examples of well-known, major incidents include hacks of the DNC, Sony, and Target.
- D. Law firms have also been targets, perhaps most famously in the Panama Papers scandal.
- E. As a conceptual matter, lawyers’ core ethical duties of competency and confidentiality are well-established and understood. But as a practical matter, what actually meets these responsibilities changes with the times, including technology and the existence of cybersecurity threats.
- F. While this evolution is largely implicit in the Rules of Professional Conduct, the Rules and other ethical guideposts also include explicit references to technology, including very recent changes.
- G. This program will first review lawyers’ ethical responsibilities regarding technology. It then will explore cybersecurity for lawyers and law firms, applying these ethical duties, as well as other legal and practical considerations.

## **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 Comment [6] to Model Rule 1.1 to address technology and the practice of law. The ABA’s “Ethics 20/20” Commission had recommended the proposed amendment because:
  - 1. “The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty

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<sup>1</sup> Alan Kay, computer scientist.

providing competent legal services in today's environment without knowing how to use email or create an electronic document.

Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase "including the benefits and risks associated with relevant technology," would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent." ABA Commission on Ethics 2/20, Resolution and Report (May 7, 2012), *available at* [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/2012\\_hod\\_annual\\_meeting\\_105a\\_filed\\_may\\_2012.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf).

- C. Virginia substantively followed suit effective March 1, 2016, adding the bolded text below 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 review has been established, the lawyer should consider making use of it in appropriate circumstances." Comment [1], Va. Rules of Professional Conduct, Rule 1.1 (emphasis added).

### III. Confidentiality and Technology.

- A. In 2012, the ABA also changed Comments [16] and [17] to its Model Rule on Confidentiality to address safeguarding client confidential information when it is being stored or transmitted. In short, the ABA determined that lawyers must take "reasonable precautions" against inadvertent and unauthorized disclosures. The Ethics 20/20 Commission rationale for this proposal is described in its May 7, 2012 Resolution and Report (*available at* [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/2012\\_hod\\_annual\\_meeting\\_105a\\_filed\\_may\\_2012.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf)).
- B. Virginia made similar changes to its Confidentiality Rule 1.6 effective March 1, 2016:

1. Section 1.6(d) was added, which states: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.” Va. Rules of Professional Conduct, Rule 1.6.
2. In addition, Comments [19], [19a], [20], and [21] were added, that specifically address “Acting Reasonably to Preserve Confidentiality”:
  - a. “[19] Paragraph (d) requires a lawyer to act reasonably to safeguard information protected under this Rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the employment or engagement of persons competent with technology, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).”
  - b. “[19a] Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other laws, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of this Rule.”
  - c. “[20] Paragraph (d) makes clear that a lawyer is not subject to discipline under this Rule if the lawyer has made reasonable efforts to protect electronic data, even if there is a data breach, cyber-attack or other incident resulting in the loss, destruction, misdelivery or theft of confidential client information. Perfect online security and data protection is not attainable. Even large businesses and government organizations with sophisticated data security systems have suffered data breaches. Nevertheless, security and data breaches have become so prevalent that some security measures must be reasonably expected of all businesses, including lawyers and law firms. Lawyers have an ethical obligation to implement reasonable information security practices to protect the confidentiality of client data. What is “reasonable” will be determined in part by the size of the firm. See Rules 5.1(a)-(b) and

5.3(a)-(b). The sheer amount of personal, medical and financial information of clients kept by lawyers and law firms requires reasonable care in the communication and storage of such information. A lawyer or law firm complies with paragraph (d) if they have acted reasonably to safeguard client information by employing appropriate data protection measures for any devices used to communicate or store client confidential information.”

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

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

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

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

(c) Procedures addressing security measures for access of third parties to stored information;

(d) Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused;

(e) The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and

(f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity.

Comments [19], [19a], [20], and [21], Va. Rules of Professional Conduct, Rule 1.6.

**IV. Supervisory Attorneys Must Take Steps to Ensure that Proper Measures are Taken for the Firm/Junior Attorneys to Maintain Competency and Protect Information.**

- A. Managers and partners bear an overall firm responsibility under Virginia Rule 5.1(a):
  - 1. “A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” Va. Rules of Professional Conduct, Rule 5.1(a).
- B. Under Virginia Rule 5.1(b), supervisory partners have a general responsibility for their charges’ technological competency:
  - 1. “A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” Va. Rules of Professional Conduct, Rule 5.1(b).
- C. In addition, any lawyer will be vicariously liable for another’s ethical breaches—including those obligations related to technology—if:
  - 1. “(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
  - 2. (2) the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.” Va. Rules of Professional Conduct, Rule 5.1(c).

**V. Ethical Responsibility for Technology Vendors and Service Providers.**

- A. Virginia Rule 1.6(b)(6)—Confidential Information Provided to Outside Support Agencies.
  - 1. “To the extent a lawyer reasonably believes necessary,” he/she may reveal confidential client information “to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.” Va. Rules of Professional Conduct, Rule 1.6(b).

- B. *See also* Va. Rules of Professional Conduct, Rule 1.6(d) and Comments [19], [20], and [21] above regarding third-party assistance with technology issues.
- C. Virginia Rule 5.3 Governs Lawyers' "Responsibilities Regarding Nonlawyer Assistants."
  - 1. Rule 5.3 applies not only to staff, but also to vendors and service providers that lawyers may use to help with technical matters.
  - 2. In full, Rule 5.3 states as follows:
    - a. "With respect to a nonlawyer employed or retained by or associated with a lawyer:
      - (a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
      - (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
      - (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
        - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
        - (2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." Va. Rules of Professional Conduct, Rule 5.3.
  - 3. The single Comment to Rule 5.3 states:
    - a. "Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information

relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. At the same time, however, the Rule is not intended to preclude traditionally permissible activity such as misrepresentation by a nonlawyer of one's role in a law enforcement investigation or a housing discrimination 'test.' Comment[1], Va. Rules of Professional Conduct, Rule 5.3

D. LEO 1872—"Virtual Law Office and Use of Executive Office Suites"

1. Legal Ethics Opinion issued on March 29, 2013, explicitly connects Competency and Confidentiality obligations with duty to supervise technology vendors and service providers:
  - a. "A lawyer must always act competently to protect the confidentiality of clients' information, regardless of how that information is stored/transmitted, but this task may be more difficult when the information is being transmitted and/or stored electronically through third-party software and storage providers. The lawyer is not required, of course, to absolutely guarantee that a breach of confidentiality cannot occur when using an outside service provider. Rule 1.6 only requires the lawyer to act with reasonable care to protect information relating to the representation of a client. When a lawyer is using cloud computing or any other technology that involves the use of a third party for the storage or transmission of data, the lawyer must follow Rule 1.6(b)(6) and 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. The lawyer will have to examine the third party provider's use of technology and terms of service in order to know whether it adequately safeguards client information, and if the lawyer is not able to make this assessment on her own, she will have to consult with someone qualified to make that determination." LEO 1872  
(available at <http://www.vsb.org/docs/1872-final.pdf>).<sup>2</sup>
2. In many respects, LEO 1872 was a precursor to Virginia Rule 1.6(d) and its Comments.

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<sup>2</sup> Rule 5.3(a) & (b) (supervision of nonlawyer assistants) are among the rules cited in LEO 1872.

## **VI. Laws/Regulations Applicable to Cybersecurity Protections and Response.**

- A. Va. Code § 18.2-186.6—“Breach of personal information notification.”
  - 1. Should a system housing unencrypted/unredacted computerized data be breached, and causes or reasonably could cause identity theft or fraud, notice is required by Virginia law.
  - 2. There are similar notification statutes for the other states.
- B. Federal Regulations.
  - 1. Health Insurance Portability and Accountability Act (“HIPAA”).
    - a. Do you have protected health information (“PHI”)?
    - b. Your firm may be a HIPAA “business associate,” meaning that it must have safeguards to secure electronic protected health information. *See* 45 C.F.R Part 160 and Subparts A and C or Part 164.
  - 2. Other possibilities depending on what type of work your firm does—regulatory, tax, etc.

## **VII. Why Law Firms and Lawyers are Cybersecurity Targets.**

- A. Law firms are repositories of vast amounts of financially valuable and sensitive information and data, for their own organization and (more importantly) that of their clients.
  - 1. Trade secrets and intellectual property.
  - 2. Corporate strategy.
  - 3. Legal strategy.
  - 4. Payment Cardholder Information (“PCI”)—credit/debit card data and information.
  - 5. Other financial information—bank/investment accounts information for firms and clients.
  - 6. Personal identifiers—name, address, birth date, telephone, email, SSN.
  - 7. Protected Health Information.

- B. Not only do law firms aggregate of data, they may have (relatively) weak safeguards, particularly when compared to some clients.

### VIII. Recent Cybersecurity Events and Alerts Related to Law Firms.

- A. Multiple FBI cybersecurity alerts have been issued for law firms in 2016.
  - 1. “Two New FBI Cybersecurity Alerts Issued for the Legal Sector,” *Ride the Lightning Blog* (May 18, 2016) (available at <http://ridethelightning.senseient.com/2016/05/two-new-fbi-cybersecurity-alerts-issued-for-the-legal-sector.html>).
  - 2. “ABA Provides FBI Cyberalerts to Law Firms Regarding Ransomware,” *Ride the Lightning Blog* (April 21, 2016) (available at <http://ridethelightning.senseient.com/2016/04/aba-provides-fbi-cyberalert-to-law-firms-regarding-ransomware.html>).
  - 3. “ABA Distributes FBI Cyber Alerts to Members,” *Ride the Lightning Blog* (April 13, 2016) (available at <http://ridethelightning.senseient.com/2016/04/aba-distributes-fbi-cyber-alerts-to-members.html>).
  - 4. “FBI Alert Warns of Criminals Seeking Access to Law Firm Networks,” Gabe Friedman, *Bloomberg Law* (March 11, 2016) (available at <https://bol.bna.com/fbi-alert-warns-of-criminals-seeking-access-to-law-firm-networks/>).
- B. Law Firms May Under Report Cyber-Incidents.
  - 1. “Citigroup Report Chides Law Firms for Silence on Hackings,” Matthew Goldstein, *The New York Times* (March 26, 2015) (available at <http://www.nytimes.com/2015/03/27/business/dealbook/citigroup-report-chides-law-firms-for-silence-on-hackings.html>)
    - a. “Due to the reluctance of most law firms to publicly discuss cyberintrusions and the lack of data breach reporting requirements in general in the legal industry, it is not possible to determine whether cyberattacks against law firms are on the rise.” *Id.*
    - b. “The report, issued last month, said it was reasonable to expect law firms to be targets of attacks by foreign governments and hackers because they are repositories for confidential data on corporate deals and business strategies. The report said bank employees should be mindful that digital security at many law firms, despite

improvements, generally remains below the standards for other industries.” *Id.*

C. The Panama Papers Scandal.

- a. 11.5 million linked documents from the Panamanian law firm Mossack Fonseca, detail offshore accounts, some used for illegal purposes. *See, e.g.,* [https://en.wikipedia.org/wiki/Panama\\_Papers](https://en.wikipedia.org/wiki/Panama_Papers).

**IX. Cybersecurity Vulnerabilities and Threats.**

A. Verizon’s 2016 Data Breach Investigations Report (for 2015).

1. 2015’s data set (all industries) had over 100,000 incidents, with 3,141 confirmed data breaches.

B. Common Modes of Attacks—Find the Weakest Link

1. Exploit innocent employee/human vulnerabilities
  - a. Social engineering—“Phishing” campaigns.
    - i. Targeted emails to individuals within the firm, posing as legitimate.
    - ii. Try to induce clicking on a link or attachment, which can download malicious code, keystroke loggers, etc. to computer/system.
    - iii. Try to induce employees to directly send information.
  - b. Weak passwords/credentials
2. Malicious insiders.
3. Hackers exploiting technological systems/wireless networks.
4. Lost computers/smart phones/storage devices.

C. External Vendors.

1. They can be your weakest link.
2. How secure is your data in the cloud?
3. What are your service providers committing themselves to?

D. What Do Hackers Want?

1. Money.
  - a. Can directly try to steal from firm.
  - b. Can employ “ransomware,” software that will keep information on your system locked down unless you pay the ransom.
2. Information→ Money.
  - a. Intellectual property/trade secrets.
  - b. Corporate strategy.
  - c. Legal strategy.
  - d. Can use sell/use personal identifiers/financial account data.
3. A “cause” or for “fun.”

**X. Legal and Ethical Obligations Related to Cybersecurity.**

- A. Must be “competent.”
  1. Stay abreast of technology and relevant cybersecurity threats.
    - a. Self-education.
    - b. Attend CLEs.
    - c. Seek expert/consultant assistance.
  2. Become more comfortable using technology.
    - a. Computers.
    - b. Mobile devices/tablets.
    - c. Email and electronic documents.
    - d. Document review applications.
    - e. Trial presentation software/applications..
  3. Become more comfortable with e-discovery and “ESI” (electronically-stored information).

- a. ESI stands for “electronically-stored information.”
    - i. Vast amounts of information and data is stored (and created) electronically.
    - ii. 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.
    - i. ESI amendments to Federal Rules of Civil Procedure were first made in 2006, and then again December 1, 2015.
    - ii. ESI amendments to the Rules of the Supreme Court of Virginia were made in 2009.
  - c. Conceptually, the e-discovery process can be represented by the diagram attached as **Appendix 1**.
  - d. Helpful e-discovery resources:
    - i. <http://www.edrm.net/>
    - ii. <https://thesedonaconference.org/>
    - iii. <http://www.ediscoveryeducationcenter.com/>
    - iv. <http://ellblog.com/>
- B. Must have reasonable safeguards to keep confidential/protected electronic information safe.
1. Ethical duties—Rule 1.6(d) and associated Comments.
  2. Legal duties for particular types of information, *i.e.*, HIPAA.
- C. Managers, partners, and supervisory attorneys have responsibility for technical competency/confidentiality practices of their firm and/or younger attorneys.
1. Cannot just rely on younger attorneys or staff.
- D. Lawyers’ duties extend to staff, as well as third-party vendors and service providers.
- E. Must inform clients/relevant third parties if there is a breach.
1. Rule 1.4—Communication.

2. State privacy laws.
3. Federal obligations.

## **XI. Cybersecurity Tips.**

- A. Do a risk assessment.
  1. What type of confidential/valuable information does your firm have?
  2. Who are your clients?
    - a. Do they have any particular security needs?
    - b. What specific rules/regulations may apply to client data/information in your possession (*e.g.*, HIPAA, if you are a business associate).
  3. What systems does your firm have in place?
  4. Who has access to confidential/valuable information, both inside and outside your firm?
- B. Establish good password processes.
  1. Strong passwords.
  2. Rotate passwords.
  3. Don't share passwords.
  4. Consider multi-factor authentication for money transfers.
- C. Update systems/software/applications.
- D. Use firewalls.
- E. Consider encryption of data/emails.
- F. Beware of public/hotel wireless networks.
- G. Consider cyber liability insurance.
  1. The ABA's Solo, Small Firm & General Practice Division published an article: "Cyber Insurance for Law Firms," Jeffrey A. Franklin, *GP Solo*, Vol. 33 No. 3 (attached as **Appendix 2**).

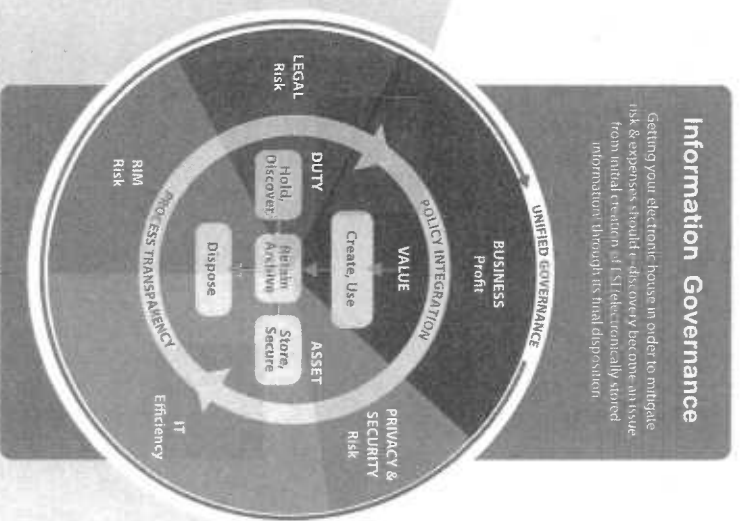
- H. Consider system-monitoring.
- I. Evaluate your third-party vendors/service providers.
- J. Develop an incident-response plan.
- K. Evaluate your systems/vulnerabilities.
- L. Training and education
  - 1. How to spot phishing scams.
  - 2. Keep current on new technology/best practices/threat.

**XII. Additional Resources.**

1. *ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals* (2013).
2. ABA Cybersecurity Legal Task Force webpage (available at [http://www.americanbar.org/groups/leadership/office\\_of\\_the\\_president/cybersecurity.html](http://www.americanbar.org/groups/leadership/office_of_the_president/cybersecurity.html))
3. ABA Cybersecurity Legal Task Force Section of Science & Technology Law, Report to the House of Delegates, Resolution (August 2014) (attached as **Appendix 3**).
4. *Beyond Technophobia: Lawyers' Ethical and Legal Obligations to Monitor Evolving Technology and Security Risks*, 21 Rich. J.L. & Tech. 1 (2014).
5. *Ride the Lightning, Electronic Evidence and Information Security Blog*, maintained by Sharon D. Nelson, Esq., President of Sensei Enterprises, Inc. (available at <http://ridethelightning.senseient.com/>).

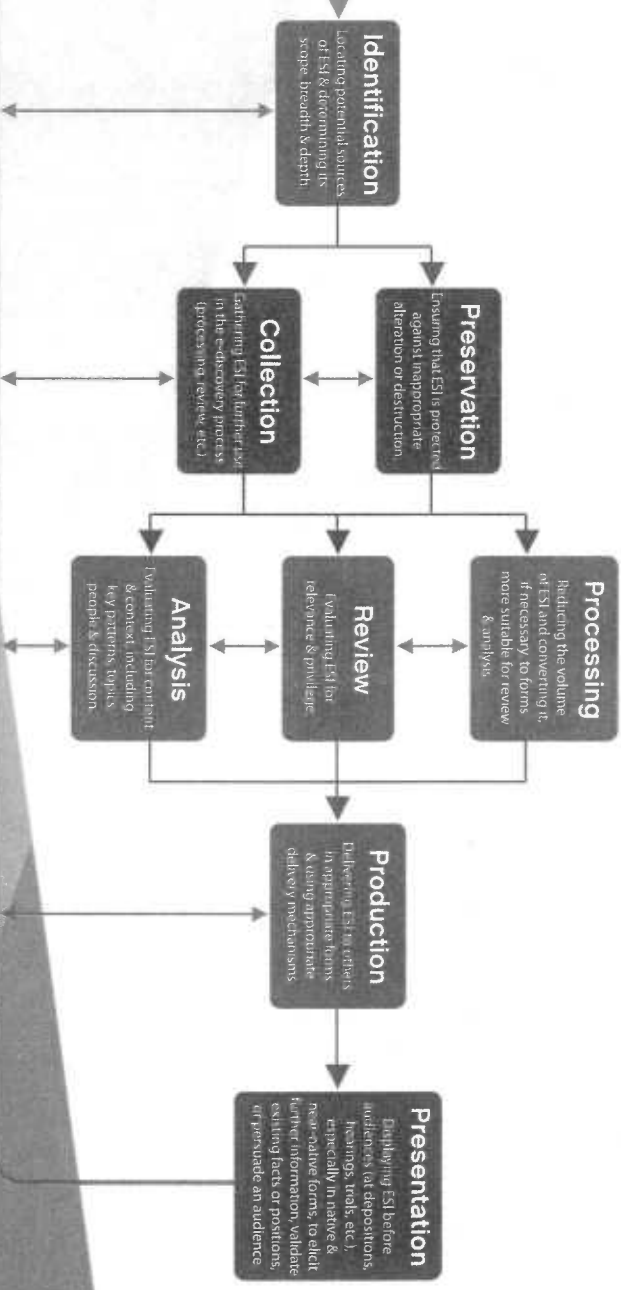
# Electronic Discovery Reference Model

Standards, Guidelines and Practical Resources for Legal Professionals and E-Discovery Practitioners



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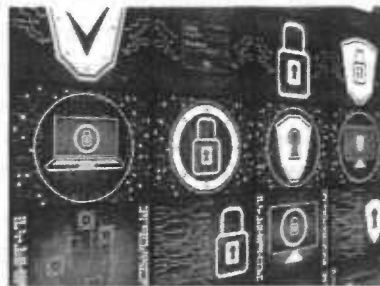
## Cyber Insurance for Law Firms

Vol. 33 No. 3

By Jeffrey A. Franklin

Jeffrey A. Franklin, Esq., is an attorney with Prince Law Offices, P.C., in Pennsylvania and founder of law firm technology consulting company BrightLine Tech Solutions, LLC.

Recent news stories focus on cyber attacks against large corporations, but about 30 percent of the victims of cyber crime are small businesses according to a report by Symantec ([tinyurl.com/pfm5ogh](http://tinyurl.com/pfm5ogh)). Large and small law firms have been the victims of cyber crime.



As attorneys, our clients trust us with confidential information. Criminals are attracted by confidential information such as financial records, health records, Social Security Numbers, intellectual property, depositions, and criminal records. Loss of such information may result from a malicious attack (e.g., hacking, malware, or deliberate espionage), a dishonest employee, or theft of a notebook, tablet, or smartphone. Loss can also result from innocent mistakes such as losing a smartphone, unintended transmissions, or other human error that can occur in any busy practice.

According to Aon Corporation, the average cost for a privacy data breach is \$217 per compromised record. Further, 47 percent of privacy breaches are the result of criminal activity, 25 percent employee error, and 28 percent system errors ([tinyurl.com/hkldjyz](http://tinyurl.com/hkldjyz)).

Few lawyers or law firms attempt to practice without professional liability insurance; however, according to a recent ABA technology survey, only about 11 percent of responding lawyers indicated that

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# Appx. 2

### About GPSolo magazine

GPSolo magazine is published six times a year

their firm has cyber liability insurance. I believe that cyber liability insurance is an increasingly popular, almost necessary choice for law firms. In a recent *ABA Journal* article (April 1, 2015), David L. Hudson Jr. came to the same conclusion. Overall, cyber insurance has been growing by about 60 percent per year over the past three years, according to Amy G. Mitchell, CIC CISR, vice president of commercial solutions for Murray Securus Insurance, a provider of cyber insurance ([murrayins.com](http://murrayins.com)).

Your lawyer's professional liability (LPL) insurance policy may help protect against third-party lawsuits, but there could be *gaps* related to

- privacy notification,
- crisis management,
- business interruption,
- cyber extortion threats (yes, this has happened to solos and small law firms), and
- recovery of data.

You need to *ask* whether your firm's LPL policy has affirmative coverage for loss of client or third-party data as well as the out-of-pocket costs associated with responding to an incident. I have also seen instances where the firm's own proprietary information was completely wiped out, leading to costly data restoration and/or re-creation expenses, such as with ransomware. Ransomware is malicious computer software that encrypts your firm's files and holds them for ransom. Recent versions of ransomware encrypt even unmapped network drives and accessible backup files. If your firm lacks a protected backup of the files that have been encrypted by ransomware, your firm may have to pay the ransom or struggle without these files.

### How Does Cyber Insurance Work?

Generally, cyber insurance is designed to assist before, during, and after an attack:

1. **Prevent:** risk management resources.
2. **Protect:** data risk liability and defense coverage.
3. **Respond:** breach services and remedies with incident response.

Coverage generally falls into two categories: third-party, which often extends to fines and penalties arising from regulatory actions, and first-party, which addresses costs and expenses the insured incurs because of a security failure including notification, credit monitoring, investigation, forensics, and perhaps even lost income.

Cyber insurance policies often include one or more of the following types of coverage:

- liability for security or privacy breaches, including loss of confidential information by allowing, or failing to prevent, unauthorized access to computer systems;
- the costs associated with a privacy breach, such as consumer notification, customer support, and costs of providing credit monitoring services to affected consumers;
- the costs associated with restoring, updating, or replacing business assets stored electronically;
- business interruption and extra expense related to a security or privacy breach;
- liability associated with libel, slander, copyright infringement, product disparagement, or reputational damage to others when the allegations involve a business website, social media, or print media;
- expenses related to cyber extortion or cyberterrorism; and
- coverage for expenses related to regulatory compliance for billing errors.

(January/February, March/April, May/June, July/August, September/October, and November/December) by the ABA Solo, Small Firm, and General Practice Division.

GPSolo is devoted to themes of critical importance to your practice. Each issue contains articles exploring a particular topic of interest to solos, small firms, and general practitioners, as well as articles related to technology and practice management. And to keep you up to date, each issue contains five *Best of ABA Sections* digests, reprinting the top articles published by other ABA entities that will be of the greatest interest to you.

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**Third-party (liability) coverage:**

*Privacy liability coverage.* This coverage includes liability to the firm's clients and employees for breach of private information. Seek trigger language that focuses on the firm's failure to protect confidential information, regardless of the cause, rather than language requiring an intentional breach. Some, but not all, cyber policies also provide coverage for the firm's failure to disclose a breach in accordance with privacy laws.

*Regulatory actions.* Not all cyber policies provide coverage for regulatory and other governmental actions. Even when they do provide regulatory coverage, some policies require that the action be initiated by a formal "suit" to trigger the defense obligation. Look for policies that cover defense from the earliest stages of an investigation, typically including a civil investigative demand or similar request for information. Try to include coverage for civil fines and penalties, too.

*Notification costs.* This coverage includes the costs of notifying third parties potentially affected by a data breach.

*Crisis management.* Most, but not all, cyber policies contain some form of public relations crisis management coverage.

*Call centers.* Because call centers tend to be one of the higher costs associated with data breaches, it is important to identify whether this coverage is expressly provided and any applicable limitations.

*Credit/identity monitoring.* This coverage is included in most cyber policies.

*Transmission of viruses/malicious code.* This coverage protects against liability claims alleging damages from the transmission of viruses and other malicious code or data. This risk may be relatively low in many law firms.

**First-party coverage:**

*Theft and fraud.* This covers certain costs related to the theft or destruction of the firm's data, as well as theft of the firm's funds.

*Forensic investigation.* This covers the costs of determining the cause of a loss of data.

*Network/business interruption.* This covers the costs of business lost, as well as additional expenses resulting from an interruption in the firm's computer systems. Such coverage is often subject to limitations and conditions.

*Extortion.* This covers the costs of "ransom" if a third party demands payment to refrain from publicly disclosing or causing damage to the firm's confidential electronic data.

*Data loss and restoration.* This covers the costs of restoring data if it is lost, and in some cases, diagnosing and repairing the cause of the loss. It may be excluded or limited.

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**Other key provisions:**

*Trigger—loss or claim.* Cyber policies typically are triggered either by an event that results in the loss of data, or a “claim” arising from the event that is made against the insured firm during the policy period. The loss-type policy is often the preferred option, even though it may be more expensive.

*Trigger—defense.* In some cyber policies, the defense obligation is triggered by a “suit,” which requires a lawsuit or written demand against the insured. This definition may preclude defense of a claim that has yet to ripen into a lawsuit or a written demand (such as investigations).

*Defense—choice of counsel.* Given the substantial costs likely to be associated with a significant data breach (which could exceed the limits of the policy), the insured should seek to have substantive input into the choice of counsel.

*Retroactive coverage.* Cyber policies often contain a “retroactive date.” Losses arising from events prior to the retroactive date will not be covered.

*Acts and omissions of third parties.* Acts or omissions of third parties often may not be covered expressly, or even may be excluded. For example, if a firm uses the services of a third-party vendor to maintain its confidential employee or client information in the “cloud” and the vendor experiences a data breach, the firm could be sued by its clients or employees and may not have any coverage. There are cyber policies providing coverage for breaches of data maintained by third parties as long as there is a written agreement between the insured and the vendor to provide such services. If a law firm relies on any third parties to maintain any of its confidential client or employee information, it should seek to have coverage for breaches of data maintained by third parties expressly covered.

*Coverage for unencrypted devices.* Many cyber policies exclude coverage for data lost from unencrypted devices. If possible, seek cyber coverage without this limitation. In any event, encrypt confidential data in every device, including phones, tablets, notebooks, network storage, and backups, whenever possible.

*Coverage for corporations and other entities.* Cyber policies often define covered persons, for liability purposes, to include only natural persons. Firms should seek coverage that appropriately defines the scope of entities potentially affected by a data breach.

*Policy territory—occurrences outside the United States.* Even if a firm does not have offices outside the United States, its lawyers may lose or have stolen their notebooks, phones, and tablets containing confidential information while traveling abroad. Many cyber policies restrict the applicable coverage territory to the United States and its territories.

*Breaches not related to electronic records.* Some cyber liability policies restrict coverage to loss or theft of electronic data. However, many breaches occur as a result of loss or theft of paper (or other non-electronic) records. The best course of action is to choose a policy that covers both electronic and non-electronic data.

*Location of security failure.* Coverage under some cyber policies is limited to physical theft of data on the firm's premises. This could be problematic in a number of situations, including theft of a laptop, phone, tablet, or external drive from an airport, restaurant, car, or an employee's home.

*Exclusion for generalized acts or omissions.* Some cyber policies exclude coverage for losses arising from (1) shortcomings in security of which the insured was aware prior to the inception of coverage; (2) the insured's failure to take reasonable steps to design, maintain, and upgrade its security; and (3) certain failures of security software. Avoid these types of exclusions, if possible.

*Exclusion for acts of terrorism or war.* It is unclear to what extent insurers will rely on this common type of exclusion when a data breach results from an organized attack by a foreign nation or hostile organization. To the extent possible, it's preferable to avoid these types of exclusions.

The overall cyber insurance market saw robust growth in 2015, although large accounts and certain industries such as point-of-sale retailers and large health care companies began to see cyber insurance price increases. These trends are likely to continue through 2016 as this insurance segment matures. Further, policyholders and insurance carriers are likely to utilize the courts to refine the meaning of non-standard policy terms.

### **Cyber Insurance Litigation**

Two recent cases may influence the expanding cyber insurance market. In *Travelers Property Casualty Company of America v. Federal Recovery Services, Inc.*, No. 2:14-cv-170 TS (D. Utah, May 11, 2015), a Utah federal court found the insurer had no duty to defend its policyholder in the underlying lawsuit. Significantly, the parties were disputing coverage under the network and information security liability and technology errors and omissions liability parts of a CyberFirst Policy. Reportedly, this was the first coverage decision with respect to a stand-alone cyber insurance policy.

This case did not involve a data breach or other cybersecurity loss, but rather was a classic intent to injure versus negligent conduct dispute. Nevertheless, this case is important because the court interpreted the cyber insurance commercial general liability (CGL) and errors and omissions liability policy as if it was any other non-cyber policy. Thus, despite some novel terminology in cyberinsurance policies, court interpretations of cyber insurance policies may be more predicable than some feared.

In *Columbia Casualty Company v. Cottage Health System*, No. 2:15-cv-03432 (C.D. Cal.) (filed May 7, 2015), Columbia Casualty Company (CCC) filed a declaratory judgment action in federal court in California in 2015 seeking a declaration that it is not obligated to cover Cottage Health Systems (CHS). The litigation concerned a NetProtect360 policy containing privacy injury claims and privacy regulation proceedings coverage parts. The claim involved a data breach resulting in release of private health care patient information. CCC sought reimbursement for \$4.125 million it paid in a related class action settlement. The policy contained a failure to follow minimum required practices exclusion. CCC contended that CHS failed to adhere to certain basic security practices such as file transfer protocol (FTP) settings, the application of patches, computer network assessments, and detecting network intrusions, and that its failure to do so was the cause of the data breach and subsequent loss. This case was dismissed for alternative dispute resolution. It serves as a reminder that policyholders do not want to be like CHS and think they are covered for data breach losses, only to discover post-breach that a broad exclusion and deficiencies in their cybersecurity apparatus and implementation left them exposed not only to data breaches but also potentially uninsured.

### **Where to Turn**

Law firm cyber insurance is available from, among others, American Bar Insurance (ABI), some state bar associations, and perhaps your current insurer.

American Bar Association members are offered cyber insurance for law firms through ABI via Aon CyberBusinessPro plans. Aon has plans for solos and small firms of up to ten employees and up to \$2.5 million in annual revenue; pricing ranges from \$199 per year to \$599 per year. (For full details of pricing and options, see [aoncyberabi.com](http://aoncyberabi.com).)

### **Conclusion**

Although cyber insurance is not a complete answer, many solo and small firm lawyers will undoubtedly sleep better at night knowing that some of the growing cyber risk can be mitigated with insurance.

Cybersecurity can no longer be ignored. Take action today to protect your clients, your firm, and yourself from this ever-growing threat to your pocketbook, privacy, and reputation. There is no silver bullet. Sound law firm cyber risk management includes people, policies, procedures, technology, and insurance solutions.

### **Protecting Against Cyber Attacks**

For general tips on protecting your practice from the risks of cyber attacks, I recommend "What to Do When Your Data Is Breached" by Sharon D. Nelson, David G. Ries, and John W. Simek (*GPSolo*,

January/February 2016, page 24). I also published some tips in my regular column, "Technology—Frankly Speaking: Cybersecurity for Law Firms" (*The Berks Barrister*, Fall 2015, page 8).



AMERICAN BAR ASSOCIATION  
CYBERSECURITY LEGAL TASK FORCE  
SECTION OF SCIENCE & TECHNOLOGY LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

7 **RESOLVED**, That the American Bar Association encourages all private and public sector  
8 organizations to develop, implement, and maintain an appropriate security program, including:

9 (1) conducting regular assessments of the threats, vulnerabilities, and risks to their data,  
10 applications, networks, and operating platforms, including those associated with  
11 operational control systems; and

12 (2) implementing appropriate security controls to address the identified threats,  
13 vulnerabilities, and risks, consistent with the types of data and systems to be protected and  
14 the nature and scope of the organization;

15 **FURTHER RESOLVED**, That the American Bar Association encourages these organizations  
16 to develop and test a response plan for possible cyber attacks, including disclosure of data  
17 breaches, notification of affected individuals, and the recovery and restoration of disrupted  
18 operations; and

19 **FURTHER RESOLVED**, That the American Bar Association encourages these organizations  
20 to (1) engage in partnerships or cooperative relationships, where appropriate, to address the  
problem of cyber attacks by sharing information on cyber threats, and (2) develop points of  
contact and protocols to enable such information sharing.

Appx. 3

## REPORT

### I. INTRODUCTION

This Resolution addresses security issues that are critical to the national and economic security of the United States (U.S.). It calls for private and public sector organizations<sup>1</sup> to address the security of their digital assets through an organization-wide security program that includes regular assessments of the threats and risks to their data, applications, networks, and operating platforms, including those associated with operational control systems, and (2) the development and implementation of an appropriate security program to address the identified threats, vulnerabilities, and risks. The activities comprising a security program should be undertaken in accordance with accepted security frameworks and standards and be consistent with the types of data and systems to be protected and the nature and scope of the organization.

The Resolution also urges these organizations to develop and test a response plan for possible cyber attacks and engage in partnerships or cooperative relationships, where appropriate, to address the problem of cyber attacks by sharing information about cyber threats.

The protection of one of the most valuable and vulnerable assets of all organizations—its information—is not only vitally important, but it also avoids the high costs associated with cybercrime, including forensic investigations and data breach notification; the loss of confidential, classified, and proprietary data; reputational damage; loss of public confidence; and in the case of business, drops in stock price, and loss of market share and trust. Breaches also have resulted in the disclosure of closely-held government information, and businesses have faced regulatory fines and investigations, civil damage actions, administrative proceedings, and criminal indictments. The first- and third-party losses associated with security incidents are rising, and cybersecurity is now one of the top risks organizations must manage.

### II. CYBERSECURITY THREATS

The threat environment today is highly sophisticated, and massive data breaches are occurring with alarming frequency. Cyber-criminals exploit weaknesses in software and operating platforms, the domain name system, and mobile and web-based applications. They conduct successful social engineering through phishing attacks, social media, email, and various applications. Malware can quickly morph, change security controls, lurk in systems undetected, download other malware, and exfiltrate data undetected.

An organization-wide security program with defined controls based on risk categorizations reflecting the operational impact and magnitude of harm of a cyber incident can mitigate risk to a considerable degree. In many cases, data breaches or other types of cyber incidents could have been prevented or detected early and the risks of the incident mitigated if the organization had undertaken proper security planning and implemented appropriate security safeguards.

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<sup>1</sup> This includes law firms and organizations authorized to provide legal services.

In today's digital world, threats to data and information systems are found almost everywhere a computer, server, smart phone, thumb drive, or other electronic device is operating. Many organizations provide access to their networks to business partners and entrust their data and business functions to outsource and cloud providers, creating additional risks. The proliferation of mobile devices and wireless technologies that enable mobile commerce and a continually expanding array of applications—more than 1.5 million—also present vulnerable points in the flow of sensitive data in computer networks.

Security is only as strong as its weakest link. Failed security has resulted in thousands of data breaches that have led to the loss or compromise of millions of personally identifiable records, as well as the theft of classified information, valuable intellectual property and trade secrets, and the compromise of critical infrastructure.<sup>2</sup> The consequences of a cyber incident or data breach can have a disturbing impact on the victim, whether a business, organization, government entity, or an individual.

### *Sensitive Data At Risk*

There are many types of sensitive data that are targeted by cyber-criminals or subject to unauthorized access, use, disclosure, or sabotage by insiders. This includes personally identifiable information (PII), personal health information (PHI), and financial records, confidential and proprietary business data, intellectual property and trade secrets, research data, privileged legal documents, and classified information (including sensitive national security information). There is a vibrant market for these data, and all organizations—regardless of size—should consider themselves at risk.

The sensitive personal data being amassed by companies and governments is staggering. Inexpensive storage has enabled companies to collect and store large amounts of data and retain it far longer than they would have if it were in paper. “Big data,” the term applied to the collection of massive amounts of data that can be correlated, analyzed, and parsed for targeted advertising and strategic business purposes, creates rich targets for cyber-criminals. PII that can be used for fraud is being collected and often stored by organizations unprotected, putting many Americans at risk.<sup>3</sup> On its website, the Internal Revenue Service (IRS) indicates that it “has seen a significant increase in refund fraud that involves identity thieves who file false claims for refunds by stealing and using someone's Social Security number.”<sup>4</sup>

Another aspect of the problem is illustrated by the dependence of American society on electronic transactions and e-commerce, which has fueled data breaches in all industry sectors. Failed security has resulted in massive data breaches of millions of personally identifiable records.<sup>5</sup>

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<sup>2</sup> White House, *Cyberspace Policy Review*, pages 1-2, 17, available at [http://www.whitehouse.gov/assets/documents/Cyberspace\\_Policy\\_Review\\_final.pdf](http://www.whitehouse.gov/assets/documents/Cyberspace_Policy_Review_final.pdf).

<sup>3</sup> For example, a Vietnamese national was indicted recently for allegedly participating in an international scheme to steal and sell hundreds of thousands of Americans' PII through various websites he operated. *United States v. Ngo*, No. 13-crm-1116 (D. N.H. 2013), available at <http://www.justice.gov/opa/pr/2013/October/13-crm-1116.html>.

<sup>4</sup> IRS Criminal Investigation Targets Identity Theft Refund Fraud, February 2013, available at <http://www.irs.gov/uac/Newsroom/IRS-Criminal-Investigation-Targets-Identity-Theft-Refund-Fraud-2013>.

<sup>5</sup> See Thomson, Lucy L., *Data Breach and Encryption Handbook* (ABA 2011), chapter 5, pages 57-85.

The recent data breaches of leading retail companies and credit bureaus have caught the attention of the public, politicians, and law enforcement. The success of these breaches, however, has also created a “me too” among cyber-criminals eager to capture their own trove of data. Risks will increase with the “Internet of Things,” as the Internet becomes the backbone for appliances, gadgets, and operational aspects of daily life. Many of the most personal aspects of people’s lives will be documented and transmitted over the Internet, subject to interception or theft.

### ***Protecting the Nation’s Critical Infrastructure***

The national and economic security of the United States depends on the reliable functioning of critical infrastructure: cybersecurity threats exploit the increased complexity and connectivity of critical infrastructure systems, placing the Nation’s security, economy, and public safety and health at risk. Similar to financial and reputational risk, cybersecurity risk affects a company’s bottom line. It can drive up costs and impact revenue. It can harm an organization’s ability to innovate and to gain and maintain customers.<sup>6</sup>

The U.S. Department of Homeland has designated the following 17 government and private industry sectors as critical infrastructure: Chemical, Commercial Facilities, Communications, Critical Manufacturing, Dams, Defense Industrial Base, Emergency Services, Energy, Financial, Food and Agriculture, Government Facilities, Healthcare and Public Health, Information Technology, Nuclear Reactors, Materials and Waste, Transportation, and Water and Wastewater Systems. The private sector owns the vast majority of the nation’s critical infrastructure and key resources—about 85 percent.

Presidential Policy Directive 21 (PPD-21) on *Critical Infrastructure Security and Resilience*, issued in February 2013, advances a national policy to strengthen and maintain secure, functioning, and resilient critical infrastructure. Comprehensive security programs are essential for critical infrastructure organizations, and following appropriate security frameworks and standards is central to achieving a strong security posture and resilience. The electric sector, for example, voluntarily agreed to comply with cybersecurity requirements promulgated by the North American Electric Reliability Corporation and the Federal Energy Regulatory Commission (NERC/FERC).

The National Institute of Standards and Technology (NIST) recently published the *Framework for Improving Critical Infrastructure Cybersecurity*, and mapped the Framework to other accepted security frameworks and standards.

### ***Law Firms Are Targets of Cyber Attacks***

Law firms are businesses and should take special care to ensure that they have a strong security posture and a well-implemented security program. The data and information kept by law firms

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<sup>6</sup> NIST *Framework for Improving Critical Infrastructure Cybersecurity*, (February 12, 2014) Executive Summary, available at <http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214-final.pdf>.

are largely protected by the attorney-client privilege and/or the work product doctrine, as well as by various legal ethics requirements.

The threat of cyber attacks against law firms is growing. Lawyers and law offices are facing unprecedented challenges from the widespread use of electronic records and mobile devices. There are many reasons for hackers to target the information being held by law firms. They collect and store large amounts of critical, highly valuable corporate records, including intellectual property, strategic business data, and litigation-related theories and records collected through e-discovery.

Both large and small law firms have been the target of hacker attacks in the U.S. as well as abroad.<sup>7</sup> The FBI has issued warnings to firms and held a meeting in early 2012 with approximately 200 law firms in New York City to discuss the risk of breaches and theft of client data.<sup>8</sup> A cybersecurity firm that helps organizations secure their networks against threats and resolve computer security incidents estimated that 80 major law firms were breached in 2011 alone.<sup>9</sup>

The *ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals* (2013) provides practical threat information, guidance and strategies to lawyers and law firms of all sizes, and explores the relationship and legal obligations between lawyers and clients when a cyber-attack occurs. Lawyers and law offices have a responsibility to protect confidential records from unauthorized access and disclosure, whether malicious or unintentional, by both insiders and hackers. Amendments to the black letter and comments to the *ABA Model Rules of Professional Conduct* (Model Rules) adopted in 2012 explicitly provide that a lawyer's duty of competence includes keeping abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology (Comment [8] to Model Rule 1.1). Further, to enhance the protection of client confidential information, Model Rule 1.6 (Confidentiality) provides that a lawyer shall make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

### **III. SECURITY PROGRAM—FRAMEWORKS AND STANDARDS**

There are a number of accepted frameworks and standards for developing, implementing, and maintaining a security program. Some of these well-known standards include<sup>10</sup>:

<sup>7</sup> Michael Riley and Sophia Pearson, China-Based Hackers Target Law Firms to Get Secret Deal Data, available at <http://www.bloomberg.com/news/2012-01-31/china-based-hackers-target-law-firms.html>.

<sup>8</sup> Mike Mintz, "Cyberattacks on Law Firms—A Growing Threat," *Martindale.com*, Mar. 19, 2012, <http://blog.martindale.com/cyberattacks-on-law-firms-a-growing-threat>.

<sup>9</sup> Mandiant Intelligence Center Report, APT1: Exposing One of China's Cyber Espionage Units, page 20, available at <http://www.mandiant.com>.

<sup>10</sup> Westby, Jody R., "Cybersecurity and Law Firms: A Business Risk," *Law Practice Magazine*, Vol. 39, No. 4, available at [http://www.americanbar.org/publications/law\\_practice\\_magazine/2013/july-august/cybersecurity-law-firms.html](http://www.americanbar.org/publications/law_practice_magazine/2013/july-august/cybersecurity-law-firms.html).

- International Organization of Standardization (ISO), the 27000 series<sup>11</sup>, <http://www.iso.org/iso/home/standards/management-standards/iso27001.htm>
- Information Technology Infrastructure Library (ITIL), <http://itil-officialsite.com>
- International Society of Automation (ISA), <http://www.isa.org>
- ISACA, COBIT, <http://www.isaca.org/Knowledge-Center/COBIT/Pages/Overview.aspx>
- Payment Card Industry Security Standards Council (PCI SSC), [https://www.pcisecuritystandards.org/security\\_standards/documents.php](https://www.pcisecuritystandards.org/security_standards/documents.php)
- National Institute of Standards and Technology (NIST) Special Publication 800 (SP-800) series and Federal Information Processing Standards (FIPS), <http://csrc.nist.gov>
- Information Security Forum (ISF) Standard of Good Practice for Information Security, <https://www.securityforum.org/?page=publicdownload2011sogp>
- Carnegie Mellon University Software Engineering Institute, Operationally Critical Threat, Asset, and Vulnerability Evaluation (OCTAVE), <http://cert.org/octave>
- North American Electric Reliability Corporation Critical Infrastructure Protection (NERC-CIP), [nerc.com/page.php?cid=2|20](http://nerc.com/page.php?cid=2|20)
- U.S. Nuclear Regulatory Commission, [nrc-stp.ornl.gov/slo/regguide571.pdf](http://nrc-stp.ornl.gov/slo/regguide571.pdf)
- The Electricity Subsector Cybersecurity Capability Maturity Model (ES-C2M2), <http://energy.gov/oe/services/cybersecurity/electricity-subsector-cybersecurity-capability-maturity-model-es-c2m2>

Fortunately, they are generally consistent, and a number of the requirements in the various security frameworks and standards map to one another. Thus, it is less important which framework or standard an organization follows and more important that it undertakes all of the key activities of a security program.

An organization-wide security program is comprised of a series of activities, including governance by boards of directors and senior executives; development of security strategies and plans, policies and procedures; creation of inventories of digital assets; selection of security controls; determination of technical configuration settings; performance of annual audits; and delivery of training. The foregoing is not an exhaustive list.

Due to the nature of the threat environment, certain activities in a security program are ongoing. Continuous monitoring and log analysis are a critical part of an organization-wide risk management, and are designed to provide meaningful, actionable intelligence and reporting that can provide early detection of threats. To maintain a highly proactive security posture, potential threats must be investigated and targeted attacks detected in advance or addressed as they occur. The objective is to address the multitude of security threats and risks in a timely, disciplined, and structured fashion.

<sup>11</sup> Given the cost and effort required to obtain and maintain ISO 270001 certification, this may not be appropriate for small organizations, particularly where the risks are not great and the benefit achieved would be minimal.

To properly support an organization's risk management framework, privacy compliance requirements also must be incorporated into the security program. In addition, an effective security program requires a team of trained personnel to evaluate the security impact of actual and proposed changes to the system, assess security controls, correlate and analyze security-related information, and provide actionable communication of the security status across all levels of the organization.

The determination of security controls is one of the most important activities of a security program. Effective security programs have administrative, technical, organizational and physical controls to help ensure the confidentiality, availability, and integrity of digital assets. Such controls must be carefully determined, implemented, and enforced. NIST has published extensive guidance on the selection of controls for government systems, which is equally appropriate for all organizations.<sup>12</sup>

The problem, however, is that many organizations are undertaking some of the required security activities, but not others, and some activities are performed without all the critical inputs. Therefore, the resulting security program has gaps and deficiencies and associated risks that impact the organization's operations, financial bottom line, and compliance is not adequately managed. In part, this is due to (a) a lack of attention at the top of many organizations, (b) a failure to assign key roles and responsibilities for privacy and security, and (c) deficient funding for security personnel, training, and program activities.

To protect against massive data breaches, it is clear that all organizations—whether private or public—must take immediate action to strengthen their security posture.

### ***Small Organizations***

Recognizing that small law offices and solo practitioners may lack the financial resources of larger firms, the components of a security program are flexible and their implementation must be practical and determined based upon the types of data and systems to be protected, the nature and scope of the organization, its compliance requirements, and system architecture. Small organizations, including small law offices and solo practitioners, will need to create a security program that prioritizes key security activities and is tailored to address the specific risks that have been identified. NIST has recognized that for some small organizations, “the security of their information, systems, and networks might not be a high priority, but for their customers, employees, and trading partners it is very important.”<sup>13</sup> Similarly, the U.S. Department of Health and Human Services (HHS) has accorded flexibility in its HIPAA Security Series guidance for the needs of small covered entities.<sup>14</sup>

<sup>12</sup> See, e.g., *Security and Privacy Controls for Federal Information Systems and Organizations*, National Institute of Standards & Technology, Special Pub 800-53, Rev. 4, Apr. 2013, available at <http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-53r4.pdf>.

NIST Interagency Report 7621, *Small Business Information Security: The Fundamentals*, 2009, was published to assist small business management to understand how to provide basic security for their information, systems, and networks, available at <http://csrc.nist.gov/publications/nistir/ir7621/nistir-7621.pdf>.

<sup>14</sup> See, *Security Standards: Implementation for the Small Provider*, available at <http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/smallprovider.pdf>.

#### IV. RISK-BASED ASSESSMENT—AN ACCEPTED BUSINESS PROCESS

Organizational risk can include many types of risk (e.g., management, investment, financial, legal liability, safety, logistics, supply chain, and security risk). Security risks related to the operation and use of information systems is just one of many components of organizational risk that senior executives address as part of their ongoing risk management responsibilities. This Resolution focuses on one aspect of a comprehensive enterprise risk management program—operational and IT/cyber risk.

Risk assessments inform decision-makers and support the risk management process by identifying: (i) relevant threats to the organization or threats directed through third party entities; (ii) vulnerabilities both internal and external to the organization; (iii) the impact (*i.e.*, harm) to the organization and individuals that may occur given the potential for threats exploiting vulnerabilities; and (iv) likelihood that harm will occur. The end result is a categorization of risk according to the degree of risk and magnitude of harm to the organization flowing from the threat or vulnerability if it occurred.

Risk assessments are an essential element of a security program. Cybersecurity is based on a systematic assessment of risks that are present in a particular operating environment. Ensuring the confidentiality, integrity, and availability of digital assets is fundamental to their protection. A risk assessment may be used to identify gaps and deficiencies in a security program due to operational changes, new compliance requirements, an altered threat environment, or changes in the system architecture and technologies deployed.

Risk assessments are the basis for the selection of appropriate security controls and the development of remediation plans so that risks and vulnerabilities are reduced to a reasonable and appropriate level. The principal goal of the organization's risk management process should be to protect the organization and its ability to perform its mission, not just to protect its IT assets.

Risk assessment is not new to most companies. It is a fundamental business process they have been following since at least 1977 when Congress enacted the requirement in the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §§ 78dd-1, et seq., that public companies have internal controls. Nearly all rely on the COSO Framework to comply with the internal control reporting requirements under the FCPA and the Sarbanes-Oxley Act of 2002, PL 107-204, 116 Stat 745.<sup>15</sup> The framework, issued in 1992 and updated in 2013, is designed to assist companies in structuring and evaluating controls that address a broad range of risks. It is geared to the achievement of three important objectives—operations (operational and financial reporting goals, and safeguarding assets from loss), reporting (financial and non-financial), and compliance (with laws and regulations). Safeguarding organizational assets, including the confidentiality, integrity and availability of sensitive personal data and computer networks, from theft or fraud by hackers and malicious insiders is at the core of what an effective security program is designed to do.

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<sup>15</sup> The Committee on Sponsoring Organizations of the Treadway Commission (“COSO”), an initiative of several groups with an interest in effective internal control, *available at* <http://www.coso.org>.

Risk assessment is necessary for publicly-traded companies to meet Securities and Exchange Commission (SEC) guidance on *Disclosure by Public Companies Regarding Cybersecurity Risks and Cyber Incidents*.<sup>16</sup>

Examples of cybersecurity risk management frameworks and standards include:

- ISO/IEC 27005:2011: *Information Security Risk Management*.<sup>17</sup> It supports the general concepts specified in ISO/IEC 27001 and is designed to assist the implementation of information security based on a risk management approach.
- ISO/IEC 31000:2009: *Risk Management—Principles and Guidelines*.<sup>18</sup> This document is intended to harmonize risk management processes in existing and future standards. It provides a common approach in support of standards dealing with specific risks and/or sectors, and does not replace those standards. It can be applied throughout the life of an organization, and to a wide range of activities, including strategies and decisions, operations, processes, functions, projects, products, services and assets.
- *Managing Information Security Risk, Organization, Mission, and Information System View*, NIST Spec Pub 800-39 (March 2011)<sup>19</sup> and *Guide for Applying the Risk Management Framework to Federal Information Systems: A Security Life Cycle Approach*, NIST Spec Pub 800-37 Rev. 1 (February 2010).<sup>20</sup> These publications provide guidance for developing an integrated, organization-wide process for managing risk that includes the activities of security categorization; security control selection, implementation, and assessment; information system authorization; and security control monitoring.
- *Critical Sectors—DHS Infrastructure Risk Management Approach*.<sup>21</sup> This guidance provides a useful approach to critical infrastructure risk management utilizing a risk management framework enunciated by DHS. It is designed to be applied to all threats and hazards, including cyber incidents, natural disasters, man-made safety hazards, and acts of terrorism, although different information and methodologies may be used to understand each. Risk information allows partners, from facility owners and operators to federal agencies, to prioritize their risk management efforts.
- *DOE Electricity Subsector Cybersecurity Risk Management Process (RPM)*.<sup>22</sup> The electricity subsector increasingly relies on digital technology to reduce costs, increase efficiency, and maintain reliability during the generation, transmission, and distribution of electric power. Managing cybersecurity risk is critical to achieving their strategic goals and

<sup>16</sup> <http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm>.

<sup>17</sup> [http://www.iso.org/iso/catalogue\\_detail?csnumber=56742](http://www.iso.org/iso/catalogue_detail?csnumber=56742).

<sup>18</sup> [http://www.iso.org/iso/catalogue\\_detail?csnumber=43170](http://www.iso.org/iso/catalogue_detail?csnumber=43170).

<sup>19</sup> <http://csrc.nist.gov/publications/nistpubs/800-39/SP800-39-final.pdf>.

<http://csrc.nist.gov/publications/nistpubs/800-37-rev1/sp800-37-rev1-final.pdf>.

<sup>21</sup> U.S. Department of Homeland Security, *Supplemental Tool: Executing A Critical Infrastructure Risk Management Approach*,

[http://www.dhs.gov/sites/default/files/publications/NIPP%202013%20Supplement\\_Executing%20a%20CI%20Risk%20Mgmt%20Approach\\_508.pdf](http://www.dhs.gov/sites/default/files/publications/NIPP%202013%20Supplement_Executing%20a%20CI%20Risk%20Mgmt%20Approach_508.pdf).

<sup>22</sup> <http://energy.gov/oe/downloads/cybersecurity-risk-management-process-rmp-guideline-final-may-2012>.

## V. SECURITY PROGRAM—CYBER RESPONSE PLANS

Incident response is the practice of detecting a problem, determining its cause, minimizing the damage it causes, resolving the problem, and documenting each step of the response for future reference. Fully developed and tested incident response plans and business continuity/disaster recovery plans are critical components of a security program. Organizations must be prepared if a cyber attack or data breach occurs or if an event interrupts their operations. Thus, response plans, policies, and procedures must be able to accommodate the full array of threats, not just data breaches.

Incident response plans must involve stakeholders across an organization, including IT, security, legal, finance, operational units, human resources, and procurement. The incident response team should be identified and their roles and responsibilities defined. The communication with and coordination among stakeholders is one of the most important aspects of an incident response plan. This includes the identification of who within an organization should be responsible for communicating with external stakeholders, investors, employees, customers, and other key groups. External stakeholders include first responders, forensic investigation experts, Computer Emergency Response Teams (CERTs), Information Sharing and Analysis Centers (ISACs), regulators, communications providers, and outside counsel.

If litigation is anticipated, adequate documentation and evidentiary procedures for incident response are very important. This ensures valuable tracking and tracing data and evidence of what happened within a system are preserved and secured and chain of custody is documented. Advance planning and the advice of a crisis communications expert can be invaluable in keeping a cybersecurity incident from becoming a disaster.

For many organizations, adequate incident response planning is a compliance requirement. For example, those subject to the Federal Information Security Management Act (FISMA), the Health Insurance Portability & Accountability Act (HIPAA), Gramm-Leach-Bliley Act (GLBA), or numerous state data breach laws must implement and maintain security programs.

There are ample resources available to assist organizations in understanding the key components of incident response. NIST, for example, has published an excellent guide, the *Computer Security Incident Handling Guide*,<sup>23</sup> and Carnegie Mellon has issued the *Handbook for Computer Security Incident Response Teams*.<sup>24</sup>

*Business Continuity Management*—The other critical cyber response plan for a security program is a business continuity/disaster recovery plan. Although they are commonly lumped together as BC/DR, there are separate processes for business continuity and disaster recovery. A cybersecurity incident that is initially handled under an incident response plan may cause a business interruption that requires implementation of business continuity procedures. Thus, each

<sup>23</sup> *Computer Security Incident Handling Guide*, NIST Spec Pub 800-61, Rev. 2 (Aug. 2012), available at [http://www.nist.gov/customcf/get\\_pdf.cfm?pub\\_id=911736](http://www.nist.gov/customcf/get_pdf.cfm?pub_id=911736).

<sup>24</sup> *Handbook for Computer Security Incident Response Teams*, Carnegie Mellon University, Software Engineering Institute, available at <http://resources.sei.cmu.edu/library/asset-view.cfm?assetid=6305>.

plan must be drafted and tested for such circumstances to ensure a smooth and efficient response and continuity of operations.

Certain critical infrastructure sectors have BC/DR requirements. NERC, for example, has requirements for BC/DR in its required standards, and it conducts ongoing work regarding continuity of operations and resiliency of electricity grids. These activities help these companies stay abreast of threats and develop, implement, and maintain sophisticated BC/DR plans.<sup>25</sup>

## VI. INFORMATION SHARING

Sharing threat information regarding cyber incidents with others, such as law enforcement, community emergency response teams (CERTs), information sharing and analysis centers (ISACs), business partners, and public sector cyber officials who could benefit from the knowledge, helps advance cyber defenses and resiliency in other organizations. An attack on any organization may impact all others, or it may be targeted at a particular activity or business process, such as point-of-sale systems or control processes. The sharing of threat information can substantially improve the ability of other organizations to respond to a similar attack. It also improves the knowledge base about threats and effective mitigation measures.

Many companies have not thought through their comprehensive incident response or developed cyber response plans, much less thought about how they might share threat information. Establishing relationships with external organizations—such as FBI Infragard, ISACs, CERTs, and industry cyber groups—regarding cyber threats is an important defensive measure for any organization. Such organizations are usually open to receiving information in an anonymized or sanitized fashion, if desired, by the entity providing the information.

It is important that organizations identify what data they might share, determine to whom they would share it and in what form, and consider any legal ramifications associated with the data or sharing it with third parties.<sup>26</sup> Although some have raised concerns that antitrust constraints may arise with information sharing, the U.S. Department of Justice (DOJ) has indicated a willingness to provide letters of exception, if requested, to enable cyber information sharing. On April 14, 2014, DOJ joined with the Federal Trade Commission (FTC) and issued a joint “Antitrust Policy Statement on Sharing of Cybersecurity Information,” which clarifies the issue:

Through this Statement, the Department of Justice’s Antitrust Division (the “Division”) and the Federal Trade Commission (the “Commission” or “FTC”)

<sup>25</sup> See, e.g., Cyber Attack Task Force, Final Report, accepted by NERC Board of Trustees, May 9, 2012, available at [http://www.nerc.com/docs/cip/catf/12-CATF\\_Final\\_Report\\_BOT\\_clean\\_Mar\\_26\\_2012-Board%20Accepted%200521.pdf](http://www.nerc.com/docs/cip/catf/12-CATF_Final_Report_BOT_clean_Mar_26_2012-Board%20Accepted%200521.pdf); Severe Impact Resilience Task Force, Final Report, accepted by NERC Board of Trustees, May 9, 2012, available at [http://www.nerc.com/comm/OC/SIRTF%20Related%20Files%20DL/SIRTF\\_Final\\_May\\_9\\_2012-Board\\_Accepted.pdf](http://www.nerc.com/comm/OC/SIRTF%20Related%20Files%20DL/SIRTF_Final_May_9_2012-Board_Accepted.pdf).

<sup>26</sup> Lawyers, law firms, and organizations and entities authorized to provide legal services must take into consideration any ethical constraints that may apply to client records, and any legal restrictions applicable to records under seal, grand jury information, classified information, etc.

(collectively, the “Agencies”) explain their analytical framework for information sharing and make it clear that they do not believe that antitrust is—or should be—a roadblock to legitimate cybersecurity information sharing.<sup>27</sup>

## VII. EXISTING ABA POLICY

In recent years, the ABA House of Delegates and Board of Governors have adopted several policies regarding cybersecurity and lawyers’ use of technology, and the proposed Resolution is consistent with, and would build upon, those existing ABA policies. These ABA policies include the following:

Resolution 118, Adopted by the House of Delegates at the 2013 Annual Meeting in San Francisco (August 2013)

This Resolution condemns intrusions into computer systems and networks utilized by lawyers and law firms, urges federal, state, and other governmental bodies to examine and amend existing laws to fight such intrusions, and makes other related recommendations. The complete Resolution and Report are available at:

[http://www.americanbar.org/content/dam/aba/administrative/law\\_national\\_security/resolution\\_118.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/law_national_security/resolution_118.authcheckdam.pdf)

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Resolution Adopted by the ABA Board of Governors (November 2012)

The ABA’s Board of Governors approved a policy in November 2012 comprised of five cybersecurity principles developed by the ABA Cybersecurity Legal Task Force. The complete Resolution and Report are available at:

[http://www.americanbar.org/content/dam/aba/marketing/Cybersecurity/aba\\_cybersecurity\\_res\\_and\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/Cybersecurity/aba_cybersecurity_res_and_report.authcheckdam.pdf)

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Resolutions 105 A, B and C, Adopted by the House of Delegates at the 2012 Annual Meeting in Chicago (August 2012).

Resolution 105A amends the black letter and Comments to Model Rule 1.0 (Terminology), the Comments to Model Rule 1.1 (Competence) and Model Rule 1.4 (Communication), and the black letter and Comments to Model Rule 1.6 (Confidentiality of Information) and Model Rule 4.4 (Respect for Rights of Third Parties) of the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding lawyers’ use of technology and confidentiality.

<sup>27</sup> Department of Justice and Federal Trade Commission: Antitrust Policy Statement on Sharing of Cybersecurity Information, *available at* [http://www.ftc.gov/system/files/documents/public\\_statements/297681/140410ftcdojcyberthreatstnt.pdf](http://www.ftc.gov/system/files/documents/public_statements/297681/140410ftcdojcyberthreatstnt.pdf).

The Resolution 105B amends the black letter and Comments to Model Rules 1.18 and 7.3, and the Comments to Model Rules 7.1, 7.2 and 5.5 of the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding lawyers' use of technology and client development.

Resolution 105C amends the Comments to Model Rule 1.1 (Competence) and Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law), and the title and Comments to Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) of the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding the ethical implications of retaining lawyers and nonlawyers outside the firm to work on client matters (i.e., outsourcing).

The complete Resolutions and the related Reports are available at:

[http://www.americanbar.org/content/dam/aba/directories/policy/2012\\_hod\\_annual\\_meeting\\_105a.doc](http://www.americanbar.org/content/dam/aba/directories/policy/2012_hod_annual_meeting_105a.doc)

[http://www.americanbar.org/content/dam/aba/administrative/law\\_national\\_security/resolution\\_105b\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/law_national_security/resolution_105b_authcheckdam.pdf)

[http://www.americanbar.org/content/dam/aba/directories/policy/2012\\_hod\\_annual\\_meeting\\_105c.doc](http://www.americanbar.org/content/dam/aba/directories/policy/2012_hod_annual_meeting_105c.doc)

## **VIII. CONCLUSION**

It is imperative that all organizations—private sector companies and other organizations, government departments and agencies, and professional firms such as legal, accounting, engineering, and consulting entities—develop, implement, and maintain an organization-wide security program in accordance with accepted security frameworks and standards. Today, too many organizations and entities—including critical infrastructure companies—have completed some activities within a security program, but not all, making them easy targets for sophisticated cyber-criminals. The lack of a disciplined process for the selection of security controls and ongoing reviews are two of the most serious gaps in security programs. Likewise, many organizations do not devote adequate funding to address known gaps and deficiencies in their security programs or to ensure that their organizations have well-developed plans to enable them to respond adequately to incidents and maintain continuity of business operations.

Through this Resolution, the ABA stresses the importance of security programs for all organizations as a matter of sound governance and risk management and as an imperative that is linked directly to our nation's economic and national security. Cybersecurity has moved beyond the realm of technical personnel; the maintenance of a security program, including the components stressed in this Resolution, is a responsibility that all senior executives, business owners, attorneys, general counsels, compliance officers, and government officials should embrace.

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Respectfully Submitted,

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