Table of Contents

Wifi network:
gentrylocke

Password:
gentrylocke2019

2019 GENTRY LOCKE SEMINAR

What Should Be On Your Radar?

AGENDA

7:30 a.m. *Sign-In and Continental Breakfast*

	8:25 a.m.	*Welcome*
1	8:30 a.m.	***The Benefits of Using Revocable Trusts*** Lauren S. Eells
2	8:55 a.m.	***Don't Like the Law? Change It.*** Gregory D. Habeeb and Chip (John G.) Dicks
3	9:25 a.m.	***Location, Location, Location: How Opportunity Zones Can Boost Real Estate Development*** Christopher M. Kozlowski
4	9:50 a.m.	***Hot Topics: Marijuana/CBD/THCA, Utility Scale Solar Energy Development, Artificial Intelligence, Blockchain & Cybersecurity, Illegal Gambling in Virginia*** Gregory D. Habeeb, Guy M. Harbert, III, Christen C. Church, Jonathan D. Puvak, Scott A. Stephenson
	10:20 a.m.	*Break*
5	10:40 a.m.	***Icing on the Cake: Getting the Other Side to Pay Attorneys' Fees, Costs, & Interest*** Monica T. Monday, Paul G. Klockenbrink, Alicha M. Grubb
6	11:30 a.m.	***Metadata: The "Hidden" Information that Could Win or Lose Your Case*** Nick (Powell M.) Leitch, III, Charles R. Calton
	12:00 p.m.	*Lunch*
7	12:30 p.m.	***ETHICS for Lunch: Don't Be THAT Lawyer*** Guy M. Harbert, III, Mia R. Yugo (1 hour)
8	1:30 p.m.	***When an OSHA Case Walks Through Your Door: What it Looks Like and What to Do With It*** Spencer M. Wiegard, Kirk M. Sosebee, David R. Berry
9	2:00 p.m.	***It's All About You: Protecting Yourself and Your Law Practice*** Bruce C. Stockburger, Lauren E. Coleman
	2:30 p.m.	*Break*
10	2:50 p.m.	***Sifting for Gold: Finding Valuable Third Party Claims in Workers' Compensation Cases*** Matthew W. Broughton, Evans G. Edwards
11	3:20 p.m.	***ETHICS: Anatomy of a Bar Complaint*** Travis J. Graham (½ hour)
12	3:50 p.m.	***ETHICS: Whistleblower Ethics; Issues and Examples from United States ex rel. Thomas v. Duke University, et al.*** (½ hour) will be directly followed by
13	4:20 p.m.	***The Hazards of Duke: Legal Challenges in Issues and Examples from United States ex rel. Thomas v. Duke University, et al.*** Matthew W. Broughton, J. Scott Sexton, Gregory J. Haley, Michael J. Finney, Andrew M. Bowman

4:50 — 6:00 p.m. *Cocktail reception*

GENTRY LOCKE
Attorneys

ROANOKE | LYNCHBURG | RICHMOND

GENTRY LOCKE
Attorneys

Monica Taylor Monday

Managing Partner

- Office: 540.983.9405
- Fax: 540.983.9400
- 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 Super Lawyers*, and on the *Best Lawyers in America* and *Virginia Business* magazine's *Legal Elite* lists, and was a "Leaders in the Law" honoree by *Virginia Lawyers Weekly*. 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 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, Monica 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 the trial court's decision to set aside a multi-million dollar verdict in a government contracting case. CGI Federal, Inc. v. FCi Federal, Inc., 295 Va. 506, 814 S.E.2d 183 (2018)
- 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 (2017-2018), Virginia Representative (2013-2017)
- Member, Virginia Model Jury Instruction Committee (2012-Present)
- Chair, Appellate Committee of the Virginia State Bar Litigation Section (2009-Present)
- The Virginia Bar Association Appellate Practice Section Council (2009-Present), Chair (2019-2020)
- Member, Boyd-Graves Conference (2011-Present); Member, Steering Committee (2016-Present)
- Board of Trustees, Virginia Museum of Natural History (2009-2019)
- 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)
- 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)
- Elected to Virginia Super Lawyers for Appellate Law in Super Lawyers magazine (2010-2019), Top 100 listed in Virginia (2013-2019), listed in Virginia Super Lawyers Top 50 Women (2015-2019), named to Super Lawyers Business Edition US in the area of Appellate Law (2012-2014), and previously was a Virginia Super Lawyers Rising Star (2007)
- Designated one of the “Legal Elite” by Virginia Business magazine for Appellate Law (2011-2018)
- 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

- **Appellate Mediation Comes to Virginia**, Virginia Lawyer, Volume 67, No. 3 (October 2018).
- 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.

- Jul 1, 2018 — **Federal contracting client prevails in teaming agreement appeal**
- 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

- Office: 540.983.9407
- Fax: 540.983.9400
- Email: broughton@gentrylocke.com

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

- $112.5 million settlement in **False Claims Act whistleblower** case involving **research fraud**
- $75 million settlement in environmental case (coal mining related)
- $14 million settlement in a products liability accident that caused brain injury and blindness
- $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

Whistleblower/Qui Tam

- Served as lead counsel on one of the world's most high-profile research fraud cases
- Speaker at the **5th World Conference on Research Integrity** in Amsterdam, "The Parallel Tracks of Legal Accountability for Research Misconduct in the United States" (Symposium Session 12; 2017)
- Participant in **4th World Conference on Research Integrity** in Rio de Janeiro (2015)

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 (2010-2019) 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

David R. Berry

Associate

- Office: 540.983.9396
- Fax: 540.983.9400
- Email: berry@gentrylocke.com

Dave Berry focuses his practice on helping clients with business disputes. Prior to joining Gentry Locke, Dave served for two years as a law clerk to The Honorable Donald W. Lemons, Chief Justice of the Supreme Court of Virginia. He has also held roles in the United States Attorney's Office and Office of the Attorney General of Virginia.

Dave earned his J.D. *summa cum laude* from the University of Richmond School of Law, where he belonged to the Order of the Coif and the McNeill Law Society. He also served as a Moot Court Board member and as an articles editor of the *University of Richmond Law Review*. Dave earned a CALI Award in the following categories: Business Litigation Practicum, Comparative Employment Law, Environmental Law, First Amendment Law, Mergers & Acquisitions, and Torts. He graduated *cum laude* with an undergraduate degree from George Mason University.

Education

- University of Richmond School of Law, J.D. summa cum laude (2016)
- George Mason University, B.A. cum laude (2012)

Experience

- As a law clerk to Chief Justice Donald W. Lemons, researched criminal and civil appeals brought before the Supreme Court of Virginia
- As a legal intern for the United States Attorney's Office, drafted memos, motions, and responses, helped Assistant U.S. Attorneys with witness interviews, and represented the United States in various court proceedings
- Researched and assisted with ongoing and upcoming environmental litigation as a Summer Associate with the Office of the Attorney General of Virginia, supported section attorneys, and aided in identifying and notifying appropriate registered agents of pending litigation

Awards

- Order of the Coif (2016)
- McNeill Law Society (2014-2016)
- CALI Award for Torts, Environmental Law, Mergers and Acquisitions, First Amendment Law, Business Litigation Practicum, and Comparative Employment Law
- Articles Editor, University of Richmond Law Review (2015-2016)
- Board Member, Moot Court (2014-2016)

GENTRY LOCKE
Attorneys

Andrew M. Bowman

Associate

- Office: 540.983.9404
- Fax: 540.983.9400
- Email: bowman@gentrylocke.com

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

- $112.5 million settlement in **False Claims Act whistleblower** case involving **research fraud**. United States ex rel. Thomas v. Duke University, Case No. 1:17-cv-276-CCE-JLW (Middle District of North Carolina)
- $2.75 million jury verdict in medical malpractice case involving failure to diagnose pulmonary embolus. Bagheri v. Bailey, Case No. 1:14-cv-77 (Western District of Virginia, Abingdon Division)
- $225,000 jury verdict in pedestrian hit-and-run case. Wood v. Arnold, Case No. 6:18-cv-53-NKM-RSB (Western District of Virginia, Lynchburg Division)
- $225,000 settlement in pedestrian-motor vehicle collision. Goldsmith v. Marshall, Case No. CL18-111 (Montgomery County Circuit Court)
- Confidential settlement of Section 1983 and Virginia Consumer Protection Act claims involving the alleged unlawful sale of an impounded vehicle by towing company. Pence v. G & J Towing & Recovery, Inc., Case No. 7:17-cv-139-GEC-RSB (Western District of Virginia, Roanoke Division)
- Prior to joining Gentry Locke, served as law clerk to the Honorable Patrick R. Johnson of the 29th Judicial Circuit of Virginia, assisting with medical malpractice cases in the Buchanan County Circuit Court. Additionally, assisted with numerous motions and hearings in Buchanan County, Dickenson County, Russell County, and Tazewell County
- Assisted in drafting briefs and motion in patent infringement litigation
- Interned with two judges on the Patent Trial and Appeal Board at the United States Patent and Trademark Office

Affiliations

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

Published Work

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

Case Studies

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

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

GENTRY LOCKE
Attorneys

Charles R. Calton

Associate

- Office: 540.983.9327
- Fax: 540.983.9400
- Email: calton@gentrylocke.com

Charlie Calton is a trial lawyer in Gentry Locke's Plaintiff's group who represents people in medical malpractice, wrongful death, and personal injury cases across Virginia. Prior to joining Gentry Locke, Charlie worked for more than a decade as a claims representative in the civil litigation section at the Virginia Office of the Attorney General, and was an Adjudication Specialist with the Virginia Department of Health Professions, and represented individuals seeking disability benefits at Social Security administrative hearings. A graduate of The University of Richmond School of Law, Charlie grew up in Lee County, Virginia and is excited to be practicing closer to home.

Education

- University of Richmond School of Law, J.D. cum laude (2016)
- University of Virginia College at Wise, B.S. in Biology and Business Administration, (2002)

Experience

- Drafted complaints and various motions for motor vehicle accidents, medical malpractice, products liability, and wrongful death matters
- As a Claims Representative in the civil litigation section at the Virginia Office of the Attorney General, performed legal research, assisted in drafting pleadings, and worked closely with individuals to secure maximum recovery in civil litigation matters
- Represented claimants at administrative hearings across five states to determine eligibility for Social Security Disability benefits
- Drafted notices and orders for the Virginia Board of Medicine, Virginia Board of Pharmacy, and Virginia Board of Long-Term Care Administrators as an Adjudication Specialist with the Virginia Department of Health Professions, and appeared before the boards at administrative hearings

Affiliations

- Executive Leadership Team, Virginia March of Dimes (2016-Present); Chair, Roanoke Valley March of Dimes Executive Leadership Team (2017-Present); Member, March of Dimes State Board (2017-2018)
- Member, Ted Dalton American Inn of Court (2017-Present)
- Member, Virginia Trial Lawyers' Association (2016-Present)
- Member, The Virginia Bar Association (2016-Present)
- Member, Virginia State Bar (2016-Present)
- The Thomas Jefferson Intellectual Property American Inn of Court (2014-2016)
- Articles Editor, Richmond Journal of Online Law & Technology (2014-2016)
- Students Live Benefit Concerts, Founder (2013-Present)

Awards

- Named a "Virginia Super Lawyers Rising Star" for Personal Injury: Plaintiff (2019)

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**

GENTRY LOCKE
Attorneys

Christen C. Church

Partner

- Office: 540.983.9390
- Fax: 540.983.9400
- Email: church@gentrylocke.com

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

Education

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

Experience

Intellectual Property

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

Cybersecurity, Data Privacy and Security

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

Health Care

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

Tax Credit Financing

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

Banking and Finance

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

Business

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

Affiliations

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

Awards

- Named one of the "Legal Elite" by Virginia Business magazine for Intellectual Property law (2018)
- Named a "Virginia Super Lawyers Rising Star" in Health Care (2019), Business/Corporate (2016-2018) and Business/Mergers & Acquisitions (2014-2015)
- Outstanding Volunteer Service Award for co-chairing the 2009 Southern Virginia Minority Pre-Law Conference, Virginia State Bar Young Lawyers Conference (2010)

GENTRY LOCKE
Attorneys

Lauren E. Coleman

Associate

- Office: 540.983.9424
- Fax: 540.983.9400
- Email: coleman@gentrylocke.com

Lauren Coleman practices in Gentry Locke's **Business & Corporate** group. Lauren focuses on assisting clients with a wide range of general corporate, real estate, and environmental matters. Prior to joining Gentry Locke, Lauren was a summer associate with the firm, and also served as a judicial extern for the Honorable William G. Petty of the Court of Appeals of Virginia.

Education

- William & Mary Law School, J.D. 2016
- College of William & Mary, B.A. summa cum laude, 2013

Experience

- Draft and review contracts and policies for compliance with applicable laws and regulations
- Assist clients with entity formation, business structure, and corporate governance matters
- Prepare and review commercial lease agreements
- Assist with commercial real estate transactions
- Research zoning, land use, and environmental matters
- Drafted opinions and bench memoranda for the Honorable William G. Petty of the Court of Appeals of Virginia
- Researched Virginia statutes and case law in criminal matters as a legal intern for the Rockbridge County and City of Lexington Commonwealth Attorney's Office
- Co-authored a policy paper as a member of William & Mary Law School's Virginia Coastal Policy Center

Affiliations

- Member, Roanoke Bar Association (2019-Present)
- Member, The Virginia Bar Association (2016-Present); Pro Bono Hotline Coordinator for Southwest Virginia Region, Young Lawyers Division (2018)
- Certificate in Leadership from Batten Leadership Institute at Hollins University (2018)
- Member, Virginia Women Attorneys Association (2017-Present)
- Board Member, Roanoke Children's Theatre (2017-Present)
- Member, Virginia State Bar (2016-Present)

Awards

- William & Mary Environmental Law and Policy Review, Senior Articles Editor
- Phi Delta Phi Legal Honor Society

Published Work

- 2018 Virginia General Assembly Report: Selected Real Estate Legislation, The Fee Simple – The Journal of the Virginia State Bar Real Property Section, Vol. XXXIX, No. 1 (2018).
- **Message in a Water Bottle: The Call for a Tri-State TMDL for Western Lake Erie**, 40 Wm. & Mary Envtl. L. & Pol'y Rev. 565 (2016).

GENTRY LOCKE
Attorneys

Chip (John G.) Dicks

Partner

- Office: 804.297.3703
- Mobile: 804.225.5507
- Fax: 540.983.9400
- Email: chipdicks@gentrylocke.com

Chip Dicks is a former member of the Virginia House of Delegates and served on the Courts and Education committees. Chip also served on the Virginia Housing Commission as a House member. Since leaving the Legislature in 1990, he has represented associations and businesses on administrative, legislative and regulatory matters before state government agencies and the General Assembly. He has substantial experience representing developers on a variety of land use applications across Virginia. Chip has extensive experience in the laws and regulations affecting billboard signs, and in the field of landlord tenant and fair housing laws. Chip joined Gentry Locke in 2018 to practice with our **Government & Regulatory Affairs** group in Richmond.

Education

- Stetson University College of Law, J.D. 1977
- Methodist College, B.A. 1973

Experience

- Represented Virginia Realtors as Legislative Counsel in the Virginia General Assembly for almost 30 years and has had a hand in writing a significant portions of the state real estate and landlord tenant statutes during that time
- Served as a member of the Virginia Code Commission Work Group to rewrite all of Title 55 of the Code of Virginia, which includes real estate related state statutes. Title 55 will be recodified into Title 55.1 effective on October 1, 2019
- Served for almost 20 years as a member of each of the three Work Groups established by the Virginia Housing Commission, which acts as a think-tank on real estate and housing related legislation
- Represented the Outdoor Advertising Association of Virginia as Legislative Counsel for more than 20 years and during that time, has had a hand in writing state billboard related legislation in the Virginia General Assembly and in that capacity, has been recognized as a national expert in sign law by industry groups
- Represented the Northern Virginia Apartment Association as Legislative Counsel in a major rewrite of the state statutes relating to administrative zoning determinations and variances before the Boards of Zoning Appeals in the Commonwealth
- Tried numerous declaratory judgment actions and cases before Boards of Zoning Appeals throughout the Commonwealth to obtain favorable outcomes to protect the zoning rights of clients
- Represented the Virginia Realtors as Legislative Counsel in major rewrites of the state statutes relating to vested zoning rights of private property owners
- Represented a coalition of major business and real estate organizations in the substantial rewrites of the eminent domain state statutes in the Virginia General Assembly during the years following the US Supreme Court decision in Kelo v. New London
- Represented Lamar Advertising Company in cases in the Richmond Circuit Court and before the Virginia Supreme Court successfully protecting Lamar’s vested zoning rights under state statutes.
- Represents the solar industry and in that capacity, has had a hand in writing transformative energy legislation in the Virginia General Assembly the last several years helping to improve the marketplace for development of new solar energy facilities in Virginia.

- Former Co-Owner of a cell tower company which was sold to a publicly traded company and handled all aspects of developing a wireless cell tower company from the start-up stage through mature operation, and as an attorney, have represented wireless companies in zoning cases in multiple localities in the Commonwealth
- Directed an economic development practice for a law firm and in that capacity, participated in foreign trade missions with various Governors of Virginia, and participated in recruiting prospects, structuring deals and closing economic development transactions to benefit the Commonwealth of Virginia
- Structured a number of complex financing deals monetizing government revenue streams into off-balance sheet transactions to create opportunities to fund government infrastructure otherwise not achievable
- Represented a multi-national oil company in a tank farm spill in Fairfax City and Fairfax County
- Represented a major petroleum pipeline company in a significant leak in Fairfax County
- Represents the Virginia Manufactured and Modular Home Association as Legislative Counsel including positioning this industry as a key player in finding solutions to address the affordable housing crisis in the Commonwealth
- Represents the Circuit Court Clerks as Legislative Counsel and in that capacity, has written legislation that established a “digital legal framework” for automation of all land records in the Commonwealth, which enables efficiency in private real estate transaction including the ability to conduct all-electronic real estate settlements. In addition, this representation includes writing legislation that streamlines the criminal procedures and the procedures used in civil cases, probate and all other substantive areas of law handled by the Circuit Court Clerks
- Experienced in trying civil cases in numerous circuit courts throughout the Commonwealth and administrative appeals before numerous regulatory agencies in the Commonwealth
- Experienced in handling cases before the Supreme Court of Virginia

Affiliations

- The Virginia Bar Association (1990-Present)
- Member, Virginia Apartment and Management Association
- Member, RVA Chamber
- Member, Chesterfield Chamber
- Member, Virginia Chamber
- Former Board Member, Virginia Chamber
- Former Member, Virginia House of Delegates
- Former Chair, Joint Legislative Commission on Infrastructure and Revenue Resources in the Commonwealth
- Former Member, Virginia Alcohol Safety Action Project
- Former Member, Virginia Housing Commission
- Member, Virginia Public Action Project
- Member, Virginia Free
- Former Board Member and Member of the Executive Committee, Virginia Economic Bridge
- Member, Virginia Economic Developers Association
- Former Member, Japan-Virginia Society
- Former Member, Canada-Virginia Business Association
- Former Board Chair, YMCA of Chester
- Former Member, Kiwanis Club
- Former Co-Chair, Epilepsy Society of Virginia
- Former Assistant Commonwealth’s Attorney
- Former Chair, Chesterfield Democratic Committee
- Former Member, Northern Virginia Building Industry Association
- Former Member, Fairfax Chamber
- Former Member, Apartment and Office Building Association
- Former Member, Metropolitan Washington DC Board of Trade
- Former Member, Home Builders Association of Virginia

Awards

- Named “Outstanding Young Man of Virginia” by the Virginia Jaycees (1988)
- Named Distinguished Alumnus by Methodist University (1988)

GENTRY LOCKE
Attorneys

Evans G. Edwards

Associate

- Office: 540.983.9436
- Fax: 540.983.9400
- Email: edwards@gentrylocke.com

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

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

Education

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

Experience

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

Affiliations

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

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**

GENTRY LOCKE
Attorneys

Lauren S. Eells

Of Counsel

- Office: 540.983.9418
- Fax: 540.983.9400
- Email: eells@gentrylocke.com

Lauren Eells is an attorney in our General Commercial group. Lauren primarily assists individuals, families, business owners and beneficiaries with various estate related matters including extensive planning, wealth preservation techniques, business succession planning and administration. Additionally, Lauren works with closely held businesses assisting with general corporate matters, various commercial transactions and obtaining intellectual property protection. Prior to joining Gentry Locke, Lauren worked in-house at SunTrust Mortgage in Richmond.

Education

- Virginia Polytechnic Institute and State University, B.A., cum laude, 2007
- University of Richmond, T.C. Williams School of Law, J.D. 2010

Experience

- Assists individuals with estate planning and administration, and drafts various trust documents related to estate planning
- Assists companies with formation, organization and corporate transactions
- Represents both buyers and sellers of corporate transactions
- Assists closely-held businesses in the transfer of ownership
- Assists companies in developing and implementing plans of liquidation
- Conducts legal research in the areas of corporate, estate and gift taxation

Affiliations

- Board of Directors, Conflict Resolution Center (2012)
- Board of Directors, Virginia Nonprofit Law Center (2017-2018)
- Virginia Women Attorneys Association: Member (2012-Present), Board Member (2015-Present)
- Member, Virginia State Bar
- Member, The Virginia Bar Association
- Member, Roanoke Bar Association

GENTRY LOCKE
Attorneys

Michael J. Finney

Partner

- Office: 540.983.9373
- Fax: 540.983.9400
- Email: finney@gentrylocke.com

Michael Finney has a diverse litigation practice, focused on resolving complex business disputes. Prior to joining Gentry Locke, Michael 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 by *Virginia Super Lawyers* and is consistently named one of the "Legal Elite" by *Virginia Business* magazine.

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).

- $112.5 million settlement in **False Claims Act whistleblower** case involving **research fraud**. *United States ex rel. Thomas v. Duke University*, Case No. 1:17-cv-276-CCE-JLW (Middle District of North Carolina)
- Defended magazine publisher in high-profile defamation case that culminated in three-week trial
- Obtained partial summary judgment and jury verdict for large gas company on multi-million dollar breach of contract claims, and then successfully argued appeal before Fourth Circuit
- Represented company President/CEO and director in shareholder's derivative action, where asserted claims exceeded $200 million
- Represented municipality in dispute over airport runway project
- Represented company on products liability claims arising from plant explosion
- Obtained dismissal of defamation and business tort claims action against newspaper publisher
- Represented shopping center owner seeking to declare that a restrictive covenant was invalid
- Represented former owner of accounting company in contract dispute over earn-out provision
- 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
- Represented guarantor of a commercial shopping center loan in federal litigation
- Represented multiple individuals who purchased illegitimate annuities in underlying and insurance coverage actions
- Represented numerous business entities and departing individuals in non-compete, trade secret, conspiracy, defamation, and other "business divorce" cases
- Represented multiple commercial tenants in lease disputes
- Served as local counsel in both state and federal litigation
- Federal judicial clerk for the Honorable James C. Turk, Western District of Virginia (2008-2009)

Affiliations

- Board Member, Virginia State Bar Litigation Section (2018-present)
- Board Member, Boys & Girls Club of Southwest Virginia (2017-present)
- Chair, Corporate and Commercial Litigation, Virginia Association of Defense Attorneys (2012-2014)
- 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, The 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 in the area of Litigation (2016-2018) and Young Lawyer (Under 40, 2015)

Published Work

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

Case Studies

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

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

GENTRY LOCKE
Attorneys

Travis J. Graham

Partner

- Office: 540.983.9420
- Fax: 540.983.9400
- Email: graham@gentrylocke.com

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

- Listed on the Tennessee Supreme Court Pro Bono Honor Roll and recognized as an “Attorney for Justice” (2018)
- 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

- Office: 540.983.9361
- Fax: 540.983.9400
- Email: grubb@gentrylocke.com

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

- Graduate, Batten Leadership Institute of Hollins University (2019)
- 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)

Published Work

- Co-author, **Show Me the Money**, VBA Journal, Volume XLVI, No. 1 (Spring 2019).

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 12, 2019 — **Restaurant chain not required to garnish employee tips**
- 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

Gregory D. Habeeb

Partner

- Office: 804.297.3702
- Fax: 540.983.9400
- Email: habeeb@gentrylocke.com

Greg Habeeb is a former member of the Virginia House of Delegates, where he represented Virginia's 8th District and served as Vice-Chair of the Courts of Justice Committee, was a Subcommittee Chair for the Courts of Justice, Commerce & Labor and Transportation committees, and served on the Rules and Privileges & Elections committees. Greg retired from the Virginia House of Delegates in August of 2018 and now chairs Gentry Locke's **Government and Regulatory Affairs** team in Richmond, Virginia. Pursuant to Virginia law, he does not perform any legislative lobbying services. Greg is also a litigation partner specializing 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 (2011-2018)
- Member, Virginia State Bar

- Member, The Virginia Bar Association: Co-Chair, Membership Committee, Young Lawyers Division; Member, Litigation and Young Lawyers Divisions
- Member, American Bar Association, Member, Litigation and Young Lawyers Divisions
- Member, Roanoke 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 (2018-2019); 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

- Office: 540.983.9368
- Fax: 540.983.9400
- Email: haley@gentrylocke.com

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 governments 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 solution the client needs, whether a business or local government.

Education

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

Experience

Commercial and Business Litigation:

Greg has tried numerous cases to verdict or decision. In the area of business litigation, these cases have included contract disputes, UCC issues (purchase and sale of equipment and goods), false claims, land development, government contracting, professional liability, tax disputes, and other matters.

- Represented manufacturers of industrial equipment in litigation matters involving breach of contract, payment, claimed defect issues, and Uniform Commercial Code issues
- Represent relator in major false claims act case involving grant funded research
- 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 banks in litigation involving a check-kiting scheme and intercreditor disputes
- 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 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 engineering firms in professional liability claims

- Represented 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 in construction disputes with general contractors
- Represented owners in condemnation proceedings involving commercial and development properties
- Represented owner in litigation involving the termination of a general construction contract

Transactions:

Greg has significant experience in transactions. In many cases, the transaction work resulted from relationships established in prior litigation matters.

- Represented manufacturers in developing and implementing contract formation practices and managing transaction risk through use of favorable terms of purchase and/or sale
- Represented seller in negotiation of contracts for the sale of customized HVAC equipment for data center projects
- 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
- Represented developers in the negotiation of economic development incentive agreements with local governments for hotel and mixed use projects
- Represented group of stockbrokers in developing new employment agreements with national financial firm

Local Government:

Greg is recognized as a leading attorney for representing local governments in litigation and for special projects.

- Represented 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 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, downzonings, code enforcement, wind energy facilities, intensive livestock operations and other matters
- Represented local governments in tax assessment litigation involving manufacturing facilities, a regional shopping center, a department store, and a regional hotel and conference center
- Represented local governments in litigation involving the administration and enforcement of stormwater management fee ordinances
- Represented local governments in the negotiation of economic development incentive agreements
- Represented local governments in matters involving intergovernmental agreements for schools, jails, solid waste management, water and sewer service, and social services
- Represented local governments in comprehensive revisions of zoning ordinances
- Represented local governments in establishing regional industrial facilities authorities

Appellate:

- Significant appellate experience before the Supreme Court of Virginia in commercial disputes and local government matters
- Served as appellate counsel in 17 reported cases decided by the Supreme Court of Virginia and the United States Court of Appeals for the Fourth Circuit

Affiliations

- Virginia State Bar: Chairman, Litigation Section (2009-2010); Member, Board of Governors (2004-2012), Secretary (2007); Former Chairman and Member, Local Government Law Section; Former Member, Board of Governors, Environmental Law Section; Member, Professionalism Faculty (2002-2005); VSB Law School Professionalism Faculty (2003-2006); Member, Construction Law Section
- Adjunct Professor, Land Use Law, Masters of Urban & Regional Planning Program, Virginia Polytechnical Institute and State University (2006)
- Member, 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, 2010-2019), 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, TheCrime Fraud Exception to the Attorney-Client Privilege: How a Client’s Actions Can Eliminate the Privilege; Gentry Locke Seminar (2018).
- Co-author, Client Satisfaction; Gentry Locke (2017).
- The Use of Corporate Depositions at Summary Judgment and Trial; Ted Dalton American Inns of Court (October 2016).
- Co-author, Qui Tam Litigation in the Western District of Virginia; Gentry Locke Seminar, (September 2016).
- Co-author, Procurement Basics and Problem Solving; Brown Edwards Government Conference (January 2016).
- Co-author, Judicial Decision-Making in Local Government Cases; Local Government Attorneys of Virginia, Fall Conference (2015).
- Co-author, Identifying and Litigation False Claims Act Cases; Gentry Locke Seminar (2015)
- 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 (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)
- Taking the Heat: Practical Issues in Responding to Procurement Protests; Journal of Local Government Law (Fall, 2002).
- Managing Ethical Issues & Practical Problems in Local Government Representation; Local Government Attorneys of Virginia, Abingdon (August, 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).
- Ten or More Ways to Stay out of Trouble; Virginia Association of Zoning Officials (January, 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

- Office: 540.983.9349
- Fax: 540.983.9400
- Email: harbert@gentrylocke.com

Guy Harbert chairs the Insurance practice group at Gentry Locke. For over 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 insurer in coverage matter for multi-million dollar “Chinese drywall” class action 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 Virginia Super Lawyers in the area of Personal Injury Defense: General (2007-2008, 2010-2019); also named to Super Lawyers Business Edition US in the area of Plaintiff Defense/General (2012-2014)
- 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

Paul G. Klockenbrink

Partner

- Office: 540.983.9352
- Fax: 540.983.9400
- Email: klockenbrink@gentrylocke.com

Paul Klockenbrink is a Partner in Gentry Locke's Labor & Employment law group. Paul advises and represents employers throughout Virginia regarding employment law issues, as well as the litigation of non-compete agreements, insurance defense matters and business-related claims. Paul is a frequent speaker at national and regional employment law seminars and also leads the firm's Restaurant & Hospitality practice group. During his 20+ years with Gentry Locke, Paul has brought cases to trial that involve discrimination, retaliation, sexual harassment, non-competition, defamation, malicious prosecution, premises liability and commercial motor vehicle accidents, among others. Paul is consistently noted as a *Virginia Super Lawyer* in Employment & Labor Law, and since 2009 he has earned a spot on the *Best Lawyers in America list* in Employment Law – Management.

Education

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

Experience

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

Affiliations

- Member, Labor & Employment Section, Virginia Bar Association
- Member, Labor & Employment Section, American Bar Association
- Member, Virginia State Bar
- Member, California State Bar (inactive)
- Member, Society for Human Resource Management; National, Roanoke, and Lynchburg
- Member, Board of Directors, Roanoke Area Ministries (2017-Present)
- Board Member, Roanoke Wildlife Rescue (2014-Present)
- Member, University of San Diego Law Review, 1987-1988
- Co-Chair (2000-present) and Former Chair (1998-1999), Roanoke Jingle Bell Run for Arthritis Foundation (1998-1999)

- Member, Board of Directors, Arthritis Foundation – Virginia Chapter (1999-2005)
- Frequent speaker for business groups throughout region

Awards

- Named one of The Best Lawyers in America® in the field of Employment Law – Management (2009-2019) Labor & Employment Litigation (2011-2019)
- Named to Virginia Super Lawyers in the area of Employment & Labor (2007-2019), included in Super Lawyers Corporate Counsel edition (2009) and Super Lawyers Business Edition US in the area of Employment & Labor (2012-2014)
- Designated one of Virginia's Legal Elite in Labor & Employment Law by Virginia Business magazine (2007, 2016)
- American Jurisprudence Awards in Torts (1986) and Evidence (1987)

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**

GENTRY LOCKE
Attorneys

Christopher M. Kozlowski

Partner

- Office: 540.983.9320
- Fax: 540.983.9400
- Email: kozlowski@gentrylocke.com

Chris Kozlowski is a Partner 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)

Awards

- Named a “Virginia Super Lawyers Rising Star” in Mergers & Acquisitions (2019)

GENTRY LOCKE
Attorneys

Powell M. (Nick) Leitch, III

Partner

- Office: 540.983.9340
- Fax: 540.983.9400
- Email: leitch@gentrylocke.com

Nick Leitch focused the first thirty years of his law practice on the defense of medical malpractice and products liability claims. His clients included a wide variety of health care providers, including physicians, nurses, hospitals, managed care organizations, nursing homes, assisted living facilities, and ancillary health care providers. He now uses that wealth of experience to represent people who have been injured as a result of substandard health care.

Nick has lectured on various issues concerning medical negligence cases, including EMTALA (Emergency Medical Transfer and Active Labor Act), informed consent, patient confidentiality, and general quality assurance/risk management topics to numerous groups of medical professionals, such as the Alleghany-Bath Medical Society, the Virginia Society of Hospital Risk Managers, Virginia Western Community College, and the Parish Nurse Association. He has been recognized as a *Virginia Super Lawyer* in Personal Injury Defense: Medical Malpractice since 2013, and has been listed with *Best Lawyers in America* for Medical Malpractice Defense consistently since 2010.

Education

- Washington & Lee University School of Law, J.D. 1987
- Washington & Lee University, B.A. cum laude, 1984

Experience

- Jury trial involving the failure of a radiologist to identify a hip fracture on an infant
- Jury trial involving the failure of an endocrinologist to diagnose Cushing's Syndrome
- Federal jury trial in which a phrenic nerve was damaged in the course of administering anesthesia, resulting in the paralysis of a lung
- Jury trial for a wrongful death claim against a gastroenterologist for failure to diagnose a lack of abdominal blood flow (mesenteric ischemia) in a patient

Affiliations

- Member, Roanoke Bar Association (1990-Present); past Board Member (2013-2014)
- Member, Virginia Association of Defense Attorneys (1987-2004)
- Member, The Defense Research Institute (1987-2004)
- Member, The Virginia Bar Association (1987-1996)

Awards

- Recognized by "Virginia Super Lawyers" in the area of Personal Injury Defense: Medical Malpractice (2013-2019)
- Listed among The Best Lawyers in America® in the field of Medical Malpractice: Defendants (2010-2019), named "Roanoke Lawyer of the Year for Personal Injury Litigation: Defendants" (2019)

GENTRY LOCKE
Attorneys

Jonathan D. Puvak

Partner

- Office: 540.983.9399
- Fax: 540.983.9400
- Email: puvak@gentrylocke.com

Jon Puvak assists businesses, business owners, lenders, and governmental entities with corporate matters, commercial transactions, employee benefits, tax, and real estate matters. Before attending law school, Jon gained corporate and real estate development experience by working with NVR Inc., one of the nation's largest homebuilders.

Education

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

Experience

Business & Corporate

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

Real Estate/Land Use/Municipal & Local Government

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

Affiliations

- Chamber Ambassador, Roanoke Regional Chamber of Commerce (2016-Present)
- Member, Virginia State Bar: Young Lawyers Division (2011-Present); Past Chair, Roanoke, Professional Development Conference; VSB Young Lawyers Conference (2016-Present); Member, VSB Communications Committee (2016-2018); Member, VSB Standing Committee on Professionalism (2018-2021)
- Member, American Bar Association, Young Lawyers Division
- Member, The Virginia Bar Association: Young Lawyers Division (2011-Present); Past Chair, Young Lawyers Division CLE Committee (2016-2018)

- Member, Roanoke Bar Association (2014-Present); Barrister Book Buddy (2015-Present)
- Firm Campaign Chair, United Way of Roanoke Valley (2015-2017)
- Graduate of Leadership Arlington, Young Professionals Program (2013)
- Member, Urban Land Institute (2011-2015)

Awards

- Named a “Virginia Super Lawyers Rising Star” in **Land Use**/**Zoning** (2018-2019)

Published Work

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

Case Studies

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

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

GENTRY LOCKE
Attorneys

J. Scott Sexton

Partner

- Office: 540.983.9379
- Fax: 540.983.9400
- Email: sexton@gentrylocke.com

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 complicated tort matters including ***Products Liability***, ***Catastrophic Injury***, *and* ***Qui Tam Relator Whistleblower*** *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 and Complex Tort Litigation

- Successful representation for qui tam whistleblower case against Duke University alleging research grant fraud resulting in $112.5 million settlement, the largest in U.S. history
- Lead trial counsel for Rolling Stone magazine in defamation case regarding UVA false rape claim, Eramo v. Rolling Stone
- 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

- Past Member, Boyd Graves Society
- Barrister, The Ted Dalton American Inn of Court (Emeritus status)
- Former 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 (2007-2019), included in Super Lawyers Corporate Counsel edition (2010) and Super Lawyers Business Edition US in the area of Business Litigation (2012-2014)
- Named a “Legal Eagle” for Commercial Litigation and Oil & Gas Law by Virginia Living magazine (2012)
- Designated as one of the Legal Elite in the field of Civil Litigation (2008-2010, 2012-2015) and Intellectual Property (2003-06) by Virginia Business magazine

GENTRY LOCKE
Attorneys

Kirk M. Sosebee

Associate

- Office: 540.983.9371
- Fax: 540.983.9400
- Email: sosebee@gentrylocke.com

Kirk Sosebee practices in the firm's Construction Litigation and Business Litigation sections. In his construction practice, Kirk represents owners, general contractors, subcontractors, and design professionals with issues relating to construction contract negotiations and preparation, payment disputes, mechanic's liens, construction defects, delay claims, and OSHA matters. Kirk also represents clients in government contractor debarment proceedings and False Claims Act/whistleblower actions. Kirk is licensed to practice law in Virginia and the District of Columbia.

Education

- Patrick Henry College, B.A. 2010
- University of Virginia School of Law, J.D. 2014

Experience

- Represents clients in complex construction disputes
- Represents clients in OSHA matters
- Represents clients in debarment proceedings
- Represented both defendants and relators in False Claims Act cases valued over $100M
- Represents clients in a wide range of commercial litigation settings, including cases involving the Virginia Consumer Protection Act, the Fair Labor Standards Act, the Fair Credit Reporting Act, the Servicemembers Civil Relief Act, the Sherman Antitrust Act, and questions of sovereign immunity for State agencies
- Worked on a Supreme Court amicus brief at the petition for certiorari stage
- Pro bono projects, including representing clients bringing VCPA claims and researching and compiling information on state Freedom of Information Acts

Affiliations

- Secretary, Federal Bar Association, Roanoke Chapter (2017-Present)
- Associate, Ted Dalton American Inn of Court (2017-2019)
- Member, Associated General Contractors of Virginia (2016-Present)
- Member, The Virginia Bar Association (2016-Present)
- Member, Roanoke Bar Association (2016-Present)
- Member, American Bar Association (2015-Present)

Awards

- Best Oralist, Legal Research & Writing Moot Court, 1L section, University of Virginia School of Law
- Editorial Board, Virginia Journal of Social Policy & the Law

Published Work

- Co-author, **Show Me the Money**, VBA Journal, Volume XLVI, No. 1 (Spring 2019).

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

GENTRY LOCKE
Attorneys

Scott A. Stephenson

Associate

- Office: 540.983.9335
- Mobile: 540.798.7120
- Fax: 540.983.9400
- Email: stephenson@gentrylocke.com

Scott Stephenson is an associate in the firm's Commercial Litigation group. A native of nearby Salem, Virginia, Scott graduated from the Georgetown University Law Center in 2014 and joined Gentry Locke shortly afterward. Scott's practice includes complex business litigation, property disputes, mineral rights cases, municipal government litigation, and appellate matters. He thrives on the challenges presented by complicated cases and nuanced legal issues; the tougher, the better. Scott particularly enjoys brief writing and oral advocacy, and constantly works on his craft under the mantra that both skills can always be improved.

Education

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

Experience

- Thomas v. Carmeuse Lime & Stone Inc., et al., 642 F. App'x 253 (4th Cir. 2016). In a case involving limestone and surface rights, successfully appealed a critical ruling by the United States District Court for the Western District of Virginia holding a deed reservation void to the Court of Appeals for the Fourth Circuit, resulting in the reversal of the district court's decision on the issue
- Knox Energy, LLC v. Gasco Drilling, Inc.738 F. App'x 122 (4th Cir. 2018). In a case involving a dispute over whether the parties mutually assented to a lucrative gas drilling contract, assisted in defending the district court's ruling upholding a jury verdict for the defendant and denying the plaintiff's motion for a new trial; the Fourth Circuit Court of Appeals affirmed the district court's opinion in all respects
- Norfolk Southern Railroad Company v. City of Roanoke, Record No. 18-1060 (4th Cir. Feb. 15, 2019) (published). In a case where Norfolk Southern claimed that the City's stormwater utility fee was an discriminatory tax under the Railroad and Revitalization and Regulatory Reform Act of 1976, assisted in defending the district court's grant of summary judgment in favor of the City, finding that the stormwater utility fee was not subject to the Act
- Knox Operating, LLC v. CNX Gas Company LLC and CNX Resources Corporation, Nos. CL 17-1439-00 and CL 17-1439-01 (Tazewell County, 2019) (still pending). Defended a gas production company against claims of breach of contract, fraud, and business conspiracy by a maintenance contractor who claimed that a former employee of the gas company had hired it to service the company's gas wells. Pursued third-party claims by the company against the former employee
- Scarlet Scott v. Central Virginia Family Physicians, Inc., et al. Record No. 160913 (June 1, 2017). In an appeal of a defense verdict, obtained a writ of review by the Supreme Court of Virginia regarding the trial court's issuance of a mitigation of damages jury instruction and evidentiary rulings
- Norfolk Southern Railroad Company v. City of Roanoke, No. 7:16-cv-00176 (W.D. Va. Dec. 26, 2017). In a case where Norfolk Southern claimed that the City's stormwater utility fee was an discriminatory tax under the Railroad and Revitalization and Regulatory Reform Act of 1976, obtained summary judgment in favor of the City, finding that the stormwater utility fee was not subject to the Act
- Brincefield v. Studdard, et al., No. 3:17-cv-718 (E.D. Va. 2017). In a shareholder derivative and ERISA action, defended individual corporate officers against claims of breach of fiduciary duty under Virginia corporate law and claims for violations of ERISA
- Turner v. Virginia Department of Medical Assistance Services, et al. 230 F. Supp. 3d 498 (W.D. Va. 2017); Turner v. Va. Dep't of Med. Assistance Servs., 310 F. Supp. 3d 637 (E.D. Va. 2018). In a case where the plaintiff alleged

violations of the antitrust laws and tortious interference claims, obtained dismissal of the plaintiff's complaint in two different forums on a motion to dismiss pursuant to Rule 12(b)(6)

- Roanoke Lodging, LLC v. City of Roanoke, No. CL 15-2328, (City of Roanoke, September 18, 2018). In a case concerning a challenge to the City's assessment of real property for real estate tax purposes, obtained a pre-trial ruling excluding two critical expert witnesses designated by the plaintiff
- Plum Creek Timberlands, L.P. v. Yellow Poplar Lumber Company, et al., No. 1:13-cv-00062 (W.D. Va. 2016). In a gas rights matter in southwest Virginia, represented the rights of individual property owners to the gas on their tracts
- Eagle Mining LLC v. Elkland Holdings LLC, No. 2:14-cv-27210 (S.D. W. Va. 2015). Successfully obtained judicial confirmation of a 23 million-dollar arbitration award in a complex coal mining case against a subsidiary of Peabody Energy Corporation. Assisted in the related federal court litigation and a second arbitration that followed the arbitration award
- Moore v. General Sales of Virginia Inc., et al., No. CL11-15-01 (City of Roanoke, March 2016). Successfully defended a Roanoke-based company in action for breach of contract in Virginia Circuit Court. Obtained summary judgment and the dismissal of a breach of contract claim based on the adequacy of notice provided pursuant to the contract, and later obtained final judgment for the company
- Hale v. CNX Gas Company, LLC, No. 1:10-cv-00059 (W.D. Va. 2017). In a coal bed methane class action, represented a company's rights to coal bed methane in Southwest Virginia
- Drafted opinions for the Honorable Edward J. Damich, United States Court of Federal Claims
- Prepared legal research and drafted opinions involving patent and government contracts issues for the Honorable Jimmie V. Reyna, United States Court of Appeals for the Federal Circuit

Affiliations

- Member, YMCA of the Blue Ridge Corporate Board of Directors (2017-Present)
- Member, Salem Family YMCA Board of Directors (2016-Present)
- Member, Virginia State Bar (2014-Present)
- Member, Litigation Section, Virginia State Bar (2014-Present)
- Saint Thomas Moore Society (2013-Present)

GENTRY LOCKE
Attorneys

Bruce C. Stockburger

Partner

- Office: 540.983.9366
- Fax: 540.983.9400
- Email: stockburger@gentrylocke.com

Bruce Stockburger is a Partner in the firm with 38 years of experience providing business owners with sophisticated tax and business advice, including multi-generation wealth preservation techniques such as family limited partnerships, grantor trusts, generation-skipping trusts, charitable remainder and lead trusts, qualified personal residence trusts and business succession plans. He has served as counsel to many physician group practices, including the largest multi-specialty physician organization in Virginia for 15 years.

In addition, Bruce has represented numerous municipalities, not for profit organizations, and private developers in structuring state and federal tax credit financing transactions (historic rehabilitation, low-income housing, and New Markets tax credits) and handles tax-exempt financing of manufacturing facilities, tax-free and taxable mergers and acquisitions, and structuring sales of substantial assets.

Education

- New York University, LL. M. in Taxation, 1977
- University of Richmond, T.C. Williams School of Law, J.D. 1976
- University of Virginia, B.A. 1973

Experience

- Practiced tax and business law on behalf of families and business owners for 35 years
- Served as counsel in numerous corporate mergers and acquisitions
- Served as general counsel for the largest multi-specialty physician organization in Virginia for 15 years
- Served as general counsel for numerous multi-specialty and single-specialty physician group practices
- Represented numerous municipalities, not for profit organizations, and private developers in structuring state and federal tax credit financings/transactions (historic rehabilitation, low-income housing, and New Markets credits)
- Has assisted numerous families in developing multi-generation wealth transfer and management plans, designed to minimize negative tax implications and maximize long term preservation in conjunction with their estate plan

Affiliations

- Past Chairman, Tax Sections, Virginia State Bar and The Virginia Bar Association (1986-88)
- Past Chairman, Health Law Section, Virginia State Bar
- Fellow, Virginia Law Foundation
- Fellow, American Bar Foundation
- Fellow, American College of Trust and Estate Counsel
- Director, Virginia Tax Foundation
- Member, Taxation, Trusts and Estates and Business Sections, Virginia State Bar

Awards

- Named to Virginia Super Lawyers in the area of Business/Corporate law (2007-2019) and Super Lawyers Business Edition US in the area of Business/Corporate Law (2012-2014)
- Named one of The Best Lawyers in America® in Leveraged Buyouts and Private Equity Law (2008-2019), Tax Law (1993-2019), and Trusts and Estates (1995-2019); named Best Lawyers 2014 Lawyer of the Year – Roanoke for Tax Law, also listed in Best Lawyers in America – Business Edition (2016)
- Named a “Top Rated Lawyer” for Taxation, Business & Commercial, Health Care Law by American Lawyer Media (2013)
- Designated one of the “Legal Elite” in the fields of Business (2004-2005, 2016-2017); Health Law (2003, 2006-2012, 2018) and Taxes/Estates/Trusts (2000-2003, 2017) by Virginia Business magazine
- Named a “Legal Eagle” for Leveraged Buyouts & Private Equity Law, Tax Law, and Trusts & Estates by Virginia Living magazine (2012)
- Voted a Top Attorney in Wills/Estates/Trusts in The Roanoker magazine “Best Of” (2012)

GENTRY LOCKE
Attorneys

Spencer M. Wiegard

Partner

- Office: 540.983.9454
- Fax: 540.983.9400
- Email: swiegard@gentrylocke.com

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 (2008-2012)
- 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

Mia Yugo

Associate

- Office: 540.983.9444
- Fax: 540.983.9400
- Email: yugo@gentrylocke.com

Mia Yugo is a litigation attorney in the firm's **Criminal & Government Investigations** group. Mia focuses her practice on complex litigation matters including white collar fraud, qui tam/whistleblower actions brought under the False Claims Act (FCA), healthcare fraud, tax issues, public corruption, regulatory matters, racketeering, corporate internal investigations, and financial crimes. Mia also represents individuals and corporations in a variety of actions, including insurance defense, defamation defense, and other civil matters.

In late 2018, the *American Journal of Trial Advocacy* published Mia's law review article on the use of statistical sampling in False Claims Act/whistleblower fraud cases entitled "*Can Statistical Sampling Be Used to Prove Liability Under the FCA or Does Each Provision of the Statute Require Individual Proofs?"* 41 Am. J. Trial Advoc. 335 (2018).

Mia was the 2016 Champion of the National Basketball Negotiations Competition hosted by the Fordham University Sports Law Forum in New York, NY and the 2015 First Runner Up at the National Tax Moot Court Competition hosted by the Florida Bar Association. Mia also had the privilege of being selected to represent Team USA as America's negotiator in the World Negotiation Championships in Lucerne, Switzerland, in 2016. During law school, Mia was Editor-in-Chief of The Legal Journal and Articles and Book Reviews Editor on Law Review.

In her spare time, Mia is a Negotiations Coach for teams preparing to compete in the ABA Negotiations Tournaments and National Basketball Negotiation Competition in New York. In February 2019, the 2L Negotiations Team that Mia coached placed in the Top 8 teams in the nation out of 193 total teams that competed, thus winning a top spot as National Quarterfinalists at the 2019 ABA National Negotiations Competition in Chicago, IL.

Mia is admitted to practice law in New York and Virginia.

Education

- University of Toronto, Trinity College, Hon. B.A., with high distinction (2013), Margaret MacMillan Trinity One Program (2010)
- Liberty University School of Law, J.D. cum laude (2016)

Experience

United States Supreme Court

- Petition for Writ of Certiorari to the Supreme Court of the United States in Orus Ashby Berkley et al. v. Federal Energy Regulatory Commission et al ., a highly publicized constitutional eminent domain case involving individual landowners in Virginia and West Virginia fighting for their right to private property and individual liberty. The only issue that was the subject of the Cert Petition at the U.S. Supreme Court was whether the District Court had subject matter jurisdiction to hear a constitutional challenge to the Natural Gas Act ("NGA")

White Collar/Qui Tam

- Successfully defended corporate qui tam defendant; drafted motion to dismiss a federal qui tam action for failure to plead fraud with particularity under Rule 9(b)
- Successfully defended corporate entity in Eighth Amendment challenges; drafted motion to dismiss a federal suit involving Eighth Amendment challenges
- Successfully negotiated with foreign embassy/diplomats to obtain reinstatement of white collar client's benefits in foreign country
- Successfully drafted bond appeal pleadings in federal court for white collar criminal defendant in highly publicized case involving university research and National Science Foundation (NSF) grant fraud
- Member of Gentry Locke's criminal defense team that successfully obtained plea agreement for large trucking company and one of its four officers, indicted on over 120 felonies and facing a $40 million forfeiture count

Insurance Coverage/Insurance Defense

- Successfully defended against $1.35 million wrongful death action; obtained dismissal with prejudice on all counts following briefing and oral argument in Circuit Court (June 2019)
- Successfully defended corporate client and its two individual officers in Virginia Circuit Court; won dismissal on all four (4) demurrers against charges of actual fraud, breach of fiduciary duty, and breach of various bylaws; also successfully delivered oral argument in Circuit Court, arguing legal grounds for the four demurrers

Defamation Defense

- Successfully defended individual client in federal court defamation suit involving highly publicized water poisoning case; drafted 20-page supplemental brief in support of individual defendant's 12(b)(6) motion to dismiss; obtained dismissal of entire Complaint that sought $3 million in damages
- Successfully defended client in state defamation suit; drafted all motions (demurrers, pleas in bar, motion craving oyer, answer, and affirmative defenses) and brief in support of motions; obtained dismissal with prejudice (with an Order granting demurrer and plea in bar, on the merits) of a $200,000 defamation suit in Virginia Circuit Court

Criminal Defense

- Successfully defended criminal client in state court on charges resulting from serious boating accident on Smith Mountain Lake that caused serious bodily injuries; obtained dismissal of all charges on a Motion to Strike the evidence after cross-examination; tried case as First Chair and obtained "Not Guilty" verdict
- Successfully defended client in state court on criminal charges resulting from two-car accident that caused serious bodily injury; successfully tried case as First Chair against Commonwealth's Attorney and won in General District Court on defense Motion to Strike; obtained dismissal of all charges for client

Other Civil and Mediation

- Successfully represented plaintiff in obtaining judgment in negligence action and successfully represented another client in insurance settlement
- Successfully settled/set aside $500,000 entry of default on behalf of Fortune 500 client; wrote federal court Motion to Set Aside Entry of Default, drafted Mediation Statement, and argued legal issues during mediation

Affiliations

- Admitted, U.S. Court of Appeals for the Fourth Circuit (2017), United States District Court, Western District of Virginia (2018) and Eastern District of Virginia (2019)
- Member, Virginia State Bar (2018-Present)
- Member, New York State Bar (2017-Present)
- Member, National Association of Criminal Defense Lawyers (NACDL) (2017-Present)
- Member, Supreme Court Historical Society (2017-Present)
- Member, Criminal Justice Section, American Bar Association (2017-Present)
- Member, New York State Bar Association, Young Lawyers Section (2017-Present)

Awards

- Champion, NBA National Basketball Negotiation Competition, Fordham Sports Law Forum, New York, NY (2016)
- First Runner-up, National Tax Moot Court Competition, Florida Bar Association, FL (2015)
- Finalist, ABA Regional Negotiation Competition, VA (2015)
- Finalist, Top Five, World Negotiation Competition representing Team USA, Switzerland (2016)
- Champion, Oral Argument, 2L/3L Moot Court Competition, Liberty University (2014)
- Best Brief Award, 2L/3L Moot Court Competition, Liberty University (2014)

- University of Toronto Elizabeth Comper Scholarship for Academic Excellence
- Trinity College Award of Academic Excellence, four-time recipient (2009-2013)
- Viewers' Choice Award for Tangent on a Tangent, an Original Comedy, University of Toronto Drama Festival, Hart House Theatre, Toronto, ON (2010)
- Wayne Fairhead New Play Award, The Impressionist Wing, Sears Drama Festival, Playwrights Canada Press
- First Place, NBA Raptors Journalism Competition, Toronto, ON (2006)
- First Place, Human Rights and Race Relations Essay Competition, Toronto, ON (2008)

Published Work

- Co-author, **Can Statistical Sampling Be Used to Prove Liability Under the FCA or Does Each Provision of the Statute Require Individual Proofs?**; 41 Am. J. Trial Advoc. 335 (2018)
- Co-author, Settlement Restrictions on False Claims Act (FCA) Qui Tam Actions: A Strict Application of Law or a Waste of Judicial Resources?; The Liberty Lawyer, A Publication of Liberty University (2017 Edition)
- The Impressionist Wing, An Original Comedy, Festival Voices, Playwrights Canada Press (May 2010)

KEEP IT SIMPLE, STUPID?

The Benefits of Using Revocable Trusts

Lauren S. Eells
2019 Gentry Locke Seminar
September 6, 2019

I. INTRODUCTION

A universal truth: Every client that has ever sought estate planning services has uttered these words…"I'd like a simple will." Of course, a client prefers something quick, easy and less expensive. As attorneys, however, are we doing the best for our clients by acquiescing to their requests and drafting a "simple" will without discussing the potential hazards that may come from that simple plan?

Estate planning is an area of law that is anything but "simple" because *people* are inherently not simple. The client might request a simple will, however, oftentimes the client is unaware of what he or she needs in terms of an appropriate estate plan that actually fulfills their personal wishes. Generally speaking, a simple estate plan (i.e. a simple will) may often result in a simple disaster. The run-of-the-mill, "I love you" will devising everything to a spouse and then to the children (in equal shares) has the potential to do far more harm than good for a lot of our clients.

This presentation will explore how the "simple" estate plan can ultimately result in the most complicated of situations. We will discuss why we believe that advising your clients to explore a revocable trust structure is not only the preferred method of "simple" estate planning but is ultimately the only way to achieve the "simple" plan that the client seeks. We will discuss how a revocable trust structure benefits a client from a process advantage (by avoiding the probate process when done correctly!) and an asset protection advantage.

This outline briefly covers a broad range of estate planning and administration subjects that you will find helpful as a resource when answering questions your clients may have when it comes to general estate planning and administration.

II. ETHICAL CONSIDERATIONS IN ESTATE PLANNING

A. Representing the Client: An attorney is often retained by the personal representative of a decedent's estate. This brings up the question, with whom does the attorney have an attorney-client relationship? Legal Ethics Opinion 1452 states the following:

> … the attorney engaged to render services in connection with the settlement of a decedent's estate enjoys a similar status to that of an attorney engaged to represent a corporation or similar entity. *See* EC:5-18. The corporate entity premise, however, requires the acceptance of the legal status of the corporation as a separate person, while, in reality and in order to carry on the legal business of the corporation, communication is required between the attorney and an individual who serves as agent for the corporate entity. Thus, the personal representative assumes the legal status as the agent of the decedent and is the only available conduit of information between the entity [i.e., the estate] and the attorney, the Committee opines that the attorney/client relationship arises between the attorney and the personal representative, albeit for the ultimate benefit of the estate.

B. Drafting Attorney Serving as a Fiduciary: All attorneys who consider acting as fiduciaries for a client should familiarize themselves with Legal Ethics Opinion No. 1515 prior to agreeing to act as a fiduciary or acting as a fiduciary. This LEO sets out various ethical guidelines for attorneys serving as fiduciaries. This LEO requires the lawyer to address multiple issues and potential conflicts of interest with the client *before* agreeing to serve as a fiduciary of a client's estate.

C. Representing Spouses: It is common for an attorney to represent husband and wife; however, the attorney must discuss the parameters of such representation and the potential conflicts of interest at the initial consultation with potential clients. ***Always*** obtain a written waiver, signed by both spouses, waiving the potential conflict of interest when representing spouses.

D. Meeting with Clients Alone: It is common for an elderly client's adult child to seek estate planning services on behalf of his/her parent(s). Often times the adult child will accompany his/her parent(s) to an initial consultation with the attorney as well as follow-up meetings. While the adult child is welcome to join his/her parent(s), if the client(s) approves, it is important for the attorney to meet with the client alone in order to ascertain exactly what the client seeks to accomplish in his/her estate plan. Family politics are often complicated. The client may not feel comfortable expressing his/her goals in the presence of his/her child and may even acquiesce to the adult child's "suggestions." Additionally, by meeting with the client alone, the attorney is better able to assess the client's level of competence.

III. INFORMATION TO OBTAIN FROM CLIENT DURING THE INITIAL CONSULTATION

A. Understand your client's assets:
   1. Prepare a *complete* list of all assets – probate and non-probate.
      a) Probate assets: Probate assets include anything owned solely by the decedent (real estate titled in name of decedent only, bank accounts held exclusively by decedent with no survivorship

designation, vehicles titled only in the name of decedent) as well as assets directed to the estate of the decedent by beneficiary designation.

b) Non-probate assets: those assets titled jointly with the right of survivorship, those assets that pass by contract or agreement (such as life insurance proceeds, annuities, IRAs, payable on death accounts), and assets held in a revocable trust.

B. Understand the form of ownership for each asset:
   1. Decedent's name only
   2. Jointly titled with survivorship
   3. Payable on death
   4. Revocable trust

C. **Practice Tip:** Develop a comprehensive estate planning questionnaire that your client can submit to you *prior* to the initial consultation, if practical. This will give you an opportunity to determine what players are involved in the client's life and ascertain the client's assets ahead of the consultation.

IV. RIGHTS OF SPOUSES AND CHILDREN IN A DECEDENT'S ESTATE

A. Dispositions made under a validly executed will are given effect. *See* Va. Code § 64.2-401.

B. Probate property not disposed of by will passes under Va. Code § 64.2-200 (real estate) and § 64.2-201 (personal property).

1. **Practice Tip:** Always check for a residuary clause in the will. The residuary clause disposes of the remainder of the decedent's property – often to an individual, educational institution or a charity.

C. Virginia intestate succession:

1. If the decedent dies with no valid will in place and decedent's spouse survives him/her, then the decedent's surviving spouse takes all **unless** there are living children from a prior relationship of decedent (in which case the surviving spouse takes one-third and the decedent's child/children from the prior relationship takes two-thirds).

2. If there is no surviving spouse, then all passes to the decedent's descendants. If decedent leaves behind no surviving spouse or descendants, then all passes to the decedent's parents. If no surviving spouse, descendants or parents then passes to siblings and their descendants. *See* Va. Code § 64.2-201.

D. Surviving spouses omitted in decedent's will may be entitled to an intestate share of the decedent's estate. *See* Va. Code § 64.2-422.

1. Old Law: In the recent past, a surviving spouse had the right to claim one-third (1/3) of a decedent's augmented estate if the decedent left surviving children or descendants, or one-half (1/2) of the decedent's augmented estate if the decedent had no surviving children or descendants.

2. Current Law: Beginning with the estates of decedents dying on or after *January 1, 2017*, a surviving spouse will have the right to claim up to fifty percent (50%) of the value of the *marital property*[1] included in the augmented estate. The current law is based on the length of the marriage, rather than whether the decedent has left any surviving children or descendants.

a) The surviving spouse may be able to claim up to fifty percent (50%) of the total value of the marital property included in the augmented estate. The number of years the couple was married determines the percentage of the elective share available of the augmented estate, from 3% for marriages of less than 1 year to 100% for marriages of 15 years or more. *See* Va. Code § 64.2-308.4.

V. INCAPACITY: POWERS OF ATTORNEY AND ADVANCE MEDICAL DIRECTIVES

A. Powers of Attorney: Governed by the Virginia Uniform Power of Attorney Act (Va. Code § 64.2-1600 et seq.)

1. A writing granting an agent authority to act in the place of the principal.

2. Power of attorney made under the Act is durable unless expressly provided otherwise (durable meaning, the power does not terminate upon the incapacity of the principal).

3. A power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.

4. "Incapacity" means inability of an individual to manage property or business affairs because the individual:

[1] Marital property consists of the following: (a) a decedent's net probate estate, (b) a decedent's non-probate transfers to others and (c) a decedent's non-probate transfers to the surviving spouse and (d) a surviving spouse's property and non-probate transfers to others

a) Has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or
b) Is missing or outside the United States and unable to return.

5. A power of attorney terminates when:
a) The principal dies;
b) The principal becomes incapacitated, if the power of attorney is not durable;
c) The principal revokes the power of attorney;
d) The power of attorney provides that it terminates;
e) The purpose of the power of attorney is accomplished; or
f) The principal revokes the agent's authority, or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

6. Co-agents and Successor Agents: A principal may designate two or more persons to act as co-agents. Unless the power of attorney otherwise provides, each co-agent may exercise its authority independently.
a) A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve.

B. Advance Medical Directive:

1. An advance medical directive ("AMD") allows someone to express his/her wishes regarding medical decisions for a time when he/she is unable to do so (i.e., the person is in an unconscious, vegetative state). The AMD may (i) specify the health care the declarant does or does not authorize; (ii) appoint an agent to make health care decisions for the declarant; and (iii) specify an anatomical gift, after the declarant's death, of all the declarant's body or an organ, tissue or eye donation.

2. **Practice Tip**: Spouses may not always be the best agents for one another! Example: Wife desires no medical intervention whatsoever if she is in a persistent vegetative state, however, Husband finds himself wanting to do everything he can to keep Wife alive. Wife may want to consider appointing an agent that will best accomplish her desires.

3. To be valid, a written AMD must be signed by the declarant in the presence of two witnesses.

4. In the absence of an AMD a physician is authorized to act, or not act, under direction of the following persons, *in the order listed*: (1) a guardian; (2) spouse (unless a divorce action has been filed), (3) an adult child; (4) a parent, (5) an adult sibling, or (6) the next closest relative.

C. Guardianship and Conservatorship of an Adult

1. Any person can petition to serve as guardian or conservator of an incapacitated adult. There is no priority set by statute. *See* Va. Code § 64.2-2002.

2. A guardian stands in a fiduciary relationship to the incapacitated person for whom he/she was appointed guardian and may be held personally liable for a breach of any fiduciary duty to the incapacitated person. A guardian shall not be liable for the acts of the incapacitated person unless the guardian is personally negligent. *See* Va. Code § 64.2-2019.

VI. LAST WILL AND TESTAMENT

A. Requisites and execution:

1. In Virginia, for a Will to be valid it must be:
   a) Made in writing,
   b) by a mentally competent person over the age of 18, and
   c) signed by the testator in the presence of two competent witnesses over the age of 18. *See* Va. Code 64.2-400 through -409.

B. Competency:

1. Competency means that the testator understands he or she is making a will and understands the assets he or she is bequeathing.

C. Revocation of a Will or Codicil:

1. If a testator cuts, tears, burns, obliterates, cancels, or destroys a will or codicil, or the signature thereto, or some provision thereof, such will, codicil, or provision is void and has no effect.

2. If a testator executes a valid will that expressly revokes a former will, the former will (including any codicils) is void and of no effect.

3. If a testator executes a valid will or codicil that (i) expressly revokes a part, but not all, of a former will or codicil or (ii) contains provisions inconsistent with a former will or codicil, such former will or codicil is revoked and superseded to the extent of such express revocation or inconsistency if the later will or codicil is effective upon the death of the testator. *See* Va. Code 64.2-410 through -413.

VII. ADMINISTRATION AND PROBATE OF A WILL

A. Probate: The circuit courts have jurisdiction of the probate of wills.

1. A will is offered for probate in the circuit court in the county or city wherein the decedent has a known place of residence;

2. If decedent has no such known place of residence, then in a county or city wherein any real estate lies that is devised or owned by the decedent; and

3. If there is no such real estate, then in the county or city wherein he dies or a county or city wherein he has estate. *See* Va. Code § 64.2-443 et seq.

B. Jurisdiction: To have the authority under the law to act as a fiduciary of a decedent's estate, the administrator must qualify with the court of proper jurisdiction.

1. The jurisdiction of the probate of wills and qualification of the administrator lies with the clerk of the circuit court in which (1) the decedent has a house or known place of residence; (2) if none, then where there is real estate that is devised or owned by the decedent; (3) if none, then where the decedent dies or has an estate.

a) A patient in a nursing home or similar institution because of age or impaired health is presumed to reside in the locality of his or her legal residence immediately before entering the home, although the presumption may be rebutted. *See* Va. Code § 64.2-443

b) When the estate is a *small asset estate* (personal property having value on the date of death of no more than $50,000.00) the appointment of an executor or administrator is not required.

C. Qualifying as an administrator:

1. If decedent died with a will then persons may qualify if they satisfy the following requirements:

a) Person is 18 years of age or older, and

b) If surety is required on the personal representative's bond, the individual must be able to obtain that surety, and

c) A nonresident of Virginia must comply with Va. Code § 64.2-1426.

2. Institutions: a professional law corporation authorized to do business in Virginia may qualify in any fiduciary capacity.

3. If decedent died without a will: persons may qualify if they satisfy the following requirements:

a) Individual is 18 years of age or older, and

b) Court or clerk is satisfied that the person is suitable and competent.

c) To avoid "race to the courthouse" situations the Virginia Code provides a list of those preferred to serve as administrator as

well as the timing of such qualifications. *See* Va. Code § 64.2-502.

D. Requirements for probate of a will:

1. Self-proving Will: A self-proving will is one that may be admitted to probate without the testimony of witnesses. Where the will is not self-proving it must meet the statutory requirements of Va. Code § 64.2-403. One or two witnesses, as determined by the clerk, must state under oath that the requirements of Va. Code §64.2-403 were met.

a) **Practice Tip:** Always add self-proving language to the instrument. Adding self-proving language involves a statement in the will that the witnesses sign under penalty of perjury.

(1) Sample: The above signature of the Testatrix was made and the foregoing will was acknowledged to be her last will and testament by the said Testatrix in the presence of us, two competent witnesses, present at the same time; and we, the said witnesses, do hereunto subscribe the said will on the date last above written in the presence of the said Testatrix and of each other, and at the request of said Testatrix who was then of sound mind and over the age of eighteen (18) years.

b) Holographic Will: A will entirely in the testator's handwriting and signed by the testator in a manner which indicates that the name is intended as a signature may be admitted to probate. If it is not witnessed, at least two disinterested witnesses must testify at probate that it is entirely in the testator's own handwriting.

VIII. REVOCABLE TRUST STRUCTURE: THE PREFERRED PLANNING TOOL

A. Revocable Trust: A revocable trust is a trust instrument that allows the Settlor to revoke and reclaim any property placed in it during his or her lifetime. Revocable trusts are a helpful estate planning tool and preferred by many practitioners over the use of a simple will. When an estate plan includes a revocable trust, the testator's will "pours over" the testator's residuary estate to the revocable trust. The testator's gifts are provided for under the trust agreement. Revocable trusts are governed by the Uniform Trust Code. *See* Va. Code § 64.2-700 through -808.

B. Advantages of Using the Revocable Trust Format:

1. Avoid Probate. When a Revocable Trust is done correctly and it is properly funded, the estate can avoid the probate process. To avoid probate the Settlor must fund the trust during his or her lifetime. This means the Settlor must transfer title/ownership of assets to the trustee of the trust. Only those assets that fall outside probate (like a joint account with the right of survivorship) and those assets held in the name of the trust will avoid the probate process.

a) Settlors will often deed real estate to their revocable trusts as well as transfer ownership of significant investment accounts and ownership interests in closely-held entities to their revocable trusts.

b) **Practice Tip:** a revocable trust will not work as intended unless it is funded properly! Many times, the client feels overwhelmed by the funding process. To help ease clients' "funding anxiety" provide your clients with a "funding checklist" that explains how to transfer various assets into the trust. To ensure clients' fund their trusts, offer assistance to do so. You can help by drafting the necessary deeds that transfer ownership of real property to the revocable trust as well as assist in changing the ownership of financial accounts with the client's financial institutions. The client may prefer that you help facilitate in naming the trust as a beneficiary on retirement accounts, if necessary. Also, consider using POD (payable-on-death) accounts targeting the trust, rather than using joint accounts with individuals. Continually follow-up with the client until all necessary items are transferred to the name of the trust and the trust is fully funded. Lastly, encourage your client to reach out to you prior to purchasing assets such as real property, membership interest in a company or an insurance policy so you can advise the client on titling those assets to best suit his/her estate plan.

2. Provide for Minor Children: A revocable trust is a flexible and safe way to provide for minor children. By leaving the assets to your minor children in a revocable trust, the surviving family can avoid lengthy court proceedings and the Trustee is able to immediately begin managing the assets on behalf of the minor children. Additionally, when assets are left to a minor child outside of a trust, the guardian or conservator normally has to hand over assets to the child once they reach the age of 18. This can have disastrous results. By leaving the assets in trust, the Settlor decides when the child will have control over the assets and until that time the Trustee will continue to manage the assets as the Settlor has directed in his/her trust document.

3. Asset Protection for Trust Beneficiaries: Asset protection for the trust beneficiaries is a major advantage of using the revocable trust format.

a) *Domestic relations disputes.* Assets held in trust are shielded from beneficiaries' domestic relations disputes. For example, Client's Daughter goes through a nasty divorce. Daughter's share of the Client's revocable trust is protected from the divorce process.

b) *Beneficiaries' creditors.* Generally, a beneficiary's share of a revocable trust is insulated from creditors. For example, Client's Son is texting while driving and drives through a cross walk, killing two small children. Son's share of the Client's revocable trust is protected from the lawsuits that ensue.

c) *Protecting beneficiaries from themselves!* Perhaps Client's Daughter is unable to responsibly manage money herself. Client may appoint a trustee or co-trustee to manage Daughter's share of the revocable trust so she uses her share of the assets towards college tuition rather than a new Mercedes SUV.

4. Control of Assets: Another great benefit of using the revocable trust structure is that the Settlor may retain control over assets after his/her death. By using the revocable trust format, the Settlor can specifically direct his/her assets exactly how he/she intends and the trustee must implement those intentions after Settlor has died - as opposed to leaving the assets outright through a will, in which case the beneficiary can do whatever he or she pleases with such assets. If the client wants to retain control over his/her assets after death, using a revocable trust is the only route to go.

a) *Remarriage of spouse after Settlor's death.* By using a revocable trust, the Settlor can ensure assets do not become those of his/her spouse's new spouse. For example, Client dies and Spouse remarries a year later. The language in the revocable trust can prohibit the Spouse from using his/her share of Client's revocable trust to purchase a condo in Vail with new spouse, fund a start-up business with new spouse, or pay his/her stepchildren's college tuition.

5. Planning for Incapacity: By using a revocable trust the Settlor can plan for older age and situations of incapacity. By appointing a Trustee to manage the Settlor's assets in instances of incapacity, the Trustee avoids conservator and guardianship proceedings and can immediately step in to manage the trust assets. It is important to note that when drafting the revocable trust "incapacity" should be clearly defined.

6. Tax Advantages: A revocable trust provides a mechanism to maximize federal estate tax exemptions. The current estate tax exemption is $11.4

million dollars per taxpayer, but this exemption amount sunsets at the end of 2025, falling back to the exemption amount in existence in 2017 ($5.49 million, but with inflation adjustments). Very generally, a revocable trust is not a separate taxpayer during the Settlor's lifetime, however, once the Settlor dies, the trust becomes irrevocable and becomes a separate taxpayer. This allows the Trustee to manipulate where the income tax liability will fall, either to the revocable trust or more efficiently to the lesser tax rate of the beneficiaries.

a) **Practice Tip:** You will want to plan using the current exemption in mind, however, 2026 is right around the corner, so when developing a plan for your client you will also want to keep in mind the possible lower tax estate exemption as you proceed.

7. Flexibility: Many people benefit from and enjoy the flexibility that a revocable trust provides. The Settlor may provide for specific beneficiaries as he or she sees fit –not a one size fits all approach. Additionally, a Settlor can easily amend his/her revocable trust at any point in his/her lifetime to account for his/her own changing needs and circumstances as well as those of his/her beneficiaries.

IX. RETITLING ASSETS TO AID IN ESTATE PLANNING

A. Survivorship: Some clients may choose to convert property to tenancy by the entirety (husband and wife) or joint tenants with the right of survivorship (JTWROS).

1. Be careful not to make an account a survivorship account unless the intent is for survivor to take all property and not share with another person (i.e. Father adds Daughter to account making it JTWROS, but has no intention on disinheriting Son. When Father passes, Daughter receives all property and has no obligation to share with Son.)

B. Designate a Beneficiary: Clients are often advised to change beneficiary designations to align with the overall estate plan (i.e. naming a trust the beneficiary of insurance, investment or retirement accounts).

Don’t Like the Law?
Change It.

Gregory D. Habeeb

Chip (John G.) Dicks

2019 Bills of Interest

TORT LAW

– PASSED –

HB 1675 **Servicemembers Civil Relief Act; attorney fees.** Provides that, where the appointment of counsel is necessary pursuant to the Servicemembers Civil Relief Act, any attorney fees assessed shall not exceed $125, unless the court deems a higher amount appropriate. **PASSED**

HB 1662 **Child restraint devices and safety belts; emergency and law-enforcement vehicles.** Exempts the operators of emergency medical services agency vehicles, fire company vehicles, fire department vehicles, and law-enforcement agency vehicles during the performance of their official duties from (i) the requirement that certain minors be secured with a safety belt and (ii) the requirement that minors under the age of eight be secured in a child restraint device, provided that exigent circumstances exist and no child restraint device is readily available. **PASSED**

HB 1767 **Wrongful death beneficiaries; parents who received support or services from the deceased for necessaries.** Adds parents who received support or services from the deceased for necessaries within 12 months prior to the decedent's death to the primary list of beneficiaries who may receive a distribution of wrongful death damages. This bill applies only to causes of action arising on or after July 1, 2019. This bill is identical to SB 1543. **PASSED**

HB 1772 **Virginia Freedom of Information Advisory Council; advisory opinions; evidence in civil proceeding.** Provides that any officer, employee, or member of a public body alleged to have willfully and knowingly violated the Virginia Freedom of Information Act who acted in good faith reliance upon an advisory opinion issued by the Virginia Freedom of Information Advisory Council may introduce such advisory opinion as evidence that the alleged violation was not made willfully and knowingly. **PASSED**

HB 1820 **Nondisclosure or confidentiality agreement; sexual assault; condition of employment.** Prohibits an employer from requiring an employee or a prospective employee to execute or renew any provision in a nondisclosure or confidentiality agreement that has the purpose or effect of concealing the details relating to a claim of sexual assault as a condition of employment. **PASSED**

SB 1041 **Virginia Telephone Privacy Protection Act.** Provides that a telephone solicitor and the seller on whose behalf or for whose benefit a telephone solicitation call offering or advertising a seller's property, goods, or services is made or initiated are jointly and severally liable for violations of the Virginia Telephone Privacy Protection Act (§ 59.1-510 et seq.). The measure establishes a presumption that a telephone solicitation call offering or advertising a seller's property, goods, or services is made or initiated on behalf of or for the benefit of the seller and provides that this presumption may be rebutted if it is shown by clear and convincing evidence that (i) the seller did not retain or request the telephone solicitor to make telephone solicitation calls on the seller's behalf or for the seller's benefit and (ii) such telephone solicitation calls were made by the telephone solicitor without the seller's knowledge or consent. The measure removes a provision that authorized the Commissioner of the Department of Agriculture and Consumer Services to inquire into possible violations of

the Act and contains technical amendments. This bill is identical to HB 2600. **PASSED**

HB 1911 **Duties of drivers of vehicles approaching stationary vehicles displaying certain warning lights; penalty.** Makes a driver's failure to move into a nonadjacent lane on a highway with at least four lanes when approaching a stationary vehicle displaying flashing, blinking, or alternating blue, red, or amber lights, or, if changing lanes would be unreasonable or unsafe, to proceed with due caution and maintain a safe speed, reckless driving, which is punishable as a Class 1 misdemeanor. Under current law, a first such offense is a traffic infraction punishable by a fine of not more than $250, and a second such offense is punishable as a Class 1 misdemeanor. **PASSED**

HB 1944 **Civil actions; no-fault divorce; fees and costs.** Provides that, in the case of a no-fault divorce proceeding, there is a presumption that a party to the case who is the recipient of a state or federally funded public assistance program for the indigent is unable to pay the fees or costs. The bill further provides that, in such no-fault divorce proceeding, such person shall certify to the receipt of such benefits under oath. **PASSED**

HB 1955 **Appellate damages.** Specifies that when any judgment is affirmed, whether in whole or in part, damages shall be awarded to the appellee on the portion of the judgment affirmed. **PASSED**

HB 2143 **Air bags; manufacture, importation, sale, etc., of counterfeit or nonfunctional air bag prohibited; penalty.** Provides that a person is guilty of a Class 1 misdemeanor if he knowingly manufactures, imports, sells, installs, or reinstalls a counterfeit air bag or nonfunctional air bag, or any device that is intended to conceal a counterfeit air bag or nonfunctional air bag, in a motor vehicle. The bill provides an exemption for the sale, installation, reinstallation, or replacement of a motor vehicle air bag on a vehicle solely used for police work. The bill also provides that any sale, installation, reinstallation, or replacement of a motor vehicle air bag with a counterfeit, nonfunctional, or otherwise unlawful air bag shall not be construed as a superseding cause that limits the liability of any party in any civil action. **PASSED**

HB 2167 **Deposition of corporate officer.** Provides that when an officer, as defined in the bill, who is called as a deposition witness files a motion for a protective order because the discovery sought by the deposition is obtainable from some other source that is more convenient, less burdensome, or less expensive, the burden is on the party seeking the deposition to defeat such a motion by showing that (i) the officer's deposition is reasonably calculated to lead to the discovery of admissible evidence, (ii) the officer may have personal knowledge of discoverable information that cannot be discovered through other means, and (iii) a deposition of a representative other than the officer or other methods of discovery are unsatisfactory, insufficient, or inadequate. This bill is identical to SB 1457. **PASSED**

HB 2197 **Summary judgment; limited use of discovery depositions and affidavits.** Allows for the limited use of discovery depositions and affidavits in support of or in opposition to a motion for summary judgment, provided that the only parties to the action are business entities and the amount at issue is $50,000 or more. This bill is identical to SB 1486 **PASSED**

HB 2242 **Statute of limitations; action based on an unsigned, written contract.** Provides that the statute of limitations for an action based on an unsigned, written contract is three years after the cause of action has accrued. This bill is

a recommendation of the Boyd-Graves Conference. **PASSED**

HB 2289 **Jurisdiction of claim; plaintiff's motion to amend claim amount; transfer of matter.** Provides that, where a matter is pending in either the general district court or the circuit court, upon motion of the plaintiff seeking to amend the amount of the claim, the court shall order transfer of the matter to the court having jurisdiction over the claim without requiring a dismissal of the claim or a nonsuit. The bill further provides that, where such an amended claim provides the general district court and the circuit court with concurrent jurisdiction over such a claim, the court shall transfer the matter to either the general district court or the circuit court, as directed by the plaintiff, provided that such court otherwise has jurisdiction over the matter. The bill further provides that, except for good cause shown, no such order of transfer shall issue unless the motion to amend and transfer is made at least 10 days before trial. The bill further provides that the plaintiff shall pay filing and other fees to the clerk of the court to which the case is transferred, prepare and present the order of transfer to the transferring court for entry, and provide a certified copy of the transfer order to the receiving court. **PASSED**

SB 1401 **Department of Forensic Science; possession of unlawful items by employees; immunity.** Provides that a Department of Forensic Science employee may lawfully possess or transfer contraband items or materials while engaged in the performance of his official duties. **PASSED**

SB 1542 **Civil actions; determination of indigency.** Provides that, in the case of a no-fault divorce proceeding, a person who is a current recipient of a state or federally funded public assistance program for the indigent shall not be subject to fees and costs. The bill further provides that, in such no-fault divorce proceeding, such person shall certify to the receipt of such benefits under oath. **PASSED**

SB 1619 **Spoliation of evidence.** Establishes that a party or potential litigant has a duty to preserve evidence that may be relevant to reasonably foreseeable litigation. The bill further provides that a court (i) upon finding prejudice to another party from loss, disposal, alteration, concealment, or destruction of such evidence, may order measures no greater than necessary to cure the prejudice, or (ii) only upon finding that the party acted recklessly or with the intent to deprive another party of the evidence's use in the litigation, may (a) presume that the evidence was unfavorable to the party, (b) instruct the jury that it may or shall presume that the evidence was unfavorable to the party, or (c) dismiss the action or enter a default judgment. The bill further provides that no independent cause of action for negligent or intentional spoliation of evidence is created. **PASSED**

SB 1627 **Summons for unlawful detainer; initial hearing; subsequent filings; termination notice.** Provides that if an initial hearing on a summons for unlawful detainer cannot be held within 21 days from the date of filing, it shall be held as soon as practicable, but not later than 30 days after the date of the filing. The bill further provides that an order of possession for the premises in an unlawful detainer action shall not be entered unless the plaintiff or the plaintiff's attorney or agent has presented a copy of a proper termination notice that the court admits into evidence. The bill allows a plaintiff to amend the amount alleged to be due and owing in an unlawful detainer action to request all amounts due and owing as of the date of a hearing on the action and to further amend such an amount to include additional amounts that become due and owing prior to the final disposition of a pending unlawful detainer action. The bill prohibits a plaintiff from filing a subsequent and additional

unlawful detainer summons for such additional amounts. This bill is a recommendation of the Virginia Housing Commission and is identical to HB 1922. **PASSED**

TORT LAW

– FAILED –

HB 1624 **Sanctions; other frivolous pleadings.** Provides that a court may consider other similar, previously filed pleadings, motions, or other papers filed by a person in violation of the sanctions statute in determining sanctions on the case immediately before the court. **FAILED**

SB 1084 **Use of firearm in commission of crime; civil liability.** Provides that a person may be held civilly liable for injury to the person or property of another or for wrongful death resulting from the use of a firearm in the commission of a crime if it can be shown by clear and convincing evidence that the firearm came into the possession of the person who committed the crime because of the failure of the civil defendant to reasonably secure the firearm from theft or unauthorized possession. The bill provides that a civil defendant exercising the ordinary standard of care for securing firearms will not be held civilly liable. **FAILED**

SB 1119 **Mechanics' liens; right to withhold payment.** Specifies that the use of funds paid to a contractor or subcontractor by such contractor or subcontractor before paying all amounts due for labor performed or material furnished gives rise to a civil cause of action for a party who is owed such funds. The bill further specifies that such cause of action does not affect a contractor's or subcontractor's right to withhold payment for failure to properly perform labor or furnish materials and that any contractual provision that allows a party to withhold funds due on one contract for alleged claims or damages due on another contract is void as against public policy. **FAILED**

HB 1897 **Equine activity liability; carriage rides.** Incorporates, for the purposes of determining equine activity liability, the act of riding in or driving a carriage or other equine-drawn vehicle into the definition of "equine activity" and adds a person who gives a carriage ride to the definition of "equine professional." The bill includes numerous technical amendments. **FAILED**

HB 2027 **Action against parents for minor knowingly possessing a firearm on school property; civil liability.** Creates a civil cause of action against the parent, guardian, legal custodian, or other person standing in loco parentis of a minor for injury to the person or property of another or for wrongful death resulting from the minor knowingly possessing a firearm on school property if it can be shown by clear and convincing evidence that the minor came into possession of such firearm because of the failure of the civil defendant to reasonably secure the firearm. The bill provides that any recovery from the parent, guardian, legal custodian, or other person standing in loco parentis of such minor shall not preclude full recovery from such minor, except to the amount of recovery from such parent, guardian, legal custodian, or other person standing in loco parentis. **FAILED**

HB 2044 **Medical records; subpoena duces tecum; additional time to comply.** Provides that a health care provider may make a written request to the party requesting the subpoena duces tecum or the party on whose behalf the subpoena was issued for such party's consent to an additional seven days within which to comply with such subpoena, which consent shall not be unreasonably withheld, provided such subpoena was served within 15 days of the return date and provided such additional time does not adversely affect a party's ability to

timely prepare for trial, depositions, or such other proceeding. **FAILED**

HB 2111 **Immunity from civil liability; abuse of process, malicious prosecution, or intentional infliction of emotional distress; statements made in the course of judicial proceedings or communications made relating to criminal conduct.** Adds statements made in the course of judicial proceedings and communications made to any government officer relating to potential criminal conduct to the list of persons' statements that are immune from certain actions or civil liability. The list further adds abuse of process, malicious prosecution, and intentional infliction of emotional distress to the list of actions from which such person is immune. **FAILED**

HB 2116 **Disposition of the remains of a decedent; right to control.** Establishes a priority order for the right to control the disposition of the remains of a decedent; the location, manner, and condition of disposition; and the arrangements for funeral goods and services to be provided, as well as circumstances that would forfeit this right. The bill establishes procedures for resolving disagreements among those who have the right to control and provides liability protections for licensed funeral establishments, funeral service licensees, registered crematories, or registered crematory operators that rely in good faith upon the instructions of an individual claiming the right of disposition. **FAILED**

SB 1282 **Safety belt systems; rear passengers; primary offense.** Expands the requirement that any driver and any person at least 18 years of age use a safety belt system in the front seat while a motor vehicle is in motion on a public highway to include occupants in rear passenger seats, defined in the bill. The bill makes any violation of the statute governing the required use of safety lap belts and shoulder harnesses a primary offense. **FAILED**

SB 1302 **Rights of persons with disabilities; procedures for certain actions; website accessibility.** Requires a person who alleges that the website of a bank, trust company, savings institution, or credit union does not comply with applicable law regarding its accessibility by the vision impaired or hearing impaired to provide such entity with notice of the alleged violation at least 120 days prior to filing a civil cause of action. If the entity cures the defect within the 120 days, then the court shall dismiss the action. The bill also requires the court to dismiss a cause of action filed after the defendant has cured the defect and award reasonable costs and attorney fees to the defendant. **FAILED**

SB 1309 **Immunity of employers and potential employers; reports of violent behavior.** Provides civil immunity to an employer who makes a report to a potential employer or law-enforcement agency of violent or threatened violent behavior, as defined in the bill, by an employee or former employee, provided that such a report was made in good faith and with reasonable cause to make such report. The bill further provides immunity to a potential employer who receives such a report and takes reasonable action in good faith to respond to the violent or threatened violent behavior noted in such report. The bill further provides that the court shall award reasonable attorney fees and costs to any employer or potential employer who has a suit dismissed against him pursuant to the immunity provided to him. **FAILED**

SB 1341 **Use of handheld personal communications devices while driving.** Prohibits any person from holding a handheld personal communications device while driving a motor vehicle. Current law prohibits only the reading of any email or text message and manually entering letters or text in such a device as a means of communicating. The bill expands the exemptions to include

handheld personal communications devices that are being held and used (i) as an amateur radio or a citizens band radio; or (ii) for official Department of Transportation or traffic incident management services. **FAILED**

HB 2257 **Dangerous or vicious dogs; emotional distress damages.** Authorizes a general district court to order the owner of a dog that is found to be a dangerous dog to pay restitution for emotional distress damages to any person injured by the animal or whose companion animal was injured or killed by the animal. The bill also authorizes the court to order the owner of a dog that is found to be a vicious dog to pay restitution for emotional distress damages to any person injured by the animal or to the estate of any person killed by the animal. **FAILED**

HB 2264 **Safety belt system use in motor vehicles.** Requires all occupants of motor vehicles to utilize a safety belt system. Current law requires the use of safety belts only by (i) occupants under the age of 18, (ii) drivers, and (iii) passengers 18 years of age or older occupying the front seat. The bill changes a violation of safety belt system requirements by a person occupying a front seat from a secondary offense to a primary offense. **FAILED**

HB 2364 **Major information technology project procurement; terms and conditions; limitation of liability provisions.** Requires, in any contract for a major information technology project, terms and conditions relating to the indemnification obligations and liability of a supplier to be reasonable and to not exceed in aggregate twice the value of the contract. The bill also provides that there is be no limitation on the liability of a supplier for (i) any intentional or willful misconduct, fraud, or recklessness of a supplier or any employee of a supplier or (ii) claims for bodily injury, including death, and damage to real property or tangible personal property resulting from the negligence of a supplier or any employee of a supplier. The bill provides an exception to such conditions where the Secretary of Administration approves a reasonable maximum alternative limitation of liability amount recommended by the Chief Information Officer of the Commonwealth based on a risk assessment showing exceptional risk to the Commonwealth. This bill is identical to SB 1329. **FAILED**

SB 1550 **Bicyclists and other vulnerable road users.** Provides that a person who operates a motor vehicle in a careless or distracted manner and is the proximate cause of serious physical injury to a vulnerable road user, defined in the bill as a pedestrian or person riding a bicycle, electric wheelchair, electric bicycle, wheelchair, skateboard, skates, foot-scooter, animal, or animal-drawn vehicle, is guilty of a traffic infraction. The bill prohibits the driver of a motor vehicle from using or crossing into a bicycle lane to pass or attempt to pass another vehicle except to provide traffic incident management services, when directed by a law-enforcement officer, or when the roadway is otherwise impassable due to weather conditions, an accident, or an emergency situation. **FAILED**

HB 2675 **Initiation of a civil action; clerk of a general district court.** Requires a general district court clerk to file, process, and issue for service of process any pleading initiating a civil action in the general district court within 14 days of receipt of such pleading. **FAILED**

MEDICAL MALPRACTICE

– PASSED –

HB 1640 **Health carriers; nurse practitioners.** Requires health insurers and health services plan providers whose policies or contracts cover services that may be legally performed by licensed nurse practitioners to provide equal coverage for such services when rendered by a licensed nurse practitioner. The bill contains an enactment that exempts the measure from the requirement that the Health Insurance Reform Commission review any legislative measure containing a mandated health insurance benefit or provider. The bill has a delayed effective date of October 1, 2019. **PASSED**

SB 1161 **Expedited review of adverse coverage determinations; cancer patients.** Provides that a covered person shall not be required to have exhausted his health carrier's internal appeal process before seeking an external review of an adverse determination regarding coverage of treatment if the treatment is to treat his cancer. The measure provides that a covered person may request an expedited external review if the adverse determination relates to the treatment of a cancer of the covered person. The measure requires health carriers' notices of the right to an external review to notify covered persons of this provision. This bill is identical to HB 1915. **PASSED**

SB 1106 **Licensure of physical therapists and physical therapist assistants; Physical Therapy Licensure Compact.**Authorizes Virginia to become a signatory to the Physical Therapy Licensure Compact. The Compact permits eligible licensed physical therapists and physical therapist assistants to practice in Compact member states, provided they are licensed in at least one member state. In addition, the bill requires each applicant for licensure in the Commonwealth as a physical therapist or physical therapist assistant to submit fingerprints and provide personal descriptive information in order for the Board to receive a state and federal criminal history record report for each applicant. The bill has a delayed effective date of January 1, 2020, and directs the Board of Physical Therapy to adopt emergency regulations to implement the provisions of the bill. **PASSED**

HB 1971**Health professions and facilities; adverse action in another jurisdiction.** Provides that the mandatory suspension of a license, certificate, or registration of a health professional by the Director of the Department of Health Professions is not required when the license, certificate, or registration of a health professional is revoked, suspended, or surrendered in another jurisdiction based on disciplinary action or mandatory suspension in the Commonwealth. The bill extends the time by which the Board of Pharmacy (Board) is required to hold a hearing after receiving an application for reinstatement from a nonresident pharmacy whose registration has been suspended by the Board based on revocation or suspension in another jurisdiction from not later than its next regular meeting after the expiration of 30 days from receipt of the reinstatement application to not later than its next regular meeting after the expiration of 60 days from receipt of the reinstatement application. **PASSED**

MEDICAL MALPRACTICE

– FAILED –

HB 2128 **Telemedicine; physicians licensed in contiguous jurisdictions.** Authorizes a person licensed to practice medicine or osteopathy who is in good standing with the applicable regulatory agency of a jurisdiction that is contiguous to the Commonwealth to provide health care services to patients located in the Commonwealth through use of telemedicine services. **FAILED**

SB 1439 **Death certificates; medical certification; electronic filing.** Requires the completed medical certification portion of a death certificate to be filed electronically with the State Registrar of Vital Records through the Electronic Death Registration System and provides that, except for under certain circumstances, failure to file a medical certification of death electronically through the Electronic Death Registration System shall constitute grounds for disciplinary action by the Board of Medicine. The bill includes a delayed effective date of January 1, 2020, and a phased-in requirement for registration with the Electronic Death Registration System and electronic filing of medical certifications of death for various categories of health care providers. The bill directs the Department of Health to work with stakeholders to educate and encourage physicians, physician assistants, and nurse practitioners to timely register with and utilize the Electronic Death Registration System. **FAILED**

HB 2556 **Department of Health Professions and health regulatory boards; information obtained in an investigation or disciplinary proceeding; authorized disclosures.** Provides that provisions protecting the confidentiality of information obtained during an investigation or disciplinary hearing do not prohibit the disclosure of information about a suspected violation of state or federal law or regulation to state law enforcement. Under current law, such disclosure is authorized only to agencies within the Health and Human Resources Secretariat or to federal law-enforcement agencies. The bill also provides that investigative staff of agencies to which disclosure is authorized are not prohibited from interviewing fact witnesses, disclosing to fact witnesses the identity of the subject of the complaint or report, or reviewing with fact witnesses any portion of records or other supporting documentation necessary to refresh the fact witnesses' recollection. **FAILED**

INSURANCE LAW

– PASSED –

HB 1867 **Motor vehicle insurance; compliance verification.** Requires motor vehicle insurance companies to report all required insurance information to the Department of Motor Vehicles (DMV) within 30 days of a policy change and to respond to all DMV requests for acknowledgment by confirming or denying the existence of an insurance policy within 15 days of receiving the request. The measure requires such insurers to report all necessary insurance information to the DMV electronically. The measure updates the types of policy updates and necessary data fields required to operate DMV's insurance verification process. The measure requires DMV to initiate the insurance verification process following receipt of a report that it processed an uninsured motorist claim involving an uninsured motor vehicle registered in Virginia. The measure provides that if a customer opts to surrender his license plates to DMV online or by telephone, he is not entitled to a partial refund of the cost of registration fees. The measure authorizes the DMV to dispense with a customer's suspension if a customer provides evidence that he was in compliance with Virginia's insurance laws. The measure renames the fee charged after a violation of Virginia's insurance laws from the uninsured motor vehicle fee to the noncompliance fee, increases the fee from $500 to $600, and directs the additional revenue to the DMV's special fund to be used for enhancements to DMV's insurance verification program. The measure also amends Virginia's installment payment program to (i) allow out-of-state individuals to apply for an installment payment plan; (ii) allow a customer to enter into a second installment payment plan after defaulting on the first plan; and (iii) authorize the Commissioner to extend an installment payment due date by up to 30 days when events outside of DMV's control adversely affect its ability to accept payment. An enactment clause requires DMV to report in 2024 to the General Assembly on the effectiveness of this measure in improving the insurance verification program. An enactment clause postpones the effective date of the provisions that require electronic filing of insurance information and update the types of data required to be provided by insurers. This bill is identical to SB 1787. **PASSED**

HB 1883 **Motor vehicle insurance policies; foster parents and foster children.** Prohibits an insurer from refusing to issue or failing to renew a motor vehicle insurance policy solely because of the status of the applicant or policyholder, as applicable, as a foster care provider or a person in foster care. **PASSED**

SB 1293 **Uninsured motorist insurance coverage; settlement and release.** Provides that any release executed as a result of a liability insurer settling a personal injury claim with an underinsured claimant for the available limits of the liability insurer's coverage shall not operate to release any parties other than the liability insurer and the underinsured motorist. The bill clarifies that neither a duty to defend nor an attorney-client relationship is created between the underinsured motorist and counsel for the underinsured motorist benefits insurer without the express intent and agreement of the underinsured motorist. The measure modifies the language in the written notice that is required to be provided to the underinsured motorist upon settlement to further clarify that no attorney-client relationship or duty to defend is created between the underinsured motorist and the underinsured motorist benefits insurer as a result of the settlement and release. The bill clarifies that by sending the notice and release to the underinsured motorist's last known address by certified mail, the liability insurer satisfies the requirement of having the

underinsured motorist sign the release and initial the notice. **PASSED**

HB 2230 **Insurance; use of credit rating.** Clarifies what constitutes adverse action in the use of credit in the rating and underwriting of homeowners and private passenger automobile insurance policies. An insurer is required to notify the applicant or insured when an insurer takes adverse action based on credit information. The measure conforms the definition of adverse action to the U.S. Supreme Court's decision in *Safeco Insurance Company v. Burr*, in which it held that an adverse action has occurred only when the use of credit information puts the applicant or insured in a worse position than if credit had not been considered. **PASSED**

HB 2538 **Balance billing; elective services.** Requires a facility where a covered person receives scheduled elective services to post the required notice or inform the covered person of the required notice at the time of pre-admission or pre-registration. The bill also requires such a facility to inform the covered person or his legal representative of the names of all provider groups providing health care services at the facility, that consultation with the covered person's managed care plan is recommended to determine if the provider groups providing health care services at the facility are in-network providers, and that the covered person may be financially responsible for health care services performed by a provider that is not an in-network provider, in addition to any cost-sharing requirements. **PASSED**

SB 1565 **Travel insurance.** Establishes procedures and requirements for travel protection plans and travel administrators. The measure establishes travel insurance as an inland marine line of insurance sold by property and casualty insurance agents. The measure (i) prohibits any person from acting as a limited lines travel insurance agent unless properly licensed, (ii) prohibits any person from acting as a travel retailer unless properly registered, and (iii) authorizes the State Corporation Commission to take enforcement actions, including suspending, revoking, or terminating a license. The measure establishes a premium tax on travel insurance premiums paid by residents of the Commonwealth and establishes acceptable practices for the sale and advertising of travel insurance. The measure applies to travel insurance policies purchased on or after July 1, 2019. This bill is identical to HB 2186. **PASSED**

INSURANCE LAW

– FAILED –

SB 1117 **Uninsured and underinsured motorist insurance policies; bad faith.** Provides that if an insurance company denies, refuses, or fails to pay its insured, or refuses a reasonable settlement demand within the policy's coverage limits for a claim for uninsured or underinsured motorist benefits within a reasonable time after being presented with a demand for such benefits and it is subsequently found that such denial, refusal, or failure was not in good faith, then the insurance company shall be liable to the insured for the full amount of the judgment and reasonable attorney fees, expenses, and interest. **FAILED**

WORKERS COMPENSATION

– PASSED –

HB 1804 **Workers' compensation; presumption of compensability for certain diseases.** Adds cancers of the colon, brain, or testes to the list of cancers that are presumed to be an occupational disease covered by the Virginia Workers' Compensation Act when firefighters and certain employees develop the cancer. The measure will become effective if reenacted by the 2020 Session of the General Assembly. The measure also directs the 2020 Session of the General Assembly, in considering and enacting any legislation relating to workers' compensation and the presumption of compensability for certain cancers, to consider any research, findings, and recommendations from the Joint Legislative Audit and Review Commission's review of the Virginia Workers' Compensation program. The provisions of this bill do not become effective unless reenacted by the 2020 Session of the General Assembly. This bill is identical to SB 1030. **PASSED**

HB 2022 **Workers' compensation; filing of claim.** Provides that if an employer has received notice of an accident resulting in compensable injury to an employee and the employer has paid compensation or wages to such employee during incapacity for work resulting from such injury or the employer has failed to file the report of said accident with the Virginia Workers' Compensation Commission or otherwise has under a workers' compensation plan or insurance policy furnished or caused to be furnished medical service to such employee, the statute of limitations applicable to the filing of a claim shall be tolled until the last day for which such payment of compensation or wages or furnishment of medical services is provided and that occurs more than six months after the date of accident. The measure provides that no such payment of wages or workers' compensation benefits or furnishment of medical service occurring after the expiration of the statute of limitations applies to this provision. The measure also provides that (i) if the employer has failed to file a first report, the statute of limitations shall be tolled during the duration thereof until the employer filed the first report of accident and (ii) if more than one of the above tolling provisions applies, whichever of those causes the longer period of tolling shall apply. **PASSED**

SB 1030 **Workers' compensation; presumption of compensability for certain diseases.** Adds cancers of the colon, brain, or testes to the list of cancers that are presumed to be an occupational disease covered by the Virginia Workers' Compensation Act when firefighters and certain employees develop the cancer. The measure will become effective if reenacted by the 2020 Session of the General Assembly. The measure also directs the 2020 Session of the General Assembly, in considering and enacting any legislation relating to workers' compensation and the presumption of compensability for certain cancers, to consider any research, findings, and recommendations from the Joint Legislative Audit and Review Commission's review of the Virginia Workers' Compensation program. The provisions of this bill do not become effective unless reenacted by the 2020 Session of the General Assembly. The bill incorporates SB 1022, SB 1172, and SB 1528 and is identical to HB 1804. **PASSED**

SB 1729 **Workers' compensation; payment of claims.** Prohibits a health care provider from submitting a claim to the Workers' Compensation Commission seeking additional payment for medical services rendered to a claimant before July 1, 2014, if the health care provider has previously accepted payment for the same medical services pursuant to the federal Longshore and Harbor Workers' Compensation Act. The measure prohibits the Commission from adjudicating any such claim. **PASSED**

WORKERS COMPENSATION

– FAILED –

HB 1706 **Workers' compensation; PTSD.** Declares that post-traumatic stress disorder (PTSD) suffered by a first responder is an occupational disease suffered in the line of duty if, among other conditions, the PTSD is demonstrated by clear and convincing evidence to have resulted from the responder's documented exposure to a qualifying event in the course of his employment. Qualifying events include seeing a deceased minor, directly witnessing the death of a minor, and seeing a decedent whose death involved grievous bodily harm of a nature that shocks the conscience. The measure also requires employers of first responders to provide educational training related to PTSD awareness, prevention, mitigation, and treatment. JLARC will study this issue in the coming months. **FAILED**

HB 1747 **Workers' compensation; retaliatory discharge of employee.** Prohibits an employer or other person from discharging an employee if the discharge is motivated to any extent by knowledge or belief that the employee has filed a claim or taken or intends to take certain other actions under the Virginia Workers' Compensation Act. Currently, retaliatory discharges are prohibited only if the employer or other person discharged an employee solely because the employee has taken or intends to take such an action. **FAILED**

HB 1748 **Workers' compensation; employer to notify employee of intent.** Requires an employer whose employee has filed a claim under the Virginia Workers' Compensation Act to advise the employee whether the employer intends to accept or deny the claim or is unable to make such a determination because it lacks sufficient information from the employee. If the employer is unable to make such a determination because it lacks sufficient information from the employee, the employer shall so state and identify the needed additional information. If the employer intends to deny the claim, it shall provide the reasons. **FAILED**

HB 2513 **Workers' compensation; occupation disease presumptions; PTSD.** Establishes a presumption that if certain firefighters, law-enforcement officers, hazardous materials officers, animal protection police officers, or 9-1-1 emergency call takers, dispatchers, or similarly situated employees (i) receive a diagnosis of post-traumatic stress disorder (PTSD) from a licensed physician, licensed clinical psychologist, licensed professional counselor, or licensed clinical social worker; (ii) suffer death or any impairment resulting in total or partial disability from work caused by the PTSD; and (iii) receive a statement from such a provider that the PTSD was caused by a single critical event or multiple exposures to critical events that occurred in the course of the employment, then the PTSD is an occupational disease, suffered in the line of duty, that is covered by the Virginia Workers' Compensation Act unless such presumption is overcome by a preponderance of competent evidence to the contrary. The measure provides that a "critical event" includes an event that results in serious injury or death to an individual; deals with a minor who has been injured, killed, abused, exploited, or a victim of a crime; deals with mass casualties; results in injury to or the death of a coworker; involves an immediate threat to the life of the claimant or another individual; or involves the abuse, cruelty, injury, exploitation, or death of an animal. **FAILED**

CRIMINAL LAW

– PASSED –

HB 1664 **Out-of-state conviction of drug offenses; restricted driver's license.** Provides that a person convicted of a drug offense in another state may petition the general district court of the county or city in which he resides for a restricted driver's license allowing the petitioner to operate a motor vehicle in the Commonwealth on a restricted basis, provided that no such restricted license shall permit the petitioner to operate a commercial vehicle. This bill is identical to SB 1181. **PASSED**

HB 1671 **Child abuse and neglect; investigations by local boards of social services.** Requires local boards of social services, when investigating an individual who is the subject of child abuse or neglect allegations or the subject of a family assessment, to determine whether such individual has resided in another state within at least the preceding five years and, if he has resided in another state, to request a search of the child abuse and neglect registry or equivalent registry maintained by such state. **PASSED**

HB 1751 **Forgery; venue.** Provides that, in addition to the current forgery venue provisions, forgery may be prosecuted in any county or city where an issuer, acquirer, or account holder sustained a financial loss as a result of the offense. This bill is identical to SB 1050. **PASSED**

HB 1833 **Investigations and reports by probation officers; persons eligible for parole.** Allows a presentence report to be made available for review without a court order to incarcerated persons who are eligible for release by the Virginia Parole Board, or to such person's counsel. **PASSED**

SB 1031 **False information and hoax criminal activities; penalty.** Makes it a Class 1 misdemeanor for any person to knowingly, with the intent to mislead a law-enforcement agency, cause another to give a false report to any law-enforcement official by publicly simulating a violation of Chapter 4 (§ 18.2-30 et seq.) (Crimes Against the Person) or Chapter 5 (§ 18.2-77 et seq.) (Crimes Against Property) of Title 18.2. This bill is identical to HB 2056. **PASSED**

SB 1069 **Habeas corpus.** Reorganizes, updates outdated language, and removes unused provisions in several writ of habeas corpus statutes. The bill clarifies certain procedural issues such as service, venue, amendments for failure to name a proper party respondent, necessity of a response, and transfer for evidentiary hearings. This bill is a recommendation of the Judicial Council. This bill is identical to HB 1909. **PASSED**

SB 1150 **Issuance of warrants by magistrates.** Provides that a magistrate may not issue an arrest warrant for a misdemeanor offense where the accused is a law-enforcement officer and the alleged offense arises out of the performance of his public duties upon the basis of a complaint by a person other than a law-enforcement officer or an animal control officer without prior authorization by the attorney for the Commonwealth or by a law-enforcement agency. **PASSED**

SB 1166 **Clerks of court; collection of DNA sample for certain offenses; disclosure of tax information; Torrens system.** Provides that a blood, saliva, or tissue sample shall be taken for any person convicted of a local ordinance that is similar to a misdemeanor for which a blood, saliva, or tissue sample is currently required to be taken. The bill also states that the prohibition for certain state and local officials from divulging tax information is not applicable

to the disclosure of information contained in an estate's probate tax return to a commissioner of accounts making a settlement of accounts filed in such estate. Finally, the bill repeals the provision of law establishing the Torrens system, which provided for the settlement, registration, transfer, and assurance of titles to land and established courts of land registration. **PASSED**

HB 1909 **Habeas corpus.** Reorganizes, updates outdated language, and removes unused provisions in several writ of habeas corpus statutes. The bill clarifies certain procedural issues such as service, venue, amendments for failure to name a proper party respondent, necessity of a response, and transfer for evidentiary hearings. This bill is a recommendation of the Judicial Council. This bill is identical to SB 1069. **PASSED**

HB 1911 **Duties of drivers of vehicles approaching stationary vehicles displaying certain warning lights; penalty.** Makes a driver's failure to move into a nonadjacent lane on a highway with at least four lanes when approaching a stationary vehicle displaying flashing, blinking, or alternating blue, red, or amber lights, or, if changing lanes would be unreasonable or unsafe, to proceed with due caution and maintain a safe speed, reckless driving, which is punishable as a Class 1 misdemeanor. Under current law, a first such offense is a traffic infraction punishable by a fine of not more than $250, and a second such offense is punishable as a Class 1 misdemeanor. **PASSED**

HB 1922 **Summons for unlawful detainer; initial hearing; subsequent filings; termination notice.** Provides that if an initial hearing on a summons for unlawful detainer cannot be held within 21 days from the date of filing, it shall be held as soon as practicable, but not later than 30 days after the date of the filing. The bill further provides that an order of possession for the premises in an unlawful detainer action shall not be entered unless the plaintiff or the plaintiff's attorney or agent has presented a copy of a proper termination notice that the court admits into evidence. The bill allows a plaintiff to amend the amount alleged to be due and owing in an unlawful detainer action to request all amounts due and owing as of the date of a hearing on the action and to further amend such an amount to include additional amounts that become due and owing prior to the final disposition of a pending unlawful detainer action. The bill prohibits a plaintiff from filing a subsequent and additional unlawful detainer summons for such additional amounts and is identical to SB 1627. **PASSED**

HB 1933 **Medical and mental health treatment of prisoners incapable of giving consent.** Establishes a process for the sheriff or administrator in charge of a local or regional correctional facility to petition a court to authorize medical or mental health treatment for a prisoner in such facility who is incapable of giving informed consent for such treatment. The process parallels the existing process for the Director of the Department of Corrections to seek authorization to provide involuntary treatment to prisoners in state correctional facilities. The bill requires the court to authorize such treatment in a facility designated by the sheriff or administrator upon finding that the prisoner is incapable, either mentally or physically, of giving informed consent; that the prisoner does not have a relevant advanced directive, guardian, or other substitute decision maker; that the proposed treatment is in the best interests of the prisoner; and that the jail has sufficient medical and nursing resources available to safely administer the treatment and respond to any adverse side effects that might arise from the treatment. The bill provides that the treatment ordered may be provided within a local or regional correctional facility if such facility is licensed to provide such treatment. If statutory procedures are followed, the service

provider does not have liability based on lack of consent or lack of capacity to consent unless there is injury or death resulting from gross negligence or willful and wanton misconduct. **PASSED**

HB 1940 **Child Pornography Registry; contents of Registry; criminal investigations; report.** Requires copies of all known or suspected child pornography found during the course of a criminal investigation of child pornography offenses to be included in the Child Pornography Registry (the Registry). **PASSED**

HB 1941 **Maiming, etc., of another; driving while intoxicated; operating watercraft while intoxicated; penalties.**Increases from a Class 6 felony to a Class 4 felony the punishment for a person who, as a result of driving while intoxicated or operating a watercraft or motorboat while intoxicated in a manner so gross, wanton, and culpable as to show reckless disregard for human life, unintentionally causes the serious bodily injury, as defined in the bill, of another person resulting in permanent and significant physical impairment. The bill creates a Class 6 felony for such driving or operation that unintentionally causes the serious bodily injury, as defined in the bill, of another person. **PASSED**

HB 1953 **Appeals from founded complaints of child abuse or neglect; concurrent criminal investigations.** Provides that whenever an appeal of a finding by a local department of social services is made and a criminal investigation is also commenced against the appellant for the same conduct involving the same victim as investigated by the local department, the appeal process shall automatically be stayed until the criminal investigation is closed or, in the case of a criminal investigation that is not completed within 180 days of the appellant's request for an appeal, for 180 days. This bill is identical to SB 1416. **PASSED**

HB 1998 **Exposure to bodily fluids; infection with human immunodeficiency virus or hepatitis B or C viruses; expedited testing.** Requires a general district court to hold a hearing within 48 hours of a petition being filed seeking to compel collection of a blood specimen for testing for human immunodeficiency virus or the hepatitis B or C viruses when exposure to bodily fluids occurs between a person and any health care provider, person employed by or under the direction and control of a health care provider, law-enforcement officer, firefighter, emergency medical services personnel, person employed by a public safety agency, or school board employee and the person whose blood specimen is sought refuses to consent to providing such specimen. **PASSED**

SB 1150 **Issuance of warrants by magistrates.** Provides that a magistrate may not issue an arrest warrant for a misdemeanor offense where the accused is a law-enforcement officer and the alleged offense arises out of the performance of his public duties upon the basis of a complaint by a person other than a law-enforcement officer or an animal control officer without prior authorization by the attorney for the Commonwealth or by a law-enforcement agency. **PASSED**

SB 1231 **Incompetent defendants; capital murder.** Provides that when a defendant charged with capital murder is determined to be unrestorably incompetent, the court may order that the defendant receive continued treatment to restore competency provided that hearings be held at yearly intervals for five years and at biennial intervals thereafter, or at any time that the director of the treating facility or his designee submits a competency report to

the court that the defendant's competency has been restored. **PASSED**

SB 1257 **Child abuse and neglect; mandatory reporters.** Adds to the list of persons who are required to report suspected child abuse or neglect ministers, priests, rabbis, imams, and duly accredited practitioners of any religious organization or denomination usually referred to as a church; however, the bill exempts such clergy members from the mandatory reporting requirement when the information supporting the suspicion of child abuse or neglect (i) is required by the doctrine of the religious organization or denomination to be kept confidential or (ii) would be subject to the exemptions set forth in § 8.01-400 or 19.2-271.3 if offered as evidence in court. This bill is identical to HB 1659. **PASSED**

HB 2042 **Assault and battery against a family or household member; prior conviction; mandatory minimum term of confinement.** Provides that upon a conviction for assault and battery against a family or household member where it is alleged in the warrant, petition, information, or indictment on which a person is convicted that such person has been previously convicted of an offense that occurred within a period of 10 years of the instant offense against a family or household member of (i) assault and battery against a family or household member, (ii) malicious wounding or unlawful wounding, (iii) aggravated malicious wounding, (iv) malicious bodily injury by means of a substance, (v) strangulation, or (vi) an offense under the law of any other jurisdiction that has the same elements of any of the above offenses such person is guilty of a Class 1 misdemeanor and the sentence of such person shall include a mandatory minimum term of confinement of 60 days. **PASSED**

HB 2056 **False information and hoax criminal activities; penalty.** Makes it a Class 1 misdemeanor for any person to knowingly, with the intent to mislead a law-enforcement agency, cause another to give a false report to any law-enforcement official by publicly simulating a violation of Chapter 4 (§ 18.2-30 et seq.) (Crimes Against the Person) or Chapter 5 (§ 18.2-77 et seq.) (Crimes Against Property) of Title 18.2. This bill is identical to SB 1031. **PASSED**

HB 2080 **Physical evidence recovery kit tracking system.** Provides that the Department of Forensic Science (Department) shall maintain a statewide electronic tracking system for physical evidence recovery kits where such kits will be assigned a unique identification number to track each kit from its distribution as an uncollected kit to the health care provider through to its destruction. The bill provides that the Department shall provide access to the tracking system to health care providers, law-enforcement agencies, the Division of Consolidated Laboratory Services, and the Office of the Chief Medical Examiner. The bill also provides that a health care provider shall inform the victim of sexual assault of the unique identification number assigned to the physical evidence recovery kit utilized by the health care provider during the forensic medical examination and provide the victim with information regarding the physical evidence recovery kit tracking system **PASSED**

HB 2278 **Expungement of police and court records; absolute pardon.** Provides for the automatic expungement of the police and court records relating to a person's conviction if he has been granted an absolute pardon for a crime that he did not commit. **PASSED**

HB 2320 **Resetting bail, bond, and recognizance determinations; jurisdiction.** Provides that any motion to alter the terms and conditions of bail where the initial bail decision is made by a judge or clerk of a district court or by a magistrate on any charge

originally pending in that district court shall be filed in that district court unless (i) a bail decision is on appeal, (ii) such charge has been transferred to a circuit court, or (iii) such charge has been certified by a district court. The bill also provides that a bail decision of a higher court from an appeal of a lower court's bail decision shall be remanded to the lower court in which the case is pending for enforcement and modification of bail. As introduced, this bill was a recommendation of the Virginia Criminal Justice Conference. **PASSED**

HB 2413 **Multi-jurisdiction grand jury; secrecy of information.** Provides that any person granted permission to make notes and to duplicate portions of the evidence given before the multi-jurisdiction grand jury shall maintain the secrecy of all information obtained from a review or duplication of the evidence presented to the multi-jurisdiction grand jury, except for disclosure as he deems necessary for use in a criminal investigation or proceeding. The bill also provides that after a person has been indicted by a grand jury, the attorney for the Commonwealth shall notify such person that the multi-jurisdiction grand jury was used to obtain evidence for a prosecution. As introduced, the bill was a recommendation of the Virginia Criminal Justice Conference. **PASSED**

HB 2414 **Transfer of venue; delinquency; adjudication**. Provides that a transfer of venue in delinquency proceedings, which under current law may occur only after adjudication, may occur when such adjudication consists of a finding of facts sufficient to justify a finding of delinquency. This bill is a recommendation of the Committee on District Courts. This bill is identical to SB 1201. **PASSED**

SB 1349 **Safe reporting of overdoses.** Eliminates the requirement to substantially cooperate with law enforcement in any investigation of any criminal offense reasonably related to an overdose in order to qualify for an affirmative defense from prosecution for the unlawful purchase, possession, or consumption of alcohol, possession of a controlled substance, possession of marijuana, intoxication in public, or possession of controlled paraphernalia. **PASSED**

SB 1381 **Student offenses reportable by intake officers to school division superintendents.** Adds (i) threats of death or bodily injury to another person communicated in writing to such person or member of such person's family and (ii) threats to commit serious bodily harm to persons on school property to the list of offenses that a juvenile intake officer is required to report to the school division superintendent when a petition is filed alleging that a juvenile student committed such an offense. This bill is identical to HB 1787. **PASSED**

SB 1395 **Threats of death or bodily injury to a health care provider.** Provides that any person who orally makes a threat to kill or to do bodily injury against any health care provider who is engaged in the performance of his duties in a hospital or in an emergency room on the premises of any clinic or other facility rendering emergency medical care is guilty of a Class 1 misdemeanor, unless the person is on the premises of the hospital or emergency room as a result of an emergency custody order, an involuntary temporary detention order, an involuntary hospitalization order, or an emergency custody order of a conditionally released acquittee. **PASSED**

SB 1416 **Appeals from founded complaints of child abuse or neglect; concurrent criminal investigations.** Provides that whenever an appeal of a finding by a local department of social services is made and a criminal investigation is also commenced against the appellant for the same conduct involving the same victim as investigated by the local

department, the appeal process shall automatically be stayed until the criminal investigation is closed or, in the case of a criminal investigation that is not completed within 180 days of the appellant's request for an appeal, for 180 days. This bill is identical to HB 1953. **PASSED**

SB 1436 **Mandatory reporters of child abuse or neglect; prenatal substance exposure.** Requires any licensed hospital, whenever a health care provider in such hospital reports suspected child abuse or neglect resulting from prenatal substance exposure, to require the development of a written discharge plan that includes, among other things, appropriate treatment referrals and notice to the community services board of the jurisdiction in which the mother resides for the appointment of a discharge plan manager. The bill provides that such reports shall not constitute a per se finding of child abuse or neglect. **PASSED**

HB 2528 **Felony homicide; certain drug offenses; penalty.** Provides that a person is guilty of felony homicide, which constitutes second degree murder and is punishable by confinement of not less than five nor more than 40 years, if the underlying felonious act that resulted in the killing of another involved the manufacture, sale, gift, or distribution of a Schedule I or II controlled substance to another and (i) such other person's death results from his use of the controlled substance and (ii) the controlled substance is the proximate cause of his death. The bill provides that venue for a prosecution of this crime shall lie in the locality where the underlying felony occurred, where the use of the controlled substance occurred, or where death occurred. **PASSED**

HB 2586 **Prostitution and sex trafficking; offenses involving a minor; penalties.** Provides that any person who commits an act of aiding prostitution or illicit sexual intercourse or using a vehicle to promote prostitution or unlawful sexual intercourse, when such act involves a minor, is guilty of a Class 6 felony. Under current law, such acts are punishable as a Class 1 misdemeanor. The bill adds the two new felony offenses to (i) the definition of "violent felony" for the purposes of sentencing guidelines, (ii) the definition of barrier crimes for the purposes of background checks for employees or volunteers providing care to children or the elderly or disabled, (iii) the definition of predicate criminal acts for street gangs, (iv) the definition of racketeering activity under the Virginia Racketeer Influence and Corrupt Organization Act, (v) the list of violations that a multi-jurisdiction grand jury is responsible for investigating, and (vi) the list of offenses requiring registration in the Sex Offender and Crimes Against Minors Registry. **PASSED**

HB 2597 **Child abuse and neglect report or complaint; victims of sex trafficking; taking child victim into custody.** Requires a local department of social services to conduct a sex trafficking assessment upon receiving a complaint of suspected child abuse that is based upon information and allegations that a child is a victim of sex trafficking, provided that the local department has not determined that a separate investigation or family assessment is required. The bill also allows a child-protective services worker of a local department responding to such complaint to take the child victim into custody and allows the local department to maintain custody of the child for up to 72 hours without prior approval of a parent or guardian. As introduced, this bill was a recommendation of the Virginia State Crime Commission. This bill is identical to SB 1661. **PASSED**

HB 2615 **Capital murder; punishment.** Provides that any person convicted of capital murder who was 18 years of age of older at the time of the offense shall be sentenced to no less than a

mandatory minimum term of confinement for life. **PASSED**

HB 2622 **Removal of a child; names and contact information of persons with a legitimate interest.** Provides that, in any proceeding in which a child is removed from his home, the court may order the parents or guardians of such child to provide the names and contact information for all persons with a legitimate interest to the local department of social services. **PASSED**

SB 1501 **Capital murder; law-enforcement officers and fire marshals; mandatory minimum.** Provides that any person convicted of capital murder of a law-enforcement officer or certain other public safety officials who was 18 years of age or older at the time of the offense shall be sentenced to no less than a mandatory minimum term of confinement for life. **PASSED**

SB 1507 **Use of unmanned aircraft systems by law-enforcement officers; persons sought for arrest.** Provides that a law-enforcement officer may deploy an unmanned aircraft system (i) to aerially survey a primary residence of the subject of the arrest warrant to formulate a plan to execute an existing arrest warrant or capias for a felony offense or (ii) to locate a person sought for arrest when such person has fled from a law-enforcement officer and a law-enforcement officer remains in hot pursuit of such person. **PASSED**

SB 1540 **Protective orders; contents of preliminary protective orders; docketing of appeal.** Provides that if a preliminary protective order is issued in an ex parte hearing where the petition for the order is supported by sworn testimony and not an affidavit or a form completed by a law-enforcement officer that includes a statement of the grounds for the order, the court issuing the order shall state in the order the basis on which the order was entered, including a summary of the allegations made and the court's findings. The bill also requires that an appeal of a permanent protective order be docketed within two business days of receipt of such appeal. Under current law, such appeals are to be given precedence on the docket of the court over other civil appeals but otherwise docketed and processed in the same manner as other civil cases. **PASSED**

Unlawful detainer; appeal bond. Provides that for an appeal in an unlawful detainer case, the defendant shall post an appeal bond into the general district court in the amount of outstanding rent, late charges, attorney fees, and any other charges or damages due, as contracted for in the rental agreement, due as of the date the appeal is filed with the court. Once the appeal is perfected, the defendant shall pay the rental amount as contracted for to the plaintiff on or before the fifth day of each month. The bill provides that if such amount is not paid, the judge, upon motion of the plaintiff, shall enter judgment for the outstanding amounts due and an order of possession without further hearings. As introduced, this bill is a recommendation of the Virginia Housing Commission. **PASSED**

HB 2678 **Unlawful dissemination or sale of images of another person; penalty.** Provides, for the purposes of the prohibition against the unlawful dissemination or sale of certain images of another person, that "another person" includes a person whose image was used in creating, adapting, or modifying a videographic or still image with the intent to depict an actual person and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic. This bill is identical to SB 1736. **PASSED**

SB 1736 **Unlawful dissemination or sale of images of another person; penalty.** Provides, for the purposes of the prohibition against the

unlawful dissemination or sale of certain images of another person, that "another person" includes a person whose image was used in creating, adapting, or modifying a videographic or still image with the intent to depict an actual person and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic. This bill is identical to HB 2678. **PASSED**

CRIMINAL LAW

– FAILED –

HB 1665 **Court-established community service programs; community service work in lieu of payment of fine or costs.** Requires courts to provide an option to any person upon whom a fine and costs have been imposed to discharge all or part of the fine or costs by earning credits for the performance of community service work before or after imprisonment. **FAILED**

HB 1716 **Criminal sexual assault; definition of sexual abuse; complaining witness under age 13.** Includes in the definition of "sexual abuse" the intentional touching of any part of a complaining witness's body, either on the skin or the material covering the complaining witness's body, if the complaining witness is under the age of 13 and the act is committed with the intent to sexually molest, arouse, or gratify any person **FAILED**

HB 1745 **Juvenile offenders; parole.** Provides that any person sentenced to a term of life imprisonment for a single felony offense or multiple felony offenses committed while that person was a juvenile and who has served at least 25 years of such sentence, and any person who has active sentences that total more than 25 years for a single felony offense or multiple felony offenses committed while that person was a juvenile and who has served at least 25 years of such sentences, shall be eligible for parole. **FAILED**

HB 1775 **Protective services for adults by local departments of social services; multidisciplinary teams.** Allows local departments of social services to foster, when practicable, the creation, maintenance, and coordination of hospital and community-based multidisciplinary teams to assist the local departments in identifying abused and exploited adults. The bill also provides that such multidisciplinary teams may develop agreements regarding the exchange of information among the parties for the purposes of the investigation and disposition of complaints of adult abuse and exploitation, delivery of services, and protection for abused or exploited adults. This bill is a recommendation of the Virginia Criminal Justice Conference. **INCORPORATED INTO IDENTICAL LEGISLATION (HB 2560 / SB 1224)**

HB 1797 **Places of confinement for juveniles; separation of juveniles from adult offenders.** Provides that when juveniles who are determined by the court to be a threat to the security or safety of other juveniles detained in a juvenile secure facility are transferred to or confined to a jail or other facility for the detention of adults, such adult-detention facility must have the capacity and availability to detain juveniles in accordance with applicable federal and state law. **FAILED**

HB 1813 **Alcoholic beverage control; interdiction; possession or consumption of alcoholic beverages by interdicted persons; repeal.** Repeals provisions allowing for a court to enter an order of interdiction prohibiting the sale of alcoholic beverages to any person who has (i) been convicted of driving any automobile, truck, motorcycle, engine, or train while intoxicated; (ii) shown himself to be a habitual drunkard; (iii) been found guilty of the illegal manufacture, possession, transportation, or sale of alcoholic beverages; or (iv) been found guilty of maintaining a common nuisance. **FAILED**

SB 997 **Marijuana; decriminalization of simple marijuana possession; penalty.** Decriminalizes simple marijuana possession and provides a civil penalty of no more than $50 for a first violation, $100 for a second violation, and $250 for a third or subsequent violation. Current law imposes a maximum fine of $500 and a maximum 30-day jail sentence for a first offense, and subsequent offenses are a Class 1 misdemeanor. **FAILED SENATE COURTS 6-9**

SB 1033 **Body-worn camera; release of recordings; penalty.** Provides a procedure for a defendant to request the inspection and the copying or photographing of any body-worn camera recordings that are within the possession, custody, or control of the Commonwealth. **FAILED**

SB 1037 **Expungement of certain offenses.** Allows a person to petition for expungement of a deferred disposition dismissal for underage alcohol possession or using a false ID to obtain alcohol when the offense occurred prior to the person's twenty-first birthday; all court costs, fines, and restitution have been paid; and the person seeking the expungement is at least 21 years of age and has no other alcohol-related convictions. **PASSED SENATE, FAILED HOUSE**

SB 1053 **Juvenile offenders; parole.** Provides that any person sentenced to a term of life imprisonment for a single felony offense or multiple felony offenses committed while that person was a juvenile and who has served at least 25 years of such sentence, and any person who has active sentences that total more than 25 years for a single felony offense or multiple felony offenses committed while that person was a juvenile and who has served at least 25 years of such sentences, shall be eligible for parole. **FAILED SENATE COURTS, 7-7**

SB 1066 **Post-conviction relief; previously admitted scientific evidence.** Provides that a person who was convicted of certain offenses, upon a plea of not guilty or an Alford plea, or who was adjudicated delinquent, upon a plea of not guilty or an Alford plea, by a circuit court of an offense that would be a covered offense if committed by an adult may petition the Court of Appeals to have his conviction vacated. The petition shall allege (i) the covered offense for which the petitioner was convicted or adjudicated delinquent; (ii) that the petitioner did not commit the covered offense for which the petitioner was convicted or adjudicated delinquent, nor engage in conduct that would support a conviction for a lesser offense or any other crime arising from, or reasonably connected to, the facts supporting the indictment or information upon which he was convicted or adjudicated delinquent; (iii) an exact description of the forensic scientific evidence and its relevance in demonstrating that the petitioner did not commit the covered offense; (iv) specific facts indicating that relevant forensic scientific evidence was not available or could not have been obtained in the exercise of diligence before the expiration of 21 days following entry of the final order of conviction or adjudication of delinquency, or that discredited forensic scientific evidence was admitted at the petitioner's trial or adjudication of delinquency; and (v) that the admission of the discredited forensic scientific evidence or the absence of the newly available forensic scientific evidence was not harmless. **PASSED SENATE, FAILED HOUSE**

SB 1076 **Admissibility of prior inconsistent statements in a criminal case.** Provides that in all criminal cases, evidence of a prior statement that is inconsistent with testimony at the hearing or trial is admissible if the testifying witness is subject to cross-examination and the prior statement (i) was made by the witness under oath at a trial, hearing, or other proceeding or (ii) narrates, describes, or explains an event or condition of which the witness had personal knowledge and (a) the

statement is proved to have been written or signed by the witness; (b) the witness acknowledges, under oath, the making of the statement in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought; or (c) the statement is proved to have been accurately recorded by use of an audio recorder, a video/audio recorder, or any other similar electronic means of sound recording. **FAILED**

SB 1092 **Preliminary protective orders; hearing dates.** Allows the full hearing resulting from the issuance of a preliminary protective order to be heard on the same hearing or trial date as a related criminal offense if such hearing or trial date has already been set for a date later than 15 days after the issuance of the preliminary protective order. **FAILED**

SB 1107 **Disorderly conduct in public places; school activities.** Eliminates the Class 1 misdemeanor for disrupting willfully or while intoxicated, whether willfully or not, the operation of any school or any school activity conducted or sponsored by any school, if the disruption (i) prevents or interferes with the orderly conduct of the operation or activity or (ii) has a direct tendency to cause acts of violence by the person or persons at whom, individually, the disruption is directed. **PASSED SENATE, FAILED HOUSE**

SB 1137 **Death penalty; severe mental illness.** Provides that a defendant in a capital case who had a severe mental illness, as defined in the bill, at the time of the offense is not eligible for the death penalty. The bill establishes procedures for determining whether a defendant had a severe mental illness at the time of the offense and provides for the appointment of expert evaluators. The bill provides that when the defendant's severe mental illness is at issue, a determination will be made by the jury or by the judge in a bench trial as part of the sentencing proceeding, and the defendant bears the burden of proving his severe mental illness by a preponderance of the evidence. **PASSED SENATE, FAILED HOUSE**

HB 1888 **Limitations period; sexual abuse.** Eliminates the civil statute of limitations period for injury resulting from sexual abuse occurring during the infancy or incapacity of the abused person. **FAILED**

HB 1903 **Dissemination of criminal history record information; limitations.** Limits the criminal history information that the Central Criminal Records Exchange, or the criminal justice agency in cases of offenses not required to be reported to the Exchange, may provide to a requesting employer or prospective employer to convictions occurring within seven years prior to the request, except for any information related to a felony act of violence or a barrier crime. **FAILED**

HB 1976 **State Police; reporting hate crimes.** Includes within the definition of "hate crime" a criminal act committed against a person because of sexual orientation or gender identification and requires the reporting of the commission of such crime to the State Police. **FAILED**

HB 1991 **Domestic terrorism offenses; penalty.** Creates a new separate and distinct Class 5 felony for any person who actively participates in or is a member of a domestic terrorist organization, defined in the bill, and who knowingly and willfully participates in any act of domestic terrorism, also defined in the bill, committed for the benefit of, at the direction of, or in association with any domestic terrorist organization. **FAILED**

SB 1137 **Death penalty; severe mental illness.** Provides that a defendant in a capital case who had a severe mental illness, as defined in the bill, at the time of the offense is not eligible for the death penalty. The bill

establishes procedures for determining whether a defendant had a severe mental illness at the time of the offense and provides for the appointment of expert evaluators. **PASSED SENATE 23-17, FAILED HOUSE COURTS**

SB 1263 **Juveniles; trial as adult.** Increases the minimum age that a juvenile can be tried as an adult in circuit court for a felony larceny offense from 14 years of age to 16 years of age. **PASSED SENATE 33-7, FAILED HOUSE COURTS**

HB 2036 **Prima facie evidence of intent to commit larceny by employed caregiver of an adult.** Provides that in any prosecution of an employed caregiver of an adult for larceny, the pawning of property by such caregiver shall be prima facie evidence of intent to commit larceny of such property if (i) the property belongs to the adult the caregiver is employed to care for; (ii) the caregiver cares for such adult in the adult's home; (iii) the caregiver is not a family or household member of such adult; and (iv) the caregiver does not receive written authorization to take and pawn such property prior to pawning it. **FAILED**

HB 2119 **School attendance officer; motion for a rule to show cause; child in need of supervision.** Authorizes a school attendance officer or division superintendent or his designee acting as an attendance officer to complete, sign, and file with the clerk of court a motion for a rule to show cause regarding the violation or enforcement of a school attendance order entered by a juvenile and domestic relations district court in response to the filing of a petition alleging the juvenile is a child in need of supervision. The bill also provides that such a filing is not considered the unauthorized practice of law. **PASSED HOUSE, FAILED SENATE**

HB 2136 **Evidence; accident reconstruction; criminal cases.** Provides that in any criminal case, an accident reconstruction expert, when properly qualified, may testify as an expert witness in a court of law subject to the Rules of Supreme Court. **PASSED HOUSE, FAILED SENATE**

HB 2199 **Preliminary removal order; preliminary protective order for a child; hearing; evidence.** Provides that, in a hearing on a preliminary removal order or preliminary protective order for a child, all relevant and material evidence helpful in determining whether such order may be issued by the court may be admitted by the court even though such evidence may not be competent in a final dispositional hearing. **FAILED**

HB 2227 **Multi-jurisdiction grand jury; hate crimes.** Adds the following to the list of crimes that a multi-jurisdiction grand jury may investigate: (i) simple assault or assault and battery where the victim was intentionally selected because of his race, religious conviction, color, or national origin; (ii) entering the property of another for purposes of damaging such property or its contents or interfering with the rights of the owner, user, or occupant where such property was intentionally selected because of the race, religious conviction, color, or national origin of the owner, user, or occupant; and (iii) various offenses that tend to cause violence. **FAILED**

HB 2235 **Protective orders; issuance upon convictions for certain felonies; penalty.** Authorizes a court to issue a protective order upon convicting a defendant for a felony offense of (i) violating a protective order, (ii) homicide, (iii) kidnapping, (iv) assaults and bodily woundings, (v) extortion, or (vi) criminal sexual assault. The bill provides that the duration of such protective order can be for any period of time, including up to the lifetime of the defendant, that the court deems necessary to protect the health and safety of the victim and may only prohibit (a) acts of family abuse or of violence, force, or threat against the victim or criminal offenses that may result in injury to the

person or property of the victim and (b) such contacts by the defendant with the victim as the court deems necessary for the health or safety of the victim. **FAILED**

HB 2277 **Driver's license suspensions for certain non-driving related offenses.** Removes the existing provisions that allow a person's driver's license to be suspended (i) when he is convicted of or placed on deferred disposition for a drug offense and (ii) for violations not pertaining to the operator or operation of a motor vehicle. **FAILED**

HB 2283 **Juvenile court; appointment of counsel; waiver.** Prohibits any child age 15 and younger who is alleged to be in need of services, in need of supervision, or delinquent from waiving his right to an attorney. The bill also requires any child who is age 16 or older and is alleged to be in need of services, in need of supervision, or delinquent to consult with an attorney before such child may waive his right to an attorney. Additionally, a court must determine that such waiver is free and voluntary. **FAILED**

HB 2370 **Possession and consumption of marijuana; penalty.** Decriminalizes simple marijuana possession and provides a civil penalty of no more than $250. **FAILED**

HB 2417 **Emergency protective order; required conditions; petition to dissolve or modify.** Requires any emergency protective order to prohibit (i) the respondent from committing acts of family abuse or criminal offenses that result in injury to person or property and (ii) such contacts by the respondent with the allegedly abused person or family or household members of the allegedly abused person, including prohibiting the respondent from being in the physical presence of the allegedly abused person or family or household members of the allegedly abused person, as the judge or magistrate deems necessary to protect the safety of such persons. **PASSED HOUSE, FAILED SENATE**

HB 2439 **DNA analysis; conviction of certain crimes or similar ordinance of a locality.** Adds persons convicted of local ordinances that are similar to certain crimes listed under current law to the list of persons from whom a blood, saliva, or tissue sample shall be taken for DNA analysis to determine identification characteristics specific to the person. **FAILED**

SB 1375 **Hate crimes; gender, disability, gender identity, or sexual orientation; penalty.** Adds gender, disability, gender identity, and sexual orientation to the categories of victims whose intentional selection for a hate crime involving assault, assault and battery, or trespass for the purpose of damaging another's property results in a higher criminal penalty for the offense. The bill also adds gender, disability, gender identity, and sexual orientation to the categories of hate crimes that are to be reported to the central repository of information regarding hate crimes maintained by the Virginia State Police and provides that a person who is subjected to acts of intimidation or harassment, violence directed against his person, or vandalism to his real or personal property, where such acts are motivated by gender, disability, gender identity, and sexual orientation, may bring a civil action to recover his damages. **FAILED SENATE COURTS, 6-8**

SB 1380 **Expungement of certain charges and convictions.** Allows a person to petition for expungement of convictions and deferred disposition dismissals for marijuana possession, underage alcohol possession, and using a false ID to obtain alcohol when the offense occurred prior to the person's twenty-first birthday; all court costs, fines, and restitution have been paid; and five years have elapsed since the date of completion of all terms of sentencing and probation. **PASSED SENATE, FAILED HOUSE**

SB 1417 **Competency report; unrestorably incompetent defendant.** Provides that in cases where a defendant's competency is primarily compromised due to an ongoing and irreversible medical condition and prior medical or educational records are available to support the diagnosis, a competency report may recommend that the court find the defendant unrestorably incompetent to stand trial, and the court may proceed with the disposition of the case based on such recommendation. **PASSED SENATE, FAILED HOUSE**

SB 1437 **Parole; exception to limitation on the application of parole statutes; investigations and reports by probation officers.** Provides that a person is entitled to parole who was sentenced by a jury prior to the date of the Supreme Court of Virginia decision in *Fishback v. Commonwealth*, 260 Va. 104 (June 9, 2000), in which the Court held that a jury should be instructed on the fact that parole has been abolished, for a noncapital felony committed after the time that the abolition of parole went into effect (January 1, 1995). The bill also allows a presentence report to be made available for review without a court order to incarcerated persons who are eligible for release by the Virginia Parole Board, or to such person's counsel. **FAILED SENATE COURTS, 7-8**

HB 2525 **Misdemeanor sexual offenses where the victim is a minor; statute of limitations.** Increases the statute of limitations for prosecuting misdemeanor violations where the victim is a minor from one year after the victim reaches the age of majority to five years after the victim reaches the age of majority for the following misdemeanor violations: carnal knowledge of offender by employee of bail bond company, sexual battery, attempted sexual battery, infected sexual battery, sexual abuse of a child age 13 or 14 by an adult, and tongue penetration by adult of mouth of child under age 13 with lascivious intent. **FAILED**

HB 2552 **Unmanned aircraft systems; delayed notice of search warrant when deployed.** Provides that within 10 days after an unmanned aircraft system is used during the execution of a search warrant, a copy of the executed search warrant shall be served on the person who was the subject of the search warrant and the person whose property was the subject of the search warrant. The bill provides that upon request, and for good cause shown, the circuit court may grant one or more extensions for such service for a period not to exceed 30 days each. **PASSED HOUSE, FAILED SENATE**

HB 2582 **Violation of provisions of protective orders; entering the lands, buildings, or premises owned or leased by protected party prohibited; penalties.** Provides that any person subject to a protective order who enters any land, buildings, or premises, when such entrance is prohibited by a provision of the protective order, while the protected party is present, or enters and remains in or on such land, buildings, or premises until the protected party arrives, is guilty of a Class 6 felony. **FAILED**

SB 1578 **Reckless driving; exceeding speed limit.** Raises from 80 to 85 miles per hour the speed above which a person who drives a motor vehicle on the highways in the Commonwealth is guilty of reckless driving regardless of the applicable maximum speed limit. **PASSED SENATE, FAILED HOUSE**

SB 1613 **Driver's license suspensions for certain non-driving related offenses.** Removes the existing provisions that allow a person's driver's license to be suspended (i) when he is convicted of or placed on deferred disposition for a drug offense and (ii) for violations not pertaining to the operator or operation of a motor vehicle. The provisions of the bill are contingent upon funding in a general appropriation act. **PASSED SENATE, FAILED HOUSE COURTS**

SB 1620 **Violation of provisions of protective orders; entering the lands, buildings, or premises owned or leased by protected party prohibited; penalties.** Provides that any person subject to a protective order who enters the lands, buildings, or premises owned or leased by a protected party while the protected party is present, or enters and remains in or on the lands, buildings, or premises owned or leased by the protected party until the party arrives, is guilty of a Class 6 felony. **FAILED**

SB 1621 **Assault and battery against a family or household member; enhanced penalty.** Reduces from two prior convictions to one prior conviction the required number of prior convictions of assault and battery against a family or household member before the Class 6 felony applies. **FAILED**

SB 1710 **Community work in lieu of payment of fines and court costs; authority of the court.** Clarifies that a court shall oversee a program allowing community service in lieu of payment of fines and court costs, including the monitoring of credit earned toward the discharge of such fine or costs for a period of up to 10 years. **PASSED SENATE, FAILED HOUSE**

HB 2794 **Refusal of tests; restricted license.** Allows a person convicted of a first offense of unreasonable refusal to have samples of his breath taken for chemical tests to determine the alcohol content of his blood to petition the court 30 days after conviction for a restricted driver's license. The court may, for good cause shown, grant such restricted license for the same purposes as allowed for restricted licenses granted after conviction of driving under the influence, if the person installs an ignition interlock system on each motor vehicle owned by or registered to the person and enters into and successfully completes an alcohol safety action program. **FAILED**

FAMILY LAW

– PASSED –

HB 1622 **Out-of-court and recorded statements made by a child; abuse or neglect of a child.** Provides that, in any civil proceeding involving the alleged abuse or neglect of a child, an out-of-court statement made by a child 14 years of age or younger at the time the statement is offered into evidence describing sexual acts with or on the child by another may be admissible. The bill further provides that in any such civil proceeding, a recorded statement of the alleged victim of the abuse or neglect, made prior to the proceeding, may be admissible if the alleged victim is 14 years of age or younger at the time the statement is offered into evidence. **PASSED**

HB 1659 **Child abuse and neglect; mandatory reporters.** Adds to the list of persons who are required to report suspected child abuse or neglect ministers, priests, rabbis, imams, and duly accredited practitioners of any religious organization or denomination usually referred to as a church; however, the bill exempts such clergy members from the mandatory reporting requirement when the information supporting the suspicion of child abuse or neglect (i) is required by the doctrine of the religious organization or denomination to be kept confidential or (ii) would be subject to the exemptions set forth in § 8.01-400 or 19.2-271.3 if offered as evidence in court. This bill is identical to SB 1257. **PASSED**

HB 1728 **Post-adoption contact and communication agreements.** Provides that a local board of social services or child welfare agency required to file a petition for a permanency planning hearing may inform the birth parents and shall inform the adoptive parents that they may enter into enter into a post-adoption contact and communication agreement. The bill further provides that such local board of social services or child welfare agency shall inform the child if he is 14 years of age or older that he may consent to such an agreement. This bill is identical to SB 1139. **PASSED**

HB 1730 **Foster care; security freeze on credit report.** Requires local departments of social services to request the placement of a security freeze on the credit report or record of any child who has been in foster care for at least six months in order to prevent cases of identity theft and misuse of personal identifying information.The bill directs a local department to request the removal of such security freezes (i) upon the child's removal from foster care, (ii) upon the child's request if the child is at least 16 years of age, or (iii) upon a determination that doing so would be in the best interest of the child. The bill requires the local department to conduct annual credit checks on all such children between the ages of 14 and 18. This bill is identical to SB 1253. **PASSED**

HB 1819 **Child support enforcement; fees.** Raises from $25 to $35 the fee charged by the State Board of Social Services to individuals who authorize the Department of Social Services to enforce child support obligations but who have never received assistance pursuant to the Temporary Assistance for Needy Families program. The bill provides that such fee shall be collected and retained from the amount of child support collected annually in excess of $550. **PASSED**

SB 1139 **Post-adoption contact and communication agreements.** Provides that a local board of social services or child welfare agency required to file a petition for a permanency planning hearing may inform the birth parents and shall inform the adoptive parents that they may enter into enter into a post-adoption contact and communication agreement. The bill further provides that such local board of social services or child welfare

agency shall inform the child if he is 14 years of age or older that he may consent to such an agreement. This bill is identical to HB 1728. **PASSED**

SB 1144 **Guardianship; annual report.** Provides that, upon receiving notice from the local department of social services that a guardian has not filed the required annual report within the prescribed time limit, the court may issue a summons or rule to show cause why the guardian has failed to file such report. **PASSED**

HB 1945 **No-fault divorce; waiver of service.** Clarifies that in the case of a no-fault divorce, waivers of service of process may occur within a reasonable time prior to or after the suit is filed, provided that a copy of the complaint is attached to such waiver, or otherwise provided to the defendant, and the final decree of divorce as proposed by the complainant is signed by the defendant. Where a defendant has waived service of process and, where applicable, notice, the bill further permits depositions to be taken, affidavits to be given, and all papers related to the divorce proceeding to be filed contemporaneously. This bill is identical to SB 1541. **PASSED**

HB 1988 **Military retirement benefits; marital share.** Requires that the determination of military retirement benefits in a divorce be made in accordance with the federal Uniformed Services Former Spouses' Protection Act (10 U.S.C. 1408 et seq.). **PASSED**

HB 2059 **Nonpayment of child support; amount of arrearage paid; time period to pay arrearage; repayment schedule; suspension of driver's license.** Provides that an individual who is delinquent in child support payments or has failed to comply with a subpoena, summons, or warrant relating to paternity or child support proceedings is entitled to a judicial hearing if he makes a written request within 30 days from service of a notice of intent to suspend or renew his driver's license. The bill further allows the Department of Motor Vehicles to renew a driver's license or terminate a license suspension imposed on an individual if such individual has reached an agreement with the Department of Social Services to satisfy the child support payment delinquency within a 10-year period and has made at least one payment of at least five percent of the total delinquency or $600, whichever is less, as opposed to whichever is greater under current law, under such agreement. The bill further provides that, where such a repayment agreement has been entered into and such an individual has failed to comply with such agreement, the Department of Motor Vehicles shall suspend or refuse to renew such individual's driver's license until it has received certification from the Department of Social Services that such individual has entered into a subsequent agreement to pay within a period of seven years and has paid the lesser amount, as opposed to greater amount under current law, of at least one payment of $1,200 or seven percent, as opposed to five percent under current law, of the current delinquency. The bill provides that an individual who fails to comply with such a subsequent agreement may enter into a new agreement if such individual has made a payment in the lesser amount, as opposed to the greater amount under current law, of $1,800 or 10 percent, as opposed to five percent under current law, and agrees to a repayment schedule of not more than seven years, which is consistent with the timeframe provided by the current law. This bill is identical to SB 1667. **PASSED**

HB 2108 **Foster care agreements; rights of foster parent; dispute resolution.** Directs the Department of Social Services to promulgate emergency regulations to ensure collaboration, communication, access, and transparency between the local boards and licensed child-placing agencies and foster parents. The bill also directs local boards of social services and

licensed child-placing agencies to implement and publicize a dispute resolution process through which a foster parent may contest an alleged violation of such regulations by the local board or licensed child-placing agency. **PASSED**

HB 2208 **Adoption by relative.** Expands the applicability of adoption procedures for a child's close relatives to all of the child's adult relatives, including stepparents, stepbrothers or stepsisters, and all other adult relatives of the child by marriage or adoption. **PASSED**

SB 1339 **Foster care omnibus.** Makes numerous changes to the laws governing the provision of foster care services in the Commonwealth. Among other things, the bill (i) allows the Commissioner of Social Services to develop and implement a corrective action plan for or assume temporary control over the foster care services of a local board of social services upon determining that the local board (a) has failed to provide foster care services or make placement and removal decisions in accordance with applicable laws or regulations or (b) has taken any action that poses a substantial risk to the health, safety, or well-being of any child under its supervision and control; (ii) requires the Commissioner to create within the State Department of Social Services (the Department) a foster care health and safety director position; (iii) directs the Commissioner to establish and maintain a confidential hotline to receive reports and complaints from foster parents and other persons regarding violations of laws or regulations applicable to foster care and any other matters related to the health, safety, or well-being of children in foster care; (iv) directs the Department to develop and implement a more reliable, structured, and comprehensive case review and quality improvement process to monitor and improve foster care services provided by local boards and departments of social services; and (v) requires the Department to establish and update annually a caseload standard that limits the number of foster care cases that may be assigned to each foster care caseworker. **PASSED**

HB 2234 **Parental leave.** Codifies the policy described in Executive Order Number 12 (2018) providing parental leave to state employees, consisting of eight weeks (320 hours) of paid leave in addition to leave provided under other state and federal programs. The bill requires that parental leave be available following the birth or adoption of a child under age 18 and be available to both parents of such child if both are state employees. The bill requires that parental leave be taken within six months of a birth or adoption and limits parental leave to once in any 12-month period and only once per child. This bill is identical to SB 1581. **PASSED**

HB 2317 **Custody and visitation orders; exchange of child.** Provides that in custody and visitation cases, at the request of either party, the court may order that the exchange of a child take place at an appropriate meeting place. **PASSED**

SB 1429 **Medical evidence admissible in juvenile and domestic relations district court; preliminary protective order hearings.** Adds preliminary protective order hearings to the list of hearings where 24-hour written notice of intention to present medical evidence is required to present a medical report as evidence in a juvenile and domestic relations district court. Under current law, notice of 24 hours is permitted only in preliminary removal hearings or in preliminary protective orders in cases of family abuse. **PASSED**

SB 1435 **Child welfare agencies and assisted living facilities; summary suspension.** Allows the Commissioner of Social Services to issue an order of summary suspension of the license of any child welfare agency when conditions or practices exist that pose an immediate and substantial threat to the health, safety, and welfare of the children receiving care. The bill

allows the Commissioner, in issuing an order of summary suspension, to suspend the license of the child welfare agency or to suspend only certain authority of the child welfare agency to operate, including the authority to provide certain services or perform certain functions that the Commissioner determines should be restricted or modified in order to protect the health, safety, or welfare of the children receiving care. The bill establishes notice, hearing, appeal, and posting requirements for such summary suspensions. The bill also amends the summary suspension procedures for licensed assisted living facilities to align such procedures with the summary suspension procedures established in the bill for child welfare agencies. **PASSED**

HB 2542 **Temporary delegation of parental or legal custodial powers; child-placing agency.** Allows a parent or legal custodian of a minor to delegate to another person by a properly executed power of attorney any powers regarding care, custody, or property of the minor for a period not exceeding 180 days. The bill provides that a parent or legal custodian who is a service member, as defined in the bill, may delegate such powers for a period of longer than 180 days while on active duty service, but specifies that such a period is not to exceed such active duty service plus 30 days. The bill provides that any such power of attorney shall be signed by all persons with authority to make decisions concerning the child, the person to whom powers are delegated under the power of attorney, and a representative of a licensed child-placing agency that assists parents and legal guardians with the process of delegating parental and legal custodial powers of their children. The bill specifies that such licensed child-placing agency will be subject to background checks and must develop and implement written policies for certain services and provide staff and provider training. The bill further requires that any person to whom any such powers are delegated shall comply with background check requirements established by regulations of the Board of Social Services or otherwise provided by law. **PASSED**

SB 1541 **No-fault divorce; waiver of service.** Clarifies that in the case of a no-fault divorce, waivers of service of process may occur within a reasonable time prior to or after the suit is filed, provided that a copy of the complaint is attached to such waiver, or otherwise provided to the defendant, and the final decree of divorce as proposed by the complainant is signed by the defendant. Where a defendant has waived service of process and, where applicable, notice, the bill further permits depositions to be taken, affidavits to be given, and all papers related to the divorce proceeding to be filed contemporaneously. This bill is identical to HB 1945. **PASSED**

SB 1758 **Jurisdiction of juvenile and domestic relations district courts; state or federal benefit.** Grants the juvenile and domestic relations district courts jurisdiction to make specific findings of fact required by state or federal law to enable a child to apply for or receive a state or federal benefit. This bill is identical to HB 2679. **PASSED**

FAMILY LAW

– FAILED –

HB 1653 **Custody and visitation arrangements; best interests of the child; domestic abuse; child abuse.** Requires the court to consider domestic abuse, defined in the bill, and child abuse in addition to family abuse and sexual abuse in current law when determining the best interests of the child for the purposes of custody and visitation arrangements. **FAILED**

SB 1019 **Referral to mediation in child custody, visitation, and support cases; appropriate cases.** Requires a court, in assessing whether a

case regarding child custody, visitation, or support is appropriate for referral to mediation, to consider whether such case can be heard by the court within 120 days of the filing of an initial petition. The bill provides that if a case cannot be heard by the court within 120 days and is otherwise deemed appropriate for referral, such case shall be referred. **FAILED**

HB 2074 **Custody and visitation arrangements; presumption of equal time.** Provides that there shall be a presumption that both parents be awarded equal time with a child subject to a custody and visitation order to the greatest extent practicable. The bill further provides that there shall be a presumption that both parents shall share equally in the responsibilities of raising their children. **FAILED**

HB 2127 **Best interests of a child; frequent and continuing contact with each parent.** Provides that, while considering the best interests of a child for the purposes of determining custody or visitation arrangements, the court shall, when appropriate, assure frequent and continuing contact with each parent. **PASSED HOUSE, FAILED SENATE**

HB 2383 **Juvenile and domestic relations court; social history report; consideration and waiver.** Requires a court, whenever it adjudicates a juvenile delinquent of an act that would be a violent felony offense if committed by an adult, to direct an investigation and social history report of the juvenile to be completed and to consider the results of such report prior to entering disposition. **FAILED**

HB 2407 **Permanent foster care; eligibility.** Allows local departments of social services and licensed child-placing agencies to place in permanent foster care, pursuant to a court order, a child who is 14 years of age or older but less than 16 years of age and who objected to the termination of residual parental rights, provided that no less restrictive alternative is available and the permanent foster care placement is in the best interest of the child. **FAILED**

SB 1539 **Withholding of income for child support; independent contractors.** Clarifies that income earned by an independent contractor may be withheld by court order for payment of child support obligations. **PASSED SENATE, FAILED HOUSE 51-49**

SB 1757 **Custody and visitation arrangements; best interests of the child; child abuse.** Requires the court to consider child abuse, in addition to family abuse and sexual abuse in current law, when determining the best interests of the child for the purposes of custody and visitation arrangements. **FAILED**

SB 1776 **Grounds for divorce; cruelty, abuse, desertion, or abandonment; waiting period.** Eliminates the one-year waiting period for being decreed a divorce on the grounds of cruelty, reasonable apprehension of bodily hurt, or willful desertion or abandonment by either party. **FAILED**

GENERAL PRACTICE

– PASSED –

HB 1814 **Deferral of jury service; persons who have legal custody of and are responsible for the care of a child.** Provides that a court may defer or limit jury service of persons who have legal custody of and are responsible for a child or children 16 years of age or younger requiring continuous care by such person during normal court hours to the term of court next after such period of responsibility ends. **PASSED**

HB 1924 **Summons to compel attendance before commissioner of another state.** Removes the authorization of a summons to compel attendance of a citizen of the Commonwealth before commissioners or other persons appointed by authority of another state when the summons requires the attendance of such witness at a place not out of his county or city. This bill is a recommendation of the Boyd-Graves Conference. **PASSED**

HB 1954 **Uniform Power of Attorney Act; breach of fiduciary duty; recovery of attorney fees.** Provides that in a judicial proceeding brought under the Uniform Power of Attorney Act commenced on or after July 1, 2019, if the court finds that the agent breached his fiduciary duty, the court may award costs and expenses, including reasonable attorney fees, to be paid by the agent found in violation. **PASSED**

SB 1186 **Payment or delivery of small asset by affidavit; check, draft, or other negotiable instrument; financial institution.** Provides that a financial institution accepting a small asset that is a check, draft, or other negotiable instrument presented for deposit by an affidavit is discharged from all claims for the amount accepted. **PASSED**

SB 1307 **Uniform Transfers to Minors Act; age 25.** Permits a transferor to transfer property under the Uniform Transfers to Minors Act to an individual under the age of 21 to be paid, conveyed, or transferred to such individual upon his attaining 25 years of age, unless the minor attaining age 21 years of age delivers a written request therefor to the custodian. Under current law, such property must be paid, conveyed, or transferred upon the individual's attaining 18 years of age, or 21 years of age if specifically requested by the custodian. **PASSED**

SB 1342 **Storage and mechanics' liens; amount of lien.** Provides that the amount of a mechanics' lien for the reasonable expenses of a keeper of a garage or a mechanic on a vehicle that is not subject to a chattel mortgage, security agreement, deed of trust, or other instrument shall be in an amount up to the value of the vehicle. **PASSED**

SB 1382 **Reorganization of motor vehicle registration, licensing, and certificates of title statutes; segregation of criminal offenses and traffic offenses.** Moves the criminal offenses related to registration, licensing, and certificates of title included within § 46.2-613 to § 46.2-612. The bill reorganizes these statutes so that § 46.2-612 contains only criminal offenses and § 46.2-613 contains only traffic infractions. Removes the authority of the court to dismiss a summons for a criminal offense related to the registration, licensing, and certificates of title when proof of compliance with the law is provided to the court on or before the court date. The bill otherwise retains the elements of and penalties for the offenses and infractions. This bill is a recommendation of the Committee on District Courts and is identical to HB 1711. **PASSED**

SB 1383 **Dismissal of summons for expiration of vehicle registration; proof of compliance.** Authorizes courts to dismiss a summons issued for expiration of vehicle registration if the defendant provides to the court proof of compliance with the law on or

before the court date. This bill is a recommendation of the Committee on District Courts. This bill is identical to HB 1712. **PASSED**

SB 1610 **Recordation tax; exemption for property transferred by deed of distribution.** Provides that no recordation tax shall be required for the recordation of a deed of distribution, which is defined in the bill, when no consideration has passed between the parties. The bill also provides that a deed of distribution must state on its front page that it is a deed of distribution. **PASSED**

SB 1782 **Notaries; qualifications.** Prohibits a person who has been convicted of a felony offense of (a) fraud or misrepresentation or (b) robbery, extortion, burglary, larceny, embezzlement, fraudulent conversion, perjury, bribery, treason, or racketeering from qualifying to be a notary, regardless of whether his civil rights have been restored. **PASSED**

GENERAL PRACTICE

– FAILED –

HB 2444 **Legal services plans.** Repeals provisions under which the State Corporation Commission regulates legal services plans and under which the Department of Agriculture and Consumer Services regulates sellers of legal services plans. The measure also eliminates the premium tax assessed on legal services plans. **FAILED**

SB 1478 **Disposition of the remains of a decedent; right to control.** Establishes a priority order for the right to control the disposition of the remains of a decedent; the location, manner, and condition of disposition; and the arrangements for funeral goods and services to be provided, as well as circumstances that would forfeit this right. The bill establishes procedures for resolving disagreements among those who have the right to control and provides liability protections for licensed funeral establishments, funeral service licensees, registered crematories, or registered crematory operators that rely in good faith upon the instructions of an individual claiming the right of disposition. **FAILED**

SB 1487 **Driver's license designation; traumatic brain injury.** Requires the Department of Motor Vehicles, upon the request of the applicant and presentation of a signed statement by a licensed neurologist confirming the applicant's condition, to designate a traumatic brain injury on the applicant's driver's license. **FAILED**

SB 1441 **Virginia Board for Court Reporters.** Creates the Virginia Board for Court Reporters (the Board) as an independent board to regulate court reporting services in the state. Beginning July 1, 2020, no person may engage in or offer to engage in work as a court reporter unless he has been licensed by the Board. The bill establishes standards of conduct for court reporters and creates the Board for Court Reporters Fund to receive licensing and registration fees to fund the regulatory program. **FAILED**

JUDICIAL ADMINISTRATION

– PASSED –

SB 1426 **Wills lodged in clerk's office for safekeeping.** Permits the clerk of a circuit court to destroy a will that has been lodged in his office for safekeeping for 100 years or more. **PASSED**

SB 1655 **Specialty dockets; report.** Requires the Office of the Executive Secretary of the Supreme Court to develop a statewide evaluation model and conduct ongoing evaluations of the effectiveness and efficiency of all local specialty dockets established in accordance with the Rules of Supreme Court of Virginia and submit a report of these evaluations to the General Assembly by December 1 of each year. This bill is identical to HB 2665. **PASSED**

JUDICIAL ADMINISTRATION

– FAILED –

HB 1630 **Substitute judges; powers and duties; entry of a final order.** Provides that a substitute judge has the power to enter a final order in any case heard by the substitute judge for a period of 14 days after the date of a hearing of such case. **FAILED**

SB 1121 **Maximum number of judges in each judicial district.** Increases from 11 to 12 the maximum number of authorized general district court judgeships in the nineteenth judicial district. This bill is a recommendation of the Committee on District Courts. **FAILED**

HB 2323 **Clerks; refusal to record certain liens or encumbrances.** Provides that a clerk may refuse to record a lien or encumbrance filed by a person previously convicted of filing a false lien or encumbrance, provided that such lien or encumbrance to be recorded is the same or substantially similar to the lien or encumbrance that led to such person's conviction. The bill further allows a clerk to refuse to record a lien or encumbrance if the clerk reasonably believes such lien or encumbrance is being filed maliciously. The bill provides that the person attempting to file such lien or encumbrance shall receive written notice of such refusal and an opportunity to be heard as to why such lien or encumbrance is not malicious. **FAILED**

SB 1384 **Virginia Retirement System; increased retirement allowance for judges.** Increases by five percent the retirement allowance for judges for service earned on and after their fifty-fifth birthday. The bill provides that the increase applies only to judges who retire on or after July 1, 2019. **FAILED**

HB 2510 **Maximum number of judges in each judicial district.** Increases from 11 to 12 the maximum number of authorized general district court judgeships in the nineteenth judicial district. This bill is a recommendation of the Committee on District Courts. **FAILED**

LONG TERM CARE

– PASSED –

HB 1674 **Abuse and neglect of incapacitated adults; informed consent.** Clarifies, for the purposes of the exemptions to abuse and neglect of incapacitated adults, that the informed consent or a declaration of the incapacitated person must have been given when such person was not incapacitated and that any wishes of the incapacitated person relied upon must have been made known when such person was not incapacitated. The bill provides that its provisions are declaratory of existing law. **PASSED**

SB 1217 **Nursing homes; truth in advertising for inspections, surveys, and investigations.** Requires that if inspection, survey, or investigation data is used in an advertisement regarding nursing homes, the advertisement also include the following information: (i) the date on which the survey, inspection, or investigation was conducted; (ii) a statement that the facility is required to submit a plan of correction in response to any and all statements of deficiencies; (iii) if a finding or deficiency cited in a statement of deficiencies has been corrected, a statement that the finding or deficiency has been corrected and the date on which the finding or deficiency was corrected; and (iv) a statement that the advertisement publication is not authorized or endorsed by the Virginia Department of Health, the Centers for Medicare and Medicaid Services, the Office of the Inspector General, or any other governmental agency. The bill provides that failure to include this required information constitutes a violation of the Virginia Consumer Protection Act. The bill also requires that such information be in the same font, color, and size as the other text in the advertisement. This bill is identical to HB 2219. **PASSED**

SB 1224 **Protective services; adult abuse, neglect, and exploitation; multidisciplinary teams.** Authorizes local departments of social services to foster, when practicable, the creation, maintenance, and coordination of hospital and community-based multidisciplinary teams focused on the abuse, neglect, and exploitation of adults 60 years of age or older or 18 years of age or older who are physically or mentally incapacitated. The bill provides that such teams may: (i) assist the local department of social services in identifying abused, neglected, and exploited adults; (ii) coordinate medical, social, and legal services for abused, neglected, and exploited adults and their families; (iii) develop innovative programs for detection and prevention of the abuse, neglect, and exploitation of adults; (iv) promote community awareness and action to address adult abuse, neglect, and exploitation; and (v) disseminate information to the general public regarding the problem of adult abuse, neglect, and exploitation, strategies and methods for preventing such abuse, neglect, and exploitation and treatment options for abused, neglected, and exploited adults. The bill also allows the attorney for the Commonwealth in each jurisdiction to establish a multidisciplinary adult abuse, neglect, and exploitation response team to review cases of abuse, neglect, and exploitation of adults. Such multidisciplinary team may be established separately or in conjunction with any already existing multidisciplinary team. This bill is identical to HB 2560. **PASSED**

SB 1409 **Assisted living facilities; requirement for licensed administrator.** Increases from one to two the number of times a licensed assisted living facility may operate under the supervision of an acting administrator during any two-year period. **PASSED**

SB 1410 **Board of Social Services; regulations governing assisted living facilities; staffing during overnight hours.** Directs the Board of Social Services to amend regulations governing staffing of assisted living facility units with residents who have serious cognitive impairment due to a primary psychiatric diagnosis of dementia and are unable to recognize danger or protect their own safety and welfare to require that the following number of direct care staff members be awake and on duty during overnight hours: (i) when 22 or fewer residents are present, at least two direct care staff members; (ii) when 23 to 32 residents are present, at least three direct care staff members; (iii) when 33 to 40 residents are present, at least four direct care staff members; and (iv) when more than 40 residents are present, at least four direct care staff members plus at least one additional direct care staff member for every 10 residents or portion thereof in excess of 40 residents. This bill is identical to HB 2521. **PASSED**

HB 2521 **Board of Social Services; regulations governing assisted living facilities; staffing during overnight hours.**Directs the Board of Social Services to amend regulations governing staffing of assisted living facility units with residents who have serious cognitive impairment due to a primary psychiatric diagnosis of dementia and are unable to recognize danger or protect their own safety and welfare to require that the following number of direct care staff members be awake and on duty during overnight hours: (i) when 22 or fewer residents are present, at least two direct care staff members; (ii) when 23 to 32 residents are present, at least three direct care staff members; (iii) when 33 to 40 residents are present, at least four direct care staff members; and (iv) when more than 40 residents are present, at least four direct care staff members plus at least one additional direct care staff member for every 10 residents or portion thereof in excess of 40 residents. This bill is identical to SB 1410. **PASSED**

LONG TERM CARE

– FAILED –

HB 2040 **Background checks; persons providing care for elderly or disabled.** Allows any person who provides or seeks to provide unsupervised care or assistance to an elderly or disabled person to request a national fingerprint criminal background check on himself at his cost. **FAILED**

SB 1570 **Adult protective services; central registry.** Creates a central registry of founded complaints of adult abuse, neglect, and exploitation to be maintained by the State Department of Social Services. The bill establishes (i) investigation requirements for local departments of social services related to complaints of adult abuse, neglect, and exploitation; (ii) record retention and disclosure requirements for the Department and local departments; (iii) notice requirements related to findings by local departments and central registry entries; and (iv) an appeals process to contest the findings of a local department related to founded reports of adult abuse, neglect, or exploitation. **FAILED**

BUSINESS/COMMERCIAL LAW

– PASSED –

HB 2272 **Limited liability companies; Protected Series Act.** Provides for the creation by a limited liability company (LLC) of one or more protected series. The measure provides that each protected series may have different ownership, management structures, assets, and liabilities. Each protected series may function in a manner analogous to a separate legal entity within the LLC that established the protected series, which is referred to as the series LLC. The measure provides a process through which debts and obligations of one protected series are neither the debts nor obligations of any other protected series nor of the series LLC. Under the measure, a separate public filing is required to establish each protected series of a series LLC. The measure specifies rules for disregarding the internal liability shields that protect the assets of one protected series from the creditors of another. The measure provides that assets not properly associated with a protected series may be subject to the claims of creditors even if the internal shields among series remain intact. The measure is based on the Uniform Protected Series Act prepared by the National Conference of Commissioners on Uniform State Laws. The measure has a delayed effective date of July 1, 2020. **PASSED**

HB 2478 **Virginia Stock Corporation Act.** Updates and modernizes the Virginia Stock Corporation Act (the Act) to conform to many provisions of the 2016 revision of the Model Business Corporation Act produced by the Corporate Laws Committee of the American Bar Association's Business Law Section. **PASSED**

BUSINESS/COMMERCIAL LAW

– FAILED –

HB 2415 **Business records electronically registered on a blockchain self-authenticating.** Creates a rebuttable presumption that a business record electronically registered on a blockchain is a self-authenticating document for certain facts. The bill provides that such presumption does not extend to the truthfulness, validity, or legal status of the contents of the fact or record. **FAILED**

SB 1369 **Virginia Public Procurement Act; statute of limitations on actions on construction contracts; statute of limitations on actions on performance bonds.** Provides that no action may be brought by a public body on any construction contract, including construction management and design-build contracts, unless such action is brought within five years after substantial completion of the work on the project and that no action may be brought by a public body on a warranty or guarantee in such construction contract more than one year from the breach of that warranty, but in no event more than one year after the expiration of such warranty or guarantee. The bill also limits the time frame during which a public body, other than the Department of Transportation, may bring an action against a surety on a performance bond to within one year after substantial completion of the work on the project. Current law allows a public body, other than the Department of Transportation, to bring such an action within one year after (i) completion of the contract, including the expiration of all warranties and guarantees, or (ii) discovery of the defect or breach of warranty that gave rise to the action. **FAILED**

EMPLOYMENT LAW

– PASSED –

SB 1387 **Covenants not to compete; low-wage employees; civil penalty.** Prohibits an employer from entering into, enforcing, or threatening to enforce a covenant not to compete between the employer and a low-wage employee. The employer is subject to a civil penalty of $10,000 per violation. The bill defines "low-wage employee" as either (i) an employee, intern, student, apprentice, or trainee whose average weekly earnings are less than the average weekly wage of the Commonwealth or who is employed without pay or (ii) an independent contractor who is compensated for his services at an hourly rate that is less than the median hourly wage. **PASSED**

EMPLOYMENT LAW

– FAILED –

HB 1687 **Nonpayment of wages; private action.** Provides that an employee has a private cause of action against an employer who fails to pay wages to recover the amount of wages due plus interest at eight percent annually from the date the wages were due. If the court finds that the employer knowingly failed to pay wages, the court shall award the employee reasonable attorney fees and other costs. If the court finds that the employer's failure to pay wages was willful and with intent to defraud the employee, the court shall also award the employee three times the amount of wages due. **FAILED**

HB 1713 **Employment; prohibited retaliatory action.** Prohibits an employer from discharging, disciplining, threatening, discriminating against, penalizing, or taking other retaliatory action against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee (i) reports a violation or suspected violation of any federal or state law or regulation to a supervisor or to any governmental body or law-enforcement official; (ii) is requested by a governmental body or law-enforcement official to participate in an investigation, hearing, or inquiry; (iii) refuses to engage in a criminal act that would subject the employee to criminal liability; (iv) refuses an employer's order to perform an action that the employee believes, which belief has an objective basis in fact, violates any federal or state law or regulation and the employee informs the employer that the order is being refused for that reason; or (v) provides information to or testifies before any governmental body or law-enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state law or regulation. **FAILED**

HB 1792 **Employment; covenants not to compete; low-wage employees.** Prohibits an employer from entering into a covenant not to compete with any of its low-wage employees. The measure declares that covenants not to compete entered into by an employer and a low-wage employee are contrary to public policy and are void and unenforceable. **FAILED**

SB 998 **Nondiscrimination in public employment.** Prohibits discrimination in public employment on the basis of sexual orientation or gender identity, as defined in the bill. The bill also codifies for state and local government employment the current prohibitions on discrimination in employment on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, or status as a veteran. **FAILED**

SB 1059 **Wage or salary history inquiries prohibited; civil penalty.** Prohibits a prospective employer from (i) requiring as a condition of employment that a prospective employee provide or disclose the prospective

employee's wage or salary history or (ii) attempting to obtain the wage or salary history of a prospective employee from the prospective employee's current or former employers. **FAILED**

HB 1859 **Virginia Human Rights Act; pregnancy, childbirth, or related medical conditions; causes of action.** Provides that no employer shall discharge any employee on the basis of pregnancy, childbirth, or related medical conditions, including lactation. **FAILED**

SB 1199 **Public employment; inquiries by state agencies and localities regarding criminal convictions, charges, and arrests.** Prohibits state agencies from including on any employment application a question inquiring whether the applicant has ever been arrested or charged with any crime. The bill prohibits state agencies from asking an applicant if he has ever been convicted of any crime unless the inquiry takes place after the applicant has received a conditional offer of employment, which offer may be withdrawn if the applicant has a conviction record that directly relates to the duties and responsibilities of the position. **FAILED SENATE, 24-16**

HB 2001 **Payment of wages.** Removes the exemptions that exclude newsboys, shoe-shine boys, ushers, doormen, concession attendants, and theater cashiers from coverage under the Virginia Minimum Wage Act (the Act). The measure limits the Act's exemption for babysitters to those not employed more than 10 hours per week. The measure eliminates the Act's exemption for persons employed by an employer that does not have four or more employees. **FAILED**

HB 2120 **Paid family and medical leave program.** Requires the Virginia Employment Commission to establish and administer a paid family and medical leave program with benefits beginning January 1, 2022. Under the program, benefits are paid to eligible employees for family and medical leave. **FAILED**

HB 2261 **Paid medical and family leave for employees; civil penalties.** Requires employers with 15 or more employees to provide to each employee paid medical and family leave at a rate of 0.46 hours per 40 hours worked, up to 24 hours in any 12-month period. **FAILED**

HB 2349 **Nonpayment of wages; investigations.** Authorizes the Commissioner of Labor and Industry, if he acquires information during an investigation of a complaint of an employer's failure or refusal to pay wages that creates a reasonable belief that other employees of the same employer may not have been paid wages, to investigate whether the employer has failed or refused to make a required payment of wages to other employees. **FAILED**

HB 2363 **Nonpayment of wages; discriminatory actions prohibited.** Prohibits an employer from discharging or otherwise discriminating against an employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding related to the failure to pay wages, or has testified or is about to testify in any such proceeding. **FAILED**

HB 2393 **Child labor; tobacco farms; civil penalty.** Prohibits any person from employing a child under the age of 18 to work in direct contact with tobacco plants or dried tobacco leaves unless (i) the owner of the farm or other location at which such work is conducted is the child's parent, grandparent, or legal guardian or (ii) the child's parent or legal guardian has consented in writing to such employment. **FAILED**

SB 1423 **Confidentiality, nondisparagement, or nondisclosure provisions; communication with law-enforcement agencies.** Prohibits the use of provisions in contracts, written agreements, or

settlement agreements resolving litigation pertaining to the employment of an employee in the Commonwealth, whether labeled as confidentiality, nondisparagement, or nondisclosure provisions, that restrict or deter consumers or employees from communicating or cooperating with a federal, state, or local law-enforcement agency. **FAILED SENATE COURTS, 7-7**

HB 2496 **Virginia Human Rights Act; creation of cause of action for discrimination based on race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, or age.** Creates a cause of action against any employer employing more than five but fewer than 15 persons who engages in an unlawful discriminatory act against any employee on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, including lactation. **FAILED**

HB 2524 **Nonpayment of wages; private action.** Provides that an employee has a private cause of action against an employer who fails to pay wages. The measure provides that if the court finds that the employer knowingly failed to pay the wages, it shall also award the employee reasonable attorney fees and other costs. **FAILED**

HB 2736 **Local employee grievance procedure.** Provides that qualifying grievances by local government employees shall advance to a final step as agreed upon by the aggrieved and the local government; however, if an agreement cannot be reached on whether to use a panel hearing or hearing officer, a three-person panel shall be used. **FAILED**

CONSUMER LAW

– PASSED –

HB 1660 **Landlord and tenant; renter's insurance; disclaimer.** Provides that if a rental agreement does not require the tenant to obtain renter's insurance, the landlord must provide a written notice to the tenant, prior to the execution of the rental agreement, stating that (i) the landlord is not responsible for the tenant's personal property, (ii) the landlord's insurance coverages do not cover the tenant's personal property, and (iii) if the tenant wishes to protect his personal property, he should obtain renter's insurance. **PASSED**

HB 1898 **Virginia Residential Landlord and Tenant Act; tenant's right of redemption.** Extends the amount of time that a tenant may have an unlawful detainer dismissed to two days before a writ of eviction is delivered to be executed if the tenant pays all amounts claimed on the summons in unlawful detainer to the landlord, the landlord's attorney, or the court. **PASSED**

HB 1923 **Virginia Residential Landlord and Tenant Act; noncompliance with rental agreement; tenant's right to reasonable attorney fees.** Provides that a tenant is entitled to reasonable attorney fees when a tenant successfully raises as a defense the landlord's noncompliance with the rental agreement and the court enters judgment in favor of the tenant. **PASSED**

HB 2007 **Eviction; writs of possession and eviction.** Changes the terminology from writ of possession to writ of eviction for the writ executed by a sheriff to recover real property pursuant to an order of possession. The bill specifies that an order of possession remains effective for 180 days after being granted by the court and clarifies that any writ of eviction not executed within 30 days of its issuance shall be vacated as a matter of law, and no further action shall be taken by the clerk. As introduced, this bill is a recommendation of the Virginia Housing Commission and is identical to SB 1448. **PASSED**

HB 2054 **Virginia Residential Landlord and Tenant Act; rental agreement; provisions made applicable by operation of law.** Requires a landlord to offer the tenant a written rental agreement containing the terms governing the rental of the dwelling unit and setting forth the terms and conditions of the landlord tenant relationship. The bill provides that in the event a written rental agreement is not offered by the landlord, a rental tenancy shall be deemed to exist by operation of law and establishes the terms and conditions of that tenancy. This bill is a recommendation of the Virginia Housing Commission. This bill is identical to SB 1676. **PASSED**

HB 2174 **Motor vehicle dealers and manufacturers.** Provides that if a motor vehicle manufacturer or factory branch discontinues, sells, or transfers its right to manufacture a line-make of motor vehicles, and the acquiring manufacturer or factory branch does not honor an existing franchise agreement with motor vehicle dealers in Virginia, such discontinuation, sale, or transfer shall constitute a termination of the franchise and such motor vehicle dealers shall be entitled to compensation pursuant to Virginia law. **PASSED**

HB 2218 **Virginia Consumer Protection Act; prohibited practices; unlawful practice of an occupation or profession.** Makes the unlawful and unlicensed practice of contracting, real estate brokering, or real estate sales, in connection with a consumer transaction, unlawful under the Virginia Consumer Protection Act. **PASSED**

HB 2304 **Landlord and tenant; renter's insurance obtained by landlord on behalf of**

tenants; notice of waiver of subrogation provisions. Requires a landlord that has obtained renter's insurance coverage on behalf of his tenants to include, as part of the summary of the insurance policy or certificate evidencing the coverage as currently required by law, a statement regarding whether the insurance policy contains a waiver of subrogation provision. The bill provides that any failure of the landlord to provide such summary or certificate, or to make available a copy of the insurance policy, shall not affect the validity of the rental agreement. **PASSED**

SB 1445 **Virginia Residential Landlord and Tenant Act; tenant's right of redemption.** Extends the amount of time that a tenant may have an unlawful detainer dismissed to two days before a writ of eviction is delivered to be executed if the tenant pays all amounts claimed on the summons in unlawful detainer to the landlord, the landlord's attorney, or the court. **PASSED**

SB 1448 **Eviction; writs of possession and eviction.** Changes the terminology from writ of possession to writ of eviction for the writ executed by a sheriff to recover real property pursuant to an order of possession. The bill specifies that an order of possession remains effective for 180 days after being granted by the court and clarifies that any writ of eviction not executed within 30 days of its issuance shall be vacated as a matter of law, and no further action shall be taken by the clerk. As introduced, this bill is a recommendation of the Virginia Housing Commission and is identical to HB 2007. **PASSED**

SB 1450 **Eviction Diversion Pilot Program.** Establishes the Eviction Diversion Pilot Program (the Program), consisting of specialized dockets within the existing structure of the general district courts for the cities of Danville, Hampton, Petersburg, and Richmond. **PASSED**

CONSUMER LAW

– FAILED –

HB 1647 **Virginia Fair Housing Law; unlawful discriminatory housing practices.** Prohibits any locality, its employees, or its appointed commissions from discriminating (i) in the application of local land use ordinances or guidelines; (ii) in the permitting of housing developments on the basis of race, color, religion, national origin, sex, elderliness, familial status, or handicap; or (iii) in the permitting of housing developments because the housing development contains or is expected to contain affordable housing units occupied or intended for occupancy by families or individuals with incomes at or below 80 percent of the median income of the area where the housing development is located or is proposed to be located. **FAILED**

HB 1780 **Salvage vehicles.** Removes the requirement that a vehicle be late model in order to meet the definition of salvage vehicle due to having been (i) acquired by an insurance company as part of the claims process or (ii) damaged to the extent that its estimated cost of repair would exceed its value before the damage minus the salvage value. **FAILED**

HB 1860 **Virginia Residential Landlord and Tenant Act; nonpayment of rent; written notice of termination; time period.** Changes from five to 14 days the period within which a tenant is required to pay rent after written notice of termination of the rental agreement is served by the landlord on the tenant. **FAILED**

HB 2196 **Debt settlement services; civil penalties.** Establishes procedures and requirements for the licensure by the State Corporation Commission of agencies providing debt settlement services. The measure defines debt settlement services as any action or negotiation initiated or taken by or on behalf of

any consumer with any creditor of the consumer for the purpose of obtaining debt forgiveness of a portion of the credit extended by the creditor to the consumer or reduction of payments, charges, or fees payable by the consumer. **FAILED**

SB 1266 **Open-end credit plans; penalty.** Requires that any person engaged in the business of extending credit under an open-end credit plan under which interest is charged at an annual rate that exceeds 36 percent obtain a license to do so from the State Corporation Commission. **FAILED**

SB 1364 **Salvage vehicles.** Removes the requirement that a vehicle be late model in order to meet the definition of salvage vehicle due to having been (i) acquired by an insurance company as part of the claims process or (ii) damaged to the extent that its estimated cost of repair would exceed its value before the damage minus the salvage value. **FAILED**

SB 1438 **Virginia Residential Landlord and Tenant Act.** Provides that when a landlord as plaintiff requests that an initial hearing on a summons for unlawful detainer be set on a date later than 21 days from the filing of such summons, the initial hearing shall not be set on a date later than 30 days after the date of the filing. The bill further provides that an order of possession for the premises in an unlawful detainer action shall not be entered unless the landlord or the landlord's attorney or agent has presented a copy of a proper termination notice that the court admits into evidence. **FAILED**

HB 2677 **Virginia Fair Housing Law; unlawful discriminatory housing practices; sexual orientation and gender identity.** Adds discrimination on the basis of an individual's sexual orientation or gender identity as an unlawful housing practice. The bill defines sexual orientation and gender identity. **FAILED**

HB 2728 **Virginia Residential Property Disclosure Act; required disclosures for buyer to beware; impounding structures or dams.** Adds an additional required disclosure statement for the buyer to beware in regards to the condition or regulatory status of an impounding structure or dam either on the property or under the ownership of the homeowners association to which the owner of the property is required to join. **FAILED**

PRODUCT LIABILITY

– PASSED –

HB2143 **Air bags; manufacture, importation, sale, etc., of counterfeit or nonfunctional air bag prohibited; penalty.** Provides that a person is guilty of a Class 1 misdemeanor if he knowingly manufactures, imports, sells, installs, or reinstalls a counterfeit air bag or nonfunctional air bag, or any device that is intended to conceal a counterfeit air bag or nonfunctional air bag, in a motor vehicle. The bill provides an exemption for the sale, installation, reinstallation, or replacement of a motor vehicle air bag on a vehicle solely used for police work. The bill also provides that any sale, installation, reinstallation, or replacement of a motor vehicle air bag with a counterfeit, nonfunctional, or otherwise unlawful air bag shall not be construed as a superseding cause that limits the liability of any party in any civil action. **PASSED**

PRODUCT LIABILITY

– FAILED –

HB 2394 **Product safety; flame retardants; regulations; fund; civil penalty.** Prohibits the manufacture or sale in the Commonwealth, beginning July 1, 2020, of upholstered furniture intended for residential use or any product that is intended to come into close contact with a person younger than 12 years of age if such upholstered furniture or product contains any flame-retardant chemical listed in the bill. The bill requires the manufacturer of any prohibited product to notify sellers of the prohibition by March 31, 2020, and requires a manufacturer to recall by that date any products that it has sold in violation of the prohibition. **FAILED**

Location, Location, Location

How Opportunity Zones Can Boost Real Estate Development

Christopher M. Kozlowski

Opportunity Zones: Really an Opportunity?

Christopher M. Kozlowski

Gentry Locke Seminar September 6, 2019

In May 2018, Governor Northam designated 212 "Opportunity Zones" in the Commonwealth of Virginia. Some of these designated areas, which are required to be low-income communities or census tracts adjacent to such communities, are located in Roanoke, Blacksburg, Danville, and even the City of Richmond. The word on the street is that Opportunity Zones are ripe for investment, but is that reality?

Clients may visit your office asking how opportunity zones work and whether they can benefit from a parcel of property or a business they own being located in an Opportunity Zones. As we discuss below, the answer to these questions is never simple, but if your client qualifies, the benefits can be handsome.

A. Introduction

The Tax Cuts and Jobs Act made changes to the Internal Revenue Code that provide tax benefits to investors in Qualified Opportunity Zones (QOZs). Investments in QOZs may allow investors to:

- Temporarily defer recognition of capital gains that are reinvested in a Qualified Opportunity Fund (QOF).
- Reduce the amount of recognized deferred capital gains by an increase in basis.
- Exempt from taxation any appreciation in their QOF investment if they meet certain requirements.

The introduction of the opportunity zone rules caused nothing but confusion. Throughout 2018 and early 2019 investors largely sat on the sidelines waiting for additional regulations and guidance from the Treasury Department.

To date, the Treasury Department and the IRS have issued the following proposed Treasury Regulations and guidance on the QOZ program requirements:

- Proposed Treasury Regulations issued October 19, 2018 (2018 Regulations)
- Proposed Treasury Regulations issued April 17, 2019 (2019 Regulations)
- Revenue Ruling 2018-29

The Proposed Regulations clarify many but not all requirements of the QOZ program. The Treasury Department has requested comments on certain aspects of the Proposed Regulations and may issue additional regulations in the future providing further clarification.

The Proposed Regulations are extensive and complex.

B. Qualified Opportunity Zones

First, it is important to determine where the QOZs are. QOZs can be low-income communities that are:

- Identified and proposed by the chief executive officers of the fifty states and other US possessions (District of Columbia and US territories).
- Designated by the Secretary of the Treasury (Secretary).

The purpose of designating a QOZ is to spur economic development and job creation by encouraging new long-term investment in these low-income communities.

1. QOZ Designation Process

A QOZ is a population census tract that is:

- A low-income community.
- Nominated as a QOZ by a state's governor or a territory's chief executive officer.
- Certified and designated by the Secretary as a QOZ within the consideration period.

QOZs have been identified in all 50 states, the District of Columbia, and five US possessions. A map of QOZs in Virginia is attached.

C. Qualified Opportunity Funds

To qualify for the tax benefits provided by the QOZ program, an investor must invest capital gains in a QOF. A QOF is an investment vehicle that is:

- Formed in a US state, the District of Columbia, or a US possession. A QOF that is formed in a US possession must only invest in that possession.
- Taxed either as a corporation or a partnership for federal income tax purposes.
- Organized for the purpose of investing in Qualified Opportunity Zone Property (QOZ Property).

The investment in a QOF must be an equity investment. The investment cannot be a debt instrument. The 2019 Regulations clarify that an investor may invest cash or other property in a QOF.

1. 90% Asset Test

A QOF must also hold at least 90% of its assets in QOZ. The QOF's property holdings are determined by the average of the percentage of QOZ Property held by the QOF, as measured on the last day of both:

- The first six-month period of the taxable year of the fund.
- The taxable year of the fund.

The Proposed Regulations provide a special rule that allows a QOF to choose to become a QOF in a month other than the first month of the taxable year. However, regardless of when an entity becomes a QOF, the last day of the taxable year is a testing date. Therefore, if an entity becomes a QOF in the seventh or later month of a 12-month taxable year, the 90% test is applied on the QOF's assets on only the last day of the taxable year. The 2019 Regulations include the following rules for the 90% asset test:

- To provide relief to a QOF that receives an investment shortly before a test date, the QOF may apply the 90% asset test without taking into account any investment received in the preceding six months provided those investments are held in:
    - cash;
    - cash equivalents; or
    - debt instruments with a term of 18 months or less.
- Sale proceeds from the distribution, sale, or disposition of the QOF's assets will count as QOZ Property for purposes of the 90% asset test provided:
    - they are reinvested in other QOZ Property within 12 months of the distribution, sale, or disposition, subject to extension for government-related delays; and
    - before reinvestment they are continuously held in cash, cash equivalents, or debt instruments with a term of 18 months or less.

2. Valuation Method for 90% Asset Test

For purposes of the 90% asset test, the Proposed Regulations allow the QOF to use either:

- The asset values reported on the QOF's applicable financial statement for the taxable year.
- The QOF's cost basis for owned assets and present values of lease payments for leased assets.

A taxpayer's applicable financial statement is generally a financial statement prepared under US generally accepted accounting principles (GAAP) that either:

- Is required to be filed with the SEC.

- Is required to be provided to the federal government or any of its agencies (other than the IRS).
- The taxpayer reasonably anticipates will be directly relied on for the purposes for which it was given and is:
    - given to creditors for purposes of making lending decisions;
    - given to equity holders for purposes of evaluating their investment in the taxpayer; or
    - provided for other substantial non-tax purposes.

3. Certification as a Qualified Opportunity Fund

Any taxpayer that is a corporation or a partnership for federal income tax purposes may self-certify as a QOF using Form 8996 (which is not yet in final form as of July 2019), which the QOF attaches to its annual tax return.

A gain deferral election is not effective for an investment that is made before an eligible entity certifies as a QOF.

4. Qualified Opportunity Zone Property

For QOF investors to receive the intended tax benefits, a QOF must be organized to invest in QOZ Property. QOZ Property includes the following three types of property:

- QOZ Stock.
- QOZ Partnership Interests.
- QOZ Business Property.

a. QOZ Stock

If an entity is classified as a corporation for federal income tax purposes, then an equity interest (stock) in the entity qualifies as QOZ stock (QOZ Stock) if:

- The stock is acquired by a QOF after December 31, 2017, at its original issue from the corporation solely in exchange for cash.
- As of the time the stock is issued, the corporation is a QOZ Business (or, in the case of a new corporation, is being organized for purposes of being a QOZ Business).
- During substantially all the QOF's holding period for the stock, the corporation is a QOZ Business. The 2019 Regulations define "substantially all" for this purpose as at least 90%.

b. QOZ Partnership Interests

If an entity is classified as a partnership for federal income tax purposes, then an equity interest in the entity qualifies as a QOZ partnership interest (QOZ Partnership Interest) if:

- The partnership interest is acquired by a QOF after December 31, 2017 from the entity solely in exchange for cash.
- As of the time the interest is issued, the entity is a QOZ Business (or, in the case of a new entity, is being organized for purposes of being a QOZ Business).
- During substantially all the QOF's holding period for the interest, the entity is a QOZ Business. The 2019 Regulations define "substantially all" for this purpose as at least 90%.

c. QOZ Business Property

Tangible property used in a trade or business of a QOF or QOZ Business qualifies as QOZ business property (QOZ Business Property) if:

- The tangible property was acquired by the QOF or QOZ Business by purchase or lease after December 31, 2017
- During at least 90% of the QOF's or QOB Business's holding period or lease term for the tangible property, at least 70% of the use of the tangible property was in a QOZ.
- For purchased tangible property, it was purchased from an unrelated party (unrelated parties means having no more than 20% common ownership) and either:
    - the original use of the tangible property in the QOZ commences with the QOF or QOZ Business; or
    - the QOF or QOZ Business substantially improves the tangible property.

A. Original Use Requirement

The Revenue Ruling addresses the original use requirement for two types of tangible property, land and existing buildings. The rules are as follows:

- **Land.** The Revenue Ruling states that, given the permanence of land, its original use can never commence with a QOF or QOZ Business, so the original use requirement does not apply to the land on which a building is located.
- **Buildings.** The original use of an existing building located on land also does not commence with the QOF or QOZ Business. They instead must substantially improve the building for the building to qualify as QOZ Property. For purposes of determining whether or not the building is substantially improved:
    - the land's adjusted basis is not included in a building's adjusted basis; and
    - the land on which a substantially improved building is located does not itself need to be separately substantially improved for the building to qualify as QOZ Property.

B. Substantial Improvement Requirement

Tangible property is treated as substantially improved by the QOF only if, during any 30-month period beginning after the acquisition date of the property, the QOF adds to the basis of the property an amount equal to more than the adjusted basis of the property at the beginning of the 30-month period. The Proposed Regulations provide a special rule for buildings located on land wholly within a QOZ that only requires the substantial improvement to the building and does not require the QOF to separately substantially improve the land on which the building is located.

5. QOZ Business

An entity that issues stock or partnership interests to a QOF must qualify as a QOZ Business for investors to receive the intended tax benefits. A trade or business is a QOZ Business if:

- Substantially all the tangible property owned or leased by the trade or business is QOZ Business Property. The Proposed Regulations define substantially all in this context as at least 70%.
- For each taxable year, at least 50% of its gross income is derived from the active conduct of a trade or business in the QOZ. The 2019 Regulations:
    - define a trade or business for purposes of the QOZ program as a trade or business within the meaning of Code Section 162;
    - provide that the ownership and operation (including leasing, provided the lease is not a triple-net lease) of real property qualifies as the active conduct of a trade or business; and
    - set out three safe harbors and a facts and circumstances test for determining whether the 50% gross income test is satisfied.
- A substantial portion of its intangible property is used in the active conduct of a trade or business in the QOZ. The 2019 Regulations define "substantially all" in this context as at least 40%.
- In each taxable year, less than 5% of the average aggregate unadjusted bases of its property is attributable to nonqualified financial property, subject to a working capital safe harbor. Nonqualified financial property is defined as:
    - debt;
    - stock;
    - partnership interests;
    - options; and
    - other similar property.

- It is not a "sin business," defined as a:
    - private or commercial golf course;
    - country club;
    - massage parlor;
    - hot tub facility;
    - suntan facility;
    - racetrack or other facility used for gambling; or
    - store the principal business of which is the sale of alcoholic beverages for consumption off premises.

6. Working Capital Safe Harbor

The Proposed Regulations allow QOZ Businesses to hold reasonable amounts of working capital in:

- Cash.
- Cash equivalents.
- Debt instruments with a term of 18 months or less.

The working capital may be held for a period of up to 31 months if :

- There is a written plan that designates these amounts for:
    - the acquisition, construction, and/or substantial improvement of tangible property in the QOZ; or
    - the development of a trade or business in the QOZ.
- There is a written schedule consistent with the ordinary start-up of a trade or business requiring the working capital assets to be spent within 31 months, subject to delay for government action on an application that is completed within the 31-month period.
- The business substantially complies with the plan and schedule.

Any gross income earned from this working capital is counted toward the satisfaction of the 50% gross income test above. The "use of intangible property" requirement for a QOZ Business is also treated as satisfied during any period in which the business is proceeding in a manner consistent with the plan and schedule described above.

D. QOZ Program Tax Benefits

There are three tax incentives to encourage investment in QOFs:

- **Temporary capital gains tax deferral.** An investor may defer income tax on gains from the sale or exchange of capital assets by reinvesting the amount of gain into a QOF within 180 days of the sale or exchange, with special rules for pass-through entities. Taxes are deferred until the earlier of:
    - the date the QOF investment is disposed of; and
    - December 31, 2026.
- **Step-up in basis/capital gains reduction.** If the investment in the QOF is held for five years, the investor receives an increase in basis equal to 10% of the deferred gain invested in the fund. If the investment is held for another two years, up to December 31, 2026, the investor receives an additional increase in basis equal to 5% of the deferred gain invested in the fund (for a total of 15%).
- **Tax exemption.** If the investment in the QOF is held for ten or more years, the investor may elect to increase its basis in the QOF investment to the fair market value of the interest on the date sold or exchanged. The investor is not taxed on any capital gains resulting from the appreciation of the investment in the QOF. This option is available until December 31, 2047. In addition, the 2019 Regulations provide that if a QOF partnership or S corporation sells directly-owned QOZ Property after the ten-year holding period, an investor in the QOF may elect to exclude some or all of its allocated capital gain from gross income and receive the benefit of the fair market value basis increase. To illustrate, if an investor realizes a gain of $100,000 from the sale or exchange of a capital asset and reinvests that money into a QOF within 180 days, the tax on that $100,000 is deferred until the earlier of:
    - December 31, 2026.
    - The date the investor disposes of its interest.

The investor's initial basis in its QOF investment is zero.

If the investor holds the investment for five years, the investor receives a $10,000 increase in basis, which is excluded from income tax when the investor recognizes the deferred gain. If the investor leaves the investment in place for an additional two years, the investor receives an additional $5,000 increase in basis, amounting to a total of $15,000 excluded from income tax. The investor must pay taxes on the $85,000 balance of the deferred gain as of December 31, 2026 and its basis is increased to $100,000 at that time.

If the investor holds the investment for a minimum of ten years, the investor has the option to avoid capital gains tax on any appreciation in the $100,000 QOF investment in addition to the $15,000 increase in basis. Therefore, after ten years, the investor may only pay tax on $85,000 of gain.

1. Rules for QOF Investment Holding Periods

The 2019 Regulations provide specific rules for determining an investor's holding period of a QOF investment. Most notably:

- The holding period for the QOF investment does not include the period the investor held property that was transferred to the QOF in exchange for the investment.
- If an investor disposes of its QOF interest and reinvests in another QOF, the investor's holding period for its investment in the second QOF begins on the date of its investment in the second QOF, not the first QOF.

2. Gain Eligible for Deferral

Although the statute refers to gains from the sale of property, the Proposed Regulations clarify that only capital gains are eligible for deferral. Any type of capital gains are eligible.

An investor may invest more than the capital gain amount, but only the capital gain amount receives tax deferral. In this case, the QOF investment is treated as two separate interests: one that qualifies for tax benefits and one that does not.

An investor may also:

- Not invest the entire capital gain amount. Any capital gain not reinvested is subject to payment of tax.
- Split its capital gains for investment in multiple QOFs.

3. 180 Day Rule

To be eligible for QOZ tax benefits, the Proposed Regulations require an investor to invest its capital gains in a QOF within a 180-day period. The 180-day period generally begins on the day the gain would be recognized for federal income tax purposes if the taxpayer did not elect to defer recognition of the gain under Code Section 1400Z-2.

There is an exception regarding the start of the 180-day period for partners in a partnership or other pass-through entity. A partner's 180-day period generally begins on the last day of the partnership's taxable year, which is the day on which the partner would otherwise recognize the gain if the gain was not deferred. If a partner knows the date of the partnership gain and that the partnership is not electing to defer the gain, the partner may instead choose to start the 180-day period on the same date as the beginning of the partnership's 180-day period.

The 2019 Regulations introduced another exception to the general 180-day rule for Section 1231 property (real property used in a trade or business and held for more than one year). The 180-day period to invest capital gain net income from Section 1231 property starts on the last day of the taxable year.

4. Gain Inclusion Events

An investor in a QOF must pay tax on its deferred gain on the earlier of:

- The date the QOF investment is sold or exchanged.
- December 21, 2026.

The 2019 Regulations define a non-exclusive list of "Inclusion Events" that reduce or terminate a QOF investor's equity interest, requiring recognition of deferred gain. The Regulations also describe certain types of transfers and exchanges that are not considered Inclusion Events.

5. Rules for Multiple QOF Investments

The Proposed Regulations address the treatment of multiple investments in a QOF by a single investor as follows:

- **First-in, first-out (FIFO) method.** This method must be used to identify the interest that was sold if a taxpayer:
    - holds investments with identical rights in a QOF that were acquired on different days; and
    - on a single day, disposes of less than all its interest.
- **Pro-rata method.** If after the application of the FIFO method, a taxpayer is treated as having disposed of less than all the investments that the taxpayer acquired on one day, and if the interests acquired on that day have different tax attributes, then a pro-rata allocation must be made to determine which interests were disposed of.

6. Advantages and Disadvantages of Alternate Investment Structures

Direct Versus Indirect Investment

There are advantages and disadvantages of a QOF investing in a QOZ through a subsidiary (by acquiring QOZ Stock or QOZ Partnership Interests in a QOZ Business), versus investing directly in QOZ Business Property.

For example, when investing in a QOZ Business only 70% of the tangible assets must consist of QOZ Business Property. On the other hand, up to 90% may be required if investing directly in QOZ Business Property. An investment in a QOZ Business can also take advantage of the working capital safe harbor and thus hold more working capital assets.

However, a QOZ Business is subject to additional restrictions including the 50% active gross income test, restrictions on conducting sin businesses, and limits on holding nonqualified financial assets. Investors and sponsors should carefully consider these factors and their business needs when structuring their investment.

HOT TOPICS

Marijuana/CBD/THCA

Utility Scale Solar Energy Development

Artificial Intelligence, Blockchain & Cybersecurity

Illegal Gambling in Virginia

Gregory D. Habeeb

Guy M. Harbert, III

Christen C. Church

Jonathan D. Puvak

Scott A. Stephenson

HOT LEGAL TOPICS:

MARIJUANA/CBD/THCA

UTILITY SCALE SOLAR ENERGY DEVELOPMENT

ARTIFICIAL INTELLIGENCE, BLOCKCHAIN AND CYBERSECURITY

ILLEGAL GAMBLING IN VIRGINIA

Gregory D. Habeeb, Guy M. Harbert
Christen C. Church, Jonathan D. Puvak,
Scott A. Stephenson

Gentry Locke Seminar
September 6, 2019

HOT LEGAL TOPICS: MARIJUANA AND CBD/THCA

Scott A. Stephenson

A. We all know what marijuana is. But, what is CBD, THC, and/or THCA?

1. Cannabidiol, better known as CBD, is the second most prevalent of the active ingredients of marijuana. By itself, it does not cause a "high."

2. Tetrahydrocannabinol, or THC, is the compound in marijuana that causes a "high."

3. THCA, or tetrahydrocannabinolic acid, is a non-intoxicating cannabinoid found in raw and live cannabis.

B. Basic tension between federal and Virginia laws relating to marijuana:

1. Under the federal Controlled Substances Act – 21 U.S.C. § 801 *et seq*. – the use, sale or distribution of marijuana is illegal.

2. Marijuana is a schedule I controlled substance under the Act, a designation that is reserved for drugs that have a high potential for abuse, lack any medical value, and can't be safely prescribed.

    i. Simple possession with no intent to distribute is a misdemeanor, punishable by up to one year in prison and a minimum fine of $1,000. Repeat offenders receive higher terms of imprisonment/fines.

    ii. Individuals involved in marijuana businesses can receive up to five years in prison and significant fines.

    iii. It is also unlawful to "knowingly open, lease, rent, maintain, or use property for the manufacturing, storing, or distribution of controlled substances." Thus, landlords that have tenants involved in state-permitted marijuana industry may risk federal asset forfeiture or other criminal fines.

3. Under Virginia law, the possession of marijuana is unlawful unless it was obtained pursuant to a valid prescription. Va. Code § 18.2-250.1.

4. In that vein, Virginia law authorizes the possession and distribution of marijuana for medical purposes, specifically, the treatment of cancer and glaucoma. Va. Code § 18.2-251.1.

C. Virginia legislation relating to the prescription and dispensation of CBD/THCA Oil:

1. The federal government considers CBD in the same class as marijuana, but doesn't habitually enforce against it.
2. Virginia Beginning in 2016 and continuing into 2017 and 2018, the Virginia General Assembly enacted and amended legislation allowing the use of CBD and THCA oil for treatment, and authorizing the Board of Pharmacy – a health regulatory Board established by Virginia statute – to establish a permitting system for cannabidiol/THC-A oil production and dispensary facilities in Virginia. Va. Code §§ 54.1-3408.3; 54.1-3442.6.

3. CBD and THCA oils must contain at least 15% of either (CBD) or THCA and no more than 5% THC. Va. Code § 54.1-3408.3(A).

4. The Board is authorized to adopt regulations establishing health, safety, and security requirements for the pharmaceutical processors. Va. Code § 54.1-3442.6(C). The statutory and regulatory scheme is still in its infancy.

5. Virginia has been divided into five health services areas. The Board was authorized to award one conditional pharmaceutical processor permit for each health service area. Va. Code § 54.1-3442.6(A)-(B). The five permit holders were selected in December 2018. The closest pharmaceutical processor facilities to Roanoke are located in Bristol and Staunton.

6. By statute, a processor must be supervised by a licensed pharmacist on-site at the facility, and can only dispense cannabidiol oil and THC-A oil that has been cultivated and produced on the permitted premises. Va. Code §§ 54.1-3442.6; 54.1-3442.7. Thus, the processors grow their own marijuana at their facilities for the production and dispensation of CBD and THCA oils. Safety and security are therefore points of major emphasis in the Board's regulations. *See, e.g.,* 18 VAC 110-60-110(B), 110-60-120(B).

7. Patients must have a "written certification" from their healthcare provider. Va. Code §§ 54.1-3408.3(B); 54.1-3442.7(A). Certifications expire after one year, at the longest. Va. Code § 54.1-3408.3(C)

8. Practitioners cannot be criminally prosecuted *under state law* for dispensing or distributing cannabidiol oil or THC-A oil for the treatment or to alleviate the symptoms of a patient's diagnosed condition or disease pursuant to a written certification. Va. Code § 54.1-3408.3(D). However, practitioners are still not protected *from federal law*. They are also still subject to sanction by the Board of Medicine. *Id.*

HOT LEGAL TOPICS:
UTILITY SCALE SOLAR ENERGY DEVELOPMENT

Jonathan D. Puvak
Gentry Locke Seminar September 6, 2019

A. Introduction

Utility scale solar ("USS") energy development is a large-scale solar production facility that is designed to generate electricity to serve a large industrial user or to connect into the electrical transmission grid. Electricity generated by a USS facility enters transmission lines as another source of power such as coal, nuclear, and natural gas. Most residential consumers measure their electricity consumption in kilowatts. However, USS projects base their production on megawatts. One (1) megawatt hour is equal to 1,000 kilowatt hours. For perspective, according to the United States Energy Information Association, in 2017, the average annual electricity consumption for a U.S. residential utility customer was 10,399 kilowatt hours (kWh), an average of 867 kWh per month.

Virginia is a relative newcomer to USS projects. While smaller scale solar panels have been installed to serves homes and businesses for decades, Virginia has seen tremendous growth in USS energy generation since 2015. Prior to 2015, the largest single solar facility in Virginia was less than 20 megawatts. Virginia has seen rapid growth, but that trend extends outside Virginia. The USS sector has been driving solar growth worldwide.

USS developers have identified agriculturally zoned farm property throughout Virginia as opportunities for USS facilities. The ideal property will also be located in close proximity to existing high capacity electrical transmission lines. The presence of these lines allows USS projects to economically "interconnect" into the existing electrical grid network.

B. Local Taxation

In 2014, the Virginia General Assembly created a significant local tax exemption for solar energy equipment installed in Virginia.[1] The tax exemption has been amended several times but currently provides an 80% local tax exemption for solar energy generation equipment. This tax exemption was mandated by legislation and Virginia counties, cities, and towns have no ability to reduce this tax exemption. However, Virginia localities have the ability to grant additional tax exemptions on solar equipment. This tax exemption applies to the taxation of the solar energy equipment itself, as personal property, but does not apply to the real property tax on the land on which the solar facility is located. There are certain time restrictions in order to qualify for the tax exemption and the tax exemption is currently set to expire on January 1, 2024. In addition to local tax exemptions, solar projects are eligible for other state and federal tax incentives.

[1] Va. Code Ann. §§ 58.1-3660-3661.

The upward trajectory of utility scale projects logically followed the creation of the local tax exemption. This trend was demonstrated in other states, such as North Carolina. Several years before solar was targeted by the Virginia General Assembly, North Carolina supported solar development through legislative and regulative efforts. As of 2019, these changes positioned North Carolina as the #2 ranked state in solar installations. Many solar developers now pursuing projects in Virginia have developed earlier projects in North Carolina. As noted above, Virginia's solar installations have grown since 2015 and Virginia now ranks 18th nationally.

In 2018, the Virginia General Assembly passed legislation that declared 5,000 megawatts of wind and solar development in the public interest.[2] This legislation was significant as it provided a financial incentive for Virginia's largest utilities, Dominion Energy and Appalachian Power, to invest in renewable energy projects. Dominion Energy has now partnered or directly constructed several utility scale solar generation projects and has additional projects planned. Appalachian Power is also pursuing projects within its service territory.

C. Virginia Department of Environmental Quality – Permit by Rule for Solar Projects

Prior to the creation of the tax exemption, the Virginia Department of Environmental Quality ("DEQ") adopted a permitting program intended to streamline the state's approval of solar projects. The legislation was known as the Small Renewable Energy Projects Act.[3] Subsequent regulations were developed by the DEQ.[4] The DEQ's process is known as "permit by rule" in which solar projects are reviewed and approved for compliance with specified requirements. The process is intended to eliminate discretion in the permit process and a project need only meet the requirements and the permit will be issued. The DEQ's permit by rule projects applies to USS solar projects in Virginia that are 150 megawatts and less, but there are some projects that are exempt from the permit by rule process such as very small projects or users that will produce and consume the energy. The DEQ started issuing permits in 2015 and the number of permitted projects has grown significantly 2015. The DEQ has a dedicated website where all the permit by rule law, regulations, application forms, and guidance documents can be accessed.[5]

D. Your Practice and Solar Development

In light of the emerging presence of Virginia solar development, it is possible that your legal practice will interact with some aspect of solar development. Some of the practice areas in which the solar industry relies on legal professionals to assist include: leasing and purchases of property, zoning, permitting, and financing.

[2] SB 966, Grid Transformation and Security Act.
[3] Va. Code Ann. § 10.1-1197.5.
[4] Solar Permit by Rule Regulations, 9VAC15-60.
[5] https://www.deq.virginia.gov/Programs/RenewableEnergy/SolarEnergy.aspx

Solar developers must control large amount of land to develop projects. Some solar developers prefer to enter into long term ground leases of 30 to 40 years, while other developers purchase the real estate. In most cases, all leases and purchases will be contingent upon a solar developer obtaining all required permits. The land acquisition, permitting and construction process will take several years. When reviewing a lease agreement, it is important to closely review provisions that address: contingencies, due diligence, landlord lien rights, assignability, and requirements to remove the solar equipment at the end of the lease. The removal of the solar equipment would occur when the project is no longer generating electricity. This process is known in the solar industry as decommissioning. In most cases, a landlord will want a form of surety or bond to ensure that the decommissioning is performed by the solar developer.

Solar developers and Virginia localities must be aware of the local tax structure. If you interact or represent any local governments, your jurisdiction may adopt a solar ordinance and need to understand the local tax impacts. In most jurisdictions, USS solar projects must seek zoning and local permit approvals. Many solar developers are not based in Virginia so often times local counsel is required to assist with the zoning, permitting, construction, and financing process.

Assuming the tax structure remains substantially similar, USS project development is likely to continue in Virginia.

Attachments:

1. Virginia Code §§ 58.1-3660 and 3661.
2. Solar Energy Industries Association, Virginia Solar Spotlight – June 2019.
3. "How Virginia is Breaking Logjams Around Solar Energy Legislation", Elizabeth McGowan, published May 7, 2019.
4. "Virginia's Push for Solar Panels Offers Few Rays of Hope", Washington Free Beacon, Nic Rowan, May 5, 2019.
5. "After Debate, Huge Solar Power Plant Coming to Northern Virginia, WTOP, Neal Augenstein, April 12, 2019.
6. "The Largest Solar Farm on the East Coast is Coming to Virginia – If Opponents Don't Kill it First", WAMU, Jacob Fenston, February 27, 2019.
7. "Governor Signs Sweeping Utility Overhaul Affecting 3 Million Virginia Ratepayers", Richmond Times-Dispatch, Robert Zullo, March 9, 2018.
8. Virginia Department of Environmental Quality – Permit by Rule Website.

HOT LEGAL TOPICS:
ARTIFICIAL INTELLIGENCE/BLOCKCHAIN/CYBERSECURITY

Christen C. Church

Gentry Locke Seminar September 6, 2019

ARTIFICIAL INTELLIGENCE (AI)

What is artificial intelligence?

- AI exists in many technological forms and applications. AI involves a form of technology where the machine or software "learns" from the data it analyzes or tasks it performs and adapts its "behavior" based on what it learns from the data to improve its performance of certain tasks over time.

Examples of current and potential uses of artificial intelligent technology:

- Autonomous, Self-Driving Cars
- Robots
- Google

The legal issues surrounding the use of AI are plentiful. AI is not only an emerging technology, but it is a technology that few people fully understand.

The legal questions involving AI not only surround liability, for example, identifying who is liable for harm caused by equipment operating using AI (the operator, the manufacturer, the AI designer?), but also if AI is utilizing impermissible considerations to return results.

When AI query technology moves from a pure algorithm to utilizing “deep learning” to produce results, how exactly are the results generated? Even pure algorithms may contain bias as they are designed by humans who themselves contain bias, but how do we determine if the AI using “deep learning” used rules and/or data that are based on, or result in, impermissible bias based on race, gender, religion, etc when making hiring or lending decisions?

The Algorithmic Accountability Act of 2019 (H.R. 2231) was recently introduced into Congress with the intent to increase federal oversight of artificial intelligence, we wait to see what bill(s) ultimately progress through to implementation.

BLOCKCHAIN

What is blockchain?

- Blockchain is a database, which is essentially just an organized collection of data. What makes blockchain technology more interesting than your typical database is that it is decentralized, distributed, and self-proving.

- A ledger is maintained of all transactions and multiple copies are maintained and reconciled, so it is difficult to manipulate or hack because all copies would need to be manipulated at exactly the same time.

Examples of current and potential uses of blockchain technology:

- Crypto Currency
- Smart Contracts – rules can be built in to the blockchain so the contract is self-executing
- Company and Asset Ownership
- Social Security Identification

Blockchain remains an emerging technology, and regulation at the federal and state level continues to be created and/or evolve to govern the functionality surrounding the usage of blockchain.

In 2018 Virginia's Joint resolution 153 was designed to investigate blockchain technology, however it did not progress. The Bureau of Financial Institutions issued a notice, attached as **Exhibit A**, that the Bureau of Financial Institutions does not specifically regulate virtual currencies and providing a warning to consumers. The Bureau of Insurance and other laws largely focus on the functionality of the blockchain technology. The functionality and role of the party may implicate existing laws and regulations such as Chapter 19 of Title 6.2 of the Code of Virginia, regarding money order sellers and money transmitters.

CYBERSECURITY

While cybersecurity is not a new legal topic, it continues to be an area calling for increased notice and consideration of attorneys, both as required in advising clients and in operating each attorney's own legal practice. In providing professional services to our clients, attorneys need to remain aware of applicable legal and ethical obligations.

Virginia State Bar Rules of Professional Conduct. Rule 1.6. Confidentiality of Information Excerpts:

> "Rule 1.6 (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule."
>
> ***"Acting Reasonably to Preserve Confidentiality"***
> [19] Paragraph (d) requires a lawyer to act reasonably to safeguard information protected under this Rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the

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

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

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

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

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

(a) Periodic staff security training and evaluation programs, including precautions and procedures regarding data security;
(b) Policies to address departing employee's future access to confidential firm data and return of electronically stored confidential data;
(c) Procedures addressing security measures for access of third parties to stored information;
(d) Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused;
(e) The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and
(f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity."

Other examples of laws and regulations that may apply to lawyers in connection with Cybersecurity?

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

HOT LEGAL TOPICS:
ILLEGAL GAMBLING IN VIRGINIA

Guy M. Harbert

I. WHAT CONSTITUTES "ILLEGAL GAMBLING?"

a. "Illegal gambling"
   i. "means the making, placing, or receipt of any bet or wager in the Commonwealth of money or other consideration or thing of value, made in exchange for a chance to win a prize, stake, or other consideration or thing of value, dependent upon the result of any game, contest, or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest, or event occurs or is to occur inside or outside the limits of the Commonwealth." Va. Code §18.2-325 (1)
   ii. This definition requires 3 elements
      1. Prize
      2. Wager
      3. Chance
   iii. Unless all three elements are present, there is no illegal gambling.
b. "gambling Device"
   i. "Any device, machine, paraphernalia, equipment, or other thing, including books, records and other papers, which are actually used in an illegal gambling operation or activity." Va. Code. §18.2-325(3)(a)
   ii. "Any machine, apparatus, implement, instrument, contrivance, board or other thing, or electronic or video versions thereof, including but not limited to those dependent upon the insertion of a coin or other object for their operation, which operates, either completely automatically or with the aid of some physical act by the player or operator, in such a manner that, depending upon elements of chance, it may eject something of value or determine the prize or other thing of value to which the player is entitled; provided, however, that the return to the user of nothing more than additional chances or the right to use such machine is not deemed something of value within the meaning of this subsection; and provided further, that machines that only sell, or entitle the user to, items of merchandise of equivalent value that may differ from each other in composition, size, shape or color, shall not be deemed gambling devices within the meaning of this subsection." Va. Code. §18.2-325(3)(b)

II. PRIZE

a. "a prize, stake, or other consideration or thing of value" Va. Code § 18.2-325
b. The prize must have intrinsic value - fame and glory for the winner is not sufficient to constitute a "prize".

III. WAGER

a. Most often, the wager is cash, or has a cash equivalent value. 1997 Virginia Attorney General Opinions 97; 1991 Virginia Attorney General Opinions 288 (attached as Exhibit 4); Maughs v. Porter, 157 Va. 415, 161 S.E. 242 (1931).
b. Purchase of a product constitutes consideration. 77-78 Virginia Attorney General Opinions 238.
c. Sweepstakes
    i. Traditional promotional sweepstakes are rendered legal by the elimination of the element of wager – "no purchase necessary" to enter. 97 Virginia Attorney General Opinion 97; 72-73 Virginia Attorney General Opinion 258; 69-70 Virginia Attorney General Opinion 167.
    ii. Making free entry available negates the "wager." Coca-Cola Bottling Company of Wisconsin v. La Follette, 316 N.W.2d 129 (Wis. App. 1982) (promotional sweepstakes based upon specially marked bottle caps on soft drink containers did not constitute gambling because free bottle caps were available upon request); Mid-Atlantic Coca-Cola Bottling Co. v. Chen, Walsch and Tecler, 460 A.2d 44 (Md. Ct. App. 1983).
    iii. However, the product that is the subject of the promotion must have intrinsic value. Virginia Alcoholic Beverage Control Board v. VFW Oceanview Post 3610, 10 Va. App. 165, 390 S.E.2d 202 (1990) (gambling existed where the only product sold was the "scratch off" card upon which the sweepstakes was played).
    iv. Sweepstakes game machines
        1. The Code was amended in 2019 in an effort to make these games illegal - "For the purposes of this subdivision and notwithstanding any provision in this section to the contrary, the making, placing, or receipt of any bet or wager of money or other consideration or thing of value shall include the purchase of a product, Internet access, or other thing made in exchange for a chance to win a prize, stake, or other consideration or thing of value by means of the operation of a gambling device as described in subdivision 3 b, regardless of whether the chance to win such prize, stake, or other consideration or thing of value may be offered in the absence of a purchase." Va. Code §18.2-325 (1)
        2. "Such devices are no less gambling devices if they indicate beforehand the definite result of one or more operations but not all the operations. *Nor are they any less a gambling device because, apart from their use or adaptability as such, they may also sell or deliver something of value on a basis other than chance*." Va. Code. §18.2-325(3)(b) (emphasis added)

IV. CHANCE vs SKILL

a. If skill *predominates* over chance, there is no illegal gambling. 1987-99 Attorney General Opinions, p.284, May 31, 1988; Id., p. 287, July 20, 1988.
b. Va. Code § 18.2-333. "Exceptions to article; certain sporting events Nothing in this article shall be construed to prevent any contest of speed or skill between men, animals, fowl or vehicles, where participants may receive prizes or different percentages of a purse, stake or premium dependent upon whether they win or lose or dependent upon their position or score at the end of such contest. Any participant who, for the purpose of competing for any such purse, stake or premium offered in any such contest, knowingly and fraudulently enters any contestant other than the contestant purported to be entered or knowingly and fraudulently enters a contestant in a class in which it does not belong, shall be guilty of a Class 3 misdemeanor."

V. EXCEPTIONS

a. Charitable Gaming. Va. Code §18-2-340.15 *et seq*
b. Fantasy Sports. Va. Code § 59.1-556 *et seq*
    i. "Fantasy contest" includes any online fantasy or simulated game or contest with an entry fee in which (i) the value of all prizes and awards offered to winning participants is established and made known to the participants in advance of the contest; (ii) all winning outcomes reflect the relative *knowledge and skill* of the participants and shall be determined by accumulated statistical results of the performance of individuals, including athletes in the case of sports events; and (iii) no winning outcome is based on the score, point spread, or any performance of any single actual team or combination of teams or solely on any single performance of an individual athlete or player in any single actual event. Va. Code § 59.1-556
c. Horse Racing. Va. Code § 59.1- 364 *et seq*
d. Personal residences: Va. Code. § 18.2-334 "Nothing in this article shall be construed to make it illegal to participate in a game of chance conducted in a private residence, provided such private residence is not commonly used for such games of chance and there is no operator as defined in subsection 4 of § 18.2-325."

Code of Virginia
Title 58.1. Taxation
Chapter 36. Tax Exempt Property

§ 58.1-3660. Certified pollution control equipment and facilities

A. Certified pollution control equipment and facilities, as defined herein, are hereby declared to be a separate class of property and shall constitute a classification for local taxation separate from other such classification of real or personal property and such property. Certified pollution control equipment and facilities shall be exempt from state and local taxation pursuant to Article X, Section 6 (d) of the Constitution of Virginia.

B. As used in this section:

"Certified pollution control equipment and facilities" shall mean any property, including real or personal property, equipment, facilities, or devices, used primarily for the purpose of abating or preventing pollution of the atmosphere or waters of the Commonwealth and which the state certifying authority having jurisdiction with respect to such property has certified to the Department of Taxation as having been constructed, reconstructed, erected, or acquired in conformity with the state program or requirements for abatement or control of water or atmospheric pollution or contamination. Such property shall include, but is not limited to, any equipment used to grind, chip, or mulch trees, tree stumps, underbrush, and other vegetative cover for reuse as mulch, compost, landfill gas, synthetic or natural gas recovered from waste or other fuel, and equipment used in collecting, processing, and distributing, or generating electricity from, landfill gas or synthetic or natural gas recovered from waste, whether or not such property has been certified to the Department of Taxation by a state certifying authority. Such property shall also include solar energy equipment, facilities, or devices owned or operated by a business that collect, generate, transfer, or store thermal or electric energy whether or not such property has been certified to the Department of Taxation by a state certifying authority. For solar photovoltaic (electric energy) systems, this exemption applies only to (i) projects equaling 20 megawatts or less, as measured in alternating current (AC) generation capacity, for which an initial interconnection request form has been filed with an electric utility or a regional transmission organization on or before December 31, 2018; (ii) projects equaling 20 megawatts or less, as measured in alternating current (AC) generation capacity, that serve any of the public institutions of higher education listed in § 23.1-100 or any private college as defined in § 23.1-105;(iii) 80 percent of the assessed value of projects for which an initial interconnection request form has been filed with an electric utility or a regional transmission organization (a) between January 1, 2015, and June 30, 2018, for projects greater than 20 megawatts or (b) on or after July 1, 2018, for projects greater than 20 megawatts and less than 150 megawatts, as measured in alternating current (AC) generation capacity, and that are first in service on or after January 1, 2017; (iv) projects equaling five megawatts or less, as measured in alternating current (AC) generation capacity, for which an initial interconnection request form has been filed with an electric utility or a regional transmission organization on or after January 1, 2019; and (v) 80 percent of the assessed value of all other projects equaling more than five megawatts and less than 150 megawatts, as measured in alternating current (AC) generation capacity for which an initial interconnection request form has been filed with an electric utility or a regional transmission organization on or after January 1, 2019. The exemption for solar photovoltaic (electric energy) projects greater than 20 megawatts, as measured in alternating current (AC) generation capacity, shall not apply to projects upon which construction begins after January 1,

2024. For pollution control equipment and facilities certified by the Virginia Department of Health, this exemption applies only to onsite sewage systems that serve 10 or more households, use nitrogen-reducing processes and technology, and are constructed, wholly or partially, with public funds. All such property as described in this definition shall not include the land on which such equipment or facilities are located.

"State certifying authority" shall mean the State Water Control Board or the Virginia Department of Health, for water pollution; the State Air Pollution Control Board, for air pollution; the Department of Mines, Minerals and Energy, for solar energy projects and for coal, oil, and gas production, including gas, natural gas, and coalbed methane gas; and the Virginia Waste Management Board, for waste disposal facilities, natural gas recovered from waste facilities, and landfill gas production facilities, and shall include any interstate agency authorized to act in place of a certifying authority of the Commonwealth.

Code 1950, § 58-16.3; 1972, c. 694; 1984, c. 675; 1995, c. 229;2003, c. 859;2006, cc. 375, 939; 2009, c. 671;2014, cc. 259, 737;2016, cc. 346, 518;2018, c. 849;2019, c. 441.

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

6/24/2019

Code of Virginia
Title 58.1. Taxation
Chapter 36. Tax Exempt Property

§ 58.1-3661. Certified solar energy equipment, facilities, or devices and certified recycling equipment, facilities, or devices.

A. Certified solar energy equipment, facilities, or devices and certified recycling equipment, facilities, or devices, as defined herein, are hereby declared to be a separate class of property and shall constitute a classification for local taxation separate from other classifications of real or personal property. The governing body of any county, city or town may, by ordinance, exempt or partially exempt such property from local taxation in the manner provided by subsection D.

B. As used in this section:

"Certified recycling equipment, facilities, or devices" means machinery and equipment which is certified by the Department of Environmental Quality as integral to the recycling process and for use primarily for the purpose of abating or preventing pollution of the atmosphere or waters of the Commonwealth, and used in manufacturing facilities or plant units which manufacture, process, compound, or produce for sale recyclable items of tangible personal property at fixed locations in the Commonwealth.

"Certified solar energy equipment, facilities, or devices" means any property, including real or personal property, equipment, facilities, or devices, excluding any portion of such property that is exempt under § 58.1-3660, certified by the local certifying authority to be designed and used primarily for the purpose of collecting, generating, transferring, or storing thermal or electric energy.

"Local certifying authority" means the local building departments or the Department of Environmental Quality. The State Board of Housing and Community Development shall promulgate regulations setting forth criteria for certifiable solar energy equipment. The Department of Environmental Quality shall promulgate regulations establishing criteria for recycling equipment, facilities, or devices.

C. Any person residing in a county, city or town which has adopted an ordinance pursuant to subsection A may proceed to have solar energy equipment, facilities, or devices certified as exempt, wholly or partially, from taxation by applying to the local building department. If, after examination of such equipment, facility, or device, the local building department determines that the unit primarily performs any of the functions set forth in subsection B and conforms to the requirements set by regulations of the Board of Housing and Community Development, such department shall approve and certify such application. The local department shall forthwith transmit to the local assessing officer those applications properly approved and certified by the local building department as meeting all requirements qualifying such equipment, facility, or device for exemption from taxation. Any person aggrieved by a decision of the local building department may appeal such decision to the local board of building code appeals, which may affirm or reverse such decision.

D. Upon receipt of the certificate from the local building department or the Department of Environmental Quality, the local assessing officer shall, if such local ordinance is in effect, proceed to determine the value of such qualifying solar energy equipment, facilities, or devices or certified recycling equipment, facilities, or devices. The exemption provided by this section shall be determined by applying the local tax rate to the value of such equipment, facilities, or devices and subtracting such amount, wholly or partially, either

(i) from the total real property tax due on the real property to which such equipment, facilities, or devices are attached or (ii) if such equipment, facilities, or devices are taxable as machinery and tools under § 58.1-3507, from the total machinery and tools tax due on such equipment, facilities, or devices, at the election of the taxpayer. This exemption shall be effective beginning in the next succeeding tax year, and shall be permitted for a term of not less than five years. In the event the locality assesses real estate pursuant to § 58.1-3292, the exemption shall be first effective when such real estate is first assessed, but not prior to the date of such application for exemption.

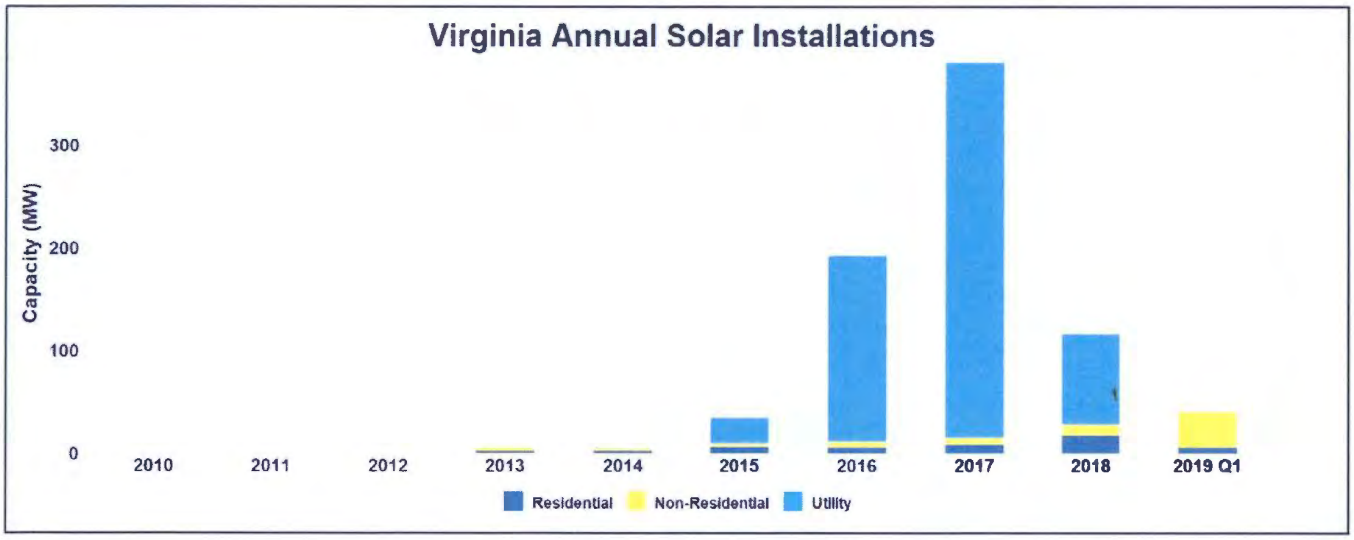
E. It shall be presumed for purposes of the administration of ordinances pursuant to this section, and for no other purposes, that the value of such qualifying solar energy equipment, facilities, and devices is not less than the normal cost of purchasing and installing such equipment, facilities, and devices.

Code 1950, § 58-16.4; 1977, c. 561; 1984, c. 675; 1988, c. 253; 1990, c. 690; 1998, c. 606; 2014, cc. 259, 737; 2016, c. 346.

Solar Spotlight – Virginia

At A Glance

- **Solar Installed:** 775.3 MW (115.8 MW installed in 2018)[i]
- **National Ranking:** 18th (19th in 2018)
- **Enough Solar Installed to Power:** 87,000 homes
- **Percentage of State's Electricity from Solar:** 1.03%[ii]
- **Solar Jobs and Ranking:** 3,890 (20th in 2018)[iii]
- **Solar Companies in State:** 255 companies total; 30 Manufacturers, 110 Installers, 115 Others[iv]
- **Total Solar Investment in State:** $1.03 billion ($156.78 million in 2018)
- **Price Declines:** 34% in the last 5 years
- **Growth Projections and Ranking:** 2,887 MW over the next 5 years (ranks 7th)

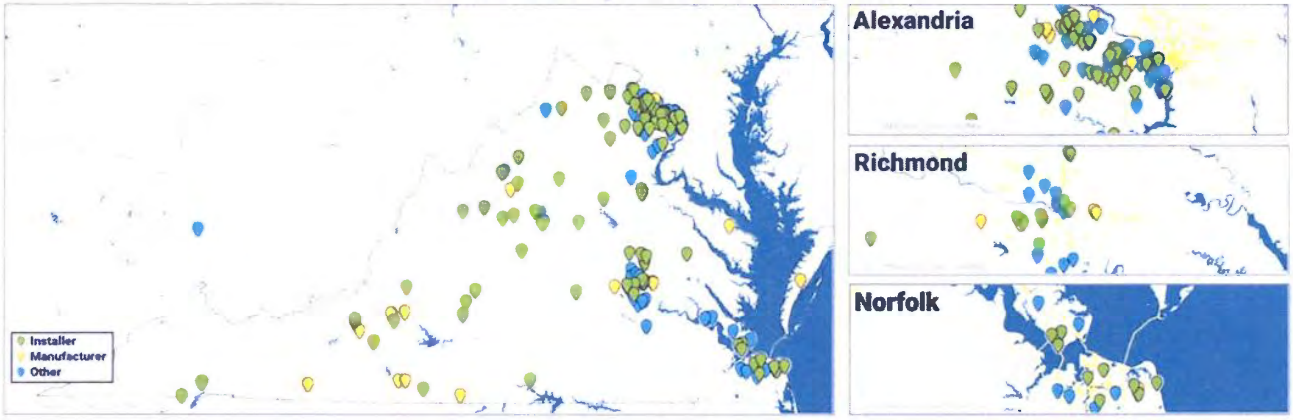


Notable Projects

- Southampton Solar, LLC has the capacity to generate 100 MW of electricity -- enough to power over 10,868 Virginia homes.[v]
- IKEA is one of the first major corporations to get involved in Virginia with its 504 kW IKEA Woodbridge project in Woodbridge.[vi]
- At 90 MW, Eastern Shore Solar, LLC in Oak Hall is among the largest solar installations in Virginia. Completed in 2016 by Dominion Renewable Energy, this photovoltaic project has enough electric capacity to power more than 9,781 homes.[vii]

Solar Spotlight – Virginia

Solar Companies in Virginia



About SEIA

The Solar Energy Industries Association (SEIA®) is the driving force behind solar energy and is building a strong solar industry to power America through advocacy and education. As the national trade association for the U.S. solar energy industry, which employs more than 242,000 Americans, we represent all organizations that promote, manufacture, install and support the development of solar energy. SEIA works with its 1,000 member companies to build jobs and diversity, champion the use of cost-competitive solar in America, remove market barriers and educate the public on the benefits of solar energy.

References

[i] ***All data from SEIA/GTM Research U.S. Solar Market Insight unless otherwise noted:*** http://www.seia.org/research-resources/us-solar-market-insight
[ii] ***Energy Information Administration, Electric Power Monthly:*** http://www.eia.gov/electricity/monthly/#generation
[iii] ***The Solar Foundation, State Solar Jobs Census:*** http://www.thesolarfoundation.org/solar-jobs-census/states/
[iv] ***SEIA, National Solar Database:*** http://www.seia.org/research-resources/national-solar-database
[v] ***SEIA, Major Solar Projects List:*** http://www.seia.org/research-resources/major-solar-projects-list
[vi] ***Ibid***
[vii] ***SEIA, Solar Means Business:*** http://www.seia.org/campaign/solar-means-business-2016

VIRGINIA

How Virginia is breaking logjams around solar energy legislation

Elizabeth McGowan | May 7, 2019

Farragutful (https://commons.wikimedia.org/wiki/File:2015_Virginia_State_House_-_Richmond,_Virginia_02.JPG) / Wikimedia Commons

The Virginia Statehouse in Richmond.

Mediation and conversation among stakeholders mean the industry's prospects in the state are brightening.

When Virginia's General Assembly convened in January for its hectic six-week session, solar developers rallied against a pair of little-noticed bills they feared would dampen their industry statewide.

Months later, their outlook is far less dire.

One bill, which would have made it costlier to deconstruct arrays of photovoltaic panels at the end of their usefulness by charging a huge per-acre fee, became far more palatable during a mediation process unique to Virginia.

The other measure, intent on repealing tax breaks for solar, never advanced out of committee. The local branch of the Solar Energy Industries Association is now in the midst of meeting with stakeholders to hammer out a compromise bill that they hope the General Assembly will pass next year.

Solar advocates praised debate and discussion as the path to consummation for both bills.

"Our approach is, 'Let's get together to see what we can work out,'" said David Murray, executive director of the trade association for Virginia, Maryland, Delaware and the District of Columbia. "Every legislative process I've ever been in, there has been an instance where legislators said we need to have stakeholders sitting around the table and coming to some form of agreement."

Mediators navigate decommissioning

The solar industry wasn't opposed to the idea of a decommissioning plan for solar farms, but developers were united against the language rolled out in SB 1091. That original bill authorized localities to have developers cover a fixed decommissioning bond of $10,000 per acre.

It was sponsored by Sen. Bryce Reeves, R-Spotsylvania, who represents the county where sPower has gained approval to build Virginia's largest solar project thus far — 500 MW spread out over 6,350 acres.

Solar developers pushed back with their own draft bill, SB 1398, sponsored by Sen. William Stanley Jr., R-Franklin.

Mediators affiliated with what's called the Rubin Group morphed all of those bits (https://energynews.us/2019/02/28/southeast/how-an-outside-mediator-helped-broker-virginias-new-solar-legislation/) into the final, more industry-friendly version that became law in late March and goes into effect July 1. The non-governmental group was created several years ago specifically to halt the stonewalling of solar legislation.

Mark Rubin, executive director of the Virginia Center for Consensus Building at Virginia Commonwealth University in Richmond, is its chief mediator. Representatives from the regional solar trade association, co-ops, investor-owned utilities, the environmental community and a rate design expert are among the other participants.

The new law, folded into HB 2621 (https://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+HB2621) and SB 1091 (http://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+SB1091), requires a written decommissioning agreement to be either part of the local project approval process or a condition of site approval.

It ditches the $10,000 per-acre bond, but requires developers to provide credit, cash or bond for decommissioning costs based upon the estimate of a licensed professional engineer. The net salvage value of the solar panels and other equipment can be included in that estimate.

As well, the companies must stabilize the soil, restore the ground cover and dispose of all materials.

Murray praised the Rubin Group for breaking a logjam on numerous solar bills and also guiding legislators through complicated measures that they don't have the expertise to understand.

"For communities concerned about liability, this bill offers assurance that land will return to its prior use," he said.

The "life" expectancy of a solar farm is 25 to 35 years. As solar power evolves, Murray said he expects the recycling of metals and other materials to grow and become more efficient.

Rural legislators spur tax repeal bill

Rural legislators convinced that solar developers weren't paying their fair tax share were behind HB 2810 (http://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+HB2810), introduced by Del. Tommy Wright, R-Victoria.

A 2016 state law established a mandatory 80% exemption from the local machine and tool tax for solar installations between 20 megawatts and 150 MW, as long as construction began before Jan. 1, 2024. Wright's bill would have sunsetted that exemption four years early — in January 2020.

That bill, backed by the Virginia Association of Counties, was spurred by local governments in Southside, a region in far south central Virginia bordering North Carolina.

Many residents there have been skeptical of solar, the pace of its development and the conversion of agricultural lands to solar farms.

For years they have maintained that tax exemptions for solar developers are shorting rural localities of revenue.

"Wright and others in that part of the state are seeing a lot of solar farms feeding data centers in northern Virginia," Murray said. "They figure they could get more revenues, more juice from the solar orange, so to speak."

Murray's trade group and their lobbyists countered local legislators on several fronts. Even with tax reductions in place, they argued, communities still collect more revenue from a solar farm than fallow or farmed land.

Two, they emphasized that solar attracts initial construction jobs and ongoing maintenance jobs in places with higher unemployment. And three, they said solar projects don't include infrastructure and service expenses that other developments do.

"What some localities don't realize is that margins are very tight in this industry because it's so competitive," Murray said.

Joe Lerch, director of local government policy for the Virginia Association of Counties, said his organization supported HB 2810 because it would have allowed local governing bodies to determine what level of tax incentive to offer solar installations.

"Rural counties will forfeit millions in revenue, particularly so for larger projects, due to the state mandate," he said, referring to the 2016 law.

While disappointed that the bill failed, Lerch said his organization is meeting with the solar industry to figure out how rural communities can recover what they claim is lost revenue.

One idea being floated is a solar severance tax — modeled after taxes paid by fossil fuel companies — on the power being produced.

"We just sat down last week to look at options," Murray said. "We're batting around some ideas that could work in the interim as a handshake agreement."

As happened with the decommissioning bill, he is optimistic that "negotiating can once again win the day."

"We're exploring a number of options that night work," he said. "It's a matter of both sides getting something they want."

- Washington Free Beacon - https://freebeacon.com -

Virginia's Push for Solar Panels Offers Few Rays of Hope

Posted By *Nic Rowan* On May 5, 2019 @ 5:00 am In Issues | No Comments

Many Civil War battles were fought on the farms surrounding Culpeper, Va., about an hour outside Washington, D.C., and in the shadow of the Blue Ridge Mountains. Now, a new conflict is underway, as members of the local community push back against energy providers attempting to cover Culpeper—and other parts of rural Virginia—with solar facilities, sometimes thousands of acres in size.

The push for solar in Virginia is part of a nationwide effort to ramp up several fashionable renewable energy sources in the United States. To attract energy providers, federal, state, and local governments offer generous tax credits and subsidies for solar and wind facilities.

Virginia's General Assembly voted in 2016 to subsidize solar and wind energy with an 80 percent sales and use tax exemption for machinery, tools, and equipment for public service corporations, following a number of legislative pushes for clean energy in the state. It was a successful strategy: Since the decision, solar providers have gained approval to set up shop in Spotsylvania, Chesterfield, Accomack, and other communities. The proposed solar facility in Culpeper, operated by the California-based Cricket Solar, will cover 800 acres of land intended for agricultural use and is set to produce 80 megawatts of power for the county.

But a growing body of research shows that, in the long run, solar isn't efficient enough to justify the land used and the money spent to make it a primary energy source. Doug Orye, an industrial electrical contractor who operates a farm near Culpeper, said he fears that solar companies moving into Virginia are using up land that would be better served for agricultural use.

"We're destroying huge amounts of land for a system that, at best, is 20 percent efficient," he told the *Washington Free Beacon*, explaining that for their cost, solar facilities produce an almost negligible amount of energy.

Orye added that in his experience, solar works best in small-scale situations, such as panels installed on private rooftops and sheds. For larger scale projects, though, the area solar panels cover coupled with their fickle nature—such as the impossibility of use on rainy days or at night—makes them not worth a hefty investment from government entities.

"I don't have a problem with clean energy—I've got a background in industrial engineering—but it's got to be efficient," Orye said.

Orye points to states such as California as previous places where solar providers have reaped the benefits of tax credits and subsidies, without significantly contributing to renewable energies. California was one of the first states to embrace solar, mandating in 2002 that energy providers begin implementing it as a power source, and by 2020 will require all houses to be built with solar panel installations. The state leads a nationwide trend that has been gestating for nearly two decades.

Federal and state governments subsidize the introduction of wind and solar—along with many other renewable energy sources—into local production lines to help aid the growth of these industries. Wind receives the most federal subsidization, with solar following in a close second. Between 2010 and 2016, solar subsidies ranged between 10 cents and 88 cents per kWh (the standard measurement for energy produced in an hour) and between 1.3 cents and 5.7 cents per kWh for wind. In comparison, other clean energy sources such as natural gas and nuclear power received between 0.05 cents and 0.2 cents per kWh in this time period.

But wind and solar are also the least efficient alternatives and dramatically raise prices to create energy. Electricity production prices went up 11 percent in states with mandates requiring subsidization for solar power seven years after their implementation, a recent study from the University of Chicago found. The same study found that after 12 years, prices rose 17 percent.

At the same time, the amount of energy saved in these states has been minimal. With the mandates, the amount of renewable energy in power generation was only 1.8 percent higher after seven years and only 4.2 percent higher after 12 years.

In Accomack, Va., local officials are regretting a 2017 decision to allow the Utah-based solar provider sPower to set up a facility in the area. Its purpose, in large part, was to serve Amazon and Microsoft, whose recent expansions into Virginia prompted the tech giants to pledge to use more renewable energy.

But it soon became clear that solar would not give a meaningful contribution to the tech giants. Amazon needs 7,000 megawatts of solar power to meet its commitment in Virginia, according to Ivy Main, chair of the Sierra Club's Renewable Energy Committee. It takes 160 to 200 acres to produce 20 megawatts of solar power, according to Dominion Energy—meaning that, at the very least, it would take 56,000 acres of solar to produce that amount of energy. In that case, a suitable power plant would require roughly 87.5 square miles of land covered in solar panels.

The Accomack solar facility still collects its subsidies and credits, which amounted to $1.1 million in 2018. But county supervisors are trying to make sure that it can't happen again. In 2017, county supervisors voted to restrict solar use for future facilities to only the few pieces of land zoned for industrial use.

"We are an agricultural powerhouse: We're ranked number one in grain production and number two in vegetables and broilers in the state," County Administrator Michael Mason told the *Free Lance-Star*. "Agricultural property is highly prized."

In early 2019, when sPower won approval to set up one of the largest plants in the United States in Spotsylvania—1.8 million panels on a 6,300-acre property, set to pump out 500 megawatts of electricity per year—community opposition was strong, even as county supervisors passed the measure.

Sean Fogarty, a leader of the Concerned Citizens of Spotsylvania County group, said that decision went against the county interests.

"It's kind of a betrayal by the supervisors," he said.

Supervisor David Ross, who opposed the decision, told the *Free Lance-Star* that he didn't think it was wise to rely so heavily on an unproven energy source.

"I think we're setting ourselves up to be a guinea pig," he said. "I would have rather started smaller."

After debate, huge solar power plant coming to Northern Virginia

By Neal Augenstein (https://wtop.com/author/neal-augenstein/) | @AugensteinWTOP (https://twitter.com/AugensteinWTOP)
April 12, 2019 9:11 am

Solar energy company sPower wants to build the 500 megawatt project on about 3,500 acres, or nearly 5-and-a-half square miles, of land in western Spotsylvania County. (Getty Images/iStockphoto)

After two years of debate, the Spotsylvania County Board of Supervisors voted Thursday to approve a special-use permit for what will be the East Coast's largest solar power plant.

Solar energy company sPower (http://spower.com/) will build the $615 million 500-megawatt project on about 3,500 acres, or more than 5 square miles of land in the western Spotsylvania County, Virginia.

Almost two-million solar panels will be installed on several tracts of land, in what's called the Wilderness area of the county.

Opponents said the project was too big and carried unknown health and environmental risks, which the company disputed.

sPower already has agreements to sell its energy to high-tech companies including Apple and Microsoft.

The company has said more than 1,000 construction jobs will be created over the next two years. Once finished, the project will provide 25 to 30 full-time jobs.

Nearby homeowners had expressed concerns about water and noise pollution in an area where many homes use well water. The company agreed to use municipal water, and tweaked landscaping buffers.

Daniel Menahem, senior manager of the Utah-based Sustainable Power Group, has said the project will pay over $20 million in property taxes during the projected 35-year life of the plant, compared with $700,000 if the land were not developed.

Editor's note: This story has been edited to correct that it will be the East Coast's largest solar power plant, not the nation's.

Like WTOP on Facebook (https://www.facebook.com/wtopnews) and follow @WTOP (https://twitter.com/WTOP) on Twitter to engage in conversation about this article and others.

WAMU | FEB 27

The Largest Solar Farm On The East Coast Is Coming To Virginia — If Opponents Don't Kill It First

Jacob Fenston

Solar panels in Nebraska.

Nati Harnik / AP

If it is built, it would be a massive expanse of black glass panels angled toward the sun. The solar panels would cover 3,500 acres in rural Spotsylvania County, generating 500 megawatts of power, the largest solar facility on the East Coast. But the project has generated intense opposition from some neighbors, many of whom live in a gated golf course community. Recently the solar project has gained (negative) attention from national conservative media outlets.

In the face of the controversy, the county board of supervisors decided in the wee hours of Wednesday morning to delay a final vote on the project until their next scheduled meeting in two weeks, and possibly even further.

By that point in the morning, just after 1 a.m., the supervisors had spent the night listening to impassioned testimony from residents — nearly nine hours, nonstop. Residents packed into the Spotsylvania High School auditorium in opposing groups, the anti-solar group wearing red t-shirts, and the pro-solar residents wearing green t-shirts.

The very first public speaker set the tone, with a fiery five-minute speech, linking the private solar project to U.S. Rep. Alexandria Ocasio-Cortez (D-NY) and her proposal to curb greenhouse gas emissions and climate change.

A yes vote from the county board would "give the green light to approve AOC's Green New Deal," said Russ Mueller, part of an organized group of residents of Fawn Lake, a housing development built around a golf course and country club. A small section of Fawn Lake abuts one corner of the solar project. "Don't transform our county into the face of the Green New Deal," said Mueller.

Other neighbors, wearing green, said solar panels would be preferable to other possible developments. "For us, this is about who do we want as our neighbors," said Jim Meadows, whose family owns property next to the proposed solar farm. "I would much rather have solar panels as our neighbor. They don't drive up and down Route 631; they don't need a lot of county services, they're not out shooting their guns at night."

The property consists of a total of 6,350 acres, 2,000 of which would be preserved as undeveloped land, according to the company, sPower, seeking to build the project, 11 miles west of the city of Fredericksburg. The solar panels would be set back from the property line by at least 100 feet. A timber company currently owns the land, and trees have been periodically clear cut.

"Unfortunately some folks seem to love living next door to our timber tract but shortsightedly hate to see us utilize it," said Bill Ridge, a forester with Riveroak Timberland, which owns the land. "They like us owning it but not using it."

"You know, and what about landowner rights?" Ridge asked. He also had a retort to residents of the neighboring housing development: "To the person who had a sign, 'Save Our Wilderness,' well why did you build a house on it?" (Fawn Lake was developed starting in the late 1980s, and covers 2,300 acres.)

The majority of the power from the facility would be sold to Microsoft, which has two data centers in Virginia, using massive amounts of electricity. The site in Spotsylvania was chosen for its remote rural location, and its proximity to a Dominion Energy substation, where solar power can be pumped into the grid, according to the solar developer, sPower.

According to sPower, the panels would be mostly invisible from roads and neighboring properties, surrounded by trees, vegetation, and earthen berms. But opponents of the project worry its large industrial footprint would lower their property values, and they also worry about the impact of construction, which would take 18 to 24 months. Other concerns ranged from the project's environmental impact, to cleanup when the site is eventually decommissioned, to the amount of tax revenue the county would collect.

Meanwhile, sPower maintains the project would create hundreds of jobs during construction, including about two dozen permanent full-time jobs. The company says the project would generate $600 million in property tax revenue during the first year (compared to the current $19,000 in revenue the timber operation garners).

In terms of environmental impact, the company says the project would reduce carbon emissions equivalent to 964,239 acres of forests sucking carbon from the atmosphere.

As one green-shirt-wearing resident, Helen Pemberton, put it, "God bless sPower, and God bless Spotsylvania County."

The board of supervisors will reconvene March 12.

RELATED STORIES

WAMU, MAR 18

Welcome To Spotsylvania: The East Coast Battleground For Big Solar

ALL THINGS CONSIDERED, MAR 25

A Battle Is Raging Over The Largest Solar Farm East Of The Rockies

https://www.richmond.com/news/virginia/governor-signs-sweeping-utility-overhaul-affecting-million-virginia-ratepayers/article_ce65175d-c789-5517-bc0c-e4cbd5d2c554.html

Governor signs sweeping utility overhaul affecting 3 million Virginia ratepayers

By ROBERT ZULLO Richmond Times-Dispatch Mar 9, 2018

Gov. Ralph Northam (center) met with staff and reporters Friday, March 2, 2018, inside his conference room at the Capitol. Northam said he would prefer that lawmakers send him a budget he can sign but warned that, if they don't, some of the compromises with Republicans may not hold up.

BOB BROWN/Times-Dispatch

Gov. Ralph Northam on Friday signed into law a dramatic overhaul of regulations for Virginia's two large electric utilities, a change that includes big boosts for grid modernization, renewable energy and energy efficiency programs but also one that opponents contend will make it difficult for state regulators to police billions in utility spending and issue customer refunds.

"Today I signed legislation ending the freeze on energy utility rates, returning money to customers, and investing in clean energy and a modern grid," Northam said on Twitter. "I am proud that my team and I improved this bill significantly and thank the General Assembly for its continued work on the measure."

The law was spearheaded by Dominion Energy, Virginia's largest utility with about 2.5 million residential and commercial customers. With increased focus on its lobbying clout this session, the company shepherded the law through a series of committee and floor debates and assembled a wide coalition of business and environmental advocates.

"We appreciate the hard work put in by the broad coalition of supporters, the governor's office, and lawmakers on both sides of the aisle to reach consensus on creating a smarter, stronger, greener electric grid with tremendous customer benefits," Dominion spokesman Rayhan Daudani said.

The bill was pitched as a crucial mechanism to move Virginia to a modern grid and more renewable energy while keeping base rates stable. But critics blasted it as another end run around regulation that was more about preserving the base rates and regulatory model that make Dominion's Wall Street analysts swoon.

Senate Bill 966, dubbed the Grid Transformation and Security Act, resets the regulatory chess board three years after the General Assembly passed the 2015 "rate freeze" law, upheld last fall by the Virginia Supreme Court, that prevented the State Corporation Commission from issuing customer refunds and lowering base rates.

The law allowed Dominion and Appalachian Power, which serves 500,000 customers in the southwestern part of the state, to roll up millions in excess profits.

The legislation declares 5,000 megawatts of wind and solar development in the public interest — roughly 3.7 times the generating capacity of Dominion's new natural gas-fired power plant in Brunswick County. Also included: $200 million in rate credits for Dominion customers for past overpayments and $10 million for Appalachian customers; nearly $1.2 billion in energy efficiency spending and low-income energy assistance over the next decade and requirements that the utilities pass through to ratepayers savings from the federal tax reforms.

"The commitments to renewable energy included in this bill will catapult Virginia to the forefront of the clean energy movement and position the commonwealth as the most active state in the nation for new solar development," said Devin Welch, co-founder of Charlottesville-based Sun Tribe Solar.

The bill, in addition to pushing the commission to approve expensive programs it has largely rejected in the past to put distribution lines underground, also moves the utilities to a new system of rate reviews every three years instead of the two-year period that existed prior to 2015.

Nominally, the State Corporation Commission will again be able to review utility earnings, lower base rates and issue customer refunds.

However, they will do so under a new framework that allows the utilities to deduct money spent on eligible grid and renewable energy projects, among other spending, from their overearnings for the purpose of determining base rates and customer refunds. Opponents, including a pair of state senators who unsuccessfully urged Northam to amend the bill, said it would lock in base rates that are already too high and make it practically impossible for the commission to lower rates and issue refunds by sanctioning utility spending that would keep that from happening.

The commission and others, including Attorney General Mark Herring's office, argued that the law would erode protections for ratepayers even as it encouraged big spending from the utilities.

Dominion, the largest corporate donor to Virginia campaigns and a major source of charitable giving, faced a new degree of scrutiny during the session as it pushed the bill through the chamber, including more than a dozen new lawmakers who refused its contributions. It also ran into skepticism from veteran lawmakers, such as Del. Mark Keam, D-Fairfax, who likened past votes on utility regulation to Lucy yanking the football away from Charlie Brown.

Northam convened mediated talks on the legislation early on in the session to hammer out details. However, his fellow Democrats in the House of Delegates stepped in last month to excise a provision that would have allowed Dominion and Appalachian Power to collect from customers twice, once by using spending on eligible projects to offset refunds and then including those projects in the utility rate base on which the companies earn a return.

rzullo@timesdispatch.com

(804) 649-6453

Solar Energy
Wind Energy
Combustion Based Energy
Water Related Energy
Model Ordinances
Renewable Energy Projects Notices of Intent
Renewable Energy Projects Map
Application Submittal & Forms
Permitting & Compliance
Laws, Regulations,& Guidance
Internet Available Resources Updates
Contacts

Virginia Department of Environmental Quality
Mailing Address
P O Box 1105
Richmond, VA 23218

Street Address.
1111 East Main St . Suite 1400
Richmond. VA 23219

Contact Us:
1-(804) 698-4000
1-800-592-5482 (Toll Free in VA)

View Department of Environmental Quality Expenses

Development of Solar Energy Program in Virginia

DEQ developed a "permit by rule" to facilitate the review of small solar projects in Virginia.

The Small Renewable Energy Projects (Solar) Permit by Rule (PBR) regulation became effective on July 18, 2012.

The PBR requirements for a complete application to construct and operate are explicitly identified under the regulation rather than being developed on a case-by-case basis and applies to solar energy projects 150 megawatts or less.

Facilities can obtain authorization from DEQ by agreeing to comply with all the construction and operating requirements of the PBR.

The number of projects permitted under the solar program have grown exponentially with one PBR issued in 2015, six in 2016, ten in 2017, and 14 in 2018.

Solar PBR Resources

Topics of interest pertaining to the Solar PBR can be accessed by clicking the hyperlinks below:

- Laws and Regulations
- Guidance
- Forms
- Fees
- Internet Resources

Laws and Regulations

- 2009 Small Renewable Energy Projects Statute
- Small Solar Renewable Energy Project Permit Regulation Adoption (July 18, 2012)
- Small Renewable Energy Projects Act §10.1-1197.5 et seq.
- Solar Permit by Rule Regulations (9VAC15-60)

Guidance

DEQ has developed guidance for the benefit of Solar PBR applicants, members of the public, and agency staff. The Solar PBR Guidance addresses pre-construction natural resource analyses, mitigation plans, post-construction monitoring, and other PBR requirements and issues. Where appropriate, the Guidance discusses methods of performing the required regulatory tasks. The Guidance information is listed on Town Hall and consists of the following modules:

- Cover Memo (REW2012-01)
- Section I: Solar PBR General (REW2012-01S1)
- Section II: Solar PBR Methodology (REW2012-01S2)

What's New

See Town Hall for information on the Notice of Intended Regulatory Action (NOIRA) regarding Amendments to the Solar Permit by Rule.

Quick Links

- Notices of Intent
- Permits by Rule

- Section III: Solar PBR CAPZ Narrative (REW2012-01S3)

Additional Guidance Resources

- Combined Solar PBR Guidance document (all modules combined into one document)
- CAPZ Map (PDF)
- Coastal GEMS (DEQ) website

Disclaimer: When using the PBR Guidance documents, please be aware that it is provided as guidance only and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method for complying with the regulations, nor does it prohibit any alternative method. If alternative proposals are made, such proposals will be reviewed and accepted or denied based upon their technical adequacy and compliance with appropriate laws and regulations.

Top of Page

Forms

- Notice of Intent for Full PBR Solar Project
- Notice of Intent for De Minimis Solar Project
- Environmental Permit Certification Form
- Local Governing Body Certification Form
- Utility Certification Form
- Non-Utility Certification Form
- Application Submittal Instructions

Fees

Permit Application Fees for renewable energy projects are listed in 9VAC15-60-110C. The permit application fee should be submitted to DEQ at the following address:

Virginia Department of Environmental Quality
Receipts Control
P.O. Box 1104
Richmond, VA 23218

Internet Resources

- Updated List of Internet Resources (as referenced in VAC15-60-120)
- Virginia Solar Native Plant Finder (VA DCR)
- Virginia Solar Site Pollinator/Bird Habitat Scorecard (VA DCR)

Top of Page

Virginia Department of Environmental Quality
P.O. Box 1105
Richmond, VA 23218
(804) 698-4000

Notice to Virginia Residents Regarding Virtual Currency

The Virginia Bureau of Financial Institutions ("Bureau") does not currently regulate virtual currencies; however, to the extent virtual currency transactions also involve the transfer of fiat currency (currency declared by a government to be legal tender), they may be regulated under Chapter 19 of Title 6.2 of the Code of Virginia (Money Order Sellers and Money Transmitters), § 6.2-1900, *et seq*. Residents considering the use of virtual currencies should research any company offering services related to virtual currencies, including exchanges, platforms, administrators, sellers, or ATMs.

Virtual currency is a digital representation of value issued by private developers and denominated in their own unit of account. It does not have the status of legal tender and is not backed by any central bank or government. **Virtual currencies are highly volatile with the potential for complete loss of value.** Virtual currencies are not insured against loss, and may be stolen if not maintained in a secure manner. Additionally, transactions in virtual currency are final and are not reversible. Advances in technology have led to the development of hundreds of different virtual currencies, each with their own characteristics. The Bureau strongly cautions residents to consider the risks associated with the purchase and use of virtual currencies.

Icing on the Cake:

Getting the Other Side to Pay Attorneys' Fees, Costs, & Interest

Monica T. Monday

Paul G. Klockenbrink

Alicha M. Grubb

Icing on the Cake: How to Get Attorneys' Fees, Costs and Interest

Monica T. Monday, Paul G. Klockenbrink, Alicha M. Grubb[1]
Gentry Locke Seminar September 6, 2019

I. Introduction

Attorneys' fees are generally not the main focus of any piece of litigation, however, they are important at the beginning, throughout, and at the end of each case. No matter the size or type of case, it is critical to the case evaluation to determine whether attorneys' fees are recoverable. Whether a party may recover attorneys' fees largely turns on the relationship of the parties and the nature of the litigation. Equally as important, whether the party actually will recover attorneys' fees depends on the attorney's careful billing and timely petition for recovery. At the end of the day, each attorney not only wants to prove her case and win, but she also wants to recover her fees in addition to the damages award.

Similarly, a full recovery for a party may also include the recovery of expenses, costs and interest. For a winning party, the recovery of expenses, costs and interest truly makes that party whole by recouping reasonable out-of-pocket litigation expenses, and accounting for the time-value of money. The availability of attorneys' fees, costs and interest should be considered in every case.

II. Practical considerations

A. The actual amount of attorneys' fees rarely matters unless a case is litigated to the end. Of course, the ability to recover attorneys' fees can be a bargaining tool during settlement negotiations, but most tort-based cases settle for one lump sum without a specific number for attorneys' fees, expenses, costs, or interest.

B. Identify the existence and type of fee-shifting provision early on and set realistic expectations for your client. Clients hear that you can recover attorneys' fees from the other side and often assume that the fees are on top of any amount settled for. Make sure your client understands that if the case is settled, your fee will come out of the total settlement amount, unless there is an express statute that permits a separate recovery of attorney fees.[2]

C. In Virginia state court actions be sure to claim reasonable attorneys' fees, expenses, costs, and interest in your first pleading (Complaint or responsive pleading) with clear Rule 3:25 notice. It is prudent to make the Rule 3:25

[1] Special thanks to Kirk Sosebee and William Spotswood for their contributions to the "Recent Cases" section.
[2] There are a number federal statutory exceptions, like Title VII, FLSA,42 USC 1983, the False Claims Act, also see Section III.A.2, *infra* for state statutes that provide for the recovery of fees

notice a separate paragraph with some type of emphasis, i.e. bold or underlined.

D. Use the "reasonable" requirement of attorneys' fees to your advantage if you are defending a case.

1. In Federal Court, a defendant can use Rule 68, Offer of Judgment, and make a settlement offer. If the offer is rejected and the ultimate award is not more favorable to the plaintiff, the plaintiff must pay the costs incurred after the offer was made.[3]

2. Virginia does not have an offer of judgment rule.

3. Whether in federal court or Virginia state court, a defendant should consider making a reasonable offer (especially if liability is clear) and with that offer, provide an explanation of the reasonableness of the offer and state that the defendant will object to any further attorneys' fees, expenses, or costs as unreasonable.

E. In Virginia, move to bifurcate the attorneys' fees early on so that you are not forced to prove up your attorneys' fees in your case in chief and consequently forced to designate experts and produce bills early on.

F. Bill carefully and with detail. Only include actual legal work, not administrative tasks, and do not overbill for unproductive conferences, travel, or duplicative work.

G. Keep in mind that a court is unlikely to award all fees incurred. Courts have discretion in considering the reasonableness of the fee and are likely to reduce the amount for which you petition.

III. The basis for recovering attorneys' fees

A. The general rule for recovering attorneys' fees in Virginia is the American Rule, which states that each party pays for its own attorneys' fees and costs absent a contractual or statutory provision to the contrary.[4]

1. Fee-shifting provisions found in contracts or in various statutes often contain some common elements. First, the provision is either mandatory or discretionary. This distinction is important, especially to the cost-benefit analysis often done in preparation for settlement, because a mandatory fee-shifting provision gives a plaintiff stronger bargaining power. In contracts, the provisions are generally

[3] FRCP R. 68. (emphasis added).
[4] *Shammas v. Focarino*, 784 F.3d 219 (4th Cir. 2015); *REVI, LLC v. Chi. Title Ins. Co.*, 290 Va. 203, 213 (2015).

mandatory, and often provide that a certain party is "entitled" to recover reasonable attorneys' fees and costs in connection its breach of contract action. Statutes may use mandatory language like "the court shall award" attorneys' fees and costs or discretionary language like "a court in its discretion may award attorneys' fees."[5] Be careful to ascertain the nature of the attorneys' fees provision early on.

The second common feature of a fee-shifting provision is the recipient of the attorneys' fees award. Fee-shifting provisions benefit either the prevailing plaintiff alone or the prevailing party in general. Statutes may give courts the authority to award attorneys' fees to a prevailing defendant, especially in cases of frivolous litigation. However, a fee-shifting provision that benefits one side regardless of whether that side prevails has been found to be unconscionable and unenforceable.[6] Thus, the first step in an attorneys' fee award analysis is to determine if there is a fee-shifting provision at play, and if so, whether the provision is mandatory or discretionary as well as who may benefit from the provision.

2. Virginia Statutory Provisions (representative listing)

   a) Va. Code § 8.01-54 -- wrongful death -- The amount recovered in a "judgment to distribute recovery when the verdict fails to do so" shall be paid to the personal representative who shall first pay the costs and reasonable attorney's fees and then distribute the amount specifically allocated to the payment of hospital, medical and funeral expenses.

   b) Va. Code § 8.01-92 -- partition of real estate.

   c) Va. Code § 8.01-216.7 -- Virginia Fraud Against Taxpayers Act – a person bringing the action or settling the claim, shall also receive an amount for reasonable expenses plus attorneys' fees and costs

   d) Va. Code § 8.01-221.2 -- rescission of deed, contract, or other instrument upon clear and convincing evidence that it was procured by fraud.

   e) Va. Code § 8.01-271.1 -- sanctions - attorney's fees are recoverable in defending an unwarranted claim and pursuing a sanctions award.

[5] *See e.g.* VA. CODE ANN. § 16.1-378.18 (1950, as amended); VA. CODE ANN. § 55-79.3(A) (1950, as amended); 42 U.S.C. § 12205; 31 U.S.C. § 3730. *Lambert v. Sea Oats Condo. Ass'n*, 293 Va. 245, 254 (2017).
[6] *McIntosh v. Flint Hill Sch.*, 2018 Va. Cir. LEXIS 321 (Fairfax, Sept. 17, 2018).

f) Va. Code § 8.01-380 -- Late notice of nonsuit "If notice to take a nonsuit of right is given to the opposing party within seven days of trial or during trial, the court in its discretion may assess against the nonsuiting party **reasonable witness fees and travel costs of expert witnesses** scheduled to appear at trial." (emphasis added).

g) Va. Code § 8.01-499 -- enforcement of judgment lien.

h) Va. Code § 8.01-653 -- representation of governmental officials as defendants in mandamus action regarding payments from treasury

i) Va. Code § 8.01-653.1 – defense of governmental officials when constitutionality of transportation obligations is questioned

j) Va. Code § 8.01-643 -- quo warranto.

k) Va. Code § 13.1-329 -- soliciting breach of tobacco marketing contract.

l) Va. Code § 18.2-500 – conspiracy claims to damage business contracts

m) Va. Code § 20-110 -- Spousal Support "Failure of [a remarrying] spouse to notify the payor shall entitle the payor to restitution equal to the amount of any current support and maintenance paid after the date of remarriage, together with interest from the date of the remarriage **and reasonable attorney's fees and costs**." (emphasis added).

n) Va. Code § 31-11 -- petition to disburse principal of infant ward.

o) Va. Code § 36-94 -- private action under Fair Housing Law.

p) Va. Code § 40.1-28.7.6 -- failure to provide leave for voluntary service in the Civil Air Patrol

q) Va. Code § 40.1-28.12 -- Violation of Virginia Minimum Wage Act

r) Va. Code § 51.5-46 -- Violation of the Rights of Persons with Disabilities; fees to the prevailing party

s) Va. Code § 55-82 -- avoiding fraudulent or voluntary conveyance.

t) Va. Code § 58.1-3969 -- suit to sell land for taxes.

u) Va. Code §§ 59.1-12(b) and 59.1-9.15(b) -- antitrust suits.

v) Va. Code § 59.1-68.3 – Victim of trademark or serial number alteration by a person with the intent to defraud or the Virginia Home Solicitation Sales Act

w) Va. Code § 59.1-204 -- Virginia Consumer Protection Act "In addition to any damages awarded, such person also **may be awarded reasonable attorneys' fees and court costs**." (emphasis added).

x) Va. Code § 59.1-207.6 -- Automobile Repair Facilities Act

y) Va. Code § 59.1-207.14 -- Motor Vehicle Warranty Enforcement Act

z) Va. Code § 59.1-207.27 Virginia Lease-Purchase Agreement Act

aa) Va. Code § 59.1-207.33 -- Collision Damage Waiver Act

bb) Va. Code § 59.1-207.44 -- Comparison Price Advertising Act.

cc) Va. Code § 59.1-214 – Regulation of Invention Development Services

dd) Va. Code § 59.1-338.1 -- Virginia Uniform Trade Secrets Act

ee) Va. Code § 59.1-518 – Virginia Telephone Privacy Act

ff) Va. Code § 60.2-122 -- unemployment compensation -- No individual claiming benefits shall be charged fees of any kind in any proceeding under this title by the commission or its representatives.

gg) Va. Code § 60.2-123 -- The Unemployment Commission can limit the amount of attorneys' fees charged in representation of an individual seeking unemployment benefits.

hh) Rules 4:5(g) and 4:12 of the Supreme Court of Virginia provide for attorney's fees in various instances for failing to make discovery.

ii) Rule 4:5(g) -- (1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may award the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees; (2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

jj) Rule 4:12(a) -- Motion for Order Compelling Discovery: (4) If the motion is granted, the Court shall...require the party or deponent whose conduct necessitated the motion or the attorney or the party advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees.

If the motion is denied, the court shall . . . require that the moving party or the attorney advising the motion or both of them to pay to the party or the deponent who opposed the motion the reasonable expenses incurred including attorney's fees.

kk) Attorney's fees can be a sanction under Rule 4:12(b)

ll) Attorney's fees are also provided for in Rule 4:12(c) for failing to admit and in 4:12(d) for the failure of party to attend at own deposition or serve answers to Interrogatories or Respond to Request for Inspection.

3. Federal Statutory Claims.

It is beyond the scope of this outline to identify every federal statute that allows for the recovery of attorneys' fees in federal court. It is quite common for Congress to include a fee-shifting provision when enacting laws that allow for a private right of action. In some situations, the award is discretionary, and in others, the award is mandatory. Likewise, the

Federal Rules of Civil Procedure allow for the award of sanctions, Rules 11 and 37 include attorneys' fees, and under 28 USC § 1927 for inappropriate actions taken in litigation in federal courts.

4. Contract fee-shifting clause examples

a) "The prevailing party shall have the right to collect from the other party its reasonable attorneys' fees and costs incurred in enforcing this Agreement."

b) "If for any reason the amount due under this [contract/promissory note/agreement] is not paid when due, the [contractor/note holder/name of party] shall be entitled to its expenses and fees incurred in the collection of this agreement with interest on the unpaid balance."

c) Be aware the AIA form contract does not have a fee-shifting provision.

B. Fraud and equitable considerations in Virginia

1. Virginia has also opened the door to the recovery of attorneys' fees in situations beyond the traditional contractual and statutory bases for recovery. The Virginia Supreme Court has allowed the recovery of attorneys' fees in cases of:

a) fraud,[7]

b) malicious prosecution,[8]

c) false imprisonment,[9]

d) a trustee's defense of his trust in good faith[10], and

e) in certain spousal support disputes.[11]

[7] *See Prospect Dev. Co. v. Bershader*, 258 Va. 75 (1999). *See also MCR Fed., LLC v. JB&A, Inc.*, 294 Va. 446 (2017) (holding that the trial court erred in awarding attorneys' fees based on fraud when the plaintiff did not properly bring fraud claims).
[8] *See Burruss v. Hines*, 94 Va. 413 (1897
[9] *Bolton v. Vellines*, 94 Va. 393 (1897).
[10] *Cooper v. Brodie*, 253 Va. 38 (1997).
[11] *Carson v. Masterson*, 224 Va. 329 (1982).

2. In cases of fraud, the general rule is that a court has discretion to award attorneys' fees but "must consider the circumstances surrounding the fraudulent acts and the nature of the relief granted to the defrauded party."[12] In *Prospect*, a couple bought a parcel of land, built a house, and spent a significant amount of money on landscaping based upon the representations of the subdivision developer that the adjoining lot would remain wooded and could not ever be built upon, due to the nature of the land.[13] The subdivision developer had actually planned all along to build houses on the landowners' adjoining lot and subsequently began removing trees.[14] The landowners obtained a temporary injunction and brought suit for a permanent injunction and damages, alleging breach of contract and fraud.[15] The trial court granted the injunction, awarded monetary damages, and awarded attorneys' fees.[16] The Virginia Supreme Court held that there were no compensatory damages to be awarded, and the trial court erred in awarding damages.[17] However, the trial court was correct to award $151,378.00 in incurred attorneys' fees and costs because without those fees, the plaintiffs' "victory would have been hollow."[18] Equity required that the plaintiffs, who were successful in getting injunctive relief in a hotly contested case, recover their attorneys' fees because of the deliberate fraudulent conduct of the defendant.[19]

3. In 2011, the Virginia Supreme Court clarified its *Prospect* ruling, pointing out, that attorneys' fees are available, within the court's discretion, when there is a finding of "callous, deliberate, deceitful acts . . .intentional wrongdoing, fraud, or self-dealing" or when there are facts that "establish a pattern of misconduct."[20]

C. Third-party attorneys' fees recoverable as breach of contract damages

A party may also recover attorneys' fees if the fees are breach of contract damages in a dispute with a third party. The Virginia Supreme Court decided this issue as an issue of first impression in the 1960 case of *Hiss v. Friedberg*.[21] In *Hiss*, the Friedbergs entered into a contract with some landowners for the purchase of unimproved real property.[22] The Friedbergs then employed the firm of Hiss & Rutledge to run the title search.[23] Both the

[12] *Prospect Dev. Co.*, 258 Va. at 92.
[13] *Id.* at 81-83.
[14] *Id.*
[15] *Id.*
[16] *Id.*at 80.
[17] *Id.*at 91.
[18] *Id.* at 93.
[19] *Id.*
[20] *Carlson v. Wells*, 281 Va. 173, 189-90 (2011)(internal quotations omitted).
[21] 201 Va. 572 (1960).
[22] *Id.* at 574.
[23] *Id.*

landowners and Hiss & Rutledge knew of an outstanding lease on the property but told the Friedbergs it would not impair their immediate possession of the property.[24] Despite language in the escrow agreement that the title would be transferred free and clear of all encumbrances, the title insurance company refused to indemnify the Friedbergs from rights of any other claimants to the property.[25] The Friedbergs were unable to remove the leasehold and sued the landowners and Hiss & Rutledge for breach of contract.[26]

The Friedbergs settled with the landowners and sought to recover their attorneys' fees expended in the landowner case from Hiss & Rutledge.[27] After a bench trial, the judge granted their request, and Hiss & Rutledge appealed the court's decision to grant the attorneys' fees.[28] The Virginia Supreme Court upheld the trial court's decision.

The Court discussed both the general attorney fee recovery rule and the rule for breach of contract damages. Generally, "in the absence of any contractual or statutory liability therefor, attorneys' fees and expenses incurred by the plaintiff the litigation of his claim against the defendant . . . are not recoverable as an item of damages" in a breach of contract action.[29] However,

> if the plaintiff can show that the defendant's breach of contract has caused litigation involving the plaintiff in payment of counsel fees, court costs, and the amount of a judgment, and shows further that such expenditure is reasonable in amount and could not have been avoided by him by reasonable prudent effort, he can recover damages against the defendant measured by the amount of these expenditures.[30]

In *Hiss*, it was "clear that the employment of counsel by the Friedbergs was a direct and necessary consequence of the breach of the contract of employment of Hiss and Rutledge and the breach of their escrow agreement."[31] "Because of the failure of Hiss and Rutledge to perform the obligations imposed upon them it was necessary that the Friedbergs employ counsel to secure from the [landowners] that which they (the Friedbergs) had purchased and paid for."[32] The Court reasoned that denying the Friedbergs the right to recover the attorneys' fees in the landowner case was to deny them all damages in the breach of contract action against Hiss & Rutledge.[33] Therefore, the Court upheld the trial court's decision and granted the Friedbergs their attorneys' fees.[34]

---

[24] *Id.*
[25] *Id.*at 574-75.
[26] *Id.* at 575.
[27] *Id.*
[28] *Id.*at 576.
[29] *Id.* at 577.
[30] *Id.* at 578 (citing Corbin on Contracts, Vol. 5 § 1037, pp. 190, 191).
[31] *Id.* at 579.
[32] *Id.*
[33] *Id.*
[34] *Id.*

Virginia courts have continued to recognize the *Hiss* exception to recovering attorneys' fees and costs if they are direct damages flowing from a breach of contract.[35]

This form of recovering attorneys' fees requires that the fees be pled as breach of contract damages, not attorneys' fees in in the traditional, American Rule sense. Because a party is recovering its attorneys' fees, not from its opponent but from a third party, there is no statute, contract, or fraud requirement, and the fees need not follow the Rule 3:25 requirements. Rather, *Hiss* and its progeny give litigants the opportunity to recover their attorneys' fees as damages when those fees are the direct result of a third party breach of contract.

D. Appellate attorneys' fees

1. Recovering appellate attorneys' fees where Supreme Court of Virginia denies the petition for appeal

a) Where the Supreme Court has denied a petition for appeal, an appellee who has recovered attorneys' fees, costs or both in the circuit court pursuant to a contract, statute or other applicable law may make an application in the circuit court in which judgment was entered for additional fees and costs incurred on appeal.[36]

1. The application must be filed within 30 days after denial of the petition for appeal or of any petition for rehearing, whichever is later.

2. The appellee does not need to file a separate action to pursue the fee application. The application may be filed in the same case from which the appeal was taken and that case shall be reinstated on the circuit court docket upon the filing of the application.

3. The circuit court shall have continuing jurisdiction of the case for the purpose of adjudicating the application.

4. The circuit court's order granting or denying the application shall be a final order for purposes of Rule 1:1.

[35] *See Owen v. Shelton*, 221 Va. 1051 (1981); *Long v. Abbruzzetti*, 254 Va. 122 (1997) (holding that the plaintiff could not recover fees because her attorney's fees in the third-party litigation were not direct damages but consequential damages). *See also Comstock Potomac Yard, L.C. v. Balfour Beatty Constr., LLC*, 694 F. Supp. 2d 468 (E.D. Va. 2010).

[36] Rule 1:1A(a), Rule 5:35(b)(1).

b) Nothing in Rule 1:1A restricts or prohibits the exercise of ay other right or remedy for the recovery of attorneys' fees by separate suit or otherwise.[37]

2. Recovering appellate attorneys' fees in domestic relations and other family-law proceedings where authorized by statute

a) The Supreme Court and Court of Appeals have discretion to award a party attorneys' fees on appeal in cases where attorneys' fees are recoverable by statute, specifically under Title 16.1, Title 20, and Title 63.2.[38]

b) A party seeking an award of attorneys' fees should make the request in the appellate brief.[39]

c) Basis for an award

1. "In determining whether to make such an award, the [appellate court shall not be limited to a consideration of whether a party's position on an issue was frivolous or lacked substantial merit but shall consider all the equities of the case."[40]

2. The Court may base its decision regarding attorneys' fees and costs on "its consideration of factors including whether the requesting party prevailed, whether the appeal was frivolous, whether either party generated unnecessary expense or delay in pursuit of its interests, as well as 'all the equities of the case.'"[41]

3. In domestic relations cases, the Court of Appeals will award appellate attorneys' fees "when the arguments on appeal are 'not fairly debatable under any reasonable construction of the record or the governing legal principles.'"[42]

4. The appellate court may award to the requesting party all or part of their attorneys' fees or may remand the issue to the circuit court for a determination of a reasonable fee award.[43]

[37] Rule 1:1A(b).
[38] Rule 5:35(b)(2)(A), Rule 5A:30(b)(1-2).
[39] Rule 5:35(b)(2)(A), Rule 5A:30(b)(1).
[40] Rule 5:35(b)(2)(C), Rule 5A:30(b)(3).
[41] *Friedman v. Smith*, 68 Va. App. 529, 546 (2018) (quoting Rule 5A:30(b)(3)-(4)).
[42] *Friedman*, 68 Va. App. at 546 (quoting *Brandau v. Brandau*, 52 Va. App. 632, 642 (2008)).
[43] Rule 5:35(b)(2)(B), Rule 5A:30(b)(2).

5. Attorneys' fees may not be available if the parties have a contract or stipulation that provides otherwise.[44]

d) When the fee determination is remanded to the circuit court:

1. Recoverable fees may include the fees incurred by the requesting party in pursuing fees in the circuit court.[45]

2. In determining the reasonableness of the fees, "the circuit court shall consider all relevant factors, including but not limited to, the extent to which the party was a prevailing party on the issues, the nature of the issues involved, the time and labor involved, the financial resources of the parties, and the fee customarily charged in the locality for similar legal services."[46]

Outside of these avenues, a litigant must pay its own attorneys' fees. Given the value of an attorneys' fees award, particularly in cases were non-monetary relief is sought, it is essential that an attorney identify if and how her client can recover attorneys' fees.

IV. Timely petition for recovery of attorneys' fees and costs

A. Virginia Rule 3:25 (State Court cases)

In Virginia, the attorneys' fees and costs claim must be included in the pleadings. Rule 3:25 of the Rules of the Virginia Supreme Court requires that a party seeking to recover attorneys' fees "include a demand therefore in the" complaint, counterclaim, cross-claim, third party pleading, or in a responsive pleading.[47] The party must also "identify the basis upon which [it] relies in requesting attorney's fees."[48] Failure to demand attorneys' fees constitutes a waiver and is an absolute bar to recovery.[49] Good practices could include emphasizing the demand for attorneys' fees in all caps or bold lettering stating "Rule 3:25 Notice" and then listing the legal basis for the demand. Note that the exact amount of the attorneys' fees need not be pled, and the *ad damnum* clause does not need to encompass the amount of a potential attorneys' fees award.[50]

B. FRCP, Rule 54 (Federal Court cases)

Pursuant to the Federal Rules of Civil Procedure, Rule 54, the proper method to petition to recover attorneys' fees and costs is with a motion. The claim "must be made by motion" unless the underlying statute provides otherwise. The motion "must: (1) be filed no

[44] Rule 5:35(b)(2)(B), Rule 5A:30(b)(2).
[45] Rule 5:35(b)(2)(B), Rule 5A:30(b)(2).
[46] Rule 5:35(b)(2)(D), Rule 5A:30(b)(4).
[47] VA. SUP. CT. R. Rule 3:25.
[48] *Id.*
[49] *Id. See also Graham*, 294 Va. at 225-26.
[50] *See Lambert v. Sea Oats Condo. Ass'n*, 293 Va. 245 (2017).

later than 14 days after the entry of judgment; (2) specify the judgment and the statute, rule, or other grounds entitling the movant to the award; (3) state the amount sought or provide a fair estimate of it; and (4) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made." It is important to keep these dates in mind and prepare as much material ahead of time to be able to submit a timely motion.

C. Bifurcation

Given the fact that attorneys' fees cannot be awarded until the underlying case is decided, a party or both parties, may wish to bifurcate the trial and/or stay discovery as to the attorneys' fees issue, and this should be done at the beginning of the case. In federal court, the motion for attorneys' fees need not even be made until the trial has concluded, so a judge may stay discovery on the issue of attorneys' fees rather than bifurcate the trial.[51]

The federal rule and the Virginia rule on bifurcation are quite similar. Rule 42(b) of the Federal Rules of Civil Procedure, the rule concerning bifurcation, states in pertinent part, "[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more issues."[52] In Virginia, generally, a trial court has discretion to "bifurcate issues where appropriate in civil trials."[53] Bifurcation is important for judicial economy and to prevent a party from suffering prejudice.[54] However, a litigant has the right to have the issue of attorneys' fees submitted to a jury.[55] Therefore without the agreement of the parties and the court, a judge will not bifurcate the trial in a jury context.[56]

V. Keep the Fee Petition Requirements in Mind while Billing

A. The legal standard for recovery: reasonable hours times reasonable hourly rate (The Lodestar)

The Fourth Circuit Court of Appeals has adopted a three-step process for determining the fees and costs award. This approach, which is followed by the federal district courts in Virginia, set forth in *McAfee v. Boczar*. The court must first "determine the lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate."[57] Second, the court subtracts fees for hours spent on unsuccessful claims, and third, the court awards

[51] *See e.g. Advance Stores Company, Incorporated v. FrontStreet Facility Solutions*, Case No. 7:17-cv-568, ECF Dkt. No. 20 (W.D.V.A., Aug. 6, 2018).
[52] Fed. R. Civ. P. 42(b). *See Seneca Specialty Ins. Co. v. Dockside Dolls, Inc.*, No. 3:12cv19-REP-DJN, 2012 U.S. Dist. LEXIS 116476 (E.D. Va. June 22, 2012); *ZEN42, LLC v. The Washington and Lee University*, Case No. 6:17-cv-53, Docket No. 29 (W.D. Va. October 10, 2017). Because attorneys' fees do not come into play until after judgment in federal court, bifurcation is not usually an issue, but a court may stay discovery on attorneys' fees if one side is insisting on proof of attorneys' fees.
[53] *Bond v. Baker Roofing Co.*, 81 Va. Cir. 439, 445 (Fairfax Cir. Ct. 2010) (citing *Centra Health, Inc. v. Mullins*, 277 Va. 59 (2009)).
[54] *Id.*
[55] Va. Code Ann. § 8.01-336 (1950, as amended). *Lee v. Mulford*, 269 Va. 562, 567 (2005).
[56] *Lee*, 269 Va. at 567-58.
[57] *McAfee v. Boczar*, 738 F.3d 81, 88 (4th Cir. 2013) (internal citations omitted). *See Lamonaca v. Tread Corp.*, 157 F.Supp. 3d 507 (W.D. Va. 2016). *See also Prison Legal News v. Stolle*, 129 F.Supp. 3d 390 (E.D. Va. 2015).

"some percentage of the remaining amount, depending on the degree of success enjoyed by the plaintiff."[58]

Although Virginia courts have not expressly adopted the *McAfee* test, Virginia follows a similar framework. Virginia courts will first consider the lodestar figure, which is determined by multiplying the number of reasonable hours expended times a reasonable hourly rate, and then subtracting fees spent on unnecessary claims, while considering the overall success of the parties.[59]

B. Reasonable hourly rate: The first step is to establish the reasonableness of the rate charged, as only attorneys' fees billed at a reasonable rate can be recovered. The applicant for the fee "bears the burden of establishing the reasonableness" of each attorney's rate by showing that it is "consistent with the prevailing market rates in the relevant community for the type of work" performed.[60]

1. The prevailing market is one where the court sits to decide the action.[61] The most important evidence for proving the reasonable hourly rate is expert testimony, usually by affidavit, as to the prevailing market rate in the area. The court will also consider the difficulty of the case and the experience of the attorneys.[62]

2. What if the case transfers in the middle of litigation? In the rare case where a case is litigated for some time in one jurisdiction before being transferred to another, the fee applicants should be prepared to present evidence of the prevailing rates in both applicable jurisdictions for the work done in each locale. In *Schwarz v. Sec'y of Health & Human Servs.*, the Ninth Circuit Court of Appeals considered how to calculate an attorney's fees when the case was transferred to Portland after two years of extensive discovery that occurred while the case was pending in Phoenix.[63] In that case, the district court award fees on the plaintiff's successful claim based on the house spent and the "going rate in Phoenix and Portland."[64] The appellate court affirmed the decision.[65] The Court agreed with the trial judge that the reasonable hourly rate should be calculated by the prevailing rate where the district courts sat,

[58] *Id.*
[59] *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 41 Va. Cir. 171, 172-72 (Newport News 1996)*; see e.g., Dewberry & Davis, Inc. v. C3NS, Inc.*, 284 Va. 485 (2012); *RECP IV WG Land Investors, LLC v. Capital One Bank (USA), N.A.*, 93 Va. Cir. 282 (Fairfax Cnty. 2016).
[60] *McAfee*, 738 F.3d at 91.
[61] *Rum Creek Sales, Inc. v. Caperton*, 31 F.3d 169, 175 (4th Cir. 1994).
[62] *See Hernandez*, 41 Va. Cir. at 173-74.
[63] 73 F.3d 895 (1995).
[64] *Id.* at 899.
[65] *Id.*

both in Phoenix and Portland during the relevant portions of the litigation.[66]

While neither the Fourth Circuit nor Virginia has considered the reasonable hourly rate when a case is transferred midway through a case, it seems likely that a judge would agree that if attorneys engage in extensive work in one location, prior to the case being transferred, the fees accrued prior to the transfer should be awarded based on the prevailing market rates in the first location.

3. For Northern Virginia and Washington D.C. area lawyers, the court may consider the Laffey Matrix. The Laffey Matrix is intended to capture the reasonable hourly rates for Washington D.C. area lawyers.[67] While the Fourth Circuit Court of Appeals has not adopted the Laffey Matrix, it has stated that the reference is a "useful starting point to determine fees."[68]

C. Reasonable hours expended

In addition to showing a reasonable hourly rate charged by his lawyers, the party seeking fees must also show that the time expended was reasonable. Generally, courts will reduce hours due to block billing, duplicate work, vague billing, unnecessary group meetings, non-legal work done by attorneys, travel time, and other extraneous or unnecessary hours spent on legal work.[69] The Western District of Virginia has lately had a critical eye regarding the hours expended by attorneys.[70]

1. Do not:

   a) Block bill,

   b) Have multiple lawyers doing the same work or bill for work that was not productive,

   c) Make vague entries that fail to describe the nature of the work and/or the topics discussed,

   d) Have an excess number of group meetings, or

   e) Bill for administrative or clerical work.

2. Do :

[66] *Id.*
[67] *Ebersole v. Kline-Perry*, 2012 U.S. Dist. LEXIS 138659, n. 2 (E.D.V.A., Sept. 26, 2012).
[68] *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 229 (4th Cir. 2009). *See id.*
[69] *McAfee v. Boczar*, 738 F.3d 81, 90 (4th Cir. 2013); *Doe v. Alger*, 2018 U.S. Dist. LEXIS 15365 (W.D. Va., Jan. 31, 2018); *Univ. Support Servs. v. Galvin*, 32 Va. Cir. 47, 55 (Fairfax Cnty. Cir. Ct., 1993).
[70] *See Doe v. Alger*, 2018 U.S. Dist. LEXIS 165957 (W.D. Va., Sept. 27, 2018) (J. Dillon).

a) Make detailed entries,

b) Make discrete entries if there are multiple claims in one case, and

c) Self-audit the bill.

The biggest battle in most fee petitions is the chance the fee applicant spent too much time or had too many lawyers working on the case, so the hours worked and the fees associated with those hours are unreasonable. The federal courts often follow a series of twelve factors, first identified in *Johnson v. Georgia Highway Express, Inc.*[71] To determine the reasonableness of the hours worked, courts consider:

a) The time and labor expended;

b) the novelty and difficulty of the questions raised;

c) the skill required to properly perform the legal services rendered;

d) the attorney's opportunity costs in pressing the instant litigation;

e) the customary fee for like work;

f) the attorney's expectations at the outset of the litigation;

g) the time limitations imposed by the client or circumstances;

h) the amount in controversy and the results obtained;

i) the experience, reputation, and ability of the attorney;

j) the undesirability of the case within the legal community in which the suit arose;

k) the nature and length of the professional relationship between attorney and client; and

l) attorneys' fees awards in similar cases.

[71] 488 F.2d 714 (5th Cir. 1974) (superseded by statute in some states). There is some question as to whether these factors will continue to apply under the *McAfee* test.

Based on these factors, a court may adjust an attorney's fee up (an enhancement) or down (a reduction) and may make the adjustment as a bulk, percentage increase of the total fee rather than a direct increase in the hourly rate. While reductions are common, enhancements should be rare and only permitted in exceptional cases.[72] An enhancement should be supported by specific evidence and detailed findings that support the court's decision to increase a party's award.[73]

D. Subtract Fees for Hours Spent on Unsuccessful Claims

After a federal court determines the lodestar figure, it may then subtract fees spent on unsuccessful claims.[74] Virginia courts also consider the overall success of the fee-petitioning party. Virginia does not consider a purely mathematical approach, discounting all fees spent on any unsuccessful claim or part of a claim, rather, Virginia follows Supreme Court guidance, considering the results obtained as one factor of the analysis but also considering other factors like the type of award sought.[75] Virginia Courts take the position that it lies within the court's discretion to deduct unnecessary fees, if a claim, defense, motion, or attorney action was "frivolous, spurious, or unnecessary."[76]

E. Degree of success

Finally, the court will take into consideration the degree of success enjoyed. This analysis considers whether the reduction of an award is warranted based on limited results obtained compared to the overall litigation. The court first compares the amount of damages sought to the amount awarded.[77] However, the fact that a plaintiff did not recover as much as he expected does not automatically trigger a reduction in fees.[78] The question is whether the plaintiff's degree of success warrants the amount of the fees claimed.[79] This factor is the "most critical" factor in determining a fee award, but it lies wholly in the discretion of the court.[80]

F. Contingency Fee Cases

It can be easy to bill with less precision on contingency fee cases because clients are less likely to scrutinize the bill. While the contingent nature of the fee may be considered by the court in calculating the reasonableness of the fee requested, it does not control the court's discretion in setting the fee. For this reason, if a party has the potential to recover

[72] *Hensley v. Eckerhart*, 461 U.S. 424 (1983).
[73] *Craddock v. LeClairRyan*, No. 3:16-cv-11, 2019 U.S. Dist. LEXIS 98209 (E.D. Va., June 11, 2019) (J. Payne).
[74] *McAfee*, 738 F.3d at 88.
[75] *Univ. Support Servs.*, 32 Va. Cir. at 54-55 (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)).
[76] *Dewberry & Davis, Inc.*, 284 Va. at 496.
[77] *Randolph v. Powercomm Constr., Inc.*, 715 Fed. Appx. 227, 231 (4th Cir. 2017).
[78] *Id.*
[79] *McAfee*, 738 F.3d at 92.
[80] *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983).

attorneys' fees and costs as a remedy, the attorney needs to keep her time records on the case with the Judge as her audience, not just the client.

G. Appeals

As a general rule, appellate courts review an award of attorneys' fees for an abuse of discretion.[81] Therefore, making a good record in the trial court, and introducing evidence of the factors the trial court must consider is critical to obtaining an affirmance of an award of attorneys' fees if they are challenged on appeal. Conversely, if the trial court abuses its discretion, for example by giving weight to an inappropriate factor, that decision may be reversed on appeal.

VI. Recent Virginia State-Law Cases

A. *Lambert v. Sea Oats Condo. Ass'n*, 293 Va. 245 (2017)

In *Lambert*, the Supreme Court of Virginia held that the Circuit Court of Virginia Beach abused its discretion by artificially limiting the amount of attorneys' fees awarded to less than the amount of damages recovered by the plaintiff. In the Circuit Court, Ms. Lambert sought and was awarded $500 in her suit against a condo association. She sought over $9,500 in attorneys' fees, but the judge stated that he felt obliged to limit the award of attorneys' fees because the amount in controversy was so low, and so awarded only $375 in attorneys' fees.

Lambert appealed. The Supreme Court identified seven non-exclusive factors that the circuit court should consider in weighing the reasonableness of an amount of attorneys' fees: (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.

The Supreme Court noted that courts may consider the results obtained in a case, and may compare this amount to the amount of damages sought, in order to measure the effectiveness of the attorney's representation.[82] But, courts may not use the amount of damages sought or recovered as a limit on the amount of attorneys' fees awarded.[83] Consequently, the Supreme Court remanded for an award of reasonable attorneys' fees.

Take-away: The amount of damages recovered is not an automatic cap or limit on the amount of attorneys' fees that may be awarded, even when the attorneys' fees sought are over 19x the amount of damages recovered. This same result occurs with frequency in

[81] *E.g.*, *Lambert v. Sea Oats Condo. Ass'n*, 293 Va. 245, 252 (2017); *Reinbold v. Evers*, 187 F.3d 348, 362 (4th Cir. 1999).
[82] *Lambert*, 293 Va. at 254-56.
[83] *Id.* at 257.

federal court where the financial recovery is small or equitable in nature, but the fees awarded are quite high.[84]

B. *Winding Brook Owner's Ass'n v. Thomlyn, LLC*, 96 Va. Cir. 173 (Hanover Co. 2017)

At closing argument, the plaintiff asked the jury for damages of $11,610.88, which the jury awarded in full. The plaintiff then asked the court for an award of around $120,000 in attorneys' fees and costs. The Hanover Circuit Court held that the amount sought was reasonable, given the complexity of the case and the steps required because of the defendant's actions, and ultimately awarded $117,155.81 in attorneys' fees and $514.55 in costs.

Take-away: Based on the complexity and length of a case, courts may award attorneys' fees of over 10x the amount of damages recovered.

C. *Graham v. Cmty. Mgmt. Corp.*, 294 Va. 222, 805 S.E.2d 240 (2017)

Ms. Graham was sued by the Community Management Corporation in the Circuit Court of Fairfax County, under a contract containing a provision that provided for an award of attorneys' fees to the prevailing party. The Community Management Corporation asked for attorneys' fees in its complaint, but Graham never asked for attorneys' fees in any of her pleadings despite having filed two demurrers, several pleas in bar, and an answer. Graham ultimately obtained a defense verdict, and then filed a subsequent suit against the Community Management Corporation seeking to recover her attorneys' fees incurred in defending the first suit.

The Supreme Court held that the plain language of Rule 3:25 prevented Ms. Graham from obtaining attorneys' fees because she did not make a demand for them in a counterclaim, cross-claim, or responsive pleading in the first suit.[85] The Court held that Ms. Graham's failure to raise her entitlement to attorneys' fees in one of these pleadings constitutes a waiver of her attorneys' fees claim.

The Court noted that it is important for both parties to know early on in the case whether attorneys' fees are on the table, because it can affect the parties' decisions on

[84] *See e.g. Crump v. United States Dep't of Navy*, 245 F. Supp. 3d 692 (E.D. Va. 2017); *Doe v. Alger*, 2018 U.S. Dist. LEXIS 165957 (W.D. Va., Sept. 27, 2018) (J. Dillon).

[85] *See* VA. SUP. CT. R. 3:25(B) ("Demand. --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."), 3:25 (C) ("Waiver. --The failure of a party to file a demand as required by this rule constitutes a waiver by the party of the claim for attorney's fees, unless leave to file an amended pleading seeking attorney's fees is granted under Rule 1:8.").

whether to pursue a claim, dismiss it, or settle it.[86] This notice also keeps parties from having to speculate throughout the case about what claims ultimately might be brought against them.[87]

Take-away: Prevailing parties will not be able to recover attorneys' fees if they do not follow the requirements of Rule 3:25 and fail to ask for attorneys' fees in their pleadings.

D. *McIntosh v. Flint Hill Sch.*, No. CL-2018-1929, 2018 Va. Cir. LEXIS 321 (Fairfax Co., Sep. 17, 2018), writ granted Va. LEXIS 40 (May 10, 2019)

Ms. McIntosh filed a complaint for declaratory relief in the Circuit Court for Fairfax County, seeking to invalidate the one-sided attorneys' fee provision in the Enrollment Contract between her and child's school. This provision read "We (I) agree to pay all attorneys' fees and costs incurred by Flint Hill School in any action arising out of or relating to this Enrollment Contract."[88] The Court held that this attorneys' fee provision was substantively unconscionable, because the provision subjects the parents to attorneys' fees, whether they prevailed in litigation against the school or not, and whether the fees sought are reasonable or not. The Court also found that the attorneys' fee provision was void as against public policy because the award of attorneys' fees contemplated by the provision was not limited to reasonable fees or to a prevailing party, and because the provision significantly barred "potentially meritorious resort to the courts by Plaintiff" and flouted "the corollary principle expressed in the Rules of Professional Conduct not to punish the prevailing party in litigation with payment of the loser's expenses."

Take-away: A draconian, one-sided "challenger pays" attorneys' fee provision will likely not be enforced by Virginia courts. The Supreme Court of Virginia has granted a writ in this case, and several assignments of error relate to the circuit court's attorneys' fee ruling. Therefore, the high court may provide guidance on the issue of one-sided fee provisions.

E. *Meuse v. Henry*, 296 Va. 194 (2018)

This case involved an arbitration where the defendants prevailed on all counts. The arbitrators found that the plaintiff's claims lacked reasonable cause and were brought for an improper purpose, and awarded attorneys' fees of $900,900.00 and costs of $8,300.00 to the defendants. The Circuit Court for the City of Alexandria confirmed the arbitration award. The Supreme Court summarily upheld the arbitrators' award of attorneys' fees and costs.

Take-away: Even very large awards of attorneys' fees in arbitration will likely be upheld by courts in Virginia, absent an abuse of discretion or extraordinary circumstances.

F. *Bergano v. City of Va. Beach*, 296 Va. 403 (2018)

---

[86] *Graham v. Cmty. Mgmt. Corp.*, 294 Va. 222, 231 (2017) (quoting *Stockman v. Downs*, 573 So. 2d 835, 837 (Fla. 1991).
[87] *Id.*
[88] *McIntosh*, 2018 Va. Cir. LEXIS 321 at *3.

This case raised the question as to whether attorneys' fees and billing information are still subject to Virginia Freedom of Information Act ("VFOIA") requests. In this case, Dr. Bergano submitted a VFOIA request for records of "all legal fees and expert invoices relating to [the City's] expenses" in on-going litigation against him in federal court. The City responded by providing "extensively redacted records." The City argued that being in the middle of ongoing of litigation called for a broader, more conservative approach to attorney-client and work-product exceptions which included billing entries.

To determine whether billing records are subject to an exemption, the Court held that an *in camera* review is a proper method to balance the need to preserve confidentiality with the statutory duty of disclosure under VFOIA. The Court acknowledged that certain billing entries may fall within attorney-client or work-product exceptions to disclosure under VFOIA, provided they actually reveal confidential information or analytical work product. However, using this standard, the Court held that billing entries such as "[t]rial preparation and document review," or "[a]ttend trial," which in no way revealed confidential communications, analytical work product, client motives, or litigation strategy, did not meet this threshold.

The Supreme Court remanded the case to circuit court to consider whether to award reasonable costs and attorneys' fees under the circumstances. In order to recover attorneys' fees under VFOIA, the plaintiff must show (1) that the denial of his request was "in violation of the provisions" of VFOIA and (2) that he "substantially prevail[ed] on the merits of the case."

Take-away: Government attorneys should take extra care with their billing with the understanding that it could be subject to a VFOIA request.

G. *Henderson v. Henderson*, 2018 Va. App. LEXIS 134 (May 15, 2018) (unpublished).

Adulterous conduct in a marriage may indirectly play a role in a court's award of attorneys' fees during a divorce proceeding. In *Henderson*, the parties were married in 1999 and had two children, one born in 2002 and another in 2006. The husband was a professional athlete before and during the marriage but retired in 2006. The parties eventually separated in 2014, and the wife filed a complaint seeking a divorce. The court granted the divorce and ordered the husband to pay all of the wife's incurred attorneys' fees and costs.

On appeal, the Court of Appeals upheld the circuit court's grant of attorneys' fees, holding that the circuit court only indirectly relied on the husband's adulterous conduct during the marriage. Primarily, the Court found that the circuit court based its decision on the fact that the husband had "vastly more" income and earning potential than the wife because he had a college degree and earned appearance fees based on his former career as a professional athlete. Meanwhile, the wife never finished college and worked at relatively low-wage jobs. Second, the Court pointed to the circuit court's finding that the wife had to

"incur many expenses in order to prepare and argue for her equitable share" because she had "little knowledge" of the family's finances.

With respect to the husband's adulterous conduct, the Court found evidence which established a pattern of adultery throughout the marriage that "destroyed [the wife's] trust in him." Thus, the Court affirmed the circuit court's finding that "the wife's questioning of the husband's 'forthrightness' regarding finances in the divorce litigation was 'the logical, reasonable, and understandable reaction to [his] adulterous conduct' and that 'the [in]escapable consequence of such conduct [was] incurring attorney's fees.'" In doing so, the Court upheld the award of attorneys' fees because it did not improperly stem from the husband's adultery.

Take-away: The reasonableness of a fee may be affected indirectly by negative conduct of the adverse party.

H. *Swahn v. Hussain*, 2019 Va. Cir. LEXIS 2 (Fairfax Co., Jan. 18, 2019)

The fact that a party happens to prevail on one out of multiple claims in a lawsuit does not necessarily make them the "Prevailing Party." Rather, in order to recover attorneys' fees, a "Prevailing Party" must *substantively prevail on the case as a whole*. In *Swahn*, the Swahns sued their immediately adjacent neighbors, the Hussains, for public and private nuisance on the basis of the Hussains regularly cooking "copious amounts" of food which emitted unpleasant and noxious odors within their town house community, in violation of the neighborhood's Declaration. The Hussains rebuffed the nuisance claims and countersued for trespass. During litigation, the Swahns attempted to nonsuit the public nuisance claim, but the Hussains objected. Nonetheless, the Swahns effectively dropped the claim at trial by waiving their right to seek an injunction. After trial, the jury ruled in favor of the Hussains on the public nuisance claim by dismissing the count, but ruled in favor of the Swahns by dismissing the trespass claim and awarding damages on the private nuisance claim. The Hussains then petitioned the Court to award attorney's fees, alleging themselves as the "prevailing party" under Virginia Code § 55-515, which awards attorney's fees to prevailing parties in suits to compel compliance with declarations of property owners' associations.

In its second alternative holding, the Court held that the Hussains failed to prove what amount of the attorney's fees petitioned for were specifically associated with the public nuisance claim. Since the Hussains failed to segregate their attorney's fees associated with the public nuisance claim from those associated with the private nuisance claim, the Court held that there was no way to distinguish which, if any, fees were incurred that were not already required for the defense of the valid private nuisance claim.

In sum, the Hussains were not the prevailing party in the litigation despite having "prevailed" on one count of public nuisance. Lastly, casting everything else aside, the Hussains failed to distinguish to the Court the attorney's fees spent on their successful count from the fees spent on their failed counts. Thus, the Court refused to award the Hussains' fees.

VII. Court Costs

A. General rule

1. It is well settled that, like attorneys' fees, expenses incurred by the plaintiff in litigating his claim are not recoverable as an item of damages.[89]

2. At common law, there existed no basis for recovery of costs, therefore, recovery now rests upon statute.[90]

3. By statute, the party for whom final judgment is given in an action or motion shall recover his costs against the opposite party, except as otherwise provided.[91]

B. Exceptions to the General Rule

1. Contractual provision can permit recovery of costs.[92]

2. Costs recoverable pursuant to Va. Code §§ 17.1-600 et seq.

a) Note that a statutory provision for costs does not include attorneys' fees.[93]

b) Expert witness fees are not "costs" as contemplated by the code.[94]

C. Taxable Court Costs Recoverable pursuant to Va. Code §17.1-624, 626.

1. all taxes on process; (Va. Code § 17.1-626)

2. all fees of officers which the party appears to be chargeable with in the case wherein the recovery is, except that when in any court, on the same side, more than one copy of anything is obtained or taken out, there shall be taxed only the fee for one copy of the same thing; (Va. Code § 17.1-626)

3. the costs of executing any order of publication; (Va. Code § 17.1-626)

[89] *Hiss v. Friedburg*, 201 Va. 572 (1960).
[90] *Scott v. Doughty*, 130 Va. 523, 526 (1921).
[91] Va. Code § 17.1-601.
[92] *Danburg v. Keil*, 235 Va. 71, 365 S.E.2d 754 (1988).
[93] *Chancey v. Garvey*, 291 Va. 1 (2015).
[94] *Holmes v. LG Marion Corp.*, 258 Va. 473 (1999).

4. the allowances to his witnesses; (Va. Code § 17.1-626) and

5. every further sum which the court may deem reasonable and direct to be taxed for depositions taken out of the Commonwealth, or for any other matter. (Va. Code § 17.1-626)

D. Miscellaneous Rules

1. Claims against the Commonwealth: No recovery of costs against the Commonwealth of Virginia, unless specifically provided for in the Code of Virginia. Va. Code § 17.1-629.

2. De minimis verdict: No costs awarded if verdict is less than $10.00. Va. Code § 17.1-602.

3. Injunction: Costs should not be taxed upon overruling or sustaining a motion to dissolve an injunction.[95] Where an injunction is perpetuated in part, the complainant ought, in general, not to be decreed to pay the costs.[96]

4. Multiple defendants: If there are multiple defendants and some are found liable and some are not, the non-liable defendants may recover costs from the plaintiff, while the plaintiff recovers its costs from the liable defendants. Va. Code § 8.01-444.

E. Taxable costs in federal court pursuant to 28 U.S.C. §1920

1. Costs Include:

a) Clerk and Marshal fees;

b) Fees for transcripts;

c) Fees and disbursements for printing and witnesses;

d) Fees for exemplification and copies[97];

e) Docket fees;

f) Compensation of court appointed experts and interpreters.

[95] *Barnett v. Spencer*, 12 Va. (2 Hen. & M) 7 (1807).
[96] *Ross v. Gordon*, 16 Va. (2 Munf.) 289 (1811).
[97] Converting document file types constitutes making a copy, however ESI processing does not constitute "exemplification". *Country Vintner of N.C., LLC v. E. & J. Gallow WIndery, Inc.*, 718 F.3d 249 (4th Cir. 2013) (denying the prevailing party a six figure cost for ESI processing).

2. Costs are recoverable by the prevailing party pursuant to Federal Rule of Civil Procedure, Rule 54(d)

F. Appellate Costs

1. As a general rule, the party who substantially prevails may recover its appellate costs.

a) "In every case in the Supreme Court or the Court of Appeals, costs shall be recovered in such court by the party substantially prevailing."[98]

i. The prevailing party "'is the party in whose favor the decision or verdict in the case is or should be rendered and judgment entered, and in determining this question the general result should be considered, and inquiry made as to who has, in the view of the law, succeeded in the action.'"[99]

ii. The prevailing party is the party in whose favor a judgment is rendered, regardless of the amount of damages awarded.[100]

b) Unless otherwise ordered, appellate costs will be taxed as follows:

i. If an appeal is dismissed, costs shall be taxed against the appellant;

ii. if a judgment is affirmed, costs shall be taxed against the appellant;

iii. if a judgment is reversed, costs shall be taxed against the appellee.[101]

2. The recoverable costs of appeal to the Court of Appeals of Virginia and the Supreme Court of Virginia are described in Title 17.1 and in Rules 5A:30(c) and 5:35(c). Taxable costs include:

a) Filing fee;

b) Costs incurred in the printing or producing of necessary copies of briefs, appendices and petitions for rehearing.

[98] Va. Code § 17.1-604.
[99] *Sheets v. Castle*, 263 Va. 407, 413 (2002) (quoting *Richmond v. County of Henrico*, 185 Va. 859, 869 (1947)).
[100] *Sheets*, 263 Va. at 413.
[101] Rules 5:35(a), Rule 5A:30(a).

i. The costs for printing briefs shall not exceed $500 for all briefs filed.[102]

ii. However, "the Court for good cause may direct that such party shall recover less than the entire cost incurred by him in printing or otherwise reproducing (i) briefs filed by him (even though less than $ 500) or (ii) the appendix.[103]

iii. Costs incurred in the preparation of transcripts.[104]

3. Notarized Bill of Costs: The party seeking to tax costs must file a notarized bill of costs with the appellate court.[105]

.

a) The bill of costs should itemize the costs sought to be taxed.

b) In the Supreme Court and Court of Appeals, the bill of costs must be filed within 14 days of the decision. Objections to the bill of costs must be filed within 10 days of the date of filing the bill of costs.

VIII. Interest

A. General policy considerations

1. The doctrine of interest is founded on the principle that one who has the use of another's money, should have to pay for it.[106]

2. Interest recoverable at law and in equity and is favored by the courts and by the General Assembly.[107]

B. Statutory basis

1. Interest as an element of damages is provided by Virginia Code § 8.01-382, which permits pre and post-judgment interest at law and in equity. The award of interest is discretionary.

2. Va. Code §8.01-382 states: "In <u>any</u> Administrative Process Act (§2.2-4000 et seq.), action or action at law or suit in equity, the final order, verdict of the jury, or if no jury the judgment or decree of the court, <u>may</u>

[102] Va. Code §17.1-605.
[103] Va. Code §17.1-605.
[104] Va. Code §17.1-128.
[105] Rule 5:35(d), Rule 5A:30(d).
[106] *Jones v. Williams*, 6 Va. 102 (1799).
[107] *Tazewell v. Saunders*, 54 Va. (13 Gratt.) 354 (1856).

provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence. The final order, judgment or decree entered shall provide for such interest until such principal sum be paid. If a final order, judgment or decree be rendered which does not provide for interest, the final order, judgment or decree awarded shall bear interest at the judgment rate of interest as provided for in § 6.2-302 from its date of entry or from the date the jury verdict was rendered. (emphasis added).

C. Time at which interest begins accruing

1. In contract cases, pre-judgment interest runs from the date the amount becomes due and payable.[108]

2. In tort cases, pre-judgment interest may run from the date prescribed by the trier of fact.[109]

3. Post-judgment interest runs from the date of the final order, judgment, decree or jury verdict.[110]

D. Maximum and Minimum Rates

1. Pursuant to Va. Code § 6.2-302, interest on judgments or decrees shall bear interest at the rate of 6% per annum.

2. However, a money judgment entered in an action arising from a contract shall carry pre-judgment interest at the rate lawfully charged on such contract, or at six percent annually if not specified.

3. Interest at the judgment rate, where no rate is fixed by the contract, shall apply to both pre-judgment interest pursuant to Va. Code § 8.01-382 and to post-judgment interest.

4. Note: The lawful rate of interest in a contract is 12 % per annum, unless the contract falls within an exception.[111] Among the exceptions are:

a) Bank loans payable in installments;[112]

[108] *See Schwab v. Norris*, 217 Va. 582, 231 S.E.2d 222 (1977).
[109] *See* Va. Code §8.01-382.
[110] *Id*.
[111] See Va. Code § 6.2-303.
[112] Va. Code § 6.2-309.

b) Certain Consumer transactions based on a closed end installment credit plan may have interest rates at that agreed to by the parties;[113]

c) Payday and title lenders;[114] and

d) Interest chargeable by pawnbrokers.[115]

5. Note: In preparation of any contract providing for interest, review allowable interest rates to prevent against allegations of usury.

E. Claims against the Commonwealth or Municipalities

1. Pre-judgment interest is not available pursuant to the Virginia Tort Claims Act.[116]

2. Interest on a refund of local taxes may only be awarded if it is contained in the local government's ordinance.[117]

F. Case Law

1. Ordinarily, pre-judgment interest is not allowed when accounts are unliquidated and in dispute between the parties.[118] The award of pre-judgment interest is within the discretion of the trier of fact.[119] Post-judgment interest is mandatory.[120]

2. Pre-judgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered. Post-judgment interest is not an element of damages but is a statutory award for delay in the payment of money actually due.[121]

---

[113] Va. Code § 6.2-1500 et seq.
[114] Va. Code § 6.2-1800 et seq.; Va. Code § 6.2-2200 et seq.
[115] Va. Code § 54.1-4008
[116] Va. Code § 8.01-195.3.
[117] *City of Winchester v. American Woodmark Corp.*, 250 Va. 451, 464 S.E.2d 148 (1995).
[118] *Skretvedt v. Kouri*, 248 Va. 26 (1994).
[119] *Upper Occoquan Sewage Auth. v. Blake Const. Co.*, 275 Va. 41 (2008); *Grubb v. Grubb*, 272 Va. 45 (2006); *Advanced Marine Enterprises v. PRC, Inc.*, 256 Va. 106 (1998); *Rush v. Hartford Mut. Ins. Co.*, 652 F.Supp. 1432 (W.D. Va. 1987); *Pierce v. Martin*, 230 Va. 94 (1985); *Marks v. Sanzo*, 231 Va. 350 (1986); *Doyle & Russell Inc. v. Welch Pile Driving Corp.*, 213 Va. 698, 194 S.E.2d 719 (1973); *Beale v. King*, 204 Va. 443, 132 S.E.2d 476, 480 (1963).
[120] Va. Code § 8.01-382; *Upper Occoquan Sewage Auth. v. Blake Const. Co.*, 275 Va. 41 (2008); *Dairyland Ins. Co. v. Douthat*, 248 Va. 627, 449 S.E.2d 799 (1994)
[121] *RGR, LLC v. Settle*, 288 Va. 260 (2014); *Upper Occoquan Sewage Auth. v. Blake Const. Co.*, 275 Va. 41 (2008); *Dairyland Ins. Co. v. Douthat*, 248 Va. 627, 449 S.E.2d 799 (1994).

3. Award of interest based on contract is not a hard and fast rule. Where a building contractor had caused a delay in payment by the owner by numerous errors and overcharges in his books and statements, which required legal investigation to ascertain the balance due, it would not have been just and equitable to allow interest until the balance was fixed.[122]

4. Post-judgment interest begins running from the date of the original judgment, and not from the date of a revised judgment entered on remand from the court of appeals.[123]

5. Post-judgment interest does not run on any pre-judgment interest awarded, rather it runs only on the principal sum awarded.[124]

IX. Conclusion

The ability to recover attorneys' fees can have great impact on the development and outcome of a case. To that end, it is essential that an attorney evaluate whether attorneys' fees are recoverable and timely request those fees. Throughout the case, the attorney must also bill precisely and carefully. When the time comes, the recoverability of attorneys' fees also can be a useful tool in settlement negotiations. Further, costs and interest can be a significant part of any recovery, and should be considered when evaluating a potential recovery in the case as well as what losses your client may face if she is the losing party. This area is the law is still evolving, so stay up to date with new case law and always remember this important part of your case.

[122] *Hitt v. Smallwood*, 147 Va. 778, 133 S.E.503 (1926).
[123] *Boyd v. Bulala*, 751 F.Supp. 576 (W.D. Va. 1990).
[124] *RGR, LLC v. Settle*, 288 Va. 260 (2014); *Upper Occoquan Sewage Auth. v. Blake Constr. Co.*, 275 Va. 41 (2008).

Metadata

The “Hidden” Information that Could Win or Lose Your Case

Nick (Powell M.) Leitch, III

Charles R. Calton

Metadata: The 'Hidden' Information That Could Win or Lose Your Case

Powell M. "Nick" Leitch, III
Charles R. Calton
Gentry Locke CLE Seminar September 6, 2019

"Metadata absolutely tells you everything about somebody's life, if you have enough metadata you don't really need content… [it's] sort of embarrassing how predictable we are as human beings."

- Stewart Baker, Asst. Secretary of Policy, Department of Homeland Security (2005-2009)

We produce a lot of information. According to statista.com, in 2019 it is estimated that an average of over 293 billion emails sent each day, and is expected to climb to over 347 billion emails per day by 2023.[1] In addition to email, we also send out a lot of data involuntarily. This data is collected by the smart devices you use in and around your home such as an Amazon Echo or Nest Camera,[2] the car your drive,[3] your "smart" watch or fitness tracker,[4] and the company that provides your internet service.[5]

In general, metadata can reveal a lot about an individual's day-to-day activities. But, as it relates to a medical malpractice case, both the volume and the type of metadata that can be obtained and utilized is astonishing. If you know what you're looking for, this information can provide a lawyer with, among other things, information about (a) where the healthcare provider was during the relevant time; (b) how long they were there; and (c) what the person did when they were there. The trick is, you need to know what to look for, how to look for it, and then how to interpret it. If you know these things, the information is particularly useful in instances where metadata can directly contradict an opposing party's statements, such as: "I wasn't there," "I didn't edit that record," or "I was only at the bar for fifteen minutes." For example, if you are litigating a medical malpractice case and a physician says they reviewed a specific radiology image at a certain time –

[1] J. Clement, *Number of sent and received e-mails per day worldwide from 2017 to 2023*, www.statista.com (last accessed July 1, 2019).

[2] Noah Apthorpe, Dillon Reisman, Nick Feamster, *A Smart Home is no Castle: Privacy Vulnerabilities of Encrypted IoT Traffic*, arXiv: 1708.06805v1, May 18, 2017, *available at* https:arxiv.org/pdf/1708.05044.pdf.

[3] Michael Liedtke, *How is Data Being Collected and Used in my Car?*, Chicago Tribune, Dec. 25, 2018.

[4] *See, e.g.*, Parmy Olson, *Fitbit Data Now Being Used in the Courtroom*, Forbes, Nov. 16, 2016, *available at* https://www.forbes.com/sites/parmyolson/2014/11/16/fitbit-data-court-room-personal-injury-claim/#7d8a4c1b7379.

[5] Thomas Brewster, *Now Those Privacy Rules are Gone, This is How ISPs Will Actually Sell Your Personal Data*, Forbes, Mar. 30, 2017, *available at* https://www.forbes.com/sites/thomasbrewster/2017/03/30/fcc-privacy-rules-how-isps-will-actually-sell-your-data/#6114031221d1.

there's no need to take his word for it, the metadata can reveal when the image was accessed, how long it was viewed, and where it was viewed.

While this involuntary and voluminous release of personal data may disturb or shock you, this presentation is designed to let you know about where this data is available and how you can utilize it to help you win your case – or at least not be blindsided by opposing counsel with information that you didn't know was out there.

I. What is metadata?

a. Literally "meta," meaning "transcending," and "data," meaning "information."[6]

b. Sounds innocent enough – it's simply "data about data."[7]

c. Metadata is "structured information that describes, explains, locates, or otherwise makes it easier to retrieve, use, or manage an information resource. Metadata is often called data about data or information about information."[8]

d. Metadata has been defined as "data describing the context, content, and structure of records and their management through time."[9]

e. As it is used in litigation, metadata is "evidence…that describes the characteristics, origins, usage, and validity of other electronic evidence."[10]

f. There are actually two types of metadata: application and system.[11]

i. Application metadata is located within "the file it describes and moves with the file when you copy it."[12]

---

[6] Merriam-Webster On-line Dictionary https://www.merriam-webster.com/dictionary/metadata.

[7] *See, e.g.*, Jeffrey L. Masor, *Medical Records and E-Discovery: With New Technology Come New Challenges*, 5 Hastings Sci. & Tech L.J. 245 (Summer 2013).

[8] *Understanding Metadata*, National Information Standards Organization, 2004, *available at* https://www.niso.org/publications/press/understanding_metadata.

[9] § 42.1-77, Code of Virginia, as amended.

[10] Craig D. Ball, *Beyond Data about Data: The Litigator's Guide to METADATA*, 2 (2005).

[11] Masor, *supra* n. 6 at 252.

[12] Ball, *supra* n. 8.

ii. System metadata is stored separately from the file on a computer system.[13]

II. Where is metadata found?

a. Virtually everything we do creates metadata trail: web browsing sessions, using a credit card,[14] emails, walking through a store.[15]

b. Cell phones and the Internet of Things devices

i. Amazon Echo

ii. Next Camera

iii. Fitbit

iv. Smart phones

c. Litigation-specific locations

i. Motor vehicles: Required under the Federal Motor Carrier Safety Act.[16]

ii. Electronic Health Records ("EHR")/Electronic Medical Records ("EMR"): Required by CMS for full Medicare reimbursement.[17]

---

[13] *Id.*

[14] Scott Berinato, *There's no Such Thing as Anonymous Data*, Harvard Business Review, Feb. 9, 2015, *available at* https://hbr.org/2015/02/theres-no-such-thing-as-anonymous-data.

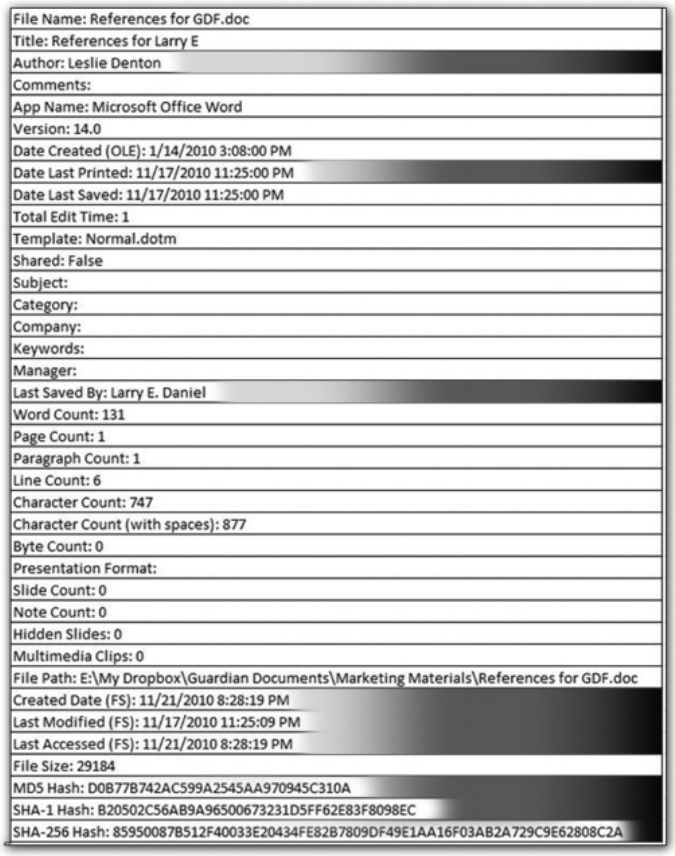
[15] Stephanie Clifford and Quentin Hardy, *Attention, Shoppers: Store is Tracking Your Cell*, NY Times, July 14, 2013, *available at* https://www.nytimes.com/2013/07/15/business/attention-shopper-stores-are-tracking-your-cell.html?pagewanted=all&_r=1& (examining how brick-and-mortar stores track shoppers via WiFi throughout their stores); *see also* Brian Fung, *How Stores use your Phone's WiFi to Track Your Shopping Habits*, Washington Post, October 19, 2013, *available at* https://www.washingtonpost.com/news/the-switch/wp/2013/10/19/how-stores-use-your-phones-wifi-to-track-your-shopping-habits/?noredirect=on&utm_term=.e8ef55779e63.

[16] *See, e.g.,* 49 C.F.R. §§ 395.8 and 395.15.

[17] *See 2019 Medicare Electronic Health Record (HER) Incentive Program Payment Adjustment Fact Sheet for Hospitals*, *available at* https://www.cms.gov/newsroom/fact-sheets/2019-medicare-electronic-health-record-ehr-incentive-program-payment-adjustment-fact-sheet-hospitals.

iii. Computer files: All files have some form of metadata.[18] Attachment A is a sample of what a metadata is available from a Microsoft Word file.

iv. Door swipes/access cards


File Name: References for GDF.doc
Title: References for Larry E
Author: Leslie Denton
Comments:
App Name: Microsoft Office Word
Version: 14.0
Date Created (OLE): 1/14/2010 3:08:00 PM
Date Last Printed: 11/17/2010 11:25:00 PM
Date Last Saved: 11/17/2010 11:25:00 PM
Total Edit Time: 1
Template: Normal.dotm
Shared: False
Subject:
Category:
Company:
Keywords:
Manager:
Last Saved By: Larry E. Daniel
Word Count: 131
Page Count: 1
Paragraph Count: 1
Line Count: 6
Character Count: 747
Character Count (with spaces): 877
Byte Count: 0
Presentation Format:
Slide Count: 0
Note Count: 0
Hidden Slides: 0
Multimedia Clips: 0
File Path: E:\My Dropbox\Guardian Documents\Marketing Materials\References for GDF.doc
Created Date (FS): 11/21/2010 8:28:19 PM
Last Modified (FS): 11/17/2010 11:25:09 PM
Last Accessed (FS): 11/21/2010 8:28:19 PM
File Size: 29184
MD5 Hash: D0B77B742AC599A2545AA970945C310A
SHA-1 Hash: B20502C56AB9A96500673231D5FF62E83F8098EC
SHA-256 Hash: 85950087B512F40033E20434FE82B7809DF49E1AA16F03AB2A729C9E62808C2A

PRACTICE POINT: Always send a preservation of evidence letter to preserve all digital evidence, including physical evidence which may contain metadata. The Supreme Court of Virginia has ruled that a party must act with the *intent* to deprive another party of the use of requested information before an adverse instruction will be given. *Emerald Point, LLC v. Hawkins*, 294 Va. 544, 558 (2017). Therefore, it is essential to put the other side on notice that you will be requesting electronically stored information.

III. What can metadata reveal?

a. Data tracked by a GPS company, Strava, over a two-year period and uploaded to its Global Heat Map, inadvertently revealed "highly sensitive" information about the locations and activities of U.S. soldiers stations at U.S. Military

[18] Larry E. Daniel, Lars E. Daniel, DIGITAL FORENSICS FOR LEGAL PROFESSIONALS, 27.2.3, 2012.

bases in the Middle East.[19] By publishing "heat trails," obtained from users via their Fitbit or JawBone devices, the information demonstrated the outlines of U.S. military bases.[20] An example of the information available can be seen below:

b. But, isn't metadata anonymous? In a word: no.

    i. Metadata collected by the devices in your home and the websites you visit is, in theory, anonymized.[21]

c. This "anonymity" is easily overcome, and personal identifiers are readily available.[22]

---

[19] Lis Sly, *U.S. Soldiers Are Revealing Sensitive And Dangerous Information by Jogging*, The Washington Post, Jan. 29, 2018, *available at* https://www.washingtonpost.com/world/a-map-showing-the-users-of-fitness-devices-lets-the-world-see-where-us-soldiers-are-and-what-they-are-doing/2018/01/28/86915662-0441-11e8-aa61-f3391373867e_story.html?utm_term=.a8c23db7cd50/ (last accessed June 30, 2019).

[20] *Id.*

[21] *See, e.g.,* Beatrice Perez, Mirco Musolesi, Gianluca Stringhini, *You Are Your Metadata: Identification And Obfuscation of Social Media Users Using Metadata Information*, arXiv.org: 1803.10133, May 14, 2018, *available at* https://arxiv.org/abs/1803.10133 (noting the "anonymous" information collected by Twitter).

[22] *See* Olivia Solon, *'Data is a Fingerprint': Why you Aren't as Anonymous as you Think Online*, The Guardian, July 13, 2018, *available at* https://www.theguardian.com/world/2018/jul/13/anonymous-browsing-data-medical-records-identity-privacy (noting numerous instances of identifying individuals through analysis of "anonymous"

d. Specific metadata particularly applicable to medical malpractice cases:

i. In 2008, only 11% of nonfederal U.S. hospitals had basic EHR systems, and less than 2% had implemented comprehensive systems in at least one clinic.[23]

ii. By 2017, a study by the CDC demonstrated that nearly 86% of office-based physicians were using an EMR/EHR system.[24] That number climbs to almost 95% of office-based physicians in Virginia.[25]

iii. What sort of metadata is in an EHR/EMR?
- Audit Trails
  - Is automatically generated
  - An audit trail will provide you with every change or addition to an electronic medical record;
  - Can provide you with who made the edit and potentially where they were when the edit was made;
  - Can provide you with the substance or the type of edit.[26]
    - Are discoverable in Virginia Courts; and
    - Are discoverable in federal court.
- Pop-Ups
  - Automatically generated warnings to healthcare providers;
  - Can include cautions against drug interactions or contra-indications to procedures.[27]
- Communications/Records outside of the "designated record set"

---

data); *see also* Perz, *supra* at n. 17 (noting a 96.7% accuracy rate in identifying one (1) user out of ten thousand (10,000)).

[23] Ha AK, DesRoches CM, Campbell EG, *et al.*, *Use of Electronic Health Records in U.S. Hospitals*, N. Engl. J. Med. 32009, 360:1628-38.

[24] Myrick KL, Ogburn DF, Ward BW. Table. Percentage of office-based physicians using any electronic health record (EHR)/electronic medical record (EMR) system and physicians that have a certified EHR/EMR system, by U.S. state: National Electronic Health Records Survey, 2017. National Center for Health Statistics, *available at* https://www.cdc.gov/nchs/fastats/electronic-medical-records.htm.

[25] *Id.*

[26] *See* Masor, *supra* n. 6.

[27] *Id.*

- Healthcare providers often maintain patient-specific information outside of the "normal" medical record. Below are some instances and where the records may be held:[28]

Record Type	Possible Maintaining Organization
Peer-review activities	Healthcare organization; providers, Accountable Care Organizations ("ACOs"), health plans
Incident reports/Risk-Management Data	Healthcare organization; providers, ACOs, health plans
Patient complaints	Healthcare organization; providers; ACOs, health plans
Patient-safety data	Healthcare organization; providers; ACOs, health plans
Case-management records	Healthcare organization; providers; ACOs, health plans
Quality-improvement records	Hospitals; health departments; NIH
Morbidity and mortality records	Hospitals, health departments
Survey reports and recommendations from the Joint Commission	Healthcare organization; providers; ACOs, health plans
Licensing applications	Licensing agencies; healthcare organization
Clinical pathways and care protocols	Healthcare organization; hospitals; providers;
Patient ombudsman records	Hospitals; healthcare organization; health departments;
System ephemeral data	EHR; clinical biomedical data system
Texts and instant messages	Providers; patients; staff; healthcare organizations; personal devices; third-party service providers
Voicemail records	Providers; patients; staff; healthcare organization; and third-party service providers
RFID tracking information	Healthcare organizations; hospitals; ACOs

IV. **How should you request metadata?**

a. Virginia Courts: Whether by subpoena or in discovery – always request unmodified and usable format. Below are a couple of ways you may request this information:

[28] Ralph Artigliere, *Diagnosing And Treatment Legal Ailments of The Electronic Health Record: Toward an Efficient And Trustworthy Process For Information Discovery And Release*, 18 Sedona J. 209 (2017).

4. If not produced in response to the foregoing Requests for Production, produce an audit trail for all electronic documents and electronically-stored information relating to any aspect of or entry in the EMRs of Plaintiff, including without limitation any and all information identifying who accessed Plaintiff's EMR, the time and date the record was accessed, the workstation, computer or location from which the record was accessed, what record was accessed, what specific portion(s) of the record was accessed, and what notes, modifications, or revisions were made to the record, if any.

RESPONSE:

5. Produce all VOCERA call logs, phone call logs, instant message logs, text message logs, page logs, emails and electronic message logs, and any other documents in any way memorializing telephone calls, pages, text messages, emails, or other communications in any way relating to the care and treatment of Plaintiff.

RESPONSE:

6. Produce all electronic documents and electronically-stored information, in native format, relating to any dictated entry into Plaintiff 's EMRS, including

a. The date, time, and identity of the individual dictating the note;

b. The date, time, and identity of the individual transcribing the dictation;

c. The date, time, and identity of any individual(s) who edited the note after transcription; and

d. The date, time, and identity of any individual(s) who signed or authenticated the note the note after transcription.

RESPONSE:

7. Produce an "audit trail" or "audit log" for every user who ever viewed any of Plaintiff's radiology images.

RESPONSE:

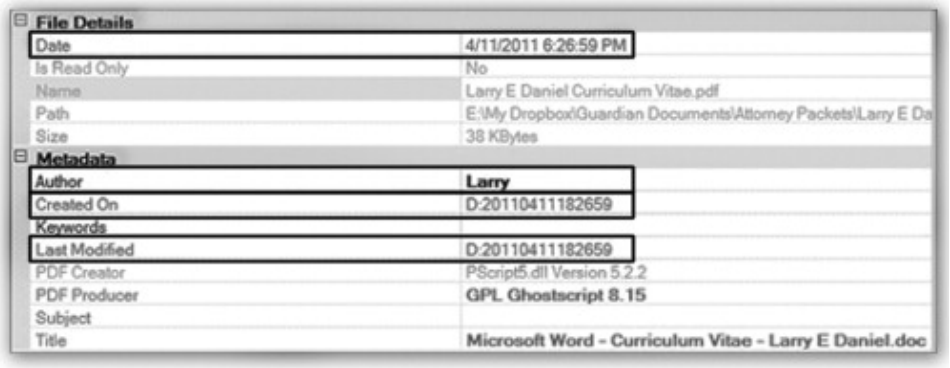
8. Produce an "audit trail" or "audit log" for every user who ever viewed, edited or modified any of Plaintiff's radiology reports.

RESPONSE:

i. Note – Virginia's Health Records Privacy Act does not require the provider to produce these in an electronic format free of charge.[29]

[29] Virginia Code § 32.1-127.1:03(E); *see also Myers v. Riverside Hosp. Inc.*, 93 Va. Cir. 189, 190 (Newport News 23016).

ii. Unmodified is essential as the image below, a Word document which was converted to PDF format, demonstrates:[30]



File Details	
Date	4/11/2011 6:26:59 PM
Is Read Only	No
Name	Larry E Daniel Curriculum Vitae.pdf
Path	E:\My Dropbox\Guardian Documents\Attorney Packets\Larry E Da
Size	38 KBytes
Metadata	
Author	Larry
Created On	D:20110411182659
Keywords	
Last Modified	D:20110411182659
PDF Creator	PScript5.dll Version 5.2.2
PDF Producer	GPL Ghostscript 8.15
Subject	
Title	Microsoft Word - Curriculum Vitae - Larry E Daniel.doc

b. Federal courts: Federal Rule of Civil Procedure 34(E)(ii) requires that electronically stored information be produced "in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms…"

c. Be specific: know what you're requesting!

i. Know the normally utilized format for the information you're requesting

ii. Research all possible formats or mediums for communication and/or tracking that are available

d. When in doubt – ask someone.

V. Tales of metadata success

a. The post-death record amendment. A physician was scheduled to perform a right leg procedure on an elderly patient but, instead, performed a left leg procedure. The physician, once he realized he had operated on the wrong leg went into the medical record in an attempt to justify his error. During discovery, an audit trail proved that the physician had reviewed imaging studies demonstrating the leg he operated on did not require surgical intervention *before* he performed the procedure.

b. The "I wasn't there" doctor. In a medical malpractice case, a physician testified he was not present in the hospital at the time a procedure was

[30] Daniel, *supra* n. 15.

ordered. Key card swipe information revealed that he was there during the procedure.

c. The "he didn't tell me about that" physician: An emergency room physician discharged a patient without properly assessing him for a broken femur. After the physician learned the patient's death, he went into the medical record and amended his treatment note. The record was amended to state that the patient had not mentioned anything regarding pain in his leg, but had mentioned pain elsewhere. The hospital-generated time-stamps on the entries proved that the amendments were made *after* the physician learned the patient's death.

d. The "I didn't take my eyes off the road" driver: A tractor-trailer driver slammed into another vehicle while traveling at approximately 60 miles per hour. Downloadable metadata stored in the tractor-trailer's black box demonstrated the driver had not taken his foot off the gas despite over 1,000 feet of clear visibility before he struck our client.

e. The pre-deposition power play: Leading into a deposition of a defendant physician, discovery responses indicated he had not reviewed certain radiology images. After informing defendant's counsel that the audit trail from the hospital demonstrated the physician had reviewed the image, the defendant then admitted to reviewing it before treating the patient.

VI. **Conclusion**

There is a LOT of data out there. Knowing what to request and how to request it can reveal information that the opposing party is unwilling to do on their own. It is imperative, especially in the data-heavy world that we live in, that we diligently serve our clients' interests by staying up-to-date on matters that could very well win, or lose, their case. To that end, you should request all available metadata early in any case to ensure that all facts are known as soon as possible.

ETHICS:
Don't Be THAT Lawyer

The Care and Feeding of the Difficult Lawyer

Guy M. Harbert, III

Mia R. Yugo

DON'T BE *THAT* LAWYER!

Guy M. Harbert, III
Mia Yugo
Special Thanks to William Spotswood
GENTRY LOCKE SEMINAR
September 6, 2019 – Hotel Roanoke, Roanoke, VA

*

In the beginning… there were lawyers.

And somewhere along the way, there were Lawyers Behaving Badly.

*

Yes… it's time for that "boring" ethics stuff again.
But maybe ethics is not so boring after all . . .
Take a look.

The Rules of Professional Conduct require lawyers to uphold the *highest* standards of ethical conduct and professionalism. Let's see what happens when they don't…

1. COMMINGLING OF FUNDS.

- VSB Docket No. 18-053-110776 (May 7, 2019)
  - Attorney withdrew money **directly** from the firm's operating and trust accounts for **personal expenses**, such as groceries, restaurants, and charges related to his sons' college expenses. Although the attorney had, in total, withdrawn more, at the time the misappropriation was discovered, the firm trust account was short $21,074.99. Attorney even wrote a check to a car dealership for $51,795.08 to purchase his wife an Acura MDX. Attorney claimed he simply "skipped a step" and paid himself directly.
  - Sanction: Suspension of license for one year and one day.
  - **Rules Violated**: 1.15 (Safekeeping Property) and 8.4 (Misconduct)

- VSB Docket No. 18-080-110504 (March 27, 2019)
  - Attorney consented to his license revocation due to allegations of misconduct. The VSB found that, while representing a criminal client, the attorney took a proprietary interest in the client's **Audi** without complying with the requirements of Rule 1.8 of the VRPC and then had it sold. Attorney then failed to properly hold in trust the proceeds of the Audi or account for them in accordance with Rule 1.15 of the VRPC.
  - **Rules Violated**: 1.15 (Safekeeping Property); 1.8 (Conflict of Interest: Prohibited Transactions)

- VSB Docket No. 19-090-113267 (March 18, 2019)

- Attorney consented to her license revocation after the VSB received a complaint from an employee of Adult Protective Services. While acting in a fiduciary capacity and holding the power of attorney for an elderly ward, the Attorney **misappropriated** substantial amounts of money **from that elderly ward**. In doing so, Attorney did not provide reasonable explanations for some expenditures, declined to answer questions about the expenditures, and failed to provide supporting documentation.
- **Rules Violated**: Not Specified

2. <u>EARNED V. UNEARNED FUNDS.</u>

- VSB Docket No. 18-070-112910 (April 3, 2019)
  - Attorney consented to the revocation of his license after he failed to comply with Rule 1.15(c). Attorney failed to provide the client with a copy of her file, an **accounting of his use of advance fees**, a **return of all unused advance fees**, and her portion of the case settlement.
  - **Rule Violated**: 1.15 (Safekeeping Property)

- *Roberts v. Va. State Bar*, 296 Va. 105 (2018)
  - Attorney improperly transferred the funds from the client's trust account to his firm's operating account in partial payment of his fees knowing there was an ongoing dispute regarding his fees and that the client had demanded a refund (after firing the attorney).
  - The Virginia Supreme Court affirmed the VSB Disciplinary Board decision, holding that there was no precedent to support a discharged contingency-fee attorney being entitled to recover in *quantum meruit* from a **personal injury claimant who never received any compensation whatsoever.**
  - The Court reasoned that even if *quantum meruit* theoretically permitted such a fee, the fee must still be adequately explained to the client, reasonable under the circumstances, and must not unreasonably hamper the client's right to discharge the attorney.
  - Held: A contingency-fee lawyer is not entitled to an award of *quantum meruit* fees (even if the Agreement stated so) if the attorney is discharged before the case is resolved and if such fees were not reasonable and adequately explained to the client.
  - **Rule Violated**: 1.15 (Safekeeping Property)

- *Ekwalla v. Va. State Bar*, Record No. 160401, 2016 Va. Unpub. LEXIS 29 (Dec. 8, 2016)
  - Sandra Medina
    - Client, Sandra Medina, retained Ekwalla to represent her in a dispute with a car dealership. The case eventually went to arbitration, which cost $2850. Client gave Ekwalla a check for

the exact amount and wrote "**arbitration**" **on the memo line**. Ekwalla never paid the arbitration fee. Instead, **he converted the fee into "earned fees"** allegedly for the time charged to the client and **placed the funds into the firm's operating account.** As a result, the arbitration service canceled the arbitration call between the parties. Ekwalla never provided the client with a refund.

- **Rules Violated**: 1.3(b) (Diligence); 1.4(a)-(c) (Communication); 1.15(b)(2)-(5) (Safekeeping Property); 1.16(d) (Declining or Terminating Representation); and 8.4(a) (Misconduct).
- Sanction: Ultimately disbarred (various violations listed throughout).

3. OVERBILLING.

- VSB Docket No. 17-033-107835, Case No. CL2018-4882-8 (Feb. 19, 2019)
  - Attorney sanctioned with Public Admonition for billing his client **after** the **client had explicitly said to "[p]lease put everything on hold."** Attorney was hired to represent a client regarding corporate matters and began preparing documents. On January 29, 2016, the client sent the Attorney an email asking him to hold off on working on the documents. On **February 1, 2016, the client told the attorney to put everything on hold**. On February 5, 2016, the Attorney sent the client a letter terminating the engagement. On August 16, 2016, **Attorney sent client a bill for February 2016, which totaled $14,680, $9,000 of which was billed after the Attorney had terminated the client.**
  - **Rule Violated**: 1.5(a) (Fees)

4. MISSING DEADLINES.

- VSB Docket No. 19-060-113717 (May 24, 2019)
  - Attorney accepted his appointment as substitute counsel, but then failed to take proper action to determine the steps needed to maintain the appeal. As a result of the attorney's negligence, he **missed the filing deadline**. Attorney took no action to reinstate the appeal. Attorney **did not notify his client** as to the status of the case and made no further attempt to communicate with his client. After the client filed a bar complaint, the attorney **failed to respond** to three separate requests for information from the VSB.
  - Sanction: Public Reprimand Without Terms
  - **Rules Violated**: 1.2 (Scope of Representation); 1.3(a)-(b) (Diligence); 1.4(a) Communication; 8.1(c)-(d) (Bar Admission and Disciplinary Matters)

- https://www.roanoke.com/news/local/blacksburg/attorney-is-defendant-in-four-cases-tied-to-not-showing/article_63252bdf-bd14-54ba-b158-4a14a9702e95.html
  - Jonathan Fisher faces misdemeanor charges in Roanoke, Montgomery County, and Salem tied to failing to appear for his clients' hearings. Fisher is also charged with contempt of court for failing to deliver a client's driving record to a judge.
  - **Rules in Question**: 1.1 (Competence)

5. LAZINESS AND DELAY.

- VSB Docket No. 18-052-110973 (May 20, 2019)
  - Opposing counsel mistakenly allowed its corporate registration to expire during litigation. Attorney then registered an entity under the same name in attempt to preclude opposing counsel from using the name. After litigation concluded, Attorney sued opposing counsel for legal malpractice and misappropriation. The court found such claims were "transparently and egregiously **frivolous**" and sanctioned the Attorney. Attorney changed his bar status to retired/disabled and has no plans to reinstate his license. Sanction: Public Reprimand Without Terms
  - **Rule Violated**: 4.4 (Respect For Rights Of Third Persons)

- *Ekwalla v. Va. State Bar*, Record No. 160401, 2016 Va. Unpub. LEXIS 29 (Dec. 8, 2016)
  - Tonya Diamond retained Ekwalla's firm in December 2013 to assist her in filing for bankruptcy. She paid a $2,250 retainer fee for the representation. Her first attorney did **no significant work on the case for several months** and then informed Diamond that he was leaving the firm. Diamond's second was no better. **Several times**, Diamond drove to the office for appointments with her new attorney only to find that he was **out of town** and that the appointment never should have been scheduled. She continually **had to check on the status of her case**, and she even had to re-take the required credit-counseling course for bankruptcy that expires after six months. Ultimately, Diamond's second attorney concluded that Diamond did not qualify for bankruptcy. Diamond then terminated the representation and requested a refund of her entire retainer. Diamond did **not receive a check for 3.5 months after initially requesting it**. Even worse, the check was for $1225, $1025 less than her initial retainer.
  - Sanction: Ultimately disbarred (various other violations listed throughout).
  - **Rules Violated**: 1.3(a) (Diligence); 1.15(b)(4) (Safekeeping Property); 1.16(d)-(e) (Declining or Terminating Representation);

8.1(a) and (d) (Bar Admission and Disciplinary Matters); and 8.4(c) (Misconduct).

6. COMMUNICATION ISSUES.

- VSB Docket No. 18-022-109905 (May 10, 2019)
  - Attorney agreed to a nine-month suspension after **failing to finalize a divorce** for nearly **three years**. After being paid a flat rate of $2,400 in Sept. 2013, the attorney worked off and on with the case until Nov./Dec. 2013. The attorney kept **no ledger or billing statements** for this matter. After Dec. 2013, opposing counsel did not hear from the attorney until August 17, 2016. The **attorney had not contacted the client between October 31, 2013 and January 2017**. **For three years, the attorney failed to respond to emails, did not contact opposing counsel, and never followed up with the client**. In violation of competence, diligence, communication, and safekeeping of property, the attorney was placed on nine-month suspension, three years of probation, and forced to refund the client the $2,400.00
  - **Rules Violated:** 1.1 (Competence); 1.3(a) (Diligence); 1.4(a) Communication; 1.15(a)-(d) (Safekeeping Property)

- VSB Docket No. 18-070-111423 (April 2, 2019)
  - Attorney was hired for a slip and fall matter in January 2017. After engaging in the case for approximately six months, the **Attorney stopped communicating with his client.** The client tried for months to reach out and contact the Attorney to no avail. Finally, the client filed a *pro se* motion with the Court to relieve the Attorney as counsel. That motion was granted on April 6, 2018. After failing to respond to VSB emails and letters, a VSB Investigator eventually met with the Attorney. In his interview, the **Attorney said it was a result of his depression and stress**. Attorney also failed to produce the client's file.
  - Sanction: Revocation
  - **Rules Violated**: 1.3(a)-(b) (Diligence); 1.4(a) and (c) (Communication); 1.16(a) and (d) (Declining or Terminating Representation)

- VSB Docket No. 18-060-112575 (March 26, 2019)
  - After being appointed as appellate counsel, Attorney made **no attempt to contact his client and took no action in furtherance of the appeal**. The Court of Appeals denied the Petition for Appeal on November 9, 2017. The Order was sent by email to the Attorney, but he claims he did not receive it. A second email was sent from the Court of Appeals on November 21, 2017, but also went unopened. Attorney claimed he did not learn of the dismissal until he received a copy of a February 9, 2018 letter from the Court of Appeals to his client. On

February 26, Attorney sent his client a letter informing him of the denial, but did not inform his client of the possibility of filing further appeals**.** When the Attorney did not hear from his client, he took **no further action to preserve the appeal**. Such inaction constituted misconduct by failing to continue to prosecute the client's appeal in the Supreme Court.

- Sanction: Public Reprimand Without Terms
- **Rules Violated**: 1.1 (Competence); 1.3(a)-(b) (Diligence); 1.4(a)-(b) (Communication)

- *Robinson v. Va. State Bar*, Record No. 151501, 2016 Va. Unpub. LEXIS 12 (Apr. 14, 2016)
  - Attorney sanctioned to Public Reprimand With Terms for violating Disciplinary Rule 1.4(a). On multiple occasions throughout the course of representation, the client requested information regarding her account. In response, Robinson only provided her with a single invoice. Robinson argued that he had provided two other invoices, but the Court held that even if this was true, **three invoices over the course of two years was still in violation of the attorney's duty to "keep a client reasonably informed** about the status of a matter and promptly comply with reasonable requests for information." The Court further held that ignorance of the Disciplinary Rules was no defense.
  - **Rule Violated**: 1.4(a) (Communication)

7. UNAUTHORIZED PRACTICE/CONDUCT.

- *Cofield v. Va. State Bar, ex rel. Second Dist. Comm.*, 827 S.E.2d 602 (2019)
  - Attorney was admonished for intentionally and knowingly making false statements as to the content of 45 C.F.R. § 164.524(c)(3) and (4), in that she presented language as if it were a sequentially numbered subpart of the C.F.R. which was **not** a subpart of the C.F.R. Instead, the **attorney took language from the HHS website, knowing it was not in the C.F.R., and added it to the end of the C.F.R. section without properly citing her source.**
  - **Rule Violated:** 3.3(a)(1) (Candor Toward the Tribunal)

- VSB Docket No. 19-070-114659 (May 13, 2019)
  - Using Va. R. Disciplinary Conduct 8.5(a), the VSB disciplined the attorney for conduct occurring in Maine in 2017. After a local attorney died, the **sanctioned attorney repeatedly sought access to the confidential list of the deceased's clients**. After being denied access to the list, the attorney knowingly took a list of the deceased's clients, which had been compiled by court order and kept confidential in a locked house. The attorney then shared the list with his office manager and made a copy of the list. After being discovered, the attorney then

refused to destroy his copy. Such actions violated the clients' confidential information and constituted misconduct.
- Sanction: Public Reprimand Without Terms
- **Rules Violated**: Maine Rule 4.4 (Respect for Rights of Third Persons; Inadvertent Disclosures); Maine Rule 8.4 (Misconduct); Virginia Rule 8.5(a) (Disciplinary Authority; Choice of Law)

- VSB Docket No. 19-000-114800 (May 20, 2019)
  - Reciprocal Disbarment
  - Attorney (who was licensed to practice law in Virginia and California) was disbarred from the practice of law in California, by Order from the California Supreme Court. Attorney, while practicing in California, **willfully held himself out as entitled to practice law in other jurisdictions** in which he was not licensed (MA, MO, GA, NH) and then failed to cooperate in State Bar investigations. Attorney had already been previously sanctioned for **incompetence**, **illegally collecting fees, misleading advertising, unauthorized practice of law in sister states**, and **offering to settle a malpractice claim** without advising the client of the right to seek independent legal advice.
  - **Rules Violated**: 8.5(a) (Disciplinary Authority)

- VSB Docket Nos. 17-010-108870; 17-010-109322; 18-010-110422; 17-010-108850 (March 22, 2019) (Sammy Ayer)
  - Attorney was disbarred by the VSB Disciplinary Board after a slew of violations to Rules 1.1, 1.3(a), 1.4(a), 1.15(a)(1), 8.1(a), and 8.4(c). The attorney failed to help his clients, failed to communicate, lied about a potentially criminal car crash, lied to his clients, and lied to the VSB Investigator (all on multiple occasions).
  - The Board noted its serious concern with the attorney's "lack of candor, failure to maintain personal integrity, failure to take responsibility for his actions, and failure to demonstrate an appreciation for the serious nature of his misconduct." The Board described the attorney's actions and blatant lies as demonstrative of "his lack of a moral compass." With strong disdain, the Board ruled, "any sanction other than revocation would be a disservice to the Virginia legal community and the public at large."
  - **Rules Violated:** 1.1 (Competence); 1.3(a) (Diligence); 1.4(a) (Communication); 1.15(a)(1) and (a)(2) (Safekeeping Property); 8.1(a) (Bar Admission and Disciplinary Matters); and 8.4(c) (Misconduct)

- *Livingston v. Va. State Bar*, 286 Va. 1 (2013)
  - Attorney was sanctioned for **incompetence** after multiple mistakes regarding the prosecution of a drug-related offense. The VSB charged that Livingston was "incompetent" in approving the issuance of an

indictment and proceeding to trial because the indictment charged possession with the intent to distribute a controlled substance, Oxycodone, when Livingston knew that the pills the defendant purchased were an imitation controlled substance. The VSB therefore charged the indictment was "not supported by probable cause" because the prosecutor, Livingston, knew the pills were imitation pills, not real Oxycodone. Livingston later attempted to indict the defendant on a third related charge, which the Court dismissed on double jeopardy grounds. Livingston appealed that dismissal but filed the appeal late. The VSB charged a number of violations, including a charge that Livingston was "incompetent" when he filed the petition for appeal late. Although Livingston argued this was mere negligence, the Court found that Livingston failed to provide the "thoroughness and preparation reasonably necessary for the representation" of the Commonwealth. The case was remanded to determine proper sanctions.

- **Rule Violated**: 1.1 (Competence)

8. INAPPROPRIATE BEHAVIOR.

- VSB Docket No. 17-000-108658 (May 17, 2019)
  - VSB suspended an attorney for three years based on a Feb. 10, 2017 felony conviction in Kentucky.
  - **Rule Violated**: 8.5(a) (Disciplinary Authority)

- VSB Docket No. 18-053-111919 (May 7, 2019)
  - VSB sanctioned Attorney to Public Reprimand Without Terms for eavesdropping on opposing counsel's recorded conversations. Opposing counsel represented a criminal client incarcerated at a local detention center. Calls from this jail were monitored and recorded by Globel Tel-Link. In order to protect attorney-client calls, attorneys may register their number so that the system will know not to record. However, opposing counsel had not done so. Instead, opposing counsel stated on the calls "F-Globel Tel-Link," "F-you Prince William County," "attorney/client, get off the line." The attorney then gained access to these phone calls and listened to the conversations. Even though the opposing counsel had failed to take appropriate precautions regarding his own phone calls, the attorney was still sanctioned.
  - **Rule Violated**: 4.4 (Respect for Rights of Third Persons)

- VSB Docket No. 19-000-112903 (April 5, 2019)
  - VSB suspended Attorney's license immediately, subject to further suspension or revocation based on the Attorney's felony conviction in the State of California. Attorney was found guilty of the crime of Possession of Child Pornography. The jury found as true that the Attorney possessed over 600 child pornography images; ten or more of

which involved a minor under the age of 12. Hearing continued until 10/25/2019.

- VSB Docket No. 19-000-114709 (Feb. 28, 2019)
  - VSB suspended Attorney's license immediately, subject to further suspension or revocation based on the Attorney's felony conviction in the State of Ohio. Attorney plead guilty to three counts of Gross Sexual Imposition in which he inappropriately touched a minor boy. Attorney sentenced to 36 months in jail. Hearing continued to 6/28/2019.

- VSB Docket No. 18-000-107910 (Feb. 11, 2019)
  - Attorney consented to license revocation after entering a plea of no contest and being found guilty to a felony charge of Distribution/Manufacturing Schedule I/II Controlled Substance. Attorney sentenced to five years, with four years and five months suspended.

9. RUDE & OTHER UNBECOMING BEHAVIOR.

- VSB Docket No. 16-060-103733 (March 12, 2019)
  - Prosecuting Attorney sanctioned to Public Reprimand Without Terms after literally fighting over a 2009 copy of the *DUI Manual for Prosecutors* in the hallway of the courthouse. After the Attorney found out that the Complainant had taken the *Manual* from his office while working there in 2009, the Attorney demanded the book back. When the Complainant refused, the Attorney tried to forcibly take the book back.
  - **Rule Violated**: 3.4(g) (Fairness to Opposing Party and Counsel)

- *Ekwalla v. Va. State Bar*, Record No. 160401, 2016 Va. Unpub. LEXIS 29 (Dec. 8, 2016)
  - Dr. Ali Miamee
    - Client Miamee retained Ekwalla's law firm to assist in collecting a judgment. The retainer agreement provided that Miamee would pay $1000 "to assist in collecting the judgment." Ekwalla then requested $500 in additional funds to continue attempting to collect the judgment. Client Miamee responded that the case was a "money pit" and that he was terminating representation. Miamee had $452.50 left in his escrow account from his initial payment. However, Ekwalla **refused to refund the money** and **argued the $1000 was a flat fee** arrangement to which he was entitled. When Miamee found out, he threatened to sue Ekwalla and have him disbarred, calling him various names. **Ekwalla then responded with his own threats of legal action against the client**.

        - **Rules Violated**: 1.15(b)(2)-(5) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), and 8.4(b) (Misconduct).
    - Andrea Arevalo
        - Client Arevalo hired Ekwalla's firm to draft and file a Property Settlement Agreement (PSA) and to negotiate and secure an uncontested divorce. Arevalo was to pay $800 for the PSA. Due to an "unprofessional email," on which Client Arevalo was copied, sent from Ekwalla to his associate attorney (who decided to leave the firm after sending Arevalo a draft PSA), Arevalo decided to terminate representation. Arevola **asked for a refund of the balance of her retainer**, but Ekwalla refused. When Ekwalla did not provide the refund, Arevalo executed a chargeback on her credit card for the full amount of her retainer. When Ekwalla discovered this chargeback, he demanded full repayment of $850 for the PSA (the $800 flat fee plus a $50 administrative fee) from Arevalo. Arevalo contested the charge and said that she should only have to pay a portion of the $850 for the PSA because she only received a draft, Ekwalla then threatened to file a warrant in debt against her. **Arevalo decided to pay the fee and to end her dealings with Ekwalla's firm**. However, several weeks later, Ekwalla contacted Arevalo via email and accused her of posting a negative review of his firm on the website Yelp. He threatened to sue her for defamation and to ensure that she spent tens of thousands of dollars in a lengthy legal battle if she did not remove the post by the next day. When Arevalo denied the accusations and even provided Ekwalla with a copy of her Yelp profile that showed all the posts that she had ever made on Yelp, Ekwalla still threatened to file a defamation suit against her.
        - Sanction: Ultimately disbarred (various violations listed throughout).
        - **Rules Violated:** 1.15(b)(2)-(5) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), and 8.4(b) (Misconduct).

*****

10. EXAMPLES OF PROFESSIONALISM (LAWYERS BEHAVING).

- *Zaug v. Va. State Bar*, 285 Va. 457 (2013)
    - Facts.
        - Attorney Zaug represented a doctor in a medical malpractice claim against the Copcutts (Yanira, Ian, and Vincent). One day, Yanira Copcutt

telephoned Zaug's office to speak with Mr. Nagle, Zaug's partner. However, since Mr. Nagle was on his way to depose Vincent, a staff member transferred the call to Zaug. Zaug took the phone call, but claimed she did not know who the caller was when she answered. When she answered, Yanira was distraught: telling Zaug that litigation was taking a toll on her family and that Vincent's deposition needed to be cancelled. **Zaug apologized, told Yanira that she could not help her and told her to contact her attorney**. However, Yanira said she had been unable to reach her own attorney and persisted "with an outpouring of emotion." After about 60 seconds, Zaug reiterated that she couldn't help Yanira and said that she would try to contact Mr. Nagle to get things sorted out and terminated the call. When Zaug told opposing counsel about the phone call, the opposing counsel filed a complaint with the VSB alleging that Zaug had violated Rule 4.2 of the VRPC. ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.") Zaug was charged and sanctioned for her misconduct by the VSB. Zaug appealed.

- Holding.
  - The Virginia Supreme Court reversed, vacated, and dismissed the charges against Zaug. In relevant part, Comment 3 to Rule 4.2 states, "A lawyer must **immediately** terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule." The VSB argued that Zaug violated this Rule because she did not "immediately" hang up on Yanira.
  - However, Zaug argued, and the Court agreed, that **immediately did not mean "instantaneously."** Thus, while an attorney must still disengage from an unrepresented person's communication, the Rule does not require an attorney to be discourteous or impolite.
  - Since Zaug did not initiate the phone call, Zaug did not intend to gain advantage from the phone call, and Zaug did not deliberately or affirmatively prolong the phone call, the Court refused to find a violation of the VRPC.

- Reasoning.
  - In its holding, the Court emphasized the importance of **professionalism** and **courtesy** in the actions of Virginia attorneys and the various places where such principles are reinforced (the oath attorneys swear in the course of being admitted to the Bar, the preamble to the VSB Principles of Professionalism).

- "Without losing sight of what lawyers do for their clients and for the public, lawyers should also focus on how they perform their duties. In their very first professional act, all Virginia lawyers pledge to demean themselves 'professionally and courteously.'" (Preamble to the Principles of Professionalism).

- The Court went on to state that "[t]he Virginia Rules of Professional Conduct . . . exist to further, not to obstruct, the **professionalism** of Virginia **attorneys**. **Professionalism** embraces common courtesy and good manners, and it informs the Rules and defines their scope. Accordingly, we will not construe the Rule to penalize an **attorney** for an act that is simultaneously non-malicious and polite."

*

Moral of the Story:

Don't be ***that*** lawyer!

(Or you may not be a lawyer anymore.)

When an OSHA Case Walks Through Your Door

What It Looks Like and What to Do With It

Spencer M. Wiegard

Kirk M. Sosebee

David R. Berry

When An OSHA Case Walks Through Your Door:

What It Looks Like And What To Do With It

Spencer M. Wiegard
Kirk M. Sosebee
David R. Berry

Gentry Locke Seminar, September 6, 2019

I. INTRODUCTION

Every attorney needs to know what to do when their client brings them an OSHA-related issue. OSHA's coverage is broad and OSHA-related issues can arise at any moment in almost any workplace. Here is a brief summary of what you as an attorney need to do immediately if a client comes to you with the following scenarios:

A) "A work-related accident just occurred – what do I do?"

Step 1: Call EMS.
Step 2: Report the accident to OSHA and VOSH, if necessary.
Step 3: Record the accident and secure/preserve evidence.

B) "An OSHA inspector is at the door – what do I do?"

Step 1: You as the attorney go to the site and participate in the inspection and interviews.
Step 2: Limit the inspection to the area of the complaint or accident.
Step 3: Document everything the inspector documents.

C) "OSHA issued a citation – what do I do?"

Step 1: Post the citation.
Step 2: Consider defenses/mitigating factors.
Step 3: Contest the citation within 15 days, if desired.

This outline examines the answers to these questions in more detail.

II. WHAT OSHA IS AND HOW IT WORKS IN VIRGINIA

The Occupational Safety and Health Administration ("OSHA") is the federal agency tasked with governing safety at the workplace.[1] In Virginia, the Virginia Department of Labor and Industry ("DOLI") enforces OSHA regulations through the Virginia Occupational Safety and Health program (the "VOSH Program"). DOLI enforces the statutes, regulations and standards established by OSHA, as well as Virginia's additional safety and health requirements.

Even if you do not generally practice OSHA law, knowing what to tell your client when DOLI comes knocking at their door, whether for an inspection or as the result of a worksite accident, can save your client aggravation, time, and money. Three useful tools for the attorney to employ are OSHA's own website, www.osha.gov, which has all of the standards and guidance on how they are to be employed; the DOLI's Administrative Regulation Manual ("ARM"),[2] which contains the administrative regulations adopted by DOLI; and the DOLI's Field Operations Manual ("FOM"),[3] Version 3.2, which sets out the process DOLI uses to inspect employers and enforce the OSHA regulations.

The Occupational Safety and Health Act of 1970 ("OSH Act"),[4] was enacted in 1970 "to assure, so far as possible, every working man and woman in the nation safe and healthful working conditions." It was designed to require employers to provide safe work places, and to eliminate dangerous conditions in those workplaces, and to balance the maintenance of safe work environments for workers with the necessity for industry to function without undue interference from the government. The OSH Act places the responsibility for workplace safety on employers, not on OSHA. OSHA's statutory authority extends to most non-governmental workplaces, but Virginia's VOSH Program applies to state and local government employees, as well as to private industry.

Any U.S. State, or territory covered by the OSH Act may submit a proposal for approval of a state plan.[5] To attain OSHA approval for a state plan the state must establish a program which covers all private employees and state and local government workers and which is at least as effective as the OSH Act.[6] Federal OSHA, as a general rule, does not

---

[1] Portions of the following material are adapted from "Handling and Responding to OSHA Citations in Virginia: Practice Tips that Every Practitioner Should Know," by K. Brett Marston, Spencer M. Wiegard, and Robert Field.
[2] https://www.doli.virginia.gov/wp-content/uploads/2019/01/ARM-11-1-2018.pdf.
[3] The DOLI website has a link to the Field Operations Manual at https://www.doli.virginia.gov/vosh-programs/vosh-manuals/. The current direct link is: http://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\181\GDoc_DOLI_5354_v3.pdf.
[4] Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 USC § 651 *et seq.* (1970)).
[5] 29 U.S.C. § 667.
[6] *Id*.

enforce the OSH Act in states with their own plans. There are approximately 28 approved state plans, including in the Mid-Atlantic Region, Virginia, South Carolina, North Carolina, Kentucky, Tennessee and Maryland.[7]

Virginia's Safety and Health Codes Board (the "Board"), is a creation of the General Assembly. It consists of fourteen members, twelve of whom are appointed by the Governor.[8] The Board studies and investigates safety in business establishments and the application of Title 40.1, and serves as advisor to the Commissioner of Labor (the "Commissioner").[9] With the advice of the Commissioner, the Board adopts, alters, amends, and repeals rules and regulations to protect and promote employee safety and health and to effect compliance with the Federal OSH Act.[10]

In making rules and regulations the Board is directed to adopt the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity.[11] The standards must be at least as stringent as the standards promulgated by the Federal OSHA.[12] The State Health Commissioner is responsible for advising and providing technical aid to the Commissioner on matters pertaining to occupational health.[13] The DOLI is responsible for drafting and submitting to the Board for its adoption rules and regulations relating to measures to protect the health of workers, with the advice and technical aid of the Department of Health.[14]

All employers are required by OSHA regulations to provide employees with a safe work environment. This duty includes a "general duty," as well as a duty to abide by each specific OSHA requirement.[15] The General Duty Clause states that "It shall be the duty of every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . ."[16]

In most instances, Virginia, through DOLI, follows the exact standards promulgated by OSHA. DOLI cannot deviate downward from those requirements, but it can add to them or create additional requirements.

---

[7] https://www.osha.gov/dcsp/osp/.
[8] Va. Code § 40.1-22.
[9] *Id*.
[10] Va. Code § 40.1-22 & 40.1-51.
[11] Va. Code § 40.1-22 (5).
[12] *Id*.
[13] Va. Code § 40.1-51(A).
[14] Va. Code § 40.1-51(B).
[15] Va. Code § 40.1-51.1(A).
[16] *Id*.

The occupational safety or health standards adopted by the Board from 29 C.F.R. Part 1910 apply by their own terms to all employers and employees at places of employment covered by VOSH.[17] The Federal Identical General Industry Standards, and amendments thereto as adopted by the Board, and their effective dates are set forth in 16 VAC 25-90-1910.

OSHA and VOSH also have specific Construction,[18] Agriculture,[19] and Maritime standards.[20] Virginia also has some standards that are unique or have requirements that differ from federal OSHA standards, including: Virginia Confined Space Standard for the Telecommunications Industry,[21] Virginia Construction Industry Standard for Sanitation,[22] The Overhead High Voltage Line Safety Act (considered safety and health standards of the Commonwealth and enforced by the Commissioner),[23] Regulation Applicable to Tree Trimming Operations,[24] Reverse Signal Operation Safety Requirements for Motor Vehicles, Machinery and Equipment in General Industry and the Construction Industry,[25] and Safety Standards for Fall Protection in Steel Erection, Construction Industry.[26]

III. SCENARIO 1: CLIENT CALLS – A WORK-RELATED ACCIDENT JUST OCCURRED

Practice Pointer: Ensure that work-related accidents are timely reported and recorded.

A. *Determine whether the incident must be reported to OSHA and VOSH.*[27]

1. Work-related incidents must be reported if they result in:

    a. Death,

    b. In-patient hospitalization,

[17] 16 VAC 25-60-120.
[18] 16 VAC 25-60-130; 16 VAC 25-175-1926
[19] 16 VAC 25-60-140; 16 VAC 25-190-1928.
[20] 16 VAC 25-60-150.
[21] 16 VAC 25-70-10 *et seq*. (applies instead of 29 C.F.R. § 1910.268(t)).
[22] 16 VAC 25-160-10 (applies instead of 29 C.F.R. § 1926.51).
[23] Va. Code § 59.1-406 *et seq*.
[24] 16 VAC 25-73-10 *et seq*.
[25] 16 VAC 25-97-10 *et seq*.
[26] 16 VAC 25-145-10 *et seq*.
[27] *See* 29 C.F.R. § 1904.39(a); Va. Code § 40.1-51.1(D).

c. Amputation, or

d. Loss of an eye.

2. When does the incident need to be reported?

a. Death = within eight (8) hours.

b. In-patient hospitalization = within twenty-four (24) hours.

c. Amputation = within twenty-four (24) hours.

d. Loss of an eye = within twenty-four (24) hours.

3. What information needs to be reported?

a. The establishment name;

b. The location of the incident;

c. The time of the incident;

d. The type of reportable event;

e. The number of affected employees;

f. The names of affected employees;

g. A brief description of the incident; and

h. The name and telephone number of the employer's contact person

4. How are incidents reported?[28]

a. Call the nearest OSHA office (i.e., VOSH Regional Office):

1. Abingdon: (276) 667-5465

[28] Occupational Safety and Health Administration, *Report a Fatality or Severe Injury*, UNITED STATES DEPARTMENT OF LABOR, https://www.osha.gov/report.html (last visited June 23, 2019).

2. Lynchburg: (434) 385-0806
3. Manassas: (703) 392-0900
4. Norfolk: (757) 455-0891
5. Richmond: (804) 371-3104
6. Roanoke: (804) 371-3104
7. Verona: (540) 248-9280

b. Call the OSHA 24-hour hotline (1-800-321-6742).

c. Report online (https://www.osha.gov/pls/ser/serform.html).

B. *Determine whether the incident needs to be recorded.*[29]

1. Some employers are exempt from recordkeeping requirements.

a. Recordkeeping is not required for:[30]

1. Small employers (with no more than 10 employees at any time during the calendar year preceding the year); and
2. Employers in low hazard industries (such as retail, service, financial, insurance, or real estate).

2. If employer is not exempt, incident recording is required for:

a. Reportable incidents, as described above in Section II(A)(1);

b. Work-related injuries or illnesses involving:

1. Loss of consciousness,

[29] *See* 29 C.F.R. § 1904.29.
[30] *See* 29 C.F.R. §§ 1904.1 and 1904.2.

2. Restricted work activity or job transfer,
3. Days away from work, or
4. Medical treatment beyond first aid.

c. Significant work-related injuries or illnesses diagnosed by a licensed health care professional;

d. Work-related "needlestick injuries" or cuts that are contaminated with another person's blood or other potentially infectious material;

e. Certain incidents where an employee experiences hearing loss;

f. Situations where any employee is occupationally exposed to anyone with active tuberculosis; and

g. Any other work-related injury or illness that meets the recording criteria listed in 29 C.F.R. §§ 1904.8 through 1904.12.

3. What if it is unclear whether an incident is recordable?

a. Call the nearest VOSH Regional Office, identified in Section II(A)(3)(a), above.

4. How are incidents recorded?

a. Gather the following information:

1. When the incident occurred;
2. The name(s) and job title(s) of affected employee(s);
3. Where the incident occurred;

4. A description of the injury or illness;
5. What the employee(s) was doing before the incident;
6. What happened;
7. What object or substance injured the employee(s); and
8. Any additional information related to the incident and resulting injury or illness.

b. Obtain a copy of OSHA Forms 300 and 301:

1. Available online at https://www.osha.gov/recordkeeping/new-osha300form1-1-04-FormsOnly.pdf.

c. Complete both forms (Form 300 and 301) and keep them on file for five (5) years following the year to which they pertain.

5. When do recordable incidents need to be recorded?

a. New incidents should be recorded within seven (7) days.

b. Previously recorded incident should also be updated, as appropriate.

c. The OSHA Forms should be updated on an on-going basis.

C. *Stay up to date regarding the status of the employee*.

1. Incidents that are not initially reportable, may later become reportable.

a. If a fatality occurs within thirty (30) days of the work-related incident, then it must be reported.

1. The fatality must then be reported within eight (8) hours.

b. If an in-patient hospitalization, amputation, or loss of an eye occurs within twenty-four (24) hours of the work-related incident, then it must be reported.

1. These incidents must be reported within twenty-four (24) hours.

IV. SCENARIO 2: CLIENT CALLS – A VOSH INSPECTOR IS AT THEIR DOOR

Practice pointer: If at all possible, go to the client's jobsite or workplace and be present during any inspection or walkthrough. You may only get ten minutes notice that an inspection will take place, but try your best to be there yourself. You can ask VOSH to wait until you get there, and they will usually wait if you are less than thirty minutes away. You should be sure to bring a camera and notepad with you and take photos of everything that the inspector looks at and photographs, as well as take detailed notes of interviews. It is often a good idea to have the client's outside-safety consultant present, if they have one. But remember that consultants are not attorneys, and communications with them will not be protected by the attorney-client privilege.

Practice pointer: During interviews, the investigator can interview low-level employees without anyone present. You, as the attorney, may be present for high-level interviews, but you generally cannot object to the questions that are asked. Whether the inspection is based on an accident or a complaint, the investigator's inspection and walk of the job site is limited to the specific area that is the focus of the accident or complaint. Do your best, in a courteous and professional manner, to keep the inspector out of areas that are not related to the complaint or accident. Remember that the inspector is free to watch and record violations that are in clear view from wherever he or she is, including violations visible from outside construction sites and other open jobsites.

There are four types of OSHA inspections listed in the FOM: unprogrammed inspections, unprogrammed related inspections, programmed inspections, and programmed related inspections.[31] "Unprogrammed inspections" are inspections in

[31] FOM, Ch. 3, pp. 6-7.

response to alleged hazardous working conditions that have been identified at a specific worksite. This type of inspection responds to imminent dangers, fatalities/catastrophes, complaints, and referrals.[32] "Unprogrammed related inspections" are inspections of employers at multi-employer worksites whose operations are not directly affected by the subject of the conditions identified in the complaint, accident, or referral. An example would be a trenching inspection conducted at the unprogrammed worksite, where the trenching hazard was not identified in the complaint, accident report or referral.[33] "

Programmed inspections" are inspections which have been scheduled based upon objective or neutral selection criteria. The worksites are selected according to the Planning Guide for safety and health or special or local emphasis programs.[34] "Programmed related inspections" are inspections of employers at multi-employer worksites whose activities were not included in the programmed assignment. An example would be the inspection of a low injury rate employer at a worksite where programmed inspections are being conducted for all high injury rate employers.[35]

Employees may request a VOSH inspection if they believe that a safety or health hazard exists in a workplace, without giving notice to the employer first.[36] Upon receipt of a complaint of hazardous conditions, the Commissioner or an authorized representative will conduct an inspection as soon as practicable.[37] An employee's complaint will be evaluated to determine whether there are reasonable grounds to believe that the violation or hazard complained of exists.[38] If the Commissioner determines that there are no reasonable grounds for believing that the violation or hazard exists, the employer and the complainant will be informed in writing of the reasons for this determination.[39]

For a complaint related inspection, at the beginning of an inspection, the employer must be provided with a copy of the written complaint.[40] The complainant's name will be deleted, as well as and any other information which would identify the complainant.[41] An inspection pursuant to a complaint may cover the entire operation of the employer, if it appears to the Commissioner that a full inspection is warranted.[42] However, if there has been a recent inspection of the worksite or if there is reason to believe that the alleged violation or hazard concerns only a limited area or aspect of the employer's operation, the

---

[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] Va. Code § 40.1-51.2(b).
[37] 16 VAC 25-60-100(C).
[38] 16 VAC 25-60-100(E).
[39] 16 VAC 25-60-100(E)(1).
[40] 16 VAC 25-60-100(H).
[41] *Id*.
[42] 16 VAC 25-60-100(I).

inspection may be limited accordingly.[43] After an inspection based on a complaint, the Commissioner must inform the complainant in writing whether or not a citation has been issued and briefly set forth the reasons if not.[44] The Commissioner shall provide the complainant with a copy of any resulting citation issued to the employer.[45]

Giving advance notice of a VOSH inspection is prohibited without the authority of the Commissioner.[46] Where advance notice of an inspection has been given to an employer, the employer, upon request of the Commissioner, must promptly notify the authorized employee representative of the inspection if the employees have such a representative.[47] An advance notice of an inspection may be given by the Commissioner only in the following circumstances: (1) in cases of imminent danger; (2) where it is necessary to conduct inspections at times other than regular working hours; (3) where advance notice is necessary to assure the presence of personnel needed to conduct the inspection; or (4) where advance notice will insure a more effective and thorough inspection.[48]

When an inspector performs a walkthrough investigation, the investigator is conferred with several privileges as a part of the investigation. These privileges are set forth fully in the regulations. These privileges include, but are not limited to, the ability to question various relevant parties and to obtain photographs and video footage.[49]

In order to carry out the purposes of the VOSH Program, the Commissioner, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized, with the consent of the owner[50], operator, or agent in charge of such workplace, or with an appropriate order or warrant: to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and[51] to inspect, investigate, and take samples during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices,

---

[43] *Id.*
[44] 16 VAC 25-60-100(J).
[45] *Id.*
[46] Va. Code § 40.1-51.3:1.
[47] 16 VAC 25-60-230(A).
[48] 16 VAC 25-60-230(B).
[49] 16 VAC 25-60-240.
[50] *See Commonwealth v. E.A. Clore Sons, Inc.*, 222 Va. 543 (1981) (discussing voluntary consent to DOLI inspections); *see also Abateco Services v. Bell*, 23 Va. App. 504 (1996) (discussing contractor's contractual consent to DOLI inspections).
[51] Va. Code § 40.1-49.8.

equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.[52]

Employer Right of Accompaniment. An employer representative must be given the opportunity to accompany the safety and health inspectors on the inspections.[53]

Employees are protected from discrimination for exercising their rights under the safety and health provisions of the VOSH regulations or statutes.[54]

At the beginning of an inspection the Commissioner must request that the employer identify any areas of the worksite that may contain or reveal a trade secret. At the close of an inspection the employer must be given an opportunity to review the information gathered from those areas and identify to the Commissioner that information which contains or may reveal a trade secret.[55] The employer must notify the Commissioner prior to the case becoming a final order of any information obtained during the inspection which is to be identified as containing trade secrets.[56] Properly identified trade secrets will be kept in a separate case file in a secure area not open for inspection to the general public. The separate case file containing trade secrets will be protected from disclosure in accordance with Va. Code § 40.1-51.4:1.[57] Upon the request of an employer, any employee serving as the walkthrough representative in an area containing trade secrets shall be an employee in that area or an employee authorized by the employer to enter that area. Where there is no such employee representative, the Commissioner will interview a reasonable number of employees working in that area concerning matters of safety and health.[58]

V. SCENARIO 3: CLIENT CALLS – A CITATION HAS BEEN ISSUED BY VOSH

Practice Pointer: Ensure that the citation is properly posted and *then* assess whether to challenge the citation. You have fifteen days to send a notice of contest. Use that time to understand the basis for the citation, potential defenses, and whether there is an opportunity for alternative resolution.

A. *Advise client to post the citation*.[59]

---

[52] *Id*.
[53] Va. Code § 40.1-51.1(F).
[54] Va. Code § 40.1-51.2:1.
[55] 16 VAC 25-60-250(1).
[56] 16 VAC 25-60-250(2).
[57] 16 VAC 25-60-250(3).
[58] 16 VAC 25-60-250(4).
[59] *See* 16 VAC 25-60-40.

a. Employers must keep employees informed of their rights and responsibilities.

b. Citations must generally be posted at a conspicuous place, where notices to employees are routinely posted, for ten (10) working days.

c. Citations must also be posted in a conspicuous place "at or near each place of alleged violation" for three (3) working days or until the violation is abated, whichever is longer.

d. If the citation is contested, then a written notice of contest must be posted until the contest proceedings are completed.

B. *Review the citation, considering*:

a. The basis for the citation:

i. Reportable incident?

ii. Routine inspection?

iii. Complaint?

b. Timeliness – was the citation issued within six (6) months of inspection?[60]

c. Content – does the citation describe the alleged violation with particularity?[61]

d. Penalty calculation – does the citation account for the gravity of the violation and mitigating factors?[62]

[60] Va. Code § 40.1-49.4(A)(3).
[61] Va. Code § 40.1-49.4(A)(1).
[62] Va. Code § 40.1-49.4(A)(4)(a).

C. *Review applicable statutes, regulations, and administrative guidance*.

a. Review and understand the applicable statutes and regulations:

i. Va. Code §§ 40.1-22 through -51.4:5, and

ii. 16 VAC 25-60, *et seq*.

b. Become familiar with DOLI's Field Operations Manual ("FOM"), available at https://www.doli.virginia.gov/vosh-programs/vosh-manuals/.

c. Become familiar with DOLI's Administrative Regulation Manual ("ARM"), available at https://www.doli.virginia.gov/wp-content/uploads/2019/01/ARM-11-1-2018.pdf.

D. *Fact Investigation & Development*.

a. Issue a litigation hold letter;

b. Gather all documents, photographs, and videotapes related to the citation;

c. Interview client and involved employees;

d. Determine what, if anything, was said by or to DOLI;

e. Review notes and records from any inspection meetings or walkthroughs;

f. Review client's citation history (number, frequency, severity, etc.);

g. Review client's logs and recordkeeping policies; and

h. Review and collect records from any related worker's compensation proceedings.

E. *Understand client's concerns and goals*.

a. Is the client more concerned with the penalties or the validity of the citation?

i. Is the penalty calculation appropriate?[63]

ii. Does the client want to contest the citation?

b. Is the client interested in settlement?

c. Is the client interested in an informal conference?

F. *Encourage client to abate violation and respond proactively*.

a. Overhaul safety programs or policies;

b. Revise training materials;

c. Improve recordkeeping practices;

d. Demonstrate that the citation is being taken seriously; and

e. DO NOT retaliate against employees or other complainants.

G. *Respond to the citation*.

a. Notice of Contest.

i. Notice should be delivered to DOLI within fifteen (15) business days of receipt of citation.

ii. Notice must state whether contesting the alleged violation, the proposed penalty, and/or the abatement time.

b. Request informal conference (if desired).

i. Can be helpful for assessing the strengths and weakness of the case.

ii. Provides insight into DOLI's evidence.

[63] FOM, Ch. 11, pp. 1-39.

iii. Opportunity to familiarize client with DOLI (and vice versa).

iv. Chance to informally present defenses and other factors (i.e., penalty calculation) for DOLI's consideration.

v. Practice Pointer: The informal conference is a good opportunity to proactively try to resolve the citations, since you have the opportunity to negotiate directly with the VOSH Regional Health Director or Regional Safety Director.

c. Consider procedural affirmative defenses.

i. Was the citation timely issued within six (6) months of the violation?

ii. Did the citation described the alleged violation with sufficient particularity?

d. Consider substantive affirmative defenses:

i. Was the alleged violation an isolated occurrence or the result of employee misconduct?[64]

1. Employer bears the burden of proving:

a. Employees have been provided with proper training and equipment to prevent the violation;

[64] 16 VAC 25-60-260(B).

b. Work rules designed to prevent the violation have been established and adequately communicated to employees;

c. Work rules have been effectively enforced;

d. The failure of employees to observe the work rules led to the violation; and

e. Reasonable steps have been taken by the employer to discover any such violation.

ii. Is impossibility a defense?[65]

1. Available if employer took reasonable steps to protect employees or there are no alternative means of employee protection available.

iii. Is the "Greater Hazard" defense available?[66]

1. Requires proof that:

a. Compliance with the applicable standard would result in greater hazards to employees than noncompliance;

b. There are no alternative means of employee protection; and

[65] *See* FOM, Ch. 15, p. 9.
[66] *Id*. at 9-10.

c. Application for a variance would have been inappropriate.

iv. Is a defense to a "Multiple-Employer" citation available?[67]

1. Only available in certain situations involving hazards at multiple-employer worksites.

VI. Scenario 4: Client Calls – A Complaint Has Been Filed By VOSH/DOLI

Practice Pointer: The judicial proceedings will be familiar to litigators. Answer the complaint and assert affirmative defenses, engage in discovery, and prepare for trial. That said, courts do not handle many DOLI Complaints, so be prepared to educate the judge regarding the nuances of VOSH statutes and regulations.

A. *Prepare for Judicial Proceedings*

a. If a citation is contested, and the dispute is not resolved through informal conference, then judicial proceedings will likely be initiated.

b. Respond to the Complaint by raising the affirmative defenses identified above.

i. Also consider whether the Complaint was filed within two (2) years of DOLI's receipt of the notice.[68]

c. Assess whether, with respect to each violation, DOLI meet its burden of proving the following elements by a preponderance of evidence:[69]

i. The applicability of whatever standard was allegedly violated;

---

[67] *See* 16 VAC 25-60-260(F) and (G).
[68] *See Bar v. S.W. Rodgers Co.*, 34 Va. App. 50 (2000) (addressing two-year statute of limitations).
[69] *National Coll. Of Bus. & Tech., Inc. v. Davenport*, 57 Va. App. 677, 685 (2011).

ii. The existence of noncomplying conditions;

iii. That employees were exposed or had access to the hazard; and

iv. That the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition.

d. Engage in thorough discovery:

i. Requests for production of documents;

1. Obtain all of VOSH's file, to the extent possible.

ii. Interrogatories;

iii. Depositions; and

iv. Subpoenas.

e. Prepare for trial:

i. Understand and explain applicable standards;

ii. Establish the FOM as authoritative guidance;

iii. Prepare key witnesses; and

iv. Streamline the evidence and presentation of evidence.

B. Consider Appeals:

a. Either DOLI or the client may appeal from an adverse outcome at trial.

b. VOSH appeals from the Circuit Court go to the Virginia Court of Appeals.[70]

c. Appeals from the Court of Appeals go to the Virginia Supreme Court.

[70] Va. Code § 40.1-49.5.

d. Burden of Proof: remember that the burden of proof is on DOLI at trial to prove each element of the citation, and on appeal, DOLI must still demonstrate that it introduced credible evidence to support a finding in its favor on each element. Nevertheless, if DOLI prevailed at trial, the appellate courts' review will be deferential.[71]

[71] *See Nat'l Coll. of Bus. & Tech., Inc. v. Malveaux*, 60 Va. App. 22, 25-29 (2012) ("On appeal, we view the facts in this case in the light most favorable to sustaining the Commissioner's action and take due account of the presumption of official regularity, the experience and specialized competence of the Commissioner, and the purposes of the basic law under which the Commissioner has acted. . . . On appeal, the burden is upon the party complaining of an agency action to demonstrate an error of law subject to review. . . Further, on appeal, findings of fact made by the trial judge are presumed to be correct and are given the same effect as a jury verdict, settling all conflicts in the evidence in favor of the prevailing party. In reviewing such a factual finding, we view the evidence in a light most favorable to the finding. A contention that the evidence does not support the court's factual finding will be sustained only when the finding is plainly wrong or is without credible evidence to support it." (internal citations, alterations and quotations omitted)); *Fairfax Cty. Dep't of Pub. Works & Envtl. Servs. v. Davenport*, No. 0745-09-4, 2009 Va. App. LEXIS 576, at *10-11 (Ct. App. 2009) ("On appeal, we review the facts in the light most favorable to sustaining the agency's decision. To do so, we take due account of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted. Review of an agency's factual findings is limited to determining whether substantial evidence in the agency record supports its decision. The burden is upon the appealing party to demonstrate error. The reviewing court may reject the agency's findings of fact *only if*, considering the record as a whole, *a reasonable mind would necessarily come to a different conclusion*. Where the question involves an interpretation which is within the specialized competence of the agency and the agency has been entrusted with wide discretion by the General Assembly, the agency's decision is entitled to special weight in the courts." (internal citations, alterations and quotations omitted) (emphasis in original)).

It's All About You:

Protecting You and Your Law Practice

Bruce C. Stockburger

Lauren E. Coleman

It's All About You!
Protecting Yourself and Your Law Practice

Bruce C. Stockburger
Lauren E. Coleman
Gentry Locke Seminar
September 6, 2019

I. Build an ethics-compliant contingency plan for your law practice.

a. As a solo practitioner or partner in a small law firm, you have significant ethical responsibilities to your clients.

i. Principal reasons for a lawyer ending his or her career as a practicing attorney: retirement, different career path, death, disability, impairment, or incapacity.

ii. Take steps now to put a plan in place.

b. Key Themes

i. It is common sense to establish a contingency plan, and lawyers have an ethical duty to make arrangements in the event of a transition or emergency.

ii. If something happens to a lawyer, what will happen to his or her clients and current matters?

iii. Important steps to consider doing now:

1. Establish a secure plan for your files. *See Section II below.*

2. Establish a plan to assure sufficient cash to continue your office operations for a reasonable time, with an authorized signatory to access such funds. *See Section III below.*

3. Consider entering into an agreement with other attorneys or law firms for coverage. *See Section IV below.*

4. Make sure your estate planning documents have specific directions and authorizations for the personal representative to deal with the logistics of transitioning your office. *See Section V below.*

5. Arrange for professional liability tail insurance. *See Section VI below.*

iv. How this works in real life:

1. A lawyer in a two-person law firm has a partner who practices in a different field of law. The lawyer enters into a Practice Succession Agreement with another firm that specializes in his area of practice to assume responsibility for his clients in the event of his death, disability, or retirement.

c. Ethics Rules:

i. **Rule 1.17** of the Virginia Rules of Professional Conduct (VRPC) allows a lawyer or law firm to sell a law practice, partially or in its entirety, including good will if certain conditions are satisfied (See Attachment 1 for full text):

1. The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area in which the practice has been conducted, except the lawyer may practice law while on the staff of a public agency or legal services entity which provides legal services to the poor, or as in-house counsel to a business. Rule 1.17(a).

2. The entire practice, or entire area of practice, is sold to one or more lawyers or law firms. Rule 1.17(b).

3. The seller (or seller's personal representative, if the seller is deceased, disabled, or has disappeared) gives actual written notice containing the information set forth in subsections 1-5 of Rule 1.17(c) to each of the seller's clients.

4. If a client involved in a pending matter cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court *in camera* information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file. Rule 1.17(d).

5. The fees charged clients may not be increased by reason of the sale. Rule 1.17(e).

6. If nothing is heard from the client within 90 days of written notice, the client's refusal to consent to the sale is presumed. Comment [7] to Rule 1.17.

7. Rule 1.17 applies to the sale of a law practice by a personal representative of a deceased, disabled, or disappeared lawyer. Comment [13] to Rule 1.17.

8. Note that admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by Rule 1.17. Comment [14] to Rule 1.17.

ii. **ABA Formal Op. 92-369** provides that a lawyer's duty of competent representation includes arranging to safeguard clients' interests in the event of the lawyer's death, disability, impairment, or incapacity.

iii. **Comment [5] to Rule 1.3** of the VRPC provides that "a lawyer should plan for client protection in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer's death, impairment, or incapacity" (Attachment 2).

iv. **Rule 1.6(b)(4)** of the VRPC provides that "to the extent a lawyer reasonably believes necessary, the lawyer may reveal… such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity, or incompetence" (Attachment 3).

II. File Management

a. Establish a written file retention and destruction policy.

i. The policy should address different forms of file retention (e.g. paper and electronic) and comply with ethics rules.

ii. Communicate the policy to your clients in your engagement letter and closing letter.

iii. Upon termination of representation, review a client's file to determine the retention period that applies based on the written policy, and ensure that all original documents and any copies of documents

requested by the client are returned to the client within a reasonable time.

b. Ethics Rules

i. **Rule 1.15(c)(4)** requires that client trust account records be "preserved at least five calendar years after termination of the representation or fiduciary responsibility." (Attachment 4)

ii. **Rule 1.16(d)** requires that upon termination of representation, a lawyer should take steps to the extent reasonably practicable to protect a client's interests, such as handling records consistent with Rule 1.16(e). (Attachment 5)

iii. **Rule 1.16(e)** provides that upon termination of representation, all original, client-furnished documents and any originals of legal instruments or official documents in the lawyer's possession (e.g. wills, corporate minutes) should be returned within a reasonable time to the client or the client's new counsel upon request. Further, upon termination, a client, upon request, must be provided with copies of certain documents related to his or her matter (i.e. transcripts, pleadings, discovery responses) within a reasonable time (See Attachment 5 for full text).

iv. **LEO 1305:** A lawyer does not have a general duty to preserve indefinitely all closed or retired files. A lawyer should screen all closed files in order to ascertain whether they contain original documents or other property of the client, in which case the client should be notified of the existence of those materials and given the opportunity to claim them. A lawyer should use care not to destroy or discard materials or information that the lawyer knows or should know may still be necessary or useful in the client's matter for which the statute of limitations period has not expired or which may not be readily available to the client through another source. Similarly, a lawyer should be cognizant of the need to preserve materials which relate to the nature and value of his or her legal services in the event of any action taken by the client against the lawyer. The lawyer may at the appropriate time dispose of the remaining files in such a manner as to best protect the confidentiality of the contents (Attachment 6).

v. **ABA Informal Opinion 1384:** In determining the length of time for retention or disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based on their obvious relevance and materiality to matters that can be expected to

arise. A lawyer should preserve for an extended time an index or identification of the files that the lawyer has destroyed or disposed of.

III. Office Operations

a. Establish a plan to assure sufficient cash to continue office operations.

   i. Consider retaining funds in your law practice bank account to cover costs in the event of a transition. Life insurance and disability insurance can also provide funds.

   ii. Designate an authorized signatory to access your law practice bank account in the event of your death, disability, impairment or incapacity. Ensure that the authorized signatory is informed of your office operations, applicable ethics rules, and contingency plan.

b. Office Procedures

   i. Prior to selling or transitioning a practice, consider developing a manual that outlines basic office procedures (i.e. file retention and destruction, fees and billing, marketing).

IV. Written Agreement with a Responsible Attorney to Protect Client Interests

a. Pursuant to Comment [5] of Rule 1.3, a lawyer has an ethical responsibility to plan for client protection in the event of his or her death, disability, impairment, or incapacity. If the lawyer is a solo practitioner, he or she should consider entering into a written agreement with an attorney (the "Responsible Attorney") who can assume responsibility for closing his or her law practice and arranging for the protection of client files.

b. Although a lawyer generally has a duty to maintain confidentiality of client information, Rule 1.6(b)(4) permits the lawyer to disclose such information to the Responsible Attorney as is reasonably necessary to protect client interests in the event of his or her death, disability, impairment, or incapacity.

c. The written agreement should authorize the Responsible Attorney to contact clients for instructions on transferring files, obtain extensions of time in litigation if needed, and take appropriate actions to close your law practice in accordance with ethics rules.

d. If the Responsible Attorney also represents you in an attorney capacity, the Responsible Attorney may be prohibited from representing your clients, as he or she would have fiduciary obligations to you.

e. Consider whether you would like for an authorized signatory to access your client trust account in the event of your disability or death. If you do not designate an authorized signatory, client money will remain in the trust account until a court orders access. You may want to consider someone other than the Responsible Attorney, as this provides for checks and balances. Make sure the person is a trusted individual, as you remain responsible for any misappropriated funds.

f. Regularly review and update the written agreement with the Responsible Attorney (and/or agreement with your authorized signatory), as circumstances change.

V. Estate Planning Considerations

a. Do your colleagues and family a favor, and have a well-organized estate plan in place that addresses protection of clients files and the future of your law practice.

i. Last Will and Testament

1. If you have a Revocable Trust in place, the Will would provide that the balance of your estate pour over into the Revocable Trust. Although the Will is public record, the balance of the estate would be distributed pursuant to the terms of the Revocable Trust, which is not public record.

2. Identify an Executor to carry out administrative details of probate (if your estate is subject to probate), such as payment of creditors, filing federal and state tax returns, martialing of assets of the estate and making a disposition of property.

ii. Revocable Trust

1. A Revocable Trust offers significant flexibility.

2. You can designate a lawyer or special trustee (i.e. your law firm or a colleague) to specifically address the closure or transition of your law practice. If you have already entered into a separate agreement with a Responsible Attorney to close your practice, note this in your Trust document and authorize your personal representative to carry out the terms of the agreement.

3. If you own an interest in a law firm, make sure provisions the Operating Agreement or Partnership Agreement coordinate with your estate plan.

4. Other practical considerations:

    a. Income tax advantages.

    b. Assures that your assets go where you want them to go and how you want them to go.

    c. Allows your child to continue to act as 'parent' regarding control of assets.

    d. Children can direct the funds into lower level trusts for their children.

    e. Half of all marriages end in divorce.

    f. If premature death, surviving spouse usually remarries.

iii. Durable Power of Attorney

1. This document specifically authorizes a named individual to carry out your legal affairs in the event that you should become mentally or physically incapable of handling your own affairs. A "durable" Power of Attorney survives your incapacity.

2. Although cumbersome, a Power of Attorney is great to have in place if the need arises.

3. Consider an escrow arrangement:

    a. Usually an attorney-in-fact immediately possesses the authority set forth in the Power of Attorney document.

    b. In order to assure that the attorney-in-fact does not act before needed, you can request that a trusted individual (i.e. your attorney or a law firm) hold the Power of Attorney, and once certain circumstances are met, deliver the original document to the attorney-in-fact.

iv. Durable Medical Power of Attorney

1. This document specifically authorizes a named individual(s) to interact with your medical providers in the event that you are unable to communicate with such medical providers. Avoids the

issues that can occur under Virginia's Health Care Decisions Act. Simply say what you want and who you want to implement it.

2. Establish a clear cascade of authorized agents so that the healthcare providers do not have to make a determination under the statutory default provisions.

v. Advance Medical Directive

1. The Health Care Decisions Act of Virginia authorizes you to formally state your desires regarding the providing, withholding, or withdrawal of life-prolonging procedures in the event of a terminal medical condition.

2. You may also appoint an agent to make health care decisions for you under specified circumstances if you are determined to be incapable of making an informed decision. You can direct your agent to follow your desires and preferences as stated in the Advance Medical Directive or as otherwise known to your agent.

3. You make the decisions and your agent simply implements them.

vi. A Note About Digital Assets

1. With the rise of social media, online advertising, and electronic data storage it is important to consider digital assets in the transition of your practice.

2. Consider including provisions in your estate documents that enables your personal representative or trustee to access and control digital assets, obtain passwords and other electronic credentials, and have rights and authority granted under the Virginia Uniform Fiduciary Access to Digital Assets Act (Va. Code § 64.2-116 et seq.).

3. You can also enable your Responsible Attorney or an attorney-in-fact under your Power of Attorney to access, use and control digital devices and digital assets related to your law practice.

VI. Insurance Considerations

a. Liability Umbrella Policy – Why the heck not?

i. An umbrella policy provides an added layer of liability insurance that extends beyond the limits on a home or automobile policy. It provides additional protection in situations involving personal injury, bodily injury, or property damage.

b. Under-insured/Uninsured Motorist Coverage – Absolutely a must as part of your umbrella liability policy.

i. This form of coverage helps to pay for damage caused by an uninsured or under-insured driver.

ii. Obtain as much as possible. For example, some companies will provide $1 million liability limits on personal auto policies, which will automatically provide $1 million limits on the uninsured and underinsured coverage as well.

iii. Look for umbrella policies that allow you to match uninsured liability coverage with the liability coverage (i.e., $5mil liability coverage/$5 mil uninsured and underinsured coverage).

VII. Final Arrangements - If you do everything else, you may as well do this too!

ATTACHMENTS

1. Rule 1.17 of the Virginia Rules of Professional Conduct.

2. Rule 1.3 of the Virginia Rules of Professional Conduct.

3. Rule 1.6 of the Virginia Rules of Professional Conduct.

4. Rule 1.15 of the Virginia Rules of Professional Conduct.

5. Rule 1.16 of the Virginia Rules of Professional Conduct.

6. LEO 1305 (1989).

Rule 1.17

Sale Of Law Practice

A lawyer or a law firm may sell or purchase a law practice, partially or in its entirety, including good will, if the following conditions are satisfied:

- **(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area in which the practice has been conducted, except the lawyer may practice law while on staff of a public agency or legal services entity which provides legal services to the poor, or as in-house counsel to a business.**
- **(b)The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;**
- **(c) Actual written notice is given by the seller to each of the seller's clients (as defined by the terms of the proposed sale) regarding:**
  - **(1) the proposed sale and the identity of the purchaser;**
  - **(2) any proposed change in the terms of the future representation including the fee arrangement;**
  - **(3) the client's right to consent or to refuse to consent to the transfer of the client's matter, and that said right must be exercised within ninety (90) days of receipt of the notice;**
  - **(4) the client's right to retain other counsel and/or take possession of the file; and**
  - **(5) the fact that the client's refusal to consent to the transfer of the client's matter will be presumed if the client does not take any action or does not otherwise consent within ninety (90) days of receipt of the notice.**
- **(d) If a client involved in a pending matter cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court *in camera* information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.**
- **(e) The fees charged clients shall not be increased by reason of the sale.**

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes over the representation, the selling lawyer or firm may

obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. *See* Rules 5.4 and 5.6.

Termination of Practice by Seller

[2] The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere does not result in a violation. Neither does the seller's return to private practice after the sale as a result of an unanticipated change in circumstances result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon leaving the office.

[3] Comment [3] to *ABA Model Rule* 1.17 substantially appears in paragraph (a) of this Rule.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction.

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counselor co-counselor by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of any lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated

sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or to make other arrangements must be made within 90 days. If nothing is heard from the client within that time, the client's refusal to consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interest will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered *in camera*.

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of work must be honored by the purchaser, unless the client consents after consultation.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to assure that the purchaser is qualified to assume the practice and the purchaser's obligation to undertake the representation competently (*see* Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure client consent after consultation for those conflicts which can be agreed to (*see* Rule 1.7); and the obligation to protect information relating to the representation (*see* Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be concluded in the sale (*see* Rule 1.16).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer shall see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

Virginia Code Comparison

Ethical Consideration 4-6 states that a lawyer should not attempt to sell a law practice as a going business because, among other things, to do so would involve the disclosure of confidences and secrets.

Committee Commentary

The Committee was persuaded to eliminate the prohibition of the sale of a law practice currently set forth in Ethical Consideration 4-6 by several arguments, the first being that sole practitioners and their clients are often unreasonably discriminated against when the attorney's practice is terminated. When lawyers who are members of firms retire, the transition for the client is usually smooth because another attorney of the firm normally takes over the matter. Such a transition is usually more difficult for the clients of a sole practitioner, who must employ another attorney or firm.

Another persuasive argument is that some attorneys leaving practice, firm members and sole practitioners alike, indirectly "sell" their practices, including its good will, by utilizing various arrangements. For example, firm members sometimes receive payments from their firm pursuant to retirement agreements that have the effect of rewarding the lawyer for the value of his/her practice. Sole practitioners contemplating leaving the practice of law may sell their tangible assets at an inflated price or bring in a partner prior to retirement, then allow the partner to take over the practice pursuant to a compensation agreement. Such arrangements do not always involve significant client participation or consent.

In addition, an attorney's practice has value that is recognized in the law. Under Virginia divorce law, for example, a professional's practice, including its good will, may be subject to equitable distribution. (*Russell v. Russell*, 11 Va. App. 411, 399 S.E.2d 166 (1990)). Therefore, under the *Virginia Code*, an attorney in a divorce proceeding may be required to compensate his/her spouse for the value of the practice, yet be forbidden to sell it.
The Committee recommended, after considering all of these factors, that adopting a carefully crafted rule allowing such sales without resort to these alternate methods would be preferable and would assure maximum protection of clients. This recommended Rule is based on the *ABA Model Rule* 1.17 with several significant changes, the chief ones relating to consent and fees.

The amendments effective January 1, 2004, paragraph (a), added the exception; deleted Comment [3].

The amendments effective January 4, 2010, paragraph (a), inserted "or in the area of practice that has been sold" following the current word "law"; added present paragraph (b) and redesignated former paragraphs (b) through (d) as present paragraphs (c) through (e); added present Comments [4] through [6].

Rule 1.3

Diligence

- **(a) A lawyer shall act with reasonable diligence and promptness in representing a client.**
- **(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.**
- **(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.**

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical 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. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

[2] Additionally, lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client's needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial

or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

[5] A lawyer should plan for client protection in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer's death, impairment, or incapacity.

Virginia Code Comparison

With regard to paragraph (a), DR 6-101(B) required that a lawyer "attend promptly to matters undertaken for a client until completed or until the lawyer has properly and completely withdrawn from representing the client." EC 6-4 stated that a lawyer should "give appropriate attention to his legal work." Canon 7 stated that "a lawyer should represent a client zealously within the bounds of the law."

Paragraphs (b) and (c) adopt the language of DR 7-101(A)(2) and DR 7-101(A)(3) of the *Virginia Code*.

Committee Commentary

The Committee added DR 7-101(A)(2) and DR 7-101(A)(3) from the *Virginia Code* as paragraphs (b) and (c) of this Rule in order to make it a more complete statement about fulfilling one's obligations to a client. Additionally, the Committee added the second paragraph to the Comment as a reminder to lawyers that there is often an appropriate collaborative component to zealous advocacy.

The amendments effective February 28, 2006, added Comment [5].

Rule 1.6

Confidentiality of Information

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

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

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

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

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

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

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

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

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

- **(c) A lawyer shall promptly reveal:**

  - **(1) the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the**

crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or

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

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

Rule 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 withdrawn promptly 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.**

Rule 1.16

Declining Or Terminating Representation

- **(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:**
  - **(1) the representation will result in violation of the Rules of Professional Conduct or other law;**
  - **(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or**
  - **(3) the lawyer is discharged.**
- **(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:**
  - **(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;**
  - **(2) the client has used the lawyer's services to perpetrate a crime or fraud;**
  - **(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;**
  - **(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;**
  - **(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or**
  - **(6) other good cause for withdrawal exists.**
- **(c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable Rules of Court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.**
- **(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client,**

allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

- **(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.**

LEO 1305

Confidentiality—Files/Property of a Client: Disposition of Clients' Closed Files. November 21, 1989

You have advised that you have slightly over 700 closed files in storage, a majority of which concern cases where you were the court-appointed defense counsel in criminal matters which took place between April 1, 1981 and May 15, 1989. You indicate your concern with costs of rental of storage space and of sending notices or complete files to former clients.

You have asked that the Committee consider first the length of time that clients' records need to be retained by an attorney who is no longer engaged in the private practice of law, and second, the propriety of disposal of files by shredding, incineration, or landfill burial.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:2-108(D) which enumerates actions which must be taken upon the termination of a lawyer's representation of a client and DR:4-101(B) which mandates that a lawyer shall not knowingly reveal a confidence or secret of his client. Under the former, the lawyer must take reasonable steps for the continued protection of a client's interests, including, among other tasks, delivering all papers and property to which the client is entitled. The lawyer is permitted to retain papers relating to the client to the extent permitted by applicable law. With regard to the lawyer's trust account information, DR:9-103(A) instructs that such records (including reconciliations and supporting records) be preserved for at least five years following completion of the fiduciary obligation and accounting period. Further guidance as to a lawyer's responsibilities is available through EC:4-6 which instructs that a lawyer must continue to preserve a client's confidences and secrets even after the termination of his employment and also should provide, for example, for the personal papers of the client to be returned to him.

The Committee has previously opined that the mere passage of time does not affect the ongoing requirement of an attorney to preserve the confidentiality of his client. (See LE Op. 812) Furthermore, the Committee has also opined that it is not proper, post-death, for an attorney's files to be turned over to an institution since the wishes of the client are still a dominant consideration. (See LE Op. 928) Finally, it has been the view of the Committee that the attorney's responsibility to preserve such confidentiality survives the death of the client. (See LE Op. 1207)

In addressing the issue you have raised, the Committee assumes that no questions have been raised with respect to a lawyer's retaining lien which has arisen as a result of unpaid legal fees or with respect to ownership of the contents of the files you describe. Such questions, if applicable, would raise legal matters beyond the purview of this Committee.

It is the opinion of the Committee that a lawyer does not have a general duty to preserve indefinitely all closed or retired files. Since neither the Code of Professional Responsibility nor any specific Virginia statute apparently sets forth specific rules addressing the retention of such files by private practitioners, the Committee, in applying DR:2-108(D) and DR:4-101, as described above, suggests the following guidelines as indicated in ABA Informal Opinion No. 1384. (See also Maine Ethics Opinion No. 74 (10/l/86), Nebraska Ethics Opinion No. 88-3 (undated), New

Mexico Ethics Opinion No. 1988-1 (undated), and New York City Bar Association Ethics Opinion No. 1986-4 (4/30/86))

Although not required, the Committee suggests the following procedures as cautionary guidelines. Since they are merely cautionary, failure to follow these procedures would not result in any ethical impropriety. The lawyer should screen all closed files in order to ascertain whether they contain original documents or other property of the client, in which case the client should be notified of the existence of those materials and given the opportunity to claim them. Having culled those materials from the closed files, the lawyer should use care not to destroy or discard materials or information that the lawyer knows or should know may still be necessary or useful in the client's matter for which the applicable statutory limitations period has not expired or which may not be readily available to the client through another source. Similarly, the lawyer should be cognizant of the need to preserve materials which relate to the nature and value of his legal services in the event of any action taken by the client against the lawyer. Having screened the files for the removal of any materials as indicated, the lawyer may at the appropriate time dispose of the remaining files in such a manner as to best protect the confidentiality of the contents.

In determining the appropriate length of time for retention or disposition of the remaining materials in a given file, a lawyer should exercise discretion based upon the nature and contents of the file. As instructed in DR:9-103(A), however, all trust account and fiduciary records should be maintained for a period of five years following completion of the fiduciary obligation and accounting period. Finally, the Committee is of the opinion that the lawyer should preserve for an extended period of time an index of all files which have been destroyed.

Committee Opinion November 21, 1989

Sifting for Gold:

Finding Valuable Third Party Claims in Workers' Compensation Cases

Matthew W. Broughton

Evans G. Edwards

Sifting for Gold: Finding And Resolving Valuable Claims Against Third Parties in Your Workers' Compensation Cases

Matthew W. Broughton broughton@gentrylocke.com
Evans G. Edwards edwards@gentrylocke.com

Gentry Locke Seminar September 6, 2019

This outline discusses how to find and resolve valuable claims against third parties during the course of a workers' compensation case—"sifting for gold" if you will. To continue that analogy, there are three (3) nuggets that we want to make sure you take away from this:

<u>NUGGET 1</u> - ALWAYS LOOK FOR POTENTIAL THIRD PARTY CASES THROUGHOUT THE COURSE OF A WORKERS' COMPENSATION CASE – NOT JUST FROM THE ORIGINAL ACCIDENT.

<u>NUGGET 2</u> – ONCE YOU IDENTIFY A POTENTIAL THIRD PARTY CASE, ALWAYS CONSULT AN ATTORNEY WITH EXPERTISE IN THAT AREA OF THE LAW (*e.g.*, PRODUCTS LIABILITY, PREMISES LIABILTY, MEDICAL MALPRACTICE).

- **AND IF YOU ARE A PERSONAL INJURY ATTORNEY WHO DOES NOT HANDLE WORKERS' COMPENSATION MATTERS, ALWAYS CONSULT OR REFER THE WORKERS' COMPENSATION CASE TO AN ATTORNEY WITH THAT EXPERTISE.**

<u>NUGGET 3</u> - IF ANY WORKERS' COMPENSATION BENEFITS HAVE BEEN PAID, OR A CLAIM HAS BEEN FILED, ALWAYS OBTAIN THE COMP CARRIER'S WRITTEN PERMISSION TO SETTLE THE THIRD PARTY CASE (AND ATTEMPT TO NEGOTIATE DOWN THE LIEN) BEFORE SETTLEMENT.

I. **A Common Problem – How to maximize the financial recovery for your client who was seriously injured in a workplace accident.**

1) The Most Likely Places to be Injured Are At the Workplace and In Motor Vehicles.

   a) There were 58,094 major workplace injuries reported to the Virginia Workers' Compensation Commission in 2017, compared to 65,306 reported motor vehicle crash injuries (per DMV's website).

2) Prevalence of Workplace Injuries in Virginia.

   a) Fairfax County and Norfolk accounted for over 5,000 claims each in 2017.

   b) Virginia Beach, Chesapeake, and Loudoun County each accounted for over 2,000 claims in 2017.

   c) Charlottesville, for some reason, accounted for 1,000 claims alone – disproportionate to its population of 48,000, and more than some much bigger localities like Hampton, Roanoke City, and Albemarle County.
   d) Many localities had fewer than 100 claims for the year, including nearby counties of Botetourt, Carroll, Floyd, Giles, Henry and Rockbridge.

3) Causes of Workplace Injuries.

   a) Strains or exertional injuries are the most common (23%), followed closely by falls, slips, and trip injuries (22%) and being struck by an object (17%).

   b) 11% of workplace injuries are due to motor vehicle crashes.

4) Workers' Compensation Settlements Provide Limited Recovery.

   a) In 2017, there were 5,699 approved settlements in Virginia.

   b) The total aggregate value of the approved settlements was $297,153,851.

   c) The average settlement equaled $52,141.40.

      i) Because the average settlement figure includes a small fraction of mid-six figure and seven figure settlements for catastrophic injuries, the median settlement amount is far less than $50,000.

      ii) The Workers' Compensation Commission must approve all attorney's fees awarded in comp settlements. The Commission ordinarily will not award an attorney's fee that is more than 20% of the gross settlement amount. In settlements over $500,000, the Commission frequently reduces the fee

awarded below 20%, though this depends on the amount of demonstrable legal work involved in arriving at a settlement. *See*, *e.g.*, *Smith v. Catron Companies*, 68 O.I.C. 245 (1989).

Source for 2017 statistics: Virginia Workers' Compensation Commission 2017 Annual Report

II. **Proving a workers' compensation claim:**

1) **An injury by accident, *Combs v. VEPCO*, 525 S.E.2d 278, 281 (Va. 2000).**

a) An injury by accident occurs (i) when the injury appears "suddenly at a particular time and place[,] and upon a particular occasion," (ii) when it is "caused by an identifiable incident or sudden precipitating event," and (iii) when the injury results "in an obvious mechanical or structural change in the human body." *Southern Express v Green*, 257 Va. 181, 187 (1999).

2) **Arising out of employment**, *Combs,* 525 S.E.2d at 281.

a) An injury arises out of employment "when there is a causal connection between the claimant's injury and the conditions under which the employer requires the work to be performed." *UPS v. Fetterman*, 230 Va. 257, 258 (1985).

b) This is known as the "actual risk test," which means "that the employment must expose the employee to the particular danger causing the injury, notwithstanding the public's exposure generally to similar risks." *Combs*, 525 S.E.2d at 282.

3) **Occurring in the course of employment**, *Id.* at 281.

a) "An accident occurs 'in the course of employment' when it takes place within the period of the employment, at a place where the employee may reasonably be, and while he is reasonably fulfilling duties of his employment or engaged in doing something incidental thereto." *Bradshaw v. Aronovitch*, 170 Va. 329, 335 (1938).

III. **If workers' compensation benefits are limited, what benefits are recoverable in a workers' compensation case?**

The Virginia Workers' Compensation Act is found at Title 65.2 of the Virginia Code. (Tip: Each year, Lexis/Nexis publishes an updated volume containing the Act with both court and Commission annotations for most issues that arise in litigation under the Act.)

1) ***Lifetime*** medical benefits for reasonable, necessary, and authorized treatment of injuries causally related to the workplace accident. Va. Code § 65.2-603.

   a) Medical benefits may include up to an aggregate cap of $42,000 for the purchase/modification of a suitable automobile and home modifications. Va. Code § 65.2-603(A)(1)(a)-(b).

   b) For those injured severely enough to need it (those with severe traumatic brain injuries, multiple amputees, quadriplegics, and those whose injuries render them unable to perform essential activities of daily living), medical benefits may include 24/7 attendant care. Depending on the locality, this care can easily cost $60,000 to over $100,000/year.

      i) A spouse or family member may qualify as the attendant care giver upon a proper showing. The care provided must be medical care beyond the scope of normal household duties and performed under the direction and control of a physician. *See Virginia Poly. Inst. & State Univ. v. Posada*, 47 Va. App. 150 (2005).

2) ***Up to 500 weeks*** (a little over 9 years, 7 months) of wage loss benefits calculated at 2/3 of the injured worker's pre-injury average weekly wage (to include overtime) for the 52 weeks prior to the accident.

   a) The 500 week maximum ***includes*** any and all ratable permanent partial impairment to a body part. *See* Va. Code § 503.

   b) ***Lifetime wage loss benefits*** (called "permanent and total disability") are recoverable under very limited circumstances:

      i) Loss of any two of arms, hands, legs, feet, or eyes in the same accident;

      ii) Injuries resulting in total paralysis for all practical purposes; and

      iii) Brain injury "so severe as to render the employee permanently unemployable in gainful employment." Va. Code § 65.2-503(C).

3) ***Death benefits.***

   a) ***Up to 500 weeks*** of wage loss benefits at 2/3 of the pre-injury average weekly wage for those persons presumed under the Act to be wholly dependent;

   b) Burial expenses up to $10,000;

   c) Reasonable transportation expenses for the deceased up to $1,000. Va. Code § 65.2-512.

IV. The Potential Solution – Finding valuable third party claims in your client's workers' compensation case.

1) **Damages that may be recovered in a third party personal injury case that are not recoverable in a comp case:**

a) "any physical pain and mental anguish [the injured worker] suffered in the past and any that … may be reasonably expected to suffer in the future";

b) **"**any inconvenience caused in the past and any that will probably be caused in the future";

c) Future lifetime lost or reduced earnings/earning capacity;

d) Humiliation and embarrassment for disfigurement or deformity. No. 9000, VMJI, Civil, Vol. 1.

e) Punitive damages for actual malice by the third party and/or conduct by the third party evincing conscious disregard for the rights of others. *Hamilton Dev. Corp. v. Broad Rock Club, Inc.*, 248 Va. 40 (1994).

Note that the payment of workers' compensation benefits qualifies as a collateral source and proof of payment from a collateral source is not admissible in a personal injury trial in Virginia. Va. Rule of Evidence 2:411; *e.g., Schickling v. Aspinall*, 235 Va. 472 (1988). The Supreme Court of Virginia has held that the Workers' Compensation Act cannot be used to benefit a negligent third party by relieving the wrongdoer from liability or reducing that liability. *Fauver v. Bell*, 192 Va. 518 (1951).

V. Likely third party claims from workplace injuries include:

1) **Personal injury claims** – Typically these claims result from motor vehicle crashes arising out of and in the course of employment.

a) Keep in mind that these negligence claims can present themselves in a variety of ways, not just from motor vehicle crashes.

b) Example – We currently represent a large retailer in a workers' comp case where a cashier was assaulted by a mentally disabled customer with a history of violent outbursts who was supposed to be supervised by a trained attendant. The cashier's attorney pursued a comp claim for the cashier's orthopedic injuries and lost time and has a tort claim against the attendant's employer for negligent supervision of the customer.

2) Medical malpractice claims resulting from treatment for workplace injuries. *Fauver v. Bell*, 192 Va. 518 (1951).

   a) Example – An injured worker suffers a cervical injury. He has deteriorating neurological symptoms but the initial treating physician commits malpractice by unreasonably delaying surgery, leading to lasting neurological compromise even after surgery. *See Rogers v. Giant Food, Inc.*, VWC File No. 145-82-01 (Feb. 27, 1996).

3) **Products liability claims** involving the machine the worker was operating or servicing when the workplace injury occurred.

   a) In products cases, the defense will often attempt to raise the workers' comp bar codified at Va. Code § 65.2-307(A).

      i) This section reads, in relevant part: "The rights and remedies herein granted to an employee when his employer and he have accepted the provisions of this title respectively to pay and accept compensation on account of injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service, or death."

      ii) The worker's comp bar is intended to limit recovery of all persons engaged in the employer's business to compensation under the Workers' Compensation Act and to deny an injured person the right of recovery against any other person unless he be a stranger to the business. *See Rea v. Ford,* 198 Va. 712 (1957).

      iii) The Workers Compensation Act does ***not*** extend to injuries caused by a stranger to the business. ***If an employee is injured by a stranger to the business while performing the duties of his employer, the stranger is not relieved of full liability for the loss.*** *See Feitig v. Chalkey*, 185 Va. 96 (1946).

      iv) A leading case is *Stone v. Door-Man Mfg. Co,*, 260 Va. 406, 413 (2000). In *Stone*, plaintiff was employed at Ford's assembly plant when an overhead door at the entrance to a new body shop suddenly closed, paralyzing him. The Supreme Court of Virginia reversed the grant of the overhead door company's motion to dismiss due to the workers' comp bar. The Court held: "We find that 'the work in which [plaintiff's] employer was engaged' was Ford's 'particular business' of manufacturing and selling motor vehicles. The defendants [all of whom were involved in the design and installation of the subject door] were strangers to that business." *Id.* at 418-19.

b) The workers' comp bar also is frequently raised in the construction and transportation industries.

i) Whenever an owner or general contractor contracts with another (subcontractor) to perform any work which is part of the owner or general contractor's "trade, business or occupation," the owner or general contractor can be held liable for payment of comp benefits to an injured employee of the subcontractor as a "statutory employer." Va. Code § 65.2-302.

(a) As a statutory employer, however, the owner or general contractor cannot be sued in tort for personal injuries – the workers' comp bar applies.

ii) An attorney faced with this situation must look closely at whether the injured subcontractor was in fact engaged in the same business, trade or occupation as the owner or contractor.

(a) For example, in *Slusher v. Paramount Warrior, Inc.,* 336 F. Supp. 1381 (W.D. Va. 1971), plaintiff was employed by a tire sales and service business and assigned to a VDOT road construction project assisting the general contractor Paramount Warrior in maintaining Paramount's truck tires. Judge Dalton ruled that the workers' comp bar did not apply, finding that plaintiff's tire service work was maintenance work and not construction work.

4) **Premises liability claims** for slip, trip and fall injuries occurring in parking lots or other buildings while picking up materials or making deliveries.

a) Example – An employee returning to work from lunch who slips and falls on an icy sidewalk immediately adjacent to her employer's premises has both a comp claim and a potential third party claim against the entity responsible for maintaining the sidewalk in a safe condition. *See Prince v. Pan American Airways,* 368 S.E.2d 96 (Va. Ct. App. 1988).

5) **Intentional torts** like assault and battery suffered on the job. *Cont'l Life Ins. Co. v. Gough*, 172 S.E. 264 (Va. 1934).

a) The injured worker may seek to recover in tort, rather than under workers' compensation, alleging the employer failed to provide adequate security or prevent or eliminate a known threat.

b) Key question in these cases is whether the assault "arose out of the employment" – that is did the assault have as its origin an actual risk connected

to the employment and did the assault flow as a rational consequence from that risk.

i) If so, then the workers' comp statutory bar applies to bar a personal injury suit against the employer. *Combs v. VEPCO*, 525 S.E.2d 278 (Va. 2000).

ii) If on the other hand, the assault was personal to the injured worker, and not directed to the worker as an employee or because of his employment, then the workers' comp bar does not apply. *Hilton v. Martin*, 654 S.E.2d 572 (Va. 2008) (workers' comp bar did not apply to personal injury action by estate of EMT who died after co-worker defibrillated her for personal reasons unconnected to deceased's employment status).

VI. Avoiding Legal Malpractice in Combined Comp and Third Party Cases: ALWAYS Obtain Written Permission from the Comp Carrier to Settle a Third Party Case And Always Evaluate Your Client's Comp Claim for a Potential Third Party Case.

1) Va. Code § 65.2-309(A) operates to create an automatic subrogation lien against the proceeds of any personal injury case for all benefits paid by the comp carrier to the injured worker, both in the past and all future benefits owed. (Va. Code § 65.2-309.1 extends the lien to third party settlements paid by UM/UIM carriers).

a) The lien is created upon the injured worker giving notice of claim to his employer, filing a claim with the Workers' Compensation Commission, or through the comp carrier's payment of indemnity benefits to the worker or payment of medical expenses on the worker's behalf. *Wood v. Caudle-Hyatt, Inc.*, 18 Va. App. 391 (1994).

b) The reason for the subrogation lien is the premise that the Workers' Compensation Act permits the injured worker only one complete recovery. *Noblin v. Randolph Corp.*, 180 Va. 345 (1942).

c) So again, ALWAYS obtain written permission from the comp carrier to settle a third party case. OTHERWISE –

i. "The employee necessarily prejudices his employer's subrogation rights and, thus, is barred, from obtaining or continuing to receive benefits under a workers' compensation award when an employee settles a third-party tort claim . . .without obtaining the consent of the employer." *Wood*, 18 Va. App. at 397.

d) You should NEVER MAKE ANY EXCEPTION to this rule in combined comp/third party cases.

e) And by never make any exception, if you are handling the personal injury case, and another attorney is handling the comp case, never assume that the comp attorney is handling permission from the comp carrier.

f) If you do not obtain the comp carrier's permission to settle, the comp carrier's attorney will file an Employer's Application to terminate benefits.

g) And if you in fact settle the personal injury case without the comp carrier's approval, the Commission will forever bar your comp client from receiving additional comp benefits of any kind.

h) In the case of catastrophic brain injuries and/or paralysis, and especially where 24/7 attendant care is involved, the failure to obtain the comp carrier's permission to settle could cost your comp client millions of dollars.

i) DO NOT LET THIS HAPPEN.

2) In the course of your comp representation, do not fail to recognize and pursue valuable third party cases.

a) These third party cases may arise at any time in the life of the comp claim. Often they involve new injuries that would be deemed "compensable consequences' and covered by the Workers' Compensation Act. *E.g.*, *Leonard v. Arnold,* 218 Va. 210 (1977); *Bartholow Drywall Co. v. Hill,* 12 Va. App. 790, 797 (1991) ("[T]he doctrine of compensable consequences is applicable both to aggravation of a prior compensable injury and a new injury for the purposes of establishing compensability of the subsequent injury."). Some examples:

i. A motor vehicle crash traveling to/from a doctor's appointment for injury-related care.

ii. A motor vehicle crash aggravating or exacerbating your client's comp injuries.

iii. Sudden, unexplained failure of durable medical equipment or an assistive device (*e.g.*, cane, walker) used by your client as a result of a compensable injury leading to new injuries,

iv. Medical malpractice committed when the treating provider delays surgery in favor of less expensive conservative treatment such as physical therapy, resulting in additional injury to your client..

v. Always consider the possibility of medical malpractice when your comp client suffers a fatal negative outcome following medical treatment.

vi. Always consider the possibility of medical malpractice when your client's treatment leads to worsening of the condition treated, need for corrective surgery, serious internal bleeding, paralysis, stroke, any acute coronary syndrome, a pulmonary embolus (PE), respiratory failure, or sepsis.

b) If, due to your own negligence, you fail to recognize that a third party case exists, should be pursued, and it can be proven that the third party case would have resulted in a favorable outcome for your comp client, you may have committed legal malpractice. *See Overhead Door Co. of Norfolk v. Lewis*, 29 Va. App. 52 (1999) (employer unsuccessfully claimed comp subrogation lien against proceeds from legal malpractice suit settled against attorney who failed to timely serve complaint on third party tortfeasor who caused claimant's workers' comp injury); *Va. Mun. Group Self-Insured Ass'n v. Crawford*, 66 Va. Cir. 236 (Fairfax County 2004) (proceeds from legal malpractice settlement not subject to comp subrogation lien where comp attorney failed to timely sue tortfeasor for causing injury that led to comp award).

VII. RESOLUTION OF THE THIRD PARTY CASE SUBJECT TO A COMP SUBROGATION LIEN

1) In most cases, the best way to maximize your client's recovery is to pursue a global settlement of both the third party case and the comp claim at the same time. Why is this so?

a) Assuming they have conducted discovery, the parties to the third party case are best positioned to understand the value of the case.

b) The comp claim undoubtedly will have been around for a year or more so that the comp carrier has a basis for projecting likely future comp benefits.

c) You should be able to fully explain the trial risks to the comp carrier (to include the risk of a defense verdict and no lien recovery).

d) You should have a good understanding of the total costs involved in the third party case (including those incurred to the date of any mediation or settlement conference) and the cost of taking the case to trial.

e) All parties to both claims should be motivated to reach an agreed-upon resolution rather than leave the amount of any recovery to an unknown and unpredictable jury (unless of course defense counsel in the third party case is convinced of a defense verdict).

f) The comp carrier should be motivated to cooperate in order to recover a significant portion of its lien and to reduce its exposure via a future credit and the recovery ratio as explained below.

2) Global settlement, though, is not always the best approach.

a) You should consider early settlement of the comp case where death benefits are at issue. The amount of the death benefits can be quickly and easily established and these benefits provide immediate assistance to a dependent (*e.g.,* a spouse, minor children) who was suddenly deprived of the deceased's income.

b) In the case of catastrophic injuries, we have seen a growing tendency on the part of the comp defense bar to deny clearly compensable comp claims by straining to assert "willful misconduct" defenses (Va. Code § 65.2-306) or contending that the accidental injuries did not arise out of (or alternatively did not occur in the course of) the injured worker's employment.

i) The comp carrier's denial of the claim forces the injured worker's private or public health insurance to foot the medical expenses.

ii) If Medicare, Medicaid, or an ERISA health plan pays the medical expenses, they will have a "super lien" which may be impossible to compromise.

iii) The defense bar appears to be taking advantage of the fact that Medicare, Medicaid, or a private health plan will pay the injured worker's medical bills at a lower rate, creating a smaller lien.

iv) This approach incentivizes the injured worker to settle the comp claim in part off the difference between the smaller lien and the full value of the medical bills subject to the Workers' Comp Fee Schedule.

v) This can be a win-win for both the injured worker and the comp carrier.

aa) We recently had great success settling a denied catastrophic comp claim early and in advance of filing a products liability case. There, our client's medical bills approached $1 million and had been paid by

her ERISA health plan. Because the claim was denied, there was no comp lien, the employer agreed to waive its ERISA lien in its entirety, and to pay for our client's COBRA coverage for 12 months post-settlement.

(1) **The result for the products case – No liens**, or at least none for our client's first 2+ years of post-accident treatment (expected to represent the great majority of any treatment).

vi) **Although beyond the scope of this outline, when settling a workers' comp case, you must take into account Medicare/Medicaid's interests. If your client is on Medicare, any settlement with a value of $25,000 or more must include an MSA approved by the Centers for Medicare & Medicaid Services (CMS). If your client has applied for SSDI, or reasonably expects to be Medicare eligible within 30 months of the settlement, and the settlement value is $250,000 or more, you must obtain a CMS-approved MSA.**

EXAMPLE - SETTLEMENT OF A THIRD PARTY CASE SUBJECT TO A WORKERS' COMP LIEN

Facts:
Flo the Florist is delivering flowers in the course and scope of her employment, when Travis Trucker sideswipes her van forcing the van into the jersey barrier on southbound I81 near Lexington. She suffers severe injuries to her left side where she was pinned in her van against the barrier and had to be extricated. (Travis is uninjured). There are competing witness accounts about whether Flo actually drifted into Travis's lane before being struck but she denies it, Travis cannot say one way or the other, and you are confident that you will prevail at trial of the negligence action against Travis.

Posture:
The crash was two years ago. You represent Flo in both her negligence action and comp claim. Flo has been awarded comp benefits for her left side injuries, has ongoing treatment needs (including a hip replacement she is putting off), and is still out of work on an open indemnity award. The comp carrier has paid $300,000 to date. You value her comp claim for settlement purposes at $200,000.

You value Flo's negligence case at $750,000, and Travis' liability insurance limit is $750,000. You agree to a mediation where Travis's liability carrier refuses to offer more than $550,000. The comp carrier refuses to reduce its lien beyond the pro rata reduction required by Va. Code § 65.2-311, and Flo therefore refuses to settle her comp claim. If Flo accepts $550,000 to settle her negligence action, how does the settlement breakdown:

Settlement Calculation

Terms:

i)	Settlement	$550,000.00
ii)	Attorney's Fee (1/3)	$183,333.33
iii)	Costs	$ 6,666.67
iv)	Total Comp Lien	$300,000.00

At this point, this does not look like a very good deal for Flo, as she would get only $60,000 without the statutory comp lien reduction.

a) **Statutory Comp Lien Reduction:**

i) Recovery ratio = Fees + costs/settlement

(1) Fees and costs = $190,000.00

(2) Fees + costs/settlement = $190,000/$550,000 = 34.55% (recovery ratio)

(3) Adjusted Comp Lien (34.55% reduction) = $196,350.00

b) **Settlement Statement After Comp Lien Reduction**

i)	Settlement	$550,000.00
ii)	Attorney's Fee and costs	$190,000.00
iii)	Adjusted Comp Lien	$196,350.00
iv)	**Net Settlement to Flo**	**$163,650.00**

c) **Comp Carrier's Future Credit**

i) Calculated as Personal injury settlement – total comp lien

(1) Credit = $550,000.00 - $300,000.00 = $250,000 credit

ii) Recovery ratio – 34.55% applied to credit.

d) **Effect on Flo's Comp Case**

i) Settlement of Flo's negligence action complicates and reduces the value of Flo's comp case. Every dollar that the comp carrier is responsible for paying for indemnity (wage loss) or medical care counts against the $250,000 credit until the credit is exhausted. If, as valued, Flo has future comp benefits equal to $200,000, she will not exhaust the credit.

ii) Plus, the comp carrier only has to pay Flo (really reimburse her) for benefits owed on a quarterly basis subject to the 34.55% recovery ratio. If Flo's award is for $500/week in indemnity benefits, now the comp carrier pays $500 * .3455 = $172.75/week. The same ratio

applies to reimbursement for medical treatment; the comp carrier only has to pay $34.55 on every $100.00 for Flo's injury-related medical treatment.

iii) For $200,000 in future comp benefits, the comp carrier will only have to pay $69,100.

iv) Once the comp carrier has given permission to settle Flo's negligence case, it will ask the Workers' Comp Commission for a "Third Party Order." A sample Third Party Order entered in one of our cases is attached at the end of this outline.

(1) The Third Party Order sets forth the total third party recovery, the comp lien at the time of the third party recovery, the amount received by the comp carrier in satisfaction of its lien, the comp carrier's future credit, and the recovery ratio for payment of future comp benefits.

e) **Global Settlement Makes Better Sense**

- The future credit and recovery ratio effectively make Flo's case worth something less than $69,100 over the rest of her life. (Of course, this example assumes a precision in evaluation of future comp benefits that is almost impossible to achieve in an actual case).

- Flo would be better served by settlement of her comp claim at the same time as the negligence action.

- Let's say that Flo and the comp carrier agree to a full and final settlement of her comp claim for $60,000.
  - Q: Is Flo better off having the $60,000 applied to her personal injury settlement as a further lien reduction or applied to a separate comp settlement?
  - A: She is better off having it applied as a further lien reduction which is taken after you receive your 1/3 contingency fee, because you (her attorney) will take an additional 20% of the $60,000 (which works out to $12,000) if it is treated as a separate comp settlement.
  - Global settlement with a further $60,000 reduction in the comp lien nets Flo $223,650.00. Global settlement with $60,000 paid via a separate comp settlement subject to your additional 20% fee nets Flo $211,650.

f) **Could the comp carrier force you to go to trial in Flo's negligence action?**

i) NO.

ii) If the comp carrier "fails to consent to an offer of settlement acceptable to the employee [Flo]," Flo may petition the circuit court where her negligence action is pending for approval of the settlement. Va. Code §8.01-424.1.

iii) "If the court determines that the settlement is fair and just to the parties in interest, it shall approve such settlement." *Id.*

iv) The court, however, cannot reduce or compromise the comp lien in approving the third party settlement. *Id.*

v) Even after the settlement is approved, you have to obtain the comp carrier's agreement on lien satisfaction before you distribute the settlement proceeds out of trust. Otherwise, the comp carrier can sue you and your client to recover its lien. Va. Code § 65.2-309((D).

g) **What if there was only $100,000 in available coverage in Flo's negligence action?**

i) In this situation, the $300,000 comp lien would exceed the coverage in the third party case.

ii) One strategy would be to propose a 1/3, 1/3, 1/3 split in the third party case with 1/3 to the comp carrier, 1/3 to Flo, and 1/3 to you for your attorney's fee.

iii) Notice that the limited available coverage eliminates the comp carrier's future credit, because (total settlement – total comp lien) here would be ($100,000-$300,000) a negative number.

iv) As a result, the settlement value of Flo's comp case would still be $200,000.

v) Here again, if the comp carrier refused to consent to the settlement, you could petition the court where the negligence action is pending for approval of the settlement pursuant to Va. Code § 8.01-424.1.

vi) Or you could select what has been called the "nuclear option" and threaten to dismiss your negligence action.

(1) If you dismiss your negligence action, you must be sure not to prejudice the comp carrier's subrogation rights. *Noblin v.*

Randolph Corp., 180 Va. 345 (1942). If you do, Flo's right to further workers' comp benefits would be barred. *Stone v. George W. Helme Co.*, 184 Va. 1051 (1946).

(2) Upon dismissal without prejudice, the employer/comp carrier could then pursue the negligence action on their own. Any amount recovered by the employer in excess of the carrier's comp lien must be held for the employee's benefit (less a pro rata share of attorney's fees and costs for prosecuting the case). Va. Code § 65.2-309(B).

(3) Note that Flo could force the comp carrier to trial. The comp carrier cannot settle Flo's third party claim without both the Commission's and Flo's approval. Va. Code § 65.2-309(C).

Two Final Thoughts on Comp Lien Reduction:

1) **Be sure to demand an itemized comp lien from the carrier. Review it and make sure it does not include nurse case manager, IME, or attorney's fees that do not represent benefits paid to or on behalf of the injured worker. Make sure any such fees are deleted and the lien recalculated.**

2) **Also be aware that there is authority for excluding the full amount of any comp settlement from the comp carrier's lien against a third party settlement. In *Spicer v. Robinson*, Case No. 16-99 (Buckingham Cir. Ct.) (VLW 018-8-065) (6/20/2018), Judge Blessing ruled that a comp settlement of $182,500 for future comp benefits reached after claimant's third party lawsuit was filed should not be included in the comp lien. This despite the fact that the final Order stated that the carrier retained all subrogation rights. The third party suit later settled for $1.8 million.**

   a) There is no controlling precedent on this question.

   b) You should expect that going forward comp carriers will try to include language in the final Order that the carrier's subrogation rights expressly include the full amount of the comp settlement.

   c) The parties to a $2.5 million comp settlement reported in *Va. Lawyers Weekly* in March 2019 appear to have had *Spicer* in mind in structuring their settlement. In that case, reported as *John Doe v. Confidential* (VLW 19-T-021), the parties agreed to limit the comp lien for the pending third party case to $790,000, the amount paid for medical and wage loss benefits up to the settlement of the comp claim, thereby excluding the $2.5 million comp settlement of future benefits from the lien.

COMMONWEALTH OF VIRGINIA
VIRGINIA WORKERS' COMPENSATION COMMISSION
333 E. Franklin St., Richmond Virginia 23219
www.workcomp.virginia.gov
1-877-664-2566

Third Party Order

Date of this Award Order: June 19, 2018

To All Interested Parties:

The Virginia Workers' Compensation Commission has been advised that a third party recovery has been received on this claim. The total recovery was $340,000.00 on May 30, 2018. The employer's statutory lien at the time of the recovery was $105,596.29. As required by §65.2-311, the employer/carrier is responsible for a pro rata of expenses and attorney's fees. At settlement, the employer/carrier received $24,546.10 in satisfaction of the employer/carrier's lien amount to date.

Pursuant to §65.2-313, Code of Virginia, the employer/carrier is entitled to a credit in the amount of $234,403.71 against its liability for additional compensation payments and medical expenses, after which its responsibility to make such payments shall resume.

The Injured Worker remains entitled to a reimbursement of attorney fees and expenses at the rate of 77% of any additional compensation and/or medical entitlements as they are incurred. Such reimbursement shall be paid by the carrier/employer directly to the Injured Worker on a quarterly basis from the date of this award. The Injured Worker must provide the carrier/employer with medical bills when a pro rata reimbursement is sought.

If any party wishes to dispute this Award Order, a Request for Review (appeal) must be filed within 30 days of the date of this Order. If there are any questions regarding information contained in this Order, please contact the Commission toll free at 1-877-664-2566.

Virginia Workers' Compensation Commission

CSD/ams

ETHICS:

Anatomy of a Bar Complaint

Travis J. Graham

ANATOMY OF A BAR COMPLAINT

Travis J. Graham
(540) 983-9420

You have been served with notice of a bar complaint. What happens next? How does the process work? Who are the players? What can you expect?

This outline will answer these questions, provide you with the applicable rules, and offer tips from practitioners who defend against bar complaints and words of wisdom from Bar officials.

It is, of course, no substitute for a full review of the rules and the advice of counsel.

I. The Players

Respondent – The attorney who is the subject of the complaint.

Intake Counsel – Bar counsel who takes on the task of making an initial review of a complaint.

Bar Counsel – Attorneys employed by the Bar; they occupy the role of prosecutor.

Bar Investigator – An employee of the Bar who occupies the role of a law enforcement officer investigating a case. Most are lawyers or law graduates.

District Committee – The first adjudicative body to consider a bar complaint. They are composed of lawyers and laypersons, and each committee serves one or more judicial district. They occupy the role of grand jury, although they can impose some types of discipline themselves.

Disciplinary Board – The highest adjudicative body established under the disciplinary rules. It is composed of 20 members, 16 of whom are attorneys.

C.O.L.D. – The Standing Committee on Lawyer Discipline. It oversees the entire process, but has no direct role in handling complaints.

II. The Process

Note – all references to rules are to sub-paragraphs of Part 6, § IV, Paragraph 13 of the Rules of the Supreme Court of Virginia. The rules are set out in Section VII below.

A. Intake of Complaint

1. Sources of Complaints

a. Clients

b. Lawyers

c. Judges

d. Anonymous

The Bar makes no distinction between anonymous complaints and others. The investigative process is identical. However, the absence of a named complainant may lead officials to conclude that the burden of proof cannot be met.

e. None

The Bar may open investigations into conduct that is revealed indirectly, such as through newspaper or journal articles.

2. Possible Disposition by Intake Counsel (Rule 13-10.)

a. "N.A.T."

Stands for "No Action Taken." Complaints that obviously lack merit may be summarily dismissed by intake counsel without further action. (Rule 13-10(A).)

- What types of complaints are dismissed at this stage?

Complaints that lack any indicia that an attorney has violated any Rule of Professional Conduct. These include complaints that a lawyer simply failed to win a case, most complaints about fees, and complaints about conduct that clearly does not infringe any Rule of Professional Conduct.

- Notification to lawyer?

  No.

b. Informal Investigation/Pro-Active Letter

In some limited circumstances, intake counsel may deal with a simple complaint by writing to the attorney and asking that the problem be remedied. This is not considered a form of discipline. (Rule 13-10(C).)

c. Assignment to Bar Counsel for Preliminary Investigation

Complaints that make credible allegations of a violation of a Rule of Professional Conduct are assigned to Bar Counsel for investigation. (Rule 13-10(C).)

B. Preliminary Investigation

1. Notification, Response, Reply

- Duty to respond, handling of privileged materials, deadlines

  Attorneys are required to cooperate with the investigative process. Failure to do so is itself a violation of the ethical rules. (Va. Rule of Prof. Conduct 8.1(c).) *An attorney may reveal otherwise confidential information in responding to a complaint*. (Va. Rule of Prof. Conduct 1.6(b)(2).)

- Form of response

  Responses should be in writing.

- Lawyer up, or not?

  Opinions differ.

- Access by Respondent to Materials

  The responding attorney will be furnished with a copy of the complaint, and the complainant will be given a copy of the attorney's response. The attorney is not allowed to see any reply from the complainant, nor to examine the Bar's file. Discovery is limited. (Rule 13-11.)

- Strategy

- Deadline, Failure to Respond

  There is typically a 21 day deadline to respond. Failure to respond may itself be an ethical violation, and will result in the complaint being escalated to the next level for further investigation.

2. Investigation and Interview (Rule 13-10(D).)

   - By whom?

     The Bar employs investigators, some of whom are attorneys or law graduates.

   - Form of interview

     The interview is typically conducted in person, and is recorded and videotaped. Investigators may interview others besides the responding attorney, including clients, other attorneys, judges, and other witnesses.

   - Pitfalls

     Any information collected by the Bar which indicates a violation of an ethical rule may be cause for discipline, regardless of whether it concerns the original complaint.

C. Possible Actions by Bar Counsel (Rule 13-10(E).)

1. Dismissal

   The Bar Counsel will not file a complaint when, in his or her judgment following a preliminary investigation:

   - *As a matter of law, the conduct questioned or alleged does not constitute misconduct;*

   - *The evidence available shows that the Respondent did not engage in the misconduct questioned or alleged;*

   - *There is no credible evidence to support any allegation of misconduct by the Respondent; or*

- *The evidence could not be reasonably be expected to support any allegation of misconduct under a clear and convincing evidentiary standard.*

(Rule 13-10(E).)

2. Charge of Misconduct and Referral to District Committee Level (Rule 13-10(F).)

- What does it mean?

A charge of misconduct and referral to the District Committee level is roughly the equivalent of submission of a charge to a grand jury. It does not necessarily mean that the complaint is well-founded or that discipline will be imposed.

D. Action at the District Committee Level

1. Referral to Sub-Committee and Possible Actions

a. Further Investigation (Rule 13-15(A).)

Possible, but virtually never occurs.

b. Dismissal

Reasons for dismissal are basically the same as the reasons Bar Counsel would elect not to proceed. (Rule 13-15 (B)(1).)

i. Real Dismissal (Rule 13-15(B)(1).)

ii. Fake Dismissal (Rule 13-15(B)(1)(c)-(d).)

- *"*Dismissal de minimis"
- "Dismissal for exceptional circumstances"

As of June, 2019, the Bar has done away with these two types of sanctions.

c. Private Admonition Without Terms

The private admonition without terms is the only form of discipline that the District Sub-Committee may impose on its own. (Rule 13-15(B)(2).)

d. Finding of Evidence of Misconduct and Referral to Full Committee

The equivalent of an indictment by a grand jury. This means that the District Sub-Committee has agreed that there has likely been an ethical violation, and has also agreed that the violation may not be remedied by a private admonition without terms. (Rule 13-15(B)(5).)

e. Certification to Disciplinary Board

If the charge involves misconduct that cannot be dealt with by the District Committee, the Sub-Committee may refer it directly to the Disciplinary Board. (Rules 13-15(B)(3).)

f. Agreed Discipline

The Sub-Committee may approve an agreed admonition or public or private reprimand, with or without terms. (Rule 13-15 (B)(4).)

2. Action by District Committee

If the case is referred to the full District Committee, Bar Counsel will serve a Charge of Misconduct on the responding attorney. The attorney must file an answer. (Rule 13-16(A)(13).)

a. Dismissal

For basically the same reasons as discussed above. (Rule 13-16(W).)

b. Agreed Discipline

The District Committee may solicit agreement by the attorney to a public or private admonition or reprimand, with or without terms.

c. Hearing by Full Committee

The District Committee can hear cases involving misconduct that would warrant an admonition or reprimand, but not suspension or revocation of a license.

- Format and rules of hearing

The hearing resembles a judicial hearing or trial, but differs in several respects -- most notably with regard to the rules of evidence and the participation of the complainant. (Rules 13-16(D)(S).)

- Burden of Proof

  Misconduct must be proven by clear and convincing evidence at <u>all</u> stages of the process.

- Disposition

  The District Committee will either dismiss the complaint, impose discipline short of suspension or revocation, or certify it to the Disciplinary Board. (Rules 13-16(W)-(X).)

d. Certification to Disciplinary Board

Upon a finding of serious misconduct, the case is referred to the Disciplinary Board.

E. Appeal of District Committee Decision

A decision by the District Committee to impose discipline may be appealed to the Disciplinary Board. (Rule 13-17.)

F. Action by Disciplinary Board

After certification to the Disciplinary Board, the responding attorney will be served with the Certification and must respond. The respondent can choose a hearing before a panel of the Disciplinary Board or a three-judge panel. (Rule 13-18(A).)

1. Agreed Discipline

   The Disciplinary Board may offer the opportunity to agree to discipline, and will set a deadline by which the responding attorney must agree.

2. Hearing Before Three-Judge Panel or Panel of Disciplinary Board

- Format of hearing

The format of the hearing is set out in Rules 13-18((D)-(N). It resembles, but is not identical to, a judicial hearing or trial.

G. Appeal to Supreme Court

An appeal of right lies to the Supreme Court of Virginia from any ruling of the Disciplinary Board. (Rule 13-26.)

III. Actions Not Involving Misconduct

A. Impairment (Rule 13-23.)

B. Criminal Conviction

- What crimes?

Lying, cheating, or stealing. (Rule 13-22.)

C. Reciprocal Actions

The Bar may impose reciprocal discipline on an attorney who is disciplined in another state. (Rule 13-24.)

IV. Public Records of Discipline

Complaints themselves and investigative files are confidential unless introduced into evidence. Files concerning impairment are confidential. No public record is made of private discipline, although the Bar may rely on records of such discipline in future proceedings. All proceedings before the District Committee, the Disciplinary Board, or any three-judge panel are public. (Rule 13-30.)

V. Words of Wisdom

"A written engagement letter is key."

"Apologize for mistakes, and fix them."

"Communicate with your client. If you have a difficult client you hate to communicate with, communicate even more."

"Be reasonable, and don't be offensive."

"Keep good records."

"Don't ignore a complaint, don't stonewall, and don't lie."

If you did it, just take your lumps and move on."

"We are mostly concerned with stealing money, but the other big ones are conflicts of interest, mishandling of confidential information, and lying."

"We have a zero tolerance for mishandling of money."

"The District Committee is often pickier than bar counsel."

"Use the ethics hotline."

"The ethics hotline is largely irrelevant."

"We are here to protect the public, but we don't want to railroad anyone."

VI. Other

A. Ethics Hotline

- *Opinions differ on value and use in disciplinary proceedings.*

B. Committee on Lawyer Discipline (C.O.L.D.)

- *Not directly involved in the handling of complaints.*

VII. Selected Rules: Part 6, § IV, Paragraph 13

13-10 Processing of Complaints by Bar Counsel

A. Review.
Bar Counsel shall review all Complaints. If, following review of a Complaint, Bar Counsel determines that the conduct questioned or alleged does not present an issue under the Disciplinary Rules, Bar Counsel shall not open an Investigation, and the Complaint shall be dismissed.

B. No Dismissal by Complainant.
No Complaint or allegation of Misconduct shall be dismissed at any stage of the process solely upon a request by a Complainant to withdraw his or her Complaint.

C. Summary Resolution.
Bar Counsel shall decide whether a Complaint is appropriate for an informal or abbreviated Investigation. When a Complaint involves minor allegations of Misconduct susceptible to early resolution, Bar Counsel may assign the Complaint to a staff member, a District Committee member, or use any other means practicable to speedily investigate and resolve the allegations of Misconduct. If the Complaint is resolved through this process, Bar Counsel shall then dismiss the Complaint. Such dismissal shall not become a part of the Respondent's Disciplinary Record. If Bar Counsel chooses not to proceed under this subsection, or, having elected to proceed under this subsection, the Complaint is not resolved within 90 days from the date of filing, Bar Counsel shall proceed pursuant to the following subsections.

D. Preliminary Investigation.
A preliminary Investigation may consist of obtaining a response, in writing, from the Respondent to the Complaint and sharing the response, if any, with the Complainant, so the Complainant may have an opportunity to provide additional information.

E. Disposition by Bar Counsel after Preliminary Investigation.
Bar Counsel may conduct a preliminary Investigation of any Complaint to determine whether it should be referred to the District Committee. Bar Counsel shall not file a Complaint with a District Committee following a preliminary Investigation when, in Bar Counsel's judgment:

1. As a matter of law, the conduct questioned or alleged does not constitute Misconduct;
2. The evidence available shows that the Respondent did not engage in the Misconduct questioned or alleged;
3. There is no credible evidence to support any allegation of Misconduct by the Respondent; or

4. The evidence available could not reasonably be expected to support any allegation of Misconduct under a clear and convincing evidentiary standard.

F. Referral to District Committee.
Bar Counsel shall notify the District Committee Chair that a Complaint has been referred to a District Committee for investigation. Thereafter, the Complaint shall be investigated and a report thereof made to a Subcommittee.

G. Report to Subcommittee.
When submitting an Investigative Report to the Subcommittee, Bar Counsel or Committee Counsel may also send a recommendation as to the appropriate disposition of the Complaint.

* * * * * * * * *

13-11 Limited Right to Discovery

There shall be no right to discovery in connection with disciplinary matters, including matters before three-judge Circuit Courts, except:

A. Issuance of such summonses and subpoenae as are authorized; and

B. Bar Counsel shall furnish to Respondent a copy of the Investigative Report considered by the Subcommittee when the Subcommittee set the Complaint for hearing before the District Committee or certified the Complaint to the Board, with the following limitations:

1. Bar Counsel shall not be required to produce any information or document obtained in confidence from any law enforcement or disciplinary agency, or any documents that are protected by the attorney-client privilege or work product doctrine, unless attached to or referenced in the Investigative Report;

2. Bar Counsel shall not be required to reveal other communications between the Investigator and Bar Counsel, or between Bar Counsel and the Subcommittee; and

3. Bar Counsel shall make a timely disclosure to the Respondent of all known evidence that tends to negate the Misconduct of the Respondent or mitigate its severity or which, upon a finding of Misconduct, would tend to support imposition of a lesser sanction than might be otherwise imposed. Bar Counsel shall comply with the duty to disclose this evidence regardless of whether the information is confidential under this Paragraph. If Bar Counsel discloses under this subparagraph information that is otherwise confidential, Bar counsel

shall promptly notify the Attorney or Complainant who is the subject of the disclosure unless Bar Counsel decides that giving such notice would prejudice a disciplinary investigation. Notice shall be in writing and shall be deemed effective when mailed by first-class mail to the Bar's last known address of the subject Complainant or Attorney.

* * * * * * * * *

13-15 Subcommittee Action

A. Referral. Following receipt of the report of Investigation and Bar Counsel's recommendation, the Subcommittee may refer the matter to Bar Counsel for further Investigation.

B. Other Actions. Once the Investigation is complete to the Subcommittee's satisfaction, it will take one of the following actions.

1. Dismiss. It shall dismiss the Complaint when:
    a. As a matter of law the conduct questioned or alleged does not constitute Misconduct; or
    b. The evidence available shows that the Respondent did not engage in the Misconduct questioned or alleged, or there is no credible evidence to support any allegation of Misconduct by Respondent, or the evidence available could not reasonably be expected to support any allegation of Misconduct under a clear and convincing evidentiary standard; or
    c. The Subcommittee concludes that a Dismissal *De Minimis* should be imposed; or
    d. The Subcommittee concludes that a Dismissal for Exceptional Circumstances should be imposed; or
    e. The action alleged to be Misconduct is protected by superseding law.

    In making the determination in the preceding subparagraphs B.1.c. and B.1.d., the Subcommittee shall have access to Respondent's prior Disciplinary Record. Respondent, within ten days after the issuance of a dismissal which creates a Disciplinary Record, may request a hearing before the District Committee.

2. Impose an Admonition without Terms. In making this determination, the Subcommittee shall have access to Respondent's prior Disciplinary Record. Respondent, within ten days after the issuance of an Admonition without Terms, may request a hearing before the District Committee.

3. Certify to the Board. Certify the Complaint to the Board pursuant to this Paragraph or file a complaint in a Circuit Court, pursuant to Va. Code § 54.1-3935. Certification shall be based on a reasonable belief that the Respondent has engaged or is engaging in Misconduct that, if proved, would justify a Suspension or Revocation. In making this determination, the Subcommittee shall have access to Respondent's prior Disciplinary Record.

4. Approve an Agreed Disposition. Approve an Agreed Disposition imposing one of the following conditions or sanctions:

   a. Admonition, with or without Terms; or

   b. Private Reprimand, with or without Terms; or

   c. Public Reprimand, with or without Terms.

5. Set the Complaint for Hearing before the District Committee. In making this determination, the Subcommittee shall have access to Respondent's prior Disciplinary Record.

C. Vote Required for Action. All actions taken by Subcommittees, except for approval of Agreed Dispositions, shall be by majority vote.

D. Report of the Subcommittee. All decisions of the Subcommittee shall be reported to the District Committee in a timely fashion.

E. Notice of Action of the Subcommittee. If a Subcommittee has dismissed the Complaint, the Chair shall promptly provide written notice to the Complainant, the Respondent and Bar Counsel of such Dismissal and the factual and legal basis therefor. If a Subcommittee determines to issue an Admonition with or without Terms, or a Private or Public Reprimand with or without Terms, the Chair shall promptly send the Complainant, the Respondent and Bar Counsel a copy of the Subcommittee's determination. If a Subcommittee elects to certify a Complaint to the Board, the Subcommittee Chair shall promptly mail a copy of the Certification to the Clerk of the Disciplinary System, Bar Counsel, the Respondent and the Complainant.

F. Procedure in All Terms Cases. If a Subcommittee imposes Terms, the Subcommittee shall specify the time period within which compliance with the Terms shall be completed. If Terms have been imposed against a Respondent, that Respondent shall deliver a certification of compliance with such Terms to Bar Counsel within the time period specified by the Subcommittee. If a Subcommittee issues an Admonition with Terms, a Private Reprimand with Terms, or a Public Reprimand with Terms based on an Agreed Disposition, the Agreed Disposition shall specify the alternative disposition to be imposed if the Terms are not complied with or if the Respondent does not certify compliance with Terms to Bar Counsel. If the Respondent does not comply with the Terms imposed or does not certify compliance with Terms to Bar Counsel within the

time period specified, Bar Counsel shall serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding shall be set for hearing before the District Committee at its next available hearing date as determined in the discretion of the District Committee Chair. The burden of proof shall be on the Respondent to show timely compliance and timely certification by clear and convincing evidence. If the District Committee determines that the Respondent failed to comply with the Terms or failed to certify compliance within the stated time period, the alternative disposition shall be imposed. Bar Counsel shall be responsible for monitoring compliance with Terms and reporting any noncompliance to the District Committee.

G. Alternative Disposition for Public Reprimand with Terms. The alternative disposition for a Public Reprimand with Terms shall be a Certification For Sanction Determination unless the Respondent has entered into an Agreed Disposition for the imposition of an alternative disposition of a specific period of Suspension of License.

* * * * * * * * *

13-16 District Committee Proceedings

A. Charge of Misconduct. If the Subcommittee determines that a hearing should be held before a District Committee, Bar Counsel shall, at least 42 days prior to the date fixed for the hearing, serve upon the Respondent by certified mail the Charge of Misconduct, a copy of the Investigative Report considered by the Subcommittee and any exculpatory materials in the possession of Bar Counsel.

B. Response by Respondent Required. After the Respondent has been served with the Charge of Misconduct, the Respondent shall, within 21 days after service of the Charge of Misconduct:

1. File an answer to the Charge of Misconduct, which answer shall be deemed consent to the jurisdiction of the District Committee; or
2. File an answer to the Charge of Misconduct and a demand with the Clerk of the Disciplinary System that the proceedings before the District Committee be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing not less than 30 nor more than 120 days from the date of the demand. Upon such demand and provision of available dates as specified above, further proceedings before the District Committee shall terminate, and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall

be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held.

C. Failure of Respondent to Respond. If the Respondent fails to file an answer, or an answer and a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the District Committee.

D. Pre-Hearing Orders. The Chair may, *sua sponte* or upon motion of the Respondent or Bar Counsel, enter such pre-hearing order as is necessary for the orderly conduct of the hearing before the District Committee. Such order may establish time limits and:

1. Direct Bar Counsel and Respondent to provide to each other, with a copy to the Chair, a list of and copies of all exhibits proposed to be introduced at the Misconduct stage of the hearing;
2. Encourage Bar Counsel and Respondent to confer and discuss stipulations; and
3. Direct Bar Counsel and Respondent to serve on each other, with a copy to the Chair, lists setting forth the name of each witness the party intends to call.

E. Subpoenae, Summonses and Counsel. The Respondent may be represented by counsel. The Respondent may request Bar Counsel or the Chair of the District Committee to issue summonses or subpoenae for witnesses and documents. Requests for summonses and subpoenae shall be granted, unless, in the judgment of the Chair of the District Committee, such request is unreasonable. Either Bar Counsel or Respondent may move the District Committee to quash such summonses or subpoenae.

F. Continuances. Once a District Committee has scheduled a hearing, no continuance shall be granted unless in the judgment of the Chair the continuance is necessary to prevent injustice.

G. Public Hearings. District Committee hearings, except deliberations, shall be open to the public.

H. Public Docket. The Clerk's Office shall maintain a public docket of all matters set for hearing before a District Committee or certified to the Board. For every matter before a District Committee for which a Charge of Misconduct has been mailed by the Office of the Bar Counsel, the Clerk shall place it on the docket 21 days after the date of the Charge of Misconduct. For every Complaint certified to the Board by a Subcommittee, the Clerk shall place it on the docket on receipt of the statement of the certified charges from the Subcommittee.

I. Oral Testimony and Exhibits. Oral testimony shall be taken and preserved by a Court Reporter. All exhibits or copies thereof received in evidence or marked

refused by the District Committee shall be preserved in the District Committee file on the matter.

J. Opening Remarks by the Chair. After swearing the Court Reporter, who thereafter shall administer oaths or affirmations to witnesses, the Chair shall make opening remarks in the presence of the Respondent and the Complainant, if present. The Chair shall also inquire of the members present whether any member has any personal or financial interest that may affect, or be reasonably perceived to affect, his or her ability to be impartial. Any member answering in the affirmative shall be excused from participation in the matter.

K. Motion to Exclude Witnesses. Witnesses other than the Complainant and the Respondent shall be excluded until excused from a public hearing on motion of Bar Counsel, the Respondent or the District Committee.

L. Presentation of the Bar's Evidence. Bar Counsel or Committee Counsel shall present witnesses and other evidence supporting the Charge of Misconduct. Respondent shall be afforded the opportunity to cross-examine the Bar's witnesses and to challenge any evidence introduced on behalf of the Bar. District Committee members may also examine witnesses offered by Bar Counsel or Committee Counsel.

M. Presentation of the Respondent's Evidence. Respondent shall be afforded the opportunity to present witnesses and other evidence on behalf of Respondent. Bar Counsel or Committee's Counsel shall be afforded the opportunity to cross-examine Respondent's witnesses and to challenge any evidence introduced on behalf of Respondent. District Committee members may also examine witnesses offered on behalf of Respondent.

N. No Participation by Other Counsel. Neither counsel for the Complainant, if there be one, nor counsel for any witness, may examine or cross-examine any witness, introduce any other evidence, or present any argument.

O. Depositions. Depositions may be taken only when witnesses are unavailable, in accordance with Rule 4:7(a)(4) of the Rules of this Court.

P. Testimony by Videoconferencing and Telephone. Testimony by videoconferencing and/or telephonic means may be utilized, if in compliance with the Rules of this Court.

Q. Admissibility of Evidence. The Chair shall rule on the admissibility of evidence, which rulings may be overruled by a majority of the remaining District Committee members participating in the hearing.

R. Motion to Strike. At the conclusion of the Bar's evidence or at the conclusion of all of the evidence, the District Committee on its own motion, or the Respondent or the Respondent's counsel may move to strike the Bar's evidence as to one or

more allegations of Misconduct contained in the Charge of Misconduct. A motion to strike an allegation of Misconduct shall be sustained if the Bar has failed to introduce sufficient evidence that would under any set of circumstances support the conclusion that the Respondent engaged in the alleged Misconduct that is the subject of the motion to strike. If the Chair sustains the motion to strike an allegation of Misconduct, subject to being overruled by a majority of the remaining members of the Committee, that allegation of Misconduct shall be dismissed.

S. Argument. The District Committee shall afford a reasonable opportunity for argument on behalf of the Respondent and Bar Counsel on the allegations of Misconduct.

T. Deliberations. The District Committee members shall deliberate in private on the allegations of Misconduct. After due deliberation and consideration, the District Committee shall vote on the allegations of Misconduct.

U. Change in District Committee Composition. When a hearing has been adjourned for any reason and any of the members initially constituting the quorum for the hearing cannot be present, the hearing of the matter may be completed by furnishing a transcript of the subsequent proceedings conducted in one or more member's absence to any such absent member or members; or substituting another District Committee member for any absent member or members and furnishing a transcript of the prior proceedings in the matter to such substituted member or members.

V. Show Cause for Compliance with Terms. Any show cause proceeding involving the question of compliance with Terms shall be deemed a new hearing and not a continuation of the hearing that resulted in the imposition of Terms.

W. Dismissal. After due deliberation and consideration, the District Committee may dismiss the Charge of Misconduct, or any allegation thereof, as not warranting further action when in the judgment of the District Committee:

1. As a matter of law the conduct questioned or alleged does not constitute Misconduct;
2. The evidence presented shows that the Respondent did not engage in the Misconduct alleged, or there is no credible evidence to support any allegation of Misconduct by Respondent, or the evidence does not reasonably support any allegation of Misconduct under a clear and convincing evidentiary standard;
3. The action alleged to be Misconduct is protected by superseding law; or
4. The District Committee is unable to reach a decision by a majority vote of those constituting the hearing panel, the Charge of Misconduct,

or any allegation thereof, shall be dismissed on the basis that the evidence does not reasonably support the Charge of Misconduct, or one or more allegations thereof, under a clear and convincing evidentiary standard.

X. Sanctions. If the District Committee finds that Misconduct has been shown by clear and convincing evidence, then the District Committee shall, prior to determining the appropriate sanction to be imposed, inquire whether the Respondent has been the subject of any Disciplinary Proceedings in this or any other jurisdiction and shall give Bar Counsel and the Respondent an opportunity to present material evidence in aggravation or mitigation, as well as argument. In determining what disposition of the Charge of Misconduct is warranted, the District Committee shall consider the Respondent's Disciplinary Record. A District Committee may:

1. Conclude that a Dismissal De Minimis should be imposed;
2. Conclude that a Dismissal for Exceptional Circumstances should be imposed;
3. Conclude that an Admonition, with or without Terms, should be imposed;
4. Issue a Public Reprimand, with or without Terms; or
5. Certify the Charge of Misconduct to the Board or file a complaint in a Circuit Court, pursuant to Va. Code § 54.1-3935.

Y. District Committee Determinations. If the District Committee finds that the evidence shows the Respondent engaged in Misconduct by clear and convincing evidence, then the Chair shall issue the District Committee's Determination, in writing, setting forth the following:

1. Brief findings of the facts established by the evidence;
2. The nature of the Misconduct shown by the facts so established, including the Disciplinary Rules violated by the Respondent; and
3. The sanctions imposed, if any, by the District Committee.

Z. Notices. If the District Committee:

1. Issues a Dismissal, the Chair shall promptly provide written notice to the Complainant, the Respondent and Bar Counsel of such Dismissal and the factual and legal basis therefor.
2. Issues a Public Reprimand, with or without Terms; an Admonition, with or without Terms; a Dismissal De Minimis; or a Dismissal for Exceptional Circumstances, the Chair shall promptly send the Complainant, the Respondent and Bar Counsel a copy of the District Committee's Determination.

3. Finds that the Respondent failed to comply with the Terms imposed by the District Committee, the Chair shall notify the Complainant, the Respondent and Bar Counsel of the imposition of the alternative disposition.

4. Has elected to certify the Complaint, the Chair of the District Committee shall promptly mail to the Clerk of the Disciplinary System a copy of the Certification. A copy of the Certification shall be sent to Bar Counsel, Respondent and the Complainant.

AA. District Committee Determination Finality and Public Statement. Upon the expiration of the ten-day period after service on the Respondent of a District Committee Determination, if either a notice of appeal or a notice of appeal and a written demand that further Proceedings be conducted before a three-judge Circuit Court pursuant to Va. Code § 54.1-3935 has not been filed by the Respondent, the District Committee Determination shall become final, and the Clerk of the Disciplinary System shall issue a public statement as provided for in this Paragraph for the dissemination of public disciplinary information.

BB. Enforcement of Terms. In all cases where Terms are included in the disposition, the District Committee shall specify the time period within which compliance shall be completed and, if required, the time period within which the Respondent shall deliver a written certification of compliance to Bar Counsel. The District Committee shall specify the alternative disposition if the Terms are not complied with or, if required, compliance is not certified to Bar Counsel. Bar Counsel shall be responsible for monitoring compliance and reporting any noncompliance to the District Committee. Whenever it appears that the Respondent has not complied with the Terms imposed, including written certification of compliance if required, Bar Counsel shall serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding shall be set for hearing before the District Committee at its next available hearing date as determined in the discretion of the District Committee Chair. The burden of proof shall be on the Respondent to show compliance by clear and convincing evidence. If the Respondent has failed to comply with the Terms, including written certification of compliance if required, within the stated time period as determined by the District Committee, the alternative disposition shall be imposed. Any show cause proceeding involving the question of compliance shall be deemed a new matter and not a continuation of the matter that resulted in the imposition of Terms.

CC. Alternative Disposition and Procedure for Public Reprimand with Terms. The alternative disposition for a Public Reprimand with Terms shall be a Certification for Sanction Determination. Upon a decision to issue a Certification for Sanction Determination, Bar Counsel shall order the transcript of the show cause hearing and file it and a true copy of the Public Reprimand with Terms determination with the Clerk of the Disciplinary System.

DD. Reconsideration of Action by the District Committee.

1. A Charge of Misconduct dismissed by a District Committee may be reconsidered only upon:

   (a) A finding by a majority vote of the Panel that heard the matter originally that material evidence not known or available when the matter was originally presented has been discovered; or

   (b) A unanimous vote of the Panel that heard the matter originally.

2. No action by a District Committee imposing a sanction or certifying a matter to the Board shall be reconsidered unless a majority of the Panel that heard the matter votes to reconsider the sanction.

3. No member shall vote to reconsider a District Committee action unless it appears to such member that reconsideration is necessary to prevent an injustice or warranted by specific exceptional circumstances militating against adherence to the initial action of the District Committee.

4. District Committee members may be polled on the issue of whether to reconsider an earlier District Committee action.

5. Any reconsideration of an earlier District Committee action must occur at a District Committee meeting, whether in person or by any means of communication which allows all members participating to simultaneously hear each other.

* * * * * * * * *

13-18 Board Proceedings Upon Certification

A. Filing by Respondent. After a Subcommittee or District Committee certifies a matter to the Board, and the Respondent has been served with the Certification, the Respondent shall, within 21 days after service of the Certification:

   1. File an answer to the Certification with the Clerk of the Disciplinary System, which answer shall be deemed consent to the jurisdiction of the Board; or file an answer to the Certification and a demand with the Clerk of the Disciplinary System that the proceedings before the Board be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing not less than 30 nor more than 120 days from the date of the demand.

   2. Upon such demand and provision of available dates as specified above, further proceedings before the Board shall terminate, and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held.

B. No Filing by Respondent. If the Respondent fails to file an answer, or an answer and a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

C. Notice of Hearing. The Board shall set a date, time, and place for the hearing, and shall serve notice of such hearing upon the Respondent at least 21 days prior to the date fixed for the hearing.

D. Expedited Hearings.

1. If Bar Counsel or a District Committee Chair has reasonable cause to believe that an Attorney is engaging in Misconduct which is likely to result in injury to, or loss of property of, one or more of the Attorney's clients or any other person, and that the continued practice of law by the Attorney poses an imminent danger to the public, Bar Counsel or the District Committee Chair may petition the Board to issue an order requiring the Attorney to appear before the Board for a hearing in accordance with the procedures set forth below.

2. The petition shall be under oath and shall set forth the nature of the alleged Misconduct, the factual basis for the belief that immediate action by the Board is reasonable and necessary and any other facts which may be relevant to the Board's consideration of the matter, including any prior Disciplinary Record of the Attorney.

3. Upon receipt of the petition, the Chair or Vice-Chair of the Board shall issue an order requiring the Respondent to appear before the Board not less than 14 nor more than 30 days from the date of the order for a hearing to determine whether the Misconduct has occurred and the imposition of sanctions is appropriate. The Board's order shall be served on the Respondent no fewer than ten days prior to the date set for hearing.

4. If the Respondent, at the time the petition is received by the Board, is the subject of an order then in effect by a Circuit Court pursuant to Va. Code § 54.1-3936 appointing a receiver for his accounts, the Board shall issue a further order summarily suspending the License of the Respondent until the Board enters its order following the expedited hearing.

5. At least five days prior to the date set for hearing, the Respondent shall either file an answer to the petition with the Clerk of the Disciplinary System, which answer shall be conclusively deemed consent to the jurisdiction of the Board; or file an answer and a demand with the Clerk of the Disciplinary System that proceedings before the Board be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing not less than 30 days nor more than 120 days from the date of the Board order. Upon such demand

and provision of available dates as specified above, further proceedings before the Board shall be terminated and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held. If any order of summary Suspension has been entered, such Suspension shall remain in effect until the court designated under Va. Code § 54.1-3935 enters a final order disposing of the issue before it. If the Respondent fails to file an answer, or an answer and a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

E. Pre-Hearing Orders. The Chair may, *sua sponte* or upon motion of the Respondent or Bar Counsel, enter such pre-hearing order as is necessary for the orderly conduct of the hearing before the Board in Misconduct cases. Such order may establish time limits and:

1. Direct Bar Counsel and the Respondent to provide to each other, with a copy to the Clerk of the Disciplinary System, a list of and copies of all exhibits proposed to be introduced at the Misconduct stage of the hearing;
2. Encourage Bar Counsel and the Respondent to confer and discuss stipulations; and
3. Direct Bar Counsel and the Respondent to provide to each other, with a copy to the Clerk of the Disciplinary System, lists setting forth the name of each witness the party intends to call.

F. Continuance of a Hearing. Absent exceptional circumstances, once the Board has scheduled a hearing, no continuance shall be granted unless, in the judgment of the Chair, the continuance is necessary to prevent injustice. No continuance will be granted because of a conflict with the schedule of the Respondent or the Respondent's counsel unless such continuance is requested in writing by the Respondent or the Respondent's counsel within 14 days after mailing of a notice of hearing. Any request for a continuance shall be filed with the Clerk of the Disciplinary System.

G. Preliminary Explanation. The Chair shall state in the presence of the Respondent and the Complainant, if present, a summary of the alleged Misconduct, the nature and purpose of the hearing, the procedures to be followed during the hearing, and the dispositions available to the Board following the hearing. The Chair shall also inquire of the members present whether any member has any personal or financial interest that may affect, or be reasonably perceived to affect, his or her ability to be impartial. Any member answering in the affirmative shall be excused from participation in the matter.

H. Attendance at Hearing. Witnesses other than the Complainant and the Respondent shall be excluded until excused from a public hearing on motion of Bar Counsel, the Respondent or the Board.

I. Order of Hearing.

1. Brief opening statements by Bar Counsel and by the Respondent or the Respondent's counsel shall be permitted but are not required.
2. Bar Counsel shall present witnesses and other evidence supporting the Certification. The Respondent shall be afforded the opportunity to cross-examine the Bar's witnesses and to challenge any evidence introduced on behalf of the Bar. Board members may also examine witnesses offered by Bar Counsel.
3. Respondent shall be afforded the opportunity to present witnesses and other evidence. Bar Counsel shall be afforded the opportunity to cross-examine Respondent's witnesses and to challenge any evidence introduced on behalf of Respondent. Board members may also examine witnesses offered on behalf of a Respondent.
4. Bar Counsel may rebut the Respondent's evidence.
5. Bar Counsel may make the initial closing argument.
6. The Respondent or the Respondent's counsel may then make a closing argument.
7. Bar Counsel may then make a rebuttal closing argument.

J. Motion to Strike. At the conclusion of the Bar's evidence or at the conclusion of all the evidence, the Board on its own motion, or the Respondent or the Respondent's counsel may move to strike the Bar's evidence as to one or more allegations of Misconduct contained in the Certification. A motion to strike an allegation of Misconduct shall be sustained if the Bar has failed to introduce sufficient evidence that would under any set of circumstances support the conclusion that the Respondent engaged in the alleged Misconduct that is the subject of the motion to strike. If the Chair sustains the motion to strike an allegation of Misconduct, subject to being overruled by a majority of the remaining members of the Board, that allegation of Misconduct shall be dismissed from the Certification.

K. Deliberations. As soon as practicable after the conclusion of the evidence and arguments as to the issue of Misconduct, the Board shall deliberate in private. If the Board finds by clear and convincing evidence that the Respondent has engaged in Misconduct, the Board shall, prior to determining the appropriate sanction to be imposed, inquire whether the Respondent has been the subject of any Disciplinary Proceeding in this or any other jurisdiction and shall give Bar Counsel and the Respondent an opportunity to present material evidence and arguments in aggravation or mitigation. The Board shall deliberate in private on the issue of sanctions. The Board may address any legal questions to the Office of the Attorney General.

L. Dismissal for Failure of the Evidence. If the Board concludes that the evidence fails to show under a clear and convincing evidentiary standard that the Respondent engaged in the Misconduct, the Board shall dismiss any allegation of Misconduct not so proven.

M. Disposition Upon a Finding of Misconduct. If the Board concludes that there has been presented clear and convincing evidence that the Respondent has engaged in Misconduct, after considering evidence and arguments in aggravation and mitigation, the Board shall impose one of the following sanctions and state the effective date of the sanction imposed:

1. Admonition, with or without Terms;
2. Public Reprimand, with or without Terms;
3. Suspension of the License of the Respondent;
    a. For a stated period not exceeding five years; provided, however, if the Suspension is for more than one year, the Respondent must apply for Reinstatement as provided in this Paragraph; or
    b. For a stated period of one year or less, with or without terms; or
4. Revocation of the Respondent's License.

N. Dismissal for Failure to Reach a Majority Decision. If the Board is unable to reach a decision by a majority vote of those constituting the hearing panel, the Certification, or any allegation thereof, shall be dismissed on the basis that the evidence does not reasonably support the Certification, or one or more allegations thereof, under a clear and convincing evidentiary standard.

O. Enforcement of Terms. In all cases where Terms are included in the disposition, the Board shall specify the time period within which compliance shall be completed and, if required, the time period within which the Respondent shall deliver a written certification of compliance to Bar Counsel. The Board shall specify the alternative disposition if the Terms are not complied with or, if required, compliance is not certified to Bar Counsel. Bar Counsel shall be responsible for monitoring compliance and reporting any noncompliance to the Board. Whenever it appears that the Respondent has not complied with the Terms imposed, including written certification of compliance if required, Bar Counsel shall serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding shall be set for hearing before the Board at its next available hearing date. The burden of proof shall be on the Respondent to show compliance by clear and convincing evidence. If the Respondent has failed to comply with the Terms, including written certification of compliance if required, within the stated time period, as determined by the Board, the alternative disposition shall be imposed. Any show cause proceeding involving the question of compliance shall be

deemed a new matter and not a continuation of the matter that resulted in the imposition of Terms.

P. Orders, Findings and Opinions. Upon disposition of a matter, the Board shall issue the Summary Order. Thereafter, the Board shall issue the Memorandum Order. A Board member shall prepare the Summary Order and Memorandum Order for the signature of the Chair or the Chair's designee. Dissenting opinions may be filed.

Q. Change in Composition of Board Hearing Panel. Whenever a hearing has been adjourned for any reason and one or more of the members initially constituting the quorum for the hearing are unable to be present, the hearing of the matter may be completed by furnishing a transcript of the subsequent proceedings conducted in one or more member's absence to such absent member, or substituting another Board member for any absent member and furnishing a transcript of the prior proceedings in the matter to such substituted member(s).

R. Reconsideration of Board Action. No motion for reconsideration or modification of the Board's decision shall be considered unless it is filed with the Clerk of the Disciplinary System within 10 days after the hearing before the Board. The moving party shall file an original and six copies of both the motion and all supporting exhibits with the Clerk of the Disciplinary System. Such motion shall be granted only to prevent manifest injustice upon the ground of:

1. Illness, injury or accident which prevented the Respondent or a witness from attending the hearing and which could not have been made known to the Board within a reasonable time prior to the hearing; or
2. Evidence which was not known to the Respondent at the time of the hearing and could not have been discovered prior to, or produced at, the hearing in the exercise of due diligence and would have clearly produced a different result if the evidence had been introduced at the hearing.
3. If such a motion is timely filed, the Clerk of the Disciplinary System shall promptly forward copies to each member of the hearing panel. The panel may deny the motion without response from Bar Counsel. No relief shall be granted without allowing Bar Counsel an opportunity to oppose the motion in writing. If no relief is granted, the Board shall enter its order disposing of the case.

* * * * * * * * *

13-26 Appeal From Board Determinations

A. Right of Appeal. As a matter of right any Respondent may appeal to this Court from an order of Admonition, Public Reprimand, Suspension, or Disbarment imposed by the Board using the procedures outlined in Rule 5:21(b) of the

Rules of the Supreme Court of Virginia. An appeal shall lie once the Memorandum Order described in this Paragraph has been served on the Respondent. No appeal shall lie from a Summary Order. If a Respondent appeals to the Supreme Court, then the Bar may file assignments of cross-error pursuant to Rule 5:28 of the Rules of the Supreme Court of Virginia.

B. Determination. This Court shall hear the case and make such determination in connection therewith as it shall deem right and proper.

C. Office of the Attorney General. In all appeals to this Court, the Office of the Attorney General, or the Bar Counsel, if so requested by the Attorney General, shall represent the interests of the Commonwealth and its citizens as appellees.

* * * * * * * * *

Virginia State Bar
1111 East Main Street, Suite 700
Richmond Virginia 23719-0076
Telephone: (804) 775-0600

Fax: (804) 775-0597 TDD: (804) 775-0500

December 6, 2017

PERSONAL AND CONFIDENTIAL

[redacted]

Re: In the Matter of [redacted]
VSB Docket No. [redacted]

Dear [redacted]:

I enclose a copy of a complaint made against you alleging ethical misconduct. The Rules of the Supreme Court of Virginia authorize bar counsel to investigate and prosecute complaints of attorney misconduct.

The bar is conducting a preliminary investigation to determine whether this complaint should be dismissed or referred to a district committee for a more detailed investigation. Pursuant to Virginia Rule of Professional Conduct 8.1(c), you have a duty to comply with the bar's lawful demands for information not protected from disclosure by Rule 1.6, which governs confidentiality of information. The bar requests that you submit a written answer to the complaint within 21 days of the date of this letter.[1] Please provide the original and one copy of your signed answer and any exhibits. You should redact all personal identifying information such as social security numbers, dates of birth, or driver's license numbers from all exhibits. Any exhibits provided should be copies, and you should preserve your original documents since you may need them later as evidence.

In addition to your answer, you may submit a written objection within 21 days of the date of this letter identifying any privileged information responsive to the complaint that you are withholding and stating why you believe Rule 1.6 protects the withheld information from disclosure. Note that Rule 1.6(b)(2) permits a lawyer to reveal otherwise privileged information in responding to allegations in any proceeding concerning the lawyer's representation of the client. Your answer and any objections you make may be used by the bar to prove any allegations of misconduct.

[1] This request constitutes a lawful demand for information from a disciplinary authority pursuant to Rule 8.1(c) of the Virginia Rules of Professional Conduct.

[redacted]
Page 2

Failure to respond in a timely manner to this and other lawful demands from the bar for information about the complaint may result in the imposition of disciplinary sanctions. If you fail to submit a written answer within 21 days, the bar will refer the complaint to the district committee for further investigation.

As part of the preliminary investigation, the bar may send your answer to the complainant for review and comment.

Volume 11 of the Code of Virginia (1950, as amended) sets out the Procedure for Disciplining, Suspending and Disbarring Attorneys and the Rules of Professional Conduct. The procedure and rules are also available on the Virginia State Bar's website at www.vsb.org. If you have questions about the disciplinary process or procedure, you or your attorney may contact me.

The bar is aware that the complaint is merely one side of the dispute, and it is important that we have a full understanding of all relevant facts. I will review your response and advise regarding what action, if any, the bar intends to take.

Thank you for your anticipated cooperation.

Very truly yours,

Edward James Dillon, Jr.
Senior Assistant Bar Counsel

EJDjr:jaj

Enclosure: Complaint

Virginia State Bar
1111 East Main Street, Suite 700
Richmond, Virginia 23219-0026
Telephone: (804) 775-0500
Facsimile:(804) 775-0597 TDD (804) 775-0502

February 1, 2018

PERSONAL AND CONFIDENTIAL

Travis Jarrett Graham, Esquire
Gentry, Locke, Rakes & Moore
P. O. Box 40013
Roanoke, VA 24022

Re: In the Matter of [redacted]
VSB Docket No. [redacted]

Dear Mr. Graham:

This complaint has been referred to the Tenth District for a more detailed investigation. A Virginia State Bar investigator may contact you during the investigation.

Pursuant to Rule of Professional Conduct 8.1(c), there is a duty to comply with the bar's lawful demands for information not protected from disclosure by Rule 1.6. An investigator's demands for information constitute lawful demands under Rule 8.1(c). Failure to comply with a bar investigator's demands for information in a timely manner may result in the imposition of disciplinary sanctions. If allegations of rule violations result from the complaint, information provided to the investigator may be used to prove the misconduct. At the conclusion of the investigation, the bar will advise of the committee's findings and decision.

If you have any questions, please contact me.

Very truly yours,

Edward James Dillon, Jr.
Senior Assistant Bar Counsel

EJDjr:jaj

cc: Roland C. Munique, Chair

A3

From: Baker, Robert [mailto:baker@vsb.org]
Sent: Tuesday, July 17, 2018 1:16 PM
To: Graham, Travis J.
Cc: Baker, Robert
Subject: RE: VSB Docket No. [redacted]

Mr. Graham,

Sounds good and I appreciate your help. Please let me know if the firm's files are problematic for [redacted]. If need be, I can speak to bar counsel about obtaining them by other means.

Sincerely,
Rob Baker

From: Graham, Travis J. [mailto:Graham@gentrylocke.com]
Sent: Tuesday, July 17, 2018 2:21 PM
To: Baker, Robert
Subject: RE: VSB Docket No. [redacted]

Mr. Baker,

I expect I will hear from him even though he is away, but I have no idea what time zone he is in. I will follow up and get the answer.

The amount of the fees at issue ($13,000) is not in dispute, and [redacted] acknowledges taking the fees and giving them to the firm. Actually, the firm itself was the fiduciary for the estate, and so technically it took the fees itself. I think the question is simply whether the fees were earned or not. Does that affect which documents you will have to look at?

GENTRY LOCKE Attorneys
web | bio | map
Travis J. Graham
Direct: 540.983.9420

From: Baker, Robert [mailto:baker@vsb.org]
Sent: Tuesday, July 17, 2018 2:29 PM
To: Graham, Travis J.
Cc: Baker, Robert
Subject: RE: VSB Docket No. [redacted]

Mr. Graham,

It does not because I am looking at more than the $13,000 you or [redacted] claim is at issue.

Sincerely,
Rob Baker

From: Graham, Travis J. [mailto:Graham@gentrylocke.com]
Sent: Tuesday, July 17, 2018 5:23 PM
To: Baker, Robert
Subject: RE: VSB Docket No. [redacted]

Mr. Baker,

We are only aware of the matters set out in Mr. Dillon's December 6, 2017 letter and its attachments, all of which relate to the dispute over the $13,000 fee.

If there are other matters being investigated, can you let me know what those are?

Thanks

GENTRY LOCKE Attorneys

web | bio | map
Travis J. Graham
Direct: 540.983.9420

From: Baker, Robert [mailto:baker@vsb.org]
Sent: Tuesday, July 17, 2018 5:48 PM
To: Graham, Travis J.
Cc: Baker, Robert
Subject: RE: VSB Docket No. [redacted]

Mr. Graham,

Based on what I've read to date, the complaint involves a payment [redacted] made to himself and his firm in the amount of $17,956.^{00}. The information suggests the possibility of multiple violations of the Virginia Rules of Professional Conduct. I have been asked to look into the matter and, as part of my duties, I plan to do so by reviewing all of the financial transactions related to the representation of [redacted] and the Estate. This, along with other investigative strategies, will hopefully allow me to gather the facts necessary for the subcommittee to make a determination on the matter. I hope that doesn't sound too cryptic or ominous because it is not meant to be.

Sincerely,
Rob Baker

ETHICS:

Whistleblower Ethics

Issues and Examples from *United States ex rel. Thomas v. Duke University, et al.*

Matthew W. Broughton

J. Scott Sexton

Gregory J. Haley

Michael J. Finney

Andrew M. Bowman

Whistleblower Ethics:

Issues and Examples from *United States ex rel. Thomas v. Duke University, et al.*

Gentry Locke Seminar
Hotel Roanoke Conference Center Friday, September 6, 2019

Matthew W. Broughton, J. Scott Sexton, Gregory J. Haley
Michael J. Finney, Andrew M. Bowman

I. Introduction

The False Claims Act ("FCA"), 31 U.S.C. §§ 3729, *et seq.*, is federal statutory scheme designed to prevent fraud on the federal Government. This once obscure area of the law dates back to the Civil War, when the FCA was passed during Abraham Lincoln's presidency to combat fraud in the Union Army. Recent amendments to the FCA contained in the Fraud Enforcement and Recovery Act of 2009 (123 Stat. 1617) and Patient Protection and Affordable Care Act of 2010 (124 Stat. 119) have breathed new life into Lincoln's Law—particularly, in the health care and defense sectors.

This outline will specifically address a lawyer's ethical duties when representing FCA whistleblowers. Many of these issues arose in the *United States ex rel. Thomas v. Duke University, et al.* litigation, which will be used as the prism to examine these topics.

The *Duke* case involved allegations that Duke University utilized false research results to obtain federal research grant funding from the National Institutes of Health ("NIH") and Environmental Protection Agency ("EPA"). The research focused on pulmonary biology and immunology—*i.e.*, asthma, allergens, infections, and potential treatments—involving the *flexi*Vent and multiplex experiments on mice. The *flexi*Vent measures the mechanical properties of the lung, and it enables researchers to quantify the impact of environmental pollutants, such as ozone or diesel exhaust, or the severity of pulmonary diseases, such as asthma, COPD, and emphysema. The multiplex measures indices of inflammation, and it enables researchers to quantify how the lung responds to allergens, such as dust mites, and infections, such as *pneumonia*.

The *Duke* Amended Complaint alleged that a research technician in Duke's Pulmonary Division falsified (*i.e.* altered the data) or fabricated (*i.e.*, made up) research results. Duke researchers allegedly reported those fake research results in federal grants submitted to the NIH and EPA, and published the fake research results in the nation's leading scientific research journals, which Duke researchers then used to obtain more federal grant funding.

In March 2013, the research technician was arrested for embezzling money from Duke, and Duke administration became aware of the research fraud she perpetuated shortly thereafter. Another Duke employee, Joseph Thomas, witnessed the fallout first hand, as he worked as a research technician for the Chief of Duke's Pulmonary Division. Thomas contacted his brother John, an attorney formerly with Gentry Locke (now with Hafemann Magee Thomas), and on May 17, 2013, he filed a lawsuit pursuant to the FCA's *qui tam* provision.

Thomas continued to work at Duke while the case was under seal. Thomas described the Spring of 2013 as "a chaotic and stressful time" in Duke's Pulmonary Division, where the research technician's embezzlement and potential data fraud was "an all-consuming issue." Duke researchers were "panicked," and "there was a great deal of discussion, speculation, and rumor about what had happened." Thomas carried on his regular job responsibilities, which included performing experiments, attending laboratory meetings, and conversing with co-workers. He kept notes of relevant events, including things he saw or heard about the potential data fraud, until he resigned in October 2014.

After the Government investigated for three years, the *Duke* case was unsealed in June 2016, and it was transferred to the Middle District of North Carolina in March 2017. The litigation that followed presented both legal and practical challenges. Legally, the case involved nuanced issues of FCA law, some of which are discussed below. Logistically, the vast scope of the data fraud necessitated analysis of dozens of federal research grants and scientific publications, as well as taking 53 depositions, retaining 10 expert witnesses (in five states and Canada), and reviewing over 2 million pages of documents. The case ultimately settled in March 2019.

II. Ethical Obligations When Your Client is on the Inside.

A. Overview

1. The FCA contains a *qui tam* provision permitting a private person—the whistleblower or relator—to file FCA claims on behalf of the Government. *See* 31 U.S.C. § 3730(b)(1). The defendant is often the whistleblower's employer. The FCA complaint is filed *in camera* and under seal. *See* 31 U.S.C. § 3730(b)(2). The whistleblower-employee faces court-imposed sanctions if he discloses even the mere existence of the FCA lawsuit, in violation of the seal. *See United States ex rel. Windsor v. Dyncorp, Inc.*, 895 F. Supp. 844 (E.D. Va. 1995). Accordingly, the defendant-employer does not know of the whistleblower's existence or even the pending FCA suit.

2. These situations present two countervailing considerations:

   a. The whistleblower's rights under the FCA; and

   b. The whistleblower's lawyer's ethical obligations to represented, unrepresented, and third parties.

B. Whistleblower's FCA Rights.

1. The FCA contemplates the whistleblower will continue work for his employer, against whom the FCA lawsuit was filed.

2. The defendant-employer is precluded from retaliating in any way against the whistleblower-employee. *See* 31 U.S.C. § 3730(h)(1).

3. In the ordinary course of business, the whistleblower may have access to documents, take part in meetings, or overhear conversations relating to the subject matter of the sealed FCA case. Having this insider information is often a predicate for being a successful relator.

    a. If the fraud is disclosed in a federal criminal, civil, or administrative hearing; government report, hearing, audit, or investigation; or from the news media—then the court may dismiss the action due to a "public disclosure." *See* 31 U.S.C. § 3730(e)(4)(A).

    b. To be the "original source" of the information, the whistleblower must (i) voluntarily disclosed the fraud to the Government prior to it becoming public; or (ii) have knowledge that is independent of what is publicly available. *See* 31 U.S.C. § 3730(e)(4)(B).

C. **The whistleblower attorney's ethical obligations.**

1. **Virginia Rule 8.1(a): Misconduct.**

    "It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

2. The lawyer cannot instruct, assist, or induce the client to engage in conduct that would violate the Rules of Professional Conduct if done by the lawyer.

3. Actions taken by the client himself or herself—not at the direction of counsel—do not implicate Rule 8.1(a) and are not prohibited. The client may convey to counsel information obtained of his own accord.

    a. *United States ex rel. Thomas v. Duke University*, No. 1:17-cv-276, 2018 U.S. Dist. LEXIS 150000, at *11 (M.D.N.C. Sept. 4, 2018).

    b. *Tucker v. Norfolk & W. Ry.*, 849 F. Supp. 1096, 1098 (E.D. Va. 1994) (holding the predecessor to Rule 8.1 "does not prohibit, even after the commencement of an action, a party from interviewing those individuals with whom the lawyer cannot communicate under" the rule).

    c. *Miano v. AC & R Advert., Inc.*, 148 F.R.D. 68, 87–89 (S.D.N.Y 1993) (finding no ethical violation where plaintiff taped conversations with defendant's employees and discussed these conversations with his attorney because the attorney did not "suggest, plan or supervise" what his client did and mere knowledge of his client's

activity and receipt of information was not sufficient to show the attorney "caused" his client's behavior).

d. *Mathis v. Leggett & Platt*, No. 1:04-cv-3703, 2006 U.S. Dist. LEXIS 103035, at *6 (N.D. Ga. Apr. 5, 2006) (finding no ethical violation where there was "no evidence indicating that Plaintiff's counsel prompted, directed, or caused" his client to ask defendant's employee to confirm if her signature on a document was authentic).

4. There is a fine line between advising a whistleblower client what actions he is lawfully entitled to take, and instructing him to gather information as the lawyer's agent.

D. **Ethical obligations when the employer is represented by counsel.**

1. The discovery of governmental fraud is a chaotic time—the employer's inside counsel or outside counsel are often involved. The Department of Justice and/or the local United States Attorneys' Office usually issue Civil Investigative Demands ("CIDs") within a few weeks/months of the filing of the sealed FCA complaint. Each CID expressly states its purpose—*i.e.*, to investigate possible FCA violations. This inevitably triggers outside involvement by outside counsel.

2. **Virginia Rule 4.2: Communications with Represented Persons**

"In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

3. Rule 4.2 requires two essential inquiries: (1) whether the person or entity is represented; and (2) whether the communication concerns the subject of the representation.

4. Rule 4.2 does not prohibit the attorney or the client from communicating with a represented party concerning matters outside the scope of the representation. *See* Comment 4 to Rule 4.2.

5. FCA defendants are often corporate entities, and parsing out which employees are, or are not, "represented parties" under Rule 4.2 requires analysis under Comment 7.

a. Virginia adheres to the "control group" analysis.

b. Virginia has rejected the holding of *Upjohn v. United States*, 449 U.S. 383 (1981).

6. **Comment 7 to Virginia Rule 4.2**

> "In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's 'control group' as defined in *Upjohn v. United States*, 449 U.S. 383 (1981) or persons who may be regarded as the 'alter ego' of the organization. The 'control group' test prohibits *ex parte* communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law."

7. An employee is a represented party if a member of the "control group"—*i.e.*, if the employee occupies a position within the corporation such that they have authority to act, make decisions, or speak on behalf of the corporation which would lead one to believe that the employees are the alter-ego of the corporation.

   a. Control Group: officers, directors, senior management or administration, etc.

   b. Non-Control Group: low level employees, mid-level managers.

8. It is improper for an attorney to contact—or direct their client to contact—a member of the defendant's "control group" concerning the subject matter of the pending litigation. *See* Legal Ethics Opinion 801. This prohibition applies where the pending FCA case is under seal.

9. It is not improper for an attorney to communicate with a non-control group employee of defendant. *See* Legal Ethics Opinion 905.

10. **Caution:** Virginia's Rules of Professional Conduct relating to communications with represented organizations are ***different*** from the ABA Model Rules and those of many other states.

    a. **Comment 7 to ABA Model Rule 4.2**

    > "In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

b. **Comment 9 to North Carolina Rule 4.2**

"In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. It also prohibits communications with any constituent of the organization, regardless of position or level of authority, who is participating or participated substantially in the legal representation of the organization in a particular matter."

c. If the organization or conduct spans across multiple states, check choice of law provisions.

i. *Duke* Example: The FCA Complaint was originally filed in the Western District of Virginia, Danville Division (a proper venue), but Duke is located in North Carolina.

ii. **Virginia Rule 8.5(b): Choice of Law**

"In any exercise of the disciplinary authority of Virginia, the rules of professional conduct to be applied shall be as follows:

(1) ***for conduct in connection with a proceeding in a court***, agency, or other tribunal before which a lawyer appears, the rules to be applied shall be the rules of the jurisdiction in which the court, agency, or other tribunal sits, unless the rules of the court, agency, or other tribunal provide otherwise.

(2) ***for any other conduct***, the rules of the jurisdiction in which the lawyer's conduct occurred; and

(3) notwithstanding subparagraphs (b)(1) and (b)(2), for conduct in the course of providing, holding out as providing, or offering to provide legal services in Virginia, the Virginia Rules of Professional Conduct shall apply." (Emphasis added).

iii. **North Carolina Rule 8.5: Choice of law**

"In any exercise of the disciplinary authority of North Carolina, the rules of professional conduct to be applied shall be as follows:

(1) ***for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits***, unless the rules of the tribunal provide otherwise.

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, ***if the predominant effect of the conduct is in a different jurisdiction***, the rules of that jurisdiction shall be applied to the conduct. A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." (Emphasis added).

E. **Ethical obligations with respect to former employees.**

1. An attorney may communicate with former employees of the defendant, even if that employee was a member of the organization's "control group." *See* Comment 7 to Rule 4.2. The rationale is that, regardless of the employee's former role at the organization, the former employee no longer has authority to speak on behalf of the organization after employment has concluded.

2. The Western District of Virginia has provided the following guidelines for contacting former employees:

   a. Counsel should immediately identify himself or herself as an attorney representing a party adverse to the former employer, and specify the purpose of the contact;

   b. Counsel should determine whether the former employee is associated with the opposing party or is represented by counsel.

      i. If so, the contact must terminate immediately.

   c. Counsel should advise the former employee (i) participation in the interview is not mandatory; and (ii) he or she may choose not to participate.

i. If the former employee does not want to participate, the contact must terminate immediately.

d. Counsel should advise the former employee to avoid disclosure of privileged or confidential corporate materials and should not solicit the same.

i. If it appears the former employee may reveal privileged or confidential materials, the contact must terminate immediately.

e. Counsel should create and preserve a list of all former employees contact, the date(s) of contact, and all statements or notes resulting from such contact.

i. The notes may be subject to *in camera* review by the Court.

See Bryant v. Yorktowne Cabinetry, Inc., 538 F. Supp. 2d 948, 953-54 (W.D. Va. 2008).

F. **Ethical obligations when client collects evidence after filing FCA suit.**

1. The FCA supports strong federal policy interests of the United States. "Congress intended that the False Claims Act and its *qui tam* action would help the government uncover fraud and abuse by unleashing a 'posse of ad hoc deputies to uncover and prosecute frauds against the government.'" *Harrison v. Westinghouse Savannah River Co.* ("*Harrison I*"), 176 F.3d 776, 784 (4th Cir. 1999); *see also United States ex rel. Cieszynski v. LifeWatch Servs.*, 2016 U.S. Dist. LEXIS 68867 *10 (N. Dist. Ill., May 13, 2016) (noting the "public policy that protects whistleblowers from retaliation for actions they take in investigating and reporting fraud to the government").

2. The FCA contemplates that the whistleblower will be in possession or, or obtain, documents from the defendant-employer that evidence fraud on the government. *See United States ex rel. Rector v. Bon Secours Richmond Health Corp.*, No. 3:11-cv-38, 2014 U.S. Dist. LEXIS 1031, at *18 (E.D. Va. Jan. 6, 2014).

a. Courts generally recognize a public policy exception to any confidentiality agreement between the plaintiff- whistleblower and defendant-employer which would otherwise preclude the disclosure of documents or information. *See, e.g.*, *X Corp. v. Doe*, 805 F. Supp. 1298, 1310 (Aug. 15, 1992) (holding, with resect to whistleblower's breach of a confidentiality agreement with defendant-employer, "[t]o the extent it prevented disclosure of

evidence of a fraud on the government, that Agreement would be void as contrary to public policy."); *Siebert v. Gene Sec. Network*, No. 11-cv-1987, 2013 U.S. Dist. LEXIS 149145, at *25 (N.D. Cal. Oct. 16, 2013). *But see United States ex rel. Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1062 (9th Cir. 2011) (declining to adopt public policy exception given the whistleblower's "vast and indiscriminate appropriation" of defendant's files).

b. The FCA "does not permit whistleblowers to have carte blanche to acquire [documents or information] in any way they deem necessary." *Rector*, 2014 U.S. Dist. LEXIS 1031, at *18.

3. When evaluating the propriety of a whistleblower's evidence collection efforts from inside the defendant-employer, courts look to the scope and selection of the documents and information obtained.

a. Vast and indiscriminate appropriation of documents or information is generally prohibited. *See, e.g.*, *id.*, 2014 U.S. Dist. LEXIS 1031, at *19 (noting the prejudice to the defendant where relator took "an indiscriminate amount of data and documents that may contain information not reachable through the discovery process."); *Cafasso*, 637 F.3d at 1062.

4. The lawyer should proceed cautiously when receiving information collected by the whistleblower-client. Given the FCA's sealing procedures, the defendant-employer may not know a lawsuit is pending, and the whistleblower-client may unknowingly provide his counsel with information protected by the employer's attorney-client privilege.

5. **Rule 4.4: Respect for Rights of Third Persons.**

"In representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of such a person."

6. **Documents**

a. **Legal Ethics Opinion 278**

"It is not improper for an attorney to continue to represent a client as plaintiff and to make use of a document in connection with such representation, the acquisition of which document by [a third party] may or may not have been authorized by defendant corporation, so long as the attorney was not a conspirator or an accessory to the illegal or improper obtaining of the evidence."

See also Legal Ethics Opinion 1141.

b. Documents a relator independently prepares does not run afoul of the rule. *See generally In re Examination of Privilege Claims*, 2016 U.S. Dist. LEXIS 186340, *15-16, 20-21 (W.D. Wash. May 20, 2016).

7. **Tape Recordings**

a. Virginia originally implemented a *per se* ban on a attorneys' involvement with the tape recording of conversations. *See, e.g.*, Legal Ethics Opinion 1448 (opining that lawyer may not advise a client to surreptitiously record potential defendant in civil matter).

b. Virginia has begun to erode this *per se* ban, finding that it is sometimes impracticable and frustrates an important public policy.

i. A lawyer may not conduct a wiretap—*i.e.*, record a conversation between third parties where neither party is aware of or consented to the recording. *See Gunter v. Virginia State Bar*, 238 Va. 617, 622 (1989).

ii. A lawyer may use tape recordings made by a client prior to the representation. *See* Legal Ethics Opinion 1324.

iii. In the context of "legitimate government law enforcement investigations," a lawyer may participate in, or advise another to participate in, a recorded conversation with a third party, with the full knowledge and consent of one party but without the knowledge or consent of the other party. *See* Legal Ethics Opinion 1738; *see also* Legal Ethics Opinion 1765 (expanding exception to include federal government's intelligence and/or intelligence work).

A. Whistleblowers can probably wear a wire, if requested by the Government.

iv. A lawyer may advise a client about the lawfulness of a proposed course of conduct—*i.e.*, the client may choose to record a conversation because Virginia is a 'one-party' state. *See* Legal Ethics Opinion 1802.

G. **Ethical obligations when inadvertently receiving privileged information.**

1. **Rule 3.4: Fairness to Opposing Party and Counsel**

"A lawyer shall not: . . . (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."

2. A lawyer should not deliberately obtain information and documents that are known to be protected by the attorney-client privilege or work-product doctrine. *See, e.g.*, Legal Ethics Opinion 651.

3. An attorney should not keep or use the privileged documents or information of an opposing party. *See generally* Legal Ethics Opinion 1702.

   a. There, the lawyer must (i) notify the opposing party; and (ii) destroy or sequester the privileged information until the court has resolved the privilege claim. *See* Legal Ethics Opinion 1871; Va. Sup. Ct. R. 4:1(b)(6)(ii).

4. FCA cases can present a unique set of circumstances that place relator's counsel in a Catch-22. If counsel receives privileged documents or information while the complaint is pending under seal, Virginia Supreme Court Rule 4:1 and Ethics Rule 3.4 require counsel to notify the defendant, but the FCA expressly prohibits counsel from revealing the existence of the lawsuit, particularly to the defendant.

   a. The Ninth Circuit has held: the "path to ethical resolution is simple: when in doubt, ask the court." *Gomez v. Vernon*, 255 F.3d 1118, 1135 (9th Cir. 2001).

   b. Under these circumstances, courts have held that relator's counsel should notify the court and, later, notify defendant after the complaint is unsealed. *See, e.g.*, *United States v. IASIS Healthcare Corp.*, No. 2:05-cv-766, 2012 U.S. Dist. LEXIS 6896, at *43-44 (D. Ariz. Jan. 9, 2012) (discussing propriety of *qui tam* counsel's access to potentially privileged documents); *see also United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, No. CV 08-1885, CV 08-6403, 2013 U.S. Dist. LEXIS 74833, at *5-12 (C.D. Cal. May 20, 2013) (discussing propriety of *qui tam* counsel's access to potentially privileged communications).

c. Attorneys should not hesitate to seek guidance from the court. *See United States ex rel. Thomas*, 2018 U.S. Dist. LEXIS 150000, at *13 n. 15; *see also Tucker v. Norfolk & W. Ry.*, 849 F. Supp. 1096, 1099 (E.D. Va. 1994).

H. **Example from the *Duke* case**

1. As discussed above, Thomas worked at Duke for approximately 18 months after filing the FCA lawsuit, and he took notes of things he saw and heard. Thomas spoke with several Duke researchers, who made statements about the involvement of Duke in-house counsel. Most of the statements were factual in nature—*i.e.*, the attorney attended a meeting on a specific date; other information mentioning counsel relayed second hand, or even third hand, from other individuals.

   a. Thomas never spoke directly with a Duke attorney.

2. Thomas would contemporaneously email notes to himself in real time, and then later compiled the notes into a daily journal.

   a. The original Complaint and Amended Complaint do not reference any information from Thomas' daily journal that even remotely mentions Duke's in-house counsel or a meeting in which an attorney may have been involved.

3. In July 2017, Duke served an interrogatory on Thomas requesting information on all communications he had regarding the events in the Amended Complaint. Thomas' daily journal formed the basis for Relator's interrogatory response.

   a. Gentry Locke prepared two sets of responses to Duke's interrogatory—a redacted and an unredacted version. In the redacted version, all references related to an attorney were blacked out. Relator provided Duke with both the redacted and unredacted versions, in order to give Duke an opportunity to assert a claim of privilege. Relator provided the other defendants with only the redacted version.

   b. Duke did not assert a claim of privilege over the redacted information in Relator's interrogatory response.

4. In May 2018, Duke filed a Motion for Sanctions seeking the disqualification of Gentry Locke. Duke alleged that Gentry Locke had communicated with represented persons (*i.e.*, Duke employees) through Thomas, and that Thomas obtained privileged information from Duke, in violation of Rules 4.2, 4.4, and 8.4(a) of the North Carolina Rules of Professional Conduct. More specifically, Duke argued:

a. Thomas, Duke, and Duke's employees were all located in North Carolina. As the focus of Thomas' activities was conduct in North Carolina, the North Carolina Rules of Professional Conduct applied;

b. Gentry Locke used Thomas to conduct *ex parte* interviews of Duke employees after they were represented by counsel, in violation of N.C. Rule 4.2; and

c. Gentry Locke obtained information through Thomas that was subject to a claim of attorney-client privilege by Duke, in violation of N.C. Rule 4.4.

5. Duke also filed a Motion to Seal Relator's unredacted interrogatory response on the basis that it contained attorney client privileged information.

6. The Court's opinion denying Duke's Motion for Sanctions is attached as **Exhibit A**.

a. The Court held that there was no direct evidence or persuasive circumstantial evidence that Gentry Locke "caused, controlled, or directed the relator's conversations with his co-workers" after Duke's counsel became involved.

i. "Many of these conversations were work-related and involved tasks of shared interest; others appear to have resulted from a natural human tendency to talk about matters of common concern. All of the relator's relevant conversations were with people with whom he ordinarily had work-related contact and a number of the conversations appear to have been initiated by his co-workers." **Exhibit A**, at 9.

b. The Court refused to infer that Gentry Locke directed or controlled Thomas' actions merely from its suggestion to take notes and subsequent receipt of that information, noting: "It would be a strange result indeed if a *qui tam* relator could not take notes or tell his lawyers about facts and actions which would support the claims in his lawsuit."

i. In a footnote, the Court analogized the scenario to an employment discrimination case, noting "it would be ludicrous to suggest that the employee-plaintiff could not talk to his or her lawyer about what co-workers or supervisors said that might be relevant to the lawsuit." **Exhibit A**, at 10 n. 11.

7. The Court also held that that there was no evidence that Gentry Locke sought or used allegedly privileged information. The Court's reasoning is intertwined with that in its opinion denying Duke's Motion to Seal, attached as **Exhibit B**.

   a. The Court held the interrogatory response and related communications were not subject to the attorney-client privilege:

      "Duke has not supported the motions to seal with evidence and legal argument demonstrating that the attorney-client privilege covers each of the purportedly privileged communications. A review of the communications shows that many are not, on their face, privileged. The public interest in access to exhibits purporting to support serious accusations of professional misconduct is high. Duke's overbroad and unsupported motion to seal the interrogatory answers, the emails, and any discussion of the answers and emails in briefs, declarations, or other documents is denied." **Exhibit B**, at 24.

   b. Therefore, the Court denied Duke's Motions to Seal:

      "Courts should not keep their own records secret without a well-supported and substantial reason that outweighs the deeply-rooted public right of access. Without open courts and transparency about the basis for court decisions, suspicions about arbitrary exercise of government power can take seed and grow, arbitrary decision-making can avoid public scrutiny, and parties can file unsupported motions with serious accusations of misconduct under cover of secret exhibits. Duke has not shown that the information it seeks to seal is protected by any privilege or that any other substantial reason supports the veil of secrecy Duke seeks to throw over these proceedings, which concern matters of serious public interest. Therefore, the motions to seal will be denied." **Exhibit B**, at 30-31.

8. Aside from the issue of whether the communications were subject to the attorney-client privilege, the Court held that there was no evidence Gentry Locke handled the alleged privileged information inappropriately:

   "There is also no persuasive evidence that counsel sought or used allegedly privileged information inappropriately. The relator did not communicate directly with Duke counsel and declined the opportunity to do so later when Duke requested an interview. Duke has not alleged that the relator obtained any privileged documents. Much of the

information Duke asserts to be privileged is not so, as discussed in detail in the Court's order on various motions to seal entered this same day. Other exchanges mentioning Duke counsel were shared with the relator in a context tending to indicate any possible privilege claim was waived. Moreover, Duke has not cited to any statements in the Amended Complaint or otherwise where Virginia counsel made use of purportedly privileged information, much less inappropriate use.

Otherwise, Virginia counsel has been sensitive to attorney-client privilege issues throughout this case, further undermining an inference of misconduct. When furnishing the relator's interrogatory answers, which summarized his communications with co-workers, Virginia counsel redacted text mentioning Duke counsel from disclosure to co-defendants so that Duke would have the opportunity to claim the attorney-client privilege. When Duke inadvertently disclosed a large amount of potentially privileged attorney-client material in discovery, Virginia counsel immediately brought the matter to Duke's attention and followed up when Duke did not respond."

Exhibit B, at 12-13.

a. The Court did note, however, that Gentry Locke was not perfect.

> "There were additional appropriate actions Virginia counsel could have taken once it became clear that the relator's co-workers were freely discussing interactions with counsel, such as seeking guidance from the Court. However, the availability of other appropriate alternative options does not mean Virginia counsel violated ethical obligations, and counsel's actions are not judged with 20/20 hindsight or in light of facts Virginia counsel could not have known." **Exhibit A**, at 12-13 n. 15 (citation omitted).

9. The Court did not reach the issue of whether the Virginia or North Carolina rules applied because it the conduct at issue violated neither set of rules.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THE UNITED STATES OF AMERICA, ex rel. JOSEPH M. THOMAS,	)	
Plaintiff,	)	
v.	)	1:17-CV-276
DUKE UNIVERSITY, DUKE UNIVERSITY HEALTH SYSTEM, INC., WILLIAM M. FOSTER, PH.D., and ERIN N. POTTS-KANT,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Catherine C. Eagles, District Judge.

In this False Claims Act *qui tam* lawsuit, defendants Duke University and Duke University Health System contend that Virginia counsel for the plaintiff-relator Joseph M. Thomas violated their ethical duties in handling communications between the relator and his co-workers at Duke after the lawsuit was filed and while it was under seal. Duke seeks sanctions, including to disqualify the relator's Virginia counsel and to exclude communications between the relator and his co-workers from evidence.

Duke has not shown to the Court's satisfaction that the relator's counsel has violated either the North Carolina or the Virginia ethical rules. The motion will be denied.

I. Background

The relator, a research analyst in Duke's pulmonary division, filed this False Claims Act *qui tam* lawsuit under seal alleging that the defendants had falsified and manipulated scientific research data used to obtain federal research grants. *See* Doc. 1. These allegations centered on data defendant Erin Potts-Kant purported to collect while working in defendant William Foster's laboratory in the pulmonary division at Duke. *Id.* The lawsuit was filed in the Western District of Virginia, and the relator was represented by Virginia counsel at the law firm Gentry Locke.

The relator continued to work for Duke after filing suit. While the lawsuit remained under seal, the relator spoke with co-workers about the alleged fraud and Duke's response to it. At the suggestion of Virginia counsel, he took notes about these conversations and shared information he learned from co-workers with his lawyers. At least some of these conversations tended to indicate that Duke was continuing to cover up the fraudulent data.

Duke concedes that relators can use information in their lawsuits that "ordinarily flow[s] to them" at work. Doc. 200 at 11. Duke contends that here, however, Virginia counsel deliberately orchestrated and directed conversations with Duke's employees and secured Duke's privileged information in violation of the applicable professional conduct rules. Virginia counsel deny orchestrating any conversations or misusing any privileged information.

II. Applicable Law

a. Disqualification of Counsel

Disqualification of counsel is a serious matter, and the moving party must meet a high standard of proof to show that opposing counsel should be disqualified. *See, e.g.*, *Plant Genetic Sys., N.V. v. Ciba Seeds*, 933 F. Supp. 514, 517 (M.D.N.C. 1996); *Tessier v. Plastic Surgery Specialists, Inc.,* 731 F. Supp. 724, 729 (E.D. Va. 1990). Whether sanctions are appropriate is a matter within the court's inherent authority and district courts in this circuit typically require proof of willful misconduct by clear and convincing evidence. *See, e.g.*, *Dillon v. BMO Harris Bank, N.A.*, No. 1:13-CV-897, 2016 WL 5679190, at *9 (M.D.N.C. Sept. 30, 2016) (collecting cases from other circuits), *aff'd sub nom.* on other grounds, *Six v. Generations Fed. Credit Union*, 891 F.3d 508 (4th Cir. 2018); *U.S. ex rel. Rector v. Bon Secours Richmond Health Corp.*, No. 3:11-CV-38, 2014 WL 66714, at *5 (E.D. Va. Jan. 6, 2014); *see also In re Liotti*, 667 F.3d 419, 425 (4th Cir. 2011) (stating that "the proper standard of proof for violations of the relevant rules of professional conduct is 'clear and convincing evidence'" for the purpose of imposing attorney discipline).

In addition, "[t]he drastic nature of disqualification requires that courts avoid overly-mechanical adherence to disciplinary canons at the expense of litigants' rights freely to choose their counsel." *Shaffer v. Farm Fresh, Inc.,* 966 F.2d 142, 146 (4th Cir. 1992). Moreover, courts must "always remain mindful of the opposing possibility of misuse of disqualification motions for strategic reasons." *Id.*

b. Rules of Professional Conduct

Both the North Carolina and Virginia ethical rules prohibit a lawyer from communicating with a person the lawyer knows to be represented about the subject of that representation, absent consent of that person's lawyer. N.C. R. Prof'l Conduct Rule 4.2; Va. Sup. Ct. R. pt. 6, § 2, Rule 4.2.[1] Both states also prohibit lawyers from using methods of obtaining evidence that violate the legal rights of third persons. N.C. R. Prof'l Conduct Rule 4.4(a); Va. Sup. Ct. R. pt. 6, § 2, Rule 4.4.[2] In both states, it is professional misconduct for a lawyer to violate these or other rules "through the acts of another." N.C. R. Prof'l Conduct Rule 8.4(a); Va. Sup. Ct. R. pt. 6, § 2, Rule 8.4(a).[3]

[1] Rule 4.2 of the North Carolina Rules of Professional Conduct states that "[d]uring the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Rule 4.2 of the Virginia Rules of Professional Conduct provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

[2] Rules 4.4 of the North Carolina Rules of Professional Conduct and the Virginia Rules of Professional Conduct state that "[i]n representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [a third person]." Both states have adopted Comment 1, which specifies that it is "impractical to catalogue all such rights [of third persons], but they include legal restrictions on methods of obtaining evidence from third persons." The North Carolina rules go on to comment that this includes "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." N.C. R. Prof'l Conduct Rule 4.4 cmt. 1.

[3] The parties disagree as to whether the North Carolina or Virginia rules apply. The states differ as to which corporate employees qualify as "persons" with whom counsel cannot communicate under Rule 4.2, and such determinations are not necessarily straightforward. *See, e.g.*, Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward A Revised 4.2 No-Contact Rule*, 60 Hastings L.J. 797, 831 (2009); Stephen M. Sinaiko, *Ex Parte Communication and the Corporate Adversary: A New Approach*, 66 N.Y.U. L. Rev. 1456, 1457–59 (1991). *See generally* Dean S. Rauchwerger, Shawn K. Jones & Allison K. Baten, *Getting the Winning Edge: Appreciating the Permissible Boundaries in* Qui Tam *and Other Litigation Contexts for Contacting Your*

The few cases addressing whether an attorney has committed misconduct by acting through his client indicate that a client is free to act independently in talking with potential witnesses, but ethical problems arise when lawyers cause or assume control and direction over those conversations.[4] *Compare Miano v. AC & R Advert., Inc.*, 148 F.R.D. 68, 87–89 (S.D.N.Y 1993) (finding no ethical violation where plaintiff taped conversations with defendant's employees and discussed these conversations with his attorney because the attorney did not "suggest, plan or supervise" what his client did and mere knowledge of his client's activity and receipt of information was not sufficient to show the attorney "caused" his client's behavior), *and Mathis v. Leggett & Platt*, No. 1:04-CV-3703, 2006 WL 8431959, at *2–3 (N.D. Ga. Apr. 5, 2006) (finding no ethical violation where there was "no evidence indicating that Plaintiff's counsel prompted, directed, or caused" his client to ask defendant's employee to confirm if her signature on a document was authentic), *with Holdren v. Gen. Motors Corp.*, 13 F. Supp. 2d 1192, 1193, 1195–96 (D. Kan. 1998) (finding attorney violated professional rules when he told his client it would be a "good idea" to obtain sworn statements from defendant's employees and advised his client on how to draft affidavits), *and Meachum v. Outdoor World Corp.*, 654 N.Y.S.2d 240, 249–50 (1996) (finding attorney violated professional

Adversary's Current & Former Employees, 40 False Cl. Act and Qui Tam Q. Rev. 14 (Jan. 2006). As discussed below, Duke has not shown that counsel caused, directed, or controlled the relator's communications with his co-workers, so whether these co-workers are "persons" under either rule is immaterial. The Court makes no findings as to whether either state's version of Rule 4.2 covers any or all of the co-workers who talked with the relator.

[4] Neither party identified or addressed these cases in the briefing. *See* Doc. 160; Doc. 189 (redacted at Doc. 185); Doc. 200; Doc. 211.

rules when he proposed that plaintiff tape a call with defendant's employee, dialed the number for plaintiff, listened to the conversation without announcing himself, and used this tape to draft the complaint). *See also San Francisco Unified Sch. Dist. ex rel. Contreras v. First Student, Inc.*, 213 Cal. App. 4th 1212, 1233 (2013) (noting that "[c]ase law and other legal authority clearly establish that the individual plaintiffs' contacts with [the defendant's] employees violated [the California equivalent of Rule 4.2] only if the contacts were wrongfully orchestrated by plaintiffs' counsel").

III. Discussion and Findings[5]

Duke contends that Rules 4.2, 4.4, and 8.4, read together, prohibited Virginia counsel from deliberately soliciting information from Duke employees through the relator once he filed this lawsuit and once it became apparent Duke was represented by counsel.[6] The motion thus turns on Duke's factual assertions that Virginia counsel knew Duke was

[5] The Court finds the facts stated for purposes of this motion only. In addition to the evidence submitted by the parties, the Court has considered the allegations of the Amended Complaint to the extent one or more of the defendants has admitted them. The Court has drawn reasonable inferences from the evidence and made credibility determinations in light of the record as a whole. The Court has largely accepted the relator's affidavit, Doc. 190, as credible; Duke has not contradicted sizable parts of it, and the relator's testimony is generally consistent with common sense. To the extent Duke has offered contrary evidence, the Court does not think it means as much as Duke thinks it means and otherwise does not find it persuasive. The Court has disregarded the many purported facts in Duke's briefs that do not withstand a dispassionate analysis of the cited supporting evidence, as well as those stated without citation to any evidence at all. *See* Doc. 110 at ¶ 1 (the Court's order indicating that "factual assertions unsupported by citation to specific evidence in the record will be disregarded"). If the Court applied a lower preponderance-of-the-evidence standard, its factual findings would not change.

[6] *See* Doc. 160 at 11 (framing the question presented as whether the actions of Virginia counsel "in supervising [relator's] *ex parte* interviews with Duke employees" violated rules of professional conduct); Doc. 200 at 3 (claiming that Virginia counsel "orchestrated a plan in which [relator], posing as a concerned co-worker, solicited information from unsuspecting Duke employees").

represented by counsel in connection with the Foster lab data issue and thereafter caused, directed, or controlled the relator's post-lawsuit conversations with co-workers.

As noted above, claims that an attorney has violated ethical rules through the acts of his client require a fact-specific analysis. Relevant factors include, *inter alia*, the context in which the relator's communications with his co-workers occurred, the nature of the information gathered, and counsel's participation in collecting and using that information.

a. The relator's communications with his co-workers

Soon after Duke fired Ms. Potts-Kant in March 2013, researchers in the Duke pulmonary division became aware that she may have manipulated data while working in the Foster lab. Widespread interest in the possibility of fraudulent research and efforts to evaluate whether data was reliable led to many conversations among researchers, including with the relator.[7]

After filing the *qui tam* lawsuit in May 2013, the relator complied with the False Claims Act's requirement that he keep the lawsuit confidential while under seal.[8]

[7] In addition to the relator's summary of conversations with his co-workers, Doc. 166, and the relator's declaration, Doc. 190, Duke's own internal documents confirm this was the case. *See* Doc. 176-10 at ¶ 3 (report of Duke's Research Integrity Officer that, in preparation for a May 9, 2013, data submission and later site visit, "there was frequent and constant conversation among the researchers . . . as they worked to determine what data were appropriate to use"). Duke has provided no evidence to the contrary.

[8] False Claims Act cases filed by individuals are, by statute, filed under seal and no summons is issued for at least 60 days while the government investigates to decide if it will intervene. 31 U.S.C. § 3730(b)(2). During this time, relators and their counsel are required to maintain silence about the existence of the lawsuit. *State Farm Fire & Cas. Co. v. U.S ex rel. Rigsby*, 137 S. Ct. 436, 442 (2016) (noting that § 3730(b)(2) "creates a mandatory rule the relator must follow"). In

Consistent with statutory protections for whistleblowers, he continued to work for Duke for over a year after filing suit, as the False Claims Act contemplates.[9] He did not tell his employer or his co-workers that he had filed a lawsuit against Duke until shortly before he left Duke's employment.

Although the relator did not work directly in the Foster lab, he did work with Ms. Potts-Kant before Duke fired her, and a grant tied to Ms. Potts-Kant's data paid for part of his salary. He co-authored one paper with Dr. Foster and Ms. Potts-Kant (among others), and he later helped determine whether some of the data Ms. Potts-Kant produced could be replicated. It is therefore not surprising that the relator participated in discussions with co-workers about the Foster lab data.

The relator and his co-workers continued to discuss the Foster lab data issue throughout 2013 and 2014, and his co-workers also continued discussions amongst themselves. *See, e.g.*, Doc. 166 at 15 ("Ledford said that Que told her that she used to be only able to run eight mice per day on a *flexi*Vent machine."); *id.* at 52 ("[Theriot] stated that she and Que had a discussion last week . . . ."). In these conversations, researchers

---

this case, the seal was extended several times and was in place for over three years. *See* Doc. 1 (showing case filed on May 17, 2013); Doc. 36 (order lifting the seal on August 9, 2016).

[9] The False Claims Act offers whistleblower-employees protection from retaliation in employment, 31 U.S.C. § 3730(h), making it clear that Congress contemplated many *qui tam* whistleblowers would be employees who continued to work for defendants after filing suit. *See generally* John T. Boese, *Civil False Claims and* Qui Tam *Actions* § 4.01[B][1] (4th ed. 2018) (noting that the most common *qui tam* plaintiff is the current employee). Employees have particular importance to the Act's whistleblowing scheme because of their familiarity with their employers' businesses and their access to internal information. Stephen M. Payne, *Let's Be Reasonable: Controlling Self-Help Discovery in False Claims Act Suits*, 81 U. Chi. L. Rev. 1297, 1303 (2014).

talked, shared information, and speculated about the allegedly falsified research data, the ongoing tests to evaluate whether the data could be replicated, how Duke was dealing with grant-making entities and publications over the questionable data, how the fall-out might affect careers and the future of the pulmonary division, what pulmonary researchers were leaving Duke, and other matters of personal and professional interest. *See generally* Doc. 166. Many of these conversations were work-related and involved tasks of shared interest; others appear to have resulted from a natural human tendency to talk about matters of common concern. All of the relator's relevant conversations were with people with whom he ordinarily had work-related contact and a number of the conversations appear to have been initiated by his co-workers.

Assuming without deciding that at some point in the summer of 2013, Virginia counsel knew Duke had retained counsel in connection with the Foster lab data issue,[10] there is no direct evidence that Virginia counsel thereafter caused, controlled, or directed the relator's conversations with his co-workers. Nor is the circumstantial evidence on which Duke relies persuasive.

In asserting otherwise, Duke relies on the relator's admission that he regularly reported what co-workers shared with him to Virginia counsel and took notes of his

[10] As previously noted, lawyers are only prohibited from communicating with those persons they "know[] to be represented by another lawyer" and only "about the subject of the representation." *See supra* note 1 (quoting Virginia and North Carolina versions of Rule 4.2). The record is not clear as to exactly when lawyers began representing Duke in connection with the Foster lab data issue, as is discussed in more detail in the Court's order addressing the motions to seal entered this same day, much less when Virginia counsel should have known of the representation. The summer of 2013 is a generous assumption in favor of Duke.

interactions at his counsel's suggestion. *See* Doc. 160 at 13; Doc. 159-1 at 4; Doc. 189 at 5 (redacted at Doc. 185). However, there are many legitimate reasons for counsel to ask a client to take notes about what he sees and hears and to provide that information to counsel. These include the need for an aid to memory as time passes, compliance with Rule 11 of the Federal Rules of Civil Procedure when filing or amending a complaint, avoiding liability under 31 U.S.C. § 3730(d)(4), insuring that all supporting information is provided to the government as required by 31 U.S.C. § 3730(b)(2), compliance with the disclosure requirements of Rule 26(a)(1) of the Federal Rules of Civil Procedure after the matter is joined, and providing complete discovery responses. [11]

It would be a strange result indeed if a *qui tam* relator could not take notes or tell his lawyers about facts and actions which would support the claims in his lawsuit, such as the confirmation that the allegedly false data could not be replicated, or which would support continuing and additional violations of the False Claims Act, such as statements tending to indicate Duke was attempting to hide or minimize the false data in its communications with outsiders, including governmental funding sources.[12] The Court declines to infer from Virginia counsel's receipt of information and suggestion to take

[11] In an employment discrimination case claiming failure to promote, for example, it would be ludicrous to suggest that the employee-plaintiff could not talk to his or her lawyer about what co-workers or supervisors said that might be relevant to the lawsuit.

[12] While Duke concedes that *qui tam* whistleblowers "can obtain information for use in their lawsuits that ordinarily flow to them," Doc. 200 at 11, it does not acknowledge that its position on note-taking and sharing information with counsel would effectively prevent such evidence from ever seeing the light of day. One might suspect that a desire to exclude harmful evidence is driving this motion for sanctions. *Shaffer,* 966 F.2d at 146 (noting potential for misuse of disqualification motions for strategic reasons).

notes that counsel directed or controlled the relator's underlying interactions. *See Miano,* 148 F.R.D. at 87–89; *Mathis,* 2006 WL 8431959 at *2–3.

Duke further contends that the number of the relator's conversations and questions about the Foster lab data issue supports the inference that Virginia counsel were directing these communications. The Court is not persuaded. Overall, the evidence shows that there was widespread serious concern about the Foster lab data issue and its ramifications. A number of people working in close proximity to the relator as well as the relator himself were trying to replicate the data. Several researchers left the Duke pulmonary lab in the wake of the problems. Conversations about the fraud, its professional and personal implications, and the efforts to replicate results would have been perfectly normal in this context. Moreover, many of the questions the relator asked were general and typical of ordinary conversation, with little to indicate a targeted inquisition.[13] Given that the relator worked for Duke for well over a year after filing suit

[13] Duke indirectly contends that the relator could not ask his co-workers any questions about the lab fraud, asserting these exchanges were unfair because the relator's co-workers did not know he was the whistleblower. But the False Claims Act required the relator to keep his involvement confidential, *see supra* note 8, and it is not clear how the relator could have tried to replicate Ms. Potts-Kant's data without asking at least some questions. Even if the relator's motivation was to obtain relevant information for his lawsuit, this is a goal contemplated by the False Claims Act. *See supra* note 9. As one commentator has noted in the context of documents, "the FCA contemplates and condones gathering and producing documents prior to service of the complaint and the beginning of formal discovery." Joel D. Hesch, *The False Claims Act Creates A 'Zone of Protection' That Bars Suits Against Employees Who Report Fraud Against the Government*, 62 Drake L. Rev. 361, 418 (2014). In any event, the relevant rules of professional conduct prohibiting contact with represented persons apply only to counsel and do not apply to the relator, and Duke has cited no case to the contrary. *See Mathis*, 2006 WL 8431959 at *3 ("[T]he Court is not aware of any authority in this Circuit or elsewhere suggesting that a party, as opposed to an attorney, is prohibited from engaging in communications with a represented adverse party."); *San Francisco Unified Sch. Dist. ex rel. Contreras*, 213 Cal. App.

and the significant interest all pulmonary division employees had in the Foster lab data fraud, the number of conversations the relator had with his co-workers is neither surprising nor suspicious.

b. The handling of potentially privileged information

There is also no persuasive evidence that counsel sought or used allegedly privileged information inappropriately. The relator did not communicate directly with Duke counsel and declined the opportunity to do so later when Duke requested an interview. Duke has not alleged that the relator obtained any privileged documents. Much of the information Duke asserts to be privileged is not so, as discussed in detail in the Court's order on various motions to seal entered this same day. Other exchanges mentioning Duke counsel were shared with the relator in a context tending to indicate any possible privilege claim was waived.[14] Moreover, Duke has not cited to any statements in the Amended Complaint or otherwise where Virginia counsel made use of purportedly privileged information, much less inappropriate use.[15]

4th at 1229 (noting that "contacts with [defendant's] employees by the individual plaintiffs on their own initiative are clearly exempt" from the California equivalent of Rule 4.2).

[14] There is nothing in the information Virginia counsel had at the time, and nothing in the record now, to show that the relator's co-workers talked with him in order to obtain information counsel needed to provide legal advice or that Duke had taken steps to protect the confidentiality of communications like the ones Duke is now claiming are privileged. *See* David. M. Greenwald, *Testimonial Privileges* § 1:83 (3d ed. 2017) ("Where a corporation or other organization is the client, waiver may occur when otherwise privileged materials are circulated to persons not assisting in furnishing information to the lawyer or acting upon legal advice received from the lawyer.").

[15] There were additional appropriate actions Virginia counsel could have taken once it became clear that the relator's co-workers were freely discussing interactions with counsel, such

Otherwise, Virginia counsel has been sensitive to attorney-client privilege issues throughout this case, further undermining an inference of misconduct. When furnishing the relator's interrogatory answers, which summarized his communications with co-workers, Virginia counsel redacted text mentioning Duke counsel from disclosure to co-defendants so that Duke would have the opportunity to claim the attorney-client privilege. When Duke inadvertently disclosed a large amount of potentially privileged attorney-client material in discovery, Virginia counsel immediately brought the matter to Duke's attention and followed up when Duke did not respond.

These facts differ substantially from the cases on which Duke relies, where the documentary information counsel obtained was clearly privileged and was used in pleadings. In *U.S. ex rel. Frazier v. IASIS Healthcare Corp.,* the relator was an attorney and the Chief Compliance Officer of the defendant organization who had taken approximately 1,300 pages of documents before departing the company and filing a *qui tam* action. No. 2:05-CV-766-RCJ, 2012 WL 130332, at *1, 3 (D. Ariz. Jan. 10, 2012). Some of these documents had attorney-client privilege headings—the specific documents at issue in the motion for sanctions had the title of "Legal Memo" —and yet counsel "feigned ignorance" as to possessing privileged information when asked. *Id.* at *5, 7, 15. In *United States ex rel. Hartpence v. Kinetic Concepts, Inc.,* the relators took documents

as seeking guidance from the Court. *See, e.g.*, *United States ex rel. Hartpence,* 2013 WL 2278122, at *2. However, the availability of other appropriate alternative options does not mean Virginia counsel violated ethical obligations, and counsel's actions are not judged with 20/20 hindsight or in light of facts Virginia counsel could not have known.

from the defendant company when they left, including communications with the defendant's attorneys. Nos. CV 08-1885-GHK (AGRx), CV 08-6403-GHK (AGRx), 2013 WL 2278122, at *1–2 (C.D. Cal. May 20, 2013). Counsel for the relators quoted directly from privileged documents in their pleadings, despite notice from the U.S. Attorney's office that the documents were likely privileged. *Id.* at *2–3. The conduct of Virginia counsel here does not approach the conduct in *Frazier* or *Hartpence*.

Duke implies that it is professional misconduct for a lawyer to fail to instruct a relator-client to walk away or to refuse to listen when co-workers mention anything about their employer's lawyers, but it has cited no case for such an overbroad proposition.[16] As discussed more fully in the Court's order on the motions to seal entered this same day, not all communications that mention counsel are protected by the attorney-client privilege, which is "strictly confined within the narrowest possible limits consistent with the logic of its principle." *Solis v. Food Emp'rs Labor Relations Ass'n*, 644 F.3d 221, 226 (4th Cir. 2011) (internal quotations omitted).

[16] There is no evidence before the Court as to what instructions Virginia counsel did or did not give the relator about potentially privileged information he received from his co-workers. Duke emphasizes that Virginia counsel did not submit affidavits affirmatively setting forth advice given to the relator, *see* Doc. 200 at 2–3, 6, but Duke has cited no case requiring the relator to waive his attorney-client privilege merely because an opposing party accuses his lawyers of misconduct. The Court agrees that *qui tam* counsel should always proceed cautiously when receiving information from their client that might be protected by the attorney-client privilege and that careful advice may well be appropriate. *See generally* Robert T. Rhoad, *Ethical Issues Arising in Healthcare Fraud Investigations and False Claims Act Qui Tam Cases*, 27 No. 1 Health L. 29, 35 (2014) (discussing the numerous obligations *qui tam* counsel must balance). But the burden here is on Duke to show misconduct, not on Virginia counsel or the relator to show the absence of misconduct.

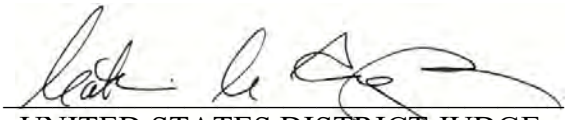
IV. Conclusion

Duke has not proven misconduct, let alone willful misconduct, by clear and convincing evidence or by the preponderance of the evidence. The Court will deny the motion for sanctions.

This does not necessarily mean that all of the statements that co-workers made to Mr. Thomas are admissible. It is obvious, for example, that some are speculative and others are not based on personal knowledge. A number contain multiple layers of hearsay. Whether a particular statement constitutes an admission or is otherwise subject to an evidentiary objection are questions that can be decided later, if and when that becomes necessary.

It is **ORDERED** that Duke's motion for sanctions, Doc. 159, is **DENIED**.

This the 4th day of September, 2018.



UNITED STATES DISTRICT JUDGE

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THE UNITED STATES OF AMERICA, ex rel. JOSEPH M. THOMAS,	)	
Plaintiff,	)	
v.	)	1:17-CV-276
DUKE UNIVERSITY, DUKE UNIVERSITY HEALTH SYSTEM, INC., WILLIAM M. FOSTER, PH.D, AND ERIN N. POTTS-KANT,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Catherine C. Eagles, District Judge.

Duke University and Duke University Health System, two of the defendants in this *qui tam* lawsuit, seek to seal various exhibits and briefs filed in connection with a motion for sanctions and a related motion to seal. Primarily at issue is whether certain email notes, interrogatory answers, and the briefs that discuss them contain information protected by the attorney-client privilege. Duke also seeks to redact or seal certain exhibits that Duke contends contain personnel information or are subject to confidentiality requirements under federal regulations.

Duke's motions to seal will be granted for five documents that do not qualify as judicial records and therefore have no right to public access attached. Otherwise, Duke has not submitted sufficient evidence in support of its claims of confidentiality and has not shown why its interest in keeping the information secret is more important than the

public interest in access to court records. For these remaining documents, Duke's motions are denied.

I. Procedural Background

In this *qui tam* lawsuit, plaintiff-relator Joseph M. Thomas contends that the defendants violated the False Claims Act in numerous ways in connection with allegedly falsified and non-existent research data created, maintained, and submitted in connection with government grants. Duke filed a motion for sanctions, Doc. 159, contending that counsel for the relator engaged in impermissible *ex parte* contacts with Duke employees. That motion has since been denied. *See* Text Order 08/03/2018 *and* Memorandum Opinion entered contemporaneously with this order.

In connection with the sanctions motion, Duke sought to file certain exhibits under seal, asserting they contained information covered by the attorney-client privilege. Doc. 161; Doc. 225-2. The relator objected to the motion to seal, Doc. 193, and responded to the motion for sanctions, Doc. 189 (redacted at Doc. 185).[1] Duke seeks to seal some of the exhibits submitted by the relator, as well as references to these exhibits in the relator's brief. *See* Doc. 201; Doc 196;[2] Doc. 225. As to these additional materials, Duke

[1] In the first citation for each exhibit or brief at issue, the Court will provide a description of the document and identify the electronic CM-ECF docket number where the sealed unredacted exhibit or brief can be located. For those documents where Duke does not seek to seal the entire document, the Court will also provide the ECF docket number for the publicly available, redacted version in a parenthetical. When and if the document or brief is referenced again, the Court will provide the ECF docket number for the sealed, unredacted exhibit alone, without the description or the docket number to the redacted version.

[2] The relator originally filed the motions to seal these documents, Doc. 174, Doc. 178, and Doc. 188, as required by LR 5.4(c) after conferring with Duke to confirm the degree of

continues to rely on the attorney-client privilege and also contends that some of the exhibits are subject to confidentiality requirements in federal regulations or contain confidential personnel information. *See* Doc. 225-3, 225-4.

Accordingly, at issue are three sets of documents: (*i*) exhibits to Duke's Motion for Sanctions, Doc. 159, (the "Sanctions Exhibits"),[3] (*ii*) parts of the relator's brief in opposition to Duke's motion for sanctions, Doc. 189, and some exhibits to the opposition brief (the "Sanctions Opposition Materials"),[4] and (*iii*) exhibits to the Relator's Superseding Opposition to Duke's Motion to Seal, Doc. 193, (the "Sealing Opposition Exhibits").[5] *See* Doc. 225-1 (Flowchart of motions to seal).

---

confidentiality. Duke has filed briefs in support of these motions, Doc. 201 and Doc. 196, as required under LR 5.4(d).

[3] The Sanctions Exhibits are listed in the chart at Doc. 225-2, and include:
- The relator's interrogatory responses, Doc. 166 (redacted at Doc. 159-2);
- The relator's redacted interrogatory responses, Doc. 165 (redacted at Doc. 159-5);
- The relator's email notes, Doc. 164 (sought to be sealed in their entirety);
- A meet and confer letter, Doc. 168 (redacted at Doc. 159-10);
- The relator's second supplemental interrogatory responses, Doc. 167 (redacted at Doc. 159-11); and
- The Schneider affidavit, Doc. 163 (redacted at Doc. 159-12).

[4] The Sanctions Opposition Materials are listed in the chart at Doc. 225-4, and include:
- Relator's Opposition to the Duke Motion for Sanctions, Doc. 189 (redacted at Doc. 185);
- The relator's declaration, Doc. 190 (redacted at Doc. 186);
- The deposition of Barbara Theriot, Doc. 189-6 (redacted at Doc. 185-6);
- The relator's interrogatory responses, Doc. 191-8 (redacted at Doc. 187-8);
- Deposition Exhibit 718, Doc. 189-11 (sought to be sealed in its entirety).

[5] The Sealing Opposition Exhibits are listed in the chart at Doc. 225-3, and include:
- Deposition Exhibit 837, Doc. 176-10 (sought to be sealed in its entirety);
- Deposition Exhibit 801, Doc. 176-18 (redacted at Doc. 172-7);
- Deposition Exhibit 804, Doc. 176-19 (redacted at Doc. 172-8);
- Deposition Exhibit 429, Doc. 176-21 (redacted at Doc. 172-10);

II. Standard

The public has an interest in transparent court proceedings, and courts have long held that the public has a right of access to judicial records. *See Nixon v. Warner Commc'ns., Inc.,* 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."). The public's right to access judicial records derives from the common law and the First Amendment. *Rushford v. New Yorker Magazine,* 846 F.2d 249, 253 (4th Cir. 1988). "While the common law presumption in favor of access attaches to all judicial records and documents, the First Amendment guarantee of access has been extended only to particular judicial records and documents." *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988).[6] The presumption of access may be overcome, under the common law, "if competing interests outweigh the interest in access." *Id*. Under the First Amendment, on the other hand, "access may be denied only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest." *Id.* (citing *Rushford,* 846 F.2d at 253).

When a party makes a request to seal judicial records, a district court "must comply with certain substantive and procedural requirements." *Va. Dep't of State Police*

- Scheduling Email, Doc. 176-27 (sought to be sealed in its entirety); and
- Exhibit 16 to the Declaration of Scott Sexton, Doc. 179 (redacted at Doc. 177) (this document is not included in Doc. 225-3).

[6] The Court omits internal citations, alterations, and quotation marks throughout this opinion, unless otherwise noted. *See United States v. Marshall*, 872 F.3d 213, 217 n.6 (4th Cir. 2017).

v. Wash. Post, 386 F.3d 567, 576 (4th Cir. 2004). Procedurally, the district court must (1) give the public notice and a reasonable opportunity to challenge the request to seal; (2) "consider less drastic alternatives to sealing"; and (3) if it decides to seal, make specific findings and state the reasons for its decision to seal over the alternatives. *Id.* "As to the substance, the district court first must determine the source of the right of access with respect to each document, because only then can it accurately weigh the competing interests at stake." *Id.*

As an initial matter, the Court notes that the motions to seal have been docketed since May 17, 2018 (Doc. 161), May 31, 2018 (Doc. 174), June 1, 2018 (Doc. 178), and June 11, 2018 (Doc. 188). Any interested party therefore has had sufficient time to intervene to contest any sealing order. The docket reflects that only the relator has opposed these motions to seal. Doc. 193; Doc. 216; Doc. 212. Accordingly, the Court concludes that the "public notice" prerequisite to entry of a sealing order has been satisfied. *See Stone,* 855 F.2d at 181 (discussing use of docketing to comply with procedural requirements for sealing).

a. Classification as Judicial Records

Before considering whether a common law or First Amendment right of access has attached to documents, a court must first assess whether the materials at issue actually constitute "judicial documents and records." *In re Application of U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D),* 707 F.3d 283, 290 (4th Cir. 2013).

Judicial records are documents "filed with the objective of obtaining judicial action or relief," and which "play a role in the adjudicative process, or adjudicate

substantive rights." *In re Application*, 707 F.3d at 290–91. To the extent the court does not rely on a document to reach its decision, the document is not a judicial record and no right of access applies. *Hunter v. Town of Mocksville,* 961 F. Supp. 2d 803, 806 (M.D.N.C. 2013) (citing *In re Application,* 707 F.3d at 290–91); *see also United States v. Moussaoui*, 65 F. App'x 881, 889 (4th Cir. 2003) (observing some court-filed documents "may not qualify as 'judicial records' at all"); *In re Policy Mgmt. Sys. Corp.,* 67 F.3d 296 (table), 1995 WL 541623, at *3–4 (4th Cir. Sept. 13, 1995) (holding that documents filed in connection with a motion to dismiss were not judicial records because they were not considered by the court in adjudication of the motion).

Duke seeks to seal several Sealing Opposition Exhibits on which the Court has not relied in deciding whether to seal the Sanctions Exhibits.[7] As explained in detail *infra*, an examination of the communications in the Sanctions Exhibits shows that Duke's proposed grounds for sealing them—attorney-client privilege—is tenuous at best, and Duke has not otherwise offered sufficient evidence to establish the privilege or shown that its interests outweigh the public's interest in open courts. It was thus unnecessary to review the exhibits submitted by the relator in support of his secondary position that any privilege had been waived.[8]

[7] These include Deposition Exhibit 801, Doc. 176-18; Deposition Exhibit 804, Doc. 176-19; and Deposition Exhibit 429, Doc. 176-21. Since these documents are not judicial records, the Court has not included a description of their content.

[8] *See, e.g.,* Doc. 193 at 11 n.40 (citing to Deposition Exhibit 801, Doc 176-18); *id.* at 11 n.41 (citing to Deposition Exhibit 804, Doc. 176-19); *id.* at 12 n.47 (citing to Deposition Exhibit 429, Doc. 176-21). While the Court need not definitely decide the issue of waiver, it is difficult to understand Duke's argument, given Duke's disclosure of these materials to outsiders with no

Because the Court did not rely on these three Sealing Opposition Exhibits, they are not judicial records and the public does not have a right to access them. *Hunter,* 961 F. Supp. 2d at 806 (citing *In re Application,* 707 F.3d at 190–91); *see also Moussaoui,* 65 F. App'x at 889. The Court will therefore grant the motion to seal, Doc. 174, as to these documents identified by CM-ECF docket number in footnote 7. If these documents are used to support or oppose a future motion, the Court may unseal them in the future.

The Court has considered two Sealing Opposition Exhibits, a memorandum from Duke's Research Integrity Officer, Doc. 176-10, and a Scheduling Email, Doc. 176-27, that were directly relevant to the privilege question before the Court on the motion to seal and that provided helpful context. The Court has not identified any Fourth Circuit decision classifying exhibits to a motion to seal as "judicial records." However, courts in this circuit have found that documents filed to facilitate protective orders and other discovery motions do not qualify as judicial records. *See, e.g., Ohio Valley Envtl. Coal. v. Elk Run Coal Co*., 291 F.R.D. 114 (S.D.W. Va. 2013) (finding a document filed to facilitate ruling on a protective order is not a "judicial record" triggering a First Amendment or common law right of public access, but denying the motion to seal because the document was not confidential and good cause did not exist to warrant a protective order); *Kinetic Concepts, Inc. v. Convatec Inc.*, No. 1:08-CV-918, 2010 WL 1418312 (M.D.N.C. Apr. 2, 2010) (finding exhibits to motions to compel and for a

mention of privilege by Duke for months. *See United States v. Jones,* 696 F.2d 1069, 1072 (4th Cir. 1982) (per curium) (noting that "[a]ny disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege").

protective order are not judicial records, but applying the "good cause" standard under Rule 26(c) as well as the common law right to public access standard to grant in part and deny in part the motions to seal); *see also Guessford v. Pa. Nat'l Mut. Casualty INS. Co.,* No. 1:12-CV-260, 2014 WL 12594127, at *2 (M.D.N.C. Sept. 30, 2014) (finding documents related to motions for summary judgment, sanctions, and in limine to be "judicial records" because "[e]ach set of documents was filed in connection with either a dispositive or non-dispositive motion, and each motion was filed with the objective of obtaining judicial action (namely, the granting of a motion *other than a motion to seal*)" (emphasis added)).

While not a discovery motion *per se*, motions to seal concern procedural issues similar to those requesting protective orders: the manner and extent to which documents are disclosed to non-parties. Exhibits to motions to seal do not ordinarily help "adjudicate substantive rights," nor is it apparent that they usually "play a role in the adjudicative process." *See In re Application*, 707 F.3d at 290. The exhibits here are not proffered towards substantive issues in the case and the Court has not considered them in connection with the motion for sanctions. Accordingly, the Court finds that Doc. 176-10 and Doc. 176-27 do not qualify as "judicial documents," and no public right to access attaches. These documents may remain under seal. If these documents are used to support or oppose future motions, and thereby become judicial records, the Court may unseal them.

The Sanctions Exhibits and the Sanctions Opposition Materials, on the other hand, have been filed in connection with a motion asking the Court to impose significant

sanctions, including disqualification of counsel and exclusion of evidence. As this motion has the potential to affect the relator's substantive rights, the accompanying exhibits are judicial records. *See 360 Mortg. Grp., LLC v. Stonegate Mortg. Corp.*, No. 5:14-CV-310-F, 2016 WL 3030166, at *6 (E.D.N.C. May 25, 2016) (finding exhibits filed in connection with a motion to disqualify counsel to be judicial records).[9] It is therefore necessary to consider whether the common law or First Amendment right to public access applies to the Sanctions Exhibits and the Sanctions Opposition Materials.

b. Right of Public Access Standard

The public right of access to judicial records is derived from "two independent sources: the common law and the First Amendment." *Va. Dep't of State Police,* 386 F.3d at 575. To determine whether the First Amendment provides a right to access, courts employ the "experience and logic" test, asking "(1) 'whether the place and process have historically been open to the press and general public,' and (2) 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *In re Application*, 707 F.3d at 291 (quoting *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989)). When a motion is dispositive, such as for summary judgment, it is well established that materials submitted are subject to the First Amendment right of access. *Va. Dep't of State Police*, 386 F.3d at 578–79. The Fourth Circuit has further held that

[9] One of the exhibits submitted as part of the Sealing Opposition Exhibits, Doc. 179, was a duplicate of one of the Sanctions Exhibits, Doc. 167. Whether or not it was considered in connection with the motion to seal hardly matters, as it was considered in connection with the motion for sanctions. It too is a judicial record. The Court reminds the parties to avoid filing duplicates of exhibits already on the docket, especially if such filing will give rise to another motion to seal.

documents "filed with the objective of obtaining judicial action or relief," but not in connection with a dispositive motion, are judicial records generally subject to the common law right of access. *In re Application*, 707 F.3d at 290–91.

The Fourth Circuit has not addressed whether the common law or First Amendment right of access attaches to documents filed in connection with a sanctions motion. One court has held that a sanctions motion is non-dispositive and the common law right of access applies, *see Silicon Knights, Inc. v. Epic Games, Inc.*, 5:07-CV-275-D, 2010 WL 11566361, at *1 (E.D.N.C. June 15, 2010). However, that same court has held that in a motion to disqualify counsel, there is a First Amendment right of access. *360 Mortg. Grp., LLC*, No. 5:14-CV-00310-F, 2016 WL 3030166, at *6.

As the *360* court noted, "pretrial civil proceedings are generally open to the public," and "the specific proceedings currently before the court—motions to allow withdrawal of counsel and to disqualify counsel—have no history of secrecy." *Id*. In addition, a motion to disqualify counsel is

> in essence, a dispute over legal ethics. Transparency in this arena is undoubtedly beneficial. Despite the important role lawyers play in society's essential functions, the legal profession is largely self-regulating. On the relatively rare occasion the court is called to pass on questions of legal ethics, the public's ability to review the decisionmaking process serves to increase confidence in the judicial system, and to improve the accountability of individual members of the bar.

360 Mortg. Grp., LLC, No. 5:14-CV-00310-F, 2016 WL 3030166, at *6.

The Court agrees with the logic of the *360* opinion. Because the motion for sanctions is essentially a motion to disqualify counsel, the Court concludes that the public

has a First Amendment right of access to the materials filed in connection with the sanctions motion.[10]

c. First Amendment Right of Access

Under the First Amendment, "access 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*, 855 F.2d at 180. "The party seeking to limit public access bears the burden to show that sealing is appropriate." *Syngenta Crop Prot., LLC v. Willowood, LLC*, No. 1:15-CV-274, 2017 WL 1745531, at *2 (M.D.N.C. May 4, 2017). This must be a "significant countervailing interest" that "outweighs the public's interest in openness." *Id*. To meet its burden, "[t]he party seeking to seal must provide specific reasons to support its position." *Id*. Accordingly, "[t]he First Amendment right of access cannot be overcome by [a] conclusory assertion." *Press-Enter. Co. v. Superior Court,* 478 U.S. 1, 15 (1986).

Claims of confidentiality for court filings cannot be made indiscriminately and without evidentiary support. *Bayer CropSci. Inc. v. Syngenta Crop Prot., LLC*, No. 13-CV-316, 2013 WL 12137000, at *1 (M.D.N.C. Dec. 12, 2013). Statements in a brief are not evidence and are insufficient to justify a motion to seal. *See Cochran v. Volvo Grp. N. Am., LLC*, 931 F. Supp. 2d 725, 730 (M.D.N.C. 2013); *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (declining to consider "[c]ounsel's unsupported assertions

[10] The result in this case would be the same, however, even if the Court applied the lower common law right of access.

in respondent's brief" as evidence); *Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009) ("An attorney's unsworn statements in a brief are not evidence.").

III. Discussion

In the various motions to seal, Duke maintains that certain exhibits should be sealed from disclosure on the grounds of the attorney-client privilege, confidentiality requirements arising out of federal regulations governing investigative information, and the protection of confidential personnel information.

Duke has identified only one document it contends should remain sealed because it contains personnel information: Doc. 176-21.[11] This document was offered in opposition to Duke's motion to seal and was not, as indicated *supra*, considered by the Court in deciding that motion. As it is not a judicial record and will remain sealed for that reason, the Court has no need to examine the claim that it contains confidential personnel information.

The remaining grounds, the attorney-client privilege and the protection of confidential investigative information, are considered below.

a. The Attorney-Client Privilege

In support of its motion for sanctions, Duke filed the relator's answers to a Duke interrogatory in which the relator details, by date, conversations he had with co-workers,

[11] Although the chart in Doc. 225-4 also includes "Private Personnel Record" as the "Basis for Sealing" portions of the relator's interrogatory responses, Doc. 191-8, this ground is not asserted in Duke's brief in support of sealing this document. Doc. 196. As this contention is unsupported by the brief, the Court will disregard it.

Doc. 165, Doc. 166, Doc. 167, and Doc. 179, along with some emails about these conversations that the relator sent to himself shortly after they took place. Doc. 164. Duke contends that over twenty statements made by co-workers to the relator as reflected in these interrogatory answers and emails contain information protected by the attorney-client privilege and should be sealed.[12] All but one of these statements mention counsel for Duke, and the one exception references a meeting that a later statement indicates was scheduled by counsel for Duke. *See* Doc. 166 at 18 (May 30, 2013). None of the statements are by a Duke lawyer directly to the relator or by the relator directly to a Duke lawyer. All of them are filtered through at least one of the relator's co-workers.

Courts generally accept a claim of privilege as capable of overriding the presumption of public access and thereby justifying redaction of documents. *See, e.g., Siedle v. Putnam Invs., Inc.,* 147 F.3d 7, 11 (1st Cir. 1998); *Publicker Indus., Inc. v. Cohen,* 733 F.2d 1059, 1073 (3d Cir. 1984); *Hanson v. Wells Fargo Home Mortg., Inc.,* No. C13-0939, 2013 WL 5674997, at *3 (W.D. Wash. Oct. 17, 2013); *Travelers Prop. Cas. Co. of Am. v. Centex Homes,* No. 11-3638, 2013 WL 707918, at *1 (N.D. Cal. Feb. 26, 2013); *Armstrong v. Kennedy Krieger Inst., Inc.,* No. WDQ-11-3380, 2012 WL 1554643, at *6 (D. Md. Apr. 30, 2012). The Court assumes without deciding that the attorney-client privilege would justify sealing covered communications in most

[12] Duke also asks to seal portions of a meet and confer letter sent from Duke to the relator's counsel, Doc. 168, and the relator's declaration, Doc. 190, both of which describe the relator's interrogatory answers, as well as the affidavit of Alan Schneider, Doc. 163, which summarizes information contained in the relator's emails to himself. As these documents are overlapping in content with Docs. 164 to 167, this analysis is applicable to all.

situations. Thus, the question before the Court is whether the information Duke seeks to seal falls within this privilege.

1. Applicable Legal Standard

Protection of client confidences is the reason behind the attorney-client privilege, *Trammel v. United States.*, 445 U.S. 40, 51 (1980), and the privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. 391, 403 (1976). The Fourth Circuit has emphasized that "the privilege is not absolute," but instead must be "strictly confined within the narrowest possible limits consistent with the logic of its principle." *Solis v. Food Emp'rs Labor Relations Ass'n*, 644 F.3d 221, 226 (4th Cir. 2011).

Indeed, the published cases in this circuit generally arise in the context of testimony or other evidence from the attorney about statements by the client. *See*, *e.g.*, *United States v. Jones,* 696 F.2d 1069 (4th Cir. 1982) (per curium); *Hawkins v. Stables,* 148 F.3d 379, 383 (4th Cir. 1998).[13] Nonetheless, it is clear that the privilege "may also be extended to protect communications by the lawyer to his client, agents, or superiors or to other lawyers in the case of joint representation, if those communications reveal

[13] As a result, the test for determining whether the privilege applies has generally been stated in this circuit in terms of communications made by a client to an attorney. In *Hawkins*, for example, the Fourth Circuit stated the following test for determining whether the attorney-client privilege applies: "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." 148 F.3d at 383; *see also Jones,* 696 F.2d at 1072.

confidential client communications." *United States v. Under Seal*, 748 F.2d 871, 874 (4th Cir. 1984). Many courts apply the privilege more broadly to statements by counsel to the client that relate to legal services. *See, e.g.*, *United States v. Christensen*, 828 F.3d 763, 802–03 (9th Cir. 2015) (discussing communications from the attorney to the client); *Fed. Trade Comm'n v. Boehringer Ingelheim Pharm., Inc.*, 892 F.3d 1264, 1267 (D.C. Cir. 2018) (applying privilege to "communications in which an attorney gives legal advice"). The Court assumes without deciding that the privilege would also cover statements by counsel that consist of confidential legal advice, even if the statement does not directly or indirectly disclose a client confidence.

Even so, the attorney-client privilege does not cover everything between a lawyer and a client and has significant limitations otherwise. "An attorney's involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all the incidents of such a transaction." *In re Fischel*, 557 F.2d 209, 212 (9th Cir. 1977); *accord United States v. Freeman*, 619 F.2d 1112, 1119–20 (5th Cir. 1980). For example, "[t]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). It does not cover the fact that an attorney-client relationship exists or the fact that the attorney undertook certain services on behalf of the client. *See*, *e.g.*, *Behrems v. Hironimus*, 170 F.2d 627, 628 (4th Cir. 1948). Similarly, an attorney's request for information or acts or statements of merely clerical significance are normally not privileged. Paul F. Rothstein & Susan W. Crump, *Federal Testimonial Privileges* § 2:11, n.3–4 (2d ed. 2017).

In addition, when an attorney does non-legal work for a client, communications in connection with that non-legal work are not privileged. *See, e.g.*, *Jones,* 696 F.2d at 1072–73 (doubtful that communications were confidential because the clients "retained the attorneys primarily for the commercial purpose of obtaining written tax opinions to include in their coal lease promotion brochures rather than for the purpose of obtaining legal advice for their own guidance as clients"); *In re Grand Jury Subpoenas dated March 9, 2001*, 179 F. Supp. 2d 270, 291 (S.D.N.Y. 2001) (communications about non-legal issues such as public relations are not protected by the attorney-client privilege); *Burton v. R.J. Reynolds Tobacco Co., Inc.*, 170 F.R.D. 481, 488 (D. Kan. 1997), *on reconsideration in part*, 175 F.R.D. 321, 488 (D. Kan. 1997) ("A party may not cloak a document with a privilege by simply having business, scientific or public relations matters handled by attorneys, whether in-house or outside counsel."). The attorney-client privilege does not protect communications about business or technical data. *See, e.g., Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403 (8th Cir. 1987) (collecting cases). When a communication has multiple purposes, such as both a legal and a business purpose, most courts apply the "primary purpose" test to determine whether the communication is privileged. *See, e.g.*, *Boehringer Ingelheim Pharm., Inc.*, 892 F.3d at 1267.

Finally, the participation of counsel in an internal investigation does not "automatically cloak the investigation with legal garb." *In re Grand Jury Subpoena*, 599 F.2d 504, 511 (2d Cir. 1979). Indeed, when in-house or outside counsel undertakes an investigation for a client, communications may or may not be privileged, depending on the circumstances. *See id.; compare In re Allen,* 106 F.3d 582 (4th Cir. 1997) (finding

communications between an attorney general and the outside counsel he hired to conduct an investigation of mismanagement in his office were protected by the attorney-client privilege because the hired attorney spent most of her time on legal rather than investigatory matters), *with Allied Irish Banks v. Bank of Am.*, *N.A.*, 240 F.R.D. 96 (S.D.N.Y. 2007) (finding outside counsel's draft investigative report and interview notes were not protected by the attorney-client privilege because it was not shown these materials were primarily or predominantly of a legal character or to convey legal advice).

2. Analysis

Initially, Duke did not make any effort to go through the twenty-plus communications on an individual basis to show that the individual communications disclose privileged information. *See* Doc. 162. Instead, Duke seemed to rely on two points applicable to all of the communications.

First, Duke contended that the relator conceded the privilege applied to these communications by redacting them in his first interrogatory responses, thereby shielding potentially privileged information from disclosure to Duke's codefendants. Doc. 162 at 7. However, as the relator points out, the evidence shows that these redactions were made "out of an abundance of caution" so that Duke would have the opportunity to claim privilege. Doc. 175-8 at 2. The relator explicitly reserved the right to object to privilege claims by Duke. *Id.* The relator's due consideration for another party's potential privilege claims does not constitute a concession that the materials are privileged.

Second, Duke seemed to contend that the mere mention of counsel made these communications privileged. That is not the law, and indeed it would be inconsistent with

the well-established rule that all testimonial or evidentiary privileges must be strictly construed. *See United States v. Bolander*, 722 F.3d 199, 222 (4th Cir. 2013); *see also* Armen Adzhemyan & Susan M. Marcella, *"Better Call Saul" If You Want Discoverable Communications: The Misrepresentation of the Attorney-Client Privilege on Breaking Bad*, 45 N.M. L. Rev. 477, 479 (2015) (noting and discussing "the myth that all communications with a lawyer are protected" by the attorney-client privilege). It also runs contrary to the well-established requirement that the proponent must show three facts in order for the attorney-client privilege to apply: first, that an attorney-client relationship existed; second, that the particular communications at issue are privileged; and third, that the privilege was not waived. *Jones*, 696 F.2d at 1072. "The burden is on the proponent of the attorney-client privilege to demonstrate its applicability." *Id*. As discussed at some length *supra*, there are many reasons a communication by or with a lawyer would not be privileged.

Duke's umbrella approach is particularly unhelpful in this case. A review of the communications disclosed in the interrogatory answers and the emails shows that all were repeated to the relator by various Duke co-workers and that they conveyed many different kinds of information with varying degrees of apparent involvement by counsel.[14] As the discussion *infra* makes clear, the application of the law on attorney-client privilege to the individual communications here requires a communication-by-

[14] As noted *supra*, none of the attorney communications here came directly to the relator from a Duke lawyer.

communication analysis. *See Upjohn,* 449 U.S. at 396–97 (application of privilege, such as attorney-client privilege, is determined on a case-by-case basis).

In its reply brief, after the relator pointed out the inadequacy of Duke's initial assertion of the attorney-client privilege, Duke made another umbrella argument, contending that all of these statements by counsel were made "in the context of an ongoing investigation," while "Duke was represented by counsel," and that the "communications concerned either facts communicated to counsel for the purpose of overseeing and providing legal advice, or counsel's impressions, or counsel's instructions." Doc. 195 at 6. Some of the communications themselves belie these contentions and, as to the remainder, Duke has provided insufficient evidence to support its privilege claims.

Beyond the interrogatory answers and emails themselves, Duke has submitted only one piece of evidence in support of these contentions: an affidavit from outside counsel concerning his participation in a meeting on September 9, 2014. *See* Doc. 161-1 (Declaration of Frederick Robinson). In relevant part, Mr. Robinson avers that "[t]he purpose of this meeting was for outside counsel and our retained experts to (1) advise Duke researchers on the status of the government's investigation into allegations involving Potts-Kant and (2) inform the researchers about the process of gathering information that would allow outside counsel to evaluate the positions Duke would take in defense of the investigation." Doc. 161-1 at ¶ 4.

Duke has submitted no other evidence to indicate when counsel was retained or consulted to provide legal advice and assistance in connection with any investigation. It

is apparent from the conversations as a whole as reported by the relator that, by some point in 2014 or possibly earlier, Duke counsel was involved in some sort of investigation into the Foster Lab data problem, but it is not apparent that this investigation had a primary purpose of obtaining or providing legal advice. *See Fisher*, 425 U.S. at 403 (the privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege."); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014) (holding that when "a given communication plainly has multiple purposes," the appropriate test is whether "obtaining or providing legal advice [was] *a* primary purpose of the communication, meaning one of the significant purposes of the communication." (emphasis in original)).

As other circuits have held, the participation of counsel in Duke's internal investigation did not "automatically cloak the investigation with legal garb." *In re Grand Jury Subpoena*, 599 F.2d at 511. The Court might guess or assume that counsel's primary purpose in the investigation was to provide legal advice, or that it became so at some point before September 9, 2014, but assumptions and guesses are insufficient grounds for a factual finding and for keeping court records secret.

Moreover, the relator submitted evidence that Duke's Research Integrity Officer (the "RIO") conducted the investigation. *See* Doc. 176-10 at 2 (2017 memorandum from the RIO indicating that an earlier "research misconduct investigation" resulted in a determination by Duke, not by counsel, that Ms. Potts-Kant "alone was responsible for the data falsification and fabrication"); *see also* Doc. 176-27 (referencing an "inquiry committee" interview). Indeed, the RIO memorandum does not mention any

involvement of counsel in the initial investigation and reflects that Dr. Ledford, the co-worker who had the most conversations with the relator, was not even interviewed in that initial investigation. Doc. 176-10 at 2.

As to the communications before September 9, 2014, even if one assumes counsel had been retained to provide legal advice and was speaking to the co-workers as part of that legal work, much of the disclosed information is obviously not privileged. For example, one communication did nothing more than mention that Duke counsel wrote a letter to funding agencies, which cannot be confidential as the letter was mailed to third parties. Doc. 166 at 18 (June 4, 2013); *see also id.* at 21 (June 25, 2013) (co-worker statement that Duke counsel wrote a letter to the National Institutes of Health stating that an investigation was underway). In another conversation, a Duke co-worker told the relator about a meeting researchers had with the RIO. *Id.* at 18 (May 30, 2013). The co-worker did not mention any statements or participation by counsel, *id*., though a few days later she did mention that Duke counsel scheduled the meeting itself. *Id.* (June 3, 2013). Duke has submitted no evidence to show that counsel's involvement was anything other than ministerial, and there is nothing in the interrogatory answer itself that discloses a client confidence to counsel or any advice by counsel. Rothstein & Crump, *supra* § 2:11 ("[A]cts or statements of merely clerical significance, are normally not privileged.").

Some of the purportedly privileged information is speculative opinion or commentary by the relator's co-workers, not arguably privileged advice from counsel. *See, e.g.,* Doc. 166 at 21 (June 25, 2013) ("Ledford also stated that she thinks that this letter [to the National Institutes of Health] would be the subject of Que's meeting with

Duke counsel on the following day. . . ."); *id.* (July 1, 2013) ("Ledford said she thought Duke counsel was blaming Duke researchers for the Foster Lab data issue."); *id.* at 47 (August 5, 2014) ("Ledford also said that Duke researchers are not going to be 'protected' if they leave Duke – the government investigators could 'just show up at their house.'"). Duke has not explained why the attorney-client privilege would cover such opinions by co-workers.

Duke also appears to think that it can hide underlying factual information merely because the word "counsel" was used in the conversation. For example, in June 2013, a co-worker told the relator that she was compiling and reviewing data at the request of Duke counsel. Doc. 166 at 20 (June 24, 2013). The fact that the co-worker compiled and reviewed data is not covered by the attorney-client privilege, nor is the data itself. *See Upjohn*, 449 U.S. at 395 ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."). The fact that it was undertaken at counsel's request might be privileged if, as previously noted, there were any evidence that counsel at that time had been retained to provide legal advice and that the data was needed to provide legal advice, but even so the underlying facts that the co-worker compiled and reviewed the data is not. *See id.*

In another conversation that Duke alleges to be protected by privilege, the relator asked a co-worker if the co-worker thought Duke counsel would be involved in a particular process. Doc. 166 at 19 (June 5, 2013). The relator's question itself is certainly not privileged, as it was not made to counsel for the purpose of obtaining legal advice on behalf of Duke. Moreover, the co-worker did not answer the question. *Id.*

Even if she had, it is doubtful the answer would be privileged. *See Behrems*, 170 F.2d at 628 (finding the attorney-client privilege does not cover the fact that the attorney undertook certain services on behalf of the client).

Finally, there were only four conversations between the relator and a co-worker on or after September 9, 2014, where Duke contends privileged information was disclosed. *See* Doc. 166 at 51 (September 9, 2014); *id.* at 53 (September 22, 2014; September 24, 2014); Doc. 167 at 10–11 (September 17, 2014). Even as to some of these, the privileged nature is not obvious. *See, e.g.*, Doc. 166 at 53 (September 22, 2014) (co-worker's statement to the relator "that her impression was that external counsel is overwhelmed" does not convey any confidential information to counsel and does not appear to have been offered by the co-worker to counsel as part of Duke's effort to obtain legal advice).

In other words, this is a case in which each purported communication has to be examined individually to determine if the attorney-client privilege applies. *Upjohn*, 449 U.S. at 396–97 (application of privilege, such as attorney-client privilege, is determined on case-by-case basis). Duke has made little to no effort to do so. Duke's broadside privilege assertion is inappropriate where Duke has the burden of proof and in light of the need to apply the privilege narrowly so as to promote its purposes and no further.[15] *See*

[15] While there are some communications that appear on their face to give rise to stronger privilege arguments, putting aside the waiver issue, it is not the Court's job to make those arguments for Duke. The Court will not undertake work that counsel has declined to present. *Cathey v. Wake Forest Univ. Baptist Med. Ctr.*, 90 F. Supp. 3d 493, 509 (M.D.N.C. 2015) (noting "it is not the court's job to undertake the analysis and legal research needed to support such a perfunctory argument."); *Hughes v. B/E Aerospace, Inc.,* No. 1:12–CV–717, 2014 WL 906220, at *1 n.1 (M.D.N.C. Mar. 7, 2014) ("A party should not expect a court to do the work that it elected not to do.").

Solis, 644 F.3d at 226 (noting the need to confine the privilege within "the narrowest possible limits consistent with the logic of its principle."); *Penn Mut. Life Ins. Co. v. Berck*, No. DKC 09-0578, 2010 WL 3294309, at *2 (D. Md. Aug. 20, 2010) (denying motion to seal allegedly privileged documents where movant offered only "barebones allegations" that the privilege applied).

Duke has not supported the motions to seal with evidence and legal argument demonstrating that the attorney-client privilege covers each of the purportedly privileged communications. A review of the communications shows that many are not, on their face, privileged. The public interest in access to exhibits purporting to support serious accusations of professional misconduct is high. Duke's overbroad and unsupported motion to seal the interrogatory answers, the emails, and any discussion of the answers and emails in briefs, declarations, or other documents is denied.

b. The "Internal Investigation" Documents

Duke seeks to seal four Sanctions Opposition Materials on the basis that these documents contain confidential information concerning Duke's internal research misconduct investigation. Doc. 196 at 8. These documents include the Relator's Opposition to Duke's Motion for Sanctions, Doc. 189,[16] the deposition of Barbara Theriot, Doc. 189-6, portions of the relator's interrogatory responses, Doc. 191-8, and an email exchange from Ms. Theriot to the RIO. Doc. 189-11.

[16] To the extent the redaction on page 13 of this document is also made on the basis of the attorney-client privilege, this redaction is rejected for the reasons stated *supra* in Section III.a.

Duke contends that sealing these documents is warranted on two grounds: first, that Duke is required by law to maintain the confidentiality of these documents or certain statements within them under 42 C.F.R. §§ 93.108, 93.300, 93.304; and second, that these documents should be sealed because the Court has entered a protective order in this case protecting "proprietary business information" from disclosure to third parties. Doc. 196 at 8. Neither argument supports sealing.

1. Applicable Legal Standard

As discussed *supra,* the Sanctions Opposition Materials are subject to the First Amendment right of access. The party seeking to seal on the grounds of confidentiality must therefore provide specific reasons and evidentiary support to justify a motion to seal. *Va. Dep't of State Police,* 386 F.3d at 575; *Bayer CropSci. Inc.*, No. 13-CV-316, 2013 WL 12137000, at *1. Statements in a brief and conclusory assertions are insufficient to justify a motion to seal. *See Cochran,* 931 F. Supp. 2d at 730; *Press-Enter. Co.,* 478 U.S. at 15; *INS*, 464 U.S. at 188 n.6 (declining to consider "[c]ounsel's unsupported assertions in respondent's brief" as evidence).

2. Protections under Federal Regulations

Duke's assertion that federal regulations require the redacted portions to remain sealed is unpersuasive for two reasons. *See* 42 C.F.R. §§ 93.108, 93.300, and 93.304. First, these provisions only require Duke to maintain the confidentiality of the identities of respondents, complainants, and research subjects in a misconduct inquiry or investigation, *i.e.,* the identity of individuals. *See* 42 C.F.R. § 93.108(a) (West 2018) ("Disclosure of the identity of respondents and complainants in research misconduct

proceedings is limited, to the extent possible, to those who need to know, consistent with a thorough, competent, objective and fair research misconduct proceeding, and as allowed by law."); 42 C.F.R. § 93.300 (West 2018) ("Institutions under this part must . . . (e) Provide confidentiality to the extent required by § 93.108 to all respondents, complainants, and research subjects identifiable from research records or evidence[.]"); 42 C.F.R. § 93.304 (West 2018) ("Institutions seeking an approved assurance must have written policies and procedures . . . that include . . . protection of the confidentiality of respondents, complainants, and research subjects identifiable from research records or evidence.").

In the motions to seal, however, Duke proposes to redact or completely seal much more than just the identity of individuals; rather, Duke asks to shield from public view facts underlying central issues in this lawsuit. For example, Duke seeks to seal the email from a Duke employee to the RIO requesting guidance on resolving questionable data, Doc. 189-11, in its entirety instead of proposing redactions that would only withhold information identifying the employee. Doc. 188 at ¶ 6. Similarly, Duke proposes to redact the entire summary of false data in the relator's interrogatory response, Doc. 191-8 at 15–18, instead of just the names of those who identified the false data. Doc. 188 at ¶ 6. These requests are not narrowly tailored and may be rejected on this basis. *See Stone,* 855 F.2d at 180 (stating that requests to seal documents subject to the First Amendment right to public access must be "narrowly tailored"); *see also* Doc. 169 at 55 (statement of the Court during status conference that it will not provide a second chance to narrow overbroad motions to seal).

Even if the proposed redactions were sufficiently narrow, Duke has made only a conclusory assertion in a brief that the individuals referenced in the documents are "complainants" covered under the C.F.R provisions. Duke did not provide any evidence to support a finding that these persons are "complainants" as that term is used in the regulations; nor did Duke dispute in its reply the relator's contention that Duke has not identified most of these individuals as "complainants" at all, and that the identities of the three individuals to whom Duke has given this label are already publicly available. Doc. 212 at 6; Doc. 221 at 7.[17] Instead, Duke shifts its argument to say that these protections apply to employee Barbara Theriot and others as witnesses under Duke's obligation to "[t]ake all reasonable and practical steps to protect the positions and reputations of good faith complainants, witnesses and committee members and protect them from retaliation by respondents and other institutional members." 42 C.F.R. § 93.300(d) (West 2018).

Duke does not specify what harm to Ms. Theriot may result other than mentioning "potential retaliation." Doc. 221 at 8. It is not clear upon examination of the statements by Ms. Theriot (the only witness Duke addresses with specificity) in her email to the RIO, Doc. 189-11, and her deposition, Doc. 189-6, that she would suffer any harm to her reputation as a result of disclosure. Ms. Theriot is merely asking for guidance on how best to proceed with concerns she has about data, and she does not make accusations of

[17] Even if these provisions did apply to the individuals whose information is included in the materials sought to be sealed, the regulations provide for disclosure "as allowed by law." 42 C.F.R. § 93.108(a) (West 2018).

misconduct against any individual other than Erin Potts-Kant, Doc. 189-11, who Duke had long since fired. The plaintiffs have already publicly identified Ms. Theriot in the Amended Complaint as someone with a significant role in the uncovering of research fraud at Duke. *See, e.g.*, Doc. 25 at ¶¶ 41, 232, 235, 243, 258. Since "broad allegations of harm, unsubstantiated by specific examples of articulated reasoning [are] not enough to overcome the strong presumption in favor of public access," *GoDaddy.com LLC v. RPost Commc'ns Ltd.*, No. CV-14-126, 2016 WL 1158851, at *2 (D. Ariz. Mar. 24, 2016) (quotation omitted), this position is likewise unavailing. *See also Press-Enter. Co.,* 478 U.S. at 15 ("The First Amendment right of access cannot be overcome by [a] conclusory assertion . . . .").[18]

3. The Protective Order

Duke also contends that the designation of documents as "confidential" under the Protective Order, Doc. 136, requires these documents to be sealed. Doc. 196 at 10. The designation of documents as confidential under a protective order does not require automatic sealing, as "courts in the Fourth Circuit have made it clear that the mere fact that a document was subject to a blanket protective order does not relieve the parties or a court of the obligation to comply with the Fourth Circuit's otherwise applicable sealing

[18] Duke's recasting of this argument in its reply, asserting that the disclosure of information that "may have been gathered throughout the research misconduct process" would serve to "chill" future investigations, is without merit for the same reasons. Doc. 221 at 3. Duke maintains this information should be protected to "encourage individuals to provide information and cooperate in misconduct investigations without the fear of their *identities* being made public or being subject to retaliation by others." Doc. 221 at 3 (emphasis added). As noted *supra,* Duke seeks to seal much more information than the identities of individuals, and this overbroad approach is rejected.

regimen." *Colony Ins. Co. v. Peterson,* No. 1:10-CV-581, 2012 WL 1047089, at *2 (M.D.N.C. Mar. 28, 2012) (collecting cases). The Protective Order itself provides that covered documents are still subject to the Court's sealing regimen, stating that "this Order does not entitle [the parties] to file Confidential Information under seal," and that the Court's local rules on sealing must be followed and "will control." Doc. 136 at ¶ 1; *see also id.* at ¶ 15.

While a party's designation of materials as "confidential" under a protective order may be relevant to whether the documents at issue have been treated as confidential, it does not relieve a party seeking to hide court records from the public from proving that such secrecy is appropriate. Litigants do not hold veto power over public access to the courts, even when they agree to secrecy. *See Cochran*, 931 F. Supp. 2d at 729; *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1358 (Fed. Cir. 2011); *Sensormatic Sec. Corp. v. Sensormatic Elecs. Corp.*, 455 F. Supp. 2d 399, 437–38 (D. Md. 2006).

The motion to seal the Relator's Opposition to Duke's Motion for Sanctions, Doc. 189, the deposition of Barbara Theriot, Doc. 189-6, portions of the relator's interrogatory responses, Doc. 191-8, and Ms. Theriot's email to the RIO, Doc. 189-11, is denied.

IV. Documents Filed Under Seal That Are Not Subject To Any Motion

Duke has filed a number of briefs under seal as provided for in the Local Rules. *See* LR 5.4(b) ("[T]he Motion to Seal should also be supported by a Brief, which may be filed under seal . . . ."). This provision allows parties to substantively discuss the information they wish to redact or seal in detail without disclosing it on the public record.

Four of these briefs—Doc. 162, Doc. 195, Doc. 196, and Doc. 221—were filed under seal in support of Duke's motions to seal the Sanctions Exhibits, Doc. 161, and the Sanctions Opposition Materials, Doc. 188. As both of these motions will be denied, and the Sanctions Exhibits and Sanctions Opposition Materials will be unsealed, there is no need to keep the briefs discussing these materials under seal as well. Accordingly, the Court will also unseal the briefs at Doc. 162, Doc. 195, Doc. 196, and Doc. 221.

The remaining two briefs—Doc. 201 and Doc. 224—were filed under seal in support of Duke's motion to seal the Sealing Opposition Exhibits, Doc. 174, which will be granted. Although these briefs provide a general description of the Sealing Opposition Exhibits, they do not quote or otherwise disclose specific details from these exhibits. *See, e.g.,* Doc. 201 at 1, 8, 11, and 13; Doc. 224 at 4–5. Accordingly, the Court will unseal the briefs filed at Doc. 201 and Doc. 224 unless, within 5 days of the entry of this Order, Duke files public copies of these briefs redacted only of the specific discussion of the Sealing Exhibits that remain under seal pursuant to this Order.

V. Conclusion

Courts should not keep their own records secret without a well-supported and substantial reason that outweighs the deeply-rooted public right of access. Without open courts and transparency about the basis for court decisions, suspicions about arbitrary exercise of government power can take seed and grow, arbitrary decision-making can avoid public scrutiny, and parties can file unsupported motions with serious accusations of misconduct under cover of secret exhibits. Duke has not shown that the information it seeks to seal is protected by any privilege or that any other substantial reason supports the

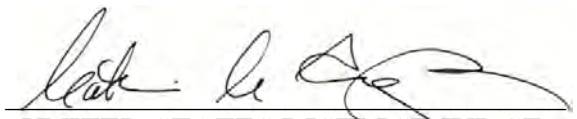
veil of secrecy Duke seeks to throw over these proceedings, which concern matters of serious public interest. Therefore, the motions to seal will be denied.

It is **ORDERED** that the pending motions to seal are granted in part, denied in part, and deferred in part, as follows:

1. The Motion to Seal at Doc. 161 is **DENIED**. On or after September 11, 2018, the Clerk shall unseal the documents filed at Doc. 166, Doc. 165, Doc. 164, Doc. 168, Doc. 167, and Doc. 163.
2. The Motion to Seal at Doc. 178 is **DENIED**. On or after September 11, 2018, the Clerk shall unseal Doc. 179.
3. The Motion to Seal at Doc. 174 is **GRANTED**. The Clerk shall maintain the documents filed at Doc. 176-10 (also at Doc. 201-1), Doc. 176-18 (also at Doc. 201-2), Doc. 176-19 (also at Doc. 201-3), Doc. 176-21 (also at Doc. 201-4), and Doc. 176-27 (also at Doc. 201-5) under seal.
4. The Motion to Seal at Doc. 188 is **DENIED**. On or after September 11, 2018, the Clerk shall unseal Doc. 189 (also at Doc. 196-5), Doc. 190 (also at Doc. 196-1), Doc. 189-6 (also at Doc. 196-2), Doc. 191-8 (also at Doc. 196-3), and Doc. 189-11 (also at Doc. 196-4).
5. On or after September 11, 2018, the Clerk shall unseal the briefs filed at Doc. 162, Doc. 195, Doc. 196, and Doc. 221.

6. On or after September 11, 2018, the Clerk shall unseal the briefs filed at Doc. 201 and Doc. 224 unless, within five (5) days of this Order, Duke has filed redacted copies as directed herein.

This the 4th day of September, 2018.



UNITED STATES DISTRICT JUDGE

The Hazards of *Duke*

Legal Challenges in *United States ex rel. Thomas v. Duke University, et al.*

Matthew W. Broughton

J. Scott Sexton

Gregory J. Haley

Michael J. Finney

Andrew M. Bowman

The Hazards of *Duke*:

Legal Challenges in *United States ex rel. Thomas v. Duke University, et al.*

Gentry Locke Seminar
Hotel Roanoke Conference Center Friday, September 6, 2019

Matthew W. Broughton
J. Scott Sexton
Gregory J. Haley
Michael J. Finney
Andrew M. Bowman

I. Introduction

This outline will review the general legal framework of the FCA, as well as FCA case law updates. The *United States ex rel. Thomas v. Duke University, et al.* litigation touched on many of these issues, and the case will serve as the basis for examples and hypotheticals on these points. Please see the companion outline on FCA ethics for a background on the facts of the *Duke* case.

II. Elements of a FCA claim.

A. Overview

1. A false statement is only actionable under the FCA if it is related to a "claim." The FCA defines a "claim" as "any request or demand, whether under a contract or otherwise, for money or property that . . . is presented to an officer, employee, or agent of the United States." 31 U.S.C. § 3729(b)(2)(A).

    i. In the *Duke* case, the claims were research grant applications and progress reports submitted to the NIH and EPA.

2. Other examples of FCA "claims" include: a bill submitted to Medicare for services rendered by hospital or doctor; or a contractor invoice for federal construction job.

3. The FCA provides for six types of cause of action. *See generally* 31 U.S.C. § 3729(a)(1). The overwhelming majority of FCA cases involve false or fraudulent claims (31 U.S.C. § 3729(a)(1)(A)) and false records (31 U.S.C. § 3729(a)(1)(B)).

    a. Section 3729(a)(1)(A) polices false statements in the actual claim for payment. For example, fraudulent research results reported in a grant application.

b. Section 3729(a)(1)(B) polices false statements in a record material to a false claim. For example, fraudulent research results published in a scientific publication, where the publication is then used to support a grant application.

4. The Fourth Circuit generally requires FCA plaintiffs to plead four elements:

(1) there was a false statement or fraudulent course of conduct;

(2) made or carried out with the requisite scienter [knowledge];

(3) that was material; and

(4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a 'claim').

See United States ex rel. Rostholder v. Omnicare, Inc., 745 F.3d 694, 700 (4th Cir. 2014)

B. **Falsity**

1. The FCA does not define "false or fraudulent."

2. Objective Falsity

a. "[T]he statement or conduct alleged must represent an objective falsehood." *United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 383 (4th Cir. 2015) (quotation omitted). This requires a statement of fact that can be said to be either true or false.

b. "Expressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false." *United States ex rel. Jones v. Brigham & Women's Hosp.*, 678 F.3d 72, 87 (1st Cir. 2012); *see also Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1420-21 (9th Cir. 1992) ("Bad math is not fraud, proof of mistake is not evidence that one is a cheat, and the common failings of engineers and other scientists are not culpable under the Act.").

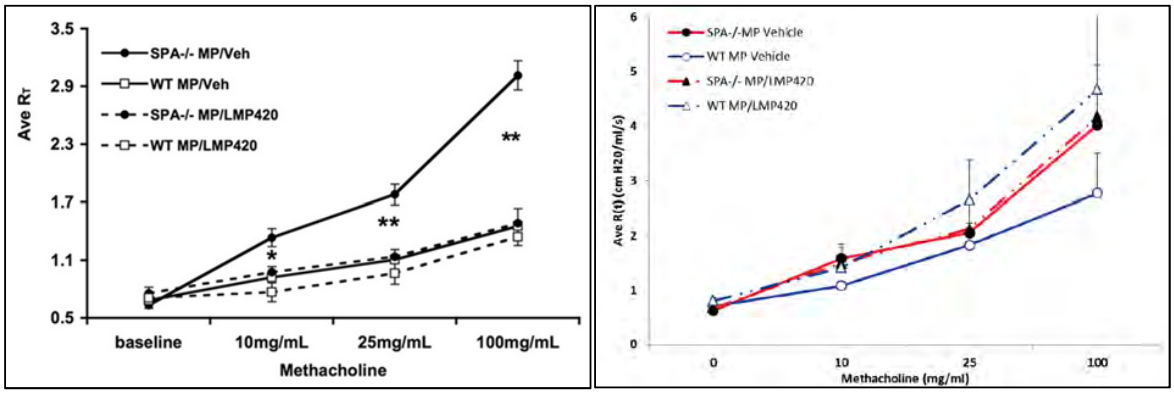
c. Example

i. The mouse is black (objectively false).

ii. The mouse is large (highly subjective).

d. *Duke* Examples

i. False data—the graph on the left is the data published in a scientific journal, and the graph on the right is the data generated by the machine.



ii. Narrative statements based on a graph of false data.

A. The narrative statement may be literally true, insofar as it reflects the scientific observation shown by the left graph.

B. The narrative statement may also be substantively false, insofar as it is based on fake scientific data.

iii. References to published scientific journal articles.

A. The citation to a publication is *literally* true, insofar as the document was published.

B. The citation may also be substantively false insofar as it incorporates by reference the publication which is based on false/fraudulent data.

E. PUBLICATIONS:

Peer Reviewed Manuscripts (Published):

1. Potts-Kant EN, Li Z, Tighe RM, Lindsey JY, Frush BW, Foster WM, **Hollingsworth JW**. NAD(P)H quinone oxioreductase 1 protects lungs from oxidant-induced emphysema in mice. **Free Radic Biol Med.** 2012 Feb 1;52(3):705-15.

↓

Retraction notice to NAD(P)H:QUINONE OXIOREDUCTASE 1 PROTECTS LUNGS FROM OXIDANT-INDUCED EMPHYSEMA IN MICE [FRB 52/3 (2012) 705 - 715]

3. False Certifications

a. Express False Certifications: affirmative falsehoods; analogous to a false statement.

i. *Duke* Example: Each NIH grant application contains the below certification. If the NIH grant application contains a false statement, the certification is probably also false.

> 14. APPLICANT ORGANIZATION CERTIFICATION AND ACCEPTANCE: I certify that the statements herein are true, complete and accurate to the best of my knowledge, and accept the obligation to comply with Public Health Services terms and conditions if a grant is awarded as a result of this application. I am aware that any false, fictitious, or fraudulent statements or claims may subject me to criminal, civil, or administrative penalties.

b. Implied False Certification Theory: When a defendant submits a claim to the Government, it impliedly certifies compliance with all conditions of payment. The defendant's failure to disclose its violation of a statutory, regulatory, or contractual requirement is a misrepresentation that renders the claim "false or fraudulent" under the FCA. *See Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

i. *Duke* Example: When a research institution is awarded a NIH grant, it must submit an annual progress report detailing the research conducted under the grant over the preceding 12 months. Most progress reports do not contain the same express certification ("the statements herein are true, complete and accurate"). There is, arguably, an implied certification that the contents of the progress report are true, complete, and accurate.

C. **Knowledge/Scienter**

1. The FCA defines knowledge as "(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(A).

2. No proof of a specific intent to defraud is required to show FCA "knowledge." *See* 31 U.S.C. § 3729(b)(1)(B).

3. **Individual Scienter**: The scienter of an individual person is a straightforward analysis according to well-established principles.

4. **Organizational Scienter**: There is a divergence in the case law regarding the extent knowledge (scienter) is imputed to the corporation.

   a. Majority View: Corporations are generally charged with the knowledge of their employees and agents acting within the scope of their authority. Corporations know what their employees know, when the employee acquires that knowledge within the scope of their employment. *See United States ex. rel. Polukoff v. St. Mark's Hosp*., , 895 F.3d 730, at 745 n.9 (10th Cir. 2018); *United States v. Anchor Mortg. Corp*., 711 F.3d 745, 747-78 (7th Cir. 2013).

      i. The knowledge of ***any*** employee (even low-level employees such as check-out cashiers), acting within the scope of employment, is imputed to the corporation for purposes of FCA knowledge (scienter). *See Polukoff*, 895 F.3d 730, at 745 n.9; *Grand Union Co. v. United States*, 696 F.2d 888 (11th Cir. 1983); *United States ex rel. Harrison v. Westinghouse Savannah River Co.* ("*Harrison II*"), 352 F.3d 908, 920 n. 12 (4th Cir. 2003) (citing with approval the Eleventh Circuit's *Grand Union* decision).

      ii. The Fourth Circuit applies the general common law of agency, as set forth in the Restatement of Agency. *See Cilecek v. Inova Health Sys. Servs.*, 115 F.3d 256, 259-60 (4th Cir. 1997).

      iii. Restatement (Third) of Agency Law § 7.04(2) defines scope of employment as:

      "An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer."

      iv. *Duke* Example:

         A. Laboratory technician's assigned duties were to conduct experiments (*flexi*Vent and multiplex), generate data, and provide those data to her supervisor and/or other Duke researchers.

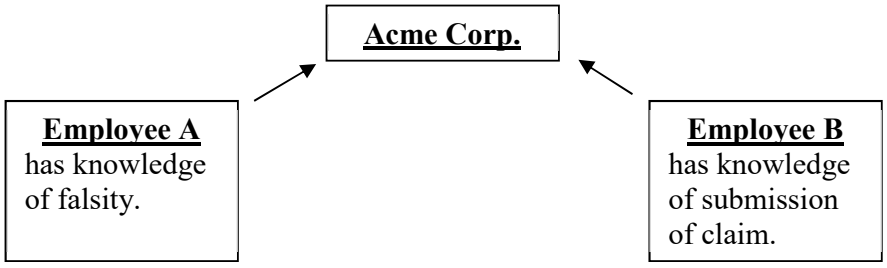
B. The supervisor entrusted these duties to the technician.

C. Laboratory technician performed this work using Duke-owned machines in a Duke facility.

D. Laboratory technician's actions were intended to benefit Duke—to obtain and maintain research grant and publish scientific journal articles.

b. Minority View: Corporations are not charged with the knowledge of non-managerial employees (*i.e.*, low-level employees), unless the employer had knowledge of the employees acts and ratified them, or was reckless in hiring or supervision of that employee. *See United States v. S. Md. Home Health Servs.*, 95 F. Supp. 2d 465, 468-69 (D. Md. 2000).

c. The *Duke* Court indicated the majority view applied, and the laboratory technician's knowledge of specific falsified or fabricated data would be imputed to Duke. *See* Text Order (Oct. 19, 2018).



5. **Scope of Knowledge**

a. FCA scienter requires knowledge of the falsity.

i. It may also require knowledge of the claim. *See, e.g.*, *United States v. President and Fellows of Harvard College*, 323 F. Supp. 2d 151, 186-87 (D. Mass. 2004).

b. Corporations cannot avoid FCA liability by isolating the knowledge of employees involved in the claims process. The knowledge of multiple employees may be pieced together to fulfil the FCA scienter requirement. *See Harrison II*, 352 F.3d at 918-19 (rejecting single-actor theory).

i. While *Harrison II* was decided in the context of false certifications, the Fourth Circuit's logic likely extends to other contexts.

D. **Materiality**

1. The FCA defines "materiality" as "having a natural tendency to influence, or capable of influencing, the payment or receipt of money." 31 U.S.C. § 3729(b)(4).

   a. By its terms, the FCA only requires proof of "materiality" in false records claims. *Compare* 31 U.S.C. § 3729(a)(1)(B), *with* 31 U.S.C. § 3729(a)(1)(A).

   b. Courts generally require proof of materiality for all types of FCA claims.

2. Materiality focuses on the potential effect of the false statement when it is made, not on the actual effect of the false statement when it is discovered. *See United States v. Triple Canopy, Inc*. ("*Triple Canopy I*"), 775 F.3d 628, 636 (4th Cir. 2015); *United States v. Triple Canopy, Inc*. ("*Triple Canopy II*"), 857 F.3d 174, 178 (4th Cir. 2017).[1]

3. The U.S. Supreme Court has endorsed a holistic view of materiality, focused on the potential impact on the Government, not any one particular requirement. *Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). A non-exclusive list of considerations from *Escobar* and the Fourth Circuit's decisions in *Triple Canopy I* and *Triple Canopy II*, are as follows:

   a. Common Sense. If the falsity goes to the essence of the bargain, then it is probably material.

      i. Example: marksmanship scores for guards of a military bases in Iraq. *See Triple Canopy I*, 775 F.3d at 638; *Triple Canopy II*, 857 F.3d at 179.

      ii. *Duke* Example: scientific data for scientific research.

[1] *Triple Canopy I* was vacated in light of *Escobar*. 136 S. Ct. 2504 (2016). On rehearing, the Fourth Circuit issued a new opinion, *Triple Canopy II*, and reinstated Part III.C and Part IV of the prior opinion, relating to implied certification claims and false records claims. 857 F.3d at 179.

b. Cover-Up. An entity's actions in covering up the falsity evidence materiality; if it was not material, then there is no motivation for the cover-up.

i. *Duke* Examples: narrative generic statement about cover-up.

c. Express Condition of Payment. The Government's designation of a condition of payment is evidence of materiality.

d. Option of Non-Payment. If the Government has the option to refuse payment based on the violation of a particular condition, then the condition is not automatically material.

e. Routine Government Enforcement. The fact that the Government regularly polices a particular requirement is probative of materiality.

i. Example: the Government terminates the contract when it becomes aware of the falsity. *See, e.g.*, *Triple Canopy II*, 857 F.3d at 179.

f. Government Knowledge. If the Government pays a specific claim, or type of claims, with actual knowledge of non-compliance, then the requirement probably is not material.

g. Minor/Insubstantial Requirements. Trivial requirements that have little or no relationship to the claim are probably not material.

i. Example: mandate that health services contractor only buys American-made staplers. *See Escobar*, 136 S. Ct. at 2004; *see also Triple Canopy I*, 775 F.3d at 637; *Triple Canopy II*, 857 F.3d at 178.

h. Over-Expansive Requirements. Probably not material.

i. Example: compliance with the entire U.S. Code and Code of Federal Regulations.

E. **Damages**

1. Under the FCA, the amount of damages is that "which the Government sustains because of the act." 31 U.S.C. § 3729(a)(1).

a. The rationale for FCA damages calculation is to make the Government completely whole. *See Harrison II*, 352 F.3d at 922-23.

2. Tangible Benefit Cases

a. Standard FCA case involving procurement-type fraud, where the Government receives a good or service that can be valued.

i. Example: the Government contracted with Acme Corp. to buy tanks with steel armor, but receives tanks with plywood armor.

b. The measure of damages is equal to the difference between the amount the Government paid and the market value of the product the Government actually received. *See Harrison II*, 352 F.3d 908, 923 (4th Cir. 2003); *see also United States ex rel. Wilson v. Graham Cty. Soil & Water Conservation Dist.*, Case No. 2:01-cv-19, 2016 U.S. Dist. LEXIS 30199, at *5 (W.D.N.C. Mar. 9, 2016).

i. Commonly known as the "Benefit-of-the-Bargain" Analysis

ii. Using the above example, If the Steel Tanks are worth $1 million, and the Plywood Tanks are worth $250,000, then the Government's damages are $750,000.

3. Intangible Benefit Cases

a. Measuring damages is more difficult when the Government does not receive a tangible good, but rather receives an intangible benefit which is difficult or impossible to calculate.

i. *Duke* Example: Federal research grants do not generate a product; it provides money to eligible deserving organizations to conduct research in order to advance the public good through scientific knowledge. This cannot be readily assigned a market value.

b. Prevailing law is the FCA damages are equal to the full amount the Government paid. *See United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 473 (5th Cir. 2009); *United States ex rel. Feldman v. Van Gorp*, 697 F.3d 78, 87-91 (2d Cir. 2012).

i. Commonly known as the "Full Amount of the Contract" or "Full Amount of the Grant" Rule.

ii. Example: If the Government paid $9.3 million for a research grant, then FCA damages are $9.3 million.