IT'S ABOUT TIME!

Welcome to Gentry Locke's 2018 CLE Seminar

AGENDA

	7:30 a.m.	Sign-in and Continental Breakfast
	8:25 a.m.	Welcome
❶	8:30 a.m.	Trial Publicity: What You Can Say About Pending Cases – W. David Paxton, Trey H. Smith, III, Catherine J. Huff – **30 min**.
❷	9:00 a.m.	Personal Injury: How Bankruptcy Affects Your Claims – H. David Gibson, Benjamin D. Byrd – **30 min**.
❸	9:30 a.m.	Construction Law: Updates Affecting Project Performance and Disputes – K. Brett Marston, Spencer M. Wiegard – **30 min.**
	10:00 a.m.	Break – 20 min.
❹	10:20 a.m.	Death Cases: How to Allow Your Deceased Client to Tell a Powerful Story for the Estate – Matthew W. Broughton, Gregory D. Habeeb, Andrew D. Finnicum – **60 min.**
❺	11:20 a.m.	Tips from the Trenches: A Judge's View (through a Clerk's eyes) on Effective Advocacy – Michael J. Finney, Alicha M. Grubb – **30 min.**
	11:50 a.m.	Break for lunch in Roanoke Ballrooms A & B
❻	12:25 p.m.	**Ethics** for Lunch: Crime Fraud Exception to the Attorney-Client Privilege Rule: How a Client's Actions can Eliminate Privilege – J. Scott Sexton, Gregory J. Haley, Andrew M. Bowman – **60 min**.
❼	1:30 p.m.	Business Law: Critical Rules in the Commercial World – W. William Gust, Clark H. Worthy, Christopher M. Kozlowski – **60 min**.
❽	2:30 p.m.	Opinions from On High: Taking the Pulse of the Supreme Court of Virginia – Monica T. Monday – **30 min.**
	3:00 p.m.	Break – 20 min.
❾	3:20 p.m.	Drugs and Money: How Your Healthcare Clients and Patients are Affected by the Opioid Crisis –Thomas J. Bondurant, Jr. – **30 min.**
❿	3:50 p.m.	**Ethics**: The "Gold Standard" in Conducting Oneself in Depositions: How to Deal with Others – Guy M. Harbert, III, Anthony M. Russell; Why Lawyer Jokes Aren't Funny – Travis J. Graham – **60 min.**
	4:50 p.m.	Cocktails and *hors d'oeuvres* until 6pm

GENTRY LOCKE
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September 7, 2018

Welcome to the 2018 Gentry Locke Seminar. We hope you find this Seminar meets both your intellectual and continuing education needs. Based on attendee feedback from prior years, we are continuing a fast-paced approach covering many areas of the law.

We are humbled by the continued growth of the Seminar and our professional relationships with you and your firms. Please share any suggestions you have to help improve future seminars. Prior attendee ideas have helped make this Seminar much better.

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 on exciting, future matters.

Very truly yours,

Matt

Matthew W. Broughton
Seminar Chair
GENTRY LOCKE

Virginia MCLE Board

CERTIFICATION OF ATTENDANCE (FORM 2)

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

INSTRUCTIONS

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

Complete this Certification. Retain for two years.

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

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

Member Name: ____ **VSB Member Number:** ______________________

Address: ____ **Daytime Phone:** ____________________________

____ **E-mail Address:** ____________________________

____

City **State** **Zip**

Course ID Number: **JFF2790**

Sponsor: **Gentry Locke Rakes Moore LLP**

Course/Program Title: **2018 Gentry Locke CLE Seminar**

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

Date Completed: _September 7, 2018__ **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

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GENTRY LOCKE
Attorneys

Monica Taylor Monday

Managing Partner

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- Email: monday@gentrylocke.com

Monica Monday is Gentry Locke's Managing Partner and heads the firm's Appellate practice. Monica represents her clients in Virginia's state and federal appellate courts across a wide variety of cases, including commercial and business disputes, healthcare, personal injury, local government matters, domestic relations and more. In 2015, Monica was inducted as a Fellow of the American Academy of Appellate Lawyers — only the fifth Virginia attorney to be so honored. She has been recognized among *Virginia's Top 50 Women Lawyers* and *Virginia's Top 100 Lawyers* by the Thomson Reuters' *Virginia* S*uper 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*. Notably, Monica is described by *Chambers USA 2018: America's Leading Lawyers for Business* as having "a commanding reputation as 'one of the go-to practitioners' for appellate work."

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

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

Education

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

Experience

- Court affirmed finding that property owners had a vested right to the use of their property. Board of Supervisors of Richmond County v. Rhoads, 294 Va. 43 (2017)
- In question of first impression involving social host duty to child guest, obtained affirmance of motion to strike. Lasley v. Hylton, 288 Va. 419, 764 S.E.2d 88 (2014)
- Court reversed dismissal of defamation case. Cashion v. Smith, 286 Va. 327, 749 S.E.2d 526 (2013)
- Obtained reversal of workers' compensation case because the Full Commission lacked authority to decide the case with a retired Commissioner. Layne v. Crist Electrical Contractor, Inc., 62 Va. App. 632, 751 S.E.2d 679 (2013)
- Obtained reversal of jury verdict in maritime case relating to asbestos exposure. Exxon Mobil Corp. v. Minton, 285 Va. 115, 737 S.E.2d 16 (2013)
- Obtained reversal of decision striking down water and sewer rates that town charged to out-of-town customers; won final judgment in favor of town. Town of Leesburg v. Giordano, 280 Va. 597, 701 S.E.2d 783 (2010)
- In question of first impression, obtained dismissal of domestic relations appeal based upon terms of property settlement agreement, which waived the right of appeal. Burke v. Burke, 52 Va. App. 183, 662 S.E.2d 622 (2008)
- Obtained reversal of award of writ of mandamus against municipal land development official in subdivision application case. Umstattd v. Centex Homes, G.P., 274 Va. 541, 650 S.E.2d 527 (2007)
- Secured affirmance of compensatory and punitive damages awards for breach of fiduciary duty, tortious interference, and conspiracy. Banks v. Mario Industries of Virginia, Inc., 274 Va. 438, 650 S.E.2d 687 (2007)

- Successfully defended a jury verdict for homeowners association for damages stemming from the negligent construction of a septic system. Westlake Properties, Inc. v. Westlake Pointe Property Owners Association, Inc., 273 Va. 107, 639 S.E.2d 257 (2007)
- Successfully represented an individual in a premises liability case involving a question of first impression. Taboada v. Daly Seven, Inc., 271 Va. 313, 626 S.E.2d 428 (2006), adhered to on rehearing, 641 S.E.2d 68 (2007)
- Obtained a new trial on damages for injured plaintiff in a medical malpractice case. Monahan v. Obici Medical Management Services, 271 Va. 621, 628 S.E.2d 330 (2006)
- Successfully defended decision of the Virginia Workers' Compensation Commission awarding attendant care benefits for employee who lost both arms in an industrial accident and assessing a large award of attorneys fees against opposing party. Virginia Polytechnic Institute v. Posada, 47 Va. App. 150, 622 S.E.2d 762 (2005)
- Obtained reversal of summary judgment in federal court negligence case. Blair v. Defender Services, 386 F.3d 623 (4th Cir. 2004)
- Successfully defended compensatory and punitive damages jury verdict in malicious prosecution case. Stamathis v. Flying J, Inc., 389 F.3d 429 (4th Cir. 2004)
- Obtained reversal of summary judgment in state malicious prosecution case representing chairman of a school board. Andrews v. Ring, 266 Va. 311, 585 S.E.2d 780 (2003)
- Obtained new trial for individual in medical malpractice case. Sawyer v. Comerci, 264 Va. 68, 563 S.E.2d 748 (2002)
- Successful defense of jury verdict in a construction case interpreting statutory warranty for new dwellings. Vaughn, Inc. v. Beck, 262 Va. 673, 554 S.E.2d 88 (2001)
- Successfully defended federal court's dismissal of First Amendment constitutional challenge in voting rights case. Jordahl v. Democratic Party of Virginia, 122 F.3d 192 (4th Cir. 1997), cert. denied, 522 U.S. 1077 (1998)

Administration & Litigation

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

Affiliations

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

Awards

- Ranked a “Leading Individual” by Chambers and Partners USA (2017-2018)
- 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 (2009-2019)
- 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 (2010-2018), Top 100 listed in Virginia (2013-2018), listed in Virginia Super Lawyers Top 50 Women (2015-2018) and previously was a Virginia Super Lawyers Rising Star (2007)
- Designated as one of the “Legal Elite” by Virginia Business magazine for Appellate Law (2011-2017)
- Named a “Legal Eagle” for Appellate Practice by Virginia Living magazine (2012, 2015)
- 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.

- Jun 29, 2018 — **Judge Reduces Jury Verdict Due to Defect in Plaintiff’s Complaint**
- Aug 31, 2017 — **Property Owners Entitled to Relief from Zoning Administrator’s Mistake**
- Dec 14, 2016 — **Supreme Court of Virginia Affirms Circuit Court Decision in Construction Claim**
- Aug 3, 2016 — **Court of Appeals Affirms Finding of Desertion, Awards Appellate Attorney’s Fees**
- Aug 18, 2015 — **Fraud and Breach of Contract Claims Dismissed, Affirmed on Appeal**
- Nov 8, 2013 — **Physician Successfully Defended Before Medical Board**
- Jun 11, 2013 — **Court of Appeals Affirms Decision, Awards Attorney Fees**

GENTRY LOCKE
Attorneys

Matthew W. Broughton

Partner

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

Education

- University of Richmond, T.C. Williams School of Law, J.D. 1985
- University of Virginia, B.A. with distinction, 1982

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
- $5 million settlement in a legal malpractice 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
- $4 million settlement for a boating death case
- $3.5 million settlement in airplane crash case involving death of a passenger
- $3.4 million in expected attendant care benefits for double amputee
- $3 million in expected attendant care benefits for brain injured/blind worker
- $2.45 million settlement in motorcycle accident case involving facial injuries
- $1.6 million verdict in complex business litigation case
- $1.2 million verdict in federal court truck accident case involving fractured spine
- $1.2 million settlement in automobile crash involving brain injury and leading to appointment of guardian and conservator
- $1 million for negligently manufactured auger resulting in amputation
- $1 million settlement against responsible parties for product manufacturing case
- $1 million for ski accident case resulting in quadriplegia
- $975,000 settlement for mechanic's brain injury in automobile accident case
- $700,000 for injured worker in products liability case involving truck lift gate which fractured lower extremity
- Resolved multiple brain injury cases for $1 million or more
- Involved in multiple cases involving tractor trailer crashes
- Multiple cases tried and settled for amounts below $1 million, involving airplane crashes, medical negligence, car accidents, truck accidents, products liability and commercial matters
- Many years of experience handling complex business transactions
- Represented multiple companies in buying, selling and changing the ownership status of their businesses
- Over 25 years of experiencing handling workers' compensation cases throughout Virginia and subrogation cases arising from such injuries

- Confidential amount in a sexual assault case of a minor
- Multiple aviation related cases to include assisting parties in purchase and documentation information of entities to hold aircraft; Represented pilots in enforcement actions prosecuted by FAA

Workers' Compensation

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

Affiliations

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

Awards

- Named one of only thirty "Leaders in the Law" statewide, and the sole Roanoke-based recipient, by Virginia Lawyers Weekly (2013)
- Named to Virginia Super Lawyers in the area of Personal Injury Plaintiff Litigation (2010-2018) 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 (2013-2019), Product Liability Litigation/Plaintiffs (2010-2019), Best Lawyers in America Business Edition for Plaintiffs (2016), Best Lawyers in America for Workers Compensation Law (1997-2002)
- Named a "Legal Eagle" for Product Liability Litigation by Virginia Living magazine (2012)
- 1998 "Boss of the Year" Award, Roanoke Valley Legal Secretaries Association
- "Attorney of the Year" Award from a top retail entity (2001)

Published Work

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

Case Studies

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

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

GENTRY LOCKE
Attorneys

Thomas J. Bondurant, Jr.

Partner

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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 29 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); Defense Contractor Fraud; 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
- 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 29 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, Fourth Circuit Judicial Conference
- Member, American Bar Association Criminal Justice Section
- Member, National Association of Criminal Defense Lawyers
- Past Member, Federal Bar Association (2011-2018)
- Past Director, South County Lacrosse Club
- Past Director, National Association of Assistant United States Attorneys

Awards

- Fellow, American College of Trial Lawyers (inducted 2008), served on State Committee (2011-2016)
- 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 (2011-2019)
- Designated a Virginia Super Lawyer in the area of Criminal Defense: White Collar (2013-2018) 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, 2015-2017)
- Named a "Legal Eagle" for Criminal Defense: White Collar by Virginia Living magazine (2012)

Published Work

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

GENTRY LOCKE
Attorneys

Andrew M. Bowman

Associate

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

Education

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

Experience

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

Affiliations

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

Published Work

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

Case Studies

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

GENTRY LOCKE
Attorneys

Benjamin D. Byrd

Partner

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

Ben has been included in the *Virginia Lawyers Weekly* list of "Virginia's Largest Verdicts" twice, and since 2012 has been noted every year by *Virginia Super Lawyers* as a "Virginia Rising Star" in the practice of Personal Injury General: Plaintiff, placing him among the up-and-coming attorneys in the state.

Education

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

Experience

- Represented plaintiffs in cases involving medical malpractice, personal injury, car accidents, trucking accidents, products liability, nursing home malpractice, dog attacks, sexual assault and wrongful death (including wrongful fetal death)
- Tried a wrongful death medical malpractice case resulting in a $2.75 million jury verdict (reduced to the cap of $2,050,000) in the Western District of Virginia, Abingdon Division; verdict was included in the Virginia Lawyers Weekly "Virginia's Largest Verdicts of 2015" list (the 6th largest overall verdict for the year and the largest medical malpractice verdict for the year)
- Represented a plaintiff in recovering in excess of $1.7 million in a medical malpractice case
- Tried a sexual assault case resulting in a $1,000,000 jury verdict in the City of Staunton; verdict was included in the Virginia Lawyers Weekly "Virginia's Largest Verdicts of 2013" list
- Represented co-plaintiffs in recovering in excess of $800,000 in a medical malpractice-wrongful death case
- Represented a plaintiff in recovering in excess of $500,000 in a trucking accident case
- Tried a medical malpractice case resulting in a jury verdict in excess of $375,000 (total recovery of over $450,000)
- Tried a wrongful death case resulting in a $400,000 jury verdict in Wise County
- Tried a medical malpractice case resulting in a jury verdict in excess of $300,000 in Tazewell County
- Represented a plaintiff in recovering $250,000 in a medical malpractice-wrongful death case
- Tried a trucking accident case resulting in a $200,000 jury verdict in Roanoke County
- Tried car accident, trucking accident, medical malpractice, personal injury, sexual assault and wrongful death cases in Virginia state courts
- Successfully represented a car accident victim in arbitration proceeding
- Represented plaintiffs in cases that received media publicity, including medical malpractice matters against the major healthcare corporation in the region

- Represented plaintiffs in state courts throughout the Commonwealth including Alleghany County, Amherst County, Appomattox County, Augusta County, Bedford County, Botetourt County, Brunswick County, Carroll County, Charlottesville, Danville, Dickenson County, Fairfax County, Floyd County, Franklin County, Grayson County, Henrico County, King William County, Loudoun County, Lynchburg, Martinsville, Mecklenburg County, Montgomery County, Newport News, Norfolk, Pulaski County, Richmond, Roanoke City, Roanoke County, Rockbridge County, Rockingham County, Russell County, Salem, Stafford County, Staunton, Tazewell County, Warren County, Washington County, Winchester, and Wise County
- Represented plaintiffs in a trucking accident case in Louisiana state court
- Represented plaintiffs in more than two dozen mediations in state and federal courts in Virginia
- Argued numerous motions in state and federal courts on the topics of charitable immunity, the collateral source rule, spoliation of evidence and other matters
- Participated in continuing legal education courses as a presenter and in preparing written materials
- Assisted with a motion to reconsider sentence for a criminal defendant serving life without parole
- Assisted the Virginia Capital Case Clearinghouse at Washington & Lee with several high-profile capital cases
- Served the United States District Court for Western Virginia during internship

Affiliations

- Member, Virginia Trial Lawyers Association; Member, VTLA Business Partner Committee (2017-Present) and VTLA Pro Bono Committee (2017-2019), VTLA Membership Committee (2018-Present), and Pro Bono Strategic Planning Committee (2018-2019)
- Member, Law Council, Washington & Lee University School of Law (2018-2022)
- Member, Ted Dalton Chapter, American Inns of Court (2017-Present)
- Member, American Association for Justice
- Member, American Bar Association
- Member, Virginia State Bar
- Member, The Virginia Bar Association
- Member, Roanoke Bar Association

Awards

- Included in the Virginia Lawyers Weekly list of “Virginia’s Largest Verdicts” (2013, 2015)
- Named a Virginia Super Lawyers Rising Star in Personal Injury: Plaintiff (2012-2018)

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 17, 2018 — **Accident caused by paving truck results in $350k settlement**
- Jan 27, 2017 — **Settlement for $125k in accident due to inattentive truck driver on I-81**
- Nov 4, 2016 — **Settlement for Permanent Paralysis Following Wisdom Tooth Removal**
- 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**
- Jun 10, 2015 — **Patient Prevails, Receives Settlement in Cancer Misdiagnosis Case**
- Jan 28, 2015 — **Feeding Tube Error Case Resolved for Widow**
- May 21, 2014 — **Client Awarded Over $387,000 for Surgical Injury**
- Nov 21, 2013 — **Medical Hardship Ignored by Physician Results in $300,000+ Award**
- Sep 29, 2013 — **Arbitration Result in Favor of Taxicab Accident Victim**
- Sep 27, 2013 — **Plaintiff in Multi-vehicle Accident Receives Over $225,000**
- Apr 4, 2013 — **Million-dollar Verdict Awarded to Home Health Care Nurse**
- Jul 26, 2012 — **Unnecessary Procedure Leads to Wrongful Death**
- May 29, 2012 — **Settlement Approved for Girl Hit by Car**
- Jan 4, 2012 — **Settlement on Uninsured Motorist Accident**
- Dec 28, 2011 — **Maximum Awarded for Head-on Accident with Tractor-trailer**

GENTRY LOCKE
Attorneys

Michael J. Finney

Partner

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Michael Finney has a diverse litigation practice, focused on resolving complex business disputes. Prior to joining Gentry Locke, Mike practiced in Washington, DC, and clerked at the United States District Court in Roanoke for the Honorable James C. Turk. Since 2012 he has been recognized as a *Virginia Rising Star* 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 (2013-2018)
- Designated one of the Legal Elite by Virginia Business magazine for the area of Young Lawyer (Under 40) (2015) and Civil Litigation (2016-2017)

Published Work

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

Case Studies

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

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

GENTRY LOCKE
Attorneys

Andrew D. Finnicum

Associate

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

Education

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

Experience

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

Affiliations

- Admitted, United States District Court for the Eastern District of Virginia (2018-Present)
- Admitted, United States District Court for the Western District of Virginia (2013-Present)
- Virginia State Bar (2010-Present)

Awards

- Named a "Virginia Super Lawyers Rising Star" in Personal Injury General: Plaintiff (2017-2018)
- Second Place, 2008 John W. Davis Appellate Advocacy Moot Court Competition for both Best Brief Award and Best Oralist Award
- Co-Administrator for the 2009 John W. Davis Appellate Advocacy Moot Court Competition

Case Studies

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

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

GENTRY LOCKE
Attorneys

H. David Gibson

Partner

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Dave Gibson is a Partner in Gentry Locke's Litigation practice group, representing businesses and individuals in complex and multi-party litigation. He regularly handles commercial matters and catastrophic injury cases. Dave's clients include parties in federal and state courts throughout Virginia and across the country.

Education

- Roanoke College, B.A. 1992
- University of Akron, J.D. 1996

Experience

- $2,000,000+ settlement in traumatic brain injury action
- $1,500,000 jury verdict for corporation in suit against former executive and competitor for illegal business practices and theft of trade secrets
- $1,200,000 jury verdict for plaintiff who suffered spinal fracture in tractor-trailer collision
- $1,000,000+ jury verdict for natural gas supplier in construction case against general contractor
- Represent plaintiffs in the United States District Court for the Northern District of Ohio in ASR Hip Implant product liability litigation
- Represent plaintiffs in the United States District Court for the Northern District of Indiana in Biomet M2A Magnum Hip Implant product liability litigation
- Represent plaintiffs in the United States District Court for the Northern District of Texas in DePuy Orthopaedics, Inc. Pinnacle Hip Implant product liability litigation
- Represent plaintiffs in the United States District Court for the District of Minnesota in Stryker Rejuvenate and ABGII Modular Hip Implant litigation
- Represent plaintiffs in the United States District Court for the District of Massachusetts in New England Compounding Pharmacy, Inc. product liability litigation
- Fen-Phen class action settlement
- Successfully defended director/officer of large coal corporation in multi-million dollar adversarial proceeding following Chapter 11 bankruptcy filing
- Represented senior secured lender in complex workout of multi-million dollar loan default
- Represent major supplier of products and services to the rail industry in North America
- Represent plaintiffs in personal injury, medical malpractice, and legal malpractice actions
- Defended manufacturer of transmission in traumatic amputation products liability action obtaining favorable settlement

Affiliations

- Member, American Bar Association
- Member, The Virginia Bar Association
- Member, Roanoke Bar Association
- Member, American Association for Justice

- Member, Virginia Trial Lawyers Association
- Member, Litigation Section, American Bar Association

Awards

- “Largest Verdicts in Virginia”, as recognized by Virginia Lawyers Weekly (2003, 2006)

Published Work

- “The Business Invitor’s Duty of Care to Protect Its Invitees from the Criminal Acts of Third Parties”, The Journal of Civil Litigation, Vol. XIII, No. 4, Winter 2001-2002, Published Quarterly by the Virginia Association of Defense Attorneys.

Case Studies

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

- Nov 4, 2016 — **Settlement for Permanent Paralysis Following Wisdom Tooth Removal**
- Nov 21, 2013 — **Medical Hardship Ignored by Physician Results in $300,000+ Award**

GENTRY LOCKE
Attorneys

Travis J. Graham

Partner

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

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

Education

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

Experience

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

Affiliations

- Member, Tennessee State Bar, 1998; Virginia State Bar, 2008
- Law Clerk to the Honorable Glen M. Williams, Senior United States District Judge for the Western District of Virginia, 1998-99
- Adjunct Professor, The University of Tennessee College of Law
- Camp Volunteer and Executive Board Member, Blue Ridge Mountains Council, Boy Scouts of America

Awards

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

Published Work

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

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

Case Studies

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

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

GENTRY LOCKE
Attorneys

Alicha M. Grubb

Associate

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Alicha Grubb works in the **Commercial Litigation** group helping clients resolve their business disputes. Prior to joining Gentry Locke, Alicha researched criminal and civil motions as a law clerk for the Twenty-third Judicial Circuit, where she assisted on large projects such as editing the Virginia Model Jury Instructions. Alicha's prior experience includes assistance in legal matters at the Roanoke County Commonwealth Attorney's Office and the U.S. Attorney's Office in Greensboro, NC. Alicha is an award-winning speaker who is also fluent in Spanish.

Education

- Wake Forest University School of Law, J.D. (2016)
- Bob Jones University, B.A., cum laude (2013)

Experience

- Successfully defended an action for breach of commercial lease on the grounds that lease was for more than five years and did not meet the seal requirements of the Virginia Code (Mitchell v. Morgan, Roanoke City General District Court)
- Successfully defended a breach of contract action against one of our commercial clients at a bench trial on the merits. (Horn v. Woods Service Center, Roanoke City General District Court)
- Successfully defended two speeding tickets on behalf of a commercial client, getting the charges reduced to defective equipment (Martinsville General District Court)
- Successfully defended numerous garnishment show causes against commercial clients on the grounds that the garnishment summons were improperly served (Harrisonburg and Lynchburg Circuit Courts)
- Court granted demurrer to the plaintiff's declaratory judgment action on the grounds that it was preemptive forum shopping (MCCOA, LLC v. Retail Service Systems, Inc., Civil Action No. 7:17-CV-00505 (Western District of Va. Feb. 1, 2018)
- As a law clerk, researched criminal and civil motions before the 23rd Judicial Circuit Court and prepared orders based on hearing outcomes
- Conducted daily misdemeanor trials and appeals in General District, Juvenile, and Circuit Court, prosecuted weekly preliminary hearings in Circuit Court, and prepared witnesses for trial as an intern for the Roanoke County Commonwealth Attorney's Office

Affiliations

- Member, Wake Forest Journal of Law and Policy (2014-2016)
- Wake Forest Moot Court: Captain and member, Jessup International Law Moot Court Team (2014-2016); Stanley Competition participant (2015); Walker Competition Elite Eight finalist (2014); moot court mentor (2015-2016)
- Member, Black Law Student Association (2013-2016)
- Chief Justice, South Carolina Student Legislature (2012-2013)

Awards

- CALI Award for Trial Practice (2015)

- North Carolina Advocates for Justice Award (2015)
- Highest Ranking Oralist, Wake Forest Jessup International Law Moot Court team (2015)
- First Place in Extemporaneous Writing Contest (2013)
- Outstanding Written Work in American History, presented by Daughters of the American Revolution (2013)
- Best Legislation and Best Written Brief awarded by South Carolina Student Legislature (2012, 2013)

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 19, 2018 — **Contract case involving home purchase settled, all fees recovered**
- Feb 7, 2018 — **Preemptive "forum shopping" fails against our client's Trade Secret litigation**

GENTRY LOCKE
Attorneys

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 is consistently noted by *Best Lawyers in America* list for 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 (2015-2017)
- Named “2017 Roanoke Lawyer of the Year for Employee Benefits (ERISA) Law” by Best Lawyers in America and consistently noted for Employee Benefits (ERISA) Law, and Tax Law

GENTRY LOCKE
Attorneys

Gregory D. Habeeb

Partner

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Greg Habeeb is a former member of the Virginia House of Delegates, where he represented Virginia's 8th District and served as Vice-Chair on the Courts Committee, was Subcommittee Chair of the Commerce & Labor and Transportation committees, and served on the Rules, Privileges & Elections, and Transportation committees. Greg retired from the Virginia House of Delegates in August of 2018 and now chairs of Gentry Locke's **Government and Regulatory Affairs** team in Richmond, Virginia. Pursuant to Virginia law, he does not perform any legislative lobbying services. During his many years with the firm as a litigation partner, Greg specialized in complex business and catastrophic injury cases, representing individuals and companies in courts throughout the Commonwealth of Virginia and the nation. In 2017 Greg was named a *"Leader in the Law"* by *Virginia Lawyers Weekly.*

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

- Named a "Leader in the Law" by Virginia Lawyers Weekly (2017)
- 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 in the area of Business Litigation (2018); previously named Rising Star in the area of Business Litigation (2008, 2010, 2012-2016), General Litigation and Personal Injury Plaintiff (2008), Commercial Litigation (2011)
- Roanoke Bar Association President's Volunteer Service Award, Bronze level, for 100-249 hours of community service in a calendar year
- "Largest Verdicts in Virginia" designation (2006) as recognized by Virginia Lawyers Weekly

Published Work

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

Case Studies

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

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

GENTRY LOCKE Attorneys

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 (2007-2019), Commercial Litigation (2008-2019), Eminent Domain and Condemnation Law, Government Relations, and Land Use and Zoning Litigation (2011-2019), and listed 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, 2010-2018), 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 Omniplex; 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).

GENTRY LOCKE
Attorneys

Guy M. Harbert, III

Partner

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Guy Harbert chairs the Insurance practice group at Gentry Locke. For nearly 30 years, Guy has represented clients before trial and appellate courts throughout Virginia on insurance coverage, insurance defense, and white collar and other criminal defense matters. He is an active member of the Virginia Association of Defense Attorneys and a frequent lecturer and author on insurance litigation issues. Guy is consistently noted as a *Virginia Super Lawyer* in Personal Injury General: Defense, and since 2012 has consistently earned a spot on the *Best Lawyers in America list* for Insurance Law.

Education

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

Experience

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

Affiliations

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

Awards

- Named one of The Best Lawyers in America® in Insurance Law (2012-2019), also listed in Best Lawyers in America – Business Edition (2016)
- Named to Super Lawyers Business Edition US in the area of Plaintiff Defense/General (2012-2014); also Virginia Super Lawyers in the area of Personal Injury Defense: General (2007-2008, 2010-2018)
- Named a “Legal Eagle” for Insurance Law by Virginia Living magazine (2012)
- Designated as one of the Legal Elite in the field of Criminal Law by Virginia Business magazine (2003-2006 and 2008-2009)

Case Studies

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

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

GENTRY LOCKE
Attorneys

Catherine J. Huff

Partner

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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. Cate defends employers against discrimination and workplace claims and advises businesses in the restaurant and hospitality industry on employment issues. Cate has been named a *Rising Star* by "Virginia Super Lawyers" since 2015 and was honored as a "Legal Elite" by *Virginia Business* magazine. Cate graduated *magna cum laude* from Virginia Tech and received her J.D. from Liberty University.

Education

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

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

- Member, ALFA International Women's Initiative Steering Committee (2018-Present)
- Board Member, Roanoke Valley Society for Human Resource Managers (SHRM) (2017-Present)
- Member, ALFA International Hospitality & Retail Steering Committee (2016-Present)
- Member, Virginia State Bar (2009-Present); Member, Young Lawyer's Conference Board (2017-Present)
- Board Member, Roanoke Wildlife Rescue
- Volunteer, Blue Ridge Legal Services Pro Bono Hotline
- Volunteer, Wills for Heroes
- Roanoke Children's Theater Board of Directors (2011-2014)
- Member, Virginia Association of Defense Attorneys
- Member, Young Lawyers Division, Virginia Bar Association
- Member, Roanoke Bar Association

Awards

- Designated one of the "Legal Elite" by Virginia Business magazine for the area of Young Lawyer (Under 40) (2016)
- Named a Virginia Super Lawyers Rising Star in Employment Litigation: Defense (2017-2018) and 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.

- Aug 4, 2016 — **Employer Defeats Hostile Workplace Claim**
- Sep 1, 2015 — **Allegation of Americans with Disability Act Discrimination Against Municipality Dismissed**
- 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)**

GENTRY LOCKE
Attorneys

Christopher M. Kozlowski

Associate

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

Education

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

Experience

Banking

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

Tax Credit Financing

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

Business

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

Affiliations

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

GENTRY LOCKE
Attorneys

K. Brett Marston

Partner

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- Email: marston@gentrylocke.com

Brett Marston chairs the Construction Law practice group at Gentry Locke. Brett has extensive experience in construction contract negotiations and preparation, payment disputes, mechanic's liens, bond claims, construction defects, delay claims, insurance and OSHA matters. He handles significant construction matters in federal and state courts, arbitration and mediation for general contractors, subcontractors, owners, design professionals and suppliers. In addition, Brett is consistently noted as a *Virginia Super Lawyer*, has consecutively made their *Virginia Top 10* and *Top 100* lists, and has thrice been awarded *Roanoke Lawyer of the Year for Construction Law* by *The Best Lawyers in America*.

Education

- George Mason University School of Law, J.D. with distinction, 1993
- University of Virginia, B.A. 1990

Experience

- Represented contractor in multi-million dispute over termination and damages related to water intake project
- Represented local municipality in dispute with highway/utility contractor on urban road/utility renovation project dispute related to construction of $800 million hotel/convention center project
- Represented structural steel subcontractor in claims, payment, and insurance dispute related to construction of $800 million hotel/convention center project
- Represented commercial subcontractor against national contractor in litigation and mediation for payment, change order, and claim issues on $45 million stadium project, in federal court
- Represented owner of municipal wastewater treatment facility in successful action against national general contractor and national engineering firm for design and construction problems, successfully resolving both in mediation
- Represented national contractor in prosecution of a liquidated damages/delay claim against concrete subcontractor, and defense of multi-million dollar counterclaim for alleged delays. Successfully resolved in mediation
- Obtained summary judgment in federal court for commercial masonry contractor against national construction manager seeking to recover for costs of repairing allegedly defective masonry work on hospital
- Obtained a directed verdict at state court trial for general contractor in suit brought by masonry subcontractor seeking additional payments on alleged oral subcontract agreement
- Represented developer of residential apartments for university students in defending and resolving approximately 15 mechanic's liens filed against property, totalling approximately $1.5 million
- Represented international engineering firm in litigation and resolution of dispute over a EPC/design-build project for a $40 million power plant, including design, site conditions, delay claim, contract interpretation, and surety issues
- Represented general contractor in multi-million dollar mechanic's lien and payment dispute related to hotel construction project
- Represented highway/bridge contractor in connection with bid-protest filed by competitor on VDOT project
- Represented highway/bridge contractor in filing protest with federal government agency on project to work on Blue Ridge Parkway

- Represented owner in preparation of package of bid and contract documents for renovation of regional educational facility
- Represented engineering firm in defense of multi-million dollar claims by project developer alleging defective site design and geotechnical errors
- Prepared documents for general contractor for submission as unsolicited proposal under Virginia's PPEA (Public Private Educational Facilities Act)
- Represented commercial subcontractor in analyzing and negotiating subcontract for work on multi-million dollar museum project
- Represented in litigation a national general contractor in defense of a claim regarding installation of allegedly defective exterior cladding on new hospital facility
- Represented commercial contractor in filing mechanic's liens for over $1 million on condominium project for work performed under a cost-plus contract
- Represented HVAC subcontractor in asserting and prosecuting claims against general contractor's payment bond on a government project, relating to delay claims and outstanding payments owed
- Represented governmental owner in negotiating a takeover agreement with general contractor's surety on new building on which construction was far behind schedule
- Represented manufacturing client in defense of alleged Willful OSHA violations arising out of workplace fatality
- Represented engineering firm in defense of alleged Willful OSHA violations arising out of construction site shoring failure
- Represented numerous general contractors, subcontractors, and general industry businesses in defense of OSHA citations, including Willful, Repeat, and Serious Violations
- Represented employer/general contractor in defending, through trial, multiple OSHA citations, including alleged trenching violations
- Successfully defended business owner in day-long hearing before Fire Code Board of Appeals for alleged fire code violations relating to building classification and egress from building

Affiliations

- Virginia State Bar Construction and Public Contracts Section, Chair (2012-2013); Board of Governors, (2003-2014); Treasurer (2009-2010); Secretary (2010-2011)
- Roanoke Symphony Orchestra Board of Directors (2013-Present)
- Hidden Valley High School Athletic Boosters, Board member (2012-2017resident (2014-2017)
- The Ted Dalton American Inn of Court, Executive Committee Member, (2009-2011); Member (2006-2014)
- Roanoke Bar Association, President (2006-07); Board of Directors (2001-2008); Chair, Young Lawyers Committee (1999-2001); President-Elect and Chair of Programs (2005-2006); Member (1994-Present)
- Roanoke Bar Association Foundation, Chair of Trustees (2007-2008)
- Roanoke Division of Associated General Contractors of Virginia, Board Member, (2003-2006); and Safety Alliance Steering Committee (2005-2007)
- Roanoke Regional Chamber of Commerce Board Member, (2007-2009)
- The Virginia Bar Association Construction and Public Contracts Law Section, Executive Council Member (2004-2006)
- Virginia State Bar Young Lawyers Conference Board of Governors representative for 8th District (1997-2001)
- Law Clerk to the Honorable J. Calvit Clarke, Jr., Senior United States District Judge, Eastern District of Virginia, Norfolk, Virginia (1993-94)
- George Mason University Law Review (1992-93)
- Cave Spring National Little League, President (2008, 2009)
- Roanoke Regional Forum, member of founding steering committee (2009-2014)

Awards

- Named "Roanoke Lawyer of the Year" for Construction Law (2013, 2015, 2017) by The Best Lawyers in America, and noted in the areas of Construction Law (2006-2019) and Construction Litigation (2011-2019)
- Elected a Top Attorney: Construction by Roanoke-area attorneys surveyed by The Roanoker magazine (2007, 2009, 2012)
- Named a "Legal Eagle" for Construction Law and Litigation – Construction by Virginia Living magazine (2012)
- Named a Top Rated Lawyer for Construction law by American Lawyer Media (2013)
- Designated one of the "40 & Under Movers and Shakers" by The Roanoker magazine for the field of Law (2008)
- Named to Super Lawyers Business Edition US in the area of Construction Litigation (2012-2014) , to Virginia Super Lawyers for Construction Litigation (2009-2018), to the Top 10 List (2015-2017), the Top 100 List (2014-2018), and was previously named a Virginia Super Lawyers Rising Star for Construction Litigation (2007)
- Designated as one of the "Legal Elite" by Virginia Business magazine in Construction (2007-2017) and the Young Lawyer category (2004-2006)

- Roanoke Bar Association President's Volunteer Service Award, Silver level, for 249-500 hours of community service (2006, 2007)
- R. Edwin Burnette, Jr. Young Lawyer of the Year Award, Virginia State Bar (2004)

Published Work

- Co-Author, **Deal…or No Deal? Identifying and Addressing Gray Areas in Construction Contracting**, The Construction Lawyer, Journal of the ABA Forum on the Construction Industry, Volume 33 No. 3 (Summer 2013)
- Co-Author,**Key Points to Consider in Filing and Challenging a Mechanic's Lien**, Virginia Lawyer magazine, Volume 59 (October 2010)
- Civil Discovery in Virginia, Chapter 3 on Interrogatories, Virginia CLE Publications, 3rd edition (2009)
- Virginia Construction Law Deskbook, Chapter 21 on Occupational Safety and Health Act (OSHA), Virginia CLE Publications, (2008)
- Co-Author, Construction Law, 40 U. RICH. L. REV., 143 (2005)
- Co-Author, Deal or No Deal? Clarifying Gray Areas in Construction Contracting, Virginia Lawyer magazine, Volume 55 No. 3 (October 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.

- Dec 14, 2016 — **Supreme Court of Virginia Affirms Circuit Court Decision in Construction Claim**

GENTRY LOCKE
Attorneys

W. David Paxton

Partner

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David Paxton advises and represents businesses, business owners, and executives in the areas of labor & employment law, complex litigation and whistleblower claims. As the demand for internal fact investigations has grown, David has been engaged by employers, businesses, local government agencies and non-profits to lead and conduct investigations regarding allegations of various forms of alleged misconduct or unlawful activities, and he works closely with the firm's white collar practice. He chairs the firm's labor and employment practice, is a frequent guest speaker at national and regional employment law seminars, and has consistently been named to *Best Lawyers in America* for Labor & Employment law since 1999.

Education

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

Experience

Complex & Multi-Party Litigation

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

Employment Litigation

- Represents employers on a broad cross-section of industries on claims of discrimination, harassment and retaliation, as well as wage and hour disputes in federal and state courts
- Represented employers and employees in litigation involving claims of theft of trade secrets, disclosure of confidential information, violations of non-competition/restrictive covenants, and other business torts
- Represented international pharmaceutical company to successful conclusion on contract claims against former inventor who began a competing company

- Obtained $4 million jury verdict for privately held company against its former president on claim to recoup bonus paid under theory of unjust enrichment
- Represents senior executives and professionals in disputes with companies
- Represented U.S. subsidiary of large multi-national company on claims of ADEA, ADA and FMLA discrimination allegations to successful resolution
- Secured summary judgment in complex ADA case brought against Fortune 100 company
- Represented large national retailer in claims of sexual harassment by former female employee to successful resolution
- Represented national manufacturer on claims involving age and disability discrimination to successful resolution
- Represented college coaches against public universities on breach of contract, NCAA violations, etc.
- Represented publicly-traded company in contractual dispute with former employee over valuation of stock option benefits upon termination of employment resulting in favorable court settlement
- Represented senior executive in negotiation of dispute with high-tech company over vesting and valuation of stock option rights resulting in favorable out of court settlement

Labor & Employment

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

Religious Organizations

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

Affiliations

- Fellow, Virginia Law Foundation (Inducted 2014)
- Chair, ALFA International Labor and Employment Law Section (2015-2017), Member of Labor & Employment Law Section Steering Committee (1996-Present); Member, ALFA International Board of Directors (2014-2017)
- Member, Labor & Employment Law Section, American & Virginia Bar Associations (1986-Present)
- Member, Virginia CLE Steering Committee, Labor & Employment Section (2000-2010)
- Board of Directors, VHSL Foundation, Inc. (2004-2009)
- Board of Directors, Interfaith Hospitality Network of Roanoke Valley (2005-2009)
- Member, Planning Committee, Gridiron Club, Hampden-Sydney College (2007-2011)
- Member, Church Council, St. John Lutheran (2006-2009). President (2008-2009)

Awards

- Voted Top Employment & Labor Attorney by readers in The Roanoker magazine's "Best Of" (2012)
- Named a Top Rated Lawyer for Labor and Employment law and Commercial Litigation by American Lawyer Media (2013)
- Named one of The Best Lawyers in America® for twenty consecutive years in the area of Employment Law – Individuals & Management (1999-2019); Labor Law – Management (2011-2019) and Labor & Employment Litigation (2011-2019), named "2017 Roanoke Lawyer of the Year" for Labor & Employment – Litigation
- Named to the "Virginia's Top 50 List" of Virginia Super Lawyers (2007) and Virginia Super Lawyers in the area of Employment & Labor Law (2007-2018), included in Super Lawyers Corporate Counsel edition (2009-2011) and Super Lawyers Business Edition US in the area of Employment & Labor (2012-2014)
- Listed in Benchmark Litigation as a Local Litigation Star for Labor & Employment and General Commercial (2012-2018) and Insurance (2018); and Benchmark Plaintiffs for Labor & Employment (2012-2014), General Commercial, and Insurance (2014)
- Designated one of the Legal Elite in the Labor/Employment field by Virginia Business magazine (2000-2016)

- Named a “Legal Eagle” for Employment Law – Individuals, Employment Law – Management, Labor Law, and Litigation – Labor & Employment by Virginia Living magazine (2012)
- Inclusion on the Virginia Amateur Sports Wall of Honor in its inaugural year (2009)
- Navy Commendation Medal, Distinguished Legal Work (1983)

Published Work

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

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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. In 2018 he was named to the *Top 100* list for *Virginia Super Lawyers*. 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 for 2017 and 2018 was named the "Roanoke Lawyer of the Year" for Medical Malpractice Law – Plaintiffs.

Education

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

Experience

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

- Represented plaintiffs in federal courts throughout the Commonwealth of Virginia including the United States District Court for the Western District of Virginia, Roanoke Division, Big Stone Gap Division, and Abingdon Division, as well as the United States District Court for the Eastern District of Virginia, Alexandria Division and Richmond Division
- Tried several jury trials in federal courts including the United States District Court for the Western District of Virginia, Roanoke Division, Big Stone Gap Division, and Abingdon Division
- Represented plaintiffs in over fifty mediations
- Represented plaintiffs in over ten arbitrations
- Represented plaintiffs in cases pending in courts in North Carolina and Tennessee
- Represented plaintiffs in cases involving medical malpractice, wrongful death, legal malpractice, product liability, dog attacks, car accidents, defamation (slander and libel), veterinary malpractice, assault and battery, pedestrian accidents, contract disputes, employment disputes, tractor trailer accidents, dental malpractice, nursing home malpractice/abuse
- Participated in several continuing legal education courses including as a presenter and preparing written materials

Affiliations

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

Awards

- Named one of The Best Lawyers in America® in the areas of Mass Tort Litigation/Class Actions – Plaintiffs, Medical Malpractice – Plaintiffs, Personal Injury Litigation – Plaintiffs (2013-2019), and Product Liability Litigation – Plaintiffs (2018-2019), named “Roanoke Lawyer of the Year for Personal Injury Litigation – Plaintiffs” (2017-2019); also listed in Best Lawyers in America – Business Edition (2016)
- Designated as a National Trial Lawyers Top 40 Under 40 (2012)
- Recipient, Client Distinction Award, Martindale-Hubbell (2012)
- Named a Top Rated Lawyer for Medical Malpractice, Personal Injury, and Legal Malpractice law by American Lawyer Media (2013)
- Named to the Blue Ridge Business Journal’s “20 Under 40 List” of the Blue Ridge Region’s up-and-coming business leaders (2010)
- Barrister, The Ted Dalton American Inn of Court (2009-2012) and Associate (2007-2010)
- Elected to Virginia Super Lawyers for Personal Injury/Medical Malpractice: Plaintiffs (2016-2018) and the Top 100 list (2018) in Virginia Super Lawyers magazine, and was previously named a Rising Star 2007, 2009-2015)
- Roanoke Bar Association Volunteer Service Award for 25+ hours of pro bono & community service (2000-2006)
- Designated one of the “Legal Elite” in the Young Lawyer (2010), Civil Litigation (2016), and Legal Services/Pro Bono category (2006) by Virginia Business magazine
- Pro-Bono of the Year Award, Blue Ridge Legal Services, Inc. (2004-2005)

Published Work

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

Case Studies

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

- Feb 22, 2018 — **Roanoke City jury renders unanimous verdict of $1.5 million for victim of radiology malpractice**
- Aug 5, 2017 — **Wrongful death surgery "blame game" results in verdict of over $8.75M**

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

GENTRY LOCKE
Attorneys

J. Scott Sexton

Partner

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

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

Education

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

Experience

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

Energy Cases: Mineral, Energy, and Land Rights

- Obtained judgment for over $23 million against Peabody Energy Corporation subsidiary
- Represented coal owner interests in **federal class action over competing property rights** in coal bed methane
- Represented long-time property owners against claims that prior conveyances were invalid
- Represented surface property owner against **aggressive claims by multi-national limestone producer**
- Negotiated favorable resolution to complicated regulatory claims against contract miner in West Virginia
- Defended large gas company against **multi-million dollar claims**
- Represented southwest Virginia local governments in negotiations with the coal industry regarding severance taxes
- Obtained **75 million dollar settlement** on behalf of mineral owners regarding claims of unauthorized dumping in old mine works

- Obtained largest jury verdict on record in the United States District Court for the Western District of Virginia on behalf of mineral owners regarding deductions from royalty
- Obtained **summary judgment liability ruling** that coal operator had no right to dump mine wastewater in mine works where plaintiffs owned coal
- **Judicially overturned arbitration decision** denying coal owner clients' claims that coal operator had caused coal to become "lost or threatened" under terms of coal lease
- Obtained **ruling by Virginia Supreme Court** that coal company had no legal right to dump mine waste in old mine works
- Obtained **ruling by Virginia Supreme Court** that gas company could not block construction of a competing gas pipeline when CNX asserted that it had the "exclusive" right to construct pipelines under its gas lease with the 20,000 acre property owner
- Argued landmark decision at trial court and before the Virginia Supreme Court determining ownership of Coalbed Methane gas in Virginia
- Successfully defended manufacturer in defective pipeline case
- Successfully defended gas production company's property interests in gas storage facility
- Represented numerous parties in various disputes involving Joint Operating Agreements
- Successfully defended gas transportation company in claims related to contract for construction of pipeline
- Successfully defended gas distribution company in claims related to gas explosion
- Successfully obtained reversal of temporary injunction issued against gas production company related to construction of and access to pipeline facility
- Represented gas production company in anti-trust and business conspiracy case against competitor
- Represented mineral owners before Virginia Gas and Oil Board
- Represented gas production company before Virginia Gas and Oil Board
- Successfully defended mineral owners against claim by others alleging competing title to coalbed methane gas and royalties
- Represented mineral owners in claims for over-deduction from royalties (ongoing)
- Represented gas production company in claims by injured pipeline worker
- Represented former shareholder in gas production company regarding dispute over payments due under buy-out
- Represented gas production company in dispute with another mineral leaseholder on large tract of gas producing property
- Represented holder of 27,000 acres of mineral interests in dispute arising out of alleged damage to its minerals
- Represented holder of 12,000 acres of mineral interests in dispute arising out of alleged damage to its minerals
- Advised large gas production company in dispute over joint operating agreement and related rights
- Successfully represented vendor of supplies and services in connection with claims for unpaid invoices against a large national pipeline construction contractor, obtaining payment
- Defended gas production and distribution company against claims by pipeline construction company, successfully obtaining jury verdict on counterclaim
- Successfully defended large gas production company against claims by coal operator related to construction and operation of a gas transportation pipeline
- Successfully resolved claims against former shareholder of large coal company arising out of stock redemption
- Represented parties opposed to permit sought to allow large coal operator to discharge waste mine water into mines and local waterway
- Represented gas production company in connection with issues related to conflicts with coal operators under Virginia Gas and Oil Act
- Represented various parties in connection with numerous issues related to mineral leases and deeds

Commercial Litigation

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

- Represented Trust beneficiary in claims against trustees of large estate
- Represented numerous parties in estate litigation

Catastrophic Injury

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

Affiliations

- Member, Boyd Graves Society
- Barrister, The Ted Dalton American Inn of Court
- Faculty, Virginia State Bar Professionalism course
- Member, Business Law Section, Virginia Bar Association
- Member, Intellectual Property Section, Virginia Bar Association
- Member, Civil Litigation Section, Virginia Bar Association
- Past Member, 8th District Ethics Committee, Virginia State Bar
- Senior Fellow, Trial Lawyer Honorary Society, Litigation Counsel of America

Awards

- Named a Virginia Leader in the Law in 2010 by Virginia Lawyers Weekly
- Named one of The Best Lawyers in America® in the fields of Commercial Litigation (2008-2019) and Oil & Gas Law (2009-2019), also listed in Best Lawyers in America – Business Edition (2016)
- Named to Virginia Super Lawyers in the area of Business Litigation (2007-2018), 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

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 17, 2018 — **Accident caused by paving truck results in $350k settlement**

GENTRY LOCKE
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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

- Member, Etheridge Society
- Member, Virginia Trial Lawyers Association
- Member, 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.

- Nov 22, 2016 — **$1.75 Million Settlement for Fall Victim due to Nursing Malpractice**
- Jun 22, 2016 — **Tragic Failure to Properly Diagnose and Treat Results in Jury Verdict for $2.75 Million**

GENTRY LOCKE
Attorneys

Spencer M. Wiegard

Partner

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Spencer Wiegard is a Partner and a member of Gentry Locke's Construction Law and Commercial Litigation practice groups. Spencer focuses his practice in the areas of construction law and construction litigation. He represents general contractors, subcontractors, trade contractors, suppliers and design professionals. Spencer is a member of the Board of Governors for the Virginia State Bar Construction Law and Public Contracts Section and a member of both the Legislative Committee and the Executive Committee for the Roanoke/SW Virginia District of the Associated General Contractors of Virginia. He currently serves as the AGCVA Roanoke District President. Since 2010 Spencer has consistently been recognized as a *Virginia Rising Star* in Construction Litigation by "Virginia Super Lawyers."

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

Education

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

Experience

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

Affiliations

- Statewide coordinator for Pro Bono Hotlines, The Virginia Bar Association Young Lawyers Division (2008-Present); Co-chair of Pro Bono Hotline for the Roanoke Valley (2006-2008)
- Member, Board of Directors, Military Family Support Centers, Inc. (2006-present)

- Associated General Contractors of Virginia (Associate Member, 2006-present), Legislative Committee (Member, 2007-Present)
- Member, Executive Committee, Associated General Contractors, Roanoke District; President (2017-Present), Second Vice President (2015-2016)
- Secretary, Roanoke City Republican Committee (2008-Present)
- Member, William and Mary Environmental Law and Policy Review
- Member, The Virginia Bar Association
- Member, Virginia State Bar
- Member, American Bar Association
- Member, Roanoke Bar Association

Awards

- Named a Virginia Super Lawyers Rising Star in the area of Construction Litigation (2010-2018)
- Roanoke Bar Association Volunteer Service Award for over 25 hours of pro bono and community service (2006)

Published Work

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

GENTRY LOCKE
Attorneys

Clark H. Worthy

Partner

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

Education

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

Experience

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

Affiliations

- Member, Board of Directors, Child Health Investment Partnership of Roanoke Valley (2015-Present)
- Member, Board of Directors, Apple Ridge Farm (2006-2014); former Board Chair
- 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 (2012-2019)
- Designated as one of the "Legal Elite" by Virginia Business magazine in Real Estate/Land Use (2017)
- Named a "Legal Eagle" for Real Estate Law by Virginia Living magazine (2012)

IT'S ABOUT TIME!
Gentry Locke's 2018 CLE Seminar

1

Trial Publicity: What You Can Say About Pending Cases

W. David Paxton
Trey H. Smith, III
Catherine J. Huff

TRIAL PUBLICITY:
What You Can Say About Pending Cases[1]

W. David Paxton
Charles "Trey" Smith, III
Catherine J. Huff

Gentry Locke Seminar
September 7, 2018

I. Introduction

Nondisclosure agreements, confidentiality, and trial publicity are at the forefront of the news. From Stormy Daniels to the IRS, individuals and government agencies are closely scrutinizing what can be disclosed about a client, a case, and the resolution thereof. The environment is changing quickly and counsel on both sides of the "v." should be well informed about their clients' rights in front of a camera and behind the curtain of a settlement agreement and release.

II. Types of Confidential Information

a. Attorney-Client Privileged Information

b. Client's Confidential Information (trade secrets, etc.)

c. Confidential Information Necessitating Motion to Seal

d. Terms of Confidential Settlement Agreements

III. Pre-Litigation Considerations

a. **Publicity – What Can You Say and When?**

i. Even the fact of your representation can be problematic if the client does not want it to be disclosed.

ii. Could potentially impede settlement if the company feels like the "cat is out of the bag."

[1] The presenters would like to thank Kelsey Martin, an associate at Gentry Locke in the Labor and Employment Section and Emily Melvin, a current law student at Wake Forest University and 2018 Summer Associate at Gentry Locke, for their contributions to this outline.

iii. Model Rule of Professional Conduct: Rule 1.6 – Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

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

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed

information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) 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.

b. **Joint Defense Agreements**

i. An agreement that allows parties with similar legal interests, who are involved in an investigation or legal proceeding, to share information with each other without waiving the attorney-client privilege, work product protection, or other applicable privilege or protection.

ii. May also protect against the disqualification of counsel as a result of sharing confidential information with other parties to the agreement.

iii. Advantages: pool information for parties with a common interest; avoid a conflict among defendants at trial; help with costs; foster information sharing when there are parallel criminal and civil cases.

iv. Disadvantages: one of the parties may reveal confidential information to a third party; may become difficult if interests diverge; participation may create unintended attorney-client relationships with other clients.

IV. Keeping Records Confidential During Litigation in Virginia

a. **Routes to Retaining Confidentiality During and After Discovery**

i. Private agreement among the parties
ii. Protective Order issued by the court upon motion by a party
iii. Motion to File Under Seal with the court

b. **Virginia Supreme Court Rules Related to Motions for Protective Orders**

i. These rules apply to Virginia Circuit Courts.

ii. Justice Requires Issuance

1. The moving party must show that justice requires an order be issued to protect the movant from annoyance, embarrassment, oppression or undue burden or expense. Va. Sup. Ct R. 4:1(c).

iii. Good Cause

1. The moving party must show good cause why a protective order is necessary. Va. Sup. Ct R. 4:1(c).

2. Like Rule 26(c) of the Federal Rule of Civil Procedure, the issuance of a protective order requires both an allegation of significant harm and a demonstration of good cause. World Mission Soc'y Church of God v. Colon, 85 Va. Cir. 134, 136 (2012).

3. To show good cause "a party must demonstrate more than that an opposing party intends to disseminate discovery materials; rather, it must show that the disclosure of those materials will cause specific prejudice or harm, such as annoyance, embarrassment, oppression, or undue burden or expense. And, importantly, the fact that public disclosure of discovery materials will cause some annoyance or embarrassment is not sufficient to warrant a protective order; the annoyance or embarrassment must be particularly serious." Id. at 137.

4. "'Good cause' depends upon the circumstances of the individual case, and a finding of its existence lies largely in the discretion of the court." Philip Morris Co. v. American Broadcasting Co., 36 Va. Cir. 1, 2 (1995).

iv. Electronic Sources

1. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the

limitations of Rule 4:1(b)(1). The court may specify conditions for the discovery, including allocation of the reasonable costs thereof. Va. Sup. Ct R 4:1(b)(7).

v. Good Faith Certification

1. A motion for protective order must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. Va. Sup. Ct R. 4:1(c); Va. Sup. Ct R. 4:1(b)(8); Va. Sup. Ct R. 4:15.

2. "If counsel violates the reasonable effort to confer and certification requirements of Va. Sup. Ct R. 4:15, then the appropriate remedy is to move the court to deny the motion for failure to follow the Rule or to ask the court not to hear the motion until the Rule's requirements are satisfied." Hutchison v. Hagadone, 78 Va. Cir. 185, 186 (Loudon 2009).

vi. Where to Bring the Motion

1. A motion for protective order must be brought in the court where the action is pending, or, on matters relating to a deposition, the court in the city or county where the deposition is to be taken. Va. Sup. Ct. R. 4:1(c).

vii. Types of Relief Available on a Motion for Protective Order includes Orders stating that:

1. The discovery not be had;
2. The discovery be had, but only upon certain conditions, which may include specifications as to time or place;
3. The discovery be had only by a different method of discovery than the one sought;
4. The scope of the discovery is limited to certain matters or that certain areas may not be inquired into;
5. No one be present except persons authorized by the court;
6. A sealed deposition may be opened only by order of the court;
7. A trade secret or other confidential material not be disclosed or may only be disclosed in a designated way; or

8. The parties file designated material in sealed envelopes only to be opened as specified by the court. Va. Sup. Ct R. 4:1(c).

viii. If Motion is Denied

1. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Va. Sup. Ct R. 4:1(c).

ix. Costs

1. The provisions of Rule 4:12(a)(4) apply to the award of expenses incurred in relation to the motion. Va. Sup. Ct. R. 4:1(c).

c. **Filing Under Seal**

i. The fact that a party designated a document as "confidential" — even if that designation was made pursuant to a court approved protective order — does not mean that the document qualifies to be filed under seal. Rather, the court must perform an independent analysis for each document that is proposed to be filed under seal.

ii. Filing Under Seal in Virginia Courts

1. Statutes and the common law govern the court's authority to seal its record. *See Shenandoah Pub. House, Inc. v. Fanning*, 235 Va. 253 (1988).
   a. Rebuttable presumption of openness: "Except as otherwise provided by law," records maintained by the circuit court clerk "shall be open to inspection by any person and the clerk shall, when requested, furnish copies thereof . . ." Va. Code § 17.1-208; *see also Shenandoah Pub. House, Inc.*, 235 Va. 253.

   b. Note: "no constitutional or common law right of access applies to 'pretrial documents.'" *Abjuaber v. Kawar*, 20 Va. Cir. 58, 62 (1990).

2. Movant bears a considerable burden to rebut presumption.

a. The movant "must bear the burden of establishing an interest so compelling that it cannot be protected reasonably by some measure other than a protective order." *Shenandoah Pub. House*, 235 Va. at 259.

b. Additionally, any such order must be drafted in the manner least restrictive of the public's interest. *Id.*

c. In all cases, the movant must show more than "the desire of litigants" or "risks of damage to professional reputation, emotional damage, or financial harm, stated in the abstract . . ." *Id.*

3. Statutory Exceptions Specifically Permitting Court to Seal Record:
    a. Divorce cases. Va. Code § 20-124.
    b. Dispute resolutions. Va. Code § 8.01-576.10.
    c. Mediation proceedings and resulting settlements. Va. Code § 8.01-581.22.

iii. Filing Under Seal in the Fourth Circuit

1. Party must move to seal documents.

    a. Documents may or may not already have been the subject of a protective order.
    b. With the motion, the moving party likely must submit a supporting memorandum of law in which the movant specifies the interests which would be served by restricting public access to those documents.

2. Court must then adhere to the *Knight* standards. *In re Knight Publishing Co.*, 743 F.2d 231, 235 (4th Cir. 1984):

    a. The district court must give the public (a) notice of a request to seal and (b) a reasonable opportunity to challenge the request. The court can accomplish these aims by docketing the motion to seal "reasonably in advance of their deposition."

b. The district court must consider less drastic alternatives to sealing.

c. If it grants the request to seal, the district court must provide reasons, supported by specific findings, for rejecting the alternatives.

3. Limits:

a. Common Law Right to Public Inspection.

i. Presumes a right to inspect and copy all judicial records and documents. The common law right of access rests on the notion that the professional and public monitoring of judges is an essential feature of democratic control. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006); accord *Landmark Commc'ns., Inc. v. Virginia* , 435 U.S. 829, 839 (1978) (operations of the courts are matters of utmost public concern). This notion is undermined when a document is permitted to be filed under seal because the raw material underlying formal judicial action is shielded from public view.

ii. The common law presumption may only be overcome if competing interests heavily outweigh the interest in access. Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178, 180 (4th Cir. 1988); accord Rushford v. The New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988).

b. First Amendment Right to Access.

i. The right to access public documents under the First Amendment extends only to particular judicial records and documents. *Stone v. Univ. of Md. Med. Sys. Corp.,* 855 F.2d 178, 180-81 (4th Cir. 1988). These documents include documents filed in connection with a motion for summary judgment, *see Rushford v. The New Yorker Magazine, Inc*., 846 F.2d 249, 253 (4th Cir. 1988), and documents filed in connection with plea hearings and sentencing hearings in a criminal case. *See In re Washington Post*, 807 F.2d 383, 390 (4th Cir. 1986).

ii. Where the First Amendment guarantees access, it may be denied only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest. *Stone*, at 180; accord *Rushford*, at 253.

V. Post-Litigation: A New Day is Dawning for Settlement Agreements

a. Confidentiality and Non-Disclosure Agreements

i. Following leaks at the beginning of his presidency, President Trump asked Senior White House staff to sign nondisclosure agreements. Unnamed sources told Washington Post columnist Ruth Marcus that the agreements were designed to last beyond Trump's presidency and carried steep financial penalties if broken.

ii. A number of women have come forward and said that they signed confidentiality agreements as part of settlements made with Harvey Weinstein.

iii. Olympic gold medalist McKayla Maroney came forward to say that she signed a confidentiality agreement as a result of abuse by former U.S.A. Gymnastics team doctor Larry Nassar.

iv. President Trump's attorney, Michael Cohen, paid $130,000 to Stormy Daniels, aka Stephanie Clifford, as part of a nondisclosure agreement relating to an alleged relationship she had with President Trump.

b. #MeToo and Settlements in Sexual Harassment Cases

i. Federal Legislation regarding sexual harassment has focused primarily on three areas:

1. Tax deduction denial;
2. Settlement disclosures; and
3. Pre-dispute arbitration agreements.

ii. In Virginia, proposed legislation on sexual harassment at the state and local level has grown exponentially since the start of 2018. State legislation regarding sexual harassment has focused primarily on the following three areas:

1. Restrictions on nondisclosure agreements;
2. New sexual harassment training requirements;
3. Greater protections against retaliation for employees.

iii. Appendix A to this outline contains a detailed summary of Sexual Harassment Legislation in 2018.

c. **Overly Broad NDAs Could Violate the National Labor Relations Act**

i. The National Labor Relations Board has stated that a confidentiality rule prohibiting employees from discussing sexual harassment complaints among themselves could violate the Wagner Act.

ii. The Board has also held that it is improper for an employer to make employees sign agreements forbidding them from making any comment that could harm the company's "business reputation" or "any employee's personal reputation," because this could chill protected and concerted activity.

iii. Board might be revising this, as new Republican members are considering balancing employee's rights with an employer's interest in confidentiality.

d. **Blanket Releases and Tax Consequences**

i. Tax consequences for confidentiality provisions in a settlement agreement are not new.

1. United States Tax Court Memorandum – 2003-329: *Eugene Amos, Jr. v. Commissioner of the Internal Revenue Service*

   a. Amos received a $200,000 settlement after Dennis Rodman kicked him during a Chicago Bulls-Minnesota Timberwolves Game.
   b. Settlement was for compensation for his injuries as well as for other things, like an agreement not to defame Rodman and confidentiality of the settlement terms.

c. Court found that $120,000 related to the injuries and $80,000 related to the nonphysical injury provisions. Amos was taxed on $80,000.

ii. However, Congress passed the Tax Cuts and Jobs Act, which may make sexual harassment settlements more expensive if employers want confidentiality.

iii. Internal Revenue Code § 162(q):

(q) Payments related to sexual harassment and sexual abuse No deduction shall be allowed under this chapter for—

(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or

(2) attorney’s fees related to such a settlement or payment.

iv. Until recently, legal fees were generally seen a classic business expenses.

v. What this means:

1. Price for confidentiality has increased. Could ultimately backfire on both plaintiffs and defendants.

2. It is still uncertain whether the IRS will consider payments made pursuant to an agreement that does not specifically settle sexual harassment claims, but contains a broad waiver of claims that include sexual harassment.

3. Attorney’s fees are not deductible – for either side. It is expected that the IRS will clarify this in the near future.

e. **Breach of Confidentiality Agreements**

i. Consider the pitfalls of enforcement:

1. Bad publicity for your client;
2. Expensive;

3. May trigger the other party to look at other issues within the agreement, i.e., overbreadth, breaches on your client's end, etc.

ii. *Gulliver Sch. Inc. v. Snay*, 137 So. 3d 1045 (Fla. App. 3d. 2014):

1. Plaintiff Snay was the headmaster of a school. He confidentially settled an age discrimination and retaliation case.

2. Four days later, his daughter posted on Facebook: "Mama and Papa won the case against [defendant]. [Defendant] is now officially paying for my vacation to Europe this summer. SUCK IT."

3. School refused to pay the settlement and plaintiff asked the court to enforce the agreement.

4. Though the trial court held the Facebook post was not a breach of the agreement, the appellate court reversed and held that it was, because the agreement specifically prohibited the plaintiff from "either directly or indirectly" disclosing "any information" about the existence of the agreement.

iii. Refresher: Virginia law on breach of contract:

1. To prevail, a plaintiff must show "(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach." *Signature Flight Support Corp. v. Landow Aviation Ltd. Partnership*, 2009 US. Dist. LEXIS 2541 (E.D. Va. Jan. 14, 2009) (quoting *Filak v. George*, 267 Va. 612 (2004)).

2. Virginia law adheres to the "plain meaning" rule, meaning that every clause has meaning and every word is given its usual, ordinary, and popular meaning. *Berry v. Klinger,* 225 Va. 201, 208 (1983).

3. No "blue penciling" in Virginia, i.e. courts will not modify contracts themselves to make them enforceable and/or remove unenforceable provisions.

Sexual Harassment Legislation in 2018

Federal Legislation

Federal legislation regarding sexual harassment has focused primarily on three areas:

(1) tax deduction denial,
(2) settlement disclosures, and
(3) predispute arbitration agreements.

Tax Cuts & Jobs Act (TCJA) – enacted Dec. 12, 2017

- Contains a provision addressing sexual harassment and tax deductions for business expenses which amends section 162 of the tax code, which generally allows business to deduct certain ordinary and necessary expenses paid or incurred during the year as part of running the business.
- The new section 13307 amends section 162 of the tax code by prohibiting tax deductions for any payment, including payments pursuant to a settlement agreement, that involve sexual harassment or abuse if the payment is subject to a nondisclosure agreement.
- Additionally, deductions for attorney's fees are prohibited if they relate to settlements or payments that include nondisclosure agreements that could prevent the disclosure of sexual harassment or assault.
- Guidance should be forthcoming.

H.R. 4570, 4734, S. 2203: "Ending Forced Arbitration of Sexual Harassment Act of 2017" – introduced Dec. 6, 2017 & Dec. 26, 2017

- House bills introduced by Rep. Cheri Bustos (D-IL)
- Senate bill introduced by Sen. Kirsten Gillibrand (D-NY) on Dec. 6, 2017
- House bill was referred to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law and Senate Bill was referred to the Committee on Health, Education, Labor, and Pensions.
- This act would make predispute agreements that require arbitration of a sex discrimination dispute invalid and unenforceable. However, one exception for collective bargaining agreements between an employer and a labor organization, or between labor organizations.
- This bill initially received a fair degree of bipartisan support but its expansive nature gave some lawmakers pause, slowing its momentum.

H.R. 4729: "Ending Secrecy About Workplace Sexual Harassment Act" – introduced Dec. 21, 2017

- Introduced by Rep. Carolyn Maloney (D-NY) in the U.S. House of Representatives
- Bill was referred to the House Committee on Education and the Workforce
- This bill would target employers obligated to submit the annual Employer Information Report EEO-1 by requiring employers to indicate on the EEO-1 report the number of settlements the employer signed with an employee to resolve claims pertaining to discrimination based on sex, including verbal and physical sexual harassment.
- "Settlements" includes any agreement where something of value is exchanged to prevent an individual from pursuing their claim of harassment.

- EEOC would be required to annually report information collected about settlements via EEO-1 filings to Congress.

H.R. 5028, S. 2454: "Sunlight in Workplace Harassment Act" – introduced February 14, 2018

- Companion bills to H.R. 4729
- House bill introduced by Rep. Jacky Rosen (D-NV) and Senate bill was introduced by Senator Elizabeth Warren (D-MA) on February 17, 2018
- House bill was referred to the House Committee on Financial Services and Senate bill was referred to the Committee on Banking, Housing, and Urban Affairs
- Bill seeks to amend the Securities Exchange Act of 1934 to require the disclosure of payments for settlements regarding harassment on form 10-K.
- Bill would require employers to disclose the total number of settlements entered into by the employer, a subsidiary, contractor, subcontractor, or a corporate executive of the employer, the total dollar amount paid under the settlements, the number of settlements related to harassment the employer is resolving, and the average time required for the employer to resolve a complaint relating to any form of sexual abuse or "covered harassment."
- "Covered harassment" under the bill is defined as discrimination based on sex, race, religion, age, disability, genetic information, sexual orientation, or gender identity.

H.R. 6406, S. 2994: "Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting (EMPOWER) Act" – introduced July 17, 2018

- House bill introduced by bipartisan group of lawmakers – Reps. Lois Frankel (D-FL), Ted Poe (R-TX), Jerrold Nadler (D-NY), Barbara Comstock (R-VA), and Lisa Blunt Rochester (D-DE)
- Senate companion bill was introduced in June by Senators Kamala Harris (D-CA) and Lisa Murkowski (R-AK)
- House bill was referred to the Committee on Education and the Workforce in addition to the Committees on Ways and Means, Financial Services, House Administration, Oversight and Government Reform, and the Judiciary and the Senate bill was referred to the Committee on Health, Education, Labor, and Pensions
- The Act would ban nondisclosure and non-disparagement agreements related to harassment as a condition of employment or receipt of employment-related benefits, and would require certain public disclosures. For example, publicly traded companies would be required to disclose the number of judgments and settlements resulting from sexual harassment claims in annual financial disclosures filed with investors and the government.
- The Act would limit certain employer tax deductions such as expenses and attorneys' fees connected to litigation of workplace harassment as well as payments made under judgments related to workplace harassment. Amounts received in connection with such awards and settlements would be considered nontaxable income.
- In addition, the Act would supplement the current complaint process at the EEOC by establishing a confidential tip line to report harassment to the EEOC.

Agency Guidance

EEOC proposed new enforcement guidance on unlawful harassment in January 2017

- If guidance is finalized, it will supersede previous EEOC guidance documents on harassment, which were published in the 1990s. Guidance was published for public comment in January 2017 and the EEOC is expected to issue final guidance in the near future. [Side note: regulations.gov notes that the comment period closed March 21, 2017]
- Guidance outlines the bases covered by federal law (i.e., legally protected characteristics of an employee), the hostile work environment threshold, and liability standards for employers. Notably, guidance includes sexual orientation alongside sex stereotyping in the covered bases.
- Proposed guidance also offers recommendations on how employers should approach harassment training, suggesting that training be provided to all employees no matter the legal requirement in the employer's state.

State Legislation

Proposed legislation on sexual harassment at the state and local level has grown exponentially since the start of 2018. State legislation regarding sexual harassment has focused primarily on the following three areas:

(1) Restrictions on nondisclosure agreements,
(2) New sexual harassment training requirements, and
(3) Greater protections against retaliation for employees.

Virginia

Bills that passed:

SB 796: Sexual harassment training; requirement for legislative branch.

- This bill passed with a delayed effective date of January 1, 2019.
- Requires General Assembly members and full-time legislative staff and employees to complete sexual harassment training once every two calendar years.
- Persons elected to the General Assembly or commencing or recommencing full-time employment in the legislative branch have 90 days from the election or hiring dates to complete the training unless the person previously completed the training earlier in the same calendar year.
- This bill is identical to HB 371 and incorporates SB 892.

HB 371: Sexual harassment training; requirement for legislative branch.

- This bill passed and is identical to SB 796.
- This bill incorporates HB 1057.

Bills that did not pass:

HB 1057: Sexual harassment training; requirement for legislative branch once every two calendar years.

- This bill is incorporated in HB 371.
- Differences from HB 371:
  - Sexual harassment training would have to be completed once a year.
  - DHRM would be required to maintain electronic records for five years for each person that completed the training.
  - Each agency head in the legislative branch would be responsible for ensuring that the agency's full-time employees completed the training.

SB 892: Sexual harassment training; requirement for legislative branch.

- This bill was incorporated in SB 796.
- This bill is identical to HB 1057.

HB 653: Employers; sexual harassment training, penalty.

- Would require every employer with 15+ employees who are located at a workplace in the Commonwealth to conduct a sexual harassment education and training program for all new employees within one year of hiring.
- The training would encompass the illegality of sexual harassment, the definition of sexual harassment under state and federal laws and federal regulations, a description of sexual harassment, the employer's sexual harassment complaint process, legal recourse and complaint processes, and protections against retaliation.
- Employers would also be required to conduct additional training for all supervisors and managers within one year of assuming their supervisory and managerial positions.
- Department of Labor and Industry would be required to develop a compliance checklist for employers to use and develop for a sexual harassment training program.
- Employers would be required to keep a record of sexual harassment training.
- Any employer who violated the requirements would be subject to a civil penalty not to exceed $100 for each violation.
- Bill was referred to Committee on Commerce and Labor. The subcommittee recommended continuing to 2019.

HB 704: Arbitration agreements; unconscionable and unenforceable provisions, sexual harassment and assault.

- Bill provided that any provision of an arbitration agreement that that has the purpose or effect of concealing the details regarding a claim of sexual harassment or sexual assault is unconscionable and unenforceable.
- Bill was left in the Committee for Courts of Justice.

HB 1053: Workplace harassment; legislative branch required to adopt policies.

- Would require the General Assembly to adopt the Commonwealth Workplace Harassment Policy mandated by the Governor's office. The policy would apply to lawmakers during any interaction with the public, including official business and reelection activities.
- Opposition to this bill claimed it would have taken the decision making away from the Legislature and put it in the Executive branch, which could change the policy.

HB 1462: Virginia Human Rights Act; sexual harassment, contracting agencies.

- Would require all contracting agencies entering into government contracts of over $10,000 to include a provision in the contract requiring the contractor to provide sexual harassment training to all supervisors and employees and to post the contractor's sexual harassment policy at business and in the employee handbook.
- The Dept. of Human Resource Management would develop an online training module addressing sexual harassment in the workplace to be available for use by all employees and agencies of the Commonwealth.
- Bill referred to Committee on General Laws – did not pass.

HB 1561: Settlement agreements; indemnification provision declared void & waiver of sexual harassment claim.

- Bill provides that any provision in a contract or agreement by which a party waives a claim of sexual assault or harassment or agrees to nondisclosure of such a claim is unconscionable and against public policy and void and unenforceable unless the waiver is in writing and the waiving party consulted with counsel who approved the waiver or the court approved the waiver.
- Bill was left in the Committee for courts of Justice.

Maryland

Disclosing Sexual Harassment in the Workplace Act of 2018 – effective Oct. 1, 2018

- The Act prohibits Maryland employers from:
    - mandating arbitration of sexual harassment claims,
    - requiring employees to enter into agreements or abide by any policy that would require them to waive future sexual harassment or retaliation claims, and
    - taking adverse action against any employee who fails or refuses to enter into a prohibited arbitration or similar agreement.
- In addition, the Act will require some employers to provide information on past sexual harassment settlements to the Maryland Commission on Civil Rights.

IT'S ABOUT TIME!
Gentry Locke's 2018 CLE Seminar

2

Personal Injury: How Bankruptcy Affects Your Claims

H. David Gibson
Benjamin D. Byrd

PERSONAL INJURY: HOW BANKRUPTCY AFFECTS YOUR CLAIMS

H. David Gibson
Benjamin D. Byrd[1]

Gentry Locke Seminar
September 7, 2018

I. Overview:

A. When your client files for bankruptcy, it can have devastating effects on your case. Issues arise as to whether your client has standing to pursue the claim, whether medical bills and other damages can be claimed in the case and whether the bankruptcy filings limit the value of your client's claim.

B. Likewise, issues also arise when a defendant in a personal injury case files for bankruptcy.

C. <u>This presentation is centered on how to deal with bankruptcy in the context of a personal injury case.</u>

[1] The presenters would like to thank Douglas P. Barber who assisted in preparing this outline.

II. Relevant Bankruptcy Basics:

A. **Bankruptcy Law Preempts State Law**: Federal statutes, bankruptcy rules and the decisions of the federal courts are dispositive in deciding all questions of bankruptcy law. *Kocher v. Campbell*, 282 Va. 113, 117, 712 S.E.2d 477, 479 (2011).

B. **Bankruptcy Code and Rules:** The substantive text can be found at 11 U.S.C. §§ 101 *et seq*. also known as the Bankruptcy Code. The procedural rights are set forth in the Federal Rules of Bankruptcy Procedure. In addition, each district has special local rules that supplement or modify the Bankruptcy Rules.

C. **Bankruptcy Estate**: The filing of a bankruptcy petition creates an estate by operation of law. 11 U.S.C. § 541(a). Causes of action and lawsuits are assets that automatically become part of the estate and <u>must be listed</u> in a debtor's bankruptcy petition/schedules. This definition includes "all causes of action that could be brought by a debtor." *USinternetworking, Inc. v. Gen. Grown Mgmt*., 310 B.R. 274, 281 (Bankr. D.Md. 2004). This includes pre-petition (inchoate) car accident tort claims. *See e.g. Kocher v. Campbell*, 282 Va. 113, 115-117, 712 S.E.2d 477, 478-81 (2011).

   1. The duty to disclose such claims continues for the duration of the bankruptcy proceeding. *USinternetworking, Inc.*, 310 B.R. at 282.

   2. By signing the petition, the debtor certifies "under penalty of perjury that the information on this statement and in any attachments is true and correct."

   3. For Chapter 13 (discussed more fully below), the estate also includes property and earnings of the debtor acquired <u>after</u> the commencement of the case before the case is closed, dismissed or converted, which could be as long as 5 years. *See* 11 U.S.C. §1306(a).

D. **Different Chapters**: There are three major types of bankruptcy cases: Chapter 7 Liquidation (consumer dominated; some commercial cases), Chapter 11 Reorganization or Liquidation (commercial cases), and Chapter 13 Adjustment of Debts of Individuals with Regular Income (consumer cases).

   1. **Chapter 7**: This chapter is available to any type of debtor, which may include individuals, partnerships and corporations. A trustee is appointed to collect and liquidate the debtor's nonexempt assets, to be followed by a discharge. The assets may include all tangible and intangible personal property, real property and accounts receivable or any property in which the debtor has a legal or an equitable interest. *See* 11 U.S.C. § 704. Chapter 7 is frequently encountered in personal injury cases.

2. **Chapter 11**: Chapter 11 can be a liquidation or a reorganization. Chapter 11 permits a debtor to file a plan of reorganization in which creditors receive their maximum recovery from the debtor. In a Chapter 11 case, the debtor continues to operate its business and manages its affairs and property as a "debtor-in-possession." This chapter is normally used by commercial entities and is rarely encountered by a personal injury attorney.

3. **Chapter 13**: Chapter 13 allows an individual with regular income to reorganize his financial affairs through a plan of reorganization. The debtor submits a budget outlining his monthly income and expenses and the difference is used to fund the plan. The funds are paid to a Chapter 13 trustee who distributes the funds to creditors over a period not to exceed five years. *See* 11 U.S.C. §§ 1306(b), 1322. If the debtor completes the plan payments, the debtor receives a discharge of his prepetition debts and keeps all of his assets. This is frequently encountered in personal injury cases.

E. **Restoration of Assets to the Debtor:** The debtor can reclaim assets that become part of the estate in two ways:

1. **Exemption**
    a. The Bankruptcy court may exempt assets pursuant to 11 U.S.C. § 522.
    b. Federal law allows certain bankruptcy exemptions, or if a state elects to "opt out" they may substitute their own. *Id*. Virginia is a state that has done so. *See* Virginia Code. § 34-3.1.
        1. Va. Code § 34-28.1 provides that causes of action for personal injury "shall be exempt from creditor process against the injured person."
        2. "Creditor process" is defined as "all methods used by creditors to collect unsecure debts." Va. Code § 34-1.

2. **Abandonment**:
    a. Normally, abandonment occurs when listed assets remain un-administered when the bankruptcy case is closed. 11 U.S.C. § 554(c); *See Kocher v. Campbell*, 282 Va. 113, 117, 712 S.E.2d 477, 480 (2011).

b. This can also happen after notice and a hearing pursuant to 11 U.S.C. § 554, if the trustee deems the asset to be burdensome to the estate or of inconsequential value.

III. How bankruptcy can impact your client's personal injury case.

A. **Can a plaintiff proceed with a personal injury case if the plaintiff filed for bankruptcy?**

1. As noted above, causes of action/lawsuits are <u>assets</u> that automatically become part of the bankruptcy estate, and <u>must be listed</u> in a debtor's bankruptcy petition/schedules.
a. Whether plaintiff can file a Complaint depends on who has standing – your client or the trustee.

2. <u>Chapter 7 Proceedings</u>:

a. Under Chapter 7, the Trustee alone has standing to bring that claim. *Nat'l Am. Ins. Co. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999).
b. In addition, after a Chapter 7 bankruptcy petition is filed and before discharge, the trustee has the sole capacity to prosecute the lawsuit. *See Dunmore v. United States*, 358 F.3d 1107, 1111-12 (9th Cir. 2004).
c. Actions taken by the plaintiff during this time period can successfully be challenged as a legal nullity. *See Kocher v. Campbell*, 282 Va. 113, 116-119 (2011).

3. <u>Chapter 13 Proceedings</u>:

a. A plaintiff that files bankruptcy under Chapter 13 retains standing to pursue her own listed personal injury cause of action after the "Chapter 13 Plan" is confirmed. *Wilson v. Dollar General Corp*. 717 F.3d 337, 342-344 (4th Cir. 2013).
b. In *Wilson*, the court stated "[u]nlike a Chapter 7 debtor, a Chapter 13 debtor possess standing – concurrent with that of the trustee – to maintain a non-bankruptcy cause of action on behalf of the estate. The nature of Chapter 13 bankruptcy, when compared to Chapter 7, supports this conclusion." In other words, actions taken by the

plaintiff after the Chapter 13 plan has been confirmed, cannot be challenged.

4. If the cause of action/lawsuit is abandoned at the end of the bankruptcy case, then control reverts back to the personal injury plaintiff, and they can continue to pursue their case.

B. **What happens if your client's medical expenses are discharged in bankruptcy?**

1. Medical bills that have been discharged in bankruptcy, are clearly admissible to prove pain and suffering. *Barkley v. Wallace*, 267 Va. 369, 373-74, 595 S.E.2d 271, 273-74 (2004).

2. However, Virginia Circuit Courts have <u>split</u> on the issue of whether discharged medical bills are recoverable damages.

a. A substantial majority of circuit courts have held that discharged medical bills are not recoverable damages. *See, e.g., Choice v. Kruse*, 57 Va. Cir. 13 (Chesterfield County, 2001); *Daniels v. Owens*, 54 Va. Cir. 284 (Norfolk, 2000); *Morganthal v. Piper*, 38 Va. Cir. 354 (Virginia Beach, 1996); *Walker v. Long*, 57 Va. Cir. 419 (Richmond, 1993).

b. The 23rd circuit reached the opposite conclusion and allowed a plaintiff to recover medical bills which were discharged in bankruptcy. *Dodd v. Lang*, 71 Va. Cir. 235, 241-42 (Roanoke, 2006)(Judge Apgar). *Dodd* is also the only published opinion which was rendered after *Barkley v. Wallace*, discussed *supra*.

c. In the *Dodd* case, Judge Apgar also ruled that the fact that the medical bills were discharged in bankruptcy is not admissible "as the mention of bankruptcy could severely prejudice the plaintiff's case." *Dodd v. Lang*, 71 Va. Cir. at 243.

d. However, Judge Apgar placed restrictions on damages awards involving discharged medical bills by ruling that if the personal injury plaintiff relies too heavily upon the *Dodd* decision: Judge Apgar further stated that "any amounts awarded by a jury above and beyond the statutory liens and assignment of benefits, should be transferred to the health care providers by the plaintiff." *Dodd v. Lang*, 71 Va. Cir. at 243.

e. Therefore, if the plaintiff discharges her medical bills, then seeks to admit those medical bills in her personal injury case, it can be challenged but the plaintiff will likely prevail in Southwest Virginia, given the *Barkley* and *Dodd* decisions.

C. **What happens if there is an error in the bankruptcy schedules or if your client fails to mention the personal injury claim entirely?**

1. If the plaintiff significantly undervalues her cause of action in her bankruptcy filing or if she does not list the cause of action at all, the defense could use Judicial Estoppel to extinguish the cause of action or limit the damage in the personal injury case to the value given by the plaintiff in her bankruptcy filing.

2. Judicial Estoppel is intended to protect the integrity of the court and to prevent litigants from playing "fast and loose" with the judicial system. *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001).

3. Judicial Estoppel need not be affirmatively plead. *Eilber v. Floor Care Specialists, Inc.*, 294 Va. 438, 445, 807 S.E.2d 219, 223 (2017). A court may raise Judicial Estoppel *sua sponta*, even on appeal. *Cathcart v. Flagstar Corp.*, No. 97-1977, 1998 U.S. App. LEXIS 14496, at *23 n.2 (4th Cir. June 29, 1998) (unpublished; for table disposition, *see* 155 F.3d 558); *Thomas v. FTS USA, LLC*, 2016 U.S. Dist. LEXIS 8269 (e.d. Va. 2016); *Eilber v. Floor Care Specialists, Inc.*, 294 Va. 438, 444, 807 S.E.2d 219, 222 (2017).

4. In *Folio v. City of Clarksburg*, 134 F.3d 1211, 1217-18 (4th Cir. 1998), the Fourth Circuit ruled that four elements are necessary for a court to estop a party from taking inconsistent positions:

a. The party to be estopped must be advancing an assertion that is inconsistent with a position taken during previous litigation;
b. The position must be one of fact instead of law;
c. The prior position must have been accepted by the court in the first proceeding; and
d. The party to be estopped must have acted intentionally, not inadvertently.

5. The Fourth Circuit has repeatedly noted that intent – more precisely, whether the plaintiff "intentionally misled the court to gain an unfair advantage" – is the "determinative factor" in the application of Judicial Estoppel. *Lowery v. Stovall*, 92 F.3d 291, 223, (4th Cir. 1996).

6. In the absence of direct evidence of intent, a court will deem the omission as inadvertent where the debtor lacked a motive to conceal the asset. In the context of underreporting/non-reporting a purportedly exempt asset on a bankruptcy petition, a plaintiff can be considered to have acted inadvertently if there is no motive to conceal, taking into consideration the claimed bankruptcy exemption [different for each state]. *See Payne v. Wyeth Pharms., Inc*., 606 F. Supp. 2d 613, 616-17 (E.D. Va. 2008); *See Calafiore v. Werner Enterprises, Inc*., 418 F. Supp 2d 795, 798-99 (D. Md. 2006).

   a. The failure to list known causes of action "impliedly represent[s] that . . . no such claim" exists. *Flugence v. Axis Surplus Ins. Co.*, 738 F.3d 126, 130 (5th Cir. 2013).
   b. Where a debtor lists a cause of action in her bankruptcy petition/schedules at a substantially lower value than they seek in a subsequent personal injury case, AND the debtor fails to amend their petition after the personal injury case is filed, the debtor is subject to the same analysis as if they had completely failed to list the asset. *See Payne*, 606 F. Supp. 2d at 616-17.

   c. As stated above, Virginia Code § 34-28.1, provides that causes of action for personal injury "shall be exempt from creditor process against the injured person."

      1. The term "creditor process" is defined as "all methods used by creditors to collect unsecure debts." Va. Code § 34-1.

      2. Since the definition refers only to unsecured debts, then the exemption does not apply to secured debts.

      3. Since the exemption does not apply to secured debts, if the debtor has secured creditors and that debtor fails to list a personal injury claim or significantly underreport a personal injury claim, the debtor could be deemed to have a motive to conceal and could later be Judicially Estopped from asserting the personal injury cause of action or asserting any value higher than they claimed in their bankruptcy petition/schedule. *See Payne*, 606 F. Supp. 2d at 617-18.

7. In either the **non-reporting** or **underreporting situation,** if any portion of the debtor's claimed asset would fall into nonexempt categories (i.e. it would add to the bankruptcy estate), that debtor could be deemed to have a motive to conceal the true value of the claim from the Bankruptcy Court and thus be estopped from asserting the higher value of the cause of action in their personal injury case. *See Payne*, 606 F. Supp. 2d at 616-17; *see also Calafiore*, 418 F. Supp. 2d at 799-800.

a. *Payne* involved a plaintiff who listed the value of his personal injury claim as being worth $1 million in his Chapter 7 Petition. *Payne*, 606 F. Supp. 2d at 614. A few days before discharge, the plaintiff filed a personal injury lawsuit seeking $25 million in damages. *Id*.
b. The defendant moved to limit the plaintiff's damages to the amount he claimed in his bankruptcy petition based on the doctrine of Judicial Estoppel.
c. The court stated that the first three *Folio* factors were met based upon the bankruptcy petition and the personal injury lawsuit. *Id*. at 616.
d. The court further stated that the fourth *Folio* factor required a "motive to conceal." The court then noted that the Virginia exemption for personal injury causes of action (Va. Code § 34-28.1) only applied to unsecured debt, and the plaintiff had a large amount of secured debt listed on his schedules. *Id.*
e. The court held that "since the secured creditors would have been able to collect on any award or settlement recovered by the plaintiff in his case, the plaintiff clearly had a motive for concealment when valuing his claim and/or failing to amend after he had filed his lawsuit." *Id*. at 617. Therefore, the court granted the defendant's motion to limit the plaintiff's damages to the amount he listed in his bankruptcy petition. *Id*.

8. Example: On November 26, 2015, Amelia was driving her car through Roanoke. She was rear-ended by a hit-and-run driver. She asserted a claim under her the uninsured motorist provisions of her insurance policy. Her claim was initially denied by the carrier and she filed a lawsuit in the City of Roanoke. Amelia has also filed bankruptcy, as discussed below.

<u>**Question:** Can the personal injury defendant use Amelia's bankruptcy against her?</u>

a.	Cause of action/car accident	November 26, 2015
b.	Filed Lawsuit	September 21, 2016 (A.D. $70,000+costs+interest)*
c.	Filed Bankruptcy (Chapter 7)	May 12, 2017
d.	Listed Claim in Petition:	$1*
e.	Exemption in Petition:	$1*

f.	Bankruptcy Discharge	August 16, 2017 (Discharged all of her medical bills two months before trial.)
g.	Car accident trial date	October 11, 2018

h. Discussion:

1. When Amelia filed for Chapter 7 bankruptcy on May 12, 2017, all of her property, including her November 26, 2015 car accident claim/lawsuit, became part of her estate. Since she filed her lawsuit before she filed for bankruptcy, the lawsuit was properly filed and the statute of limitations was tolled. However, after the Petition was filed and before her Discharge, the Trustee had the sole capacity to prosecute the lawsuit. Therefore, from May 12 through August 16, 2017, Amelia had no authority to prosecute her lawsuit, making her actions a legal nullity. These actions can be challenged by the defense.
2. After Amelia's discharge on August 16, 2017, her personal injury lawsuit was un-administered and thus abandoned by operation of law. This restored control of the lawsuit to Amelia, giving her the authority to continue prosecuting her case.
3. Amelia listed the value of her claim as $1 in her Bankruptcy Petition, approximately eight months after filing her lawsuit claiming $70,000+ in damages. The same Virginia exemption was claimed, as was claimed in the *Payne* case discussed *supra*, and Amelia also had secured creditors listed in her Petition (schedule D). Therefore, there is evidence to support a motion to limit Amelia's damages to $1 based on judicial estoppel.
4. Amelia discharged all of her medical bills, therefore the defense has a basis to challenge the admissibility of Amelia's discharged medical bills. However, the defense will face an uphill battle given the *Barkley* and *Dodd* decisions. If Amelia relies upon the *Dodd* decision, she needs to be ready for the above mentioned comment from the decision that "any amounts awarded by a jury above and beyond the statutory liens and assignment of benefits, should be transferred to the health care providers by the plaintiff." *Dodd v. Lang*, 71 Va. Cir. at 243.

9. What actions should the personal injury plaintiff take to correct this problem? Immediately seek to amend the petition/schedules when this is discovered. If the personal injury defendant asserted judicial estoppel, it will be too late to amend. *See In re Superior Crewboats*, 374 F.3d 330, 336, *quoting Burnes v. Pemco Aeroplex Inc.*, 291 F.3d 1282, 1288 (11th Cir. 2002) ("allowing [the debtor] to back-up, reopen the bankruptcy case and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing personal assets only if he is caught concealing them.").

D. **Statute of limitations Issues:**

1. If the plaintiff files bankruptcy:

a. If the plaintiff files Chapter 7 or Chapter 13 bankruptcy before the statute of limitations runs, then:
   1. the trustee can file within the normal statute of limitation, or
   2. the trustee can file within two (2) years of the filing of the petition, during the pendency of the bankruptcy. 11 U.S.C. 108(a).

b. As discussed above, in some ways the debtor can act as the trustee in the Chapter 13 context. There is a split of authority nationally on this issue, but in Virginia it appears that the Chapter 13 debtor will not be given the 2 year extension described in 11 U.S.C. 108(a), only the a trustee. *Ranasinghe v. Compton*, 341 B.R. 556, 567 (Bankr. E.D. Va. 2006).

2. If the defendant files bankruptcy:

a. If the defendant files Chapter 7 or Chapter 13 bankruptcy before the statute of limitations runs, then the automatic stay of course stops the plaintiff from filing her lawsuit, but the statute of limitation will be tolled until **30 days after notice** of the termination or expiration of the stay. 11 U.S.C. 108(c).

E. **What happens to the personal injury case if the personal injury defendant files for bankruptcy?**

1. Automatic Stay: 11 U.S.C. § 362.

a. Once a personal injury defendant files a bankruptcy petition, a stay is imposed by operation of law. The stay prohibits a personal injury plaintiff from continuing litigation against a personal injury defendant that had commenced pre-petition, including discovery. Likewise, the stay prohibits a plaintiff from continuing negotiations or initiation of a personal injury case following the bankruptcy filing unless it first obtains relief from the stay.

b. The stay continues until the case is closed, dismissed or discharge is either granted or denied.

c. A motion for relief from the stay is the proper proceeding for a personal injury plaintiff to file in order to obtain permission to initiate or continue a personal injury case against the defendant. Relief shall be granted for "<u>cause</u>" such as "lack of adequate protection of an interest in property of the moving party. *See* 11 U.S.C. § 362(d) (emphasis added).

1. Chapter 7: If the personal injury cause of action involves willful or malicious injury or intoxication, then the plaintiff must move for relief in order to establish that the cause of action is not dischargeable (*see infra*). If the cause of action involves simple negligence, the personal injury plaintiff can still move for relief by either promising to only pursue the applicable insurance proceeds, or attempt to convince the court that if there is an excess verdict that she will merely be added to the list of unsecured creditors that will receive assets if there are any after the discharge (*see infra*).
2. Chapter 13: Because a personal injury cause of action has not yet been reduced to a specific dollar value, it will be very difficult to incorporate into a payment plan. Therefore, it is unlikely that the repayment plan will be confirmed. Therefore, it is possible that the court will grant relief from the stay in order to allow the personal injury plaintiff to prosecute her case and liquidate defendant's liability. *See e.g., In re Hudgins,* 102 Bankr. 495 (Bank. E.D. Va. 1989). After the case is reduced to

judgment, the amount in excess of insurance policy limits will likely be discharged (discussed *infra*). However, if the repayment plan is confirmed, the personal injury plaintiff should file an objection to the plan, and seek relief from the stay.

2. Discharge pursuant to 11 U.S.C. § 524.

a. A bankruptcy discharge <u>voids</u> any <u>unsecured debt or judgments</u> to the extent that the judgment is a determination of the personal liability of the debtor. 11 U.S.C. § 524(a)(1). The discharge also imposes an <u>injunction</u> against the commencement of any <u>listed</u> action for personal liability against the debtor. 11 U.S.C. § 524(a)(2).

b. Chapter 13 discharge is broader than a Chapter 7 discharge. Certain debts are <u>not</u> dischargeable under Chapter 7, specifically:

1. Debts that are not listed or scheduled. 11 U.S.C. § 523(a)(3).
2. Debts for willful or malicious injury to another entity or to the property of another entity. 11 U.S.C. § 523(a)(6).
3. Debts for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance. 11 U.S.C. § 523(a)(9).

f. While a simple negligence personal injury cause of action may be discharged, this does not impact a personal injury plaintiff's ability to proceed against other non-debtor defendants and, most importantly, applicable insurance policies. *See* 11 U.S.C. § 524(e); *see e.g.*, Va. Code § 38.2-2200; *see also In re Shegog*, 2008 Bankr. LEXIS 2663, *9 (E.D.Va Sept 11, 2008).

g. If the personal injury defendant has already discharged your personal injury plaintiff's simple negligence [e.g. car accident] cause of action, you must seek to re-open the bankruptcy case, and then seek relief from the injunction imposed by 11 U.S.C. § 524(a)(2) in order to proceed with your case.

F. Advice regarding dealing with your personal injury plaintiff clients regarding bankruptcy.

1. During initial meeting, ask about bankruptcy and immediately check Pacer.

2. Include a provision in your fee agreement – that the client will immediately tell you if he intends to file bankruptcy. This is what our firm uses in our fee agreements:

> **BANKRUPTCY** I understand that bankruptcy can have devastating effects on my personal injury case. By signing this agreement, I confirm that I have never declared bankruptcy and have no current intentions of filing. In the event I consider filing bankruptcy, I will immediately inform the lead counsel on my case at Gentry Locke, so that I can receive advice about how such a decision could affect my recovery rights, as well as my relationship with the law firm.

3. Periodically check Pacer to see if the defendant has filed for bankruptcy.

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3

Construction Law: Updates Affecting Project Performance and Disputes

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CONSTRUCTION LAW: UPDATES AFFECTING PROJECT PERFORMANCE AND DISPUTES

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Introduction

Construction law is a broad area of practice, encompassing everything from formation of contracts to litigation over building defects. There are a myriad of issues in between which confront contractors, owners, designers, suppliers, and many others involved in the construction industry. These issues include labor and employment disputes, workplace safety/OSHA compliance, payment disputes, insurance coverage questions, building code compliance, and many others.

It is also an area of the law that is continually evolving as the result of changes in federal, state, and local law, both in the statutory realm and through courts interpreting the statutes, contracts, and, yes, even verbal disputes. When a potential client enters an attorney's office with a problem related to a commercial construction project[2], there are some key items, terms, and concepts that should immediately come to mind. These materials provide a top five set of areas of immediate attention, depending upon the circumstances that exist. It may well be an issue of "should I sign this contract." It might be an issue of "how do I collect the money my company is owed." Or it might well be an issue of "how do I handle an issue with a public construction project."

Beyond the variety of issues that a practitioner can encounter, the "player" in the overall situation can be one of many different ones. When considering the contractual, statutory, and regulatory responsibilities, it can often greatly vary depending upon where in the chain of contract the client falls. Some of the main parties in this process are:

1. The owner of the commercial construction project, which could include a private owner (such as a developer or a big-box store) or a public owner (such as a city, county, state, federal government, or specially-created governmental authority).

[1] The authors would like to thank Emily Melvin, a third-year law student at the Wake Forest University School of Law, for her assistance in preparing this update.
[2] The handling of a residential construction dispute is outside the scope of this outline and presentation. There are many similarities and overlapping concepts in the context of a residential construction disputes, and some unique elements as well. The unique elements of residential construction disputes is omitted from these materials.

2. The design professional, which can be contracted in standard arrangements by the owner, but can in other situations, such as a "design-build" arrangement, be contracted for by the general contractor or construction manager. The design professional can be an architect, an engineer, or one of many sub-specialties within the design world like a geotechnical engineer, a structural engineer, or a mechanical (HVAC) engineer.

3. The party that is overall responsible for building the project and who is usually in contract with the owner may be a general contractor or possibly a construction manager. As discussed below, the pricing arrangement can vary with these parties, as can the level of responsibility.

4. Subcontractors work below and for the general contractor and/or construction manager on a project, normally to perform a specific, specialized aspect of the work, such as excavation, masonry, HVAC, roofing, etc.

5. Suppliers are parties that provide particular construction materials either to the owner, the general contractor/construction manager, or a subcontractor. Certain rights apply to protect suppliers similar to those pertaining to subcontractors, but there are important differences.

6. Most all of the entities in the construction chain of contract will have or be required to obtain various types of insurance. Some of the key concepts are touched on below, as they may pertain, for example, to Commercial General Liability (CGL), Builder's Risk, Professional Liability, or Umbrella Coverage.

7. On many commercial construction projects, the general contractor/construction manager and certain subcontractors will be required by a party above them in the chain of contract to procure payment and performance bonds. These bonds are issued by a surety, and they are much different than the insurance policies that might exist on the job. Performance bonds are intended to protect the "obligee" on the bond against failure of the "principal" on the bond to complete its work. Payment bonds are intended to help protect "claimants," such as subcontractors and suppliers who are not paid by the "principal" on the bond.

Regardless of the situation, the following are five areas where an attorney might need some basic understanding of the issues, risks, and pitfalls that can await a construction-industry client. And in some instances – as discussed below – timing can be everything. In the construction industry, there are certain areas where acting promptly is not only important, it is absolutely and legally mandatory.

In the context of these discussions of some of the basic issues that a practitioner might confront, there are updates from some recent cases that provide some "color commentary" on how these issues can play out when addressed in court. Be aware, though, that this information is slightly less than "the tip of the iceberg." Beyond these points there is a sea full of statutes, cases, and commentary that provide the full array of construction law. And those are changing every year as it continues to evolve.

I. Some Key Commercial Construction Contract Provisions

Thanks in part to the myriad of disputes that continue to arise on commercial construction projects, the prime contracts and subcontracts have become thicker and thicker, with more attachments, and much smaller print. And they have become increasingly difficult to negotiate, as demanding significant changes to another party's contract can often lead to not getting the job.

Keep in mind that there are industry-standard contract forms that are often used, such as the ones published (and charged for) by the American Institute of Architects (AIA). These form documents are often modified before being proposed to other parties in the chain. Likewise, there are "manuscript" contracts that certain companies prepare for their companies to use and are often more friendly to that party's position in the process.

If a player in the commercial construction chain of contract is determining whether to proceed with a project and sign a contract, here are some of the key provisions that need to be reviewed and understood.

A. Indemnification.

1. In short, indemnification is "pay back" from one party to another. Most construction contracts require one party, such as a subcontractor, to indemnify (or pay back) the general contractor if the general contractor incurs a financial loss related to personal injury or property damage to a third-party due to the negligence of the subcontractor.

2. Often the indemnitor is contractually required to indemnify not only the party above it in the chain of contract, such as the subcontractor to the

general contractor, but also others above the indemnitee in the chain of contract, such as the owner, architect, etc. above the general contractor.

3. The breadth of the indemnification provision is of vital importance. Some are limited to indemnification for personal injury or property damage type losses to third-parties, and those are often insurable losses for the indemnitor. More and more, parties are broadening indemnification provisions to relate to any type of financial loss that the indemnitee might sustain related to the work of the indemnitor. Close attention should be paid to the language in these provisions, no matter how small the type or how glassy-eyed you might become reading these provisions.

4. Certain indemnification is declared void pursuant to the Code of Virginia.

    a) A contract provision that seeks to make the contractor “indemnify or hold harmless another party to the contract against liability for damage arising out of bodily injury to persons or damage to property suffered in the course of performance of the contract, caused by or resulting solely from the negligence of such other party or his agents or employees, is against public policy and is void and unenforceable.”[3]

    b) In 2010, the Supreme Court of Virginia affirmed the Circuit Court’s finding that an indemnification clause that served as the basis for a claim of indemnification violated Va. Code Ann. § 11-4.1, in that the indemnification clause illegally obligated the company to indemnify the corporation whether or not the claim was based upon the negligence of the corporation.[4]

    c) This year, the Federal District Court for the Eastern District of Virginia (Alexandria Division) ruled in favor of a defendant’s motion for judgment on the pleadings that sought to invalidate an indemnification provision that was the basis of a claim for attorney’s fees brought by Travelers, as subrogee, for the outstanding attorneys' fees and costs related to a separate related litigation.[5] The court found that “because Section 2.7 of the Agreement, the indemnification provision, required [the defendant], as a contractor, to indemnify the owner of the building

[3] Va. Code Ann. § 11-4.1.
[4] *Uniwest Constr., Inc. v. Amtech Elevator Servs.*, 280 Va. 428, 699 S.E.2d 223 (2010).
[5] *The Travelers Indemnity Company of Connecticut v. Lessard Design, Inc.*, Civil No. 1:17-cv-1401, 2018 U.S. Dist. LEXIS 98937 (E.D. Va. 2018).

> and [the subrogor] for the owner's and [the subrogor's] sole negligence, the provision is void pursuant to § 11-4.1. And because of the Supreme Court of Virginia's holding in *Uniwest*, Section 2.7 must be invalidated in its entirety, and so [the defendant] was under no duty to indemnify [the subrogor] based on Section 2.7 of the Agreement."[6]

B. Provisions Related to Form of Pricing of Work.

One of the biggest points of misunderstanding and dispute on commercial construction projects relates to how the payment of the general contractor or a subcontractor is determined. While such terms sound relatively straightforward, players in the construction industry themselves often have a misunderstanding of what they mean and how they are to be handled.

1. Lump Sum: In this arrangement, the parties agree to a set price for a certain scope of work, unless there are changes that occur in the scope of work. Change orders present a prime area for dispute on construction projects and the timing and documentation of these is important.

2. Cost Plus: Under this arrangement, the price being charged by the entity doing the work is based largely, if not exclusively, on the cost of certain elements of the work, such as the cost of labor, materials, subcontractor work, and other items. Acrimonious and expensive disputes often arise as to the necessity, documentation, and propriety of certain costs that are charged.

3. Cost Plus with a Guaranteed Maximum Price (GMP): In an effort to combat a "run-away" cost-based price, many contracts include a GMP over which the paying party is not responsible to pay unless there are agreed-upon changes and modifications to the GMP. Even so, these are fraught with inherent issues and often end up in dispute.

4. Unit Price Work: Elements of a project for which it is hard to predict up front how many of that element will be required on a job are often handled on a unit-price basis. Grading projects, highway projects, and underground utility/piping projects are examples of these, as it is not an absolute science as to how many linear feet or how many cubic yards are going to be involved in piping or excavation. In these instances, an estimate of the quantities is made in advance, and the contractor provides a price for each linear foot or each cubic yard, subject to ultimate verification as to the

[6] *Id.* at *15.

amount used. No surprise that the quantification of the units can often lead to debate and dispute.

C. Scope of Work.

1. What exactly a contractor or subcontractor is or is not going to do on a project would seem pretty simple. It isn't. Disputes often arise because the original contract did not sufficiently specify what one party thinks the other party is going to do, or vice-versa. These can lead to claims for change orders, for additional payment, and for additional time (and corresponding time-related impact claims).

D. Choice of Law and Venue.

1. Again, this seems like a simple concept, but parties often overlook these issues as they presume there will not be any disputes on a job. Wrong! Thus, it is important to see if an out-of-state contractor or owner is trying to require that the law of another state other than Virginia apply to the project, or if the out-of-state party is requiring that any disputes be resolved in its home state, often far away from Virginia.

2. Virginia has a statute that *may* help protect a Virginia-based company working on a Virginia-based construction project from having to go to another state for litigation or arbitration.

   a) Where a party whose principal place of business is in the Commonwealth enters into a contract on or after July 1, 1997, to design, manage construction of, construct, [. . .] a building, structure, appurtenance, road, bridge, or tunnel which is physically located in the Commonwealth, any cause of action arising under such contract may be brought in the jurisdiction where the construction project is located, or such other jurisdiction where the venue is proper under the provisions of this chapter. Any provision in the contract mandating that such action be brought in a location outside the Commonwealth shall be unenforceable.[7]

3. In any event, this is a provision that should be addressed and negotiated up front to try and make the laws of the Commonwealth of Virginia apply to all disputes concerning the contract, and also require that any dispute resolution be conducted in Virginia, preferably in the location of the project.

[7] Va. Code Ann. § 8.01-262.1(A).

E. Dispute Resolution.

1. Likewise, whether the case will be subject to mediation (as most construction disputes are now), and whether it will be resolved through litigation or arbitration is an issue that should not be ignored in a proposed contract. Depending upon the party involved and the potential disputes that can arise, there are various reasons why litigation or arbitration may be preferred over the other one. Factors can include costs to litigate vs. arbitrate, knowledge of the likely trier of fact involved, and speed of the process. Keep in mind that many contracts provide for waiver of jury trial if the matter does go through litigation.

F. Pay If Paid.

1. These provisions are of utmost importance and interest to subcontractors. They make payment from the owner to the general contractor a "condition precedent" to the general contractor having to pay the subcontractor. They are valid under Virginia law so long as the magic words "condition precedent" are used.[8]

G. No Damages for Delay.

1. These provisions limit a party's damages for being delayed on a project just to a (potential) extension of time. Thus, a party agreeing to this provision would not be entitled to any damages for being kept on the project longer than expected, such as for extended field overhead, extended financing, extended home office overhead, etc.[9]

2. The Virginia Public Procurement Act ("VPPA") bars the use of "no damage for delays" clauses in any public construction contract.[10]

H. Liquidated Damages.

1. Often a party will be asked to agree in advance to a liquidated amount for which it will be responsible on a daily basis if it does not meet the deadline established in the contract. These "liquidated damages"

[8] *Universal Concrete Prods. Corp. v. Turner Constr. Co.*, 595 F.3d 527 (4th Cir. 2010); *Moore Bros. v. Brown & Root, Inc.*, 207 F.3d 717 (4th Cir. 2000); *Galloway Corp. v. S.B. Ballard Constr. Co.*, 250 Va. 493, 501, 464 S.E.2d 349, 354 (1995); *W.O. Grubb Steel Erection, Inc. v. 515 Granby, LLC*, 78 Va. Cir. 463 (Norfolk 2009).

[9] *Blake Const. Co., Inc./Poole & Kent v. Upper Occoquan Sewage Authority*, 266 Va. 564, 571-72, 587 S.E.2d 711, 715 (2003).

[10] Va. Code Ann. § 2.2-4335(A).

provisions are generally enforceable under Virginia law[11], and, in our view, are often preferred by the entity taking the risk as it helps to quantify the potential impact of being late as opposed to being responsible for some unknown amount of actual damages.

II. Some Key Public Contract Issues

When addressing the contents of a construction contract or determining how to handle a dispute related to it, it is vitally important to appreciate the differences between how these issues operate in the context of a private construction project as opposed to a public construction project where the owner is a public entity, such as a city, county, state, or federal government. Suffice it to say, there are many differences between the two. Some of these are set out below.

Most of the pertinent and unique elements related to public construction projects in Virginia are found within Title 2.2 of the Code of Virginia. There are also unique provisions for other governmental agencies, such as the Virginia Department of Transportation, the provisions related to which are in Title 33.2 of the Code of Virginia.

A. <u>Attention to the Contract Form is Important as There are Certain Provisions Required by the VPPA</u>

In preparing construction contract documents, or reviewing those prepared by others, be aware that there are certain provisions that are required to be included, pursuant to the VPPA.

1. **Va. Code § 2.2-4311**
   a) <u>Employment discrimination</u> by contractor prohibited (in any contract of more than $10,000). In this provision, the contractor agrees not to discriminate and agrees to include this provision in agreements with subcontractors and vendors as well.

2. **Va. Code § 2.2-4312**
   a) <u>Drug-free workplace</u> to be maintained by contractor (in any contract of more than $10,000). In this provision, the contractor agrees to take steps to provide a drug-free workplace for employees and agrees to include this provision in agreements with subcontractors and vendors as well.

3. **Va. Code § 2.2-4354**

[11] *Taylor v. Sanders*, 233 Va. 73, 75, 353 S.E.2d 745, 747 (1987).

a) Prompt Payment clauses (in contracts of any size). This provision requires that all public contracts include a payment clause that obligates the contractor to take certain actions in seven days in relation to payment to subcontractors, either pay in proportion to the amount the contractor has been paid, or notify the government owner and the subcontractor in writing as to why payment is not being made. This statute also requires certain provisions and clauses in contracts relating to interest payments as between the owner and contractor, and contractor and subcontractors.

4. **Va. Code Ann § 2.2-4363**

a) Contractual Disputes. Each public body shall include in its contracts a procedure for consideration of contractual claims including a time limit for a final decision and timing requirements for submission of the claim.

5. **Va. Code § 2.2-4343.1**

a) Non-discrimination against Faith-Based Organizations. Public bodies shall ensure that all invitations to bid, requests for proposals, contracts, and purchase orders prominently display a nondiscrimination statement indicating that the public body does not discriminate against faith-based organizations. The public body must also provide a notice to each individual who applies for or receives goods, services, or disbursements provided pursuant to a contract between a public body and a faith-based organization a notice with bold face type including a disclaimer statement listed in this statute.

6. **Va. Code § 2.2-4311.1**

a) Compliance with Immigration Law. All public bodies shall provide in every written contract that the contractor does not, and shall not during the performance of the contract for goods and services in the Commonwealth, knowingly employ an unauthorized alien as defined in the federal Immigration Reform and Control Act of 1986.

7. **Va. Code § 2.2-4311.2**

a) State Corporation Commission Requirements (new as of July 2010). All public bodies shall include in every written contract a provision that a contractor organized as a stock or non-stock corporation, limited liability company, business trust, or limited partnership or registered as a registered limited liability partnership shall be authorized to transact business in the Commonwealth as a domestic or foreign business entity if so required by Title 13.1 or Title 50 or as otherwise required by law.

B. Additional Provisions that are Not Required, but Should be Given Specific Attention on a Public Construction Contract.

1. Notice…NOTICE…NOTICE.

a) The VPPA establishes a default structure for how claims are to be made on public construction projects.[12] Contractors must provide notice of intent to file a claim at the time of the occurrence or the beginning of the work upon which the claim is based, and submit an actual claim for money or other relief within 60 days after final payment.

b) Based upon *Commonwealth vs. AMEC Civil, LLC*, Virginia courts have administered the notice provisions strictly and declined to adopt "constructive notice" or "actual notice" approaches.[13] In short, written notice of intended claims is likely to be required by Virginia courts on contracts under the VPPA.

c) So bear in mind that contractors may be providing this notice to protect themselves, but that does not mean that a battle is brewing. It should, however, serve the purpose of placing the locality on notice and trying to address – or protect itself – now instead of later.

d) Likewise, the locality must be aware that the notice provisions, if left in the form normally found in the AIA and EJCDC documents, require notice of any claims by the locality on the same (often short) basis as that applying to the contractor.

2. Change Order provisions.

[12] Va. Code § 2.2-4363(A).
[13] *Commonwealth vs. AMEC Civil, LLC,* 280 Va. 396 (2010).

a) Awareness of how the change order process works, in conjunction with the notice or other provisions, is vital as well.

b) Va. Code Section 2.2-4309, prior to 2015, prohibited any fixed-price contract from being increased by more than 25% of the amount of the contract or $50,000, whichever is greater, without advance written approval of the Governor or his designee, in the case of state agencies, or the governing body, in the case of political subdivisions.

c) In 2010, Carnell Construction Corporation pursued a claim for an adjustment of the contract time and price, which manifested in a federal court case in Danville related to the interpretation and application of the 25% statutory cap on change orders.

d) In *Carnell*, the federal district court judge ruled that the contractor was limited in the amount of extra work the contractor could seek without a change order.[14] The judge relied upon Section 2.2-4309(A) and determined the maximum amount by taking 25% of the original contract price, and deducting the amount already added to that amount by change order.[15] This issue was further addressed by the district court (different judge) and affirmed on that issue.

e) Of note, the court concluded that this applied not only to the Commonwealth but to any political subdivision, including redevelopment and housing authorities. And, the court concluded that it applied to actions for breach of contract.

f) In 2015, the General Assembly added part (D) to Va. Code Section 2.2-4309, which repealed the cap as it applies to the pursuit of a claim or recovery against a public body, so long as the claimant complies with the "Section 2.2-4363 or any other applicable statute or regulation."[16]

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[14] *Carnell Constr. Corp. v. Danville Redev. & Hous. Auth.*, No. 4:10CV00007, 2013 U.S. Dist. LEXIS 2974, *23-25 (W.D. Va. Jan. 8, 2013), *affirmed in part, vacated in part & remanded*, 745 F.3d 703 (4th Cir. Va. 2014), *cert. denied* 135 S. Ct. 361 (2014), *superseded by* Va. Code § 2.2-4309(D).
[15] *Id.*
[16] Va. Code Ann. § 2.2-4309(D).

C. Recent Decision Addressing Public Contract Procurement Issues: Western District of Virginia declares that School Board's non-compliance with VPPA procurement rules renders contract void and contractor has no right to payment.[17]

1. **Overview**: The Lee County School Board, without following the competitive bidding process outlined in the VPPA, and through its insurance pool, hired H. S. Martin to repair two schools damaged by weather. Through its insurance pool, the School Board paid a majority of the payment applications for the work performed, which reached nearly $1,000,000.00, upon the prior authorization of the School Board. However, even after these payments, H. S. Martin had outstanding bills totaling approximately $585,000.00. When neither the Board or its self-insurance pool paid the final balance, the company brought suit for breach of contract against the School Board and bad faith breach of contract against the self-insurance pool under a third party beneficiary theory.

2. **Holding:** The court dismissed the claims against the School Board because the underlying contract between the School Board and H. S. Martin was void *ab initio* due to non-compliance with the VPPA's requirements for competitive bidding and for emergencies. The court asserted that "[w]hen a school board attempts to enter into a contract without complying with the VPPA, the school board seeks to exercise powers beyond those granted to it by the General Assembly, and the resulting contract is therefore ultra vires."[18] Additionally, the court dismissed the claims against the insurance pool because when the underlying contract is void, any claim for bad faith non-payment pursuant to that contract is void as well. Finally, the court found that H. S. Martin was never made a third party beneficiary of the insurance policy because the requisite forms did not constitute a valid contract. In sum, H. S. Martin did not have a contractual right to payment because the school board failed to follow the VPPA and could use this non-compliance as a shield against payment.

3. **Takeaway**: Construction contractors in Virginia should ensure that the public body asking the contractor to perform work both understands and follows the procurement rules.

D. Notable Updates to the VPPA Effective July 1, 2018.[19]

[17] *H.S. Martin Constr. Corp. v. Lee Cnty. Sch. Bd.*, 2016 U.S. Dist. LEXIS 176348 (W.D.Va. Dec. 21, 2016).
[18] *Id*. at *21.
[19] *See* Appendix A: Memorandum of Changes to the Virginia Public Procurement Act, Effective July 1, 2018.

1. **Va. Code § 2.2-4336(B)**[20]
    a) This new section adds a sunset date of July 1, 2021 to the provision allowing for a locality to waive the *bid bond* requirement for prequalification of a bidder with a current Class A contractor license for contracts in excess of $100,000 but less than $300,000, upon written determination made in advance that waiving the requirement is in the best interest of the locality. Additionally, this sunset date applies to the sentence providing that "a locality shall not enter into more than 10 such contracts per year."[21]

2. **Va. Code § 2.2-4337(B)**[22]
    a) This new section adds a sunset date of July 1, 2021 to the provision allowing for a locality to waive the *performance and payment bond* requirement for prequalification of a bidder with a current Class A contractor license for contracts in excess of $100,000 but less than $300,000, upon written determination made in advance that waiving the requirement is in the best interest of the locality. Additionally, this sunset date applies to the sentence providing that "a locality shall not enter into more than 10 such contracts per year.[23]

III. Some Key Concepts to Securing Payment

A. Privity of Contract.

1. A contractor can only recover breach of contract damages from the party with whom it contracted with.[24] This is privity of contract. If a contractor incurs damages due to an architect's error, and the architect did not contract with the contractor, but rather with the owner, then the contractor's claim is with the owner, not the architect.[25]

B. Notice and Submission of Claims.

1. Claims for additional time and/or money are commonplace on today's construction projects, and have been for many years. Despite the commonality of a construction claim, it is important to review and

[20] *See* HB 398.
[21] Va. Code Ann. § 2.2-4336(B).
[22] *See* HB 398.
[23] *Id*. § 2.2-4337(B).
[24] *See Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 374 S.E.2d 55 (1988).
[25] *Id*.

understand the timing and manner in which a claim is submitted to the upstream party. In Virginia, the contract is king and governs how the parties interact, and will be enforced as written absent an ambiguity or legal exception. Most construction contracts contain some form of a claim procedure, which must be followed in order to ensure your client's rights to pursue a claim for an adjustment of the contract are preserved.

2. A contractor on a private project may seek a change to the contract, but must do so in accordance with the terms of the contract. This includes complying with the notice requirements as set forth in the contract. Virginia courts will look at the contract and hold the parties to that document. Failure to follow the claim procedure can be fatal to a client's pursuit of a claim.[26]

3. Claim procedures concerning a public construction contract are strictly enforced. If a contractor believes it is entitled to an adjustment of the contract price or time, then it must, at a minimum, file a notice of intent in compliance with the Code of Virginia with the appropriate agency to preserve its right to institute and maintain a legal action for its contract claim against the public body.[27]

C. Mechanic's Lien.

1. A useful tool for contractors working on projects that are not constructed pursuant to a contract with the Commonwealth, political subdivision thereof, cities, counties, towns, and quasi-public entities.[28]

2. On new construction projects, a properly perfected and enforced Mechanic's Lien affords the lien claimant super-priority over a preexisting deed of trust.[29]

3. For construction projects concerning the repair or improvement of an existing building or structure, a properly perfected and enforced

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[26] *See Main v. Department of Highways*, 206 Va. 143, 142 S.E.2d 524 (1965); *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp. 906, 922 (E.D. Va. 1989) (holding that a contractor's claim for additional compensation was barred because of failure to promptly notify owner), aff'd in part, rev'd in part on other grounds, 911 F.2d 723 (4th Cir. 1990); *John W. Johnson, Inc. v. J.A. Jones Constr. Co.*, 369 F. Supp. 484, 494 (E.D. Va. 1973) (subcontractor's failure to obtain prior written approval for extra work precludes claim for additional compensation); *MCI Constructors v. Spotsylvania County*, 62 Va. Cir. 375 (Spotsylvania 2003).

[27] *See* Va. Code § 2.2-4363(A); *Dr. William E.S. Flory Small Bus. Dev. Ctr. v. Commonwealth*, 261 Va. 230, 238, 541 S.E.2d 915, 919 (2001); *Commonwealth v. AMEC Civil, LLC*, 280 Va. 396, 406-12, 699 S.E.2d 499, 505-08 (2010) (applying VDOT statute, which is equivalent to VPPA).

[28] *See, e.g.*, *Legg v. County Sch. Bd.*, 157 Va. 295, 160 S.E. 60 (1931).

[29] Va. Code Ann. § 43-21.

Mechanic's Lien is subordinate to any preexisting encumbrance against the land and building or structure of record before the improvements or repairs are commenced.[30]

a) This creates a precarious situation for contractors doing high-end, high-value renovation and rehabilitation work, especially on buildings and structures that are heavily leveraged.

b) Virginia courts have determined that the reconstruction of a bulkhead previously destroyed by a storm constituted new construction.[31] To the contrary, improvements to the interior of a building, including the conversion of an apartment building to condominiums, without alterations to the exterior, are improvements rather than new construction.[32]

4. It is paramount to the successful use of a Mechanic's Lien that Memorandum for Mechanic's Lien comply with the requirements of Title 43 of the Code of Virginia.[33]

a) Correctly identify the property and the property owner.

b) Correctly identify other upstream parties.

c) Abide by the 150-Day Rule.[34]

i. "The lien claimant may file any number of memoranda but no memorandum filed pursuant to this chapter shall include sums due for labor or materials furnished more than 150 days prior to the last day on which labor was performed or material furnished to the job preceding the filing of such memorandum."[35]

d) Abide by the 90-Day Rule.[36]

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[30] Va. Code Ann. § 43-21.
[31] *Strauss v. Princess Anne Marine & Bulkheading Co.*, 209 Va. 217, 222-23, 163S.E.2d 198, 202 (1968).
[32] *Hanson Assocs., P.C. v. Gallery Plaza P'ship*, 32 Va. Cir. 356, 359 (Richmond 1994) ("It is but fair that the building should present to the eye that external change indicating newness of structure which is calculated to put purchasers, mortgagees and other lien-creditors upon an inquiry for liens." *Quoting Miller v. Hershey, 59 Pa. 64, 69 (1868))*; *First State Holdings, Inc. v. Shor Leesburg Assocs. Ltd. P'ship*, 28 Va. Cir. 314 (Loudoun 1992).
[33] Va. Code Ann. §§ 43-1 through 43-23.2 govern Mechanic's and Materialmen's Liens.
[34] Va. Code Ann. § 43-4.
[35] *Id.*
[36] Va. Code Ann. § 43-4.

i. "[F]ile a memorandum of lien at any time after the work is commenced or material furnished, but not later than 90 days from the last day of the month in which he last performs labor or furnishes material, and in no event later than 90 days from the time such building, structure, or railroad is completed, or the work thereon otherwise terminated."[37]

D. Recent Decision Addressing Mechanic's Lien Challenge: Supreme Court of Virginia holds that minor defects in a memorandum for a mechanic's lien do not prevent substantial compliance with the law.[38]

1. **Overview**: A.R. Design Group, Inc. ("A.R. Design") recorded a mechanic's lien for each of two properties for which Ulka Desai served as trustee. A.R. Design used Form CC-1512 from the Virginia judiciary's website for its memoranda. Plaintiff challenged the validity of the liens, arguing the memoranda were defective because: (1) one memorandum never listed the owner of the property because it failed to specifically name her as "trustee;" (2) both memoranda improperly identified Abbas Rouhani, Vice President, as the claimant instead of the agent; and (3) both memoranda failed to list either an interest accrual date or a date on which the debt is due. The trial court sustained the validity of the liens and it was appealed to the Supreme Court of Virginia.

2. **Holding**: First, because Ulka Desai, as trustee, had the right to sell and encumber the property, she was properly identified as the "owner" on the memorandum pursuant to Virginia Code § 43-4 and adding the word "trustee" was unnecessary. Next, although Abbas Rouhani signed his name as Vice President and the memoranda listed A.R. Design as the claimant, the memoranda were sufficiently compliant because a defect in a memorandum of mechanic's lien is substantial pursuant to §§ 43-5 and 43-15 only if it would prejudice a party or thwart one of the purposes underlying the statute. Ulka Desai did not argue that she was misled or confused in any way concerning the claimant. Finally, A.R. Design did not have to list an interest accrual date, and Plaintiff was not prejudiced in any way because although § 43-4 states that a memorandum shall show the time or times when the amount is or will be due and payable, § 43-5 states that a memorandum should state "the same is payable as therein stated," and does not require a specific date payable. A.R. Design's memoranda

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[37] *Id.*

[38] *Ulka Desai v. A. R. Design Grp., Inc.*, 293 Va. 426, 799 S.E.2d 506 (2017).

were recorded on a form that included this language and, thus, indicated that the amount was due and payable as of the date of the memoranda.

3. **Takeaway**: A mechanic's lien with minor defects that (1) sufficiently identifies an owner, (2) does not prejudice a party or thwart the purposes of the underlying statute, and (3) states a sufficiently identifiable interest accrual date, substantially complies with statutory provisions.

4. The *Ulka Desai v. A. R. Design Grp., Inc*. decision should not be construed as a free-pass to make mistakes. Mechanic's Liens remain a malpractice trap, and courts are still inclined to enforce the letter of the Code of Virginia.

E. Recent Decision Addressing Mechanic's Lien Challenge: Circuit Court of Hanover County declares that multiple variations of a claimant's name listed on a memorandum for a mechanic's lien is not substantially compliant with the law.[39]

1. **Overview**: Without the assistance of an attorney, a memorandum of lien was recorded by G. H. Watts in which the claimant was identified as "G. H. Watts Construction, Inc." while the signatory on the memorandum of lien and the claimant identified in the notary block were identified as "Gary H. Watts" and "Gary Watts," respectively. The memorandum did not identify Gary Watts' capacity as it related to the company, nor did it state that Gary Watts was an agent for claimant. G. H. Watts Construction, Inc. attempted to enforce the lien and Cornerstone filed a demurrer arguing, among other things, that the memorandum of lien was not in proper substance or form to meet the requirements of Va. Code § 43-1 et seq.

2. **Holding**: Because the memorandum identified three separate claimants in different sections of the document, the court sustained the demurrer, holding that the memorandum did not substantially in form and effect identify the claimant as required by Va. Code § 43-8. The court discharged the lien and released the lien bond.

3. **Takeaway**: A plaintiff will lose its right to enforce a mechanic's lien if the mechanic's lien fails to substantially comply with statutory provisions by listing multiple claimant names.

F. Payment Bond

[39] *G.H. Watts Constr., Inc. v. Cornerstone Builders, LLC*, 2017 Va. Cir. LEXIS 30 (Hanover County, Jan. 27, 2017).

1. Because a contractor cannot lien federal property, payment bonds have long been in use on federal construction projects as a means for subcontractors and materialmen to obtain payment in the event the general contractor became insolvent. Virginia has followed suit, and enacted legislation that is very similar to that of the federal government.[40]

2. Payment bonds, however, are not limited to public construction projects. In fact, payment bonds are becoming quite popular with large private construction contracts.

3. On public projects, the provider of the payment bond, known as the principal, must provide a bond that complies with the applicable law.

4. On private projects, the bond form controls. It is extremely important counsel and the client read and understand the bond, and the requirements therein. Failure to satisfy the terms of the payment bond will be fatal to a contractor's claim against the bond.

IV. **Some Key Insurance Concepts**

A. <u>Construction Insurance, generally.</u>

1. Construction insurance, whether to fulfill a contractual requirement or for a company's peace-of-mind, is a tool to protect against those risks that cannot be shifted to another party. The right insurance can alleviate the potential financial hardship presented by an indemnification claim, a property damage claim, or a host of other unfortunate events. In addition, a contractor's insurance policy may require the insurer to provide a legal defense for the insured contractor. This too can be a significant benefit to the insured contractor. In each instance, the policy language will control the insurer's defense and coverage obligations.

B. <u>Commercial General Labiality ("CGL").</u>

1. Provides coverage for the insured contractor's legal liability to a third-party for certain events of property damage, bodily injury, or personal and advertising injury.

2. CGL does not automatically cover the contractor's cost to replace or repair defective workmanship.[41]

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[40] *See* Va. Code Ann. § 2.2-4337.

[41] *Boiler Brick & Refractory Co. v. Maryland Cas. Co.*, 210 Va. 50, 53, 168 S.E.2d 100, 102-03 (1969);

C. Professional Liability, Error and Omissions (E&O).

1. Provides coverage for professionals that fail to perform in accordance with the applicable standard of care. Put another way, E&O provides coverage for certain risks inherent in the professional's performance of its profession.

2. With the ever growing shift from traditional design-bid-build projects to design-build, many general contractors procure E&O coverage in an effort to protect the business from possible "professional" type claims.

D. Builder's Risk.

1. Builder's Risk provides coverage for the insured in the event the construction project is damaged while work is underway.

2. The contract should clarify if owner or General Contractor will procure this coverage.

3. Losses arising out of defective design, faulty workmanship, errors in manufacturing or distribution, etc., are generally excluded.[42] This is often referred to as the "Faulty Workmanship" exclusion.

4. Other common exclusions to a Builder's Risk policy may include: pollution[43], earth movement[44], latent defect[45], water and flood damage[46], and collapse[47].

V. Some Key Points for Interacting with OSHA Laws and Administration

A. Essential Principles of OSHA and VOSH.

1. Federal 1970 Occupational Safety and Health Act (OSH Act) Implemented through the Occupational Safety & Health Administration (OSHA).

Nationwide Mut. Ins. Co. v. Wenger, 222 Va. 263, 267-68, 278 S.E.2d 874, 876-77 (1981).
[42] ISO form CP 00 20 10 91, *see e.g. Nat'l Hous. Bldg. Corp. v. Acordia of Va. Ins. Agency, Inc.*, 267 Va. 247, 591 S.E.2d 88 (2004).
[43] ISO form CP 10 20 04 02.
[44] *Sentinel Assoc. v. American Mfrs. Mut. Ins. Co.*, 804 F. Supp. 815, 818 (E.D. Va. 1992)
[45] ISO form CP 10 20 04 02.
[46] *Id.*
[47] *Id.*

2. Virginia implements the OSH Act within the Commonwealth through the Virginia Occupational Safety & Health (VOSH) program of Virginia Department of Labor & Industry (DOLI).

   a) Title 40.1 of the Code of Virginia authorizes the VOSH program.

   b) The DOLI Regulations implementing the program are found at 16 VAC 25-60-10 et seq. (Virginia Administrative Manual).

3. "General Duty" Clause: Mandates that every employer furnish safe employment free from recognized hazards that are likely to cause death or serious physical harm to employees (Va. Code § 40.1-51.1).

4. Each employer is required to comply with all applicable occupational safety and health standards promulgated by the DOLI.

   a) VOSH generally follows standards developed by Federal OSHA (contained in the Code of Federal Regulations, Title 29, Part 1900).

   b) The two main sets of standards are: General Industry Standards (29 CFR Part 1910) and Construction Industry Standards (29 CFR Part 1926).

   c) Virginia has unique standards in certain construction and agricultural areas.

5. Where a specific standard applies, the General Duty Clause cannot be cited as a basis for a violation.

6. Employers also have notice, posting, record keeping, and reporting requirements.

   a) Every employer must report to the DOLI within 8 hours of any worker fatality, and within 24 hours of any amputation, loss of any eye, or the inpatient hospitalization of a worker.

7. Employees also have a statutory duty to comply with all rules, regulations, and orders that apply to the employee's own action and conduct (Va. Code § 40.1-51.2), but employees are not subject to penalties, and courts are hesitant to hold employees to these standards in any meaningful way.

8. DOLI monitors compliance with VOSH program through inspections of the workplace.

9. DOLI issues citations and assesses penalties for violations and level of citations varies depending upon the seriousness of the violations in relationship to likelihood of serious injury or death resulting from the violation. Legislation enacted this term by the General Assembly – HB No. 1883 – raises the penalty amounts based on federal increases. Effective July 1, 2017: "Serious", "Other than Serious", "Posting Requirements": up to $12,471, per violation; "Willful": up to $124,709, per violation; "Willful" causing death: $124,709 plus 6 months imprisonment (double for second offense); "Repeated": $124,709; "Failure to abate": $12,471 per violation per day.[48]

10. DOLI enforces the citations (if challenged by the employer and settlement not reached) by filing a Bill of Complaint to enforce the citation in the Circuit Court in the jurisdiction where the violation occurred

    a) Notice of Contest must be filed within 15 working days of receipt of the Citation.

    b) There are defenses to citations, such as employee misconduct, infeasibility, and violation having been created/caused by another employer on worksite (under certain conditions).

B. <u>Effect on Civil Litigation/Worker's Compensation Practice</u>.

1. Forms kept by employer can be informative about the accident at issue or about previous workplace injuries or medical conditions of an employee.

    a) OSHA No. 300 form: Employers are required to keep an annual log and summary of all occupational injuries and illnesses, unless the business has 10 or fewer employees or business has certain SIC (Standard Industrial Classification) code (e.g., law firms).

    b) OSHA No. 301 form: Supplementary detailed record describing how the injury or illness exposure occurred, lists the objects or substances involved, and indicates the nature of the injury or illness and the part(s) of the body affected.

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[48] *See Nat'l Coll. of Bus. & Tech., Inc. v. Malveaux*, 60 Va. App. 22, 31, 723 S.E.2d 270, 274 (2012);*See also Nat'l Coll. of Bus. & Tech., Inc. v. Davenport*, 57 Va. App. 677, 680, 705 S.E.2d 519, 521 (2011).

c) DOLI allows the "First Report of Injury" forms used in workers' compensation to substitute if it contains all the required information.

d) Safety Data Sheets (SDSs) required under the Hazard Communication (HazCom) Standard provide information about toxic and hazardous substances to which workers might have been exposed.

e) Information could be obtained by subpoena to the Employer (records are maintained for five years).

f) Regulations also require employers to maintain employee medical records for at least 30 years.

2. Effect of OSHA Citation and/or Penalty in Related Civil Litigation: Under Va. Code § 40.1-51.3:2, evidence of citation, voluntary payment of civil penalty, or judicial assessment of a civil penalty is inadmissible:

   a) In the trial of any action to recover for personal injury or property damage sustained by any party, in which action it is alleged that an employer acted in violation of or failed to act in accordance with any provision of this chapter or any state or federal occupational safety, health and safety standards act, the fact of the issuance of a citation, the voluntary payment of a civil penalty by a party charged with a violation, or the judicial assessment of a civil penalty under this chapter or any such state or federal occupational safety, health and safety standards act, shall not be admissible in evidence.

3. Information about an Investigation by DOLI can be sought under the Freedom of Information Act or Subpoena to DOLI (be prepared for DOLI to take various positions about why it cannot/will not release the information and be prepared to challenge).

4. Violation of OSHA Standard is not Negligence or Contributory Negligence per se, but is means of establishing the relevant standard of care.

5. Illegal for Employer to discriminate against employee who has filed a complaint, testified, or otherwise acted to exercise rights under Title 40.1 (resulting Whistleblower cases).

COMMONWEALTH of VIRGINIA

Department of General Services
Division of Purchases and Supply

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July 5, 2018

MEMORANDUM

TO: Purchasing Offices
Departments, Institutions, Agencies
Commonwealth of Virginia

FROM: J. Peter Stamps
Director, DPS

SUBJECT: Changes to the *Virginia Public Procurement Act*, Effective July 1, 2018

The 2018 session of the General Assembly made changes to the *Virginia Public Procurement Act (VPPA)* that took effect July 1, 2018 or later. Attached is an unofficial copy of the *VPPA* incorporating those changes. Changes are indicated by arrows (➪) in the margin. After June 30, 2018, the 2017 version of the *VPPA* issued by the Division is obsolete.

The following is a brief summary of the significant changes made by the 2018 General Assembly, which are reflected in this copy. For judicial or other legal uses, consult the *Code of Virginia.*

§ 2.2-4303.G *Methods of Procurement*

Increases the dollar threshold for single or term professional services contract procedures from $60,000 to $80,000.

§ 2.2-4303.1.B *Architectural and professional engineering term contracting; limitations.*

Increases the sum of all projects performed in a one-year contract term from $500,000 to $750,000.

§ 2.2-4304.B.2 *Joint and cooperative procurement.*

Clarifies that installation of artificial turf and track surfaces, stream restoration and storm water management practices, including all associated and necessary construction and maintenance are not considered construction for purposes of Subsection B.

§ 2.2-4306-2.2-4308 *Repealed*

Adds reference of *Acts 2017, cc. 699 and 704, cl.2.*

§ 2.2-4310 *Discrimination prohibited; participation of small, women-owned, minority-owned, and service disabled veteran-owned businesses and employment services organizations.*

Technical correction of section title. Changed from "service disabled veteran business and employment services organization" to service disabled veteran-owned businesses and employment services organizations"

§ 2.2-4310.B Adds contracts and subcontracts awarded to service disabled veteran-owned business shall be credited toward the small business, women-owned, and minority-owned business contracting and subcontracting goals of state agencies and contractors.

§ 2.2-4310.2 *Executive branch agency's goals for participation by small businesses; requirements.*

Title and section content changed from "state agency's" to "executive branch agency's".

Removed definition reference of "information technology" and "state agency" and added reference to "executive branch agency" as defined in § 2.2-2006.

§ 2.2-4326 *Preference for recycled paper and paper products used by state agencies.*

Adds the word "former" in reference to the EPA Recommended Content Standards as defined in former 40 C.F.R. Part 247.

§ 2.2-4336 *Bid bonds.*

§ 2.2-4336.B Adds expiration date of July 1, 2021 to current Subsection B.

§ 2.2-4336.B Adds effective date of July 1, 2021 to new Subsection B.

- New Section B removes last two sentences: "However, a locality may waive the requirement for prequalification of a bidder with a current Class A contractor license for contracts in excess of $100,000 but less than $300,000 upon a written determination made in advance by the local governing body that waiving the requirement is in the best interests of the locality. A locality shall not enter into more than 10 such contracts per year."

§ 2.2-4337 *Performance and payment bonds.*

§ 2.2-4337.A Adds expiration date of July 1, 2021 to current Subsection A.

§ 2.2-4337.A Adds effective date of July 1, 2021 to new Subsection A.

New Section A removes payment and performance bond requirements and adds bid bond requirements.

§ 2.2-4337.B New Section B removes last two sentences of Section B. "However, a locality may waive the requirement for prequalification of a contractor with a current Class A contractor license for contracts in excess of $100,000 but less than $300,000 upon a written determination made in advance by the local governing body that waiving the requirement is in the best interests of the locality. A locality shall not enter into more than 10 such contracts per year."

§ 2.2-4342.F *Public inspection of certain records.*

Adds "A bidder, offeror, or contractor shall not designate as trade secrets or proprietary information (a) an entire bid, proposal, or prequalification application; (b) any portion of a bid, proposal, or prequalification application that does not contain trade secrets or proprietary information; or (c) line item prices or total bid, proposal, or prequalification application prices."

§ 2.2-4343 *Exemption from operation of chapter for certain transactions.*

§ 2.2-4343.A.12 Adds Reference to § 2.2-4342

§ 2.2-4343.A.22 Adds that Virginia-grown food products purchased for use by a public body under $100,000 annually shall obtain written informal solicitations of a minimum of three bidders or offerors if practicable and include a written statement regarding the basis for awarding the contract.

§ 2.2-4345.A.4 *Exemptions from competitive sealed bidding and competitive negotiation for certain transactions; limitations.*

Removes expiration date for the Virginia Alcoholic Beverage Control Authority for alcoholic beverage purchases.

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Death Cases: How to Allow Your Deceased Client to Tell a Powerful Story for the Estate

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DEATH CASES
How to Allow Your Deceased Client to Tell a Powerful Story for the Estate

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Gregory D. Habeeb
Andrew D. Finnicum

Gentry Locke Seminar
September 7, 2018

Your phone rings regarding a new potential case. The grieving family member on the line explains there has been an untimely death of a young professional, which indicates to you the possibility for high lost earning capacity and special damages. However, the family member then explains the decedent died unmarried, had no children, was not providing financial assistance to any dependents, and lived in a state hundreds of miles away from any potential beneficiaries he left behind. He also died at the scene and no medical expenses were incurred.

Under Virginia Code § 8.01-52, the beneficiaries will have no recoverable economic damages other than the cost of the funeral. Instead, the damages must be based on the "[s]orrow, mental anguish, and solace" of the beneficiaries. *See* Va. Code Ann. § 8.01-52. Given these restrictions on damages, how do you obtain fair and just compensation for the beneficiaries, knowing the other side will not properly value their loss? In addition, how will you value this type of loss and how will you put your damages evidence together? This presentation discusses one recent case our firm handled involving this precise situation.

On August 11, 2017, Graham McCormick, an up-and-coming finance analyst from Atlanta was drowning in the midnight waters of Carter's Creek. His "friend," Rand Hooper, knew there had been a crash and knew Graham was in the water. Instead of calling for help, Rand Hooper piloted his father's boat back to his parents Creekside home and went to bed. The next morning he reported Graham missing and claimed he knew nothing about what had happened.

Graham McCormick died unmarried and childless. He left behind his devoted parents and a beloved younger brother and sister.

Graham's family refused to accept Rand Hooper's story that Graham had simply disappeared in the middle of the night. When local law enforcement got involved, Rand Hooper suddenly "remembered" that there had been a boating crash that led to Graham's death. Rand Hooper claimed he could not remember who was driving his father's boat. Witnesses confirmed Rand Hooper had been drinking the night of the crash.

Initial investigations revealed Rand Hooper had a history of alcohol-related misconduct: underage drinking; multiple charges for underage possession of alcohol; multiple driving-while-intoxicated convictions; and charges related to an alcohol-fueled shooting incident in Richmond. Additional investigation revealed Rand Hooper had a history of fleeing the scene of a crash to avoid prosecution and claiming an inability to remember to avoid answering questions.

Given this history, the Complaint alleged Rand's parents, who owned the home and the boat, were aware of all his past alcohol-fueled misconduct. The Administrators of Graham McCormick's Estate sued Rand for negligence and sued the Hoopers for negligent entrustment. This was done in part out of concern that the applicable insurance policies would exclude deny coverage based on the nature of Rand's conduct.

These written materials first address the negligent entrustment issues relevant to the case. These written materials then address the proper valuation of non-economic wrongful death claims in Virginia. Finally, these materials address admiralty issues that arise anytime a death or other personal injury occurs in "navigable waterways."

I. Negligent Entrustment

Model Jury Instruction No. 7.010 reads as follows:

> The plaintiff, contends that the defendants, are liable because they permitted their vehicle to be used by an unfit driver whose negligence, as a result of the unfitness, caused the accident. An unfit driver is a person who, because of his drug/alcohol impairment [age, inexperience; physical condition; mental condition], is likely to use a motor vehicle in a manner involving unreasonable risk of harm to others. Plaintiff must prove by the greater weight of the evidence that:
>
> (1) defendants expressly or impliedly permitted the driver to drive their vehicle; and
>
> (2) the driver was an unfit driver; and
>
> (3) defendants knew, or should have known, that the driver was an unfit driver; and
>
> (4) the driver was negligent as a result of the unfitness; and
>
> (5) the driver's negligence was a proximate cause of the plaintiff's injuries.
>
> Permission is express when it is given directly. Permission is implied when it is gathered from the circumstances, general language, or conduct of the parties.

(1) Express or implied permission

Absent express permission, permissive use may be implied from a pattern of conduct to hold an owner liable for negligent entrustment. *Denby v. Davis*, 212 Va. 836, 838 (1972). To establish permission, the Complaint alleged that the Hoopers gave Rand broad access to their estate, their cars and boats, and their alcohol. The Complaint also alleged the Hoopers had security cameras that streamed in real time to their smart phones, with which they saw or should have seen Rand use the boat.

(2) Unfit driver

In this case, the Complaint alleged Rand had a long history of driving under the influence of alcohol, that he had consumed large amounts of alcohol the night of the crash, and that he operated the boat under the influence of alcohol.

(3) Knowledge of Unfitness

Ordinarily, negligence on the part of the entrustee does not render the owner liable. *Dreher v. Budget Rent-A-Car System, Inc.*, 272 Va. 390, 395 (2006). The test of liability under is whether the owner knew or had reasonable cause to know that he was entrusting his motor vehicle to an unfit driver likely to cause injury to others. *Hack v. Nester*, 241 Va. 499, 505 (1990).

In the case of intoxication, there must be actual or imputable knowledge that the person to whom the vehicle is entrusted is addicted to the use of intoxicants or has the habit of drinking. *McNeill v. Spindler*, 191 Va. 685, 690-91 (1950) (citing *Crowell v. Duncan*, 145 Va. 489 (1926)) (emphasis added). Said differently, the owner must know or be chargeable with knowledge that the driver's habits are such that he is likely to drive while he is intoxicated. *Id.* at 691.

In *McNeill*, the Court cited several reasons the defendants didn't have knowledge that the driver working for them was unfit: he had been driving for them for nine years and never had an accident; no one had ever seen him driving while intoxicated and no one had ever charged him with doing that; and the driver did not have a reputation of being "a drinking man or addicted to liquor." *Id.* at 691. Thus, the employer's knowledge the driver was willing to take a drink was not enough, because "[i]f only teetotalers could be employed, many vehicles would probably stand idle." *Id.*

In contrast, in *Crowell v. Duncan*, cited in *McNeill*, the defendant's son drove the defendant's automobile at an excessive speed after consuming two or three drinks of whiskey and negligently ran into and injured the plaintiff. The Supreme Court of Virginia found there was sufficient evidence that the father negligently permitted his son, who was known to drink, to use his automobile without restriction. *Crowell*, 145 Va. at 508. In language reflective of the prohibition era, the *Crowell* Court held:

> It is commonly known that one who is most competent and careful as an operator of an automobile when perfectly sober, becomes incompetent and reckless after indulgence in one or two drinks. So unfailingly is this true that one who is given to drinking intoxicating liquor must be regarded as an unsafe and a potentially incompetent and dangerous driver, and the owner of an automobile who knows of such habits and entrusts it to such a driver may be liable for injuries to third persons which follow.
> *Crowell v. Duncan*, 145 Va. 489, 508 (1926).

While *Crowell* remains good law, a successful plaintiff likely needs additional facts to succeed on a negligent entrustment claim today.

In our case, Rand had a history that included multiple alcohol-related criminal charges, multiple alcohol-related criminal convictions, multiple driving-while-intoxicated convictions, and multiple instances where his license to drive was suspended or restricted due to alcohol-related misconduct. The Complaint alleged Rand's parents had actual or constructive knowledge of this history.

(4) Rand Hooper was negligent as a result of the unfitness.

Knowledge of unfitness, however, is not enough for the plaintiff to prevail. Rather, the plaintiff must also establish that the crash occurred because of the unfitness. The Complaint must allege, and the evidence must thereafter establish, that the known unfitness caused the driver's negligent conduct.

(5) Proximate cause.

Similarly, the negligent entrustment must be a proximate cause of the accident. That is to say, the entrustee's disqualification, incompetency, inexperience, intoxication, or recklessness must be a cause of the injury. *Hack v. Nester*, 241 Va. 499, 503-04 (1990). In our case, the Complaint alleged Rand consumed alcohol the night of the death, then crashed his father's boat in a familiar waterway with no alternative explanation for the crash other than his intoxication.

Practice pointers:

- Make your negligence entrustment allegations far more detailed than a standard negligence Complaint. Our Complaint is attached as an example. Notably, no demurrer was ever filed against our negligent entrustment count.

- Go the extra mile in discovery. Remember that prior misconduct that may not typically be relevant in a personal injury case can be very relevant to the constructive knowledge component of a negligent entrustment claim. Thus, in an intoxication case, every fact going to show that an entrustee had a known history with alcohol may be relevant to the entrustor's knowledge.

- Think outside the box. Negligent entrustment claims can be difficult and very fact-specific. However, even fighting and losing the battle over a negligent entrustment claim may educate the insurance adjuster, the court, or the jury about the problems with the defendant driver.

II. Evaluating "Solace Only" Wrongful Death Claims

Getting full value in wrongful death claims with no spouse, no children, no dependents, and no economic damages is notoriously difficult. Virginia's wrongful death statute, Va. Code § 8.01-50 et. seq., provides damages as may seem "fair and just." Given Virginia's statutory punitive damages cap, even truly egregious facts on liability may not greatly increase the potential recovery. Va. Code § 8.01-38.1 (1950, as amended).

Solace damages are a non-pecuniary damage and are awarded to the beneficiaries[1] for the alleviation of grief. Actual proof of sorrow or suffering by the deceased's beneficiaries is not necessary. In fact, the jury can infer sorrow, suffering and mental anguish by virtue of the death itself. Requiring the plaintiff to prove solace damages with "mathematical precision would be illusory." *Sawyer v. United States*, 465 F.Supp. 282, 292 (E.D. Va. 1978) (citing *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 590 (1974)). As the court stated in *Sawyer*:

> Needless to say, loss of comfort, guidance and society, like sorrow, mental anguish and solace, are virtually incalculable except in a rough and gross manner. There is no measure of the love of or for a dear one. . . . Money is no substitute, and under our statute the amount which may be awarded is what "may seem fair and just." Such an award is not suggested or intended to be replacement of the loss sustained. It is the mans provided by which the damaging party may make some amends for the wrong done.

465 F.Supp. at 292.

Similarly, no proof of actual financial deprivation is required to prove loss of the decedent's care, attention and society. Furthermore, dependency is not a condition precedent to the recovery of "solace" damages. Evidence of the character and habits of the deceased is admissible to prove his worth to the survivors. When determining solace damages, the trier of fact considers all the facts and circumstances of the case. *Id*. "[T]he judge or jury must be allowed to make a reasonable approximation, guided by judgment and practical experience." *Id*.

Even when there are no loss of income damages, the plaintiff still has the opportunity to show loss of care and assistance and introduce evidence of the decedent's life expectancy. In *Graddy v. Hatchett*, a Norfolk City jury awarded the plaintiff over $400,000 for the wrongful death of a 16 year-old male who was killed in a car accident. 233 Va. 65, 67 (1987). The statutory beneficiaries were his parents, a brother, and four half-siblings. *Id*. at 71. At trial, the plaintiff introduced evidence of life expectancy pursuant to Virginia Code § 8.01-419 and argued for the recovery of solace damages and damages under Virginia Code § 8.01-52(2)(ii) for "any reasonably expected loss of services, protection, care, and assistance." *Id*. at 70. The defendant appealed on the issue that the evidence of life expectancy was irrelevant because there was "no evidence of pecuniary loss to the beneficiaries and there was no evidence . . . of any kind of

[1] Who qualifies as a beneficiary is set forth in Virginia Code § 8.01-53.

dependency by any of the beneficiaries on the decedent." *Id*. (internal quotations omitted). The Supreme Court of Virginia disagreed.

The Court first noted that the life expectancy table is admissible to "establish the extent of loss for" loss of "society, companionship, comfort, guidance, advice, services, protection, care, and assistance provided by the decedent." *Id*. at 71. The Court went on to recount that the testimony at trial was that the "family members were devoted to each other[,]" that "the decedent often took care of the children of a sister; he assisted a brother in his work in cleaning and performing odd jobs[; he] helped his mother with shopping, washing and cleaning," etc. Based on the evidence of comfort and assistance provided to the family, the life expectancy table was properly admitted. *Id*.

Failure to grant solace damages without a rational reason for doing so is a basis to set aside the verdict. In *Johnson v. Smith*, the jury failed to award the decedent's widow and children any amount for sorrow, mental anguish, and solace. 241 Va. 396, 400 (1991). The plaintiff moved to set aside the verdict, which the trial court denied, and the plaintiff appealed. *Id*. at 397. The Supreme Court of Virginia found the denial of solace damages incompressible and a clear shock to the conscience, vacated the verdict, and remanded the case for a new trial on the damages. *Id*. at 401.

Thus, even if the decedent had no economic dependents, a damages award can include amounts for solace, for loss of services and assistance, for expenses for his care and treatment, for reasonable funeral expenses, and for punitive damages – each upon the proper proof. The amount of a verdict or a settlement will likely depend on the testimony of his family as to the closeness of the family, their interactions, and the decedent's continued assistance (even babysitting, homework, etc.).

Adjusters will often take a dim view of the value of these types of cases because there are no dependent children and there is no spouse. As a result, it may be difficult to claim lost wages or loss of earning capacity. *See generally Conrad v. Thompson*, 195 Va. 714, 721, 80 S.E.2d 561, 566 (1954) ("We have frequently held that an action for wrongful death is not for the benefit of the decedent's estate, but for certain near relatives"); *O'Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345 (E.D. Va. 1981) ("The damages specified in § 8.01-52 as recoverable are designed to compensate the beneficiaries for the losses they suffer as a result of the decedent's death, and not to accumulate an estate for the decedent"). To maximize value and educate the adjuster and defense counsel, Plaintiff's counsel should reinforce early and often the fact that the insurance adjusters are using faulty data sets when evaluating so-called "solace only" death claims in Virginia. Many settled death claims are capped either by the medical malpractice cap or by insufficient insurance coverage, which even in the best cases often only covers $1 million.

Thus, while the below is a table of verdicts and settlements in Virginia where no economic loss could be or actually was claimed, plaintiffs should not allow these results to be used by defendants to suggest a low value in "solace only" death cases. Prior to the McCormick case, the range of reported recovery was from a $100,000 insurance cap in 1993 to a $6 million jury verdict in 2016. The average award was $1,399,670. The average after eliminating the highest and lowest awards as outliers was $1,124,615.

Year	Decedent Description	Manner of Award	Award	Beneficiaries
2016	24 y/o Female licensed cosmetologist, worked at DMV	Jury Verdict	$6 million	Parents and brother
2010	22 y/o high school graduate lived at home and employed as wire-cut technician	Settlement/Umbrella policy with $1 million limit	$1 million	Parents and two siblings
2015	34 y/o male tractor trailer driver	Settlement	$395,000	Aunt & uncle, siblings
2011	37 y/o optometrist	Settlement	$2 million	Parents and three siblings
1999	27 y/o male	Settlement	$700,000	Parents and three siblings
2015	Person sitting at home when defendant's car ran through his wall, killing him	Settlement	$1.4 million	Mother, three siblings
1997	24 y/o male, employed	Settlement before filing	$370,000	Parents and two adult siblings
2014	18 y/o female	Jury Verdict/Insurance ($750,000 limit)	$1,880,385	Parents and three half siblings
1999	48 y/o female systems analyst for IBM	Settlement	$375,000	Mother, two adult siblings
2012	20 y/o male	Settlement	$1.5 million	Parents and five siblings
2010	73 y/o male	Settlement	$700,000	Mother, four siblings, three estranged adult children
1993	Elderly British citizen visiting her family in the U.S.	Settlement/Insurance $100,000 limit-defendant was 19	$100,000	No economic loss, two adult beneficiaries
2008	77 y/o female	Settlement	$675,000	Two adult children, no economic loss
2006	74 y/o male retired, no pension rights	Settlement	$2.5 million	Wife of 51 years, three adult children, one grandchild, no economic loss

Notably, even one significant case can meaningfully change the value of these cases. Thus, after the $4 Million McCormick settlement, the new average result is $1,573,025. The average after eliminating the highest and lowest awards as outliers is now $1,345,798. Our results in the McCormick case demonstrate the high value that is still recoverable in "solace only" death cases.

III. Admiralty Law in Wrongful Death Boating Accidents

What is Admiralty Law?

When a death—or any other personal injury—occurs in a body of water, admiralty law issues may arise. Admiralty, or maritime, law is part of our federal system. "The admiralty jurisdiction in England and in this country was born of a felt need to protect the domestic shipping industry in its competition with foreign shipping, and to provide a uniform body of law for the governance of domestic and foreign shipping, engaged in the movement of commercial vessels from state to state and to and from foreign states." *See Crosson v. Vance*, 484 F.2d 840, 840 (4th Cir. 1973). It has since broadened from its initial purpose to include a variety of activities not obviously related to commercial navigation.

Why would the Defendant invoke admiralty jurisdiction?

First, if multiple deaths or injuries occurred, the Defendant can invoke admiralty law and federal jurisdiction to centralize all claims, bringing everyone into the same court even if the parties are not diverse. Second, and often most important, if a defendant is the owner of the boat—but not the operator of the boat at the time of injury—the owner may be able to limit her liability for damages to the value of the vessel and cargo if the "injury by collision" occurred "without the privity or knowledge of the owner." *See* 46 U.S.C. § 30505(b); *See also Coryell v. Phipps*, 317 U.S. 406 (1943).

However, admiralty jurisdiction has some benefit for plaintiffs as well. A federal court sitting in admiralty jurisdiction applies federal, not state common law. Therefore, in cases where contributory negligence is a strong defense, the plaintiff may prefer to bring the claim in admiralty. *See Mullenix v. United States*, 984 F.2d 101 (4th Cir. 1993). Contributory negligence is not a defense in admiralty law, rather, contributory negligence serves only to reduce damages. *See Dise v. Express Marine, Inc.*, 476 Fed. Appx. 514, 518 (4th Cir. 2011) ("[Federal admiralty law] rejects the doctrine of contributory negligence in favor of comparative negligence…"); *see also Holley v. The Manfred Stansfield*, 269 F.2d 317, 320 (4th Cir. 1959) ("Undeniably, had [the Plaintiff's husband] survived, the admiralty rule would have governed under which contributory negligence merely reduces the damages").

How do you determine if a case is subject to admiralty jurisdiction?

(1) The "Locus"

The alleged wrong must occur or be located over a navigable waterway, or have been caused by a vessel on navigable water; and

(2) The "Nexus"

(a) This general type of incident must have a potentially disruptive impact on maritime commerce; and

(b) The activity must bear a significant relationship to traditional maritime activity.

See Jerome B. Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995).

The Locus: "Navigable Waterway"

Navigability is based on a waterway's *capability* to bear commercial navigation: "Waters are navigable when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Mullenix v. United States*, 984 F.2d 101, 104 (4th Cir. 1993). Note the waterway does not have to be currently supporting commercial navigation; it only needs to be capable of it. *See Price v. Price*, 929 F.2d 131 (4th Cir. 1991)(holding the Kerr Reservoir, Philpott Lake, and Lake Gaston all were navigable waterways).

The Nexus: What is a "Traditional Maritime Activity"?

Traditional maritime activity now often includes activities that arguably appear completely unrelated to commercial activity. Thus, a claim that a passenger disembarking from a pleasure craft was injured by excessive wakes in the Kerr Reservoir was deemed traditional maritime activity. *See Price v. Price*, 929 F.2d 131 (4th Cir. 1991). Claims involving a collapsing chair on a boat were also subject to admiralty jurisdiction, *see Bradford v. Ind. & Mich. Elec. Co.*, 588 F. Supp. 708 (S.D. W. Va. 1984), as were claims involving fishing, *Godfrey v. Little River Fishing Fleet, Inc.*, 396 S.E.2d 828 (S.C. 1990), and parasailing, *Cobb v. Aramark Sports and Entertainment Services, LLC*, 933 F. Supp. 2d 1295 (D. Nev. 2013).

In our case, Gary and Lucy Hooper filed a Limitation Complaint stating that admiralty law governed the case because the boat commenced its voyage on a tributary of the Rappahannock River, a navigable waterway of the United States. The Limitation of Liability Act of the United States, 46 U.S.C. §§30501-30512, would then potentially greatly minimize the damages owed. However, as referenced above, this limitation on liability only applies if the owner lacks privity or knowledge. The case resolved prior to the resolution of any pending admiralty issues.

Practice pointers:

- Consider the possibility of admiralty jurisdiction in any water-related accident unless the body of water involved is completely intrastate and landlocked.

- Remember that admiralty jurisdiction may be beneficial to the plaintiff if the facts suggest a strong contributory negligence defense exists under Virginia law.

- Remember that admiralty jurisdiction does not require diversity of parties.

- Combine the issues of knowledge (negligent entrustment) and privity (admiralty liability) to gain access to even greater discovery. If a negligent entrustment defendant raises admiralty jurisdiction to limit liability, any prior bad acts of the driver are now relevant to both knowledge and privity.

IT'S ABOUT TIME!
Gentry Locke's 2018 CLE Seminar

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Tips from the Trenches: A Judge's View (through a Clerk's eyes) on Effective Advocacy

Michael J. Finney
Alicha M. Grubb

TIPS FROM THE TRENCHES:
A Judge's View (through a Clerk's eyes) on Effective Advocacy

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I. Introduction

In addition to analyzing your legal argument, judges often critique your writing skills, presentation and demeanor. Whether you know it or not, you are a lesson the judge uses to teach his or her clerks about good and bad legal practice. More importantly, you are the face of your client. If your argument is sloppy, if your writing is full of errors, or if your performance shows a lack of skill and preparation, you reflect badly on your client and the case. Conversely, a polished, well-reasoned, careful argument emphasizes the importance and legitimacy of your position. Maintaining a reputation of credibility and preparedness can be key to prevailing on difficult and murky issues.

II. General Tips

a. People Skills

   i. Always respect the court staff and the judge's clerks/assistants. If a court staff member makes a mistake, it is always better to either move on or bring up the issue with the judge in private (if it is a serious or repeat mistake) rather than to show frustration with a staff member or worse, act rudely or unprofessionally.

   ii. Always respect opposing counsel. Judges do not appreciate name-calling and other *ad hominem* attacks.

   iii. Always respect the judge. It should go without saying, but always act professionally with the judiciary in and out of chambers. If you disagree with a judge's ruling, note your objection for the record, but do not argue. Always stand when speaking unless you are given permission to sit.

b. Writing

   i. Produce excellent work. Cite good law and Shepardize your cases. Make sound and concise arguments. You must advocate for your client, but avoid advocating by blatantly ignoring facts and case law that are not favorable to you. It is better to address adverse facts and law head on with a reasoned and supported argument.

   ii. Check your citations, spelling, grammar, and formatting. Basic mistakes can be a distraction from your argument and your credibility because you communicate to the judge that you did not have the time and attention to properly spell words and therefore may not have had the time and attention to ensure that your position is legally sound.

c. Be timely.
   i. File motions in a timely manner. Avoid eleventh hour motions *in limine*, especially those that are better dealt with as an objection at trial. Judges do not appreciate having to work late the night before a long trial in order to evaluation your fourteen motions. Even if there is no scheduling order, respect opposing counsel's and the court's time by filing response and reply briefs with enough time for all parties to prepare for a hearing.
      1. A court can postpone hearings so that it can review briefs in advance of a hearing. *See* Va. Sup. Ct. R. 4:15(d) ("A court, however, at the request of counsel of record, or in the judge's discretion, may postpone the hearing of the motion, or require the filing of briefs to assure fairness to all parties and the ability of the court to review all such briefs in advance of the hearing.").
   ii. Show up early if you need to talk with the judge, opposing counsel, or your client. If the hearing starts at nine, do not show up at nine to talk to your client.
   iii. Follow the judge's instructions on submitting orders and briefing.
      1. Judge Carson's sample Order is attached to this outline.
      2. Some deadlines are set forth in the Uniform Pretrial Scheduling Order (Va. Sup. Ct. R. 1:18).
      3. Keep in mind the requirements of Rule 4:15 of the Rules of the Supreme Court of Virginia regarding the deadlines for serving a notice of hearing (7 days, but up to 14 days if a brief in support is submitted), briefs in support of a motion (14 days before the hearing if the brief is five or fewer pages in length along with the notice) and briefs in opposition (in a sufficient time to allow for consideration of the issues involved).
      4. If a brief is more than five pages, Rule 4:15 allows the court to change the hearing date, notice requirement and briefing schedule.
      5. In addition, leave of court is required for a brief in excess of 20 pages double spaced. *See* Va. Sup. Ct. R. 4:15(c).

d. Do not regurgitate your motion in your oral argument.
   i. If you have nothing to say in addition to your brief, do not request a hearing.
   ii. If a hearing is set, then prepare to advocate for your client. Your brief sets out the law, but oral advocacy is your chance to tell the judge about your

client and your case and to rebut any unanswered arguments from opposing counsel.

e. Know the Rules of Evidence.
You should always carry a copy of the appropriate rules with you, especially if you are a trial lawyer. There is also a book entitled "The Virginia and Federal Rules of Evidence: A Concise Comparison with Commentary" by Jeffrey Bellin that will help you understand the differences between the two sets of rules.

f. Improve your trial skills.
Take CLEs or ask experienced attorneys for trial presentation advice. Having good trial strategy and presentation is key to being successful. You may have all the facts and law on your side, but if you cannot communicate your position or you muddy the water with superfluous, unhelpful, or even harmful testimony, you could still lose the case.

   i. Judge Carson of the Twenty-Third Judicial Circuit has complied the results of extensive jury surveys on effective advocacy at trial. His researched is attached to this outline with permission.
   ii. Some judges have specific trial orders. Judge Carson's sample order is attached to this outline.
   iii. The City of Winchester also uses specific scheduling orders for medical malpractice cases. A copy of such an Order is attached.

III. Know your Judges

a. If you have not practiced in a particular court before, find out who your judge is and ask others for advice about that judge's quirks and preferences. In the Roanoke/Salem Circuit Courts, it is generally a good idea to arrive a few minutes early and visit chambers to introduce yourself to the judge. If the judge is already on the bench, make sure you introduce yourself at the beginning of your hearing and again at the end when the hearing is over as long as the judge is not pressed for time.
   i. Always introduce your associate/new attorney with you in court, even if you've introduce the attorney before. It will take a while for the judge to get to know the new attorneys.

b. The General Assembly just voted to fund all positions, so there will be more state court judges.

c. Retired judges now have to be re-confirmed every three years, so there will likely be less retired judges on the bench.

d. Remember that clerkships are seasonal, so in August/September, the judges are usually training new clerks. Occasionally, a judge has a career clerk, especially in the higher-level courts. Just be mindful of the fact that during the turnover, your case could slow down slightly.

e. The Twenty-Third Circuit

i. Juvenile and Domestic Relations Court
   1. Chief Judge Onzlee Ware (City)
   2. Leisa Ciaffone (County/Salem)
   3. Hilary Griffith (County/Salem)
   4. Frank Rogers (City)
   5. John Weber (City)

ii. General District Court
   1. Chief Judge Jackie Talevi (County/Salem)
   2. Scott Geddes (County)
   3. Frank Burkart (City)
   4. Tom Roe (City)

iii. Circuit Court
   1. Chief Judge Charlie Dorsey (County)
   2. Jim Swanson (County)
   3. Bill Broadhurst (City)
   4. David Carson (City/Salem)*Designated in other jurisdictions
   5. Chris Clemens (City)

f. The Western District of Virginia
   i. Chief Judge Urbanksi (Roanoke)
   ii. Judge Conrad (Roanoke)-Senior Status
   iii. Judge Dillon (Roanoke)
   iv. Judge Jones (Abingdon)
   v. Judge Kiser (Danville)
   vi. Judge Moon (Lynchburg)
   vii. Magistrate Judges
      1. Judge Sargent
      2. Judge Ballou
      3. Judge Hoppe

IV. Know the Local Rules

a. These are generally located on the court’s website.

b. You are required to be familiar with any Local Rules:
   i. “[W]henever an attorney becomes counsel of record in any proceedings in a circuit court in which he does not regularly practice, it shall be his responsibility to ascertain the rules of that court and abide thereby. The clerk shall, upon request, promptly furnish a copy of all rules then in force and effect.” Va. Sup. Ct. R. 1:15(a).

c. The district court judges also have standing orders, which can be found on the court’s website. For example, Judge Dillon has guidelines on communicating with chambers as well as sample scheduling orders posted with her judicial link on the Western District’s website.

d. Know each judge's requirements, if any, on page limits, setting hearings, and scheduling. Attached is a recent example of Judge Urbanski's scheduling order along with Judge Dillon's sample order.

e. Electronic filing

   i. The Roanoke City and Roanoke County Circuit Courts now have e-filing. The court does accept paper filings, but they are scanned and destroyed. An attorney user manual is located on both courts' websites, and a demonstration video is located on the county website.

      1. **The clerks do not send hard copies of filings to the judge. If you want the judge to see a filing ahead of time, send the court a courtesy copy.**

   ii. CM/ECF is used in federal courts for filing. The twenty-two page procedures document is located on the court's website and outlines how to set up a PACER account and file electronically. Federal courts do not accept paper or e-mailed filings.

      1. To use the electronic filing, each attorney must register using the one page registration form located on the Western District of Virginia's website

      2. Attached is an overview, step-by-step guide to filing electronically with the Western District.

V. Mediation

a. Federal Judges can also facilitate mediations through the magistrate judges. Some judges order mediation while others simply make it available.

b. Circuit court judges can do judicial settlements. They can still mediate your case if they are your judge, but if the case does not settle, you will have to get a new judge for the trial. Attached is an example judicial settlement order from Judge Carson. Using judicial settlements can be a much cheaper and efficient option for your client.

   i. Rule 1:19 allows for a Pretrial Conference at which time settlement can be discussed.

      1. The Uniform Scheduling Order allows a court to order a pretrial conference wherein settlement discussions, along with other matters can be heard. Va. Sup. Ct. R. 1:18B, ¶ VI (Pretrial Conferences).

   ii. Some courts require a settlement conference prior to trial. Be aware of whether your court requires that.

Attachments

- Trial Protocol Order: Judge David Carson, Roanoke
- Order on Submitting Orders, Judge David Carson, Roanoke
- City of Winchester Law Medical Malpractice Scheduling Order
- Juror Survey by Judge Carson, attached with permission
- Judge Dillon Sample Scheduling Order
- Judge Urbanksi Example Scheduling Order
- Electronic Filing Guide
- Settlement Conference Order, Judge David Carson, Roanoke

Judge Carson's Criminal and Civil Trial Protocol Order

When presiding over any trial, my starting point is always to let counsel try their cases with as little interference from the bench as possible. This, of course, presumes that counsel come to court prepared, and with decorum befitting their role as officers of the Court.

To these ends, you should unambiguously understand two rules of my courtroom, which are grounded in the respect and integrity essential to the administration of justice. **First**, if you are talking in the presence of a jury, then you are standing. (Counsel may always use the rostrums located on each side of the courtroom.) **Second**, there will be no "speaking objections" or "cross-talk" between counsel. Trying your case through objections and bantering will not be tolerated. Objections and/or concerns shall be directed solely to the Court.

The following are other general rules that should be followed, unless instructed otherwise:

- **Scheduling Orders.** I will freely enter scheduling orders. The contents of any such order, if agreed to by counsel, are largely left to counsel. If there is no agreement, then I will enter the standard scheduling order, modified as set forth below. If counsel present me with a non-standard scheduling order, it shall contain at least four (4) provisions:
  - Discovery cutoff: Complete 30 days before trial.
  - Expert Deadline: 120 days for Plaintiff, 75 days for Defendant, and 60 days for Rebuttal.
  - Pretrial Hearing: At the same time the case is set for trial, counsel shall set a pretrial hearing close to the trial date and include it in the scheduling order.
  - Jury Instructions/Voir Dire: At least one day before the pretrial hearing, counsel shall submit to me and opposing counsel the following[1]:
    - Copies of proposed jury instructions (in Word format if submitted electronically); and
    - A list of potential areas of voir dire inquiry. (I do not expect to receive an exhaustive list, but instead would like to see general areas of inquiry.)
- **Motions.** There is no "motions day" in the Twenty-third Circuit. To be heard on a motion filed in a case I am handling, counsel shall contact any of the judicial assistants to

[1] Whenever it is contemplated by this Order that any documents(s) be submitted to me, counsel may always do so electronically by sending the materials to my judicial assistant, Martha Riddleberger, at mriddleberger@courts.state.va.us.

schedule a hearing. Counsel shall otherwise comply with Rule 4:15 in all respects. When filing any brief or memoranda in connection with a motion, counsel shall send a courtesy copy of any such filing to me.

- **Daily Agenda.** Time is of the essence. For jury trials, court will begin promptly at 9 AM each day, unless instructed otherwise. Counsel is encouraged to request a meeting in chambers earlier than the 9 AM start time if housekeeping matters need to be addressed. (The Court generally will not address substantive issues raised on the morning of trial; counsel should utilize the pretrial hearing to raise substantive issues.) The mid-morning and mid-afternoon breaks will be taken when appropriate and will each last about fifteen minutes. The luncheon recess will likely be one hour and fifteen minutes long. Counsel should plan to complete the presentation of evidence by 5:00 PM each day, but when necessary and/or appropriate, counsel may present evidence after 5:00 PM.

- **Voir Dire.** Counsel must refer to jurors and prospective jurors by their juror number as shown on their laminate, not by their names. Also, counsel may not use voir dire as an opportunity to argue their case, but may freely explore relevant matters as set forth in Va. Sup. Ct. R. 3:22A (civil cases) and 3A:14 (criminal cases).

- **Technology.** Counsel may utilize virtually any technology in presenting evidence. However, it is up to counsel to ensure that their technology is in working order and that there is a backup plan in place, as the Court will not unnecessarily delay trial due to poor preparation. “Dry runs” are encouraged, and counsel may access the courtroom in advance of trial to conduct any such dry run. Only attorneys may bring cell phones into the courthouse without seeking advance approval from the court.

- **Opening Statements and Closing Arguments.** Counsel is not automatically given a time limit for either, but less is usually better than more. As a reminder, opening statements are for stating what you think the evidence will show; closing arguments are for arguing what the evidence means. Counsel shall not subject the jury to counsel’s personal beliefs or opinions at any point in the trial.

- **Exhibits.** Counsel should pre-mark exhibits prior to the time at which such evidence is being presented.

- **Moving about in the Well.** Counsel need only ask to approach a witness once. Counsel must ask to approach the bench throughout the trial. Counsel may approach the jury box in both opening statements and closing arguments.

- **Party and Spectator Decorum.** Counsel shall advise their clients, witnesses, and family and friends of their clients that proper decorum, including dress and behavior, is essential to the administration of justice. Inappropriate and/or disruptive behavior will not be tolerated and could result in a finding of contempt.

This list does not purport to be an exhaustive one, but it is meant to address some common issues that come up both pre-trial and at trial. I encourage counsel to use the pretrial conference as a time to discuss any questions you might have regarding courtroom expectations.

____

David B. Carson, Judge

Submission of Orders in Cases Handled by Judge Carson

Effective July 1, 2018

1. All Orders requested by Judge Carson shall be prepared and entered promptly.

2. Counsel whom Judge Carson has requested prepare an Order shall submit an agreed Order within 7 days of the request. (Upon submission, counsel shall affirmatively indicate that all counsel have agreed to the Order.)

3. If counsel is unable to submit an agreed Order within 7 days of the request, then all counsel shall prepare Orders and submit them within 10 days of the initial request. Judge Carson will then choose the Order he concludes best captures his rulings and enter it.

4. All Orders shall be submitted utilizing one of the two following methods:

    a. First (the preferred method), counsel may submit Orders electronically, in which case counsel shall submit the Order directly to Judge Carson (dcarson@vacourts.gov) and to his assistant, Kim Bender (kbender@vacourts.gov). Any electronically-submitted Order shall reflect whether or not it is an agreed Order, that written endorsement is waived pursuant to Rule 1:13, and that all objections are preserved. Judge Carson and/or Kim will then print the Order and enter it**.** (If counsel submit an Order electronically, then counsel should not simultaneously submit the Order to the Clerk.)

    b. Second, counsel may submit an Order to the Clerk. Once again, any Order submitted to the Clerk shall reflect whether or not it is an agreed Order, that written endorsement is waived pursuant to Rule 1:13, and that all objections are preserved. (If counsel submit an Order to the Clerk, then counsel should not simultaneously submit the Order electronically.)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF WINCHESTER

CYNTHIA FRAULA-HAHN, Executrix,
Plaintiff

v. Civil Action No.10 - 207

AMHERST FAMILY PRACTICE, PC, et al.,
Defendants

LAW MEDICAL MALPRACTICE PRETRIAL ORDER

This case came before the Court for a pretrial conference on November 18, 2010.

It appears that the issues to be tried in this case are:

1. Whether the Defendants violated the standard of care of a reasonably prudent health care provider in their specialty in the Commonwealth of Virginia?

2. If so, whether that negligence proximately caused injury to the Plaintiff?

3. If the Plaintiff is entitled to recover, what is the amount of her damages?

Therefore, it is ADJUDGED AND ORDERED that:

I. **Trial**

The trial date is **January 9 – 13, 2012, at 9:00 a.m.,** before a civil jury. The estimated length of trial is five days.

II. **Discovery**

The parties shall complete discovery, including depositions, by 30 days before trial; however, depositions taken in lieu of live testimony at trial will be permitted until 15 days before trial **upon agreement of the parties**. "Complete" means that all interrogatories, requests for production, requests for admissions and other discovery must be served sufficiently in advance of trial to allow a timely response at least 30 days before trial. Depositions may be taken after the specified time period by agreement of counsel of record or for good cause shown, provided however, that the taking of a deposition after the deadline established herein shall not provide a basis for continuance of the trial date or the scheduling of motions inconsistent with the normal procedures of the court. The parties have a duty to seasonably supplement and amend discovery responses pursuant to Rule 4:1(e) of the Rules of Supreme Court of Virginia. Seasonably means as soon as practical. No provision of this Order supersedes the Rules of Supreme Court of Virginia governing discovery. Any discovery motion filed shall contain a certification that counsel has made a good faith effort to resolve the matters set forth in the motion with opposing counsel. **The Clerk has a memorandum from the Court on discovery issues which the Court has decided, so check with the Clerk prior to appearing on any discovery dispute to ensure that you have the most recent version of this memo, because it is supplemented as new issues are decided.**

III. Designation of Experts

Plaintiff's experts shall be identified on or before **5 months** before trial. Defendant's shall be identified on or before **4 months** before trial. Expert opinions responsive to new matters raised in the opposing parties' identification of experts shall be designated no later than 45 days before trial. In the designation all information discoverable under Rule 4:1(b) (4) (A) (1) of the Rules of Supreme Court of Virginia shall be provided or the expert will not ordinarily be permitted to express any nondisclosed opinions at trial. The foregoing deadlines shall not relieve a party of the obligation to respond to discovery requests within the time periods set forth in the Rules of Supreme Court of Virginia, including, in particular, the duty to supplement or amend prior responses pursuant to Rule 4:1(e).

This is an addition to the standard order, read it carefully. Most medical malpractice cases turn on the experts' opinions. The rules of discovery governing inquiry about the defendant's experts in Virginia are patterned after the federal rules. Supreme Court Rule 4:1(b)(4) contemplates that a party will initially inquire through the relatively inexpensive means of interrogatories about the substance of the facts and opinions to which the defendant's expert is expected to testify. Supreme Court Rule 4:1(b)(4)(a)-(2) provides that "upon motion, the Court may order further discovery by other means...," such as by depositions. The answers to interrogatories about experts should be detailed, so that the opposing side knows what your expert will be testifying about from reading your answer. Your answer must include the subject matter, the substance of the facts and opinions to which the expert will testify, and a summary of the grounds of each opinion. If these required elements are not in your answer, then your answer is insufficient. See generally Handling Products Liability Cases in Virginia, Virginia CLE (1994), p. III-2. Parties very frequently fail to adequately state the "substance of the facts," the "opinions," and "a summary of the grounds of each opinion." While there is no talismanic form for an answer, the following would be an adequate answer with respect to an orthopedic surgeon who will testify for the Plaintiff (IF IN DOUBT, ERR ON THE SIDE OF INCLUSION):

<u>Name and Address:</u>

Sue Brown, M.D. (provide curriculum vitae)
(address)

<u>Substance of the Facts:</u> This witness has examined the following records of the Plaintiff: (list all which the witness has examined, and, if the witness has examined the plaintiff or performed any procedures on the plaintiff describe those).

Medical records and reports of John Smith, M.D., ABC Orthopedic Associates, and Winchester Medical Center.

<u>Summary and Grounds of Opinions:</u> Based on his review of the records in this case and (set forth as appropriate, BE SPECIFIC, THE DOCTOR MAY NOT TESTIFY AT TRIAL TO ANY OPINION NOT SET FORTH IN THE DESIGNATION) examination of ________ (if there was an examination set forth the specific findings and diagnosis as it is relevant to the claim, and consultations with __________, Dr. X will testify that:

Based on her review of the above material, Dr. Brown will testify that:

1. On May 21, 2009, and May 30, 2009, the standard of care for the diagnosis, care and treatment of osteomyelitis and associated epidural abscess which compresses the spinal cord required a reasonably prudent orthopedist and/or neurologist to consider infectious etiologies as the cause of persistent worsening back pain and symptoms. The standard of care required an emergency MRI and/or myelogram and/or bone scan to consider infectious etiologies, the proper diagnosis of the infection, surgical decompression, and the administering of intravenous antibiotics.

2. On May 21, 2009, Dr. Smith departed from the standard of care of a reasonably prudent orthopaedic surgeon, because he failed to consider infectious etiologies as the cause of Plaintiff's persistently worsening back pain and neurologic symptoms associated with fever and elevated WBC count, and failed to order the appropriate tests in light of the complaints of thoracic pain, bilateral leg weakness, tingling in the extremities, constipation, and urinary retention, which indicated

imminent spinal cord compression, all of which breached the standard of care and caused Plaintiff to become paraplegic.

3. On May 30, 2009, Dr. Doe departed from the standard of care for a reasonably prudent neurologist, because he failed to consider infectious etiologies as the cause of Plaintiffs persistently worsening back pain and neurologic symptoms associated with fever and elevated WBC count, and failed to order the appropriate tests in light of the complaints of thoracic pain, bilateral leg weakness, tingling in the extremities, constipation, and urinary retention, which indicated imminent spinal cord compression, all of which breached the standard of care and caused Plaintiff to become paraplegic.

4. The violation of the standard of care set forth above was a proximate cause of Plaintiffs paraplegia. Had Plaintiff been diagnosed and treated in the proper manner as late as 12 hours before he became paraplegic, Plaintiff would have recovered with mild, minimal, or no permanent neurologic deficits.

5. Dr. Brown is also expected to testify that the Medical bills are reasonable, necessary and incurred as a proximate result of Plaintiffs paraplegia, and that the current and future health care needs resulting from the act of negligence as reported by Mr. Life Expert, are reasonable, necessary and a proximate result of Plaintiffs condition, with the exception of the need for the case manager/rehabilitation counsel.

A court may grant summary judgment on relevant claims because a party fails to identify expert witnesses as required by the pretrial order. Woodbury v. Courtney, 239 Va. 651, 654, 391 S.E.2d 293 (1990) (failure to identify expert witness five months prior to trial in medical malpractice case). Alternatively, the court may refuse to allow the witness to testify. See, e.g., Ashmont v. Welton, 20 Va. Cir. 181 (1990).

IV. **Dispositive Motions**

All dispositive motions shall be presented to the court for hearings as far as in advance of the trial date as practical. All counsel of record are encouraged to bring on for hearing all demurrers, special pleas, motions for summary judgment or other dispositive motions not more than 60 days after being filed.

This is an addition to the standard order, read it carefully. All Motions shall be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies. The opposing party shall file a response, including a like brief and such supporting documents as are then available within fifteen days after service. The moving party may file a rebuttal brief within five days after the service of the opposing party's reply brief. Counsel shall send copies of their briefs and all major, non-Virginia authorities relied upon to the presiding judge at the Winchester-Frederick Joint Judicial Center, 5 N. Kent Street, Winchester, Virginia 22601. Motions for Summary Judgment and Motions in Limine must be filed no later than forty-five days before trial.

V. **Exhibit and Witness List**

This is an addition to the standard order, read it carefully. The Plaintiff shall file its exhibits and a list of witnesses sixty days before trial. Witnesses include those in the case in chief and rebuttal. Forty days before trial, the Defendant will file its exhibits and list of witnesses. Any objections to exhibits submitted by any party must be filed with the Clerk of the Court and with the opposing party within ten days of submission, or they will be deemed waived. Any exhibits filed and not objected to in writing will be admitted at trial. All exhibits submitted must be pre-marked with labels. NOTICE: If a party has more than ten exhibits, the exhibits are to be indexed, tabbed, and fastened together.

Any exhibit or witness not so identified and filed will not be received in evidence, except in rebuttal or for impeachment or unless the admission of such exhibit or testimony of the witness would cause no surprise or prejudice to the opposing party and the failure to list the exhibit or witness was through inadvertence. Any objections to exhibits or witnesses shall state the legal reasons therefore except on relevancy grounds, and shall be filed with the Clerk of the Court and a copy delivered to opposing counsel at least five days before trial or the objections will be deemed waived absent leave of court for good cause shown.

VI. **Pretrial Conferences**

Pursuant to Rule 4:13 of the Rules of Supreme Court of Virginia, when requested by any party or upon its own motion, the court may order a pretrial conference wherein motions in limine, settlement discussions or other pretrial motions which may aid in the disposition of this action can be heard.

VII. **Motions in Limine**

Absent leave of court, any motion in limine which requires argument exceeding five minutes shall be duly noticed and heard before the day of trial.

VIII. **Witness Subpoenas**

Early filing of a request for witness subpoenas is encouraged so that such subpoenas may be served at least 10 days before trial.

IX. **Continuances**

Continuances will only be granted by the court for good cause shown.

X. **Jury Instructions**

This is an addition to the standard order, read it carefully. Not later than thirty days before the date set for trial counsel for the plaintiff shall serve on opposing counsel proposed jury instructions. If Counsel for the defendant objects to plaintiff's instructions on substantive grounds, or offers additional instructions, he shall file and serve such objections and additional instructions as provided above not later than ten days after receipt of the Plaintiff's instructions. Ten days after receipt of the Defendant's instructions, the Plaintiff shall file such objections thereto as deemed advisable. Plaintiff's instructions will be numbered in the lower right corner, and defendant's instructions will be lettered in the lower right corner.

XI. **Deposition Transcripts to be Used at Trial**

Counsel of record shall confer and attempt to identify and resolve all issues regarding the use of depositions at trial. It is the obligation of the proponent of any deposition of any non-party witness who will not appear at trial to advise opposing counsel of record of counsel's intent to use all or a portion of the deposition at trial at the earliest reasonable opportunity. It becomes the obligation of the opponent of any such deposition to bring any objection or other unresolved issues to the court for hearing before the day of trial.

XII. **IME.** **This is an addition to the standard order, read it carefully.** If the Defendant exercises his right to a medical examination of the Plaintiff pursuant to Supreme Court Rule 4:10, the examination shall take place at least six months prior to trial, and the examining physician shall file his written report of the examination with the Clerk and with each party at least four months prior to trial. The report shall set forth the findings of the physician, including results of all tests made, his diagnosis and conclusions.

XIII. **Motion to Strike. This is an addition to the standard order, read it carefully.** Counsel for the Defendant shall prepare and file at the time at which a motion to strike the evidence of the Plaintiff is made a memorandum of authorities in support of that motion on any ground which is reasonably foreseeable in advance of trial. Copies of major authorities relied upon shall be provided to the Court.

XIV. **Voir Dire. This is an addition to the standard order, read it carefully.** The Plaintiff will file its proposed voir dire questions thirty days prior to the trial, and twenty days before trial the Defendant shall file any objections and its proposed voir dire questions. Within ten days of receipt of the Defendant's voir dire, the Plaintiff will file such objections thereto as deemed advisable.

XV. **Settlement Conference. This is an addition to the standard order, read it carefully.** Any request for a settlement conference in this case must be made on or before three months prior to trial.

XV. **Future Pretrial Conferences. This is an addition to the standard order, read it carefully.** A final pretrial conference will be held at the end of the Motions day immediately preceding the trial. The Clerk is directed to set this pretrial conference for two hours.

XVI. **Waiver or Modification of Terms of Order**

Upon motion, the time limits and prohibitions contained in this order may be waived or modified **by the parties in writing or** by leave of court for good cause shown.

The Clerk shall forward copies of this order to counsel of record, who shall file such objections hereto as they deem advisable within ten days of their receipt of a copy of this order.

ENTER November 18, 2010.

John E. Wetsel, Jr., Judge

A COPY TESTE:

~~CLERK~~ DEPUTY CLERK
WINCHESTER CIRCUIT COURT

JURORS' INSIGHTS ON THE TRIAL OF CASES

By David B. Carson, Judge, Twenty-third Judicial Circuit of Virginia

During a 24 month period from July 2013 through July 2015, jurors who sat in a variety of civil and criminal cases in the City of Roanoke, County of Roanoke, and City of Salem provided feedback regarding effective and ineffectual trial tactics, and about the lawyers who they saw try cases. 72 of these jurors also completed and returned detailed responses with comments. Here is some of what they said, coupled with responses obtained from a similar exercise undertaken by Judge Clifford R. Weckstein in the late 1990s.

I. Respect

1. Of the 72 responses returned, 61 mentioned respect in one or more places in the response.
2. Respect for the litigants, for the court, and for the process permeated the responses and many of the conversations.
3. Similarly, perceived disrespect for any of the above was often fatal.
4. Standing in the presence of the jury is a BIG deal.

II. Appearance and Manner

1. Lawyer appearance, manner, and demeanor matter. To nearly every juror, they seem to matter a lot.
2. "Lawyers need to be aware when we get bored, we're watching them.... They need to be aware that they're 'on' all the time."
3. First impressions, nonverbal impressions, count – for lawyer, client, and witnesses. At least with some jurors, the credibility of the case depends in some part on the credibility of appearance of lawyer or client.
4. Jurors comment on lawyers' mannerisms and nervous habits, on clothing, on hair.
5. Jurors watch lawyer "body language," and comment on it.
6. No juror who sat in a case had anything positive to say about any lawyer's expression or demonstration of emotion.
7. Jurors notice redundancy. They dislike it. They think it insults their intelligence.
8. Raised voices and belligerent manner received negative reviews.
9. Flamboyance plays badly.

10. Low-key presentation - especially when contrasted to flamboyance on the other side of the case - allows concentration on the facts that the lawyer is presenting.

11. Appearing "relaxed, on the same level with the jurors" is effective. "Humility" is good. "Arrogance" is bad, as is letting the jury know you believe you're a "big time lawyer."

12. "Courtesy" wins friends and influences jurors. Jurors talk about perceived rudeness.

III. Examination of Witnesses

1. No juror thought that "attacking" a witness was successful. Every juror who saw such an attack either said that the attack diminished the juror's confidence in the lawyer's case or that the attack had that effect on other members of the jury.

2. An overbearing manner can cause the jury to reject the lawyer's message.

3. A bad attitude toward the judge can hurt a lawyer with the jury. "Act like the rules were made for you, too."

4. Don't downplay juror intelligence, but always take the time to educate the jurors about non-routine terms and phrases.

IV. Use of Depositions at Trial

1. Jurors preferred live witnesses to testimony presented through read depositions or videotaped depositions.

2. One juror commented that in a videotaped deposition, he wanted to see the witness being videotaped because non-verbal mannerisms are important.

3. If a deposition is read, the reader should use voice inflection and otherwise modulate his or her voice.

    a. The verb "droning" was used to describe some depositions that were read from the witness stand.

4. One juror commented that a video deposition should never be more than 30 minutes – "I have a hard enough time sitting through a 30 minute TV show."

5. Never put on a witness by deposition immediately after lunch.

6. When videotapes are played, lights should not be dimmed and breaks should come frequently.

    a. Some jurors felt strongly about the volume of any videotaped deposition, suggesting the lawyers should sit in the jury box while setting the volume.

V. Exhibits

1. Jurors are impatient when a witness is shown something they cannot see. While they like demonstrative evidence and charts, they are scornful of lawyers who use such evidence in a way that everyone in the jury box cannot see the exhibit.

2. "If it's in front of the witness, it should be up on the screen also. So when he's talking, we can look at the screen and find out what's going on at the same time."

3. "Visual and audio at the same time. It retains a lot better."

4. No juror said that he or she paid attention to exhibits circulated through the jury box.

5. Exhibits large enough to be seen from the jury box were vastly preferred to photographs which were circulated and later available in the jury room.

6. No one was helped by having an expert's curriculum vitae in the jury box - or in the jury room.

7. The use of technology versus “physical” exhibits was a mixed bag. Some jurors appreciated seeing things clearly on the screen while others appreciated the simplicity of posterboard.

    a. To a person, jurors who commented had no patience for technological delays and/or mishandling of exhibits.

VI. Opening Statements

1. No juror admitted to making up his or her mind to vote for the plaintiff or the prosecution as a result of opening.

2. Jurors who formed positive or negative impressions of lawyers during opening statements generally carried those impressions throughout the trial, and beyond.

3. First impressions - including nonverbal impressions - count.

4. How long is too long for an opening? 15 minutes.

VII. Objections

1. Jurors had few problems with objections

2. Most jurors listen to the lawyers' objections, and pay attention to the manner in which the objections are articulated.

3. Some jurors evaluated the basis that counsel stated for their objections. "When it did not make sense, I was left feeling, is this just a delay? Is it a diversion, or is there some basis that is just not well expressed?"

4. Some jurors expressed the view that when a lawyer aggressively objected to evidence (or to the qualification of a witness), then the witness or evidence objected to must, *ipso facto*, be damaging to the lawyer who objected.

VIII. Jury Instructions

1. "Those instructions," one juror said, in a typical comment, "were our guide for making our decision. We pretty much went through them page by page, the questions and the instructions one by one, and made sure we covered each topic, each question, and discussed it with the jury and made sure we all understood what the question was and collectively what our answer might be to that question."

2. Jurors gave several examples of instances in which the instructions were used to coax recalcitrant jurors into agreement with others.

3. No member of any of the panels on which these jurors sat expressed disagreement with any of the principles of law set forth in the instructions.

4. Some jurors who sat in both civil and criminal cases expressed the view that there was no practical distinction between "by the greater weight of the evidence" and "beyond a reasonable doubt." Those jurors agreed that the burden of proof was, simply enough, that they were “convinced.”

IX. Closing Arguments

1. In spite of the folklore of jury trials, closings “swayed” none of the jurors.

2. In some cases, closings “confirmed” opinions jurors already had.

3. Closing argument is an additional opportunity to annoy jurors.

4. Closings must be succinct and must not be repetitive.

5. Appeals to emotion or sympathy can antagonize and repel, just like seemingly groundless requests for large sums of money in a civil case.

6. How long for a closing? One juror, who had served on three juries, said: "The opening should be short and sweet; the closing almost shouldn't exist."

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

NAME	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. __________
	)	
NAME	)	By: Elizabeth K. Dillon
	)	United States District Judge
Defendant.	)	

SCHEDULING ORDER

The court proposes the following as a pretrial scheduling order pursuant to Federal Rule of Civil Procedure 16(b). If no party requests changes within 14 days, it will constitute the scheduling order in this case.

Summary

TRIAL DATE:	**Date (Jury / Bench Trial)** **9:30 a.m.**
PLACE:	**UNITED STATES DISTRICT COURT** **210 Franklin Road, SW** **Roanoke, VA 24011**

FED. R. CIV. P. 26(f) CONFERENCE:	**14 days from this order**
PLAINTIFF'S INITIAL DISCLOSURES UNDER FED. R. CIV. P. 26(a):	**30 days from this order**
DEFENDANT'S INITIAL DISCLOSURES UNDER FED. R. CIV. P. 26(a):	**45 days from this order**
PLAINTIFF'S INITIAL EXPERT DISCLOSURE:	**80 days from this order**
DEFENDANT'S INITIAL EXPERT DISCLOSURE:	**110 days from this order**
DEADLINE FOR MOTIONS TO JOIN OTHER PARTIES OR AMEND PLEADINGS:	**120 days from this order**
DEADLINE TO COMPLETE DISCOVERY:	**95 days before trial**

DEADLINE TO FILE DISPOSITIVE MOTIONS AND MOTIONS TO EXCLUDE EXPERTS:	**80 days before trial**
DEADLINE FOR HEARINGS ON DISPOSITIVE MOTIONS AND MOTIONS TO EXCLUDE EXPERTS:	**45 days before trial**
DEADLINE FOR PARTIES TO EXCHANGE WITNESS AND EXHIBIT LISTS:	**28 days before trial**
DEADLINE FOR MOTIONS IN LIMINE:	**21 days before trial**
DEADLINE FOR DEPOSITION DESIGNATIONS:	**21 days before trial**
DEADLINE FOR COUNTERDESIGNATIONS AND OBJECTIONS TO DEPOSITION DESIGNATIONS:	**14 days before trial**
DEADLINE FOR OBJECTIONS TO COUNTERDESIGNATIONS:	**7 days before trial**
DEADLINE FOR [JURY INSTRUCTIONS, STATEMENT OF THE CASE, AND SPECIAL INTERROGATORIES: *OR* FINDINGS OF FACT AND CONCLUSIONS OF LAW:]	**7 days before trial**
DEADLINE FOR HEARING ON MOTIONS IN LIMINE AND MOTIONS OBJECTING TO DEPOSITION TESTIMONY OR TRIAL EXHIBITS:	**7 days before trial**
FINAL PRETRIAL CONFERENCE:	**7 days before trial**

Mediation

1. The parties are encouraged to engage in settlement discussions. Upon motion of any party, the court will refer the case to a magistrate judge to conduct mediation.

Trial and Settlement

2. This case is set for a ***(jury / bench)*** trial, scheduled to begin at 9:30 a.m. on ------------------.

3. The parties shall contact Miriam Frazier, Judicial Assistant (MiriamF@vawd.uscourts.gov or 540-857-5120), to schedule a final pretrial conference to be held no later than seven days before trial.

4. Proposed ***(jury instructions and special interrogatories / findings of fact and conclusions of law)*** must be filed electronically through CM/ECF at least seven days before trial. The parties should also email the proposed ***(jury instructions and special interrogatories / findings of fact and conclusions of law)*** in Word format, with citations, to dillon.ecf@vawd.uscourts.gov, copying opposing counsel.

5. If the case is set for a jury trial, the parties must jointly submit a proposed statement of the case (briefly summarizing all plaintiff's claims, defendant's defenses, and any counterclaims and cross-claims) to be read to the jury during voir dire. The statement must be emailed, in Word format, to dillon.ecf@vawd.uscourts.gov no later than seven days before trial. If the parties, after conferring, cannot agree on a proposed joint statement, each party shall submit its own proposed statement.

6. If the trial of a case will involve significant issues not adequately addressed by the parties in pretrial motions, the parties should prepare trial briefs addressing such issues and electronically file those briefs no later than five days before the final pretrial conference.

7. If the case settles before trial and the court does not receive a proposed final order within 30 days after the court has received oral or written notification of the settlement, the court will dismiss the case with prejudice. If any party wants the court to retain jurisdiction to enforce the settlement, then that party must so move within 60 days of the entry of the dismissal order.

Discovery, Rule 26(f) Plan, and Scheduling Order Amendments

8. Unless the parties stipulate otherwise, they must confer and develop a discovery plan as required by Rule 26(f) and make initial disclosures as required by Rule 26(a)(1).

9. The parties may, but are not required to, file an agreed written plan pursuant to Rule 26(f), except that the plan must be filed if the parties amend this order's disclosure or discovery provisions, which the parties may do by agreement and without seeking leave of court. If the agreed written plan purports to change any deadlines other than the disclosure and discovery deadlines, the parties shall file a separate motion requesting leave to amend this order and shall submit a proposed agreed order with the modified deadlines. The court may also amend the order on its own motion.

10. All discovery must be completed at least 95 days before trial. This schedule requires that all written discovery be served in sufficient time to allow the responding party time to respond on or before the cutoff date for discovery.

11. Except disclosures under Rule 26(a)(3) of trial witnesses and exhibits, which the parties must file, the parties are not to file disclosure or discovery materials unless and until they are relevant to the court's disposition of a motion or otherwise required by this order.

Motions

12. A supporting brief must accompany all pretrial motions, unless the motion contains the legal argument necessary to support it or is certified to be unopposed.

13. If any motion, properly filed and briefed, is to be opposed, a brief in opposition must be filed within 14 days of the date of service of the movant's brief (or within 14 days of this order if a motion and supporting brief were served before this order), except that briefs in opposition to motions in limine or other motions related to trial matters must be filed within seven

days of the date of service of the movant's brief. Except for good cause shown, if a brief opposing a motion is not timely filed, the court will consider the motion to be unopposed. If a moving party desires to submit a reply brief, it must do so within seven days of the date of service of the brief opposing the motion, except that reply briefs in support of motions in limine or motions relating to trial matters must be filed within seven days of the date of service of the brief in opposition or at least two days before the final pretrial conference, whichever time period is shorter. A surreply brief may not be filed without prior leave of the court. After December 1, 2016, and consistent with amendments to Federal Rule of Civil Procedure 6(d), effective that date, service by CM/ECF is no longer equivalent to service of pleadings or other papers by first class mail. Thus, the additional three days given to respond for service by mail does not apply to service by electronic means.

14. Exclusive of any accompanying exhibits, a brief may not exceed 25 pages in length using standard margins and double-spaced lines, unless the filing party first obtains leave of the court after showing good cause why a longer brief is necessary.

15. When a dispositive motion, together with its supporting brief and exhibits, consists of 75 or more pages, the filing party must send a paper courtesy copy of the documents to Judge Dillon's chambers at 210 Franklin Road, S.W., Suite 132, Roanoke, Virginia 24011.

16. No motion, brief, or exhibit may be filed under seal, except as allowed by the mandatory provisions of Western District of Virginia General Local Rule 9. The requirements of General Local Rule 9 may not be modified by a stipulated protective order or other agreement of the parties.

17. All nondispositive pretrial motions and issues are hereby referred to United States Magistrate Judge Robert S. Ballou pursuant to 28 U.S.C. § 636(b)(1)(A). Before moving for an order relating to discovery, the movant must request a conference with Judge Ballou. Hearings on motions before Judge Ballou and conference dates are scheduled by contacting his chambers at 540-857-5158. The court, in its discretion, may also refer dispositive motions to Judge Ballou pursuant to 28 U.S.C.
§ 636(b)(1)(B).

18. The court does not generally schedule motions hearings. Such scheduling is the responsibility of the parties. Any party requesting a hearing must contact Miriam Frazier, Judicial Assistant, by email or telephone to set a hearing date. If the parties do not promptly schedule a hearing, the court will rule on the motion without a hearing. Nondispositive motions, including motions for enlargement of time, whether or not opposed, may be acted upon at any time by the court without awaiting a response.

19. Dispositive motions and motions to exclude experts must be heard no later than 45 days before trial.

20. Motions in limine, including motions objecting to the introduction of deposition testimony and trial exhibits, must be heard no later than the final pretrial conference.

21. Proposed orders filed through CM/ECF during the course of litigation should also be sent separately in Word format by email to dillon.ecf@vawd.uscourts.gov.

Witnesses and Exhibits

22. Expert witnesses who are retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert

testimony must prepare a written report that conforms to the requirements of Rule 26(a)(2)(B). Unless the parties otherwise agree or the court otherwise directs, the plaintiff must disclose the written report of each expert no later than 80 days from the date of this order, and the defendant must disclose the written report of each expert no later than 110 days from the date of this order.

23. With respect to expert witnesses who are not retained or specially employed to provide expert testimony, such as a treating physician, or other person who may qualify as both an expert and a fact witness, the plaintiff must disclose the identity of any such witnesses and provide the information required by Rule 26(a)(2)(C) no later than 80 days from the date of this order. The defendant must disclose the identity of any such witness and provide the information required by Rule 26(a)(2)(C) no later than 110 days from the date of this order.

24. Expert testimony intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rules 26(a)(2)(B) or (C) shall be disclosed as provided under Rule 26(a)(2)(D).

25. All expert disclosures must be submitted in sufficient time that discovery, if desired, can be completed reasonably by the discovery cutoff date without undue duplication and expense.

26. Any motion to exclude the testimony of an expert must be filed no later than the deadline for filing motions for summary judgment.

27. The parties shall exchange lists of trial exhibits to be used in their case-in-chief and witnesses they expect to call in their case-in-chief at trial no later than 28 days before trial. For each witness, the list shall include the witness's name and address and a summary of the witness's anticipated testimony.

28. Unless otherwise agreed by the parties, depositions or portions thereof from persons not appearing at trial may be read into the record at trial only if a designation is filed for such use no later than 21 days before trial. Counterdesignations and objections to designations must be filed no later than 14 days before trial. Objections to counterdesignations must be filed no later than seven days before trial or at least two days before the final pretrial conference, whichever period is shorter.

29. The court encourages the parties to enter into stipulations of fact and requires the parties to confer in good faith, and at length if necessary, to attempt to resolve objections to witnesses, exhibits, and deposition designations prior to the final pretrial conference.

It is so **ORDERED**.

Entered:

Elizabeth K. Dillon
United States District Judge

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

BAKER PACKING CO. ,	)	
	)	
Plaintiff,	)	Civil Action No. 7:16CV00149
v.	)	
	)	
ANDREWS FARMING, INC., ET AL	)	By: Hon. Michael F. Urbanski
	)	Chief United States District Judge
Defendant.	)	

SECOND AMENDED SCHEDULING ORDER

The court proposes the following as a pretrial scheduling order pursuant to Federal Rule of Civil Procedure 16(b). If no party requests changes within fourteen (14) days, it will constitute the scheduling order in this case. The court may amend the order on its own motion, or ***the parties may amend the order's disclosure and discovery provisions by submitting an agreed written plan that satisfies the requirements of Rule 26(f).***

Summary

TRIAL DATE:	September 17-19, 2018 (Bench Trial) 9:30 a.m.
PLACE:	UNITED STATES DISTRICT COURT 210 Franklin Road, SW Roanoke, VA 24011

FED. R. CIV. P. 26(f) CONFERENCE:	14 days from this order
FILING OF RULE 26(f) PLAN:	21 days from this order
INITIAL DISCLOSURES UNDER FED. R. CIV. P. 26(a):	30 days from this order
PLAINTIFF(S) INITIAL EXPERT DISCLOSURE:	75 days from this order
DEFENDANT(S) INITIAL EXPERT DISCLOSURE:	90 days from this order
DEADLINE TO COMPLETE DISCOVERY:	90 days before trial date
DEADLINE TO FILE DISPOSITIVE MOTIONS:	75 days before trial date
DEADLINE FOR HEARING DISPOSITIVE MOTIONS:	45 days before trial date
DEADLINE FOR HEARING MOTIONS IN LIMINE:	14 days before trial date

Trial

1. This case is set for a bench trial, scheduled to begin at 9:30 am on September 17, 2018.

2. The parties shall contact Kristin Ayersman, Courtroom Deputy, (kristina@vawd.uscourts.gov; 540-857-5153), to schedule a pretrial conference to be held no later than fourteen (14) days prior to trial.

3. Proposed findings of fact must be filed electronically via CM/ECF at least seven (7) days prior to trial. The parties also should email the proposed findings of fact in Word format, with citations, to urbanski.ecf@vawd.uscourts.gov, and copy opposing counsel.

4. Motions in limine, including motions objecting to introduction of deposition testimony and trial exhibits, must be heard no later than the final pretrial conference.

Motions

5. All nondispositive pretrial motions and issues, except motions in limine, are hereby referred to United States Magistrate Judge Robert S. Ballou pursuant to 28 U.S.C. § 636(b)(1)(A). Hearings on motions before Judge Ballou are scheduled by contacting Judge Ballou's chambers at 540-857-5158.

6. Prior to filing any discovery motions, the parties are directed to contact the magistrate judge by telephone in an effort to resolve the issue.

7. A supporting brief must accompany all pretrial motions, unless the motion contains the legal argument necessary to support it or is certified to be unopposed.

8. If any motion, properly filed and briefed, is to be opposed, a brief in opposition must be filed. For all motions other than motions in limine, opposition briefs must be filed within fourteen (14) days of the date of service of the movant's brief (or within fourteen (14) days of this order if a motion and supporting brief were served before this order). Briefs in opposition to motions in limine must be filed within seven (7) days of the date of service of the movant's motion in limine. Except for good cause shown, if a brief opposing a motion is not timely filed, the court will consider the motion

to be unopposed. If a moving party desires to submit a reply brief, it must be filed within seven (7) days of the date of service of the brief opposing the motion. A surreply brief may not be filed without prior leave of the court.

9. Exclusive of any accompanying exhibits, a brief may not exceed twenty-five (25) pages in length using standard margins, double-spaced lines, and a font no smaller than 12-point Garamond, unless the filing party first obtains leave of the court after showing good cause why a longer brief is necessary.

10. When a dispositive motion, together with its supporting brief and exhibits, consists of fifty (50) or more pages, the filing party must send a paper courtesy copy of the documents to Judge Urbanski's chambers at 210 Franklin Road, SW, Suite 350, Roanoke, VA 24011-2208.

11. No motion, brief, or exhibit may be filed under seal, except as allowed by the mandatory provisions of Western District of Virginia General Local Rule 9. The requirements of General Local Rule 9 may not be modified by a stipulated protective order or other agreement of the parties.

12. Motions to join the parties and amend the pleadings shall comply with Rules 15 and 19 of the Federal Rules of Civil Procedure. Absent unusual circumstances, such motions should be filed prior to the close of discovery.

13. The court does not generally schedule motions hearings. Such scheduling is the responsibility of the parties. Any party requesting a hearing must contact Kristin Ayersman (kristina@vawd.uscourts.gov; 540-857-5153), to set a hearing date. If the parties do not promptly schedule a hearing, the court will rule on the motion without a hearing.

14. Nondispositive motions, including motions for enlargement of time, whether or not opposed, may be acted upon at any time by the court without awaiting a response.

Witnesses

15. Expert witnesses who are retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony must prepare a written report that conforms to the requirements of Rule 26(a)(2)(B). Unless the parties otherwise agree or the court otherwise directs, the plaintiff must submit the written report of each expert not later than seventy-five (75) days from the date of this order, and the defendant must submit the written report of each expert no later than ninety (90) days from the date of this order. Supplemental and additional reports may be thereafter submitted, if submitted in sufficient time that discovery, if desired, can be completed reasonably by the discovery cutoff date without undue duplication and expense.

16. With respect to expert witnesses who are not retained or specially employed to provide expert testimony, such as a treating physician, or other person who may qualify as both an expert and a fact witness, the plaintiff must disclose the identity of any such witnesses and provide a summary of all opinions the witness will render and the basis therefore not later than seventy-five (75) days from the date of this order. The defendant must disclose the identity of any such witness and provide a summary of all opinions the witness will render and the basis therefore not later than ninety (90) days from the date of this order. Supplemental and additional disclosures may be thereafter submitted, if submitted in sufficient time that discovery, if desired, can be completed reasonably by the discovery cutoff date without undue duplication and expense.

17. Any motion to exclude the testimony of an expert must be filed no later than the deadline for filing motions for summary judgment.

18. The parties shall exchange lists of trial exhibits to be used in their case-in-chief and witnesses they expect to call in their case-in-chief at trial no later than twenty-one (21) days prior to

trial. For each witness, the list shall include the witness's name and address and a summary of the witness's anticipated testimony.

Settlement Conference / Mediation

19. Upon motion of any party, the court will refer the case to a magistrate judge to conduct a settlement conference / mediation.

20. If the case settles before trial and the court does not receive a proposed final order within thirty (30) days after the court received oral or written notification of the settlement, the court will dismiss the case with prejudice and retain jurisdiction to enforce the settlement if any party so moves within sixty (60) days of the entry of the dismissal order.

It is so **ORDERED**.

Entered: January 9, 2018

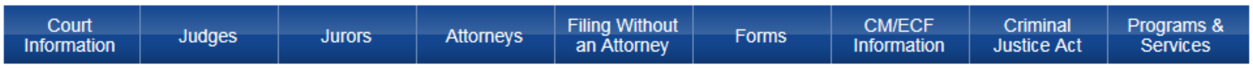
Michael F. Urbanski

Michael F. Urbanski
Chief United States District Judge

STEP-BY-STEP INSTRUCTIONS ON ELECTRONIC FILING SYSTEM (CM/ECF) FOR CIVIL CASES IN WESTERN DISTRICT

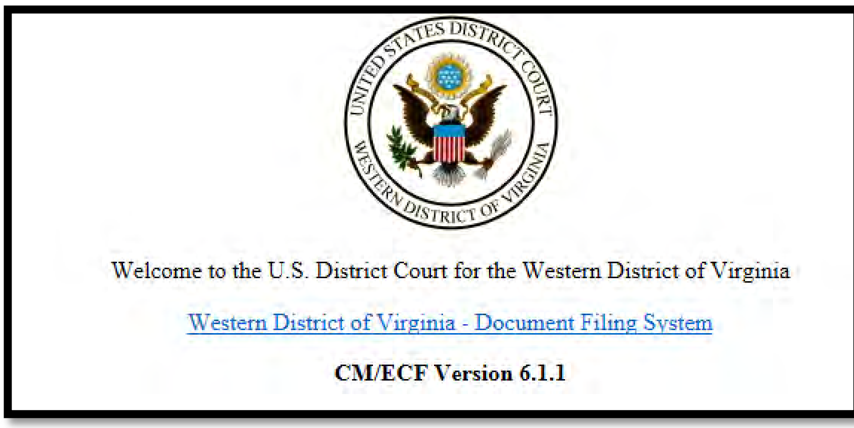
1. Go to website: http://www.vawd.uscourts.gov.

2. From example blue bar below, click CM/ECF Information.

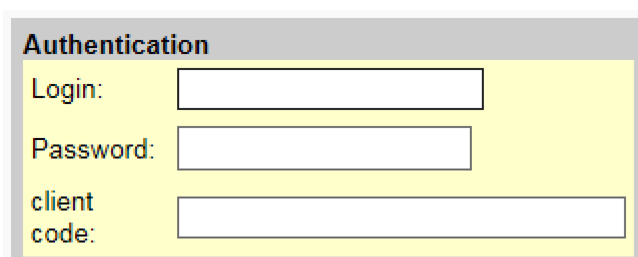


3. On CM/ECF drop-down box, click "E-Filing (CM/ECF)."

4. From example below, click **Western District of Virginia – Document Filing System**



5. Enter Login, Password, and client code where box appears (note: you will also need to check the box that states: ☐ **I understand that, if I file, I must comply with the redaction rules. I have read this notice.**). Then click Login



6. From below example, we will use Civil Filing. Click on Civil.

7. Choose and click on type of service.

8. Choose the Available Event that fits the closest to the pleading you are filing.

9. Enter the Civil Case Number, and click "Find this Case."

10. Follow instructions until you get to the next example (# 11).

11. Documents will need to be scanned and saved to a drive (your personal drive or a designated one) on your computer. Upload your Main Document by clicking on Browse. If there are any attachments, they will need to be uploaded separately and individually from the "Main Document," so follow the same procedure and upload under "Attachments."

12. Select the Party or Parties you represent, and click Next.

13. Follow instructions, making sure all information is correct before submitting. Then click Submit.

For practice, you can click on section that states:

If you wish to practice filing electronically, please visit our TRAINING WEBSITE.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

PATRICIA L. HANCOCK	)	
Plaintiff,	)	**Civil Action No.: 16-1762**
v.	)	
WILLIAM H. KINGERY	)	**By: Honorable David B. Carson**
Defendant.	)	

SETTLEMENT CONFERENCE ORDER

Judge David B. Carson has agreed to conduct a judicial settlement conference in this case. To facilitate the just and expeditious resolution of this case, it is **ORDERED** as follows:

1. All parties and their lead counsel shall appear at the settlement conference scheduled in the Roanoke City Circuit Court **at 9:00 a.m. on September 11, 2017, and ending at 11:30 p.m.**, for the purpose of conducting discussions, in good faith, towards a compromise resolution of this case. ***Other court proceedings are scheduled throughout the day, so the parties need to be prepared to conclude their negotiations during the time scheduled***.

2. At the settlement conference, the parties should be prepared to provide a brief presentation outlining the factual and legal highlights of the case to be followed by separate confidential caucuses with Judge Carson.

3. Each party must bring to the settlement conference a person who is knowledgeable about the facts of the case and who has final authority up to the amount of plaintiff's last demand (or any demand made on a cross-claim or counterclaim), to be employed at that person's discretion, to resolve all facets of the case without having to seek or obtain additional authority from persons not in attendance.

No party or party representative may appear at the settlement conference via telephone without first obtaining court approval.

4. Prior to the settlement conference, the parties should make good faith efforts to negotiate and settle the case.

5. The substantive negotiations at the settlement conference are **CONFIDENTIAL** and may not be used by the parties for any purpose other than settlement. The parties and representatives attending or participating in the settlement conference are required to negotiate in good faith.

6. Counsel for the parties shall schedule a conference call with Judge Carson in advance of the settlement conference to discuss the issues in the case, the settlement conference process, and any unusual circumstances or questions. Such initial communications should involve all parties. Thereafter, the parties may raise confidential or strategic considerations with Judge Carson on a separate and confidential basis.

7. If the case is resolved at the settlement conference, the parties will be required to execute a settlement agreement that day.

8. If a party appears at the settlement conference without having complied with the requirements of this Order or fails to negotiate in good faith at the settlement conference, Judge Carson may continue or cancel the settlement conference, and may assess against the non-complying party, attorney, or both, a monetary sanction, which may include the fees and expenses incurred by the other parties in attending the settlement conference.

Enter this ______ day of __________________________, 201___.

____
David B. Carson, Judge

IT'S ABOUT TIME!
Gentry Locke's 2018 CLE Seminar

6

Ethics for Lunch

Crime Fraud Exception to the Attorney-Client Privilege Rule: How a Client's Actions can Eliminate Privilege

J. Scott Sexton

Gregory J. Haley

Andrew M. Bowman

ETHICS FOR LUNCH:
Crime Fraud Doctrine Exception to the Attorney-Client Privilege

Scott Sexton
Greg Haley
Andrew Bowman[1]

Gentry Locke Seminar
September 7, 2018

I. INTRODUCTION: The Attorney-Client Privilege and The Crime-Fraud Exception.

The attorney-client privilege exists to encourage honest and open communication between attorneys and their clients, and thus to promote the observance of law and the administration of justice. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The attorney-client privilege is the oldest privilege for confidential communications known to the common law. Id.

However, the privilege is not absolute. It is an exception to the general duty to disclose information, "is an obstacle to the investigation of the truth, and should be strictly construed." Walton v. Mid-Atlantic Spine Specialists, P.C., 280 Va. 113, 122 (2010) (quoting Comm. v. Edwards, 235 Va. 499, 509 (1988)).

For example, the privilege is not designed to protect a client's criminal or fraudulent activities. "[A] client who consults an attorney for advice that will serve him in commission of a fraud will have no help from the law. He must let the truth be told.'" United States v. Under Seal (In re Grand Jury Proceedings), 102 F.3d 748, 752 (4th Cir. 1996).

The "crime-fraud" exception addresses this concern, and is one of the most well-established exceptions to the attorney-client privilege in American law. H. Lowell Brown, The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling, 87 Ky. L.J. 1191, 1197 (1998-1999); see also Clark v. United States, 289 U.S. 1, 15 (1933) (listing early cases invoking the privilege).

II. ETHICAL CONSIDERATIONS FOR ATTORNEYS

Although tasked with representing their clients zealously, lawyers are not free to follow their clients' instructions in all cases. The actions that the client wishes the attorney to participate in may not be permitted by the Rules of Professional Conduct. The proposed actions or conduct

[1] The speakers thank Tom Spahn and Edna Selan Epstein for their extensive treatments of the exception in: Thomas E. Spahn, The Attorney-Client Privilege and The Work Product Doctrine: A Practitioner's Guide, Ch. 18 (3d. ed. 2013); and Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine, Vol. 1, § V.B., pp. 878-972 (6^{th} ed. 2017 American Bar Association). The speakers also thank Kirk Sosebee, Ben Byrd, and Kathy Wright for help in preparing this outline.

may involve potential crimes. They may involve potential misrepresentations or material omissions. Or the proposed conduct may be merely sharp practices.

Some examples of such questionable conduct would include secretly recording a conversation or phone call; or setting up a "straw man" to contact a third party and get information for the client's or attorney's use. This conduct could also include drafting sales documents that contain false representations, or transaction documents that omit material information.

Attorneys confronted with these scenarios face a dilemma. A client might approach an attorney for help in engaging in questionable conduct. Or in the middle of litigation or a transaction, a solution is proposed that involves questionable conduct.

Attorneys need to know what to do in these scenarios. A couple of examples illustrate the difficulties attorneys can find themselves in:

In *Under Seal 1 v. United States (In re Grand Jury Subpoena)*, 642 F. App'x 223 (4th Cir. 2016), a grand jury was investigating two commodities traders who worked for a bank executing block futures trades for large investors. The investigation centered on whether the traders used information about the impending trades for their personal gain. The bank that employed the traders engaged an attorney to represent the traders and the bank with regards to a regulatory investigation into the same matter. The attorney interviewed the traders and sent them a written submission asserting legal and factual defenses of the suspect trades. Because the traders intended to avoid detection and to continue their scheme, and to have the attorney misrepresent their activities to the regulator, the attorney's written communications to the traders were held to fall under the crime-fraud exception, and to not be privileged.

In *Sevachko v. Commonwealth*, 35 Va. App. 346, 355 (2001), the defendant informed his attorney that he planned to testify untruthfully. In the resulting perjury case, this statement to the defendants' attorney was held to fall under the crime-fraud exception, and to not be privileged. The Court held that the defendant's (now former) attorney could be forced to testify regarding the defendant's disclosure to him that the was going to testify untruthfully.

In *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128 (1992), the appellant's medical director wrote a memo regarding the case and forwarded it to the appellant's in-house counsel. When the in-house counsel later filed an interrogatory answer that was contradicted by the medical director's memo, it was held to constitute a fraud on the court, and the medical director's memo was found to not be privileged.

When attorneys face these types of situations, they should look to Virginia's Rules of Professional Conduct for guidance:

A. Clients sometimes ask lawyers to perform services that are not permitted by the rules of professional conduct, including assisting clients in the perpetration of a crime or fraud.

i. Rule 1.2(a): "*A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued*." Ordinarily, the objectives of the representation are determined by the client, and the means of achieving these objectives are determined by the lawyer, in consultation with the client.

ii. Rule 1.2(c): "*A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law*." There are limits to what objectives and means the lawyer may use, even at the client's direction. This Rule forbids lawyers from knowingly assisting a client in criminal or fraudulent conduct. Comment 10 to this Rule highlights the difficulty lawyers can face: "When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer shall not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. See Rule 1.16."

iii. Rule 1.2(e): "*When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct*." If the situation arises were the client requests or directs the lawyer to engage in unethical conduct, including assisting the client in the commission of a crime or fraud, the lawyer is directed to raise the issue with the client and explain to them the limits that the ethical rules place on the attorney's actions.

iv. Rule 1.3(c): "*A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3*." This rule prevents attorneys from prejudicing or damaging their client during the representation. The Rules again attempt to strike a balance between zealous representation and ethical considerations. Comment 1 elaborates on this: "A lawyer . . . may take whatever lawful <u>and ethical</u> measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." (emphasis added).

v. Rule 3.1: "*A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law*." Even at the client's direction, it is unethical for attorneys to bring claims or raise issues that are frivolous or lack a good faith basis. Comment 1 emphasizes that attorneys have a "duty not to abuse legal procedure" in the course of their zealous representation. Under Comment 2, it is not frivolous to filing a claim or take a position "even though the lawyer believes that the client's position ultimately will not prevail." The action is frivolous only if "the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person," or the attorney has no good faith argument under existing law or for an extension, modification or reversal of existing law.

B. An attorney can terminate the relationship with a client if the client continues to insist that the attorney engage in unethical conduct.

i. Rule 1.16(a)(1): "*a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in violation of the Rules of Professional Conduct or other law*." An attorney is <u>required</u> to withdraw from a representation if continuing with the representation would violate the ethical rules or other law. If the continuance of the attorney-client representation would help to perpetrate a crime or fraud, the attorney must withdraw.

ii. Rule 1.16(b)(1): "*a lawyer may withdraw from representing a client if . . . the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust*." An attorney is <u>permitted</u> to withdraw from a representation if the client is using the attorney's services to further illegal or unjust conduct.

iii. Rule 1.16(b)(2): "*a lawyer may withdraw from representing a client if . . . the client has used the lawyer's services to perpetrate a crime or fraud*." If the client has used the attorneys' services to perpetrate a crime or fraud <u>in the past</u>, the attorney is <u>permitted</u> to end the representation.

iv. Rule 1.16(b)(3): "*a lawyer may withdraw from representing a client if . . . a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent*." An attorney is <u>permitted</u> to withdraw from a representation where the client insists on pursuing "repugnant or imprudent" objectives.

C. Attorneys have independent duties toward the Court and the judicial system that also prohibit them from engaging in, or assisting in, fraudulent or criminal conduct.

i. Rule 3.3(a)(1): "*A lawyer shall not knowingly make a false statement of fact or law to a tribunal*."

ii. Rule 3.3(a)(2): "*A lawyer shall not knowingly . . . fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client*."

iii. Rule 3.3(a)(4): "*A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures*."

iv. Rule 3.3(d): "*A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal*."

v. Rule 3.4(a): "*A lawyer shall not . . . Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act*."

vi. Rule 3.4(c): "*A lawyer shall not . . . Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law*."

vii. Rule 3.4(i): "*A lawyer shall not . . . Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter*."

viii. Rule 3.4(i): "*A lawyer shall not . . . File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another*."

ix. Rule 4.1(a): "*In the course of representing a client a lawyer shall not knowingly . . . make a false statement of fact or law*."

x. Rule 4.1(a): "*In the course of representing a client a lawyer shall not knowingly . . . fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client*."

xi. Rule 4.4: "*In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person*."

xii. Rule 8.4(b): "*It is professional misconduct for a lawyer to: . . . commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law*."

xiii. Rule 8.4(c): "*It is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law*."

III. SCOPE

A. Client. An individual, or persons within a "corporate control group." Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1 (4th Cir. 1976). United States v. Under Seal (In re Grand Jury Proceedings), 102 F.3d 748 (4th Cir. 1996).

B. Types of communication.

i. Applies to both attorney-client statements and attorney work product. In re Grand Jury Proceedings, 102 F.3d at 750-51.

ii. Applies to advice sought from an attorney, and advice given by an attorney. In re Grand Jury Proceeding (Schroeder), 842 F.2d 1229 (11th Cir. 1988).

iii. Documents, electronic communications, conversations, and potentially non-verbal communications like nods, raised eyebrows, etc. See Thomas E. Spahn, *supra* note 1 at 391, § 18.402.

C. Timeframe of the Crime or Fraud.

i. Crime or fraud presently occurring or planned for the future. United States v. Zolin, 491 U.S. 554, 562-63 (1989)). Sevachko v. Commonwealth, 35 Va. App. 346, 356 (2001).

ii. Active concealment of prior wrongdoing. Under Seal 1 v. United States (In re Grand Jury Subpoena), 642 F. App'x 223, 226 (4th Cir. 2016).

iii. NOT to communications in which a client seeks advice on dealing with past wrongful conduct. Zolin, 491 U.S. at 562[2].

D. Crimes. Violations of criminal law, domestic or (sometimes) foreign. Madanes v. Madanes, 199 F.R.D. 135 (S.D.N.Y. 2001).

[2] The line between assistance in dealing with a prior wrongdoing and assistance used to cover up, or continue a past wrongdoing, is not always clear. Epstein, note 2 supra, Vol I at 887.

E. Fraud. Common law/tortious fraud or a particular legal definition or interpretation of fraud. The term is also used generally to convey other forms of wrongdoing. Spahn, *supra* at § 18.303, pp. 383-84.

F. Other wrongful conduct. Across the United States, the crime-fraud exception has been related to cases involving:

i. Intentional breaches of fiduciary duty. Mueller Indus., Inc. v. Berkman, 927 N. E. 2d 794, 808 (Ill. App. Ct. 2010).

ii. Fraud on government agencies. Danisco A/S v. Novozymes A/S, 427 F. Supp. 2d 443, 444-45 (S.D. N.Y. 2006).

iii. Spoliation of evidence. In re Grand Jury Investigation, 445 F.3d 266, 279 (3d Cir. 2006); Rambus Inc. v. .Infineon Techs. AG, 220 F.R.D. 264, 283 (E.D. Va. 2004).

iv. Bad faith by an insurer. Hutchinson v. Farm Family Cas. Ins. Co., 867 A.2d 1, 7 (Conn. 2005); but see, Freedom Trust v. Chubb Grp., 38 F. Supp. 2d 1170, 1171-73, n.3 (C.D. Cal. 1999).

v. Securities Fraud. SEC v. Herman, No. 00 Civ 5575 (PKC) (MHD), 2004 U.S. Dist. LEXIS 7829 (S.D.N.Y. May 5, 2004).

vi. Baseless or frivolous litigation. Specialty Minerals, Inv. v. Pleuss-Stauffer AG, No. 98 Civ. 7775 (VM)(MHD), 2004 U.S. Dist. LEXIS 178 (S.D.N.Y. Jan. 6, 2004); but see in re Fresh Del Monte Pineapple Antitrust Litig., No. MD 1628 (RMB)(MHD), 2007 U.S. Dist. LEXIS 1372 (S.D.N.Y. Jan. 4, 2007).

vii. Intentional torts. Madanes, 199 F.R.D. at 148-49; Cooksey v. Hilton Int'l Co., 863 F. Supp. 150, 151 (S.D.N.Y. 1994); but see Tri-State Hosp. Supply Corp. v. United States, 238 F.R.D. 102-04 (D.D.C. 2006) (malicious prosecution).

viii. Deception. Ngai v. Old Navy, Civ. A. No. 07-5653 (KSH) (PS), 2009 U.S. Dist. LEXIS 67117 (D.N.J. July 31, 2009).

ix. Gross negligence. Derrick Mfg. Corp. v. Sw. Wire Cloth, Inc., 934 F. Supp. 813, 816 (S.D. Tex 1996).

x. Intentional infliction of emotional distress. Diamond v. Stratton, 95 F.R.D. 503, 505 (S.D.N.Y. 1982).

xi. Fraud on a court. Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128 (1992); Sevachko v. Comm., 35 Va. App. 346, 355 (2001).

xii. Violation of legal ethics rules. Barouh v. Barouh, No. 021154/2008 2011 N.Y. Slip Op. 32141U at 5 (N.Y. Sup. Ct. July 28, 2011); LM Ins. Corp. v. ACEO, Inc., 275 F.R.D. 490, 492 (N.D. Ill. 2011).

xiii. Lawyer's unprofessional or sanctionable behavior. Blanchard v. Edgemark Fin. Corp., 192 F. R. D. 233, 241 (N.D. Ill 2000); United States v. Oloyede, 982 F.2d 133, 141 (4th Cir. 1992); but see, Prudential Ins. Co. of Am. v. Massaro, Civ. A. No. 97-2022, 2000 U.S. Dist. LEXIS 11985 (D.N.J. Aug. 14, 2000).

xiv. Violations of an administrative order regarding *ex parte* contacts. Chevron U.S.A., Inc. v. United States, 80 Fed. Cl. 340 (Fed. Cl. 2008).

G. Not applied.

i. The crime-fraud exception was not applied in response to:

ii. Inequitable conduct alone. Magnetar Techs. Corp. v. Six Flags Theme Park, Inc., 886 F. Supp. 2d 466, 482-83 (D. Del. 2012).

iii. Tortious conduct. Klingeman v. DeChristofaro, Case NO. 4:09CV528, 2010 U.S. Dis. LEXIS 98025 (N.D. Ohio Sept. 8, 2010).

iv. Trespass. Tara Woods Ltd. P'ship v. Fannie Mae, Civil A. No. 09-cv-00832-MSK-MEH, 2010 U.S. Dist. LEXIS 95107 (D. Colo. Aug. 19, 2010).

v. Filing bankruptcy. Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F. 3d 371, 388 (7th Cir. 2008).

vi. Firing an employee. Estes v. Health Ventures of S. Ill., Civ. No. 05-741 DRH, 2006 U.S. Dist. LEXIS 80719 (S.D. Ill. Nov. 3, 2006).

vii. Errors made during discovery. Jinks-Umstead v. England, 232 F.R.D. 142, 145-46 (D.D.C. 2005).

viii. Possible prior perjury. Princeton Ins. Co. v. Vergano, 883 A.2d 44, 59 (Del.Ch. 2005).

IV. PROCEDURE

A. Motion. In criminal cases, the context is frequently in response to a motion to quash or other resistance to a subpoena on the ground that the information sought is privileged. In civil cases, the argument appears in motions to compel discovery responses that have been withheld as privileged.

i. Frequently a two-step process.

1. The movant must make an initial “threshold” or “lesser” showing, without the allegedly privileged material, of “a factual basis adequate to support a good faith belief by a reasonable person, that in camera review may reveal evidence to establish that the crime fraud exception applies. United States v. Under Seal (In re Grand Jury Proceedings #5), 401 F.3d 247, 253 (4th Cir. 2005). But, see, In re Grand Jury Proceedings, 33 F.3d at 351 (when the government moved to apply the exception in the context of grand jury proceedings, it was not required to meet the initial threshold for *in camera* review).

2. After the threshold showing is made, the court may review the allegedly privileged documents *in camera* to determine whether *prima facie* case has been made to remove the privilege.

3. If the evidence presented at the “threshold” stage is sufficient to meet the *prima facie* burden, then the court may determine that the documents are subject to the crime fraud exception, and are not privileged, without an *in camera* review of the documents at issue. However, some circuits require the court to review the documents before applying the exception. In re Grand Jury Proceedings #5, 401 F.3d at 253 n.5.

ii. *Prima facie* showing. To remove the privilege, the party asserting the crime-fraud exception “must make a *prima facie* showing that requested documents fall within the exception.” Grand Jury Subpoena v. United States, 870 F.3d 312, 319 (4th Cir. 2017). The showing requires evidence of two prongs:

1. that the client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel (Prong 1); and

2. that the attorney’s assistance was obtained in furtherance of the crime or fraud or was closely related to it (Prong 2).

Under Seal 1,642 F. App’x at 226.

B. Standard.[3]

i. Prong one is satisfied by evidence that, “if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed.” In re Grand Jury Proceedings #5, 401 F.3d at 251; Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Grp., Inc., 116 F.R.D. 46, 53 (M.D.N.C. 1987).

[3] Epstein’s treatise on attorney-client privilege (*supra*), includes a comparison of the standards applied in different federal circuits. *Supra* pp. 908-28. Ultimately, the differences in describing the standard do not appear to have a significant effect on the application of the exception. Id.

1. No requirement to prove the crime by a preponderance of evidence, or beyond a reasonable doubt. In re Grand Jury Proceedings #5, 401 F.3d at 251.

2. However, a "mere speculative nexus or even coincidences between different pieces of evidence does not establish a *prima facie* basis for the exception." Parkway Gallery. 116 F.R.D. at 53.

3. The violation need not be tied to the claims at issue; any ongoing or prospective crime, fraud, or tort is sufficient. In re Grand Jury Proceedings #5, 401 F.3d at 255.

4. For the first prong, there must be evidence that the client was either engaged in or planning criminal or fraudulent conduct when she sought the legal advice, or that the client committed a crime or fraud after receiving legal counsel. In re Schroeder, 842 F.3d at 1226.

ii. Prong two is satisfied by evidence of a close relationship between the attorney-client communications and the possible criminal or fraudulent activity. In re Grand Jury Proceedings #5, 401 F.3d at 251.

1. Timing alone is not sufficient to show a close relationship. In re Sealed Case, 107 F.3d 46, 51 (D.C. Cir. 1997) (privilege could not be pierced for communications surrounding a meeting between corporation's general counsel, president and vice president where campaign finance law was discussed, even though the vice president violated those laws within weeks of the meeting).

2. Cannot be assumed based on sufficient showing of Prong 1. In re Grand Jury Proceedings #5, 401 F.3d at 254-56, (upholding a district court's finding, based on other evidence, that a violation of federal law was either ongoing or about to happen; but remanding to the lower court to review the challenged documents before holding that the exception applied. The district court had had no evidence to evaluate whether there was any connection between the communications and the potential crime); see also Ukiah Auto Inv. V. Mitsubishi Motors of N. Am., Inc., 2006 U.S. Dist. LEXIS 39613 (N.D. Cal. June 5, 2006) (no *in camera* review was warranted when there was no evidence that legal advice was sought to cover up prior wrongdoing, rather than appropriately dealing with prior wrongdoing).

iii. A "lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege." Zolin, 491 U.S. at 572.

iv. The Fourth Circuit cases tend toward a more broad view of the required connection between the attorney's communication or work and the crime or other wrongdoing. Spahn, *supra*, § 18.404, 393-94; see, e.g., In re Grand Jury Proceedings #5, 401 F.3d at 251 (attorney's action must be "closely related to" the crime or fraud).

C. Evidence to meet the *prima facie* showing.

i. The burden of proof is on the party seeking to remove the privilege. Grand Jury Subpoena v. United States, 870 F.3d at 319.

ii. A court may determine whether the *prima facie* showing has been met based on testimony or other proffer of evidence. In re Grand Jury Proceedings #5, 401 F.3d at 255. *Ex parte* testimony or affidavits may also be considered. In re Grand Jury Subpoena, 745 F.3d 681 (3d Cir. 2014). The evidence is not required to be admissible at trial. United States v. Under Seal (In re Grand Jury Investigation), 352 Fed. App'x 805, 808 (4th Cir. 2009) A court can review the allegedly privileged documents *in camera* to support the *prima facie* case *after* the moving party makes a threshold evidentiary showing that the crime-fraud exception applies using non-privileged information. Zolin, 491 U.S. 554, 570-75.

iii. The party seeking the exception must provide enough evidence to "subject the opposing party to the risk of non-persuasion if the evidence as to the disputed fact is left unrebutted." Duplan, 540 F.2d at 1220.

iv. The intent of the client, not the lawyer, is what matters, when considering communications allegedly protected by attorney-client or factual work-product privileges. The *prima facie* showing need only demonstrate that the attorney-client "communication furthered, or was intended by the client to further," a crime or fraud, even if the attorney was unaware of the planned fraud or crime. United States v. Under Seal (In Re Grand Jury Proceedings), 102 F.3d 748, 751 (4th Cir. 1996) (emphasis added).

v. Opinion work product is analyzed differently. To pierce the privilege applicable to opinion work product, the opponent must show the lawyer was aware of or was a knowing participant in the illegal or fraudulent act. In re: Grand Jury Proceedings #5, 401 F.3d at 252.

D. *In camera* review.

i. Of the disputed documents. After sufficient evidence of a factual basis that would support "a good faith belief by a reasonable person" that the exception applies (Zolin, 491 U.S. at 572), the court has discretion to order an *in camera* review of the documents to ascertain whether or not the crime-fraud exception applies to them. United States v. Under Seal (In re Grand Jury Proceedings), 33 F.3d 342, 350-51 (4th Cir. 1994).

ii. Of other evidence. The court also has the discretion to conduct an *in camera* review, through a hearing or document review, of other evidence to determine whether the *prima facie* case has been made. In re Grand Jury Proceedings #5, 401 F.3d at 253.

E. Virginia courts follow the same procedure as federal courts. See Peterson v. Fairfax Hosp. Sys., 32 Va. Cir. 294, 296 (Cir. Ct. 1993) ("Plaintiffs have the burden of establishing a '*prima facie*' case of fraud . . . The Court may make an *in camera* review of alleged privileged material prior to making it available to requesting party.").

F. Standard of Review on Appeal. A district court's ruling to apply the exception or affirm the claim of privilege will only be reversed on a clear showing of abuse of discretion. Under Seal 1, 642 F. App'x at 226.

G. Effect on privilege. When the crime-fraud exception applies, documents that would otherwise be protected by the attorney-client privilege are subject to discovery to the extent the content meets the exception. However, communications not related to the wrongdoing do not lose protection. In re Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir. 1986) (existence of antitrust violation did not remove the privilege for all attorney-client communications).

V. PART 6 – ETHICS RULES IN VIRGINIA RELATED TO CONFIDENTIAL CLIENT COMMUNICATIONS

A. The Rules generally require that client information be kept in confidence. See Rule 1.6 (a).

B. There are exceptions to this duty:

i. Rule 1.6(b) details a number of exceptions to the duty of confidentiality. These include, but are not limited to, the following types of permissive disclosure when the lawyer may choose to reveal information:

1. To comply with a court order (Rule 1.6(b)(1));

2. To establish a claim or defense on behalf of the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client (Rule 1.6(b)(2));

3. If a client, in the course of representation, has perpetrated a fraud upon a third party related to the subject matter of the representation (Rule 1.6(b)(3)); and

4. To prevent reasonably certain death or substantial bodily harm (Rule 1.6(b)(7)).

C. Rule 1.6(c) also provides for situations under which a lawyer "shall promptly reveal" confidential information. These include, but are not limited to:

i. The intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3 (Rule 1.6(c)(1)); and

ii. Information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client (Rule 1.6(c)(2)).

VI. FOURTH CIRCUIT AND VIRGINIA CASE SUMMARIES

A. Fourth Circuit Cases.

i. **Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215 (4th Cir. 1976)** addresses the burden on the party seeking to compel production of otherwise privileged materials.

In this interlocutory appeal, appellants sought discovery prepared by attorneys regarding certain prior litigation. The appellants argued that the documents were part of a conspiracy to violate the Sherman Act. The district court refused to order production of the documents.

On appeal, the Fourth Circuit affirmed the district court's conclusion that these documents were protected from discovery under the work product doctrine. While the Fourth Circuit did not address whether a crime-fraud exception existed under the Federal Rules of Civil Procedure, it found that even if there was such an exception, the appellants failed make a *prima facie* showing of a conspiracy. While the appellants were not required to prove the existence of a conspiracy to meet their burden, they were nonetheless required to make a strong enough showing to "subject the opposing party to the risk of non-persuasion if the evidence as to the disputed fact is left unrebutted." Duplan, 540 F.2d at 1220. The Fourth Circuit left open the possibility that the appellants might be able to make such a showing on remand.

ii. **United States v. Under Seal (In re Grand Jury Proceedings), 33 F.3d 342 (4th Cir. 1994)** details the procedure required for review of documents.

At the district court level, one of the appellants was served with a subpoena issued by the grand jury, which was investigating billing practices. The appellant withheld a number of documents based on the attorney-client and work product privileges. The government filed a motion to compel, claiming that many of the records were not covered by privilege and that the claims of privilege were abrogated because the services of the attorneys were utilized to further a course of fraudulent and/or criminal conduct. The government provided, *in camera*, grand jury testimony and documents supporting the applicability of the crime-fraud exception.

The district court granted the government's motion to compel, ruling that some of the documents were not covered by privilege, and that the crime-fraud exception applied to the remaining documents.

The Fourth Circuit affirmed the district court's finding that the crime-fraud exception applied to the documents at issue, relying heavily on the United States Supreme Court's opinion in Zolin.

Zolin addressed the question of whether a court may examine the allegedly privileged documents to determine whether the crime-fraud exception applies. The party asserting the privilege in Zolin contended that the party invoking the crime-fraud exception had to establish the existence of the crime or fraud through the use of independent evidence. The Supreme Court rejected that argument, and held that the documents themselves could be examined to make the necessary determination; but only after a threshold showing that *in camera* review of the challenged documents is appropriate:

> Before engaging in *in camera* review [of allegedly privileged documents] to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person, . . . that *in camera* review of the materials [at issue] may reveal evidence to establish the claim that the crime-fraud exception applies.

Id. at 350 (quoting United States v. Zolin, 491 U.S. at 572).

The Fourth Circuit noted that Zolin did not prohibit all *in camera* reviews without the requisite threshold showing. Zolin only prohibited *in camera* review of the documents that are the subject of the subpoena and the asserted privilege, unless the threshold showing is made. Id.

The Zolin court approved a procedure where the district court considered evidence (outside the challenged documents) *ex parte* to determine that the government had made the required threshold showing. The district court held that the *ex parte* evidence was sufficient to apply the crime-fraud exception and require the documents be produced. No *in camera* review of the challenged documents themselves was necessary. Under Zolin, the decision to review the allegedly privileged documents *in camera* is one within the district court's discretion. The Supreme Court also noted that a district court is free to defer an *in camera* review of the challenged documents if it concludes that additional, non-privileged evidence in support of the crime-fraud exception may be available. Id.

Similarly, the district court in the Fourth Circuit case had evidence the government obtained through grand jury proceedings. That evidence was sufficient to make it unnecessary for him to review the documents. The appellants had also submitted summaries of the contested documents *in camera*. The district court made a decision that the exception applied on the basis of both the government's and the appellants' *in camera* submissions and exercised its discretion not to review the actual documents. Id. at 350-51.

The Fourth Circuit affirmed the district court's rulings, but held that attorney opinion work product needed to be redacted after an *in camera* review.

iii. **United States v. Under Seal (In Re Grand Jury Proceedings), 102 F.3d 748 (4th Cir. 1996).** The exception applies to innocent actions of counsel if the client acts improperly.

In this case, the Federal Deposit Insurance Corporation (FDIC) was investigating bank loans for alleged violations of lending limits. The FDIC subpoenaed the bank's lawyers to find out what the bank told them regarding a certain loan. The bank moved to quash, citing attorney-client privilege. The district court held that the government met its burden and the crime-fraud exception applied to remove the privilege, even though the bank's attorneys were unaware of the bank's fraudulent activities. Id. at 750-52.

The Fourth Circuit upheld the decision. The Court held that the client's frame of mind, not the lawyer's, matters when it gives its lawyer false information to help perpetrate a crime. The client's intent to cover up criminal or fraudulent activities governed the court's analysis, because the client holds the privilege. Id. at 751.

> The court is satisfied that the district court's finding of a *prima facie* case of crime-fraud is adequately established by the record. Here, each of the attorneys, unknowingly, furthered the Bank's alleged fraud by referencing in various documents the November 21, 1990 loan to the customer's wife. Thus, the Bank was able to 'legitimize' the wife's 1990 loan, as made on a date six days earlier than when actually made, by using its attorneys to file pleadings, documents, and to write letters referencing the November 21,

> 1990 note. Consequently, the attorneys, albeit unknowingly, furthered the Bank's fraud.

Id. at 751-52. The Court agreed that the crime-fraud exception overrode both the attorney client and work product privileges the bank asserted.

iv. United States v. Under Seal (In re Grand Jury Proceedings #5), 401 F.3d 247 (4th Cir. 2005).

In this case the district court denied a motion to quash a grand jury subpoena seeking documents and testimony from a lawyer regarding former clients. The district court's decision was based on *ex parte* evidence from the grand jury investigation. The district court did not review the challenged documents themselves.

The Fourth Circuit reversed and remanded, holding the district court had abused its discretion by failing to require or consider any evidence in support of the second prong of the test described in Chaudhry v. Gallerizzo, 174 F.3d 394, 403 (4th Cir. 1999). No evidence had been submitted that showed that the documents at issue were connected to a crime or fraud. The court therefore instructed the district court to either "examine the actual documents (or summaries thereof) *in camera* or to otherwise determine whether they satisfy prong two of the crime-fraud exception as it applies to attorney-client privilege." 401 F.3d at 255.

The Court similarly held that there was not enough evidence to show that the requested testimony by the attorneys would bear a close relationship to the alleged criminal conduct. The court agreed that the government had provided sufficient evidence of an ongoing or future plan to commit crimes – the first prong was satisfied.

The opinion affirms the two-prong test described above, the standards for meeting the two prongs, and the importance of the client's (not the attorney's) intentions in the analysis.

v. Under Seal 1 v. United States (In re Grand Jury Subpoena), 642 F. App'x 223 (4th Cir. 2016).

The Fourth Circuit upheld the district court's application of the exception. This case involved efforts to cover up past criminal conduct:

> With this framework in mind, we have reviewed the particulars of this case and determined that the district court did not clearly err in determining that the government successfully made a *prima facie* showing that the Traders engaged in a criminal or fraudulent scheme of misusing information about impending trades for personal gain. The district court's

> determination that the Traders intended to avoid detection and continue their scheme in communicating with Lawyer, not least by having Lawyer misrepresent their activities to the regulator, is likewise supported by the record.

Id. at 227-28.

B. Virginia Cases.

i. Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128 (1992). Fraud upon the court.

The Court upheld the trial court's decision to admit into evidence a memo written by appellant's medical director and forwarded to appellant's in-house counsel. The memo directly contradicted the appellant's later interrogatory answer. The appellant's false interrogatory answer was a fraud on the court, and therefore unprotected by the privilege. Excluding the memo from evidence would only serve to perpetuate the original fraud and would not serve the administration of justice.

ii. Seventh Dist. Comm. v. Gunter, 212 Va. 278, 287 (1971).

An attorney, Gunter, was being investigated for unethical and unprofessional conduct. In one instance, he took a statement from a new client on February 14, 1968, then changed the date on the statement to February 20, 1968 to hide the fact that he took on civil representation of the client before a related criminal charge was disposed of on February 19, 1968.

Gunter provided the forged statement with the February 20, 1968 date to his attorneys, and they used this statement and the fact that there was nothing in the file before the 20th to argue that Gunter had not undertaken representation of the client in the civil matter before February 19, 1968.

The Virginia Supreme Court rejected Gunter's claim of privilege over communications with his attorneys related the altered statement. The communications were made in an effort to commit fraud on the Committee. The communications were not protected by the attorney-client privilege.

iii. **Sevachko v. Commonwealth, 35 Va. App. 346, 355 (2001).** A lawyer may be compelled to testify that a client planned to testify untruthfully.

In this perjury prosecution case, the government sought testimony from the defendant's former attorney. The defendant had informed his attorney that he planned to testify untruthfully. The Court of Appeals held that his disclosure to his attorney that the was going to testify untruthfully was not privileged, and was admissible under the crime-fraud exception. The case cites Seventh District Committee v. Gunter, 212 Va. 278, 183 S.E.2d 713 (1971).

VII. FACTUAL SCENARIOS – HOW DO THESE SITUATIONS ARISE?

A. Examples.

i. Client intentionally withholds relevant information, or provides false information, to the attorney, and the attorney acts on the information to make representations to third parties, particularly a court or government agency.

ii. Organized crime ring concealed part of its criminal actions by hiring attorneys to defend members who were arrested. The attorney was compelled to identify the person who hired him.

iii. Client's request to the attorney to find out about the status of a case by asking a federal judge was admissible under the crime-fraud exception when both attorney and client claimed the attorney never represented the client.

iv. An internal investigation designed to persuade third parties that no wrongdoing had occurred was part of the client's cover up, and not protected by privilege.

v. A lawyer for a securities broker under investigation explained the type of emails the government was seeking, and then took no action to prevent the broker from deleting the emails. The attorney was compelled to testify to the grand jury.

vi. On the affidavit of former employees of a law firm and a medical clinic regarding spurious personal injury claims, the government seized the entire files of the law office.

vii. Communications between a company and counsel were not privileged when the government made a *prima facie* showing that the sale of a wholly-owned subsidiary was a fraudulent conveyance. Communications not related to the sale retained their privilege.

B. Attorney actions:

i. Lawyer may act innocently, without knowledge of client's wrongdoing (preparing a report based on false information);

ii. Lawyer may actively participate to further the crime or fraud; or

iii. Lawyer may acquiesce in the crime or fraud.

VIII. CONCLUSION.

Attorneys should be aware of the possibility that your attorney-client privilege with your clients, or your opposing counsel's privilege with his or her clients, is not inviolate. That privilege will not apply to communications designed to assist in the commission of a crime or fraud. Virginia's Rules of Professional Conduct also prohibit attorneys from assisting clients in the perpetration of a crime or a fraud.

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Business Law: Critical Rules in the Commercial World

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THE LAW OF CRYPTOCURRENCY

Christopher M. Kozlowski

Gentry Locke Seminar
September 7, 2018

The idea of a worldwide, uniform currency is not a new one. However, the advent of potentially workable solutions, such as Bitcoin, has required the legal community to quickly adapt to the technically complex world of crypto currency.

I. Reasons for a New Currency.

a) Global Financial Crises.

b) Loss of faith in some banking systems.

c) Bank inefficiencies.

d) Currency exportation prohibitions (China) and FX volatility.

e) Anonymity (Not really…)

II. Problems with Current Banking Systems.

a) 50% of the world has no or limited access to banking systems.

b) High costs and fees.

c) Privacy issues.

d) Security.

III. What is "Bitcoin"?

a) Bitcoin is:

Open Source (Non-proprietary), Decentralized (no issuing authority), Peer-to-Peer (no intermediary), Digital, Alternative, Cryptographic, Currency.

b) Bitcoin is not:

Anonymous (but it is pseudonymous), Risk-free (can be stolen), a Substitute (complementary), or Free.

IV. <u>Elements of a Bitcoin Transaction.</u>

a) Sender's Account Address (i.e. a series of number and letters which contains a Bitcoin Balance)

b) Sender's Message (Directing Bitcoins to be transferred)

c) Sender's Signature (Private Key/Password).

d) Transaction Verification (Mining)

- But How Does Mining Work?
  - **Miners** compete to solve **Blocks**
  - **Blocks** = bundles of individual transactions (10 min. intervals)
  - When Block is solved by a **Miner**, it is added to the **Blockchain**
  - **<u>Blockchain</u>**: Record of all Bitcoin transactions that have ever occurred. Public Ledger of Accounts . Extraordinarily difficult to hack . Uses state of the art, industry standard cryptography.

V. <u>Why is it Secure?</u>

a) Hashes and Nonces.

- Cyrptographic hash functions transform a collection of data into an alphanumeric string with a fixed length, called a "hash value."

- A nonce is a random number that's added to data prior to "hashing." Changing a nonce results in a wildly different hash value.
- Miners have no way to predict which Nonces will produce a correct hash value, so they are forced to continue generating nonces until the happen upon one that works.

b) Each block of transfers (and corresponding hash values) gets buried beneath more recent transactions. For anyone to modify the details, he would have to redo the work of the miner (changes required a completely different nonce) and then redo all of the work of the all of the subsequent miners. This process is widely regarded as nearly impossible.

VI. <u>Regulatory Environment.</u>

a) Cyptocurrencies are "securities," subject to the laws and rules regarding stock, not cash. The Securities and Exchange Commission has indicated it views digital currency as a security. Earlier in March, the agency expanded its scrutiny and said it is looking to apply securities laws to everything from cryptocurrency exchanges to digital asset storage companies known as wallets. The agency has focused on initial coin offerings, or digital coins released through fundraisers known as token sales, and has stepped up efforts to police them through recent subpoenas.

b) The SEC has issued numerous investor alerts stating that the rise of Bitcoin and other virtual and digital currencies creates new concerns for investors. The new product could give rise to fraud and high-risk investment opportunities, preying on individuals who do not understand the intricacies of the technology and are promised high returns. In February 2014, the SEC suspended trading in the securities of Imogo Mobile Technologies (announcement attached) because of questions about the accuracy and adequacy of publicly disseminated information about the company's business, revenue and assets. Shortly before the suspension, the company announced that it was developing a mobile Bitcoin platform, which resulted in significant movement in the trading price of the company's securities.

c) FinCen deems cryptocurrency not to be legal tender.

d) The IRS recently issued guidance (attached) stating that it will treat virtual currencies, such as Bitcoin, as property for federal tax purposes. As a result, general tax principles that apply to property transactions apply to transactions using virtual currency.

e) Ever-evolving. Bitcoin is only one currency, there are **many** others, some using drastically different technology.

f) There are different rules throughout the world. This causes issues for international transactions. What does this mean for Bitcoin as a "global" currency.

VII. Other Applications.

a) Cities are testing out blockchain as a way to record property transactions — and many other players are exploring technologies to streamline real estate transactions and closings

b) Cloud Storage and Digital Identities.

c) Passports.

d) Smart contracts/escrow agents.

e) Digital voting; Combating voter fraud.

f) Payment of legal fees?

VIII. Ethical Implications for Lawyers.

a) State ethics boards are beginning to opine on accepting Bitcoin.

b) The Nebraska board approved Bitcoin as a form of payment for services, subject to certain limitations.

c) The opinion explains that the ease of payment and other benefits to the payor come with certain requirements for attorneys accepting Bitcoin.

The board was mindful that a change in the price of Bitcoin could lead to attorneys being underpaid or clients being overcharged.

d) To avoid these problems, the opinion establishes several requirements for using Bitcoin.

e) First, a lawyer accepting Bitcoin must notify clients that the Bitcoin will immediately be converted to U.S. dollars. Second, the conversion must go through a payment processor. Third, the lawyer must credit the client's account at the time of payment. Lawyers may hold Bitcoin in trust for clients only after advising that the Bitcoin will remain as Bitcoin and not be converted but that it will be held separately from the lawyer's property.

f) The opinion specifically places itself within a trend that it notes has started with more jurisdictions using Bitcoin, albeit with restrictions. Because the Model Rules of Professional Conduct require lawyers to stay on top of technological trends and advancements, understanding the opinion is paramount for lawyers who want to allow clients to use another form of payment while simultaneously heeding the stringent guidelines the opinion requires.

g) Lawyers should consider how and where their business will use cryptocurrencies, determine what laws and regulations might apply, assist clients in implementing their plan so that they comply with applicable law, and advise them to stick to their plan. It is incumbent on counsel to stay informed on new laws or changes to existing laws, to advise your client if plans need to change.

IX. Attachments.

Securities Exchange Act of 1934, Release No. 71568, Feb. 19, 2014.

IRS Notice 2014-21.

Nebraska Ethics Advisory Opinion for Lawyers, No. 17-03.

See also SEC Investor Alert: Bitcoin and Other Virtual Currency-Related Investments (https://www.sec.gov/oiea/investor-alerts-bulletins/investoralertsia_bitcoin.html).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 71568 / February 19, 2014

The Securities and Exchange Commission announced the temporary suspension, pursuant to Section 12(k) of the Securities Exchange Act of 1934 (the "Exchange Act"), of trading in the securities of Imogo Mobile Technologies, Corp. ("IMTC"), of Bellevue, WA, at 9:30 a.m. EST on February 19, 2014 through 11:59 p.m. EST on March 4, 2014.

The Commission temporarily suspended trading in the securities of IMTC because of questions that have been raised about the accuracy and adequacy of publicly disseminated information concerning, among other things, IMTC's business, revenue, and assets. This order was entered pursuant to Section 12(k) of the Exchange Act.

The Commission acknowledges the assistance of FINRA in this matter.

The Commission cautions broker-dealers, shareholders, and prospective purchasers that they should carefully consider the foregoing information along with all other currently available information and any information subsequently issued by the company.

Further, brokers and dealers should be alert to the fact that, pursuant to Rule 15c2-11 under the Exchange Act, at the termination of the trading suspension, no quotation may be entered unless and until they have strictly complied with all of the provisions of the rule. If any broker or dealer has any questions as to whether or not he has complied with the rule, he should not enter any quotation but immediately contact the staff in the Division of Trading and Markets, Office of Interpretation and Guidance, at (202) 551-5777. If any broker or dealer is uncertain as to what is required by Rule 15c2-11, he should refrain from entering quotations relating to IMTC's securities until such time as he has familiarized himself with the rule and is certain that all of its provisions have been met. If any broker or dealer enters any quotation which is in violation of the rule, the Commission will consider the need for prompt enforcement action.

If any broker-dealer or other person has any information which may relate to this matter, they should contact Amy Weber, Senior Counsel, at (305) 416-6296 or Jeffrey Cook, Staff Attorney, at (305) 982-6344.

Notice 2014-21

SECTION 1. PURPOSE

This notice describes how existing general tax principles apply to transactions using virtual currency. The notice provides this guidance in the form of answers to frequently asked questions.

SECTION 2. BACKGROUND

The Internal Revenue Service (IRS) is aware that "virtual currency" may be used to pay for goods or services, or held for investment. Virtual currency is a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value. In some environments, it operates like "real" currency -- i.e., the coin and paper money of the United States or of any other country that is designated as legal tender, circulates, and is customarily used and accepted as a medium of exchange in the country of issuance -- but it does not have legal tender status in any jurisdiction.

Virtual currency that has an equivalent value in real currency, or that acts as a substitute for real currency, is referred to as "convertible" virtual currency. Bitcoin is one example of a convertible virtual currency. Bitcoin can be digitally traded between users and can be purchased for, or exchanged into, U.S. dollars, Euros, and other real or virtual currencies. For a more comprehensive description of convertible virtual currencies to date, see Financial Crimes Enforcement Network (FinCEN) *Guidance on the Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies* (FIN-2013-G001, March 18, 2013).

SECTION 3. SCOPE

In general, the sale or exchange of convertible virtual currency, or the use of convertible virtual currency to pay for goods or services in a real-world economy transaction, has tax consequences that may result in a tax liability. This notice addresses only the U.S. federal tax consequences of transactions in, or transactions that use, convertible virtual currency, and the term "virtual currency" as used in Section 4 refers only to convertible virtual currency. No inference should be drawn with respect to virtual currencies not described in this notice.

The Treasury Department and the IRS recognize that there may be other questions regarding the tax consequences of virtual currency not addressed in this notice that warrant consideration. Therefore, the Treasury Department and the IRS request comments from the public regarding other types or aspects of virtual currency transactions that should be addressed in future guidance.

Comments should be addressed to:

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2014-21)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

or hand delivered Monday through Friday between the hours of 8 A.M. and 4 P.M. to:

Courier's Desk
Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2014-21)
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Alternatively, taxpayers may submit comments electronically via e-mail to the following address: Notice.Comments@irscounsel.treas.gov. Taxpayers should include "Notice 2014-21" in the subject line. All comments submitted by the public will be available for public inspection and copying in their entirety.

For purposes of the FAQs in this notice, the taxpayer's functional currency is assumed to be the U.S. dollar, the taxpayer is assumed to use the cash receipts and disbursements method of accounting and the taxpayer is assumed not to be under common control with any other party to a transaction.

SECTION 4. FREQUENTLY ASKED QUESTIONS

Q-1: How is virtual currency treated for federal tax purposes?

A-1: For federal tax purposes, virtual currency is treated as property. General tax principles applicable to property transactions apply to transactions using virtual currency.

Q-2: Is virtual currency treated as currency for purposes of determining whether a transaction results in foreign currency gain or loss under U.S. federal tax laws?

A-2: No. Under currently applicable law, virtual currency is not treated as currency that could generate foreign currency gain or loss for U.S. federal tax purposes.

Q-3: Must a taxpayer who receives virtual currency as payment for goods or services include in computing gross income the fair market value of the virtual currency?

A-3: Yes. A taxpayer who receives virtual currency as payment for goods or services must, in computing gross income, include the fair market value of the virtual currency, measured in U.S. dollars, as of the date that the virtual currency was received. See Publication 525, *Taxable and Nontaxable Income,* for more information on miscellaneous income from exchanges involving property or services.

Q-4: What is the basis of virtual currency received as payment for goods or services in Q&A-3?

A-4: The basis of virtual currency that a taxpayer receives as payment for goods or services in Q&A-3 is the fair market value of the virtual currency in U.S. dollars as of the date of receipt. See Publication 551, *Basis of Assets,* for more information on the computation of basis when property is received for goods or services.

Q-5: How is the fair market value of virtual currency determined?

A-5: For U.S. tax purposes, transactions using virtual currency must be reported in U.S. dollars. Therefore, taxpayers will be required to determine the fair market value of virtual currency in U.S. dollars as of the date of payment or receipt. If a virtual currency is listed on an exchange and the exchange rate is established by market supply and demand, the fair market value of the virtual currency is determined by converting the virtual currency into U.S. dollars (or into another real currency which in turn can be converted into U.S. dollars) at the exchange rate, in a reasonable manner that is consistently applied.

Q-6: Does a taxpayer have gain or loss upon an exchange of virtual currency for other property?

A-6: Yes. If the fair market value of property received in exchange for virtual currency exceeds the taxpayer's adjusted basis of the virtual currency, the taxpayer has taxable gain. The taxpayer has a loss if the fair market value of the property received is less than the adjusted basis of the virtual currency. See Publication 544, *Sales and Other Dispositions of Assets*, for information about the tax treatment of sales and exchanges, such as whether a loss is deductible.

Q-7: What type of gain or loss does a taxpayer realize on the sale or exchange of virtual currency?

A-7: The character of the gain or loss generally depends on whether the virtual currency is a capital asset in the hands of the taxpayer. A taxpayer generally realizes capital gain or loss on the sale or exchange of virtual currency that is a capital asset in the hands of the taxpayer. For example, stocks, bonds, and other investment property are generally capital assets. A taxpayer generally realizes ordinary gain or loss on the sale or exchange of virtual currency that is not a capital asset in the hands of the taxpayer. Inventory and other property held mainly for sale to customers in a trade or business are examples of property that is not a capital asset. See Publication 544 for more information about capital assets and the character of gain or loss.

Q-8: Does a taxpayer who "mines" virtual currency (for example, uses computer resources to validate Bitcoin transactions and maintain the public Bitcoin transaction ledger) realize gross income upon receipt of the virtual currency resulting from those activities?

A-8: Yes, when a taxpayer successfully "mines" virtual currency, the fair market value of the virtual currency as of the date of receipt is includible in gross income. See Publication 525, *Taxable and Nontaxable Income*, for more information on taxable income.

Q-9: Is an individual who "mines" virtual currency as a trade or business subject to self-employment tax on the income derived from those activities?

A-9: If a taxpayer's "mining" of virtual currency constitutes a trade or business, and the "mining" activity is not undertaken by the taxpayer as an employee, the net earnings from self-employment (generally, gross income derived from carrying on a trade or business less allowable deductions) resulting from those activities constitute self-employment income and are subject to the self-employment tax. See Chapter 10 of Publication 334, *Tax Guide for Small Business*, for more information on self-employment tax and Publication 535, *Business Expenses,* for more information on determining whether expenses are from a business activity carried on to make a profit.

Q-10: Does virtual currency received by an independent contractor for performing services constitute self-employment income?

A-10: Yes. Generally, self-employment income includes all gross income derived by an individual from any trade or business carried on by the individual as other than an employee. Consequently, the fair market value of virtual currency received for services performed as an independent contractor, measured in U.S. dollars as of the date of receipt, constitutes self-employment income and is subject to the self-employment tax. See FS-2007-18, April 2007, *Business or Hobby? Answer Has Implications for Deductions,* for information on determining whether an activity is a business or a hobby.

Q-11: Does virtual currency paid by an employer as remuneration for services constitute wages for employment tax purposes?

A-11: Yes. Generally, the medium in which remuneration for services is paid is immaterial to the determination of whether the remuneration constitutes wages for employment tax purposes. Consequently, the fair market value of virtual currency paid as wages is subject to federal income tax withholding, Federal Insurance Contributions

Act (FICA) tax, and Federal Unemployment Tax Act (FUTA) tax and must be reported on Form W-2, *Wage and Tax Statement*. See Publication 15 (Circular E), *Employer's Tax Guide*, for information on the withholding, depositing, reporting, and paying of employment taxes.

Q-12: Is a payment made using virtual currency subject to information reporting?

A-12: A payment made using virtual currency is subject to information reporting to the same extent as any other payment made in property. For example, a person who in the course of a trade or business makes a payment of fixed and determinable income using virtual currency with a value of $600 or more to a U.S. non-exempt recipient in a taxable year is required to report the payment to the IRS and to the payee. Examples of payments of fixed and determinable income include rent, salaries, wages, premiums, annuities, and compensation.

Q-13: Is a person who in the course of a trade or business makes a payment using virtual currency worth $600 or more to an independent contractor for performing services required to file an information return with the IRS?

A-13: Generally, a person who in the course of a trade or business makes a payment of $600 or more in a taxable year to an independent contractor for the performance of services is required to report that payment to the IRS and to the payee on Form 1099-MISC, *Miscellaneous Income*. Payments of virtual currency required to be reported on Form 1099-MISC should be reported using the fair market value of the virtual currency in U.S. dollars as of the date of payment. The payment recipient may have income even if the recipient does not receive a Form 1099-MISC. See the Instructions to Form 1099-MISC and the General Instructions for Certain Information Returns for more information. For payments to non-U.S. persons, see Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*.

Q-14: Are payments made using virtual currency subject to backup withholding?

A-14: Payments made using virtual currency are subject to backup withholding to the same extent as other payments made in property. Therefore, payors making reportable payments using virtual currency must solicit a taxpayer identification number (TIN) from the payee. The payor must backup withhold from the payment if a TIN is not obtained prior to payment or if the payor receives notification from the IRS that backup withholding is required. See Publication 1281, *Backup Withholding for Missing and Incorrect Name/TINs,* for more information.

Q-15: Are there IRS information reporting requirements for a person who settles payments made in virtual currency on behalf of merchants that accept virtual currency from their customers?

A-15: Yes, if certain requirements are met. In general, a third party that contracts with a substantial number of unrelated merchants to settle payments between the merchants and their customers is a third party settlement organization (TPSO). A TPSO is required to report payments made to a merchant on a Form 1099-K, *Payment Card and Third Party Network Transactions*, if, for the calendar year, both (1) the number of transactions settled for the merchant exceeds 200, and (2) the gross amount of payments made to the merchant exceeds $20,000. When completing Boxes 1, 3, and 5a-1 on the Form 1099-K, transactions where the TPSO settles payments made with virtual currency are aggregated with transactions where the TPSO settles payments made with real currency to determine the total amounts to be reported in those boxes. When determining whether the transactions are reportable, the value of the virtual currency is the fair market value of the virtual currency in U.S. dollars on the date of payment.

See The Third Party Information Reporting Center, http://www.irs.gov/Tax-Professionals/Third-Party-Reporting-Information-Center, for more information on reporting transactions on Form 1099-K.

Q-16: Will taxpayers be subject to penalties for having treated a virtual currency transaction in a manner that is inconsistent with this notice prior to March 25, 2014?

A-16: Taxpayers may be subject to penalties for failure to comply with tax laws. For example, underpayments attributable to virtual currency transactions may be subject to penalties, such as accuracy-related penalties under section 6662. In addition, failure to timely or correctly report virtual currency transactions when required to do so may be subject to information reporting penalties under section 6721 and 6722. However, penalty relief may be available to taxpayers and persons required to file an information return who are able to establish that the underpayment or failure to properly file information returns is due to reasonable cause.

SECTION 5. DRAFTING INFORMATION

The principal author of this notice is Keith A. Aqui of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information about income tax issues addressed in this notice, please contact Mr. Aqui at (202) 317-4718; for further information about employment tax issues addressed in this notice, please contact Mr. Neil D. Shepherd at (202) 317- 4774; for further information about information reporting issues addressed in this notice, please contact Ms. Adrienne E. Griffin at (202) 317-6845; and for further information regarding foreign currency issues addressed in this notice, please contact Mr. Raymond J. Stahl at (202) 317- 6938. These are not toll-free calls.

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS
NO. 17-03

I. Questions Presented

A. May an attorney receive digital currencies such as bitcoin as payment for legal services?

B. May an attorney receive digital currencies from third parties as payment for the benefit of a client's account?

C. May an attorney hold digital currencies in trust or escrow for clients?

II. Summary of Opinion

A. An attorney may receive and accept digital currencies such as bitcoin as payment for legal services. In order to assure that the fee charged remains reasonable under Neb. Ct. R. Prof. Cond. § 3-501.5(a), which prohibits charging unreasonable fees the attorney should mitigate the risk of volatility and possible unconscionable overpayment for services by (1) notifying the client that the attorney will not retain the digital currency units but instead will convert them into U.S. dollars immediately upon receipt; (2) converting the digital currencies into U.S. dollars at objective market rates immediately upon receipt through the use of a payment processor; and (3) crediting the client's account accordingly at the time of payment.

B. An attorney may receive digital currencies as payment from third-party payors so long as the payment prevents possible interference with the attorney's independent relationship with the client pursuant to Neb. Ct. R. of Prof. Cond. §3-501.7(a) or the client's confidential information pursuant to Neb. Ct. R. of Prof. Cond. §3-501.6 by implementing basic know-your-client ("KYC") procedures to identify any third-party payor prior to acceptance of payments made with digital currencies.

C. An attorney may hold bitcoins and other digital currencies in escrow or trust for clients or third parties pursuant to Neb. Ct. R. of Prof. Cond. §3-501.15(a) so long as the attorney holds the units of such currencies separate from the lawyer's property, kept with commercially reasonable safeguards and records are kept by the lawyer of the property so held for five (5) years after termination of the relationship. Because bitcoins are property rather than actual currency, bitcoins cannot be deposited into a client trust account created pursuant to Neb. Ct. R. §§ 3-901 to 3-907 (Trust Fund Requirements for Lawyers).

III. Statement of Facts

Bitcoin and similar computer program protocols are essentially shared ledger books maintained by networked computers. These protocols are often referred to as "digital currencies." Digital currency that has an equivalent value in real currency, or that acts as a substitute for real currency is referred to as "convertible" virtual currency. Bitcoin is one example of a convertible virtual currency. Bitcoins can be digitally traded between users and can be purchased for, or exchanged into, U.S. dollars, Euros and other real or virtual currencies. Notice 2014-21, 2014 I.R.B. 938 (4/14/14) entitled I.R.S. Virtual Currency Guidance.

Bitcoin exists on a decentralized peer-to-peer network on the Internet. It is "open source", which means that anyone with the requisite skill can obtain the computer program, review the programming code, evaluate it, use it or create their own version of the software. Bitcoins are stored in a computer file known as a "wallet". A person sending bitcoins to another person uses a "public key", a series of letters and numbers comprising the address to where the funds should be sent. The sender then utilizes a "private key", a code that authorizes the ledger book to make a change that debits the sender's wallet and credits the receiver's wallet.

Bitcoin has an advantage over traditional methods of transmitting value in that there are virtually no fees associated with transfer. Transfers are instant and the shared digital ledger book keeps track of all transactions while also preventing "counterfeiting".

Bitcoin and protocols using similar transactions are not anonymous. They have often been referred to as pseudonymous because it is possible, although difficult, to trace the identity of someone sending bitcoins on the network.

Bitcoin is used by both legitimate businesses and criminals. Legitimate businesses enjoy the ability to quickly receive "digital cash" that guarantees payment without the risk of chargebacks or credit card fees. Criminals, such as the ones that operated the website known as Silk Road, found that their operations were not entirely anonymous. Law enforcement agencies have been able shut down such sites while also arresting the operators and customers of the sites.

Bitcoin and other digital currencies are subject to extensive regulation in the United States. The U.S. Commodity Futures Trading Commission (CFTC), Department of the Treasury and the IRS consider Bitcoin to be property and subject to capital gains taxes. FinCEN and the Department of the Treasury regulate Bitcoin exchangers and money transmitters through authority granted by the Bank Secrecy Act and other statutes. FinCEN requires money transmitters to be registered and implement know-your-client (KYC) and anti-money laundering (AML) procedures. In addition to the Federal framework, each state regulates money transmitters. Some states, including the State of New York, recently adapted their money transmitter statutes to provide for this new technology, allowing for the receipt of digital currencies by merchants but requiring regulatory compliance for businesses selling to consumers. Nebraska's Money Transmitter Act at Neb. Rev. Stat. §8-2701, *et. seq.,* as passed in year 2013 arguably regulates money transmitters who use digital currencies. However, no Nebraska court or administrative body has yet publicly ruled as to whether a money transmission license is required to sell digital currencies and transmit them to buyers.

The price of bitcoins has been volatile. It is traded on dozens of various digital currency exchanges throughout the world. The price fluctuated from approximately $7.00 per bitcoin in January of 2013 to over $1,200.00 by December of 2013. Bitcoin sometimes fluctuates in value as much as ten percent (10%) per day. The price of a bitcoin has recently increased substantially. As of August 30, 2017, the price of a bitcoin was $4,627.77. The price of a bitcoin has been measured objectively using the market prices at various exchanges that sell bitcoins. One such organization, Coindesk, publishes a constant Bitcoin Price Index that considers the weighted average price of a bitcoin at exchanges that meet certain objective requirements such as minimum volume of trade. In year 2015, the New York Stock Exchange created the NYSE Bitcoin Index with the listing "NYXBT".

Presently there are a large number of Bitcoin payment processors including Coinbase (San Francisco), Bitpay (Atlanta) and Circle (New York). These services claim to eliminate the volatility risk by maintaining consistent exchange rates based on an objective value presented by various exchanges. Of the most established payment processors, Coinbase is licensed by the Nebraska Department of Banking and Finance as a money trasmitter under Nebraska's Money Transmitter Act.

A growing number of law firms in other jurisdictions accept bitcoins as payment for services, although it is unknown if they undertook any effort to determine whether such policy is allowed through their respective Bar Associations' Codes of Conduct.

IV. Applicable Rules of Professional Conduct

A. § 3-501.5(a), (b). Fees.

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

B. § 3-501.6. Confidentiality of information.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer’s compliance with these Rules;

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

(4) to comply with other law or a court order.

(c) The relationship between a member of the Nebraska State Bar Association Committee on the Nebraska Lawyers Assistance Program or an employee of the Nebraska Lawyers Assistance

Program and a lawyer who seeks or receives assistance through that committee or that program shall be the same as that of lawyer and client for the purposes of the application of Rule 1.6.

C. § 3-501.7. Conflict of interest; current clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

D. § 3-501.8. Conflict of interest; current clients; specific rules.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

E. <u>§ 3-501.15. Safekeeping property.</u>

(a) A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in the state where the lawyer’s office is situated. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of 5 years after termination of the representation.

(b) A lawyer may deposit the lawyer’s own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

V. Discussion

A. Receiving Payments in Digital Currencies as Payment for Services.

Comment 4 of the Neb. Ct. R. Prof. Cond. § 3-501 expressly allows accepting property in payment of services. Therefore, there is no per se rule prohibiting payment of earned legal fees with convertible virtual currency since it is a form of property. However, Nebraska attorneys must be careful to see that this property they accept as payment is not contraband, does not reveal client secrets, and is not used in a money-laundering or tax avoidance scheme; because convertible virtual currencies can be associated with such mischief.

According to Neb. Ct. R. of Prof. Cond. §3-501.5(a), there is a prohibition on unreasonable fees. The values of bitcoins and other digital currencies often fluctuate dramatically. An arrangement for payment in bitcoin for attorney services could mean that the client pays $200.00 an hour in one month and $500.00 an hour the next month, which the client could very easily allege as unconscionable. Conversely, if the market value of the digital currency used as payment quickly fell, the attorney would be underpaid for services.

To mitigate or eliminate the risk of volatility, it is possible to value or convert bitcoins and other digital currencies into U.S. dollars immediately upon receipt. The conversion rate would be market based such as from an exchange or based upon the New York Stock Exchange Price Index, for example. In this way, the bitcoins would serve to credit the client's account and there would be no risk to the client of value fluctuation. As part of this process, a law office would need to disclose to the client that the firm would not be retaining the bitcoins but converting them to cash upon receipt. Through this method, the client is informed that an increase in the value of their bitcoins will not additionally fund their outstanding account. In addition, clients need not be concerned if the value of the bitcoins they sent for payment suddenly dropped.

Such a process should include (1) notifying the client that the attorney will not retain the digital currency units but instead will convert them into U.S. dollars immediately upon receipt; (2) converting the digital currencies into U.S. dollars at objective market rates immediately upon receipt through the use of a payment processor; and (3) crediting the client's account accordingly at the time of payment. Providing the client the notifications described in this opinion can best be accomplished by including the appropriate notifications in the fee agreement between lawyers and client. Under this framework, the client is properly informed, the use of bitcoins as payment would not result in unconscionable fees to the attorney and the receipt of bitcoins as payment to the attorney would conform to the Nebraska Code of Professional Conduct.

B. Receiving Payments in Digital Currencies from Third-Party Payers.

Any time a client arranges for a third party to pay the client's attorney fees the attorney must keep in mind his or her obligations under the Nebraska Code of Professional Conduct. The Code allows an attorney to accept payment from a third party only if the arrangement would not interfere with the attorney's independence or relationship with the client (Neb. Ct. R. of Prof. Cond. §§3-501.7(a), 3-501.8(f)) nor interfere with the client's confidential information (Neb. Ct. R. of Prof. Cond. §3-501.6).

The dilemma faced by an attorney in identifying a third-party payer is that the use of bitcoins is pseudonymous and often close to anonymous. An attorney should comply with the requirements by use of standard Know Your Client ("KYC") procedures when receiving payments from third parties. Most Bitcoin payment processing services require the disclosure of the user's identity. Bitcoin payment processors including Coinbase (San Francisco), Bitpay (Atlanta) and Circle (New York) require the payer to complete a KYC form in order to use their service for payment. In any other situation, the attorney should request sufficient KYC information from the third-party payer prior to acceptance of the digital currency payment.

C. Receiving and Holding Digital Currencies in Trust or in Escrow.

It is permissible to hold bitcoins and other digital currencies in escrow or trust for clients or third parties pursuant to Neb. Ct. R. of Prof. Cond. §3-501.15(a). This Rule allows attorneys to store property as well as currency on behalf of a client. The property must be held separate from the lawyer's property, be properly safeguarded and records must be kept by the lawyer of account funds or other property for five (5) years after termination of representation. Bitcoins are treated as property for federal tax purposes.

Due to the volatility in the value of bitcoins and other digital currencies, the client and parties should be advised that the property held in trust or escrow will be held and not converted into U.S. dollars or other currency. Records of that notice and the records of the separate wallet used to store the bitcoins would be maintained by the lawyer. The shared nature of the blockchain allows anyone, including the client or regulators, to verify the amount of bitcoins and any transactions regarding the separate wallet maintained by the attorney.

Due to security concerns, an attorney opting to receive client payments in Bitcoin or storing them on behalf of clients, whether in trust or in escrow, must take reasonable security precautions. There is no bank or FDIC insurance to reimburse a Bitcoin holder if a hacker steals them. Once lost, bitcoins could be gone forever. Reasonable methods could include encryption of the private key required to send the bitcoins. Another method may include utilization of more than one private key (known as a "multi-signature account" or "multi-sig") for access to the bitcoins. Other reasonable measures may include maintenance of the wallet in a computer or other storage device that is disconnected from the Internet (also known as "cold storage"), a method that would also allow for off-line storage of one or more private keys.

However, unless converted to U.S. dollars, bitcoins cannot be deposited in a client trust account created pursuant to Neb. Ct. R. §§ 3-901 to 3-907 (Trust Fund Requirements for Lawyers). Thus, if a lawyer receives bitcoins intended to reflect a retainer to be drawn upon when fees are earned in the future, the lawyer must immediately convert the bitcoins into U.S. dollars in accord with section V(A) of this opinion.

Dated: September 11, 2017.

OVERVIEW OF THE TAX CUTS AND JOBS ACT OF 2017

W. William Gust

Gentry Locke Seminar
September 7, 2018

The Tax Cuts and Jobs Act (the "Act") will bring significant changes to many areas of the tax law affecting individuals and businesses beginning January 2018 through 2025. In 2026, the pre-Act rules are scheduled to come back into effect. This article is a general overview of just some of the changes that may be of interest, with individual taxation changes presented first, followed by corporate taxation changes. Please note that as the IRS continues its work on the implementation of the Act, we anticipate that additional technical corrections and updated regulations will follow.

Individual Taxation Changes

Rate changes for individuals. Individuals are subject to income tax on "ordinary income," such as compensation, and most retirement and interest income, at increasing rates that apply to different ranges of income depending on their filing status (single; married filing jointly, including surviving spouse; married filing separately; and head of household). In 2017, those rates were 10%, 15%, 25%, 28%, 33%, 35%, and 39.6%.

Beginning with the 2018 tax year and continuing through 2025, there will still be seven tax brackets for individuals, but their percentage rates will change to: **10%, 12%, 22%, 24%, 32%, 35%, and 37%.**

Impact of Changes. While these changes will lower rates at many income levels, determining the overall impact on any particular individual or family will depend on a variety of other changes made by the Act, including increases in the standard deduction, loss of personal and dependency exemptions, a dollar limit on itemized deductions for state and local taxes, and changes to the child tax credit and the taxation of a child's unearned income, known as the "Kiddie Tax."

Capital gain rates. The Act did not significantly change capital gain rate structure. Three tax brackets apply to net capital gains, including certain kinds of dividends, of individuals and other noncorporate taxpayers: 0% for net capital gain that would be taxed at the 10% or 15% rate if it were ordinary income; 15% for gain that would be taxed above 15% and below 39.6% if it were ordinary income, or 20% for gain that would be taxed at the 39.6% ordinary income rate.

The Act generally, keeps the existing rates and breakpoints on net capital gains and qualified dividends. For 2018, the 15% breakpoint is: $77,200 for joint returns and surviving spouses (half this amount for married taxpayers filing separately), $51,700 for heads of household, and $38,600 for other unmarried individuals. The 20% breakpoint is $479,000 for joint returns and surviving spouses (half this amount for married taxpayers filing separately), $452,400 for heads of household, and $425,800 for any other individual (other than an estate or trust).

It is important to note that these new individual income tax rates will not affect your tax on the return you will soon file for 2017. However they will almost immediately affect the amount of your wage withholding and the amount, if any, of estimated tax that you may need to pay for 2018.

A related change is that the future annual indexing of the rate brackets (and many other tax amounts) for inflation, which helps to prevent "bracket creep" and the erosion of the value of a variety of deductions and credits due solely to inflation, will be done in a way that generally will recognize less inflation than the current method does. While it won't be very recognizable immediately, over the years this will push some additional income into higher brackets and reduce the value of many tax breaks.

Standard deduction. The Act increases the standard deduction to $24,000 for joint filers, $18,000 for heads of household, and $12,000 for single and married taxpayers filing separately. Given these increases, many taxpayers will no longer have a need to itemize deductions. These figures will be indexed for inflation after 2018.

Child and family tax credit. The Act increases the credit for qualifying children (i.e., children under 17) to $2,000 from $1,000, and increases to $1,400 the refundable portion of the credit. It also introduces a new (nonrefundable) $500 credit for a taxpayer's dependents who are not qualifying children. The adjusted gross income level at which the credits begin to be phased out has been increased to $200,000 ($400,000 for joint filers).

Miscellaneous itemized deductions. There is no longer a deduction for miscellaneous itemized deductions which were formerly deductible to the extent they exceeded 2 percent of adjusted gross income. This category included items such as tax preparation costs, investment expenses, union dues, and unreimbursed employee expenses.

Medical expenses. Under the Act, for 2017 and thereafter, medical expenses are deductible to the extent they exceed 7.5 percent of adjusted gross income for all taxpayers. Previously, the AGI "floor" was 10% for most taxpayers.

Casualty and theft losses. The itemized deduction for casualty and theft losses has been suspended except for losses incurred in a federally declared disaster.

Overall limitation on itemized deductions. The Act suspends the overall limitation on itemized deductions that formerly applied to taxpayers whose adjusted gross income exceeded specified thresholds. The itemized deductions of such taxpayers were reduced by 3% of the amount by which adjusted gross income exceeded the applicable threshold, but the reduction could not exceed 80% of the total itemized deductions, and certain items were exempt from the limitation.

Moving expenses. The deduction for job-related moving expenses has been eliminated, except for certain military personnel. The exclusion for moving expense reimbursements has also been suspended.

New State and Local Tax Limitations. For tax years 2018 through 2025, the Act limits deductions for taxes paid by individual taxpayers in the following ways:

> . . . Limits the aggregate deduction for state and local real property taxes; state and local personal property taxes; state and local, and foreign, income, war profits, and excess profits taxes; and general sales taxes (if elected) for any tax year to $10,000 ($5,000 for marrieds filing separately). However this limit doesn't apply to: (i) foreign income, war profits, excess profits taxes; (ii) state and local, and foreign, real property taxes; and (iii) state and local personal property taxes <u>if those taxes are paid or accrued in carrying on a trade or business or in an activity engaged in for the production of income</u>.
>
> . . . Completely eliminates the deduction for foreign real property taxes unless they are paid or accrued in carrying on a trade or business or in an activity engaged in for profit.

To prevent avoidance of the $10,000 deduction limit by prepayment in 2017 of future taxes, the Act treats any amount paid in 2017 for a state or local income tax imposed for a tax year beginning in 2018 as paid on the last day of the 2018 tax year. So an individual <u>may not</u> claim an itemized deduction in 2017 on a pre-payment of income tax for a future tax year in order to avoid the $10,000 aggregate limitation. The IRS has also issued guidance indicating that the prepayment of real estate, personal property and other local taxes in 2017 for 2018 unassessed taxes are not deductible in 2017.

Health care "individual mandate." Starting in 2019, there is no longer a penalty for individuals who fail to obtain minimum essential health coverage.

Exemptions. The Act suspends the deduction for personal exemptions. Thus, starting in 2018, taxpayers can no longer claim personal or dependency exemptions. The rules for withholding income tax on wages will be adjusted to reflect this change, but IRS was given the discretion to leave the withholding unchanged for 2018.

Estate and gift tax exemption. For decedents dying, and gifts made, in 2018, the estate and gift tax exemption has been increased to roughly $11.2 million ($22.4 million for married couples).

Alternative minimum tax (AMT) exemption. The AMT has been retained for individuals but the exemption has been increased to $109,400 for joint filers ($54,700 for married taxpayers filing separately), and $70,300 for unmarried taxpayers. The exemption is phased out for taxpayers with alternative minimum taxable income over $1 million for joint filers, and over $500,000 for all others.

Deduction for Qualified Residential Interest (i.e., interest on your home mortgage). Under the pre-Act rules, you could deduct interest on up to a total of $1 million of mortgage debt used to acquire your principal residence and a second home, (i.e., acquisition debt). For a married taxpayer filing separately, the limit was $500,000. You could also deduct interest on home equity debt, (i.e., other debt secured by the qualifying homes). Qualifying home equity debt was limited to the lesser of $100,000 ($50,000 for a married taxpayer filing separately), or the taxpayer's equity in the home or homes (the excess of the value of the home over the acquisition debt). The funds obtained via a home equity loan did not have to be used to acquire or improve the homes. So you could use home equity debt to pay for education, travel, health care, etc.

Under the Act, starting in 2018, the limit on qualifying acquisition debt is reduced to $750,000 ($375,000 for a married taxpayer filing separately). However, for acquisition debt incurred before Dec. 15, 2017, the higher pre-Act limit applies. The higher pre-Act limit also applies to debt arising from refinancing pre-Dec. 15, 2017 acquisition debt, to the extent the debt resulting from the refinancing does not exceed the original debt amount. This means you can refinance up to $1 million of pre-Dec. 15, 2017 acquisition debt in the future and not be subject to the reduced limitation.

In addition to the home mortgage interest limit, starting in 2018, there is no longer a deduction for interest on home equity debt. This applies regardless of when the home equity debt was incurred. Accordingly, if you are considering incurring home equity debt in the future, you should take this factor into consideration. And if you currently have outstanding home equity debt, be prepared to lose the interest deduction for it, starting in 2018. (You will still be able to deduct it on your 2017 tax return, filed in 2018.)

Beginning in 2026, interest on home equity loans will be deductible again, and the limit on qualifying acquisition debt will be raised back to $1 million ($500,000 for married separate filers).

Tax Impact for Divorce and Alimony Payments. Under divorce agreements and legal separation agreements executed *after 2018:*

Under the current rules, an individual who pays alimony or separate maintenance may deduct an amount equal to the alimony or separate maintenance payments paid during the year as an "above-the-line" deduction. (i.e., a deduction that a taxpayer need not itemize deductions to claim which is more valuable for the taxpayer than an itemized deduction.) And, under current rules, alimony and separate maintenance payments are taxable to the recipient spouse (includible in that spouse's gross income).

Under the Act, alimony payments made under divorce agreements and legal separation agreements executed after 2018 no longer qualify for a deduction for alimony for the payer. Furthermore, alimony is not gross income to the recipient. So for divorces and legal separations that are executed (i.e., that come into legal existence due to a court order) after 2018, the alimony-paying spouse won't be able to deduct the payments, and the alimony-receiving spouse doesn't include them in gross income or pay federal income tax on them.

The new rules don't apply to existing divorces and separations. It's important to emphasize that the current rules continue to apply to already-existing divorces and separations, as well as divorces and separations that are executed *before 2019.*

Some taxpayers may want the Act rules to apply to their existing divorce or separation. Under a special rule, if taxpayers have an existing (pre-2019) divorce or separation decree, and they have that agreement legally modified, then the new rules don't apply to that modified decree, unless the modification *expressly provides* that the Act rules are to apply. There may be situations where applying the Act rules voluntarily is beneficial for the taxpayers, such as a change in the income levels of the alimony payer or the alimony recipient.

Recharacterization of IRA contributions. An individual who makes a contribution to a regular or Roth IRA can recharacterize it as made to the other type of IRA via a trustee-to-trustee transfer before the due date of the return for the contribution year. Under the new law, however, once a contribution to a regular IRA has been converted into a contribution to a Roth IRA, it can no longer be converted back into a contribution to a regular IRA, i.e., a recharacterization cannot be used to "unwind" a Roth conversion. For any conversions made by taxpayers to a Roth IRA during 2017, taxpayers have until Oct. 15, 2018 to unwind the 2017 recharacterization (provided they meet the requirements for an automatic extension of the election period).

Extended rollover period for plan loan offset amounts. If an employee's loan from his qualified retirement plan, Code Sec. 403(b) plan, or Code Sec. 457(b) plan is treated as distributed from the plan due to the plan's termination or the employee's failure to meet the repayment terms due to his separation from service, the employee may roll over the deemed distribution to an eligible retirement plan. The new law allows the rollover to be made any time up to the due date (including extensions) of the employee's tax return for the year of the deemed distribution. Pre-Act law allowed the employee only 60 days from the date of the distribution.

Length of service awards to public safety volunteers. Under pre-Act law, a plan that only provides length of service awards to bona fide volunteers or their beneficiaries for qualified services performed, is not treated as a deferred compensation plan for Code Sec. 457 purposes. Qualified services are firefighting and prevention services, emergency medical services, and ambulance services, including services performed by dispatchers, mechanics, ambulance drivers, and certified instructors. The new law increases the limit on the aggregate amount of length of service awards that can accrue in a year of service for a bona fide volunteer from $3,000 to $6,000, to be adjusted annually for inflation. For a defined benefit plan, the limit applies to the actuarial present value of the aggregate amount of awards accruing for any year of service.

Qualified disaster distributions taxable over three-year period. Under the new law, a "qualified 2016 disaster distribution" will be included in a taxpayer's gross income ratably over a three-year period starting with the year it is received, unless the taxpayer elects to have the distribution fully taxed in the year it is received. A "qualified 2016 disaster distribution" is a distribution received from an "eligible retirement plan" in 2016 or 2017 by an individual whose place of abode was in a Presidentially declared disaster area at any time during 2016, and who sustained an economic loss from the disaster. An eligible plan is an IRA, individual retirement annuity, qualified plan, Code Sec. 403(a) qualified annuity plan, Code Sec. 403(d) plan, governmental Code Sec. 457(b) plan, or Code Sec. 403(b) annuity contract. There is a $100,000 aggregate limit on qualifying distributions for these purposes.

Qualified 2016 disaster distributions not subject to 10% early withdrawal penalty. In general, unless an exception applies, withdrawals from qualified plans and IRAs before age 59 and a half are subject to a 10% penalty in addition to regular taxation. Under the new law, a "qualified 2016 disaster distribution," defined above, will not be subject to the 10% penalty on early withdrawals from qualified plans and IRAs.

Three-year period to recontribute qualified 2016 disaster distributions. In general, eligible distributions from qualified plans and IRAs can be rolled over into eligible plans within 60 days to avoid being taxed. Under the law new, qualified 2016 disaster distributions, defined above, can be recontributed to a qualified plan or IRA in which the taxpayer is a beneficiary up to three years beginning the day after the date of distribution and avoid taxation. A recontribution is treated as a direct trustee-to-trustee rollover.

Period to amend qualified plans and IRAs for new law changes extended. Under the new law, a qualified plan or IRA can be amended for new law changes retroactively any time up to the last day of the first plan year beginning after 2017 without losing its qualified status for actions taken in compliance with the law changes. Thus, e.g., a qualified plan can make a qualified 2016 disaster distribution in 2017 without first amending the plan to allow such a distribution, as long as the amendment is made retroactively before the end of the extension period. For governmental plans, the amendment may be made up to the last day of the first plan year beginning after 2019.

Corporate Taxation Changes

Corporate income tax rate drop. “C” or regular corporations currently are subject to graduated tax rates of 15% for taxable income up to $50,000, 25% (over $50,000 to $75,000), 34% (over $75,000 to $10,000,000), and 35% (over $10,000,000). Personal service corporations pay tax on their entire taxable income at the rate of 35%. (The benefit of lower rate brackets was phased out at higher income levels.)

Beginning with the 2018 tax year, the Act makes the corporate tax rate a flat 21%. It also eliminates the corporate alternative minimum tax.

Tax Reduction for Pass-Through Entities The Act provides for a new deduction that should provide a substantial tax benefit to individuals with "qualified business income" from a partnership, S corporation, LLC, or sole proprietorship. This income is sometimes referred to as "pass-through" income.

The deduction is 20% of your “qualified business income” or QBI from a partnership, S corporation, or sole proprietorship, defined as the net amount of items of income, gain, deduction, and loss with respect to your trade or business. The business must be conducted within the U.S. to qualify, and specified investment-related items are not included, (e.g., capital gains or losses, dividends, and interest income unless the interest is properly allocable to the business). The trade or business of being an employee does not qualify. Also, QBI does not include reasonable compensation received from an S corporation, or a guaranteed payment received from a partnership for services provided to a partnership's business.

The deduction is taken "below the line," (i.e., it reduces your taxable income but not your adjusted gross income). But it is available regardless of whether you itemize deductions or take the standard deduction. In general, the deduction cannot exceed 20% of the excess of your taxable income over net capital gain. If QBI is less than zero it is treated as a loss from a qualified business in the following year.

The Act includes provisions (discussed below) to deter high-income taxpayers from attempting to convert wages or other compensation for personal services into QBI eligible for the deduction. For taxpayers with taxable income above $157,500 ($315,000 for joint filers), an exclusion from QBI of income from "specified service" trades or businesses is phased in. These are trades or businesses involving the performance of services in the fields of health, law, consulting, athletics, financial or brokerage services, or where the principal asset is the reputation or skill of one or more employees or owners. Here's how the phase-in works: If your taxable income is at least $50,000 above the threshold, (i.e., $207,500 ($157,500 + $50,000), all of the net income from the specified service trade or business is excluded from QBI. (Joint filers would use an amount $100,000 above the $315,000 threshold, (i.e.,$415,000). If your taxable income is between $157,500 and $207,500, you would exclude only that percentage of income derived from a fraction the numerator of which is the excess of taxable income over $157,500 and the denominator of which is $50,000. So, for example, if taxable income is $167,500 ($10,000 above $157,500), only 20% of the specified service income would be excluded from QBI ($10,000/$50,000). (For joint filers, the same calculation would apply using the $315,000 threshold, and a $100,000 phase-out range.)

Additionally, for taxpayers with taxable income more than the above thresholds, a limitation on the amount of the deduction is phased in based either on wages paid or wages paid plus a capital element. Here's how it works: If your taxable income is at least $50,000 above the threshold, or $207,500 ($157,500 + $50,000), your deduction for QBI cannot exceed the greater of (1) 50% of your allocable share of the W-2 wages paid with respect to the qualified trade or business, or (2) the sum of 25% of such wages plus 2.5% of the unadjusted basis immediately after acquisition of tangible depreciable property used in the business (including real estate). So if your QBI were $100,000, leading to a deduction of $20,000 (20% of $100,000), but the greater of (1) or (2) above were only $16,000, your deduction would be limited to $16,000, i.e., it would be reduced by $4,000. If your taxable income were between $157,500 and $207,500, you would only incur a percentage of the $4,000 reduction, with the percentage worked out via the fraction discussed in the preceding paragraph. (For joint filers, similar calculations would apply using the $315,000 threshold, and a $100,000 phase-out range.)

Other limitations may apply in certain circumstances, e.g., for taxpayers with qualified cooperative dividends, qualified real estate investment trust (REIT) dividends, or income from publicly traded partnerships.

As you can see from above, the ability to qualify for the new deduction for Pass Through Entities requires a series of rather complicated calculations and the impact will depend upon the facts and circumstances unique to your situation. Fluctuations in income from one year to another may have a positive or negative effect on the application of the deduction.

Bonus depreciation. Before the Act, taxpayers were allowed to deduct in the year that an asset was placed in service 50% of the cost of most new tangible property other than buildings and, with the exception of qualified improvement property, building improvements. Most new computer software was also eligible for the 50% deduction. Because of the deduction in the year placed in service, there was adjustment of the regular depreciation allowed in that year and later years. The "50% bonus depreciation" was to be phased down to 40% for property placed in service in calendar year 2018, 40% in 2019 and 0% in 2020 and afterward. The phase down was to begin a year later for certain private aircraft and long-production period property.

For property placed in service and acquired after Sept. 27, 2017 (with no written binding contract for acquisition in effect on Sept. 27, 2017), the Act has raised the 50% rate to 100%. (Appropriately, 100% bonus depreciation is also called "full expensing" or "100% expensing".)
Additionally, under the Act the post-Sept. 27, 2017 property eligible for bonus depreciation can be new *or used*. Also, certain film, television and live theatrical productions are now eligible. On the other hand, the Act excluded from bonus depreciation public utility property and property owned by certain vehicle dealerships.

The 2018/2019/2020 phase down (above) doesn't apply to post-Sept 27, 2017 property. Instead, 100% depreciation is decreased to 80% for property placed in service in calendar year 2023, 60% in 2024, 40% in 2025, 20% in 2026 and 0% in 2027 and afterward (with phase down beginning a year later for certain private aircraft and long-production period property).

Code Sec. 179 expensing. Before the Act, most smaller taxpayers could elect, on an asset-by-asset basis, to immediately deduct the entire cost of section 179 property up to an annual limit of $500,000 adjusted for inflation. For assets placed in service in tax years that begin in 2018, the scheduled adjusted limit was $520,000. The annual limit was reduced by one dollar for every dollar that the cost of all section 179 property placed in service by the taxpayer during the tax year exceeded a $2 million inflation-adjusted threshold. For assets placed in service in tax years that begin in 2018, the scheduled threshold was $2,070,000.

The Act substitutes as the annual dollar limit $1 million (inflation-adjusted for tax years beginning *after* 2018) and $2.5 million as the phase down threshold (similarly inflation adjusted).

Before the Act, section 179 property included tangible personal property as well as non-customized computer software. The only buildings or other non-production-process land improvements that qualified did so because the taxpayer elected to treat "qualified real property" as section 179 property, for purposes of both the dollar limit and the phase down threshold. Qualified real property included restaurant buildings and certain improvements to leased space, retail space and restaurant space.

For tax years beginning after 2017, those buildings and improvements are eliminated as types of qualified real property and there is substituted a far broader group of improvements made to any building other than a residential rental building: (1) any building improvement other than elevators, escalators, building enlargements or changes to internal structural framework, and (2) building components that are roofs; heating, ventilation and air conditioning property; fire protection and alarm systems; or security systems.

Also, for tax years beginning after 2017, items (for example, non-affixed appliances) used in connection with residential buildings (but not the buildings or improvements to them) are section 179 property.

Other rules for real property depreciation. If placed in service after 2017, qualified improvement property, in addition to being eligible for bonus depreciation and being newly eligible as section 179 property, has a 15 year depreciation period (rather than the usual 39 year period for non-residential buildings).

Apartment buildings and other residential rental buildings placed in service after 2017 generally continue to be depreciated over a 27.5 period, but should the alternative depreciation system (ADS) apply to a building either under an election or because the building is subject to one of the conditions (for example, tax-exempt financing) that make ADS mandatory, the ADS depreciation period is 30 years instead of the pre-act 40 years.

For tax years beginning after 2017, if a taxpayer in a real property trade or business "elects out" of the Act's limits on business interest deductions, the taxpayer must depreciate all buildings and qualified improvement property under the ADS.

Vehicles. The Act triples the annual dollar caps on depreciation (and Code Sec. 179 expensing) of passenger automobiles and small vans and trucks. Also, because of the extension of bonus depreciation, the increase, for vehicles allowed bonus depreciation, of $8,000 in the otherwise-applicable first year cap is extended through 2026 (with no phase-down).

Computers and peripheral equipment. Under the Act, computer or peripheral equipment placed in service after 2017 isn't treated as "listed property" whether or not used in a business establishment (or home office) and whether or not, in the case of an employee, the use is for employer convenience. So an item no longer has to pass a more-than-50%-qualified-business-use test to be eligible for Code Sec. 179 expensing and to avoid mandatory use of the ADS.

Farm property. For items placed in service after 2017, the Act shortens the depreciation period for most farming equipment and machinery from seven years to five and allows many types of farm property to be depreciated under the 200% (instead of 150%) declining balance method.

As you will note, the foregoing tax changes may present an opportunity for substantial savings. If you have any questions about a specific provision that may affect your business or individual tax situation please feel free to contact us.

LAWYER TRUST ACCOUNTS

Clark H. Worthy[1]

Gentry Locke Seminar
September 7, 2018

This presentation deals with common matters that arise with trust accounts including record keeping, maintaining funds and actions that can be taken against trust accounts.

Establishing and Maintaining your Trust Account

Choosing an Interest On Lawyers Trust Account (IOLTA).

- A lawyer must now "opt in" or "opt out" of establishing an IOLTA account.
  - Pt. 6, § IV, Para. 20 (F) ("A lawyer who elects to open an IOLTA account shall obtain a 'Request to Establish IOLTA Account' form from LSCV. A lawyer who elects not to maintain an IOLTA account shall make such election on a 'Request to Opt-Out' form provided by LSCV.").
- Options include:
  - Interest-bearing Trust Accounts (Pt. 6, § IV, Para. 20 (A)).
  - IOLTA Accounts (Pt. 6, § IV, Para. 20 (B)).
  - Non-interest bearing Trust Accounts (Pt. 6, § IV, Para. 20(C)).
- A lawyer may obtain the "opt in" or "opt out" forms from the Legal Services Corporation of Virginia (LCSV). The forms are available on the LSCV website (www.lscv.org/iolta).
- Client approval is not needed to "opt in" or "opt out".
  - Pt. 6, § IV, Para. 20(D) ("A lawyer who elects to deposit funds of a client in an account pursuant to Paragraph 20(B) or (C) shall not be required to seek permission from such client in making the election.").

Required record keeping.

- The record keeping requirements of Rule 1.15(c)(1) and (2) require that the lawyer establish and practice sound procedures for recording cash received into trust (the "cash receipts journal"), cash being paid out from trust (the "cash disbursements journal"), and a consistent, reliable, and ***separate*** system for recording the trust account transactions relating to each individual client (the "subsidiary ledger").

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[1] The presenter would like to thank Prescott L. Prince, Assistant Bar Counsel, Virginia State Bar who provided materials which assisted in the preparation of this outline.

- The subsidiary ledger is a ledger containing a separate page or card for each client or other person for whom funds are held in trust, showing dates of receipts and disbursements, with up-to-date balances. A subsidiary ledger enables the attorney to know at a glance what funds are held for a given client and to provide the client with an accounting on request. It probably is impossible to adequately maintain an IOLTA or other trust account without keeping a detailed receipts and disbursement journal, described above, and without maintaining subsidiary ledgers. A subsidiary ledger should show a zero balance when the representation is concluded.
- Rule 1.15(d) details required trust accounting procedures. These include:
    - Insufficient fund reporting;
    - Deposits; and
    - Reconciliations.

<u>Funds to be maintained in the Trust Account</u>.

- Funds that *must* be deposited into the Trust Account include:
    - All funds given to the lawyer by the client that are to be applied against future legal fees;
    - All funds placed with the lawyer for present or future use on the client's behalf or at the client's direction;
    - All funds received by the lawyer for future litigation expenses; and all funds received by the lawyer for the benefit of the client or his designees.

- Funds that *must not* be deposited into the Trust Account include:
    - Funds that belong to the lawyer or law firm are not escrow funds. Such funds may not be held in the escrow account unless they have been placed there "to pay bank charges…" or the lawyer's entitlement to them "is disputed by the client…." Rule 1.1.5(a)(3).
    - Frequently a lawyer will receive funds that belong in part to the lawyer and in part to the client. Once a deposit has cleared the bank, the "portion belonging to the lawyer or law firm must be withdrawn." Rule 1.15(a)(3)(ii). This includes all earned legal fees and all costs expended or accrued.
    - Reimbursement of advances for costs and expenses are not required to be deposited into trust accounts. (Rule 1.15(a)(1) ("All funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, <u>*other than reimbursement of advances for costs and expenses*[.]"))</u>.

Funds may be maintained in trust account to avoid imposition of bank charges/service fees

- The lawyer may deposit enough of his/her own funds to cover bank charges made for administration of the escrow account (See LEO 1510) or to maintain a minimum balance to avoid the imposition of service fees, provided the funds deposited are no more than necessary to do so. Rule 1.15 (a)(3)(i).

- But doing this will be closely scrutinized if there is evidence that the additional funds are being used to hide overdrafts.

Use of credit card for payment of advance fee.

- The lawyer can maintain a sum of money on deposit in his/her trust account to cover credit card merchant fees.

- The lawyer may pass along merchant fees associated with credit card use to the client with disclosure and consent. These fees may be deducted from the lawyer's escrow account; however, when possible, a lawyer should contract with the financial institution that all debits of fees and costs associated with credit card use, including "chargebacks," be made from the lawyer's operating account. (See LEO 1848).

Insufficient funds reporting (to the Virginia State Bar) by the bank.

- All overdrafts must be reported to VSB. Under Rule 1.15 and Paragraph 20, whenever "any instrument" is presented against a lawyer's trust account which has insufficient funds on deposit to cover payment of the instrument, the bank or financial institution ***must*** report that event to the VSB, and this obligation to report applies whether or not the bank honors the instrument.

- Upon receipt of a notice of overdraft, VSB will investigate.
    - Pursuant to Pt. 6, §IV, ¶ 13-10 C the VSB Disciplinary System Intake Office may dismiss the complaint if it appears that the overdraft was due to simple error;
    - If evidence seems to indicate more serious problems, the matter will be investigated further by Bar Counsel.

Contested Funds in Attorney Trust Accounts

Garnishment of Trust Accounts.

- Funds in an attorney's trust account belong to the client and are subject to garnishment. *Marcus, Santoro & Kozak v. Wu*, 274 Va. 743, 652 S.E.2d 777 (2007) (affirming trial court's judgment that client funds held in trust by two law firms were subject to garnishment and ordering lawyers to cease drawing funds out of trust to pay earned fees).

Disputed funds.

- Lawyers are required to hold disputed funds in trust. Any portion of the funds determined to belong to the lawyer must be promptly withdrawn from the trust account. The remaining funds should remain in trust until controversy is resolved. Rule 1.15 (a)(3)(ii).
- Rule 1.15(a)(3)(ii) provides that:

> No funds belonging to the lawyer or law firm shall be deposited or maintained therein except as follows … funds in which two or more persons (one of whom may be the lawyer) claim an interest shall be held in the trust account until the dispute is resolved and there is an accounting and severance of their interests. Any portion finally determined to belong to the lawyer or law firm shall be promptly withdrawn from the trust account.

- A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, *and whether such expenses are to be deducted before or after the contingent fee is calculated.* Rule 1.5©.

Consensual liens.

- A lawyer is obligated to protect consensual third party liens. LEO 1747; Cmt. 4 to Rule 1.15. A lawyer cannot disregard properly entered into third-party lien even if client insists. The attorney cannot compromise the lien unless third-party and client consent. The best course of action is to hold funds in trust until dispute resolved or interplead the funds into court for resolution.

Unclaimed funds.

- An attorney must exercise reasonable diligence in attempting to contact and disburse trust funds to persons entitled to receive them

- *See* LEOs 1644, 1673:

    - In 1644, the Committee addressed a situation wherein money remained in a trust account following real estate closings. The Committee noted that it is proper for attorneys to follow the mandates of the Uniform Disposition of Unclaimed Property Act, § 55-210.1, et. seq.
        - "Once the attorney determines that property is either 'unclaimed' or 'abandoned' as defined by [the Act], the attorney must dispose of the funds in accordance with the directives of this statute."

        - "The Committee is of the opinion that an attorney must exercise reasonable diligence in attempting to contact and disburse trust funds to persons entitled to receive them."
        - "The Committee believes that an attorney owes an ethical duty to use whatever means are reasonable under the circumstances, which will include in almost all instances first class mail to the last known address of the owner. In many instances involving very small payments or refunds, first class mail to the last known address of the owner will be the only reasonable effort required."
        - "The Committee believes that it would not be improper to deduct from the funds held in trust reasonable costs incurred by the attorney in attempting to locate the party to whom trust funds are owed, but this does not include an attorney's fee."
    - 1673 dealt with hiring an investigator to locate a person who is owed funds from a trust account.
        - "Thus, the committee opines that it is not improper to use monies from a trust to pay an investigator to locate promptly clients whose whereabouts are unknown."
        - "However, the committee believes the amount paid out of the trust to an investigator must be reasonable and must not deplete the client's funds held in the trust itself, lest the purpose of finding the client would be defeated."

<u>Attorney's lien claimed by former lawyer</u>.

- Unless a lawyer can determine that the former attorney is NOT entitled to the funds, the safest course of action is to hold the funds in trust until all issues are resolved and the validity of the lien is determined. If the lawyer believes in good faith and after due diligence that the former lawyer is not entitled to payment, the lawyer may disburse those funds to the client. See Comment 4, Rule 1.15; LEO 1280.
- LEO 1280 states:
    - "The Committee is of the opinion that by retaining the funds in your trust account until the dispute is resolved, you have met the ethical obligation."

Enforcement

<u>Mishandling client funds</u>.

- Loss of money is not a prerequisite to suspension of an attorney's license for mishandling client funds. Whether the attorney's failure to pay third party entitled to funds resulted from inadvertence or from intentional wrongdoing, is immaterial. *Delk v. Virginia State Bar*, 233 Va. 187, 355 S.E.2d 558 (1987).

Reference Materials

- Rule 1.5 (Fees and Fee Agreements) (attached)
- Rule 1.15 (Trust Accounts/Safekeeping of Client property) (attached)
- Pt. 6, §IV, ¶ 20 of Rules of Virginia Supreme Court; Notice of Election Requirements (attached)
- "*Lawyers and Other People's Money*", Fifth Edition, by Frank A. Thomas, III and Kathleen M. Uston," (available on internet)

Va. Sup. Ct. R. pt. 6, sec. II, 1.5

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Rule 1.5. Fees

(a)A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1)the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2)the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3)the fee customarily charged in the locality for similar legal services;

(4)the amount involved and the results obtained;

(5)the time limitations imposed by the client or by the circumstances;

(6)the nature and length of the professional relationship with the client;

(7)the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8)whether the fee is fixed or contingent.

(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c)A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d)A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

(1)in a domestic relations matter, except in rare instances; or

(2)for representing a defendant in a criminal case.

(e)A division of a fee between lawyers who are not in the same firm may be made only if:

(1)the client is advised of and consents to the participation of all the lawyers involved;

(2)the terms of the division of the fee are disclosed to the client and the client consents thereto;

(3)the total fee is reasonable; and

(4)the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

(f) Paragraph (e) does not prohibit or regulate the division of fees between attorneys who were previously associated in a law firm or between any successive attorneys in the same matter. In any such instance, the total fee must be reasonable.

Annotations

Notes

Basis or Rate of Fee

[1] *ABA Model Rule* Comment not adopted.

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the amount, basis, or rate of the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple letter, memorandum, receipt or a copy of the lawyer's customary fee schedule may be sufficient if the basis or rate of the fee is set forth.

[3] *ABA Model Rule* Comment not adopted.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When considering whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage. In any event, a fee should not be imposed upon a client, but should be the result of an informed decision concerning reasonable alternatives.

Contingent Fees in Domestic Relations Cases

[6] An arrangement for a contingent fee in a domestic relations matter has been previously considered appropriate only in those rare instances where:

(a) the contingent fee is for the collection of, and is to be paid out of (i) accumulated arrearages in child or spousal support; (ii) an asset not previously viewed or contemplated as a marital asset by the parties or the court; (iii) a monetary award pursuant to equitable distribution or under a property settlement agreement;

(b) the parties are divorced and reconciliation is not a realistic prospect;

(c) the children of the marriage are or will soon achieve the age of maturity and the legal services rendered pursuant to the contingent fee arrangement are not likely to affect their relationship with the non-custodial parent;

(d) the client is indigent or could not otherwise obtain adequate counsel on an hourly fee basis; and

(e) the fee arrangement is fair and reasonable under the circumstances.

Division of Fee

[7] A division of fee refers to a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist.

[8] *ABA Model Rule* Comment not adopted.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Virginia Code Comparison

With regard to paragraph (a), DR 2-105(A) required that a "lawyer's fees . . . be reasonable and adequately explained to the client." The factors involved in assessing the reasonableness of a fee listed in Rule 1.5(a) are substantially similar to those listed in EC 2-20.

Paragraph (b) emphasizes the lawyer's duty to adequately explain fees (which appears in DR 2-105(A)) but stresses the lawyer's duty to disclose fee information to the client rather than merely responding to a client's request for information (as in DR 2-105(B)).

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

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

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

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

Committee Commentary

The Committee believes that DR 2-105 placed greater emphasis than the ABA Model Rule on the Full Disclosure of Fees and Fee Arrangements to Clients and therefore added language from DR 2-105(A) to paragraph (a) and from

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

Effects of Amendment. --

The amendment effective January 1, 2004, adopted September 24, 2003, inserted present paragraph (e)(2) and redesignated former paragraphs (e)(2) and (e)(3) as present (e)(3) and (e)(4); and added paragraph (f).

Case Notes

Fees as percent of pro rata distribution. -- Absent a showing of exceptional circumstances, any fee exceeding 10 percent of a pro rata distribution in the instant case is "per se" unreasonable, shocks the conscience of the court, and will be disallowed pursuant to this court's inherent powers to supervise the bar. In re A.H. Robins Co., 182 Bankr. 128 (Bankr. E.D. Va. 1995), aff'd sub nom. *Bergstrom v. Dalkon Shield Claimants Trust, 86 F.3d 364* (4th Cir.), cert. denied, *519 U.S. 993, 117 S. Ct. 483, 136 L. Ed. 2d 377 (1996)* (decided under former DR 2-105).

Earned on receipt. -- While the attorney testified that the law firm viewed debtors' attorney fees as "earned on receipt," this position was incompatible with Virginia professional conduct standards; as no petitions were ever filed in certain cases, and there was no evidence fees were earned, the services rendered by the firm in each of those matters could not be said to have any reasonable value, and fees collected by it were excessive in their entirety. *Robbins v. Barbour (In re Futreal), 2016 Bankr. LEXIS 3974* (Bankr. W.D. Va. Nov. 15, 2016).

Ethical considerations were properly considered where court awarded deceased attorney's estate a $100,000 fee for approximately 52 hours of legal work. Fambrough v. Estate of Nunley (In re Mullins), 190 Bankr. 812 (Bankr. W.D. Va. 1995) (decided under former DR 2-105).

Alleged ethical violations not grounds for reducing attorney's fee award. -- Where property owners prevailed in a condemnation action, even assuming that a referral fee arrangement involving the owner's attorneys violated Va. Sup. Ct. R. pt. 6, § II, R. 1.5(e), this was not grounds for reducing the fees the attorneys were entitled to under § 25.1-419. *Norfolk Redevelopment & Hous. Auth. v. C & C Real Estate, Inc., 72 Va. Cir. 464, 2007 Va. Cir. LEXIS 162 (Norfolk 2007).*

Violation of Va. Sup. Ct. R., pt. 6, § II, R. 1.5(c), which required that contingency fee agreements be in writing, was not a bar to recovery of attorney's fees under § 59.1-207.14 of the Motor Vehicle Warranty Enforcement Act as the manufacturer did not have standing in a collateral proceeding to argue reduction of attorney's fees to the vehicle purchasers' counsel on that basis. *Dickerson v. Ford Motor Co., 74 Va. Cir. 509, 2008 Va. Cir. LEXIS 4 (Roanoke 2008).*

Research References & Practice Aids

Law Review.

For article, "Professional Responsibility," see *43 U. Rich. L. Rev. 255 (2008).*

End of Document

Va. Sup. Ct. R. pt. 6, sec. II, 1.15

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Rule 1.15. Safekeeping Property

(a) *Depositing Funds.*

(1) All funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable trust accounts; all other property held on behalf of a client should be placed in a safe deposit box or other place of safekeeping as soon as practicable.

(2) For lawyers or law firms located in Virginia, a lawyer trust account shall be maintained only at a financial institution approved by the Virginia State Bar, unless otherwise expressly directed in writing by the client for whom the funds are being held.

(3) No funds belonging to the lawyer or law firm shall be deposited or maintained therein except as follows:

(i)funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution or to maintain a required minimum balance to avoid the imposition of service fees, provided the funds deposited are no more than necessary to do so; or

(ii)funds in which two or more persons (one of whom may be the lawyer) claim an interest shall be held in the trust account until the dispute is resolved and there is an accounting and severance of their interests. Any portion finally determined to belong to the lawyer or law firm shall be promptly withdrawn from the trust account.

(b) *Specific Duties.* --A lawyer shall:

(1)promptly notify a client of the receipt of the client's funds, securities, or other properties;

(2)identify and label securities and properties of a client, or those held by a lawyer as a fiduciary, promptly upon receipt;

(3)maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them;

(4)promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive; and

(5)not disburse funds or use property of a client or of a third party with a valid lien or assignment without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

(c) *Record-Keeping Requirements.* --A lawyer shall, at a minimum, maintain the following books and records demonstrating compliance with this Rule:

(1) Cash receipts and disbursements journals for each trust account, including entries for receipts, disbursements, and transfers, and also including, at a minimum: an identification of the client matter;

the date of the transaction; the name of the payor or payee; and the manner in which trust funds were received, disbursed, or transferred from an account.

(2)A subsidiary ledger containing a separate entry for each client, other person, or entity from whom money has been received in trust.

The ledger should clearly identify:

(i)the client or matter, including the date of the transaction and the payor or payee and the means or methods by which trust funds were received, disbursed or transferred; and

(ii)any unexpended balance.

(3) In the case of funds or property held by a lawyer as a fiduciary, the required books and records shall include an annual summary of all receipts and disbursements and changes in assets comparable in detail to an accounting that would be required of a court-supervised fiduciary in the same or similar capacity, including all source documents sufficient to substantiate the annual summary.

(4) All records subject to this Rule shall be preserved for at least five calendar years after termination of the representation or fiduciary responsibility.

(d) *Required Trust Accounting Procedures.* --In addition to the requirements set forth in Rule 1.15 (a) through (c), the following minimum trust accounting procedures are applicable to all trust accounts:

(1) Insufficient Fund Reporting. All accounts are subject to the requirements governing insufficient fund check reporting as set forth in the Virginia State Bar Approved Financial Institution Agreement.

(2) Deposits. All trust funds received shall be deposited intact. Mixed trust and non-trust funds shall be deposited intact into the trust fund and the non-trust portion shall be withdrawn upon the clearing of the mixed fund deposit instrument. All such deposits should include a detailed deposit slip or record that sufficiently identifies each item.

(3) Reconciliations.

(i) At least quarterly, a reconciliation shall be made that reflects the trust account balance for each client, person or other entity.

(ii)A monthly reconciliation shall be made of the cash balance that is derived from the cash receipts journal, cash disbursements journal, the trust account checkbook balance, and the trust account bank statement balance.

(iii) At least quarterly, a reconciliation shall be made that reconciles the cash balance from (d)(3)(ii) above and the subsidiary ledger balance from (d)(3)(i).

(iv) Reconciliations must be approved by a lawyer in the law firm.

(4) The purpose of all receipts and disbursements of trust funds reported in the trust journals and ledgers shall be fully explained and supported by adequate records.

Annotations

Notes

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. For purposes of this Rule, the term "fiduciary" includes personal representative, trustee, receiver, guardian, committee, custodian, and attorney-in-fact. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if funds, in one or more trust accounts. Separate trust accounts may be warranted when administering estate funds or acting in similar fiduciary capacities.

[2] Separation of the funds of a client from those of the lawyer not only serves to protect the client but also avoids even the appearance of impropriety and, therefore, commingling of such funds should be avoided.

[2a] In relation to (b)(5), consent can be inferred from the engagement agreement or any consequential agreement between the lawyer and the client regarding the disbursement of fees, i.e., when earned fees are routinely withdrawn from the lawyer's trust account upon an accounting to the client, when costs and expenses of litigation are routinely withdrawn, or when other fees/costs or expenses are agreed upon in advance.

[3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration or mediation. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraphs (b)(4) and (b)(5) do not impose an obligation upon the lawyer to protect funds on behalf of the client's general creditors who have no valid claim to an interest in the specific funds or property in the lawyer's possession. However, a lawyer may be in possession of property or funds claimed both by the lawyer's client and a third person; for example, a previous lawyer of the client claiming a lien on the client's recovery or a person claiming that the property deposited with the lawyer was taken or withheld unlawfully from that person. Additionally, a lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. For example, if a lawyer has actual knowledge of a third party's lawful claim to an interest in the specific funds held on behalf of a client, then by virtue of a statutory lien (e.g., medical, workers' compensation, attorneys' lien, a valid assignment executed by the client, or a lien on the subject property created by a recorded deed of trust) the lawyer has a duty to secure the funds claimed by the third party. Under the above-described circumstances, paragraphs (b)(4) and (b)(5) require the lawyer either to deliver the funds or property to the third party or, if a dispute to the third party's claim exists, to safeguard the contested property or funds until the dispute is resolved. If the client has a non-frivolous dispute with the third party's claim, then the lawyer cannot release those funds without the agreement of all parties involved or a court determination of who is entitled to receive them, such as an interpleader action. A lawyer does not violate paragraphs (b)(4) and (b)(5) if he has acted reasonably and in good faith to determine the validity of a third-party's claim or lien.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[6] Nothing in this Rule is intended to prohibit an attorney from using electronic checking for his trust account so long as all requirements in this Rule are fulfilled. It is the lawyer's responsibility to assure that complete and accurate records of the receipt and disbursement of entrusted property are maintained in accordance with this Rule. Many businesses are now converting paper checks to automated clearinghouse (ACH) debits. Authorized ACH debits that are electronic transfers of funds (in which no checks are involved) are allowed provided the lawyer maintains a record of the transaction as required by this Rule. The record, whether consisting of the instructions or authorization to debit the account, a record or receipt from the financial institution, or the lawyer's independent record of the transaction, must show the amount, date, recipient of the transfer or disbursement, and the name of the client or other person to whom the funds belong.

Prior Rule Comparison

This rule is substantially the same as the original Rule 1.15 adopted January 1, 2000 except that the language has been substantially simplified for ease of understanding and the portions regarding the Financial Institutions duties redacted as they are appropriately incorporated into the "Trust Account Notification Agreement" signed by all Virginia-approved financial institutions.

Committee Commentary

The Committee chose to modify the rule for ease of understanding and enforcement with no substantive changes to a lawyer's safekeeping property and record-keeping requirements.

Effects of Amendment. --

The amendment effective January 1, 2004, adopted September 24, 2003, deleted "subsidiary ledger" at the beginning of paragraph (e)(1)(iii); substituted "paragraph" for "subsection" in paragraphs (e)(1)(v) and (e)(2)(iii); deleted "subsection" preceding "(i)" in paragraph (e)(2)(ii); and rewrote the second paragraph of paragraph (f)(1)(ii).

The amendment effective June 21, 2011, adopted June 21, 2011, rewrote the Rule.

The amendment, effective November 1, 2013, adopted November 1, 2013, substituted "all other property held on behalf of a client should be" for "or" in subdivision (1); and substituted "funds" for "monies" in two places in Paragraph [1] of the Comments.

Case Notes

This rule was promulgated to protect third parties as well as clients. *Pickus v. Virginia State Bar, 232 Va. 5, 348 S.E.2d 202 (1986)* (decided under former DR 9-102).

When suspension of license appropriate. -- Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property. *Delk v. Virginia State Bar, 233 Va. 187, 355 S.E.2d 558 (1987)* (decided under former DR 9-102).

Clear and convincing evidence supported the Board's determination that the attorney in one case violated the professional conduct rule about handling client funds, Va. Sup. Ct. R. pt. 6, § II, R. 1.15(a)(2), by putting the client's retainer in a trust account and almost immediately withdrawing those funds when they had not been earned, and in a second case violated rules regarding client communication and termination of representation, Va. Sup. Ct. R. pt. 6, § II, R. 1.4(a), (b), and (c), and Va. Sup. Ct. R. pt. 6, § II, R. 1.16(d), respectively, by not keeping the clients informed about the status of their case and not informing them when the attorney stopped representing them. As a result, an 18-month suspension of the attorney's law license was warranted.*Green v. Va. State Bar, 278 Va. 162, 677 S.E.2d 227, 2009 Va. LEXIS 67 (2009).*

Misappropriation of client funds. -- Attorney violated Va. Sup. Ct. R. pt. 6, § II, R. 1.15 because, although he was paid to file a habeas corpus petition on behalf of a client, he did not file the petition, he refused to refund the fee, and he claimed that his associate was actually retained to file the petition. *Green v. Va. State Bar ex rel. Seventh Dist. Comm., 274 Va. 775, 652 S.E.2d 118, 2007 Va. LEXIS 134 (2007).*

Attorney violated Va. Sup. Ct. R. pt. 6, § II, R. 1.15 because he was paid in advance to represent a client in a divorce matter, immediately removed the money from his trust account before little, if any, work was done, worked on the case sporadically, and did not respond to a request for itemization of his work after his services were terminated. *Green v. Va. State Bar ex rel. Seventh Dist. Comm., 274 Va. 775, 652 S.E.2d 118, 2007 Va. LEXIS 134 (2007).*

"Funds" is not confined to items such as money or cash. -- *El-Amin v. Virginia State Bar ex rel. Third Dist. Committee, 257 Va. 608, 514 S.E.2d 163 (1999)* (decided under former DR 9-102).

Where attorney held client's car as a bailee for the purpose of securing the payment of legal fees to be incurred in the future by the client, and attorney converted the car into a credit which he received on the purchase of his new car, the credit represented the retainer fee and it became a "fund " set aside for a specific purpose. Therefore, the attorney had an obligation to deposit the funds. *El-Amin v. Virginia State Bar ex rel. Third Dist. Committee, 257 Va. 608, 514 S.E.2d 163 (1999)* (decided under former DR 9-102).

Moral turpitude need not be shown for suspension of license. -- It is not necessary in a disciplinary proceeding to show that moral turpitude exists before a lawyer's license may be suspended for mishandling client funds. Whether the attorney's failure to pay the association resulted from mere inadvertence, or from intentional wrongdoing, is immaterial. Delk v. Virginia State Bar, 233 Va. 187, 355 S.E.2d 558 (1987) (decided under former DR 9-102).

Loss of money by a client is not a prerequisite to suspension of an attorney's license for mishandling the client's funds. Delk v. Virginia State Bar, 233 Va. 187, 355 S.E.2d 558 (1987) (decided under former DR 9-102).

Closing attorney represents all parties where no other attorney involved. -- The lending institutions were more than third parties in their relationship with the closing attorney, where the institutions were not represented by their own attorneys, so he acted alone in closing the loans in question. When a lawyer acts as a closing or settlement attorney and no other lawyer is involved, the closing or settlement attorney represents all the parties and, in this limited sense, all the parties are his clients. In such a situation, the settlement attorney assumes the duties of a fiduciary and must properly handle and dispose of any funds not his own which he may receive in connection with the settlement. Pickus v. Virginia State Bar, 232 Va. 5, 348 S.E.2d 202 (1986) (decided under former DR 9-102).

Making loans from trust account. -- An attorney who makes loans from a trust account, obviously treating the money as his own, violates this rule. Cogdill v. First Dist. Comm., 221 Va. 376, 269 S.E.2d 391 (1980) (decided under former DR 9-102).

Retainer fee. -- Where debtor-in-possession, authorized to manage its affairs under 11 U.S.C.S. § 1107, sought to employ general counsel, pursuant to 11 U.S.C.S. § 327, the applicant was required to disclose the compensation paid, under 11 U.S.C.S. § 329(a), and show that it waived any conflicting claim as a pre-petition creditor of the debtor. The retainer fee had to comply with Va. Sup. Ct. R. pt. 6, § II, R. 1.15(a)(2), 1.16(d), and the authorization to settle claims could not conflict with Va. Sup. Ct. R. pt. 6, § II, R. 1.2. In re Circle T Pipeline, Inc., 2011 Bankr. LEXIS 2490 (Bankr. W.D. Va. Apr. 27, 2011).

Research References & Practice Aids

Law Review.

For article, "Professional Responsibility," see 45 U. Rich. L. Rev. 347 (2010).

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Va. Sup. Ct. R. pt. 6, sec. IV, 20

Including changes received by the publisher through July 16, 2018

Virginia Court Rules > RULES OF SUPREME COURT OF VIRGINIA > PART SIX INTEGRATION OF THE STATE BAR > SECTION IV. ORGANIZATION AND GOVERNMENT

Rule 20. Maintenance of Trust Accounts; Notice of Election Requirements

Every trust account maintained by an active member of the VSB under Rules of Professional Conduct 1.15 shall also be maintained at a "financial institution approved by the Virginia State Bar" and maintained in accordance with this paragraph and Rule 1.15. A "financial institution approved by the Virginia State Bar" includes regulated state or federal chartered banks, savings institutions, and credit unions that are properly licensed and authorized to do business, have federal insurance on deposits, and have entered into and agreed to abide by a Virginia State Bar Approved Financial Institution Agreement. (See Appendix A which the Virginia State Bar reserves the right to amend or modify upon notice to all approved financial institutions.) The Virginia State Bar shall maintain and publish from time to time a list of approved financial institutions.

(A) *Interest-bearing Trust Accounts.* --A lawyer may maintain funds of clients in one or more interest-bearing accounts in one or more financial institutions, whenever the lawyer has established and follows record-keeping, accounting, clerical, and administrative procedures to compute and credit or pay periodically, but at least quarterly, pro rata to each client the interest on such client's funds less fees, costs, or expenses charged by the lawyer for the record-keeping, accounting, clerical, and administrative procedures associated with computing and crediting or paying such amounts.

(B) *IOLTA Accounts.* --A lawyer may deposit funds of a client in an identifiable interest-bearing trust (IOLTA) account for which the lawyer has not established procedures to compute and credit or pay pro rata net earnings to such client whenever:

(1) At the time of such deposit the lawyer reasonably expects that the fees, costs, or expenses which the lawyer would be entitled to charge under Paragraph 20(A) would equal or exceed the pro rata interest on such client's funds (the determination of whether the funds of a client or third person can earn income in excess of fees, costs or expenses the lawyer would be entitled to charge under paragraph 20(A) shall rest in the sound judgment of the lawyer or law firm, and no lawyer shall be charged with an ethical impropriety or breach of professional conduct based on the good faith exercise of such judgment); and

(2) The financial institution has agreed to:

(a) Periodically, but at least quarterly, remit to the Legal Services Corporation of Virginia (LSCV) interest or dividends on the average monthly balance of each such account or as otherwise computed in accordance with such bank's standard accounting practice, provided that such rate of interest shall not be less than the rate paid by such bank to regular, non-attorney depositors;

(b) Transmit with each remittance to LSCV a statement identifying the name of the lawyer or law firm from whose account the remittance is sent, the rate of interest applied, the period for which the remittance is made, the total amount of interest earned, the service charges or other fees assessed against the account, if any, and the net amount of interest remitted;

(c) Transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to LSCV from such interest-bearing account, the rate of interest applied, the fees assessed, if any, and the average account balance for the period for which the report is made;

(d) Charge no fees against an IOLTA trust account that are greater than the fees charged to non-attorney depositors, except that an IOLTA remittance fee may be charged to defray the depository institution's administrative costs attributable to calculating and remitting the interest to LSCV; other allowable fees are per check charges, per deposit charges, a fee in lieu of a minimum balance and sweep fees. Allowable, reasonable fees may be deducted from interest or dividends earned on an IOLTA account, provided that such charges or fees shall be calculated in accordance with the Financial Institutions' standard practice for non-IOLTA customers. Fees or charges in excess of the interest or dividends earned on the IOLTA account, for any month or quarter, shall not be taken from the interest or dividends of any other IOLTA account. Fees for wire transfers, insufficient funds, bad checks, stop payment, account reconciliation, negative collected balances, and check printing are not considered customary account maintenance charges and are not deductible from the interest or dividends earned on the IOLTA account. All other fees including those non-customary fees just listed are the responsibility of the lawyer or law firm, who in turn may absorb these specific costs or pass along those fees to the client(s) being served by the transaction in accordance with attorney/client agreements. Financial Institutions may elect to waive any or all fees on IOLTA accounts in recognition of their charitable nature;

(e) Collect no fees from the principal deposited in the IOLTA trust account;

(f) Pay all or part of the funds deposited in such interest-bearing trust account upon demand or order. An IOLTA account may be an interest-bearing check account, a money market account with or tied to check-writing, a sweep account which is a government money market fund or daily overnight financial institution repurchase agreement invested solely in or fully collateralized by United States government securities, or an open-end money market fund solely invested in or fully collateralized by the United States government securities; and

(g) Agree and abide by all provisions in the Virginia State Bar Approved Financial Institution Agreement.

(3) Interest accruing on such accounts and paid by the financial institution to LSCV shall be used for funding 1) civil legal services to the poor in Virginia, 2) LSCV's administrative expenses, and 3) the creation and augmentation of a reserve fund for the same purposes.

(C) *Non-interest-bearing Trust Accounts.* --A lawyer may deposit funds of a client in an identifiable non-interest-bearing trust account for which the account accrues no interest or dividends so long as the attorney or law firm receives no consideration or benefit from the Financial Institution for opening a non-interest bearing trust account or for converting from an IOLTA account to a non-interest bearing trust account. A lawyer who elects not to participate in the maintenance of an interest-bearing trust account as described in Paragraph 20(B) must submit such an election in accordance with the procedures set forth in Paragraph 20(F) of this rule.

(D) *Reporting to Client.* --A lawyer who elects to deposit funds of a client in an account pursuant to Paragraph 20(B) or (C) shall not be required to seek permission from such client in making the election. As to funds deposited in accordance with Paragraph 20(B), a lawyer shall not be required to compute or report to such client any payment to LSCV of interest or dividends by the banking institution on funds in any such account wherein the client's funds have been deposited by the lawyer.

(E) *Law Firm Trust Accounts.* --A law firm of which any participating lawyer is a member may maintain the account(s) on behalf of any or all lawyers in the firm.

(F) *Opt-Out of IOLTA Account.* --A lawyer who elects to open an IOLTA account shall obtain a "Request to Establish IOLTA Account" form from LSCV. A lawyer who elects not to maintain an IOLTA account shall make such election on a "Request to Opt-Out" form provided by LSCV.

Annotations

Notes

Effects of Amendment. --

The amendment, effective February 4, 2000, substituted "Rules of Professional Conduct 1.15" for "DR 9-102 and DR 9-103" in the introductory paragraph.

The amendment effective June 21, 2011, adopted June 21, 2011, rewrote the Rule.

Case Notes

Only the Virginia State Bar has the ability to pursue violations of paragraph 20. In re Palumbo Family Ltd. Partnership, 182 Bankr. 447 (Bankr. E.D. Va. 1995).

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8

Opinions from On High: Taking the Pulse of the Supreme Court of Virginia

Monica T. Monday

OPINIONS FROM ON HIGH:
Taking the Pulse of the Supreme Court of Virginia

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Gentry Locke Seminar
September 7, 2018

I. INTRODUCTION

A. Overview of Civil Cases

In its unique role as the highest court in Virginia, the Supreme Court of Virginia decides cases that define and explain Virginia law, and serves as the head of Virginia's judiciary.

In its principal role as the final arbiter of Virginia law, the Court has continued the recent trend of explaining the requirements for the admission of expert testimony in tort cases, including medical malpractice and products liability cases. As we have seen in recent years, the Court will demand an adequate foundation for the admission of expert testimony, and has provided guidance on how to establish that foundation.

In the past year, the Court also decided several questions of first impression, including an important holding that the intentional loss or destruction of evidence is required to support a jury instruction on the spoliation of evidence; mere negligent destruction is not sufficient. The Court also held that lost profits are not recoverable in a fraudulent inducement claim if they are based on an unenforceable provision of a contract. And, the Court held that a 15-year lease was not enforceable because it lacked a seal or any specific substitute for a seal. Additionally, the Court handed down a seminal case on the recovery of attorney's fees in Virginia, setting forth clear guidelines for raising, proving and recovering attorney's fees.

B. Overview of Policy Changes and News

On the policy side, the Supreme Court has taken some noteworthy steps in the past year.

The Supreme Court has continued to urge the General Assembly to fund all vacant judgeships. In this year's budget, the General Assembly authorized and agreed to fund all 435 state court judgeships recommended by the National Center for State Courts' November 2017 weighted caseload study. Therefore, in 2019, we should have a fully staffed and fully funded judiciary. The Court has also urged funding to help increase low pay in the district court clerks offices. Salary increases authorized by the General Assembly last year for general district clerks and deputy clerks have helped, but have not eliminated the understaffing problems in those clerks offices. District court clerks' offices are currently understaffed by 271 full-time positions.

The Supreme Court has also worked independently and through the General Assembly to implement reforms for Virginia's practices for collecting fines and court costs, which frequently result in the suspension of drivers' licenses for those who cannot afford these expenses. A recent report noted that almost 1 million Virginia driver's licenses are suspended due in part to court debt, and nearly two-thirds were suspended solely for court debt. Last year, a new rule (Rule 1:24) was adopted to facilitate payment plans for these fines and costs to avoid suspensions, and the General Assembly codified most of the rule in Virginia Code §19.2-354.1.

The Court also approved a pilot program for limited appellate mediation in the Court of Appeals and Supreme Court beginning January 2019. The program will be available in certain civil cases where both parties are represented by counsel. In the Court of Appeals, mediation will be available in equitable distribution and/or related attorney's fees disputes. In the Supreme Court, mediation will be available only where a petition for appeal has been granted. If the parties agree to mediate, there will be an automatic stay of proceedings for 30 days to allow them an opportunity to mediate. A training program for interested mediators is tentatively scheduled for November. Information about the pilot program can be found at: http://www.courts.state.va.us/news/items/2018_0613_scv_press_release_appellate_mediation.pdf.

Last year, the Judicial Performance Evaluation program (JPE) expanded into the appellate arena. Following a pilot program last year, the JPE now includes appellate court judges. Additionally, beginning this year court reporters will be included in a new "respondents group," and will be permitted to provide feedback on the judges under the JPE.

Do you plan to request the recall of a retired circuit court judge? This session, the General Assembly passed a law that requires retired circuit court judges who are subject to recall to be deemed qualified every three years by the House and Senate Courts committees before being recalled for service. The bill becomes effective in July 2019. Therefore, once the bill takes effect, the Chief Justice may not recall a retired circuit court judge who does not meet the qualification requirements.

Last year, the Chief Justice formed a committee to study and make recommendations concerning recent reports documenting unhealthy conditions of many lawyers nationwide. The reports show higher than average rates of alcohol and substance abuse problems and mental illness (depression, anxiety, etc.) among lawyers. In response, the Chief Justice tapped Justice Mims to lead Virginia's Committee on Lawyer Well-Being to make recommendations to improve the wellness and quality of professional and personal life for lawyers and judges in the Commonwealth.

Beginning this year, the Court enacted a subscription service that permits subscribers to receive emails about updates to the court dockets and calendars, release of opinions, appeals granted, the posting of oral argument recordings, and news events from the Court of Appeals and Supreme Court. So, it is now easier to stay informed about what is going on in the appellate courts. To subscribe, go to this address and fill out the information at the bottom right hand corner of the page: http://www.courts.state.va.us/main.htm.

On the pro bono front, your 2019 VSB membership dues statement will contain a new question that will provide the Court will information about whether Virginia lawyers are meeting the 2% aspirational goal for pro bono services. Next year, Virginia lawyers will be asked to voluntarily report their pro bono hours or financial support of legal aid programs/organizations on their VSB membership dues statements. This approach was in lieu of mandatory reporting, which did not get support from Bar Council.

In further pro bono news, under an amended “Emeritus” rule, those lawyers who qualify for Emeritus status with the VSB will be allowed to provide pro bono legal services without being under the direct supervision of a supervising attorney, provided certain requirements are met. So, senior lawyers may help those who need free legal services without direct supervision.

II. CASE SUMMARIES

1. EVIDENCE

A. <u>Lay Opinions</u>

Martin v. Lahti, 295 Va. 77 (2018)

In this medical malpractice case, the Supreme Court held that the circuit court did not abuse its discretion when it excluded lay opinions by a deceased patient’s sister and daughter stating the patient would not have agreed to gallbladder surgery if she had been properly advised of the risks of surgery and its alternatives.

The patient was diagnosed with pancreatitis, and the physician recommended the patient’s gallbladder be removed. Due to complications from the surgery, the patient died one week later.

The decedent’s daughter qualified as executor of the estate and filed suit against the doctor, contending that he failed to obtain informed consent to conduct the surgery. According to the executor, the doctor failed to explain to the decedent that there were non-surgical options available and, if he had, the decedent would not have consented to the surgery.

The physician filed a motion to dismiss the informed consent claim. The court held an evidentiary hearing where the decedent's daughter and sister testified that the decedent would not have agreed to the surgery if she had been offered a non-surgical option for treatment. However, the relatives were not present when the decedent consulted with the doctor or when she gave her consent. Further, the decedent did not communicate to her relatives what the physician told her about the surgery or other alternatives. The circuit court dismissed the case, finding that the testimony was hearsay and speculation and, therefore, plaintiff could not prove causation.

The Supreme Court affirmed. It held that under Rule 2:701, the lay witness opinion rule, lay witnesses may offer opinions based upon their "personal experience or observations." Here, though, the decedent's relatives were offering opinions that were not rooted in their personal experience or observations, as Rule 2:701 requires, but rather were offering opinions based on speculation. Although witnesses can provide opinions about conditions, they cannot offer opinions about whether a person would or would not have made a specific decision.

B. <u>Expert Testimony (and Spoliation)</u>

1. *Emerald Point, LLC v. Hawkins*, 294 Va. 544 (2017)

Four tenants of an apartment building at Emerald Point Apartments in Virginia Beach filed suit against the apartment owner and management for injuries suffered from carbon monoxide exposure. Plaintiffs alleged that the carbon monoxide detector in the apartment unit sounded repeatedly, but the apartment owner and management failed to adequately make necessary repairs to the furnace.

The jury returned a verdict for the tenants, awarding them $4,100,000 collectively. Emerald Point Apartments appealed, contending, in part, that the circuit court erred by permitting (1) an undisclosed opinion from plaintiffs' expert witness, and (2) expert testimony about defective repairs and installation that occurred after the alleged negligence.

First, the Supreme Court held that the circuit court abused its discretion by allowing the plaintiffs' expert to testify outside the scope of his designated opinion. Rule 4:1(b)(4)(A)(i) provides that the designation of an expert witness must disclose the "substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." The expert's opinions that dementia is a long-term effect of people with carbon monoxide exposure and that there is a latency period for such exposures were not disclosed in plaintiff's answers to interrogatories.

The Court further held that the circuit court erred in admitting testimony regarding alleged defects in a new furnace and piping. Because the new furnace was installed after the alleged negligence and could not be the cause of the carbon monoxide leak at issue, it was not relevant.

The Court also reversed a spoliation instruction that permitted the jury to make an adverse inference from the landlord's decision to throw away the furnace one year after the injuries were sustained. In a ruling of first impression, the Court held that in order to justify a spoliation instruction, there must be intentional loss or destruction of evidence. Here, the landlord's destruction of the furnace was merely negligent, and would not support a spoliation instruction.

Finally, the Court held that it was error to permit the plaintiffs to increase their ad damnum after the close of the evidence.

2. *Evans v. NACCO Materials Handling Group Inc.*, 295 Va. 235 (2018)

The widow of Jerry Wayne Evans ("Evans") filed an action against NACCO Materials Handling Group, the manufacturer of a lift truck, based on negligent design, breach of an express or implied warranty, and failure to warn.

Evans was employed by International Paper Plant making boxes. Although not trained to do so, he was asked to operate a lift truck one day to unload bales of paper from a tractor trailer. After making several trips successfully, the lift truck he was driving became stuck on a sloped loading ramp. Evans properly engaged the parking brake, got out of the truck and walked to the rear. His lift truck began to roll backward and Evans was crushed to death between the truck he was driving and another lift truck parked behind his.

The vehicle was equipped with an "operator adjustable" parking brake that could be loosened or tightened for operator ease without the use of tools. At trial, the plaintiff's expert testified that although the brake complied with industry standard, it was unreasonably dangerous because it was designed to be "operator adjustable" by hand, instead of being adjustable only by a mechanic. The jury found for the estate and awarded it $4,200,000 on the negligence claim. However, the circuit court set aside the verdict, finding that Evans was contributorily negligent as a matter of law.

The Supreme Court affirmed judgment for the manufacturer, albeit on different grounds. To sustain a claim for negligent design, a plaintiff must show that the product was unreasonably dangerous, and that the manufacturer failed to meet objective safety standards prevailing at the time. Government regulations and industry standards and practices are not dispositive or conclusive in determining negligence but, like reasonable consumer expectations, can provide objective evidence that the product is defective.

The Court unanimously agreed that the plaintiff's expert testimony fell short of proving that the brake on the lift truck was unreasonably dangerous. The plaintiff offered no evidence showing an alternative design would have been safer than the one used by the manufacturer, and the expert did not testify that the design of the brake violated any regulation, industry standard, or consumer expectation. Further, the failure to warn claim also failed because the verdict form did not provide the jury with an option to find for the plaintiff on this theory but, nevertheless, the defense verdict on the implied warranty claim was necessarily a defense verdict on the failure to warn claim.

2. PRACTICE AND PROCEDURE

A. Appeals

Robinson Family, LLC v. Allen, 295 Va. 130 (2018)

A landlord filed a warrant in debt in general district court against tenants for property damage and unpaid rent. The tenants counterclaimed, seeking to recover their security deposit.

The general district court dismissed all claims. The landlord appealed, but the tenants did not. The landlord eventually withdrew the appeal, and tenants pursued their counterclaim despite having not filed a notice of appeal. The circuit court granted the relief sought by tenants, and awarded sanctions against the landlord.

The Supreme Court reversed. First, it held that the fact that the parties were engaged in protracted litigation was not sufficient to support an award of sanctions against the landlord. Second, the tenants could not pursue their counterclaim without filing an appeal. The right to an appeal is statutory, and there is no statutory basis for one party's appeal to "piggyback" on an opponent's notice of appeal. The fact that the circuit court has *de novo* review refers to the standard of review, not the scope of review. Because a notice of appeal filed by one litigant does not appeal the entire case on behalf of all other litigants in an appeal from the general district court, the circuit court did not have authority to review the tenant's claims.

B. Expungement

A.R.A. v. Commonwealth, 295 Va. 153 (2018)

Petitioner was charged with two misdemeanors and a felony assault on an officer. The Commonwealth's Attorney agreed to dismiss the misdemeanors and reduce the felony to disorderly conduct. The circuit court sentenced Petitioner to a fine and a suspended jail sentence. She later sought to expunge her felony arrest record, and the circuit court denied her request.

The Supreme Court held that the circuit court abused its discretion in denying the requested expungement. Under Code §19.2-392.2(F), a petition for expungement should be granted if the petitioner can establish that the continued existence and possible dissemination of information relating to her arrest causes or may cause circumstances which constitute a manifest injustice to the petitioner. This "manifest injustice" standard is forward-looking, rather than backward-looking. The inquiry turns on whether the continued existence of the record will or *may* cause the petitioner a manifest injustice in the future. The Court concluded that the existence of this arrest record may cause the petitioner a manifest injustice. The facts underlying an arrest are irrelevant and the petitioner need not show actual prejudice to prevail on her expungement petition. Because there is a reasonable possibility that a felony arrest record would hinder her career and her educational opportunities, the petitioner made the requisite showing of a manifest injustice.

The Court concluded that the requirements of the expungement statute were satisfied. Under Virginia Code § 19.2-392.2(A), a person charged with a criminal offense may seek the expungement of police and court records relating to a criminal charge if the person has been acquitted or a *nolle prosequi* is taken or the charge is otherwise dismissed. Where a person is charged with a felony and is convicted of a lesser-included misdemeanor, she is not entitled to expungement. However, if a criminal charge is amended to a separate and unrelated charge, the elements of the amended charge are not subsumed within the original charge. The Court held that disorderly conduct is not a lesser included offense of felony assault and battery of a police officer.

C. <u>Recovery of Attorney's Fees</u>

1. *Lambert v. Sea Oats Condominium Association,* 293 Va. 245 (2017)

An award of reasonable attorney's fees is mandatory to the prevailing party by statute when a party enforces compliance with condominium instruments. In a dispute between a condominium owner and a condominium association resulting from the condominium association's failure to pay $500 to repair an exterior door, the Court considered whether attorney's fees may be limited solely based on the amount of damages recovered by the plaintiff. In this case, the plaintiff sought 16 times the amount of the judgment awarded to the plaintiff.

The Supreme Court held that the circuit court abused its discretion by failing to consider all seven relevant factors to determine the reasonableness of attorney's fees. The relevant factors include: (1) the time and effort expended by the attorney, (2) the nature of the services rendered, (3) the complexity of the services, (4) the value of the services to the client, (5) the results obtained, (6) whether the fees incurred were consistent with those generally charged for similar services, and (7) whether the services were necessary and appropriate. These factors are not exhaustive, and courts may also consider the amount of damages the plaintiff recovered or sought to recover within the scope of the "results obtained" factor.

Although a court may consider the amount of damages recovered by the plaintiff and/or the amount the plaintiff sought to recover in its consideration of attorney's fees, it may not merely apply a ratio between the damages sought and the damages awarded or use the amount of damages sought or awarded as the upper limit on the amount of attorney's fees without considering other relevant factors. Courts must evaluate whether the attorney's fees are necessary and appropriate for effectively litigating the case in light of the claims and defenses presented.

The Court also addressed the stage of a proceeding at which a prevailing party who seeks an award of attorney's fees must meet its burden of proving the amount sought is reasonable. A prevailing party seeking attorney's fees is not required to prove the reasonableness of attorney's fees as part of its prima facie case, or to provide advance notice of the amount of attorney's fees. The party seeking an award of attorney's fees is only required to make a demand for attorneys' fees under Rule 3:25(B), which provides: "A party seeking to recover attorney's fees shall include a demand therefor in the complaint filed pursuant to Rule 3:2, in a counterclaim filed pursuant to Rule 3:9, in a cross-claim filed pursuant to Rule 3:10, in a third-party pleading filed pursuant to Rule 3:13, or in a responsive pleading filed pursuant to Rule 3:8. The demand must identify the basis upon which the party relies in requesting attorney's fees."

Additionally, the Court recognized that it is often appropriate to delay the issue of awarding attorney's fees until the disposition on the merits reveals which party has actually prevailed, and on which claims. Indeed, Rule 3:25(D) permits a trial court to establish a procedure *before* trial for deciding attorney's fees in cases where they may be awarded.

The opinion contains a number of juicy footnotes on related matters. First, the Supreme Court noted that in some cases, a jury may decide the reasonable amount of attorney's fees. Second, the Court pointed out that although the question of the recovery of attorney's fees by a law firm from a client is a different issue, the same factors are relevant in both types of cases. Third, the Court emphasized that in determining which party is the prevailing party on a claim, a comparison of the damages recovered to the damages sought is not relevant; rather, the prevailing party is the party in whose favor a judgment is rendered, regardless of the amount of damages.

2. *Graham v. Community Management Corp.*, 294 Va. 222 (2017)

Graham, a former employee of Community Management Corporation ("Community"), was sued by Community for allegedly breaching her obligation of confidentiality with respect to Community's proprietary information when she left Community to undertake other employment. Graham prevailed in the lawsuit, and then instituted the present action separately, as plaintiff, to recover her legal fees from defending the prior case.

Graham relied on a contractual provision in the confidentiality agreement which allowed fee recovery by a prevailing party in confidential information disputes. The circuit court correctly held that Graham was precluded from requesting attorney's fees in a separate lawsuit because she had failed to do so when originally defending the case. Rule 3:25(B) required Graham to make a demand for attorney's fees in the underlying litigation, and her failure to do so means she waived any claim for such fees. The Court dismissed the present action.

3. *Feeney v. Feeney*, 295 Va. 312 (2018)

The issue presented was whether a will's residuary clause granted the testator's wife a fee simple or a life estate in the residual estate. The Supreme Court found that the language limiting wife's use of the residual estate "to provide for her health and support, and to continue providing for the health, support and education of my son while is a minor" was irreconcilable with an absolute power of disposition and thus, the language clearly granted a life estate.

The Court further held that the testator's children (the appellants) were not entitled to attorney's fees under the doctrine of judicial instruction. The doctrine of judicial instruction provides that if judicial instructions are needed to interpret an *ambiguous* will or trust, all expenses of that litigation are paid by the estate. Although the Court declined to expressly recognize the doctrine of judicial instruction, it held that even if the doctrine exists in Virginia, it would not apply because the appellants had consistently argued throughout the litigation that the language of the will was *unambiguous*, not ambiguous. Therefore, the Court affirmed the circuit court's refusal to award attorney's fees.

D. <u>Wills, Trusts and Estates</u>

Gray v. Binder, 294 Va. 268 (2017)

A potential beneficiary of a will attempted to collaterally attack the distribution of an estate by challenging the subject matter jurisdiction of the commissioner of accounts who, without a referral from the circuit court, gave aid and guidance in the interpretation of the will and the determination of his heirs.

Without filing a lawsuit, the administrator of the decedent's estate requested that the commissioner of accounts interpret a will to determine the beneficiaries among its potential claimants. After an aggrieved claimant unsuccessfully attempted to challenge that determination, the commissioner filed the mandatory report with the circuit court providing for distribution pursuant to his determination of the respective beneficiaries. The aggrieved claimant filed exceptions, challenging the jurisdiction of the commissioner of accounts to interpret and determine the beneficiaries. The circuit court ultimately approved the commissioner's report, upholding the commissioner's authority and jurisdiction.

The Supreme Court held that "[a] commissioner's authority to assist the circuit court with the settlement of estates is simply an extension of the circuit court's subject matter jurisdiction to administer estates." Commissioners are empowered to hear motions for aid and direction from the administrator of an estate and to give guidance in the interpretation of a will and the determination of heirs. Further, the Court held that commissioners' determinations constitute the opinion of the court, if otherwise undisturbed.

E. Res Judicata

1. *Funny Guy, LLC v. Lecego, LLC,* 293 Va. 135 (2017)

In a 4-3 decision, the Supreme Court holds that the plaintiff's suit to recover a debt for services rendered was barred by res judicata where the plaintiff had previously sued to enforce a settlement agreement for the same debt.

In 2014, the plaintiff sued the defendant, claiming that the defendant had breached an agreement for payment of a debt. Plaintiff claimed that it had performed work for the defendant pursuant to a contract, and that the parties had resolved a payment dispute by agreeing that the defendant would pay at $.97 on the dollar for its work. The trial court found that there had been no meeting of the minds as a matter of law on the alleged compromise agreement, and dismissed the action on defendant's demurrer.

The plaintiff then brought another suit for the full amount of the debt under the original contract; alternatively, the plaintiff pursued recovery under a quantum meruit theory. As in the first suit, the plaintiff alleged that it had performed work for the defendant, but was never paid, and defendant breached an oral agreement. Defendant filed a plea in bar asserting that the suit was barred by res judicata because the plaintiff could have raised these theories of recovery in the first suit. The trial court agreed and dismissed the second suit.

The Supreme Court affirmed. It held that Rule 1:6 barred the plaintiff's second suit because the plaintiff could have joined all three of its claims in the first suit. Rule 1:6 is designed to enact the underlying principles of res judicata – every claim that can be joined, should be, and therefore, the final decree concludes not only "every question actually raised and decided," but also "every claim which properly belonged to the . . . litigation." Under Code §8.01-272, a plaintiff may join in the same proceeding any claims that "arise out of the same transaction or occurrence." The Court held that both suits arose out of the same dispute – the plaintiff wanted to be paid for the work it did for the defendant. The Court reasoned that the parties' later agreement for $.97 payment was not a distinct "transaction or occurrence," but rather, was an extension of the original dispute.

Therefore, the Court affirmed the dismissal of the second suit because "Rule 1:6 prohibited [the plaintiff] from filing two separate lawsuits when one would have been perfectly sufficient."

2. *Chilton-Belloni v. Angle*, 294 Va. 328 (2017)

In 2006, a City of Staunton building official authorized a homeowner to build a wall for sound proofing. In 2007, when the wall was almost complete, the City's zoning administrator informed the landowners that the wall violated the zoning ordinance. The zoning administrator alleged the wall violated the ordinance by obstructing the line of sight at an intersection and the wall height exceeded the permitted three and a half feet. He acknowledged "there may have been a miscommunication with my staff, but that does not change the fact that the wall is in violation of . . . the City of Staunton Code."

The homeowners sought and were granted a variance by the Board of Zoning Appeals ("BZA") in 2008, and the zoning administrator appealed to the circuit court. The circuit court denied the variance, agreeing with the City that the Board of Zoning Appeals lacked the authority under current law to issue the variance.

The homeowners did not take down or alter the wall, and two years elapsed with no action taken by the City. In 2011, the City filed criminal charges against the landowners for failure to remove the wall. The circuit court dismissed the action as time-barred because a misdemeanor has a one-year statute of limitations.

Later, the homeowners filed another request for a variance with the BZA. This time, the zoning administrator filed an injunction to order the wall to be removed. The circuit court granted the injunction, ruling that the variance issue was res judicata after earlier proceedings.

The Supreme Court reversed. Res Judicata did not bar a hearing on the latest variance issue. The circuit court's ruling in 2008-2009 was based only on the issue whether the BZA had authority to issue a variance. The actual merits of the requested variance were not "litigated and resolved" in the initial variance case. The Court declined to decide whether res judicata applies to administrative proceedings generally, concluding that application of the doctrine in zoning appeals for this variance was improper. The Court noted that courts must be cautious about using res judicata in administrative settings, and that a strict rule of res judicata could have unfortunate consequences to landowners in zoning matters. Thus, neither the prior administrative proceeding or the circuit court's prior ruling barred the landowner's second request for a variance.

F. <u>Remedies/Specific Performance</u>

Denton v. Browntown Valley Association, 294 Va. 76 (2017)

The Supreme Court considered whether the circuit court abused its discretion either by denying a seller specific performance of a contract for the sale of real property or by determining the amount of attorney's fees to award the prevailing party under the contract's fee-shifting provision.

The seller owned a 122-acre parcel of land in Warren County which he contracted to sell to Browntown Valley Associates ("BVA") for $740,500. Approaching the closing date, BVA indicated it was unable to reach an agreement with an adjacent landowner to obtain access to the property, attempted to terminate the contract, and refused to close on the sale.

The seller sued for specific performance of the contract. BVA alleged that specific performance was not an available remedy. It contended that 4 of the 120 acres of land were subject to a title defect because there was no valid deed, and therefore the seller could not have delivered marketable title.

After hearing all of the evidence and closing argument, the circuit court granted BVA's motion to strike the evidence, entered judgment for BVA, and dismissed the seller's complaint with prejudice. A hearing was later held on BVA's counterclaim for costs and attorney's fees, and the circuit court awarded BVA $47,800 in attorney's fees, plus expert witness fees and costs.

On appeal, the Supreme Court affirmed the circuit court's decision. Specific performance is an equitable remedy, and even if all required proofs are made, a court in equity is not required to grant the relief sought. Thus, the circuit court's determination of the availability of specific performance is reviewed for an abuse of discretion.

One who seeks specific performance bears the burden of proving both that there is a definite contract and that he has performed all that is required of him (or that he is ready and willing to perform at the time of his suit), and that all conditions precedent have been fulfilled. Where a seller seeks specific performance of a contract, he bears the burden of providing a marketable title when that issue is challenged. Here, the lack of access available to both the buyer and seller created a significant "cloud" on the title, and specific performance was not an appropriate remedy.

The Court further held that the circuit court did not err by awarding BVA attorney's fees. The circuit court's letter opinion expressly referenced each of the seven factors to consider in determining the reasonableness of the fees, and the court received evidence and expert opinion testimony to support each factor.

3. TORTS

A. <u>Defenses</u>

Eilber v. Floor Car Specialists, 294 Va. 438 (2017)

In a defamation action, the Supreme Court held that judicial estoppel is an affirmative defense that is waived if not pled. Because the purpose of judicial estoppel is to protect the integrity of the judicial process, the ability to apply the doctrine of judicial estoppel should not be contingent upon the parties raising it in their pleadings.

Eilber filed a chapter 13 bankruptcy petition, and the bankruptcy court ordered him to pay 36 monthly payments to the bankruptcy trustee. During the payment period, Eilber was fired from his job and subsequently filed a lawsuit against his former employer and a subcontractor (the Appellees).

Eilber completed payments to the trustee as planned, and the bankruptcy court discharged all of his remaining unsecured debts. Appellees then moved for summary judgment in the defamation action, contending Eilber lacked standing to pursue the matter due to his failure to disclose the defamation claim to the bankruptcy court.

Appellees argued Eilber was judicially estopped from pursuing the claim because his failure to identify it meant he took the position that no such claim existed. The circuit court determined Eilber (1) lacked standing and (2) his claim was barred by judicial estoppel. Eilber appealed both bases for the circuit court's ruling. Appellees cross appealed, contending that the circuit court erred by finding that Eilber stated a claim for defamation *per se*.

The doctrine of judicial estoppel prohibits a party from assuming inconsistent or contrary positions in an action or a series of actions. Here, Eilber challenged only whether a defendant may rely upon judicial estoppel if it was not previously raised as an affirmative defense. Judicial estoppel is distinct from many affirmative defenses because its primary goal is to "protect the integrity of the judicial process and to guard it from improper use." As such, the defense of judicial estoppel can be raised *sua sponte* by the court at any time and the Appellees did not waive it by failing to raise it in their pleadings.

B. <u>Fraud and Contract</u>

1. *MCR Federal, LLC v. JB & A, Inc.*, 294 Va. 446 (2017)

This appeal involves claims for breach of contract and constructive fraud arising out of a contract for the sale of a government contracting firm, JB&A, to MCR Federal, another contracting firm. At closing, MCR Federal falsely stated that representations and warranties previously made in the contract remained true at that time, including the representation that MCR Federal was not under any investigation or inquiry from a governmental entity that could materially harm MCR Federal's ability to complete its purchase obligations to JB&A's shareholders.

Contrary to its representation, MCR Federal knew at closing it was being investigated by the Air Force. As a result of that investigation, MCR Federal was suspended from obtaining federal contracts, and shortly thereafter defaulted on its purchase agreement terms with the JB&A shareholders.

JB&A filed suit for breach of the purchase agreement's representations and warranties and for actual and constructive fraud. After a 21-day bench trial, the circuit court found MCR liable for both breach of contract and constructive fraud.

MCR Federal appealed. The Supreme Court found that the circuit court erred in allowing JB&A to sue in tort for actual or constructive fraud based on allegedly false contractual representations, but affirmed the breach of contract verdict. The Court held that JB&A could not sue for actual and constructive fraud because MCR Federal's false representation concerning pending government investigations was not made prior to the contract, and was part of the contract itself. The source of the duty breached was based in contract, not tort, because the representation and warranty breached existed solely based on the contractual relationship between the parties, and no valid tort claim existed.

2. *CGI Federal, Inc. v. FCi Federal, Inc.*, 814 S.E.2d 183 (2018)

In a suit involving a dispute between government contractors, the Supreme Court affirms the circuit court's decision to set aside a multi-million dollar jury verdict.

In September 2012, CGI entered into a teaming agreement to help FCi prepare a proposal for a government services contract with the United States Department of State. The teaming agreement provided that FCi would submit a proposal as the prime contractor, and include CGI as a subcontractor. It further provided that "subject to the final solicitation requirements, CGI will receive 45% workshare of the total contract value, but the work share commitment may not be exactly 45% each year." If FCi was awarded a prime contract, the teaming agreement stated that the parties would negotiate in good faith for a subcontract for CGI. The agreement contemplated that the subcontract was subject to numerous conditions, including the inclusion in the prime contract of CGI's statement of work and the parties' agreement to the statement of work, financial terms, and reasonable subcontract provisions. If the parties could not agree to a subcontract within 90 days of the award of the prime contract, then under the terms of the teaming agreement, that agreement would expire. The teaming agreement included exclusions for lost profits for a breach of contract, and acknowledged that the parties would bear their own costs, expenses, risks and liabilities arising out of performance of the teaming agreement.

FCi submitted a proposal to the State Department that gave FCi a 38% workshare. During an evaluation of the government's response to the initial proposal, FCi later orally agreed to revise the teaming agreement to provide CGI with a 41% total contract value work share and 10 management positions. The parties then executed an amendment to the teaming agreement to reflect these changes. The next day, FCi submitted a revised proposal to the State Department that allocated only a 35% workshare to CGI and reserved all management positions for FCi.

FCi was later awarded the prime contract, but there were several bid protests from other bidders. To resolve the bid protests, FCi agreed to give part of CGI's workshare to others. In its final revised proposal to the government, FCi gave CGI an 18% workshare. In March 2014, the State Department awarded FCi a contract valued at $145 million, and FCi and CGI began negotiations for a subcontract. As work on the contract needed to begin while subcontract negotiations were underway, the parties entered into a Letter Subcontract for CGI's work until their subcontract negotiations could be finalized. CGI was paid over $2 million for work it performed under the temporary Letter Subcontract. Due to a staffing dispute, FCi later terminated CGI, and the parties never entered into a subcontract.

CGI sued FCi for breach of contract, fraudulent inducement, and unjust enrichment. The jury returned a $12 million verdict for CGI on the first two claims. The circuit court set aside those verdicts, and later granted summary judgment on the unjust enrichment claim. The Supreme Court affirmed.

First, on the breach of contract claim, the Supreme Court held that teaming agreement did not create an enforceable promise for FCi to enter into a subcontract with CGI for a 41% workshare and 10 management positions. The teaming agreement was an unenforceable agreement to agree because the post-award provisions of the agreement did not create any enforceable obligation for FCi to extend work to CGI. Under the teaming agreement, the parties would have to negotiate in good faith the terms of a subcontract. The "statement of work" provision in the teaming agreement for 41% workshare was expressly subject to and dependent on the parties' successful negotiation of a final subcontract, which never occurred.

Second, on the fraudulent inducement claim, the Court found that CGI could not recover any lost profits based upon its promise that CGI would get a 41% workshare and 10 management positions. This promise did not create an enforceable obligation for FCi to extend a subcontract to CGI with these terms. Instead, all CGI had was a promise to negotiate for a future subcontract. In a matter of first impression, the Court held that "lost profits are not recoverable for a fraudulent inducement claim when they are based on the provisions of an unenforceable contract."

Third, there was no error in awarding FCi judgment on the unjust enrichment claim, which sought to recover expenses CGI incurred in helping FCi win the prime contract and to disgorge FCi of its profits. Unjust enrichment is an implied contract action based on the principle that one person may not enrich himself unjustly at the expense of another. The existence of an express contract covering the same subject matter of the parties' dispute precludes a quasi-contract claim for unjust enrichment. Here, the teaming agreement governed the parties' relationship, and required both parties to bear their own costs of performance. Thus, it was an express contract covering the subject matter of the parties' dispute. And, although the post-award provisions were not enforceable, when CGI elected to sue for tort and contract damages, it affirmed the teaming agreement and bound itself to its provisions. Nor did the teaming agreement fail for any lack of mutuality.

4. ZONING/VESTED RIGHTS

Board of Supervisors v. Rhoads, 294 Va. 43 (2017)

The landowners filed an application for a Zoning Certificate of Compliance. The Richmond County's zoning administrator approved the landowners' plans to build a two-story detached garage on their property. The zoning administrator visited the property before approving the application and signing the certificate of compliance. In good faith reliance on the zoning administrator's approval, the landowners completed the garage and incurred approximately $27,000 in construction costs.

Soon after they completed construction on the garage, the zoning administrator informed the landowners that they were in violation of an ordinance prohibiting garages taller than the home on the property. Their house was one-story, but the garage had two stories. The zoning administrator subsequently sent a written Notice of Zoning Violation to the landowners advising them the garage was in violation of the ordinance.

The landowners appealed the notice to the County Board of Zoning Appeals, alleging under Code §15.2-2311(C), their rights had vested and the permit and certificate of compliance for the garage were not subject to revocation or reversal. That statute provides:

> In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the written order, requirement,

> decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud. The 60-day limitation period shall not apply in any case where, with the concurrence of the attorney for the governing body, modification is required to correct clerical errors.

The Board upheld the zoning violation. The circuit court reversed, finding that the landowners' rights had vested by statute.

On appeal, the Supreme Court affirmed. It held that Code §15.2-2311(C) is a remedial statute designed to provide relief and protection to property owners who detrimentally rely in good faith upon erroneous zoning determinations and who would otherwise suffer loss because of their reliance upon the zoning administrator's error. The statute provides for the potential vesting of a right to use property in a manner that otherwise would not have been allowed. Here, the property owners had a vested right to the use of their property in violation of a zoning ordinance, when more than 60 days elapsed after a zoning administrator issued a determination which allowed that use, and the property owners had relied to their detriment upon the zoning administrator's determination. Thus, all the statutory factors for vesting applied.

4. REAL ESTATE

The Game Place, LLC v. Fredericksburg 35, LLC, 295 Va. 396 (2019)

Fredericksburg 35, LLC, a commercial lessor, brought an action against its lessee, The Game Place, LLC for unpaid rent under a 15-year lease. The lessee demurred, contending that the lease was unenforceable under the Statute of Conveyances, Code §55-2, because it did not have either the common-law formality of a seal or the relaxed seal substitutes available under Code §11-3. The circuit court overruled the demurrer, and entered final judgment for the Lessor for almost $70,000 in unpaid rent, plus attorney's fees.

The Court held that the 15-year lease was unenforceable as a matter of law. The Statute of Conveyances, codified at Code §55-2, provides that "[n]o estate of inheritance or freehold or for a term of more than five years in lands shall be conveyed unless by deed or will. . . . " One of the essential requirements for a deed for the conveyance of land is a seal. Code §11-3 does not abolish the common law seal requirement. Instead, it relaxes the seal requirement by offering a limited list of specific substitutes for a seal, including: (1) "a scroll by way of a seal"; (2) an imprint or stamp "of a corporate or an official seal on paper or parchment"; (3) the use in the "body of such writing" of the words "this deed" or "this indenture" or other words importing a sealed instrument" or recognizing a seal; or (4) a proper acknowledgement of a document clearly demonstrating an intent to convey real estate "before an officer authorized to take acknowledgements of deeds."

Here, the lease did not have a seal of any kind and did not have any specific seal substitute. Additionally, the saving statute – Code §55-51 – did not cure the defect. That statute provides that "[a]ny deed, or part of a deed, which shall fail to take effect by virtue of this chapter shall, nevertheless, be as valid and effectual and as binding upon the parties thereto, so far as the rules of law and equity will permit, as if this chapter had not been enacted." This saving statute does not overrule the seal requirements, which appear in an entirely different chapter of the Code. Therefore, the lease was unenforceable as to either party.

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9

Drugs and Money: How Your Healthcare Clients and Patients are Affected by the Opioid Crisis

Thomas J. Bondurant, Jr.

DRUGS AND MONEY:
How Your Healthcare Clients and Patients are Affected by the Opioid Crisis

Thomas J. Bondurant, Jr.

Gentry Locke Seminar
September 7, 2018

The presenter is indebted to John Reed Thomas, Jr. for his assistance in preparing the materials for this session.

The Opioid Epidemic is one of the greatest public health crises facing the United States today – and its effects can be seen throughout Southwest Virginia. According to the National Institutes of Health (NIH), approximately 115 people die every day from opioid addiction, primarily through overdoses. In 2016, over 42,000 people died. The Centers for Disease Control and Prevention estimates that the total "economic burden" of prescription opioid misuse alone in the United States is $78.5 billion a year, including the costs of healthcare, lost productivity, addiction treatment, and the criminal justice system.

The Opioid Epidemic has a myriad of legal implications that impact a wide range of practitioners. These impacts include criminal prosecution of both addicts and the physicians and health care providers supplying opioids, civil suits involving pharmaceutical companies and health care providers, as well as collateral effects in the form of family law, local government law, and other areas. All attorneys should be familiar with the broad contours of this crisis and how it could affect their practice.

A. What is the "Opioid Epidemic?"

a. History
   i. In the 1990s, physicians prescribed prescription opioids liberally.[1]
   ii. This was in part due to the assurances on the part of pharmaceutical companies that these drugs were safe.[2]
   iii. This subsequently led to widespread diversion and misuse of these medications before it became clear that these medications could indeed be highly addictive. It is estimated that roughly 21 to 29 percent of patients prescribed opioids for chronic pain misuse them.[3]
   iv. As "pill mills" have more recently come under scrutiny, many addicts have transitioned to heroin and other illegal drugs as their access to prescription opioids has disappeared.
   v. "Pill mill" is a term used primarily by law enforcement to describe a doctor, clinic or pharmacy that is prescribing or dispensing powerful narcotics inappropriately or for non-medical reasons.
      1. "Pill mill" clinics exist in many forms but are commonly disguised as independent pain-management centers.
      2. Red flags for pill mills/inappropriate prescribing habits:
         a. Accepts cash only;
         b. No medical exams given;
         c. No medical records or x-rays needed;
         d. Treats pain with pills only;
         e. Patients can request or choose their medication(s);
         f. Patients are directed to "their" specific pharmacy;
         g. High patient volume; and
         h. No attempt to utilize alternative therapies or wean patients off pain medicine.

b. Scope of the Problem
   i. As noted above, opioid overdoses have dramatically increased.
   ii. People are dying every day from opioid misuse.
   iii. The economic burden is substantial and impacts the health system, the labor market and the legal system.

[1] *See* https://www.cdc.gov/vitalsigns/opioids/index.html and https://www.hhs.gov/opioids/about-the-epidemic/index.html
[2] https://www.hhs.gov/opioids/about-the-epidemic/index.html
[3] https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis

c. According to NIH Data[4]
   i. Roughly 21 to 29 percent of patients prescribed opioids for chronic pain misuse them.
   ii. Between 8 and 12 percent develop an opioid use disorder.
   iii. An estimated 4 to 6 percent of those who misuse prescription opioids transition to heroin.
      1. About 80 percent of people who use heroin first misused prescription opioids.

B. Criminal Implications

a. Attorney General Sessions has made the opioid epidemic one of his key priorities.

b. In his May 10, 2017 Memorandum on Charging and Sentencing, AG Sessions rescinded the previous Department of Justice guidance memoranda on charging and sentencing, which had particular impact on drug prosecutions:
   i. The Sessions Memo specifically rescinded the 2013 Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases and the 2014 Guidance Regarding Section 851 Enhancements in Plea Negotiations.
   ii. This May 2017 Memorandum stated that it is "a core principle that prosecutors should charge and pursue the most serious, readily provable offense."
      1. The Memorandum further defined the most serious offenses as "those that carry the most substantial guidelines sentence, including mandatory minimum sentences."
   iii. Mandatory minimum sentences in federal drug cases are set forth in 18 U.S.C. §§841 and 851.
   iv. Thresholds for Section 841(b)(1)(A):
      1. 1 kg or more of heroin;
      2. 5 kgs or more of powder cocaine;
      3. 280 grams or more of cocaine base (crack cocaine);
      4. 1,000 kgs or more of marijuana or 1,000 or more plants of marijuana;
      5. 50 grams or more of methamphetamine ;
      6. 400 grams or more of fentanyl;
      7. 100 grams or more of PCP; and
      8. 10 grams or more of LSD.

[4] https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis

v. Penalties:
   1. Section 841(a) violation involving one of the 8 above drugs at higher than 841(b)(1)(A) threshold is punishable by imprisonment for:
      a. Not less than 10 years;
      b. Not less than 20 years if the offense results in death or serious bodily injury OR if the offender has a prior felony drug conviction; and
      c. A mandatory term of life imprisonment if the offender has a prior felony drug conviction and the offense resulted in death or serious bodily injury or if the offender has two or more prior felony drug convictions.

vi. Thresholds for 841(b)(1)(B) – [one tenth of those for 841(b)(1)(A)]:
   1. 100 grams or more of heroin;
   2. 500 grams or more of powder cocaine;
   3. 28 grams or more of cocaine base (aka crack cocaine);
   4. 100 kgs or more of marijuana or 100 or more plants of marijuana;
   5. 5 grams or more of methamphetamine ;
   6. 40 grams or more of fentanyl;
   7. 10 grams or more of PCP; and
   8. 1 gram or more of LSD.

vii. Penalties:
   1. Section 841(a) violation involving one of the 8 above drugs at higher than 841(b)(1)(B) threshold is punishable by imprisonment for:
      a. Not less than 5 years;
      b. Not less than 10 years if offender has prior conviction;
      c. Not less than 20 years if offense results in death or serious bodily injury; and
      d. A mandatory term of life imprisonment if the offender has a prior felony drug conviction and the offense resulted in death or serious bodily injury.

viii. Other Mandatory Minimum Penalties:
   1. A Section 841(a) violation involving one of the eight above drugs in lesser amounts, or some other Schedule I or II drug, or a date rape drug is punishable by imprisonment for:
      a. Not less than 20 years if death or serious bodily injury results; and
      b. Life if the offender has a prior felony drug conviction and death or serious bodily injury results.

c. The Sessions Memo will impact local criminal prosecutions.
    i. US Attorney Thomas Cullen has echoed this new DOJ viewpoint, stating in a June 2018 interview with the Roanoke Times that the opioid epidemic was one of his two key priorities, and that the Office of US Attorney would be seeking mandatory minimums and stronger sentences on drug offenses, particularly drug diversion.
    ii. According to Mr. Cullen:
        1. "Mandatory minimums are a necessary and effective tool to fighting this problem[.]"
        2. He has also indicated that he plans to particularly focus the drug prosecution efforts in the Western District on "punishing illicit pain-pill prescribing by doctors and nailing drug pushers whose customers overdose and die. [5]

d. Other DOJ initiatives include:
    i. The Drug Enforcement Agency issued new administrative guidance on pharmaceutical production limits for companies whose drugs are found to be abused – such companies will see their production limits lowered.[6]
    ii. DEA has also reached an agreement with 48 state attorneys general to share prescription drug records with one another to identify pill mills.
        1. DEA reached an agreement with Attorneys General from 46 states, Puerto Rico, and the District of Columbia to share prescription drug information with one another in order to aid investigations. DEA's Automation of Reports and Consolidated Orders System (ARCOS) system collects some 80 million transaction reports every year from manufacturers and distributors of prescription drugs. DEA will provide the Attorneys General with that data, and the states will provide their own information, often from prescription drug monitoring programs (PMPs) to DEA.[7]

C. Civil Implications

a. The False Claims Act ("FCA") is a major tool for DOJ action against drug diversion – in other words – "pill mills."

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[5] Sturgeon, J. (2018, June 16) For new U.S. Attorney Thomas Cullen, time is limited, duties are clear. *Roanoke Times*. Retrieved from https://www.roanoke.com/business/news/roanoke/for-new-u-s-attorney-thomas-cullen-time-is-limited/article_6a94514c-5ed7-57c6-bf8a-c659063d3aba.html.
[6] Balick, R. (2017, 28 November) DEA mandates reduction in opioid manufacturing for 2018. *American Pharmacists Association*. Retrieved from https://pharmacist.com/article/dea-mandates-reduction-opioid-manufacturing-2018.
[7] https://www.justice.gov/opa/pr/dea-share-painkiller-prescription-information-48-attorneys-general

b. History
   i. Originally passed in 1863 to deal with merchants selling worthless or defective goods to the Union Army. 12 Stat. 696.
   ii. The FCA has been expanded and strengthened over time:
      1. In 1986 (False Claims Act Amendments, Pub.L. 99–562, 100 Stat. 3153, enacted October 27, 1986);
      2. In 2009 (Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009)(signed by the President on May 20, 2009);
      3. Again in 2010 (Patient Protection and Affordable Care Act (PPACA) – signed into law on March 23, 2010.)

c. The FCA creates a financial incentive for whistleblowers through its *qui tam* provision, allowing for **whistleblowers to share up to 30%** of the Government's recovery.

d. Statute: 31 U.S.C. §§3729 – 3733
   i. Liability extends to anyone who: (31 U.S.C. §3729(a))
      1. Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
      2. Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
      3. Conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
      4. 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;
      5. 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;
      6. 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
      7. Knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

ii. Damages (31 U.S.C. §3729(b)):
1. Civil penalties of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act;
2. Treble damages of "the amount of damages which the Government sustains because of the act of that person[]"; and
3. Attorneys' fees and costs.

iii. Unique Procedure (31 U.S.C. § 3730)
1. Cases filed under seal and served only upon the Government initially.
2. Government has 60 day period to evaluate the case to decide upon intervention (although in practice, the period of the seal is routinely extended to allow the Government more time to investigate).

D. Considerations for Healthcare Providers

a. DOJ initiatives indicate a continued increased focus on investigation of healthcare providers.
   i. The largest healthcare fraud takedown to date occurred in 2017.
      1. DOJ arrested more than 400 defendants around the country, including over 50 physicians. This case involves more than $1 billion in health care fraud.
   ii. In June 2018, Attorney General Sessions announced in that since January 2017, the DOJ has charged nearly 200 doctors and another 220 other medical personnel for opioid-related crimes.[8]
   iii. The Office of the Attorney General has created a new Opioid Fraud and Abuse Detection Unit, which includes a data analytics program focusing specifically on opioid-related healthcare fraud.
   iv. DOJ has authorized the hiring of over 300 additional federal prosecutors for specific purposes, including combatting the opioid crisis.
b. Other concerns for providers.
   i. Department of Healthcare Professions Investigations.
      1. There are 13 health regulatory boards within the Department of Health Professions. There are over 80 different professions and over 6,800 facilities regulated by these boards.

[8] (2018, June 28) Remarks by Attorney General Sessions Announcing National Heath Care Fraud and Opioid Takedown. Retrieved from https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-announcing-national-health-care-fraud-and

2. Parallel investigations by Department of Healthcare Professions are often initiated by criminal investigations.
3. These investigations can have serious consequences including suspension or loss of license to practice.
4. Investigations by the Department of Healthcare Professions can also arise from complaints regarding the provider that are received by the respective board.
5. Statutes relating to the Board of Medicine are set forth in Virginia Code § 54.1-2911, et. seq., 18 VAC 76 and 18 VAC 85.

ii. DEA Registration investigations

1. Criminal investigations can also lead to investigations of the provider's DEA Registration. Revocation of a provider's DEA Registration can have immediate consequences on a provider's practice by limiting the ability to prescribe certain prescription medications.
2. Be aware that investigators may request providers to voluntarily surrender their DEA Registration before criminal charges are brought. If a provider surrenders his DEA Registration or license, it is unlikely to be reinstated while he is under investigation.

c. Recent local cases.

i. *United States v. Frank Purpera*

1. Dr. Purpera of Blacksburg was convicted of 67 felony counts including federal prescription fraud charges, false statements on a government form, and making a false statement to a government official in February of 2018. The over 10,000 units of controlled substances shipped to Purpera's practice between 2014-2016 included strong narcotic painkillers such as Oxycodone.
2. Purpera has since been indicted a second time.
3. The new indictment alleges 56 counts of illegal distribution of controlled substances and two counts of witness tampering.

ii. *United States v. Dwight Bailey*

1. Dr. Bailey of Lebanon, Virginia was convicted of 63 counts of federal drug and healthcare fraud charges in August of 2018. The evidence in the Bailey trial focused heavily on the prescription of Schedule II drugs without a legitimate medical purpose. The drugs involved in this case were primarily opiates, benzodiazepines, and sleeping pills.
2. Dr. Bailey previously surrendered his license following an investigation into his practice's administration of pain medication to multiple patients, several of whom died.

E. Collateral Implications

a. Family Law: Attorneys need to understand the opioid epidemic and watch for signs of opioid abuse in order to advise and represent clients in family law situations, particularly child custody.
   i. In addition to the impact of opioid abuse on the criminal courts, the nation's family courts and child welfare system have been deeply affected. A recent report by the Administration for Children and Families shows that, after years of decline, the number of children in foster care is rising. From 2012 to 2016, the percentage of removals nationally due to parental substance abuse increased 13 percent to 32.2 percent.[9]
   ii. In Virginia, a judge will make custody and visitation determinations based on an analysis of what arrangement would serve the best interests of the child. This involves looking at a set of factors, a number of which may be affected by a parent's issues with drug or alcohol, including:
      1. The physical and mental condition of each parent;
      2. The ability of each parent to accurately assess and meet the physical, intellectual, and emotional needs of the child;
      3. The role that each parent has and will play in the upbringing and care of the child;
      4. The relative willingness and demonstrated ability of each parent to maintain a close, continuing relationship with the child; and
      5. "Such other factors as the court deems necessary and proper to the determination".
      6. *See generally* Va. Code § 20-124.3.
   iii. In situations where one parent can demonstrate to the court that the other parent consistently struggles with drug and alcohol use, this could weigh heavily in favor of the first parent in reaching favorable custody and visitation orders based on an analysis of the above factors.
      1. *See Patron Furtado*, No. 0719-12-2, 2012 Va. App. LEXIS 382, at *5-6 (Nov. 27, 2012) (not an abuse of discretion to award custody to wife when "husband had sold illegal drugs and had exposed his daughter to those illegal activities. At the *pendente lite* hearing on October 13, 2010, husband tested positive for illegal drugs.").
      2. *See also Hart v. Hart*, No. 1724-11-1, 2012 Va. App. LEXIS 188, (June 5, 2012).

[9] https://www.ncsc.org/opioidsandcourts

b. Business Law: What happens when a business partner becomes addicted to opioids? Attorneys must be prepared to advise business clients on how to proceed. Law firms already have to deal with this.

   i. Supervision of Attorneys with Substance Abuse Issues.
      1. Rule 5.1 requires partners or other lawyers in the firm with managerial authority to make reasonable efforts to ensure that all lawyers in the firm conform to the Virginia Rules of Professional Conduct.
      2. Lawyers in a firm may have an obligation under Rule 8.3 to report an impaired lawyer to the Virginia State Bar if the impaired lawyer has engaged in misconduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law.
   ii. LEO 1886 outlines precautionary steps that may be taken to address such a situation.
      1. The firm's paramount obligation is to take steps to protect the interests of its clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are represented appropriately notwithstanding the lawyer's impairment.
      2. Other steps may include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients.[10]

c. Local Governments: Local governments are increasingly being forced to spend public funds on combatting this problem and allocating funds to emergency service providers (particularly for drugs to treat overdose cases.)
   i. Difficult to quantity total costs of opioid crisis but a recent study by the American Enterprise Institute (AEI) attempts to estimate the costs by state.
   ii. The study estimates that the estimated cost of the opioid crisis in Virginia is $1,518 per capita, or 2.65% of the overall gross domestic product.[11]
      1. These costs include costs related to overdoses such as administration of emergency treatment for overdoses (drugs such as Naloxone) and increased public safety costs (law enforcement and emergency responders).
      2. Many of these public safety and emergency response costs are borne to some extent by local governments. Other increased costs

[10] *See* ABA's Standing Committee on Ethics and Professionalism observed in ABA Formal Op. 03-429.
[11] Alex Brill, "New State-Level Estimates of the Economic Burden of the Opioid Epidemic," AEI, January 16, 2018.

that are harder to quantify are an expected result, such as costs associated with increased equipment and personnel demand.

iii. The overdose treatment medication Naloxone (aka Narcan) is also increasingly available without a prescription throughout Virginia.

   1. Department of Behavioral Health and Developmental Services offers a program, known as the Revive! Program, which provides training to civilians for administering these drugs.

IT'S ABOUT TIME!
Gentry Locke's 2018 CLE Seminar

10

Ethics

The "Gold Standard" in Conducting Oneself in Depositions: How to Deal with Others

Guy M. Harbert, III

Anthony M. Russell

Why Lawyer Jokes Aren't Funny

Travis J. Graham

THE ETHICS OF DEPOSITIONS

Guy M. Harbert, III
Anthony "Tony" M. Russell

Gentry Locke Seminar
September 7, 2018

> *"Someone must teach that good manners, disciplined behavior, and civility—by whatever name—are the lubricants that prevent lawsuits from turning into combat. More than that, civility is really the very glue that keeps an organized society from flying into pieces. . . . I submit that lawyers who know how to think but have not learned to behave are a menace and a liability, not an asset, to the administration of justice."*
>
> *— Chief Justice Warren E. Burger, 1971*

I believe that the justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and the system itself lose esteem in the public's eyes.

. . . .

. . . In my view, incivility disserves the client because it wastes time and energy--time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent.

The Honorable Sandra Day O'Connor, "Civil Justice System Improvements," ABA at 5 (Dec. 14, 1993) (footnotes omitted).

Runions v. Norfolk & Western Ry., 51 Va. Cir. 341 (Roanoke City, 2000)(Judge Clifford Weckstein):

> I agree with the Florida Supreme Court that "[a] search for truth and justice can only be accomplished when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise, or superior trial tactics. We caution that discovery was never intended to be used and should not be allowed as a tactic to harass, intimidate, or cause litigation delay and excessive costs." *Id.*, 390 So. 2d at 707, 19 A.L.R. 4th at 1233. Borrowing language used in summary judgment cases, a purpose of discovery "is to expedite litigation with as few technicalities as possible and thus avoid common law procedural tactics interposed for delay." *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 5, 82 S.E.2d 588 (1954).
>
> In the "modern view," pretrial discovery exists "to prepare the parties for trial and to encourage out-of-court settlements of cases in which there is no substantial or irreconcilable dispute between the parties. A party can find out the existence of witnesses and the substance of their testimony." W. Hamilton Bryson, Bryson on Virginia Civil Procedure (3d ed. 1997), at 327-28.
>
> ….
>
> I conclude with this thought, expressed by Judge William W. Schwarzer in an article prepared for Litigation, the magazine published by the section of Litigation of the American Bar Association:
>
> > The most pervasive discovery mistake lawyers make is to forget the purpose of discovery. The framers of the… rules intended that discovery would give each party rapid and low-cost access to the truth. The hope was that, as a result, cases would be settled or tried speedily and inexpensively. It is time for lawyers to remind themselves of what discovery is supposed to be about.
>
> William W. Schwarzer, "Mistakes Lawyers Make in Discovery," The Litigation Manual: Pretrial (3d ed.), Section on Litigation, American Bar Association, 1999, at 137.

It is precisely when animosity runs high that playing by the rules is vital. Rules of legal procedure are designed to defuse, or at least to channel into set forms, the heated feelings that accompany much litigation. Because depositions take place in law offices rather than courtrooms, adherence to professional standards is vital, for the judge has no direct means of control." Easterbrook, J. in *Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007).

Concurrent Citations: ***Va. Sup. Ct. R. ** Fed. R. Civ. Pro. † Va. R. Prof. C. (Sup. Ct. R. pt. 6, sec. II) (**these largely track the ABA Model Rules of Professional Conduct**.)**

I. <u>Ethical Rules / Virginia Rules of Professional Conduct</u>

Depositions are an essential part of an attorney's discovery skills. They can have great benefit in discovering the facts of a case or revealing the opposing the party's theory of the case. They can also be used to obtain key concessions from the other party. But depositions are a two-edged sword. Clients are often nervous about being deposed, and many cases have been lost because of admissions or poor testimony in a deposition.

Consequently, depositions can be stressful and heated affairs. Depositions are the one time when the opposing clients and their attorneys are in the same room together, without a judge or mediator to keep the peace. Tension between the clients can erupt, and competing egos of the attorneys on both sides can create friction.

A few examples can help to illustrate the situations during the deposition process where attorneys must make decision applying the ethics rules. A client might inform his attorney that he intends to lie in his deposition. Or the client might ask his attorney to tell him what to say in his deposition. A client could tell her attorney that she is not going to show up to her deposition, giving the excuse of an illness that the attorney knows is fabricated. Or the client might show up, then give testimony the attorney knows to be false, or believes to be false. What is her attorney to do? And what should the attorney defending a deposition do when the opposing counsel berates a witness, or asks questions with no factual basis?

Attorneys can find themselves on either side of these examples during the deposition process, and need to know what to do in these scenarios to minimize the chance of something going wrong. And when something does go wrong in a deposition, attorneys need to know how to fix it. These are ethics questions, with ethics solutions.

It is therefore imperative for attorneys to know and apply their ethical obligations under Virginia's Rules of Professional Conduct in the context of depositions, and throughout the deposition process.

a. The Preamble to the Rules states that "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials."

b. While it can be tempting to aggressively advocate for the client in a deposition setting, the attorney should never engage in intimidation or use the deposition process to harass the other side. An attorney can, and is required to, zealously advocate for his or her client while demonstrating respect for opposing counsel.

c. A lawyer must always provide competent representation of a client. *See* †1.1 ("*A lawyer shall provide competent representation to a client. Competent representation requires the* *legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation*." Attorneys must thoroughly prepare themselves and their clients before taking or defending a deposition.

In the context of a deposition, attorneys must not encourage or condone false testimony by a client or a witness, and must not intentionally solicit false testimony by a client or a witness.

d. Lawyers must always deal honestly with the court and other parties. †4.1 ("*In the course of representing a client a lawyer shall not knowingly: make a false statement of fact or law; or fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client*."). Attorneys may not misrepresent facts or the law to deponents at a deposition.

e. A lawyer can neither assist nor counsel a client to commit fraud. †1.2(c) ("*A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law*."

f. A lawyer may not knowingly offer false evidence, and if a lawyer learns that she has offered false evidence, she must make reasonable remedial efforts. †3.3(a)(4) ("*A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.*").

g. If a lawyer knows a client has offered false material evidence, the lawyer must counsel the client to disclose and remedy the falsehood. †3.3(a)(2) ("*A lawyer shall not knowingly . . . fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client*."); 1.6(b)(3) ("*To the extent a lawyer reasonably believes necessary, the lawyer may reveal . . . such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation*.").

i. If a client refuses to disclose and remedy false testimony, including false statements made during a deposition, the attorney "must take reasonable remedial measures." †3.3 cmt. 10. These measures include remonstrating with the client confidentially, advising the client of the lawyer's duty of candor to the tribunal, and seeking the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. *Id.* If this fails, the attorney must take further remedial action, including withdrawal, or if that is not possible or would not undo the effect of the false testimony, or disclosing the false testimony to the court, "even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6." *Id. See also* ABA Committee on Ethics & Professional Responsibility, Formal opinion 376 (1993) (stating a lawyer learning that his client has lied in a deposition must take "reasonable" steps to rectify the fraud, which may involve amending the testimony or advising the court of the fraud; a "noisy withdrawal" will generally not be sufficient).

ii. Any misrepresentation made by a lawyer during a deposition may be considered a false statement to the tribunal under †3.3(a)(1) ("*A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal.*"), regardless of whether it is material or not. *See* Virginia LEO 1451 (1992) (adopting deposition within the definition of "tribunal" and adopting the view that false testimony during a deposition may constitute a "fraud upon a tribunal"), *but see* Virginia LEO 1650 (1995) ("…[N]ot every misrepresentation made by a witness in a deposition is a "fraud upon the tribunal").

iii. In Virginia LEO 1650 (1995), the plaintiff's expert lied about his qualifications during his deposition. The opinion states that, if it was material to his expert opinion, it would be improper to let the testimony stand regardless of whether it proceeds to trial or is settled. However, in Virginia LEO 924 (1987), the committee opines the lawyer may negotiate a settlement that is based only on the facts that are true, as long as it does not implicate the false deposition statement in any way.

h. If as attorney has good reason to believe that certain evidence or testimony would be false, the Rules allow him or her to refrain from offering or soliciting it. †3.3(d) ("*A lawyer may refuse to offer evidence that the lawyer reasonably believes is false*.").

i. If a non-client has perpetrated a fraud on a tribunal, a lawyer must promptly reveal the fraud. †3.3(d) ("*A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal*.").

j. Lawyers owe a duty of fairness to other parties. †3.4.

k. A lawyer may not obstruct another party's access to evidence, or counsel another person to do so. †3.4(a) ("*A lawyer shall not . . . Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act*.").

l. A lawyer may not advise or encourage a witness to give false testimony. †3.4(c) ("*A lawyer shall not . . . Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law*.").

m. Depositions may not be used to harass an opposing party. †3.4(j) ("*A lawyer shall not . . . File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.*")

n. When deposing a third party witness, attorneys must keep respect their rights as well. †4.4 ("*In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person*.").

II. <u>Before the Deposition</u>

The line between unethical coaching and ethical preparation as part of competent and zealous representation is truth: Don't influence the truth, but prepare your witness well. The ethical rules require attorneys to be competent, and that includes competently preparing the witness. The rules also require honesty and prevent attorneys from intentionally soliciting false information.

a. Goals in Preparing Witnesses

i. Ascertain the most accurate and objective recollections of the witness.

ii. Communicate testimony accurately and effectively.

iii. Protect the witness' testimony from being manipulated, distorted, or attacked.

iv. Help them feel confident and prepared.

b. General issues

i. Prepare your client and your client's witnesses for question about past events and about present understandings/beliefs and verify truthfulness of responses:

  i. As opposed to allowing, condoning, suggesting, encouraging, inducing, or coaching false testimony or evasion of truthful answer when attorney knows testimony to be false, mistaken, or misleading (even if witness believes it to be true), or when attorney has not verified truth, VRPC 3.4(c), 3.3 (a)(4), 1.2(c), and 8.4(b) and (c).

  ii. From an evidentiary perspective, you must prepare a witness for trial different than a deposition given the difference between discovery and admissibility at trial. See, for example, Rule 4:1(b)(1) of the Rules of the Supreme Court of Virginia ("Parties may obtain discovery regarding any matter, not privileged, which is relevant….It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.").

ii. You must emphasize to witnesses that it is imperative to tell the truth, and that preparation is about how to tell the truth:

  i. As opposed to allowing a witness to believe she should read between the lines by giving deceptive or less-than-accurate testimony to help the case, VRPC 3.4(c), 1.2(c), and 8.4(b) and (c).

ii. LEO 924: Finding improper the use (by implication or otherwise) of fabricated witness statements in settlement negotiations, even though opposing counsel already had the statements, because the lawyer learned of the fabrication.

iii. All witnesses must be encouraged to provide candid and honest accounts of relevant facts before discussing applicable law.

i. As opposed to explaining law and what facts are needed for strategic advantage, then asking witness if needed facts exist, in attempt to induce false testimony or to induce a witness holding some perception/memory to say a contrary perception/memory, VRPC 3.4(c), 1.2(c), 8.4(b) and (c).

iv. If a witness is uncertain in memory and/or perception, provide witness with evidence or materials that may refresh the witness' memory without supplying or creating testimony.

i. As opposed to influencing the witness to fabricate or adopt an inaccurate or nonexistent perception/memory, or to use demeanor or false testimony to assert confidence about perceptions when witness is uncertain, VRPC 3.4(c), 1.2(c), 3.3(a)(4), and 8.4(b) and (c).

v. Assist witnesses with words, demeanor, and manner of description in delivering honest and truthful testimony.

i. As opposed to scripting answers with words that are inaccurate. VRPC 3.4(c) and 3.3(a)(4).

c. Your Client

i. The attorney-client privilege and work product doctrine largely protect an attorney's conduct in preparing her client from scrutiny. Prepare client—and maintain any materials for such preparation—in confidence to preserve privilege(s). See, for example, Rule 4:1(b)(6)(i)(claiming privilege in discovery); Rule 2:501 and 2:502 (attorney-client privilege is governed by the principles of common law as interpreted by the courts of the Commonwealth in the light of reason and experience).

ii. Begin by emphasizing that the witness must tell the truth, and the goals of preparing them for the deposition: Remember, Communicate, Protect, Be Confident.

iii. The rules of ethics prohibit attorneys from: "Allowing, condoning, suggesting, encouraging, inducing, or coaching false testimony or evasion of truthful answer (e.g., by witness saying does not remember or by telling witness not to answer during testimony under cloak of attorney-client privilege or work product doctrine), when attorney knows testimony is false, mistaken, or misleading (even if witness believes true), or when attorney has not verified truth, VRPC 3.4(c); *id*. 3.3(a)(4); *id*. 1.2(c); *id*. 8.4(b), (c)." *Id.*

iv. Attorneys should be straightforward with their clients, and "[i]mmediately and frequently emphasize to the witness that it is imperative to tell truth, and that preparation is about how to tell the truth." *Id.*

v. Attorneys must not engage in: "Allowing witness to believe he or she should read between lines by giving deceptive or less-than-accurate testimony to help the case, VRPC 3.4(c); *id.* 1.2(c); *id.* 8.4(b), (c)." *Id.*

vi. According to LEO 1650 (9/8/95), "[I]f the expert's perjured testimony is so material to the [expert opinion] that it corrupts the opinion, [counsel must] reveal the fraud to the tribunal." *Id.*

vii. Ask about prior deposition experience, if they have concerns and address them.

viii. Talk about the other lawyer, and his goals in the deposition: to obtain admissions and information, assess the credibility and likeability of the witness, and pin down the witness's story. Explain he may try to intimidate, upset, or anger the witness to assess his strategy. He may be skeptical, aggressive, sarcastic, persistent, or condescending. Explain the importance of remaining calm and confident, and that preparing now will help.

ix. Review discovery answers and responses including documents produced by both sides. Send these ahead of time so that the client has already reviewed them once and can ask any questions they may have in your meeting.

x. Role play to rehearse testimony with a colleague cross-examining, if possible.

- Start with the typical ground rules.
- Ask both open and closed ended questions.
- Remind them not to guess or speculate, but to say "I don't know" or "I don't recall," if that is the truth.
- Remind them to respond truthfully even if it is uncomfortable. Saying "I don't know" reflexively in response to feeling uncomfortable is not truthful.
- Direct your client to speak up and correct any mistakes he makes right away.

d. Lay Witness

i. Key VRPC for preparing witnesses:

i. VRPC 3.4 "A lawyer shall not:

    i. (a) Obstruct another party's access to evidence….;

    ii. (c) Falsify evidence, counsel or assist a witness to testify falsely….;

    iii. (h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:….the person in a civil matter is a relative or…employee or other agent of a client…."

ii. VRPC 3.3(a)(4) "A lawyer shall not knowingly…offer evidence that the lawyer knows to be false. If a lawyer…comes to know of its falsity, the lawyer shall take reasonable remedial measures."

iii. VRPC 1.2(c) "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct…."

iv. VRPC 8.4(b), (c) "misconduct involving dishonesty, deceit).

ii. Counsel may inform client's witnesses (not adverse witnesses) that they may but are not obligated to talk to anyone:

    i. As opposed to "[r]equesting a person other than a client to refrain from voluntarily giving relevant information to another party," which is prohibited by VRPC 3.4(h), or advising that the witness refuse to talk with opposing counsel, or discouraging communication, VRPC 3.4(a) and (h).

    ii. However, if the witness is a relative, current or former employee, or other agent of client (often including retain expert witnesses) in a civil matter, and if counsel reasonably believes the person's interest will not be adversely affected by her refraining from communicating, counsel may request the witness not to talk with opposing counsel, pursuant to VRPC 3.4(h)(2).

        i. LEO 1639: Virginia Code § 8.01-399(D) prohibits opposing counsel from obtaining information via *ex parte* communications with patient's treating physician.

        ii. VRPC 4.2 cmt. 7 (prohibiting communications by an adverse lawyer with persons in an organization's "control group" or persons who may be regarded as the "alter ego" of the organization); *Pruett v. Va. Health Servs.*, 69 Va. Cir. 80, 86 (Lancaster County Cir. Ct. 2005)(discussing different courts' treatment of control group and holding no bar to communicating with former control group and non-control group employees).

i. LEO 459: "Only if the attorney first receives permission from the corporation's counsel to communicate with [employees for the corporation that are in the position to commit the corporation to specific courses of action] may he do so."

ii. LEO 347: "There is nothing ethically impermissible with an attorney communicating with employees of a corporation adverse to the interests of the attorney's client in litigation so long as the employee does not occupy a position…that would lead one to believe the employee is the corporation's alter ego."

iii. *Bryant v. Yorktowne Cabinetry, Inc.*, 538 F.Supp.2d 948 (W.D. Va. 2008)(Urbanski, J.)(discussing Virginia's bright line rule that attorneys may communicate *ex parte* with a former employee of an organization even if he was a member of the control group).

iii. However, VRPC 4.3(b) prohibits giving advice to unrepresented persons whose interests have a reasonable possibility of being in conflict with the client's.

i. LEO 1795: A criminal defense attorney's advising the victim-witness that she did not have to talk with the Commonwealth's Attorney did not violate VRPC 3.4(h)(general prohibition on requesting non-clients to refrain from giving relevant information to another party) but did violate VRPC 4.3(b) (prohibition on advising adverse unrepresented persons).

ii. LEO 1426: A criminal defense attorney improperly and unethically advised the victim-witness that she did not have to talk with the police or Commonwealth's Attorney's Office, as such advice violated VRPC 4.3(b) and 8.4 (b) and (c).

iii. The ethics rules prohibit paying money to a witness in return for favorable testimony. At the other pole, the ethics rules undoubtedly allow parties to pay witness' parking charges, mileage or other out-of-pocket expenses. If witnesses will forfeit a salary for the time that she spends preparing to testify and testifying, it also seems fair to reimburse her for this amount (because it avoids the witness' out-of-pocket loss).

iv. Explain there is no confidential relationship and that they must answer questions about conversations between you both, if the opposing lawyer asks. (Also remember this for yourself, so you don't disclose anything privileged.)

v. Alternatively, consider if you may represent this witness for the purposes of the deposition, keeping in mind any concurrent representation conflict rules.

vi. Ask whether they have ever given a deposition before. Ask about concerns they may have, discuss them, try and alleviate their anxiety.

vii. Explain generally the claims, defenses, and where the witness fits into the case.

viii. Review any documents you plan to use in their deposition so they are prepared.

e. Corporate Designee

i. Attorneys have an ethical obligation to adequately prepare corporate representatives before the client's corporate deposition

ii. "'The corporation must make a good-faith effort to designate people with knowledge of the matter sought by the opposing party and to adequately prepare its representatives so that they may give complete, knowledgeable, and nonevasive answers in deposition.' *Spicer v. Universal Forest Prods.*, 2008 U.S. Dist. Lexis 77232, at *10 (W.D. Va. Oct. 1, 2008) (Urbanski, J.). *See also Martin v. Nordic Group of Cos.*, 61 Va. Cir. 13, 22-23 (2003) ('Rule 4:5(b)(6), like Rule 30(b)(6) of the Federal Rules, is designed to elicit information from the corporation, not the individual deponent. . . . The corporation had a duty to ensure that the designee is prepared to answer questions . . . .')."

iii. The organization named as the deponent designates one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and they testify as to matters known or reasonably available **to the organization**. *Rule 4:5(b)(6), **Rule 30(b)(6) (emphasis added).

- This places the burden on the organization to produce knowledgeable people.

- If a corporation fails to make a designation under *4:5(b)(6)/**30(b)(6) or *4:6(a)/**31(a)(4), confer with other party in good faith and then, if necessary, order to compel designation under *4:12(a)(2)/**37(a)(3)(B)(ii).

- Failure to obey such an order may be subject to 4:12(b) sanctions, up to and including dismissing the action or judgement by default. *American Safety Casualty Insurance Co. v. C.G. Mitchell Construction*, 268 Va. 340 (2004).

- Note that this does not preclude the traditional method of allowing the examining party to designate officers, directors, or managing agents of its own choosing. *Staples Corp. v. Washington Hall Corp.*, 44 Va. Cir. 372 (Fairfax 1998).

- In *Martin v. Nordic Group of Cos.*, 61 Va. Cir. 13 (Fairfax 2003), the court imposed sanctions under *4:12(b)(2)(C), barring corporate defendant from denying notice of product defects at trial due to flagrant violations, including producing a letter showing prior notice over 2.5 years after discovery requests, false response to an interrogatory, and producing a corporate designee who could not answer questions on the issues designated.

- For other sanctions regarding corporate depositions *see Friedman v. Five Guys Enters., LLC*, 91 Va. Cir. 457 (Fairfax 2016) (late notice and unreasonable number of topics); *Sea Bay Hotel, LLC v. Gosnell*, 97 Va. Cir. 250 (Fairfax 2017) (numerous speaking objections, instructions not to answer, answering and advocating).

iv. **The Historical Record**. Part of representing a corporation is reconciling the honest testimony of corporate witnesses into a historical record. If testimony is damaging, but honestly believed to be true despite contrary testimony from others, it is part of the corporate historical record.

v. You **must prepare the corporate designee** to testify by supplementing facts from the historical record and communicating the corporation's position and present understandings (1) to avoid inconsistencies in corporate testimonies being leveraged, but more importantly (2) because an uninformed representative is a violation subject to 4:12(b)(2) sanctions.

- Corporate defendants violated their duty to designate a representative with knowledge of each subject noticed for deposition and to ensure that the designee was prepared to answer questions on each of the subjects noted, as its designee took no steps to investigate the deposition subjects. *Martin v. Nordic Group of Cos.*, 61 Va. Cir. 13 (Fairfax 2003); *see also Black Horse Lane Assocs., L.P. v. Dow Chem. Corp.*, 228 F. 3d 275, 304 (3d Cir. 2000)(that "producing an unprepared witness is tantamount to a failure to appear that is sanctionable") (internal quotes omitted). However, many courts have been reluctant to impose sanctions on that basis. *Estrada v. Rowland*, 69 F.3d 405, 406 (9th Cir. 1995) ("Estrada attended his deposition but refused to testify. This is not a 'failure to appear' for the purposes of Rule 37(d)."); *accord R.W. Int'l Corp. v. Welch Foods, Inc.*, 937 F.2d 11, 15 n.2 (1st Cir. 1991); *SEC v. Research Automation Corp.*, 521 F.2d 585, 589 (2d Cir. 1975); *Stevens v. Greyhound Lines, Inc.*, 710 F.2d 1224, 1228 (7th Cir. 1983); *Aziz v. Wright*, 34 F.3d 587, 589 (8th Cir. 1994).

vi. **Give a Disclaimer**: Tell the witness there is no attorney-client relationship with the corporate designee in an individual capacity, only with the organization.

- If the designee, or any witness you are preparing for the corporation, reveals information that would put them in incurable conflict with the corporation, you can no longer prepare them, and you must advise them to seek independent counsel. The information divulged during deposition preparation may not be shared with the corporation, because the meeting "created an expectation of confidentiality which must be protected by the attorney." It may even become impossible to both represent the corporation and protect the confidences of witness. See Rule 1.13 for guidance. See also Virginia LEO 1457 (1992) (a lawyer representing a condominium board was preparing the board's former president for deposition and learned the former president had exceeded their authority and contributed to the injury of the plaintiff).

f. Opposing Expert Witness

i. Hypothetical 1: Before an attorney deposes another party's testifying expert witness, may the attorney contact the expert ex parte?

- No: "For instance, in Virginia LEO 1076 (5/17/88), the Bar indicated that a lawyer may have ex parte contacts with an adversary's expert witness, although 'courtesy' would suggest that the lawyer advise the adversary's lawyer. *Accord* Virginia LEO 1235 (5/30/89) (a defense lawyer may interview the plaintiff's expert even after losing a motion to allow a deposition of the expert; overruled by Virginia LEO 1639 and Va. Code § 8.01-339(D)).

  In a stark contrast, in 2005 a Virginia federal court sanctioned a plaintiff's lawyer for what the court clearly viewed as improper ex parte contacts between the plaintiff's lawyer and the defendant's expert." Thomas E. Spahn, Litigation Ethics: Part III (Witnesses), p.57 (available at http://media.mcguirewoods.com/publications/Ethics-Programs/5294707.pdf).

ii. Hypothetical 2: May your testifying expert contact the adversary's testifying expert ex parte?

- Maybe: First of all, "the lawyer will be barred from doing through the expert what the lawyer could not do himself or herself." Spahn, at 58.

  "In Virginia LEO 1678 (9/5/96), the Bar indicated that a lawyer (acting directly or through an expert witness) may not 'advise the other party's expert witness not to testify,' although the lawyer has no duty to take any measures in response to the lawyer's expert acting independently in convincing the opposing expert not to testify, unless the 'tampering' is a 'fraud on the tribunal' or the lawyer hired the expert 'merely to harass or maliciously injure plaintiff by subverting plaintiff's employment' of an expert, which had not occurred there." Spahn, at 58-59.

III. <u>During the Deposition</u>

a. Questions

i. Avoid

- Obviously, an overt lie "I will represent to you that [false statement]," violates ethical rule †4.1, and possibly †3.3 (see "Ethical Rules," *supra*, I(d)(v)(2)).

- A leading question containing false statement: "The light was green when [the client] entered the intersection, was it not?" (When you know it was red). May violate † 3.3 or 4.1.

- Bluffing (possibly)

    - See, e.g., *Cincinnati Bar Assoc. v. Statzer*, 800 N.E.2d 1117 (Ohio 2003) where a lawyer, deposing her former legal assistant, stacked a series of tapes on the table and insinuated they contained damaging recordings of her in an attempt to secure her compliance with questioning. The tapes were actually blank or unrelated. The lawyer was deemed to have violated the Ohio version of †Rule 4.1, prohibiting a lawyer from engaging in fraud, deceit, dishonesty or misrepresentation.

- Harassing or Embarrassing the Deponent or Opposing Counsel

    - A lawyer should not ask questions that "have no substantial purpose other than to embarrass, delay, harass or burden" the deponent. †4.4. *See, e.g., Paramount Communications v. QVC Network*, 637 A.2d 34 (Sup. Ct. Del. 1994) ("You could gag a maggot off a meat wagon.")

    - A party or the deponent can move to terminate or limit the examination if it is "being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party." *4.5(d).

b. Difficult Attorneys

i. Instructing not to answer: An attorney should not instruct a witness not to answer a question, unless the question directly invades a privilege. Instead, counsel defending may (1) obtain an agreement that such questioning will not continue; (2) seek a protective order; or (3) demand the suspension of the deposition to seek relief from the court in limiting or terminating the deposition. *Sea Bay Hotel, LLC v. Gosnell*, 97 Va. Cir. 250 (Fairfax 2017). *See also Kerr Contracting Corp. v. Rector and Visitors of George Mason Univ.*, 25 Va. Cir. 403 (1991)(noting that only privilege and trade secrets are appropriate topics to instruct a deponent not to disclose) (citations omitted).

- A defendant doctor's expert opinions are not proprietary information, such that his attorney can direct him not to respond to deposition questions. *Cuesta v. Shapiro*, 65 Va. Cir. 79, 83 (Fairfax 2004). But the deposition may be suspended to seek a ruling from a judge. *Id.* at 81.

- *But see* Virginia LEO 1192 (1989) that addresses whether the lawyer defending the deposition of a witness, a treating physician in a medical malpractice case who is not represented, violates any ethical rules by advising the doctor he is not required to answer what his opinion as to the standard of care provided by the defendant unless he agreed to serve as an expert witness. (Note, the committee opinion states that it is not unethical, not whether it is in violation of the Virginia law).

ii. If an attorney instructs a witness not to answer, there are consequences. The examining attorney has the option of (1) terminating the deposition until such time as a ruling is obtained from the court; (2) contemporaneously seeking an order from a court compelling the deponent to answer the question; or (3) proceeding with the deposition, noting his objection to the defending attorney's instruction, and taking the issue up with the court at a later date. In any event, the defending attorney risks exposing his client to an additional deposition and/or himself to sanctions, including costs, under Rule 4:12.

- At least one Virginia circuit court has granted a motion to dismiss where counsel refused to comply with the court's instruction to refrain from speaking objections. In *EER Sys. Corp. v. Armfield, Harrison & Thomas, Inc.*, 51 Va. Cir. 84 (Fairfax 1999), the circuit court had previously admonished counsel that he was not to make "speaking objections" to signal a witness how to answer in deposition or to direct a witness not to answer a question over unprivileged matter. Counsel's later deposition disruptions, culminating with him and the witness leaving the room, were tantamount to instructing the witness not to answer. A monetary sanction seemed to have no impact. Accordingly, under Rule 4:12, the circuit court granted the motion to dismiss.

- But see *Hall v. Va. Int'l Terminals, Inc.*, 82 Va. Cir. 330 (Norfolk 2011) (distinguishing from the "persistent, pervasive, and contemptuous discovery violations" in *EER Sys. Corp*) and *Skibinski v. Lunger*, 74 Va. Cir. 428 (Arlington 2008) (distinguishing failure to produce one witness and his knowledge from the "serious and systematic discovery violations" that justified dismissal in *EER Sys. Corp*).

- At least one Virginia circuit court has held that counsel may not consult with the deponent while a question is pending during a deposition, as such conduct is improper and impermissibly taints the witness' answers. *Aetna Cas. & Sur. Co. v. Corroon & Black of Ohio, Inc.*, 10 Va. Cir. 207 (Richmond 1987) (granting sanctions under Rule 4:12(a)(4)). This case also states that "speaking objections" of counsel is impermissible because it taints the witness' answer in violation of Rule 4:5(c).

iii. **Bad Behavior**: If the examining attorney is conducting the deposition "in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party" the court may order the deposition terminated, or may limit the scope and manner of the deposition as provided in Rule 4:1(c).*4:5(d), **30(d)(3)(A).

Paramount Communications v. QVC Network, 637 A.2d 34 (Sup. Ct. Del. 1994) ("You could gag a maggot off a meat wagon"); *Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007) (Both attorneys were sanctioned. The questioning attorney for asking inappropriate questions intended solely to harass, i.e. " . . . [A]re you involved in any type of homosexual clique with any other defendants in this action?" and the defending attorney was sanctioned for instructing his client not to answer instead of applying for a protective order, contrary to the rules).

- If the deposition is terminated, it shall be resumed thereafter only upon the order of the court in which the action is pending.
- Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.
- The provisions of Rule 4:12(a)(4) apply to the award of expenses incurred in relation to the motion.

iv. **Guidance for when disputes arise between attorneys:**

i. Attorneys must keep their ethical obligations under the Rules of Professional Conduct in mind at all times. When disputes arise during a deposition, counsel, as officers of the court, are required to follow these Rules, and to use all reasonable efforts to resolve the matter.

ii. The attorney objecting to questions should, where feasible, allow the answer to be given subject to objection. This is particularly important in those cases where the deposition is being taken to be used as evidence in the case of *de bene esse* rather than for pure discovery.

iii. If this is not possible, then the objecting attorney may instruct his client not to answer, provided the attorney believes that to answer would disclose privileged information, or that the answer would be prejudicial to the rights of the clients in the case.

iv. Appropriate sanctions may be imposed if the attorney's conduct is unreasonable or unlawful.

v. The depositions may be terminated by any party if (1) there is substantial harassment of a witness, including but not limited to unprofessional conduct by an attorney, or (2) an attorney in good faith believes that further questioning cannot be fairly pursued under the circumstances. Thereupon, a court ruling and/or the entry of a protective order pursuant to Rule 4:1(c) should be obtained and the decision to terminate the deposition will be subject to appropriate sanctions by the court, if justified. *Layne's Administrators v. Christie*, 1 Va. Cir. 504 (Richmond 1984).

e. Difficult Witnesses

i. **Not Answering/ Evasive**: If the deponent fails to answer a question (or provides evasive or incomplete answers) in a deposition conducted under *4:5/**30 (oral) *4:6/**31 (written) the discovery party may move for an order compelling an answer or designation, respectively. The lawyer can complete or adjourn the examination before applying for an order. *4:12(a)(2), **37(a)(3)(i).

ii. **Hostility/Vulgarity**: *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 82 (E.D. Pa. 2008) (using the f*** word and its variants at least 73 times, and using the word "contract" only 14 times while persistently demeaning and abusing the questioning lawyer).

iii. **Frustrating/Impeding/Delaying**: Storming out: *GMAC Bank*, 248 F.R.D. 82 (E.D. Pa. 2008); excessive objections: *Sec. Nat'l Bank v. Abbott Labs.*, 299 F.R.D. 595, 601 (N.D. Iowa 2014),

iv. **Objecting**: "Deponents who are represented by counsel should not interpose objections or parrot the objections of counsel when testifying unless the deponents are raising an issue of privilege which counsel has failed to notice." *Sea Bay Hotel, LLC v. Gosnell*, 97 Va. Cir. 250 (Fairfax 2017); *See* **30(c)(2); *Sec. Nat'l Bank v. Abbott Labs.*, 299 F.R.D. 595, 601 (N.D. Iowa 2014) (making too many needless form objections, deponent parroting objections in her answers).

v. **Pocketing an exhibit mid-deposition:** (See the attached opinion) A Virginia circuit court invoked its inherent authority to punish fraud on the court by granting summary judgement on liability for a medical malpractice plaintiff where the doctor defendant committed several discovery violations:

- He read the plaintiff's medical records the day he was sued and lied about it under oath during the deposition and on three hearings for motions for sanction.

- At one point, he was asked to mark a diagram to show where he had inserted a needle. Later that diagram could not be found. The defendant later admitted that he pocketed the deposition drawing "on an impulse" and then watched without comment as the lawyers and court reporter tried to find the missing paper. He had also provided a written statement under oath that he was not in possession of the drawing and did not know where it was. When asked at the sanctions hearing how he managed to pocket the diagram with everyone else sitting at the table, he responded, "I guess I'm just Houdini."

    - At the first sanctions hearing, his lawyer argued there was no evidence the defendant had anything to do with the disappearance of the drawing. The defendant later gave the drawing to his lawyer, who then submitted it to the court as defendant acknowledged his actions. (The court made it clear it imputed no wrongful conduct to defendant's lawyers, who enjoy "sterling reputations".)

- Defendant referred to the injured plaintiff as a "bum", raising objections on his own, and calling himself "Houdini" during his testimony, the defendant displayed a scornful demeanor, and his testimony as a whole was not credible," the court wrote.

- The court concluded there was clear and convincing evidence of the defendant's fraud upon the court and it therefore had the inherent power to punish.

- Defendant's medical malpractice insurance company filed a declaratory judgment action in which it asked the court to declare that it had no obligation to provide a defense or indemnity for the malpractice claim against the defendant, because his behavior undermined the insurance coverage. Ultimately, the case didn't go to the jury on damages; there was a confidential settlement.

f. Counseling Your Client

Virginia

Since a lawyer during a civil trial is not permitted to confer with a witness during the witness' testimony, the same must be true in a deposition per *4:5(c)(1)("Examination and cross-examination of witnesses may proceed as permitted at trial").

i. However, in *Francisco v. Verizon South, Inc.*, a deponent's lawyer interrupted the deposition after an answer, noting that she believed the deponent misspoke and asked her to clarify. 756 F. Supp. 2d 705 (E.D. Va. 2010). The deponent agreed that she meant to say something different. Then the questioning lawyer accused the defending lawyer of witness coaching and motioned for sanctions. The court held that the defending lawyer did not impede, delay, or frustrate the fair examination of a deponent, and that it was not witness coaching since the contradictory testimonies are on the record and the lawyer only interjected after the answer was fully given. The court did say, it "may have been more prudent for counsel to correct the record during cross-examination, it may also be appropriate for counsel to correct the record in context…."

ii. As in other districts, things like texting the deponent during the deposition are not privileged. See *Wei Ngai v. Old Navy*, 2009 U.S. Dist. LEXIS 67117 (D.N.J. July 31, 2009). In this case, the plaintiff's counsel caught on when defense counsel accidentally sent them a text message instead of the deponent.

West Virginia

i. Held that an attorney may confer with a client during a recess or break in a discovery deposition, so long as the attorney did not request a break in the questions or request a conference between a question and an answer for an improper purpose. *State ex rel. means v. King*, 205 W. Va. 708, 715-16 (1999)("The right to counsel should not be jeopardized absent a showing that the attorney or the deponent is abusing the deposition process . . . . We presume . . . that lawyers will follow the ethical tenets of our profession.")

ii. WV distinguishes discovery depositions from evidentiary depositions, however. Evidentiary depositions are to be used in trial when a witness is not available to testify, and "must be afforded more stringent safeguards than a discovery deposition." *Id.* at 715.

The Absolutist Approach

i. Attorney-Client consultations are prohibited, except to invoke a privilege, preserve waivable objections on the record, and present a motion to limit/ terminate the deposition under *Rule 4:5(d) **30(d). See, e.g., *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993):

- Lawyer started interjecting early, instructing the client "[A]t any time if you want to stop and talk to me, all you have to do is indicate that to me." The client then consulted with his lawyer regarding the meaning of the word "document." *Id.* at 526. When opposing counsel showed the deponent a document and began his question, deponent's counsel interrupted, insisting that he was entitled to review the document with his client before opposing counsel asked any questions. Opposing counsel disagreed and a hearing on the issue was conducted. The court held that once a deposition begins, all deponent-attorney consultations must end.

Id. at 529. The court applied this to both consultations initiated by the attorney and the deponent. The court believed that the lawyer who asked the question would be in a better position to clarify than the witness's own lawyer. *Id.* at 520. This prohibition extends during breaks as well. The sole exception was to help the witness invoke a testimonial privilege, preserve objections that might otherwise be waived, and present a 30 (d) motion to limit or terminate the deposition.

ii. Attorney Client consultations that occur in violation of the above are unprotected by attorney-client privilege and subject to inquiry.

iii. The goal is to prevent witness coaching and the reasoning is that if examination and cross examination of witnesses proceeds as permitted at trial, then there shouldn't be conferences between the client and attorney during examination because it wouldn't be permitted at the questioning of a witness at trial. *Id*. at 528.

Criticism of the Absolutist Approach

i. Witness coaching can happen **before** the deposition or even **after** when the deponent may make changes in form or substance to the deposition.

ii. Silences the unethical attorney in the deposition of *his* client, but leaves a witness at the mercy of an unethical attorney is his deposition.

iii. Interferes with attorney client relationship.

1. Attorney can't prevent mistreatment of his client.
2. Client is powerless to deal with unscrupulous attorney, difficult to prepare them for the traps a skilled questioner can set, i.e.:
    a. Questions that assume facts not in evidence
    b. Questions prefaced with an unfair summary of the deponent's responses
    c. Repeatedly asking the same question
3. Only recourse becomes motion to limit or terminate deposition, which should always be the last resort, and is never assured.

iv. Hinders the Pursuit of Truth

1. Prevents attorney from ensuring the deponent understood the question, which does not pursue truth.
2. If the deponent is embarrassed or confused, they may shut down and not provide a complete and honest answers.

3. If an attorney cannot counsel the witness to correct a false statement, then the examining attorney will continue questioning the witness assuming the truth of facts that are untrue. This may result in the deposition needing to be reopened if the facts were material.

v. Interferes with attorney ethical obligations

1. A false statement given knowingly by a witness in a deposition is a "fraud upon a tribunal." If the attorney knows or suspects this might have happened, her 3.3(a)(2) and (d) obligations may be triggered to promptly reveal this.

2. Preventing attorney client consultations during break prevents the attorney from investigation testimony she believes is false and encouraging the client to remedy the false testimony.

3. If the attorney does consult with client about potentially false testimony, she can't guarantee that conversation is protected under attorney client privilege. This puts her ethical obligations to maintain attorney client privilege in conflict with her obligation to consult with a client before revealing the client's false testimony.

vi. Interferes with Cross Examination

1. Prevents the attorney from conferring with the client during break about following up issues on cross examination.

vii. Ethical standards prohibit witness coaching during depositions anyway, so if an attorney is going to be unethical about witness coaching, the absolutist approach does not prevent them from doing so before and after the deposition.

More Permissive Approaches

i. Often times attorneys and clients regularly confer during trial and even during the client's testimony while the court is in recess." *In re Stratosphere Corp. Securities litigation*, 182 F.R.D. 614, 621 (D. Nev. 1998)

ii. *In re Stratosphere Corp. Securities litigation*

1. Held that prohibiting deponent-attorney consultations during breaks goes too far and violates the right to counsel.

2. However, if the break is requested during a question, the question must first be answered and the line of questioning reasonably pursued before taking the break. Then during the break, the attorney and deponent may freely consult about the pending deposition.

3. Also held that any conference between the deponent and his lawyer may have during a deposition does not waive client privilege.

iii. Other jurisdictions recognize that the deponent may freely initiate deponent-attorney conferences at any time, reasoning that deponent initiated consultation does not pose a threat of witness coaching, only when counsel initiates. (i.e. EDNY, SDNY, S.D. Ind.)

IV. Changes to the Transcript After the Deposition

a. The deponent is entitled to review the deposition and make changes in **form or substance** and must state the reasons for the changes. *4:5(e), **30(e)(1).

b. In *Foutz v. Town of Vinton*, 211 F.R.D. 293 (W.D. Va. 2002), the deponent submitted 19 pages of "changes, amplifications, and additions" and stated at the beginning that the reasons were to "correct typographical errors and provide the Defendants with more thorough and complete information on the Plaintiff's position." The district court found these reasons, stated only in the beginning of the 19 pages, sufficient. *Id*. at 296. ("It is not necessary for the court to examine the sufficiency, reasonableness, or legitimacy of the reasons.")

i. The court found the substantive changes, even though they changed his testimony, were still admissible and that 30(e) should be construed broadly.

ii. But since the deponent in *Foutz* made such substantive changes to his testimony, which was given under oath, the Court found it best to reopen the deposition to give the defendants an opportunity to impeach the deponent using his changes and contradictory answers. *Id.* at 295.

V. Witness/Party Fails to Appear

a. Deponent fails to appear: upon Motion to the court under 4:12(d), the court may make:

i. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

ii. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

iii. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; AND

iv. "In lieu of any order or in addition thereto, the court **shall** require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." (emphasis added).

b. Party taking the deposition fails to appear/Fails to subpoena the witness

- Court can order they pay reasonable expenses including attorney's fees for whoever did come to the deposition. *4:5(g).

VI. <u>Deposition Abuses</u>

a. Virginia LEO 1552 (1993): A lawyer acted improperly by arranging for the issuance of a deposition subpoena without sending a deposition notice, then releasing the witness from the deposition after interviewing the witness *ex parte*.

b. *GMAC Bank v. HTFC*, 248 F.R.D. 182 (E.D. Pa. 2008).

The deponent (the infamous Aaron Wider) was sanctioned for abusing and demeaning opposing counsel, leaving the room to force breaks, giving long non-answers (he proudly expressed opposing counsel would have to come back to question him month after month and that he was running up a huge bill for the client. In 12 hours of depositions, he used the f*** word and its variants 73 times while only using the word "contract" 14 times… in breach of contract/tortious interference case).

More interestingly, the deponent's lawyer was held jointly liable for the sanctions, because he had violated **37(a)(5)(A), for advising the conduct of providing evasive answers and under **30(d)(2) for impeding, delaying, frustrating the fair examination of the deponent by his inaction. Id. at 195 ("It is true that any attorney can be blindsided by a recalcitrant client who engages in unexpected sanctionable conduct at a deposition. An attorney faced with such a client cannot, however, simply sit back, allow the deposition to proceed, and then blame the client when the deposition process breaks down.") (citation omitted). The deponent's lawyer was (1) on notice early on of his client's hostility to opposing counsel and efforts to frustrate the deposition; (2) nonetheless allowed the deposition to drag on for 12 hours over two days "much of which was an unmitigated waste of time and resources"; and (3) never once suggested the deposition be adjourned. *Id.* at 196

c. *Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007).

Both attorneys were sanctioned. The questioning attorney for asking inappropriate questions intended solely to harass, i.e. " . . . [A]re you involved in any type of homosexual clique with any other defendants in this action?" *Id.* at 467-69. The defending attorney was sanctioned for instructing his client not to answer instead of applying for a protective order, contrary to the rules.

d. *Howard v. Offshore Liftboats, LLC*, Nos. 13-4811; 13-4811, 13-6407, 2015 U.S. Dist. LEXIS 26629, at *28–30 (E.D. La. Mar. 4, 2015).

Improper speaking objections that combined incivility with interjecting testimony. **Made worse by refusing to admit the impropriety in a hearing for sanctions before the**

judge. Sanctioned directly $1,500, non-billable, barred from taking further depositions in the case, and required to provide a copy of the Order and Reasons to his client.

Also, the opposing lawyer was sanctioned for saying “shut your mouth “ when he’d had enough of the deposition abuses, and for generally responding in kind to the lawyer’s behavior when he ran out of patience. The sanction was 5 additional hours of CLEs in ethics.

e. *In re Golden*, 496 S.E.2d 619, 623 (S.C. 1998)

The attorney denied any misconduct, contending that his actions during the depositions were reasonable to obtain responses from hostile witnesses. The court held that the attorney had committed misconduct. In one deposition, the attorney's statements were sarcastic, rude and threatening. In the second deposition, the attorney's comments were insulting and degrading, as well as threatening. By clear and convincing evidence, that attorney used means that had no purpose other than to embarrass, delay, or burden a third party. The attorney thereby violated Rule 4.4 of the Rules of Professional Conduct. Furthermore, the attorney's conduct tended to pollute the administration of justice and to bring the legal profession into disrepute in violation of Rule 8.4 of the Rules of Professional Conduct and § 5 of the Rule of Disciplinary Procedure. Because the matters involved different parties and different depositions and showed a repeated pattern of misconduct over the course of an entire deposition, the court publicly reprimanded the attorney.

Attachment follows

March 27, 2013

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RE: David Nelson French v. Jack Allan Painter, M.D., et al.

Dear Counsel:

In this medical malpractice action, which has a tortuous procedural history, the plaintiff alleges in his first amended complaint that Dr. Jack Painter,[1] an interventional cardiologist, negligently performed a cardiac catheterization by improperly utilizing a vascular closure device (‘device”), with the result that the plaintiff suffered a complete occlusion of blood flow to his right leg. The plaintiff further alleges that it was necessary for him to be transported emergently to Carilion Roanoke Memorial Hospital, where he underwent vascular surgery on an emergency basis. The plaintiff further alleges that, as a consequence of the lack of blood flow to his leg, he developed reflex sympathetic dystrophy/comprehensive regional pain syndrome, a permanent neurological injury.

[1] The plaintiff named both Dr. Painter and his professional corporation as defendants. For the purpose of clarity, this opinion will refer to Dr. Painter as the defendant or by name.

Pursuant to Rule 4:12, Va. Code §8.01-271.1, and the inherent power of the court, the plaintiff has filed a motion for sanctions, asking the court to strike the defensive pleadings and grant summary judgment on the issue of liability. In general, the plaintiff asserts that the defendant has perpetrated fraud on the court by engaging in "a continuing pattern of illegal, devious, misleading, deceptive conduct, tending to obstruct justice and to undermine the [c]ourt's ability to fairly adjudicate the case." Motion for Sanctions at 2-3. Specifically, the plaintiff contends: 1) "that the defendant has deliberately and knowingly been less than truthful in answers to discovery," 2) "that the defendant has surreptitiously accessed and copied the plaintiff's confidential medical records" in violation of state and federal law, 3) "that the defendant has improperly used the information so obtained to attempt to influence the plaintiff's need for subsequent medical treatment…[by having] improperly contacted a material witness," and 4) that the defendant has intentionally concealed evidence. Id. at 1-2. The plaintiff makes no accusations of improper conduct against the defendant's lawyers,[2] who have sterling reputations; it is the defendant's conduct that is at issue.

Following the filing of the motion for sanctions, the court conducted three evidentiary hearings, during which the court heard the testimony of five witnesses, including Dr. Painter, who was called as an adverse witness on behalf of the plaintiff. The plaintiff also introduced numerous exhibits, which consisted primarily of depositions and interrogatory answers. The parties have filed excellent memoranda, which the court has reviewed, along with all of the testimony and exhibits, and the court makes the following findings of fact.

I. Findings of Fact

On the morning of April 1, 2011, Deputy Dean Comer of the Martinsville Sheriff's Office personally served the complaint on Dr. Painter at his office in the City. The proof of service, which was introduced as Exhibit 8, confirms that the defendant received personal service, in spite of his testimony that he was at Memorial Hospital of Martinsville and Henry County ("the hospital") and was not personally served with the complaint.[3] Had Deputy Comer not found Dr. Painter, and had the deputy left the complaint with "a person in charge" [Tr., December 6, 2012, at 109], a different stamp would appear at the bottom of the proof of service.

Later the same morning, either Dr. Painter or one or more of his employees at his direction, using computer terminals with passwords, obtained access to the hospital's information system and, in turn, the plaintiff's complete medical chart. The defendant or someone at his direction proceeded to copy thirty pages of records, most of which pertained to the cardiac catheterization performed by the defendant on July 7, 2009. However, eight pages of the records pertained to the plaintiff's admission on April 18, 2010 to the hospital for treatment of addiction to alcohol, pain pills, and marijuana. The admission history and physical states in part that the plaintiff "became pill-addicted in the last year or so since he has been diagnosed with regional pain syndrome of [the] right foot related to cardiac catheterization complications.

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[2] Mr. Peake represents the defendant with respect to the underlying allegations of the lawsuit, while Mr. Leitch is the defendant's personal counsel concerning the motion for sanctions.
[3] Referring to the plaintiff as a "bum," raising objections on his own, and calling himself "Houdini" during his testimony, the defendant displayed a scornful demeanor, and his testimony as a whole was not credible.

He is taking 10—20 Percocet 10/650. Francis Walsh, M.D. is his primary physician who is treating his regional pain syndrome for the pain medicine. He has been buying some pain pills off the street." See Exhibit 1, March 4, 2013, at 30. Contrary to his testimony, the court finds that Dr. Painter read the records, and that on April 14, 2011, his office sent them via facsimile to his attorney, Robert Donnelly.[4] Id. at 1. It is beyond dispute that Dr. Painter played no part in the admission of April 18th, and that he had no legitimate reason to obtain the records of that admission.

In late April 2011, Donald Craighead, the manufacturer's representative of the device, received a request from the hospital for a copy of the instructions for use concerning the device. When he delivered the instructions for use to the hospital, the hospital's catheterization laboratory director called and told him that he needed to talk to Dr. Painter. Craighead then went to the defendant's office and met with the defendant, who told Craighead that "he had had an incident where a patient had had a complication with an Angio-Seal device…." [Craighead Dep., at 35]. Craighead replied that the complication rate was "relatively low." The defendant proceeded to tell Craighead "that he would go in from the contralateral side and pop it open, but that this one would not pop open and got sent to Roanoke Memorial." The defendant wanted to know if other doctors had seen "any specific complications that he was looking for in regard to cutting off the blood flow, occluding the blood flow." [Craighead Dep., at 35-36]. Craighead told the defendant that he would search the literature in order to find studies showing the safety and efficacy of the device. The defendant asked Craighead the specific ways in which the blood flow could be cut off, and they discussed the issue of plaque in the artery. Craighead asked Dr. Painter "if he had a groin shot," a colloquialism for a femoral angiogram film, to which the defendant answered that he did not. [Craighead Dep., at 37]. At no time during the meeting did the defendant identify the plaintiff by name.

At some time after the filing of the lawsuit but before the defendant gave his deposition, there was a chance encounter between Dr. Painter and Dr. Walsh, the plaintiff's treating neurologist, at the hospital. Under examination by the defendant's attorney, Dr. Walsh described what happened as follows in his deposition:

> "Q And had you had an opportunity either at this time or subsequently to speak with Dr. Painter about the procedure?
>
> A No. I have spoken to him on one occasion about it. He brought it up when we just happened to be in the hospital one time.
>
> Q Do you have any recollections of what was discussed, when that discussion may have occurred, things of that nature?
>
> A It occurred a while ago. He had asked me – I don't know if he had seen records from me or not, but he talked about what had happened, basically

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[4] Mr. Donnelly and his firm withdrew from representation of the defendant shortly after the defendant gave his deposition. See Exhibit 9.

> said he did nothing wrong and that the patient was a malingerer, and I should just leave him alone.
>
> Q Besides what we have discussed, do you remember any medical specifics or things that Dr. Painter may have told you about the procedure or his treatment?
>
> A I don't remember what he said about the procedure. I was more taken aback by his opinion of the patient.
>
> Q Do you recall any specifics – I know you gave me a generalization, but if you have any quotes or things that stick out to you, I would like to know them from that conversation.
>
> A Again, as far as the procedure, he said he did everything right. He didn't think anything went wrong. He felt that the patient just wanted drugs." [Walsh Dep., at 23-24].

During cross-examination by plaintiff's counsel, the following exchange took place:

> "Q You also mentioned an encounter, one encounter, that you had had with Dr. Painter. Was there anything said by Dr. Painter in that encounter with you that lead (sic) you to believe that he had looked at David's records from that hospitalization?
>
> A No. That was not mentioned specifically. I don't know if he had looked at the records. He did not mention anything about his hospitalization that I recall, but he did comment that he felt that he was a drug abuser. I do remember that." [Walsh Dep., at 80].

What was Dr. Painter's intent in engaging in this conversation? When the conversation took place, the defendant, having read the records from the April 18th admission, knew that Dr. Walsh was treating the plaintiff's neurological condition, and that the plaintiff had become addicted to pain medication. The defendant explained in his deposition that he was "finding out what neurologic workup had been done on this patient to ascertain any scientific evidence for nerve damage in his leg" [Painter Dep., p. 58], an explanation which the court does not accept. The defendant was thoroughly familiar with the confidentiality requirements of federal law,[5] and he had to know that Dr. Walsh could not discuss with him the plaintiff's neurological condition or the plaintiff's admission of April 18th, 2010. In telling Dr. Walsh-- the very physician who was treating the plaintiff for alleged sequela of the procedure performed by Dr. Painter--that the plaintiff was a drug abuser and malingerer whom he should, in effect, abandon, Dr. Painter was not simply "venting" as the defendant suggests. Opposition to Plaintiff's Motion for Sanctions,

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[5] See the Health Insurance Portability and Accountability Act, 42 U.S.C. §1320d, et seq. (HIPAA).

at 7. The only logical conclusion is that the defendant was acting with the intent improperly to influence a material witness.

On May 27, 2011, the defendant gave his deposition, in which he made the following statements: 1) that he had not seen any medical records concerning the plaintiff since the date of the catheterization performed on July 7, 2009, other than the operative report of the vascular surgeon [Painter Dep., at 57], and 2) that he had not talked to anyone about the plaintiff, other than Dr. Walsh [Painter Dep., at 58-59]. These statements were false, and the defendant knew that they were false. With regard to the medical records that his office obtained through the hospital's information system, Dr. Painter testified that he never read them [Tr., January 22, 2013, at 32]; however, it is inconceivable that the defendant did not read the records before faxing them to Richmond counsel, in light of the confrontation with Dr. Walsh. The only records that referred to the plaintiff's drug abuse were the records of the April 18th admission. The defendant's testimony that, by the time of the conversation with Dr. Walsh, he had learned of "what was in [the plaintiff's] various records" from "discussions with [his] lawyers in Richmond…" [Tr., January 22, 2013, at 34] was not credible. With regard to the second statement, the conversation between the defendant and Donald Craighead took place one month prior to the defendant's deposition, and it is unlikely that the defendant did not remember having spoken to Craighead about such an important subject. While it is true that Dr. Painter at no time mentioned the name of the plaintiff, that circumstance hardly excuses the defendant's answer, since the conversation revolved around the plaintiff's catheterization.

During the defendant's deposition, plaintiff's counsel gave the defendant an anatomical drawing and asked him, "could you look at this and give me some idea where the puncture site would have been on Mr. French?" Protesting that "[t]his drawing is not a very accurate drawing" [Painter Dep., at 36], the defendant, nevertheless, took a pen, made a mark on the drawing, and said, "[s]o it's generally in this region here that we'll place the needle." [Painter Dep., at 36]. Plaintiff's counsel then asked that Dr. Painter use a red pen to depict "the approximate location that [the defendant] meant…for the site," at which point the defendant, stating that he was "not going to use an inaccurate drawing any more," refused to draw any further. [Painter Dep., at 37-38]. Plaintiff's counsel resumed his examination without moving for the introduction of the drawing. A short time later, Plaintiff's counsel, intending to make the drawing an exhibit, said, "[b]efore I forget it, the drawing that you said was imprecise, what did we do with that?" [Painter Dep., at 54]. The drawing had disappeared, so a break was taken, during which the attorneys and the court reporter looked through files and briefcases in order to find it. However, the drawing could not be located.

The drawing reappeared twenty months later. During the defendant's testimony at the second hearing on the motion for sanctions, the following exchange occurred:

> "Q And do you remember approximately 20 minutes after that we got ready to introduce that as an exhibit, and it couldn't be found. Do you remember that?
>
> A I do.

Q Do you know what happened to it?

A I had put it in my coat pocket, shortly after I had done the drawing.

Q When did you do that?

A Probably within five minutes of having done the drawing.

Q Did you know –

A I mean I was embarrassed, when you went looking for it again, that I had it in my coat pocket.

Q Did you put it in your coat pocket during the break?

A No.

Q How did you manage to get it off the table and get it in your coat pocket without anybody seeing you?

A I guess I'm just Houdini.

Q Didn't you have to fold it?

A I did.

Q How many times did you have to fold it, to get it in your coat pocket?

A I don't recall.

Q And why did you take it?

A Well, I guess it was just an impulse; that I knew it was not any part of David French's record, and it was just a generalized thing that showed where I get access on ten thousand people that I've done a cath on in the last quarter of a century, and I had regretted even doing any kind of a drawing on something that was not anatomic.

Q You knew it wasn't yours?

A Well, I had done the drawing, so the drawing part of it was mine, at that point. I would disagree with that.

Q So you thought you had a right to take it?

A No. I didn't really think about it too much. I just, it was an impulse. I put it in my pocket, and that was the end of it.

Q Do you recall when I asked to have it marked as an exhibit and couldn't find it, do you remember me looking for it?

A I do.

Q Do you remember the court reporter looking for it?

A I remember you looking for it. I mean I wasn't paying attention to what she was doing.

Q You didn't see her get down under the table, looking for it?

A I don't remember that.

Q Did you see your own lawyers looking for it?

A They looked on the desk.

Q But you knew all the time they weren't going to find it, unless they looked in your pocket?

A That's true." [Tr., January 22, 2013, at 43-45].

The defendant turned the document over to his personal counsel just prior to the second hearing on January 22d, and after this line of questioning Mr. Leitch handed the document to the court, which admitted the document as Hearing Exhibit 1.[6]

Soon after the defendant's deposition, the plaintiff sent a second set of interrogatories to the defendant. Interrogatory number four stated as follows: "Do you have any current knowledge of the whereabouts of the anatomical drawing on which you made entries during your deposition? Do you know what happened to the document during the deposition?" See Exhibit B to Plaintiff's Memorandum in Support of Motion for Sanctions for Discovery and Other Misconduct. The defendant's answer, to which he signed a declaration pursuant to Va. Code §8.01-4.3, was that "[d]efendant is not in possession of this drawing and does not know where it

[6] The court does not ascribe any improper conduct to Mr. Leitch, for whom the court has the highest respect. The defendant's actions in withholding the drawing until the second hearing, without notifying his personal counsel that he, in fact, had possession of the document, placed his personal counsel in the awkward position of having argued incorrectly but ingenuously at the first hearing that there was no evidence that the defendant had anything to do with the disappearance of the drawing. [Tr., December 6, 2012, at 34].

is located." See Exhibit 11. This answer was without question false and misleading. Nevertheless, in his testimony at the second hearing, the defendant insisted that his answer was truthful on the ground that he had moved in March 2012 "and in the move lost the drawing and had no idea where it was." [Tr., January 22, 2013, at 49]. This testimony was plainly absurd, for the defendant knew that he had possession of the document—he just forgot where he had placed it.

On October 11, 2012, the plaintiff took the deposition of Andrea Dalton, an employee of Dr. Painter. The plaintiff had acquired from the hospital a computer printout showing that on the morning of April 1, 2011, Dalton, or someone using her password, obtained access to the plaintiff's medical records three separate times. See Exhibit 10. Dalton denied having accessed the records because she did not work on that day. The following exchange then occurred:

> "Q Are you saying that on April the 1st, 2011 you know that you did not look up or access these records because you were not working that day?
>
> A That is correct. I was not working that day.
>
> Q And how do you know that?
>
> A We have time sheets that we keep up with.
>
> Q Well, how would you know to be looking at those time sheets to determine the date that was important?
>
> A I don't know.
>
> Q Can you tell me some other dates, specific dates in 2011 that you didn't work?
>
> A I could probably think of a few if you give me time to look at my calendar.
>
> Q Ms. Dalton, someone had to tell you before you came into the deposition today that April the 1st, 2011 was the date that you were going to be questioned about. Somebody told you that, didn't they?
>
> A Yes, sir.
>
> Q Who was it?
>
> A I think it was Dr. Painter one day this week. I can't remember the day.

> Q Was that at the same time that he told you that you needed to be here?
>
> A Yes, sir.
>
> Q And what else did he say?
>
> A Just that I needed to be here and it was talking about a date in 2011 that I was not here. I was not working that day.
>
> Q Did he suggest to you that you weren't working that day or did he…
>
> A No, sir. I have a time sheet.
>
> Q Ma'am, what I need you to tell me, and I know you're trying as best you can, but it just happened last week, I need for you to recreate for us as best you can the total substance of the conversation that occurred between you and Dr. Painter. Where were you? What were you doing? How did he bring it up? What did he say to you? What was your response? It's very important that you try to recreate that as best as you can.***
>
> Q All right. So when did the conversation occur between you and Dr. Painter, before or after you met with the attorneys?
>
> A Before. After I got off the phone with them, I asked him what did I do? What has happened?
>
> Q And what did he say?
>
> A He said, "You just need to do what they say." And he said he thought it was around this time and he pulled my time sheet to let me know that I did not work. That I had nothing, no involvement.
>
> Q And that's all you can remember that he said?
>
> A Yes, sir." [Dalton Dep., at 21-24].

On November 30, 2012, Matthew Kelley, Mr. Peake's associate who defended Dalton's deposition, sent the court a letter stating that "[f]ollowing her deposition, Ms. Dalton told me that while she had been truthful in her testimony, she had failed to mention a conversation with Dr. Painter that occurred prior to the deposition. In that conversation, Dr. Painter said something to the effect of 'don't tell the attorney that you and I [Dr. Painter] talked before your deposition.'" Mr. Kelley further informed the court that Dalton did not include this information in her errata sheet, and that he believed his ethical obligations required disclosure of the information.[7] Interestingly, in her testimony at the second hearing, Dalton denied that the defendant had made that statement, and she stated that Mr. Kelley had misunderstood her. [Tr., January 22, 2013, at 73]. Did Mr. Kelley misunderstand what Dalton said or did Dr. Painter, in effect, influence Dalton to testify falsely? If Mr. Kelley is correct, the clear implication of Dalton's omitted statement is that, if plaintiff's counsel were to ask in the deposition whether Dr. Painter and she had talked about her prospective testimony, Dr. Painter wanted her not to tell the truth. Dalton testified in a seemingly forthright manner at the second hearing, apparently in stark contrast to her demeanor during her deposition, when she admitted that she was nervous. On the other hand, a lawyer does not lightly write a letter to the court such as Mr. Kelley wrote. The court is of the opinion that Mr. Kelley did not misunderstand Dalton, that Dalton testified untruthfully at the second hearing, and that, prior to her deposition, Dr. Painter told her not to tell plaintiff's counsel that he [Dr. Painter] and she had talked.

II. Conclusions of Law

Although the plaintiff seeks sanctions under Rule 4:12, the rule is inapplicable in these circumstances. In order for the rule to apply, the court must first enter an order compelling discovery. Rule 4:12(b)(2) states in part that "[i]f a party…fails to obey an order to provide or permit discovery,…the court in which the action is pending may make such orders in regard to the failure as are just…." See Brown v. Black, 260 Va. 305, 534 S.E.2d 727 (2000) (holding that trial court erred in dismissing motion for judgment on ground that no motion to compel had been entered under Rule 4:12); Nolte v. MT Technology Enterprises, 284 Va. 80, 726 S.E.2d 339 (2012) (holding that trial court had authority to impose sanctions because defendants violated discovery order, but that choice of sanction was abuse of discretion). In this case, the court has entered no motion to compel or other discovery order, other than the standard pretrial scheduling order, which is not sufficient to invoke the sanctions of Rule 4:12 under the court's factual findings.

Likewise, Code §8.01-271.1 does not authorize the court to impose sanctions in this case. This statute states in part as follows:

> "The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Id. By it express terms, the statute applies only when an attorney or party has signed a "pleading, motion, or other paper" in contravention of the listed requirements. See generally

[7] See Rule 3.3(d) of the Rules of Professional Conduct, stating that "[a] lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal."

Ford Motor Company v. Benitez, 273 Va. 242, 639 S.E.2d 203 (2007); Williams & Connolly v. PETA, 273 Va. 498, 643 S.E.2d 136 (2007). In accordance with the findings of fact, the only document that Dr. Painter himself signed was his interrogatory answer, which is obviously not a pleading or motion, but is an interrogatory answer an "other paper," within the meaning of the statute? In Lester v. Allied Concrete Co., 80 Va. Cir. 454 (2010), the court found that "[t]hough literally 'other papers' falls within the ambit of Va. Code §8.01-271.1, certification requirements for discovery papers should be governed by new Rule 4:1(g), the specific provision for pretrial discovery." Id. This court is inclined to agree. Since Rule 4:1(g), which mirrors §8.01-271.1 for the most part, applies only to discovery responses of attorneys and parties not represented by counsel, that rule is also inapplicable in this context.

The parties essentially agree that the main issue confronting the court is whether the defendant has committed fraud on the court that the court may punish in the exercise of its inherent power. In United States v. Shaffer Equipment Co., 11 F. 2d 450 (4th Cir. 1993), the Court of Appeals for the Fourth Circuit described the inherent power of the federal courts as follows:

> "Due to the very nature of the court as an institution, it must and does have an inherent power to impose order, respect, decorum, silence, and compliance with lawful mandates. This power is organic, without need of a statute or rule for its definition, and it is necessary to the exercise of all other powers. [Citation omitted]. Because the inherent power is not regulated by Congress or the people and is particularly subject to abuse, *it must be exercised with the greatest restraint and caution, and then only to the extent necessary*."

Id. at 461 (emphasis added). See also Chambers v. Nasco, Inc., 501 U.S. 32 (1991) ("Because of their very potency, inherent powers must be exercised with restraint and discretion. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process."). "A federal court has the inherent authority to impose sanctions for fraud on the court or abuse of the litigation process." Holmes v. Wal-Mart Stores East, L.P., 2011 U.S. Dist. Lexis 46020 (E.D. Va. 2011). See SunTrust Mortgage, Inc. v. AIG United Guaranty Corp., 2011 U.S. Dist. Lexis 33118 (E.D. Va. 2011) ("By now it is well-settled that fraud on the court or abuse of the judicial process warrants use of the inherent power to impose sanctions on the offending party or its counsel, or both.").

Though the Supreme Court of Virginia has not defined the phrase "fraud on the court," the Court has stated that, in determining whether a party has committed fraud on the court, "a controlling factor is 'whether the misconduct tampers with the judicial machinery and subverts the integrity of the court itself.'" Owens-Corning Fiberglass Corp., v. Watson, 243 Va. 128, 142, 413 S.E.2d 630 (1992), quoting United Business Communications, Inc. v. Racal-Milgo, Inc., 591 F. Supp. 1172, 1186 (D. Kan. 1984). The federal courts of the Eastern District of Virginia utilize the following definition of the phrase:

> " A 'fraud on the court' occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense."

SunTrust Mortgage, Inc., supra, at 41-42; Holmes, supra, at 11. Fraud on the court must be proven by clear and convincing evidence. Id. Since the general statement by the Supreme Court of Virginia does not conflict with the above definition, this court adopts the definition of "fraud on the court" promulgated by the federal courts.

Some appellate courts have upheld the dismissal of all or part of a claim on the basis of a plaintiff's testifying falsely in a deposition. The case of Baker v. Myers Tractor Services, Inc., et al., 765 So.2d 149 (Fla. App. 2000), is illustrative. In that case, the plaintiff, who suffered a knee injury, denied in his deposition that he had sustained a prior injury to his knee. However, medical records obtained by the defendants showed that the plaintiff, in fact, had injured his knee while playing football in high school. The trial court then granted the defendants' motion to dismiss as a sanction for the plaintiff's false testimony. In affirming the decision of the trial court, the Florida Court of Appeals stated as follows:

> "[T]his Court concludes that Baker knowingly and intentionally concealed prior injuries to his right knee in an attempt to gain an unfair advantage in this litigation. Such conduct is a serious affront to the administration of justice. *Honesty is not a luxury to be invoked at the convenience of a litigant. Instead, complete candor must be demanded in order to preserve the ability of this court to effectively administer justice*…. A system that relies upon an adversary's ability to uncover falsehoods is doomed to failure. In the instant case, the repeated lies by Baker constitute knowing intentional misconduct justifying dismissal. This is particularly true, given that these misrepresentations occurred repeatedly and went to the central issue in this case. If these misrepresentations had remained undiscovered, the ability of this Court to impartially adjudicate this claim would have been seriously impaired. While it is clear that every litigant has the right to proceed forward, it is equally clear that this is a right which can be forfeited. Given the serious nature of Baker's misconduct this Court not only has the right, but the obligation to involuntarily conclude these proceedings."

Id., at 150 (emphasis added). See also Pierce v. Heritage Properties, Inc., et al., 688 So.2d 1385 (Miss. 1997) (plaintiff lied in deposition that she had been alone in bed when ceiling fan fell on her); Reed v. Furr's Supermarkets, Inc., 11 P.3d 603 (N.M. App. 2000) (plaintiff misrepresented her medical history during deposition).

The leading case in Virginia appears to be Holmes, supra, in which the Equal Employment Opportunity Commission (EEOC) alleged that Wal-Mart had violated the Americans with Disabilities Act of 1990 by failing to provide reasonable accommodation to Holmes for her disability. During her deposition, Holmes testified falsely concerning the extent of her mental health treatment resulting from her employment. After a second deposition, in which Holmes admitted that she had withheld relevant documents that Wal-Mart had requested, Wal-Mart moved for dismissal of the complaint as a sanction for Holmes' fraud. The magistrate judge found that Holmes had committed fraud on the court and granted the motion to dismiss. In upholding the decision of the magistrate as to the finding of fraud, the district court stated as follows:

> "In sum, the record evidence clearly and convincingly establishes that Holmes has engaged in a pattern of misconduct in this litigation that includes, (i) making false statements to the EEOC that resulted in the EEOC providing false discovery responses to Walmart (sic), (ii) providing false testimony during depositions, (iii) intentionally failing to produce relevant documents, and (iv) providing false testimony at the evidentiary hearing. As the Magistrate Judge correctly concluded, Holmes' conduct clearly and convincingly reflects an intentional scheme to hinder Walmart's (sic) access to relevant evidence and to prevent the fair adjudication of her claims."

Id., at pp. 19-20. Finding that dismissal of the case was not appropriate, the district court struck Holmes' claim for compensatory damages as a sanction.

One circuit court has held that false testimony in a deposition, in and of itself, justifies the imposition of a sanction, though not dismissal of the action. In Ellerbe v. Lowe's Home Center, Inc., 47 Va. Cir. 464 (1998), Ellerbe denied in his deposition having received treatment for back pain prior to his accident at Lowe's, despite the fact that the medical records showed that he had received treatment for numerous back injuries. In assessing a sanction of twenty-five percent of any verdict returned in Ellerbe's favor, the court stated that "*[a] party's obligation to be truthful during discovery is absolute*." Id. (emphasis added). See Guertler v. Ukrop's Supermarkets, Inc., 61 Va. 59 (2003) (Guertler testified untruthfully in deposition as to medical history, and court imposed sanction of twenty-five percent of any verdict returned for Guertler); Mayfield v. Southern Railway Co., 31 Va. Cir. 229 (1993) (Mayfield gave false testimony in deposition as to existence of prior shoulder problems, and court imposed $10,000 sanction).

The duty to tell the truth applies with equal force to an interrogatory answer. In Smith v. Cessna Aircraft Co., et al., 124 F.R.D. 103 (D. Md. 1989), the defendants propounded an interrogatory asking that the plaintiff state his income from 1981 through 1987 as reflected on his federal income tax returns. In his answer, the plaintiff listed figures that were fraudulent, since the plaintiff had failed to file tax returns for the years 1983 through 1987. However, at the end of the answers, the plaintiff signed his name below the statement, "I declare under penalty of perjury that the foregoing is true and correct." The defendants uncovered the plaintiff's malfeasance and took the plaintiff's deposition, during which the following testimony occurred:

> "Q. So your affirmation at the end that this is true under penalty of perjury, that is not accurate, is it?
>
> A. The answers to the interrogatories in that instance is (sic) not correct.
>
> Q. So your statement you declare under penalty of perjury that the foregoing answers and responses are true and correct, that certification signed by you was not accurate, was it?
>
> A. In this case, that is correct.
>
> Q. So you committed perjury in that case, didn't you?
>
> A. I would believe you would call it that, yes.
>
> Q. What would you call it? You would call it perjury, too?
>
> A. Yes."

Id., at 105. Granting in part the defendants' motion to dismiss by striking the plaintiff's lost wage claim, the district court quoted from a Missouri case as follows: "Parties like witnesses are required to state the truth, the whole truth, and nothing but the truth in answering written interrogatories." Id., at 109-110, quoting Hunter v. International Systems & Controls Corp., 56 F.R.D. 617, 631 (W.D. Mo. 1972).

Similarly, the Supreme Court of Virginia takes a dim view of a false interrogatory answer. In Owens-Corning Fiberglass Corp., supra, the issue was whether a memorandum from the defendant's medical director to the defendant's in-house counsel was protected by the attorney-client privilege. The memorandum, which was written at the request of counsel for the purpose of supplying an interrogatory answer in a federal case in Texas, stated that asbestosis "was well known and well documented in the literature during the entire time that [the plaintiff] used the insulation." Id., 243 Va. at 141. After receiving the memorandum, the defendant answered the interrogatory by stating that it "has no information or belief that prolonged use of its products containing asbestos fibers will cause 'asbestosis.'" Id., 243 Va. at 141. The trial court ruled that the memorandum was not protected by the attorney-client privilege because the defendant had committed an act of fraud by answering the interrogatory in a manner inconsistent with the information contained in the memorandum. In affirming the trial court, the Supreme Court of Virginia cited Smith, supra, with approval and stated as follows:

> "We hold that, under the facts of this case, the trial court did not err in holding that the attorney-client privilege did not extend to the Konzen memorandum because Owens-Corning committed a fraud upon the Texas court. Owens-Corning's in-house counsel received the Konzen

> memorandum on February 9, 1968. Yet, five days later, Owens-Corning filed an answer to an interrogatory under oath. *The answer contained a statement which Owens-Corning knew was patently false. This false statement, under oath, constituted a fraud upon the Texas court* and, thus, the Konzen memorandum which reveals this fraud is not protected by the attorney-client privilege.

Id., 243 Va. at 142 (emphasis added).

Citing Bower v. Weisman, 674 F. Supp. 109 (S.D.N.Y. 1987) and Doe v. Federal Grievance Committee, 847 F.2d 57 (2d Cir. 1988), the defendant argues that "[w]here, as here, the alleged misconduct concerns matters that are peripheral to the merits of the case, courts will refuse to use their implied powers to dismiss or default the case." Opposition to Plaintiff's Motion for Sanctions, at 11. These cases stand for the proposition that "dismissal is permissible only when the deception relates to matters in controversy in the action, and even then is so harsh a remedy that it should be imposed only in the most extreme cases." Bower, supra, at 112. There is, of course, authority for the contrary proposition that "when a plaintiff misrepresents information during discovery, dismissal is not dependent upon whether the information goes to the merits of the case or upon 'the ultimate importance of the false or deceptive information.'" Reed, supra, at 609.

In view of the sanctity of the oath, the court follows Reed, supra, and concludes that imposing a sanction does not depend upon whether a party's lying under oath relates to matters in controversy. Even if it could be said that Dr. Painter's misconduct is tangential to the underlying issues of causation and standard of care, the defendant's credibility, or lack thereof, is central to the case. The plaintiff alleges that the defendant failed to perform a femoral angiogram, which would have detected the presence of plaque in the artery, a contraindication for the use of the vascular closure device. Dr. Painter maintains that he did a femoral angiogram, but "[t]here's no picture of it." [Painter Dep., at 44]. Thus, whether the defendant is credible is at the heart of the case.

The court is of the opinion that Dr. Painter has intentionally engaged in a pattern of deceptive and abusive conduct designed to undermine the court's ability impartially to adjudicate the case by 1) testifying falsely in his deposition; 2) giving a false interrogatory answer; 3) obtaining access to the plaintiff's confidential medical records, in violation of HIPAA; 4) using the information so obtained improperly to influence the plaintiff's treating physician; 5) suppressing a document that the plaintiff intended to make an exhibit to the defendant's deposition; and 6) influencing a witness to testify falsely. As the Supreme Court of Virginia stated many years ago, "falsehood is a badge of fraud, and a case which is sought to be supported by means of deception may *prima facie*, until the contrary be shown, be taken to be a bad and dishonest case…." Neece v. Neece, 104 Va. 343, 348, 51 S.E. 739, 740 (1905). The court finds by clear and convincing evidence that Dr. Painter has committed fraud on the court.

The court cannot tolerate such conduct, and a sanction is unquestionably warranted. The dismissal of a plaintiff's case is a harsh sanction, but many courts have imposed such a sanction for conduct far less contumacious than that of the defendant in the case at bar. If, in the exercise of the court's inherent power, such a sanction is available to punish a plaintiff, it must also be available to punish a defendant whose deceptive and abusive conduct is no less deserving of condemnation. The court grants the motion for sanctions, strikes the defendant's answer, and grants the plaintiff summary judgment on the issue of liability. The case will proceed to trial on the issue of damages only. Will Mr. Mann please prepare and circulate an appropriate order?

Very Truly Yours,

G. Carter Greer

ETHICS: WHY LAWYER JOKES AREN'T FUNNY

Travis J. Graham

Gentry Locke Seminar
September 7, 2018

I. Overview

Although the reasons are unclear, it is unquestionably true that, on the whole, America has little respect for the legal profession. A recent Gallup poll shows that only 18% of Americans believe that lawyers are highly honest and have high ethical standards. Judges fare slightly better at 43%, but when compared to nurses (82%), military officers (71%), grade school teachers (66%), and medical doctors (65%), it is clear that lawyers are not held in high esteem.

Some of this is no doubt due to the American adversarial system of justice. Nurses and doctors do not have opponents trying to prevent them from caring for their patients, nor is there any "winning" or "losing" party when other professionals assist their clients. No one goes home hating the opposing surveyor or veterinarian.

On the other hand, some of the stigma attached to the legal profession appears to be the result of misunderstanding, misperception, media spin, and outright lies.

The poster child in this regard is, of course, the legendary McDonald's hot coffee case. This 1994 product liability case became a flashpoint for debate, and is still cited as an example of all that is wrong with the legal profession and the legal system. But compare the popular version of the facts with the truth:

The Popular Media Version:

> *A young woman purchased a cup of coffee at a McDonald's drive-thru. In the course of trying to drive her car, add sugar and cream to the coffee, and, no doubt, apply makeup and adjust the radio, she spilled coffee on herself. She suffered a mild burn, which her lawyers then turned into a multi-million dollar judgment against McDonald's, and everyone got rich.*

The Actual Facts:

> *Stella Liebeck, a 79-year-old New Mexico woman, was a passenger in her grandson's car (which did not feature cup holders) when the two went through a McDonald's drive-thru on February 27, 1992. Ms. Liebeck's grandson parked the car so that Ms. Liebeck could add cream and sugar to the coffee. She attempted to open the coffee cup, but spilled the entire cup onto her lap. Her cotton sweatpants absorbed the coffee, which was between 180 and 190 degrees*

Fahrenheit, and held the hot liquid against her skin. As a result, Ms. Liebeck suffered third-degree burns on 6% of her skin, and lesser burns over 16%. She was in the hospital for 8 days while undergoing skin grafting and surgery to her genitals. During this period, she lost 20 pounds, which was nearly 20% of her body weight. She left the hospital weighing 83 pounds, and needed in-home care for 3 weeks. She was permanently disfigured, and was partially disabled for 2 years following the accident.

Ms. Liebeck asked McDonald's for $20,000 to cover her actual and anticipated expenses. McDonald's offered $800. Only then did Ms. Liebeck hire an attorney. Ms. Liebeck's attorney initially offered to settle the case for $90,000, which McDonald's rejected. Shortly before trial, he offered to settle for $300,000, and a mediator suggested $225,000. McDonald's rejected these offers, with no counter-offer. Ms. Liebeck thus had no choice but to take her case to trial.

The 12-person jury found that McDonald's was 80% responsible for the injury, and Ms. Liebeck was 20% at fault. The jury awarded Ms. Liebeck $200,000 in compensatory damages, which was reduced by 20% to $160,000. Additionally, they awarded her $2.7 million in punitive damages. This figure represents 2 days' worth of McDonald's revenue from coffee sales alone. The court reduced the punitive award to $480,000. While the case was on appeal, the parties settled for an undisclosed amount less than $600,000. The settlement was primarily used to pay for a live-in nurse for Ms. Liebeck, who died in 2004 at age 91.

From this case alone, it seems obvious that a simple examination of the facts is an effective way to combat animosity toward the legal profession. This presentation will provide some of those facts.

II. Legal Standards Governing Lawyer Conduct and "Frivolous Litigation"

A. Rule 11 of the Federal Rules of Civil Procedure

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions.

(a) **Signature**. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented . . . .

(b) **Representations to the Court**. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) **Sanctions**.

(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation . . . .

B. Virginia Code § 8.01-271.1

§ 8.01-271.1. Signing of pleadings, motions, and other papers; oral motions; sanctions.

Except as otherwise provided . . . , every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name . . . .

The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

. . .

If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.

III. Ethical Standards Governing the Conduct of Attorneys

A. Preamble to the Virginia Rules of Professional Conduct

. . .

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. 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.

. . .

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers.

. . .

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

. . .

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. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

. . .

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

. . .

B. Specific Provisions of the Virginia Rules of Professional Conduct Relating to Honesty and Fair Dealing

Rule 3.1. Meritorious Claims And Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.3. Candor Toward The Tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal.

(e) The duties stated in paragraphs (a) and (d) continue until the conclusion of the proceeding, and apply even if compliance requires disclosure of information protected by Rule 1.6.

Rule 3.4. Fairness To Opposing Party And Counsel.

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

(b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:

(1) reasonable expenses incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for lost earnings as a result of attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

(f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

(h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the information is relevant in a pending civil matter;

(2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and

(3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Rule 8.3. Reporting Misconduct.

(a) A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority.

(b) A lawyer having reliable information that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

. . .

IV. The Role of Lawyers in History

The earliest examples of legal advocacy were the practices of the orators of ancient Athens in the first century A.D. It was not until the reign of Emperor Claudius (41 A.D.-54 A.D.) that the profession was openly recognized, and the rule against accepting payment for pleading the cause of another was abolished. By the 4th century, the profession had advanced to the point that advocates were required to be enrolled with the bar of a particular court in order to argue before it. After a decline during the Dark Ages, the trend toward professionalization continued, and there was a proposal at the 2nd Counsel of Lyon in 1275 that all ecclesiastical courts should require an oath of admission. During that year, the English courts approved a statute that prescribed punishment for professional lawyers found guilty of deceit.

Since that time, lawyers have taken part in most significant cultural advances, and have inspired many.

Notes from PowerPoint Presentation

V. The Role of Lawyers in Modern Society and Popular Culture

Today, lawyers not only shape our society in every way, they feature prominently as actors on the world stage and fictional characters in books, movies, and TV. These figures, as with all others, are more or less respectable and inspiring as the circumstances and human nature dictate. There is no pervasive pattern of behavior that should cause lawyers to be singled out.

And, of course, lawyers continue to be the subject of countless jokes. As of this writing, Amazon offers 18 different collections.

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