Practicing Law in a Brave New World.

2020 Gentry Locke CLE Seminar

Friday, September 11, 2020

GENTRY LOCKE

Roanoke | Lynchburg | Richmond | gentrylocke.com

2020 Gentry Locke CLE Seminar

Practicing Law in a Brave New World

AGENDA

September 11, 2020

8:25 a.m. *Welcome*

1. 8:30 a.m. **“Old Dogs Learning New Tricks: The Ethics of Practicing Law Outside the Office.”**
Greg J. Haley, Jon D. Puvak, and Alicha M. Grubb

2. 9:20 a.m. **“Catastrophic Motor Vehicle Accidents; Real Lessons Learned in Representing Injured Motorists and Defendant Trucking Companies.”**
Matt W. Broughton, Ashley W. Winsky, Andrew D. Finnicum, and David R. Berry

3. 10:00 a.m. **“The CARES Act – Who CARES Anyway?”**
Bill W. Gust, and Ben R. Law

10:25 a.m. *Break*

4. 10:45 a.m. **“New Rules Impacting the Employment Relationship; L&E and the General Assembly – What’s Changed?”**
W. David Paxton, and Kelsey M. Martin

5. 11:15 a.m. **“Managing the Workforce in the Time of a Pandemic.”**
Paul G. Klockenbrink, and Cate J. Huff

12:00 p.m. *Lunch*

6. 12:15 p.m. **“Ethical and Practical Issues in Criminal Defense: Navigating *Giglio* & Allegations of Official Misconduct.”**
Jenny S. DeGraw, and Erin M. Harrigan

1:05 p.m. *Break*

2020 Gentry Locke CLE Seminar

Practicing Law in a Brave New World

AGENDA

7	1:05 p.m.	**“Achieving and Maintaining Wellness for Lawyers.”** Dr. Ted Polverino, Carilion
	1:55 p.m.	*Break*
8	2:15 p.m.	**“2020 Bills of Interest: Passed or Considered by the 2020 Session of the General Assembly of Virginia.”** Greg D. Habeeb, Chip G. Dicks, and Matthew S. Moran
9	2:55 p.m.	**“Improving Interstate 81: Understanding the Process, Challenges, and Opportunities.”** K. Brett Marston, and Spencer M. Wiegard
	3:20 p.m.	*Break*
10	3:30 p.m.	**“Creditors Rights in a Pandemic: Understanding how to Protect your Client in an Economic Downturn.”** Bill E. Callahan, Chip G. Dicks, and Chris M. Kozlowski
11	3:55 p.m.	**“Insurance Coverage in the COVID-19 Pandemic.”** Guy M. Harbert, and Pete G. Irot
12	4:25 p.m.	**“What Could Go Wrong? A Guide to Defaults and Default Judgments from a Plaintiff’s Perspective.”** Travis J. Graham

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).

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

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.

- Aug 8, 2019 — **Reduction of Commercial Vehicle Citations**
- 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

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

Ashley W. Winsky

Partner

- Office: 804.297.3704
- Fax: 540.983.9400
- Email: winsky@gentrylocke.com

Ashley Winsky, a partner and trial lawyer in the firm's Richmond office, maintains a diverse litigation practice. Ashley listens to her clients and works tirelessly to advance their objectives. Comfortable in the courtroom, Ashley has tried cases before both judge and jury in state and federal court. She is equally effective in mediating disputes to save clients the expense and exposure that comes with protracted litigation.

Ashley's clients have described her as "compassionate, empathetic, and tactful" and "energetic, dynamic, and very tenacious." Her peers have labeled her "a stand-up trial lawyer who is tenacious, ambitious, and hardworking" and "utterly devoted to the client's cause, imminently capable, and always professional."

Ashley has over a decade of experience defending motor carriers, railroads, amusement parks, bus companies, product manufacturers, and business owners against a wide array of personal injury claims. Ashley has also represented individuals in wrongful death and catastrophic injury claims. She has been consistently recognized in the transportation arena by *Chambers USA*, named a "Rising Star" in Transportation by *Legal 500*, and named a "Virginia Rising Star" by *Super Lawyers*.

Education

- Antonin Scalia Law School – George Mason University, J.D. 2009
- Virginia Polytechnic Institute and State University, B.A. summa cum laude, 2006

Experience

- Second-chaired three-week federal trial involving allegations of fraud against a former executive of an aviation software company and a demand in excess of $20 million and obtained a favorable defense verdict while also securing a counterclaim verdict for the client
- First-chaired jury trial to defense verdict for a waterpark in a premises liability action involving the operation of an amusement device and allegations of lifeguard negligence
- Obtained multiple defense verdicts at trial for tractor-trailer companies and drivers involved in automobile collisions
- Obtained 6.5 million dollar settlement for plaintiff in a premises liability case, which was reported in Virginia Lawyers Weekly as the second largest settlement in 2018
- Obtained 1.9 million dollar settlement for plaintiff in a wrongful death case, which was believed to be a record-setting settlement in the rural county where the case was filed
- Obtained dismissal with prejudice of a personal injury action, filed against a tractor-trailer company and its driver, arising out of a roadway accident in the months before trial was scheduled to commence
- Obtained dismissal with prejudice of a negligence and assault and battery action, filed against a tractor-trailer company and its driver on a motion to dismiss
- Obtained favorable resolution for a tractor-trailer company whose driver was driving under the influence of alcohol and in possession of marijuana in a negligence action
- Obtained favorable resolution for a tractor-trailer company whose driver ran a red light in a personal injury action
- Obtained favorable resolution for a tank truck carrier involved in a multiple vehicle collision where a plaintiff rendering assistance suffered permanent injuries

- Obtained favorable resolution for a tank truck carrier in a chemical exposure case
- Obtained favorable resolution for a tractor-trailer company and its driver in collision involving a cyclist
- Obtained favorable resolution for a tractor-trailer company and its driver in a collision involving a pregnant motorist
- Obtained favorable resolution for fitness facility in action alleging wrongful death by drowning
- Obtained defense verdict at trial for a theme park in a case involving allegations of assault and battery to a minor
- Obtained defense verdict at trial for a theme park in a premises liability action involving an injury to a minor
- Obtained dismissal with prejudice of a slip-and-fall action for a theme park
- Obtained favorable resolution in a defamation case
- Successfully defended entertainment venue against copyright infringement claims
- Successfully tried a breach of contract claim to bench verdict for a manufacturer of pool products
- Served as local counsel for a component part manufacturer in a product liability action involving pourable gel fuel and obtained nonsuit
- Defended railroad in an action alleging take-home asbestos exposure to an independent contractor's family member and obtained nonsuit
- Represented railroad in casualty, FRSA, and FELA litigation
- Represented software company in federal court litigation involving breach of contract, tortious interference, and conspiracy claims
- Tried numerous personal injury cases to defense verdict at trial for public transit authority
- Tried multiple workers' compensation cases to defense verdict before the Virginia Workers' Compensation Committee for public transit authority

Affiliations

- Member, Transportation Lawyers Association (TLA)
- Member, American Trucking Association (ATA)
- Licensed in Virginia and West Virginia
- Admitted to practice before the U.S. District Courts for the Eastern District of Virginia, Western District of Virginia, and Southern District of West Virginia

Speaking Engagements

- Presenter, "Ethics for Motor Carrier In-house Counsel," American Trucking Association's Forum for Motor Carrier General Counsel, Santa Ana Pueblo, NM, July 15, 2018
- Presenter, "I am not a Professional: Rejecting the Heightened Standard of Care for Truck Drivers," Transportation Lawyers Association Annual Conference, Orlando, FL, May 3, 2018
- Presenter, "Ethical Quandaries in Light of the Cloud, Social Media and Data Breaches," American Trucking Association's Forum for Motor Carrier General Counsel, Beaver Creek, CO, July 16, 2017

Awards

- Named a "Rising Star" in the practice of Transportation: Rail and Road – Litigation by Legal 500 US (2019)
- Named an "Up and Coming" attorney in Chambers USA America's Leading Lawyers for Business, Transportation: Road (Carriage/Logistics) (2019-2020); and an "Associate to Watch" in Transportation: Road (Carriage/Commercial) (2016-2018)
- Named to Super Lawyers "Virginia Rising Stars" for Civil Litigation (2013-2020)

Published Work

- Interview, "**How Plaintiffs Use Commercial Vehicle Regulations to Turn Simple Negligence Into Driver Malpractice**," Corporate Counsel Business Journal, September 11, 2018.

GENTRY LOCKE
Attorneys

Andrew D. Finnicum

Partner

- Office: 540.983.9355
- Fax: 540.983.9400
- Email: finnicum@gentrylocke.com

Andrew Finnicum helps people who have suffered personal injury due to negligence or workplace accidents. Andrew has recovered millions of dollars for clients throughout Virginia who are victims of medical malpractice, have suffered workplace injuries that entitle them to workers' compensation benefits, and who have been injured or lost their lives in boating and motor vehicle accidents. Andrew has appeared before the Workers' Compensation Commission, the General District Courts of Virginia, the Circuit Courts of Virginia, the Court of Appeals of Virginia, the Judicial Panel on Multidistrict Litigation, and the United States District Court for the Central District of California. Prior to joining Gentry Locke, he worked with a Lynchburg firm handling workers' compensation, personal injury matters, and consumer litigation. As a law student he was a judicial extern for the Honorable Charles Dorsey, where he authored memoranda, conducted legal research, and observed Circuit Court proceedings.

Education

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

Experience

- $5,000,000 successful resolution in favor of victim of legal malpractice
- $4,000,000 successful resolution in favor of family in wrongful death boating crash in Irvington, Virginia
- $2,100,000 successful resolution in favor of family members of two siblings killed in a commercial vehicle crash in Scott County, Virginia
- $900,000 successful resolution in favor of family in wrongful death tractor-trailer crash on Route 220
- Mediated workers' compensation matter resulting in claimant receiving benefits totaling over $750,000
- $500,000 successful resolution in favor of victims of tractor trailer crash on Interstate 81
- $475,000 successful resolution in favor of victim of multi-vehicle crash on Interstate 81
- $350,000 successful resolution in favor of victim of deck collapse in Halifax, Virginia
- Mediated workers' compensation case involving traumatic electrocution injuries resulting in claimant receiving over $300,000 in benefits
- Successfully tried federal case involving tractor-trailer accident with contested liability resulting in jury verdict of $300,000
- Successfully represented homeowner in products liability lawsuit against manufacturer and installer of home insulation product
- Handled a myriad of cases from intake to trial in the Workers' Compensation Commission, the General District Courts, and the Circuit Courts of Virginia
- Appellate experience in the Supreme Court of Virginia, the Court of Appeals of Virginia, the United States Court of Appeals for the Fourth Circuit, and the United States Court of Appeals for the Ninth Circuit

Affiliations

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

Awards

- Named a “Virginia Super Lawyers Rising Star” in Personal Injury General: Plaintiff (2017-2019)
- Second Place, 2008 John W. Davis Appellate Advocacy Moot Court Competition for both Best Brief Award and Best Oralist Award
- Co-Administrator for the 2009 John W. Davis Appellate Advocacy Moot Court Competition

Case Studies

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

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

GENTRY LOCKE
Attorneys

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

W. William Gust

Partner

- Office: 540.983.9305
- Fax: 540.983.9400
- Email: gust@gentrylocke.com

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

Education

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

Experience

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

Affiliations

- Member, Roanoke-Blacksburg Regional Airport Commission (past Chairman)
- Past Chair, Board of Governors, Trusts and Estates Section, Virginia State Bar
- Fellow, American College of Trust and Estate Counsel
- Member, Tax, Trusts and Estates, Health Care, Business Law Sections, Virginia State Bar

- Member, Tax, Employee Benefits, Corporate Sections, American Bar Association
- Member, Roanoke Valley Estate Planning Council
- Member, ESOP Association; NCEO, Mid-Atlantic Chapter of ESOP Associations

Awards

- Designated one of the “Legal Elite” by Virginia Business magazine for the area of Taxes/Estates/Trusts/Elder Law (2015-2017) and Business Law (2018)
- Named “2017 Roanoke Lawyer of the Year for Employee Benefits (ERISA) Law” by Best Lawyers in America and consistently noted for Employee Benefits (ERISA) Law, and Tax Law

Benjamin R. Law

Associate

- Office: 540.983.9310
- Fax: 540.983.9400
- Email: blaw@gentrylocke.com

Ben Law practices with the firm's Business Law group. Prior to joining Gentry Locke, Ben was a Senior Consultant in Deloitte's commercial IT Advisory practice, spent two summers interning for a Memphis law firm, was a legal extern for The Honorable Jon P. McCalla in United States District Court, Western District of Tennessee, and served as a Student Attorney for the University of Memphis School of Law Neighborhood Preservation Clinic. During law school, Ben also served as a Writing Fellow to the University of Memphis School of Law Writing Center.

Education

- The University of Memphis Cecil C. Humphreys School of Law, J.D. magna cum laude (2018)
- Virginia Tech Pamplin School of Business, M.S. (2011) and B.S. (2010) in Accounting & Information Systems

Experience

- Represented client in syndicated credit facility amendment
- Represented clients in commercial real estate matters, including purchase and sale transactions and commercial leases
- Acted as settlement agent for commercial real estate transactions
- Advised clients on land use matters, including special use permit applications and zoning violations
- Prepared stock purchase agreements
- Prepared asset purchase agreements
- Prepared independent contractor agreements
- Prepared employment agreements
- Prepared flight services agreements in accordance with FAA regulations
- Performed due diligence reviews
- Assisted individuals with new business entity formation
- Advised clients on stock repurchase plans
- Advised clients on local ordinances
- Prepared ordinances for local government clients
- Co-authored the 2018 legislative amendments to Tennessee's Neighborhood Preservation Act (Tenn. Code Ann. § 13-6-101, et seq.)

Affiliations

- Member, Virginia State Bar (2018-Present)

Awards

- Law Student of the Year, Neighborhood Preservation, Inc. (Memphis, 2018)
- Articles Editor, University of Memphis Law Review, Volume 48 (January 2017 – May 2018)
- Staff Member, University of Memphis Law Review, Volume 47 (August 2016 – May 2017)

- CALI Awards for Negotiation and Mediation (Spring 2017), Land Use Law (Fall 2017), and Neighborhood Preservation Clinic (Fall 2017)
- Dean’s Award for Excellence, Best Memorandum (Fall 2015)

GENTRY LOCKE
Attorneys

W. David Paxton

Partner

- Office: 540.983.9334
- Fax: 540.983.9400
- Email: paxton@gentrylocke.com

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

Education

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

Experience

Complex & Multi-Party Litigation

- Representing national mining company in complex contract dispute involving claims against rail company; case pending in federal court in Roanoke, Virginia
- Representing a private equity and venture capital firm, and its owner in defense of a lawsuit asserting ERISA and securities violations; case pending in federal court in Roanoke, Virginia
- Trial counsel for Rolling Stone and Sabrina Erdely in Eramo v Rolling Stone, a case tried to a jury for 3.5 weeks in federal court in Charlottesville, Virginia
- Secured summary judgment for the plaintiff in Doe v Alger, a seminal case that recognized the due process rights of students at state universities accused of sexual misconduct based on a property right in continued enrollment
- Represented and successfully defended defendant in special litigation committee investigation of a derivative action for breach of fiduciary duty, where state court dismissed the shareholder's claims based on special litigation committee report
- Secured jury verdict for three members of insurance company's Board of Directors in defense of claims brought by Commissioner of Insurance for fraud, fiduciary duty, conspiracy and securities violations. Also later recovered more than $3 million in attorney fees on indemnity claims
- Secured summary judgment on §1981 public accommodation discrimination claims brought against large franchisee of national restaurant chain by the Washington Lawyers Committee
- Secured dismissal of anti-trust and constitutional claims brought against state association that regulates public school athletics in Virginia by local media organization seeking to broadcast playoff games
- Represented President of Peanut Corporation of America in connection with Congressional and criminal food safety investigations, and in lawsuit to secure D&O coverage for defense costs
- Represented national restaurant chain in connection with contrived "mouse in the soup" claims resulting in the felony criminal conviction of two persons who made allegations

- Trial and appellate counsel to college athlete accused of sexual assault and prevailed on the constitutional challenge to civil remedy under VAWA before U.S. Supreme Court in United States v. Morrison

Employment Litigation

- Represented and successfully defended a US subsidiary of multinational company in response to a whistleblower claim brought under the Energy Reorganization Act before OSHA Administrative Law Judge and Administrative Review Board
- Directed internal investigation conducted by former FBI agent of senior officials of a local governmental agency accused of various act of misconduct, which led to no charges or litigation
- Directed internal investigation conducted by former FBI agent into alleged claims of misconduct of a senior executive of large regional financial institution, which lead to a resolution with no subsequent litigation
- Obtained $4 million jury verdict for privately held company against its former president on claim to recoup bonus paid under theory of unjust enrichment
- Represented and successfully prosecuted claims on behalf of a US subsidiary of an international pharmaceutical company against a former employee and a newly formed company on claims of breach of contract and tortious interference; Shire, LLC v Mickle, a case brought in federal court in Roanoke, Virginia
- Represents employers on a broad cross-section of industries on claims of discrimination, harassment and retaliation, as well as wage and hour disputes in federal and state courts
- Represented employers and employees in litigation involving claims of theft of trade secrets, disclosure of confidential information, violations of non-competition/restrictive covenants, and other business torts
- Represented and successfully defended a national restaurant on claims of racial discrimination by a former employee in federal court in Newport News, Virginia
- Representing a national retailer in defense of a racial discrimination and defamation claim by a customer in federal court in Norfolk, Virginia
- Representing a national logistics company on claims by a current employee alleging race discrimination in federal court in Roanoke, Virginia
- Represented a company in defense of collective and class action claims for unpaid wages under the FLSA and applicable state laws
- Represented U.S. subsidiary of large multi-national company on claims of ADEA, ADA and FMLA discrimination allegations to successful resolution
- Secured summary judgment in complex ADA case brought against Fortune 100 company
- Represented large national manufacturer and retailer on claims of sexual harassment by former female employee to successful, pre-litigation resolution
- Represented national manufacturer on claims involving age and disability discrimination to successful resolution
- Represented publicly-traded company in contractual dispute with former employee over valuation of stock option benefits upon termination of employment resulting in favorable court settlement
- Represented senior executive in negotiation of dispute with high-tech company over vesting and valuation of stock option rights resulting in favorable out of court settlement

Labor & Employment

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

Religious Organizations

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

Affiliations

- Fellow, Virginia Law Foundation (Inducted 2014)
- Chair, ALFA International Labor and Employment Law Section (2015-2018), Member of Labor & Employment Law Section Steering Committee (1996-Present); Member, ALFA International Board of Directors (2014-2017)
- Member, Labor & Employment Law Section, American & Virginia Bar Associations (1986-Present)
- Member, Virginia CLE Steering Committee, Labor & Employment Section (2000-2012), Chair (2010-2011)
- Board of Directors, Positive Alternative Radio, Inc. (2017-Present)
- Board of Directors, VHSL Foundation, Inc. (2004-2009)
- Board of Directors, Interfaith Hospitality Network of Roanoke Valley (2005-2009)
- Member, Planning Committee, Gridiron Club, Hampden-Sydney College (2007-2011)
- Member, Church Council, St. John Lutheran (2006-2009). President (2008-2009)

Awards

- Named one of The Best Lawyers in America®for twenty consecutive years in the area of Employment Law – Individuals & Management (1999-2019); Labor Law – Management (2011-2019) and Labor & Employment Litigation (2011-2019), named “2017 Roanoke Lawyer of the Year” for Labor & Employment – Litigation
- Named to the “Virginia’s Top 50 List” of Virginia Super Lawyers (2007) and Virginia Super Lawyers in the area of Employment & Labor Law (2007-2019), included in Super Lawyers Corporate Counsel edition (2009-2011) and Super Lawyers Business Edition US in the area of Employment & Labor (2012-2014)
- Listed in Benchmark Litigation as a Local Litigation Star for Labor & Employment and General Commercial (2012-2018) and Insurance (2018); and Benchmark Plaintiffs for Labor & Employment (2012-2014), General Commercial, and Insurance (2014)
- Designated one of the “Legal Elite” in the Labor/Employment Law field by Virginia Business magazine (2000-2016, 2018)
- Named a “Legal Eagle” for Employment Law – Individuals, Employment Law – Management, Labor Law, and Litigation – Labor & Employment by Virginia Living magazine (2012)
- Voted Top Employment & Labor Attorney by readers in The Roanoker magazine’s “Best Of” (2012)
- Named a Top Rated Lawyer for Labor and Employment law and Commercial Litigation by American Lawyer Media (2013)
- Inclusion on the Virginia Amateur Sports Wall of Honor in its inaugural year (2009)
- Navy Commendation Medal, Distinguished Legal Work (1983)

Published Work

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

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.

- Sep 23, 2019 — **Gentry Locke's David Paxton Helps Secure Jury Verdict in Favor of Multinational Corporation**

Kelsey M. Martin

Associate

- Office: 540.983.9439
- Fax: 540.983.9400
- Email: martin@gentrylocke.com

Kelsey Martin practices with Gentry Locke's Employment Law team, advising business owners and Management on employment matters. She also defends federal and state court claims involving employment-related issues, including the Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), Title VII, Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA), affirmative action plans, noncompete agreements, trade secrets, and related matters. Prior to joining Gentry Locke, Kelsey clerked for The Honorable Joseph J. Ellis and The Honorable Ricardo Rigual.

Education

- University of Richmond School of Law, J.D., cum laude, 2016
- Virginia Polytechnic Institute and State University, B.S., magna cum laude, 2013

Experience

- As a Circuit Court Law Clerk, conducted legal research, prepared bench memoranda, drafted opinions, and observed court proceedings
- Represented indigent juveniles and adults on criminal matters such as domestic assault and battery and protective orders
- As a professorial Research Assistant, conducted legal research on accomplice liability, federal sentencing guidelines, presidential signing statements, the death penalty, and the practical and legal implications of utilizing lethal injection

Affiliations

- Member, The Virginia Bar Association (2016-Present)
- Managing Editor, Richmond Journal of Law and the Public Interest (2015-2016)

Awards

- Orrell-Brown Award for Clinical Excellence in the Children's Law Center (2016)
- CALI Award for Advanced Legal Research
- Best Oral Advocate Award, Children's Defense Clinic (2015)

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

Catherine J. Huff

Partner

- Office: 540.983.9460
- Fax: 540.983.9400
- Email: huff@gentrylocke.com

Cate Huff practices in the Employment, Insurance, and Workers' Compensation practice groups and has litigated in federal and state courts throughout Virginia. Cate defends employers against discrimination and workplace claims and advises businesses in the restaurant and hospitality industry on employment issues. Cate has been named a *Rising Star* by "Virginia Super Lawyers" since 2015 and was honored as a "Legal Elite" by *Virginia Business* magazine. Cate graduated *magna cum laude* from Virginia Tech and received her J.D. from Liberty University.

Education

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

Experience

- Representation of companies before the EEOC, Department of Labor, and other agencies
- Extensive litigation experience involving Title VII, defamation, wage and hour issues and other employment-related issues
- Provide advice to management and companies involving day-to-day labor and employment issues regarding hiring, firing, leave and disability issues, wage and hour issues, unemployment, EEOC complaints and other matters
- Representation of insurers in numerous auto liability and premises liability litigation
- Representation of insurers in fire and other property damage litigation
- Argued motions in state and federal court regarding defamation, spoliation of evidence, bifurcation and various other matters
- Handled infant settlements and wrongful death settlements throughout the state
- Handled various misdemeanor charges and assisted with the defense of felony charges throughout the state
- Litigation experience in general district and circuit courts throughout the state
- Negotiated settlements in various personal injury actions

Affiliations

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

Awards

- Designated one of the “Legal Elite” by Virginia Business magazine for the area of Young Lawyer (Under 40) (2016)
- Named a Virginia Super Lawyers Rising Star in Employment Litigation: Defense (2017-2019) and Workers’ Compensation (2015-2016)

Published Work

- Co-author, **When Bad Things Happen to Good Companies**; Performance News Summer 2012, Scott Insurance.

Case Studies

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

- Aug 4, 2016 — **Employer Defeats Hostile Workplace Claim**
- Sep 1, 2015 — **Allegation of Americans with Disability Act Discrimination Against Municipality Dismissed**
- May 29, 2015 — **University Prevails on Motion to Dismiss Claims by Former Employee**
- Apr 23, 2015 — **Company Prevails Twice in Hostile Work Environment Claim**
- Nov 7, 2013 — **Family Member's Estate Protected in Slip & Fall Case**
- Apr 23, 2013 — **Blinded Employee Agrees to $14 Million-dollar Settlement ($16.5M Payout)**

Jennifer S. DeGraw

Partner

- Office: 540.983.9445
- Fax: 540.983.9400
- Email: degraw@gentrylocke.com

Jennifer DeGraw joined Gentry Locke's Criminal & Government Investigations group after serving as a Special Assistant United States Attorney in the United States Attorney's Office for the Western District of Virginia. Prior to that, she was an Assistant District Attorney in the state of North Carolina. She has successfully tried eight federal criminal jury trials and hundreds of federal and state criminal bench trials. At Gentry Locke, Jennifer focuses on defending white-collar criminal matters in federal court. Her extensive experience from the prosecutorial side enables her to strategically advise her clients. Jennifer is licensed to practice law in North Carolina and Virginia.

Education

- University of North Carolina at Chapel Hill, B.A. 2004
- Wake Forest University School of Law, J.D. 2008

Experience

- Representation of individuals and corporations on criminal and regulatory matters in the areas of pharmaceuticals and diversion, healthcare, transportation, national security, tax, fraud, government contracting, and public service, as well as homicide, firearms, violent crimes, and narcotics investigations
- Represented clients in relation to Congressional, Grand Jury, and other federal and state investigations
- Represented corporate and individual parties in complex tax investigations
- Drafted and argued pretrial motions and sentencing motions for federal district court
- Prepared appellate briefs for the Fourth Circuit Court of Appeals
- Successfully obtained expungements of a variety of criminal charges for clients
- As a Special Assistant United States Attorney with the United States Attorney's Office for the Western District of Virginia, from 2012 until 2016:
  - Directed government investigations and prosecuted a variety of matters including federal narcotics offenses, offenses involving controlled substance analogues (synthetic drugs), money laundering, firearms offenses, violent crimes, Hobbs Act robbery, identity theft, fraud, Customs and importation violations, and child exploitation cases. Extensive experience with the use of the federal Grand Jury in investigations.
  - Represented the United States in seven federal criminal jury trials, to include narcotics conspiracy and narcotics trafficking offenses, firearms offenses, and violent crimes offenses.
  - Drafted numerous appellate and habeas pleadings, including appellate briefs filed with the United States Court of Appeals for the Fourth Circuit.

Affiliations

- Member, Federal Bar Association (2018-Present)
- Member, The Virginia Bar Association (2018-Present)
- Member, North Carolina State Bar (2008-Present); Virginia State Bar (2016-Present)
- Member, National Association of Criminal Defense Lawyers (2016-Present)
- Member, American Bar Association (2016-Present), American Bar Association Criminal Justice Section (2016-Present)

Awards

- Recipient of commendation from the Bureau of Alcohol, Tobacco, Firearms & Explosives (2016)
- Goldberg Scholarship recipient, Wake Forest University School of Law
- Wake Law Trial Bar team member

GENTRY LOCKE
Attorneys

Erin Harrigan

Partner

- Office: 804.956.2061
- Mobile: 804.489.2838
- Fax: 540.983.9400
- Email: harrigan@gentrylocke.com

Erin Harrigan is a Partner in Gentry Locke's Criminal & Government Investigations practice group. Erin previously served as Assistant United States Attorney in the Western District of Virginia, based in Charlottesville, where she was the Lead Prosecuting Attorney for the Organized Crime & Drug Enforcement Task Force ("OCDETF") and was nationally recognized for her work with the OCDETF National Director's Award. As a federal prosecutor, Erin also prosecuted and investigated public corruption, regulatory offenses, human trafficking and fraud cases of local origin and involving multi-national corporations. Working at the Virginia Attorney General's office, she handled criminal matters in the trial and appellate courts, and focused on human trafficking and gang/organized crime. As both a federal and state prosecutor, Erin is well known for her work in human trafficking.

Education

- William & Mary School of Law, J.D. 2005
- The College of New Jersey, B.A., magna cum laude, 2000

Experience

- Served as Assistant United States Attorney and Lead Task Force Attorney for the Organized Crime & Drug Enforcement Task Force at the United States Attorney's Office for the Western District of Virginia, 2014-2020
- Served as Assistant Attorney General in Special Prosecutions & Organized Crime, and Criminal Litigation for the Virginia Office of the Attorney General, 2008-2014
- Directed numerous government investigations in federal and state grand jury proceedings
- Conducted federal and state criminal prosecutions involving organized crime, complex international criminal activity, drug trafficking, money laundering, fraud, public corruption, and human trafficking
- Tried federal and state jury and bench trials in Virginia
- Briefed and argued dozens of criminal appeals before the Fourth Circuit Court of Appeals, the Supreme Court of Virginia, and the Court of Appeals of Virginia
- Provided advice and drafting assistance for the first uniform criminal law on human trafficking, promulgated by the Uniform Law Commission and passed in more than 20 states in the United States
- Supplied advice, counsel and drafting assistance on Virginia state criminal laws as part of the legislative team for the Virginia Office of the Attorney General
- Appointed as the first Anti-Trafficking Coordinator in the Virginia Office of the Attorney General from 2012-2014
  - Developed a coordinated, statewide, and multidisciplinary response to trafficking, co-leading law enforcement task forces across Virginia
  - Trained nearly 2,500 professionals in law enforcement, health care, victim services, and the private sector on recognizing and responding to human trafficking crimes

Awards

- Panelist and Speaker, **Supply Chain Integrity and Corporate Social Responsibility: A New Legal and Enforcement Landscape,** 2014 ABA Global Anti-Corruption Committee Annual Conference
- Panelist and Speaker, **Sex and Labor Slaves: The Scourge of Human Trafficking**, 2014 Virginia State Bar Annual Meeting

- Designee for the National Association of Attorneys General to the Uniform Law Commission Committee on Human Trafficking, 2011-2013
- Panelist and Speaker, **The Business of Transparency: Harnessing Economies of Scale in FCPA, Corporate Social Responsibility, and Supply Chain Compliance** at the 2013 ABA National Institute on the Foreign Corrupt Practices Act
- 2011 International Fellow on Human Trafficking, National Association of Attorneys General
- Adjunct Professor on Human Trafficking, 2016-2017, James Madison University, Department of Justice Studies
- U.S. Representative at the 2013 International Expert Meeting on Child Sex Trafficking, hosted by the Dutch National Rapporteur on Trafficking in Human Beings
  - Invited by the Dutch Government as part of a four-person delegation from the U.S. to collaborate with experts from five other countries on strategies to combat sex trafficking of children globally
- Awards:
  - 2019 OCDETF National Director's Award for Individual/Group Achievement on Opiate Reduction Efforts and Prosecutions

PROFESSIONAL BIO

EDWIN J. POLVERINO, D. O.

4767 Walton Lane
Roanoke, Virginia 24018
Office: (540) 387-0441

Principle and President of PCA

Dr. Polverino graduated from the University of Florida with a BS degree in Chemistry and Southeastern University in Miami with a degree in Osteopathic Medicine. After practicing medicine for ten years he led the development of a private seven site multi-specialty medical practice (PCA), located in Virginia. He remained the principal partner, president and CEO of the company overseeing all operations including its acquisition by Carilion Health Systems in 2015. Under his direction multiple service lines and business affiliations were developed including physical therapy, cardiac testing, sleep services, specialty diagnostic services, wellness and laser/spa services. The organization had grown to include multiple medical specialties offered through seven sites. In 2015 Dr. Polverino joined Carilion Clinic where he currently serves as a regional medical director with a focus on population health management, value-based care as well as overseeing clinical operations of 6 medical sites. He has extensive experience in urgent care and primary care medicine along with a background in occupational medicine, correctional medicine, health risk adjustment and medical malpractice.

Dr. Polverino was one of the founding physicians and remains an Assistant Professor of Medicine at the Virginia College of Osteopathic Medicine (VCOM), located at Virginia Polytechnic Institute and State University (Virginia Tech) in Blacksburg, Virginia. He is also an Assistant Professor of Medicine at Virginia Tech Carilion School of Medicine (VTC), located in Roanoke Virginia. In addition he has been the Director of Student Medical Education for VCOM at Lewis-Gale Medical Center in Salem, Virginia and has been an adjunct instructor at Radford University where he was the primary physician leading the development of a Mobile Medical Unit.

Dr. Polverino has 30 years of experience in family medicine, practice management, business development and medical education. He lectures on these topics and provides medical clerkships in medical business management.

Dr. Polverino has an extensive background in medical legal work as an expert witness and lectures on the subject. He is experienced in real-estate finance and development including commercial and residential development along with multiple other business ventures, both medical and nonmedical.

Dr. Polverino has also served on various corporate boards over the years including Lewis-Gale Medical Center and Richfield Retirement Center.

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. 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

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

Matthew S. Moran

Government Affairs Director

- Office: 804.297.3708
- Fax: 540.983.9400
- Email: moran@gentrylocke.com

Matt Moran is our Government Affairs Director. He is not an attorney. Matt specializes in providing strategic communications guidance to clients who need a comprehensive strategy to support their legal and policy goals. Matt has had involvement in nearly every major policy initiative in the Virginia General Assembly since 2013. His extensive experience in state policy and strategic communications includes serving as former Chief of Staff to Virginia House Speaker Kirk Cox, fulfilling multiple roles as a top adviser to House Speaker Bill Howell, working with Congressman Morgan Griffith, as well as involvement in numerous state and federal political campaigns since 2011. Matt earned his undergraduate degree in Government from the University of Virginia.

Education

- University of Virginia, B.A. (2011)

Experience

- Served as top advisor to the Speaker and House leaders on all matters, including policy development, communications strategy, caucus management, and political campaigns
- Developed and executed communications and media strategy for local, state, and national press efforts
- Coordinated with policy and political teams on successful policy rollouts on major legislative initiatives
- Worked closely with consultants, vendors, and other elected officials on high-stakes campaigns
- Experienced in managing and leading teams in political and government operations
- Oversaw budget of more than $5 million and coordinated nearly $10 million in political campaign spending across nearly two-dozen legislative campaigns
- Developed deep and meaningful relationships with both Republican and Democrat House members and their staff

Affiliations

- Member, University of Virginia Richmond Alumni chapter (2012-Present)
- Past Board Member, SkillsUSA (2013-2015)

GENTRY LOCKE
Attorneys

K. Brett Marston

Partner

- Office: 540.983.9391
- Fax: 540.983.9400
- Email: marston@gentrylocke.com

Brett Marston chairs the Construction Law practice group at Gentry Locke. Brett has extensive experience in construction contract negotiations and preparation, payment disputes, mechanic's liens, bond claims, construction defects, delay claims, insurance and OSHA matters. He handles significant construction matters in federal and state courts, arbitration and mediation for general contractors, subcontractors, owners, design professionals and suppliers. In addition, Brett is consistently noted as a *Virginia Super Lawyer*, has consecutively made their *Virginia Top 10* and *Top 100* lists, and has thrice been awarded *Roanoke Lawyer of the Year for Construction Law* by *The Best Lawyers in America*. In 2018, Brett was named to the 2018 class of "Leaders in the Law" by *Virginia Lawyers Weekly*.

Education

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

Experience

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

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

Affiliations

- Virginia State Bar: Member, Bar Council representing the 23rd Judicial Circuit (2016-present); Construction and Public Contracts Section, Chair (2012-2013), Board of Governors, (2003-2014), Treasurer (2009-2010), Secretary (2010-2011)
- Roanoke Symphony Orchestra Board of Directors (2013-Present)
- Hidden Valley High School Athletic Boosters, Board member (2012-2017), President (2014-2017)
- The Ted Dalton American Inn of Court, Executive Committee Member, (2009-2011); Member (2006-2014)
- Roanoke Bar Association, President (2006-07); Board of Directors (2001-2008); Chair, Young Lawyers Committee (1999-2001); President-Elect and Chair of Programs (2005-2006); Member (1994-Present)
- Roanoke Bar Association Foundation, Chair of Trustees (2007-2008)
- Roanoke Division of Associated General Contractors of Virginia, Board Member, (2003-2006); Safety Alliance Steering Committee (2005-2007)
- Roanoke Regional Chamber of Commerce Board Member, (2007-2009)
- The Virginia Bar Association Construction and Public Contracts Law Section, Executive Council Member (2004-2006)
- Virginia State Bar Young Lawyers Conference Board of Governors representative for 8th District (1997-2001)
- Law Clerk to the Honorable J. Calvit Clarke, Jr., Senior United States District Judge, Eastern District of Virginia, Norfolk, Virginia (1993-94)
- George Mason University Law Review (1992-93)
- Cave Spring National Little League, President (2008, 2009)
- Roanoke Regional Forum, member of founding steering committee (2009-2014)

Awards

- Fellow, Virginia Law Foundation (inducted 2019)
- Named one of the "Leaders in the Law" by Virginia Lawyers Weekly (2018)
- Named "Roanoke Lawyer of the Year" for Construction Law (2013, 2015, 2017) by The Best Lawyers in America, and noted in the areas of Construction Law (2006-2019) and Construction Litigation (2011-2019)
- Elected a Top Attorney: Construction by Roanoke-area attorneys surveyed by The Roanoker magazine (2007, 2009, 2012)
- Designated one of the "40 & Under Movers and Shakers" by The Roanoker magazine for the field of Law (2008)
- Named to Virginia Super Lawyers for Construction Litigation (2009-2019), to the Top 10 List (2015-2017), the Top 100 List (2014-2019), to Super Lawyers Business Edition US in the area of Construction Litigation (2012-2014), and was previously named a Virginia Super Lawyers Rising Star for Construction Litigation (2007)

- Designated one of the “Legal Elite” by Virginia Business magazine in Construction (2007-2018) and the Young Lawyer category (2004-2006)
- Named a “Legal Eagle” for Construction Law and Litigation – Construction by Virginia Living magazine (2012)
- Named a “Top Rated Lawyer” for Construction law by American Lawyer Media (2013)
- Roanoke Bar Association President’s Volunteer Service Award, Silver level, for 249-500 hours of community service (2006, 2007)
- R. Edwin Burnette, Jr. Young Lawyer of the Year Award, Virginia State Bar (2004)

Published Work

- Co-Author, Design-Builders’ Amending AIA A141-2014: Standard Form of Agreement Between Owner and Design-Builder, Alternative Clauses to Standard Construction Contracts, Fifth Edition (2019)
- Co-Author, **Deal…or No Deal? Identifying and Addressing Gray Areas in Construction Contracting**, The Construction Lawyer, Journal of the ABA Forum on the Construction Industry, Volume 33 No. 3 (Summer 2013)
- Co-Author,**Key Points to Consider in Filing and Challenging a Mechanic’s Lien**, Virginia Lawyer magazine, Volume 59 (October 2010)
- Civil Discovery in Virginia, Chapter 3 on Interrogatories, Virginia CLE Publications, 3rd edition (2009)
- Virginia Construction Law Deskbook, Chapter 21 on Occupational Safety and Health Act (OSHA), Virginia CLE Publications, (2008)
- Co-Author, Construction Law, 40 U. RICH. L. REV., 143 (2005)
- Co-Author, Deal or No Deal? Clarifying Gray Areas in Construction Contracting, Virginia Lawyer magazine, Volume 55 No. 3 (October 2006)

Case Studies

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

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

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 Board of Directors and the Legislative Committee for the Associated General Contractors of Virginia ("AGCVA"). He currently serves on the Executive Committee for the Roanoke District of the AGCVA, and served as the AGCVA Roanoke District President from 2017-2019. From 2010-2018, Spencer has consistently been recognized as a Virginia Rising Star in Construction Litigation by "Virginia Super Lawyers." In 2019, Spencer was recognized by Virginia Business Magazine's "Legal Elite" list in the area of Construction Law.

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

Construction Law

- Represented owners, design professionals, general contractors, subcontractors, and suppliers in the preparation, negotiation, interpretation, and revision of contracts concerning public and private construction projects throughout Virginia, the mid-Atlantic, southeast, and northeast.
- Represented owners, general contractors, subcontractors, and suppliers in payment disputes and other contractual disputes.
- Represented owners, general contractors, subcontractors, and suppliers in alleged construction defect matters.
- Represented design professionals in alleged design defect matters.
- Represented owners, general contractors, subcontractors, and suppliers in arbitration proceedings, mediation, and litigation in both state and federal courts.
- Prepared, reviewed, and revised contracts, subcontractor, and purchase orders for general contractors, subcontractors, and suppliers.
- Represented road and bridge contractors in bid disputes, claims and disputes involving the Virginia Department of Transportation.
- Represented localities concerning claims and disputes arising out of road and utility construction projects.
- Represented general contractors, subcontractors and suppliers in preparing, recording, perfecting, and enforcing mechanic's lien claims.

- Represented owners, general contractors, and subcontractors in defending and/or bonding-off mechanic's liens.
- Represented general contractors, subcontractors, and sureties in defending payment bond claims and mechanic's lien release bond claims.
- Represented subcontractors and suppliers in asserting and litigating mechanic's lien claims.
- Represented manufacturers and retailers of modular and manufactured homes in disputes with homeowners and investigations and enforcement actions by the Virginia Department of Professional and Occupational Regulation (Board for Contractors) and the Virginia Department of Housing and Community Development (Manufactured Housing Board).
- Represented contractors, design professionals, and realtors in enforcement and licensing matters before the Virginia Department of Professional and Occupational Regulation.
- Reviewed and revised contracts for licensed Virginia contractors concerning compliance with regulatory requirements.
- Provided training for licensed contractors concerning compliance with Board for Contractors regulations.

Health and Safety Law

- Represented employers in the construction, manufacturing, and general industry fields during VOSH and OSHA investigations and inspections, and in response to citations concerning alleged violations of health or safety regulations, including matters involving injuries to multiple employees, amputations, and fatalities.
- Assisted employers with health and safety compliance audits.
- Assisted employers in preparation of health and safety policies and procedures.
- Assisted employers concerning firearms and weapons carry laws and in setting weapons and workplace violence policies.

Firearms Law

- Represented a Virginia firearm retailer in a Federal Lawsuit filed by the City of New York in the Eastern District of New York concerning alleged handgun trafficking.
- Represented of firearm retailers and distributors in products liability actions.
- Counseled and assisted major retailer in setting its firearms carry policies for all United States stores.

Affiliations

- Member, Board of Governors of the Virginia Sate Bar Construction and Public Contracts Law Section (2012-2018, 2019-Present).
- Statewide coordinator for Pro Bono Hotlines, The Virginia Bar Association Young Lawyers Division (2008-2015); Co-chair of Pro Bono Hotline for the Roanoke Valley (2006-2008).
- Member, Board of Directors, Associated General Contractors of Virginia (2017 – Present); Legislative Committee (Member, 2007-Present); Associate Member (2006-present).
- Member, Executive Committee, Associated General Contractors of Virginia, Roanoke District (2006-Present); District President (2017-2019); District Vice President (2015-2017).
- Associate Member, Transportation Construction Alliance.
- Member, Board of Directors, Military Family Support Centers, Inc. (2006-2019).
- Member, Board of Directors, Southwest Virginia Ballet (2015-Present).
- Member, Board of Directors, Roanoke Valley SPCA (2015-Present); Vice President (2017-Present).
- Secretary, Roanoke City Republican Committee (2008-2012).
- Member, William and Mary Environmental Law and Policy Review (2002-2004).
- 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)
- Named "Legal Elite" in field of Construction Law by Virginia Business Magazine (2019)
- 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

William E. Callahan, Jr.

Partner

- Office: 540.983.9309
- Fax: 540.983.9400
- Email: callahan@gentrylocke.com

Bill Callahan joined Gentry Locke's **Business Litigation** group in 2019 to further his distinguished, 25-year career in business law and litigation. Bill assists businesses, financial institutions, and investment firms with insolvency matters. He is highly skilled in bankruptcy litigation and in formulating effective strategies for avoiding future problems. Bill represents financial institutions outside of bankruptcy proceedings in a wide variety of matters, including foreclosures, collection proceedings, and the development of non-judicial liquidation strategies. He has been recognized as one of the *Best Lawyers in America* since 2010 and has been recognized as a *Virginia Super Lawyer* since 2012. Bill has served as an Adjunct Professor at Washington and Lee University School of Law and is a regular lecturer at continuing legal education seminars.

Education

- Washington and Lee University School of Law, J.D. magna cum laude, 1994
- University of Virginia, B.A. with honors, 1975

Experience

- Has represented constituents in bankruptcy matters, Chapter 11 debtors, creditors both secured and unsecured, and official committees of creditors
- Has represented a wide range of businesses and property in liquidation proceedings, including a grocery store chain, two heavy equipment contractors, a plywood manufacturing plant, numerous coal mining operators, a textile manufacturer, a metal machining facility and vast amounts of real estate, both residential and commercial, in an amount totaling well in excess of ten million dollars
- Appears before the United States Bankruptcy Court for the Western District of Virginia and the Eastern District of Virginia, the Western District of North Carolina, and the District of Delaware; is admitted to and appears before the United States District Courts for the Eastern and Western Districts of Virginia, and the United States Bankruptcy Court for the Western District of New York

Affiliations

- Member, Panel of Chapter 7 Trustee for the Western District of Virginia
- Member, American Bar Association
- Member, Roanoke Bar Association
- Member, Board of Directors, Roanoke chapter of the Federal Bar Association (2016-Present)
- Member, American Bankruptcy Institute

Awards

- Listed among The Best Lawyers in America® in the fields of Bankruptcy and Creditor-Debtor Rights/Insolvency and Reorganization Law, and Litigation – Bankruptcy (2010–2019)
- Recognized as a Virginia Super Lawyer for Bankruptcy: Business (2012–2018)
- Order of the Coif, Washington and Lee University School of Law (1994)

Published Work

- Co-author, “Ethics Violations, Fraud, and Crime” chapter, **Bankruptcy Practice in Virginia**, Virginia CLE (2017).

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)

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

Peter G. Irot

Partner

- Office: 540.983.9402
- Fax: 540.983.9400
- Email: irot@gentrylocke.com

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

Education

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

Experience

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

Affiliations

- Recipient, Leadership Rice Mentorship (1999)

Case Studies

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

- May 16, 2014 — **Virginia Company Prevails in Hard-Fought Labor Arbitration Case**

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**

Practicing Law in a
Brave New World

1

Old Dogs Learning New Tricks:
The Ethics of Practicing Law Outside the Office.

Presented by:

Greg J. Haley

haley@gentrylocke.com

Jon D. Puvak

puvak@gentrylocke.com

Alicha M. Grubb

grubb@gentrylocke.com

Roanoke | Lynchburg | Richmond | gentrylocke.com

Old Dogs Learning New Tricks: The Ethics of Practicing Law Outside the Office

Gregory J. Haley
Jonathan D. Puvak
Alicha M. Grubb
Gentry Locke Seminar – September 11, 2020

I. Introduction

The office is closed. Maybe you find yourself out of town for an extended period of time or at home for the day waiting for a contractor. For whatever myriad of reasons it could be, you're away from your office, working. The COVID-19 pandemic forced many of us to work remotely, and brought to light both the challenges and benefits. The reality is the world has changed, and companies see the benefit of reducing overhead by having their employees work from home. Others now realize their employees can still be productive working from home and see increased demand to allow work-from-home options. Our world is heading in the direction of less office space and increased flexibility in work location.

As lawyers, whether we're in suits or in sweatpants, our ethical obligations remain unrelaxed. If you found yourself caught off-guard working remotely or you dread having to work remotely again (a likely possibility), we hope this outline will remind you of the ethical obligations we have as attorneys and give you some helpful tips and tricks.

The ethics rules require that we are competent in our representation, that we communicate with our clients, that we maintain confidentiality, that we avoid conflicts, that we protect client property and that we supervise junior lawyers and subordinates. The purpose of this outline is give you tips and tools to be a better lawyer with the technical competence and flexibility to work remotely and to achieve better outcomes, provide better service to your clients and reduce your own stress while doing so.

II. Ten Things You Need to Successfully Work Remotely

At the beginning of the pandemic, Joanna Stern of the Wall Street Journal published an article entitled "Living the Coronavirus Work-From-Home-Lie? Here are all the Tech Tips You Need" – Some of our partners (Greg Haley) found this article enlightening, and we think you would too. In addition to technology, we came up with our top ten must-haves for working remotely:

1. Strong internet connection.
2. Dedicated work space.
3. A second (and maybe third) monitor.
4. Wireless hardware (think printer/scanner, keyboard, mouse, and headset).
5. A smartphone.
6. A routine.
7. Video-conferencing software.
8. Virtual Private Network – VPN (allows you to connect to your office network).

9. Access to an electronic legal database like LEXIS, WestLaw or Fastcase.
10. Electronic and hard-file security.

We'll provide you with a more in depth explanation as well as some options for purchasing or creating each of these ten must-haves. But first, the rules.

III. Key Rules in the Virginia Rules of Professional Conduct

The legal profession is one of the few that has guidelines for professional conduct and an associated regulatory body.

A. Rule 1:1 Competence

Rule 1:1 says that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

This rule is usually interpreted to include technological competency, which is particularly relevant to remote working. Comment 6 to the rule states that "To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. Attention should be paid to the benefits and risks associated with **relevant technology**. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances." (emphasis added). There are no LEOs directly on the use of or ability to use technology. However, if you're still using stone tablets or a flip phone, you might be a little behind.

In addition to technological competence, Rule 1.1 covers mental well-being. Comment 7 to the Rule states that "[a] lawyer's mental, emotional, and physical well-being impacts the lawyer's ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law. *See also* Rule 1.16(a)(2)."

Working remotely can present its own challenges to a lawyer's mental, emotional and physical health, so it is important to plan ahead and have an emphasis on staying well.

B. Rule 1:4 Communication

Rule 1.4 states that "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter."

When working remotely, a lawyer has an obligation to ensure that others can easily reach her and that she can reach others, including clients, staff, opposing counsel, witnesses, experts and the court.

C. Rule 1:6 Confidentiality

In addition to a lawyer's obligation not to affirmatively reveal privileged information, part (d) of Rule 1:6 requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule." This part of the rule applies to those supervised by the lawyer (See Cmt. 19 and Rules 5.1 and 5.3). Comment 19 provides that "[f]actors 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)." (emphasis added).

Comment 21 cautions lawyers to keep up-to-date with security technology "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."

While working remotely, each lawyer needs to make sure that she has a plan for herself and her staff to keep both electronic and hard files and data secure.

D. Other Rules

Rule 1:7 states the rules of when and how a lawyer can represent clients with adverse or potentially adverse interests. **If working remotely, the lawyer needs to have a way to continue to run conflicts checks to avoid improper representation.**

Rule 1:14 covers representation of a client with an impairment. This rule generally covers diminished mental capacity, but it is broader in scope, saying "when a client's capacity to make

adequately considered decisions in connection with a representation is diminished" for a mental impairment or "some other reason", the lawyer must still act as reasonably as possible to maintain a normal relationship. In a world where everyone is limiting in-person contact, you may have a client who does not have access to internet, a cellphone or even computer. A lawyer has a duty to communicate with and represent his client, even if the client is not technologically capable in participating in certain ways.

Rule 1:15 requires a lawyer to safely maintain a client's property, particularly funds in a trust account, and to keep adequate records. Just like a lawyer must maintain access to his conflict-check database, he must also ensure that he and his staff have access to the trust account – the lawyer needs to be able to accept money, return money, and pay bills.

Maintaining a Virtual Office – A virtual law practice involves a lawyer or firm interacting with clients partly or exclusively via secure Internet portals, emails or other electronic messaging. The practice is often combined with the rental of shared conference space. *See* LEO 1872 (Attached). In general, it is permissible for an attorney to maintain a virtual office. This LEO admonishes attorneys that they still must act competently, protect their client's information, and communicate effectively with their clients.

Rules 5.1 and 5.3 – Supervision. These rules require lawyers to supervise younger attorneys and non-attorney staff. The Virginia State Bar held a COVID-19 related presentation that addressed this topic. Their outline can be found here https://www.vsb.org/docs/Ethics_COVID.pdf and attached. Regarding supervision, the VSB said this:

> The rules (Rules 5.1 and 5.3) focus heavily on law firms, but it's not just about law firms. If you are a partner in a law firm or you are the head of a practice group: in-house counsel, government, pro bono, or public type of law office, anything -- it doesn't matter what the institution is or the format in which you work-- if you have responsibilities for the work of others, then you have responsibilities to make sure that they are adhering to our professional standards of conduct. You are responsible to make sure that they are meeting their obligations, including all the requirements discussed in this paper. Well, how in the world do you do that when you are in your home in one place and your junior colleague is somewhere else? It isn't easy at all. **If you're a person with supervisory responsibilities over lawyers or other professional staff, consider having a regular phone call, team call, or some way, whether you do it by Citrix, WebEx, Zoom, or something else.** Microsoft Team [sic] is another product you can use to teleconference with your colleagues and staff. If you do it by Zoom you need to make sure you follow the protocols for privacy or pass [sic] protection as comments have been written in the past few days about people hacking into other people's Zoom calls. It doesn't have to be Zoom or Skype where you can see one another, you can just chat on the phone. **It's just important that you have regular calls with your team, both for the supervisor lawyer and for the junior or nonlawyer members of your team so people can talk about what they're doing and what they're worried about and what they need from you to do their jobs well.**

If working remotely, lawyers should maintain a means of virtual supervision and accountability. Have regularly scheduled discussions with other lawyers and review time sheets on a regular basis. Associate attorneys may not be comfortable with initiating contact with a senior lawyer at home or by cell phone. It is part of supervision (Rules 5.1 and 5.3) for the senior lawyer to initiate contact and to establish a pattern of communication where the junior lawyer is comfortable engaging with the senior lawyer.

IV. The Practical Side of Working Remotely – What the Rules Require

Working remotely poses some obvious changes to normal office life. You are without staff or the convenience of the office equipment and supplies. You have different distractions with pets and family. You are without the camaraderie of the office for both professional and personal support. Whether or not you enjoy working remotely, the circumstances are certainly different than working from the office and require additional and intentional preparation. Here are our practical suggestions.

A. The Nuts and Bolts: How to Meet Your Ethical Obligations of Competence, Communication and Confidentiality

1. Create a dedicated physical space and a routine.

It can be nice to take a few hours to work from a coffee shop or a park or somewhere unique, but as a general rule, when working remotely, you should create a dedicated space. This is important to give you a physical space to secure files (Rules 1:5 and 1:15) and to work without interruption. Whether you have a home office or use a guestroom or get stuck working from the attic (like Seth Myers did on his Late Night show), you need to find a space that is comfortable and works for you. Ideally, your space would have a door and lock. Have a comfortable desk and chair. You should also communicate with your family or roommates (as is practical) that you cannot be disturbed. Of course, COVID presented unique difficulties with children doing school from home and needing extra attention, but the best you are able, you should create and maintain a dedicated work space.

Establish a routine. The first few weeks of quarantine were unique, possibly even fun. Maybe you slept in or dressed more casually or took breaks to walk around the neighborhood. But if you're like us, after a couple weeks, we had to establish a good routine. Get up at a decent hour, practice good hygiene and get dressed, have your coffee, workout – whatever you would normally do when going to the office. And then set your work hours. Obviously, working from home allows for the flexibility of working different hours, taking walks, dressing casually, doing household chores during the day, etc. So work those things into your schedule too. You might save some time on your commute, so build in a two hour lunch time to mow the grass or play with your kids or whatever works best for you. Having a good routine not only helps with productivity but also helps with the increased potential for depression and anxiety while you work remotely (there's that lawyer wellness in Rule 1:1).

2. Hardware

In addition your dedicated space and routine, you need to have the right tools.

i. Smart Phone

Sorry folks, but it's time to ditch the flip phones! You need to have and be able to effectively use a smart phone. A smart phone is a mobile phone that performs many of the functions of a computer, typically having a touchscreen interface, Internet access, and an operating system capable of running downloaded applications. Application are programs, which we'll talk about in the software section. When you purchase a new smart phone, your service provider can give you a tutorial or you can look on YouTube for a variety of tutorials…that is if you don't have a grandchild who is already adept at smart phones. Additionally, download and learn how to use apps like the Dictaphone app and your Calendar app.

ii. Laptop

You need a good laptop with enough memory and storage for you to be able to use. Unless you are doing graphic design or computer programing, look for a computer that has a minimum of 16GB (gigabytes) of laptop RAM (random access memory-this determines how fast your computer works) and at least 250 GB of storage. Get one with a big enough screen for your needs. Make the laptop you get has the components you want – perhaps a CD/DVD player, USB ports, HDMI connection, etc. If you're not sure, ask your IT staff or a sales person at the store. Pick a laptop that is physically comfortable for you and that has the capabilities you need to work well. Additionally, your laptop might be required to have an operating system that is supported by your company's network. For example, most businesses are NOT setup to interface Macs on their network. Where some other small businesses may be a totally Mac shop and won't interface with a Windows operating system laptop. The operating systems, file structures, and even the drive formats are completely different and NOT interchangeable.

iii. Accessory Cables

Take the time to make sure you can connect your laptop to any other hardware you want, like monitors, printers, keyboards, and a mouse. If you have an Apple computer, you may need adaptor cables. If you have or can purchase wireless or Bluetooth accessories, then you don't have to worry about all the cords, which can be cumbersome. However, be aware that not all laptops have Bluetooth, even new ones. So make sure your laptop can support a Bluetooth device. Either way, make sure you're set up for everything to be connected and work together.

iv. **Wi-Fi equipment** (you need a good router and possible wi-fi extenders or ethernet cables)

In our world, good Wi-Fi is a must. You can contact your internet provider about increasing your internet speed to meet the demands of your video call software, especially if your kids are in the next room watching Netflix. If you are working in a basement or attic or far corner of the house, you may need to invest in a wi-fi extender, which helps carry the signal strength through the house.

Your internet provider can help you with that, or you can purchase one on Amazon. You could also get an ethernet cable if your home office is located near your router. An ethernet cable allows you to be hard-wired into your internet and can sometimes help avoid glitches in the wi-fi to maintain a stronger connection.

BEWARE OF PUBLIC WI-FI. Public Wi-fi presents a massive security risk, allowing anyone to access your files and data, including client information. Securing your Wi-Fi is just as critical. You should change the default password on your router and set the security to WPA2 with an AES encryption. You can do this in your settings or call your internet service provider to help. Additionally, don't make the name of your Wi-Fi network something silly like "FBI Surveillance" or something obvious like "Smith House". These kinds of names attract hackers.

v. Scanner/Printer/Copier

You can purchase a scanner, printer and copier in one device on Amazon or at your local Staples or other office supply store. You should look for a printer than can print 20-30 pages per minute, that has high resolution scanning and printing and that can connect wirelessly to your laptop and smartphone. Note, some firm security settings may not allow wireless printers to connect to firm owned equipment. If you're using a firm owned laptop, you may simply need a printer cable to connect instead of wireless printing. You can find some great options for around $200. While you're at it, make sure you have enough paper, letterhead, envelopes and ink in stock.

vi. Additional Monitors

Additional monitors allow you to have more and larger screen space to view multiple things at the same time. For example, you can have LEXIS pulled up on one monitor, a brief on the other, and then have your email showing on a third monitor. You can even use a TV you have as an additional monitor by connecting your laptop to the TV via a wireless connection or an HDMI cable. Different laptops and monitors have different monitor connection types – make sure your connection type is the same for both. HDMI is extremely common, but there are MANY laptops and monitors that support newer and older connection types and do not have an HDMI connection. Consider a wireless or Bluetooth monitor if compatible with your laptop.

vii. Keyboard and Mouse

For many folks, the keyboard and trackpad that come with a laptop may be too small or uncomfortable to use. Make sure you have a keyboard and mouse you like as well as any necessary additions like a wrist wrest and mousepad. Consider a wireless or Bluetooth keyboard and mouse if your laptop is compatible.

viii. Headset/Bluetooth

Consider investing in a wireless headset or Bluetooth to use with your cellphone and computer. These devices make it easier to speak to a client hands free without having your phone

on speaker phone or having your computer audio broadcast to the whole house, allowing for greater privacy. Using a hands-free option can increase your productivity as well..

ix. Web Cam

If your laptop does not have a usable webcam, be sure to purchase an external webcam to use for video conferencing. The expectation of clients, opposing counsel, and the court is going to be that they can see you if you are using video conferencing. These can be purchased at an electronics store or on Amazon.

3. Software – the programs (sometimes called applications).

i. E-mail

You should have a reliable email service that is dedicated to work and that you can access from your home. You want to be sure your email service provider allows you to send encrypted emails, meaning that you can add a layer of security when you send sensitive information, especially financial and personally identifying information. Regarding encryption services, you want to look for AES 128bit minimum, but 256 is much better and becoming standard for most larger vendors. You also want an email service provider that will filter spam emails and dangerous emails. Regardless, you should be extra vigilant to avoid opening emails and attachments or clicking links from unknown sources. Double check email addresses and hover over links and attachments before clicking on them to be sure you're not clicking on something dangerous. Use your email to your benefit with other applications. For example, if you download the Dictaphone app on your phone, you can email your dictation to your assistant who can type it up and send you the document back on the same email chain.

ii. Conference Call Service

Depending on your provider, most smart phones are limited to five callers on a conference call. You should learn how to merge calls on your cellphone, but you should also consider investing in a conference call service. Usually, with a conference call service, you provide the other participants with a dial-in number and a participant code, and there are large limits (if any) on the number of participants. Some conference call services only require you to pay per use as opposed to a monthly or annual fee. You may also be able to use video conferencing software that has a dial in feature as well. We use a company called The Conference Group, and a quick Google search will yield additional companies you could use.

iii. Video Conferencing – Communication and Supervision

Video conferencing may be the new norm as we see more and more people working remotely. Video conferencing is cost-effective and an efficient way to hold meetings, take depositions, and even participate in judicial hearings. You need to invest in good video conferencing software. Look for software that allows you to have a large number of participants, provides for security, allows you to blur the background, allows you to share your screen, and allows for multiple "rooms" as well as webinar presentations.

Learn how to use the software. Whether you are using Zoom or GoTo Meeting or any other software, watch YouTube tutorial vides so you can learn the features of your software.

Don't forget your etiquette. Here are some tips:

1. Mute yourself unless speaking. This should go without saying, but then again, a Supreme Court justice flushed the toilet during an oral argument, so apparently we all need to be reminded. Headsets are helpful if they have effective muting capabilities.
2. Create a quiet and professional space. Don't get on a conference call in a Starbucks or from your bed. Tell your kids and pets to leave you be and shut and lock the door.
3. Be courteous. Just like in real, pre-Covid, life when you would shake person's hand and introduce yourself, introduce yourself to others on the call, and be polite. Engaging in small talk is a plus.
4. Speak clearly, and look at the camera, not yourself. Remember, the camera is what captures your face. It's hard not to look at the other participants or yourself on the screen, but you should get in the habit of speaking to the camera.
5. Dress appropriately. You should dress professionally for any type of meeting, deposition or court appearance.
6. Arrive early and check to be sure your technology is working.
7. Pay attention to what is in the background. The best thing to do is to blur your background (don't know how to do this? Watch a YouTube tutorial video.), but if you can't do that, make sure your background is appropriate. Avoid displaying a whiteboard with case data or even personal things that may not be appropriate for a video call.
8. Be prepared. Treat a video or phone conference like you would any other meeting or appearance, and be prepared.

iv. Calendar

Use a reliable, electronic calendar, preferably one that is linked to your email and that you can see on your phone and computer and that you can share with your staff. Outlook and Google both have those features.

v. Document Management and Storage System

Your email, calendar and document management system are all likely serviced by some kind of cloud technology vendor. A DMS allows you to organize and access your files, including all historical documents in the file. You can access your files to edit documents and then save them back to the system for your assistant to access. You can organize your files by pleadings, research, client documents, etc. Before signing up, be sure you know what you're actually getting into.

Here are three things to which you should pay attention:

1) Read the fine print on the agreement. Does the vendor (and/or its affiliates) have access to your data? For example, if the government produces a subpoena for your data, and the provider has access to your data they will have to hand it over.
2) Is your data in transit and at rest encrypted? For example, if the data is not encrypted in transit, it could be hijacked along the way so that bad guys can read it.
3) What country/region will your data be located? (including backups) For example, you'll want to understand which jurisdiction laws will apply not only for subpoenas but who "owns" the data, you or them, when you decide to switch providers!

Make sure you can access and organize your documents remotely and that your staff also has access.

vi. Word Processing

Make sure your word processing software is up-to date! Word processing software allows you to edit and format documents. You can create templates to use for letters and pleadings and other frequently used documents. You can revise documents to finalize them for mailing or production.

vii. Virtual Private Network (VPN) - Confidentiality

A VPN creates a private network – a connection – between your computer and your office servers. Think of a VPN as a tunnel that only you can access that allows you to securely access your firm's shared data. All VPNs are not created equal. VPNs for your home internet are for security for the internet. Business VPNs create a secure tunnel for traffic directly to your office network. For single practitioner's, a home VPN while using the internet is a great idea, relatively easy to setup yourself and usually a small monthly subscription fee. For users who need to connect to the office network, you'll likely need an IT professional to set this up on your firm firewall. Some Roanoke area IT companies we would recommend are SyCom, ALI and Ethos Technologies (especially good for solo practitioners).

viii. Network Security – Keeping Client Information Confidential

We frequently read in the news about a ransomware attack or other types of data security breaches from government servers to credit card data. Law firms are no exception to being vulnerable to an attack.[1] A network is when two or more devices are connected, sharing data and files; this includes your computer, printer, smart phone, etc. Network security includes the policies and practice of your law firm to monitor and prevent misuse, modification or unauthorized access to your computer network. You may need to hire an IT professional to help you set up your network security. While there is no rule telling you what kind of technology you should have, you do have an obligation to protect your client's data, so you should have a policy regarding Wi-Fi passwords, computer passwords, anti-virus software, and encryption software.

[1] Ries, David G., *2017 Security*, ABA Tech Report, Dec. 1, 2017, available at https://www.americanbar.org/groups/law_practice/publications/techreport/2017/security/.

1. Make sure you use a strong password and change it often. The best passwords use more than 15 characters and have a random sequence of numbers, letters and symbols. Do NOT write your password down and keep it next to your computer. You can use secure password apps on your phone to store that information if you cannot remember.
2. Use multi-factor authentication. For example, use software that sends a code to your phone every time you start your VPN.
3. Recognize Phishing techniques to avoid clicking on spam.
4. Back up your files on a separate server.
5. Have a bit-coin wallet in case you get a ransomware attack. Often times the ransomware hackers will only accept bit-coin as payment for releasing your files, and if you do not pay, they will erase your data. It takes time to set up and purchase bit-coin, so you'll want to purchase it ahead of time. Keep in mind the FBI and Homeland Security suggest not paying the hackers. If you don't have a choice, having your own bit-coin wallet or a cyber security vendor who can take care of the problem for you will work to your advantage.

The best thing to do is to talk with your IT professionals to make sure you have the software and security you need to protect yourself from an attack.

ix. Virtual signing software

Invest in virtual signing software like DocuSign or Adobe Sign to facilitate remote signing when allowed. You can sign up for these services by going to their website and purchasing a subscription. Note that DocuSign is used by the federal government and by many courts.

Since 2001, federal courts have allowed e-filing through the CM/ECF system. The system gives each user a unique log-in and allows a user to file a pleading in any federal court in the country. Yet Virginia has been slow to follow suit. Virginia Code § 8.01-271.1 says "every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name." Pro se parties may sign their own pleadings. The Supreme Court of Virginia has held that pleadings which are not signed in handwriting by a party or licensed attorney are nullities. Stamps, electronic signatures, proxy signatures or other markings are not acceptable. In other words, the requirement for a personal, ink signature is a bright-line rule.

Since 2012, the Virginia Code has allowed for electronic notarization, allowing for remote notarization of depositions, affidavits and similar documents. Applying to be an e-notary is separate from a traditional notary application, and there are additional rules and requirements that can be found on the website for the Secretary of the Commonwealth.

During COVID-19, the Supreme Court of Virginia issued an order allowing electronic filing of all pleadings and documents otherwise required to be filed in hard copy, but that allowance will not necessarily last indefinitely.

So what does the future look like? Hopefully, courts across Virginia will universally adopt e-filing (and e-signatures) through the VJEFS system. Much like the CM/ECF system, attorneys would be able to file anywhere in the state, saving their clients time and money for having to drive to deliver pleadings or overnight pleadings by federal express. E-filing would save paper, time, and money all around. Firms and court reporters and clients alike are seeing the cost savings of remote depositions and e-notarization and are likely to adopt such practices where practical. Most courts have their own requirements and processes, so be sure to call the clerk's office ahead of time to make sure your pleading will be accepted.

x. Accounting – Rule 1:15 on Protecting Trust Funds

Make sure your accounting software works and is accessible by you and your staff remotely. Even if you are not in the office, you have to keep up with your books, both your trust account and your firm books. Accounting software allows you to keep track of your income and expenses, to monitor your trust account, to pay employees, and in some cases to issue firm checks.

B. The Impact on Key Tasks

In addition to having the right hardware and software, make sure you are prepared to properly carry out your work. We chose some of the most common tasks to highlight. Consider the questions and tips for each category of work.

1. Letters

Do you dictate? Do you have a way to send dictation to your staff? Consider using an App that automatically emails your dictation to your staff rather than a standard Dictaphone. How are you going to print, sign and mail the letter. Can you sign the letter virtually? Do you or your staff have access to a printer, letterhead, envelopes, address labels, stamps, FedEx or UPS packages, etc.?

2. Pleadings

How are you going to sign the pleading? In Virginia, you are required to physically sign a pleading (with the exception of the ongoing COVID-related allowances). Do you have a printer? How will you get the check for the filing and service fees? Do you need extra time to overnight the pleading to the court if you cannot get it there in person? How are you going to communicate with your client about the pleading? Does your client have reliable internet and email access?

Do you know how to use PACER? You need to be able to file documents electronically if your staff are unable to for one reason or another. Learn how to use the e-filing systems in Virginia state courts as well.

3. Memos

Keep the client informed! Will your client want an Email or hardcopy memo? Do you need a fax machine or fax service? If you use a fax service make sure they are HIPAA compliant.

4. Exhibits

How are you going to prepare exhibits for a deposition or trial? Consider organizing your documents electronically. Can you electronically stamp them with exhibit numbers? Does your assistant have the ability to print them? Does your assistant have exhibit stickers? Does your court reporter have a way to electronically stamp exhibits?

5. Meetings

How are you going to conduct meetings? With your staff? With your associates? With your clients? With the court? With opposing counsel? Have a plan and be adept at using the appropriate technology. You can hold meets via conference calls and video calls. Learn how to send a calendar invitation to the participants of the meeting. Make sure you know how to connect to and host a conference or video call. Practice with your law partners, friends or family ahead of time so you can learn the bells and whistles.

6. Argument

What if you have to engage in virtual argument? Jay O'Keefe had a great article in Virginia Lawyers Weekly on April 20, 2020, describing his experience arguing before the Virginia Supreme Court – via his telephone.[2] Will you be on video or just the phone? Do you have a quiet and dedicated space to argue? Do you have proper charging and back up for your phone and computer? Do you have all your notes and cases? Do you need to submit anything to the court ahead of time?

7. Payments

How are you going to get paid? Where should your client send the check? How are you going to pay your staff? How are you going to distribute settlement proceeds or left over trust account funds? Make sure you know how this is going to work so you know that you have the proper access to your accounts and ability to be paid and to pay.

8. Document Review and Production

Do you have the ability to electronically review and produce documents? Invest in a secure document sharing system like ShareFile (not DropBox!) to be able to upload and share large volumes of documents. Invest in Adobe or another PDF review software so you can electronically review documents, highlight, and make notes.

9. Record Keeping

Do not neglect your record keeping even while working remotely. You still have an ethical obligation to keep your time, keep your file up to date, keep your calendar current and make sure the appropriate people have access to your schedule.

---

[2] Vieth, Peter, *Lawyers Adjust to High Court Arguments Heard by Phone*, Virginia Lawyers Weekly, Apr. 20, 2020, available at https://valawyersweekly.com/2020/04/20/lawyers-adjust-to-high-court-arguments-heard-by-phone/.

C. Lawyer Wellness – Competence

The future is unknown and uncertain. Many of you may feel we are losing the "good old days" of practice. Working remotely can pose its own challenges of isolation and silo-ing, which in turn can lead to a lack of attention to your work, a lack of engagement with your colleagues and staff and a lack of interaction with your client. All of that can lead to a lack of appreciation and a delay or refusal to pay. So no wonder we feel stressed, overwhelmed, and anxious. Lawyer wellness is a part of Rule 1:1 – practicing competently. You cannot maintain your ethical obligations if you fail to maintain your own health.

According to a recent Law360 article, "Virus Poses Latest Test to Supporting Attorneys' Mental Health," Law360, Mar. 23, 2020:

> As lawyers grapple with the anxiety of a public health crisis, juggle work and family obligations at home, and adjust to physical isolation due to the spread of COVID-19, efforts to support attorneys' mental health and wellness are paramount, according to mental health professionals.
>
> Lawyers struggle with higher rates of mental health issues, including depression and problem drinking, than the average public, studies have shown.
>
> The current environment, in which stress and anxiety are running high and many lawyers are physically isolated while working from home, stands to exacerbate the attorney mental health crisis if preventative measures are not taken, attorney wellness and mental health experts told Law360.
>
> "The pandemic and ensuing disruption to routines and stability is unquestionably taking a toll on the mental health and well-being of many in the legal profession, just as it is for individuals in all walks of life," said Patrick Krill, founder of attorney well-being consulting firm Krill Strategies. "Fear, uncertainty, stress and worry are widespread."

Even though we won't always be in a pandemic, it's good to keep in mind the importance of being well. The change – rather the loss that comes from change- causes stress, and we can relieve some of that stress by familiarizing ourselves with new and important technology that will make our lives easier.

The ABA Commission on Lawyer Assistance Programs has published a list of resources titled "Mental Health Resources for the Legal Profession During COVID-19." See also "Staying on the Well Being PATH During COVID-19." The Virginia Supreme Court also published its 2018 report, entitled "A Profession at Risk" available here https://cdn.ymaws.com/www.vba.org/resource/resmgr/home/2018_home/A_Profession_At_Risk_Report.pdf.

Every lawyer should take stock of his or her mental and physical health and put health habits into place to ensure proper representation of clients whether in or out of the office. Here are some things to consider:

1. Limit alcohol and caffeine consumption and binge eating.
2. Find healthy foods you enjoy.
3. Create a physical exercise routine that meets your needs and capabilities; take walks during the day.
4. Drink plenty of water.
5. Get the sleep and rest you need, including taking naps.
6. Connect with friends over non-work related topics.
7. See a counselor.
8. Do mediation or engage in another spiritual practice that is meaningful to you.
9. Find a space and activity that helps you relax.
10. Do good things for others.

Whatever works for you, be aware of yourself and your needs and create a space for you to be healthy. Keep in mind your duty to supervise – associates and staff are at risk too. Check in on them and their well-being.

V. Best Practices and Business Continuity

Have a written plan for you and your staff to stay on track while working remotely. How often will you check in? How will you check in? How will you supervise work if you are a partner or stay connected if you are an associate? Whether you're an associate or a partner, of counsel, in-house counsel or a solo practitioner, you should be intentional about being a good leader. Read books; go to seminars; make yourself better. Good leaders can navigate their team through change and do so by leading, not directing – or micromanaging.[3] Good leaders establish and communicate a culture that fosters buy-in to certain values, good communication, independence, initiative, and hard work. If you create a good culture, keep up to date with emerging technology and develop a written plan to facilitate remote work, you will be able to capitalize on the benefits of working remotely and meet your ethical obligations to your staff and your clients.

VI. Conclusion

Even during changing and difficult times, lawyers have ethical obligations to their clients and their colleagues. We need to be competent by keeping up with new technology and by staying well. We need to be able to communicate with our clients effectively through the use of technology and by ensuring they can receive and send us communication. We need to supervise junior lawyers and staff by establishing routine and protocol for accountability and communication. And we need to put into practice good business solutions for accessing documents, accounts, and other databases while working remotely. Hopefully the tips and tools in this outline will be a good starting point for you and your ability to successfully work remotely.

[3] Bingham, Jason E., "Cultureship: The ABCs of Business Leadership" (2013).

Practicing Law in a Brave New World

2

Catastrophic Motor Vehicle Accidents; Real Lessons Learned in Representing Injured Motorists and Defendant Trucking Companies.

Presented by:

Matt W. Broughton

broughton@gentrylocke.com

Ashley W. Winsky

winsky@gentrylocke.com

Andrew D. Finnicum

finnicum@gentrylocke.com

David R. Berry

berry@gentrylocke.com

Roanoke | Lynchburg | Richmond | gentrylocke.com

VA CLE: Essentials of Trucking Accidents in Virginia

Matthew W. Broughton
Ashley W. Winsky
Andrew D. Finnicum
David R. Berry
Gentry Locke Seminar – September 11, 2020

This seminar will take you step-by-step through handling a trucking accident case. Learn how to conduct a rapid-response investigation, appropriately value your case, make tactical decisions to advance your client's objectives, and persuade a jury. Whether you are representing the plaintiff or the defendant, this training session will ensure you are able to master the complexity that is trucking litigation.

1. RAPID RESPONSE

Trucking cases require a rapid response. Tire marks fade, data disappears, and witnesses forget. There is no time to waste when it comes to identifying, gathering, and preserving evidence. This is true for both the plaintiff and defense bar.

a. Identifying Potentially Relevant Evidence

Every trucking case is unique and so is the evidence. The primary focus following an accident should be identifying what evidence exists, who has it, and how to preserve it. This process begins at the scene of the accident and continues through discovery.

Evidence the Defendant May Have. The Federal Motor Carrier Safety Regulations ("FMCSR") require trucking companies to maintain a wealth of potentially relevant information. Many companies also utilize fleet management systems and other technologies that provide insight into what happened in the days, hours, and minutes leading up to an accident. This and other common evidence in the defendant's possession may include, among other things:

- The defendant's vehicle
- On-board computer data
- Dashcam footage
- GPS/Tracking data
- Maintenance records
- Inspection records
- Training manuals
- Company policies
- Delivery records
- Bills of lading
- Accident reports
- Trip summaries
- Dispatch records
- DOT health evaluations
- Disciplinary records
- Cell phone data
- Driver's logs
- Photographs
- Driver receipts

Evidence the Plaintiff May Have. Many modern passenger vehicles, like most commercial vehicles, now have on-board computer systems (a.k.a., a "black box") that capture information about the speed, steering angle, direction, braking, and status of a vehicle before, during, and after an accident. Cellular-connected infotainment systems can also provide insight into how or why an

accident occurred. This data is almost always relevant and should be considered alongside more traditional types of evidence in the plaintiff's possession, including:

- The plaintiff's vehicle
- Dashcam footage
- GPS/Tracking data
- Maintenance records
- Inspection records
- Photographs
- Medical records
- Driver receipts
- Cell phone data

Third-Party Evidence. Some of the most significant evidence may not be in either party's possession. Witnesses, accident investigators, and other third-parties may have relevant photographs, videos, or other documents that neither party knows about. Finding them is key. As a starting point, common examples of this type of information include:

- Accident reports
- Draft accident reports
- Investigation notes
- 9-1-1 recordings
- Dispatch records
- Traffic cameras
- Police dashcam footage
- ATM/Surveillance video
- Body camera footage
- Traffic control patterns
- Eyewitness accounts
- Telematics data
- Tow records
- Accident photographs

The process of identifying potentially relevant evidence, and who has it, should begin as soon as possible. There is no one-size-fits-all approach to doing this. Each case will depend on the unique circumstances of the accident. The key is to be alert, remain flexible, and act quickly.

b. **Preservation of Evidence**

After identifying potentially relevant evidence, the next step is notifying those who have that evidence of their statutory duty to preserve it – including your own client.

i. *Statutory Duty to Preserve Evidence*

In 2019, the General Assembly enacted Va. Code § 8.01-379.2:1, which clarifies that "[a] party or potential litigant has a duty to preserve evidence that *may be relevant* to reasonably foreseeable litigation" (emphasis added). The statute further explains that "determining whether and at what point such a duty to preserve arose" requires consideration of, among other things, "the extent to which the party or potential litigant was on notice that specific and identifiable litigation was likely and that the evidence would be relevant."

ii. *The Preservation Letter*

A well-crafted preservation letter will put the receiving party "on notice" of the potential relevance of the evidence identified therein. Boiler-plate letters are not enough. The letters should be tailored to the specific recipient and specifically identify the evidence that should be preserved.

Electronic Data. Plaintiffs and defendants alike should be notified to preserve any electronically stored information ("ESI") that may be relevant in the event of litigation. This would include in-vehicle computer data, dashcam footage, telematics data, cell phone data, photographs, and the like. Plaintiffs, in particular, should be put on notice to affirmatively preserve ESI because they may not know that continued use of the recording device – whether a vehicle, dashcam, or cell phone – may overwrite the relevant data. This is especially true of in-vehicle computers and dashcams, which can quickly overwrite accident data as soon as a vehicle is restarted.

Document Retention. Transportation companies should be notified to suspend any document retention and destruction policies as they relate to potentially relevant records. The mandatory record retention periods specified in the FMCSRs could permit the destruction of relevant records before litigation even commences:[1]

Item & Category of Records	**Retention Period**
Supporting data for periodical reports of accidents, inspections, tests, hours of service, repairs, etc.	6 months
Records of freight received, forwarded, and delivered	1 year
Contracts with employees and employee bargaining groups	Until expiration
Personnel and payroll records	1 year
Transportation records	1-3 years

iii. *The Litigation Hold Letter*

The significance of a preservation letter is that it puts other parties on notice of what evidence to preserve. If the receiving party fails to comply, the letter can be used as a sword in support of a spoliation claim. The litigation hold letter, by contrast, is a shield. Attorneys should counsel their own clients to preserve relevant evidence through a litigation hold letter, which, much like a preservation letter, identifies what categories of documents to preserve.

iv. *Spoliation of Evidence*

If a party "fail[s] to take reasonable steps to preserve [relevant evidence]" – or the evidence "is otherwise disposed of, altered, concealed, destroyed, or not preserved" and cannot be restored or replaced – the court "may order measures no greater than necessary to cure" any resulting prejudice to the other party.[2] Moreover, to the extent the offending party "acted recklessly or with the intent to deprive another party of the evidence's use in the litigation," the court may presume the evidence was unfavorable, instruct the jury to do so, or dismiss the action or enter a default judgment.[3]

v. *Third-Party Preservation*

Notably, the statutory duty to preserve evidence in Virginia only applies to "[a] party or potential litigant."[4] The statute does not address third parties, nor does it offer any sanction or relief against

[1] See 49 C.F.R. § 379.13.
[2] Va. Code § 8.01-379.2:1(B).
[3] *Id*.
[4] Va. Code § 8.01-379.2:1(A).

third parties who fail to preserve evidence. Accordingly, to the extent a third-party declines to share relevant evidence voluntarily, any corresponding preservation letter should be quickly followed by a subpoena request as soon as litigation commences. Furthermore, as discussed more fully below, the Virginia Freedom of Information Act ("FOIA")[5] is a valuable tool for obtaining documents and evidence from various governmental entities.

c. **Gathering Relevant Evidence**

The process of gathering evidence begins at the scene of the accident.

i. *On-Scene Inspection*

It is critical to have accident investigators and forensic experts on stand-by to respond to the scene of an accident as soon as possible. A variety of time-sensitive evidence – ranging from tire marks and debris scatter to traffic patterns and signage – can disappear within hours. That evidence may prove critical at trial years later.

Overhead Drones. Accident investigators and forensic experts are relying on drones to visualize and survey accident scenes from above with increasing regularity.[6] The drones can be dispatched quickly and take high-quality images and measurements using GPS control systems without physically entering or disturbing the scene.[7] The images and measurements can then be used to generate three-dimensional models of the roadway, terrain, vehicles, buildings, and other nearby objects.[8]

ii. *Attorney On-Scene Response*

In addition to dispatching investigators and experts to the scene, both parties' attorneys should respond to the scene as soon as possible. This will enable them to figure out what happened and influence what happens next.

Counsel the Client. The attorney's first priority is to guide his or her client through the uncertain, and often terrifying, process that takes place after an accident. The client should be informed of what subsequent litigation might look like and be advised against generating additional evidence through phone calls, texts, social media posts, and the like. The attorney should also gather as much information as possible from the client, as soon as possible, to better ascertain the scope of potential liability for those involved in the accident.

Coordination. Responding to the scene of the accident will enable the attorney to manage a variety of post-accident activities. This would include coordinating, and potentially postponing, the

---

[5] Va. Code § 2.2-3700 *et. seq*.
[6] *See* Steven M. Schorr, *New Technology in Forensic Engineering Keeps "Flying" Ahead*, EXPERTLY SPEAKING, https://www.forensicdjs.com/blog/new-drone-technology-forensic-engineering-keeps-flying-ahead/ (last visited June 24, 2020).
[7] Chiara Cappelletti et al., *Forensic Engineering Surveys with UAV Photogrammetry and Laser Scanning Techniques*, INT'L ARCH. PHOTOGRAMM, REMOTE SENS. SPATIAL INFO. SCI., XLII-2/W9, 227-34 (2019).
[8] For a demonstration of this technology in action, *see Drone Investigations*, KNOTT LABORATORY, https://knottlab.com/services/drone-investigations/ (last visited June 24, 2020).

client's police interview. In addition, the attorney will coordinate with his or her investigators and experts to ensure that they knew when, where, and how to collect relevant information at the scene of the accident.

<u>On-Scene Interviews</u>. If possible, the attorney should interview witnesses, including eyewitnesses, police, first responders, etc., at the scene of the accident. Gathering that information immediately after an accident while it is still fresh will better enable the attorney to build a case or mount a defense in the event of litigation. Importantly, however, the attorney should be mindful not to become a witness – any information gathered on the scene should be gathered by those who will ultimately testify about it.

<u>Towing Information</u>. While on-scene, it is important to document where any vehicles involved in the accident are ultimately towed. It is fairly common for multiple vehicles to end up in multiple tow yards. Determining what vehicles are going where, before they leave the scene, will make it much easier to promptly recover relevant evidence from those vehicles.

iii. *Vehicle Inspection*

Whether on-scene or at the tow yard, the vehicles themselves are one of the most important sources of evidence in a trucking case. The vehicles may contain food debris, cigarettes, car seats, beer cans, or a variety of other evidence that can provide insight into what caused or contributed to an accident. A forensic expert should also perform three-dimensional scans of all vehicles involved in the accident to document the extent of the damage and better reconstruct how the accident occurred.

iv. *Vehicle Data Extraction*

Forensic experts are capable of extracting data from a vehicle's "black box." The data is temporarily recorded by an Electronic Control Module ("ECM"), Event Data Recorder ("EDR"), or other on-board computer system. These systems and the types of data they record vary depending on the model and year of the vehicle, even among commercial vehicles:

Electronic Control Module Quick Reference Guide

Given the variety of on-board computer systems, and the unique methods of extracting information from each system, it is important to ascertain the make, model, and year of the corresponding vehicles. That information must be relayed to a forensic expert in order to determine how the computer data may be extracted and who[9] can extract it. This is true of both commercial and passenger vehicles.

Consent. On-board computer data may generally only be accessed by the vehicle owner or those the owner has authorized to access the data – regardless of whether the vehicle is readily accessible in a tow yard or otherwise.[10]

Coordination Among the Parties' Experts. The process of extracting vehicle computer data carries the risk of corrupting the underlying data. This can give rise to spoliation claims if the vehicle owner extracts the data without giving the other party an opportunity to participate. As a result, it is important for the parties' counsel to coordinate an agreed-upon time for both parties' experts to be present. At a minimum, each party should give prior notice before attempting to extract vehicle computer data. Alternatively, if data extraction is performed on the date of the accident, it is important to document when and how it was performed and by whom.

Interpreting the Data. After extracting the raw data, a forensic expert will need to make sense of it. This may require timing adjustments to correct the vehicle's internal "clock" so that it corresponds with the actual date and time. The expert can also review the computer's audit trail to assess whether the data has been tampered with or manipulated in any way. Processing the data takes time and should begin as soon as possible.

Using the Data. The significance of vehicle computer data may not be immediately apparent. In some instances, the data might allow an expert to opine about the speed of a vehicle at various points in time prior to an accident.[11] That same data, however, may be insufficient for purposes of expert testimony concerning when the accident occurred and the speed of the vehicle at the time of the accident.[12] Ultimately, the data is at its strongest when used in conjunction with other evidence from the accident scene and the vehicles.[13]

v. *Accident Response Records*

Accident Reports. Accident reports (i.e., crash reports) are inadmissible in Virginia.[14] The reports do, however, contain a variety of crucial information, including: the date, time, and location of the accident, the names and addresses of the drivers, the vehicle owners, the persons who were injured, and the identity of witnesses and the investigating officer.[15] This information is available to any

---

[9] As an example, Delta |V| is Mack Trucks' "Designated Affiliate" for the east coast, and the only forensic engineering firm that can extract data from those vehicles. *See Data Harvesting*, DELTA |V| FORENSIC ENGINEERING, http://www.deltavinc.com/what-we-do/data-harvesting/ (last visited July 1, 2020).

[10] *See* Va. Code § 46.2-1088.6(B).

[11] *See Ferguson v. Nat'l Freight, Inc.*, 2016 U.S. Dist. LEXIS 37487, at *12 (W.D. Va. Mar. 22, 2016).

[12] *Id*. at *12-13.

[13] *Id*. at *14-15.

[14] *See* Va. Code § 46.2-379.

[15] *Id*.

person involved in the accident[16] and should be requested as soon as possible from the Virginia Department of Motor Vehicles ("DMV").

Law Enforcement Records. Counsel should submit a FOIA request to state and local enforcement agencies for additional documents and recordings that may not be incorporated into the final accident report. This may include draft reports, investigation notes, and witness statements as well as police dashcam footage or footage from the body cameras worn by law enforcement personnel at the scene of the accident. This information must be requested as soon as possible to ensure that it is not lost or overwritten before litigation commences.

Virginia State Police – Motor Carrier Safety Division Records. In addition to more traditional law enforcement entities, the Motor Carrier Safety Division of the Virginia State Police may also respond to truck accidents.[17] The Motor Carrier Safety Division routinely assists local law enforcement agencies with accident investigations involving hazardous material spills and commercial vehicles. These records may contain valuable, specialized information and should not be overlooked.

9-1-1 Recordings and Reports. Unlike accident reports, 911 call recordings may be admissible.[18] The recordings are generally available through a FOIA request,[19] provided they do not relate to a criminal investigation or prosecution.[20]

Emergency Response Records. Firefighters and paramedics may also have records that can be obtained through a FOIA request. While some of the information in those records – such as health information – may require redaction, the records as a whole often include general information that can be extremely useful prior to litigation.

VDOT Records. A less-common source of potentially relevant information is the Virginia Department of Transportation ("VDOT"). Depending on the circumstances of the accident, VDOT may have records regarding road closures, traffic flow, and clean-up efforts following an accident. A FOIA request for this information, and any other information related to the accident, should be submitted to VDOT as soon as possible after an accident.

d. **Rapid Response Summary**

Whether you represent the plaintiff or defendant, a rapid response is the key to a successful trucking case. The process of identifying relevant evidence, as well as preserving and gathering that evidence, should begin at the accident scene before it is cleared, if possible. Maintaining relationships with qualified accident investigators and forensic experts, who can respond at a

---

[16] Va. Code § 46.2-380.
[17] *See Motor Carrier Safety*, VIRGINIA STATE POLICE, https://www.vsp.virginia.gov/BFO_MotorCarrier.shtm (last visited July 2, 2020).
[18] *See Caison v. Commonwealth*, 52 Va. App. 423, 434 (2008) ("[T]he trial court did not err in admitting the 911 recording into evidence under the excited utterance exception to the hearsay rule."); *see also* Va. Code § 8.01-390(B) (addressing authenticity of 911 recordings).
[19] Va. Code § 2.2-3700 *et. seq*.
[20] *See* Va. Code § 2.2-3706.

moment's notice, will ensure that valuable evidence remains available long after the vehicles leave the scrap yard.

2. CRIMINAL LIABILITY & TRAFFIC CITATIONS

It is not uncommon for serious trucking cases to also involve parallel criminal prosecution of the defendant truck driver for the crash at issue in your civil case. The existence of these criminal charges can affect assessment and the course of discovery.

a. Admissibility & Impact of Criminal Charges & Convictions

Under Virginia law, guilty or *nolo contendere* pleas by the defendant driver will be admissible in the companion civil case.[21] As many truck drivers live and work outside the area where the crash occurs, they are often prone to prepayment of less serious charges. However, prepayment of the ticket "shall itself be deemed a waiver of court hearing and entry of guilty plea."[22] Thus, no matter the severity of the charge, prepayment, guilty pleas, and *nolo contendere* pleas shall be admitted into evidence by the civil trial judge.

However, "In Virginia, the settled rule is that 'a judgment of conviction or acquittal in a criminal prosecution does not establish in a subsequent civil action the truth of the facts on which it was rendered' and 'such judgment of conviction or acquittal is not admissible in evidence' in the civil case."[23] "The reason for the rule is that the parties in a criminal proceeding are not the same as those in a civil proceeding and there is a consequent lack of mutuality."[24]

Moreover, if a defendant fails to appear to contest a traffic offense and is found guilty in absentia, then evidence of the conviction is inadmissible, regardless of whether the defendant pays the corresponding fines and court costs arising from the infraction.[25]

Thus, defense counsel in the civil case has cause to become involved in the results of the traffic and criminal proceedings to prevent admissibility of the results in the civil case. When criminal charges are a possibility, civil defense counsel should coordinate with the trucking company and driver to retain a criminal defense attorney for the driver as soon as possible and coordinate case strategy. When the driver is cited for a traffic violation, defense counsel should retain an attorney to contest the citation or have the driver wait to pay the citation after the traffic hearing occurs.

b. Impact of the Fifth Amendment on Discovery

---

[21] *See* Va. Code § 8.01-418 ("Whenever, in any civil action, it is contended that any party thereto pled guilty or nolo contendere or suffered a forfeiture in a prosecution for a criminal offense or traffic infraction which arose out of the same occurrence upon which the civil action is based, evidence of said plea or forfeiture as shown by the records of the criminal court shall be admissible.")

[22] Va. Code § 19.2-254.1.

[23] *Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 261 (1987) (internal citations omitted).

[24] *Id.*

[25] *See Yeager v. Adkins*, 250 Va. 1 (1995).

When a defendant driver faces potential loss of career and jail time as a result of pending prosecution, the driver and his counsel – who will likely be different than the trucking company's counsel in this situation – may attempt to use the Fifth Amendment right to remain silent to stonewall discovery. However, the Fifth Amendment does not permit a civil defendant to simply ignore discovery responsibilities. "The circuits have held with great uniformity that a blanket refusal to answer questions does not suffice to raise constitutional questions."[26]

The privilege against self-incrimination protects an individual from answering specific allegations in a complaint or filing responses to interrogatories in a civil action where the answers might incriminate him in future criminal actions. "But for one to invoke this privilege the party claiming it must not only affirmatively assert it, he must do so with sufficient particularity to allow an informed ruling on the claim."[27] Similarly, a blanket objection or refusal to appear for deposition is not a proper invocation of the Fifth Amendment privilege.[28] "Defendants cannot simply invoke the privilege as to the entire deposition without hearing individual questions."[29]

However, the Fifth Amendment may provide the driver the right not to answer key questions about what happened in the crash, thereby depriving the plaintiff of vital information about how and why the collision occurred. As a result, plaintiff's counsel should investigate the potential for pending criminal charges and consider the impact of the Fifth Amendment in the strategic timing of the filing of the Complaint and the service of discovery requests.

c. **The Role of the Fifth Amendment in a Civil Trial**

The role at trial of the defendant's exercise of the Fifth Amendment varies greatly depending on whether the case is brought in Virginia or Federal courts. With a few exceptions not relevant to our subject, Virginia law provides, "[i]n any civil action, the exercise by a party of any constitutional protection shall not be used against him."[30] Thus, in Virginia courts, the plaintiff would likely be unable to use the defendant's exercise of his constitutional right to remain silent against him. There is no case law holding that the driver's refusal to testify could or could not be held against his employer. However, this statute has never been held applicable in federal courts.

In contrast, the Supreme Court of the United States has held "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.'"[31] "The rule allowing invocation of the privilege, though at the risk of suffering an adverse inference or even a default, accommodates the right not to be a witness against oneself while still permitting civil litigation to proceed."[32] Notably, many courts have held that the admissibility of a witness exercising their Fifth Amendment rights and the allowance of negative inferences therefrom applies even when the witness exercising the

---

[26] *United States v. Carroll*, 567 F.2d 955, 957 (10th Cir. 1977) (citing *United States v. Malnik*, 489 F.2d 682, 685 (5th Cir. 1974).
[27] *N. River Ins. Co. v. Stefanou*, 831 F.2d 484, 486-87 (4th Cir. 1987).
[28] *See Fulmer v. Bullard*, 1988 U.S. App. LEXIS 20727, *2-3 n.* (4th Cir. 1988).
[29] *United States v. Woods*, 2009 U.S. Dist. LEXIS 133871, *9 (E.D. N.C. Dec. 27, 2009).
[30] Va. Code § 8.01-223.1.
[31] *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (internal citations omitted).
[32] *Mitchell v. United States*, 526 U.S. 314, 328 (1999).

right is a non-party.[33] Thus, even if a driver has not been sued or has been dismissed as a party for strategic reasons, the fact that the driver will not answer questions based on the Fifth Amendment is admissible and inferential in Federal court. This reality should influence both filing and removal decisions by counsel.

3. Case Assessment

a. Evaluating Injuries & Damages (Plaintiff's Perspective)

Proper workup of the medical damages in trucking case involves striking the proper balance between thoroughly developing the medical evidence and still adequately maintaining the jury's focus on the misconduct of the defendants. Zealous representation does not require overplaying the plaintiff's hand or overreaching in the plaintiff's diagnoses or disabilities. Exaggeration by the plaintiff or her experts is many defense attorneys' favorite red herring. Thorough preparation and honest evaluation can prevent its effect.

Frequent injuries in trucking crashes include severe lacerations, traumatic orthopedic injuries, and death. We now turn our attention to a form of injury that is less apparent but just as serious—traumatic brain injuries.

i. *Traumatic Brain Injuries (TBI)*

A TBI is caused by a bump, blow, or jolt to the head that disrupts the normal function of the brain. Not all blows or jolts to the head result in TBIs. The severity of a TBI may range from "mild" (a brief change in mental status or consciousness) to "severe" (an extended period of unconsciousness or memory loss after the injury). Most TBIs are mild and commonly called concussions, according to the Centers for Disease Control and Prevention (CDC), National Center for Injury Prevention and Control.[34]

TBI Overview. TBI is one of the leading causes of disability in the United States, estimated to affect 13.5 million individuals.[35] Many survivors live with significant disabilities, resulting in major socioeconomic burden as well as health issues. In 2010, the economic impact of TBI in the United States was estimated to be $76.5 billion in direct and indirect costs.[36] In 2013, there were approximately 2.5 million emergency department visits, 282,000 hospitalizations, and 56,000

---

[33] *See, e.g., Cargill, Inc. v. WDS, Inc.*, 2018 U.S. Dist. LEXIS 51854, *35 (W.D. N.C. Mar. 28, 2018) (citing *LiButti v. United States*, 107 F.3d 110, 124 (2d Cir. 1997)); *FDIC v. Fidelity & Deposit Co. of Md.*, 45 F.3d 969, 977 (5th Cir. 1995) (finding "no constitutional bar to the admission of [a nonparty's invocation of the Fifth Amendment privilege]").

[34] Report to Congress on mild traumatic brain injury in the United States: steps to prevent a serious public health problem. Atlanta (GA): Centers for Disease Control and Prevention; 2003.

[35] Schiller JS, Lucas JW, Ward BW, Peregoy JA. Summary health statistics for U.S. adults: National Health Interview Survey, 2010. Vital Health Stat 10 2012; :1.

[36] Finkelstein E, Corso P, Miller T. The Incidence and Economic Burden of Injuries in the United States, Oxford University Press, New York 2006; Coronado V, McGuire L, Faul M, et al. Epidemiology and public health issues. In: Brain Injury Medicine: Principles and Practice, 2nd ed, Zasler ND, Katz DI, Zafonte RD, et al. (Eds), Demos Medical Publishing, New York 2012.

deaths related to TBI in the United States.[37] TBI contributes to 30 percent of all injury-related deaths in the United States.[38]

TBIs in Trucking Cases. Due to the severity of impact and the massive weight differential between the involved vehicles, TBI are a common result in trucking crashes. These TBI are typically caused by:

- Direct impact of the plaintiff's head with structural components of the vehicle, safety devices, or other objects in the vehicle.
- De-acceleration injuries, where there is no impact to the head itself, but injuries occur within the brain as tissue is damaged by the sudden deceleration of the brain impacting with the skull.
- Coup Contre Coup, when there is a blow to the head and the brain strikes the inside of the skull on the side of the blow and on the opposite side.

Diagnostic Challenges. In the traumatic aftermath of a trucking crash, it is not uncommon for a traumatic brain injury to go unreported or undiagnosed in the initial emergency medical care. Both the patient and the physician tend to focus on traumatic orthopedic injuries and other physical injuries immediately after the crash. Also, it may take a significant amount of time for the plaintiff to recognize changes and symptoms caused by the TBI. Additionally, it is often a challenge for people suffering from a TBI to even recognize their own symptoms. The challenge of symptom recognition means that friends, family, and even the plaintiff's counsel may recognize the symptoms of a TBI before the plaintiff herself recognizes it.

Common Symptoms. After a severe brain injury, a person may experience post-traumatic confusion and be unaware of a variety of important symptoms, such as their personal feelings, their current location or daily schedule, or even their name. In some scenarios, these symptoms resolve after a few weeks. In other scenarios, victims experience symptoms such as decreased attention span, differential levels of activity throughout the day, or severe personality changes for months, years, or even permanently following an accident. This state is referred to as delirium (mental confusion followed by emotional and behavioral disruptions).

Personality changes are a common symptom of TBIs. Those changes often include one or more of the following:

- Irritability
- Unexpected Outbursts
- Mood Swings
- Difficulty Thinking
- Selfishness
- Lack of Empathy
- Lack of Self-Control
- Decreased Sex Drive
- Paranoia

TBIs may also cause emotional changes, including:

---

[37] Taylor CA, Bell JM, Breiding MJ, Xu L. Traumatic Brain Injury-Related Emergency Department Visits, Hospitalizations, and Deaths — United States, 2007 and 2013. MMWR Surveill Summer 2017; 66:1.

[38] *Id.*

- Anxiety
- Depression
- PTSD
- Apathy
- Flat Affect
- Amotivation

In addition, a person may experience communication challenges, sensory deficits, and sleep pattern changes following a TBI.

Proving TBI Damages. Because TBIs frequently do not produce large medical bills due to limited available medical treatment, plaintiff's counsel must have expert and lay witnesses prepared to aid the jury in understanding the full impact of the TBI on the plaintiff's life. Special attention should be given on the plaintiff's living condition and whether the plaintiff will need attendant care going forward. Even care that is currently provided by family members should be projected as damages, especially because the complicated long-term symptoms from a brain injury can result in alienation from family members who are currently providing care.

b. **Evaluating Injuries & Damages (Defense Perspective)**

TBIs are some of the biggest money-makers for plaintiffs in the realm of commercial vehicle accident litigation. "In terms of traumatic brain injuries, the presence of these raised jury awards by more than $800,000 per case."[39] Accordingly, much of this section focuses on the evaluation and assessment of cases with a TBI component.

i. *Determine Whether There Has Actually Been a TBI*

According to neurologists and neuropsychologists with whom we consult, it is estimated that around 40% of TBIs claimed in litigation are the result of malingering, so figuring out whether the TBI in your case is the genuine article is crucial. This is easier said than done, and good plaintiff's attorneys know how to build a TBI case regardless of whether the plaintiff is actually suffering from such an injury. When a plaintiff has seen all the right doctors, complained of all the right (almost always subjective) symptoms, and has done so in a reasonably timely fashion, you will likely be faced with a case that you'll have to hire experts to defend. This is expensive and can frequently drive a defendant to settle a case earlier or for more money than they would otherwise pay on the case. Therefore, it is important to evaluate the strength of a plaintiff's TBI claim as soon as possible and to continue evaluating it as documents and evidence come in.

Start at the Beginning. The common course of TBI symptoms is "worst at first," meaning the worst symptoms occur immediately or very shortly after the trauma and then get better over time. So you will want to ensure you have a grasp on the facts of the accident and on witnesses who saw the plaintiff's behavior immediately after the accident.

First, look at the vehicles. In a fender-bender or other accident with minimal vehicle damage, a plaintiff almost instantly loses credibility when they ask a jury for a whole bunch of money for

[39] David Sparkman, *Trucking Tort Awards Grow in Number and Cost, Material Handling & Logistics* (July 10, 2020), https://www.mhlnews.com/transportation-distribution/article/21136448/trucking-tort-awards-grow-in-number-and-cost#:~:text=The%20situation%20has%20reached%20the%20point%20that%20litigation,it%20is%20both%20highly%20speculative%20and%20relatively%20unregulated.

almost any injury but especially a TBI. If the plaintiff claims she hit her head on something, figure out what that could be – for example, if a plaintiff hit the rearview mirror with her head, find a picture and see if the rearview is knocked loose. Hit a window? Get a picture of the window to see if there is a smudge or crack. If the plaintiff struck her head on the rearview mirror or front windshield, the jury may infer that the plaintiff was not wearing a seatbelt – a fact you will otherwise find hard to get into evidence.

Often times, your best friends will be the first responders and witnesses at the scene. You will want to determine how the plaintiff behaved immediately after the accident. Was she alert and aware or unconscious? Was she able to provide a thorough description of what happened or was she dazed and unable to remember anything? Did she call 911 – get the recording if so. Check the plaintiff's phone records to see if she made any other calls at the scene. It is not uncommon to find a lengthy phone call with an insurance company shortly after the incident. The minutes and hours immediately following the accident are crucial as the plaintiff is going to be the most forthcoming during that time when the adrenaline is still pumping and before she has called a lawyer.

Monitor the Timeline of TBI Symptoms. When we refer to a TBI, we are talking about the types of brain injuries that leave long-term side effects, altering the plaintiff's way of life either permanently or for a considerable amount of time. Plaintiff's experts will often like to explain to jurors that even a minor concussion is technically a TBI – this is true, though it is often referred to as a "mild TBI." The trick here is to differentiate a minor/moderate concussion that typically resolves in a matter of days to weeks from the more serious TBIs that lead to big verdicts and settlements. The way to do it is to monitor the symptom trajectory.

Most neurologists will tell you that an uncomplicated concussion (mild or moderate) will resolve in a matter of days or weeks. The symptoms (e.g., headaches, photosensitivity, nausea or wooziness, trouble concentrating) will fade away over time in an uncomplicated concussion. In a TBI, these symptoms tend to persist. So, if your plaintiff has a concussion diagnosis and the symptoms seem to fade with time, then you are likely dealing with an uncomplicated concussion. If they get *worse* over time, that is a red flag that something is fishy. It is also a red flag if symptoms do not appear until months later – especially if plaintiff hired an attorney in the interim.[40] Presenting the jury with a timeline where there is considerable gap in treatment, especially when the treatment picks up after the plaintiff is referred to their doctor by the attorney, creates a significant blow to the credibility of the plaintiff's TBI claim.

Get a Doctor Involved Early. It will be worth the expense to get a neurologist and/or neuropsychologist involved early on to perform a record review. Their findings and input will be helpful in developing discovery as they will know what to look for. They can also advise you as to whether an independent medical exam (IME) will be useful. When the records make sense, it may be in your interest to forgo an IME. In most cases, you will want your neuropsychologist to perform a neuropsychological evaluation, which falls under either Sup. Ct. Va. R. 4:10 or FRCP 35[41], but confer with your experts to determine what testing will be necessary.

[40] It's always worthwhile to find out when the plaintiff retained counsel for the accident in question.

[41] Often, a plaintiff will want to record some or all of the neuropsychological evaluation. The considerable majority of neuropsychology professionals oppose recording the actual testing itself and both the American Board of Professional Neuropsychology and the American Psychological Association have issued statements and guidelines

A Note on PTSD. PTSD is a popular add-on to TBI claims. TBI and PTSD are generally unrelated, as TBIs involve a physical injury that may lead to psychological symptoms, whereas PTSD is a purely psychological occurrence. They can, of course, both arise out of the same traumatic event. You will want your neuropsychologist's input on evaluating the strengths and weaknesses of the specific PTSD claim. It is important to determine whether testing for PTSD was proper and whether there are alternative explanations for the diagnosis. In actuality, PTSD appears in only 8% of people who experience a traumatic injury. Though you are likely to see PTSD claimed in almost every case involving a tractor-trailer, a true diagnosis of PTSD is a rarity.

PTSD damages should not be exorbitant. The typical course of treatment for PTSD runs around $3,000 - $18,000.

Other Considerations. This is a no-brainer in this day and age but is always worth repeating – check the plaintiff's social media! There is nothing better than finding a plaintiff complaining that she can no longer work but then celebrating a new job on Facebook, or claiming that she cannot spend long days outdoors because of photosensitivity . . . except of course for that beach vacation that is posted all over Instagram. In discovery, you will want to request that the plaintiff download and produce social media postings at the time of the accident through the present that you cannot view due to privacy settings.

Along those lines, order a criminal background check of the plaintiff. If you can find aliases or other names used by your plaintiff, run social media checks on those as well. Surveillance can also turn up the same sorts of things as social media and is often worthwhile, especially if the plaintiff has been advised to keep social media posts private.

ii. *Evaluating Damages*

Set the Baseline. TBI cases frequently involve wildly inflated damages arising from lost earning capacity, lost wages, and intangible losses such as the inability to do the host of activities plaintiffs did before the accident as well as those things they "planned" on doing after the accident that will not happen as a result of their grievous injury. Accordingly, you will want to set the baseline for these damages.

The first step is assembling key records establishing the plaintiff's cognitive abilities prior to the accident. In a perfect world, the plaintiff would have just completed a neuropsychological evaluation the day before the accident, and you could compare that to the post-accident evaluation to determine what, if any, cognitive consequences resulted from the accident. Short of that, you will have to make do by painting a picture of the plaintiff's pre-accident cognitive state using a

---

accordingly. Further, while the Supreme Court of Virginia is silent on the matter, the vast majority of federal courts have rejected "the notion that a third party should be allowed, even indirectly through recording device" to observe a FRCP 35 examination. *Scheriff v. C.B. Fleet Co.*, 2008 U.S. Dist. LEXIS 54189, at *4 (E.D. Wis. June 16, 2008); *Holland v. United States*, 182 F.R.D. 493, 495 (D. S.C. 1998); *see also Newman v. Gaetz*, 2010 U.S. Dist. LEXIS 125892, at *3 (N.D. Ill. Nov. 29, 2010); *Morrison v. Stephenson*, 244 F.R.D. 405, 406-07 (S.D. Oh. 2007); *Tomlin v. Holecek*, 150 F.R.D. 628 (D. Minn. 1993). The Western District of Virginia requires a showing of good cause for third-party observation of Rule 35 exams. *United States v. Universal Health Servs., Inc.*, 2011 U.S. Dist. LEXIS 75298 at *2-5 (W.D. Va. 2011).

palette of records including: academic records, past employment records, job applications, work evaluations, and psychological and medical records. You will want to find people in the plaintiff's life that interact with her both before and after the accident.

Plaintiff will often use a Life Care Planner ("LCP") and/or a vocational rehabilitation expert to help establish the costs of living with the alleged injuries (LCP), and the plaintiff's lost earning potential (vocational expert). Be on the lookout for Life Care Planners introducing hearsay in their exhibits or sneaking in a medical opinion when they are not qualified to do so. Also look for opportunities to attack the vocational rehabilitation expert's opinions as speculative.

It may be worthwhile to obtain your own experts in these fields early on to assist you in assessing a realistic value for the case. Sometimes they will find issues with the plaintiff's experts' methodology or spot holes in their analysis that can significantly affect the case value. It is also helpful to have your own internal assessment as to what the future damages are likely to be worth. If you get on top of the futures issue early enough, you will be in a better position to define the value of the case.

c. **Litigation Financing**

i. *What is Litigation Financing?*[42]

While still relatively uncommon, litigation financing (a.k.a. legal funding, third party litigation finance ("TPLF"), or alternative litigation financing ("ALF")) is on the rise in trucking litigation. The basic setup involves a third party providing capital to one of the parties to a legal claim (typically a plaintiff, but sometimes a defendant) to allow them to fund the expense of litigation, in exchange for a financial interest in the outcome of the case or a lien on the law firm. It can be a high-risk proposition for the investor, as these arrangements typically only require the litigant to repay the financing upon a judgment or settlement.

Litigation financiers will argue that such arrangements allow plaintiffs of little means "access to justice" by allowing them to pursue cases they might otherwise be unable to afford and makes them less susceptible to succumbing to a defendant with deep pockets and a large litigation budget. The flip side is that the borrowing party now has an investor and its interests to consider when litigating, and the actual litigant's desires become an afterthought. Typically this problem is dealt with by language in the agreement prohibiting the investor from involvement in the management of the case, in particular with settlement negotiations.

One type of TPFL arrangement is between an injured plaintiff and a medical funding company[43] instead of an insurance company. These entities advance funds to plaintiffs to cover medical bills while cases are in litigation. The profit margin for these entities lies in the difference between the

---

[42] For a more in-depth discussion of litigation financing, *see* AM. TRANSP. RES. INST., UNDERSTANDING THE IMPACT OF NUCLEAR VERDICTS ON THE TRUCKING INDUSTRY (2020), available at https://truckingresearch.org/2020/06/23/understanding-the-impact-of-nuclear-verdicts-on-the-trucking-industry [hereinafter *ATRI Report*].
[43] *See* Aaron Huff, *Court cases reveal secret litigation networks for trucking accidents*, Commercial Carrier Journal (June 27, 2019) https://www.ccjdigital.com/recent-court-cases-reveal-secret-litigation-networks-in-truck-accidents/

billing rate charged by the doctor and the lower rate the doctor actually charges the medical funding company.

ii. *Discovery and Litigation Financing*

Litigation financing arrangements can raise a number of bias problems for the financing side and its experts. Accordingly, a party should engage in thorough discovery of any identified financing arrangement. Key things to ask about include liens, electronic medical records (EMRs), and the differences between a medical provider's self-pay or "uninsured" rates versus rates for insured files. If a doctor is paid 50% in self-pay files and only 25% in insurance files, a bias exists. When a plaintiff with health insurance opts out of using it, this may be a red flag that the plaintiff has obtained litigation financing and could lead to an argument that the plaintiff failed to mitigate his or her damages.

From the liens, you can subpoena the lien holders for additional information. In the case of EMR software, often times there may be correspondence between a funding party (or the attorney) and the doctor that is not kept in the patient's chart. Anything that shows a treating provider has a potential financial interest in the outcome of the case can go a long way in showing bias and putting a considerable dent in that provider's credibility. In addition, if a plaintiff's attorney is directing when treatment continues, the attorney becomes a material witness, a conflict is created, and the attorney may not be able to try the plaintiff's case.

4. WHETHER TO ADMIT NEGLIGENCE / LIABILITY

One of the earliest decisions for defense counsel is whether to admit negligence by the truck driver. If it is clear that the truck driver caused the accident, defense counsel should admit liability as soon as possible. An admission of negligence may serve several strategic purposes.

First, admitting negligence may limit the scope of discovery by narrowing the relevant issues at trial. This inevitably saves discovery costs and may set the case up for early resolution. Second, admitting negligence may prevent the jury from hearing details of how and why the crash occurred. Third, admitting negligence may prevent the need for the truck driver to come to trial in person—which can be advantageous if the driver presents poorly or provides a particularly bad contrast to the plaintiff. Fourth, if there is a contributory negligence defense, admitting negligence on behalf of the trucker turns the focus of the case onto the role of the plaintiff in causing the crash. Fifth, a truck driver or trucking company will lose credibility by contesting liability in a clear case. Finally, if there is reason to believe the plaintiff may be exaggerating her damages, admitting negligence causes the trial to become almost completely focused on the credibility of the plaintiff, while the defendant appears as the more reasonable party.

For all of the reasons above, plaintiff's counsel should begin preventing the impact of an admission of negligence from the earliest stages of case assessment. This may seem counterintuitive, but the best strategy is often for the plaintiff to develop a theory that prevents the defendant from avoiding the focus of the jury. Here, as always, the plaintiff is "the master of the complaint."[44]

[44] *See e.g. Holmes Grp., Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, 831 (2002).

5. CLAIMS & DEFENSES

a. **Making the Facts of the Crash Relevant to Damages**

"When an issue has been taken from a case by an unqualified admission of liability it is error to receive evidence which is material solely to the excluded matter. . . . This does not mean, however, that an admission of liability precludes a plaintiff in an action for personal injuries from showing how the accident happened if such evidence is material and relevant to the question of damages."[45] Thus, even when liability has been admitted "and the only issue to be determined is the quantum of damages, the force of the impact and the surrounding circumstances may be relevant to show the extent of plaintiff's injuries."[46] "The jury may properly infer mental anguish as well as physical pain from the circumstances of the injury, including the violence with which it was inflicted."[47] "A defendant has no right to exclude evidence relevant to a complete assessment of a plaintiff's compensatory damages by conceding liability for them even when he admits that they were serious or 'severe.'"[48] The jury "is entitled to all relevant information offered on the subject which meets the requirements of the rules of evidence."[49] Thus, the Supreme Court of Virginia clearly permits introduction of evidence of the severity of *the crash* even after an admission of negligence. However, damages issues alone are likely insufficient to allow evidence of the severity of *the defendant's conduct*.

b. **Using Punitive Damages Claims to Preserve Relevance**

Punitive damages claims—in and of themselves—are nowhere near as valuable in Virginia as they are in many other states. "The purpose of punitive damages is to provide 'protection of the public, . . . punishment to [the] defendant, and . . . a warning and example to deter him and others from committing like offenses."[50] However, that purpose is limited by the General Assembly's decision to cap punitive damages at $350,000 regardless of the severity of the defendant's conduct or the size of its purse.[51]

This cap may give larger trucking companies little to fear from punitive damages awards in Virginia. However, plaintiffs may still use punitive damages claims to keep evidence of the severity of the defendant's conduct from being "material solely to the excluded matter" of the defendant's admitted negligence.[52] If case facts are particularly bad, defendants should consider admitting their conduct was willful and wanton.

In Virginia, a claim for punitive damages requires proof that "the defendant acted with actual malice toward the plaintiff or acted under circumstances amounting to a willful and wanton disregard of the plaintiff's rights."[53] "'Willful and wanton conduct' is acting consciously in

---

[45] *Wallen v. Allen*, 231 Va. 289, 293 (1986) (quoting *Eubank v. Spencer*, 203 Va. 923 (1962)).
[46] *Id*.
[47] *Id*. at 294 (citing *Bruce v. Madden*, 208 Va. 636, 639-40 (1968)).
[48] *Id*.
[49] *Id*.
[50] *Coalson v. Canchola*, 287 Va. 242, 249 (2014) (internal citations omitted) (alterations in *Coalson*).
[51] *See* Va. Code § 8.01-38.1.
[52] *See Wallen*, 231 Va. at 293.
[53] Virginia Model Jury Instruction No. 9.080.

disregard of another person's rights or acting with a reckless indifference to the consequences to another person when the defendant is aware of his conduct and is also aware, from his knowledge of existing circumstances and conditions, that his conduct would probably result in injury to another."[54]

As we have already discussed above, allegations of willful and wanton conduct necessarily create relevance for the defendants' training, knowledge of risks, and knowledge of regulations, as well as his disregard for those training, risk, and regulations.[55] As a result, from the earliest moments of the case, a key part of case assessment is discovering sufficient evidence to raise or prevent a jury issue on punitive damages.

Making a claim for punitive damages has the additional effect of preventing the case from becoming solely about the plaintiff's alleged contributory negligence. "[A] defendant who is willfully and wantonly negligent cannot rely upon a plaintiff's contributory negligence as a defense."[56] Thus, for plaintiffs, while the actual monetary recovery in punitive damages claims is small, the strategic benefits make claiming punitive damages worthwhile in any case where the defendant's conduct presents a good faith basis for making the claim.

Defendants should move to dismiss claims for punitive damages where the plaintiff does not have a good faith basis for the argument and particularly where the driver is not in violation of any specific provisions of the FMCSRs. Plaintiffs should consider waiting until discovery is produced to see if they have the evidence necessary to state a claim for punitive damages and then move to amend their pleadings. An allegation that a defendant violated an hours of service regulation or drug and alcohol regulation, for example, is much more likely to withstand a motion to dismiss or motion for summary judgment than bare allegations that defendant violated 49 CFR 383.110-11, which sets forth general regulations.

c. **Using Direct Liability Claims to Preserve Relevance**

In some cases, one final way to keep the conduct of the defendants relevant at trial is through making direct negligence claims—particularly negligent hiring or negligent entrustment claims—against the company.

<u>Negligent Hiring.</u> The Supreme Court of Virginia has explained the uniqueness of a negligent hiring claim as follows:

---

[54] Virginia Model Jury Instruction No. 4.040.

[55] *See, e.g., Alfonso v. Robinson*, 257 Va. 540, 546 (1999) ("Such evidence that a defendant had prior knowledge or notice that his actions or omissions would likely cause injury to others is a significant factor in considering issues of willful and wanton negligence."); *Laporsek v. Burress*, 2019 U.S. Dist. LEXIS 212193, at *17-18 (W.D. Va. Dec. 10, 2019) (finding that a claim for punitive damages in an admitted liability case continued to raise material facts about the defendant's status as a professional tractor trailer driver, the defendant's knowledge of the skill required to drive a tractor trailer, the defendant's awareness of the added danger of any accident resulting from his negligent driving, the defendant's specialized training, and the defendant's violation of that training).

[56] *Wolfe v. Baube*, 241 Va. 462, 465 (1991).

> Under *respondeat superior*, an employer is vicariously liable for an employee's tortious acts committed within the scope of employment. In contrast, negligent hiring is a doctrine of primary liability; the employer is principally liable for negligently placing an unfit person in an employment situation involving an unreasonable risk of harm to others. Negligent hiring, therefore, enables plaintiffs to recover in situations where *respondeat superior's* "scope of employment" limitation previously protected employers from liability.[57]

More recently, the Supreme Court of Virginia explained:

> Liability for negligent hiring "is based on the principle that one who conducts an activity through employees is subject to liability for harm resulting from the employer's conduct if the employer is negligent in the hiring of an improper person in work involving an unreasonable risk of harm to others' and on the employer's negligence 'in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.'"[58]

While negligent hiring can be a high hurdle to cross, it is also rarely, if ever, admitted by the defense, thereby making the history and conduct of the defendants of continued relevance at trial. Moreover, federal courts applying Virginia law have held that negligent hiring is a standalone tort, separate from vicarious liability, and may survive regardless of whether the defendant admits that its driver was acting within the scope of his or her employment.[59] This is not the case in a majority of states.[60] The Virginia Supreme Court, however, has not yet addressed the issue directly.

Negligent Entrustment. A plaintiff who invokes the doctrine of negligent entrustment "must present evidence which creates a factual issue whether the owner knew, or had reasonable cause to know, that he was entrusting his car to an unfit driver likely to cause injury to others."[61] Furthermore, "the plaintiff must prove that the negligent entrustment of the motor vehicle to the tortfeasor was a proximate cause of the accident."[62]

---

[57] *J. v. Victory Tabernacle Baptist Church*, 236 Va. 206, 211 (1988); *see also Interim Pers. of Cent. Va. v. Messer*, 263 Va. 435 (2002).

[58] *A.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 627 (2019) (internal citations omitted).

[59] *Fairshter v. Am. Nat'l Red Cross*, 322 F. Supp. 2d 646, 653-54 (E.D. Va. June 15, 2004).

[60] *Id.*; *see also Greene v. Grams*, 384 F. Supp. 3d 100, 103 (D.D.C. 2019) (noting that claims for negligent hiring or retention may be dismissed as redundant once liability is admitted) (citing *Hackett v. Wash. Metro. Area Transit Auth.*, 736 F. Supp. 8, 9-11 (D.D.C. 1990)).

[61] *Turner v. Lotts*, 244 Va. 554, 557 (1992) (internal citations omitted).

[62] *Id.*

The mere existence of traffic citations or infractions predating the accident are likely not sufficient to state a claim for negligent hiring or negligent entrustment where the infraction had no bearing on the employee's "propensity to cause injury to others."[63]

Thus, in addition to the benefit of potentially doubling insurance coverage, the direct negligence claims of negligent hiring and negligent entrustment specifically keep the defendants' conduct before and during the accident relevant to the unresolved issues in an admitted negligence case. Because both claims require the plaintiff to prove that the unreasonable hiring or entrustment was causally related to the specific crash at issue, the jury can no longer be prevented from hearing about the facts and causes of the crash.

The plaintiff will have a hard time stating a claim for negligent hiring if the defendant satisfied the FMCSRs related to investigating and hiring commerical drivers. If the defendant checked all of the appropriate FMCSR boxes, the court will likely find that defendant was not negligent. This is one of the rare occasions where the FMCSRs can be used by the defense as a shield. Similar to punitive damages claims pled without factual support, defendants should move to dismiss negligent hiring, retention, and entrustment claims that do not contain supporting facts and clear violations of the FMCSRs.[64]

d. **Special Defenses: "Unavoidable Accident" & "Sudden Emergency"**

Many defendants continue to plead unavoidable accident and sudden emergency defenses as a matter of course. However, recent developments in Virginia case law bring the viability of these defenses into question, especially with regard to the unavoidable accident defense.

An "unavoidable accident" is defined as "one which ordinary care and diligence could not have prevented or one which occurred in the absence of negligence by any party."[65] While Virginia historically permitted courts to apply the "unavoidable accident" principle, albeit under rare circumstances, it was disfavored because it had "the tendency to afford a jury an easy way of avoiding instead of deciding the issue made by the evidence in the case."[66] Thus, in 2009, the Supreme Court of Virginia jettisoned the "unavoidable accident" doctrine altogether.[67] The Supreme Court expressed concern this principle "merely restates the law of negligence"—*i.e.*, in order for the "unavoidable accident" principle to apply, the defendant, by definition, must be not be negligent.[68] Therefore, the Supreme Court held that Virginia would no longer recognize an "unavoidable accident," and "it is error to grant an unavoidable accident instruction."[69]

---

[63] *See, e.g., Hack v. Nester*, 241 Va. 499, 503-504 (1990) (holding, in a case regarding the negligent entrustment of an automobile to a driver without a license, "there can be no recovery for negligent entrustment unless the reason for the entrustee's disqualification from securing a license was a proximate cause of the collision") (citing *Laughlin v. Rose*, 200 Va. 127, 132-33 (1958)).
[64] *See Braho v. Liquid Transp. Corp.*, 2019 U.S. Dist. LEXIS 106053 (N.D. Ohio June 25, 2019) (dismissing negligent hiring claim on summary judgment); *see also Greene*, 384 F. Supp. 3d at 105-06 (finding compliance with the FMCSRs supports dismissal of a negligent hiring claim).
[65] *Hancock-Underwood v. Knight*, 277 Va. 127, 131 (2009).
[66] *Id*. at 134 (quoting *Herr v. Wheeler*, 272 Va. 310, 315 (2006)).
[67] *Id*. (holding "we join the clear trend in the states favoring exclusion of its use altogether.").
[68] *Id*. at 136.
[69] *Id.*

While stated in less absolute terms, the defense of sudden emergency is likewise highly disfavored. According to the Supreme Court of Virginia, "the grant of a sudden emergency instruction is rarely appropriate."[70] For example, stopped traffic, standing water, and heavy rain are not sudden emergencies.[71] A party "may not rely on the sudden emergency doctrine if the situation he alleges to have been a sudden emergency was created, in whole *or in part*, by his own negligence."[72] Additionally, a defense of sudden emergency can lead the plaintiff to claim that the driver's specialized training is even more relevant if his training specifically included warnings about the kinds of emergencies allegedly involved in the case.

In the right circumstances, a sudden emergency defense can be very effective, as most jurors can relate to experiencing an emergency condition on the roadways, such as an unexpected animal crossing.

6. WHERE TO FILE / WHETHER TO REMOVE

Trucking cases often involve diverse parties, with an amount in controversy in excess of $75,000.00. This gives plaintiffs an option to choose whether they file in state or federal court. The defendant, in turn, generally has the option of removing to federal court if the case is initially filed in Virginia state court.

a. Federal Diversity Jurisdiction

Federal district courts may exercise diversity jurisdiction under 28 U.S.C. § 1332 if:

(i) The amount in controversy exceeds $75,000.00, exclusive of interest and costs, and

(ii) The parties are completely diverse – that is, none of the plaintiff(s) are citizens of the same state as any of the defendant(s).[73]

If these two requirements are satisfied, the plaintiff may file in either state or federal court.

b. Removal of Civil Actions

If the plaintiff opts to file in state court, then the defendant(s) may elect to remove the case to federal court if, but only if:

(i) The federal district court may exercise diversity jurisdiction;[74]

---

[70] *Id*. at 137.
[71] *See id*.
[72] *Thibodeau v. Vandermark*, 234 Va. 15, 18 (1987) (internal citations omitted) (emphasis in *Thibodeau*).
[73] Corporations are citizens of the state in which they are incorporated *and* the state where they maintain their principal place of business. *See* 28 U.S.C. § 1332(c)(1). Limited liability companies and other "unincorporated entities" possess the citizenship of "all [their] members." *Americold Realty Tr. v. ConAgra Foods, Inc.*, 136 S. Ct. 1012, 1016 (2016).
[74] 28 U.S.C. § 1441(b)(2); 28 U.S.C. § 1332(c).

(ii) None of the defendants are citizens of the state in which the case was filed;[75]

(iii) All defendant(s) consent to removal;[76] and

(iv) The defendant seeking removal files a notice of removal within 30 days of service of the summons or receipt of the complaint,[77] or within 30 days after the case becomes removable if it was not initially.[78]

c. **Practical Differences Between State and Federal Court**

Substantive law. From a legal perspective, it should not matter whether a diversity case is filed in state or federal court. Both courts will generally apply the substantive laws of the forum state. In Virginia, that means Virginia's common law and statutes apply.

Procedural rules. Procedurally speaking, however, the difference between state and federal court is enormous. Those distinctions are too numerous to reproduce here, but some significant differences between procedural deadlines include:

<table>
<tr><th></th><th>Virginia</th><th>E.D. Va.</th><th>W.D. Va.</th></tr>
<tr><td>Service of Complaint</td><td>Within 1 year
Rule 3:5</td><td colspan="2">90 days
FRCP 4(m)</td></tr>
<tr><td>Discovery Objections</td><td>21 days
Rule 4:8</td><td>15 days
Local Rule 26(c)</td><td>30 days
FRCP 33-34, 36</td></tr>
<tr><td>Discovery Responses</td><td>21 days
Rule 4:8</td><td colspan="2">30 days
FRCP 33-34, 36</td></tr>
</table>

[75] 28 U.S.C. § 1441(b)(2).

[76] 28 U.S.C. § 1446(b)(2)(A); *see Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255, 259 (4th Cir. 2013) (discussing the "rule of unanimity").

[77] 28 U.S.C. § 1446(b)(2)(B)-(C); *see Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 354 (1999) (discussing four possibilities of when the 30-day deadline is triggered by service of a summons or receipt of the complaint).

[78] 28 U.S.C. § 1446(b)(3).

Expert Disclosures	90 days before trial (If requested in discovery) *See* Rule 1:18	Pl.'s = 60 days before discovery ends or final pretrial conference; Def.'s = 30 days later; Pl.'s rebuttal = 15 days later Local Rule 26(D)	90 days before trial; rebuttal disclosures due 30 days later FRCP 26(a)(2)
Expert Reports	Not Required	Required *See* FRCP 26(a)(2)	
Briefs	Supporting brief[79] = 14 days before hearing; Responsive brief = 7 days before hearing Rule 4:15(c)	Opening brief must accompany motion; Responsive brief = 14 days after service; Reply brief = 6 days after service Local Rule 7(F)(1)	Opening brief must accompany motion; Responsive brief = 14 days after service; Reply brief = 7 days after service Local Rule 11(c)(1)
Notice of Hearing	7 days before hearing (14 days if brief filed) Rule 4:15(b)-(c)	30 days after motion filed Local Rule 7(E)	60 days after motion filed Local Rule 11(b)
Summary Judgment	No Deadline	Must be filed & set for hearing within a "reasonable time" before trial Local Rule 56(A)	Must be filed & set for hearing within a "reasonable time" before trial or as fixed by Court Local Rule 56(a)
Offer of Judgment	Not Available	Offer = at least 14 days before trial; Acceptance (if any) = 14 days later FRCP 68	

[79] If a brief in support exceeds five pages in length, "an alternative hearing date, notice requirement, and briefing schedule may be determined by the court or its designee." Rule 4:15(c).

Other procedural differences include the heightened pleading standard in federal court,[80] the availability of deposition testimony for use in support of a motion for summary judgment,[81] and the general speed with which the case will progress through trial.[82]

Venire. Virginia circuit courts draw potential jurors from the city or county in which the court is located. *See* 8.01-345. The Eastern and Western District Courts of Virginia, by contrast, draw jurors from a broader geographical area:

Western District of Virginia	**Territorial Limits:**
Abingdon Division	**Counties:** Buchanan, Russell, Smyth, Tazewell, and Washington. **City:** Bristol.
Big Stone Gap Division	**Counties:** Dickenson, Lee, Scott, and Wise. **City:** Norton.
Charlottesville Division	**Counties:** Albemarle, Culpeper, Fluvanna, Greene, Louisa, Madison, Nelson, Orange, and Rappahannock. **City:** Charlottesville.
Danville Division	Charlotte, Halifax, Henry, Patrick, Pittsylvania, Danville, and Martinsville
Harrisonburg Division	**Counties:** Augusta, Bath, Clarke, Frederick, Highland, Page, Rockingham, Shenandoah, and Warren. **Cities:** Harrisonburg, Staunton, Waynesboro, and Winchester.
Lynchburg Division	**Counties:** Amherst, Appomattox, Bedford, Buckingham, Campbell, Cumberland, and Rockbridge. **Cities:** Bedford, Buena Vista, Lexington, and Lynchburg.
Roanoke Division	**Counties:** Alleghany, Bland, Botetourt, Carroll, Craig, Floyd, Franklin, Giles, Grayson, Montgomery, Pulaski, Roanoke, and Wythe. **Cities:** Covington, Galax, Radford, Roanoke City, and Salem.

[80] Virginia embraces a "notice pleading" regime. *Allison v. Brown*, 293 Va. 617, 624 (2017). Federal courts, by contrast, apply the more exacting standard set out in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Virginia courts do, however, require more than bare-bones notice pleading. *See, e.g., A.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 613 (2019) (discussing distinction between reasonable and unreasonable inferences) (citing *Iqbal*, 556 U.S. at 679 and *Twombly*, 550 U.S. at 556); *see also* 1 W. HAMILTON BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE § 6.02 (5th ed. 2019) (noting Virginia's "demurrer statute requires fact and issue pleading; mere notice pleading is not sufficient").

[81] *Compare* Va. Code § 8.01-420 (allowing deposition testimony in support of summary judgment motions where the only parties are business entities and the amount at issue is $50,000.00 or more), *and* Va. Sup. Ct. R. 3:20 (same), *with* Fed. R. Civ. P. 56 (allowing use of deposition testimony without exception).

[82] The median time intervals for all civil cases resolved in the Eastern and Western Districts of Virginia for the 12-month period ending March 31, 2020, were 5.7 months and 10.8 months, respectively. *See Federal Judicial Caseload Statistics*, U.S. COURTS (March 31, 2020), https://www.uscourts.gov/statistics/table/c-5/federal-judicial-caseload-statistics/2020/03/31. In Virginia, by contrast, a plaintiff may wait as much as a year after filing to serve the underlying complaint. *See* Va. Sup. Ct. R. 3:5.

Eastern District of Virginia	Territorial Limits
Alexandria Division	**Counties:** Arlington, Fairfax, Fauquier, Loudoun, Prince William, and Stafford. **City:** Alexandria
Newport News Division	Gloucester, James City, Mathews, York, Newport News, Hampton, and Williamsburg
Norfolk Division	**Counties:** Accomack, Isle of Wight, Northampton, and Southampton. **Cities:** Cape Charles, Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk, and Virginia Beach.
Richmond Division	**Counties:** Amelia, Brunswick, Caroline, Charles City, Chesterfield, Dinwiddie, Essex, Goochland, Greensville, Hanover, Henrico, King and Queen, King George, King William, Lancaster, Lunenburg, Mecklenburg, Middlesex, New Kent, Northumberland, Nottoway, Powhatan, Prince Edward, Prince George, Richmond, Spotsylvania, Surry, Sussex, and Westmoreland. **Cities:** Colonial Heights, Fredericksburg, Hopewell, Petersburg, and Richmond.

d. **Plaintiff's Considerations Regarding Where to File**

Whether to file a trucking case in state or federal court can be a challenging question. The more plaintiff's counsel wants to file in state court, the more likely defense counsel will be to remove it. However, state court is not necessarily the best option; several factors weigh on where to file.

Case Progression. The faster pace of federal courts could be problematic for solo practitioners. This is especially true when additional investigation or treatment is needed before the statute of limitations lapses. In those situations, filing suit in state court, and then waiting another year before serving the defendant, could buy much needed time. On balance, the quicker turnaround in federal court may be appealing to the client, and it could persuade a litigation-wary defendant to consider settlement. Ultimately, while each case is unique, the "pace of play" is an important consideration that should not be overlooked.

Summary Judgment. In federal court, the availability of deposition testimony in support of summary judgment is a double-edged sword. For plaintiff's counsel, it may be an opportunity to foreclose argument or evidence that a driver exceeded the scope of his employment at the time of an accident. For defense counsel, it may be an opportunity to dismiss the case as a whole on the basis of liability or to dismiss certain claims, including punitive damages or negligent hiring or retention.

Offer of Judgment. The defendant's ability to make an offer of judgment in federal court may be a strong deterrent in cases where the extent of the plaintiff's injuries will be hotly contested. It can be a costly mistake to decline an offer of judgment that exceeds the verdict. If that happens, "the

offeree [i.e., the plaintiff] must pay the costs incurred [by the defendant] after the offer was made."[83]

Venire. The jury pool is probably the most significant factor. Jurors along interstate corridors heavily trafficked by tractor-trailers tend to be more sympathetic to plaintiffs. This could bode well if, for example, the accident occurred in Roanoke. Filing suit in the Circuit Court of Roanoke County would all but ensure that at least one juror has had, at one point or another, a bad experience on Interstate 81 with a tractor-trailer. Alternatively, if the accident occurred in a more rural area like Bland County, where tractor-trailers are less prevalent, then the jury pool might be less appealing in state court. Under those circumstances, filing suit in the Roanoke Division of the Western District of Virginia could be advantageous.

In addition to interstate proximity, plaintiff's counsel should consider population demographics when choosing where to file. Jurors in liberal areas generally return larger verdicts than those in conservative areas, where the jurors tend to be more skeptical of the nature and extent of a plaintiff's alleged injuries.

Plaintiff's counsel must also remain cognizant of the parties' reputations, if any, in a particular area. This is especially true when the potential jurors – or their family or friends – may be employed by the defendant. Accordingly, as a general rule, plaintiff's counsel should avoid filing suit in any county where the defendant trucking company maintains a presence in the community.

Mediation. Federal courts routinely refer cases to mediation before a magistrate judge. Likewise, in Virginia, courts may enter an order of referral directing the parties to participate in mediation.[84] If, however, either party objects to referral within fourteen days, then the "court shall excuse the parties from participat[ing]."[85] Nevertheless, some jurisdictions require the parties to participate in mediation notwithstanding their objection.

Avoiding Removal. If a plaintiff elects to file suit in federal court, the case will stay there. The defendant cannot "unremove" it. Keeping a case out of federal court, however, is more difficult. The best way to avoid removal is to either name a defendant that is not diverse (i.e., the driver, shipper, broker, etc.), if possible, or name a defendant that is a citizen of Virginia. In doing so, however, the plaintiff must refrain from fraudulently joining defendants solely for purposes of defeating diversity jurisdiction.

e. **Defendant's Considerations Regarding Whether to Remove**

If removal is possible, it may be in the defendant's best interest to do so. Most plaintiffs would not have filed in state court if they preferred federal. And, from the defendant's perspective, the same factors that prompted the plaintiff to file in state court may counsel against staying there.

[83] Fed. R. Civ. P. 68(d).
[84] Va. Code § 8.01-576.6.
[85] *Id.*

Moreover, the defendant may remove a case to federal court *before* service of the complaint,[86] which may catch plaintiff's counsel off-guard and force an early settlement or even dismissal of a case that the plaintiff is not yet ready to prosecute.

7. STANDARD OF CARE

A key issue in many trucking cases is whether the commercial truck driver is held to a different standard of conduct than other drivers. While this issue is often zealously litigated throughout the country, it can take on outsized importance in Virginia, where contributory negligence still poses a complete bar to a plaintiff's recovery.

a. The Standard of Care For Truck Drivers in Virginia.

In Virginia, a commercial driver's ordinary negligence is judged by the same standard as the motoring public. The jury instruction on negligence is the same for drivers of big trucks and small cars: "Negligence is the failure to use ordinary care. Ordinary care is the care a reasonable person would have used under the circumstances of this case."[87] Unlike a medical malpractice case, there is no specific jury instruction on a truck driver's standard of care.

There is arguably current support in Virginia law for the plaintiff's contentions that truck drivers may be held to a higher standard in specific situations, particularly in claims for punitive damages. While the jury instructions on punitive damages are the same for truck drivers and other motorists, the instruction on "willful and wanton" asks jurors to take into account whether "the defendant is aware of his conduct and is also aware, *from his knowledge* of existing circumstances and conditions, this his conduct would probably result in injury to another."[88]

The "from his knowledge" language has opened the door for the argument that a holder of a Commercial Drivers' License (CDL) has more knowledge than a driver with a standard drivers' license and has allowed plaintiffs to hold truck drivers to a higher standard of care in the context of punitive damages.

Litigation on this issue typically focuses on whether the commercial truck driver is a "professional" and whether he/she can be held to the guidelines contained in CDL Manuals, the Federal Motor Carrier Safety Regulations (FMCSR), or other specialized training and experience.

ii. *The Seminal Punitive Damages Case in Virginia*

The seminal punitive damages case on the subject is *Alfonso v. Robinson*.[89] The truck driver, Alfonso, had broken down on the road and left his truck to call for help without first putting out reflective triangles to warn oncoming traffic of his location. Alfonso admitted at trial that he was

---

[86] *See* 28 U.S.C. § 1446(b); *see also Abraham v. Cracker Barrel Old Country Store, Inc.*, 2011 U.S. Dist. LEXIS 49186, at *6 (E.D. Va. May 9, 2011) (finding that the defendant's "removal prior to service complied with Section 1446(b)" and "no remand [was] warranted on [that] ground").
[87] Virginia Model Jury Instruction No. 4.000.
[88] Virginia Model Jury Instruction No. 4.040 (emphasis added).
[89] *Alfonso v. Robinson*, 257 Va. 540 (1999).

instructed that the deployment of safety flares and reflective triangles was the first act that should be taken after securing a disabled truck.[90] Alfonso further testified that he "knew that the purpose of such safety devices was to warn motorists that they were approaching a stopped vehicle."[91] Thus, the Supreme Court of Virginia, in upholding the trial court's decision to send punitive damages to the jury, characterized the truck driver as "a professional driver who had received specialized safety training warning against the very omissions he made prior to the accident."[92] The Court continued, "[E]vidence that a defendant had prior knowledge or notice that his actions or omissions would likely cause injury to others is a significant factor in considering issues of willful and wanton negligence."[93] Thus, at least in *Alfonso*, the Supreme Court concluded that the specialized training included in becoming a professional truck driver was evidence that should be considered and that could lead to an award of punitive damages.

iii. *Application of* Alfonso v. Robinson *by Federal Courts*

As predicted, the Supreme Court of Virginia's language in *Alfonso* spawned a series of cases exploring and defining the extent to which a commercial driver's training and experience could be used against him. In *Baker v. Oliver*, a federal district court found a claim for punitive damages was properly pled when a professional driver blocked the road while attempting to turn around without signals, lights, or reflective markings.[94] In *Stanley v. Star Transp., Inc.*, the court likewise found a claim for punitive damages was properly pled when a professional driver crashed into a vehicle on the shoulder of the roadway while the commercial driver traveled in a sleep-deprived condition at night over a snow-and-ice-covered road at an excessive rate of speed.[95] In *Boone v. Brown*, the court dismissed a punitive damages claim as pled but granted leave to refile, noting, "[T]he Supreme Court, and other courts applying Virginia law, have allowed punitive damage claims to move forward against professional drivers involved in traffic accidents."[96]

In *Madison v. Acuna*, a federal district court denied a commercial driver's Motion to Dismiss Punitive Damages Claims. It wrote:

> Acuna is a professional driver who received a specific warning about the dangers of driving under conditions likely to cause sleep deprivation. He subsequently caused an accident by falling asleep at the wheel. The specific warning Acuna received about the fourteen-hour rule put him on notice that injury could result from conduct likely to cause sleep deprivation.[97]

In *Blankenship v. Quality Transp., LLC,* the same court permitted a claim for punitive damages to move forward against the defendant company despite its Motion to Dismiss.[98] The court noted:

---

[90] *Id*. at 546.
[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] *Baker v. Oliver*, 2006 U.S. Dist. LEXIS 39645 (W.D. Va. June 15, 2006).
[95] *Stanley v. Star Transp., Inc.*, 2010 U.S. Dist. LEXIS 90404 (W.D. Va. Sep. 1, 2010).
[96] *Boone v. Brown*, 2013 U.S. Dist. LEXIS 138989, at *5 (W.D. Va. Sep. 26, 2013).
[97] *Madison v. Acuna*, 2012 U.S. Dist. LEXIS 176170, *13 (W.D. Va. Dec. 12, 2012).
[98] *Blankenship v. Quality Transp., LLC*, 2015 U.S. Dist. LEXIS 92948 (W.D. Va. July 17, 2015).

> Quality Transportation authorized Skeen to operate a tractor-trailer for excessive hours in violation of federal law, knowing this would almost certainly result in undue driver fatigue. While driver fatigue is dangerous enough on its own, Quality Transportation allegedly permitted Skeen to haul 8,500 gallons of gasoline, a highly combustible and dangerous material, in his precarious state. Further, Skeens is alleged to have driven the tractor-trailer at excessive rates of speed through a construction zone, causing him to lose control of the vehicle and collide with construction vehicles conspicuously parked in the right-hand lane.[99]

Furthermore, with regard to the driver's specialized training, the court concluded, "Skeens was employed as a professional driver who was presumably aware of the dangers of speeding through a construction zone while hauling a hazardous material."[100]

In *Rainey v. Anderson*, another federal district court opined: "Virginia law imputes a high degree of competence and knowledge to professional drivers when it comes to the safe operation of their vehicles because of the extensive training required to gain and maintain the proper operator's licenses."[101] The court then denied the driver's Motion to Dismiss a claim for punitive damages, stating:

> Anderson's status as a professional driver makes it plausible that he had received training in how to inspect his truck for proper care and maintenance and that he actually conducted inspections before operating his vehicle, which would have revealed the poor condition of his brakes and tires. It is therefore plausible for the Plaintiff to allege – as he has – that Anderson knew of his vehicle's allegedly poor condition, knew these defects affected his ability to operate it safely, and decided to operate it anyway. This is sufficient to plausibly assert that Anderson consciously disregarded the safety of other drivers and in doing so engaged in wanton or willful behavior warranting punitive damages.[102]

Most recently, in *Laporsek v. Burress*, a court denied a driver's Motion for Summary Judgment on punitive damages when a commercial driver drove while intoxicated with alcohol.[103] According to the court, "Burress was a professional tractor trailer driver."[104] The court then explained, "[T]ruck drivers are held to a higher standard because they are covered by federal regulations and often receive additional safety training."[105] The court therefore concluded:

---

[99] *Id*. at *5.
[100] *Id*. at *6.
[101] *Rainey v. Anderson*, 2018 U.S. Dist. LEXIS 231288, at *3 (E.D. Va. Feb. 15, 2018).
[102] *Id*. at *4-5.
[103] *Laporsek v. Burress*, 2019 U.S. Dist. LEXIS 212193 (W.D. Va. Dec. 10, 2019).
[104] *Id*. at *15-16.
[105] *Id*. at *16-17.

> Burress was a professional tractor trailer driver who knew the skill required to drive a tractor trailer and the added danger of any accident resulting from his negligent driving. He also received more training than an average driver would have received on the effects of consuming alcohol before driving. Nonetheless, he chose to drink a fifth of bourbon, knowing he was going to be driving within the next hour. He then drove "erratically," nearly running a witness off the road. Burress's actions arguably do not constitute willful or wanton conduct under Virginia's typical common-law standard. However, when taking into account *Alfonso*, along with Burress's status as a professional tractor trailer driver and the additional training he received in that role, a reasonable jury could find that he acted willfully and wantonly.[106]

In ordinary negligence cases, truck drivers are still held to the same standard of care as other motorists. However, a driver's violation of the FMCSRs could change that analysis.[107]

The federal district courts of Virginia have also made it clear the mere possession of a CDL is not sufficient to establish punitive damages against a commercial driver involved in a accident. Thus, in *Lester v. SMC Transp., LLC*, the Court found that the lack of evidence of the defendant's specialized training as a professional driver in the record was fatal to any punitive damages claim even though defendant had a CDL.[108] Likewise, in *McDonald v. Betsinger*, the Court found that merely alleging a rear-end crash with no other details was insufficient to plead punitive damages against a professional driver.[109]

iv. *Application of* Alfonso *By Virginia Circuit Courts*

While the progeny of *Alfonso* in the Virginia circuit courts are less impactful given the propensity for tractor-trailer cases to be either filed in or removed to federal court, the circuit courts have reached similar results as the federal district courts. In *Small v. Hanson*, for example, a circuit court concluded that the plaintiff's allegations were sufficient to establish a claim for punitive damages when the defendant "operated the tractor trailer with defective brakes, defective steering, defective tires, and with a trailer in excess of the posted length allowed on the road where the accident occurred."[110] By contrast, in *Brown v. Seay Logging & Hauling, LLC*, the court granted summary judgment in favor of the defendant on the issue of punitive damages when a trucker allegedly violated "at least twelve federal regulations leading up to the accident."[111] Notably,

---

[106] *Id*. at *17-18.

[107] *See Kimberlin v. PM Transport, Inc.*, 264 Va. 261, 268 (2002) (holding that 49 CFR 392.14 "imposes a duty on the operator of a commercial motor vehicle to exercise 'extreme caution' under such circumstances"); *Cf. Smithers v. C & G Custom Module Hauling*, 172 F. Supp. 2d 765, 775 (E.D. Va. 2000) (rejecting higher "extreme caution" standard of care and holding reasonable care is the appropriate standard).

[108] *Lester v. SMC Transp., LLC*, 2016 U.S. Dist. LEXIS 177905 (W.D. Va. Dec. 22, 2016).

[109] *McDonald v. Betsinger*, 2016 U.S. Dist. LEXIS 29139 (W.D. Va. Mar. 8, 2016).

[110] *Small v. Hanson*, 66 Va. Cir. 445, 446 (Nelson Co. Cir. Ct. 2000).

[111] *Brown v. Seay Logging & Hauling, LLC*, 93 Va. Cir. 502 (Greensville Co. Cir. Ct. 2015).

however, the court in *Seay Logging* did conclude that the FMCSRs "provide the standard of care for simple negligence" in cases against truck drivers.[112]

v. *Persuasive Authority From Foreign Jurisdictions*

While Virginia's case law on a heightened standard of care primarily focuses on punitive damages—often leaving plaintiff and defense counsel to argue whether that makes the heightened standard even more applicable or completely inapplicable to simple negligence—some foreign jurisdictions have addressed the issue of simple negligence more directly. To the extent it may be persuasive in Virginia cases, foreign authority contains multiple cases for and against a higher standard of care for commercial drivers.

Foreign cases opposing a higher standard of care include:

- *Freudiger v. Keller*, 104 S.W. 3d 294, 298 (Tex. App. 2003) (holding there is "neither a legislative enactment nor a finding by a court in a civil case that the regulation creates a special standard of care").

- *Tavorn v. Cerelli*, 2007 WL 2189075, *5 (Mich. App. Jul. 31, 2007) (adopting reasonable care standard and holding it would have been error to include specification of "commercial truck driver" in negligence jury instruction and upholding jury instruction, which paraphrased 49 CFR 392.14 and omitted the words "extreme caution" to avoid juror confusion).

- *Gruenbaum v. Werner Enterprises, Inc*., 2011 WL 563912, *4 (S.D. Ohio Feb. 2, 2011) (holding "extreme caution" language in 49 CFR 392.14 does not create a heightened standard of care, but evidence of a violation of the FMCSR can be considered as evidence of negligence).

- *Jordan v. Torain*, 2015 WL 5968530, *10 (Md. Ct. Spec. App. July 23, 2015) ("Just as drivers of larger vehicles have 'no additional rights on the highways,' so too do they have no responsibility to 'use additional care' in the operation of their vehicles. Accordingly, truck drivers are to be held to the same standard of care as all other drivers.").

- *Nixon v. Zurich Am. Ins. Co.*, 2016 WL 9108034, *4 (M.D. Ga. April 22, 2016) (granting motion *in limine* and precluding any argument that commercial truck driver is held to a higher standard of care).

- *Botey v. Green*, 2017 WL 2536387,*4 (M.D. Pa. June 9, 2017) (holding expert prohibited from using word "professional" or inferring that a commercial motor vehicle driver is subject to an increased or higher standard of care).

- *Ferrell v. BGF Global, LLC*, 2018 WL 878621, *4 (W.D. Okla. Feb. 13, 2018) (driver not subjected to a heightened standard of care simply because he is a licensed professional truck driver).

[112] *Id*. at 504.

- *Dahlgreen v. Muldrow*, 2008 WL 186641, *7 (N.D. Fla. Jan. 18, 2008) (excluding any testimony "regarding commercial motor vehicle operators being held to a higher standard of care than other highway users").

- *Southard v. Belanger*, 966 F. Supp. 2d 727 (W.D. Ky. 2013) (holding all motor vehicle drivers, with the exception of those who carry passengers for hire, are held to the same standard of care).

- *Botey v. Green*, No. 3:12-CV-1520, 2017 U.S. Dist. LEXIS 88207, at *8 (M.D. Pa. June 8, 2017) (counsel and lay and expert witnesses may refer to "commercial motor vehicle drivers" or other appropriate variations of this term but shall avoid using the word "professional").

- *Davis v. Brown Local Sch. Dist.*, 131 N.E.3d 431, 446 (Oh. Ct. App. 2019) (finding no heightened duty of care should be imposed on commercial drivers in Ohio based on the facts in this case).

Foreign cases supporting a higher standard of care include:

- *Crooks v. Sammons Trucking, Inc.*, 2001 WL 1654986 (Cal. App. 3 Dist. Dec. 21, 2001) (holding trial court erred in instructing jury based on reasonableness instead of higher standard of "extreme caution"); *Weaver v. Chavez*, 133 Cal. App. 4th 1350, 1355 (Cal. App. 2 Dist. 2005) (same).

- *Chanler v. Jamestown Ins. Co.*, 223 So. 3d 614, 624 (La. Ct. App. 2017) ("a professional truck driver is a superior actor in the eyes of the law and, as such, is held to a high standard of care to the motoring public").

- *Hyder v. Womack*, 2018 U.S. Dist. LEXIS 164486, at *6-7 (M.D. Pa. Sep. 25, 2018) ("The fact that defendant Womack is characterized as a 'professional driver' in the Complaint is of no legal significance at this point. Moreover, should this case go to trial, the jury will obviously be well aware that Womack was a professional driver in any event. Should the jury ultimately find negligence in this case, the fact that Defendant Womack is a professional driver may then appropriately be considered by the jury in determining whether punitive damages should be assessed.").

- *Union Pac. R.R. Co. v. Taylor Truck Line, Inc.*, 2017 U.S. Dist. LEXIS 161497, at *13 (W.D. La. Sep. 29, 2017) ("Professional truck drivers are recognized as superior actors and are held to a high standard of care. A professional driver's duties include an understanding of the truck he is operating and the specifications of the load he is pulling.") (internal citations omitted).

- *McIntyre v. Murphy*, 2019 U.S. Dist. LEXIS 45775, at *6 (E.D.N.C. Mar. 20, 2019) (denying defense summary judgment motion when driver "was trained as a professional driver and realized FMCSR are the law for commercial drivers.").

- *Tingle v. Cornelison*, 2018 U.S. Dist. LEXIS 211084, at *8 (W.D. Ky. Dec. 14, 2018) (denying Defendants' Motion for Summary Judgment because the CDL Manual requires a decrease in speed of 33% during rain and a reasonable jury could agree with Plaintiff that Defendant, as a professional driver, should have complied with the Manual.).

- *Barrowes v. State*, 390 P.3d 1126, 1131 (Wy. 2017) (affirming criminal conviction) ("It is also significant that he was a professional driver operating a double trailer rig that weighed approximately 110,000 pounds loaded. The risk of death from a crash involving a vehicle like this is substantial, and the requirements to obtain a CDL license to operate one should inform a commercial driver of that risk.").

- *State v. Butts*, 419 P.3d 661 (Kan. Ct. App. 2018) (affirming criminal conviction) ("[T]he totality of the circumstances may include the fact that the defendant is a professional commercial truck driver. '[F]or a professional driver to be oblivious to his surroundings while propelling a semitrailer truck down a highway at 50 to 55 miles per hour is closer to reckless and wanton conduct than to simple negligence.'") (internal citations omitted).

vi. *Defense Techniques to Combat a Heightened Standard of Care*

The Complaint. Defense counsel should move to strike "professional driver" language often found in plaintiffs' complaints. In addition, defense counsel should challenge punitive damages claims, if any, at the pleadings stage.

Written Discovery. Defense counsel should object to discovery requests for admission and interrogatories that include the term "professional driver." Requests for production seeking training manuals or CDL manuals should be objected to as well.[113]

Depositions. Commercial drivers, who may be inclined to consider themselves "professional" drivers, should be prepped. The same is true of corporate representatives, who will likely be questioned about company manuals that include "professional" language and internal policies that exceed state and federal requirements.

Expert Witnesses. Defense counsel should be prepared to challenge plaintiff's expert witnesses, who may be unqualified,[114] apply the wrong standard of care,[115] or attempt to opine on matters that

[113] *See Capodanno v. Premier Transportation & Warehousing, Inc.*, 2009 WL 10668761, *11 (S.D. Fl. Oct. 28, 2009) (denying requests for driver's manuals, company manuals, and other materials pertaining to company, federal, or state rules where plaintiff had not asserted a claim for negligent hiring or retention).

[114] *See Rosas v. O'Donoghue*, 2005 WL 5961992 (E.D. Pa. 2005) (Civil engineer and accident reconstructionist who had never taken any truck driver training courses or driven a tractor-trailer found not qualified to render an expert opinion concerning the state's CDL manual.).

[115] *See Parks v. Daily Express, Inc.*, 719 F. Supp. 2d 894, 898-900 (E.D. Tenn. 2010) (granting summary judgment for defendant where plaintiff's expert relied on federal regulatory and industry standards for defensive driving in determining truck driver had violated his "duty," since Tennessee law provided the relevant standard of care and defendant-driver adhered to the appropriate standard of care).

do not require specialized knowledge and training.[116] Defense counsel should also be prepared to offer a competing expert to challenge plaintiff's expert.

Motions *in Limine*. In cases where the plaintiff seeks to impose a heightened standard of care, defense counsel should seek to exclude any evidence that may be used to do so. This would include argument and evidence regarding a driver's compliance with the FMCSRs, which do not refer to truck drivers as "professionals" or state that they must be held to a higher standard of care.[117] Defense counsel should also seek to preclude plaintiff from introducing evidence of company policies or rules in an effort to inflate the standard of care.[118]

Jury Instructions. Defense counsel should contest jury instructions that state or imply that commercial drivers are subject to a heightened standard of care.[119] It is also important to offer alternative instructions, which clarify that commercial drivers are not subject to a heightened standard, because jurors may be inclined to infer otherwise to the extent they hear evidence concerning a driver's training, experience, and knowledge.

8. CDL MANUALS & COMPANY MANUALS

[116] *See Ferrell v. BGF Global, LLC*, 2018 WL 878621, *2 (W.D. Okla. Feb. 13, 2018) (holding experts' opinions regarding drivers' duty to follow trucking industry standards and scan ahead, to look for hazards, and to operate tractor-trailer to eliminate distractions inadmissible because those duties are obvious to a lay person). *But see Harvey v. Palumbo*, 2015 WL 2340236, *10-14 (Pa. Super. Feb. 20, 1015) (reversing summary judgment for defendant where trial court failed to consider expert's report on defensive driving techniques and training, and further holding that expert testimony was necessary because driving a tractor-trailer requires special skills and training not common to the ordinary lay person).

[117] *See, e.g., Dahlgreen v. Muldrow*, 2008 WL 186641, *7 (N.D. Fla. Jan. 18, 2008) (excluding any testimony "regarding commercial motor vehicle operators being held to a higher standard of care than other highway users"); *Southard v. Belanger*, 966 F. Supp. 2d 727 (W.D. Ky. 2013) (holding all motor vehicle drivers, with the exception of those who carry passengers for hire, are held to the same standard of care); *Nixon v. Zurich Am. Ins. Co.*, 2016 WL 9108034, *4-5 (M.D. Ga. April 22, 2016) (granting motions *in limine* regarding any reference to trends in trucking litigation and arguments that tractor-trailers are inherently dangerous and a threat to other motorists); *Cervelli v. Graves*, 661 P.2d 1032, 1037-38 (Wyo. 1983).

[118] *See Virginia R. & P. v. Godsey*, 117 Va. 167, 168 (1915) ("[W]hether a given course of conduct is negligent, or the exercise of reasonable care, must be determined by the standard fixed by law, without regard to any private rules of the party."); *Pullen v. Nickens*, 226 Va. 342, 351 (1983) ("We believe the rationale of *Godsey* is sound, and we reaffirm our holding in that case that private rules are inadmissible in evidence either for or against a litigant who is not a party to such rules."); *see also Bulger v. Chicago Transit Auth.*, 801 N.E. 2d 1127, 1141-43 (Ill. App. Ct. 2003) (error to incorporate internal rules and defendant's defensive driving guide in jury instructions because such voluntary rules do not have the force of law); *Rosas v. O'Donoghue*, 2005 WL 5961992 (E.D. Pa. 2005) (CDL manual language constitutes "only a recommendation or advice" and is not a mandatory command and, thus, inadmissible); *Botey v. Green*, 2017 WL 2536387,*3 (M.D. Pa. June 9, 2017) (CDL manual not admissible but expert entitled to rely on it in offering his opinions); Asbury v. MNT, Inc., 2014 WL 6674475 (D. N. M. Aug. 6, 2014) (same)

[119] *See Fredericks v. Castora*, 360 A.2d 696 (Pa. Super. Ct. 1976) (trial court did not err in refusing a higher degree of care instruction); *Townsel v. Dadash, Inc.*, 2012 WL 1403246 (Tex. App. Apr. 24, 2012) (rejecting plaintiff's argument on appeal that he was entitled to a jury instruction regarding a "professional" tow truck driver and held jury was properly instructed to judge the "degree of care that would be used by a person of ordinary prudence under the same or similar circumstances").

The Virginia Commercial Driver's License Manual "provides driver license testing information for drivers who wish to have a [CDL]."[120] The material in the CDL Manual is "created for and provided to State Driver License Agencies," such as VDOT, by the American Association of Motor Vehicle Administrators ("AAMVA").[121] The CDL Manual is, in other words, a study aid. In fact, a driver is only required to get 80% of the questions correct to pass the test. Moreover, as acknowledged therein, the "opinions, findings, conclusions or recommendations expressed in [the CDL Manual] are those of the Author(s) [i.e., the AAMVA] and do not necessarily reflect the view of the Federal Motor Carrier Safety Administration."[122]

The CDL Manual does not establish the standard of care in Virginia.[123] Nor do company manuals or policies.[124] Plaintiffs' attorneys nevertheless leverage company manuals, which occasionally refer to the CDL Manual as the "industry standard," to great effect during depositions or even at trial. Defense counsel should be wary of this tactic and object to the use of the CDL Manual, which lacks a foundational basis for the recommendations it contains. Defense counsel should also consider lodging a hearsay objection to combat use of the CDL Manual because, as noted above, the document reflects the opinions and recommendations of the AAMVA – a nonprofit, non-governmental third-party.

9. <u>CSA BASIC Scores</u>

CSA BASIC scores are metrics relating to a carrier's safety in a number of categories. Not all carriers have BASIC scores, and those that do may not have them in all categories. The scores are not in and of themselves a reliable metric of a carrier's overall safety. Even the FMCSA admits on its website that users "should not draw conclusions about a carrier's overall safety condition simply based on the data displayed in this system."[125] Unless a carrier received an "unsatisfactory" rating after a full compliance review or had been "otherwise ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways."[126]

Due to controversy concerning the use of BASIC scores by the public or brokers in determining the safety of carriers, Congress directed the Government Accountability Office (GAO) to investigate whether BASIC scores accurately assessed accident risk. The GAO issued a report in February 2014 that was highly critical of the BASIC scores as a predictive risk assessment tool for

---

[120] AM. ASS'N OF MOTOR VEHICLE ADM'RS, COMMERCIAL DRIVER LICENSE MANUAL (2017), available at https://www.dmv.virginia.gov/webdoc/pdf/dmv60a.pdf [hereinafter *CDL Manual*].
[121] *Id.* at 1.
[122] *Id.*
[123] *See Benedict v. Hankook Tire Co.*, 286 F. Supp. 3d 785, 794 (E.D. Va. Feb. 6, 2018) (dismissing defendants' contributory negligence claim on summary judgment because "they have pointed to no experts who actually testify to the standard of care, let alone establish the CDL Manual as this standard").
[124] *See Godsey*, 117 Va. at 168.
[125] *Alliance for Safe, Efficient & Competitive Truck Transp. v. Fed. Motor Carrier Safety Admin*., 755 F.3d 946, 948-49, 410 U.S. App. D.C. 304 (D.C. Cir. 2014).
[126] *Id.*

individual carriers.[127] In December, 2015, President Obama signed the FAST act, which eliminated percentile scores but still allowed FMCSA to use a symbol to denote "high risk" carriers.[128]

A defendant carrier will want to object to the admissibility of a BASIC score when used to establish liability – especially in claims against brokers for negligent hiring of a particular carrier. However, some courts will allow experts to reference BASIC scores when they are one aspect of several that the expert relies on.[129]

10. <u>Admissibility of Accident Reconstruction Data</u>

It is well known that the general rule in Virginia is that accident reconstruction testimony is not allowed as it invades the province of the jury.[130] That said, there are some ways to get accident reconstruction testimony in front of a jury. The first rule of thumb, therefore, is ***not*** to call it "accident reconstruction." Beyond that, a party should be able to get accident reconstruction testimony in front of a jury if the focus is not in recreating what happened, but rather in explaining the facts of the accident so that the jury understands all the pieces and can put them together on their own.

The statute on expert testimony provides that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," a qualified expert may testify thereto.[131] An expert cannot be excluded simply because the facts to which they testify go to an "ultimate issue" to be decided by the jury.[132] Accordingly, if the expert sticks to explaining measurements, physical evidence, and technology (e.g., EDR and infotainment data) and steers away from the ultimate question of negligence, the testimony should come in.

For example, in *Breeden v. Roberts*, 258 Va. 411, 518 S.E.2d 834 (1999), Defendant offered expert testimony from a mechanic who was prepared to testify that the left rear brake adjuster was frozen, which caused the fishtail-type accident the defendant-driver testified to. Defendant sought to have this witness explain how the frozen brake adjuster would affect the operation and performance of the vehicle. The evidence was deemed relevant and admissible because it tended to support defendant's contention about why he lost control of his truck.

EDR and Infotainment data is the type of information "normally relied upon" by experts in the field.[133] Further, this data is not hearsay and should be compared to cell phone records because there is no declarant. Federal Rules of Evidence 902 §§ 13, 14 provide methods of self-authenticating the data.

---

[127] GAO, *Federal Motor Carrier Safety: Modifying the Compliance, Safety Accountability Program Would Improve the Ability to Identify High Risk Carriers*, GAO-14-114 (Feb. 2014), available at http://www.gao.gov/assets/670/660610.pdf.
[128] *Mann v. C. H. Robinson Worldwide, Inc.*, Civil Action No. 7:16-cv-00102, 2017 U.S. Dist. LEXIS 117503, at *8 (W.D. Va. July 27, 2017).
[129] *See id.*
[130] *See, e.g.*, *Brown v. Corbin*, 244 Va. 528, 423 S.E.2d 176 (1992).
[131] Va. Code § 8.01-401.3(A).
[132] Va. Code § 8.01-401.3(B).
[133] Va. Code § 8.01-401.1.

11. "Nuclear" Verdicts

Whether a pipedream or a nightmare, "nuclear" verdicts have become a reality of trucking litigation. The American Trucking Research Institute ("ATRI") recently reported[134] that as few as four verdicts exceeded $1 million in 2006.[135] By 2013, there were over 70.[136] In the time since, the number of verdicts in excess of $1 million has gradually declined,[137] but the average amount of those verdicts has continued to rise[138] – and they have risen at a rate that is "substantially faster than either inflation or healthcare costs."[139] According to the ATRI, "[T]he increasing average verdict award, as compared to average medical costs and inflation, indicates that the non-economic damages associated with a lawsuit are increasing."[140]

a. How Nuclear Verdicts Happen

A variety of factors influence the size of a given verdict. It is not enough to be familiar with the types of accidents or injuries that prompt juries to award large verdicts. Legal counsel must also be familiar with the litigation strategies that persuade jurors to do so.

i. *Circumstances of the Accident*

Children. Crashes involving children generally result in much larger verdicts than those that do not. Of the cases sampled by the ATRI, "the size of the verdict increases 1,687 percent, from $2.3 million to $42.3 million,"[141] when a child was either injured or killed.

Death. According to the Property Casualty Insurers Association of America, wrongful death claims account for 49% – nearly $3.5 billion – of the total dollars awarded in trucking cases between 2006 and 2016.[142] The ATRI likewise observed a correlation between the size of a verdict and the number of people killed in an accident.[143]

Injury Type. According to the ATRI, "Awards in cases with a spinal cord injury were on average $566,099 higher than those without a spinal cord injury."[144] Nevertheless, unspecified spinal injuries only account for roughly 2% of the total dollars awarded between 2006 and 2016.[145] Cases involving brain and head injuries, paralysis, amputation, and broken bones account for roughly 42% of the verdicts awarded in that same timeframe.[146]

---

[134] *See generally ATRI Report*, *supra* note 42.
[135] *Id*. at 14.
[136] *Id*. at 15.
[137] *See id*.
[138] *See id*. at 18.
[139] *Id*. at 19.
[140] *Id*.
[141] *Id*. at 21.
[142] DAVID GOLDEN, PROP. CAS. INS. ASS'N OF AM., NUCLEAR VERDICTS AND THEIR PORTENTOUS IMPLICATIONS & APPLICATIONS FOR TRUCKING 35 (2017).
[143] *ATRI Report*, *supra* note 42, at 24.
[144] *Id*. at 22.
[145] GOLDEN, *supra* note 142, at 35.
[146] *Id*.

Crash Type. The ATRI analyzed four major types of crashes in its recent report: 1) collisions, 2) sideswipes, 3) spins and rolls, and 4) improper turns, U-turns, stops, and lane changes.[147] Crashes in the third category, spins and rolls, averaged verdicts of nearly $15 million, "more than twice the average verdict of the next highest crash type, standard collisions."[148] The ATRI notes that the increase "is likely due to factors such as high kinetic energy (required to generate spins and rolls), and the fact that rollovers are typically one of the most expensive crash types.[149]

Driver Misconduct. Evidence of driver misconduct – and the extent to which a jury is permitted to hear about that misconduct – is another significant consideration. The ATRI observed that out of 491 cases it analyzed for this purpose, the jury returned a verdict for the plaintiff in 100% of cases involving: Hours-of-Service or log book violations, poor driving history, intoxication, fleeing the scene, and/or health-related issues.[150] In cases where the driver was asleep, fatigued, or using a cell phone, the jury returned a verdict for the plaintiff 91.7% of the time.[151]

ii. *Litigation Strategy – The "Reptile Theory"*

While the circumstances of an accident no doubt influence the size of a verdict, they do not account for the recent spike in the amount and frequency of nuclear verdicts. Whether causation or correlation, that trend corresponds, at least in part, with the rise of the "Reptile Theory" of litigation.

Reptile Theory. The "Reptile Theory" emerged in 2009[152] and has gained popularity with the plaintiffs' bar ever since.[153] The theory focuses on "causing jurors to perceive the defendant's alleged conduct as a threat to their own personal safety and the safety of their families and community, rather than deciding the case based upon considering a specific dispute between the plaintiff and the defendant."[154] This approach aims to increase jury verdicts by circumventing the "Golden Rule," which otherwise prohibits counsel from encouraging jurors to put themselves in the plaintiff's shoes or base their verdict on how they would like be treated.[155]

Reptile Tactics. The Reptile Theory encourages jurors to decide a case based on fear or a perceived threat to the community, rather than logic and reasoning.[156] Plaintiffs' attorneys attempt to do this by first establishing foundational safety rules through the use of statutes, regulations, employee

---

[147] *ATRI Report*, *supra* note 42, at 23.
[148] *Id*.
[149] *Id*.
[150] *Id*. at 24-25.
[151] *See id*. at 25 (noting that only one case involving cell phone use resulted in a defense verdict, and that the plaintiff in that case failed to prove the driver was using the cell phone at the time of the accident).
[152] DAVID BALL & DON KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION (2009).
[153] Bill Kanasky, *Debunking and Redefining the Plaintiff Reptile Theory*, FOR THE DEFENSE, Apr. 2014, at 14-16.
[154] Gregory Kendall, *Challenging Use of "Reptile Theory" Tactics at Trial Through Motions in Limine Requires a Case-Specific Approach*, JD SUPRA (Nov. 18, 2019), https://www.jdsupra.com/legalnews/challenging-use-of-reptile-theory-28528/.
[155] *The Reptile Theory: A Game-Changing Strategy in Personal Injury Lawsuits*, LEXISNEXIS (Feb. 21, 2020), https://www.lexisnexis.com/community/lexis-legal-advantage/b/trends/posts/the-reptile-theory-a-game-changing-strategy-in-personal-injury-lawsuits; *see Velocity Express Mid-Atl. v. Hugen*, 266 Va. 188, 202 (2003) (encouraging jurors to apply the Golden Rule constitutes reversible error).
[156] Taylor Denslow Brewer, *Confronting the Reptile in Virginia*, J. CIV. LITIG., Summer 2018, at 187, 188-90.

handbooks, industry standards, and the like. Plaintiffs' attorneys then emphasize that the defendant, having violated those safety rules, endangered not only the plaintiff who was injured but also the community at large. The focus, in other words, is on the threat posed by the defendant rather than the injuries caused to the plaintiff.

Recent Reptile Success Stories. The founders of the Reptile Theory claim it has led to more than $7.7 billion in settlements and verdicts since 2009.[157] Others dispute its validity.[158] Valid or not, however, the strategy has resulted in staggering verdicts in a variety of contexts:

- A Texas jury returned a $101 million verdict against an oil company and its tractor-trailer driver who rear-ended the plaintiff causing neck and back injuries.[159] The plaintiff initially told the responding officer he was not injured but later underwent back surgery on discs in his neck and was unable to return to work as a crane operator.[160] The verdict included $75 million in punitive damages against the company, which violated its own internal policy against hiring a driver who had three or more violations in the past three years.[161] At trial, "the action of [the defendant] in its training and onboarding of [its driver] were the center of much of the testimony and interrogation."[162]
- A Texas jury returned a $90 million verdict against a trucking company and its driver after the plaintiff's vehicle hit black ice, slid across the median, and collided with the defendants' tractor-trailer.[163] Plaintiffs' counsel emphasized that the FMCSRs require commercial drivers to use "extreme caution" in hazardous weather and the truck driver violated the Texas Motor Vehicle Drivers Handbook, which instructs commercial drivers who encounter icy roads to "reduce speed to a crawl and stop driving as soon as you can safely do so."[164]
- An Illinois jury returned a $54 million against a trucking company and its driver who rear-ended a plaintiff that stopped on the interstate because another driver was travelling the wrong way.[165] The verdict included a $35 million punitive damages award, which was affirmed on appeal.[166] The appellate court noted that the trucking company violated its own internal policies when it hired the driver, who had numerous moving violations and a felony conviction, as well as failed to monitor his "commercial driver's license or motor vehicle record after he was fired."[167] On appeal, the court also rejected the defendant's argument that "plaintiffs' counsel invited the jury to consider themselves as 'plaintiffs' partners' by stating that [the plaintiff] had a contract with '[e]ach and every one of you.'"

---

[157] *Id*. at 187.
[158] *Kanasky*, *supra* note 153, at 76.
[159] *Patterson v. FTS International Manufacturing LLC, et al.*, Case No. 356-15 (Upshur County 2018).
[160] *See* John Kingston, *The Biggest Ever? Truck Accident in Texas Leads to a $100+ Million Award*, FREIGHTWAVES (July 23, 2018), https://www.freightwaves.com/news/verdict-trucking-company-big-award.
[161] *Id*.
[162] *Id*.
[163] *Blake et al., v. Ali et al.*, Case No. 2015-36666 (Harris County 2018).
[164] *Penn Law Firm Uses Tell the Winning Story Trial Techniques Wins Nearly $90 Million Against Negligent Trucking Firm*, TELL THE WINNING STORY (2018), https://tellthewinningstory.com/wp-content/uploads/2018/06/Blake-Case-Story-Tell-The-Winning-Story.pdf.
[165] *See Denton v. Universal Am-Can, Ltd.*, 2019 IL 181525 (2019).
[166] *Id*.
[167] *Id*. at 12.

- A Connecticut jury returned a $15 million verdict against a trucking company and its driver who rear ended the plaintiff while following too closely and distracted by his phone.[168]
- A California jury returned an $11 million verdict against a trucking company and its driver who illegally parked his tractor-trailer on the side of a freeway to urinate.[169] The plaintiff was a passenger in another vehicle that collided with the parked tractor-trailer.

b. **How To Avoid Nuclear Verdicts**

From the defendant's perspective, combatting the Reptile Theory early is the primary way to avoid a nuclear verdict. This means, at the pleading stage, defense counsel should be prepared to demur or move to dismiss negligent hiring and retention claims, as well as punitive damages claims, and admit liability if the circumstances warrant doing so. These tactics can preempt evidence that might support the Reptile Theory by narrowing the scope of litigation and rendering safety rules irrelevant. Even after the parties are at issue, however, defense counsel must remain vigilant of reptilian tactics all the way through trial.

Written Discovery. Document requests that focus heavily on company rules, policies, standards, and practices are a red-flag that plaintiffs' counsel will leverage the Reptile Theory. Requests for those documents may be objectionable if, for example, liability has been admitted. Defense counsel should also be on the lookout for interrogatories and requests for admission concerning the importance of company policies, regulations, and industry standards.

Depositions. It is important to prepare witnesses, especially drivers and corporate representatives, to deal with hypotheticals and other lines of questioning about public safety and the common good. Witnesses should be prepared to qualify and explain their answers with a focus on the circumstances of the underlying accident.

Motions *in Limine*. Defense counsel should move to exclude irrelevant evidence related to company rules and policies, and seek to preclude plaintiffs' counsel from using prejudicial reptilian tactics to influence the jury. Many states, including Virginia, have little or no case law regarding the propriety of Reptile Theory tactics. Nevertheless, case law condemning the Golden Rule – a relative of the Reptile Theory – may be very useful. Courts across the nation are, with increasing frequency, analogizing the Reptile Theory with the Golden Rule and granting motions *in limine* on that basis:[170]

- *Perez v. Ramos*, 2018 Kan. App. Unpub. LEXIS 825, *25-26 (Kan. Ct. App. 2018) (affirming trial court's "anti-reptile theory order in limine").
- *Brooks v. Caterpillar Glob. Mining Am.*, 2017 U.S. Dist. LEXIS 125095, at *25 (W.D. Ky. Aug. 8, 2017) ("Reptile Theory arguments appear to mirror the 'send the message' or

[168] *Amparo v. Ayala*, Case No. FST-CV-16-6029461 (Stamford/Norwalk 2019).
[169] *Karen Garcia v. Tri-Modal Distribution Services Inc., et al.*, Case No. BC536714 (Los Angeles County 2019).
[170] *See* James M. Beck, *Reptile Research – Avoiding the Snake Pit*, DRUG & DEVICE LAW (December 16, 2019), https://www.druganddevicelawblog.com/2019/12/reptile-research-avoiding-the-snake-pit.html.

conscience of the community arguments . . . . Plaintiffs may not properly argue that the lawsuit was brought to ensure or promote community safety.").

- *Woulard v. Greenwood Motor Lines, Inc.*, 2019 U.S. Dist. LEXIS 131701, at *7 (S.D. Miss. Feb. 4, 2019) ("Evidence and argument related to non-specific 'safety rules' or employing the 'Reptile Theory' will be excluded at trial, including during *voir dire*.").
- *Roman v. Msl Capital, LLC*, 2019 U.S. Dist. LEXIS 64984, at *15-16 (C.D. Cal. Mar. 29, 2019) (granting motion *in limine* to exclude "reptile theory" arguments designed to circumvent the "golden rule").

Motions *in limine* to exclude Reptile Theory tactics may not always be successful. Even if they are not, however, well-drafted motions *in limine* will put the court on notice for purposes of subsequent objections at trial.

Voir Dire. Defense counsel should carefully screen jurors who may be susceptible to Reptile Theory tactics during voir dire. Potential jurors should be questioned on their views concerning the burden of proof, why it exists, and whether it is important. Thoughtful questioning may also have the added benefit of encouraging the jury to step into the shoes of the defendant, and remain cognizant of the plaintiff's burden of proof as it relates to the particular facts of the case.

Trial. At trial, defense counsel must be prepared to object to Reptile Theory tactics as they unfold in real-time. A judge who previously denied a motion *in limine* to exclude vague references to safety rules or company policies may be prepared to sustain the objection after seeing the evidence unfold. Moreover, preserving objections to Reptile Theory tactics at trial may enable the defendant to successfully challenge those tactics, and potentially reverse a nuclear verdict, on appeal.

3

The CARES Act – Who CARES Anyway?

Presented by:

Bill W. Gust

gust@gentrylocke.com

Ben R. Law

blaw@gentrylocke.com

Roanoke | Lynchburg | Richmond | gentrylocke.com

The CARES Act – Who CARES Anyway?

W. William Gust
Benjamin R. Law
Gentry Locke Seminar – September 11, 2020

In response to the global Coronavirus pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (Pub. L. 116-136), more commonly known as the CARES Act (the "Act"). The CARES Act received bipartisan support and President Trump signed the Act into law on March 27, 2020. Certain programs contained within the Act have already been completed. The following is our overview of tax-related provisions contained within the Act.

I. Goals of the CARES Act

a) Provide emergency economic assistance for American workers and families.

b) Support and assist small businesses, and preserve jobs and American industries.

c) Assist state, local, and tribal governments.

II. Individuals and Families

a) Recovery Rebate:

(i) To assist individuals during a period of economic uncertainty, the government provided up to $1,200 to eligible taxpayers and $2,400 for eligible married couples filing joint returns. The government also provided an additional payment of $500 for each qualifying child dependent under age 17.

(ii) Rebates were gradually phased out at a rate of 5% of the individual's adjusted gross income over $75,000 (singles and married couples filing separately), $122,500 (for head of household), and $150,000 (for joint filers).

(iii) Rebates were paid by check or direct deposit. Mostly, taxpayers were not required to take any action – the IRS determined the rebate based on the taxpayer's tax 2019 return (or 2018 if 2019 not yet filed).

b) Waiver of IRA Early Distribution Penalty and Required Distribution Rules:

(i) The 10% early withdrawal penalty tax on early distributions from IRAs and defined contribution plans (e.g., 401(k) plans) made prior to age 59 ½ is waived for distributions made during the period of

January 1, 2020 and December 31, 2020, subject to a $100,000 distribution limit.

(ii) The amount distributed can be re-contributed to the defined contribution plan or the IRA.

(iii) Automatically, income from such distributions will be spread over a three-year period, unless the employee elects to take the income in the current year.

(iv) An employer must amend its defined contribution plan to expressly provide for these distributions, and such plans may be amended to permit expanded plan loans and loan repayment terms to employees who are qualified individuals.

(v) In addition, required minimum distributions that otherwise would have been required to be made in 2020 from defined contribution plans and IRAs are waived, including distributions that would have been required by April 1, 2020 due to the account owner attaining age 70 ½ during 2019.

c) Charitable Deductions:

(i) The CARES Act makes four significant liberalizations to the rules governing charitable income tax deductions, including two that apply to individuals:

(1) Individuals will be able to claim a $300 above-the-line deduction for cash contributions made to IRC Sec. 501(c)(3) public charities during 2020, effectively allowing a limited charitable deduction to taxpayers claiming the standard deduction rather than itemized deductions.

(2) The limitation on charitable deductions for individuals that is generally 60% of modified adjusted gross income (the "contribution base") will not apply to cash contributions made to IRC Sec. 501(c)(3) public charities during 2020; rather, an individual's qualifying contributions, reduced by other contributions, can be as much as 100% of the contribution base.

d) Student Loans:

(i) An employee currently may exclude up to $5,250 from income with respect to benefits received from an employer-sponsored educational assistance program. The CARES Act expands the

definition of expenses qualifying for the exclusion to include employer direct payments of student loan debt made before January 1, 2021.

e) Healthcare:

(i) Remote care. For plan years beginning before 2021, the CARES Act allows high deductible health plans to pay for expenses for tele-health and other remote services without regard to the deductible amount otherwise required under the plan.

(ii) Nonprescription medical products. For amounts paid after December 31, 2019, the CARES Act allows amounts paid from Health Savings Accounts and Archer Medical Savings Accounts to be treated as paid for medical care even if they aren't paid under a prescription, and menstrual care products are treated as amounts paid for medical care. For reimbursements after December 31, 2019, the same rules apply to Flexible Spending Arrangements and Health Reimbursement Arrangements.

III. Businesses and Jobs.

a) Employee retention credit for employers:

(i) Eligible employers can qualify for a refundable credit against the employer's 6.2% portion of the Social Security (OASDI) payroll tax (or against the Railroad Retirement tax) for 50% of certain wages (described below) paid to employees during the pandemic crisis.

(ii) The credit is available to employers carrying on business during 2020, including non-profits (but excluding government entities), whose operations for a calendar quarter have been fully or partially suspended as a result of a government order limiting commerce, travel or group meetings. It is also available to employers who have experienced a more than 50% reduction in quarterly receipts, measured on a year-over-year basis relative to the corresponding 2019 quarter, until receipts surpass 80% of the receipts for the corresponding 2019 quarter, in which case eligibility will extend for one additional quarter.

(iii) For employers with more than 100 employees in 2019, all employee wages are eligible, even if employees haven't been prevented from providing services. The credit is provide for wages and compensation, including health benefits, and is provided for the first $10,000 in eligible wages and compensation paid by the employer

to an employee. Thus, the credit is limited to a maximum of $5,000 per employee.

(iv) For calculation of the tax credit, the following "wages" will not include: (1) wages taken into account for purposes of the payroll credits provided by the earlier Families First Coronavirus Response Act for required paid sick leave or required paid family leave; (2) wages taken into account for the employer income tax credit for paid family and medical leave (under IRC Sec. 45S); or (3) wages in a period in which an employer is allowed a work opportunity credit (under IRC Sec. 51). An employer can elect not have the credit apply on a quarter-by-quarter basis.

(v) The IRS has authority to advance payments to eligible employers and to waive penalties for employers who do not deposit applicable payroll taxes in reasonable anticipation of receiving the credit. The credit is not available to employers receiving Small Business Interruption Loans. The credit is provided for wages paid after March 12, 2020 through December 31, 2020.

b) Delayed payment of employer payroll taxes:

(i) Taxpayers (including self-employed) may defer paying the employer portion of certain payroll taxes through the end of 2020, with all deferred amounts due in two equal installments (one at the end of 2021, and the other at the end of 2022).

(ii) Taxes that can be deferred include the 6.2% employer portion of the Social Security (OASDI) payroll tax and the employer and employee representative portion of Railroad Retirement taxes (that is attributable to the employer 6.2% Social Security (OASDI) rate). This relief is not available if the taxpayer has had debt forgiveness under the CARES Act for certain loans under the Small Business Act as modified by the CARES Act (see below). For self-employed individuals, the deferral applies to 50% of the Self-Employment Contributions Act tax liability (including any related estimated tax liability).

c) Charitable Deductions:

(i) Similar to the limitations for individuals, the limitation on charitable deductions for corporations that is generally 10% of modified taxable income doesn't apply to qualifying contributions made in 2020; rather, a corporation's qualifying contributions, reduced by other contributions, can be as much as 25% of modified taxable income.

(ii) For contributions of food inventory made in 2020, the deduction limitation increased from 15% to 25% of taxable income for C Corporations and, for other entity taxpayers, from 15% to 25% of the net aggregate income from all businesses from which the contributions were made.

d) Net Operating Loss (NOL) liberalizations:

(i) The 2017 Tax Cuts and Jobs Act (TCJA) limited NOLs arising after 2017 to 80% of taxable income and eliminated the ability to carry NOLs back to prior tax years. For NOLs arising in tax years beginning before 2021, the CARES Act allows taxpayers to carryback 100% of NOLs to the prior five tax years, effectively delaying for NOL carrybacks the 80% taxable income limitation and carryback prohibition until 2021.

(ii) The Act also temporarily liberalizes the treatment of NOL carryforwards. For tax years beginning before January 1, 2021, taxpayers can take an NOL deduction equal to 100% of taxable income (rather than the present 80% limit). For tax years beginning after December 31, 2020, taxpayers will be eligible for: (1) a 100% deduction of NOLs arising in tax years before 2018, and (2) a deduction limited to 80% of taxable income for NOLs arising in tax years after 2017.

e) Deferral of non-corporate taxpayer loss limits:

(i) The CARES Act retroactively delays the excess active business loss limitation rule of the TCJA in IRC Sec. 461(l) by deferring its effective date to tax years beginning after December 31, 2020 (rather than December 31, 2017). Under the delayed rule, active net business losses in excess of $250,000 ($500,000 for joint filers) were disallowed by the 2017 Tax Law and were treated as NOL carryforwards in the following tax year.

(ii) The CARES Act clarifies, in a technical amendment that is retroactive, that an excess loss is treated as part of any net operating loss for the year, but isn't automatically carried forward to the next year. Another technical amendment clarifies that excess business losses do not included any deduction under Code Sec. 172 (NOL deduction) or Code Sec. 199A (qualified business income deduction).

f) Acceleration of corporate AMT liability credit:

(i) The 2017 Tax Law repealed the corporate alternative minimum tax (AMT) and allowed corporations to claim outstanding AMT credits subject to certain limits for tax years before 2021, at which time any remaining AMT credit could be claimed as fully refundable. The CARES Act allows corporations to claim 100% of AMT credits in 2019 as fully refundable and further provides an election to take the entire refund in 2018.

g) Relaxation of business interest deduction limit:

(i) The 2017 Tax Law generally limited the amount of business interest allowed as a deduction to 30% of adjustable taxable income (ATI). The CARES Act generally allows businesses, unless they elect otherwise, to increase the interest limitation to 50% of ATI for 2019 and 2020, and to elect to use 2019 ATI in calculating their 2020 limitation. For partnerships, the 30% of ATI limit remains in place for 2019 but is 50% for 2020. However, unless a partner elects otherwise, 50% of any business interest allocated to a partner in 2019 is deductible in 2020 and not subject to the 50% (formerly 30%) ATI limitation. The remaining 50% of excess business interest from 2019 allocated to the partner is subject to the ATI limitations. Partnerships, like other businesses, may elect to use 2019 partnership ATI in calculating their 2020 limitation.

h) Technical correction to restore faster write-offs for interior building improvements:

(i) The CARES Act makes a technical correction to the 2017 Tax Law by retroactively treating a variety of interior, non-load-bearing building improvements (qualified improvement property (QIP)) as eligible for bonus depreciation (and hence 100% write-off) or treatment as 15-year MACRS property or, if required to be treated as alternative depreciation system property, as eligible for a write-off over 20 years. The correction of the error in the 2017 Tax Law restores the eligibility of QIP for bonus depreciation, and in giving QIP 15-year MACRS status, restores 15-year MACRS write-offs for many leasehold, restaurant and retail improvements.

i) Accelerated payment of credits for required paid sick leave and family leave:

(i) The CARES Act authorizes the IRS to allow employers an accelerated benefit of the paid sick leave and paid family leave credits allowed by the Families First Coronavirus Response Act by, for example, not requiring deposits of payroll taxes in the amount of credits earned.

j) Pension funding delay:

(i) The CARES Act gives single employer pension plan sponsors more time to meet their funding obligations by delaying the due date for any contribution otherwise due during 2020 until January 1, 2021. At that time, contributions due earlier will be due with interest. Also, a plan can treat its status for benefit restrictions as of December 31, 2019 as applying throughout 2020.

k) Certain SBA loan debt forgiveness isn't taxable income:

(i) Amounts of Small Business Administration Sec. 7(a)(36) guaranteed loans that are forgiven under the CARES Act will not be taxable as discharge of indebtedness income if the forgiven amount are used for one of several permitted purposes. The loans have to be made during the period beginning on February 15, 2020 and ending on June 30, 2020.

l) Suspension of certain alcohol excise taxes:

(i) The CARES Act suspends alcohol taxes on spirits withdrawn from the bonded premises of any distilled spirits plant during 2020 for use in or contained in hand sanitizer produced and distributed in a manner consistent with FDA guidance related to the outbreak of virus SARSCoV-2 or COVID-19.

m) Suspension of certain aviation taxes:

(i) The CARES Act suspends excise taxes on air transportation of persons and property and on the excise tax imposed on kerosene used in commercial aviation. The suspension period is from March 28, 2020 to December 31, 2020.

IV. <u>State, Local, and Tribal Governments</u>

a) $150B Coronavirus Relief Fund:

(i) Covers expenses that:

(1) Are necessary expenditures incurred due to the public health emergency related to COVID-19;

(2) Were not accounted for in the budget most recently approved as of March 27, 2020 for the State or government; and

(3) Were incurred during the period between March 1, 2020 and December 30, 2020.

Practicing Law in a Brave New World

4

New Rules Impacting the Employment Relationship; L&E and the General Assembly – What's Changed?

Presented by:

W. David Paxton

paxton@gentrylocke.com

Kelsey M. Martin

martin@gentrylocke.com

GENTRY LOCKE
Attorneys

Roanoke | Lynchburg | Richmond | gentrylocke.com

New Rules Impacting the Employment Relationship
L&E and the General Assembly – What's Changed?

W. David Paxton
Kelsey M. Martin
Gentry Locke Seminar **-** September 11, 2020

I. Sweeping Changes to Virginia's Employment Laws

The 2020 General Assembly passed new laws that redefine the employment landscape in Virginia.

New employment laws focus on employment discrimination, pregnancy protections, wage payments, employee misclassification, and whistleblower claims. These laws became effective on July 1, 2020.

We expect Virginia state courts to be inundated with new employment law claims based on these new laws. Below is a summary of key changes.

II. Worker Misclassification: Independent Contractor vs. Employee (Va. Code § 40.1-28.7:7)

New Cause of Action for Misclassification. Effective July 1, 2020, workers can file a lawsuit against an employer for damages for classifying the worker(s) as an independent contractor instead of an employee. Va. Code § 40.1-28.7:7(A). The employer must have "had knowledge" of the individual's misclassification. *Id.*

Employee Presumption. Workers are now presumed to be employees in Virginia if they provide services for which they are paid. Va. Code § 40.1-28.7:7(B).

20-Factor IRS Test. If an individual files suit under this new law, the defendant/alleged employer must prove that the individual is an independent contractor. Va. Code § 40.1-28.7:7(C). This analysis involves a 20-factor test created by the IRS. The main consideration is whether the alleged employer can exercise enough control to establish an employer-employee relationship.

Damages. An individual can recover the following damages: wages, salary, employment benefits (including health insurance expenses), other compensation lost, attorney's fees, and costs. Va. Code § 40.1-28.7:7(A).

Anti-Retaliation Provision (Va. Code § 40.1-33.1). Employers cannot retaliate against individuals who in good faith report misclassification or participate in investigations or proceedings related to misclassification. Va. Code § 40.1-33.1(A). Specifically, employers cannot

"discharge, discipline, threaten, discriminate against, or penalize an employee or independent contractor, or take other retaliatory action regarding an employee or independent contractor's compensation, terms, conditions, location, or privileges of employment . . . ." *Id.* While there is no private right of action for retaliation, an individual can file a complaint with the Virginia Department of Labor and Industry. Va. Code § 40.1-33.1(C). DOLI can investigate and institute proceedings against the employer seeking reinstatement and lost wages. *Id.*

Virginia Board of Contractors (Va. Code § 54.1-1102). As of July 1, 2020, the Board of Contractors specifically requires contractors to classify workers appropriately as independent contractors or employees. Va. Code § 54.1-1102(B). The Board regulates tradesmen, licensed businesses engaged in construction, removal, repair, or improvement of facilities on property owned by others, and individuals and firms engaged in residential building energy analysis. The Board has the ability to sanction contractors who are found to have intentionally misclassified workers. *Id.*

Virginia Department of Taxation (Va. Code § 58.1-1900 et seq.). Effective January 1, 2021, Department of Taxation has broad authority to investigate misclassification of workers. The Department is authorized to work and share information with other state agencies (DOLI, VEC, DPOR, and others) to determine misclassification. Va. Code § 58.1-3.4. All violations must be provided to all public bodies and covered institutions, and repeat offenses result in debarment from government contracts for one year for second offenses and two years for third and subsequent offenses. Va. Code § 58.1-1902. Civil penalties range from $1,000 (for first offense) to $5,000 (third or subsequent offense). Va. Code § 58.1-1901. Misclassifications of employees made by the same employer at the same time or within 72 hours are deemed a single offense. Va. Code § 58.1-1900(C).

III. Wage Theft (Va. Code § 40.1-29 et seq.)

New Cause of Action for Unpaid Wages. Effective July 1, 2020, employees can file suit against employers for unpaid wages. Va. Code § 40.1-29(J). Previously, employees were required to file an administrative claim with the Virginia Department of Labor and Industry (or file unpaid wage claims under the Fair Labor Standards Act in Federal Court).

Potential for Collective Action. An employee can file suit individually, jointly with other employees, or can file on behalf of other similarly situated employees as a collective action. Va. Code § 40.1-29(J).

Damages. Employees can recover unpaid wages (plus 8% interest), an additional equal amount of liquidated damages, attorneys' fees, and costs. Va. Code § 40.1-29(J). If an employer is found to have "knowingly" failed to pay wages, **then damages are tripled.** *Id.* "Knowingly" does not require proof of a specific intent to defraud; actual knowledge, deliberate ignorance, and reckless disregard are sufficient. Va. Code § 40.1-29(K).

Criminal Penalties. Employers are excused from criminal liability if the employer's failure to pay wages was due to a *bona fide* dispute between the employer and employee. Va. Code § 40.1-29(E). Potential criminal penalties for violations made willfully and with the intent to defraud:

- If unpaid wages are less than $10,000, the employer is subject to a Class 1 Misdemeanor. Va. Code § 40.1-29(E)(1).

- If unpaid wages are more than $10,000, or if the employer's conviction is a second or subsequent offense, employer is subject to a Class 6 Felony. Va. Code § 40.1-29(E)(2).

Civil Penalties. The civil penalty for "knowing" violations is not to exceed $1,000 per violation, payable to the Virginia State Treasurer. Va. Code § 40.1-29(H). The amount of the civil penalty is determined based on the employer's size and the gravity of the violation. *Id.*

Three Year Statute of Limitations. An employee has 3 years to file a claim for unpaid wages. Va. Code § 40.1-29(K).

Anti-Retaliation Provision. Employers cannot retaliate or in any other manner discriminate against an employee for reporting a wage complaint (internally or externally), for filing a lawsuit for unpaid wages, or for participating in an investigation or for testifying in a proceeding for unpaid wages. Va. Code § 40.1-33.2. However, there is no private right of action for aggrieved employees. Employees are required to file a complaint with the Department of Labor and Industry, which can then with the employee's consent institute proceedings on the employee's behalf. *Id.*

Virginia DOLI Investigations. The Virginia Department of Labor and Industry has the authority to investigate wage complaints. Va. Code § 40.1-29.1. A single complaint could result in a site wide or even statewide investigation with commensurate recovery and penalties. *See id.*

General Contractors (Va. Code § 11-4.6). Effective July 1, 2020, general contractors of large multi-residential or commercial construction contracts (greater than $500,000) are liable for unpaid wages to a subcontractor's employees if the general contractor knew or should have known the subcontractor was not paying all wages due. Va. Code. § 11-4.6(E). For purposes of the statute, the general contractor is considered an "employer" of its subcontractors' employees. Va. Code § 11-4.6(C). Any liability of a general contractor pursuant to Va. Code § 40.1-29 is joint and several with the subcontractor that failed or refused to pay the wages to its employees. *Id.* General contractors are also subject to all civil and criminal penalties to which an employer that fails or refuses to pay wages under Va. Code § 40.1-29. *Id.*

Wage Disclosure. Employers are prohibited from discharging or taking other retaliatory action against an employee because the employee inquired about, discussed with, or disclosed to another employee any information about either (i) the employee's own wages or other compensation, or

(ii) any other employee's wages or other compensation. Va. Code § 40.1-28.7:9(A). Violations are subject to a civil penalty of $100. Va. Code. § 40.1-28.7:9(B).

IV. Updates to the Virginia Human Rights Act: The Virginia Values Act

Virginia Values Act (Va. Code §§ 2.2-3900 et seq.). Effective July 1, 2020, the Virginia Values Act ("VVA") makes Virginia the first state in the South to enact comprehensive protections for the LGBTQ+ community. The VVA extends existing non-discrimination protections under the Virginia Human Rights Act ("VHRA") to individuals based on sexual orientation or gender identity. These protections apply to employment, housing, public accommodations, and credit applications.

Covered Employers. Employee protections are based upon the number of employees.

Employers with 15 or more employees: prohibits *unlawful employment practices* on the basis of race, color, religion, national origin, veteran status, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, including lactation. Va. Code § 2.2-3905(A).

Employers with 5 or more employees: prohibits *unlawful discharge* on the basis of race, color, religion, national origin, veteran status, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth, or related medical conditions, including lactation. *Id.*

Age discrimination claims: only apply to employers with more than 5 but fewer than 20 employees. *Id.*

Individual Liability. The VVA appears to open the door to individual liability as well as liability for the business. *See* Va. Code § 2.2-3908. This means there is the potential for supervisors and co-workers to be sued individually for harassment, discrimination, etc.

Division of Human Rights. The VVA creates a new Division of Human Rights ("DHR") in the Attorney General's office to investigate complaints. Employees are required to file an administrative claim with the DHR prior to filing a lawsuit (similar to EEOC's procedures). *See* Va. Code § 2.2-3907.

Remedies. Employees can recover uncapped compensatory damages (unlike Federal law), punitive damages (state cap of $350,000), reasonable attorney's fees and costs, and injunctive relief or other relief as may be appropriate (e.g. potential reinstatement). Va. Code § 2.2-3908(B).

Race Discrimination Based Upon Hair. Employers are prohibited from discriminating against individuals because of traits historically associated with race, including hair texture, hair type, and hairstyles such as braids, locks, and twists. Va. Code § 2.2-3901(D).

V. Pregnancy Discrimination & Accommodations (Va. Code § 2.2-3909)

New Cause of Action. Effective July 1, 2020, the VVA extends non-discrimination protections under the VHRA to individuals based upon pregnancy, childbirth, and related medical conditions (lactation). Va. Code § 2.2-3909. This law applies to employees and applicants. *Id.*

Covered Employers. Any person, or agent of such person, employing five or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Va. Code § 2.2-3909(A).

Reasonable Accommodations. Employers are required to provide reasonable accommodations for the known limitations of an employee related to such conditions, unless the employer can demonstrate undue hardship. Va. Code § 2.2-3909(B)(1). The employee must first request an accommodation, then the employer must engage in a timely and good faith interactive process with the employee to determine if the requested accommodation is reasonable. *See* Va. Code § 2.2-3909(C). If an accommodation is not reasonable, the employer must discuss alternatives. *Id.* The code section identifies a list of reasonable accommodations:

- More frequent or longer bathroom breaks;
- Breaks to express breast milk;
- Access to a private location other than a bathroom for the expression of breast milk;
- Acquisition or modification of equipment or access to or modification of employee seating;
- A temporary transfer to a less strenuous or hazardous position;
- Assistance with manual labor;
- Job restructuring;
- A modified work schedule;
- Light duty assignments; and
- Leave to recover from childbirth

Va. Code § 2.2-3909(A).

Cannot Require Leave. Employers are prohibited from requiring an employee to take leave if another reasonable accommodation can be provided. Va. Code § 2.2-3909(B)(4).

Undue Hardship. The following factors are considered when determining whether an accommodation would constitute an undue hardship on the employer:

- Hardship on the conduct of the employer's business, considering the nature of the employer's operation, including the composition and structure of the employer's workforce;
- The size of the facility where employment occurs; and
- The nature and cost of the accommodations needed.

Va. Code § 2.2-3909(B)(1)(a).

Rebuttable Presumption. The fact that the employer provides or would be required to provide a similar accommodation to other classes of employees creates a rebuttable presumption that the accommodation does not impose an undue hardship. Va. Code § 2.2-3909(B)(1)(b).

No Retaliation. Employers are prohibited from taking adverse action against an employee who requests or uses a reasonable accommodation. Va. Code § 2.2-3909(B)(2). "Adverse action" includes failure to reinstate an employee to her previous position or an equivalent position with equivalent pay, seniority, and other benefits when her need for a reasonable accommodation ends. *Id.*

No Discrimination. Employers are prohibited from denying employment or promotion opportunities to an otherwise qualified applicant or employee because the employer will be required to make reasonable accommodation to the known limitation of such applicant or employee related to pregnancy, childbirth, or related medical conditions. Va. Code § 2.2-3909(B)(3).

Remedies. Employees can recover compensatory damages (uncapped), back pay, other equitable relief (such as reinstatement), reasonable attorney's fees and costs, and injunctive relief. Va. Code § 2.2-3909(E).

Statute of Limitations. Employees must file suit within two years of the alleged violation. Va. Code § 2.2-3909(E). Employees can file a complaint with the DHR prior to filing suit in a general district or circuit court, but are not required to do so. *Id.*

Notice & Poster. Employers are required to post and include in any employee handbook information concerning an employee's rights under this new law. Va. Code § 2.2-3909(D). Employers must also provide this information to new employees and any employee within 10 days of the employee informing the employer of a pregnancy. *Id.* DOLI is expected to release a poster for employers to use for this purpose. (Notice and poster requirement effective October 29, 2020).

VI. Whistleblower Protection (Va. Code § 40.1-27.3)

Broad Anti-Retaliation Protections. Effective July 1, 2020, employees can file a lawsuit against their employer if they believe they were retaliated against for engaging in certain protected activity. Va. Code § 40.1-27.3(A).

Specific Protections. This new law protects any employee who:

- In good faith reports a violation of any federal or state law or regulation to a supervisor or to any governmental body or law-enforcement official (also covers a person acting on behalf of another employee), Va. Code § 40.1-27.3(A)(1);
- Receives a request to participate in a government investigation, hearing, or inquiry, Va. Code § 40.1-27.3(A)(2);
- Refuses to engage in an act that would subject the employee to criminal liability, Va. Code § 40.1-27.3(A)(3);
- Refuses an employer's order to perform an action that violates any federal or state law or regulation, provided the employee explains his or her reasoning to the employer, Va. Code § 40.1-27.3(A)(4); or
- Testifies or otherwise provides information in connection with a governmental or law enforcement investigation, hearing, or inquiry into the employer's alleged violation of any federal or state law, Va. Code § 40.1-27.3(A)(5).

But Does Not . . .

- Authorize employees to disclose their employer's data otherwise protected by law or any legal privilege, Va. Code § 40.1-27.3(B)(1);
- Permit an employee to make statements or disclosures knowing that they are false or that they are in reckless disregard of the truth, Va. Code § 40.1-27.3(B)(2); or
- Permit disclosures that would violate federal or state law, or diminish or impair the rights of any person to the continued protection of confidential communications provided by common law, Va. Code § 40.1-27.3(B)(3).

Procedure. Employees are not required to file an administrative complaint but can file suit in any court within one year of employer's alleged prohibited retaliatory action. Va. Code § 40.1-27.3(C).

Remedies. The court may order as a remedy to the employee (i) an injunction to restrain continued violations, (ii) the reinstatement of the employee to the same position held before the retaliatory action or to an equivalent position, and (iii) compensation for lost wages, benefits, and other remuneration, together with interest, as well as reasonable attorney fees and costs. Va. Code § 40.1-27.3(C).

VII. Limiting Noncompete Agreements for "Low Wage" Workers (Va. Code § 40.1-28.7:8)

Limiting Noncompete Agreements. Effective July 1, 2020, employers are prohibited from entering into, enforcing, or threatening to enforce a covenant not to compete with "low-wage" employees. Va. Code § 40.1-28.7:8(B).

Not Retroactive. Prohibition only applies to noncompete agreements entered into on or after July 1, 2020.

A **"Covenant Not to Compete"** is defined as a covenant or agreement, including a provision of a contract of employment, that "restrains, prohibits, or otherwise restricts an individual's ability, following the termination of the individual's employment, to compete with his former employer." Va. Code § 40.1-28.7:8(A).

Non-Solicitation Provisions. A "covenant not to compete" shall "not restrict an employee from providing a service to a customer or client of the employer if the employee does not initiate contact with or solicit the customer or client." Va. Code § 40.1-28.7:8(A).

Nondisclosure Agreements. This law does not limit the creation or application of nondisclosure agreements intended to prohibit the taking, misappropriating, threatening to misappropriate, or sharing of certain information, including trade secrets, as defined in Va. Code § 59.1-336, and proprietary or confidential information. Va. Code § 40.1-28.7:8(C).

A **"Low-Wage Employee"** is defined as an employee whose average weekly earnings are less than the average weekly wage of the Commonwealth. Va. Code § 40.1-28.7:8(A).

- The average weekly wage of the Commonwealth equates to the maximum workers' compensation benefits allowed by the Virginia Workers' Compensation Commission.
- As of July 1, 2020, the threshold is $1,137 per week (annualized salary = $59,124).[1]

Worker Coverage. This prohibition applies to employees, interns, students, apprentices, or trainees employed without pay or with weekly earnings less than the average weekly wage. Va. Code § 40.1-28.7:8(A). It also applies to independent contractors who are compensated at hourly rates less than the median hourly wage in the Commonwealth for all occupations as reported, for the preceding year, by the Bureau of Labor Statistics of the U.S. Department of Labor ($20.30 per hour, as of May 2019[2]). *Id.*

[1] http://www.vwc.state.va.us/documents/rates-min-max-benefits-cola-mileage.
[2] https://www.bls.gov/oes/current/oes_va.htm#00-0000.

Exclusions. Employees whose earnings are derived in whole or predominant part from sales commissions, incentives, or bonuses are excluded from the noncompete prohibition. Va. Code § 40.1-28.7:8(A). This means that many sales employees may still be required to sign noncompete agreements depending on the employer's compensation structure.

Private Right of Action. Employees may bring a private cause of action against an employer who seeks to enforce the restrictive covenant against a low-wage worker within 2 years of (i) the date that the covenant not to compete was signed; (ii) the date the employee learns of the covenant not to compete; (iii) the date the employment relationship is terminated; or (iv) the date the employer takes any step to enforce covenant not to compete. Va. Code § 40.1-28.7:8(D).

Damages & Penalties. Liquidated damages, lost compensation, reasonable attorney's fees and costs (including expert witness fees), and injunctive relief. Va. Code § 40.1-28.7:8(D). Civil penalty of $10,000 for each violation for entering, enforcing, or threatening to enforce any prohibited restrictive covenant. Va. Code § 40.1-28.7:8(E).

No Retaliation. Law prohibits retaliation or discrimination against an employee for bringing civil action. Va. Code § 40.1-28.7:8(D).

Posting Requirement. Employers are required to post a copy of the new code section or a summary approved by the Virginia Department of Labor and Industry in the same location where other employee notices are posted. Va. Code § 40.1-28.7:8(G).

VIII. Other Important Changes

Minimum Wage Increase (Va. Code § 40.1-28.10). Virginia's minimum wage will increase to $9.50 per hour, effective May 1, 2021; $11.00 per hour, effective January 1, 2022; and $12.00 per hour, effective January 1, 2023.

Legislation includes provisions that could increase minimum wage to $15.00 per hour by 2026. However, General Assembly must reenact these provisions prior to July 1, 2024 for these increases to occur.

If General Assembly fails to reenact these provisions by July 1, 2024, minimum wage will continue to increase after January 1, 2025, but at a slower rate tied to inflation.

Marijuana Decriminalization (Va. Code § 19.2-389.3). Effective July 1, 2020, Virginia decriminalized simple marijuana possession (up to one ounce of marijuana) and reduced a violation to a civil infraction. Employers are prohibited from requiring job applicants from

disclosing information concerning arrests, criminal charges, or convictions related to the simple possession of marijuana.

Collective Bargaining for Government Employees (Va. Code § 40.1-57.2). Effective May 1, 2021, localities have the option – but are not required – to adopt an ordinance or resolution authorizing collective bargaining. Localities have 120 days from receiving certification from a majority of public employees in a unit considered appropriate for the purposes of collective bargaining to take a vote to adopt or not adopt such resolution or ordinance to provide for collective bargaining.

Practicing Law in a
Brave New World

5

Managing the Workforce in the Time of a Pandemic.

Presented by:

Paul G. Klockenbrink

klockenbrink@gentrylocke.com

Cate J. Huff

huff@gentrylocke.com

Roanoke | Lynchburg | Richmond | gentrylocke.com

Managing the Workforce in the Time of a Pandemic

Paul G. Klockenbrink
Catherine J. Huff

Gentry Locke Seminar - September 11, 2020

I. Introduction

Dealing with COVID-19 has become a part of our everyday lives and there is no end in sight. When the pandemic began, individuals, businesses, and entire countries scrambled for information and ways to safely protect themselves and those around them. The public was inundated with conflicting information and it has taken months to adapt our lives to this "new normal." This outline and presentation will provide a helpful summary of the laws and regulations surrounding the pandemic and how employers can navigate the return-to-work and the future of business in these unprecedented times.

II. Relief for Businesses and Individuals

A. Families First Coronavirus Response Act (FFCRA)

Prior to December 31, 2020, if an employee cannot return to work due to a "qualifying reason," the employee may be eligible for two weeks (80 hours) of paid Emergency Paid Sick Leave benefits or up to twelve weeks of Emergency Family and Medical Leave Act (EFMLA) leave. Only employers with fewer than 500 employees are eligible. The 500-employee count is taken as a "snapshot" and is calculated at the time leave is requested.

Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work or telework because the employee:

i. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
ii. has been advised by a health care provider to self-quarantine related to COVID-19;
iii. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
iv. is caring for an individual subject to an order described in (i) or self-quarantine as described in (ii);
v. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
vi. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

This leave cannot be taken in tandem with any other leave. Once the employee exhausts this leave, he/she cannot get it twice. If an employee takes some of his/her FFCRA leave and then goes to another company, the employee is entitled to the remaining portion of the leave from the new employer if (1) the new employer is covered by the FFCRA and (2) the employee qualifies for the leave.

B. CARES Act

In April 2020, Congress signed into law a $2 trillion relief law to provide relief to individuals, businesses, and government organizations during COVID-19. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) created the Paycheck Protection Program, provided expanded unemployment compensation benefits, enacted provisions to review supply issues with medical equipment and drug shortages, and provided significant relief for businesses, states, municipalities and tribes. The Paycheck Protection Program and expanded unemployment insurance benefits are two of the most important aspects of the CARES Act for employers.

1. Paycheck Protection Program

The Paycheck Protection Program is a loan program that originated from the CARES Act. It provides quick access to loans from the SBA for companies with 500 or fewer employees to assist with payroll and operating costs during short-term business disruption caused by COVID-19.

Companies can use the money for payroll costs, payments of interest on any mortgage obligation not including prepayments, rent, lease, or utility costs, as well as interest on any other debt obligations incurred before February 15, 2020. Sixty percent of the loan amount must be used for payroll costs.

Borrowers who receive their loan funds prior to June 5, 2020 may elect to have a "covered period" of 12 or 24 weeks. Depending upon the circumstances, borrowers may have an alternative covered period. If the PPP money is not spent during the covered period, it can be returned or paid back at the interest rate of 1% interest. If a borrower does not use the funds for the allowed purposes, the borrower will be directed to repay the misused amounts, and those amounts will not be forgiven.

Now that many employers have obtained and spent their PPP funds, they wish to know how to secure loan forgiveness. The CARES Act provides that borrowers who maintain their average monthly full-time employee equivalent (FTE) during the eight-week forgiveness period will be eligible for full forgiveness provided the employer has not reduced wages by more than 25% for those who earned less than $100,000 in 2019.

Companies should continue to check the Treasury Department's website and the IRS's website for updated guidance on documentation, reporting, and loan forgiveness. *See* https://home.treasury.gov/policy-issues/cares and https://www.irs.gov/coronavirus-tax-relief-and-economic-impact-payments for more information.

2. Unemployment Compensation

The CARES Act provides expanded unemployment insurance benefits for qualified individuals who are out of work due to COVID-19 through December 31, 2020 (an additional $600 per week in benefits was available only through the end of July 2020).

Qualifying reasons for expanded unemployment benefits:

i. You or someone in your home was diagnosed with COVID-19, or have symptoms and awaiting diagnosis;
ii. You're caring for a family member or someone in your home who has COVID-19;
iii. You're caring for a child whose school or childcare is closed because of COVID-19;
iv. You've been quarantined by a government body or medical professional;
v. You've lost your job or cannot reach your job because of COVID-19;
vi. You've become the main source of income for a household due to a death caused by COVID-19;
vii. You've quit your job because of COVID-19;
viii. Your workplace is closed because of COVID-19; or
ix. You were scheduled to start a new job but cannot because of COVID-19.

The expanded benefits also cover self-employed workers, independent contractors, gig economy workers, and individuals who have not worked long enough to qualify for other types of unemployment assistance. Note that employees cannot receive these benefits and benefits under the FFCRA at the same time.

III. A Myriad of Regulations and Guidance

The novel coronavirus has turned the legal world upside down. Many federal and state departments and agencies have published regulations and guidance to cope with new issues arising from COVID-19. While the information below is not, by any means, an exhaustive list of agencies with published regulations and guidance, it is a helpful starting point of reference.

A. Department of Labor – Fair Labor Standards Act

- https://www.dol.gov/coronavirus

B. Equal Employment Opportunity Commission

- https://www.eeoc.gov/coronavirus

C. Occupational Health and Safety Administration

- https://www.osha.gov/SLTC/covid-19/

D. Center for Disease Control

- https://www.cdc.gov/coronavirus/2019-nCoV/index.html

E. Virginia Department of Health

- https://www.vdh.virginia.gov/coronavirus/#COVID-19-resources

F. New Virginia Department of Labor and Industry Regulations[1]

- https://www.doli.virginia.gov/wp-content/uploads/2020/07/COVID-19-Emergency-Temporary-Standard-FOR-PUBLIC-DISTRIBUTION-FINAL-7.17.2020.pdf

Virginia's Emergency Temporary Standard ("ETS") was published on July 15, 2020. As of the time of this outline, the final text of the standard was being finalized and will be published in the Richmond Times the week of July 27. The ETS classifies industries and jobs as having a High, Medium, or Low risk of exposing workers to COVID-19. Some of the specific steps an employer must take depends upon this classification.

One of the controversial issues before the Virginia Department of Labor was whether an employer would be in compliance with many of the new Virginia rules if it complied with the voluntary guidelines issued by the Federal CDC. According to published reports, this provision was approved after Virginia regulators confirmed that employers would only be in compliance if they, in fact, followed the applicable CDC guidance. Further guidance on the specifics of this provision is anticipated.

Among the well-publicized rules is a new requirement that if a worker tests positive, a business must notify "all employees within 24 hours." Employers must not reveal the person's name. Only persons who were in "close contact" with the person who tested positive or is suspected to be positive, are required to self-isolate. There are varying definitions of "close contact." As general matter, it means being within 6 feet of the person for a "prolonged period" (at least 10 minutes).

In addition, employees known or suspected to be positive cannot return to work for 10 days or until they receive two consecutive negative tests.

The EST mandates several steps that many employers have already implemented. This includes items such as providing personal protective equipment (PPE), sanitation, social distancing, face coverings for employees in customer-facing positions or when social distancing is not possible, frequent access to hand washing or hand sanitizer, and regular cleaning of high-contact surfaces.

Once the ETS takes effect (see above—anticipated to be sometime during the week of July 27), covered employers have 30 days to train employees on the new standards.

[1] The presenters thank Gentry Locke attorney Todd Leeson for providing the excellent summary of Virginia's Emergency Temporary Standard.

In addition, employers will be given 60 days from the effective date to develop and train employees on the employer's infectious disease preparedness and response plan.

As you will see in the DOLI link, VOSH is developing training and outreach products to help employers comply with the new rules. Importantly, VOSH will be publishing PowerPoint presentations for these training requirements and sample plans with different versions for different industries

IV. Post-Pandemic Return to Work: The New Normal

A. Employees who do not want to return to work.

Generally, employers do not have to allow employees to work from home. Simply because an employee has unfounded fears of returning to work does not make the employee eligible for FFCRA leave or unemployment compensation. However, if the employee is considered "vulnerable" the employee may have a good argument for staying home and may be eligible for the leave. The employer must engage in the same analysis as with any disability under the Americans with Disabilities Act. Employer and employee should engage in the interactive process to determine how best to accommodate the employee without undue hardship to the company.

Retaliation is prohibited in any case. Companies may not retaliate against employees for requesting to stay home or for attempting to exercise their rights under the FFCRA.

B. Employee refuses to wear a mask in the workplace.

Unless an employer is required to *provide* a mask or personal protective equipment to employees, generally an employee does not have the right to refuse to work without a mask. Employers may require employees and customers to wear masks. The CDC recommends that all individuals wear cloth face coverings in public, and Virginia has a similar requirement.

The EEOC's guidance on the subject provides that employers may require employees to wear personal protective equipment, including masks and gloves, during a pandemic. However, employers must use the interactive process to find a reasonable accommodation for an employee who claims that he/she cannot wear a mask. An employer should not require an employee to wear a mask if doing so would pose an undue hardship or direct threat to the employee's health. This is a fact-specific inquiry and should be done one-on-one with the employee so as not to violate HIPAA laws. Employers should be certain to comply with OSHA's guidance face coverings or PPE and stay abreast of any developments. See the above link for information from OSHA.

C. Best Practices/Suggestions

1. Cleaning and disinfecting

The CDC has issued guidance for cleaning and disinfecting public areas including workplaces, business, schools, homes, and other areas. That guidance is updated periodically and can be found here: https://www.cdc.gov/coronavirus/2019-ncov/community/clean-disinfect/index.html.

2. Adapting the workplace depending upon your circumstances

Each workplace is unique, and a one-size-fits-all approach is not recommended. For example, a law office's return-to-work protocol may be vastly different from the protocol implemented by a manufacturing company. However, some general recommendations to consider include:

- Staggering employees' return so some employees work Monday-Wednesday-Friday and others work Tuesday-Thursday. Alternate every other week.
- Require employees to drive separately if required to travel for work so individuals are not sitting together in a confined space for a period of time.
- Conduct remote meetings via Zoom, GoToMeeting, or some other platform as much as possible.
- Make sure seating in break areas is spaced so that employees will be at least 6 feet apart.
- Create a daily certification form where employee must certify that they do not have a fever or other symptoms of COVID-19, have not been exposed to individuals with COVID-19, have not traveled to a "hot spot," etc.
- Provide hand washing stations or hand sanitizers where possible.
- If employees share tools or equipment, make sure the equipment is cleaned between employees' use.

As stated above, the guidance on workplace safety continues to evolve based upon additional information learned about COVID-19. Employers should stay vigilant and check the above links often for updated information.

3. Dealing with a positive COVID-19 test

We suggest following these steps when dealing with a positive test in the workplace:

a. Isolate the confirmed employee. The infected individual should remain home until released by a physician.

b. Communicate with the employee to determine the employee's "footprint." Interview the employee to determine who he/she has been in contact with, who the employee works in close proximity with, where the employee has been in the workplace, and what he/she has touched/interacted with prior to the positive test. If other employees have come into contact with the infected individual, those employees may need to be quarantined at home for fourteen days.

c. Employer should be certain to thoroughly clean and disinfect all areas touched by the infected employee. It is recommended to have a professional cleaning service perform this function, at least initially.

d. Notify all employees who work in the location or surrounding area where the infected employee works. Do not reveal the infected employee's name, but let the other individuals know what the Company has done to clean and mitigate any risk of infection.

4. Social and/or Business Travel

Many employers have questioned how to handle social or business travel. While companies can control whether their employees travel for work, they cannot control where employee choose to travel on their personal time.

As it relates to vacations and travel, the details of the situation are important. These are factually specific inquiries and there are not bright lines/firm rules for each circumstance. For example, what is a hot spot today, may not be next week.

Some companies want to require a COVID-19 test before employees return to work from vacation. However, this may not make a lot of sense when an employee is asymptomatic. Studies have shown that there is a fourteen-day incubation period and, therefore, requiring testing before symptoms does not provide the employer much information, other than to show that on the day the sample was taken, the virus was not detectible. Nonetheless, it is yet another measure to try to protect the workforce and to make employees feel more secure. There is currently no legal requirement to have an employee quarantine if he or she travels to a hot spot. Thus, it is a business decision.

A more difficult area of analysis relates to whether or not employers have to pay an employee who is being required to quarantine when returning from vacationing in a hot spot location. The the FFCRA sick pay requires a person to be unable to work. If they can telework then they are not eligible for the FFCRA paid leave. If they cannot telework, then the eligibility depends on specific circumstances. Employers must evaluate the different qualifying reasons for leave that must be related to COVID-19. If the employee does not qualify for FFCRA, then he or she is not entitled to be paid during the quarantine period. The employer has the option of permitting the individual to use accrued paid time off, but this is up to the company. Whether the employee would be eligible for unemployment compensation during this period is up to the Virginia

Employment Commission (or the employment commission of the state in which the employee works).

5. Contact counsel

When in doubt, employers should not attempt to navigate these issues alone. Contacting employment counsel is the safest way to ensure that companies are in compliance with the various regulations and updated guidance.

Ethical and Practical Issues in Criminal Defense: Navigating *Giglio* & Allegations of Official Misconduct.

Presented by:

Jenny S. Degraw

degraw@gentrylocke.com

Erin M. Harrigan

harrigan@gentrylocke.com

Ethical & Practical Issues in Criminal Defense:
Navigating Giglio & Allegations of Official Misconduct

Erin Harrigan
Jennifer DeGraw
Gentry Locke Seminar - September 11, 2020

I. Introduction

In the last ten years, a case that dates back to 1972 reshaped the dynamic of criminal prosecutions and gradually made its way into the everyday lexicon of judges, prosecutors, law enforcement officers, and criminal defense attorneys: *Giglio v. United States*, 405 U.S. 150 (1972). What was originally just an extension of the landmark Supreme Court decision in *Brady v. Maryland* has transformed into a cornerstone of criminal practice, and, like *Miranda* before it, "Giglio" has now become a verb, adjective, noun as it describes a critical element in preparing a case for trial, or finding fault after a conviction. Increasingly, it has become the basis for impeaching police officers on the witness stand, and providing critical context for trials as police misconduct comes to the fore.

In this presentation, we will explore the challenges in identifying *Giglio* information about official witnesses, the ethical obligations of prosecutors to find and disclose that information, and the ethical obligations of criminal defense attorneys who believe they have uncovered misconduct – either by law enforcement or by prosecutors complicit in concealing police misconduct. Finally, we hope to provide a framework for criminal defense attorneys to set expectations for *Giglio* disclosures in each criminal case, and provide a vehicle for ethically raising the alarm about potential misconduct.

II. *Brady & Giglio* Refresher: Where It All Began

A. *Brady v. Maryland,* 373 U.S. 83 (1963): Exculpatory Evidence

1. Landmark US Supreme Court case established prosecution's obligation to disclose exculpatory evidence to the defense.
2. Withholding exculpatory evidence violates due process where the evidence is material either to guilt or to punishment.

B. *Giglio v. United States*, 405 U.S. 150 (1972): Impeachment of Informant

1. Extended *Brady* to require prosecution to disclose impeachment evidence for any prosecution witness (informants, law enforcement, etc.).
2. Important Note**:** Prosecutor need not have ***actual knowledge*** – knowledge imputed from prosecution team. Good faith/bad faith – doesn't matter.
3. Surge of *Giglio* focus in last decade results from caselaw that established what qualifies as "impeachment material."

C. *Kyles v. Whitley*, 514 U.S. 419 (1995): Impeachment of Police Witnesses

1. Finding several pieces of undisclosed evidence would have been important to impeach the investigation of the police, the reliability of the police witnesses, and their credibility.
2. "The defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence," particularly in whether they had seriously considered another person as a suspect in the murder.

III. Consequences for Failure to Disclose *Brady*/*Giglio*

A. *Wearry v. Cain*, 136 S. Ct. 1002 (2016): Murder conviction/death penalty reversed.

1. Prosecution's case relied on two eyewitness accounts.
2. ***AFTER*** conviction and sentencing – discovery of significant *Brady* and *Giglio* evidence had not been disclosed:
   a. Consideration/promises for leniency extended to a witness.
   b. Another witness giving impossible account of crime, accomplice "running, bending, lifting, and crawling" though accomplice just had knee surgery.
   c. Incarcerated informant's attempt to manipulate other witnesses into giving incriminating statements.

B. *Wolfe v. Clarke*, 718 F.3d 277 (4th Cir. 2013): Murder conviction/death penalty reversed.

1. Prosecution's key witness revealed that police strong-armed him into testifying and fed him information about the case.
2. Court found Commonwealth's use of witness' false testimony was grounds for habeas relief under both *Stockton v. Virginia* and *Giglio v. United States*.

IV. Focusing *Giglio's* Attention on Law Enforcement

A. *Milke v. Ryan,* 711 F.3d 998 (9th Cir. 2013): ***The Perfect Giglio Storm***

1. "The *only* evidence linking Milke to the murder of her son is the word of Detective Armando Saldate, Jr.—a police officer with a long history of misconduct that includes lying under oath as well as accepting sexual favors in exchange for leniency and lying about it." (Concurring Opinion)
2. "Swearing contest" between defendant and officer about what was said during a confession.
3. Prosecution did not disclose the following about the officer:
    a. Allegation, reported to supervisors, that he pulled a woman over for a traffic violation, leaned into the car and sexually assaulted her, and directed her to meet him someplace secluded to engage in sex, in exchange for not giving a ticket.
        i. Supervisors found he lied during investigation of this incident.
    b. Three different court orders finding he lied under oath.
    c. Four different court orders finding he violated Fifth Amendment and Fourth Amendment rights of defendants during interrogations.
4. "The state is charged with the knowledge that there was impeachment material in Saldate's personnel file."
    a. "The prosecutor's office no doubt knew of this misconduct because it had harmed criminal prosecutions. The police must have known, too."
5. "Even if there somehow weren't actual knowledge of Saldate's misconduct, inadvertent failure to disclose is enough for a *Brady* violation. That the court documents showing Saldate's misconduct were available in the public record doesn't diminish the state's obligation to produce them under *Brady*."

V. The "Prosecution Team:" *Giglio* Applied to Official Witnesses

A. *Kyles v. Whitley*, 514 U.S. 419, 432 (1995):

1. "A prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf, including the police."

B. Who is on the prosecution team?

1. Section 9-5.001 of the US Attorneys' Manual:
    a. "Prosecution team" includes "federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant."

C. Who is ***not*** on the prosecution team?

1. *United States v. Taylor,* 942 F.3d 205, 225 (4th Cir. 2019):

a. Separate federal agency, not involved in current investigation, paired with a different AUSA? No.

b. Imputing such knowledge would require the court "to stretch *Brady* beyond its scope and would effectively impose a duty on prosecutors to learn of any favorable evidence known by *any* government agent."

D. Who ***<u>might</u>*** be on the prosecution team?

1. Subdivisions of the same parent agency? For example:

a. US Dept. of Health & Human Services – FDA & CDC?

b. US Dept. of Homeland Security – CBP & ICE-ERO? Secret Service & TSA?

c. US Dept. of Justice – DEA & FBI? ATF & USMS?

2. Does participation of one subdivision of an agency obligate other divisions of the parent agency to participate in criminal discovery?

a. Fourth Circuit: No decision yet.

b. Three other circuits: No requirement to produce information possessed by a separate subdivision of a participating agency when (1) it had no part in the criminal investigation or (2) when the prosecution had no control over the agency officials who physically possessed the documents.

i. *United States v. Pelullo,* 399 F.3d 197, 216-18 (3d Cir. 2005).

- Separate agency unit within the same parent agency where not "engaged in a joint investigation or otherwise shared labor and resources."

ii. *United States v. Casas,* 356 F.3d 104, 116 (1st Cir. 2004).

iii. *United States v. Morris,* 80 F.3d 1151, 1169-70 (7th Cir. 1996).

VI. <u>Ethical Obligations Under *Giglio* for Prosecutors</u>

A. Virginia Rules of Professional Conduct, Rule 3.8(d): A prosecutor shall --

> (d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court.

B. Ethical obligation is "disclosure" of *Giglio* material – key question: how does the prosecutor get the information to "disclose"?

1. When it comes to official witnesses, prosecutors usually do ***<u>not</u>*** have this information.
2. Potential sources of *Giglio* material for official witnesses:
    a. Sustained complaints made to an agency
    b. Personnel actions/internal investigations of alleged misconduct
    c. Social media posts reflecting on bias or lack of professionalism
    d. Public criminal records of officers
    e. Court opinions/decisions impacting officer's credibility

C. Duty to investigate or duty to inquire?

1. Knowledge means "actual knowledge," which "may be inferred from [the] circumstances."
    a. Although a lawyer cannot ignore the obvious, Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.
2. VA Supreme Court ***<u>rejected</u>*** "haystack" interpretation, by declining to adopt a proposed "Comment 5" to Rule 3.8, and thereby refused to impose an affirmative obligation to identify exculpatory information in discovery disclosures. (Order of the Virginia Supreme Court, dated October 24, 2019, available at http://www.courts.state.va.us/courts/scv/amendments/part_six_sect_ii_rule_3_8_cmt_5.pdf).
    a. This strongly suggests the prosecutor does not have an affirmative duty to investigate official witnesses for possible misconduct, and can meet ethical obligations by making a diligent inquiry.
    b. The bottom line: prosecutors can take law enforcement "at their word," and satisfy their ethical obligations – this is not prosecutorial misconduct.

D. Timing of disclosures:

1. VA Legal Ethics Op. 1862 (July 23, 2012):
    a. Rule 3.8(d) requires ***<u>earlier</u>*** disclosure than *Brady/Giglio* standard.

b. So, "timely disclosure" under Rule 3.8(d) means "one that is made as soon as practicable considering all the facts and circumstances of the case."

c. Violation: Intentional delays making the disclosure, "without lawful justification or good cause."

   i. What is "good cause" -- Witness safety? Privacy concerns?

   ii. *Ex parte* rulings supporting delay are the most protective course of action.

2. ABA Standing Committee on Ethics & Prof'l Responsibility, Formal Op. 09-454 (July 8, 2009):

   a. "[E]arly enough that the information can be used effectively."

   b. "Once known to the prosecutor must be disclosed" "as soon as reasonably practical."

   c. Defense may need to be able to use evidence "prior to trial" to investigate or determine defense strategy or decide how to plead.

   d. "[P]rior to a guilty plea proceeding."

E. Discovery of Information after Conviction

1. Ethical obligations of the prosecutor may still require turning over *Brady/Giglio* evidence that casts doubt on a conviction.

   a. *Imbler v. Pachtman*, 424 U.S. 409, 427, fn. 25 (1976): A prosecutor is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.

2. Evidence discovered ***after*** conviction and sentencing can be raised in habeas litigation, actual innocence petitions, and under standards for "newly discovered evidence."

3. Misconduct by officer discovered after guilty plea can render defendant's plea involuntary where the defendant demonstrates that there was a reasonable probability that he would not have pled guilty had he been aware of the misconduct.

   a. *United States v. Fisher*, 711 F.3d 460, 462 (4th Cir. 2013): The law enforcement officer responsible for the investigation that led to the defendant's arrest and guilty plea himself later pled guilty to having defrauded the justice system in connection with his duties as an officer. Specifically, the officer admitted to having lied in his sworn affidavit that underpinned the search warrant for the defendant's residence and vehicle, where evidence forming the basis of the charge to which defendant pled guilty was found.

      i. Defendant showed that there was a reasonable probability that he would not have plead guilty, had he known of the impermissible conduct by the officer. The Court agreed with defendant's contention that the officer's deliberate misrepresentation underpinned the entire case against him and induced his guilty plea, thereby rendering his plea involuntary.

VII. Police Misconduct, Privacy Rights, and Prosecutorial Ethics: What to Expect When You're Expecting *Giglio* Disclosures

A. *IMPORTANT PRACTICE NOTE:* A *Brady/Giglio* violation that requires reversal of a conviction does ***not*** necessarily rise to the level of an ethical violation for the prosecutor.

B. Practically, what are prosecutors able to obtain in the first place?

1. Personnel records are not necessarily the same as internal affairs files.
2. Complaints can be "formal" or "informal," "written" or "oral."
3. Discipline can be "formal" or "informal," "written" or "oral."
4. What is the records retention policy of the agency? What are the rules about what can be disclosed?
5. County/city attorneys advising law enforcement agencies – may have ***no*** experience with *Brady/Giglio*/criminal prosecutions.

C. Consider these examples:

1. *United States v. McClellon*, 260 F. Supp. 3d 880 (E.D. Mich. 2017):
   a. Arresting officer suspended the day after his trial testimony for making false reports of felony charges for weapons offenses, and criminally charged one year later in 2015.
      i. Of course, this is a weapons offense case….
   b. Impeachment information on officer would have had "devastating impact" – only one who saw defendant throw weapon from waistband in pursuit.
   c. April 2016 *Giglio* request from prosecutor to Detroit Police Department: ***Officer's "disciplinary records were clear."***
      i. HOW? Internal investigations are confidential and not disclosed to disciplinary administration.
      ii. Large agency – "records department" is centralized.
   d. Result: Conviction reversed, as "undisclosed information undermines confidence in the jury's verdict," and ordered new trial.
2. *United States v. Shade Workman,* WDVA 1:18CR00020 (2019):
   a. Virginia State Police, Tazewell HIDTA (drug task force) team leader.
   b. Arrested federally in August 2018 for extorting sexual favors from female drug informants.
      i. Incidents occurring with active DTF informants from May 2016 to March 2018.
      ii. "You have sex with me, I'll get you home to your children. You have sex with me, I'll get your boyfriend out of jail."

iii. In another instance when an informant wavered about having a relationship with Workman, she had testified that he told her that she could go back to jail and "be away from your children."

c. Convicted of bribery, obstruction, and making false statements to the FBI (2 years in prison)

d. ***Most Critical Fact:*** VSP Internal Affairs conducted an investigation into these **same** allegations, and concluded they were "unfounded," **without ever interviewing the female informant about them**.

3. *Jason Norton,* Richmond City Police Department, 2008-2013 (Report in 2020):

a. Detective manufactured a confidential informant, and used that fake informant as the basis of information in search warrants.

i. Discovered by federal agents/prosecutors.

b. Led to review of every case he touched to determine whether there was in "independent basis" for search warrant/charges once false information was parsed out, several dismissed.

i. *https://www.richmond.com/news/local/crime/wake-of-former-richmond-police-detectives-conduct-still-wide-and-unsettled/article_b53214a9-c717-5d0e-af57-57ae138bf3f8.html*

c. Special prosecutor declined prosecution of Norton in June 2020.

i. Based almost entirely on poor record-keeping by Norton, and:

ii. "Complete absence of accurate record-keeping" by many in RPD, and "culture within division" of signing they had witnessed informant payments when they had not.

iii. ***No*** oversight or audit of compliance.

iv. *https://richmond.com/news/local/crime/special-prosecutor-declines-charges-against-former-richmond-detective-citing-missing-documents/article_5e29b79d-201f-52bf-9c1f-a88993effc2c.html*

D. Quick internet search for the last two years reveals these criminal charges:

1. *Fauquier Sheriff's Deputy, July 2020, Fauquier:* False police report of roadside assault, while on duty.

2. *Virginia State Trooper, June 2020, Fairfax:* Resigns after text message that he intentionally coughed on Mennonite man in the hopes of spreading COVID-19, based on statements he had specific distaste for Mennonites.

3. *Franklin City Police Officer, June 2020:* Sexual battery and strangulation (off-duty).

4. *Virginia Beach Police Officer, April 2020:* Domestic assault.

5. *Virginia Beach Police Officer, January 2020:* Trespassing and assault, occurring in multiple events over six months.

6. *Prince William Police Officer, July 2019:* Computer invasion of privacy, for misusing law enforcement database for personal use.
7. *Virginia State Trooper, July 2019, Norfolk:* 16 charges of misusing background checks for personal use.
8. *Amherst Police Officer, May 2019 (Multi):* Computer harassment, computer invasion of privacy, sharing image of another, felony interception of wire communication.
9. *Virginia State Trooper, April 2019, Allegheny County:* Child pornography charges.
10. *Chesterfield Police Officer, March 2019, Chesterfield County:* Solicitation of sex with a minor.

E. How does an ethical prosecutor obtain this information? Some approaches:

1. Brady Lists/Blacklists: Rising Trend
    a. Police departments/prosecutors keep a list of officers with substantiated complaints against them.
    b. Tension between ***employment law/personnel file privacy*** and disclosure obligations.
        i. When does the department need to disclose a complaint to the prosecutor? When it comes in? When it is resolved?
    c. State laws vary regarding what information is protected and private, and what is subject to ***public*** disclosure.
        i. In 23 states, police disciplinary records are confidential.
        ii. In 15 states, police disciplinary records are available in limited circumstances, like suspensions and terminations, for example.
        iii. In 12 states, police disciplinary records are public. However, unsubstantiated complaints and active investigations are usually still confidential in these states.
    d. ***Challenge is making agencies understand the difference – disclosure to prosecutor is not equal to public disclosure.***
2. New Hanover County District Attorney, July 6, 2020:
    a. "*Giglio* Committee" formed in 2013.
        i. Modeled after Charlotte, NC.
        ii. Three senior prosecutors.
        iii. Reviews police video footage, current case files, internal affairs files.
    b. Confidential list: officers whose conduct "impairs" their testimony.
        i. Doesn't necessarily prevent testimony – just allows cross-examination on cause of "impairment."
        ii. Cannot be disclosed because of NC personnel laws.

c. "Death Letter:" Permanently barring testimony in court for the prosecution in the county.

d. Racist comments about citizens, police chief, magistrate, fellow officers – leads to "death letter" for three Wilmington, NC officers.

i. Dismissal of more than 70 cases.

3. Baltimore: 20 city police officers charged in 2019, and top prosecutor has a list of more than 300 officers with "credibility issues."

VIII. Ethical Responsibilities of Criminal Defense Attorneys in Pursuing Allegations of Prosecutorial Misconduct

A. Sometimes, the prosecutor ***is guilty*** of professional misconduct (*US Department of Justice, Office of Professional Responsibility):*

1. 2017 OPR Investigative Summary:

a. Federal court of appeals reversed convictions because:

i. Government suppressed impeachment evidence.

ii. Federal prosecutors made misrepresentations to the trial court regarding the evidence and either sponsored false testimony at trial or failed to correct the false testimony.

b. OPR conducts investigation and concludes federal prosecutor committed six discrete acts of professional misconduct in violation of both DOJ and state bar ethics rules.

2. 2016 OPR Investigative Summary:

a. Federal prosecutor intentionally lied to the trial court to cover up a *Brady/Giglio* violation, specifically that a cooperating co-defendant had been promised a favorable sentencing recommendation in exchange for cooperation in different, ongoing investigation.

b. OPR conducts investigation and concludes federal prosecutor committed eight discrete acts of professional misconduct in violation of both DOJ and state bar ethics rules.

3. 2020 OPR Investigative Summary:

a. Federal prosecutor intentionally concealed "close personal relationship" with a witness in a drug prosecution from supervisors, district court, and defendants.

b. Review of text messages and emails established relationship, and showed federal prosecutor disclosed "confidential information" to the witness in violation of professional responsibilities and obligations to client (US government).

c. OPR conducts investigation and concludes federal prosecutor violated four different rules of professional conduct under the state bar ethics rules.

B. So, what can a defense attorney do if they suspect the prosecutor of actively participating in or concealing *Giglio* violations?

1. Virginia Rules of Professional Conduct, Rule 8.3(a):

> "A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority."

2. Responsibly raising the alarm to the court about missing *Giglio* information means distinguishing between intentional actions and mistakes.

    a. Virginia Legal Ethics Opinion 1308:

    i. A lawyer reporting another lawyer's misconduct must make the report "in concert with factual ***<u>determinations and an analysis</u>*** of the impact on the offending lawyer's fitness to practice law."

    ii. No frivolous statements tossed into argument, or intimations in written pleadings.

    b. *United States v. Agurs*, 427 U.S. 97, 110 (1976):

    i. Under *Brady/Giglio,* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment.

    ii. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

    c. *Strickler v. Greene*, 527 U.S. 263, 282 (1999):

    i. Suppression under *Brady/Giglio* can be either a willful or inadvertent failure to disclose favorable evidence.

3. Ask for a court hearing to air concerns before the judge, and present the facts for the court to weigh in.

C. The best defense is a good offense: Create an atmosphere for success early in the criminal justice process.

1. Seek a court order on "exculpatory evidence" that declares who is on the prosecution team, and orders the production of potential impeachment material under *Brady/Giglio.*

2. Ask court to set a disclosure deadline for any *Giglio* material.

3. Identify a list of official witnesses from discovery materials.

    a. Research news stories.

    b. Search VA Court Records.

    c. Conduct social media checks.

    d. Internet searches for their names.

Practicing Law in a Brave New World

7

Achieving and Maintaining Wellness for Lawyers

Presented by:

Ted Polverino, Carilion

polverino@comcast.net

Roanoke | Lynchburg | Richmond | gentrylocke.com

Achieving and Maintaining Wellness for Lawyers

By Edwin J. Polverino, D.O., Carillion Clinic
Gentry Locke Seminar – September 11, 2020

I. Introduction

Health and wellness is a lifelong pursuit. And the legal profession presents its own special challenges to wellness. Lawyers have high-pressure jobs. For example, hours can be long and unpredictable. Clients depend on lawyers to help with their most pressing problems, typically in an adversarial setting. When the stakes are high, so too is the stress.

In recent years, bar associations and courts have shone a spotlight on the importance of lawyer well-being. In 2016, the National Task Force on Lawyer Well-Being (the "Task Force") was formed.[1] In August 2017, the Task Force released *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* with the participation of a number of bar associations and groups.[2] It contains 44 specific recommendations for lawyers.[3]

The Task Force defined lawyer well-being "as a continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections with others." Three reasons supported this national call to action: lawyer well-being (1) contributes to organizational success, (2) influences ethics and professionalism, and (3) is just important and the right thing to do.

Chief Justice Donald W. Lemons of the Supreme Court of Virginia is a member of the Task Force. After the report's release, he appointed a 25-member committee to review it, examine existing programs and procedures in Virginia, and recommend

---

[1] https://lawyerwellbeing.net/.

[2] ABA CoLAP; ABA Standing Committee on Professionalism; ABA Center for Professional Responsibility; ABA Young Lawyers Division; ABA Law Practice Division Attorney Wellbeing Committee; The National Organization of Bar Counsel; Association of Professional Responsibility Lawyers; National Conference of Chief Justices; and National Conference of Bar Examiners.

[3] *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* is available at https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf.

improvements. In 2018, the Committee on Lawyer Well-Being of the Supreme Court of Virginia issued its own report, titled *A Profession at Risk*.[4]

The importance of wellness—and the challenges in attaining it—has only been heightened with the coronavirus pandemic. We are more isolated, with more burdens, and more stress and anxiety.

This presentation focuses on wellness, specifically how lawyers can help achieve better balance and health in their lives.

II. Particular Risks for Lawyers

A Profession at Risk attached a number of exhibits, including a "Health Matrix of Occupational Risks to Lawyer Well-being"[5] The catalog of risks included:

- The sedentary nature of work;
- Long hours;
- Unusual hours;
- Managing others' problems;
- Adversarial nature of work;
- The need to achieve and display confidence; and
- Demands of clients and courts.

III. What is Wellness?

Wellness is a balance of health, across the different dimensions of our lives. I consider there to be three general aspects of health: (1) emotional health; (2) professional health; and (3) physical health. Below is an illustration a wellness:

[4] *A Profession at Risk* is available at http://www.courts.state.va.us/programs/concluded/clw/2018_0921_final_report.pdf.

[5] Appendix Exhibit 8 to *A Profession at Risk* and attached as **Exhibit 1** here.

Wellness is a balance of health

CAREER/INCOME/WORK | PHYSICAL HEALTH | FAMILY/FREE TIME

PROFESSIONAL HEALTH | | EMOTIONAL HEALTH

But things can easily get out of balance:

HEALTH

FAMILY/FREE TIME

EMOTIONAL HEALTH

CAREER/INCOME/WORK

PROFESSIONAL HEALTH

IV. Stress

Stress—particularly long-term stress—detrimentally affects wellness. Stress is a feeling of tension, be it emotional or physical, a reaction to a challenge or demand. Jobs, stringent work demands, and financial pressure are often a source of stress. Our personal/family lives cause stress as well; for example, in our relationships. And physical activities can be a source of stress too.

Stress can lead to burn-out, whether with work or in our personal relationships. Stress also increases the risk of abusing alcohol or drugs.

V. Keys to Health

<u>Emotional Health</u>

- Manage stress.
- Prevent the negative impact of alcohol or drugs.
- Obtain 7-8 hours of sleep per night.
- Maintain a healthy weight.
- Exercise regularly.
- Prioritize family, relationships, and "free time."

<u>Professional Health</u>

- It starts with many of the same keys to emotional health—managing stress, prevent the negative impact of substances, get good sleep, exercise, etc.
- Set limits and boundaries at work.
- Do a realistic financial review.

<u>Physical Health</u>

- Again, it starts with the same keys to emotional health.
- Balance your time.
- Be proactive with your health screening.
    - The U.S. Preventative Services Task Force systematically reviews the evidence of effectiveness and develops recommendations for clinical preventive services.

- These are published/updated on its website: https://www.uspreventiveservicestaskforce.org/uspstf/recommendation-topics

- For example, the current list of "A" and "B" grade recommendations is attached as **Exhibit 2**, and is available at https://www.uspreventiveservicestaskforce.org/uspstf/recommendation-topics/uspstf-and-b-recommendations. These are services that the Task Force most highly recommends implementing for preventive care, as having a high or moderate net benefit for patients.

- The CDC publishes (and updates) a list of recommended adult immunization schedules.

  - The current list is attached as **Exhibit 3** and is available at https://www.cdc.gov/vaccines/schedules/hcp/imz/adult.html

8

2020 Bills of Interest: Passed or Considered by the 2020 Session of the General Assembly of Virginia.

Presented by:

Greg D. Habeeb

habeeb@gentrylocke.com

Chip G. Dicks

chipdicks@gentrylocke.com

Matthew S. Moran

moran@gentrylocke.com

GENTRY LOCKE
Attorneys

Roanoke | Lynchburg | Richmond | gentrylocke.com

2020 Bills of Interest

Passed or Considered by the 2020 Session of the
General Assembly of Virginia

Gregory D. Habeeb
John G. (Chip) Dicks
Matthew Moran
Gentry Locke Seminar - September 11, 2020

2020 Bills of Interest

Tort Law .... page 2

Medical Malpractice .... page 9

Criminal Law .... page 13

Insurance Law .... page 36

Workers' Compensation .... page 40

Consumer .... page 44

Judicial Administration .... page 51

Domestic Relations / Family Law .... page 54

General Practice .... page 60

Long Term Care .... page 62

Employment .... page 65

Product Liability .... page 73

The final disposition of the bills are presumed accurate as of March 15, 2020. If you have a question regarding the status of legislative action of the 2020 Acts of the General Assembly, please visit http://leg1.state.va.us/lis.htm.

2020 VTLA BILLS OF INTEREST

TORT LAW

– PASSED –

HB 651 **Recoupment.** Specifies what actions qualify for statutory recoupment to include all defenses arising out of the transaction, whether such defenses are in law or equity.

HB 764 **Domesticated animal premises; liability for transmission of domesticated animal pathogen.** Provides that no owner or operator of a domesticated animal premises, defined in the bill, shall be liable for damages arising from a claim by a person visiting such premises alleging injury or death caused by a domesticated animal pathogen if the owner or operator took reasonable precautions to prevent the transmission of such pathogen. The bill also requires the posting of a warning sign and the provision of a hand-washing station at the premises and provides that liability may arise if the person proves that no warning sign was posted or hand-washing station provided as required. The provision of the bill protecting the owner or operator from liability shall not apply if the transmission of the pathogen was due to the owner's or operator's gross negligence, willful and wanton conduct, or intentional act.

HB 781 **Accrual of cause of action; diagnoses of nonmalignant and malignant asbestos-related injury.** Provides that a diagnosis of a nonmalignant asbestos-related injury or disease shall not accrue an action based upon the subsequent diagnosis of a malignant asbestos-related injury or disease and that such subsequent diagnosis shall constitute a separate injury that shall accrue an action when such diagnosis is first communicated to the person or his agent by a physician. The bill is intended to reverse *Kiser v. A.W. Chesteron*, 285 Va. 12 (2013). This bill is identical to SB 661.

HB 792 **Appeals of right in general district court; order or judgment altering prior final orders.** Provides that there shall be an appeal of right to a court of record from any order entered or judgment rendered in a general district court that alters, amends, overturns, or vacates any prior final order. The bill further provides that, if any party timely notices such an appeal, such notice of appeal shall be deemed a timely noticed of appeal by any other party on a final order or judgment entered in the same or a related action arising from the same conduct, transaction, or occurrence as the underlying action. As introduced, the bill was a recommendation of the Boyd-Graves Conference. This bill is identical to SB 545.

HB 819 **Real estate settlements; kickbacks and other payments; remedies; penalties.** Relocates from Chapter 9 (Real Estate Settlements) to Chapter 10 (Real Estate Settlement Agents) within Title 55.1 the existing provision that prohibits persons from paying or receiving a kickback, rebate, commission, thing of value, or other payment pursuant to an agreement to refer business incident to a settlement. This relocation authorizes the State Corporation Commission to impose penalties, issue injunctions, and require restitution in cases where a person who does not hold a license from the appropriate licensing authority has violated the provision. The measure also adds to Chapter 10 of Title 55.1 provisions that (i) authorize a court to assess civil penalties of not more than $5,000 per violation of the chapter and (ii) authorize the recovery of costs

and reasonable expenses and attorney fees.
acts

HB 870 **Statute of limitations; sexual abuse.** Provides that, for a cause of action accruing on or after July 1, 2020, every action for injury to the person resulting from sexual abuse shall be brought within 10 years after the cause of action accrues. This bill does not change the current 20-year statute of limitations for actions for injury to the person resulting from sexual abuse that occurred during the infancy or incapacity of such person.

HB 874 **Handheld personal communications devices; holding devices while driving a motor vehicle.** Prohibits any person from holding a handheld personal communications device while driving a motor vehicle. Current law prohibits (i) the reading of any email or text message and manually entering letters or text in such a device as a means of communicating and (ii) holding a personal communications device while driving in a work zone. The bill expands the exemptions to include handheld personal communications devices that are being held and used (a) as an amateur radio or a citizens band radio or (b) for official Department of Transportation or traffic incident management services. The bill has a delayed effective date of January 1, 2021. This bill is identical to SB 160.

HB 1066 **Signals; overtaking vehicle.** Removes the requirement that the driver of an overtaking vehicle use his lights or an audible method to signal to the driver of a slower vehicle to move to the right. The bill does not change the requirement that the slower-moving vehicle move to the right for an overtaking vehicle.

HB 1226 **Collection of debts by hospitals affiliated with public institutions of higher education.** Prohibits the Virginia Commonwealth University Health System Authority and the University of Virginia Medical Center from participating in debt collection efforts pursuant to the Virginia Debt Collection Act or the Setoff Debt Collection Act unless all reasonable efforts have been made to determine if the individual with delinquent debt is eligible for financial assistance. The bill requires both hospitals to develop debt collection policies that adhere, at a minimum, to Internal Revenue Service policies regarding financial assistance by tax-exempt hospitals as they were in effect on January 1, 2020.

HB 1359 **Jurisdiction of civil claims; amending amount of claim; concurrent jurisdiction.**
Provides that, while a matter is pending in a circuit court, upon motion of the plaintiff seeking to decrease the amount of the claim to within exclusive or concurrent jurisdiction of the general district court, the circuit court shall order transfer of the matter to the general district court having jurisdiction over the claim without requiring a dismissal of the claim or a nonsuit. The bill provides that the tolling of the applicable statutes of limitations governing the pending matter shall be unaffected by the transfer. 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 and requires 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.

HB 1378 **Signature defects on pleadings, motions, and other papers.** Clarifies that any pleading, motion, or other paper that is not properly signed is defective and voidable. The bill further provides that failure to timely raise signature defects waives any challenge based on such a defect, and that a signature defect shall be cured within 21 days after it is brought

to the attention of the pleader or movant, or the pleading, motion, or other paper that contains the signature defect shall be stricken. This bill is identical to SB 229.

HB 1705 **Pedestrians; drivers to stop when yielding the right-of-way.** Clarifies the duties of vehicle drivers to stop when yielding to pedestrians at (i) clearly marked crosswalks, whether at midblock or at the end of any block; (ii) any regular pedestrian crossing included in the prolongation of the lateral boundary lines of the adjacent sidewalk at the end of a block; or (iii) any intersection when the driver is approaching on a highway where the maximum speed limit is not more than 35 miles per hour. The bill contains technical amendments.

SB 24 **Agritourism activities; adds horseback riding or stabling to definition.** Adds horseback riding to the definition of "agritourism activity." Agritourism activities have limited liability for the inherent risks of the activity under certain conditions.

SB 401 **Immunity of persons at public hearing; attorney fees; costs.** Allows for the award of reasonable attorney fees and costs to any person who has a subpoena against him quashed in an action for statements made at a public hearing before the governing body of a locality or other local entity when he is immune from liability for such statements. Current law provides for the award of attorney fees and costs upon the dismissal of such an action.

SB 408 **Appeal from district court; civil cases; notice of docketing.** Provides that the clerk of the appellate court to which an order of protection is appealed shall have the parties served with notice of the appeal stating the date and time of the hearing and that such a hearing shall not take place unless the appellee has been served or has waived service.

SB 437 **Bicyclists and other vulnerable road users; penalty.** 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 a person operating a bicycle, electric wheel chair, electric bicycle, wheelchair, skateboard, skates, motorized skateboard or scooter, or animal-drawn vehicle or riding an animal, is guilty of a Class 1 misdemeanor. The bill also prohibits the driver of a motor vehicle from crossing into a bicycle lane to pass or attempt to pass another vehicle, except in certain circumstances.

SB 545 **Appeals of right in general district court; order or judgment altering prior final orders.** Provides that there shall be an appeal of right to a court of record from any order entered or judgment rendered in a general district court that alters, amends, overturns, or vacates any prior final order. The bill further provides that, if any party timely notices such an appeal, such notice of appeal shall be deemed a timely noticed of appeal by any other party on a final order or judgment entered in the same or a related action arising from the same conduct, transaction, or occurrence as the underlying action. This bill is identical to HB 792.

SB 658 **Contracts with design professionals; provisions requiring a duty to defend void.** Provides that any provision contained in any contract relating to the planning or design of a building, structure, or appurtenance thereto, including moving, demolition, or excavation connected therewith, or any provision contained in any contract relating to the planning or design of construction projects by which any party purports to impose a duty to defend on any other party to the contract, is against public policy and is void and unenforceable.

SB 693 **Common-law defense of intra-family immunity; abolished in certain cases.** Abolishes the common-law defense of intra-family

immunity for wrongful death actions that accrue on or after July 1, 2020.

SB 752 **Virginia Fraud Against Taxpayers Act; illegal gambling device.** Adds possession of an illegal gambling device and knowingly concealing, avoiding, or decreasing an obligation to pay or transmit money to the Commonwealth that is derived from the operation of such device to the list of violations for which a civil penalty may be assessed against a person who is found to have committed any such violation.

SB 771 **Interlocutory appeals; immunity.** Provides that, when the circuit court has entered in any pending civil action an order or decree that is not otherwise appealable, a party may file in such court a motion requesting that the court certify such order or decree for interlocutory appeal. The bill further provides that if such certification is opposed by any party the parties may brief the motion. Within 15 days of the entry of an order granting such certification, a petition for appeal may be filed with the appellate court having jurisdiction from a final judgment in the proceeding.
Current law specifies that such petition must be filed within 10 days of such certification. The bill further provides that when, prior to the commencement of trial, the circuit court has entered an order granting or denying a plea of sovereign, absolute, or qualified immunity that, if granted, would immunize the movant from compulsory participation in the proceeding, the order is eligible for immediate appellate review. The bill specifies that any person aggrieved by such order may file a petition for review with the appropriate appellate court. The bill provides that the failure of a party to seek interlocutory review shall not preclude review of the issue on appeal from a final order and that an order denying such review shall not preclude review of the issue on appeal from a final order.

TORT LAW

– CARRIED OVER –

HB 610 **Limitations period; previously time- barred actions; sexual abuse; two-year time period to file.** Creates a two-year time period, on or after July 1, 2020, but before July 1, 2022, within which persons previously time-barred from filing an action for injury to such person for sexual abuse occurring during the infancy or incapacity of such person due to the expiration of the statute of limitations may file such an action.

SB 285 **Intentional or negligent infliction of injury or death; bystander claims for emotional distress.** Provides that a bystander who witnesses, live and in-person, an event during which the intentional or negligent infliction of injury to or death of a victim occurs may recover damages for resulting emotional distress, proven by a preponderance of the evidence, with or without a physical impact or physical injury to the bystander, if (i) the bystander is related to the victim or (ii) although not related to the victim, the bystander is in close proximity to the victim at the time the event occurs and is aware that such event is causing injury to or the death of the victim.

SB 641 **Civil action; sale of personal data.** Requires a person that disseminates, obtains, maintains, or collects personal data about a consumer for a fee to implement security practices to protect the confidentiality of a consumer's personal data, obtain express consent of a parent of a minor before selling the personal data of such minor, provide access to consumers to their own personal data that is held by the entity, refrain from maintaining or selling data that it knows to be inaccurate, and provide a means by which a consumer can opt out of the sale of his personal data. The bill

provides that a violation could result in a civil penalty of up to $7,500 or damages to be awarded to a consumer. The bill also provides for the award of attorney fees and costs.

SB 780 **Campgrounds; inherent risks, liability.** Provides that a person who goes camping at a campground shall be presumed to have known the inherent risks of camping, which is defined in the bill. The bill states that a campground, an owner or operator of a campground, and any employee or officer of a campground shall be immune from civil liability for acts or omissions related to camping at a campground if a person is injured or killed, or the property of an individual or group is damaged, as a result of the inherent risks of camping. An owner or operator of a campground, and any employee or officer of a campground, may be held civilly liable under this section if the person or agents of the campground seeking immunity intentionally cause injury, death, or property damage; act with a willful or wanton disregard for the safety of others or the property of others; or fail to conspicuously post warning signs of a dangerous inconspicuous condition known on the property if the owner of the campground is aware of the condition by reason of a prior injury involving the same location or the same mechanism of injury.

SB 1060 **For good cause shown or upon agreement of all parties, court may dismiss action without prejudice.** Provides that, for good cause shown or upon agreement of all parties, the court may dismiss an action without prejudice and the plaintiff may recommence such action within the original period of limitation.

TORT LAW

– FAILED –

HB 16 **Safety belt system; all occupants of motor vehicles to utilize.** 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. This bill was incorporated into HB 1414.

HB 616 **Vehicle headlights; required to be lighted.** Requires every vehicle in operation to display lighted headlights. Currently headlights are required to be lighted only (i) from sunset to sunrise; (ii) during any other time when, because of rain, smoke, fog, snow, sleet, insufficient light, or other unfavorable atmospheric conditions, visibility is reduced to a degree whereby persons or vehicles on the highway are not clearly discernible at a distance of 500 feet; and (iii) whenever windshield wipers are in use as a result of fog, rain, sleet, or snow. The bill removes provisions making the failure to display lighted headlights when windshield wipers are in use as a result of fog rain, sleet, or snow (a) a secondary offense, (b) subject to no demerit points being assessed, and (c) not a defense to any claim for personal injury or recovery of medical expenses for injuries sustained in a motor vehicle accident.

HB 628 **Sanctions; improper purpose; claims filed in retaliation for certain actions.** Provides that, for the purpose of awarding sanctions, improper purpose includes certain claims filed in retaliation for or in order to discourage actions taken by victims of violence to obtain an order of protection or criminal charges based on such conduct.

[HB 759] **Strategic lawsuits against public participation; special motion to dismiss; stay of discovery.** Establishes a procedure by which a party alleging that a claim filed against him is a strategic lawsuit against public participation (SLAPP), as defined in the bill, may file a special motion to dismiss. The bill provides that the filing of such a special motion to dismiss shall stay discovery proceedings related to the claim, pending the entry of an order adjudicating the special motion to dismiss. The bill provides that a court shall award reasonable expenses related to a special motion to dismiss, including attorney fees and costs, if the moving party prevails, in whole or in part, on such a special motion. The bill allows the court to award such reasonable expenses to a prevailing responding party to a special motion to dismiss if the court finds that such a motion was filed in bad faith or solely with the intent to delay the underlying proceedings.

HB 1550 **Franchises; covenants not to compete.** Declares that any covenant not to compete executed on or after July 1, 2020, between a franchisor and any of its franchisees that restricts the ability of a former franchisee to conduct a business that will compete with the franchisor or another of its franchisees is void unless the franchisor or other franchisee has conducted such a business within 150 miles of the former franchisee's authorized area at any time during the 12 months preceding the termination or expiration of the former franchisee's franchise.

SB 375 **Immunity of persons; statements regarding matters of public concern or made at a public hearing.** Provides that a person claiming immunity from certain claims for making statements at a public hearing or regarding matters of public concern may file a special plea to dismiss the underlying claim. The bill further provides that, upon the filing of such a plea, discovery related to such underlying claim shall be stayed pending the entry of an order adjudicating the plea.

SB 529 **Admissibility of statements of a deceased or incompetent party; hearsay.** Provides that statements made by a deceased or incompetent party when such party was competent shall not be excluded as inadmissible hearsay, provided that such statements are relevant and otherwise admissible. Under current law, such statements are admissible provided that they are relevant.

SB 644 **Traffic incident management vehicles.** Adds traffic incident management vehicles, defined in the bill, operated by persons who meet certain training requirements to a list of vehicles exempt from certain traffic regulations at or en route to the scene of a traffic accident or similar incident. The bill also allows such vehicles to be equipped with sirens and flashing red or red and white secondary warning lights.

SB 645 **Local arbitration agreements.** Requires a locality, for any procurement contract for goods and services except for construction, construction-related services, transportation construction, or transportation-related construction--and any purchasing decision to ensure that solicitations require the bidder or offeror to disclose certain information regarding pre-dispute arbitration clauses and consider each bidder or offeror's policies and practices related to arbitration. The bill requires each locality to seek to contract with qualified entities and business owners that can demonstrate or will certify that they do not use pre-dispute arbitration clauses in contracts with employees or consumers, and to evaluate bidders and offerors based on disclosures required under the bill, in the event no bidder or offeror can demonstrate or will certify that they do not use pre-dispute arbitration clauses in contracts with employees or consumers.

SB 655 **Consideration of bills that create immunity from civil liability for physical injuries or death.** Requires that any bill that creates immunity from civil liability for physical injuries or death caused to a person include an appropriation of $50,000 to the Department of Medical Assistance Services for the provision of medical assistance services as a condition of consideration by the General Assembly. The bill requires that the $50,000 appropriation be included in a final enactment clause to such bill that creates immunity and requires the Department of Planning and Budget, in conjunction with other state agencies, to ensure that the fiscal impact statement for such bill states that the bill creates immunity from civil liability for physical injuries or death caused to a person.

SB 656 **Offender medical and mental health information and records; exchange of information to facility.** Provides that a health care provider who has provided services within the last year to a person committed to a local or regional correctional facility shall disclose to such correctional facility any information and records necessary to ensure continuity of care. The bill provides immunity from civil liability for such disclosures absent bad faith or malicious intent.

SB 659 **Contributory negligence; motor vehicle accident involving a pedestrian, bicyclist, etc.** Provides that the negligence of a pedestrian, bicyclist, or other person lawfully using a device other than a motor vehicle on a public highway who is involved in a collision with a motor vehicle shall not bar a plaintiff's recovery in any civil action unless the plaintiff's negligence is (i) a proximate cause of the plaintiff's injury and (ii) greater than the aggregated total amount of negligence of all the defendants that proximately caused the plaintiff's injury.

SB 663 **Practice of medicine and other healing arts; provision of litigation assistance.** Requires practitioners of medicine and other healing arts to provide litigation assistance to treated patients and their attorneys. Such litigation assistance includes providing a legal consult fee schedule upon request, scheduling and participating in meetings with a treated patient's attorney upon request, participating in trial or de bene esse depositions as needed, and providing a written estimate of the cost of the patient's medical services related to the litigation. The bill prohibits providers from refusing services to a patient who is insured or otherwise has the ability to pay for provided services on the ground that such person was involved in an incident that is the subject of litigation or could result in litigation

SB 1043 **Civil actions; filed on behalf of multiple persons.** Provides that a circuit court may enter an order joining, coordinating, consolidating, or transferring civil actions upon finding that separate civil actions brought by a plaintiff on behalf of multiple similarly situated persons involve common questions of law or fact and arise out of the same transaction, occurrence, or series of transactions or occurrences. Under current law, such order is permitted only where six or more plaintiffs have filed such actions. The bill further requires the Supreme Court to promulgate rules no later than November 1, 2020, governing such actions. The bill has a delayed effective date of July 1, 2021.

MEDICAL MALPRACTICE

– PASSED –.

HB 115 **Health care providers, certain; programs to address career fatigue and wellness, civil immunity.** Expands civil immunity for health care professionals serving as members of or consultants to entities that function primarily to review, evaluate, or make recommendations related to health care services to include health care professionals serving as members of or consultants to entities that function primarily to address issues related to career fatigue and wellness in health care professionals licensed to practice medicine or osteopathic medicine or licensed as a physician assistant. The bill also clarifies that, absent evidence indicating a reasonable probability that a health care professional who is a participant in a professional program to address issues related to career fatigue or wellness is not competent to continue in practice or is a danger to himself, his patients, or the public, participation in such a professional program does not trigger the requirement that the health care professional be reported to the Department of Health Professions. The bill contains an emergency clause.

HB 165 **Teledentistry; definition, establishes requirements for the practice of teledentistry, etc.** Defines "teledentistry," establishes requirements for the practice of teledentistry and the taking of dental scans for use in teledentistry by dental scan technicians, and clarifies requirements related to the use of digital work orders for dental appliances in the practice of teledentistry.

HB 385 **Chiropractic, practice of; clarifies definition**. Clarifies the definition of "practice of chiropractic" to make clear that a doctor of chiropractic may (i) request, receive, and review a patient's medical and physical history, including information related to past surgical and nonsurgical treatment of the patient and controlled substances prescribed to patients, and (ii) document in a patient's record information related to the condition and symptoms of the patient, the examination and evaluation of the patient made by the doctor of chiropractic, and the treatment provided to the patient by the doctor of chiropractic.

HB 908 **Naloxone; possession and administration; employee or person acting on behalf of a public place.** Authorizes an employee or other person acting on behalf of a public place, as defined in the bill, who has completed a training program on the administration of naloxone or other opioid antagonist to possess and administer naloxone or other opioid antagonist, other than naloxone in an injectable formulation with a hypodermic needle or syringe, in accordance with protocols developed by the Board of Pharmacy in consultation with the Board of Medicine and the Department of Health. The bill also provides that a person who is not otherwise authorized to administer naloxone or other opioid antagonist used for overdose reversal may administer naloxone or other opioid antagonist used for overdose reversal to a person who is believed to be experiencing or about to experience a life-threatening opioid overdose. The bill provides immunity from civil liability for a person who, in good faith, administers naloxone or other opioid antagonist used for overdose reversal to a person who is believed to be experiencing or about to experience a life-threatening opioid overdose, unless such act or omission was the result of gross negligence or willful and wanton misconduct. This bill incorporates HB 650, HB 1465, and HB 1466.

HB 1059 **Certified registered nurse anesthetists; prescriptive authority.** Authorizes certified registered nurse anesthetists to prescribe Schedule II through Schedule VI

controlled substances and devices to a patient requiring anesthesia as part of the periprocedural care of the patient, provided that such prescribing is in accordance with requirements for practice by certified registered nurse anesthetists and is done under the supervision of a doctor of medicine, osteopathy, podiatry, or dentistry. This bill is identical to SB 264.

HB 1084 **Surgical assistants; licensure**. Defines "surgical assistant" and "practice of surgical assisting" and directs the Board of Medicine to establish criteria for the licensure of surgical assistants. Currently, the Board may issue a registration as a surgical assistant to eligible individuals. The bill also establishes the Advisory Board on Surgical Assisting to assist the Board of Medicine regarding the establishment of qualifications for and regulation of licensed surgical assistants.

HB 1261 **Athletic trainers; naloxone or other opioid antagonist.** Authorizes licensed athletic trainers to possess and administer naloxone or other opioid antagonist for overdose reversal pursuant to an oral or written order or standing protocol issued by the prescriber within the course of his professional practice.

HB 1332 **Telehealth services.** Directs the Board of Health to develop and implement, by January 1, 2021, and thereafter maintain as a component of the State Health Plan a Statewide Telehealth Plan (the Plan) to promote an integrated approach to the introduction and use of telehealth services and telemedicine services, as those terms are defined in the bill. The bill requires the Plan to include provisions for (i) the use of remote patient monitoring services and store-and-forward technologies, including in cases involving patients with chronic illness; (ii) the promotion of the inclusion of telehealth services in hospitals, schools, and state agencies; (iii) a strategy for the collection of data regarding the use of telehealth services; and (iv) other provisions.

HB 1701 **Practice of medicine; license not required, person licensed in a contiguous state**. Directs the Department of Health to determine the feasibility of establishing a Medical Excellence Zone Program to allow citizens of the Commonwealth living in rural underserved areas to receive medical treatment via telemedicine services from providers licensed or registered in a state that is contiguous with the Commonwealth and directs the Department of Health Professions to pursue reciprocal agreements with such states for licensure for certain primary care practitioners licensed by the Board of Medicine. The bill states that reciprocal agreements with states that are contiguous with the Commonwealth for the licensure of doctors of medicine, doctors of osteopathic medicine, physician assistants, and nurse practitioners shall only require that a person hold a current, unrestricted license in the other jurisdiction and that no grounds exist for denial based on the acts of unprofessional conduct. The Department of Health Professions is required to report on its progress in establishing such agreements to the Senate Committee on Education and Health and the House Committee on Health, Welfare and Institutions by November 1, 2020. The bill requires the Board of Medicine to prioritize applications for licensure by endorsement as a doctor of medicine or osteopathic medicine, a physician assistant, or a nurse practitioner from such states through a streamlined process with a final determination regarding qualification to be made within 20 days of the receipt of a completed application. This bill is identical to SB 757.

SB 122 **Teledentistry; definition, report.** Defines "teledentistry," establishes requirements for the practice of teledentistry and the taking of dental scans for use in

teledentistry by dental scan technicians, and clarifies requirements related to the use of digital work orders for dental appliances in the practice of teledentistry. This bill incorporates SB 210 and SB 884 and is identical to HB 165.

SB 540 **Health professionals; unprofessional conduct; reporting.** Requires the chief executive officer and the chief of staff of every hospital or other health care institution in the Commonwealth, the director of every licensed home health or hospice organization, the director of every accredited home health organization exempt from licensure, the administrator of every licensed assisted living facility, and the administrator of every provider licensed by the Department of Behavioral Health and Developmental Services in the Commonwealth to report to the Department of Health Professions any information of which he may become aware in his professional capacity that indicates a reasonable belief that a health care provider is in need of treatment or has been admitted as a patient for treatment of substance abuse or psychiatric illness that may render the health professional a danger to himself, the public or his patients, or that he determines, following review and any necessary investigation or consultation with the appropriate internal boards or committees authorized to impose disciplinary action on a health professional, indicates that there is a reasonable probability that such health professional may have engaged in unethical, fraudulent, or unprofessional conduct. Current law requires information to be reported if the information indicates, after reasonable investigation and consultation with the appropriate internal boards or committees authorized to impose disciplinary action on a health professional, a reasonable probability that such health professional may have engaged in unethical, fraudulent, or unprofessional conduct. This bill is identical to HB 471.

SB 544 **Advance directives; physician assistants; capacity determinations.** Expands the class of health care practitioners who can make the determination that a patient is incapable of making informed decisions to include a licensed physician assistant. The bill provides that such determination shall be made in writing following an in-person examination of the person and certified by the physician assistant. This bill is identical to HB 362.

SB 565 **Collaborative practice agreements; adds nurse practitioners and physician assistants to list.** Adds nurse practitioners and physician assistants to the list of health care practitioners who shall not be required to participate in a collaborative agreement with a pharmacist and his designated alternate pharmacists, regardless of whether a professional business entity on behalf of which the person is authorized to act enters into a collaborative agreement with a pharmacist and his designated alternate pharmacists. As introduced, this bill is a recommendation of the Joint Commission on Healthcare. This bill is identical to HB 517.

SB 566 **Naloxone or other opioid antagonist; possession and administration.** Provides that a person who is not otherwise authorized to administer naloxone or other opioid antagonist used for overdose reversal may administer naloxone or other opioid antagonist used for overdose reversal to a person who is believed to be experiencing or about to experience a life-threatening opioid overdose, provided that the administration is in good faith and absent gross negligence or willful and wanton misconduct.

MEDICAL MALPRACTICE

– FAILED –

HB 303 **Clinical psychologists; telepsychology; out of state.** Allows clinical psychologists to provide services by telepsychology to established patients who are out of state at the time services are provided. The bill establishes the criteria that must be met for the clinical psychologist to offer telepsychology services.
Clinical psychologists who offer telepsychology services must comply with the Standards of Practice set by the Board of Psychology.

HB 532 **Safe reporting of overdoses; immunity from prosecution.** Provides that no individual (i) who sought or obtained emergency medical attention for himself or for another individual because of a drug or alcohol-related overdose or (ii) is experiencing a drug or alcohol-related overdose and another individual, in good faith, seeks or obtains emergency medical attention for such individual shall be prosecuted for unlawful purchase, possession, or consumption of alcohol, simple possession of a controlled substance, possession of marijuana, intoxication in public, or possession of controlled paraphernalia.

HB 548 **Virginia Freedom of Information Act; exclusions; Department of Behavioral Health Services.** Exempts from mandatory disclosure under the Virginia Freedom of Information Act records of active investigations that are being conducted by the Department of Behavioral Health and Developmental Services.

HB 1449 **Physicians; medical specialty board certification options**. Prohibits requiring maintenance of certification from physicians licensed to practice medicine in the Commonwealth, as a prerequisite to hospital medical staff membership, employment, malpractice liability insurance coverage, network status, or reimbursement for services provided to a person covered by a health insurance policy.

SB 858 **Naturopathic doctors; Board of Medicine to license and regulate**. Requires the Board of Medicine to license and regulate naturopathic doctors, defined in the bill as an individual, other than a doctor of medicine, osteopathy, chiropractic, or podiatry, who may diagnose, treat, and help prevent diseases using a system of practice that is based on the natural healing capacity of individuals, using physiological, psychological, or physical methods, and who may also use natural medicines, prescriptions, legend drugs, foods, herbs, or other natural remedies, including light and air.

CRIMINAL LAW

– PASSED –

HB 33 **Parole; exception to limitation on the application of parole statutes.** Provides that a person is eligible to be considered for parole if (i) such person 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 on or after the abolition of parole going into effect (on January 1, 1995); (ii) the person remained incarcerated for the offense on July 1, 2020; and (iii) the offense was not one of the following: (a) a Class 1 felony; (b) if the victim was a minor, rape, forcible sodomy, object sexual penetration, or aggravated sexual battery or an attempt to commit such act; or (c) carnal knowledge.

HB 34 **Refusal of tests; restricted license.** Allows a person convicted of a first offense of unreasonable refusal to have samples of his breath or blood 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. The bill provides that such restricted license shall not permit any person to operate a commercial motor vehicle.

HB 35 **Juvenile offenders; eligibility for 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 20 years of such sentence and any person who has active sentences that total more than 20 years for a single felony offense or multiple felony offenses committed while that person was a juvenile and who has served at least 20 years of such sentences shall be eligible for parole. This bill is identical to SB 103.

HB 61 **Adults sentenced for juvenile offenses; good conduct credit.** Provides that an adult sentenced for a juvenile offense can earn good conduct credit at the rate of one day for each one day served, including all days served while confined in jail or secured detention prior to conviction and sentencing, in which the adult has not violated the written rules and regulations of the jail. This bill is a recommendation of the Virginia Criminal Justice Conference and is identical to SB 307.

HB 100 **Voir dire examination of persons called as jurors; criminal case.** Allows the court and counsel for either party in a criminal case to (i) ask potential jurors any relevant question to ascertain whether the juror can sit impartially in either the guilt or sentencing phase of the case and (ii) inform any potential juror as to the potential range of punishments to ascertain if the person or juror can sit impartially in the sentencing phase of the case. This bill is identical to SB 325.

HB 245 **Fornication; repeal.** Repeals the crime of fornication, i.e., voluntary sexual intercourse by an unmarried person, punishable under current law as a Class 4 misdemeanor.

HB 246 **Law-enforcement agencies, local; body- worn camera systems.** Requires localities to adopt and establish a written policy for the operation of a body-worn camera system, as defined in the bill, that follows identified best practices and is consistent with Virginia law and regulations, using as guidance the model policy established by the Department of Criminal

Justice Services prior to purchasing or deploying a body-worn camera system. The bill also requires localities to make such policy available for public comment and review prior to its adoption. The bill requires the Department to establish a model policy for the operation of body-worn camera systems and the storage and maintenance of body-worn camera system records.

HB 253 **Sex Offender and Crimes Against Minors Registry Act; offenses requiring registration.** Adds a third or subsequent conviction of unlawful dissemination or sale of images of another to the list of offenses requiring registration under the Sex Offender and Crimes Against Minors Registry if the offense was committed on or after July 1, 2020.

HB 259 **Unrestorably incompetent defendant; competency report.** Provides that in cases where a defendant is likely to remain incompetent for the foreseeable future 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. Under current law, the defendant is required to undergo treatment to restore his competency before the court can find a defendant unrestorably incompetent to stand trial. The bill also provides that such person who is found unrestorably incompetent to stand trial shall be prohibited from purchasing, possessing, or transporting a firearm.

HB 262 **Inquiry and report of immigration status; certain victims or witnesses of crimes.** Prohibits law-enforcement officers from inquiring into the immigration status of a person who (i) reports that he is a victim of a crime or a parent or guardian of a minor victim of a crime or (ii) is a witness in the investigation of a crime or the parent or guardian of a minor witness to a crime. However, a law-enforcement officer is not prohibited from making such an inquiry if it is necessary for the enforcement or implementation of certain criminal provisions or if the parent or guardian has been arrested for, has been charged with, or is being investigated for a crime against the minor victim.

HB 276 **Virginia State Police; reporting hate crimes.** Includes within the definition of "hate crime" a criminal act committed against a person or the person's property because of disability, as defined in the bill, sexual orientation, gender, or gender identification and requires the reporting of the commission of such crime to the State Police. This bill incorporates HB 1058.

HB 277 **Payments of court fines and costs; community work in lieu of payment; during imprisonment.** Provides that a court may permit an inmate to earn credits against any fines and court costs imposed against him by performing community service. Under current law, credits may be earned only before or after imprisonment. This bill incorporates HB 965 and is identical to SB 736.

HB 278 **Home/electronic incarceration program; payment to defray costs.** Changes from mandatory to optional the current requirement that the director or administrator of a home/electronic incarceration program charge an offender or accused a fee for participating in the program to be used for the cost of home/electronic incarceration equipment.

HB 298 **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 if the offender was an adult at the time of the offense and more than three years older than the victim for the following misdemeanor violations: carnal knowledge of detainee 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.

HB 477 **Juveniles; increases minimum age at which a juvenile must be tried as an adult.** Increases from age 14 to age 16 the minimum age at which a juvenile must be tried as an adult in circuit court for murder or aggravated malicious wounding; however, if the juvenile is 14 years of age or older but younger than 16 years of age the court, on motion of the attorney for the Commonwealth, shall hold a transfer hearing. The minimum age is also raised from 14 to 16 for certain charges requiring notice of intent to try such juvenile as an adult by the attorney for the Commonwealth. In order to be tried as an adult in circuit court for the charges that under current law require notice of intent to proceed with trial as an adult by the attorney for the Commonwealth, the bill requires that (i) a report of the juvenile be prepared by the court services unit or other qualified agency and (ii) the attorney for the Commonwealth provide written notice that he intends to proceed with a preliminary hearing for trial of such juvenile as an adult, including affirmation that he has read the report. This bill incorporates HB 1440.

HB 557 **Carnal knowledge of pretrial or posttrial offender; bail bondsmen; penalty.** Increases to a Class 6 felony from a Class 1 misdemeanor the penalty for an owner or employee of a bail bond company that posted bond for a person to carnally know such person if the owner or employee has the authority to revoke the person's bond.

HB 618 **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. The bill 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, or sexual orientation, may bring a civil action to recover his damages. The bill also provides that no provider or user of an interactive computer service on the Internet shall be liable for any action voluntarily taken by it in good faith to restrict access to material that the provider or user considers to be intended to incite hatred on the basis of gender, disability, gender identity, or sexual orientation. The bill also eliminates the mandatory minimum terms of confinement for such hate crimes. The provisions of the bill are contingent on funding in a general appropriation act. This bill incorporates HB 488.

HB 639 **Persons acquitted by reason of insanity; use of two-way electronic communications in proceedings.** Permits the annual or biennial hearing required for persons acquitted of a criminal offense by reason of insanity to be conducted using a two-way electronic video and audio communication system unless objected to by the acquittee, the

acquittee's attorney, or the attorney for the Commonwealth.

HB 660 **Deferred dispositions; property crimes, larceny and receiving stolen goods.** Provides that a court, upon such plea if the facts found by the court would justify a finding of guilt, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation subject to terms and conditions for a first offense misdemeanor larceny, provided that such person has not previously been convicted of any felony. The bill also provides that deferred disposition will no longer be allowed for peeping crimes. This bill incorporates HB 1592.

HB 744 **Sentencing of juvenile tried as adult.** Provides that a court, in the case of a juvenile tried as an adult and convicted of a felony, may depart from any mandatory minimum sentence required by law and suspend any portion of an otherwise applicable sentence. The bill also requires the court, when sentencing a juvenile as an adult, to consider the juvenile's exposure to adverse childhood experiences, early childhood trauma, or any child welfare agency and the differences between juvenile and adult offenders.

HB 746 **Custodial interrogation of a child; consultation with legal counsel; admissibility of statements.** Requires that prior to the custodial interrogation of a child who has been arrested by a law-enforcement officer for a criminal violation, the child's parent, guardian, or legal custodian be notified of the child's arrest and the child have contact with his parent, guardian, or legal custodian. Such notification and contact may be in person, electronically, by telephone, or by video conference. However, notification and contact prior to a custodial interrogation is not required if the parent, guardian, or legal custodian is a codefendant in the alleged offense; the parent, guardian, or legal custodian has been arrested for, has been charged with, or is being investigated for a crime against the child; the person cannot reasonably be located or refuses contact with the child; or the law-enforcement officer conducting the custodial interrogation reasonably believes the information sought is necessary to protect life, limb, or property from an imminent danger and the questions are limited to those that are reasonably necessary to obtain that information.

HB 752 **Postrelease incarceration of felons sentenced for certain offenses.** Clarifies that offenders who are convicted of knowingly failing to register or reregister with, or knowingly providing materially false information to, the Sex Offender and Crimes Against Minors Registry are subject to added terms of postrelease incarceration. The bill also clarifies that when a sentence is imposed upon conviction of a felony that includes an active term of incarceration and the court does not order a suspended term of confinement of at least six months, a period of postrelease incarceration shall be imposed that is not less than six months or more than three years. The bill also clarifies that it is the period of postrelease incarceration that is required to be suspended, not the period of postrelease supervision. As introduced, this bill was a recommendation of the Judicial Council.

HB 787 **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, gender, disability, gender identity, sexual orientation, 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, gender, disability, gender identity, sexual orientation, color, or national origin of the owner, user, or occupant; and (iii) various offenses that tend to cause violence.

HB 821 **Saliva or tissue sample required for DNA analysis after arrest for a violent felony.** Clarifies that the Department of Forensic Science may retain a DNA sample from a person who was arrested for a violent felony if such person was convicted of a misdemeanor offense that would otherwise require the sample to remain in the DNA data bank.

HB 824 **Ex parte requests for expert assistance in criminal cases.** Provides that in any case before a circuit court in which a defendant is charged with a jailable offense and determined to be indigent by the court, the defendant or his attorney, upon notice to the Commonwealth, may move the court to designate another judge in the same circuit to hear an ex parte request for appointment of a qualified expert to assist in the defense. For a motion for expert assistance, the bill requires a defendant or his attorney to state under oath or in a sworn declaration that a need for confidentiality exists. Upon receiving the defendant's or his attorney's declaration of need for confidentiality, the court is required to conduct an ex parte hearing as soon as practicable on the request for authorization to obtain expert assistance. After a hearing upon the motion, the court is required to authorize the defendant or his attorney to obtain expert assistance upon a showing that the requested assistance would materially assist the defendant and the denial of such services would result in a fundamentally unfair trial.

HB 873 **Discovery in criminal cases; penalties.** Establishes requirements and procedures for discovery by an accused and by the Commonwealth in a criminal case. The bill requires a party requesting discovery to request that the other party voluntarily comply with such request prior to filing any motion before a judge. Upon receiving a negative or unsatisfactory response, or upon the passage of seven days following the receipt of the request without response, the party requesting discovery may file a motion for discovery with the court. The bill details information that is subject to discovery and provides that discovery shall be provided at a reasonable time before trial but that in no case shall it be provided later than (i) 14 days before trial on a misdemeanor in circuit court, (ii) 30 days before trial on a felony or multiple felony counts punishable by confinement in a state correctional facility for an aggregate of 30 years or less, or (iii) 90 days before trial on a felony or multiple felony counts punishable by confinement in a state correctional facility for an aggregate of more than 30 years. The bill also provides a mechanism for redaction of certain personal identifying information and creates a procedure for either party to move the court to enter a protection order with regard to discovery. Finally, the bill grants the court the ability to impose various remedies it deems just if a party fails to comply with any of the requirements. This bill incorporates HB 1153.

HB 880 **Protective orders; motions to dissolve filed by petitioner; ex parte hearing and issuance of order.** Provides that, upon motion by a petitioner to dissolve a protective order, a dissolution order may be issued on an ex parte basis with or without a hearing and that a hearing on such a motion shall be heard by the court as soon as practicable. The bill further provides that a dissolution order granted on an ex parte basis shall be served upon the respondent.

HB 885 **Speeding; reckless driving.** Raises the threshold for per se reckless driving for speeding from driving in excess of 80 miles per hour to driving in excess of 85 miles per hour. The threshold for per se reckless driving for speeding for driving at or more than 20 miles

per hour in excess of the speed limit remains unchanged. The bill also provides that any person who drives a motor vehicle at a speed in excess of 80 miles per hour but below 86 miles per hour on any highway in the Commonwealth having a maximum speed limit of 65 miles per hour shall be subject to an additional fine of $100. This bill is identical to SB 63.

HB 972 **Possession and consumption of marijuana; penalty.** Decriminalizes simple marijuana possession and provides a civil penalty of no more than $25. 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. The bill provides that any violation of simple possession of marijuana may be charged by a summons in form the same as the uniform summons for motor vehicle law violations and that no court costs shall be assessed for such violations.

HB 974 **Petition for writ of actual innocence.** Provides that a person who was convicted of a felony or who was adjudicated delinquent by a circuit court of an offense that would be a felony if committed by an adult may petition for a writ of actual innocence based on biological evidence or nonbiological evidence regardless of the type of plea he entered at trial.

HB 904 **Child abuse and neglect reporting; public sports programs.** Adds to the list of mandatory reporters of suspected child abuse and neglect athletic coaches, directors, and other persons 18 years of age or older that are employed by or volunteering with a public sports organization or team. Current law applies only to such individuals involved with private sports organizations or teams.

HB 1023 **Custodial interrogations; recording.** Provides that any law-enforcement officer shall, if practicable, make an audiovisual recording of the entirety of any custodial interrogation of a person conducted in a place of detention. The bill provides that if an audiovisual recording is unable to be made, the law-enforcement officer shall make an audio recording of the entirety of the custodial interrogation. The bill provides that the failure of a law-enforcement officer to make such a recording shall not affect the admissibility of the statements made during the custodial interrogation, but the court or jury may consider such failure in determining the weight given to such evidence.

HB 1044 **Unauthorized use of electronic tracking device; penalty.** Increases from a Class 3 misdemeanor to a Class 1 misdemeanor the punishment for a person who installs or places an electronic tracking device through intentionally deceptive means and without consent, or causes an electronic tracking device to be installed or placed through intentionally deceptive means and without consent, and uses such device to track the location of any person.

HB 1047 **Fingerprints and photographs by police authorities; reports to the Central Criminal Records.** Provides that all duly constituted police authorities having the power of arrest may take the fingerprints and photographs of persons who plead guilty or are found guilty for driving while intoxicated when charged by summons.

HB 1150 **Inquiry and report of immigration status; persons charged with or convicted of certain crimes.** Removes provisions requiring (i) jail officers to ascertain the citizenship of any inmate taken into custody at a jail, (ii) probation and parole officers to inquire as to the citizenship status of an individual convicted of a felony in circuit court and referred to such officers, and (iii) officers in charge of correctional facilities to inquire as to the citizenship of any person committed to a correctional facility, and therefore such information is not required to be reported to the Central Criminal Records Exchange of the

Department of State Police. The bill also removes the mandatory duty of the clerk of a court committing a convicted alien to a correctional facility to furnish related court records to a United States immigration officer and the requirement that an intake officer report to the Bureau of Immigration and Customs Enforcement of the U.S. Department of Homeland Security any juvenile detained on an allegation that the juvenile, believed to be in the United States illegally, committed a violent felony. This bill incorporates HB 244.

HB 1181 **Violation of provisions of protective order; venue.** Provides that a violation of a protective order may be prosecuted in the jurisdiction where the protective order was issued or in any county or city where any act constituting the violation of the protective order occurred.

HB 1196 **Suspension of driver's license for nonpayment of fines or costs.** Removes the requirement that a court suspend the driver's license of a person convicted of any violation of the law who fails or refuses to provide for immediate payment of fines or costs. The bill provides that the fine for any moving violation while operating a motor vehicle in a designated highway safety corridor shall be no more than $500 for any violation that is a traffic infraction and not less than $200 for any violation that is a criminal offense.

HB 1437 **Juvenile confinement for violation of court order.** Reduces from 10 days to seven days the maximum allowable period of confinement of a juvenile in a secure facility for a contempt violation or when a child in need of supervision is found to have willfully and materially violated an order of the court. The bill also provides that any order of disposition of such violation confining the juvenile in a secure facility for juveniles shall (i) identify the valid court order that has been violated; (ii) specify the factual basis for determining that there is reasonable cause to believe that the juvenile has violated such order; (iii) state the findings of fact that support a determination that there is no appropriate less restrictive alternative available to placing the juvenile in such a facility, with due consideration to the best interest of the juvenile; (iv) specify the length of time of such confinement, not to exceed seven days; and (v) include a plan for the juvenile's release from such facility.

HB 1462 **Admission to bail; rebuttable presumptions against bail.** Eliminates the provision prohibiting a judicial officer who is a magistrate, clerk, or deputy clerk of a district court or circuit court from admitting to bail, that is not set by a judge, any person who is charged with an offense giving rise to a rebuttable presumption against bail without the concurrence of an attorney for the Commonwealth. The bill also eliminates the requirement that notice be provided to the attorney for the Commonwealth before such judicial officer may set or admit a person to bail.

HB 1482 **Involuntary admission or certification of eligibility order; appeals.** Clarifies provisions governing appeals of orders for involuntary admission or for certification as eligible for admission to a training center and provides that in cases in which a person is released during the pendency of an appeal, the appeal shall be in accordance with provisions for testing the legality of detention.

SB 1 **Driver's license; suspension for nonpayment of fines or costs.** Repeals the requirement that the driver's license of a person convicted of any violation of the law who fails or refuses to provide for immediate payment of fines or costs be suspended. The bill also removes a provision allowing the court to require a defendant to present a summary prepared by the Department of Motor Vehicles of the other courts in which the defendant also

owes fines and costs. The bill requires the Commissioner of the Department of Motor Vehicles to return or reinstate any person's driver's license that was suspended prior to July 1, 2019, solely for nonpayment of fines or costs. Such person does not have to pay a reinstatement fee. This bill incorporates SB 10, SB 514, and SB 814.

SB 42 **Aggravated sexual battery by false representation or subterfuge; penalty.**
Provides that any massage therapist, person practicing the healing arts, or physical therapist, or a person purporting to be such practitioner, who sexually abuses another person without the express consent of the complaining witness is guilty of aggravated sexual battery.

SB 63 **Reckless driving; exceeding speed limit.** Raises the threshold for per se reckless driving for speeding from driving in excess of 80 miles per hour to driving in excess of 85 miles per hour. The threshold for per se reckless driving for speeding for driving at or more than 20 miles per hour in excess of the speed limit remains unchanged. The bill also provides that any person who drives a motor vehicle at a speed in excess of 80 miles per hour but below 86 miles per hour on any highway in the Commonwealth having a maximum speed limit of 65 miles per hour shall be subject to an additional fine of $100. This bill is identical to HB 885.

SB 64 **Paramilitary activities; penalty.**
Provides that a person is guilty of unlawful paramilitary activity if such person brandishes a firearm or any air or gas operated weapon or any object similar in appearance while assembled with one or more persons with the intent of intimidating any person or group of persons with any firearm, any explosive or incendiary device, or
any components or combination thereof. Such unlawful paramilitary activity is punishable as a Class 5 felony.

SB 133 **Criminal cases; deferred disposition.**
Allows a court to defer and dismiss a criminal case where the defendant has been diagnosed with autism or an intellectual disability.

SB 144 **Protective orders; issuance upon convictions for certain felonies, penalty.**
Allows a court to defer and dismiss a criminal case where the defendant has been diagnosed with autism or an intellectual disability.

SB 179 **Hate crimes; adds 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. The bill 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, or sexual orientation, may bring a civil action to recover his damages. The bill also provides that no provider or user of an interactive computer service on the Internet shall be liable for any action voluntarily taken by it in good faith to restrict access to material that the provider or user considers to be intended to incite hatred on the basis of gender, disability, gender identity, or sexual orientation. The bill also eliminates the mandatory minimum terms of confinement for such hate crimes.

SB 282 **Ignition interlock for first offense driving under the influence of drugs.**
Provides that a court of proper jurisdiction may, as a condition of a restricted license, prohibit an

offender from operating a motor vehicle that is not equipped with a functioning, certified ignition interlock system for a first offense of driving under the influence of drugs. Under current law, such prohibition is required to be ordered as a condition of a restricted license.

SB 286 **Deferred dispositions; property crimes, larceny and receiving stolen goods.** Provides that a court, upon such plea if the facts found by the court would justify a finding of guilt, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation subject to terms and conditions for a first offense misdemeanor larceny provided such person has not previously been convicted of any felony or had a prior deferred disposition for the same offense. As introduced, this bill was a recommendation of the Virginia Criminal Justice Conference. This bill incorporates SB 309.

SB 307 **Adults sentenced for juvenile offenses; good conduct credit.** Provides that an adult sentenced for a juvenile offense can earn good conduct credit at the rate of one day for each one day served, including all days served while confined in jail or secured detention prior to conviction and sentencing, in which the adult has not violated the written rules and regulations of the jail. This bill is a recommendation of the Virginia Criminal Justice Conference and is identical to HB 61.

SB 325 **Voir dire examination of persons called as jurors; criminal case.** Sentencing proceeding by the jury after conviction; recommendation of leniency Allows the court and counsel for either party in a criminal case to (i) ask potential jurors any relevant question to ascertain whether the juror can sit impartially in either the guilt or sentencing phase of the case and (ii) inform any potential juror as to the potential range of punishments to ascertain if the person or juror can sit impartially in the sentencing phase of the case. This bill is identical to HB 100.

SB 439 **Driving under the influence; first offenders; license conditions.** Provides that in the case of an adult offender's first conviction of driving under the influence when the offender's blood alcohol content was less than 0.15, upon motion of the offender, the sole restriction of the offender's restricted driver's license shall be the prohibition of the offender from operating any motor vehicle not equipped with a functioning, certified ignition interlock system for one year without any violation of the ignition interlock system requirements. The bill provides that if a person is ineligible to receive a restricted license, a court may instead authorize such person to use a remote alcohol monitoring device, refrain from alcohol consumption, and participate in an alcohol safety action program. The bill provides that tampering with a remote alcohol monitoring device is a class 1 misdemeanor. This bill incorporates SB 154 and SB 520.

SB 492 **Sex offenses requiring registration.** Clarifies the registration and reregistration obligations imposed upon a person convicted of a foreign sex offense for the purposes of registration with the Sex Offender and Crimes Against Minors Registry. The bill also provides that a person who is required to register may not petition the circuit court for the removal of his name and all identifying information from the Registry if such person was convicted of two or more offenses for which registration is required and was at liberty between such convictions. Under current law, a person does not need to be at liberty between such convictions and would be prohibited from petitioning for removal from the Registry.

SB 491 **Inquiry and report of immigration status; persons charged with or convicted of certain crimes.** Provides that the provisions requiring (i) jail officers to ascertain the citizenship of any inmate taken into custody at a jail, (ii) officers in charge of correctional

facilities to inquire as to the citizenship of any person committed to a correctional facility, and (iii) the mandatory duty of the clerk of a court committing a convicted alien to a correctional facility to furnish related court records to a United States immigration officer, are limited to felony offenses. The bill also provides that the clerk of court report to the Bureau of Immigration and Customs Enforcement of the U.S. Department of Homeland Security any juvenile adjudicated of delinquency or finding of guilt for a violent juvenile felony.

SB 511 **Writ of actual innocence; petition by convicted person.** Provides that a person who was convicted of a felony or who was adjudicated delinquent by a circuit court of an offense that would be a felony if committed by an adult may petition for a writ of actual innocence based on biological evidence or nonbiological evidence regardless of the type of plea he entered at trial. The bill also (i) allows a writ of actual innocence based on nonbiological evidence to be granted if scientific testing of previously untested evidence, regardless of whether such evidence was available or known at the time of conviction, proves that no trier of fact would have found proof of guilt of the person petitioning for the writ, provided that the testing procedure was not available at the time of conviction, and (ii) eliminates the provision that limits a petitioner to only one writ of actual innocence based on nonbiological evidence for any conviction. The bill provides that the petitioner must prove the allegations supporting either type of writ of actual innocence by a preponderance of the evidence. This bill is identical to HB 974.

SB 513 **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; (ii) for non-payment of certain fees owed to a local correctional facility or regional jail; and (iii) for shoplifting motor fuel. This bill is identical to HB 909.

SB 514 **Driver's license; suspension for nonpayment of fines or costs.** Removes the requirement that a court suspend the driver's license of a person convicted of any violation of the law who fails or refuses to provide for immediate payment of fines or costs. The bill provides that the fine for any moving violation while operating a motor vehicle in a designated highway safety corridor shall be no more than $500 for any violation that is a traffic infraction and not less than $200 for any violation that is a criminal offense. The bill also repeals the Nonresident Violator Compact of 1977. The bill contains an emergency clause. This bill was incorporated into SB 1.

SB 546 **Juveniles; trial as adult.** Increases from 14 years of age to 16 years of age the minimum age at which a juvenile must be tried as an adult in circuit court for murder or aggravated malicious wounding; however, if the juvenile is 14 years of age or older but younger than 16 years of age, the court, on motion of the attorney for the Commonwealth, shall hold a transfer hearing. The minimum age is also raised from 14 to 16 for certain charges requiring notice of intent to try such juvenile as an adult by the attorney for the Commonwealth. In order to be tried as an adult in circuit court for the charges that under current law require notice of intent to proceed with trial as an adult by the attorney for the Commonwealth, the bill requires that (i) a report concerning the juvenile be prepared by the court services unit or other qualified agency and (ii) the attorney for the Commonwealth provide written notice that he intends to proceed with a preliminary hearing for trial of such juvenile as an adult, including affirmation that he has read the report. HB 477 is identical to this bill.

SB 640 **Unlawful detainer; expungement.** Creates a process by which unlawful detainer actions filed in a general district court that have been dismissed or nonsuited may be expunged upon request of the defendant to such action. The bill has a delayed effective date of January 1, 2022.

SB 670 **Unrestorably incompetent defendant; competency report**. Provides that in cases where a defendant is likely to remain incompetent for the foreseeable future 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. Under current law, the defendant is required to undergo treatment to restore his competency before the court can find a defendant unrestorably incompetent to stand trial. The bill also provides that such person who is found unrestorably incompetent to stand trial shall be prohibited from purchasing, possessing, or transporting a firearm.

SB 683 **Competency to stand trial; outpatient treatment.** Clarifies that for the purposes of restorative treatment for a person incompetent but restorable to stand trial that outpatient treatment may occur in a local correctional facility or at a location determined by the appropriate community services board or behavioral health authority.

SB 711 **Driving while license, permit, or privilege to drive suspended or revoked; mandatory minimum.** Eliminates the mandatory minimum term of confinement in jail of 10 days for a third or subsequent conviction of driving on a suspended license.

SB 724 **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 if the offender was an adult at the time of the offense and more than three years older than the victim for the following misdemeanor violations: carnal knowledge of detainee 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.

SB 736 **Fines and costs; community service work in lieu of payment.** Provides that a court may permit an inmate to earn credits against any fines and court costs imposed against him by performing community service. Under current law, credits may be earned only before or after imprisonment. This bill is identical to HB 277.

SB 788 **Grand larceny; increases threshold amount.** Increases from $500 to $1,000 the threshold amount of money taken or value of goods or chattel taken at which the crime rises from petit larceny to grand larceny. The bill increases the threshold by the same amount for the classification of certain property crimes. This bill is identical to HB 995.

SB 798 **Driving after forfeiture of license.** Specifies that a person is guilty of an offense of driving or operating a motor vehicle (i) after his driver's license has been revoked for certain offenses; (ii) in violation of the terms of a restricted license; (iii) without an ignition interlock system if one is required; or (iv) if the person's license had been restricted, suspended, or revoked for certain driving under the influence offenses, with a blood alcohol content of 0.02 percent or more, only if such

person was driving or operating the motor vehicle on a highway, as defined in Title 46.2, Motor Vehicles.

SB 801 **Subpoena duces tecum; attorney-issued subpoena duces tecum; criminal cases.** Provides that in any criminal case a subpoena duces tecum may be issued by an attorney who is an active member of the Virginia State Bar at the time of issuance, as an officer of the court. The bill provides that any such subpoena duces tecum shall be on a form approved by the Executive Secretary of the Supreme Court, signed by the attorney as if a pleading, shall include the attorney's address, and shall be mailed or delivered to the adverse party. The bill also provides that the law governing subpoenas duces tecum issued by a clerk shall apply mutatis mutandis and provides a process for objection to such attorney-issued subpoenas.

SB 818 **Behavioral health dockets; established.** Establishes, by the Behavioral Health Docket Act (the Act), behavioral health courts as specialized court dockets within the existing structure of Virginia's court system, offering judicial monitoring of intensive treatment and supervision of offenders who have mental illness and co-occurring substance abuse issues. The bill establishes a state behavioral health docket advisory committee and requires localities intending to establish such dockets to establish local behavioral health docket advisory committees. The bill gives the Supreme Court of Virginia administrative oversight of the implementation of the Act. The Act is modeled on the Drug Treatment Court Act (§ 18.2-254.1).

SB 925 **Fingerprints and photographs; authority of police.** Provides that all duly constituted police authorities having the power of arrest may take the fingerprints and photographs of any person found in contempt or in violation of the terms or conditions of a suspended sentence or probation for a felony offense. This bill is a recommendation of the Virginia State Crime Commission. This bill is identical to HB 1048

SB 926 **Fingerprints and photographs by police authorities; reports to the Central Criminal Records.** Provides that all duly constituted police authorities having the power of arrest may take the fingerprints and photographs of persons who plead guilty or are found guilty of driving while intoxicated when charged by summons. The bill also provides that such summons information may be entered into the Virginia Criminal Information Network. This bill is a recommendation of the Virginia State Crime Commission. This bill is identical to HB 1047.

SB 1071 **DNA; post-conviction testing**. Permits private laboratories that are accredited and follow the appropriate Quality Assurance Standards issued by the Federal Bureau of Investigation to complete post-conviction testing of DNA evidence.

CRIMINAL LAW

– CARRIED OVER –

HB 32 **Police and court records; expungement of records for misdemeanor and nonviolent felony convictions.** Allows a person convicted of a misdemeanor or nonviolent felony to file a petition requesting expungement of the police and court records relating to the conviction if such person has (i) been free from any term of incarceration, probation, and postrelease supervision imposed as a result of such conviction for at least eight years, (ii) no prior or subsequent convictions other than traffic infractions, and (iii) no pending criminal proceeding.

HB 159 **Protective orders; prohibited contact; remote control of appliance, etc., by electronic device.** Clarifies that a court entering a

protective order may, as a condition of such protective order, prohibit the respondent from using any electronic device to remotely control any appliance, utility, or device located on or within the petitioner's residence or the curtilage thereof.

HB 250 **Juvenile offenders; eligibility for 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.

HB 251 **Prostitution-related crimes; minors; penalties.** Makes it a Class 6 felony for an adult to visit a bawdy place with a minor when he knows that the bawdy place is used or to be used for lewdness, assignation, or prostitution. The bill also adds felony violations of such offense to (i) the list of offenses for which registration in the Sex Offender and Crimes Against Minors Registry is required, (ii) the definition of violent felony for the purposes of the sentencing guidelines, (iii) the list of predicate criminal acts that constitutes the definition of street gangs, (iv) the list of offenses that may constitute racketeering under the Virginia Racketeer Influenced and Corrupt Organization Act, and (v) the offenses that may be investigated by a multi-jurisdiction grand jury. The bill also makes applicable to all persons, regardless of the gender of the victim, the crimes of (a) assisting or aiding in the abduction of or threatening to abduct a female under 16 years of age for the purpose of concubinage or prostitution, which the bill also changes to include any person under 18 years of age, and (b) placing or leaving one's wife in a bawdy place.

HB 252 **Causing or encouraging acts rendering children sexually abused; penalty.** Provides that any person 18 years of age or older who (i) (a) has physical custody of a minor, (b) allows a minor to reside at his residence, (c) is in a position of trust or authority over a minor, or (d) is the temporary caretaker of a minor; (ii) is more than three years older than such minor; and (iii) willfully contributes to, encourages, or causes any act, omission, or condition that results in any sexual act upon the minor in violation of the law is guilty of a Class 4 felony.

HB 254 **Underage alcoholic possession, etc.; 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 and fines and orders of restitution have been satisfied, and the person seeking the expungement is at least 21 years of age and has no other alcohol-related convictions. The bill provides that any person seeking expungement of an alcohol-related charge shall be assessed a $150 fee, which shall be paid into the state treasury and credited to the Department of State Police.

HB 258 **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.

HB 261 **Suspension of driver's license for nonpayment of fines or costs.** Removes the requirement that a court suspend the driver's

license of a person convicted of any violation of the law who fails or refuses to provide for immediate payment of fines or costs.

HB 281 **Prisoners; medical care.** Eliminates the Department of Corrections prisoner co-payment program for nonemergency health care services.

HB 288 **Criminal sexual assault; definition of sexual abuse; complaining witness under age 13; penalty.** Includes in the definition of "sexual abuse" the intentional touching of any part of a complaining witness's body, on either 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. The bill repeals the Class 1 misdemeanor prohibiting adult penetration of the mouth of a child under the age of 13 with lascivious intent.

HB 295 **Maximum term of probation.** Limits to five years the term of probation for a person convicted of an offense other than a violent felony, an act of violence, or an offense for which registration with the Sex Offender and Crimes Against Minors Registry is required.

HB 323 **Criminal sexual assault; definition of intimate parts.** Includes in the definition of "intimate parts," for the purposes of criminal sexual assault, the chest of a child under the age of 15.

HB 384 **Presumption of death; confessions or convictions of murder.** Provides that any person who is a resident of the Commonwealth shall be presumed dead if such person has disappeared, his body has not been found, he is not known to be alive, and an individual has confessed to such person's murder under oath or has been convicted of such murder. The bill further exempts such persons from the notice and hearing requirements otherwise required for the court to enter an order determining that the presumed decedent is in fact dead.

HB 412 **Family or household member; adds to existing definition.** Adds to the existing definition of "family or household member" any individual who is in or who, within the previous 12 months, has been in a dating relationship with the person. The definition is used for purposes of statutes related to assault and battery against a family or household member, stalking a family or household member, protective orders, and the recruitment of persons for criminal street gangs.

HB 430 **Parole; application of statutes.** Repeals the abolition of parole. The bill also provides that the Virginia Parole Board shall establish procedures for consideration of parole for persons who were previously ineligible for parole, because parole was abolished, to allow for an extension of time for reasonable cause.

HB 652 **Admission to bail; presumption of release on recognizance.** Provides that a judicial officer shall release any person taken into custody by an arresting officer for any misdemeanor violation committed in such arresting officer's presence, except for violations of driving or operating a motor vehicle, watercraft, or motorboat while intoxicated offenses that give rise to a rebuttable presumption against bail; or as otherwise provided in Title 46.2.

HB 673 **Cruelty to children; penalty.** Increases the penalty from a Class 6 felony to a Class 4 felony for any person employing or having custody of a child to willfully cause or permit such child to be tortured physically or psychologically, tormented, mutilated, beaten, or cruelly treated. The bill includes such offense in the definition of "violent felony" for purposes of determining felony sentencing guidelines. The bill also includes willful and negligent acts of cruelty and injuries to children in offenses

prohibiting a person from operating or residing in a family day home and provides that a conviction is a barrier crime for persons providing care to certain children or the elderly or disabled.

HB 830 **Expungement of certain charges and convictions.** Allows a person to petition for expungement of convictions and deferred disposition dismissals for possession of a controlled substance, marijuana possession, and underage alcohol possession when (i) the offense occurred as a result of such person being a victim of sexual assault or sexual battery and reporting such sexual assault or sexual battery to law enforcement; (ii) all court costs, fines, and restitution have been paid; and (iii) two years have passed since the date of completion of all terms of sentencing and probation.

HB 864 **Infected sexual battery.** Provides that, in order for a person to be convicted of infected sexual battery, such person (i) knew that he was infected at the time of the offense with HIV, syphilis, or hepatitis B and (ii) knew that his infection was currently detectable and transmittable, and committed the offense without using a prophylactic barrier, including a condom or dental dam.

HB 869 **Supplementing compensation of public defender.** Requires the governing body of any county or city that elects to supplement the compensation of the attorney for the Commonwealth, or any of their deputies or employees, above the salary of any such officer, deputy, or employee, to supplement the compensation of the public defender, or any of his deputies or employees, in the same amount as the supplement to the compensation of the attorney for the Commonwealth, or any of his deputies or employees.

HB 871 **Robbery; penalty.** Defines "robbery" and creates degrees of punishment corresponding to the severity of a robbery offense. Any person who commits a robbery by causing serious bodily injury is guilty of robbery in the first degree, which is punishable by confinement in a state correctional facility for a maximum term of life. Any person who commits robbery by displaying a firearm in a threatening manner is guilty of robbery in the second degree, which is punishable by confinement in a state correctional facility for a maximum term of 20 years.

HB 996 **Parole; exception to limitation on the application of parole statutes.** Provides that an incarcerated person is eligible for parole if (i) such person 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 on or after the abolition of parole went into effect (on January 1, 1995) and (ii) the jury was not instructed on the abolition of parole in the Commonwealth.

HB 1033 **Petition for vacatur and expungement of convictions and police and court records.**
Allows any person who was a human trafficking victim at the time of an offense that led to a criminal charge or conviction of certain crimes to petition the court to vacate such conviction and expunge the police and court records related to such conviction or to expunge the police and court records related to such charge. The bill provides that there is a rebuttable presumption that a person's participation in an offense was a result of having been a victim of human trafficking if there is official government documentation, defined in the bill, of the petitioner's status as a victim of human trafficking at the time of the offense.

HB 1035 **Attorneys for the Commonwealth; compensation and collection of fees.** Prohibits the Compensation Board, when determining

staffing and funding levels for offices of attorneys for the Commonwealth, from (i) considering the number of charges brought or the number of convictions obtained by such attorney for the Commonwealth; (ii) relying on standards devised or recommended by the attorney for the Commonwealth, law-enforcement agencies, or professional associations representing attorneys for the Commonwealth or law-enforcement officers; or (iii) using measures that increase if an attorney for the Commonwealth (a) elects to prosecute a more serious charge, (b) elects to prosecute additional charges from a single arrest or criminal incident, (c) obtains convictions rather than dismissing charges or offering reduced charges, or (d) proceeds with prosecution rather than diversion.

HB 1111 **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.

HB 1351 **Temporary detention; evaluation; who may perform.** Expands the category of individuals who may evaluate a person who is the subject of an emergency custody order to determine whether the person meets the criteria for temporary detention to include any person described in the definition of "mental health professional" in § 54.1-2400.1 who (i) is skilled in the diagnosis and treatment of mental illness, (ii) has completed a certification program approved by the Department of Behavioral Health and Developmental Services, and (iii) complies with regulations of the Board of Behavioral Health and Developmental Services related to performance of such evaluations.

HB 1433 **Destruction of criminal history information for certain charges and convictions.** Provides that a court shall enter an order of destruction for police and court records, in the absence of good cause shown to the contrary by the Commonwealth, for a deferred disposition dismissal of (i) underage alcohol possession when one year has passed since the date of dismissal and all court costs and fines and all orders of restitution have been satisfied or (ii) possession of marijuana when three years have passed since the date of dismissal and all court costs and fines and all orders of restitution have been satisfied. The bill also provides that any person who has received such deferred disposition dismissals may file a petition with the court that disposed of such charge for an order of destruction at any time provided that all court costs and fines and all orders of restitution have been satisfied. This bill is a recommendation of the Virginia Criminal Justice Conference.

HB 1507 **Possession of marijuana.**

HB 1517 **Expungement of police and court records; misdemeanor and nonviolent felony convictions.** Allows a person convicted of a misdemeanor or nonviolent felony to file a petition requesting expungement of the police and court records relating to the conviction if such person (i) has been free from any term of incarceration, probation, and postrelease supervision imposed as a result of such conviction for at least ten years; (ii) has no prior or subsequent convictions other than traffic infractions; and (iii) has no pending criminal proceeding.

SB 148 **Driving under the influence; provisions regarding driving or operating a motor vehicle, etc.** Provides that the provisions regarding driving or operating a motor vehicle, engine, or train while intoxicated and the provisions regarding operating a motor vehicle by a person under the age of 21 after illegally consuming

alcohol shall not apply to any person driving or operating a motor vehicle on his own residential property or the curtilage thereof.

SB 223 **Juvenile records; expungement.** Provides for the expungement of juvenile records for offenses that would be felony larceny if committed by an adult.

SB 306 **Criminal history information; destruction of information for certain charges and convictions.** Provides that a court shall enter an order of destruction for police and court records, in the absence of good cause shown to the contrary by the Commonwealth, for a deferred disposition dismissal of (i) underage alcohol possession when one year has passed since the date of dismissal and all court costs and fines and all orders of restitution have been satisfied or (ii) possession of marijuana when three years have passed since the date of dismissal and all court costs and fines and all orders of restitution have been satisfied. The bill also provides that any person who has received such deferred disposition dismissals may file a petition with the court that disposed of such charge for an order of destruction at any time provided that all court costs and fines and all orders of restitution have been satisfied. As introduced, this bill was a recommendation of the Virginia Criminal Justice Conference. The provisions of the bill are contingent on funding in a general appropriation act. This bill incorporates SB 287.

SB 449 **Death penalty; abolishes penalty, including those persons currently under a death sentence.** Abolishes the death penalty, including for those persons currently under a death sentence.

SB 537 **Limitation on mandatory minimum punishment.** Provides that mandatory minimum punishments shall not apply to any sentence imposed for an offense committed on or after July 1, 2020.

SB 550 **Dating relationship abuse; penalty.** Expands the crime of assault and battery against a family or household member to include persons in a dating relationship, as defined in the bill. The bill also expands the class of persons who are eligible to obtain a protective order in cases of family abuse to include persons who are in a dating relationship and who have been subjected to dating relationship abuse, also defined in the bill.

SB 608 **Expungement of police and court records; pardons.** Allows a person to petition for the expungement of the police and court records relating to such person's conviction for misdemeanors and certain felonies if he has been granted a simple pardon for the crime. The bill also allows a person to petition for an expungement of the police and court records relating to convictions of marijuana possession, underage alcohol or tobacco possession, and using a false ID to obtain alcohol, and for deferred disposition dismissals for possession of controlled substances or marijuana, underage alcohol or tobacco possession, and using a false ID to obtain alcohol, when 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. Under current law, police and court records relating to convictions are only expunged if a person received an absolute pardon for a crime he did not commit. This bill incorporates SB 118 and SB 517.

SB 624 **Geriatric prisoners; conditional release.** Allows any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, who (i) is 55 years of age or older and has served at least 15 years of the sentence imposed or (ii) is 50 years of age or older and has served at least 20 years of the sentence imposed, to petition the Parole Board for conditional release.

SB 681 **Compensation of experts in criminal cases.** Increases from $750 to $1,200 the maximum fee that the court may pay for professional services rendered by each psychiatrist, clinical psychologist, or other expert appointed by the court to render professional service in a criminal case other than capital murder. The provisions of the bill are contingent on funding in a general appropriation act.

SB 721 **Orders of restitution; enforcement.** Provides that an order of restitution shall be docketed in the name of the Commonwealth on behalf of a victim and that the clerk of such court, prior to satisfaction of the judgment and upon written request of the victim, shall enter a judgment in the victim's favor for the amount of unpaid restitution, remove from its automated financial system the amount of unpaid restitution, and record a release of any judgment for restitution previously entered in favor of the Commonwealth on behalf of the victim.

SB 723 **Bail; data collection and reporting standards, report.** Requires the Department of Criminal Justice Services to (i) collect data relating to bail determinations for any person who is held in custody pending trial or hearing for an offense, civil or criminal contempt or otherwise, in every locality; (ii) create a uniform reporting mechanism for criminal justice agencies to submit such data; and (iii) submit an annual report on the data collected to the Governor and the General Assembly, as well as publish the annual report on the Department's website.

SB 802 **Death penalty executions; moratorium.** Imposes a moratorium on executions. The bill does not affect any other matter of law related to the death penalty, including bringing and trying capital charges, sentencing proceedings, imposition of the death penalty, appeals of the death penalty, and habeas review. The moratorium will remain in effect until adjournment of the first regular session of the General Assembly after a joint subcommittee established pursuant to a joint resolution passed by the 2020 General Assembly conducts a study of the death penalty in the Commonwealth and issues a report of its conclusions and recommendations.

SB 803 **Attorneys for the Commonwealth; compensation and collection of fees.** Prohibits the Compensation Board, when determining staffing and funding levels for offices of attorneys for the Commonwealth, from (i) considering the number of charges brought or the number of convictions obtained by such attorney for the Commonwealth; (ii) relying on standards devised or recommended by the attorney for the Commonwealth, law-enforcement agencies, or professional associations representing attorneys for the Commonwealth or law-enforcement officers; or (iii) using measures that increase if an attorney for the Commonwealth (a) elects to prosecute a more serious charge, (b) elects to prosecute additional charges from a single arrest or criminal incident, (c) obtains convictions rather than dismissing charges or offering reduced charges, or (d) proceeds with prosecution rather than diversion. The bill also requires attorneys for the Commonwealth to pay all fees collected by them in consideration of the performance of official duties or functions into the state treasury, instead of only half of such fees.

SB 805 **Robbery; definition, penalty.** Defines "robbery" and creates degrees of punishment corresponding to the severity of a robbery offense. Any person who commits a robbery by causing serious bodily injury is guilty of robbery in the first degree, which is punishable by confinement in a state correctional facility for a maximum term of life. Any person who commits robbery by displaying a firearm in a threatening

manner is guilty of robbery in the second degree, which is punishable by confinement in a state correctional facility for a maximum term of 20 years. Any person who commits robbery by using physical force not resulting in serious bodily injury, or by displaying a deadly weapon other than a firearm in a threatening manner, is guilty of robbery in the third degree, which is punishable as a Class 5 felony.

SB 808 **Expungement of police and court records; misdemeanor and felony convictions.** Allows a person convicted of a criminal offense to file a petition requesting expungement of the police and court records relating to the conviction if such person (i) has been free from any term of incarceration, probation, and postrelease supervision imposed as a result of such conviction for (a) at least eight years for a misdemeanor offense or (b) at least 12 years for a felony offense, (ii) has no subsequent convictions other than traffic infractions, and (iii) has no pending criminal proceeding. CO

SB 810 **Discretionary sentencing guidelines worksheets; use by juries**. Requires that the jury be given the applicable discretionary sentencing guidelines worksheets during a sentencing proceeding and that the court instruct the jury that the sentencing guidelines worksheets are discretionary and not binding on the jury. The bill requires sentencing guidelines worksheets to be kept confidential by the jurors and filed under seal by the court.

SB 811 **Sentencing in a criminal case; bifurcated jury trial.** Provides that in a criminal case the court shall ascertain the extent of the punishment, unless the accused has requested that the jury ascertain punishment or was found guilty of capital murder.

CRIMINAL LAW

– FAILED –

HB 118 **Trespass with an unmanned aircraft system; local or state correctional facilities, penalty.** Provides that any person who knowingly and intentionally causes an unmanned aircraft system to come within 400 feet of the lateral boundaries of any local or state correctional facility, for any reason, is guilty of a Class 1 misdemeanor.

HB 163 **Contempt of court; penalty.** Increases from 10 days to 30 days the maximum term of imprisonment for a charge of contempt of court but limits the term of imprisonment to 30 days, including in cases where the court empanels a jury to ascertain the punishment.

HB 247 **Infliction of injury on pedestrians and wheelchair users; penalties.** Increases from a traffic infraction to a Class 2 misdemeanor the penalty for failure to obey traffic lights or stop for pedestrians when such failure results in the death or serious bodily injury of a pedestrian or wheelchair user.

HB 266 **Interest on fines and costs in criminal cases and traffic infractions.** Eliminates the accrual of interest on any fine or costs imposed in a criminal case or in a case involving a traffic infraction. The bill provides that any such fine or costs that have accrued interest prior to July 1, 2020, shall cease to accrue interest on July 1, 2020, and such accrued interest may be waived by any court.

HB 274 **Juveniles; trial as adult.** Increases from 14 years of age to 16 years of age the minimum age at which a juvenile can be tried as an adult in circuit court for a felony.

HB 279 **Sentencing proceeding by the jury after conviction; recommendation of leniency.** Provides that a jury may, in ascertaining the punishment for a person convicted of a felony

or Class 1 misdemeanor, recommend that the sentence imposed be suspended in whole or in part, or that sentences imposed for multiple offenses be served concurrently, except where such suspension of sentence or concurrent service is prohibited by law.

HB 401 **Court-appointed counsel; additional compensation.** Allows court-appointed counsel for parents in child welfare cases to submit a waiver application for additional compensation of $120 in district court and $158 for cases appealed to the circuit court. FAILED

HB 470 **Protective orders on behalf of incapacitated persons.** Allows an employee of a local department of social services (local department) to petition a court on behalf of an incapacitated person for a preliminary protective order in cases of family abuse or non-family abuse.

HB 580 **Child abuse and neglect; gender identity or sexual orientation.** Expands the definition of "abused or neglected child" to include any child whose parents, or other person responsible for his care, create or inflict, threaten to create or inflict, or allow to be created or inflicted upon such child a physical or mental injury on the basis of the child's gender identity or sexual orientation.

HB 625 **Protective orders in cases of family abuse; definition of family abuse**; identity
theft. Includes acts of identity theft committed against a person's family or household member in the definition of "family abuse" for purposes of the issuance of protective orders in cases of family abuse.

HB 675 **License restrictions for minors; use of handheld personal communications devices.** Clarifies that the prohibition on the use of a wireless communications device by the holder of a provisional driver's license applies whether or not the device is being used for communication purposes. The bill exempts the use of applications for solely navigation purposes and global positioning systems provided that the driver does not enter information into or manually manipulate the device or system while operating the vehicle.

HB 667 **Habitual offenders; driving while intoxicated.** Decreases the penalty for driving while intoxicated while a habitual offender revocation is in effect, provided that such driving does not endanger the life, limb, or property of another, from a felony with a mandatory minimum of one year confinement to a Class 1 misdemeanor with a mandatory minimum of 10 days confinement.

HB 820 **Court appearance of a person not free on bail.** Makes various changes to provisions regarding bail hearings, including (i) the appointment of counsel for the accused, (ii) the information provided to accused's counsel, (iii) a requirement that counsel for the accused be provided with adequate time to confer with the accused prior to any bail hearing, and (iv) the compensation of counsel for the accused.

HB 919 **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.

HB 1077 **Protective orders; minors; filing of petition.** Provides that a minor may petition for a protective order on his own behalf without the consent of a parent or guardian and without doing so by next friend.

HB 1180 **Misdemeanor; maximum term of confinement.** Reduces the maximum term of confinement in jail for a Class 1 misdemeanor and certain unclassified misdemeanors from 12 months to 364 days.

HB 1182 **Protective order; family abuse; restitution; temporary spousal support.** Allows the court to order the respondent in a protective order issued in a case of family abuse to order financial or other relief for the protection or well-being of the petitioner. The bill further allows a court to issue a temporary spousal support order for support of the petitioner in conjunction with the issuance of such a protective order.

HB 1386 **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.

HB 1423 **Orders of restitution; enforcement.** Provides that an order of restitution shall be docketed in the name of the Commonwealth on behalf of a victim, unless the victim named in the order of restitution requests in writing that the order be docketed in the name of the victim. The bill provides that an order of restitution docketed in the name of the victim shall be enforced by the victim as a civil judgment.

HB 1461 **Appeal from bail, bond, or recognizance order.** Provides that a court may stay the execution of a bail order, in all bail decisions, for as long as reasonably practicable, but in no event more than three days, for a party to obtain an expedited appeal before the next higher court. Under current law, there is no maximum time for the stay unless the bail decision was governed by the bail presumption provisions.

SB 145 **Protective orders; violations, penalty.** Provides that any person who commits any assault, assault and battery, or bodily wounding upon any party protected by a protective order is guilty of a Class 6 felony. Currently, the Class 6 felony is only applicable if the person commits an assault and battery that results in serious bodily injury to the protected party.

SB 331 **Capital murder of a person in a school setting; penalty mandatory minimum term.** Provides that the willful, deliberate, and premeditated killing of any person by another when such person is upon the property of any child day center, any public, private, or religious preschool, elementary school, middle school, or high school, or any institution of higher education is punishable as capital murder, a Class 1 felony.

SB 440 **Electronic transmission of sexually explicit visual material by minors; penalties.** Provides that a minor who (i) knowingly transmits, distributes, publishes, or disseminates to another minor an electronically transmitted communication containing sexually explicit visual material of his own person or (ii) knowingly possesses at least one but not more than 10 electronically transmitted communications containing sexually explicit visual material of another minor is guilty of a Class 2 misdemeanor.

SB 489 **Authority to defer and dismiss a criminal case.** Provides that a trial court presiding in a criminal case may, after any plea or trial, with or without a determination, finding, or pronouncement of guilt, and notwithstanding the entry of a conviction order, upon consideration of the facts and circumstances of the case, upon its own motion with the consent of the defendant, or with the agreement of the defendant and the Commonwealth, defer proceedings, defer entry of a conviction order, if none, or defer entry of a final order, and continue the case for final disposition, on such reasonable terms and conditions as may be agreed upon by the parties and placed on the record, or if there is

no agreement, as may be imposed by the court. The bill provides that final disposition may include (a) conviction of the original charge, (b) conviction of an alternative charge, or (c) dismissal of the proceedings.

SB 493 **Geriatric, terminally ill, etc., prisoners; conditional release.** Provides that any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, who is terminally ill or permanently physically disabled is eligible for consideration by the Parole Board for conditional release. The bill also provides that any person serving such sentence (i) who is 65 years or age or older and has served at least five years of the sentence imposed or (ii) who is 60 years of age or older and has served at least 10 years of the sentenced imposed is eligible for consideration by the Parole Board for conditional release without the need to petition the Parole Board.

SB 625 **Failure to advise of consequences of guilty plea; vacation of conviction.** Creates a mechanism for a person who is not a citizen of the United States to vacate a criminal conviction or adjudication of delinquency, other than for a violent felony or an offense that requires sex offender registration, if such person was not advised of the possible adverse consequences of such conviction or adjudication on his immigration status (i) for any conviction of such offense entered on or before July 1, 2019, or (ii) if the petitioner received actual notice that he is subject to deportation or removal from the United States, exclusion from admission to the United States, or denial of naturalization under federal law as a result of entering a plea of guilty or nolo contendere to such offense and such petition is filed within one year after receiving such notice. The bill provides that such person may file a petition with the appropriate circuit court, which may hold a hearing on the petition and either dismiss the petition or vacate the person's conviction or adjudication and order a retrial. The bill also provides that only one such petition may be filed.

SB 642 **Functions of a multi-jurisdiction grand jury; failure to pay wages.** Adds the offense of willfully failing to pay wages to the list of offenses that a multi-jurisdiction grand jury is authorized to investigate.

SB 730 **Custodial interrogations; recording.** Provides that any law-enforcement officer shall, if practicable, make an audiovisual recording of the entirety any custodial interrogation of a person conducted in a place of detention. The bill provides that if an audiovisual recording is unable to be made, the law-enforcement officer shall make an audio recording of the custodial interrogation. The bill provides that the failure of a law-enforcement officer to make such a recording shall not affect the admissibility of the statements made during the custodial interrogation, but the court or jury may consider such failure in determining the weight given to such evidence. As introduced this bill was a recommendation of the Virginia Criminal Justice Conference. This bill incorporates SB 305.

SB 806 **Ex parte requests for investigative services or expert assistance in noncapital cases.** Allows a defendant or his attorney, when such defendant is charged with a felony offense or Class 1 misdemeanor and is financially unable to pay forexpert assistance, to move the circuit court to designate another judge in the same circuit to hear an ex parte request for appointment of a qualified expert to assist in the preparation of the defendant's defense. Upon receiving the defendant's or his attorney's declaration of need for confidentiality, the designated ex parte judge shall conduct an ex parte hearing on the request for authorization to obtain expert assistance. After a hearing upon the motion and upon a showing that the provision of the requested expert services

would materially assist the defendant in preparing his defense and the denial of such services would result in a fundamentally unfair trial, the court shall order the appointment of a qualified expert. The provisions of the bill are contingent on funding in a general appropriation act.

SB 823 **Writs of actual innocence.** Provides that a person who was convicted of a felony or who was adjudicated delinquent by a circuit court of an offense that would be a felony if committed by an adult may petition for a writ of actual innocence based on biological evidence or nonbiological evidence regardless of the type of plea he entered at trial. Under current law, such person may petition for either writ if he entered a plea of not guilty, and any person, regardless of the type of plea he entered at trial, may petition for such writ based on biological evidence if he is sentenced to death or convicted or adjudicated delinquent of murder or a felony for which the maximum punishment is imprisonment for life. The bill also eliminates the provision that limits a petitioner to only one writ of actual innocence based on nonbiological evidence for any conviction.

SB 840 **Persons acquitted by reason of insanity.** Makes various changes to the provisions regarding confinement hearings and conditional release procedures for persons who have been acquitted of a violent felony by reason of insanity. Under current law, such provisions do not distinguish between persons acquitted of a violent felony or any other felony offense.

SB 878 **Court-appointed counsel; additional compensation.** Allows court-appointed counsel for parents in child welfare cases to submit a waiver application for additional compensation of $120 in district court and $158 for cases appealed to the circuit court. The provisions of the bill are contingent on funding in a general appropriation act.

INSURANCE LAW

– PASSED –

HB 951 **Mutual assessment property and casualty insurers; notice by electronic delivery.** Authorizes a mutual assessment property and casualty insurer to provide notice of assessment by electronic delivery. Under current law, such notice may only be provided personally or by mail.

HB 1251 **Balance billing; emergency services.** Provides that when a covered person receives covered emergency services from an out-of-network health care provider or receives out-of-network services at an in-network facility, the covered person is not required to pay the out- of-network provider any amount other than the applicable cost-sharing requirement. The measure also establishes a standard for calculating the health carrier's required payment to the out-of-network provider of the services. If such provider determines that the amount to be paid by the health carrier does not comply with the applicable requirements, the measure requires the provider and the health carrier to make a good faith effort to reach a resolution on the appropriate amount of the reimbursement and, if a resolution is not reached, authorizes either party to request the State Corporation Commission to review the disputed reimbursement amount and determine if the amount complies with applicable requirements. The measure provides that such provisions do not apply to an entity that provides or administers self-insured or self-funded plans; however, such entities may elect to be subject such provisions. The measure requires health carriers to make reports to the Bureau of Insurance and directs the Bureau to provide reports to certain committees of the General Assembly. The measure requires the nonprofit data services organization contracting with the Department of Health to operate the All Payer Claims Database to convene an advisory work group to make recommendations for a methodology to be used for identifying codes for comparable emergency services and statistical adjustments to account for outlier payment amounts for each health planning region to be used for the market-based value calculation and submit its recommendations to the Commissioner of Insurance no later than December 31, 2020.

HB 1334 **Insurance data security; required programs and notifications.** Establishes standards for insurance data security and for the investigation of a cybersecurity event and the notification to the Commissioner of Insurance and affected consumers of a cybersecurity event. The bill requires insurers to develop, implement, and maintain a comprehensive written information security program based on an assessment of its risk and that contains administrative, technical, and physical safeguards for the protection of nonpublic information and its information system. The bill requires investigation of potential cybersecurity events and prescribes standards for such investigations. The bill requires that the notification of the occurrence of a cybersecurity event provided by an insurer or other entity to the Commissioner and affected consumers to include certain information prescribed by the bill. The bill requires the Commissioner to adopt rules and regulations regarding data security and authorizes the Commissioner to investigate potential violations.

SB 172 **Health insurance; payment to out-of- network providers, emergency services.** Provides that when a covered person receives covered emergency services from an out-of-network health care provider or receives out-of-network services at an in-network facility, the covered person is not required to pay the out- of-network provider any amount other than the

applicable cost-sharing requirement. The measure also provides that the health carrier's required payment to the out-of-network provider of the services is the usual and customary commercial payment. If such provider determines that the amount to be paid by the health carrier is not appropriate, the measure requires the provider and the health carrier to make a good faith effort to reach a resolution on the appropriate amount of the reimbursement and, if a resolution is not reached, authorizes either party to request to enter arbitration. The measure requires the State Corporation Commission to establish rules for an expedited arbitration process to settle disputes between providers and health carriers arising out of such disputes. Under the measure, the Commission is required to establish a portal on its website for the submission of arbitration claims, (ii) contract with independent arbitrators to settle such disputes, (iii) ensure the arbitrators do not have a conflict of interest with the parties and have experience in health care billing, and (iv) maintain a list of such arbitrators on its website. The measure provides certain factors that an arbitrator is required to consider when settling such a disputed claim. The measure provides that provisions of the bill do not apply to an entity that provides or administers self-insured or self-funded plans; however, such entities may elect to be subject such provisions. The measure requires health carriers to make reports to the Bureau of Insurance and directs the Bureau to provide reports to certain committees of the General Assembly.

SB 208 **Mechanics' liens; right to withhold payment.** Specifies that the use of funds paid to a general contractor or subcontractor and used 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.

SB 735 **Peer-to-peer vehicle sharing platforms.** Establishes insurance, taxation, recordkeeping, disclosure, and safety recall requirements for peer-to-peer vehicle sharing platforms, defined in the bill.

SB 766 **Health care services; explanation of benefits.** Authorizes the State Corporation Commission to adopt regulations that establish alternative methods of delivery of the explanation of benefits, provided that such alternative method is in compliance with the provisions of federal regulations regarding the right to request privacy protection for protected health information. This bill is identical to HB 807.

INSURANCE LAW

– CARRIED OVER –

HB 59 **Health carriers; licensed athletic trainers.** Requires health insurers and health service plan providers whose policies or contracts cover services that may be legally performed by a licensed athletic trainer to provide equal coverage for such services when rendered by a licensed athletic trainer.

HB 188 **Health care services; payment estimates.** Requires hospitals and practitioners licensed by the Board of Medicine to provide a patient or the representative of a patient scheduled to receive a nonemergency procedure, test, or service to be performed by the hospital or practitioner with an estimate of the payment amount for which the patient will

be responsible no later than one week after the scheduling of such procedure, test, or service. Currently, only hospitals are required to provide such estimate, and such estimate is required only (i) for elective procedures, tests, or services; (ii) within three days of the procedure, test, or service; and (iii) upon request of the patient or his representative.

SB 27 **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 from the date the initial settlement demand was presented to the insurance company.

INSURANCE LAW

– FAILED –

HB 1172 **Electronic health records; digital format.** Requires electronic health record systems to transfer data in a common file format that is suitable for electronic access and use by the receiving entity and provides that if an individual requests his health record in an electronic format from a health care entity, the health care entity shall provide such health record in a common electronic file format that is suitable for electronic access and use by the receiving entity.

HB 1212 **Compliance with terms and conditions of personal motor vehicle insurance policy.** Provides that any party, regardless of the age of such party, seeking liability coverage under a personal motor vehicle insurance policy shall comply with the terms and conditions of an insurance policy, including the duty to cooperate in any investigation of a claim in which liability coverage is sought.

HB 1539 **Peer-to-peer vehicle sharing platforms.** Establishes insurance, taxation, recordkeeping, disclosure, and safety recall requirements for peer-to-peer vehicle sharing platforms, defined in the bill.

SB 192 **Health insurance; physical therapist office visit; cost-sharing requirements.**
Prohibits health insurers, corporations providing health care coverage subscription contracts, and health maintenance organizations whose policies, contracts, or plans include coverage for physical therapy from imposing any cost-sharing requirements such as a copayment, coinsurance, or deductible for a physical therapist office visit that exceeds the cost-sharing requirements for a physician or osteopath office visit.

SB 664 **Motor vehicle liability insurance coverage limits.** Increases the minimum motor vehicle liability insurance coverage amounts from $25,000 to $35,000in cases of bodily injury to or death of one person, from $50,000 to $70,000 in cases of bodily injury to or death of more than one person in any one accident, and from $20,000 to $40,000 for property damage coverage.

SB 767 **Health insurance; payment to out-of- network providers.** Provides that when a covered person receives covered emergency services from an out-of-network health care provider or receives out-of-network services at an in-network facility, the covered person is not required to pay the out-of-network provider any amount other than the applicable cost-sharing requirement. The measure also

establishes a standard for calculating the health carrier's required payment to the out-of- network provider of the services, which standard is the lower of the market-based value for the service or 125 percent of the amount that would be paid under Medicare for the service.

HJ 49 **Congress; amend ERISA to support state actions to expand access to health care.**

WORKERS' COMPENSATION

– PASSED –

HB 55 **Worker cooperatives; established as a category of cooperative associations.** Establishes worker cooperatives as a category of cooperative associations. A worker cooperative is a stock corporation that has elected to be governed by provisions established by this measure, which include (i) conducting its business primarily for the mutual benefit of its members, (ii) allowing only current and retired employees to be members, (iii) limiting voting rights to current employees, (iv) providing that each employee is entitled to one vote, (v) prohibiting any person from owning more than one membership share, (vi) requiring at least two-thirds of employees to own membership shares, and (vii) requiring that net earnings be paid or credited to members in accordance with the ratio that each member's amount of work performed during a period bears to the total amount of work performed by all members during that period.

HB 169 **Workers' compensation; occupational disease presumption, correctional officers.** Adds correctional officers and full-time sworn members of the enforcement division of the Department of Motor Vehicles to the list of public safety employees who are entitled to a presumption that certain infectious diseases are compensable occupational diseases.

HB 438 **Workers' compensation; post-traumatic stress disorder, law-enforcement officers and firefighters.** Provides that post- traumatic stress disorder incurred by a law- enforcement officer or firefighter is compensable under the Virginia Workers' Compensation Act if a mental health professional examines a law-enforcement officer or firefighter and diagnoses the individual as suffering from post-traumatic stress disorder as a result of the individual's undergoing of a qualifying event, defined as an incident or exposure occurring in the line of duty on or after July 1, 2020, (i) resulting in serious bodily injury or death to any person or persons; (ii) involving a minor who has been injured, killed, abused, or exploited; (iii) involving an immediate threat to life of the claimant or another individual;(iv) involving mass casualties; or (v) responding to crime scenes for investigation. Other conditions for compensability include (a) if the post-traumatic stress disorder resulted from the law-enforcement officer or firefighter acting in the line of duty and, in the case of a firefighter, such firefighter complied with certain federal Occupational Safety and Health Act standards; (b) if the law-enforcement officer's or firefighter's undergoing of a qualifying event was a substantial factor in causing his post-traumatic stress disorder; (c) if such qualifying event, and not another event or source of stress, was the primary cause of the post-traumatic stress disorder; and (d) if the post-traumatic stress disorder did not result from any disciplinary action, work evaluation, job transfer, layoff, demotion, promotion, termination, retirement, or similar action of the officer or firefighter. The measure also establishes requirements for resilience and self-care technique training. This bill is identical to SB 561.

HB 617 **Workers' compensation; repetitive motion injuries.** Directs the Virginia Workers' Compensation Commission to engage an independent and reputable national research organization to examine the implications of covering workers' injuries caused by repetitive motion through the Virginia workers' compensation system.

HB 783 **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 or certain employees develop the cancer. The presumption shall not apply for any individual who was diagnosed with one of the conditions before July 1, 2020. The measure removes the compensability requirement that the employee who develops cancer had contact with a toxic substance encountered in the line of duty. The bill also reduces the number of years of service needed to qualify for the presumption from 12 to five for various types of cancer. For hypertension or heart disease, the bill adds a requirement that an individual complete five years of service in their position in order to qualify. This bill is identical is identical to SB 9.

HB 1558 **Workers' compensation; Ombudsman program.** Authorizes the Virginia Workers' Compensation Commission to create an Ombudsman program and appoint an ombudsman to administer such program. The program's purpose is to provide neutral educational information and assistance to persons who are not represented by an attorney, including those persons who have claims pending or docketed before the Commission.

SB 9 **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 or certain employees develop the cancer. The presumption shall not apply for any individual who was diagnosed with one of the conditions before July 1, 2020. The measure removes the compensability requirement that the employee who develops cancer had contact with a toxic substance encountered in the line of duty. The bill also reduces the number of years of service needed to qualify for the presumption from 12 to five for various types of cancer. For hypertension or heart disease, the bill adds a requirement that an individual complete five years of service in his position in order to qualify. This bill incorporates SB 58, SB 381, and
SB 531 and is identical to HB 783.

SB 40 **Line of Duty Act; eligible dependents.** Provides that children born or adopted after the dDath or disability of an employee covered by the Line of Duty Act are eligible for health insurance coverage if the pregnancy or adoption occurred before July 1, 2017. Under current law, such children are not eligible.

SB 345 **Workers' compensation; occupational disease presumptions.** Adds correctional officers and full-time sworn members of the
enforcement division of the Department of Motor Vehicles to the list of public safety employees who are entitled to a presumption that certain infectious diseases are
compensable occupational diseases.

SB 561 **Workers' compensation; post-traumatic stress disorder, law-enforcement officers and firefighters.** Provides that post-traumatic stress disorder incurred by a law-enforcement officer or firefighter is compensable under the Virginia Workers' Compensation Act if a mental health professional examines a law-enforcement officer or firefighter and diagnoses the
individual as suffering from post-traumatic stress disorder as a result of the individual's undergoing a qualifying event, defined as an incident or exposure occurring in the line of duty on or after July 1, 2020, (i) resulting in serious bodily injury or death to any person or persons; (ii) involving a minor who has been injured, killed, abused, or exploited; (iii) involving an immediate threat to life of the claimant or another individual;(iv) involving mass casualties; or (v) responding to crime scenes for investigation. Other conditions for compensability include (a) if the post-traumatic stress disorder resulted from the law-

enforcement officer or firefighter acting in the line of duty and, in the case of a firefighter, such firefighter complied with certain federal Occupational Safety and Health Act standards; (b) if the law-enforcement officer's or firefighter's undergoing of a qualifying event was a substantial factor in causing his post-traumatic stress disorder; (c) if such qualifying event, and not another event or source of stress, was the primary cause of the post- traumatic stress disorder; and (d) if the post- traumatic stress disorder did not result from any disciplinary action, work evaluation, job transfer, layoff, demotion, promotion, termination, retirement, or similar action of the officer or firefighter. The measure also establishes requirements for resilience and self-care technique training. The bill incorporates SB 741 and SB 924 and is identical to HB 438.

WORKERS' COMPENSATION

– CARRIED OVER –

HB 1542 **Workers' compensation; occupational disease presumption; Department of Motor Vehicles officers.** Establishes a presumption that hypertension or heart disease causing the death or disability of a full-time sworn member of the enforcement division of the Department of Motor Vehicles is an occupational disease compensable under the Workers' Compensation Act.

WORKERS' COMPENSATION

– FAILED –

HB 45 **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.

HB 46 **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 or a third party. If the employer is unable to make such a determination because it lacks sufficient information from the employee or a third party, the employer shall so state and identify the needed additional information. If the employer intends to deny the claim, it shall provide the reasons.

HB 47 **Workers' compensation; foreign injuries.** Provides that an injured employee is eligible for benefits under the Virginia Workers' Compensation Act when a compensable accident happens while the employee is employed outside Virginia if (i) the employment contract was not expressly for services exclusively to be performed outside Virginia and (ii) either the employer's place of business is in Virginia or the employee regularly performs work on the employer's behalf in Virginia and resides in Virginia.

HB 649 **Workers' compensation; occupational disease presumption; police dispatchers.**
Establishes a presumption that hypertension or heart disease causing the death or disability of full-time salaried police dispatchers is an occupational disease compensable under the Workers' Compensation Act.

SB 227 **Virginia Workers' Compensation Commission; fee schedules.**

CONSUMER LAW

– PASSED –

HB 135 **Virginia Consumer Protection Act; assignment of right to receive veteran's benefits.** Provides that if any person advertises, arranges, offers, or enters into any assignment of right to receive veterans' pension or retirement benefits, such action constitutes a prohibited practice under the Virginia Consumer Protection Act if such assignment is prohibited or void under specified federal anti-assignment acts.

HB 334 **Manufactured Home Lot Rental Act; sale of manufactured home park to developer.** Provides that if the termination of a manufactured home park rental agreement is due to the sale of the manufactured home park to a buyer that is going to redevelop the park and change its use, the landlord shall provide certain relocation expenses to each manufactured home owner in the park within the 180-day notice period for the purpose of removing the manufactured home from the park.

HB 393 **Landlord and tenant; tenant rights and responsibilities, Tenant Bill of Rights.** Requires that the Director of Housing and Community Development develop a statement of tenant rights and responsibilities explaining in plain language the rights and responsibilities of tenants under the Virginia Residential Landlord and Tenant Act and maintain such statement on the Department's website. The bill requires the Director to develop and maintain on the Department's website a printable form to be signed by the parties to a written rental agreement acknowledging that the tenant has received from the landlord the statement of tenant rights and responsibilities and requires a landlord to furnish to a prospective tenant, at the time of furnishing an unsigned copy of the proposed written rental agreement, the statement of tenant rights and responsibilities for signature by the parties to the rental agreement. The landlord may not file or maintain an action against the tenant in a court of law for any alleged lease violation until he has provided the tenant with such statement.

HB 518 **Virginia Residential Property Disclosure Act; disclosures for a buyer to beware; energy analyst.** Adds obtaining a residential building energy analysis to the disclosure statement furnished to the buyer by the owner of residential real property that the buyer beware and exercise necessary due diligence with respect to determining the condition of real property or any improvements thereon. This bill is a recommendation of the Virginia Housing Commission. The bill incorporates HB 574 and is identical to SB 628.

HB 519 **Virginia Residential Landlord and Tenant Act; certain notices of termination to contain legal aid.** Provides that no notice of termination of tenancy served upon a tenant receiving tenant-based rental assistance through (i) the Housing Choice Voucher Program, 42 U.S.C. § 1437f(o), or (ii) any other federal, state, or local program by a private landlord is effective unless it contains on its first page, in type no smaller or less legible than that otherwise used in the body of the notice, the statewide legal aid telephone number and website address. This bill is identical to SB 115.

HB 594 **Virginia Residential Landlord and Tenant Act; security deposits; timing of application.** Requires the landlord to return the tenant's security deposit, minus any deductions or charges, within 45 days of the termination of the tenancy or the date the tenant vacates the dwelling unit, whichever occurs last. Under current law, the 45-day period to return the security deposit begins on the date of the termination of the tenancy. This bill is identical to SB 388.

HB 789 **Consumer lending.** Replaces references to payday loans with the term "short-term loans." The measure caps the interest and fees that may be charged under a short-term loan at an annual rate of 36 percent, plus a maintenance fee; increases the maximum amount of such loans from $500 to $2,500; and sets the duration of such loans at a minimum of four months, subject to exceptions, and a maximum of 24 months. Short-term loan licensees are required to make a reasonable attempt to verify a borrower's income and may not collect fees and charges that exceed 50 percent of the original loan amount if such amount is equal to or less than $1,500 and 60 percent of the original loan amount if such amount is greater than $1,500. The measure amends the requirements for motor vehicle title loans, including setting the duration of such loans at a minimum of six months, subject to exceptions, and a maximum of 24 months and prohibiting motor vehicle loans for amounts greater than §2,500. The measure sets a 36-percent annual interest rate cap on open-end credit plans and allows a $50 annual participation fee. A violation of these provisions is made a prohibited practice under the Virginia Consumer Protection Act. The measure amends provisions of the Consumer Finance Act to, among other things, allow licensed lenders to use the services of access partners and establish requirements that loans be between $300 and $35,000; be repayable in substantially equal installment payments; have a term of no fewer than six and no more than 120 months; charge not more than 36 percent annual interest and a loan processing fee; and require licensees to post a bond. The measure prohibits credit service businesses from advertising, offering, or performing other services in connection with an extension of credit that has an annual interest rate exceeding 36 percent, is for less than $5,000, has a term of less than one year, or is provided under an open-end credit plan. The measure has a delayed effective date of January 1, 2021.

HB 1161 **Virginia Residential Property Disclosure Act and Virginia Residential Landlord and Tenant Act.** Adds to the disclosure statement required to be furnished by the owner of residential real property to a buyer that the buyer beware and exercise necessary due diligence with respect to whether the property contains any pipe, pipe or plumbing fitting, fixture, solder, or flux that does not meet the federal Safe Drinking Water Act definition of "lead free." The bill also requires any licensee who is engaged by a landlord and who has actual knowledge of the existence of any pipe, pipe or plumbing fitting, fixture, solder, or flux that does not meet the federal Safe Drinking Water Act definition of "lead free" to disclose such information to a prospective tenant.

HB 1249 **Manufactured Home Lot Rental Act; manufactured home park; termination due to sale of park; notice.** Provides that where the sale of a manufactured home park is due to a change in the use of all or any part of a manufactured home park by the landlord, including conversion to hotel, motel, or other commercial use, planned unit development, rehabilitation, or demolition, a 180-day written notice is required to terminate the rental agreement. The bill also requires a manufactured home park owner who offers or lists the park for sale to a third party to provide written notice to (i) the Department of Housing and Community Development, which shall make the information available on its website within five days of receipt, and (ii) each tenant of the manufactured home park at least 90 days prior to accepting an offer. The bill provides that tenants who have been evicted from a manufactured home park have 90 days after a judgment has been entered in which to rent the manufactured home to a subtenant, contingent

on the subtenant's making a rental application to the manufactured home park owner within such 90-day period and approval by the home park owner of such rental application from the subtenant. This bill incorporates HB 1163 and HB 1229.

HB 1341 **Manufactured Housing Construction and Safety Standards Law; provisions not set out; applicability.** Sets out a section from Chapter 37 of the Acts of Assembly of 1986 establishing the applicability of the Manufactured Housing Construction and Safety Standards Law (§ 36-85.2 et seq.). The bill also removes an obsolete provision relating to the purpose of the chapter and makes technical changes. The bill is a recommendation of the Code Commission.

HB 1342 **Virginia Residential Property Disclosure Act and Virginia Residential Landlord and Tenant Act.** Adds to the disclosure statement required to be furnished to the buyer by the owner of residential real property that the buyer beware and exercise necessary due diligence (i) with respect to whether the property contains any pipe, pipe or plumbing fitting, fixture, solder, or flux that does not meet the federal Safe Drinking Water Act definition of "lead free" and (ii) with respect to the existence of defective drywall on the property.

HB 1401 **Landlord and tenant; remedy for unlawful ouster; ex parte issuance of order to recover possession.** Provides that, upon receipt of a petition for an order to recover possession or restore essential services alleging a tenant's unlawful ouster from the rental premises and a finding that the petitioner has attempted to provide the landlord with actual notice of the hearing on the petition, the judge of the general district court may issue such order ex parte upon a finding of good cause to do so. The bill further provides that an ex parte order shall be a preliminary order that specifies a date for a full hearing on the merits of the petition, to be held within five days of the issuance of the ex parte order.

HB 1553 **Debt settlement services providers; penalties.** Provides for the licensure and regulation of debt settlement services providers by the State Corporation Commission. 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. The measure prohibits licensees from accepting a fee from consumers prior to providing the consumers' requested debt settlement services. The requirements imposed by this measure on licensed providers of debt settlement services are similar to those applicable to agencies providing debt management plans. The measure provides for civil penalties against licensees that violate these requirements, grants consumers a private right of action against licensees, and makes a violation a prohibited practice under the Virginia Consumer Protection Act. The licensing and regulation of debt settlement services providers has a delayed effective date of July 1, 2021. The measure directs the State Corporation Commission to establish a procedure to be in effect by March 1, 2021, for any person to apply prior to July 1, 2021, for a license that will become effective when the licensing requirements of this measure become effective on July 1, 2021.

SB 33 **Consumer finance companies; loans, licensing.** Requires the State Corporation Commission, as a condition of licensing a consumer finance company, to find that the applicant will not make consumer finance loans at the same location at which the applicant makes payday loans or motor vehicle title loans.

The measure also (i) sets the minimum and maximum amounts of a consumer finance loan at $500 and $35,000, respectively; (ii) requires that such loans be installment loans with a term that is not less than six months nor more than 120 months; (iii) sets the maximum annual interest rate on such loans at 36 percent; (iv) authorizes late payment fees of $20, provided that they are set forth in a contract; (v) authorizes loan processing fees of the greater of $75 or five percent of the principal amount of the loan but not to exceed $150; and (vi) increases from $15 to $25 the amount of a bad check fee.

SB 114 **Comprehensive animal care; enforceable under Virginia Consumer Protection Act.** Subjects certain animal care statutes to enforcement under the Virginia Consumer Protection Act (§ 59.1-196 et seq.). These statutes relate to the posting of information about dogs and to written notice of consumer remedies required to be provided by pet shops, pet dealers, and animal boarding establishments.

SB 115 **Va. Residential Landlord & Tenant Act; notice of termination to contain legal services information.** Provides that no notice of termination of tenancy served upon a tenant receiving tenant-based rental assistance through (i) the Housing Choice Voucher Program, 42 U.S.C. § 1437f(o), or (ii) any other federal, state, or local program by a private landlord is effective unless it contains on its first page, in type no smaller or less legible than that otherwise used in the body of the notice, the statewide legal aid telephone number and website address. This bill is identical to HB 519.

SB 343 **Virginia Residential Property Disclosure Act; required disclosures for buyer to beware; impounding.** Directs the Real Estate Board to include in the residential property disclosure statement provided on its website a disclosure relating to the condition or regulatory status of any impounding structure or dam on the owner's property or under the ownership of a common interest community that the owner of the property is required to join. This bill is identical to HB 1569 and as introduced was a recommendation of the Virginia Housing Commission.

SB 388 **Virginia Residential Landlord and Tenant Act; return of security deposit.** Requires the landlord to return the tenant's security deposit, minus any deductions or charges, within 45 days of the termination of the tenancy or the date the tenant vacates the dwelling unit, whichever occurs last. Under current law, the 45-day period to return the security deposit begins on the date of the termination of the tenancy. This bill is identical to HB 594.

SB 421 **Consumer lending; replaces references to payday loans with term "short-term loans."** Replaces references to payday loans with the term "short-term loans." The measure caps the interest and fees that may be charged under a short-term loan at an annual rate of 36 percent, plus a maintenance fee; increases the maximum amount of such loans from $500 to $2,500; and sets the duration of such loans at a minimum of four months, subject to exceptions, and a maximum of 24 months. Short-term loan licensees are required to make a reasonable attempt to verify a borrower's income and may not collect fees and charges that exceed 50 percent of the original loan amount if such amount is equal to or less than $1,500 and 60 percent of the original loan amount if such amount is greater than $1,500. The measure amends the requirements for motor vehicle title loans, including requiring licensed lenders to use a database to determine a prospective borrower's eligibility for a loan and prohibiting loans to a borrower who has an outstanding short-term loan. The measure sets a 36-percent annual interest rate cap on open-end credit

plans and allows a $50 annual participation fee. A violation of these provisions is made a prohibited practice under the Virginia Consumer Protection Act. The measure amends provisions of the Consumer Finance Act to, among other things, allow licensed lenders to use the services of access partners and establish requirements that loans be between $300 and $35,000; be repayable in substantially equal installment payments; have a term of no fewer than six and no more than 120 months; charge not more than 36 percent annual interest and a loan processing fee; and require licensees to post a bond. The measure prohibits credit service businesses from advertising, offering, or performing other services in connection with an extension of credit that has an annual interest rate exceeding 36 percent, is for less than $5,000, has a term of less than one year, or is provided under an open-end credit plan. The bill has a delayed effective date of July 1, 2021, and requires any person who would be required to be licensed under the provisions of the act to apply for a license by April 1, 2021.

SB 672 **Property Owners' Association Act and Virginia Condominium Act; contract disclosure statement.** Provides for a limited extension of the right of cancellation where such extension is provided for in a ratified real estate contract, defined in the bill. This bill is identical to HB 176.

SB 707 **Landlord and tenant; tenant rights and responsibilities; explanation and remedy.**
Requires the Director of the Department of Housing and Community Development to develop a statement of tenant rights and responsibilities explaining in plain language the rights and responsibilities of tenants under the Virginia Residential Landlord and Tenant Act (§ 55.1-1200 et seq.) and maintain such statement on the Department's website along with a form to be signed by the parties to a rental agreement. The bill requires that the statement be provided to any prospective tenant and that the form developed by the Department be signed by the parties to the rental agreement. The bill prohibits a landlord from filing or maintaining an action against a tenant in a court of law for any alleged lease violation unless he has provided the tenant with the statement of tenant rights and responsibilities. The provisions of the bill are contingent on funding in a general appropriation act.

SB 905 **Property; landlord and tenant; tenant's remedy by repair.** Permits a tenant, under certain circumstances, to have a condition that constitutes a material noncompliance by the landlord with the rental agreement or with provisions of law, or that if not promptly corrected will constitute a fire hazard or serious threat to the life, health, or safety of occupants of the premises, remedied by a third-party licensed contractor. The bill provides that, unless the tenant has been reimbursed by the landlord, the tenant may deduct from rent the actual costs incurred, not to exceed the amount of one month's periodic rent, after submitting to the landlord an itemized statement accompanied by receipts for purchased items and third-party contractor services.

CONSUMER LAW

– CARRIED OVER –

HB 473 **Personal data; Virginia Privacy Act.** Gives consumers the right to access their data and determine if it has been sold to a data broker. The measure requires a controller, defined in the bill as a person that, alone or jointly with others, determines the purposes and means of the processing of personal data, to facilitate requests to exercise consumer rights regarding access, correction, deletion, restriction of processing, data portability, objection, and profiling.

[HB 1516] **Landlord and tenant; certain owners of residential rental property; agent and**
registration require. Creates the Virginia Residential Rental Property Registry, to be developed and maintained by the Department of Housing and Community Development. Every owner of residential property on which three or more dwelling units are offered for rent is required to submit certain information to be placed on the Registry. Failure to properly register or maintain updated registry information is subject to a civil penalty of $50 per unit for the first day and $50 for each additional day of noncompliance, to be levied by the Department. The bill also requires such property owners to appoint and continuously maintain an agent who (i) is available to be contacted 24 hours a day and (ii) works or resides not more than 25 miles from any such property. The contact phone number of such agent is required to be posted in any residential building on any such property in a conspicuous manner for use by the tenants.

CONSUMER LAW

– FAILED –

SB 755 **Disclosure of vehicle damage; vehicle title.** Requires the Department of Motor Vehicles to attach a disclosure to the title of any vehicle that is reported to the National Motor Vehicle Title Information System (NMVTIS) noting that such vehicle has been reported to NMVTIS and how to obtain more information about the history of the vehicle.

SB 906 **Property; landlord and tenant; noncompliance as defense to action for possession for nonpayment.** Removes provisions limiting the discretion of the court in actions for possession based upon nonpayment of rent and actions for rent by a landlord when the tenant is in possession. The bill simplifies the law; stating only that, in such cases, a tenant may assert as a defense the landlord's violation of his duty to maintain a fit and habitable premises.

HB 858 **Virginia Residential Property Disclosure Act and Virginia Residential Landlord and**
Tenant Act. Requires the owner of residential real property who has actual knowledge that the property is located in one or more special flood hazard areas to provide a disclosure that states such information to a potential purchaser. The owner of any residential real property upon which a stormwater management facility is located is required to provide to a prospective purchaser a written disclosure that includes specifications, requirements, and a schedule of audits of such facility.

HB 1019 **Motor vehicle sales and use tax; definition of sale price; trade-in vehicles.** Provides that for the purposes of calculating the motor vehicle sales and use tax for new vehicle purchases only, the sale price shall be reduced by the value of any trade-in vehicle. Under current law, no allowance or deduction is given for the value of a trade-in vehicle.

HB 1020 **Records of financial institutions; reimbursement of costs for production.** Provides that a financial institution that is asked to provide records related to a customer of the financial institution pursuant to a court proceeding shall be reimbursed by the requesting party for the reasonably necessary and directly incurred costs for the production of such records. FAIED

HB 1195 **Virginia Residential Landlord and Tenant Act; notice of termination to contain legal services.** Provides that no notice of termination of tenancy served upon any residential tenant is effective unless it contains on its first page, in type no smaller or less legible than that otherwise used in the body of

the notice, the name, address, and telephone number of the legal services program, if any, serving the jurisdiction in which the premises is located. The same requirement is currently only applicable to a public housing authority organized under the Housing Authorities Law.

JUDICIAL ADMINISTRATION

– PASSED –

HB 60 **Judges, substitute; powers and duties, entry of a final order.** Gives a substitute judge the power to enter a final order in any case heard by such substitute judge for a period of 14 days after the date of a hearing of such case.

HB 63 **Court of Appeals; use of moot courtroom of accredited law schools.** Provides that upon proper agreement with the applicable authorities the Court of Appeals may use the moot courtroom of any accredited law school located in the Commonwealth for the holding of court and for its ancillary functions. Current law specifies that the Court may use state and federal facilities but not private law schools in the Commonwealth. This bill is identical to SB 1002.

HB 275 **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. The Committee on District Courts recommended the additional judgeship in 2018. This bill is identical to SB 209.

HB 305 **Circuit court clerk's fee; lodging of wills.** Increases from $2 to $5 the fee that the circuit court clerk is required to charge for lodging, indexing, and preserving a will. This bill is identical to SB 940.

HB 306 **Fees collected by circuit court clerks for recording and indexing; use of fee in preserving.** Increases by $2 the fees for the recording and indexing of certain documents. The bill further increases from $1.50 to $3.50 the portion of the recording and indexing fee collected by circuit court clerks that is designated for use in preserving the permanent records of the circuit courts. This bill is identical to SB 938.

HB 500 **Lists of registered voters; provided at no charge to courts of the Commonwealth.** Directs the Department of Elections to provide, at no charge, the courts of the Commonwealth and the United States with the lists of registered voters in their districts for jury selection purposes no more than two times in a 12-month period. At any other time in the same 12-month period, the lists shall be provided for a reasonable price. This bill is identical to SB 466.

HB 1324 **Juvenile and domestic relations district court; intake.** Makes various changes to the intake procedures for the domestic relations district court, including (i) providing that, if a juvenile is alleged to be a truant, the intake officer may defer filing a petition in order to develop and allow the juvenile to complete a truancy plan or program; (ii) changing the notice requirement for circumstances under which informal action has been taken on a complaint alleging that a juvenile is in need of services, in need of supervision, or delinquent so that the intake officer advises the juvenile and his parents that any subsequent complaint may result in the filing of a petition with the court; and (iii) adding possession of alcohol to the existing offense of possession of marijuana for which, if charged by summons, a juvenile is entitled to have the charge referred to intake for consideration of informal proceedings.

HB 1725 **Judicial assistants; serves under supervision of presiding judge of circuit court.** Provides that an employee hired and paid by a county or city to assist with the administration of a circuit court judge's office shall serve at the sole discretion and under the sole supervision of such judge.

SB 149 **Courthouse and courtroom security; assessment.** Increases from $10 to $20 the maximum amount a local governing body may assess against a convicted defendant as part of the costs in a criminal or traffic case in district

or circuit court to fund courthouse and courtroom security.

SB 209 **Judges; increases maximum number in judicial district.** Increases from 11 to 12 the maximum number of authorized general district court judgeships in the nineteenth judicial district. The Committee on District Courts recommended the additional judgeship in 2018. This bill is identical to HB 275.

SB 466 **Lists of registered voters; provided at no charge to courts of the Commonwealth.** Directs the Department of Elections to provide, at no charge, the courts of the Commonwealth and the United States with the lists of registered voters in their districts for jury selection purposes no more than two times in a 12-month period. At any other time in the same 12-month period, the lists shall be provided for a reasonable price. This bill is identical to HB 500.

SB 499 **Specialty dockets; veterans docket.** Provides that any veterans docket authorized and established as a local specialty docket in accordance with the Rules of Supreme Court of Virginia shall be deemed a "Veterans Treatment Court Program," as that term is used under federal law or by any other entity, for the purposes of applying for, qualifying for, or receiving any federal grants, other federal money, or money from any other entity designated to assist or fund such state programs. The bill contains an emergency clause.

SJ 47 **Study; jurisdiction and organization of Court of Appeals of Virginia; report.** Requests the Judicial Council of Virginia to study the jurisdiction and organization of the Court of Appeals of Virginia and make recommendations on providing an appeal of right from the circuit courts to the Court of Appeals and organizing the Court of Appeals into four geographic circuits.

JUDICIAL ADMINISTRATION

– FAILED –

HB 1165 **Statewide electronic filing system; circuit courts, general district courts.** Directs the Supreme Court of Virginia to establish and operate a system for electronic filing for civil and criminal proceedings for all circuit courts, general district courts, and juvenile and domestic relations district courts on or before July 1, 2026. The bill further directs the Supreme Court to promulgate rules to govern such filing system.

SB 438 **Judicial performance evaluation program; risk assessment tool; use of alternative sanction.** Requires the Virginia Criminal Sentencing Commission to use sentencing guidelines to determine the cost of incarceration for an offender who receives the minimum recommended sentence and to include the cost on the sentencing guideline form. The bill also requires the Commission to determine the number of offenders during a judge's term who qualify for the use of the offender risk assessment tool and, on the basis of such assessment, are recommended to receive an alternative sanction and do not receive an alternative sanction.

HB 556 **Judicial Retirement System; amount of retirement allowance.** Provides that the annual retirement allowance of a person who retires under the Judicial Retirement System shall not exceed 78 percent of the person's average final compensation, unless such person prior to becoming a judge performs five or more years of creditable service under another retirement plan administered by VRS. However, in no case shall such person's annual retirement allowance exceed 100 percent of his average final compensation.

HB 671 **Va Freedom of Information Act; applicability to certain records of the Office of**

Executive Sec. Provides that for the purposes of the provisions of the Virginia Freedom of Information Act that are applicable to access to public records, the Office of Executive Secretary to the Supreme Court shall be considered a public body and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records. The bill clarifies that the public records provisions of the Freedom of Information Act do not apply to judicial officers or information created or maintained on behalf of judicial officers, but do apply to any administrative records of judicial officers that are maintained by the Office of Executive Secretary and unrelated to a record created, collected, received, or maintained in connection with a particular case. The bill also adds to the duties of the Executive Secretary a role as custodian of records of administrative functions performed by persons employed by him or acting under his direction and of aggregated data regarding Virginia courts that may be obtained from systems maintained by his office. Finally, the bill directs the Supreme Court of Virginia to revise the rules of practice and procedure as necessary to comply with the provisions provided for in the bill.

HB 777 **Duties of the Executive Secretary to the Supreme Court.** Adds to the duties of the Executive Secretary that he shall be custodian of records of administrative functions performed by persons employed by him or acting under his direction and of aggregated data regarding Virginia courts that may be obtained from systems maintained by his office.

HJ 22 **Substitute and retired district court judges subject to recall; report on current training, etc.** Requests the Office of the Executive Secretary of the Supreme Court of Virginia to study the current training and legal education requirements and performance standards for substitute judges and retired district court judges subject to recall and to provide recommendations for additional oversight and evaluation of such judges.

HB 95 **Court of Appeals; jurisdiction, contempt of court.** Provides that the Court of Appeals of Virginia has appellate jurisdiction over a judgment of the circuit court that holds or fails to hold a person in contempt of court. Under current law, the Court of Appeals has jurisdiction only over a judgment that holds a person in contempt of court.

HB 164 **Jurors; allowances, unclaimed funds, retention by the court for jury operations or expenses.** Exempts funds held by the court for payment to a juror from the provisions of the Virginia Disposition of Unclaimed Property Act and provides that such funds may be used by the court for jury operations or other jury-related expenses if such funds are unclaimed for more than one year after becoming payable.

SB 169 **Warrants; issuance for law-enforcement officers by a magistrate.** 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. The bill provides for the appointment of an attorney for the Commonwealth from outside the jurisdiction if a conflict of interest exists for the attorney for the Commonwealth having jurisdiction.

DOMESTIC RELATIONS/FAMILY LAW

– PASSED –

HB 94 **Adoption; proper proceeding to legal custodian.** Provides that a legal custodian of a child being placed for adoption, and any other named parties in pending cases in which the custody or visitation of such child is at issue, shall be entitled to proper notice of any adoption proceeding and an opportunity to be heard.

HB 137 **Guardians ad litem for children; certification of compliance with certain standards.** Requires guardians ad litem appointed to represent a child in a matter to conduct an investigation in compliance with certain standards. The bill requires a guardian ad litem to file with the court, along with any attorney representing a party or party proceeding pro se, a certification of the guardian ad litem's compliance with such standards, specifically addressing such standards requiring face-to-face contact with the child. The bill further requires the guardian ad litem to document the hours spent satisfying such face-to-face contact requirements and specifies that compensation for such contact shall be at the same rate as that for in-court service.

HB 637 **Child support; reasonable cost of health care coverage.** Modifies the definition of "reasonable cost" for purposes of health care coverage in child support arrangements by capping the maximum amount to five percent of the gross income of the parent responsible for providing health care coverage. Under current law, such costs are capped at five percent of the parents' combined gross income.

HB 721 **Post-adoption contact and communication agreements; involuntary termination of parental rights.** Provides that a child's birth parent or parents for whom parental rights were involuntarily terminated may enter into a post-adoption contact and communication agreement with the child's pre-adoptive parent or parents.

HB 861 **Best interests of the child; act of violence, force, or threat against an intimate partner.** Provides that any history of child abuse and acts of violence, force, or threat that occurred no earlier than 10 years prior to the filing of a petition for custody or visitation of a child shall be considered by a court in determining the best interests of a child. This bill is identical to SB 105.

HB 933 **Kinship Guardianship Assistance program; expands eligibility, fictive kin.** Expands eligibility for the Kinship Guardianship Assistance program by allowing payments to be made to fictive kin who receive custody of a child of whom they had been the foster parent. This bill incorporates HB 917 and is identical to SB 178.

HB 1490 **Same-sex marriages; civil unions.** Repeals the statutory prohibitions on same-sex marriages and civil unions or other arrangements between persons of the same sex purporting to bestow the privileges and obligations of marriage. These prohibitions are no longer valid due to the United States Supreme Court decision in *Obergefell v. Hodges*, 576 U.S.__ (June 26, 2015). This bill is identical to SB 17.

HB 1500 **Pendente lite spousal support; guidelines.** Makes current juvenile and domestic relations district court guidelines for the presumptive amount of temporary spousal support applicable in cases filed in circuit court. The bill also adjusts the guidelines to account for changes to the federal tax code that became effective on January 1, 2019.

HB 1501 **Modification of spousal support.** Removes requirement that a stipulation or contract that is executed on or after July 1,

2018, contain specific language, as set out in the Code, stating that the amount or duration of spousal support is not modifiable in order for a request for modification of spousal support to be denied solely on the basis of the terms of such stipulation or contract. The bill instead provides that such stipulation or contract need only expressly state that the amount or duration of spousal support is non-modifiable.

SB 17 **Same-sex marriages; civil unions.** Repeals the statutory prohibitions on same-sex marriages and civil unions or other arrangements between persons of the same sex purporting to bestow the privileges and obligations of marriage. These prohibitions are no longer valid due to the United States Supreme Court decision in *Obergefell v. Hodges*, 576 U.S.____(June 26, 2015). This bill incorporates SB 39 and is identical to HB 1490.

SB 62 **Marriage records; divorce and annulment reports, eliminates requirement for identification of race.** Eliminates the requirement that the race of married parties be included in marriage records, divorce reports, and annulment reports filed with the State Registrar. The bill also removes the requirement that the State Registrar include race data in the compilation and posting of marriage, divorce, and annulment data. This bill incorporates SB 19 and is identical to HB 180 and SB 1066.

SB 105 Best interests of the child; act of violence, force, or threat against an intimate partner, etc. Provides that any history of child abuse and acts of violence, force, or threat that occurred no earlier than 10 years prior to the filing of a petition for custody or visitation of a child shall be considered by a court in determining the best interests of a child. This bill is identical to HB 861.

SB 178 **Kinship Guardianship Assistance program; expands eligibility, fictive kin.** Expands eligibility for the Kinship Guardianship Assistance program by allowing payments to be made to fictive kin who receive custody of a child of whom they had been the foster parent. This bill is identical to HB 933. PASSED

SB 247 **No-fault divorce; gender-neutral terminology.** Replaces the terms "husband" and "wife" with gender-neutral terms in the no-fault divorce statute.

SB 428 **Initial child support order; unreimbursed medical expenses for pregnancy and birth.** Provides that for any initial child support proceeding that is commenced within six months of the birth of a child, the order shall provide that the parents pay in proportion to their gross incomes any reasonable and necessary unpaid expenses of the mother's pregnancy and the delivery of such child.

SB 429 **Child support; withholding from income of an independent contractor.** Clarifies that income earned by an independent contractor may be withheld by court order for payment of child support obligations.

SB 430 **Access to minor's child-care records by parent.** Provides that, absent a court order, a minor's records from a child day center or family day home shall not be withheld from a parent of such minor, regardless of whether the parent has custody of such child

SB 432 **Spousal support; reservation of right to seek; material change of circumstances.** Provides that, unless otherwise provided by stipulation or contract, or unless otherwise ordered by the court, a party seeking to exercise his reserved right to spousal support shall be required to prove that a material change of circumstances has occurred as a prerequisite for the court to consider exercise of such reservation.

SB 433 **Adultery; civil penalty.** Allows the trier of fact in a civil domestic relations proceeding to draw an adverse inference if a party or witness in such a proceeding refuses to answer

a question regarding adultery on the grounds that such testimony might be self-incriminating.

SB 434 **Child support; assignment of tax credits.** Provides that the court may assign a party in a child support proceeding the right to claim any credits resulting from the income tax dependency exemption for any child or children of the parties for federal and state income tax purposes.

SB 451 **Juvenile and domestic relations district court; award of attorney fees.** Permits a juvenile and domestic relations district court judge to take all relevant factors, in addition to the relative financial ability of the parties, into consideration when awarding attorney fees and costs.

SB 472 **Foster care; termination of parental rights; independent living needs assessments.** Requires local boards of social services and child-placing agencies, if the child has been in the custody of a local board or child-placing agency for 15 of the most recent 22 months and no petition for termination of parental rights has been filed with the court, to include in the petition for a permanency planning hearing the reasons why a petition to terminate parental rights has not been filed and the reasonable efforts made regarding reunification or transfer of custody to a relative. The bill requires that local boards and child-placing agencies provide information to birth parents regarding the parent's option to voluntarily terminate parental rights, and that the Commissioner of Social Services develop clear guidance documents regarding the manner in which such information should be relayed. The bill requires the Board of Social Services to promulgate regulations related to termination of parental rights, independent living needs assessments and plans, and reporting requirements for local boards and child-placing agencies.

SB 585 **Guardianship; supported decision making.** Provides that if the respondent to a guardianship or conservatorship petition is between 17 and a half and 21 years of age and has an Individualized Education Plan (IEP), the guardian ad litem appointed to represent the respondent shall review the IEP and include the results of his review in the report required to be submitted to the court and requires the Superintendent of Public Instruction to make available transitional materials prepared by the Department of Education that include information about powers of attorney and guardianship to be provided to students and parents during the student's annual IEP meeting.The bill also requires the guardian ad litem to consider whether a less restrictive alternative, including the use of an advance directive or durable power of attorney, is available to provide assistance to the respondent.The bill requires the court, upon appointment of a guardian or conservator, to inform such person of his duties and that the respondent should be encouraged to participate in decisions, act on his own behalf, and develop or maintain the capacity to manage his personal affairs if he retains any decision-making rights. The bill sets out specific language to be included in all orders of appointment of a guardian.Finally, the bill requires the Department of Behavioral Health and Developmental Services to convene a group of stakeholders to study the use of supported decision-making agreements.

DOMESTIC RELATIONS/FAMILY LAW

– CARRIED OVER –

HB 291 **Uniform Collaborative Law Act.** Creates the Uniform Collaborative Law Act, which provides a framework for the practice of collaborative law, a process entered into voluntarily by clients for the express purpose of reaching a settlement in a family or domestic relations law matter, including (i) marriage, divorce, dissolution, annulment, and property distribution; (ii) child custody, visitation, and parenting time; (iii) alimony, spousal support, maintenance, and child support; (iv) adoption; (v) parentage; and (vi) negotiation or enforcement of premarital, marital, and separation agreements. The Act governs disclosure of information, privilege against disclosure of communications, and scope of representation by the attorneys in the proceeding.

SB 352 **Guardianship and conservatorship; supported decision-making alternative.** Requires a guardian ad litem in a proceeding for the appointment of a guardian or conservator to include in his report to the court information as to whether a supported decision-making agreement, as defined in the bill, is a viable option in lieu of guardianship or conservatorship.

SB 502 **Department of Social Services; child support enforcement; distribution of support payments.** Requires the Department of Social Services, in cases in which the Department receives child support payments, to enter into an agreement with the obligee that shall include information regarding the Department's duty to disburse support payments to the obligee and establish a date by which such disbursements shall be made each month. The bill requires the Department, if it does not receive a support payment at least two days before the date scheduled for disbursement, to issue to the obligee a payment in the amount that would have been distributed had the obligor's support payment been timely received.

DOMESTIC RELATIONS/FAMILY LAW

– FAILED –

SB 920 **Surrogacy contracts; provisions requiring abortion or selective reduction unenforceable.** Provides that any provision of a surrogacy contract requiring or prohibiting an abortion or selective reduction is against the public policy of the Commonwealth and is void and unenforceable.

HB 1530 **No-fault divorce; corroboration requirement.** Removes the corroborating witness requirement for no-fault divorces.

HB 862 **Guardianship; communication between close relatives and friends of incapacitated persons.** Provides that a guardian may restrict an incapacitated person's ability to communicate with, visit, or interact with close relatives, as defined in the bill, and friends, as defined in the bill, only when necessary to prevent a reasonable expectation of serious physical or psychological harm or serious financial exploitation occurring to the incapacitated person. The bill further sets up a procedure by which a person whose visits, communication with, or interaction with an incapacitated person have been restricted may challenge such restriction in court and a procedure by which a guardian may petition the court to restrict an incapacitated person's communication, visitation, and interaction rights with a close relative or friend.

HB 1206 **Guardian ad litem; compensation; order of the court.** Provides that, in any civil action in which a guardian ad litem is appointed

and for which the compensation and payment of expenses of such guardian ad litem are not otherwise provided for, a court may order that such compensation and expenses be paid by the Commonwealth for good cause shown.

SB 501 **Adoption and foster care; persons authorized to conduct home studies.** Allows home studies for purposes of adoption or foster care placements to be conducted by any person who has completed the home study training program established by regulations of the Board of Social Services. Under current law, such home studies must be conducted by a local board of social services or licensed child-placing agency.

SB 570 **State-Funded Kinship Guardianship Assistance program; created.** Requires the Department of Social Services, in cases in which the Department receives child support payments, to enter into an agreement with the obligee that shall include information regarding the Department's duty to disburse support payments to the obligee and establish a date by which such disbursements shall be made each month. The bill requires the Department, if it does not receive a support payment at least two days before the date scheduled for disbursement, to issue to the obligee a payment in the amount that would have been distributed had the obligor's support payment been timely received.

SB 571 **Visitation; petition of grandparent of deceased parent.** Requires the court, in petitions for visitation filed by the grandparent of a child where either (i) the parent is the grandparent's child and is deceased, incarcerated, or incapacitated, or has had is parental rights terminated or (ii) the grandparent has an established relationship with the child and has provided a significant level of care for the child, to consider the following factors: (i) the historical relationship between the grandparent and child; (ii) the motivation of the grandparent in seeking visitation; (iii) the motivation of the living parent in denying visitation to the grandparent; (iv) the quantity of time requested and the effect it will have on the child's daily activities; and (v) the benefits of maintaining a relationship with the extended family of the deceased parent.

HB 485 **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.

HB 684 **Online case information system; juvenile and domestic relations district court.** Requires the Executive Secretary of the Supreme Court to make certain nonconfidential information for adult criminal cases in the juvenile and domestic relations district courts publicly viewable in the online case information system. Under current law, only criminal cases in circuit courts participating in the Executive Secretary's case management system and in the general district courts are required to be made publicly available in such system.

HB 82 **Child and spousal support; net income, imputation of income.** Changes the child support guidelines to establish net income, defined in the bill, as the basis for establishing a child support obligation and provides that a periodic award of spousal support shall not be more than the payor's net income. The bill removes consideration of earning capacity of a party in determining spousal support and removes the earning capacity and imputation of income of a party as a means to rebut the child support presumption.

HB 212 **Custody and visitation arrangements; use of cannabidiol oil or THC-A oil by foster parent, etc.** Provides that the use of cannabidiol

oil or THC-A oil by a parent in a custody or visitation case shall not serve as the sole basis for the denial or restriction of custody or visitation, if such parent has a written certification by a practitioner attesting to the benefit of such use. The bill further provides that such use by a foster parent shall not be the sole reason a child is removed from a foster parent and that such use by a prospective foster parent shall not be the sole reason to deny such prospective foster parent eligibility to become a foster parent. The bill also provides that such use by a petitioner for adoption shall not be the sole reason for the denial of a final order of adoption by a circuit court.

HB 350 **Best interests of the child; frequent and continuing contact with each parent.**
Requires that the court consider, when appropriate, frequent and continuing contact with each parent when determining the best interests of the child for purposes of determining custody or visitation arrangements.

HB 371 **Adoption by stepparent; background check.** Repeals the July 1, 2020, sunset on provisions that require a circuit court, when determining whether an investigation by the director of the local department of social services should be required before a final order is entered to approve as an adoptive parent the spouse of a child's birth or adoptive parent, to consider the results of a national criminal history background check conducted on the prospective adoptive parent.

SB 61 **Custody and visitation arrangements; use of cannabidiol oil or THC-A oil by foster parent, etc.** Provides that the use of cannabidiol oil or THC-A oil by a parent in a custody or visitation case shall not serve as the sole basis for the denial or restriction of custody or visitation, if such parent has a written certification by a practitioner attesting to the benefit of such use. The bill further provides that such use by a foster parent shall not be the sole reason a child is removed from a foster parent and that such use by a prospective foster parent shall not be the sole reason to deny such prospective foster parent eligibility to become a foster parent. The bill also provides that such use by a petitioner for adoption shall not be the sole reason for the denial of a final order of adoption by a circuit court.

GENERAL PRACTICE

– PASSED –

HB 788 **Restrictive covenants; deeds of reformation.** Prohibits a deed containing a restrictive covenant from being recorded on or after July 1, 2020, and provides the form for a Certificate of Release of Certain Prohibited Covenants to be recorded to remove any such restrictive covenant.

HB 1346 **Claim for attorney fees.** Aligns the provision for a claim for attorney fees to be paid out of money or property under control of the court with Rule 3:25 of the Rules of Supreme Court of Virginia by providing that the claim for such attorney fees shall be made in a complaint, petition, or other proceeding. The bill removes the provision that provides that such attorney fees may also be paid where the parties are notified in writing that application will be made to the court. This bill is a recommendation of the Boyd-Graves Conference.

HB 1380 **Uniform Directed Trust Act.** Codifies the Uniform Directed Trust Act, which expressly validates terms of a trust that provide for a trust director, a term that is defined in the Act, and prescribes a set of rules for directed trusts, including allocation of fiduciary duties.

HB 1561 **Fort Monroe Authority; civil actions in general district court.** Authorizes the Fort Monroe Authority to prepare, execute, file, and have served certain documents in a civil proceeding in general district court without the intervention of an attorney. This bill is identical to SB 956.

SB 700 **Indexing of wills.** Provides that a will shall be indexed in the name of the executor as listed in such instrument.

SB 1032 **Civil actions; determination of indigency.** Sets out the factors to be considered by the court in its determination of a person's indigency for the purpose of determining inability to pay fees or costs in a civil action. The bill also provides that a person is presumed unable to pay if he is a current recipient of a state or federally funded public assistance program or he is represented by a legal aid society. The bill provides that the presumption is rebuttable except in the case of a no-fault divorce.

GENERAL PRACTICE

– CARRIED OVER –

HB 76 **Statute of limitations on written contract; missing persons declared dead, executor of estate.** Provides that, for any action that would be barred by the five-year statute of limitations on a written contract, wherein a person who would be party to such action was a missing person presumed dead and subsequently declared dead by court order, the executor of such person's estate has one year from the entry of such order to bring such an action, provided that a cause of action accrued on or after the date upon which such person went missing.CO

HB 96 **Power of attorney; witness or notary public**. Requires that a power of attorney signed on or after July 1, 2020, be signed before at least one witness or a notary public.CO

HB 1381 **Special education; due process hearings; nonattorney representatives.** Permits a school division and the parents of a child with a disability in the school division to be accompanied and advised by any nonattorney with special knowledge or training with respect to the needs of children with disabilities in any due process hearing before a hearing officer. The bill declares that it constitutes the practice of law without being authorized or licensed to do so as prohibited by law when any such nonattorney drafts or submits pleadings, motions, or briefs; presents evidence; makes

any argument, including any argument relating to any law or regulation; or questions witnesses on behalf of any parent or student. CO

SB 359 **Gifts of real estate; title search required for recordation.** Provides that no deed of gift conveying real estate shall be recorded unless accompanied by a document certifying that a title search has been completed for the real estate subject to the deed and stating any matters affecting the title of property that were found by the title search. CO

SB 699 **Juries; fine for failure to respond to questionnaire.** Permits a court to fine a person no more than $200 for failure to respond to a request from a jury commissioner or clerk of court containing questions to ascertain such person's eligibility to serve on a jury. The bill provides that prior to assessing such fine, the court may issue a rule to show cause regarding why the person failed to respond to the request.

SB 1042 **Wills; presumption of undue influence.** Codifies the common law test for establishing undue influence upon a testator in the execution of a will. The bill further provides that if evidence is presented to establish the elements required for such a presumption, a jury sitting as trier of fact shall be instructed that it may presume that the will was executed under undue influence.

GENERAL PRACTICE

– FAILED –

HB 1391 **Deeds of trust; fiduciary duties.** Specifies that a trustee under a deed of trust has only the duties, rights, and obligations imposed and conferred on it by the deed of trust or by statute. The bill further requires that a trustee shall comply with all restrictive covenants regarding the affordability of the property and that a trustee under a deed of trust is a fiduciary for both the debtor and the creditor. This bill is in response to *Crosby v. ALG Trustee, LLC, 296 Va. 561 (2018)*.

HB 1463 **Virginia Board for Court Reporters.** Creates the Virginia Board for Court Reporters as an independent board to regulate court reporting services in the state. Beginning July 1, 2021, 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.

HB 1472 **Virginia Board for Court Reporters.** Creates the Virginia Board for Court Reporters as an independent board to establish the qualification of applicants for licensure or registration of court reporters in the state.
Beginning July 1, 2021, 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 principles of conduct for court reporters and creates the Board for Court Reporters Fund to receive licensing and registration fees to fund the licensure and registration program.

LONG TERM CARE

– PASSED –

HB 597 **Group homes; licensure; certain information required.** Requires every applicant for licensure or renewal of a license to establish, conduct, maintain, or operate or continue to operate a group home at which services for individuals with mental health or substance use disorder are offered to submit to the Department of Behavioral Health and Developmental Services, together with such application, financial information; information about services and staffing; and a statement of (i) the legal name of the applicant and, if the applicant is an association, partnership, limited liability company, or corporation, the names and addresses of its officers, agents, sponsors, partners, shareholders, or members and (ii) the legal name under which the applicant, any entity that operates group homes that is affiliated with or under common ownership or control with the applicant, and any entity that operates group homes and that is affiliated with or under common ownership or control with any officer, agent, sponsor, partner, shareholder, or member of the applicant to which a license to operate a group home has been issued in any other state, together with a list of the states in which such licenses have been issued and the dates for which such licenses were issued. The bill also provides that in the case of an application for licensure as a children's residential facility, such application shall contain information regarding any complaints, enforcement actions, or sanctions against a license to operate a children's residential facility held by the applicant in another state and that the investigation into such application conducted by the Department of Social Services shall include consideration of any complaints, enforcement actions, or sanctions against a license to operate a children's residential facility held by the applicant in another state.

HB 902 **Long-term care services and supports; preadmission screenings.** Provides that every individual who applies for or requests community or institutional long-term services and supports, as defined in the state plan for medical assistance services, may choose to receive services in a community or institutional setting and may choose the setting and provider of long-term care services and supports from a list of approved providers. The bill also clarifies requirements related to the performance of such long-term care services and supports screenings. The bill removes the definition of and references to Pre-PACE. The bill directs the Department of Medical Assistance Services to consider alternative assessment tools for long-term services and supports screenings completed on or after July 1, 2021, and to report its findings and conclusions to the Governor and the Chairmen of the House Committee on Health, Welfare and Institutions and the Senate Committee on Education and Health by December 1, 2020. The provisions of the bill shall not become effective if they conflict with any provision of federal law or regulations or guidance issued by the Centers for Medicare and Medicaid Services. This bill is identical to SB 902.

HB 1222 **Notaries; satisfactory evidence of identity; persons in nursing homes or assisted living facilities.** Allows expired state issued driver's licenses or state issued identification cards and expired passports to be used as a means of identification for notarial purposes for individuals residing in nursing homes or assisted living facilities, provided such expired documents expired within five years of the date of use for such identification purposes. PASSED

SB 355 **Assisted living facilities; audio-visual recording of residents.** Directs the Board of Social Services (the Board) to convene a work

group to make recommendations regarding adoption of regulations for audio-visual recording of residents in assisted living facilities. The workgroup shall report its recommendations to the Board and the General Assembly by December 1, 2020.

SB 391 **Adult abuse; financial exploitation; required report by financial institution.**
Requires financial institutions to report to the local department of social services or the adult protective services hotline within five business days any refusal to execute a transaction, delay of a transaction, or refusal to disburse funds based on a good faith belief that such transaction or disbursement may involve financial exploitation of an adult.

SB 397 **Nursing home standards of care and staff requirements; regulations.** Directs the Department of Health to convene a work group to review and make recommendations on increasing the availability of the clinical workforce for nursing homes in the Commonwealth. The work group shall include stakeholder groups as appropriate. The bill directs the Department to collaborate with the Department of Health Professions, the Governor's Chief Workforce Development Advisor, and other state agencies as appropriate. The bill directs the Department to report all recommendations to the Chairmen of the Senate Committee on Education and Health and the House Committee on Health, Welfare and Institutions on or before November 15, 2020.

SB 686 **Assisted living facilities; individualized service plans.** Requires the Board of Social Services to amend its regulations governing assisted living facility individualized service plans to require (i) that individualized service
plans be reviewed and updated (a) at least once every 12 months or (b) sooner if modifications to the plan are needed due to a significant change in the resident's condition and (ii) that any deviation from the individualized service plan be documented in writing or electronically, include a description of the circumstances warranting deviation and the date such deviation will occur, certify that notice of such deviation was provided to the resident or his legal representative, be included in the resident's file, and in the case of deviations that are made due to a significant change in the resident's condition, be signed by an authorized representative of the assisted living facility and the resident or his legal representative.

LONG TERM CARE

– CARRIED OVER –

HB 1321 **Guardianship; supported decision making.** Guardianship; supported decision
making. Creates the Supported Decision-Making Act, which allows an adult with an intellectual or developmental disability to enter into an agreement with another person, called a "supporter," for the purposes of having the supporter assist the adult in making decisions to manage his affairs, giving adults who need assistance a less restrictive means of receiving such assistance than being appointed a guardian or conservator by a court.

LONG TERM CARE

– FAILED –

HB 737 **Nursing home standards of care.** Requires regulations establishing the staffing and care standards in nursing homes to require a minimum number of hours of direct care services to each resident per 24-hour period, which minimum increases in specified phases from 3.5 hours to 4.1 hours.

HB 1075 **Home care organizations; public disclosure of complaints.** Requires the Department of Health to make available on its website information regarding all complaints received regarding home care organizations or employees thereof, including whether an investigation was conducted in response to the complaint and the Department's ultimate findings on such complaint.

SB 425 **Assisted living facilities; audio-visual recording of residents.** Directs the Board of Social Services (the Board) to promulgate regulations by July 1, 2021, governing audio-visual recording of residents in assisted living facilities and requires the Department of Social Services to convene a workgroup of stakeholders to make recommendations on such regulations. The workgroup shall report its recommendations to the Board and the General Assembly by December 1, 2020. Directs the Board of Social Services (the Board) to promulgate regulations by July 1, 2021, governing audio-visual recording of residents in assisted living facilities and requires the Department of Social Services to convene a workgroup of stakeholders to make recommendations on such regulations. The workgroup shall report its recommendations to the Board and the General Assembly by December 1, 2020.

EMPLOYMENT LAW

– PASSED –

HB 123 **Nonpayment of wage; private action, liability for payment of wages due under construction contracts.** 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 to an employee, the court shall award the employee (i) reasonable attorney fees and other costs and (ii) an amount equal to triple the amount of wages due.

HB 143 **Unemployment compensation; leaving employment to follow military spouse.** Repeals the sunset provision on the current statutory provision that provides that good cause for leaving employment exists if an employee voluntarily leaves a job to accompany the employee's spouse, who is on active duty in the military or naval services of the United States, to a new military-related assignment established pursuant to a permanent change of duty order from which the employee's place of employment is not reasonably accessible.

HB 196 **Employment discrimination; prohibits against electoral board member, etc., for election day service.** Prohibits discrimination in employment against electoral board members and assistant general registrars on the basis of service on election day or at a meeting of the
electoral board following the election to ascertain the results of the election.

HB 330 **Employment; covenants not to compete; low-wage employees; civil penalty.** Prohibits an employer from entering into a covenant not to compete with any of its low-wage employees. Any employer that violates this prohibition is subject to a civil penalty of $10,000 for each violation. The measure authorizes a low-wage employee to bring a civil action against an employer that attempts to enforce a prohibited covenant not to compete.

HB 336 **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 and that information 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. The measure also provides that if the Commissioner finds in the course of such investigation that the employer has committed a violation, the Commissioner may institute proceedings on behalf of any employee against his employer. In such proceedings, the Commissioner is not required to have obtained a written complaint of the violation or the written and signed consent of any employee. This bill is identical to SB 49.

HB 337 **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. The measure authorizes the Commissioner of Labor and Industry to institute proceedings against an employer who has taken such prohibited discriminatory action. Available remedies include reinstatement of the employee, recovery of lost wages, and liquidated damages. This bill is identical to SB 48.

HB 340 **Emergency laws; civil relief; citizens of the Commonwealth furloughed.** Provides a 60- day stay of an unlawful detainer for nonpayment of rent for tenants and a 30-day

stay of foreclosure proceedings for homeowners of, and owners who rent to a tenant, a one-family to four-family residential dwelling unit who request a stay and provide written proof, defined in the bill, that they are (i) an employee of the United States government, (ii) an independent contractor for the United States government, or (iii) an employee of a company under contract with the United States government who was furloughed or was or is otherwise not receiving wages or payments as a result of a closure of the United States government, defined in the bill. The bill requires homeowners and owners who rent to a tenant a one-family to four-family residential dwelling unit to request such stay of foreclosure proceedings within 90 days of a closure of the United States government or 90 days following the end of such closure, whichever is later.

HB 570 **Teachers, public school; unsatisfactory performance evaluations, grounds for dismissal.** Removes the definition of "incompetency" for the purpose of establishing grounds for the dismissal of public school teachers. This bill is identical to SB 167.

HB 622 **Limiting employees' sharing of wage information prohibited; civil penalty.** Prohibits an employer from discharging or taking other retaliatory action against an employee because the employee inquired about or discussed with, or disclosed to, another employee any information about either the employee's own wages or other compensation or about any other employee's wages or other compensation. Violations are subject to a civil penalty of $100.

HB 689 **Wage payment statements.** Limits the scope of the requirement enacted in 2019 that requires periodic wage payment statements to show the number of hours worked during the pay period. The measure requires the statement (i) to show the number of hours worked if the employee is either (a) paid on the basis of the number of hours worked or (b) paid on the basis of a salary that is less than the standard salary level adopted by the U.S. Department of Labor establishing an exemption from the overtime premium pay requirements of the federal Fair Labor Standards Act and (ii) to include sufficient information to enable the employee to determine how the gross and net pay were calculated. The measure contains an emergency clause.

HB 757 **Public employment; limitations on inquiries by state agencies and localities regarding arrests.** Prohibits state agencies and localities from including on any employment application a question inquiring whether the prospective employee has ever been arrested for, charged with, or convicted of any crime. The bill prohibits asking a prospective employee if he has ever been arrested or charged with or convicted of any crime unless the inquiry takes place during or after a staff interview of the prospective employee. The prohibition does not apply to applications for employment with law-enforcement agencies or positions related to law-enforcement agencies. The prohibition also does not apply to applications for state agency positions designated as sensitive or to state agencies that are expressly permitted to inquire into an individual's criminal arrests or charges for employment purposes pursuant to any provision of federal or state law. For localities, the prohibition also does not apply to positions for employment by the local school board. This bill incorporates HB 140.

HB 798 **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 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 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. A person who alleges a violation of this chapter may bring a civil action seeking injunctive relief, reinstatement, and compensation for lost wages, benefits, and other remuneration.

HB 827 **Virginia Human Rights Act; discrimination on the basis of pregnancy, childbirth, or related medical.** Requires employers, defined in the bill, to make reasonable accommodation for the known limitations of a person related to pregnancy, childbirth, or related medical conditions, if such accommodation is necessary to assist such person in performing a particular job, unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer.

HB 984 **Misclassification of workers; cause of action.** Authorizes an individual who has not been properly classified as an employee to bring a civil action for damages against his employer for failing to properly classify the employee if the employer had knowledge of the individual's misclassification. The court may award damages in the amount of any wages, salary, employment benefits, including expenses incurred by the employee that would otherwise have been covered by insurance, or other compensation lost to the individual, a reasonable attorney fee, and the costs incurred by the employee in bringing the action. PASSED

HB 1049 **Prohibited discrimination; sexual orientation and gender identity.** Prohibits discrimination in employment, public accommodation, public contracting, apprenticeship programs, housing, banking, and insurance on the basis of sexual orientation or gender identity. The bill also adds discrimination based on sexual orientation or gender identity to the list of unlawful discriminatory housing practices.

HB 1199 **Employee misclassification; retaliatory actions prohibited; civil penalty.** Prohibits an employer from discharging, disciplining, threatening, discriminating against, or penalizing an employee or independent contractor because the employee or independent contractor reported or plans to report that an employer or any officer or agent has failed to properly classify an individual as an employee and failed to pay required benefits or other contributions. The measure also prohibits such actions against an employee or independent contractor who is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry by an appropriate authority or in a court action. These prohibitions apply only if an employee or independent contractor acts in good faith and upon a reasonable belief that the information is accurate. The measure authorizes the Commissioner of Labor and Industry to institute proceedings against an employer who has taken such prohibited retaliatory action. Available remedies include reinstatement of the employee and recovery of lost wages. An employer that violates these provisions is subject to a civil penalty equal to the employee's lost wages. This bill is identical to SB 662.

HB 1228 **Fair Employment Contracting Act; sexual harassment policy.** Requires contractors

and subcontractors under any public contract with a locality for public works to pay wages, salaries, benefits, and other remuneration to any mechanic, laborer, or worker employed, retained, or otherwise hired to perform services in connection with the public contract at the prevailing wage rate.

HB 1514 **Virginia Human Rights Act; racial discrimination, hair.** Provides that the terms "because of race" and "on the basis of race," and terms of similar import, when used in reference to discrimination in the Code of Virginia and acts of the General Assembly, include traits historically associated with race, including hair texture, hair type, and protective hairstyles such as braids, locks, and twists. This bill is identical to SB 50.

SB 48 **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. The measure authorizes the Commissioner of Labor and Industry to institute proceedings against an employer who has taken such prohibited discriminatory action. Available remedies include reinstatement of the employee, recovery of lost wages, and liquidated damages. This bill is identical to HB 337.

SB 49 **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 and that information 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. The measure also provides that if the Commissioner finds in the course of such investigation that the employer has committed a violation, the Commissioner may institute proceedings on behalf of any employee against his employer. In such proceedings, the Commissioner is not required to have obtained a written complaint of the violation or the written and signed consent of any employee. This bill is identical to HB 336.

SB 480 **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 for the Commonwealth for all occupations as reported by the Bureau of Labor Statistics of the U.S. Department of Labor. The bill defines "covenant not to compete" as an agreement that restrains, prohibits, or otherwise restricts an individual's ability to compete with his former employer. The bill allows any low-wage employee subject to such a covenant not to compete to bring a civil action against an employer and seek appropriate relief, including enjoining the conduct of any person or employer, ordering payment of liquidated damages, and awarding lost compensation, damages, and reasonable attorney fees and costs. The bill provides that if the court finds a violation of the bill's provisions, the plaintiff is entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorney fees from the former employer or

other person who attempts to enforce a covenant not to compete against such plaintiff.

SB 548 **Unemployment compensation.** Amends various provisions regarding unemployment compensation and the Virginia Employment Commission. The bill provides that (i) the Commission shall base its determination on whether an individual is an employee on the standard used by the Internal Revenue Service for such determinations; (ii) for the purposes of unemployment compensation, "wages" does not include any payment made to, or on behalf of, an employee or his beneficiary under a cafeteria plan, as defined in § 125 of the Internal Revenue Code, if such payment would not be treated as wages under the Internal Revenue Code; and (iii) in an unemployment compensation claims adjudication matter, each day a person fails to obey a subpoena issued by a court, a court order, or a subpoena issued by the Commission shall be deemed to be a separate offense. Additionally, the bill requires (a) any employing unit to establish an account with the Commission by the end of the calendar quarter in which it becomes subject to the requirements for unemployment compensation, (b) an employer that has become subject to liability under the unemployment compensation provisions to submit the required reports by the due date of the calendar quarter in which the employer has initially become subject to such liability, and (c) all employers to file their quarterly payroll and tax reports on an electronic medium using a format prescribed by the Commission. Under current law, only employers with 100 or more employees are required to file electronically.

SB 662 **Employee misclassification; retaliatory actions prohibited, civil penalty.** Prohibits an employer from discharging, disciplining, threatening, discriminating against, or penalizing an employee or independent contractor because the employee or independent contractor reported or plans to report that an employer or any officer or agent has failed to properly classify an individual as an employee and failed to pay required benefits or other contributions. The measure also prohibits such actions against an employee or independent contractor who is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry by an appropriate authority or in a court action.

SB 712 **Virginia Human Rights Act; discrimination on the basis of pregnancy, childbirth.** Requires employers, defined in the bill, to make reasonable accommodation for the known limitations of a person related to pregnancy, childbirth, or related medical conditions, if such accommodation is necessary to assist such person in performing a particular job, unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer. The bill also prohibits employers from taking any adverse action against an employee who requests or uses a reasonable accommodation and from denying employment or promotion opportunities to an otherwise qualified applicant or employee because such employer will be required to make reasonable accommodation to the applicant or employee. The bill creates a cause of action against any employer who denies any of the rights afforded by the bill and permits the court or jury to award compensatory damages, back pay, and other equitable relief. The bill makes technical amendments and is identical to HB 827.

SB 804 **Employment; domestic service; Human Rights Act.** Eliminates the exclusion in the Virginia Minimum Wage Act for persons employed in domestic service. The bill requires the Secretary of Commerce and Trade to convene a work group consisting of representatives from the Department of Labor

and Industry, the Virginia Employment Commission, and the Workers' Compensation Commission to make recommendations, including any necessary statutory and regulatory changes, with regard to protecting domestic service employees from workplace harassment and discrimination, providing remedies for such employees for the nonpayment of wages, ensuring the safety and health of such employees in the workplace, and protecting such employees from loss of income as a result of unemployment or employment- related injury by including coverage of such employees in the Virginia Unemployment Compensation Act and the Virginia Workers' Compensation Act.

SB 838 **Nonpayment of wages; private action; liability for payment of wages due.** 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 to an employee, the court shall award the employee (i) reasonable attorney fees and other costs and (ii) an amount equal to triple the amount of wages due.

SB 894 **Misclassification of workers; cause of action.** Authorizes an individual who has not been properly classified as an employee to bring a civil action for damages against his employer for failing to properly classify the employee if the employer had knowledge of the individual's misclassification. The court may award damages in the amount of any wages, salary, employment benefits, including expenses incurred by the employee that would otherwise have been covered by insurance, or other compensation lost to the individual, a reasonable attorney fee, and the costs incurred by the employee in bringing the action. The measure provides that an individual who performs services for a person for remuneration shall be presumed to be an employee unless it is shown that the individual is an independent contractor as determined under the Internal Revenue Service guidelines. This bill is identical to HB 984.

SB 939 **Labor and employment; collective bargaining; employees of counties, cities, and towns.** Permits counties, cities, and towns to adopt local ordinances authorizing them to (i) recognize any labor union or other employee association as a bargaining agent of any public officers or employees, except for Constitutional officers and their employees, and including public school employees and (ii) collectively bargain or enter into any collective bargaining contract with any such union or association or its agents with respect to any matter relating to them or their employment. The bill provides that prohibition against striking for public employees applies irrespective of any such local ordinance.

EMPLOYMENT LAW

– CARRIED OVER –

HB 11 **Human Rights, Division of; duties.** Clarifies that the duties of the Division of Human Rights shall include receiving and investigating all complaints alleging unlawful discriminatory practices that are filed within the applicable statute of limitations period and allege a wrongdoing covered under applicable federal or state law.

HB 403 **Safe days for employees; private employers required to allow days.** Requires private employers to allow an employee safe days, with pay, if the employee is a victim of domestic violence, sexual assault, or stalking or is a family member of a victim of domestic violence, sexual assault, or stalking.

HB 584 **Virginia Personnel Act; hiring preference in state government for persons with disabilities.** Establishes a hiring preference in state government for persons with disabilities, provided that such person meets all of the knowledge, skill, and ability requirements for the available position. The bill defines the term "preference" as requiring that a person with a disability be hired over a person without a disability when the two individuals are substantially equal in qualifications for an eligible position.

HB 800 **Employment; disclosure of terms.** Requires every employer of employees who are 18 years of age or older who work for daily wages or are employed to work on a project for a total of 10 days or less, with some exceptions specified in the measure, to furnish to such employees, at the time of the employee's hiring, a written disclosure of information regarding the terms of employment, including the name and address of the employer, the rate of pay and basis thereof, and the regular payday. The measure also requires employers to notify its employees in writing of any changes to this information.

HB 1112 **Employment; covenants not to compete.** Declares that any contract, including a provision of an employment agreement, entered into on or after July 1, 2020, by which an employee is restrained from engaging in a lawful profession, trade, or business for a specified period of time, in a specified geographical area, or for another employer is contrary to public policy and void.

SB 295 **Employment; disclosure of terms.** Requires every employer to furnish to its employees, at the time of the employee's hiring, (i) a written disclosure of information regarding the terms of employment, including the name and address of the employer, the rate of pay and basis thereof, and the regular payday; and (ii) a physical or digital copy of the driver's license or government-issued identification card of the employer, if the employer is a natural person, or the employee's immediate supervisor, if the employer is not an individual.

SB 427 **Employee protection; discharge for protective order prohibited.** Prohibits an employer from discharging, taking other retaliatory personnel action, or otherwise discriminating against an employee solely on the basis that such employee has filed for or has been issued an emergency protective order or a preliminary protective order against the employer or another employee of such employer. The bill establishes an administrative process for an employee that believes he has been discharged or discriminated against in violation against such prohibition.

SB 660 **Virginia Equal Pay Act; civil penalties.** Prohibits public and private employers from discriminating between employees on the basis of membership in a protected class in the payment of wages or other compensation, including benefits, by paying wages or other compensation to employees who are members of a protected class at a rate less than the rate at which it pays wages or other compensation to employees who are not members of the protected class for substantially similar work. The measure also prohibits an employer from (i) discriminating between employees by providing less favorable employment opportunities on the basis of membership in a protected class, (ii) limiting an employee's right to discuss wages, (iii) relying on the wage history of a prospective employee in considering the prospective employee for employment or determining the wages that the prospective employee is to be paid by the employer upon hire, or (iv) taking certain retaliatory actions against an employee. The measure also establishes criteria for when wage differentials between employees are permitted.

SB 719 **Virginia Minimum Wage Act; exclusions.** Eliminates the exclusion in the Virginia Minimum Wage Act for persons whose employment is covered by the federal Fair Labor Standards Act of 1938 (FLSA) and for persons whose earning capacity is impaired by physical deficiency, mental illness, or intellectual disability.

EMPLOYMENT LAW

– FAILED –

HB 1663 **Discrimination; prohibited in public accommodations, etc., causes of action.**
Creates explicit causes of action for unlawful discrimination in public accommodations and employment in the Virginia Human Rights Act.
Currently, under the Act there is no cause of action for discrimination in public accommodations, and the only causes of action for discrimination in employment are for (i) unlawful discharge on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, including lactation, by employers employing more than five but fewer than 15 persons and (ii) unlawful discharge on the basis of age by employers employing more than five but fewer than 20 persons. The bill allows the causes of action to be pursued privately by the aggrieved person or, in certain circumstances, by the Attorney General.

SB 866 **Virginia Human Rights Act; discrimination on the basis of pregnancy, childbirth.** 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 pregnancy, childbirth, or related medical conditions.

HB 801 **Worker classification; penalties.** Prohibits a contractor from classifying an individual who performs delivery services or construction labor services for the contractor as the contractor's independent contractor if he is an employee of the contractor.

HB 898 **Earned paid sick time.** Requires public and private employers with six or more employees to provide those employees with earned paid sick time. The measure provides for an employee to earn at least one hour of paid sick leave benefit for every 30 hours worked. An employee shall not use more than 40 hours of earned paid sick time in a year, unless the employer selects a higher limit. Employees shall not be entitled to use accrued earned paid sick time until the ninetieth calendar day following commencement of their employment, unless otherwise permitted by the employer.

HB 1203 **Prevailing wage; public works contracts with localities; penalty.** Requires contractors and subcontractors under any public contract with a locality for public works to pay wages, salaries, benefits, and other remuneration to any mechanic, laborer, or worker employed, retained, or otherwise hired to perform services in connection with the public contract at the prevailing wage rate.

HB 1418 **Virginia Human Rights Act; discrimination on the basis of sex; sexual harassment.** Creates a cause of action against any employer employing more than five employees who discharges or engages in an unlawful discriminatory act against any employee on the basis of race; color; religion; national origin; sex; sexual orientation; gender identity; pregnancy; childbirth or related medical conditions, including lactation; marital status; status as a veteran; or age, if the employee if 40 years of age or older. The bill permits a court, in cases where the employee prevails, to award compensatory or punitive damages and reasonable attorney fees and

costs. The bill provides rules for determining whether conduct constitutes workplace harassment, defined in the bill, and lays out a number of factors to consider in determining whether conduct constitutes workplace harassment.

SB 481 **Employees; earned sick leave, civil penalties.** Requires public and private employers with 15 or more employees to provide those employees with earned paid sick time; however, the provisions of the bill would not apply to an employer that has entered into a bona fide collective bargaining agreement. The measure provides for an employee to earn at least one hour of paid sick leave benefit for every 30 hours worked. An employee shall not use more than 40 hours of earned paid sick time in a year, unless the employer selects a higher limit. Employees shall not be entitled to use accrued earned paid sick time until the ninetieth calendar day following commencement of their employment, unless otherwise permitted by the employer. The bill provides that earned paid sick time may be used (i) for an employee's mental or physical illness, injury, or health condition; an employee's need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or an employee's need for preventive medical care; (ii) to provide care to a family member under similar circumstances; (iii) when there is a closure of the employee's place of business or the employee's child's school or place of care due to a public health emergency; or (iv) when an employee's or employee's family member's presence in the community may jeopardize the health of others because of their exposure to a communicable disease.

HB 662 **Local grievance procedure.** Incorporates into the local grievance procedure certain provisions in the state grievance procedure related to appeal of final decisions to the circuit court.

HB 204 **Nonpayment of wages; private cause of action by an employee.** 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.

PRODUCT LIABILITY

– FAILED –

HB 1129 Product safety; flame retardants; regulations; fund; civil penalty. Prohibits the manufacture or sale in the Commonwealth, beginning July 1, 2021, 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.

Practicing Law in a Brave New World

9

Improving Interstate 81: Understanding the Process, Challenges, and Opportunities.

Presented by:

K. Brett Marston

marston@gentrylocke.com

Spencer M. Wiegard

swiegard@gentrylocke.com

Roanoke | Lynchburg | Richmond | gentrylocke.com

Improving Interstate 81: Understanding the Process, Challenges, and Opportunities

K. Brett Marston, Esq.
Spencer M. Wiegard, Esq.
Gentry Locke Seminar – September 11, 2020

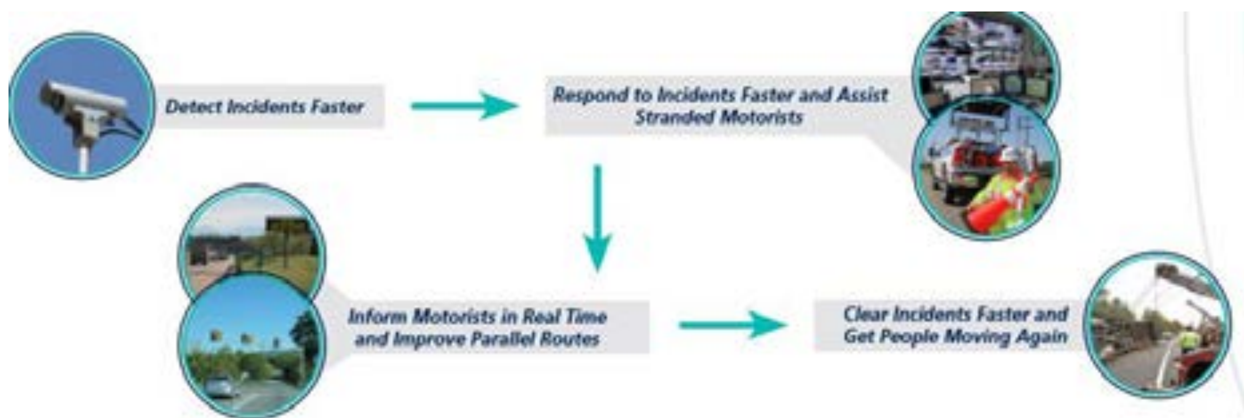
I. Introduction

Interstate 81 is a critical component of the freight network going up and down the east coast of the United States. Running 325-miles through Virginia, I-81 is vital to the movement of goods through the Commonwealth and beyond. In fact, more than one-third of all trucks (11.7 Million) and close to 50% of the value ($312 Billion) of goods that pass through the state are transported on I-81.[1] Those numbers indicate that I-81 has the highest per capita truck volume of any interstate highway through Virginia.[2] In addition to facilitating the movement of goods, I-81 connects to thirty colleges and universities, 21 cities and towns, and 13 counties.[3]

The steady and efficient flow of traffic through the I-81 corridor is essential to businesses throughout these localities, the rest of the Commonwealth, and the entire east coast. Just-in-time manufacturing methods rely upon the timely delivery of materials. Traffic jams and temporary lane closures are a regular occurrence on I-81. The resulting delays can cause disruptions to supply chains. The corridor spans three Virginia Department of Transportation ("VDOT") districts; Bristol, Salem, and Staunton.[4] Although VDOT has recently completed some improvements to I-81, additional improvements are necessary to ensure the safe and efficient movement of people and goods.

---

[1] *See* http://improve81.org/program-overview/overview/default.asp.
[2] *Id.*
[3] *Id.* These include Augusta, Botetourt, City of Bristol, Frederick, City of Harrisonburg, Montgomery, Pulaski, Roanoke, City of Roanoke, Rockbridge, Rockingham, City of Salem, Shenandoah, Smyth, City of Staunton, Washington, City of Winchester and Wythe counties.
[4] *Id.*



II. What Has the General Assembly Approved

In 2018, a study was performed by VDOT, the Commonwealth Transportation Board ("CTB"), the Office of Intermodal Planning and Investment, and the Department of Rail and Public Transportation.[5] Just before the start of the 2019 General Assembly session, the CTB approved the I-81 Improvement Plan, which idenfied $2 Billion of infrastructure projects.[6]

In January 2019, two bills were introduced in the 2019 General Assembly session; SB 1716[7] and HB 2718[8]. Although both bills passed both houses of the General Assembly, in March 2019, Governor Northam announced amendments to both bills. The Governor's amendments established dedicated funding sources for the identified improvements. In April 2019, the General Assembly approved the Governor's amendments, and on April 3, 2019, Governor Northam signed the bills, establishing 2019 Acts of Assembly Chapters 837 and 846.[9] The new laws created the Interstate 81 Corridor Improvement Program and Fund.

Gentry Locke is tracking I-81 corridor improvements on our web site. Please use the following link to access articles and updates that concern the I-81 corridor improvements program and funding: https://www.gentrylocke.com/news/interstate-81-developments-impacts-and-updates/.

III. Legal Framework for the Funding and the Work

The 2019 legislation dedicated new revenues to the Fund from several sources including increases in statewide truck registration fees, statewide diesel and road taxes, and a 2.1% regional fuels tax along the I-81 corridor.

A. Funding for the Work:

[5] *Id.*
[6] *Id.*
[7] *See* https://lis.virginia.gov/cgi-bin/legp604.exe?ses=191&typ=bil&val=SB1716.
[8] *See* https://lis.virginia.gov/cgi-bin/legp604.exe?ses=191&typ=bil&val=HB2718.
[9] *See* https://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+CHAP0846.

- Va. Code Ann. § 46.2-697.2: Additional fees for vehicles not designed or used for transportation of passengers (TRUCK REGISTRATION FEES)
  - Establishes an additional fee for the registration of all motor vehicles not designed and used for the transportation of passengers shall be determined per thousand pounds of the gross weight of the vehicle or combination of vehicles. For vehicles with a gross weight of 10,001 through 15,000 pounds, $6.00 per 1,000 pounds; for vehicles with a gross weight of 15,001 through 25,000, $7.00 per 1,000 pounds; for vehicles with a gross weight of 25,001 through 29,000, $9.00 per 1,000 pounds; for vehicles with a gross weight of 29,001 through 40,000, $10.00 per 1,000 pounds; and for vehicles with a gross weight of 40,001 pounds or more, an amount equal to the per 1,000 pound rate for for-rent or for-hire vehicles provided that the total rate, including any base charged, shall not exceed $23.25 per 1,000 pounds.
  - The fee imposed by this section shall not be applicable to farm motor vehicles used exclusively for farm use.
  - Allowed under Va. Code Ann. § 46.2-697: Fees for vehicles not designed or used for transportation of passengers.
    - The fee for registration of all motor vehicles not designed and used for the transportation of passengers shall be $23 plus an amount determined by the gross weight of the vehicle or combination of vehicles of which it is a part, when loaded to the maximum capacity for which it is registered and licensed.

- Va. Code Ann. § 58.1-2217: Taxes levied; rate (DIESEL TAX)
  - There shall be an excise tax on diesel fuel. On and after July 1, 2020, but before July 1, 2021, the rate shall be 20.2 cents per gallon. On and after July 1, 2021, but before July 1, 2022, the rate shall be 27 cents per gallon. On and after July 1, 2022, the rate shall be adjusted annually based on the greater of the charged in the United States Average Consumer Price Index for all items, all urban consumers, as published Bureau of Labor statistics for the U.S. Department of Labor for the previous year.

- Va. Code Ann. § 58.1-2295: Levy; payment of tax (REGIONAL FUELTAX)
  - There is a tax imposed upon every distributor who engages in the business of selling fuels at wholesale to retail dealers for retail sale in any county or city or any city wholly embraced by a county, through which an interstate passes that is more than 300 miles in length in the Commonwealth and as of January 2, 2019, carried more than 40% of interstate vehicle miles traveled for vehicles classified as Class 6 or higher. The tax shall be imposed on each gallon of fuel, other than diesel fuel, sold by a distributor to a retail dealer for retail sale in any such county or city previously described. The rate shall be 7.6 cents per gallon on gasoline and gasohol. The tax shall be imposed on each

gallon of diesel fuel sold by a distributor to a retail dealer for retail sale in any such county or city at a rate of 7.7 cents per gallon on diesel fuel.

- Va. Code Ann. § 58.1-2701: Amount of tax: (ROAD TAX)
  - Every motor carrier shall pay a road tax per gallon equivalent to the cents per gallon credit for diesel fuel as determined under subsection A of §58.1-2706 for the relevant period plus an additional amount per gallon, calculated on the amount of motor fuel, diesel fuel or liquefied gas used in its operations within the Commonwealth. On July 1, 2020, the additional amount per gallon shall be calculated by multiplying the average fuel economy by $0.0225.

- Va. Code Ann. § 33.2-1604: Funds for administration of Department of Rail and Public Transportation:
  - The Commonwealth Transportation Board may annually allocate up to 3.5% of the revenues available each year in the funds established pursuant to §§ 33.2-1526.4 and 3.2-1602 to support the costs of project development, project administration, and project compliance incurred by the Department of Rail and Public Transportation in implementing rail, public transportation, and congestion management programs and grants.
  - Va. Code Ann § 58.1-2706: Credit for payment of motor fuel, diesel fuel or liquefied gases tax:
    - Every motor carrier subject to the road tax shall be entitled to a credit on such tax on every gallon of motor fuel, diesel fuel, and liquefied gases purchased by such carrier within the Commonwealth for use in its operations either within or without the Commonwealth.

- Relevant legislation for 2019 and 2020 regarding I-81:
  - Senate Bill No. 1716 (2019): The General Assembly wanted to impose and collect tolls for the use of Interstate 81. The revenue collected from these tolls was to be deposited into the fund created by § 33.2-3603: Interstate 81 Corridor Improvement Fund. The initial toll rate imposed on vehicles was not to exceed a total of $55.25 for such vehicle using all the tolled bridges along the entire length of Interstate 81 in a single direction. A discount on the tolls was established by an annual pass that could be purchased by passenger motor vehicles. The cost of the annual pass was not to exceed the amount of a full length round trip for such vehicles. Fees collected for the purchase of the annual pass were to be considered toll revenues and would be deposited into the Interstate 81 Corridor Improvement Fund. However, this bill was amended, and these portions were removed. Instead, the General Assembly decided that a regional gas tax would be collected and deposited into the Interstate 81 Corridor Improvement Fund.

- Many rural counties such as Floyd, Bland, Bath, Carroll, Grayson, Page, Giles and Craig, pushed back against the new regional fuel tax, stating that the tax burden should be shared by all localities instead of just those along the I-81 border. Since I-81 does not run directly through their counties, they would prefer that a portion of the money be used for primary and secondary improvements on other highways within their counties. Senator Obenshain introduced Senate Bill No. 692 (2020) asking for the fuel tax to only be applied in counties or cities in which a portion of Interstate 81 is located. However, it was passed by indefinitely in the Finance and Appropriations Committee on February 4, 2020.

B. **Legal Framework for the Work**

- Va. Code Ann. § 33.2-373: Virginia Highway Safety Improvement Act:
  - The Virginia Highway Safety Improvement Program shall be established to reduce motorized and nonmotorized fatalities and severe injuries on highways in the Commonwealth, whether such highways are state or locally maintained. The Board shall use funds set aside pursuant to § 33.2-358 for the Program.
  - Va. Code Ann. § 33.2-358: Allocation of funds to programs
    - The Board shall allocate each year from all funds made available for highway purposes such amount as it deems reasonable and necessary for the maintenance of roads within the Interstate System, the primary state highway system, and secondary state highway system and for city and town street maintenance payments.

- Va. Code Ann. § 33.2-372: Interstate Operations and Enhancement Program
  - The Board shall establish the Interstate Operations and Enhancement Program to improve the safety, reliability, and travel flow along interstate highway corridors in the Commonwealth.

- Va. Code Ann. §33.2-357: Revenue-sharing funds for systems in certain localities
  - From revenues made available by the General Assembly and appropriated for the improvement, construction, reconstruction, or maintenance of the systems of state highways, the Board may make an equivalent matching allocation to any locality for designations by the governing body of up to $5 million for use by the locality to improve, construct, maintain, or reconstruct the highway systems within such locality, with up to $2.5 million for use by the locality to maintain the highway systems within such locality.

- Va. Code Ann. § 33.2-3600: Definitions

    - Interstate 81 Corridor means Interstate 81, Route 11, and other parallel highways, parallel railways, and related transportation facilities that help move people and goods.

- Va. Code Ann. § 33.2-3601: Interstate 81 Corridor Improvement Fund
    - All revenues dedicated to the Fund, any other funds that may be appropriated by the General Assembly, and any funds that may be received for credit to the Fund from any other sources shall be paid into the state treasury and credited to the Fund. Interest earned on money in the Fund shall remain in the Fund and be credited to it. Money in the Fund shall be used for capital, operating, and other improvement costs identified in the Plan.

- Va. Code Ann. § 33.2-3602: Report
    - The Board shall adopt an Interstate 81 Corridor Improvement Program. The program shall allocate year by year revenue, including a financing plan to support such allocation and include a schedule of all new projects and strategies identified in the Plan adopted by the Board. The Board shall update the program annually by July 1. The Board shall report to the General Assembly regarding the status and progress of implementation of the program. The report shall be submitted to the Chairmen of the House Committees on Appropriations and Transportation and the Senate Committees on Finance and Transportation. The report shall include the safety and performance of the Interstate 81 corridor, assessment of the effectiveness of the operation strategies and capital projects implement and funded through the program, the status of capital projects funded through the program, and the current and projected balances of the Fund.

- Va. Code Ann. § 33.2-3603: Interstate 81 Committee
    - The Board shall establish an Interstate 81 Committee to provide advice and recommendations to the Board regarding the development of the Program and updates to the Plan. The Committee shall hold at least four (4) meetings a year and consult with interested stakeholders. The Committee shall consist of fifteen (15) voting members and two (2) ex officio members compromised of representatives as follows: the chairs of planning district commissions for Planning Districts 3, 4, 5, 6, and 7, or in the discretion of a chairman, his designee, who shall be a current elected official serving on such commission; four (4) members of the House of Delegates, each of whom resides in Planning District 3, 4, 5, 6, or 7, to be appointed by the Speaker of the House of Delegates (none of the four members shall live in the same planning district); three (3) members of the Senate, each of whom resides in Planning District 3, 4, 5, 6, or 7, to be appointed by the Senate Committee on Rules (none of the three members shall live in the same planning district); the three (3) members of the Board representing the

Bristol, Salem, and Staunton highway construction districts; and The Commissioner of Highways and the Director of the Department of Rail and Public Transportation shall serve ex officio with nonvoting privileges.

- The Committee has met several times, starting in August 2019.[10] The members of the Committee include:

  Frank Friedman;
  Bradley Grose;
  Michael Harvey;
  Dennis Morris;
  Tim Reeves;
  CTB Member Ray Smoot, Jr.;
  CTB Member Jerry Stinson;
  CTB Member Dixon Whitworth; and
  CTB Member Greg Yates.

  Ex officio members include:
  VDOT Commissioner Steve Brich
  DRPT Director Jennifer Mitchell

  The Senators serving on the Committee are:

  Bill Carrico, R-Grayson;
  John Edwards, D-Roanoke; and
  Mark Obenshain, R-Rockingham.

  The Delegates on the Committee are:

  Terry Austin, R-Botetourt;
  Chris Collins, R-Frederick;
  Chris Hurst, D-Blacksburg; and
  Tony Wilt, R-Rockingham.

- Va. Code Ann § 33.2-3604: Updates to the Interstate 81 Corridor Improvement Plan; requirements
  - The Board shall regularly update the improvement plan. In updating the plan, the Board should analyze existing conditions of I-81, identify potential improvements to address the needs related to safety, congestions and incident-related delays, they should prioritize potential improvements, identify corridor-wide incident management strategies, analyze and review truck parking needs along I-81, and hold public meetings throughout the I-81 corridor.

[10] *See* http://www.VA81Corridor.org.

- Va. Code Ann. §33.2-3605: Continuing responsibilities of the Commonwealth Transportation Board and Department of Transportation
  - The Board shall allocate funding to, and the Department shall perform all maintenance and operation of bridges, tunnels, and roadways.

IV. What Does VDOT Have Planned?

A. Completed Operational Improvements:

- Bristol:
  - Safety Service Patrol Improvements
    - Added 12 additional safety service patrol trucks and 10 personnel in the Salem and Bristol Districts.
    - Added 2 additional traffic operations center operators in the Southwest Region.
    - Expanded safety service patrol operation to 7 days a week.
  - Detour Plans
    - Detour plans have been developed for VDOT and other responding agencies to follow when I-81 incidents occur between interchanges. The plans provide detailed resource information for responders such as number and stations for traffic control personnel, location and type of traffic signals, signing and other required traffic control devices.
- Salem:
  - Safety Service Patrol Improvements
    - Separated the existing Roanoke County/Botetourt county coverage areas into two areas, creating one route for 1-81 and I-581 in Roanoke County and one route for Botetourt County.
    - Added 12 additional safety service patrol trucks and 10 personnel in the Salem and Bristol Districts.
    - An additional safety service patrol route was added to Christiansburg Mountain to increase coverage.
    - Added two additional traffic operations center operators in the Southwest Region.
  - Detour Plans
    - Detour plans have been developed for VDOT and other responding agencies to follow when I-81 incidents occur between interchanges. The plans provide detailed resource information for

responders such as number and stations for traffic control personnel, location and type of traffic signals, signing and other required traffic control devices.

- Staunton
  - Safety Service Patrol Improvements:
    - Created a new Safety Service Patrol route for I-81 in Augusta County.
    - Separated the Frederick County/Warren County Safety Service Patrol coverage area into two areas, one for I-81 and one for I-66.
    - Expanded Safety Service patrol coverage from 12 hours to 16 hours per day in the Staunton District and added 7 additional trucks and 12 personnel.
    - Added 2 additional traffic operations center operators in the Northwest Region.
  - Detour Plans
    - Detour plans have been developed for VDOT and other responding agencies to follow when I-81 incidents occur between interchanges. The plans provide detailed resource information for responders such as number and stations for traffic control personnel, location and type of traffic signals, signing and other required traffic control devices.

B. **Planned Improvements:**

District	Number of Projects by Type								
	Widening	Auxiliary Lane	Truck Climbing Lane	Acceleration Lane Extension	Deceleration Lane Extension	Curve Improvement	Shoulder Widening	Total Number of Projects	Total Cost (millions $)
Bristol District	1	3	3	6	10	4	0	27	$285.2
Salem District	4	0	0	4	2	3	0	13	$875.3
Staunton District	4	1	2	10	4	1	1	23	$838.1
Total I-81 Corridor Number of Improvements	**9**	**4**	**5**	**20**	**16**	**8**	**1**	**63**	**$1,998.8**

- **Widening:**
  - Bristol District
    - Bristol/Washington County
      - Widen to three lanes between mile marker 8 to mile marker 9 South bound.
      - Construction to take place in 2020-2024.
  - Salem District
    - Roanoke/Roanoke County
      - Widen to three lanes between mile marker 144 and exit 150 in both directions.
      - Construction to take place 2024-2028.
    - Salem/Roanoke County:
      - Widen to three lanes between exit 137 and exit 140 in both directions.
      - Construction to take place 2020-2026.
    - Montgomery County/Roanoke County/Salem
      - Widen to three lanes between exit 128 and exit 137 North bound.
      - Construction to take place 2029-2038.
    - Christiansburg/Montgomery County
      - Widen to three lanes between exit 116 and exit 128 North bound.
      - Construction to take place 2029-2039.
  - Staunton District
    - Frederick County/Winchester
      - Widen to three lanes between exit 313 and exit 317 in both directions.
      - Construction to take place 2028-2031.
    - Shenandoah County/Warren County/ Frederick
      - Widen to three lanes between exit 299 and exit 296 South bound.

            - Construction to take place 2024-2027.
        - Rockingham County/Harrisonburg
            - Widen to three lanes between exit 243 to exit 248 in both directions.
            - Construction to take place 2024-2028.
        - Augusta County/Staunton
            - Widen to three lanes between exit 221 and exit 225 in both directions.
            - Construction to take place 2024-2027.

- **Curve Improvements:**
    - Bristol District
        - Wytheville:
            - Curve improvements at mile marker 68 North bound.
            - Construction to take place 2019.
        - Washington County:
            - Curve improvements at mile marker 22 South bound.
            - Construction to take place 2019.
        - Abingdon:
            - Curve improvements at mile marker 18 North bound.
            - Construction to take place 2019.
    - Salem District
        - Botetourt:
            - Curve improvements between mile marker 176 and mile marker 172 South bound.
            - Construction to take place 2019-2020.
        - Pulaski:
            - Curve improvements at mile marker 88 northbound.
            - Construction to take place 2019-2020.
    - Staunton District:
        - Shenandoah County:
            - Curve improvements at mile marker 272 South bound.
            - Construction to take place 2019.

- **Auxiliary Lane:**
    - Bristol District
        - Wytheville:
            - Add an auxiliary lane between exit 73 and exit 72 South bound.
            - Construction to take place 2023-2028.

            - Smyth County:
                - Add auxiliary lane between exit 54 and Smyth safety rest area South bound.
                - Construction to take place 2020-2023.
            - Wythe County:
                - Add an auxiliary lane between exit 40 on I-77 and exit 72 on I-81 South bound.
                - Construction to take place 2023-2028.
    - Salem District:
        - No planned improvements.
    - Staunton District:
        - Augusta County:
            - Add an auxiliary lane between exit 221 and exit 220 South bound.
            - Construction to take place 2023-2025.

- **Truck Climbing Lane:**
    - Bristol District:
        - Chilhowie/Smyth County:
            - Add truck climbing lane between mile marker 39 to mile marker 40 North bound.
            - Construction to take place 2020-2024.
        - Washington County:
            - Add truck climbing lane between mile marker 34 and mile marker 33 South bound.
            - Construction to take place 2020-2024.
    - Salem District:
        - No planned improvements.
    - Staunton District:
        - Augusta County/Rockingham County:
            - Add truck climbing lane at Weyers Cave between mile marker 233 and mile marker 237.
- **Operational Improvements:**
    - Bristol District:
        - 28 new CCTV cameras.
        - 4 new changeable message boards.
    - Salem District:
        - 10 new CCTV cameras.
        - 5 new changeable message boards.
    - Staunton District:
        - 13 new CCTV cameras.
        - 23 new changeable message boards.
- **Acceleration/Deceleration Extension**
    - No specific plans yet.

I-81– I-77 System-System Interchange Improvements

- Improve operational and safety characteristics of I-81/I-77 Interchange
- Major System-System Interchange.
- Three projects – decal extension, ramp re-configuration, auxiliary lane improvements
- Estimated value = $75 M

IV. Impacts on the Construction Industry

For more than a decade to come, the road and bridge building industry will be impacted by the planned improvements to I-81. We will see orange cones and barrels from 2020 through the next decade. There will be numerous opportunities for general contractors, subcontractors, material suppliers, engineers and consultants, inspectors, traffic control contractors, specialty contractors, utility contractors, concrete and stone suppliers, and support industries.

The Virginia legal market should expect to see more activity in the following:

- bid disputes and protests;
- contract disputes
- delay claims;
- extra work claims;
- disputes over alleged defective work;
- disputes over alleged defective design;
- licensing issues;
- health and safety compliance and enforcement issues;
- payment disputes; and
- bond claims.

V. What Other Industries Will be Impacted?

- Commercial Real Estate
- Environmental
- Billboard/Entertainment
- Trucking

10

Creditors Rights in a Pandemic: Understanding how to Protect your Client in an Economic Downturn.

Presented by:

Bill E. Callahan

callahan@gentrylocke.com

Chip G. Dicks

chipdicks@gentrylocke.com

Chris M. Kozlowski

kozlowski@gentrylocke.com

GENTRY LOCKE
Attorneys

Roanoke | Lynchburg | Richmond | gentrylocke.com

Creditors Rights in a Pandemic

Understanding how to protect your client in an economic downturn

William E. Callahan, Jr.
John G. "Chip" Dicks
Christopher M. Kozlowski
Gentry Locke Seminar – September 11, 2020

I. INTRODUCTION

For many, the COVID-19 pandemic has proven to be a severe financial stress test. For creditors (including landlords), the pandemic has been an opportunity to refresh their recollection on collection, bankruptcy, and landlord/tenant laws, rules, and best practices.

II. RELEVANT BANKRUPTCY RULES

The Automatic Stay of Section 362(a)

The automatic stay provisions of section 362(a) are some of the most fundamental and powerful provisions of the Bankruptcy Code. The automatic stay constitutes an injunction that is "applicable to all entities" to prevent most actions that might be taken against (i) the debtor, (ii) any property of the debtor, and (iii) any property of the bankruptcy estate.

Its purpose is to provide the debtor with a breathing spell from his creditors. It "automatically" enjoins all collection efforts against the debtor and the debtor's property. It is effective throughout the United States and its territories contemporaneously with the debtor's filing of a petition for relief under the Bankruptcy Code. There is no requirement that there be notice of the filing of a petition for relief for the automatic stay to become effective. As a result, collection actions taken after the automatic stay become effective are void or voidable. The automatic stay remains in effect until the bankruptcy court grants "relief" from the automatic stay or it is terminated by operation of the Bankruptcy Code. The scope of the automatic stay is broad, enjoining with few exceptions, the commencement or continuance of any action to obtain or enforce a right against the debtor or its property.

For example, where a lease has been terminated pre-petition but the debtor remains in possession of the leased premises, the possessory right of the debtor to occupy the premises, however slight in the eyes of the landlord, is protected by the automatic stay of section 362(a).

Actions taken in violation of the automatic stay may be void or voidable, depending on the jurisdiction where the bankruptcy case is pending. In the Eastern District of Virginia, violations of the automatic stay are voidable by the bankruptcy court. Conversely, in the Western District of Virginia, such actions are void ab initio. There is a similar split of opinion on this issue among the country's Courts of Appeal, although the Fourth Circuit has not ruled on this question.

A creditor or party in interest in a bankruptcy case may seek and obtain "relief" from the automatic stay. A request for relief is governed by section 362(d) of the Bankruptcy Code and Bankruptcy Rule 4001. Section 362(d) creates four grounds for obtaining relief: (i) cause, including the lack of "adequate protection" of the creditor's interest in the property in question; (ii) the lack of equity in property and that property is not necessary for an effective reorganization of the debtor; (iii) the case is a single-asset real estate case; and (iv) the filing of a petition is a part of a scheme to delay, hinder, or defraud creditors.

The automatic stay can also terminate automatically. Where the debtor had one prior bankruptcy case that was dismissed within one year of a second filing of a petition, the stay is only effective until the thirtieth day after the date the new petition is filed. During that first 30 days, a "party in interest," presumably the debtor or the trustee, can file a request that the stay be extended, and the hearing on this request must be held during that 30-day period. To justify an extension of the stay, the moving party must show by clear and convincing evidence that the filing of the second case was in good faith.

A willful violation of the automatic stay may result in an award of damages to the debtor. Section 362(k) provides that "[a]n individual injured by any willful violation of a stay provided by [section 362] shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." However, only "actual damages" can be recovered for violation of the automatic stay by a creditor acting in the good faith belief that the stay terminated under section 362(h) due to the debtor's failure to file or perform according to the statement of intent. To be "willful" the creditor must (i) have had knowledge of the bankruptcy case, and (ii) undertaken an intentional or a deliberate action prohibited by section 362(a), but it does not require a specific intent to violate the stay or actual contempt of court.

Section 365 & the Assumption or Rejection of Unexpired Leases

Section 365 of the Bankruptcy Code permits the trustee (and in some cases debtors or debtors-in-possession) to reject or assume unexpired leases (and executory contracts). An unexpired lease is exactly what its name implies: a lease that has not expired by its terms and has not been terminated.

If a lease is assumed, it may also be assigned to a third party. While the Bankruptcy Code does not establish the standard by which a trustee determines whether to assume or reject a contract or lease, most courts apply the business judgment test. This standard requires the trustee to use the type of judgment that a business person would employ under similar circumstances. In most cases, a court will rely upon the trustee's business judgment. The benefits conferred by this section are especially valuable to the debtor-in-possession, but can also be valuable to a trustee seeking to recover the value of a lease (by assuming and assigning the lease) or to minimize the administrative expense claim associated with a lease (by timely rejecting the lease).

Under section 365(b)(1) of the Bankruptcy Code, the trustee may assume an unexpired lease even though it is in default, but only if the trustee (i) cures or provides adequate assurance of the cure of the existing default, (ii) compensates or provides adequate assurance of the

compensation of the other party to the lease for any actual pecuniary losses arising from the default, and (iii) provides adequate assurance of future performance under the lease.

Section 365(b)(2) makes clear that the provisions of subsection 365(b)(1) do not apply to a default resulting from lease terms that trigger the default on the basis of the debtor's insolvency, the filing of a bankruptcy petition, or the debtor's financial condition. This provision gives effect to the bankruptcy law policy that ipso facto clauses are unenforceable.

An unexpired lease may only be assumed or rejected in its entirety, taking with it the burdens with the benefits. For example, if an unexpired lease is for more than one location, absent the consent of the landlord, the trustee must assume the entire lease. Once a trustee has assumed an unexpired lease, the other party to the lease may enforce it against the trustee or his assignee, if assigned, according to its terms.

In some instances, unexpired leases are not assumable by the trustee. Notwithstanding a trustee's satisfaction of all of the requirements of section 365(b)(1), section 365(c) prohibits the trustee from assuming or assigning an unexpired lease if (i) applicable law excuses a party, other than the debtor, from accepting such performance from or rendering performance to an entity other than the debtor or the debtor-in-possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, *and* such party does not consent to such assumption or assignment, or (ii) the lease is of nonresidential real property that has been terminated under applicable non-bankruptcy law prior to the order for relief.

Section 365(d) specifies the time periods during which a trustee, debtor, or debtor-in-possession must act to assume and/or assign an unexpired lease.

Chapter 7 Cases: Under section 365(d)(1), in a Chapter 7 case, if the trustee does not assume or reject an unexpired lease of residential real property or of personal property of the estate within 60 days after the order for relief, the contract or unexpired lease is deemed rejected. The court may, for cause, extend the 60-day period in which the trustee must assume or reject. However, the trustee must file a pleading requesting an extension within the initial 60-day period.

Chapter 9, 11, 12, or 13 Cases: Under section 365(d)(2), in a Chapter 9, 11, 12, or 13 case, the trustee, the debtor, or the debtor in possession, as applicable, may assume or reject an unexpired lease of residential real property, either by formal motion or in a plan, at any time before the confirmation of the plan. However, upon request of any party to a lease, the court may order the trustee, the debtor or the debtor-in-possession to determine, within a specific period, whether it will assume or reject the contract or lease.

The above-described provisions apply only to leases of residential real property or personal property. Under section 365(d)(3), where the debtor is the lessee under a lease of non-residential real property is at issue in a case under any title of the Bankruptcy Code, a lease of nonresidential real property is deemed to be rejected if the trustee, debtor or debtor-in-possession does not assume or reject it within the earlier of 120 days after the order for relief or the date of the entry of an order confirming a plan. If deemed rejected the property must then be immediately surrendered by the debtor to the landlord. This 120-day deadline may be extended by the bankruptcy court for an

additional 90 days upon the request of the debtor prior to the expiration of the 120-day period upon a showing of cause, and may be further extended – but only upon the prior written consent of the landlord "in each instance. In addition, under section 365(d)(3) of the Bankruptcy Code, the trustee, debtor or debtor-in-possession must perform all of the obligations of the debtor to the landlord/lessee prior to the assumption of a lease of non-residential real property.

After assuming an unexpired lease, a trustee, debtor or debtor-in-possession may assign the lease. Pursuant to section 365(f)(1), exclusive of the limitations in sections 365(b) and (c), a restriction upon assignment in the contract or lease or applicable laws that restrict assignments are not enforceable in a bankruptcy case. Section 365(f)(3) also prohibits the enforcement of any clause or provision of a lease that mandates termination or modification of the lease upon assignment.

A trustee may assign a contract or lease only if the trustee (i) assumes the contract or lease in accordance with the provisions of section 365, and (ii) provides adequate assurance of future performance by the assignee of the contract or lease. This latter requirement for adequate assurance of future performance applies regardless of whether there is a default. Under section 365(k), the trustee's assumption and assignment relieves the trustee from any further obligations for a breach that arises after the assignment.

An unexpired lease may be affirmatively rejected by the trustee, debtor or debtor-in-possession or rejected by operation of the applicable provisions of section 365 following the expiration of deadlines to assume or reject the lease. The rejection of an unexpired lease that has not been previously assumed by the trustee, debtor or debtor-in-possession is considered as a breach of such lease before the commencement of the case pursuant to section 365(g)(1), and any damages arising from that breach is treated as a pre-petition claim.

However, if the lease has been assumed, the treatment of the lease and any claim arising under the lease depends on whether and when, in relationship to the rejection, the case has been converted and when the rejection occurred in relation to the conversion.

Section 365(b)(3) and section 365(h)(1)(C) apply only to shopping centers and they provide that, notwithstanding other provisions in section 365, it does not affect any provision of an unexpired shopping center lease relating to radius, location, use, exclusivity of similar stores, or tenant mix or balance of the shopping center. Both parties to the lease may continue to enforce these provisions in an unexpired lease.

The Bankruptcy Code does not define the term "shopping center". In the Ames Department Stores, Inc. case, *In re Ames Dep't. Stores, Inc.*, 348 B.R. 91 (Bankr. S.D.N.Y. 2006), the Court set out fourteen factors to consider in determining whether a development was a "shopping center", whether (i) there is a combination of leases, (ii) all leases are held by a single landlord, (iii) all tenants are engaged in the commercial retail distribution of goods, (iv) there is a common parking area, (v) there is the purposeful development of the premises as a shopping center, (vi) there is the existence of a master lease, (vii) there is the existence of fixed hours during which all stores are open, (viii) there is the existence of joint advertising, (ix) there is contractual interdependence of the tenants as evidenced by restrictive use provisions in their leases, (x) there is the existence of

percentage rent provisions in the leases, (xi) there is the right of the tenant to terminate their leases if the anchor tenant terminates its lease, (xii) there is the joint participation by the tenants in trash removal and other maintenance, (xiii) there is the existence of a tenant mix, and (xiv) there is the contiguity of the stores. The *Ames* Court found that the most important characteristics to consider were a combination of leases held by a single landlord, tenants engaged in the commercial retail distribution of goods, and the presence of a common parking area. This decision was followed by the Bankruptcy Court in the Eastern District of Virginia in *In re Toys "R" Us, Inc.,* 587 B.R. 340 (Bankr. E.D. Va. 2018).

III. LEASE DRAFTING AFTER THE PANDEMIC (NEW RULES!)

The Nonresidential Tenancies Act is new, as of October 1, 2019.

The Virginia Code Commission worked on a rewrite of Title 55 (the Real Estate Code) into Title 55.1 for three calendar years, which ultimately passed the 2019 Virginia General Assembly. Recodifications of the Code of Virginia are always effective on October 1 of the year is it is signed into law by the Governor, so Chapter 14 of Title 55.1, entitled the Nonresidential Tenancies, became effective on October 1, 2019. The Real Estate Code was codified in the year 1919 and recodified in the year 1950. So, there was lots of old stuff in the Real Estate Code that cleaned up.

There are some key points to remember about the 2019 Nonresidential Tenancies Act for transactional lawyers and for those who litigate:

One. "Nonresidential tenancy" means the rental of any real estate for purposes other than residential use, including business, industrial, or agricultural purposes. (See Section 55.1-1400).

Two. The lease or rental agreement controls the landlord-tenant relationship unless such lease agreement is silent, in which case the provisions of this chapter apply. So, the way we write any nonresidential lease is more important than ever, not only what we say but what we don't say. ONLY when a nonresidential lease does not address a particular issue, do the statutory provisions even come into play. (See Section 55.1-1400).

Three. Depending upon the language of a nonresidential lease, common law may or may not apply. Everything will come down to the plain meaning of the language in a nonresidential lease.

Four. The right to evict a tenant whose right of possession has been terminated in any commercial or other nonresidential tenancy under this chapter may be effectuated by self-help eviction without further legal process so long as such eviction does not incite a breach of the peace. But, if you choose, a nonresidential landlord has a right to file an unlawful detainer and go to court. This is dramatically different from a residential tenancy which can only be terminated through the filing of an unlawful detainer action based upon the public policy of evicting somebody from their home. (See Section 55.1-1400). (Also, see Chapter 12 of Title 55.1 for residential tenancies).

Five. Remember that any tenancy, residential or nonresidential, can be terminated by the filing of an unlawful detainer, regardless of the amount of rent and damages due, so the jurisdictional limits of $25,000 in general district do NOT apply to unlawful detainer cases. This means a nonresidential landlord is able to obtain a quick hearing in a general district court proceeding without waiting on a more extended timeframe in a circuit court. (See Section 16.1-77 (A)(3).

We would encourage anyone practicing in landlord tenant law, residential or nonresidential, to review Chapters 12 and 14 of the new Title 55.1. You will find lots of changes from the old statutes.

IV. WORKOUTS – A MENTAL EXERCISE

In most cases, when a borrower defaults on a loan, creditors do not move straight to enforcement. The default may be only temporary, or it may be prohibitively expensive or time consuming to chase after payment. In the event of a default, creditors should be prepared to refrain – or forbear – from enforcement. However, the terms and conditions of any forbearance need to be carefully considered and memorialized in a well-drafted agreement. Both the borrower and the creditor can ultimately benefit from these arrangements.

A. Opportunities for the Borrower:

1. Continued operations during default.

2. Potential to restructure payment terms in a more affordable manner.

3. Runway to seek refinancing, buyout, and other cash flow positive opportunity.

B. Opportunities for the Creditor:

1. Avoid cost and time of enforcement.

2. Address issues with (or add additional) collateral.

3. Obtain waivers or concessions from Borrower, such as confessed judgement provisions.

C. Key Terms.

There are a number of key terms that need to be addressed in a forbearance agreement, and which counsel should be careful to review.

1. Length. The creditor and borrower should determine the length of time each expect the forbearance to last. The creditor should do its due diligence to underwrite a new structure. The borrower should project how long it will take to dig out.

2. Confirmation and Acknowledgements. The creditor should require the borrower to acknowledge and confirm:

(a) the amount of the debt, and the terms of the interest.

(b) the defaults by the borrower.

(c) enforceability of previously executed documents.

(d) that the creditor is not required to lend anything further, nor make any accommodations to the borrower.

3. Fees and Expenses. The creditor will likely include confirmation that all of its fees and expenses (including for their counsel) in negotiating, executing and enforcing the forbearance agreement must be paid immediately.

4. Modification of Terms. The creditor may choose to:

(a) raise interest rates.

(b) require additional reporting.

(c) charge additional fees.

(d) shorten or lengthen maturity.

(e) add security.

(f) add guarantors.

(g) alter the payment schedule.

Remember that forbearance agreements are creatures of contract, and the parties should ensure proper memorialization of the terms.

Practicing Law in a Brave New World

11

Insurance Coverage in the COVID-19 Pandemic.

Presented by:

Guy M. Harbert

harbert@gentrylocke.com

Pete G. Irot

irot@gentrylocke.com

GENTRY LOCKE
Attorneys

Roanoke | Lynchburg | Richmond | gentrylocke.com

INSURANCE COVERAGE AND THE COVID 19 PANDEMIC

Guy M. Harbert, III
Peter G. Irot
Gentry Locke Seminar - September 11, 2020

I. INTRODUCTION

Insurance companies make their money by managing risk – agreeing to cover some and excluding coverage as to others. As a general matter, the distinction between coverage and uncovered losses is based upon risk-benefit-cost analysis. Where the likelihood and consequences of particular risks are somewhat predictable, the carriers are able to calculate a premium amount sufficient to allow the company to cover anticipated losses and generate an acceptable profit. For this reason, standard coverage is generally unavailable for widespread catastrophes such as earthquakes, floods, and hurricanes, pollution contamination, war or terrorist attack.[1] After the "bird flu" and "swine flu" incidents of the 2000s, many insurance companies included language in their policies purporting to limit or exclude coverage for losses arising by reason of a "virus."

The COVID-19 pandemic will likely put this effort to the test, as COVID related claims have arisen, or are likely to arise under virtually every type of available insurance. This presentation will focus upon what may be some of the more common and controversial claims, such as commercial property, business interruption, commercial general liability, directors & officers coverage and workers compensation.

II. INSURANCE POLICIES POTENTIALLY APPLICABLE

A. First Party Policies

1. Commercial Property Policies

- **a.** "[A]n insurance policy for businesses and other organizations that insures against damage to their buildings and contents due to a covered cause of loss, such as a fire." [2]
- **b.** The policy may also cover loss of income or increase in expenses that results from the property damage (PD). [3]
- **c.** Commercial property policies may be written on standard or nonstandard forms."[4]

2. Event Cancellation Policies –

[1] That is not to say coverage is unavailable, as many carriers offer special riders and policies affording coverage for these catastrophes.
[2] https://www.irmi.com/term/insurance-definitions/commercial-property-policy.
[3] https://www.irmi.com/term/insurance-definitions/commercial-property-policy.
[4] https://www.irmi.com/term/insurance-definitions/commercial-property-policy.

a. "Special event insurance covers cancellations necessitated by adverse weather and natural disasters, such as hurricanes. Most policies also provide coverage for cancellation due to the death, illness or serious injury of a key participant in the event, such as the groom or a member of the immediate family. Also, if an officiant (such as a minister or rabbi), or a key vendor (like the caterer, florist or photographer) does not show up, special event insurance allows you to recover some of the costs."[5]

b. Most event cancellation policies are written on a manuscript basis, meaning that they are tailored to the particular needs of and risks likely to be encountered by a particular insured,[6] and may or may not cover virus or pandemic related losses, depending upon the language of the policy.

B. Third Party Policies

1. Commercial General Liability Policies – "A Commercial General Liability (CGL) policy protects your business from financial loss should you be liable for property damage or personal and advertising injury caused by your services, business operations or your employees. It covers *non-professional* negligent acts. Understanding this coverage is an important first step in managing CGL risks."[7]

2. Directors' and Officers' Liability Policies – "Directors and officers is a type of liability insurance that covers individuals for claims made against them while serving on a board of directors and/or as an officer. This type of policy can be written to cover directors and officers of for-profit businesses, privately held firms, not-for-profit organizations and educational institutions."[8]

3. Workers Compensation/Employers' Liability Policies – "Workers compensation insurance serves two purposes: It assures that injured workers get medical care and compensation for a portion of the income they lose while they are unable to return to work and it usually protects employers from lawsuits by workers injured while working."[9]

III. COMMERCIAL PROPERTY POLICIES

---

[5] https://www.iii.org/article/special-event-insurance.
[6] https://consumer.findlaw.com/insurance/what-is-a-manuscript-policy.html.
[7] https://www.iii.org/article/commercial-general-liability-insurance.
[8] https://www.iii.org/article/directors-and-officers-insurance.
[9] https://www.iii.org/publications/insuring-your-business-small-business-owners-guide-to-insurance/specific-coverages/workers-compensation-insurance.

A. Types of Coverage – Standard Policy Language

1. Business Property Coverage – "We will pay for direct physical loss of or damage to Covered Property caused by or resulting from any Covered Caused of Loss."[10]

2. Business Income Coverage (w/ or w/out Rental Value) – "We will pay for the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration.' The 'suspension' must be caused by ***direct physical loss of or damage*** to property at premises which are described in the Declarations."[11]

    a. Extra Expense – "We will pay any necessary Extra Expense you incur during the 'period of restoration' that you would not have incurred if there had been no ***direct physical loss or damage to property***. The loss or damage must have been caused by or result from a Covered Cause of Loss."[12]

        i. "Extra Expense means necessary expenses incurred": (a) To avoid or minimize the suspension of business and to continue 'operations' … (b) to minimize the suspension of business if you cannot continue 'operations' … (c) to (i) Repair or replace any property or (ii) Research, replace or restore the lost information on damaged 'valuable papers and records.'"[13]

    b. Contingent Business Interruption Coverage – CBI can be defined as the loss of business income caused by disruption stemming from a member of a network on which the insured is dependent.

3. Civil Authority Coverage – "We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the [covered] premises ***due to direct physical loss of or damage*** to property, other than at the [covered] premises, caused by or resulting from any Covered Cause of Loss."

B. "Direct Physical Loss or Damage"

1. **Insurance is governed on the principle of indemnity**; that if the property is damaged, the insured suffers a financial loss. Insurance will restore the insured to his pre-loss condition by repairing the property or paying for replacement property if the property is irreparable.[14]

---

[10] *Millers Standard Insurance Policies Annotated*, (7th ed.) Vol. I, Part 2, BP-13.
[11] *Millers Standard Insurance Policies Annotated*, (7th ed.) Vol. I, Part 2, BP-19.
[12] *Millers Standard Insurance Policies Annotated*, (7th ed.) Vol. I, Part 2, BP-20
[13] *Millers Standard Insurance Policies Annotated*, (7th ed.) Vol. I, Part 2, BP-20.
[14] "Coronavirus and Insurance Coverage – What Attorneys Need to Know," VADA Webinar, Mumford, John, Harbert, Guy, May 21, 2020.

2. **Burden of Proof Rests with the Insured** – Because the existence of "direct physical loss or damage" is required to trigger the insuring agreement of the policy, the insured has the burden of proof.[15]

3. **Plain Meaning Rule**

   a. In what has been referred to as a "plain meaning rule", the words used in the policy are to be given their ordinary and usual meaning when they are susceptible to such construction.[16]

   b. "[A] court must adhere to the terms of a contract of insurance as written, if they are plain and clear and not in violation of law or inconsistent with public policy. It is not [the court's] function to make a new contract for the parties different from that plainly intended and thus create a liability not assumed by the insurer."[17]

4. **"Physical"**

   a. The dictionary definition: "having material existence**:** perceptible especially through the senses and subject to the laws of nature."[18]

   b. "The requirement that the loss be ***'physical,'*** …is widely held to exclude losses that are intangible or incorporeal, and, thereby to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property."[19]

5. **"Damage"**

   a. The dictionary definition: "loss or harm resulting from injury to person, property or reputation."[20]

      i. "Loss" is defined as "destruction, ruin."[21]

      ii. "Harm" is defined as "physical or mental damage."[22]

   b. "Damage' is defined as loss, injury or deterioration … of one's person or property."[23]

[15] *See Furrow v. State Farm Mut. Auto. Ins. Co.*, 237 Va. 77, 375 S.E. 2d 738, 740 (1989).
[16] *State Farm Fire and Cas. Co. v. Walton*, 244 Va. 498, 502, 423 S.E.2d 188, 191 (1992).
[17] *Blue Cross and Blue Shield of Virginia v. Keller*, 248 Va. 618, 626, 450 S.E.2d 136, 140 (1994).
[18] https://www.merriam-webster.com/dictionary/physical.
[19] *Couch on Insurance* (3d. 2019).
[20] https://www.merriam-webster.com/dictionary/damage.
[21] https://www.merriam-webster.com/dictionary/loss.
[22] https://www.merriam-webster.com/dictionary/harm.
[23] *Lumbermen's Mut. Cas. Co. v. Keller*, 219 Va. 455, 456 S.E.2d 525 (1995)

6. **Case Law Comparisons**[24]

   a. ***Mama Jo's, Inc. v. Sparta Ins. Co.***, 2018 U.S. Dist. LEXIS 201852 (S.D. Fla. Jun 11, 2018) (holding that restaurant did not sustain direct physical loss when dust and debris from nearby roadwork could be remediated by cleaning);

   b. ***Mastellone v. Lightning Rod Mut. Ins. Co.***, 884 N.E.2d 1130 (Ohio Ct. App. 2008) (finding that mold which could be removed by cleaning was not physical damage, as it did not alter or otherwise affect the structural integrity of the building's siding);

   c. ***Universal Image Prods. v. Chubb Corp.***, 703 F. Supp. 2d 705 (E.D. Mich. 2010) (holding that intangible harms such as odors or the presence of mold and bacteria in an HVAC system did not constitute physical damage to property);

   d. ***Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n***, 793 F. Supp. 259 (D. Or. 1990) (opining that asbestos contamination was not a physical loss, as the building remained unchanged), *aff'd*, 953 F.2d 1387 (9th Cir. 1992);

   e. ***Air Lines, Inc. v. Insurance Co. of Pa.***, 439 F.3d 128, 130 (2d Cir. 2006) (airline not entitled to coverage when a civil authority halted flights due to the September 11 terrorist attacks because the closure was for preemptive prevention of terrorism, not the "result of" a dangerous condition of the physical damage to the nearby Pentagon, or the authority's need to access it).

   f. ***State Farm Fire & Cas. Co. v. Cabatbat*** , Cv. No. 09-00532 DAE-LEK, 2011 U.S. Dist. LEXUS 14560 (D. Hawaii 2011). The depositing of dog feces onto the plaintiff's yard does not constitute "physical damage to tangible property."

   g. ***Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America,*** No. 12-cv-04418, 2014 U.S. Dist. LEXIS 165232 (D.N.J. Nov. 25, 2014) (Release of ammonia from refrigeration system inside facilities rendering building uninhabitable constituted a "direct physical loss").

7. **The challenge**

   a. The evidence in any case considering "COVID contamination" will likely be that the virus can be cleaned off of any item of tangible

[24] "Coronavirus and Insurance Coverage – What Attorneys Need to Know," VADA Webinar, Mumford, John, Harbert, Guy, May 21, 2020.

property just like germs, bacteria or plain dirt, with relatively little effort, leaving the item of property in essentially the same condition it was in prior to exposure to the virus.

b. The CDC website advises:[25] "**Clean surfaces using soap and water, then use disinfectant.** Cleaning with soap and water **reduces number of germs, dirt and impurities** on the surface. **Disinfecting kills germs** on surfaces."[26]

C. The Virus Exclusion

1. "We will not pay for loss or damage caused directly or indirectly by any of the following … **j. Virus or Bacteria** … Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."[27]

2. Policies may include other "virus exclusions."

a. May be **genera**l (for "virus") **or specific** (for SARS, anthrax, etc.).

b. May be in an **"omnibus exclusion"** (for mold, fungus, dry rot, etc.).

c. There may be no such exclusion.

d. The exclusion may only apply to certain coverages (e.g. it may apply to the property coverage, but not business interruption coverage.

e. This is an example of the *variables* amongst various policies that make generic predictions as to coverage difficult.

3. Even if the insured gets past the "physical damage" requirement, the "virus exclusion" is likely to be a problem.

4. Unlike proving that there is "direct physical loss and damage" so as to trigger the insuring agreement, the burden of proving the virus exclusion rests with the insurer.[28]

5. As to whether the injury or damage was "caused by or resulted from any virus," the "plain meaning rule" will likely control.

---

[25] This information is on the CDC website as of July 7, 2020. Whether the CDC has, or may, change its conclusions and advice is apparently the subject of some question. https://www.washingtonpost.com/health/2020/05/21/virus-does-not-spread-easily-contaminated-surfaces-or-animals-revised-cdc-website-states/. Obviously, a significant change in the cleaning protocol could have an impact upon the evidence a court might consider.

[26] https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html.

[27] *Millers Standard Insurance Policies Annotated*, (7th ed.) Vol. I, Part 2, BP-232.

[28] *See State Farm Mut. Auto. Ins. Co.v. Long*, 212 Va. 234, 183 S.E.2d 138 (1971); *White v. State Farm Mut. Auto. Ins. Co.*, 208 Va. 394, 157 S.E.2d 925 (1967).

6. What if the loss resulted not from virus contamination, but from a government mandated shutdown?

    a. Is that a loss "indirectly" caused by a virus?

    b. Many property policies also have an "Ordinance or Law" exclusion, negating coverage for "loss or damage caused directly or indirectly by … The enforcement of any ordinance or law: (1) Regulating the construction, use or repair of any property.

D. Practical Issues

1. Regardless of the coverage issue, there are actions an insured needs to take sooner rather than later in order to be in compliance with its duties in the event of a loss.

2. Time matters – Most policies require that "losses" need to be reported "as soon as practicable," regardless of whether the insured will submit a "claim," and regardless of whether there is coverage for that claim.

3. Documenting the loss – Especially with lost income claims, documentation is needed to substantiate loss of sales, customers, extra expenses (e.g., payroll, material, rent, and replacement inventory to shorten period of restoration) and hard costs (e.g., legal and accounting). Documenting sales trends and business cycles before and after the damaging event is important to show the related losses. Saved expenses should be included.

4. Mitigation of losses – The business should attempt to mitigate losses to the extent it can. Mitigation examples include continuing to operate if possible, limiting the period of restoration, or mitigating certain costs.

E. Legislative Considerations

1. It is not unreasonable to expect legislatures across the country, and perhaps in Virginia, to consider legislation that may have a direct impact upon coverage for COVID 19 losses. And the possibility of legislation with an *ex post facto* effect is not out of the question.

2. Examples – State Law.[29]

    a. **LA S 477 / LA H 858**: construes insurance policies covering business interruption to include coverage for business interruption due to imminent threat posed by coronavirus, requires notice of exclusions.

    b. **MA S 2655**: requires that every insurance policy insuring against loss or damage to property that includes the loss of use and occupancy and

[29] "Coronavirus and Insurance Coverage – What Attorneys Need to Know," VADA Webinar, Mumford, John, Harbert, Guy, May 21, 2020.

business interruption, be construed to include coverage; coverage for business interruption directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus.

c. **MI H 5739**: provides for business interruption coverage for Coronavirus disease losses; coverage against loss or damage to property, including the loss of use and occupancy.

d. **NJ A 3844**: requires every policy insuring against loss or damage to property, including loss of use and occupancy and business interruption in force on the effective date of the act, be construed to include among the covered perils, coverage for business interruption due to the Coronavirus disease pandemic.

e. **NY S 8211 / NY A 10226**: requires certain perils be covered under business interruption insurance during the Coronavirus disease 2019.

f. **OH H 589**: requires insurers offering business interruption insurance to cover losses attributable to viruses and pandemic.

g. **PA S 1114 / PA H 2372**: provides coverage under business interruption insurance during the Coronavirus disaster emergency.

h. **PR H 2469**: provides that due to the Coronavirus pandemic, **the virus or disease exception shall not apply** in commercial insurance policies regarding loss due to business interruption if the insured closed its business by government order.

i. **SC S 1188**: provides that every policy in force in the state insuring loss against damage to property that includes a loss of use and occupancy, or business interruption, **shall be construed to include**, among the covered perils under the policy, coverage for business interruption directly or indirectly resulting from the Coronavirus pandemic.

3. Examples – Federal – "A bipartisan group of 18 U.S. House members on March 18 asked insurers to honor business interruption claims. Insurance industry groups responded that business insurance policies were never designed to cover communicable diseases." – VLW 05-18-20

F. Litigation

1. As of July 7, 2020, over 100 coverage suits have been filed in the federal courts across the country, and the number will almost certainly rise.[30]

2. Examples – Virginia.

[30] https://www.claimsjournal.com/news/national/2020/05/21/297180.htm.

a. ***Guajillo Mexican v. Twin City Fire Insurance Co***., 1:20-cv-00632-LMB-MSN (E.D. Va. Alexandria) (originally filed in Arlington Circuit Court, removed to E.D.Va. June 5, 2020).

   i. Breach of contract claim alleging insurer's refusal of coverage breached its obligation under the policy "due to its covered loss of business income because its premises are unusable and uninhabitable and have lost all function, which constitutes a direct physical loss under the policy."

   ii. "claimed that Gov. Ralph Northam's March 23 closing order caused a direct physical loss."

   iii. The restaurant says its policy covers loss of business income and "explicitly covered such loss when caused by a virus."

   iv. There is an endorsement that extends coverage for "loss or damage by 'fungi,' wet rot, dry rot, bacteria and virus" but it is pegged to "[d]irect physical loss or direct physical damage" to the property.

b. ***L&L Logistics and Warehousing Inc. d/b/a L&L Trucking v. Evanston Insurance Company,*** 3:20-cv-00324-REP (E.D. Va., Richmond)

   i. Declaratory judgment action seeking business income and civil authority coverage under property policy.

   ii. Alleges that COVID-19 shut down order (and worldwide viral contamination) constitutes direct physical loss to property and that virus exclusion does not apply.

   iii. Defendant filed its Answer on July 1, 2020.

c. ***Rush Hour Live Escape Games LLC v. Mesa Underwriters Specialty Insurance Company d/b/a MUSIC***, 3:20-cv-00323-REP (E.D. Va., Richmond)

   i. Declaratory judgment action.

   ii. Sought coverage for all business losses incurred due to the coronavirus pandemic and subsequent government orders.

   iii. Voluntarily dismissed without prejudice on May 26, 2020 before defendant was served.

4. Political Considerations

a. In two of the cases, *Rush Hour* and *L&L*, the plaintiffs "argue the president is on their side. The suits quote President Donald Trump

suggesting insurance should cover business losses during the emergency closings" – VLW 05-18-20

b. Trump's April 20 comments: "You have people that have never asked for business interruption insurance [payouts] and they've been paying a lot of money for a lot of years for the privilege of having it. And then when they finally need it, the insurance company says 'we're not going to give it.' We can't let that happen."

5. Federal MDL Efforts[31]

a. Policyholders seek to consolidate all federal COVID-19 business interruption coverage litigation in multi-district litigation.

b. To be eligible for MDL, a majority of the 7-judge Judicial Panel must find that the cases involve one or more common questions of fact and that the transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. 1407.

c. Competing petitions filed, seeking venue in Philadelphia, Chicago, and Miami.

d. Key issues/variables:

i. Different policies contain different language and endorsements;

ii. Manuscript virus exclusions (an exclusion tailored to a particular insured based upon the insured's unique exposure);[32]

iii. Varying scope of shut down orders by state; and

iv. Effect of virus/shut down orders on different types of businesses.

IV. COMMERCIAL GENERAL LIABILITY POLICIES

A. Policy language – coverage for damages, and defense costs, due to "bodily injury" or "property damage" suffered by a third party.

1. "Bodily injury" is defined in terms of "physical injury, sickness or disease."[33]

a. The "great bulk of … authority points in one direction; it holds that 'bodily injury' does not encompass emotional distress, but is limited to *physical injury*."[34]

---

[31] "Coronavirus and Insurance Coverage – What Attorneys Need to Know," VADA Webinar, Mumford, John, Harbert, Guy, May 21, 2020.

[32] https://consumer.findlaw.com/insurance/what-is-a-manuscript-policy.html.

[33] *Millers Standard Insurance Policies Annotated*, (7th ed.) Vol. I, Part 2, GL-18.

[34] *West American Ins. Co. v. Bank of Isle of Wight*, 673 F. Supp. 760, 764 (E.D. Va. 1987) (emphasis added); *see also, Cornett v. Trustees of the United Mine Workers*, 1996 U. S. Dist LEXIS 20029, p. 25 (W.D. Va. 1996).

b. In order for a "bodily injury" to exist, there must be a "*physical injury* to the body."[35]

c. "[N]onphysical or emotional harm" does not constitute a "bodily injury."[36]

2. "Property damage"

a. generally requires "physical injury" to "tangible property."[37]

b. loss of use of property is covered, so long as that loss of use is the result of physical injury to some tangible property.

B. Anticipated claims and suits – Third party contracts COVID due to insured's failure to take necessary precautions or have proper procedures and plans in place to prevent exposure to infected individuals. This scenario may well fall within the insuring agreement.

1. Suits against cruise lines.[38]

2. Suits against nursing homes.[39]

3. Anticipated lawsuits against a multitude of large and small businesses.[40]

C. Coverage issues.

1. Pollution exclusion.

a. "This insurance does not apply to … **f. Pollution** (1) 'Bodily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' … ".[41]

i. Note that the language of the pollution exclusion varies from "limited" to "absolute" to "total," each of which have degrees of exceptions, and many policies have pollution endorsements that apply to restore coverage.

---

[35] *Amer. and Foreign Ins. Co. v. Church Schools*, 645 F. Supp. 628, 632 (E.D. Va. 1986) (emphasis added)
[36] *Amer. and Foreign Ins. Co. v. Church Schools*, 645 F. Supp. 628, 632 (E.D. Va. 1986); *see also King v. City of Chesapeake*, 478 F. Supp.2d 871, 874 (E.D. Va. 2007)
[37] *America Online, Inc. v. St. Paul Mercury Ins. Co.*, 347 F.3d 89 (4th Cir. 2003); *Millers Standard Insurance Policies Annotated*, (7th ed.) Vol. I, Part 2, GL-21.
[38] https://www.usatoday.com/story/travel/2020/06/08/princess-cruises-faces-two-new-lawsuits-over-coronavirus-plagued-ships/5322809002/.
[39] https://www.usatoday.com/story/travel/2020/06/08/princess-cruises-faces-two-new-lawsuits-over-coronavirus-plagued-ships/5322809002/.
[40] https://www.law.com/2020/05/01/as-businesses-reopen-lawsuits-loom-over-covid-19-exposure/?slreturn=20200607155924.
[41] *Millers Standard Insurance Policies Annotated*, (7th ed.) Vol. I, Part 2, GL-24.

b. "Pollutants mean any solid, liquid, gaseous or thermal irritant or contamination, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."[42]

2. A number of Virginia courts have held that the exclusion is not limited to just "traditional" notions of "environmental" pollution.[43]

3. Again, because the primary coverage issues involve an exclusion, the burden of proof will lie with the insurer.[44]

4. The key issue may well be how the person or property suffering the injury or damage came to be exposed to the virus; that is, was it the result of a "discharge, dispersal, seepage, migration, release or escape?"

D. Legislation – In what appears to be a very partisan issue, federal and state legislation is being considered, or at least discussed, to provide varying degrees of immunity on a national and state level.[45]

V. DIRECTORS' AND OFFICERS' LIABILITY POLICIES

A. These policies may provide coverage for "wrongful acts" arising from responses or lack of responses to COVID-19 outbreak.

B. D&O policies may also extend to government investigations and inquiries which could provide coverage for investigations and claims under the False Claims Act, which may be triggered by a variety of COVID issues.

C. D&O policies may also provide coverage for shareholder derivative lawsuits, at least one of which has been filed against Norwegian Cruise Lines on the allegations that executives lied about the effect of the pandemic on the company's business shortly before its stock value fell by over 50% in two days.[46]

D. Many Homeowners Associations and Condominium Unit Owners Associations have D&O coverage written in to their HOA and UOA policies.

---

[42] *Millers Standard Insurance Policies Annotated*, (7th ed.) Vol. I, Part 2, GL-21.

[43] *Firemen's Ins. Co. of Washington D.C. v. Kline & Son Cement Repair, Inc.*, 474 F. Supp.2d 779 (E.D. Va. 2007) (epoxy/urethane fumes emitted as the result of restoration work on a concrete floor in a warehouse was within the exclusion); *West American Ins. Co. v. Johns Brothers, Inc.*, 435 F. Supp.2d 511, 516 (E.D. Va. 2003); (heating oil that leaked from a storage tank was properly characterized as a "contaminant," especially in light of the "extensive Virginia regulatory framework surrounding aboveground and belowground petroleum storage tanks") *City of Chesapeake v. States Self-Insurers Risk Retention Group, Inc.*, 271 Va. 574, 578, 628 S.E.2d 539, 541 (2006) (chemicals found in drinking water were properly characterized as "contaminants" in light of the fact that they were specifically regulated under the Federal Safe Drinking Water Act).

[44] *See State Farm Mut. Auto. Ins. Co.v. Long*, 212 Va. 234, 183 S.E.2d 138 (1971); *White v. State Farm Mut. Auto. Ins. Co.*, 208 Va. 394, 157 S.E.2d 925 (1967).

[45] https://www.law.com/2020/05/01/as-businesses-reopen-lawsuits-loom-over-covid-19 exposure/?slreturn=20200607155924.

[46] *Eric Douglas, Individually and on Behalf of All Others Similarly Situated v. Norwegian Cruise Lines, Frank Del Rio, & Mark A. Kempa* (S.D. Fla.); https://www.miamiherald.com/news/business/tourism-cruises/article241239406.html.

VI. WORKERS COMPENSATION POLICIES

A. Under most state's workers compensation laws, an "ordinary disease of life to which the general public is exposed outside of the employment" is not considered a compensable occupational disease.

B. Potentially, there are exceptions under existing law (or newly proposed law) for **healthcare workers and first responders** who can show that they contracted the virus while engaged in the direct delivery of healthcare services.

C. Proposed legislation in some states.

1. **CA S 1159** (pending): amends existing law relating to the workers' compensation system. Defines injury for a **critical worker** to include illness or death that results from exposure to coronavirus disease. Creates a disputable presumption that an injury that develops or manifests itself while a critical worker is employed arose out of and in the course of the employment.

2. **LA S 475** (pending): provides that **essential workers** disabled because of the contraction of coronavirus disease are entitled to workers compensation benefits.

Practicing Law in a Brave New World

12

What Could Go Wrong? A Guide to Defaults and Default Judgments from a Plaintiff's Perspective.

Presented by:

Travis J. Graham

graham@gentrylocke.com

GENTRY LOCKE
Attorneys

Roanoke | Lynchburg | Richmond | gentrylocke.com

WHAT COULD GO WRONG?

A Guide to Defaults and Default Judgments from a Plaintiff's Perspective

Travis J. Graham
Gentry Locke Seminar – September 11, 2020

I. TERMINOLOGY

"Default" vs. "Default Judgment"

- *Default is a state of being.*
- *A default judgment is a thing; it is a type of judgment awarded by the court following a default.*

II. SETTING UP FOR DEFAULT: PLEADINGS

A. Virginia

Rule 3:2. Commencement of Civil Actions.

. . .

(c) *Form and Content of the Complaint.*

. . .

(ii) Every complaint requesting an award of money damages shall contain an ad damnum clause stating the amount of damages sought. Leave to amend the ad damnum clause shall be available under Rule 1:8.

B. Federal

Rule 54. Judgment; Costs.

. . .

(c) Demand for Judgment; Relief to be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings.

Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

- *You must state the amount sued for in state court. You don't have to in federal court.*
- *In state court, you can't get a judgment (default or otherwise) for more than your ad damnum.*
- *In federal court, your ad damnum doesn't matter—except in the case of a default judgment.*

III. SETTING UP FOR DEFAULT: SERVICE

A. Virginia

Va. Code § 8.01-296. Manner of serving process upon natural persons.

Subject to the provisions of § 8.01-286.1, in any action at law or in equity or any other civil proceeding in any court, process, for which no particular mode of service is prescribed, may be served upon natural persons as follows:

1. By delivering a copy thereof in writing to the party in person; or

2. By substituted service in the following manner:

   a. If the party to be served is not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of 16 years or older; or

   b. If such service cannot be effected under subdivision 2 a, then by posting a copy of such process at the front door or at such other door as appears to be the main entrance of such place of abode, provided

that not less than 10 days before judgment by default may be entered, the party causing service or his attorney or agent mails to the party served a copy of such process and thereafter files in the office of the clerk of the court a certificate of such mailing . . . . In any civil action brought in a circuit court, the mailing of a copy of the pleadings with a notice that the proceedings are pending in the court indicated and that upon the expiration of 10 days after the giving of the notice and the expiration of the statutory period within which to respond, without further notice, the entry of a judgment by default as prayed for in the pleadings may be requested, shall satisfy the mailing requirements of this section and any notice requirement of the Rules of Court . . . .

B. Federal

Rule 4. Summons.

. . .

(e) Serving an Individual Within a Judicial District of the United States.

Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

. . . .

- *In state court, make sure to follow the rules on posted service.*
- *In federal court, you can serve a defendant any way that you could do so in state court, as well as by other means as set out in Rule 4. But, those means don't include posting. So, posted service in federal court requires the same steps as in state court.*

IV. ENTRY OF DEFAULT

A. Virginia

Rule 3:8. Answers, Pleas, Demurrers and Motions.

(a) Response Requirement

A defendant shall file pleadings in response within 21 days after service of the summons and complaint upon that defendant . . . or within 90 days after that date if the defendant was addressed outside the Commonwealth.

. . . .

Rule 3:19. Default.

(a) Failure Timely to Respond

A defendant who fails timely to file a responsive pleading as prescribed in Rule 3:8 is in default.

. . . .

B. Federal

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

(a) Time to Serve a Responsive Pleading.

(1) ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint . . . .

Rule 55. Default; Default Judgment.

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

. . . .

- *In Virginia, the defendant "falls into default" when no response is served before the deadline. No further action is necessary.*
- *In federal court, the plaintiff typically must ask the clerk to enter a party's default.*
- *Note the difference between "in default" and "failed to appear."*

V. PARTIAL DEFAULT

A. Virginia

- *Yes. A defendant must respond to everything.*

B. Federal

- *No. A response by way of motion to any part of the complaint tolls the deadline to respond to the rest.*

VI. NOTICE FOLLOWING DEFAULT

A. Virginia

Virginia Rule 3:19. Default.

(a) Failure Timely to Respond.

A defendant who fails timely to file a responsive pleading as prescribed in Rule 3:8 is in default. A defendant in default is not entitled to notice of any further proceedings in the case, including notice to take depositions, except that written notice of any further proceedings shall be given to counsel of record, if any. The defendant in default is deemed to have waived any right to trial of issues by jury.

. . . .

B. Federal

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

. . .

(2) ***If a Party Fails to Appear.*** No service is required on a party who is in default for failing to appear. But a pleading that

asserts a new claim for relief against such a party must be served on that party under Rule 4.

. . . .

- *The rule in state court and federal court is basically the same: if a defendant fails to appear, he or she isn't entitled to notice or service of anything.*
- *This includes the request to enter the default itself.*
- *Note the difference between "default" and "failure to appear."*
- *Note the exception for new claims in federal courts. This applies to attempts to amend the ad damnum.*

VII. ENTRY OF DEFAULT JUDGMENT FOR SUM CERTAIN

A. Virginia

Rule 3:19. Default.

. . .

(c) *Default Judgment and Damages*.

(1) Except in suits for divorce or annulling a marriage, the court shall, on motion of the plaintiff, enter judgment for the relief appearing to the court to be due. When service of process is effected by posting, no judgment by default shall be entered until the requirements of Code § 8.01-296(2)(b) have been satisfied.

(2) If the relief demanded is unliquidated damages, the court shall hear evidence and fix the amount thereof, unless the plaintiff demands trial by jury, in which event, a jury shall be impaneled to fix the amount of damages.

. . . .

B. Federal

Rule 55. Default; Default Judgment.

. . .

(b) Entering a Default Judgment.

(1) ***By the Clerk.*** If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk— on the plaintiff's request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

. . .

- *The court enters all default judgments in Virginia. In federal courts, the clerk can enter default judgment for a "sum certain."*
- *"Sum certain" doesn't mean the number in your ad damnum.*

VIII. ENTRY OF DEFAULT JUDGMENT FOR UNLIQUIDATED DAMAGES

A. Virginia

Rule 3:19. Default.

. . .

(c) *Default Judgment and Damages*

. . .

(2) If the relief demanded is unliquidated damages, the court shall hear evidence and fix the amount thereof, unless the plaintiff demands trial by jury, in which event, a jury shall be impaneled to fix the amount of damages.

(3) If a defendant participates in the hearing to determine the amount of damages such defendant may not offer proof or argument on the issues of liability, but may (i) object to the plaintiff's evidence regarding damages, (ii) offer evidence regarding the quantum of damages, (iii) participate in jury selection if a jury will hear the damage inquiry, (iv) submit proposed jury instructions regarding damages, and (v) make oral argument on the issues of damages.

B. Federal

Rule 55. Default; Default Judgment.

. . .

(b) Entering a Default Judgment.

. . .

(2) ***By the Court.*** In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a

representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals— preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

- *The court has wide latitude as to how to conduct the proceedings. There are only a handful of things the court can't do.*
- *Defaulting defendants have substantial rights to participate in the damages phase.*