



GENTRY LOCKE
Attorneys

Working Together Completes the Puzzle



2022 Gentry Locke Seminar
September 28, 2022
The Dewey Gottwald Center

2022 Gentry Locke Seminar

September 28, 2022

The Dewey Gottwald Center

- 8:40 a.m. **Welcome**
- 8:45 a.m. **“Ethics in Internal Investigations: Conflicts & Confidentiality Under Heightened Public Scrutiny.”**
Thomas J. Bondurant, Erin M. Harrigan, Jennifer S. DeGraw, moderated by John G. Danyluk
- 9:45 a.m. **Break**
- 10:00 a.m. **“You Start Walking My Way: Keys to a Successful Mediation.”**
Ashley W. Winsky
- 10:30 a.m. **“PFAS Is Coming.”**
Charles L. Williams, Maxwell H. Wiegard, and Jasdeep Singh Khaira
- 11:00 a.m. **Break**
- 11:15 a.m. **“Risk Management for Construction Clients.”**
K. Brett Marston and Spencer M. Wiegard
- 11:45 a.m. **“How to Excel in the Federal Jury Trial Sandbox.”**
Matthew W. Broughton and Andrew D. Finnicum
- 12:15 p.m. **Networking Lunch Break**
- 12:45 p.m. **“The Story of the Hard-Fought Legal Battle to Protect One of the Most Fundamental Rights – Marriage.”**
Monica T. Monday and Karen L. Cohen
- 1:45 p.m. **Break**
- 2:00 p.m. **“Virginia Legislative Update.”**
Patrice L. Lewis and Zachary R. LeMaster



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2022 Gentry Locke Seminar

September 28, 2022
The Dewey Gottwald Center

- 2:30 p.m. **“Appellate Ethics in an Appeal-of-Right Virginia.”**
Monica T. Monday
- 3:00 p.m. **Break**
- 3:15 p.m. **“Managing the Insurance Relationship: Making Sure Your Coverage Is There When You Need It.”**
Guy M. Harbert, III
- 3:45 p.m. **“What Every Lawyer Needs to Know About Cybersecurity and Data Privacy.”**
Christen C. Church and Andrew E. Hayhurst
- 4:15 p.m. **“The Outside General Counsel Role.”**
Herschel V. Keller
- 4:45 p.m. **Reception**
– 5:45 p.m.



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Monica Taylor Monday

Managing Partner

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Monica Monday is Gentry Locke's Managing Partner and heads the firm's Appellate practice. Monica represents her clients in Virginia's state and federal appellate courts across a wide variety of cases, including commercial and business disputes, healthcare, property, personal injury, local government matters, domestic relations and more. In 2015, Monica was inducted as a Fellow of the American Academy of Appellate Lawyers — only the fifth Virginia attorney to be so honored. Monica is ranked (Band 1) in *Chambers USA*, Virginia, for Appellate and General Commercial Litigation. She has been described by Chambers USA as having “a commanding reputation as ‘one of the go-to practitioners’ for appellate work” (2018) and as being “held in high esteem as a leading appellate lawyer.” (2022). She has been recognized among *Virginia's Top 10 Lawyers*, *Virginia's Top 50 Women Lawyers*, and *Virginia's Top 100 Lawyers* by the Thomson Reuters' *Virginia Super Lawyers*, and on the *Best Lawyers in America* and *Virginia Business* magazine's *Legal Elite* lists, and was a “Leaders in the Law” honoree by *Virginia Lawyers Weekly*.

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

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

Education

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

Experience

- Court affirmed renewal of co-executors of an estate. *Galiotos v. Galiotos*, 300 Va. 1, 858 S.E. 2d 653 (2021)
- Court affirmed summary judgment for local government in suit alleging discriminatory taxation. *Norfolk Southern Pay v. City of Roanoke*, 916 F.3d 315 (4th Cir. 2019)
- Court affirmed the trial court's decision to set aside a multi-million dollar verdict in a government contracting case. *CGI Federal, Inc. v. FCi Federal, Inc.*, 295 Va. 506, 814 S.E.2d 183 (2018)
- Court affirmed finding that property owners had a vested right to the use of their property. *Board of Supervisors of Richmond County v. Rhoads*, 294 Va. 43 (2017)
- In question of first impression involving social host duty to child guest, obtained affirmance of motion to strike. *Lasley v. Hylton*, 288 Va. 419, 764 S.E.2d 88 (2014)
- Court reversed dismissal of defamation case. *Cashion v. Smith*, 286 Va. 327, 749 S.E.2d 526 (2013)
- Obtained reversal of workers' compensation case because the Full Commission lacked authority to decide the case with a retired Commissioner. *Layne v. Crist Electrical Contractor, Inc.*, 62 Va. App. 632, 751 S.E.2d 679 (2013)
- Obtained reversal of jury verdict in maritime case relating to asbestos exposure. *Exxon Mobil Corp. v. Minton*, 285 Va. 115, 737 S.E.2d 16 (2013)
- Obtained reversal of decision striking down water and sewer rates that town charged to out-of-town customers; won final judgment in favor of town. *Town of Leesburg v. Giordano*, 280 Va. 597, 701 S.E.2d 783 (2010)
- In question of first impression, obtained dismissal of domestic relations appeal based upon terms of property settlement agreement, which waived the right of appeal. *Burke v. Burke*, 52 Va. App. 183, 662 S.E.2d 622 (2008)
- Obtained reversal of award of writ of mandamus against municipal land development official in subdivision application case. *Umstatt v. Centex Homes, G.P.*, 274 Va. 541, 650 S.E.2d 527 (2007)

- Secured affirmance of compensatory and punitive damages awards for breach of fiduciary duty, tortious interference, and conspiracy. *Banks v. Mario Industries of Virginia, Inc.*, 274 Va. 438, 650 S.E.2d 687 (2007)
- Successfully defended a jury verdict for homeowners association for damages stemming from the negligent construction of a septic system. *Westlake Properties, Inc. v. Westlake Pointe Property Owners Association, Inc.*, 273 Va. 107, 639 S.E.2d 257 (2007)
- Successfully represented an individual in a premises liability case involving a question of first impression. *Taboada v. Daly Seven, Inc.*, 271 Va. 313, 626 S.E.2d 428 (2006), adhered to on rehearing, 641 S.E.2d 68 (2007)
- Obtained a new trial on damages for injured plaintiff in a medical malpractice case. *Monahan v. Obici Medical Management Services*, 271 Va. 621, 628 S.E.2d 330 (2006)
- Successfully defended decision of the Virginia Workers' Compensation Commission awarding attendant care benefits for employee who lost both arms in an industrial accident and assessing a large award of attorneys fees against opposing party. *Virginia Polytechnic Institute v. Posada*, 47 Va. App. 150, 622 S.E.2d 762 (2005)
- Obtained reversal of summary judgment in federal court negligence case. *Blair v. Defender Services*, 386 F.3d 623 (4th Cir. 2004)
- Successfully defended compensatory and punitive damages jury verdict in malicious prosecution case. *Stamathis v. Flying J, Inc.*, 389 F.3d 429 (4th Cir. 2004)
- Obtained reversal of summary judgment in state malicious prosecution case representing chairman of a school board. *Andrews v. Ring*, 266 Va. 311, 585 S.E.2d 780 (2003)
- Obtained new trial for individual in medical malpractice case. *Sawyer v. Commerci*, 264 Va. 68, 563 S.E.2d 748 (2002)
- Successful defense of jury verdict in a construction case interpreting statutory warranty for new dwellings. *Vaughn, Inc. v. Beck*, 262 Va. 673, 554 S.E.2d 88 (2001)
- Successfully defended federal court's dismissal of First Amendment constitutional challenge in voting rights case. *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192 (4th Cir. 1997), cert. denied, 522 U.S. 1077 (1998)

Administration & Litigation

- Represent physicians in obtaining restoration of Virginia medical licenses
- Represent medical providers, including physicians, veterinarians, dentists, chiropractors and nurse practitioners in disciplinary and licensure matters before the Virginia Department of Health Professions

Affiliations

- Member, Judicial Council of Virginia (2013-Present)
- The Virginia Bar Association Appellate Practice Section Council (2009-Present), Past Chair (2019-2021)
- Chair, Appellate Committee of the Virginia State Bar Litigation Section (2009-2019)
- Fourth Circuit Rules Advisory Committee; Chair (2017-2018), Virginia Representative (2013-2017)
- Member, Virginia Model Jury Instruction Committee (2012-2020)
- Member, Boyd-Graves Conference (2011-Present); Member, Steering Committee (2016-Present)
- Board of Directors, The Harvest Foundation (2015-Present)
- Member, Special Committee to Study Appellate Mediation in Virginia
- Member, American National Bankshares, Inc., Virginia State Banking Board (2019-2020)
- Board of Trustees, Virginia Museum of Natural History (2009-2019)
- Member, Virginia Workers' Compensation American Inn of Court (2015-Present)
- Member, Virginia State Bar Professionalism Course Faculty (2013-2016)
- Member, Blue Ridge Regional Library Board (2007-2011)
- American Heart Association Roanoke "Go Red for Women" Luncheon; Chair (2017-2018), Co-chair (2016-2017)
- Board of Governors, The Virginia Bar Association (2011-2014)
- Board of Directors, Virginia Law Foundation (2005-2011)
- Member, The Ted Dalton American Inn of Court (2003-2012); Secretary (2007-2012)
- Chair, Committee on Federal Judgeships, Western District, Virginia Bar Association (2004-2008, 2015-Present)
- Member, Nominating Committee, The Virginia Bar Association (2004); Membership Committee (2003-2005)
- Board of Directors, Virginia Association of Defense Attorneys (2001-04)
- Co-Chair, Judicial Screening Committee, Virginia Women Attorneys Association (2001-03)
- Member, Board of Trustees, Adult Care Center (1999-04)
- Executive Committee, Young Lawyers Division, Virginia Bar Association (1998-02)
- President, William & Mary Law School Association (2000-01)
- Law Clerk to the Honorable Lawrence L. Koontz, Jr., Chief Judge, Court of Appeals of Virginia (1991-93)

Awards

- "Leading Individual" by Chambers and Partners USA (2021-2022), Band 1, Litigation: Appellate (Virginia)
- "Leading Individual" by Chambers and Partners USA (2017-2022), Band 1, Litigation: Commercial (Virginia)
- "Virginia Business Power 500" (2020, 2021)
- "Roanoke Lawyer of the Year for Appellate Practice" (2020) by Best Lawyers in America

- Peer rated “AV/Preeminent” by Martindale-Hubbell
- Fellow, American Academy of Appellate Lawyers (AAAL, inducted 2015)
- Fellow, American Bar Association (inducted 2013)
- Fellow, Roanoke Law Foundation (inducted 2013)
- Fellow, Virginia Law Foundation (inducted 2011)
- Virginia State Bar Harry L. Carrico Professionalism Course Faculty (2013-2016)
- Benchmark Appellate Local Litigation Star (2013)
- 2013 Class of “Influential Women of Virginia” by Virginia Lawyers Media
- Named one of The Best Lawyers in America in the field of Appellate Law (2009-2022)
- Named to Virginia Super Lawyers for Appellate Law in Super Lawyers magazine (2010-2022), listed in Virginia Super Lawyers *Top 100* in Virginia (2013-2022), listed in Virginia Super Lawyers Top 50 Women in Virginia (2015-2022), listed in Virginia Super Lawyers Top 10 in Virginia (2019-2022), named to Super Lawyers Business Edition US in the area of Appellate Law (2012-2014), and previously was a Virginia Super Lawyers Rising Star (2007)
- Designated one of the “Legal Elite” by Virginia Business magazine for Appellate Law (2011-2021)
- Named a “Legal Eagle” for Appellate Practice by Virginia Living magazine (2012, 2015)
- Named a “Leaders in the Law” honoree by Virginia Lawyers Weekly (2006)
- Sandra P. Thompson Award (formerly the Fellows Award), Young Lawyers Division, Virginia Bar Association (2003)
- Best Appellate Advocate, First Place Team, and Best Brief, 1991 National Moot Court Competition
- Influential Women of Law Award, Virginia Lawyer’s Weekly (2020)
- “Virginia Business Women of Leadership” (2021)

Published Work

- Appeals of Right are Coming to Virginia, The Virginia Bar Association Journal, Vol. XLVIII, Number 2 (Fall 2021).
- Interview with the Honorable Marla Graff Decker, The Virginia Bar Association Appellate Practice Section, On Appeal, Vol. VI, Number 1 (Spring 2021).
- Drawing Jurisdictional Lines: New Virginia Rules 1:1B and 1:1C, The Virginia Bar Association Appellate Practice Section, On Appeal, Vol. V, Number 1 (Spring 2020).
- Appellate Mediation in Virginia, The Virginia Bar Association Appellate Practice Section, On Appeal, Vol. V Number 1 (Spring 2020).
- [Appellate Mediation Comes to Virginia](#), Virginia Lawyer, Volume 67, No. 3 (October 2018).
- New Rules for Appeal Bonds and Suspending Bonds, The Journal of the Virginia Trial Lawyers Association, Vol 26, Number 4 (2017).
- Confessions of an Oral Argument Junkie, The Virginia Bar Association Appellate Practice Section, On Appeal, Vol IV, Number 1 (Fall 2015).
- Drafting Good Assignments of Error, VTLAppeal Volume 1 (2012).
- Lessons from the Supreme Court of Virginia in 2010 on Preserving Error and Rule 5:25, The Virginia Bar Association Appellate Practice Section, On Appeal, Vol. II No. 1 (Summer 2011).
- Editorial Board, The Revised Appellate Handbook on Appellate Advocacy in the Supreme Court of Virginia and the Court of Appeals of Virginia, 2011 Edition, Litigation Section of the Virginia State Bar.
- Co-author, [Something Old, Something New: The Partial Final Judgment Rule](#), VSB Litigation News, Volume XV Number III (Fall 2010).
- Co-author, Thoughts on Trying Construction Cases: An Appellate Perspective, Virginia State Bar Construction Law and Public Contracts News, Issue No. 56 (Spring 2010).
- You May Need to Object Twice...What “A Few Good Men” Taught Us About Preserving Error of Appeal, Virginia State Bar Litigation News (Winter 2005).

Case Studies

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

- Jul 1, 2018 — [Federal contracting client prevails in teaming agreement appeal](#)
- Jun 29, 2018 — [Judge Reduces Jury Verdict Due to Defect in Plaintiff’s Complaint](#)
- Aug 31, 2017 — [Property Owners Entitled to Relief from Zoning Administrator’s Mistake](#)
- Dec 14, 2016 — [Supreme Court of Virginia Affirms Circuit Court Decision in Construction Claim](#)
- Aug 3, 2016 — [Court of Appeals Affirms Finding of Desertion, Awards Appellate Attorney’s Fees](#)
- Aug 18, 2015 — [Fraud and Breach of Contract Claims Dismissed, Affirmed on Appeal](#)
- Nov 8, 2013 — [Physician Successfully Defended Before Medical Board](#)
- Jun 11, 2013 — [Court of Appeals Affirms Decision, Awards Attorney Fees](#)



GENTRY LOCKE

Attorneys



Matthew W. Broughton

Partner

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

Education

- University of Richmond, J.D.
- University of Virginia, B.A. with distinction

Special Licenses

- Pilot – ATP Rated Pilot with over 5,000 flight hours in airplanes ranging from Gliders to Jets
- Tractor Trailer Driver – Licensed Tractor-Trailer Driver, holding Commercial Driver's License (CDL) with experience driving on interstates, highways, byways, and rural routes

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
- \$8 million settlement in products liability case involving scalp degloving injuries and brain injury
- \$5.5 million settlement in brain injury/trucking case
- \$5 million settlement in premises liability case involving worker falling down 20' shaft
- \$5 million settlement in a legal malpractice case
- \$4.5 million settlement against responsible parties for product (wash down nozzle) improperly manufactured in China
- \$4.25 million settlement against hazardous material hauler doing illegal U-turn, causing brain injury and horrific orthopedic injuries
- \$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

- 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 a "Best Lawyer in America" for over 25 consecutive years in plaintiffs for Personal Injury Litigation and Product Liability Litigation (1997-2022)
- 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 General Plaintiff Litigation (2010-2022), 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 (2003-2006, 2019)
- Named "2012 Roanoke Product Liability Litigation Lawyer of the Year" and 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.

- Aug 25, 2020 — [**\\$8,000,000 awarded in Products Liability Case**](#)
- Apr 23, 2013 — [**Blinded Employee Agrees to \\$14 Million-dollar Settlement \(\\$16.5M Payout\)**](#)
- Apr 17, 2013 — [**Settlement for Medical Malpractice Injury**](#)
- May 29, 2012 — [**Settlement Approved for Girl Hit by Car**](#)



GENTRY LOCKE

Attorneys



Thomas J. Bondurant, Jr.

Partner

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Tom Bondurant is a Gentry Locke Partner and Chair of the firm's Criminal & Government Investigations practice group. While serving as a Federal Prosecutor for 29 years, Tom tried more than 200 criminal jury trials, many involving complex matters including white collar fraud, tax issues, public corruption, healthcare fraud, regulatory matters and racketeering. At Gentry Locke, Tom represents corporations and individuals in all phases of the criminal process and conducts corporate internal investigations. Of note, the firm's White Collar Investigations practice and Tom are both ranked in Band 1 by Chambers USA. The qualities on which Chamber rankings are assessed include technical legal ability, professional conduct, client service, commercial astuteness, diligence, commitment, and other qualities most valued by the client. Band 1 is the highest level ranking.

Tom is admitted to practice in Virginia and the District of Columbia, and is a Fellow with the American College of Trial Lawyers, the Virginia Law Foundation, and the American Bar Foundation. Tom is consistently noted among the *Best Lawyers in America* for Corporate Compliance Law and White Collar Criminal Defense. He also is regularly recognized as a *Virginia Super Lawyer* in the areas of Criminal Defense and White Collar Crime.

Education

- University of Richmond, T.C. Williams School of Law, J.D.
- Emory & Henry College, B.A. cum laude

Experience

- Since entering private practice in October 2009, representation of individuals and corporations on **criminal matters** in the areas of Racketeering (RICO); Defense Contractor Fraud; Tax Evasion; Foreign Corrupt Practice Act; Espionage Act; Arms Export Control Act; Bribery; Public Corruption; Food, Drug & Cosmetic Act (food borne illness and pharmaceutical issues); International Banking Crimes; Money Laundering; Structuring; Healthcare Fraud, Program Fraud; Customs Violations; Insurance Fraud; Mail/Wire Fraud; Mortgage Fraud; Capital Murder; Solicitation to Commit Murder; Counterfeiting; Firearms Offenses; Mine Safety & Health Act Offenses; Narcotics; and Post-Conviction Actions
- Since entering private practice, representation of individuals and corporations on **civil matters** in the areas of the Food, Drug & Cosmetic Act (pharmaceutical issues); Internal Revenue Service matters (assessments, abatements); False Claims Act; Non-Compete Litigation; Customs Violations; Federal Chemical Regulatory Issues; Qui Tam actions; Cyber Security/Theft matters; Banking; Medical Malpractice; Healthcare Matters; Patent; Insurance Defense; Malicious Prosecution; and Defamation
- Holds Top Secret clearance
- Conducted Internal Investigations in the Banking, Healthcare, Pharmaceutical, Insurance, Construction, Mortgage, and Salvage Industries
- Admitted Pro Hac Vice to Federal Courts in Montana, Georgia, and New Jersey
- Employed until October 2009 as a Federal Prosecutor for 29 years in the Western District of Virginia. At varying times occupying the duties of Criminal Chief, Senior Litigation Counsel, Coordinator for Anti-Terrorism Advisory Committee and Lead Prosecuting Attorney for the Organized Crime Drug Enforcement Task Force
- Appointed as a Special Prosecutor for the Eastern District of Virginia, the District of Columbia, the Southern District of West Virginia and the Northern District of West Virginia
- Tried over 200 Jury Trials in United States District Courts and directed thousands of investigations
- Tried Bench Trials in United States Magistrate's Court
- Argued dozens of appeals in the United States Court of Appeals for the Fourth Circuit
- Served as a Law Clerk for United States District Judge Glen Williams in Abingdon, Virginia
- Former Editor-in-Chief of the University of Richmond Law Review (1979)

Affiliations

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

Admissions

- Washington, D.C. Bar
- Virginia Bar
- Fourth Circuit Court of Appeals
- Western District of Virginia
- Eastern District of Virginia
- Supreme Court of the United States

Awards

- Named a member of the Pro Bono Service Honor Roll by Virginia Access to Justice Commission (2022)
- Named Band 1 for White Collar Investigations by Chambers USA (2021)
- Fellow, American Bar Foundation (inducted 2018)
- Recipient, Emory & Henry College Distinguished Achievement Award (2017)
- Fellow, American College of Trial Lawyers (inducted 2008), served on State Committee (2011-2016)
- Fellow, Virginia Law Foundation (inducted 2015)
- Named to The National Trial Lawyers Top 100 Trial Lawyers list (2014)
- Recipient, Department of Justice Director's Award
- Recipient, numerous Commendations from the Department of Justice; Federal Bureau of Investigation; Drug Enforcement Administration; Bureau of Alcohol, Tobacco, Firearms & Explosives; Internal Revenue Service; Mine Safety & Health Administration; Department of Transportation; Social Security Administration; Department of Agriculture; Department of Labor; and, Animal Plant Health Inspection Service
- Listed in Best Lawyers in America for Corporate Compliance Law and Criminal Defense: White-Collar (2011-2022), listed in "Best Lawyers in America Business Edition" for Corporate Compliance Law and Criminal Defense: White-Collar (2017)
- Named "2012 Roanoke Criminal Defense White-Collar Lawyer of the Year" by Best Lawyers in America, listed for Corporate Compliance Law and Criminal Defense/White-Collar (2011-2021)
- Listed as a Top Rated Attorney for Criminal Defense/White Collar by American Lawyer Media and Martindale-Hubbell (2012 & 2013)
- Designated one of the "Legal Elite" by Virginia Business magazine for Criminal Law (2010, 2012-2013, 2015-2020) and for Criminal & Government Investigations (2021)
- Named to Virginia Super Lawyers in the area of Criminal Defense: White Collar (2013-2022) and Super Lawyers Business Edition US in the area of Criminal Defense: White Collar (2013-2014)
- Named a "Legal Eagle" for Criminal Defense: White Collar by Virginia Living magazine (2012)

Published Work

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



Christen C. Church

Partner

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Christen Church has a transactional and advisory practice focusing on intellectual property, health care regulation and compliance, data privacy and security, mergers and acquisitions, and commercial financings. Christen has consistently been recognized since 2014 as a “Virginia Rising Star” by *Virginia Super Lawyers* and listed as a “Legal Elite” in Intellectual Property and Health Law by *Virginia Business* magazine.

Education

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

Experience

Health Care

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

Intellectual Property

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

Cybersecurity, Data Privacy and Security

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

Banking and Finance

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

Business

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

Affiliations

- Roanoke Bar Association: Board Member (2017-Present); Chair, Young Lawyers Committee (2016-2017); Member (2009-Present)
- Member, Board of Directors for Children’s Trust Foundation Roanoke Valley (2012-2018)
- Chair, Health and Law Commission, Virginia State Bar Young Lawyers Conference (2009-2011)
- Co-Chair, Virginia State Bar Southern Virginia Minority Pre-Law Conference (2009)
- Co-Chair, Virginia Bar Association Washington and Lee Law School Council (2009-2012)
- Member, American Health Lawyers Association
- Member, Virginia State Bar

- Member, The Virginia Bar Association
- Member, American Bar Association
- Member, Virginia Women Attorneys Association
- Judicial Clerk to the Honorable Jonathan M. Appgar, Roanoke City Circuit Court (2007-2008)

Awards

- Named as Virginia Lawyer's Weekly "Influential Women of Law" (2021)
- Named one of the "Legal Elite" by Virginia Business magazine for Intellectual Property law (2018) and Health Law (2019-2021)
- Named a "Virginia Super Lawyers Rising Star" in Health Care (2019-2022), Business/Corporate (2016-2018) and Business/Mergers & Acquisitions (2014-2015)
- Outstanding Volunteer Service Award for co-chairing the 2009 Southern Virginia Minority Pre-Law Conference, Virginia State Bar Young Lawyers Conference (2010)
- Influential Women of Law Award, Virginia Lawyer's Weekly (2021)



GENTRY LOCKE

Attorneys



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Karen Cohen is a Partner in Gentry Locke's Richmond office and is a member of the firm's Real Estate, Land Use & Zoning and Solar & Renewable Energy practice groups. Karen assists clients obtaining approvals for solar and energy storage projects to implement the Virginia Clean Economy Act and advises developers on real estate transactions, the entitlement process, commercial leasing, environmental issues, construction, financing and general corporate matters. She also is a member of the firm's outdoor advertising team. Karen serves as Vice Chair of the Virginia State Bar Real Property Section Board of Governors. Karen received her B.S. degree in architecture from the University of Virginia, her M.S. in real estate development from George Mason University, and her J.D. magna cum laude from Georgetown University Law Center.

Education

- Georgetown University Law Center, J.D., magna cum laude
- George Mason University School of Business, M.S. R.E.D.
- University of Virginia, B.S. Architecture

Experience

- Provided zoning analysis in connection with various clients' potential purchase of land for commercial and industrial uses, including evaluation of property within data center opportunity zone in Prince William County, and represented developers and landowners in connection with rezoning and special use permits, sign permits and subdivision approvals.
- Represented commercial property owner in connection with easement acquisition agreement and filing of site plan.
- Represented healthcare facility in connection with obtaining special use permit for an additional building-mounted sign.
- Represented regional shopping mall owner in connection with subdivision and sale of mall parcel and drafted and negotiated complex reciprocal easement and operating agreement in connection with sale.
- Analysis of zoning and restrictive covenant issues in defending operator of farm winery in land use litigation brought by homeowners to prevent operation of winery on historic property
- Represented religious institution in connection with special permit amendment for "church with school" zoning classification in Fairfax County.
- Represented developer in connection with application for mixed-use rezoning.
- Advised municipalities in connection with various zoning and land use matters including Virginia's new proffer legislation; sign ordinances after the U.S. Supreme Court's decision in *Reed v. Town of Gilbert*; the Religious Land Use and Institutionalized Persons Act (RLUIPA), federal constitutional issues in connection with zoning ordinances pertaining to certain land uses; and preparation of performance and bonding agreements.
- Representation of landlords and tenants in shopping center, office, and industrial leases, including medical building leases for non-profit integrated health system and urgent care facilities, government contractors, professional service firms and retail establishments.
- Representation of general contractor in DPOR hearing, avoiding licensure penalty and obtaining a substantial reduction in fines.

Affiliations

- Co-Chair of the Land Use & Environmental Committee for the Real Property Section of the Virginia State Bar (present)
- Chair of the Real Property Section of the Virginia State Bar (present)
- Vice Chair, Virginia State Bar Real Property Section Board of Governors (2021)
- Secretary, Virginia State Bar Real Property Section (2020 – 2021)
- Board of Governors, Virginia State Bar Real Property Section (2017 – present)

- Chair, Land Use Committee, Virginia State Bar Real Property Section (2017 – present)
- Chair, NAIOP Prince William Government Relations Subcommittee (2016 – 2021)
- Chair, Real Estate Development Committee, Prince William County Economic Recovery Task Force (2020)
- Strategic Planning Committee, Mason Center for Real Estate Entrepreneurship (2017)
- Founding Director, George Mason University School of Business Real Estate Development Industry Group (2016)
- Director-at-Large, George Mason University School of Business Alumni Chapter (2013 – 2017)
- Virginia Women Attorneys Association (2013 – present)
- Board of Directors, Legal Services of Northern Virginia (2017 – 2021)
- Racial Justice Committee, Legal Services of Northern Virginia (2020 – 2021)
- Black Family Land Trust Legal Services Advisory Committee (2020 – present)
- Women's Impact Network, Jewish Women International (2020 – present)

Admissions

- Member, Virginia State Bar
- Member, District of Columbia Bar
- Admitted to practice in the following courts:
 - United States Court of Appeals for the Fourth Circuit
 - United States District Court for the Eastern District of Virginia
 - United States Bankruptcy Court for the Eastern District of Virginia
 - Virginia (all state courts)
 - United States District Court for the District of Columbia

Speaking Engagements

- COVID-19 Government Relations: Federal, State and Local – Commercial Real Estate Development Association Webinar, NAIOP, May 5, 2020
- Land Use and Zoning from Start to Finish: A Practical Guide to Land Use and Zoning Approvals and Issues, National Business Institute, September 10, 2019
- 22nd Annual Advanced Real Estate Seminar, Lurking in the Weeds – Advanced Covenant Issues
- Prince William Chamber of Commerce, Powerful Partnerships 2017 Conference
- Virginia Association of Zoning Officials 2017 (Proffer Legislation, RLUIPA, Sign Ordinances)

Awards

- AV Preeminent Peer Rated, Martindale-Hubbell®
- Super Lawyers, Thomson Reuters (2020)
- Virginia Legal Elite, Virginia Business (2018 – 2020)
- Member of the Year Award, NAIOP Government Relations (2020)
- Influential Women of Law Award, Virginia Lawyer's Weekly (2019)
- Prominent Patriot, George Mason University School of Business (2017)

Published Work

- Author, "Vested Rights: Ironing Out the Confusion," The Fee Simple (December 2020)
- Author, "What Is Land Use Law?" Lay of the Land (Land Use Law Blog Series, 2020)
- Author, "Where Does Land Use Law Come From?" Lay of the Land (Land Use Law Blog Series, 2020)
- Author, "A Good Time for Virginia Developers to Re-Evaluate Approved Plans," Lay of the Land (Land Use Law Blog Series, 2020)
- Contributor, Dewberry Land Development Handbook Series (McGraw-Hill Education, 4th ed. 2019)
- Co-Author, Finding Common Ground on Proffer Reform, The Fee Simple (November 2018)
- Author, 2012-2017 Strategic Plan for George Mason Master of Science in Real Estate Development (prepared on behalf of the George Mason Center for Real Estate Entrepreneurship)
- Featured in [George Mason University School of Business article](#)
- Real Estate Development Capstone Project featured in [Viva Tysons magazine](#)



GENTRY LOCKE

Attorneys



John G. Danyluk

Associate

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John Danyluk practices with the firm's Criminal and Government Investigations practice group. Prior to joining Gentry Locke, John had a distinguished career with the United States Armed Forces, serving for more than four years in the U.S. Army Judge Advocate General's Corps in Texas and Germany. He has been recognized with the Army Commendation Medal, Army Achievement Medal and the 2018 Client Services Award for Excellence. As a Special Assistant U.S. Attorney in the Western District of Texas, he litigated more than 1,000 federal cases, including six jury trials, 14 bench trials, and 70 revocation hearings. He has also worked closely with FBI and Army CID agents on investigatory matters to aid in case development. With experience in criminal defense, investigations, financial liability determinations and issues related to misconduct, John is well- positioned to help clients facing increasing legal and government scrutiny.

Education

- University of Richmond School of Law, J.D.
- University of Richmond, B.A.

Experience

- As a Military Magistrate, responsible for authorizing law enforcement search warrants and making pre-trial confinement determinations for criminally charged defendants
- As an Administrative & National Security Law Attorney in Grafenwohr, Germany, advised on diverse international law issues and investigations into senior leader misconduct
- As an Administrative & National Security Law Attorney in Grafenwohr, Germany, reviewed multi-million dollar purchase agreements for acquisition of equipment and construction
- As an Administrative & National Security Law Attorney in Grafenwohr, Germany, advised on investigations/financial liability determinations for damaged or lost U.S. Gov't property
- As an Administrative & National Security Law Attorney in Grafenwohr, Germany, served as primary legal POC during outbreak of COVID-19 and lead U.S. Army Europe's commanders through complex legal hurdles of exercising command/control of personnel in pandemic
- As a Special Assistant U.S. Attorney, served as lead trial attorney for Fort Hood's exclusive federal jurisdiction within WDTX
- As a Special Assistant U.S. Attorney, litigated over 1,000 federal cases, including 6 jury trials, 14 bench trials, and 70 revocation hearings
- As a Special Assistant U.S. Attorney, established collegial rapport with defense bar, leading to 98% of cases resolved in favorable pleas
- As a Special Assistant U.S. Attorney, closely advised FBI and Army CID agents on investigatory matters to aid in case development

Affiliations

- Member, Virginia State Bar
- Member, American Bar Association
- Member, Federal Bar Association
- Member, Richmond Bar Association
- Editor-in-Chief, Richmond Journal of Law and Technology, University of Richmond School of Law (2015-16)
- Competitions Chair, Moot Court Executive Board, University of Richmond School of Law (2015-16)

Admissions

- Virginia State Bar
- Western District of Texas

Awards

- Army Commendation Medal (2)
- Army Achievement Medal
- National Defense Service Medal
- Army Overseas Service Ribbon
- Global War on Terrorism Service Medal
- 2018 Client Services Award for Excellence (estate planning, income tax, and consumer finance)
- CALI Award for Excellence in Criminal Law
- Best Brief Award – 2014 Carrico Moot Court Competition



GENTRY LOCKE

Attorneys



Jennifer S. DeGraw

Partner

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Jennifer DeGraw is a partner in Gentry Locke's Criminal & Government Investigations practice group. Jennifer represents individuals and corporations in all stages of the criminal/investigatory process and conducts corporate internal investigations. Jennifer previously served as a Special Assistant United States Attorney in the Western District of Virginia and began her career as an Assistant District Attorney in North Carolina. As a state and federal prosecutor, Jennifer prosecuted and investigated narcotics offenses, violent crimes and firearms offenses, regulatory offenses, child exploitation, and fraud offenses. Her extensive experience on the defense and prosecution sides prepares her to represent clients in any criminal or investigatory matters that arise at the state or federal level. Jennifer is licensed to practice in Virginia and North Carolina.

Education

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

Experience

- Representation of individuals and corporations on criminal and regulatory matters in the areas of pharmaceuticals and diversion, healthcare and healthcare fraud, transportation, banking crimes, money laundering, mail and wire fraud, bribery, public corruption, racketeering (RICO), national security, tax, program fraud, government contracting, structuring, and public service, as well as homicide, firearms, violent crimes, and narcotics investigations
- Representation of individuals and corporations on civil matters in the areas of healthcare and pharmaceutical issues, IRS/tax matters, False Claims Act, qui tam actions, cybersecurity/theft matters, banking, and fraud matters
- 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, North Carolina State Bar (2008-Present); Virginia State Bar (2016-Present)
- Member, Virginia Trial Lawyers Association (2021 – present)
- Member, Women's White Collar Defense Association (2021 – present)
- Member, Virginia Association of Criminal Defense Lawyers (2021 – present)
- Member, Roanoke-Blacksburg Technology Council (2021 – present)
- Member, Federal Bar Association (2018-Present)

- Member, The Virginia Bar Association (2018-Present)
- Member, National Association of Criminal Defense Lawyers (2016-Present)
- Member, American Bar Association (2016-Present), American Bar Association Criminal Justice Section (2016-Present)

Admissions

- North Carolina Bar
- Virginia Bar
- Fourth Circuit Court of Appeals
- Western District of Virginia
- Eastern District of Virginia
- Middle District of North Carolina

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



Andrew D. Finnicum

Partner

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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 tractor-trailer crashes, medical malpractice, product defects, and boating and motor vehicle accidents. Andrew has appeared before the Virginia Workers' Compensation Commission, Circuit Courts across Virginia, the Court of Appeals of Virginia, the Supreme Court of Virginia, the United States District Court for the Western District of Virginia, the Judicial Panel on Multidistrict Litigation, the United States District Court for the Central District of California, and the United States Court of Appeals for the Fourth Circuit. While at Gentry Locke, he has handled workers' compensation cases, complex personal injury matters, traumatic brain injuries, and wrongful death claims. As a law student, he was a judicial extern for the Honorable Charles Dorsey in the 23rd Judicial Circuit of Virginia.

Education

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

Experience

- \$5,000,000 successful resolution in favor of victim of legal malpractice
- \$4,250,000 successful resolution for victim of tractor-trailer crash
- \$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
- \$750,000 mediated resolution of workers' compensation claim on behalf of injured employee
- \$650,000 successful resolution on behalf of tractor-trailer driver injured when an oncoming motor vehicle crossed the center line
- \$645,000 successful resolution on behalf of victim of tractor-trailer crash on Route 419 in Roanoke, Virginia
- \$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
- \$300,000 mediated resolution of workers' compensation case involving traumatic electrocution injuries
- \$300,000 jury verdict in federal case against tractor-trailer driver involving contested liability accident and no medical bills or lost wages

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 (2017-2020)
- 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



Guy M. Harbert, III

Partner

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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
- Davidson College, B.A.

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 "Roanoke Lawyer of the Year" for Insurance Law (2021) by Best Lawyers in America
- Named one of The Best Lawyers in America[®] in Insurance Law (2012-2022), 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, 2010-2022); 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](#)



Erin M. Harrigan

Partner

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Erin Harrigan is a Partner in Gentry Locke's Criminal & Government Investigations practice group. Erin guides clients through federal and state government investigations and enforcement actions, and has directed internal investigations for businesses confronting allegations of misconduct. Chambers USA recognized Erin in 2021 as a leading attorney for White Collar Investigations in Virginia, one of the legal industry's most prestigious rankings and a distinction that is awarded based on a commitment to the qualities most valued by a client. Erin previously served as Assistant United States Attorney in the Western District of Virginia, based in Charlottesville, where she prosecuted and investigated public corruption, money laundering, regulatory offenses, human trafficking and fraud cases of local origin and involving multi-national corporations. Erin was recognized for her work as Lead Prosecuting Attorney for the Organized Crime & Drug Enforcement Task Force with the OCDEF National Director's Award. As a former Virginia Assistant Attorney General, Erin is particularly well-suited to assist clients facing inquiries from state Attorneys General.

Education

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

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

Affiliations

- American Bar Association, Criminal Justice Section
- Women's White Collar Criminal Defense Association
- Federal Bar Association, Richmond
- Virginia Bar Association, Criminal Section

Admissions

- Virginia State Bar
- Eastern District of Virginia
- Western District of Virginia
- Fourth Circuit Court of Appeals

Awards

- Ranked a "Significant Individual" by Chambers and Partners USA (2021), Band 2, Litigation: White Collar Investigations
- 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
- 2019 OCDETF National Director's Award for Individual/Group Achievement on Opiate Reduction Efforts and Prosecutions
- 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



GENTRY LOCKE

Attorneys



Andrew "Drew" E. Hayhurst

Associate

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Drew Hayhurst works in Gentry Locke's Richmond office and is a member of the firm's general commercial practice group. He joins the firm from an AmLaw 100 firm, where he worked on public finance and general corporate issues and transactions.

Drew previously served as a judicial extern for Special Master George Hastings, with the U.S. Court of Federal Claims, Office of Special Masters.

Education

Wake Forest University School of Law, J.D.

The University of Mississippi, B.A.

Special Licenses

- Certified Information Privacy Professional with a U.S. designation (CIPP-US)

Experience

- Drafted and revised commercial leasing, stock purchase, asset purchase, and revolving credit agreements.
- Drafted and managed closing/ancillary transaction documents and disclosure schedules for commercial real estate, credit, stock, and asset transactions.
- Drafted corporate organizational documents including articles of incorporation/organization, bylaws and operating agreements.
- Drafted and revised master services, subcontracting and non-disclosure agreements.
- Drafted and revised documents required in municipal bond transactions including indenture, loan, security, assignment and commercial leasing agreements.
- Drafted and managed closing transaction documents for municipal bond transactions.
- Drafted and revised master services agreements and statements of work.
- Provided legal due diligence review and counsel for prospective credit agreement.

Affiliations

- 3rd Degree Member of the Knights of Columbus, Richmond
- Wake Forest Transactional Competition
- Community and Business Law Clinic

Awards

- Articles Editor, Wake Forest University Journal of Law and Policy, Spring 2017-Spring 2018
- Vice Chairperson, Wake Forest Transactional Competition, 2017
- Named Best Negotiator in Wake Forest's Transactional Law Competition, Fall 2016
- CALI Award Recipient in Commercial Leasing



GENTRY LOCKE

Attorneys



Herschel V. Keller

Partner

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Herschel Keller is a Partner with Gentry Locke, representing businesses, governmental entities, and institutions in Lynchburg and across the Commonwealth through his practice of Corporate and Business Law, Commercial Construction Law and Litigation, Complex Contract Drafting and Negotiation, and Government and Regulatory Affairs. Originally from Ft. Wayne, Indiana, Herschel now lives in Lynchburg, where he has practiced law for the past 20 years. Herschel heads up Gentry Locke's Lynchburg office and also services clients in our Richmond office. He is active in the community, including serving as past president of the Central District Committee for the Associated General Contractors of Virginia. Prior to joining Gentry Locke, he was Assistant Commonwealth's Attorney for the City of Lynchburg, and later rose to the role of a principal and an officer of a Lynchburg law firm.

Education

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

Experience

- Represents one of the oldest pipeline and utility contractors in the Commonwealth of Virginia in all aspects of its business, including procurement issues, contract negotiations, disputes, employment issues, and OSHA compliance
- Represented steel erector in litigation arising from construction of Virginia Tech's Lane Stadium West Sideline Expansion
- Assisted in formation of \$400,000,000 joint venture for construction of heavy manufacturing facility in Norfolk, Virginia
- Negotiated contract with Italian firm for construction of concrete manufacturing plant in West Virginia
- Represented statewide road and bridge builder in claims with VDOT
- Assisted in organization of community bank in Lynchburg, Virginia
- Successfully negotiated acquisition of woodworking supply catalogue business by publicly traded competitor
- Negotiated and drafted numerous joint venture and teaming agreements to allow minority contractors to participate in government contracts
- Represents numerous manufactures in UCC and other issues.
- Negotiated contractor's withdrawal from mixed used development that failed after the 2008 financial collapse
- Negotiated multiple agreements to facilitate CEO transitions
- Obtained master rezoning for one of states largest university
- Obtained zoning approvals and conditional use permits for cellular telephone tower developer
- Obtained conditional use permit to allow for construction of 235,000 square feet office park in residential zoned district in Lynchburg, Virginia
- Advised Virginia Housing and Redevelopment Authorities on housing law, finance and compliance.
- Assisted in establishing numerous successful construction businesses in Central Virginia
- Investigated and resolved numerous employment discrimination claims
- Lobbied before Virginia General Assembly in support of contractors seeking to limit the use of competitive negotiation to procure
- Conducted numerous employee sexual harassment trainings
- Drafted and negotiated numerous commercial leases for landlords and tenants
- Acted as both issuers' and borrowers' counsel for tax-exempt bond issues
- Successfully defended patent infringement litigation against one of the largest patent firms in the United States
- Drafted numerous heavy equipment leases, rent to own agreements, and other agreements for use in the heavy equipment rental and sales industry
- Frequent speaker for business groups throughout region

Affiliations

- Member, National D-Day Memorial Foundation Board of Directors (2022)
- Associated General Contractors of Virginia; Board of Directors (2015-Present); Central District Committee President (2011-2012), State Legislative Committee (2007-Present), Safety Alliance Board (2007-2010)
- Member, Virginia Amateur Sports Board of Directors (2017-Present)
- Member, Lynchburg Business Alliance Legislative Committee (2017-Present)
- Counsel to the Virginia State Crime Commission (1998-2000)
- Assistant Commonwealth's Attorney for the City of Lynchburg; Project Exile Prosecutor (2000-2001)
- Former Staff Chair, Senate Joint Resolution 220 Advisory Panel: Legislative Study Aimed at Protecting Children from Sexually Violent Predators, (1997-1998)
- Former Staff Chair, Legislative Task Force Examining More Severe Sanctions for DUI Offenses (1997-1998)

Awards

- Named a Lynchburg Business Top Lawyer in Construction Law (2020-2022)
- Named to Lynchburg Business Magazine's "Top Lawyers" for Business, Commercial Litigation, Construction, Environmental and Land Use, and Real Estate law (2016)



GENTRY LOCKE

Attorneys



Jasdeep Singh Khaira

Associate

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Jasdeep's practice focuses on energy and environmental law. Prior to joining the firm, Jasdeep was a full-time legal extern for the U.S. Environmental Protection Agency in Colorado, and held a summer law clerk position with the Sierra Club's Environmental Law program. He also held a position as a clinician with the Vermont Law School Energy Clinic.

Education

- Vermont Law School, J.D. cum laude/Masters in Energy Regulation and Law
- Denison University, B.A.

Experience

- Worked as a legal extern for the Environmental Protection Agency, Region 8, supporting a team of attorneys on complex enforcement, compliance, and counseling actions
- Clerked with the Sierra Club Environmental Law Program
- Worked as a legal clinician with the Vermont Law School Energy Clinic

Affiliations

- Member, Virginia State Bar

Admissions

- Virginia Bar



GENTRY LOCKE

Attorneys



Zachary R. LeMaster

Government Affairs Manager

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Zach LeMaster is our Government Affairs Manager. Zach specializes in providing insight on the rules and procedures of the General Assembly to clients who need a comprehensive strategy to support their legislative goals through the biennial budget and legislative process. He is not an attorney. Zach has been involved in nearly every major policy initiative in the Virginia General Assembly since 2014 including the biennial budget, modernizing Virginia's energy policy, criminal justice reform, marijuana decriminalization, and the expansion of gaming and gambling in the Commonwealth. His experience in state policy and strategic communications includes serving as Legislative Aide to Virginia Senator, Thomas K. Norment, Jr. who was both Majority and Minority Leader during Zach's tenure. Zach earned his Bachelor of Science in Public Policy and Administration with a minor in Political Science from James Madison University.

Education

James Madison University, B.S. in Public Policy and Administration

Experience

- Developed policy initiatives for the Virginia Senate Republican Caucus
- Planned and organized fundraiser that generated nearly \$4.5 million in funds
- Coordinated a regional group of local government and businesses on legislative strategies to support and promote tourism.
- Served as an intermediary for hundreds of constituent to various executive agencies
- Lead grassroots teams in historic special elections
- Reviewed and vetted thousands of applicants to citizen led commissions



GENTRY LOCKE

Attorneys



Patrice L. Lewis

Government Affairs Manager

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Patrice Lewis serves as our Government Affairs Manager, using data and strategy to help clients achieve their legal, policy, and communications goals. Patrice's eclectic background fuses law with policy and communications. She recently served as a strategic marketing and communications consultant for senior advisor for SIR, Inc. located in Richmond, VA. Prior to her time at SIR, she worked as an outreach representative for Senator Mark R. Warner, serving Central and South Central Virginia, and as the legislative assistant to former Delegate Onzlee Ware. Patrice is a native of Roanoke, Virginia. She received her undergraduate degree in sociology from the University of Virginia and her law degree from Regent University School of Law. Patrice is also licensed to practice law in Maryland.

Education

- Regent University School of Law, J.D.
- University of Virginia, B.A.

Experience

- Serves as Senior Advisor at Southeastern Institute of Research
- Works as an Adjunct Professor of Research Methodologies at Virginia Commonwealth University
- Represented U.S. Senator Mark Warner at the United States Senate as an Outreach Representative
- Worked as a Legislative Assistant for Delegate Onzlee Ware, 11th District

Affiliations

- Diversity and Inclusion Committee Chair, Public Relations Society of America – Richmond Chapter
- Past Board Member, Brown Virginia
- Past Member, Government Affairs Committee, Chamber RVA Chesterfield County
- Past Member, Civic Engagement Committee, Urban League of Greater Richmond's Young Professional Network



GENTRY LOCKE

Attorneys



K. Brett Marston

Partner

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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
- University of Virginia, B.A.

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

- Serving on the Virginia State Bar's Budget & Finance Committee, Professionalism Committee, and Standing Committee for Legal Ethics
- 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

- 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 (2006-2022) and Construction Litigation (2011-2022)
- Fellow, Virginia Law Foundation (inducted 2019)
- Named one of the "Leaders in the Law" by Virginia Lawyers Weekly (2018)
- 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 (2009-2022), to the Top 10 List (2015-2017), the Top 100 List (2014-2019, 2020-2022), 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 (2007-2021) 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-Build, 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](#)



GENTRY LOCKE

Attorneys



Maxwell H. Wiegard

Partner

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

Education

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

Experience

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

Affiliations

- Serving on the Virginia State Bar's Real Property Section's Land Use and Environmental Committee (present)
- Area Representative to the Real Property Section of the Virginia State Bar (present)
- Vice Chair of the Environmental Law Section of the Virginia Bar Association (2022)
- Virginia State Bar Board of Governors of the Environmental Section: Secretary (2013), Chair (2014)
- Previously served as Chair, Vice Chair and Secretary/Treasurer of the Environmental Section of the Virginia State Bar
- The Virginia Bar Association: Secretary/Treasurer, Executive Council of the Real Estate Section (2013-2014), Chair (2017-2018); Executive Council of the Environmental Section (2013-Present); Executive Council of the Young Lawyers Division (2005-2015), Chair, Mentorship Program
- Member, Virginia Association of Defense Attorneys (2005-2016)
- Member, District of Columbia Bar
- Member, Maryland State Bar

- Member, Virginia State Bar
- Member, American Bar Association
- Member, Roanoke Bar Association
- Member, Mill Mountain Theatre Board of Directors

Awards

- Designated one of the “Legal Elite” by Virginia Business magazine for the area of Environmental Law (2015-2017, 2019-2021)

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



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Partner

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Spencer Wiegard is a Partner and a member of Gentry Locke's Construction Law and Commercial Litigation practice groups. Spencer focuses his practice in the areas of construction law and construction litigation. He represents general contractors, subcontractors, trade contractors, suppliers, and design professionals. Spencer is a member of the Board of Governors for the Virginia State Bar Construction Law and Public Contracts Section and a member of both the 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.
- University of Virginia, B.A.

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

- Secretary, Virginia State Bar's Construction and Public Contracts Section (present)
- Treasurer, Virginia State Bar's Construction and Public Contracts Section (2021)
- Member, Board of Governors of the Virginia State 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 (2019-2021)
- 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



Charles L. Williams

Partner

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Charlie Williams joined Gentry Locke in 1970 and as a senior partner he heads the firm's Environmental Law practice. His work includes advising corporate and municipal clients in the areas of environmental compliance, including enforcement and environmental tort litigation. He has extensive experience in contaminated land renewal and the management of environmental aspects of mergers and acquisitions. Charlie has consistently been recognized among the *Best Lawyers in America* for Environmental Law since 2006.

Education

- University of Richmond, T.C. Williams School of Law, J.D.
- Hampden-Sydney College, B.S.

Experience

- Representation of corporations and individual clients in environmental litigation and administrative proceedings
- Representation of corporate and individual clients in environmental compliance and permitting matters
- Representation of corporate, banking, and individual clients in contaminated site transactions
- Advising corporate, banking, individual, and municipal clients in areas of Brownfield Redevelopment and adaptive land reuse
- Defense of environmental criminal prosecutions and enforcement actions

Affiliations

- Member, Legal Community representative, Roanoke Business Environmental Leadership Coalition
- President, Roanoke Bar Association (1994-1995)
- Past Chairman, Client Protection Fund Board, Virginia State Bar
- Past Member, U.S. Department of Commerce Virginia District Export Council
- Past Board Member, International Section, Virginia State Bar
- Past Board Member, Business Law Section, Virginia State Bar
- Member, Environmental Law Section, Virginia State Bar
- Member, Natural Resources, Energy and Environmental Law Section, American Bar Association
- Member, McNeill Law Society, University of Richmond
- Editorial Board, University of Richmond Law Review

Awards

- LEED Accredited Professional (Leadership in Energy and Environmental Design) for New Construction (2009)
- Named one of the Best Lawyers in America for Environmental Law (2006-2022) and Environmental Litigation (2011-2014)
- Designated one of the "Legal Elite" by Virginia Business magazine in the Environmental/Land Use field (2003-2004, 2015-2017) and Legislative/Regulatory/Administrative (2007, 2010 and 2011)
- Named a Top Rated Lawyer for Environmental law by American Lawyer Media (2013)
- Recipient, Martindale-Hubbell Client Distinction Award (2012)
- Named a "Legal Eagle" for Environmental Law and Litigation – Environmental by Virginia Living magazine (2012)
- Elected a Top Attorney: Land Use/Environment by Roanoke-area attorneys surveyed by The Roanoker magazine (2009, 2012)
- Inducted to the Virginia Lawyers Weekly "Hall of Fame" – Class of 2021



GENTRY LOCKE

Attorneys



Ashley W. Winsky

Partner

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Ashley Winsky is a partner at Gentry Locke's Richmond office. She specializes in defending motor carriers against personal injury claims resulting from roadway accidents. She has over a decade of experience defending trucking companies in catastrophic injury, brain injury, spine injury, and wrongful death cases. Ashley responds to accident scenes throughout the Commonwealth and works with experts in the fields of human factors, biodynamics, and accident reconstruction. Her trucking clients range from small, family-owned operations to some of the nation's largest truckload carriers.

Ashley also serves as lead counsel for an amusement park and water park, coordinating and defending all third-party injury claims. In addition, she assists a wide variety of businesses across the state in cases involving premises liability, breach of contract, defamation, intentional torts, and other business disputes. Confident and 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 is a member of American Trucking Association (ATA), the Transportation Lawyers Association (TLA), and Chair of the Virginia Bar Association's Transportation Section. She has been consistently recognized in the transportation arena by *Chambers USA* and was recently named an "Up and Coming" lawyer in Nationwide Transportation: Road (Carriage/ Logistics). In 2019, she was selected as a "Rising Star" in Transportation by *Legal 500*. For the past ten years, Ashley has been named a *Super Lawyers* "Rising Star" by her peers. She maintains an AV Preeminent peer rating with Martindale-Hubbell.

Education

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

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 dismissal with prejudice of an assault 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

- Chair of the Virginia Bar Association's Transportation Section (2022)
- 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
- Vice Chair of the Virginia Bar Association's Transportation Law Section Council (2020-2021)
- Virginia Kids Belong, Business Advisory Council Member

Speaking Engagements

- Presenter, "The Thrill of Victory or Agony of Defeat, Which Will It Be?," Transportation Lawyers Association Annual Conference, Olympic Valley, CA, June 24, 2021
- Presenter, "Transportation Update: Navigating the Insurance Market, Banking Environment, and Legal Landscape," McGriff Webinar, Virtual, November 10, 2020
- Presenter, "Secrets to Conducting a Flawless Rapid Response," Arkansas Trucking Seminar, Virtual, September 17, 2020
- Presenter, "Essentials of Trucking Accidents in Virginia," Virginia Continuing Legal Education (VACLE), Virtual, August 13, 2020
- 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

- Influential Women of Law Award, Virginia Lawyer's Weekly (2022)
- 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, 2022), and for Personal Injury General: Defense (2021-2022)

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

1

Ethics in Internal Investigations: Conflicts & Confidentiality Under Heightened Public Scrutiny

Presented by:

Thomas J. Bondurant
bondurant@gentrylocke.com

Erin M. Harrigan
harrigan@gentrylocke.com

Jennifer S. DeGraw
degraw@gentrylocke.com

Moderated by John G. Danyluk
danyluk@gentrylocke.com



Roanoke | Lynchburg | Richmond | gentrylocke.com

Ethics in Internal Investigations: Conflicts & Confidentiality Under Heightened Public Scrutiny

Thomas Bondurant, Erin Harrigan & Jennifer DeGraw
Moderators: Jessiah Hulle (Roanoke) & John Danyluk (Richmond)

Gentry Locke Seminar
Roanoke – September 16, 2022
Richmond – September 28, 2022

I. Introduction

Increasingly, allegations of wrongdoing in corporate America are making headlines well before they reach a pleading filed in a court. The public airing of grievances against companies, corporate officers, and institutions brings heightened scrutiny to these businesses, who must grapple with tackling this problem under the harsh light of public opinion and intense pressure for transparency. Enforcement and oversight agencies are paying close attention to a company's response, upping the stakes for getting the response right and taking any allegations seriously. Sometimes, the enforcement action is already underway, and the company is facing some "unknown" allegation that showed up as a federal subpoena. As a result, businesses and institutions find themselves placing unprecedented importance on internal investigations and relying more heavily on outside attorneys to conduct those investigations.

Attorneys conducting internal investigations must be mindful of the unique role they serve in relation to the client. Many ethical obligations of the attorney look different when engaging as investigations counsel: the scope of representation, duties of confidentiality and loyalty, potential for conflicts of interest, and concerns regarding maintaining the protections of the attorney-client privilege and work product doctrine. Plus, a company with an internal investigation in a high-profile matter faces enormous pressure – from both the public at large and any investigating agencies – to produce public reports of findings, which brings its own challenges in the attorney-client relationship.

In this presentation, we will explore the ethical rules in the Virginia Rules of Professional Conduct ("Rule") implicated by internal investigations, discuss real-life examples of these issues, and present a framework for considering and navigating ethical responsibilities at the outset of an investigation.

II. First Rule First: Are You the Right Attorney for the Job?

- A. An opportunity to lead an internal investigation may come in many ways.
1. A long-standing client may receive a misconduct allegation lodged by a former employee.
 2. A neighbor who knows you are an attorney may volunteer on the Board of an organization who received an anonymous complaint about the CEO.
 3. A frustrated general counsel found your name after researching online because the firm they originally hired to do this investigation has completely botched the whole thing, and they need someone to fix it.
- B. You *want* to take this case – it sounds interesting – but *should* you? You must do an honest assessment of whether you are equipped to lead this investigation.
- C. **Duty of Competence: Rule 1.1:** “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
1. **Comment 1 to Rule 1.1** sets forth some of the factors to consider, including:
 - a. the relative complexity and specialized nature of the matter,
 - b. the lawyer’s general experience,
 - c. the lawyer's training and experience in the field in question,
 - d. the preparation and study the lawyer is able to give the matter and
 - e. whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.
 2. **Comment 5 to Rule 1.1:** “Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.”
 3. For internal investigations, this assessment requires the attorney to ask themselves:
 - a. Am I equipped with the basic skills to conduct any investigation?
 - i. Most investigations require interviews, fact-gathering, credibility determinations, and analysis.
 - ii. If your entire legal career involves transactional practice, you likely have not amassed the experience to conduct an investigation.

- b. Do I have the time, team, and resources available to conduct this investigation?
 - i. Investigations may require two interviews, or they may require 200; you may have to review only a handful of documents, or you may have to review 400,000 emails.
 - Do you have the staff to accompany you to interviews to take notes? The technology to search and review emails? The team to assist you to get it done?
 - ii. Most investigations require you to spring into action on a short time frame, and you need to assess your near-term capacity.
 - iii. Plan for the unexpected: often allegations can start small, but balloon into something far greater in short order.
- c. Does the investigation require a certain area of expertise?
 - i. The nature of the allegations will dictate whether a special skill set is necessary to conduct the investigation.
 - ii. Pay special attention to complex financial allegations, sexual misconduct, highly-regulated industries, and criminal implications.
 - Just because you have conducted hundreds of interviews in civil litigation does not equip you to conduct an interview of a complainant alleging sexual misconduct.
 - iii. **Comment 2 to Rule 1.1:** “A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.”
 - Consider engaging professionals with specialized skill sets, such as accountants, retired detectives or federal agents, and regulatory compliance experts to augment your team.
- d. Does this require a neutral investigator, and will I be perceived as neutral by the relevant stakeholders?
 - i. If an in-house investigation would suffice, an outside attorney would not get the call – so neutrality, and, most importantly, the appearance of neutrality to the public, Board, complainant, government agencies, etc., are critical to success.
 - ii. Critical to building rapport during interviews.
 - iii. If you have served as the only attorney for the client for the last 10 years and have a close relationship with the CEO, consider whether

you can actually be neutral – and whether the relevant stakeholders would consider you neutral.

- **Comment 8 to Rule 1.7:** “Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests.”
 - **Ask:** If I take on this investigation, what happens if there is later civil litigation on the same matter?
- e. Do I have the credibility within this organization to conduct this investigation effectively?
- i. Consider whether your client’s corporate/organizational culture centers around a strong set of core beliefs shared by the majority of the staff, and whether those core beliefs will impact your ability to conduct effective interviews.
 - ii. Consider whether your past representations, particularly if they were high-profile, would leave the impression you entered the investigation with bias, and impact your ability to conduct effective interviews.
 - iii. Even the appearance of bias on the part of the investigating attorney can seriously undermine the credibility of an investigation and any findings.

D. Practical Examples: Figuring Out If You Can (Should) Take the Case¹

1. A religious entity facing a flood of allegations that have hit the media needs an outside firm to conduct the investigation.
 - a. How do you evaluate whether your religious orientation/beliefs will impact the case?
 - b. Does it matter if the allegations involve financial misconduct, versus sexual misconduct at the hands of a religious leader?
2. An anonymous complaint came to the compliance officer at a large, publicly traded company that has been your client for years; the very general complaint is focused primarily on the company’s hiring practices, but makes a passing reference to favoritism shown by a senior vice president to a subordinate, and a CEO that looked the other way.
 - a. **Can** you conduct the investigation yourself, or find other counsel to conduct it? **Should** you?

¹ These hypotheticals will be answered during the live presentation.

- b. See **Rule 1.13(b)(2)**, discussed in detail in Section IV, “Conflicts of Interest for Investigations,” below.

III. Accept the Engagement: Define the Scope, Establish the Client Relationship, and Clarify the Deliverables (and Their Risks)

A. Early, Candid Communication Is Key

1. An attorney must set clear parameters at the inception of the engagement to ensure the client is fully aware of and consents to:
 - a. the scope of the representation,
 - b. the definition of the client in the relationship,
 - c. the method of conducting the investigation,
 - d. the role of the Board/governing body/key officers,
 - e. the manner of reporting the investigation outcome, and
 - f. the process for taking any action, if necessary, on the findings.
2. Discussing all of these issues candidly with the client often can stave off future ethical issues that can derail an investigation.

B. Define the Scope of Representation

1. For investigations counsel, it is critically important to define the scope of representation, the objectives of the representation, and any limitations on the role of investigations counsel as it relates to the client.
 - a. **Rule 1.2(a):** “A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued.”
 - b. **Rule 1.2(b):** “A lawyer may limit the objectives of the representation if the client consents after consultation.”
 - c. **Rule 1.2(d):** “A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.”
2. The boundaries of the engagement should be reduced to writing and endorsed by the client and investigations counsel to ensure the terms of representation are clear to all.

C. Establish the Client in the Relationship:

1. **Organizational Clients: Rule 1.13(a):** “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”
 - a. Who are the duly authorized constituents that can engage you as outside counsel?
 - i. First, who are “constituents?” The owners, officers, directors, employees, and other agents of a represented entity.

- ii. Duly-authorized constituents: Key officers with contracting authority is typical in non-investigation representations – but what if they are the subject of an allegation?
 - iii. Where key officers are the subject of allegations, the Board, or a subset of the Board (Audit Committee, Executive Committee, Special Committee), in-house general counsel.
2. Maintaining the line between the Organization and its “Constituents”:
- a. A lawyer interviewing a constituent in an investigation must be careful to avoid creating an *inadvertent* attorney-client relationship with the constituent – if the interests of the constituent and the organization later diverge, this can create a conflict of interest in the representation.
 - b. **Rule 1.13(d)**: “In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”
 - c. **Comment 10 to Rule 1.13**: “When the organization’s interest may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.”
 - d. Provide employees and constituents with an “*Upjohn Warning*” at the start of every interview.²

² While the name is taken from the US Supreme Court case *Upjohn v. United States*, 449 U.S. 383 (1981), “Upjohn warnings” do not actually appear in the case. Instead, the Court recognized the unique problem presented by an attorney trying to uphold their ethical obligation to learn key facts for diligent representation of an organizational client:

“In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a

- i. Four key elements to an *Upjohn* warning:
 - The lawyer’s only client is the organization.
 - The constituent/interviewee is not a client.
 - May hire own personal counsel.
 - *If authorized by client*: If the constituent/interviewee would like personal counsel, organization will pay for personal counsel.
 - Discussions between the lawyer and constituent are confidential and privileged, and the organization is asking the constituent to maintain the confidentiality of these communications.
 - Because the organization is the lawyer’s client, and not the constituent, it is the organization and not the constituent who decides whether the privilege will be waived and if so, which lawyer-constituent discussions should be disclosed.
- ii. Can reduce to writing – if investigations counsel plans to provide employees with a written authorization from the Board during interviews, for instance, that authorization can also include an *Upjohn* warning.

D. Describe the Method of Conducting the Investigation

1. Investigations counsel should apprise the client of the plan for moving forward and receive the client’s general approval of the methods used.
 - a. **Rule 1.2(a)**: “A lawyer shall . . . consult with the client as to the means by which [the objectives of representation] are to be pursued.”

complex legal problem 'is thus faced with a “Hobson's choice”. If he interviews employees not having the very highest authority, their communications to him will not be privileged. If, on the other hand, he interviews *only* those employees with the very highest authority, he may find it extremely difficult, if not impossible, to determine what happened.”

Upjohn Co. v. United States, 449 U.S. 383, 391-92 (1981) (quoting *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 608-609 (8th Cir. 1978) (*en banc*)). The Court held that such communications by counsel for the corporation to employees of the corporation were protected by the attorney-client privilege and could not be compelled to be produced to the government in a tax investigation. *Id.* at 397.

- b. **Rule 1.4(b):** “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”
 - c. **Comment 1 to Rule 1.3:** “A lawyer should act with commitment and dedication to the interests of the client[.]”
2. Key decisions to reach early and to advise the client of your recommended approach:
- a. Should you issue a litigation hold on the records that may be relevant to your investigation?
 - i. The answer largely depends on how public these allegations have become, and whether you compromise any advantages to beginning the investigation in confidence.
 - ii. Consider taking technological steps, behind the scenes, to prevent deletion of electronic records that may be relevant to the investigation.
 - b. Will you be conducting interviews? Who will you interview? Where? Who is your interview team?
 - i. Consider drafting an authorization directly from the Board/Audit Committee/Executive Committee to the employee/constituent of the organization to give them permission to discuss otherwise confidential information with you.
 - *Note:* You may want to consider including language setting forth the applicable Whistleblower Protections (see below), reminding them of their duty to keep your communications confidential, and setting forth language describing your role as investigations counsel.
 - c. Do you need to gather records? How will you gain access to electronic records and communications? How will you review these records and communications?
 - i. Consider drafting an authorization directly from the Board/Audit Committee/Executive Committee to IT/human resources/compliance staff to coordinate directly with you on gathering records without going through the normal channels for approval and access.
 - d. Is an outside vendor (i.e., an accounting firm, a cell phone expert, a private investigator) necessary to facilitate the investigation?
 - i. Ensure the outside vendor is engaged through *the law firm*, not directly with the client – see Section IV, “Planning for Success,” below for more information about protecting privilege with vendors.

- e. Are the allegations of such a nature that a key employee may try to interfere in the investigation, or they simply create a fear in the other employees that there will be interference?
 - i. The Board will need to act early to neutralize this person’s ability to communicate with witnesses, or tamper with evidence.
- f. Plan to be flexible; as you gather new facts, you may need to entirely change your path forward. Advise your client of this fact early.

E. Who Do You “Report” to? Identifying the Role for the Board and Senior Leadership in the Investigation

1. **Comment 6 to Rule 1.4:** “When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization.”
2. In many organizations, the Board or organizational policies and procedures establish the process for conducting an internal investigation through outside counsel.
 - a. The reporting structure will establish the members of the Board, the committee of the governing body, or the key officers at the organization that will oversee investigations counsel.
 - b. May be the Audit Committee, Special Investigations Committee, Executive Committee, Human Resources Lead, General Counsel, Compliance Officer, etc.
3. Some organizations, particularly some non-profit entities, have not contemplated the process and procedure for conducting an investigation using an outside firm.
 - a. In those instances, the full Board, or depending on the governance structure, the Executive Committee, will need to meet and vote to act, engage counsel for the investigation, and delegate points of contact on the Board to communicate with the investigating firm.

F. Reporting the Outcome: Make Sure You Have “The Talk” About Deliverables

1. **Rule 1.2(a):** “A lawyer shall . . . consult with the client as to the means by which [the objectives of representation] are to be pursued.”
 - a. **Comment 1 to Rule 1.2:** “The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations.”
2. **Duty of Confidentiality: Rule 1.6(a):** “A lawyer shall not reveal information protected by the attorney-client privilege under applicable

- law . . . unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation[.]”
- a. **Rule 1.6(d)**: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.”
 - i. **Comment 19 to Rule 1.6(d)**: “The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure.”
 - b. A lawyer should consider whether a legal or business practice has a risk of inadvertently resulting in a future disclosure or waiver of privileged information.
3. Important, practical questions to address at the outset of the engagement:
- a. Will you produce a written report of your findings?
 - b. When will you deliver the report? Interim reporting?
 - c. Who will receive your report? Select committee? Entire Board? Public?
 - d. ***Answers to all of these questions have significant implications for confidentiality, and waiver of attorney-client privilege, which is addressed below.***
4. Sometimes organizations face tremendous pressure to publicize the results and findings of any investigation.
- a. At the outset, that seems to be an attractive proposition: simply because of human nature, many Board members and leadership teams often start out believing there is likely no merit to the claims.
 - b. They may want the temporary reprieve from the onslaught of seemingly negative attention that the public announcement of an investigation can bring, and the positive feedback they get from a commitment to make the findings of any investigation public.
 - c. Commitments to publicizing reports early in an investigation, though, may seriously jeopardize the attorney-client privilege, and may impact the ability to maintain the confidential nature of the investigation.
 - d. Wiser choice: Hold on the decision about publicizing the report until the Board/organization can make an informed decision on the full impact of that choice in light of all the circumstances at the time.
 - i. Sometimes, the better choice is to publicize the fact of the investigation, and any changes the Board/organization chooses to make as a result of the finding.

G. Handling the Aftermath: Who Is Responsible for Taking the Next Step?

1. It is critical that the organization place the attorney findings in the proper context to preserve privilege.
 - a. Investigation attorneys investigate, report, and recommend/advise, but ***the organization*** must independently evaluate the findings, reach its own conclusion, and take action in light of all of the information.
 - b. This independent deliberative process by the organization, of which the investigation findings are simply a component of that process, is critical to preserving the confidentiality of the investigation and protecting the attorney-client and work product privilege.
2. In WDVA, District Court Judge Cullen recently found a waiver of attorney-client privilege where several leaders in the organization essentially said their attorney told them they “must” fire plaintiff:
 - a. Plaintiff sued the Town of Front Royal for hostile work environment and retaliatory termination for reporting her claims.
 - b. Human resources opened an investigation, but also engaged counsel to assist the investigation.
 - i. Based on deposition testimony, the organization repeatedly blurred the lines between the attorney investigation and the human resources personnel actions.
 - Attorney worked side-by-side with human resources staff, and employees in depositions had indicated the plaintiff’s termination had been directed by the attorney.
 - ii. Reliance on counsel in this manner – essentially folding them into the human resources decision-making process as opposed to keeping them separate, outside advisors – put counsel’s communications squarely at issue in the employment action.
 - c. Court granted plaintiff’s motion to compel communications from the attorney in the investigation:
 - i. Where “the reasonableness of the defendant’s corrective actions in response to plaintiff’s allegations was a critical issue in the case,” the court will “not permit the defendant to rely on the attorney’s advice and actions as a ‘sword’ while also allowing attorney-client privilege to ‘shield’ the nature of those actions from the plaintiff.” *Brown v. Town of Front Royal*, Civil Action No. 5:21-cv-00001, 2022 U.S. Dist. LEXIS 80013, at *20 (W.D. Va. May 3, 2022).
 - i. The court “did not conclude that the Town waived its attorney-client privilege simply because [investigations counsel] conducted an internal investigation or provided legal advice related thereto;

indeed, if he had, this court would have no trouble holding such a finding contrary to law. Instead, the magistrate judge correctly recognized that the reasonableness of the Town's investigation was part and parcel to Brown's hostile work environment claim, and that the Town had expressly put that investigation and [investigation counsel's] advice related to it at issue.” *Id.*

H. Practical Examples: Where Attention to Setting the Stage for Investigations Pays Off³

1. An organization in a highly-regulated industry hires you to do a very high-profile, large scale internal investigation, after misconduct allegations against the head of the organization made headline news.
 - a. After more than a year of investigation into multiple areas of potential misconduct, you made your findings and report to the Board, but the Board decided *not* to release the report to the public and took careful steps to maintain confidentiality.
 - b. The organization made large-scale changes to its policies and procedures to prevent future misconduct. As a result of all of the media attention, though, the organization is facing multiple inquiries from regulatory agencies inquiring into possible regulatory violations.
 - c. One such agency insists your client produce the results of your entire investigation, since some of the allegations made in the media touch on Regulation XYZ. In fact, your investigation never touched on XYZ.
 - i. How can you satisfy this agency's inquiry, *without* breaching the confidentiality of your investigation?
2. An organization is facing multiple allegations that the leadership team has created a climate of fear and tyranny among employees, chilling the reporting of serious financial misconduct and abuse of power witnessed by employees.
 - a. The reports make clear that none of the employees will trust any investigation commissioned by or connected to the current leadership.
 - b. The Board feels compelled to act, in any event, and hires you as investigations counsel.
 - i. What steps can you take at the very beginning of the investigation to gain credibility with employees and assure them of your neutrality?

³ These hypotheticals will be answered during the live presentation.

II. Conflicts of Interest for Investigations: Check Early, Reassess Often

- A. **Duty of Loyalty: Rule 1.7(a):** “A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or
 - (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”
- B. In investigations for organizations, *the duty of loyalty is to the organization, not the employees, not the officers, and not the individual members of the governing body.*
- C. Initial conflict checks for internal investigations require a few extra steps, and some forward thinking – there often is no litigation, no party to a contract, no controversy, no criminal charges/enforcement actions (yet).
1. Typically, all you have is an allegation, perhaps an anonymous one – sometimes you might be lucky to have even that much.
 - a. Federal or state subpoenas give nothing to go on.
 2. Cast the net wide, and, in addition to the usual players, be sure to search:
 - a. All members of the Board/governing body, past and present, for the relevant time period;
 - b. All key corporate officers/managers;
 - c. Any key vendors that may be witnesses to the allegations;
 - d. Any complaining party, if known, and any other individual making similar allegations in the past;
 - e. In certain cases, all key employees with knowledge/potential knowledge (i.e., the human resources department for workplace harassment allegations); and
 - f. The best guesses for the complainant/potentially adverse parties, if unknown.
- D. **Reassessing Conflicts:** In an investigation, it is not uncommon to discover, during the course of the investigation, that an employee has become adverse to the organization. Now, their individual interests no longer align with those of their employer.
1. What to do? Advise the client, and the constituent, that the constituent now needs personal counsel.

- a. **Rule 1.13(b):** “If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.”
 - i. **Comment 14 to Rule 1.13:** “[I]f the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.”
2. *Obligations to Report Back to Client:*
- a. **Rule 1.13(b):** “In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations.”
 - b. Investigations counsel must give a higher authority within the organization the opportunity “to act on behalf of the organization” to address the actions. **Rule 1.13(b)(3).** This is your report and findings.
 - c. Investigations counsel may recommend that the organization seek “a separate legal opinion on the matter” to present options for action to the “appropriate authority in the organization.” **Rule 1.13(b)(2).**
 - i. This highlights the importance of investigations counsel being *separate* from regular counsel for the organization.
 - ii. This permits regular counsel for the organization to provide this separate legal opinion based on the results of the investigation.
 - d. **BUT:** Investigations counsel be mindful that “[a]ny measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization.” **Rule 1.13(b).**
 - i. *Note:* This can make an early decision – and more concerningly, any public commitment – to publish a report a dangerous proposition, when the organization is not aware of where the investigation may lead.

E. Practical Examples: Conflicts Arising Mid-Investigation⁴

1. An organization learns that the U.S. Department of Justice is conducting an investigation of organization's activities, and hires your firm to conduct an internal investigation to uncover any potential misconduct.
 - a. One year into the investigation, you learn that Employee X may have committed acts which could subject both the organization and Employee X to civil or criminal liability.
 - b. Up to that point, you had met with Employee X multiple times for interviews to gather information for the factual investigation, and to help Employee X prepare for an interview with DOJ investigators.
 - i. Luckily, you remembered to provide Employee X with an *Upjohn* warning each time you met.
 - c. What are the next steps?
 - i. Can you continue to meet with Employee X to gather factual information for your investigation?
 - ii. Do you have to advise the organization about the development?
 - iii. Do you have to advise DOJ about what you've learned about Employee X?
2. An organization receives a grand jury subpoena from the U.S. Department of Justice demanding the production of communications from several mid-level managers and senior leadership at the organization.
 - a. DOJ notifies the organization they are a target of a criminal investigation, but they refuse to tell the organization what this is all about.
 - b. The organization hires your firm to represent them in the criminal matter, and to conduct an internal investigation to try to uncover the misconduct DOJ is targeting.
 - c. Your main points of contact are counsel for the organization, an outside attorney who acts like in-house counsel (i.e., outside general counsel), and the CEO.
 - d. How do you evaluate the conflicts in this investigation?
 - i. Can you represent the organization, mid-level managers, and senior leadership simultaneously?
 - What if the CEO says he can waive any conflicts, since he just wants to save on legal fees?

⁴ These hypotheticals will be answered during the live presentation.

- ii. What if each of the mid-level managers and key members of senior leadership receive individual subpoenas to produce their email communications? Does that impact the analysis?
- iii. What if, a year into the investigation, DOJ informs you that the CEO is a target of their criminal investigation? Can you continue to represent the CEO and the organization?

III. Planning for Success: Prepare for Whistleblowers

A. Whistleblowers in Investigations: Plan for the Unexpected

1. Aside from any initial complainant, prepare to encounter individuals who report new misconduct during the course of the investigation.
 - a. Sometimes, these individuals were the *target* of the original investigation, and raise allegations during their own interview in an effort to invoke whistleblower protection in the event you planned to terminate them as a result of their *own* misconduct.
2. Organization should have a plan for action and response to protect the rights of whistleblowers.
 - a. Evaluate the scope of your investigation, and consider whether this new information falls within or outside the scope.
 - i. Within the scope? Consider it new information and a lead that should be pursued.
 - ii. Outside the scope? Create a short report of the allegation, and refer it to the appropriate authority within the organization to pursue further (timing of this referral will depend on nature, scope, and sensitivity of your original investigation).
 - This is where your advice to your client about whistleblower protections is critical.
 - iii. Unsure? Get clarification from your client regarding how they would like you to proceed.
3. Do not go outside the scope of the investigation within the original engagement without express authorization from the client.
 - a. Creates a whole host of issues for protecting confidentiality and privilege.

- b. If you give the perception that you have done a “wide-reaching” investigation, or investigated outside the scope, you open the client up to claims the privilege has been waived, and you lose the ability to rely on the limited scope of your engagement to ward off outside inquiries.

B. Whistleblower Protections: Know the Law

1. **Virginia Whistleblower Protection Law, Va. Code § 40.1-27.3** (Effective July 1, 2020): Provides broad protections against retaliation for employee-whistleblowers, and precludes retaliatory personnel actions against an employee for:
 - a. Reporting in good faith a violation of any federal or state law or regulation to a supervisor or to any governmental body or law enforcement official;
 - b. Being requested by a governmental body or law enforcement official to participate in an investigation, hearing, or inquiry;
 - c. Refusing to engage in a criminal act that would subject the employee to criminal liability;
 - d. Refusing an employer’s order to perform an action that violates any federal or state law or regulation when the employee informs the employer that the order is being refused for that reason; or
 - e. Providing information to or testifying 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.
2. **Fraud and Abuse Whistleblower Protection Act (“FAWPA”), Va. Code § 2.2-3009**: Whistleblower protection for those reporting wrongdoing or abuse committed by governmental agencies or independent contractors of governmental agencies.
3. *Alexander v. City of Chesapeake*, 108 Va. Cir. 161 (Chesapeake Cir. Ct. May 20, 2021):
 - a. Plaintiff was Superintendent of Chesapeake Juvenile Services, and reported a violation by other city employees of the mandatory reporting requirements applicable to suspected child abuse.
 - i. Alleged termination from her employment in retaliation for reporting.
 - b. City had opened an investigation into Plaintiff’s own actions after she had reported violations to her immediate supervisor, and she made a later report to the City Attorney.

- c. Court held she was entitled to whistleblower protection under both Va. Code §§ 2.2-3009 and 40.1-27.3.

C. Whistleblower Protections: Advise Your Client

1. Both strategic and ethical considerations require the lawyer to caution their client regarding retaliation against any whistleblower – particularly important in *qui tam* actions.
 - a. Advise against **any** retaliatory action – or perceived retaliatory action – against a whistleblower.
2. **Rule 1.13:** If an officer pursues a retaliatory course of action despite the lawyers advise to the contrary, and the lawyer believes that such action would constitute a violation of the officer’s legal obligation to the organization which is likely to result in substantial injury to the organization, the lawyer must act in the best interests of the organization.
 - a. Ask officer to reconsider the course of action, advise the client to seek a separate legal opinion, or refer the matter to a higher authority within the organization.

IV. Planning for Success: Protect the Privilege

A. How It Works: Duty of Confidentiality & Attorney-Client Privilege

1. **Comment 3 to Rule 1.6(a):** “The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. . . . The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, whatever its source.”
2. The Rules expressly recognize that interviews conducted during the course of an investigation are protected as confidential communications with an attorney pursuant to **Rule 1.6:**
 - a. **Comment 2 to Rule 1.13:** “[I]f an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client’s employees or other constituents are covered by Rule 1.6.”

- b. **However**, take special care in what you reveal **to** that constituent or employee during the course of the interview:
 - i. **Comment 2 to Rule 1.13**: “The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.”
3. In internal investigations, attorney-client privilege protects “not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him [or her] to give sound and informed advice.” *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981).

B. What Is Protected in an Internal Investigation?

1. Communications, not facts:
 - a. The attorney-client privilege “only protects disclosure of communications; it does not protect disclosure of the underlying facts.” *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).
 - b. Thus, a fact is not privileged “merely because [a client] incorporated a statement of such fact into his communication to his attorney.” *Id.* at 396.
2. Work product, but **not** underlying facts:
 - a. The work product privilege protects the work of the attorney done in preparation for litigation. *Hickman v. Taylor*, 329 U.S. 495, 509-14 (1947). “Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney.” *Hickman*, 329 U.S. at 510.
 - b. “Courts have analyzed the work product privilege in two contexts -- fact work product and opinion work product. Both are generally protected and can be discovered only in limited circumstances.” *United States v. Under Seal (In re Grand Jury Proceedings)*, 33 F.3d 342, 348 (4th Cir. 1994).
 - c. “The work-product doctrine ‘insulates a lawyer’s research, analysis of legal theories, mental impressions, notes, and memoranda of witnesses’ statements from an opposing counsel’s inquiries.’ It protects materials prepared in anticipation of litigation, whether those materials were prepared by the attorney or by agents of the attorney.” *Adams v. Mem’l Hermann*, 973 F.3d 343, 349 (5th Cir. 2020) (quoting

Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869, 875 (5th Cir. 1991)).

C. Privilege for the Investigation Team: Adding Nonlawyer Resources

1. Attorney-client privilege and work product protection extends to communications to and work by an attorney's agents.
 - a. "The privilege attaches to communications of the client made to the attorney's agents, including accountants, when such agent's services are indispensable to the attorney's effective representation of the client." *Commonwealth v. Edwards*, 235 Va. 499, 509 (1988).
 - b. When an investigation "is conducted at the direction of the attorneys," "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (Cir. D.C. 2014).
2. **Rule 5.3(b)**: A lawyer with direct supervisory authority over a nonlawyer, such as an investigator assisting with an internal investigation, must "make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."
 - a. **Rule 5.3(c)(2)**: An ethical violation by a nonlawyer can be imputed to a lawyer if the lawyer "knows about and ratifies the violation or "knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action").
 - b. **Rule 1.6(a), (d)**: A lawyer must safeguard against a nonlawyer inadvertently disclosing confidential and privileged information.
3. Inadvertent waivers are a real danger, and engagement of nonlawyers through counsel is critical to protect privilege and work product.
 - a. The District of New Jersey recently found a waiver of privilege in an internal investigation into potential violations into the Foreign Corrupt Practices Act because the client had asked counsel to disclose investigation materials to a public relations firm. *United States v. Coburn, et al.*, No. 2:19-cr-00120, 2022 WL 357217, at *7 (D.N.J. Feb. 1, 2022)

D. Waivers of Privilege for Corporations: Who Decides?

1. The answer depends on the subject of the privilege: attorney-client communications, or work product?
 - a. Communications? Only the client can decide.
 - b. Fact Work Product? Only the client can decide.

- c. Opinion Work Product? BOTH the client and attorney can claim privilege protection, so both must choose to waive.
- 2. For attorney-client communications, “[t]he client is the holder of the privilege.” *United States v. Under Seal (In re Grand Jury Proceedings)*, 33 F.3d 342, 348 (4th Cir. 1994).
 - a. Therefore, only the client, as the holder, may waive the privilege.
 - b. For a corporation, “the power to waive the corporate attorney-client privilege rests with the corporation’s management and is normally exercised by its officers and directors.” *Commodity Futures Trading Com v. Weintraub*, 471 U.S. 343, 348 (1985).
 - i. “The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.” *Id.* at 348-49.
 - ii. What about former managers? “Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.” *Id.* at 349.
 - c. For work product, “[f]act work product can be discovered upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship. Opinion work product is even more scrupulously protected as it represents the actual thoughts and impressions of the attorney, and the protection can be claimed by the client or the attorney.” *United States v. Under Seal (In re Grand Jury Proceedings)*, 33 F.3d 342, 348 (4th Cir. 1994).

E. When Waivers Make Sense

- 1. **Business Decisions:** The client may make a business decision to publicly disclose the results or contents of an internal investigation, including attorney-client communications, after it is complete.
 - a. What ethical considerations are at play? Once privilege is waived, it is destroyed. An attorney should consider the pros and cons of waiving privilege before advising the client on this strategy.
 - i. **Comment 1 to Rule 1.2:** Requires a lawyer to advise the client about the “advantages” and “disadvantages” of pursuing an objective.
 - ii. **Comment 1 to Rule 1.3:** “A lawyer has professional discretion in determining the means by which a matter should be pursued.”

iii. **Comment 2 to Rule 1.3:** “[L]awyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client’s needs and interests.”

b. What if you believe this is the wrong decision?

i. If purely a business decision, not the attorney’s to make.

ii. Key question: Does waiver violate an ethical obligation, perhaps to the organization? Do you have reason to believe the decisionmakers are violating their fiduciary duties to the organization by waiving privilege?

- Remember, officers must be mindful of their fiduciary obligations to the organization, not acting in their own self-interest, when they evaluate whether to waive the organization’s privilege.
- A breach of that fiduciary duty implicates the attorney’s duty of loyalty and duty of confidentiality to the true client: the organization.

iii. **Rule 1.13(b):** “If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.”

- **Comment 14 to Rule 1.13:** “[I]f the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

iv. **Rule 1.16(a)(1):** “[A] lawyer shall . . . withdraw from the representation of a client if: the representation will result in violation of the [ethics rules].”

c. *Case in Point: Southern Baptist Convention*

- i. In a recent internal sexual abuse investigation of the Southern Baptist Convention (“SBC”), the denomination’s Executive Committee voted to waive all attorney-client privilege for the investigation.⁵
- ii. The SBC’s longtime general counsel subsequently terminated representation, writing: “Because the attorney-client privilege existed, [the SBC and its executives and employees] have on occasion shared with us sensitive information which we needed in order to competently represent the Executive Committee. . . . We simply do not know how to advise a client, and otherwise represent a client, with the quality of advice and representation the client must have, and in keeping with the standard of practice our firm tries to uphold, when the client has indicated a willingness to forego this universally accepted principle of confidentiality.”⁶

2. **Waivers as Legal Strategy:** Waivers can constitute an important part of sound legal strategy.

- a. For example, a company may desire to waive privilege pertaining to specific communications in order to assert an “advice-of-counsel defense” or to obtain a prosecutorial cooperation credit.
- b. Increasingly necessary to turn over privileged information to receive a favorable resolution and full cooperation credit in government investigations, but meetings with the government disclosing investigation materials may entirely waive privilege over the investigation in all aspects. *United States v. Coburn, et al.*, No. 2:19-cr-00120, 2022 WL 357217, at *7 (D.N.J. Feb. 1, 2022).

⁵ See *No other decision . . . to make’: Floyd, longtime legal team explain reasons for resigning from SBC roles*, THE ALABAMA BAPTIST (Oct. 15, 2021), <https://thealabamabaptist.org/no-other-decision-to-make-floyd-longtime-legal-team-explain-reasons-for-resigning-from-sbc-roles/>.

⁶ See *Law firm resigns as SBC/EC general counsel*, THE PATHWAY (Oct. 11, 2021), <https://mbcpathway.com/2021/10/11/law-firm-resigns-as-sbc-ec-general-counsel/>.



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You Start Walking My Way: Keys to a Successful Mediation

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You Start Walking My Way: Keys to a Successful Mediation

Ashley Winsky

Gentry Locke Seminar
Richmond – September 28, 2022

I. Is it Time to Mediate?

- a. “Mediation” means a process in which the mediator facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute. **Va. Code § 8.01-581.21.**
- b. Mediation can commence at any point, either pre or post suit or during any stage of litigation. The mediation process is informal and in most cases it is voluntary.
- c. Mediation is not mandatory in Virginia, but the court has authorization to refer disputes for mediation under **Va. Code § 8.01-576.5:**
 - i. While protecting the right to trial by jury, a court, on its own motion or on motion of one of the parties, may refer any contested civil matter, or selected issues in a civil matter, to an orientation session in order to encourage the early resolution of disputes through the use of procedures that facilitate (i) open communication between the parties about the issues in the dispute, (ii) full exploration of the range of options to resolve the dispute, (iii) improvement in the relationship between the parties, and (iv) control by the parties over the outcome of the dispute. The neutral or intake specialist conducting the orientation session shall provide information regarding dispute resolution options available to the parties, screen for factors that would make the case inappropriate for a dispute resolution proceeding, and assist the parties in determining whether their case is suitable for a dispute resolution process such as mediation. The court shall set a date for the parties to return to court in accordance with its regular docket and procedure, irrespective of the referral to an orientation session. The parties shall notify the court, in writing, if the dispute is resolved prior to the return date.
 - ii. However, **Va. Code § 8.01-576.6** allows a party to object to the Court’s referral to mediation:
 1. When a court has determined that referral to an orientation session is appropriate, an order of referral to a neutral or to a dispute resolution program shall be entered and the parties shall be so notified as expeditiously as possible. The court shall excuse the

parties from participation in an orientation session if, within fourteen days after entry of the order, a written statement signed by any party is filed with the court, stating that the dispute resolution process has been explained to the party and he objects to the referral.

d. Case Characteristics to Consider before Mediation

- i. The case involves novel legal issues, ambiguous precedent, constitutional issues, or public policy.
- ii. A judgment would contribute to the development of the law.
- iii. The public should have information about the case and its resolution.
- iv. There is an imbalance of bargaining power between the parties.
- v. One side has other motives (e.g., discovery) and is not interested in resolution.

e. Case Characteristics in Favor of Mediation

- i. There is a need to save time.
- ii. There is a need to save money.
- iii. There is a need for the client to avoid discovery and trial for emotional, personal, or publicity reasons.
- iv. There is a need to avoid trial because the risk of losing is not acceptable.
- v. There is a need for complexity, flexibility or creativity in the desired solution.
- vi. There is a need for privacy and/or confidentiality in resolving the matter.
- vii. There is a need for assistance in overcoming communication barriers.
- viii. There is a need for the parties to “have their day,” vent, to provide information, to get information, to explain positions and interests.
- ix. There is a need for assistance in dealing with a difficult client, opposing party, opposing attorney, etc.
- x. There is a need to maintain or improve ongoing relationships between the parties.

- xi. There is a need to seek partial solutions to the dispute to narrow the scope and complexity of the dispute.
- xii. There is a need to informally assess the opposing party or perhaps the opposing attorney to better evaluate the case for resolution.
- xiii. There is a need to examine positions and explore underlying interests.
- xiv. There is a need for assistance in managing the litigation of the case.
- xv. There is a need for the parties to invest in and own the solution.
- xvi. There is a need for a reality check regarding the merits of the dispute.
- xvii. There is a need for assistance in evaluating the merits of the dispute.
- xviii. There is a need to keep control of the process.
- xix. There is a need to keep control of the outcome.

II. Selecting a Mediator

- a. “‘Mediator’ means an impartial third party selected by agreement of the parties to a controversy to assist them in the mediation.” **Va. Code § 8.01-581.21.**
 - i. “A mediator shall conduct a mediation in an impartial manner. Impartiality means freedom from favoritism or bias in word, action or appearance.” ¶ **G(1) Standards of Ethics for Certified Mediators.**
- b. When selecting a mediator, the parties should look at factors such as reputation, subject matter and industry experience, fees, location, and training.
 - i. It is also very important to pick a mediator with the right temperament.
 - ii. It is especially important for the parties to be able to trust the mediator and listen to the mediator.
 - iii. Seek input from colleagues, attorneys, and other mediators.
- c. Unlike a court judge or an arbitrator, a mediator cannot make decisions or take sides. The mediator's role is simply to help the parties evaluate their options and come to their own mutually satisfactory resolution. The process focuses on finding solutions, not discovering the truth or imposing the law.

d. Certified Mediators

- i. A certified mediator is a person who has satisfied the guidelines for certification established by the Judicial Council of Virginia.
 1. Mediators may be certified in six categories: General District Court (GDC), Circuit Court-Civil (CCC), Juvenile and Domestic Relations District Court (J&DR), Circuit Court-Family (CCF), Appellate – Family (APF), and Appellate – Civil (APC).
 2. A certified mediator must comply with the standards of ethics and professionalism established by the Judicial Council of Virginia.
 3. Only a certified mediator can mediate court-referred cases in Virginia.

ii. Civil Immunity

1. A certified mediator has civil immunity unless the mediator acts in bad faith, has malicious intent, or mediates in a manner exhibiting a willful and wanton disregard of the rights of others. **Va. Code § 8.01-581.23.**
 - a. “When a mediation is provided by a mediator who is certified pursuant to guidelines promulgated by the Judicial Council of Virginia, or who is trained and serves as a mediator through the statewide mediation program established pursuant to § 2.2-1202.1, then that mediator, mediation programs for which that mediator is providing services, and a mediator co-mediating with that mediator shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in efforts to assist or conduct a mediation, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another. This language is not intended to abrogate any other immunity that may be applicable to a mediator.”

e. Uncertified Mediators

- i. An uncertified mediator does not have civil immunity and is not required to follow the Judicial Council of Virginia standards of ethics and professionalism.
- ii. There are no training or ethical requirements for uncertified mediators.

- iii. An uncertified mediator cannot mediate court-referred cases in Virginia.
- iv. For these reasons, uncertified mediators are rarely used as both parties must agree to the mediator pursuant to **Va. Code § 8.01-581.21**.

III. Preparation for Mediation

- a. It is important to engage in conversations with opposing counsel to have the best chance of success. Talk about how you expect the mediation to go.
 - i. Important to see what the client dislikes/likes, what client goals are, or if client really wants to know something in particular.
 - ii. Strategize how to get clients in right frame of mind.
- b. Prepare the mediator with pre-mediation information. More information is better than less. Submit your mediation statement early.
- c. Be as candid as possible with the mediator in pre-mediation *ex parte* discussions (which are confidential) so the mediator can help you.
- d. Identify information you do not want the mediator to know.
- e. Make sure client is prepared for mediation. Emphasize that it is a non-adversarial collaborative effort to reach a binding resolution. Emphasize the stress and uncertainty of litigation versus the certainty and closure of settlement.
- f. Be willing to devote the entire day to the mediation and encourage your client to be willing to devote the entire day.
- g. Have the actual decision makers with authority attend the mediation.
- h. Consider preparing your client to say something during the opening statement. Remember that a mediated agreement is the client's agreement. Also, the client can create a favorable impression on the opposing party and counsel.
- i. Consider the pros and cons to in-person mediations vs. virtual mediations.
- j. Know your weak points and be prepared to address them. This may include owning a decision or an apology.
- k. Know who the key players/decision-makers are on the other side. Identify people who are not in the room but may be making decisions. Try to get them there.

- l. Determine whether there are liens or other restraints to resolution. Address those before the mediation commences.
- m. Research the other side. Know company culture and outside factors. Know individual values and beliefs. Discover similarities.
- n. Know your bottom-line before the mediation starts and be prepared to walk away.
- o. Draft Settlement Agreement Prior to Mediation
 - i. Having a draft ready is key; if an agreement is reached you want to get it signed, rather than doing a memorandum of understanding.
 - ii. Consider sharing a draft settlement agreement with the other side before mediation day.
- p. Pre-Mediation Process and Confidentiality
 - i. Pre-mediation conference call (not confidential).
 - ii. Ex parte calls between mediator and attorney (confidential).
 - iii. Written submissions (confidential or not confidential).

IV. Mediation Day

- a. Mediation Process and Confidentiality
 - i. Opening statements of mediator and parties (not confidential).
 - ii. Individual caucus groups (confidential discussions).
 - iii. Joint caucus groups (partially confidential).
 - iv. Mediator gives permitted caucus information to other parties.
 - v. Mediator may provide legal information or evaluation information to a caucus group.
- b. Opening Statements
 - i. Mediator's Opening Statement
 - 1. In his or her opening statement, the mediator introduces all those present, explains the rules and goals of the mediation, and

encourages each side to cooperate as much as possible to reach a settlement.

ii. Each Party's Opening Statement

1. Important to say something and to not be adversarial.
2. Should not be arguing the case in the opening statement.
3. Show a human element – can be important to apologize and mean it.

c. Strategies for the “Win”

- i. Active listening
- ii. Be positive; do not react to confrontational behavior or make accusations
- iii. Be empathic; try to understand their position and relate to them
- iv. Build rapport; use humor and similarities
- v. Ask “how” and “what” questions aimed at solving the problem
- vi. Be patient
- vii. Reveal any hard deadlines early
- viii. Pay attention; this includes prior to the mediation starting
- ix. Allow other side small wins to allow them to feel in control
- x. Control the mediation; it's okay to break the “rules,” such as bidding against yourself
- xi. Aim for the other side to make the first offer/demand
- xii. Bolster in your offers/demands and brackets
- xiii. Utilize diminishing offers/demands
- xiv. Apply loss aversion; make sure the other side understands what they will lose if they walk away from the deal
- xv. Say “no” without saying “no”

- xvi. Consider non-monetary terms that are easy to give away; signals that you have given all you can on the monetary side
- xvii. Consider side bars with opposing counsel; reenter the room to close the deal

d. Written Settlement Agreement

i. **Va. Code § 8.01-581.25. Effect of written settlement agreement.**

- 1. If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract. If the mediation involves a case that is filed in court, upon request of all parties and consistent with law and public policy, the court shall incorporate the written agreement into the terms of its final decree disposing of a case.

ii. **Va. Code § 8.01-581.26. Vacating orders and agreements.**

- 1. Upon the filing of an independent action by a party, the court shall vacate a mediated agreement reached in a mediation pursuant to this chapter, or vacate an order incorporating or resulting from such agreement, where:
 - a. The agreement was procured by fraud or duress, or is unconscionable;
 - b. If property or financial matters in domestic relations cases involving divorce, property, support or the welfare of a child are in dispute, the parties failed to provide substantial full disclosure of all relevant property and financial information; or
 - c. There was evident partiality or misconduct by the mediator, prejudicing the rights of any party.

For purposes of this section, “misconduct” includes failure of the mediator to inform the parties at the commencement of the mediation process that: (i) the mediator does not provide legal advice, (ii) any mediated agreement may affect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.

e. Confidentiality

- i. Pursuant to **Va. Code § 8.01-581.22**, all memoranda, work products, and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation, which that relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the mediator, mediation program staff, a party, or any other person, is confidential. Written settlement agreements, however, are not confidential unless the parties specifically agree otherwise. Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except:
 1. Where all parties to the dispute resolution proceeding agree, in writing, to waive the confidentiality
 2. In a subsequent action between the neutral or dispute resolution program and a party to the dispute resolution proceeding for damages arising out of the dispute resolution proceeding
 3. Statements, memoranda, materials, and other tangible evidence, otherwise subject to discovery, that were not prepared specifically for use in and actually used in the dispute resolution proceeding
 4. Where a threat to inflict bodily injury is made
 5. Where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime
 6. Where an ethics complaint is made against the neutral by a party to the dispute resolution proceeding to the extent necessary for the complainant to prove misconduct and the neutral to defend against such complaint
 7. Where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation
 8. As otherwise provided by law or rule
- ii. Counsel should carefully consider the documents and information his or her client should provide during a mediation to protect their confidentiality. Additionally, best practices include adding language to the applicable mediation agreement stating that, subject to applicable law, all communications are confidential.

- iii. “Unless, explicitly authorized by the disclosing party, the mediator may not disclose to other parties information relating to the subject matter of the mediation.” **Va. Code § 8.01-581.24**. Also, the mediator shall not disclose information exchanged or observation regarding the conduct and demeanor of the parties and their counsel during the mediation, unless the parties agree to the disclosure. ¶ **H(8), Standard of Ethics for Certified Mediators**.
- iv. If the parties to a mediation reach a settlement and execute a written agreement, the agreement is enforceable in the same manner as any other written contract. **Va. Code § 8.01-581.25**. A written mediated agreement is not confidential unless the parties agree in writing that it will be confidential. **Va. Code § 8.01-581.22**.
- v. Exception for wrongful death actions
 1. In a wrongful death claim, the court must approve the compromise settlement, pursuant to **Va. Code § 8.01-55**, and so the parties must include the complete and unredacted terms of the compromise settlement—even though under **§ 8.01-581.22** they would be confidential. *Perreault v. Free Lance-Star*, 276 Va. 375 (2008).
- vi. Exception for infant settlements
 1. Similarly, because the court must approve the terms of an infant settlement pursuant to **Va. Code § 8.01-424(A)**, the terms of such an agreement cannot be sealed. *Brown v. Tashman*, 105 Va. Cir. 152 (Fairfax County Apr. 21, 2020).
- f. The parties may terminate the mediation at any time before reaching an agreement. If a settlement is not achieved, or if the mediation is terminated, the mediator may follow-up with the parties to assist them in seeking a resolution of the dispute. “The primary role of the mediator is to facilitate a voluntary resolution of a dispute. The mediator may not coerce a party into an agreement, and shall not make decisions for a party in the mediation process.” ¶ **E(3), Standards of Ethics for Certified Mediators**.



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PFAS Is Coming

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PFAS Is Coming

2022 Gentry Locke Seminar

September 16, 2022 – Roanoke
September 28, 2022 – Richmond

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I. Introduction:

- Per-and polyfluoroalkyl substances (collectively, “PFAS”) are a group of nearly 5,000 toxic chemicals that are resistant to heat, water, and oil. Due to these “resistance” properties, since the 1940s, PFAS have been used in a spectrum of industrial applications and commercial products, including everyday household items and packaging. Some examples of PFAS usage include carpeting, waterproof clothing, upholstery, food paper wrappings, cookware, personal care products, fire-fighting foams, and metal plating.
- PFAS are commonly referred to as “forever” chemicals, as they are persistent and long-lasting, and they travel quickly through environmental media. Recently, PFAS have been associated with a number of serious health issues such as liver, thyroid and pancreatic function, hormonal changes, fetal development, cancer risk, immune system disruption, and fertility issues. For these reasons, PFAS are now the subject of imminent and significant regulation.
- This presentation examines the current status of PFAS regulations and the anticipated future regulation of PFAS at federal and state levels.

II. What are PFAS?

- PFAS are synthetic chemicals that were invented in the 1930s for use in nonstick cookware and waterproof coatings.
- PFAS development and use surged in the late 1960s after a fire on a U.S. Navy aircraft carrier led to the development of PFAS-containing Aqueous Film Forming Foam (“AFFF”), which was used for the purpose of rapidly extinguishing fires.¹
 - AFFF foam was used for decades for fire-fighting purposes and in fire-resistant coatings and applications on military ships, civilian ships, airplanes, and airports.

¹ What Are PFAS? <https://www.livescience.com/65364-pfas.html> (Last visited Jul. 14, 2022).

- AFFF-related materials also have been applied to everyday items such as microwave-pops bags, carpets, and pipe coatings.
- Recently, PFAS has been causally linked to certain health conditions.
- In 2005 an EPA advisory panel concluded that “PFOA” (one of the best-known members of PFAS) is likely a human carcinogen.²
- In 2018, PFAS contamination was detected at hundreds of military sites, airports and in drinking-water supplies throughout the United States.

III. Recent PFAS Regulatory Developments:

- In 2012, the EPA directed operators of public drinking water systems to begin testing for the presence of PFAS in their drinking water supplies.
- In 2016, the EPA issued health advisories setting strict lifetime exposure standards for members of PFAS (PFOA and perfluorooctane sulfonate (“PFOS”))
- In June 2020, EPA added 172 PFAS chemicals to the Toxics Inventory Reporting (“TRI”) reporting requirements for 2020 and another three PFAS chemicals were added to TRI reporting requirements for 2021.³
- In March 2021, EPA issued a final determination to regulate PFOA and PFOS in drinking water.⁴
- In 2021 the EPA issued the PFAS Strategic Roadmap⁵ for 2021-2024.
 - Notable goals of the PFAS Strategic Roadmap include:
 - “Hold polluters accountable” (p. 7)
 - “Place responsibility for limiting exposures and addressing hazards of PFAS on manufacturers, processors, distributors, importers, industrial and other significant users, dischargers, and treatment and disposal facilities” (p. 9)
 - “Enhance PFAS reporting” (p. 11)
 - EPA has identified the following industrial sectors as “priorities” for additional investigation

² Toxic Timeline: A brief history of PFAS, <https://searchlightnm.org/toxic-timeline-a-brief-history-of-pfas/>

³ <https://www.federalregister.gov/documents/2020/06/22/2020-10990/implementing-statutory-addition-of-certain-per-and-polyfluoroalkyl-substances-toxic-chemical>

⁴ <https://www.govinfo.gov/content/pkg/FR-2021-03-03/pdf/2021-04184.pdf>

⁵ See Attachment A.

and evaluation as suspected PFAS users:

- Printing;
 - Chemical manufacturing and blending;
 - Plastics and resins;
 - Oil & Gas;
 - Metal coating;
 - Mining and refining;
 - Electronics;
 - Aviation;
 - Waste management, treatment and disposal; and
 - Potable water management, treatment and distribution
- On June 15, 2022, the EPA released four drinking water health advisories for certain PFAS chemicals, including PFOA, PFOS, hexafluoropropylene oxide-dimer acid (“GenX”), and perfluorobutane sulfonate (“PFBS”).
 - The *interim* health advisory concentrations for PFOA and PFOS are 0.004 parts per trillion (ppt) and 0.02 parts per trillion (ppt) respectively, which is much lower than previous health advisory concentrations for these PFAS (70 parts per trillion). (See: Attachment A)
 - Final health advisory concentrations for GenX and PFBS are 10 parts per trillion (ppt) and 2,000 parts per trillion (ppt) respectively. The final health advisory for GenX chemicals and PFBS are based on animal studies following oral exposure to these chemicals. (See Attachment A.)
 - Please note that EPA drinking water health advisories are standards that are intended to provide technical information and guidance to state agencies and public health officials related to the adverse health effects of PFAS exposure, methods for analyzing samples of environmental media for the presence of PFAS, and development of drinking water treatment technologies.
 - The EPA has announced a plan to propose PFAS National Drinking Water Regulations in late 2022, with a goal to finalize such regulations by the end of 2023.
 - House Bill 586 - Virginia workgroup studying occurrence of PFAS (HB 586)
 - House Bill (HB) 586, 2020 Acts of Assembly Chapter 611, an uncodified Act, required the State Health Commissioner to convene a workgroup to study the occurrence of six PFAS chemicals—including PFOA, PFOS, perfluorobutyrate (“PFBA”), perfluoroheptanoic acid (“PFHpA”), perfluorohexane sulfonate (“PFHxS”), and perfluorononanoic acid (“PFNA”)—that may be

present in drinking water, to identify possible sources of such contamination, and to evaluate approaches to regulating PFAS.

- The PFAS Workgroup was given the option to recommend maximum contaminant levels (“MCLs”) for inclusion in Virginia Board of Health’s regulation of public drinking water supplies.
- The legislation required the workgroup to “determine current levels of PFOA, PFOS, PFBA, PFHpA, PFHxS, PFNA ... contamination in the Commonwealth’s public drinking water, provided that in making such determination of current levels, the Department of Health shall sample no more than 50 representative waterworks and major sources of water[.]”⁶
 - The PFAS workgroup’s efforts focused on “water supplies” and “waterworks,” as those terms are defined in the *Public Water Supplies Law, Code of Virginia* § 32.1-167, and *Waterworks Regulations, 12 VAC 5-590-10*.
 - The PFAS Workgroup reported its findings to the Governor and the Virginia General Assembly on December 1, 2021.⁷
 - Information about PFAS contamination of drinking water in Virginia, which came from the Sample Study conducted pursuant to **HB586**, will be used by the Virginia Board of Health to develop and implement maximum contaminant levels (“MCLs”) for PFAS chemicals, in accordance with Code of Virginia § 32.1-169 B.
 - As a follow-up to the PFAS monitoring and occurrence study undertaken in 2021, VDH, through the Office of Drinking Water (ODW) is undertaking a Phase 2 PFAS Sampling Program in the summer of 2022.⁸
 - The purpose of this sampling program is to collect additional data on the occurrence of PFAS in Virginia public drinking water supplies, help determine the fiscal impact of PFAS, and support rulemaking to develop MCLs for PFAS.
- HB1257, 2020 Acts of Assembly Chapter 1097⁹
 - Directs the Board of Health to adopt regulations establishing MCLs for PFOA, PFOS, and other PFAS as it deems necessary; hence, the PFAS Workgroup’s recommendations for MCLs is a critical objective.

⁶ Va. House Bill No. 586. §1.

⁷ VIRGINIA PFAS WORKGROUP, VIRGINIA DEPARTMENT OF HEALTH, STUDY OF THE OCCURRENCE OF PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) IN THE COMMONWEALTH’S PUBLIC DRINKING WATER (Dec. 1, 2021)

⁸ PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) IN DRINKING WATER, <https://www.vdh.virginia.gov/drinking-water/pfas/>.

⁹ Va. House Bill No. 1257.

- Code of Virginia § 32.1-169 B – Adoption of Maximum Contaminate Levels for PFAS by VA Board of Health¹⁰
 - Requires the Board of Health to adopt regulations establishing MCLs in all water supplies and waterworks in the Commonwealth for (i) PFOA, (ii) PFOS, and (iii) for such other perfluoroalkyl and polyfluoroalkyl substances as the Board deems necessary.
 - Each MCL must be protective of public health, including of vulnerable subpopulations, including pregnant and nursing mothers, infants, children, and the elderly, and shall not exceed any MCL or health advisory for the same contaminant adopted by the U.S. Environmental Protection Agency (the “EPA”).
 - In establishing MCLs, the Board is required to review MCLs adopted by other states, studies and scientific evidence reviewed by such states, material in the Agency for Toxic Substances and Disease Registry of the U.S. Department of Health, and current peer-reviewed scientific studies produced independently or by government agencies.
 - VDH should include an analysis of environmental justice impacts that may flow from the promulgation of MCLs for PFAS and carefully assess whether and to what extent MCLs for PFAS would improve protection of public health in communities already burdened by water, air and industrial pollution.¹¹

IV. Anticipated Regulatory Developments:

- PFAS likely will be regulated at the state and federal level under the certain environmental programs, including:
 - Superfund Site Brownfield Site Clean-up Programs:
 - PFAS likely will be identified as “Hazardous Substances” requiring remediation of contaminated sites under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”)¹² EPA is currently undertaking a rulemaking effort to designate PFOA and PFOS as CERCLA Hazardous Substances, which would require reporting of releases of PFOA and PFOS that meet or exceed the reportable quantity assigned to these substances.¹³
 - Toxic Inventory Reporting (“TRI”) Programs:

¹⁰ Va. Code Ann. §32.1-169 B

¹¹ PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) IN DRINKING WATER, <https://www.vdh.virginia.gov/drinking-water/pfas/>.

¹² 42 U.S.C. §§ 9601, *et seq.*

¹³ Designating PFOA and PFOS as CERCLA Hazardous Substances, Office of Information and Regulatory Affairs, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=2050-AH09>.

- Annual reporting of use of PFAS-containing materials will be required under the Emergency Planning and Community Right-to-Know Act of 1986 (“EPCRA”).¹⁴ The National Defense Authorization Act (“NDAA”) for Fiscal Year 2020 provided a framework for additional PFAS to be added to TRI on an annual basis.¹⁵ Pursuant to section 7321 of the NDAA for Fiscal Year 2020, the EPA published a final rule adding three types of PFAS to the list of chemicals subject to toxic chemical release reporting under EPCRA and the Pollution Prevention Act (“PPA”) on June 3, 2021.¹⁶ Additional types of PFAS will likely be added to toxic chemical release reporting under both EPCRA and the PPA.
 - National Pollutant Discharge Elimination System (“NPDES”) Wastewater and Stormwater Permit Programs:
 - Stormwater pollution prevention plans will be required to cover PFAS chemicals under the *Federal Water Pollution Control Act*¹⁷ and the *Virginia Stormwater Regulations*.¹⁸ On April 28, 2022 the EPA issued a memorandum aligning EPA-issued wastewater and stormwater discharge permits under NPDES with the goals articulated in the PFAS roadmap, including enhanced monitoring provisions, use of new analytical methods, and implementation of pollution prevention and best management practices to address PFAS discharges at the source.¹⁹
 - Industrial Wastewater Discharge Permit Programs:
 - Local potable water treatment works (“POTWs”) will be required to conduct sampling and testing for the presence of PFAS chemicals under the *Federal Water Pollution Control Act*²⁰, the *Public Health Service Act*²¹, and the *Virginia Public Water Supply Law*²² and the *Virginia State Water Control Law*.²³

¹⁴ 42 U.S.C. §§ 11001, *et seq.*

¹⁵ 42 U.S.C. §§ 11023, *et seq.*

¹⁶ 40 C.F.R. §372.

¹⁷ 33 U.S.C. §§ 1251, *et seq.*

¹⁸ 9 Va. Admin Code §§ 25-11-10, *et seq.*

¹⁹ Radhika Fox, Assistant Administrator, Addressing PFAS Discharges in EPA-Issued NPDES Permits and Expectations where EPA is the Pretreatment Control Authority, United States Environmental Protection Agency Office of Water Official Memorandum. (Apr. 2022)

²⁰ 33 U.S.C. §§ 1251, *et seq.*

²¹ 42 U.S.C. §§ 300f, *et seq.*

²² Va. Code Ann. §§ 32.1-167, *et seq.*

²³ *See*, Va. Code Ann. §§ 62.1-44.2, *et seq.*; Radhika Fox, Assistant Administrator, Addressing PFAS Discharges in EPA-Issued NPDES Permits and Expectations where EPA is the Pretreatment Control Authority, United States Environmental Protection Agency Office of Water Official Memorandum. (Apr. 2022)

- Solid and Hazardous Waste Management and Disposal Programs:
 - Generators of Solid Waste will be required to characterize, manage and dispose of PFAS-containing materials as Hazardous Waste under the *Solid Waste Disposal Act*²⁴ and the *Virginia Waste Management Act*.²⁵
- Toxic Substances Control Programs
 - The EPA will seek to use its broad authority to regulate toxic substances to implement and enforce regulation of the manufacturing, process, distribution in commerce, use and disposal of PFAS-containing materials, under the *Toxic Substances Control Act* (“TSCA”).²⁶ For instance, in a final rule published on July 27, 2020, the EPA required persons to notify the EPA at least ninety (90) days before commencing the manufacture (including import) or processing of long-chain perfluoroalkyl carboxylate for the significant new uses further described in the rule.²⁷
 - Consequently, businesses that engage in manufacturing, managing, or distributing any tangible product should be made aware of the coming PFAS regulations and how they may affect their operations, including their supply chain.
- Implications of New PFAS Regulations:
 - The initial focus of new PFAS regulations will be reporting and labeling requirements.
 - Businesses will receive questionnaires requiring the disclosure of PFAS-related activities.
 - Business in industries that the EPA and the DEQ have identified as suspected PFAS users—and targets for further investigation, consequently—such as printing, chemical manufacturing and blending, plastics and resins, oil and gas, metal coating, mining and refining, electronics, aviation, waste management, treatment and disposal, and potable water management, treatment and distribution, already have received requests for PFAS-related information from the DEQ under TSCA.²⁸
 - Going forward, air, water, and waste permits will include PFAS-related compliance requirements.

²⁴ 42 U.S.C. §§ 6901, *et seq.*

²⁵ Va. Code Ann. §§ 10.1-1400, *et seq.*

²⁶ 15 U.S.C. §§ 2601, *et seq.*

²⁷ 40 C.F.R. § 721.

²⁸ 15 U.S.C. § 2603.

- The scope of environmental diligence in M&A and real estate transaction diligence will expand to include assessment of potential PFAS-related risks, accordance with updates to applicable ASTM standards governing environmental site assessments, and other changes to environmental regulations to insert PFAS-related requirements and establish grounds for potential liability for clean-up costs, property damage and personal injuries related to PFAS.

V. Preparing for Coming Federal and State PFAS Regulations:

- In preparation for the coming federal and state PFAS regulations, we recommend that attorneys advise their businesses clients—especially in the target industries listed above—take the following steps:
 - Conduct and carefully document internal & confidential risk assessments of locations, operations, products and materials that may be potential PFAS sources;
 - Review and analyze current and future compliance obligations related to PFAS under all operating permits (e.g., air, water, waste, etc.);
 - Prepare a plan for meeting current and future compliance obligations related to PFAS;
 - Develop a plan for adjusting their operations to limit potential exposure to PFAS-related liability; and
 - Include potential PFAS-related liability in environmental risk assessment and management planning for future real estate and M&A transactions.

2022 PFAS Is Coming—Presentation by:

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Attachment A

PFAS Strategic Roadmap: EPA's Commitments to Action 2021–2024



A Note from EPA Administrator Michael S. Regan

For far too long, communities across the United States have been suffering from exposure to PFAS pollution. As the science has continued to develop, we know more now than ever about how PFAS build up in our bodies over long periods of time, and how they can cause adverse health effects that can devastate families. As Secretary of the North Carolina Department of Environmental Quality, I saw this devastation firsthand. For years, the Cape Fear River had been contaminated by these persistent “forever” chemicals. As I spoke with families and concerned citizens, I could feel their suffering and frustration with inaction. I knew my job was going to be trying and complex. But we were able to begin to address this pervasive problem by following the science, following the law, and bringing all stakeholders to the table.

As one of my earliest actions as EPA Administrator, I established the EPA Council on PFAS and charged it with developing an ambitious plan of action to further the science and research, to restrict these dangerous chemicals from getting into the environment, and to immediately move to remediate the problem in communities across the country. EPA’s PFAS strategic roadmap is our plan to deliver tangible public health benefits to all people who are impacted by these chemicals—regardless of their zip code or the color of their skin.

Since I’ve been EPA Administrator, I have become acutely aware of the invaluable and central role EPA has in protecting public health in America. For more than 50 years, EPA has implemented and enforced laws that protect people from dangerous pollution in the air they breathe, the water they drink, and the land that forms the foundation of their communities. At the same time, my experience in North Carolina

reinforced that EPA cannot solve these challenges alone. We can only make progress if we work in close collaboration with Tribes, states, localities, and stakeholders to enact solutions that follow the science and stand the test of time. To affect meaningful change, engagement, transparency, and accountability will be critical as we move forward.

This roadmap will not solve our PFAS challenges overnight. But it will turn the tide by harnessing the collective resources and authority across federal, Tribal, state, and local governments to empower meaningful action now.

I want to thank the co-chairs of the EPA Council on PFAS—Radhika Fox, Assistant Administrator for Water, and Deb Szaro, Acting Regional Administrator in Region 1—for their leadership in guiding the development of this strategy.

Let’s get to work.



Administrator Michael S. Regan

PFAS Council Members

The following policy and technical leaders serve as members of the EPA Council on PFAS. They have been instrumental in working with their respective offices to develop the Agency's strategy. The Council will continue to coordinate across all EPA offices and Regions to accelerate progress on PFAS.

Co-Chairs

Radhika Fox, Assistant Administrator for Water

Deb Szaro, Acting Regional Administrator,
Region 1

Office of the Administrator

John Lucey, Special Assistant to the
Administrator

Andrea Drinkard, Senior Advisor to the Deputy
Administrator

Office of Air and Radiation

John Shoaff, Director, Air Policy and Program
Support

Office of Chemical Safety and Pollution Prevention

Jeffrey Dawson, Science Advisor

Tala Henry, Deputy Director, Pollution Prevention
and Toxics

Office of Enforcement and Compliance Assurance

Cyndy Mackey, Director, Site Remediation
Enforcement

Karin Leff, Director, Federal Facilities
Enforcement

Office of General Counsel

Dawn Messier, Deputy Associate General
Counsel, Water

Jen Lewis, Deputy Associate General Counsel,
Solid Waste and Emergency Response

Office of Land and Emergency Management

Dana Stalcup, Deputy Director, Superfund
Remediation and Technology Innovation

Dawn Banks, Director, Policy Analysis and
Regulatory Management

Office of Research and Development

Tim Watkins, Acting Director, Center for Public
Health and Environmental Assessment

Susan Burden, PFAS Executive Lead

Office of Water

Jennifer McLain, Director, Ground Water and
Drinking Water

Deborah Nagle, Director, Science and
Technology

Zachary Schafer, Senior Advisor to the Assistant
Administrator

EPA Regions

John Blevins, Acting Regional Administrator,
Region 4

Tera Fong, Water Division Director, Region 5

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Introduction

Harmful per- and poly-fluoroalkyl substances (PFAS) are an urgent public health and environmental issue facing communities across the United States. PFAS have been manufactured and used in a variety of industries in the United States and around the globe since the 1940s, and they are still being used today. Because of the duration and breadth of use, PFAS can be found in surface water, groundwater, soil, and air—from remote rural areas to densely-populated urban centers. A growing body of scientific evidence shows that exposure at certain levels to specific PFAS can adversely impact human health and other living things. Despite these concerns, PFAS are still used in a wide range of consumer products and industrial applications.

Every level of government—federal, Tribal, state, and local—needs to exercise increased and sustained leadership to accelerate progress to clean up PFAS contamination, prevent new contamination, and make game-changing breakthroughs in the scientific understanding of PFAS. The EPA Council on PFAS developed this strategic roadmap to lay out EPA’s whole-of-agency approach to addressing PFAS. To deliver needed protections for the American people, the roadmap sets timelines by which the Agency plans to take specific actions during the first term of the Biden-Harris Administration. The strategic roadmap builds on and accelerates implementation of policy actions identified in the Agency’s 2019 action plan and

commits to bolder new policies to safeguard public health, protect the environment, and hold polluters accountable.

The risks posed by PFAS demand that the Agency attack the problem on multiple fronts at the same time. EPA must leverage the full range of statutory authorities to confront the human health and ecological risks of PFAS. The actions described in this document each represent important and meaningful steps to safeguard communities from PFAS contamination. Cumulatively, these actions will build upon one another and lead to more enduring and protective solutions.

EPA’s integrated approach to PFAS is focused on three central directives:

- **Research.** Invest in research, development, and innovation to increase understanding of PFAS exposures and toxicities, human health and ecological effects, and effective interventions that incorporate the best available science.
- **Restrict.** Pursue a comprehensive approach to proactively prevent PFAS from entering air, land, and water at levels that can adversely impact human health and the environment.
- **Remediate.** Broaden and accelerate the cleanup of PFAS contamination to protect human health and ecological systems.

The Agency's Approach

EPA's approach is shaped by the unique challenges to addressing PFAS contamination. EPA cannot solve the problem of “forever chemicals” by tackling one route of exposure or one use at a time. Rather, EPA needs to take a lifecycle approach to PFAS in order to make meaningful progress. PFAS pollution is not a legacy issue—these chemicals remain in use in U.S. commerce. As such, EPA cannot focus solely on cleaning up the downstream impacts of PFAS pollution. The Agency needs to also look upstream to prevent new PFAS contamination from entering air, land, and water and exposing communities. As the Agency takes tangible actions both upstream and downstream, EPA will continue to pursue a rigorous scientific agenda to better characterize toxicities, understand exposure pathways, and identify new methods to avert and remediate PFAS pollution. As EPA learns more about the family of PFAS chemicals, the Agency can do more to protect public health and the environment. In all this work, EPA will seek to hold polluters accountable for the contamination they cause and ensure disadvantaged communities equitably benefit from solutions.

Consider the Lifecycle of PFAS

EPA will account for the full lifecycle of PFAS, their unique properties, the ubiquity of their uses, and the multiple pathways for exposure.

PFAS are a group of synthetic chemicals that continue to be released into the environment throughout the lifecycle of manufacturing, processing, distribution in commerce, use, and disposal. Each action in this cycle creates environmental contamination and human and ecological exposure. Exacerbating this challenge is that some PFAS persist in the environment. PFAS are synthesized for many different uses, ranging from firefighting foams, to coatings for clothes and furniture, to food contact substances. Many PFAS are also used in industrial processes and applications, such as in the manufacturing of other chemicals and products. PFAS can be released into the environment during manufacturing and processing as well as during industrial and commercial use. Products known to contain PFAS are regularly disposed of in landfills and by incineration, which can also lead to the release of PFAS. Many PFAS have unique properties that prevent their complete breakdown in the environment, which means that even removing PFAS from contaminated areas can create PFAS-contaminated waste. This is currently unregulated in most cases.

Get Upstream of the Problem

EPA will bring deeper focus to preventing PFAS from entering the environment in the first place—a foundational step to reducing the exposure and potential risks of future PFAS contamination.

Intervening at the beginning of the PFAS lifecycle—before they have entered the environment—is a foundational element of EPA's whole-of-agency approach. While hundreds of individual PFAS compounds are in production and use,ⁱ a relatively

modest number of industrial facilities produce PFAS feedstock,ⁱⁱ and a relatively narrow set of industries directly discharge PFAS into water or soil or generate air emissions in large quantities.ⁱⁱⁱ This context helps to pinpoint clear opportunities to restrict releases into the environment. EPA will use its authorities to impose appropriate limitations on the introduction of new unsafe PFAS into commerce and will, as appropriate, use all available regulatory and permitting authorities to limit emissions and discharges from industrial facilities. This approach does not eliminate the need for remediation where releases and exposures have already occurred, but it is a critical step to preventing ongoing concentrated contamination of soil and surface and groundwaters.

Hold Polluters Accountable

EPA will seek to hold polluters and other responsible parties accountable for their actions and for PFAS remediation efforts.

Many communities and ecosystems are continuously exposed to PFAS in soil, surface water, groundwater, and air. Areas can be exposed due to their proximity to industrial sites, airports, military bases, land where biosolids containing PFAS have been applied, and other sites where PFAS have been produced or used and disposed of for specific and repeated purposes. When EPA becomes aware of a situation that poses a serious threat to human health or the environment, the Agency will take appropriate action. For other sites where contamination may have occurred, the presence of certain PFAS in these environments necessitates coordinated action to understand what specific PFAS have been released, locations where they are found, where they may be transported through air, soil, and water in the future, and what remediation is necessary. EPA will seek to hold polluters and other responsible parties accountable for their actions, ensuring that they assume responsibility for remediation efforts and prevent any future releases.

Ensure Science-Based Decision-Making

EPA will invest in scientific research to fill gaps in understanding of PFAS, to identify which additional PFAS may pose human health and ecological risks at which exposure levels, and to develop methods to test, measure, remove, and destroy them.

EPA's decisions regarding PFAS will be grounded in scientific evidence and analysis. The current body of scientific evidence clearly indicates that there are real, present, and significant hazards associated with specific PFAS, but significant gaps remain related to the impacts of other PFAS on human health and in the environment. Regulatory development, either at the state or federal level, would greatly benefit from a deeper scientific understanding of the exposure pathways, toxicities, and potential health impacts of less-studied PFAS. The federal government, states, industry, academia, and nonprofit organizations—with appropriate coordination and resources—have the capability to conduct this necessary research.

EPA is conducting new research to better understand the similar and different characteristics of specific PFAS and whether and how to address groups and categories of PFAS. The Agency is focused on improving its ability to address multiple chemicals at once, thereby accelerating the effectiveness of regulations, enforcement actions, and the tools and technologies needed to remove PFAS from air, land, and water.

To break the cycle of contamination and exposure from PFAS, additional research is needed to identify and/or develop techniques to permanently dispose of or destroy these durable compounds. Government agencies, industry, and private laboratories need tools and validated methods to measure PFAS in air, land, and water to identify pollution sources, demonstrate facility compliance, hold polluters accountable, and support communities during and after cleanups.

Prioritize Protection of Disadvantaged Communities

When taking action on PFAS, EPA will ensure that disadvantaged communities have equitable access to solutions.

Many known and potential sources of PFAS contamination (including military bases, airports, industrial facilities, and waste management and disposal sites) are near low-income communities and communities of color. EPA needs to ensure these affected populations have an opportunity to participate in and influence the Agency's decision-making. This may call for the Agency to seek out and facilitate the communities' engagement by providing culturally appropriate information and accommodations for people with Limited English Proficiency, facilitating community access to public meetings and comment periods, and offering technical assistance to build community-based capacity for participation. EPA's actions need to consider the unique on-the-ground conditions in these communities, such as outdated infrastructure, to help ensure they benefit equitably from policy solutions.

EPA will also collect more data and develop new methodologies to understand PFAS exposure pathways in disadvantaged communities; to what extent PFAS pollution contributes to the cumulative burden of exposures from multiple sources in these communities; and how non-environmental stressors, such as systemic socioeconomic disparities, can exacerbate the impacts of pollution exposure and vice versa.

Goals and Objectives

EPA's comprehensive approach to addressing PFAS is guided by the following goals and objectives.

RESEARCH

Invest in research, development, and innovation to increase understanding of PFAS exposures and toxicities, human health and ecological effects, and effective interventions that incorporate the best available science.

Objectives

- Build the evidence base on individual PFAS and define categories of PFAS to establish toxicity values and methods.
- Increase scientific understanding on the universe of PFAS, sources of environmental contamination, exposure pathways, and human health and ecological effects.
- Expand research on current and emerging PFAS treatment, remediation, destruction, disposal, and control technologies.
- Conduct research to understand how PFAS contribute to the cumulative burden of pollution in communities with environmental justice concerns.

RESTRICT

Pursue a comprehensive approach to proactively prevent PFAS from entering air, land, and water at levels that can adversely impact human health and the environment.

Objectives

- Use and harmonize actions under all available statutory authorities to control and prevent PFAS contamination and minimize exposure to PFAS during consumer and industrial uses.
- Place responsibility for limiting exposures and addressing hazards of PFAS on manufacturers, processors, distributors, importers, industrial and other significant users, dischargers, and treatment and disposal facilities.
- Establish voluntary programs to reduce PFAS use and release.
- Prevent or minimize PFAS discharges and emissions in all communities, regardless of income, race, or language barriers.

REMEDiate

Broaden and accelerate the cleanup of PFAS contamination to protect human health and ecological systems.

Objectives

- Harmonize actions under all available statutory authorities to address PFAS contamination to protect people, communities, and the environment.
- Maximize responsible party performance and funding for investigations and cleanup of PFAS contamination.
- Help ensure that communities impacted by PFAS receive resources and assistance to address contamination, regardless of income, race, or language barriers.
- Accelerate the deployment of treatment, remediation, destruction, disposal, and mitigation technologies for PFAS, and ensure that disposal and destruction activities do not create new pollution problems in communities with environmental justice concerns.

Key Actions

This section summarizes the bold actions that EPA plans to take from 2021 through 2024 on PFAS, as well as some ongoing efforts thereafter. The actions described in this roadmap are subject to the availability of appropriations and other resources. Each of these actions—led by EPA’s program offices—are significant building blocks in the Agency’s comprehensive strategy to protect public health and ecosystems by researching, restricting, and remediating PFAS contamination. As EPA takes each of these actions, it also commits to transparent, equitable, and inclusive engagement with all stakeholders to inform the Agency’s work.

These are not the only actions underway at EPA, nor will they be the last. As the Agency does more, it will learn more. And as EPA learns more, it will do more. As EPA continues to build the evidence base, as regulatory work matures, and as EPA learns more from its partnerships across the country, the Agency will deliver additional actions commensurate with the urgency and scale of response that the PFAS problem demands.

Office of Chemical Safety and Pollution Prevention

Publish national PFAS testing strategy *Expected Fall 2021*

EPA needs to evaluate a large number of PFAS for potential human health and ecological effects. Most PFAS have limited or no toxicity data. To address this data gap, EPA is developing a national PFAS testing strategy to deepen understanding of the impacts of categories of PFAS, including potential hazards to human health and the environment. This will help EPA identify and select PFAS for which the Agency will require testing using Toxic Substances Control Act (TSCA) authorities. In the 2020 National Defense Authorization Act (NDAA), Congress directed EPA to develop a process for prioritizing which PFAS or classes of PFAS should be subject to additional research efforts based on potential for human exposure to, toxicity of, and other available information. EPA will also identify existing test data for PFAS (both publicly available and submitted to EPA under TSCA) that will be considered prior to requiring further testing to ensure adherence to the TSCA goal of reducing animal testing. EPA will use the testing strategy to identify important gaps in existing data and to select representative chemical(s) within identified categories as priorities for additional studies. EPA expects to exercise its TSCA Section 4 order authority to require PFAS manufacturers to conduct and fund the studies. EPA plans to issue the first round of test orders on the selected PFAS by the end of 2021.

Ensure a robust review process for new PFAS *Efforts Ongoing*

EPA’s TSCA New Chemicals program plays an important gatekeeper role in ensuring the safety of new chemicals, including new PFAS, prior to their entry in U.S. commerce. Where unreasonable

risks are identified as part of the review process, EPA must mitigate those risks before any manufacturing activity can commence. The 2016 TSCA amendments require EPA to review and make a determination regarding the potential risks for each new chemical submission. Since early 2021, EPA has taken steps to ensure that new PFAS are subject to rigorous reviews and appropriate safeguards, including making changes to the policies and processes underpinning reviews and determinations on new chemicals to better align with the 2016 amendments. In addition, EPA has previously allowed some new PFAS to enter the market through low-volume exemptions (LVEs), following an expedited, 30-day review process. In April 2021, the Agency announced that it would generally expect to deny pending and future LVE submissions for PFAS based on the complexity of PFAS chemistry, potential health effects, and their longevity and persistence in the environment. Moving forward, EPA will apply a rigorous premanufacture notice review process for new PFAS to ensure these substances are safe before they enter commerce.

Review previous decisions on PFAS

Efforts Ongoing

EPA is also looking at PFAS that it has previously reviewed through the TSCA New Chemicals program, including those that it reviewed prior to the 2016 TSCA amendments. For example, EPA recently launched a stewardship program to encourage companies to voluntarily withdraw previously granted PFAS LVEs. EPA also plans to revisit past PFAS regulatory decisions and address those that are insufficiently protective. As part of this effort, the Agency could impose additional notice requirements to ensure it can review PFAS before they are used in new ways that might present concerns.

In addition, EPA plans to issue TSCA Section 5(e) orders for existing PFAS for which significant new use notices (e.g., a new manufacturing process for an existing PFAS, or a new use or user) have recently been filed with EPA. The orders would impose rigorous safety requirements as a condition of allowing the significant new use to commence.

More broadly, EPA is planning to improve approaches for overall tracking and enforcement of requirements in new chemical consent orders and significant new use rules (SNURs) to ensure that companies are complying with the terms of those agreements and regulatory notice requirements.

Close the door on abandoned PFAS and uses

Expected Summer 2022

Many existing chemicals (i.e., those that are already in commerce and listed on the TSCA Inventory of chemicals), including PFAS, are currently not subject to any type of restriction under TSCA. In some instances, the chemicals themselves have not been actively manufactured for many years. In others, chemicals may have certain past uses that have been abandoned. Absent restriction, manufacturers are free to begin using those abandoned chemicals or resume those abandoned uses at any time. Under TSCA, by rule, EPA can designate uses of a chemical that are not currently ongoing—and potentially *all* uses associated with an inactive chemical—as “significant new uses.” Doing so ensures that an entity must first submit a notice and certain information to EPA before it can resume use of that chemical or use. TSCA then requires EPA to review and make an affirmative determination on the potential risks to health and the environment and to require safety measures to address unreasonable risks before allowing the PFAS use to resume. EPA is considering how it can apply this authority to help address abandoned uses of PFAS as well as future uses of PFAS on the inactive portion of the TSCA Inventory.

Enhance PFAS reporting under the Toxics Release Inventory

Expected Spring 2022

The Toxics Release Inventory (TRI) helps EPA compile data and information on releases of certain chemicals and supports informed decision-making by companies, government agencies, non-governmental organizations, and the public. Pursuant to the 2020 NDAA, certain industry sectors must report certain PFAS releases to TRI. However, certain

exemptions and exclusions remain for those PFAS reporters, which significantly limited the amount of data that EPA received for these chemicals in the first year of reporting.^{iv} To enhance the quality and quantity of PFAS information collected through TRI, EPA intends to propose a rulemaking in 2022 to categorize the PFAS on the TRI list as “Chemicals of Special Concern” and to remove the de minimis eligibility from supplier notification requirements for all “Chemicals of Special Concern.” EPA will also continue to update the list of PFAS subject to TRI and expects to announce an additional rulemaking to add more PFAS to TRI in 2022, as required by the 2020 NDAA.

Finalize new PFAS reporting under TSCA Section 8 *Expected Winter 2022*

TSCA Section 8(a)(7) provides authority for EPA to collect existing information on PFAS. In June 2021, EPA published a proposed data-gathering rule that would collect certain information on any PFAS manufactured since 2011, including information on uses, production volumes, disposal, exposures, and hazards. EPA will consider public comments on the proposal and finalize it before January 1, 2023. Ultimately, information received under this rule will enable EPA to better characterize the sources and quantities of manufactured PFAS in the United States and will assist the Agency in its future research, monitoring, and regulatory efforts.

Office of Water

Undertake nationwide monitoring for PFAS in drinking water *Final Rule Expected Fall 2021*

The Safe Drinking Water Act (SDWA) establishes a data-driven and risk-based process to assess drinking water contaminants of emerging concern. Under SDWA, EPA requires water systems to conduct sampling for unregulated contaminants every five years. EPA published the proposed Fifth Unregulated Contaminant Monitoring Rule (UCMR 5) in March 2021. As proposed, UCMR 5 would provide new data that is critically needed to improve EPA’s understanding of the frequency that 29 PFAS are found in the nation’s drinking water systems and at what levels. The proposed UCMR 5 would significantly expand the number of drinking water systems participating in the program, pending sufficient appropriations by Congress. The data gathered from an expanded set of drinking water systems would improve EPA’s ability to conduct state and local assessments of contamination, including analyses of potential environmental justice impacts. As proposed, and if funds are appropriated by Congress, all public water systems serving 3,300 or more people and 800 representative public water systems serving fewer than 3,300 would collect samples during a 12-month period from January 2023 through December 2025. EPA is considering comments on the proposed UCMR 5 and preparing a final rule. Going forward, EPA will continue to prioritize additional PFAS for inclusion in UCMR 6 and beyond, as techniques to measure these additional substances in drinking water are developed and validated.

Establish a national primary drinking water regulation for PFOA and PFOS *Proposed Rule Expected Fall 2022, Final Rule Expected Fall 2023*

Under the SDWA, EPA has the authority to set enforceable National Primary Drinking Water Regulations (NPDWRs) for drinking water contaminants and require monitoring of public water

supplies. To date, EPA has regulated more than 90 drinking water contaminants but has not established national drinking water regulations for any PFAS. In March 2021, EPA published the Fourth Regulatory Determinations, including a final determination to regulate Perfluorooctanoic acid (PFOA) and Perfluorooctane sulfonic acid (PFOS) in drinking water. The Agency is now developing a proposed NPDR for these chemicals. As EPA undertakes this action, the Agency is also evaluating additional PFAS and considering regulatory actions to address groups of PFAS. EPA expects to issue a proposed regulation in Fall 2022 (before the Agency's statutory deadline of March 2023). The Agency anticipates issuing a final regulation in Fall 2023 after considering public comments on the proposal. Going forward, EPA will continue to analyze whether NPDR revisions can improve public health protection as additional PFAS are found in drinking water.

Publish the final toxicity assessment for GenX and five additional PFAS *Expected Fall 2021 and Ongoing*

EPA plans to publish the toxicity assessments for two PFAS, hexafluoropropylene oxide dimer acid and its ammonium salt. These two chemicals are known as “GenX chemicals.” GenX chemicals have been found in surface water, groundwater, drinking water, rainwater, and air emissions. GenX chemicals are known to impact human health and ecosystems. Scientists have observed liver and kidney toxicity, immune effects, hematological effects, reproductive and developmental effects, and cancer in animals exposed to GenX chemicals. Completing a toxicity assessment for GenX is essential to better understanding its effects on people and the environment. EPA can use this information to develop health advisories that will help communities make informed decisions to better protect human health and ecological wellness. The Office of Research and Development is also currently developing toxicity assessments for five other PFAS—PFBA, PFHxA, PFHxS, PFNA, and PFDA.

Publish health advisories for GenX and PFBS *Expected Spring 2022*

PFAS contamination has impacted drinking water quality across the country, including in underserved rural areas and communities of color. SDWA authorizes EPA to develop non-enforceable and non-regulatory drinking water health advisories to help Tribes, states, and local governments inform the public and determine whether local actions are needed to address public health impacts in these communities. Health advisories offer a margin of protection by defining a level of drinking water concentration at or below which lifetime exposure is not anticipated to lead to adverse health effects. They include information on health effects, analytical methodologies, and treatment technologies and are designed to protect all lifestages. EPA will publish health advisories for Perfluorobutane sulfonic acid (PFBS) and GenX chemicals based on final toxicity assessments. The Agency will develop accompanying fact sheets in different languages to facilitate access to information on GenX and other PFAS. Going forward, EPA will develop health advisories as the Agency completes toxicity assessments for additional PFAS.

Restrict PFAS discharges from industrial sources through a multi-faceted Effluent Limitations Guidelines program *Expected 2022 and Ongoing*

Effluent Limitations Guidelines (ELGs) are a powerful tool to limit pollutants from entering the nation's waters. ELGs establish national technology-based regulatory limits on the level of specified pollutants in wastewater discharged into surface waters and into municipal sewage treatment facilities. EPA has been conducting a PFAS multi-industry study to inform the extent and nature of PFAS discharges. Based on this study, EPA is taking a proactive approach to restrict PFAS discharges from multiple industrial categories. EPA plans to make significant progress in its ELG regulatory work by the end of 2024. EPA has established timelines for action—whether it is data collection

or rulemaking—on the nine industrial categories in the proposed PFAS Action Act of 2021, as well as other industrial categories such as landfills. EPA’s multi-faceted approach entails:

- Undertake rulemaking to restrict PFAS discharges from industrial categories where EPA has the data to do so—including the guidelines for organic chemicals, plastics and synthetic fibers (OCPSF), metal finishing, and electroplating. Proposed rule is expected in Summer 2023 for OCPSF and Summer 2024 for metal finishing and electroplating.
- Launch detailed studies on facilities where EPA has preliminary data on PFAS discharges, but the data are currently insufficient to support a potential rulemaking. These include electrical and electronic components, textile mills, and landfills. EPA expects these studies to be complete by Fall 2022 to inform decision making about a future rulemaking by the end of 2022.
- Initiate data reviews for industrial categories for which there is little known information on PFAS discharges, including leather tanning and finishing, plastics molding and forming, and paint formulating. EPA expects to complete these data reviews by Winter 2023 to inform whether there are sufficient data to initiate a potential rulemaking.
- Monitor industrial categories where the phaseout of PFAS is projected by 2024, including pulp, paper, paperboard, and airports. The results of this monitoring, and whether future regulatory action is needed, will be addressed in the Final ELG Plan 15 in Fall 2022.

Leverage NPDES permitting to reduce PFAS discharges to waterways

Expected Winter 2022

The National Pollutant Discharge Elimination System (NPDES) program interfaces with many pathways by which PFAS travel and are released into the environment and ultimately impact people and water quality. EPA will seek to proactively use existing

NPDES authorities to reduce discharges of PFAS at the source and obtain more comprehensive information through monitoring on the sources of PFAS and quantity of PFAS discharged by these sources. EPA will use the effluent monitoring data to inform which industrial categories the Agency should study for future ELGs actions to restrict PFAS in wastewater discharges.

- **Leverage federally-issued NPDES permits to reduce PFAS discharges.**^v EPA will propose monitoring requirements at facilities where PFAS are expected or suspected to be present in wastewater and stormwater discharges, using EPA’s recently published analytical method 1633, which covers 40 unique PFAS. In addition, EPA will propose, as appropriate, that NPDES permits: 1) contain conditions based on product elimination and substitution when a reasonable alternative to using PFAS is available in the industrial process; 2) require best management practices to address PFAS-containing firefighting foams for stormwater permits; 3) require enhanced public notification and engagement with downstream communities and public water systems; and 4) require pretreatment programs to include source control and best management practices to protect wastewater treatment plant discharges and biosolid applications.
- **Issue new guidance to state permitting authorities to address PFAS in NPDES permits.** EPA will issue new guidance recommending that state-issued permits that do not already include monitoring requirements for PFAS use EPA’s recently published analytical method 1633, which covers 40 unique PFAS, at facilities where PFAS is expected or suspected to be present in wastewater and stormwater discharges. In addition, the new guidance will recommend the full suite of permitting approaches that EPA will use in federally-issued permits. The guidance will enable communities to work closely with their state permitting authorities to suggest monitoring at facilities suspected of containing PFAS.

Publish multi-laboratory validated analytical method for 40 PFAS

Expected Fall 2022

In September 2021, EPA (in collaboration with the Department of Defense) published a single-laboratory validated method to detect PFAS. The method can measure up to 40 specific PFAS compounds in eight environmental matrices (including wastewater, surface water and biosolids) and has numerous applications, including NPDES compliance monitoring. EPA and DOD are continuing this collaboration to complete a multi-laboratory validation of the method. EPA expects to publish the multi-lab validated method online by Fall 2022. Following the publication of the method, EPA will initiate a rulemaking to propose the promulgation of this method under the Clean Water Act (CWA).

Publish updates to PFAS analytical methods to monitor drinking water

Expected Fall 2024

SDWA requires EPA to use scientifically robust and validated analytical methods to assess the occurrence of contaminants of emerging concern, such as an unidentified or newly detected PFAS chemical. EPA will update and validate analytical methods to monitor additional PFAS. First, EPA will review reports of PFAS of concern and seek to procure certified reference standards that are essential for accurate and selective quantitation of emerging PFAS of concern in drinking water samples. EPA will evaluate analytical methods previously published for monitoring PFAS in drinking water (EPA Methods 533 and 537.1) to determine the efficacy of expanding the established target PFAS analyte list to include any emerging PFAS. Upon conclusion of this evaluation, EPA will complete multi-laboratory validation studies and peer review and publish updated EPA PFAS analytical methods for drinking water, making them available to support future drinking water monitoring programs.

Publish final recommended ambient water quality criteria for PFAS

Expected Winter 2022 and Fall 2024

EPA will develop national recommended ambient water quality criteria for PFAS to protect aquatic life and human health. Tribes and states use EPA-recommended water quality criteria to develop water quality standards to protect and restore waters, issue permits to control PFAS discharges, and assess the cumulative impact of PFAS pollution on local communities. EPA will publish recommended aquatic life criteria for PFOA and PFOS and benchmarks for other PFAS that do not have sufficient data to define a recommended aquatic life criteria value. EPA will first develop human health criteria for PFOA and PFOS, taking into account drinking water and fish consumption. This initiative will consider the latest scientific information and will develop human health criteria for additional PFAS when final toxicity assessments are available. Additionally, EPA will support Tribes in developing water quality standards that will protect waters under Tribal jurisdiction under the same framework as waters in adjacent states. Aquatic life criteria are expected in Winter 2022, and human health criteria are expected Fall 2024.

Monitor fish tissue for PFAS from the nation's lakes and evaluate human biomarkers for PFAS

Expected Summer 2022

States and Tribes have highlighted fish tissue data in lakes as a critical information need. Food and water consumption are important pathways of PFAS exposure, and PFAS can accumulate in fish tissue. In fact, EPA monitoring to date shows the presence of PFAS, at varying levels, in approximately 100 percent of fish tested in the Great Lakes and large rivers. In Summer 2022, EPA will collect fish tissue in the National Lakes Assessment for the first national study of PFAS in fish tissue in U.S. lakes. This will provide a better understanding of where PFAS fish tissue contamination is occurring, which

PFAS are involved, and the severity of the problem. The new data will complement EPA's analyses of PFAS in fish tissue and allow EPA to better understand unique impacts on subsistence fishers, who may eat fish from contaminated waterbodies in higher quantities. EPA's preliminary analysis on whether concentrations of certain PFAS compounds in human blood could be associated with eating fish using the Centers for Disease Control and Prevention's National Health and Nutrition Examination Survey (NHANES) data found a positive correlation. Completing this analysis will help make clear the importance of the fish consumption pathway for protecting communities. EPA will continue to pursue collaboration with Tribal and federal partners to investigate this issue of mutual interest.

Finalize list of PFAS for use in fish advisory programs

Expected Spring 2023

EPA will publish a list of PFAS for state and Tribal fish advisory programs that are either known or thought to be in samples of edible freshwater fish in high occurrence nationwide. This list will serve as guidance to state and Tribal fish tissue monitoring and advisory programs so that they know which PFAS to monitor and how to set fish advisories for PFAS that have human health impacts via fish consumption. This information will encourage more robust data collection from fish advisory programs and promote consistency of fish tissue PFAS monitoring results in EPA's publicly accessible Water Quality Portal. By issuing advisories for PFAS, state and Tribal programs can provide high-risk populations, including communities and individuals who depend on subsistence fishing, with more information about how to protect their health.

Finalize risk assessment for PFOA and PFOS in biosolids

Expected Winter 2024

Biosolids, or sewage sludge, from wastewater treatment facilities can sometimes contain PFAS. When spread on agricultural fields, the PFAS can contaminate crops and livestock. The CWA authorizes EPA to set pollutant limits and monitoring and reporting requirements for contaminants in biosolids if sufficient scientific evidence shows that there is potential harm to human health or the environment. A risk assessment is key to determining the potential harm associated with human exposure to chemicals. EPA will complete the risk assessment for PFOA and PFOS in biosolids by Winter 2024. The risk assessment will serve as the basis for determining whether regulation of PFOA and PFOS in biosolids is appropriate. If EPA determines that a regulation is appropriate, biosolids standards would improve the protection of public health and wildlife health from health effects resulting from exposure to biosolids containing PFOA and PFOS.

Office of Land and Emergency Management

Propose to designate certain PFAS as CERCLA hazardous substances

Proposed rule expected Spring 2022; Final rule expected Summer 2023

EPA is developing a Notice of Proposed Rulemaking to designate PFOA and PFOS as Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) hazardous substances. Such designations would require facilities across the country to report on PFOA and PFOS releases that meet or exceed the reportable quantity assigned to these substances. The hazardous substance designations would also enhance the ability of federal, Tribal, state, and local authorities to obtain information regarding the location and extent of releases. EPA or other agencies could also seek cost recovery or contributions for costs incurred for the cleanup. The proposed rulemaking will be available for public comment in Spring 2022. The Agency commits to conducting robust stakeholder engagement with communities near PFAS-contaminated sites.

Issue advance notice of proposed rulemaking on various PFAS under CERCLA

Expected Spring 2022

In addition to developing a Notice of Proposed Rulemaking designating PFOA and PFOS as hazardous substances under CERCLA, EPA is developing an Advance Notice of Proposed Rulemaking to seek public input on whether to similarly designate other PFAS. The Agency may request input regarding the potential hazardous substance designation for precursors to PFAS, additional PFAS, and groups or subgroups of PFAS. The Agency will engage robustly with communities near PFAS-contaminated sites to seek their input

and learn about their lived experiences. Going forward, EPA will consider designating additional PFAS as hazardous substances under CERCLA as more specific information related to the health effects of those PFAS and methods to measure them in groundwater are developed.

Issue updated guidance on destroying and disposing of certain PFAS and PFAS-containing materials

Expected by Fall 2023

The 2020 NDAA requires that EPA publish interim guidance on destroying and disposing of PFAS and certain identified non-consumer PFAS-containing materials. It also requires that EPA revise that guidance at least every three years, as appropriate. EPA published the first interim guidance in December 2020 for public comment. It identifies three technologies that are commercially available to either destroy or dispose of PFAS and PFAS-containing materials and outlines the significant uncertainties and information gaps that exist concerning the technologies' ability to destroy or dispose of PFAS while minimizing the migration of PFAS to the environment. The guidance also highlights research that is underway and planned to address some of these information gaps. Furthermore, the interim guidance identifies existing EPA tools, methods, and approaches to characterize and assess the risks to disproportionately impacted people of color and low-income communities living near likely PFAS destruction or disposal sites. EPA's updated guidance will address the public comments and reflect newly published research results. Since the publication of the interim guidance, EPA and other agencies have been conducting relevant research on destruction and disposal technologies. EPA anticipates that additional research data will become available starting in 2022. EPA will update the guidance when sufficient useful information is available and no later than the statutory deadline of December 2023.

Office of Air and Radiation

Build the technical foundation to address PFAS air emissions

Expected Fall 2022 and Ongoing

The Clean Air Act requires EPA to regulate emissions of hazardous air pollutants (HAPs), which are pollutants that are known or suspected to cause cancer or other serious health effects. At present, EPA actively works with Tribal, state, and local governments to reduce air emissions of 187 HAPs to the environment. While PFAS are not currently listed as HAPs under the Clean Air Act, EPA is building the technical foundation on PFAS air emissions to inform future decisions. EPA is conducting ongoing work to:

- Identify sources of PFAS air emissions;
- Develop and finalize monitoring approaches for measuring stack emissions and ambient concentrations of PFAS;
- Develop information on cost-effective mitigation technologies; and
- Increase understanding of the fate and transport of PFAS air emissions to assess their potential for impacting human health via contaminated groundwater and other media pathways.

EPA will use a range of tools, such as EJSCREEN, to determine if PFAS air pollution disproportionately affects communities with environmental justice concerns. Data from other ongoing EPA activities, such as field tests, TRI submissions, and new TSCA reporting and recordkeeping requirements, will help EPA collect additional information on sources and releases. By Fall 2022, EPA will evaluate mitigation options, including listing certain PFAS as hazardous air pollutants and/or pursuing other regulatory and non-regulatory approaches. The Agency will continue to collect necessary supporting technical information on an ongoing basis.

Office of Research and Development

Develop and validate methods to detect and measure PFAS in the environment

Ongoing Actions

Robust, accurate methods for detecting and measuring PFAS in air, land, and water are essential for understanding which PFAS are in the environment and how much are present. These methods are also essential for evaluating the effectiveness of different technologies for removing PFAS from air, land, and water and for implementing future regulations. To date, EPA has developed validated methods to measure 29 PFAS in drinking water and 24 PFAS in groundwater, surface water, and wastewater. EPA has also developed a method for measuring selected PFAS in air emissions. EPA will build on this work by developing additional targeted methods for detecting and measuring specific PFAS and non-targeted methods for identifying unknown PFAS in the environment. EPA also recognizes the need for “total PFAS” methods that can measure the amount of PFAS in environmental samples without identifying specific PFAS. EPA will increase its efforts to develop and, if appropriate, validate “total PFAS” methods, focusing on air emissions, wastewater, and drinking water. Near-term deliverables include:

- Draft total adsorbable fluorine method for wastewater for potential laboratory validation (Fall 2021);
- Draft method for measuring additional PFAS in air emissions (Fall 2022); and
- Draft methods and approaches for evaluating PFAS leaching from solid materials (Fall 2022).

Advance the science to assess human health and environmental risks from PFAS

Ongoing Actions

EPA will expand understanding of the toxicity of PFAS through several ongoing research activities. First, EPA will continue to develop human health toxicity assessments for individual PFAS under EPA’s Integrated Risk Information System (IRIS) Program,

and if needed, other fit-for-purpose toxicity values. When combined with exposure information and other important considerations, EPA can use these toxicity assessments to assess potential human health risks to determine if, and when, it is appropriate to address these chemicals. Most PFAS, however, have limited or no toxicity data to inform human health or ecological toxicity assessments. To better understand human health and ecological toxicity across a wider variety of PFAS, EPA will continue to compile and summarize available and relevant scientific information on PFAS and conduct toxicity testing on individual PFAS and PFAS mixtures. This will inform the development and refinement of PFAS categories for hazard assessment. EPA will also conduct research to identify PFAS sources in the outdoor and indoor environment, to characterize PFAS movement through the environment, and to identify the relative importance of different human exposure pathways to PFAS (e.g., ingestion of contaminated food or water, interaction with household articles or consumer products, and inhalation of indoor or outdoor air containing PFAS). EPA also will work to characterize how exposure to PFAS may contribute to cumulative impacts on communities, particularly communities with environmental justice concerns. Near-term deliverables include:

- Identify initial PFAS categories to inform TSCA test orders as part of the PFAS National Testing Strategy (Fall 2021)
- Consolidate and update data on chemical/physical properties, human health toxicity and toxicokinetics, and ecotoxicity (Spring 2022 – Fall 2024)
- Complete draft PFHxS, PFHxA, PFNA, and PFDA IRIS assessments for public comment and peer review (Spring – Fall 2022)
- Complete and publish the final PFBA IRIS assessment (Fall 2022)

Evaluate and develop technologies for reducing PFAS in the environment

Ongoing Actions

EPA needs new data and information on the effectiveness of different technologies and approaches for removing PFAS from the environment and

managing PFAS and PFAS-containing materials to inform decisions on drinking water and wastewater treatment, contaminated site cleanup and remediation, air emission controls, and end-of-life materials management. This information is also needed to better ensure that particular treatment and waste management technologies and approaches do not themselves lead to additional PFAS exposures, particularly in overburdened communities where treatment and waste management facilities are often located. Toward that end, EPA will continue efforts to develop approaches for characterizing PFAS in source waters, at contaminated sites, and near PFAS production and treatment/disposal facilities. EPA will also continue to evaluate and develop technologies for drinking water and wastewater treatment, contaminated site remediation, air emission controls, and destruction and disposal of PFAS-containing materials and waste streams. These efforts include conducting laboratory- and pilot-scale studies, which will inform the design of full-scale field studies done in partnership with facilities and states to evaluate real-world applications of different PFAS removal technologies and management approaches.

EPA will prioritize efforts to evaluate conventional thermal treatment of PFAS-containing wastes and air emissions and assess the effectiveness of conventional drinking water and wastewater treatment processes. EPA will also continue to evaluate and advance the application of innovative, non-thermal technologies to treat PFAS waste and PFAS-contaminated materials. Building upon these evaluations, EPA will document the performance of PFAS removal technologies and establish technology-based PFAS categories that identify the list of PFAS that are effectively removed through the application of the associated technology. Near-term deliverables include:

- Collect data to inform the 2023 guidance on destroying and disposing of certain PFAS and PFAS-containing materials (Spring 2022 – Fall 2023);
- Identify initial PFAS categories for removal technologies (Summer 2022); and
- Develop effective PFAS treatment technologies for drinking water systems (Fall 2022).

Cross-Program

Engage directly with affected communities in every EPA Region *Expected Fall 2021 and Ongoing*

EPA must fully understand the challenges facing individuals and communities grappling with PFAS contamination to understand their lived experiences and determine the most effective interventions. As recommended by the National Environmental Justice Advisory Council (NEJAC), EPA will meet with affected communities in each EPA Region to hear how PFAS contamination impacts their lives and livelihoods. EPA will use the knowledge from these engagements to inform the implementation of the actions described in this roadmap. EPA will also use the input to develop and share information to reduce potential health risks in the near term and help communities on the path to remediation and recovery from PFAS contamination.

Use enforcement tools to better identify and address PFAS releases at facilities *Ongoing Actions*

EPA is initiating actions under multiple environmental authorities—RCRA, TSCA, CWA, SDWA and CERCLA—to identify past and ongoing releases of PFAS into the environment at facilities where PFAS has been used, manufactured, discharged, disposed of, released, and/or spilled. EPA is conducting inspections, issuing information requests, and collecting data to understand the level of contamination and current risks posed by PFAS to surrounding communities and will seek to address threats to human health with all its available tools. For example, EPA's enforcement authorities allow the Agency, under certain circumstances, to require parties responsible for PFAS contamination to characterize the nature and extent of PFAS contamination, to put controls in place to expeditiously limit future releases, and to address contaminated drinking water, soils, and other contaminated media.

When EPA becomes aware of a potential imminent and substantial endangerment situation where PFAS poses a threat to human health, the Agency will swiftly employ its expertise to assess the situation and take appropriate action, including using statutorily authorized powers.

Accelerate public health protections by identifying PFAS categories *Expected Winter 2021 and Ongoing*

To accelerate EPA's ability to address PFAS and deliver public health protections sooner, EPA is working to break the large, diverse class of PFAS into smaller categories based on similarities across defined parameters (such as chemical structure, physical and chemical properties, and toxicological properties). EPA plans to initially categorize PFAS using two approaches. In the first approach, EPA plans to use toxicity and toxicokinetic data to develop PFAS categories for further hazard assessment and to inform hazard- or risk-based decisions. In the second approach, EPA plans to develop PFAS categories based on removal technologies using existing understanding of treatment, remediation, destruction, disposal, control, and mitigation principles.

EPA plans to use the PFAS categories developed from these two approaches to identify gaps in coverage from either a hazard assessment or removal technology perspective, which will help EPA prioritize future actions to research, restrict, and remediate PFAS. For example, EPA may choose to prioritize research to characterize the toxicity of PFAS that are not being addressed by regulations that require the implementation of removal technologies. Conversely, EPA may prioritize research to evaluate the efficacy of technologies designed to remove PFAS that are included in a hazard-based category with relatively higher toxicities. To support coordination and integration of information across PFAS categories, EPA plans to develop a PFAS categorization database that will capture key characteristics of individual PFAS, including category assignments.

Establish a PFAS Voluntary Stewardship Program

Expected Spring 2022

Reduction of PFAS exposure through regulatory means can take time to develop, finalize, and implement. Moreover, current PFAS regulatory efforts do not extend to all of the approximately 600 PFAS currently in commerce. As a companion to other efforts described in this roadmap, EPA will establish a voluntary stewardship program challenging industry to reduce overall releases of PFAS into the environment. The program, which will not supplant industry's regulatory or compliance requirements, will call on industry to go beyond those requirements by reporting all PFAS releases in order to establish a baseline and then continuing to report to measure progress in reducing releases over time. EPA will validate industry efforts to meet reduction targets and timelines.

Educate the public about the risks of PFAS

Expected Fall 2021 and Ongoing

Addressing PFAS contamination is a critical part of EPA's mission to protect human health and the environment. This important mission cannot be achieved without effectively communicating with communities, individuals, businesses, the media, and Tribal, state, and local partners about the known and potential health risks associated with these chemicals. When EPA communicates risk, it is the Agency's goal to provide meaningful, understandable, and actionable information to many audiences. To accomplish this goal, EPA will make available key explainers that help the public understand what PFAS are, how they are used, and how PFAS can impact their health and their lives. These explainers and other educational materials will be published in multiple languages, and the Agency will work to ensure information reaches targeted communities (including those with limited access to technology and resources).

Issue an annual public report on progress towards PFAS commitments

Winter 2022 and Ongoing

EPA is committed to acting on PFAS with transparency and accountability. On an annual basis, EPA will report to the public on the status of the actions outlined in this roadmap, as well as future actions the Agency may take. EPA will also engage regularly with communities experiencing PFAS contamination, co-regulators, industry, environmental groups, community leaders, and other stakeholders to clearly communicate its actions and to stay abreast of evolving needs.

Conclusion

Every level of government—federal, Tribal, state, and local—needs to exercise increased and sustained leadership to accelerate progress to clean up PFAS contamination, prevent new contamination, and make game-changing breakthroughs in the scientific understanding of PFAS. This strategic roadmap represents the Agency’s commitment to the American people on what EPA seeks to deliver from 2021 to 2024.

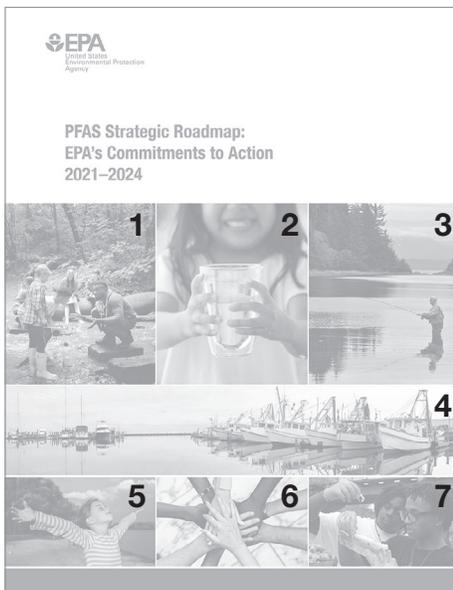
The risks posed by PFAS demand that the Agency take a whole-of-agency approach to attack the problem from multiple directions. Focusing only

on remediating legacy contamination, for example, does nothing to prevent new contamination from occurring. Focusing only on preventing future contamination fails to minimize risks to human health that exist today. To build more enduring, comprehensive, and protective solutions, EPA seeks to leverage its full range of statutory authorities and work with its partners—including other federal agencies, state and Tribal regulators, scientists, industry, public health officials, and communities living with PFAS contamination—to implement this multi-media approach and achieve tangible benefits for human health and the environment.^{vi}

Endnotes

- ⁱ Approximately 650 PFAS are currently in commerce under TSCA, roughly half of which were grandfathered into the TSCA inventory.
- ⁱⁱ EPA has identified 6-8 facilities that produce PFAS feedstock.
- ⁱⁱⁱ Key industries with significant documented discharges include PFAS production and processing, metal finishing, airports, pulp and paper, landfills, and textile and carpet manufacturing.
- ^{iv} Examples include de minimis exemption, supplier notification requirements, and applicability of those requirements to wastes.
- ^v Federally-issued permits are those that EPA issues in MA, NH, NM, DC, territories, federal waters, and Indian Country (and federal facilities in DE, CO, VT, WA).
- ^{vi} This document provides information to the public on how EPA intends to exercise its discretion in implementing statutory and regulatory provisions that apply to PFAS. Those provisions contain legally binding requirements, and this document does not substitute for those statutory and regulatory provisions or regulations, nor is it a regulation itself.

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Risk Management for Construction Clients

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Risk Management for Construction Clients

2022 Gentry Locke Seminar- Richmond, VA

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I. Introduction

Unfortunately, there is no perfect construction project. As they approach a new construction project, the owner, general contractor, its subcontractors, and its suppliers all encounter a multitude of risks. Some risks arise out of the contracts between them, some risks arise out of tort law, and some arise out of applicable statutes and regulations. It is vital that any party to a construction contract, subcontract, or purchase order for materials or equipment to be supplied to a construction project, understand the risks that they face, and take reasonable steps to manage and mitigate those risks.

II. Contractual Risk Management

Construction contracts are key to managing and transferring risk between the parties. Below are several contractual clauses and tools to mitigate and manage risk.

A. Flow Down Provisions

The general contractor should not stand alone in its contractual responsibilities and obligations to the owner. Every subcontract between the general contractor and a subcontractor should contain a flow down provision that passes down to the subcontractor all of the responsibilities and obligations that the general contractor owes to the owner in the prime contract. The subcontract should also require the subcontractor to flow down these responsibilities and obligations to its lower tier subcontractors.

1. Make sure that the general contractor provides to its subcontractors, or at least makes available for review, all prime contract documents that are incorporated into the subcontract. If you represent a subcontractor, be sure to ask the general contractor to provide copies of all contract documents and review them with your client.

2. The flow down provision(s) should include the insurance and bonding requirements in the prime contract. This is an important step to avoid gaps in the event that a subcontractor causes a loss that should be covered by an insurance policy, a payment bond or a performance bond.

3. The flow down provision(s) should include all schedule and time of performance terms and deadlines, as well as any liquidated or delay damages obligations that the general contractor owes to the owner. If the subcontractor is the cause of a period of delay that results in the general contractor owing the owner liquidated or actual delay damages, then the subcontract should obligate the subcontractor to pay the general contractor any damages owed to the owner, and for the general contractor's delay damages as well.

4. The general contractor should take care to avoid gaps in scopes of work. If the general contractor's scope of work is broader than the scope of work passed to the subcontractor, then the general contractor will have to fill in these gaps with its own people. To avoid these gaps, the subcontract should incorporate the specification sections and scope documents from the prime contract.

B. Choice of Law Clause

The prime contract and subcontracts should specifically select Virginia law as governing the interpretation and enforcement of the contract, regardless of the location of the project. The

inclusion of this clause can help avoid unanticipated outcomes resulting from the application of state laws with which the general contractor is unfamiliar.

C. Forum Selection Clause

The prime contract and all subcontracts should include a forum selection clause. The selected forum should be either the location of the project or the location of your client's office.

D. Waiver of Subrogation

The contract documents should include a waiver of subrogation in the event damages are covered by an insurance policy.

E. Waiver of Consequential Damages

The contract documents should include a clause whereby both parties waive consequential damages in the event of a dispute, so that they can only recover direct damages.

F. Differing conditions, extras, and change orders

The prime contract and all subcontracts should include clear provisions concerning how to address differing conditions should they arise, as well as requests for the performance of extra work outside of the original contract or subcontract scope, and how to process change orders to properly document changes in the contract scope, pricing, or time. The contract and subcontract documents should require the change order be in writing and should require the party seeking a change order continue with its work while the change order request is pending. Any dispute concerning a requested change order should be addressed by the dispute resolution process.

G. Claims and Dispute Resolution

The prime contract and subcontract documents should expressly state the process for the resolution of claims and disputes. A claim is a request or demand for additional compensation (costs or time) on account of a change in the terms of the contract.

1. Types of Claims

- a. Claims from a failure to pay
- b. Claims from changes to the scope of the work
 - i. Claims for increased work and increased complexity of work
 - ii. Differing or unforeseen site conditions claims
 - iii. Change order/CCD claims
- c. Acceleration claims
- d. Delay claims
 - i. Excusable delay vs. Compensable delay
- e. Idle equipment or labor claims
- f. Claims by Owner
 - i. Failure to perform the work Performance bonds
 - ii. Damage to the work
 - iii. Defective work
 - 1. Repair costs vs. corrective work
 - iv. Delayed completion
 - 1. Liquidated damages or actual damages

- 2. The prime contract and subcontract documents should include provisions requiring timely notice of claims. Failure to provide timely notice should prohibit the party asserting the claim from recovery. The notice period should provide the general contractor sufficient time to review the claim and provide notice to the owner within the time period required in the prime contract.

3. The subcontract should include a provision that establishes how to cooperate in pursuing upstream claims. The parties should also agree to shift to the subcontractor costs associated with experts, consultants, and lay witnesses necessary to pursue upstream claims.
4. The contract documents should include an attorneys' fees shifting provision so that the client can recover its attorneys' fees if it prevails.
5. The dispute resolution clause should specify if the parties will resolve a dispute by litigation in a court of competent jurisdiction, or if they will submit to arbitration.
6. If the chosen method of dispute resolution is litigation, then the contract documents should include an express waiver of the right to a jury trial. Juries are unpredictable, and it is most often preferable to submit a complex construction dispute to a judge rather than the inexperienced laypersons on a jury.
7. The contract documents should state whether the parties will be required to first engage in formal negotiations and/or mediation. Many form contract documents, including the American Institute of Architects ("AIA") standard contract forms, require that the parties participate in mediation at the beginning of the dispute resolution process. This can be an expedient and cost-effective path towards dispute resolution, but the parties need to fully understand the facts and legal issues at play to increase the likelihood of success at mediation. Even if the contract does not require early mediation, the

parties should still consider mediating the dispute during the dispute resolution process.

8. Arbitration is an alternative dispute resolution process that permits the parties to control who is deciding their dispute. The parties can select a process that uses a single arbitrator or a panel of multiple arbitrators. The contract should specify which set of arbitration rules apply, how the arbitration shall be administered, and how a party may initiate arbitration proceedings.

H. Termination

The contract documents should provide conditions of default that permit either or both parties to terminate the contract. The contract should also include notice requirements and a cure period prior to termination being effective. The contract should also specify how the contractor is compensated in the event of termination for cause or convenience, and how the owner is compensated if termination for cause results in additional costs to the owner.

I. Indemnification

The contract documents should also include an indemnification clause. Indemnification clauses vary in scope from contract to contract. Some are limited in scope to include only insurable risks likely covered by the indemnitor's Commercial General Liability or Contractor General Liability ("CGL") policy. Others are much broader, covering most foreseeable risks, regardless of whether insurance coverage is available.

By statute, there is some limitation on the ability to obtain or provide indemnification under construction-related contracts in Virginia. Under Virginia Code §11-4.1, any provision in a construction contract that would indemnify a party to the contract for personal injury or damage to property "caused by or resulting solely from the negligence of such other party or his agents or

employees, is against public policy and is void and unenforceable.” The Supreme Court of Virginia has applied this prohibition when the contractual language at issue obligated the indemnitor to indemnify the indemnitee regardless of whether the claim was based upon the negligence of the indemnitor.¹ Under the Supreme Court of Virginia’s opinion, the insertion of the phrase “to fullest extent permitted by law” into an indemnification clause may save it.

Va. Code §11-4.4 has similar provisions for design professionals such as architects and engineers. Any other contractual indemnification provision should be enforceable under Virginia law. Indemnification causes of action for it accrue when the indemnitee has paid or discharged the obligation.

III. Vet bidders and vet subcontractors

Before the prime contract is sent for bidding, there are important steps that the general contractor can take to vet potential bidders, and that the potential bidders can take to vet potential subcontractors providing pricing.

- A. Check references from their past customers to evaluate their past and current performance.
 - 1. Check the Department of Professional and Occupational Regulation’s (“DPOR”) online contractor license database to ensure that the potential bidder has the requisite licenses.
 - 2. Check for records of complaints, disputes, and enforcement actions by the DPOR.
- B. Review the bidder’s current and backlog of work. If they are too busy, you may want to go with someone else.

¹ See *Uniwest Construction, Inc. v. Amtec Elevator Serv., Inc.*, 280 Va. 428, 699 S.E.2d 223 (2010).

- C. Check creditworthiness.
- D. Get insurance, bonding, and banking information.
- E. Consider requiring a bid bond even if not required by statute.
- F. Consider requiring a performance bond even if not required by statute.

IV. Insurance

Parties can shift and manage risks by obtaining insurance coverage. These coverages include builders risk insurance, liability insurance, professional liability/errors and omissions insurance, and other coverage options.

Builders Risk policies cover the work during the course of construction. This coverage can be furnished by the owner or the general contractor. CGL policies typically cover property damage, bodily injury, or death resulting from the negligence of the insured. Professional liability/errors and omissions (“E&O”) insurance is maintained by design professionals providing architectural or engineering services. If a contractor’s scope of work includes any design related services, the contractor should obtain an E&O policy to cover design risks.

Virginia courts remain relatively conservative in interpreting the applicability of CGL insurance policies to claims for defective construction work. In general terms, Virginia courts adhere to the approach that personal injury or damage to property other than the insured’s work is covered by the CGL policy, but that the performance of faulty work, in and of itself, is not covered. Beyond these general concepts, there are a number of issues that arise, some of which have been resolved by Virginia courts, and some of which remain open for debate.²

² Discussion of these topics is beyond the scope of this presentation.

V. Statutory Risks

A. New Statutory Prohibition of Pay-If-Paid Clauses.

During the 2022 Session, the Virginia General Assembly passed Senate Bill 550 (“SB 550”), which, among other things, prohibits the application of contingent payment or condition precedent payment clauses (known as “pay-if-paid” clauses) under most circumstances. The bill also establishes prompt payment clauses for prime contracts and subcontracts on private projects, whereas Virginia’s Prompt Payment Act was formerly applicable only to public projects. The final language of the bill included a delayed enactment clause so that the statutory changes in SB 550 will not take effect until January 1, 2023. This delay allows project owners, developers, design professionals, general contractors, and subcontractors the opportunity to work with counsel to modify contracts, subcontracts, and the payment application review and approval processes, to both comply with the new statutory language and to provide the maximum amount of protection available to prevent a catastrophic outcome. It also allows time for stakeholders to work towards agreement on revisions to the language of the bill addressing its numerous ambiguities.³

- Language was added to the Virginia Public Procurement Act (VA Code § 2.2-4354) section that establishes clauses that must be included in public construction contracts:
 1. *A payment clause that obligates a contractor on a construction contract to be liable for the entire amount owed to any subcontractor with which it contracts. Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract. However, in the event that the contractor*

³ For the final language of Senate Bill 550, *see* <https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+CHAP0727>.

withholds all or a part of the amount promised to the subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment. Payment by the party contracting with the contractor shall not be a condition precedent to payment to any lower-tier subcontractor, regardless of that contractor receiving payment for amounts owed to that contractor. Any provision in a contract contrary to this section shall be unenforceable.

Pursuant to this new clause, contracts for public projects must include a clause “*that obligates a contractor on a construction contract to be liable for the entire amount owed to any subcontractor with which it contracts.*” However, the contractor is not liable to pay the subcontractor “*for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract.*” But, if the contractor intends to withhold all or part of a payment from the subcontractor, the contractor must provide written notice to the subcontractor “*of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.*” Last, but certainly not least, pay-if-paid clauses in contracts for public projects will be unenforceable, without exception.

- Language was added to the “Wage Theft” statute that was adopted in 2020 (Virginia Code § 11-4.6):

"Owner" means a person or entity, other than a public body as defined in § 2.2-4301, responsible for contracting with a general contractor for the procurement of a construction contract.

B. In any construction contract between an owner and a general contractor, the parties shall include a provision that requires the owner to pay such general

contractor within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced. An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract. However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment. Failure of an owner to make timely payment as provided in this subsection shall result in interest penalties consistent with § 2.2-4355. Nothing in this subsection shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract.

C. Any contract in which there is at least one general contractor and one subcontractor shall be deemed to include a provision under which any higher-tier contractor is liable to any lower-tier subcontractor with whom the higher-tier contractor contracts for satisfactory performance of the subcontractor's duties under the contract. Such contract shall require such higher-tier contractor to pay such lower-tier subcontractor within the earlier of (i) 60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced or (ii) seven days after receipt of amounts paid by the owner to the general contractor or by the higher-tier contractor to the lower-tier contractor for work performed by a subcontractor pursuant to the terms of the contract. Such

contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor. However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance. Payment by the party contracting with the contractor shall not be a condition precedent to payment to any lower-tier subcontractor, regardless of that contractor receiving payment for amounts owed to that contractor, unless the party contracting with the contractor is insolvent or a debtor in bankruptcy as defined in § 50-73.79. Any provision in a contract contrary to this section shall be unenforceable. Failure of a contractor to make timely payment as provided in this subsection shall result in interest penalties consistent with § 2.2-4355. Nothing in this subsection shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract.

These new requirements apply to “Construction Contracts,” defined in Virginia Code § 11-4.6 as “a contract between a general contractor and a subcontractor relating to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance thereto, including moving, demolition, and excavation connected therewith, or any provision contained in any contract relating to the construction of projects other than buildings.” In the new language, “General Contractor” and “Subcontractor” continue to use definitions from the Virginia Mechanic’s Lien Statute (Virginia Code § 43-1).

Pursuant to new subsection B, any prime contract on a private construction project must include a provision requiring *“the owner to pay such general contractor within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced.”* It is unclear if this provision will prevent owners and contractors from entering into a contract with milestone payments rather than payments after invoices are submitted at regular intervals. It is also unclear how this new prompt payment language will affect the submission of pencil copies of payment applications prior to the submission of final versions for approval and payment. As in the changes to the Prompt Payment Act, subsection B of Virginia Code § 11-4.6 states that the Owner *“shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract.”* Per Virginia Code § 11-4.6 (B), if the Owner intends to withhold all or part of the amount invoiced, *“the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment.”* Subsection B also imposes interest penalties under Virginia Code § 2.2-4355 on owners who fail to make timely payments. Virginia Code § 2.2-4355B establishes that the rate of interest shall be the base rate on corporate loans, or prime rate, at large United States money center commercial banks as reported daily in the Wall Street Journal. The new language does not apply to or prohibit retainage provisions in prime contracts.

Virginia Code § 11-4.6 (C) applies to subcontracts between the General Contractor and Subcontractor. These subcontracts must include a provision *“under which any higher-tier contractor is liable to any lower-tier subcontractor with whom the higher-tier contractor contracts for satisfactory performance of the subcontractor's duties under the contract.”*

Virginia Code § 11-4.6 (C) states that the contract “*shall require such higher-tier contractor to pay such lower-tier subcontractor within the earlier of (i) 60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced or (ii) seven days after receipt of amounts paid by the owner to the general contractor or by the higher-tier contractor to the lower-tier contractor for work performed by a subcontractor pursuant to the terms of the contract.*” Note that there is a potential gap between the 60-day payment period in Virginia Code § 11-4.6 (C) and the 60-day payment period in Virginia Code § 11-4.6 (B) so that a General Contractor may be obligated to pay its subcontractors prior to the General Contractor receiving payment from the Owner.

Using the language in the first sentence of Virginia Code § 11-4.6 (C) and the definitions in Virginia Code § 11-4.6 and § 43-1, it remains unclear if Virginia Courts will apply the requirements in Subsection C to sub-subcontracts, although it appears that the General Assembly intended these provisions to apply to subcontracts and sub-subcontracts, regardless of tier.

Virginia Code § 11-4.6 (C) also states that “*such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor.*” But, as in Subsection B, if the contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor, the contractor must provide written notice to its subcontractor “*of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance.*” If a higher-tier contractor intends to withhold payment of any amount invoiced, they must be proactive in providing written notice with the information required. We expect that General Contractors and Subcontractors will err on the side of caution, providing written notice of withholding payment

any time there is even the slightest discrepancy, question, or problem with a payment application. It may prove difficult for a contractor to meet the requirements of this section, particularly in identifying the "lower-tier subcontractor responsible for the contractual noncompliance" if the contractor does not yet know who is responsible at the time that the payment application is pending.

Virginia Code § 11-4.6 (C) also includes a provision rendering pay-if-paid clauses unenforceable in subcontracts for private projects, but with two exceptions: "*unless the party contracting with the contractor is insolvent or a debtor in bankruptcy as defined in § 50-73.79.*" General Contractors pushed for these exceptions to be added to the bill. These exceptions protect General Contractors and higher-tier Subcontractors in the event that the party above them in the chain of contract becomes insolvent as defined in the Virginia code, or files for bankruptcy. However, it is unclear if these exceptions apply to downstream subcontractors if the Owner is insolvent or files for bankruptcy, or if this protection is limited to the General Contractor.

SB 550 will not solve some thorny issues, like non-payment for work that is performed subject to a change order rejected due to a dispute over whether the work is an extra or falls within the contract scope. Furthermore, on private projects, lower-tier subcontractors still run the risk of being left holding the bag if the owner goes bankrupt or is insolvent. Discussions are already underway concerning potential modifications and clarifications to be proposed during the 2023 General Assembly Session.

Now is the time to discuss how to modify contract and subcontract forms and procedures for review, approval, and payment of invoices and payment applications to ensure compliance with these new provisions.

B. Wage Theft Statute

In the 2020 General Assembly Session, the General Assembly established a “Wage Theft” law (Virginia Code § 11-4.6). The “Wage Theft” law provides that the general contractor and the subcontractor at any tier are jointly and severally liable to pay any subcontractor’s employees at any tier the greater of (i) all wages due to a subcontractor’s employees at such rate and upon such terms as shall be provided in the employment agreement between the subcontractor and its employee or (ii) the amount of wages that the subcontractor is required to pay its employees under the provisions of applicable law, including provisions of the Virginia Minimum Wage Act.

The General Contractor is the employer of a subcontractor’s employees at any tier for the purposes of Virginia Code § 40.1-29. The bill also provides that except otherwise provided in a contract between a general contractor and the subcontractor, the subcontractor shall indemnify the general contractor for any wages, damages, interest, penalties, or attorneys’ fees owed as a result of the subcontractor’s failure to pay wages to the subcontractor’s employees, unless the subcontractor’s failure to pay wages was due to the general contractor’s failure to pay moneys due to the subcontractor in accordance with the terms of their construction contract.

The provisions of § 11-4.6 only apply if (i) it can be demonstrated that the general contractor knew or should have known that the subcontractor was not paying his employees all wages due, (ii) the construction contract is related to a project other than a single-family residential project, and (iii) the value of the project, or aggregate costs of projects under one construction contract, is greater than \$500,000.

Additionally, the bill provides that a general contractor or subcontractor, regardless of tier, may offer as evidence a written certification, under oath, from the subcontractor in direct

privity of contract with the general contractor or subcontractor stating that (a) the subcontractor and each of his sub-contractors has paid all employees all wages due for the period during which the wages are claimed for the work performed on the project and (b) to the subcontractors' knowledge all sub-contractors below the subcontractor, regardless of tier, have similarly paid their employee all such wages. Any person who falsely signs such certification shall be personally liable to the general contractor or subcontractor for fraud and damages the general contractor or subcontractor may incur.

Contractors and subcontractors should carefully modify their contract forms to require compliance with this statute, and to require the lower tier subcontractors provide written certifications in conformance with this statute.

C. Prohibition of Setoff Clauses

As amended in 2020, Virginia Code § 43-13 renders offset clauses void and unenforceable against public policy. Contractors can no longer hold funds owed to a subcontractor for work performed on project B to offset amounts the subcontractor owes the contractor for claims or damages related to project A.

VI. Tools to Get Paid

A. Verify Funding or Financing

Before entering into the prime contract, the general contractor should ask the owner to provide proof of funding or financing. The prime contract should require the owner to provide updated funding or financing information upon the general contractor's request. The subcontract documents should permit the subcontractor to request from the general contractor any funding or financing information the general contractor has received from the owner.

B. Recording Mechanic's Lien(s)

If the general contractor or a subcontractor does not receive timely payment, it may record a "memorandum of mechanic's lien" as the first step to perfect its mechanic's lien rights. The memorandum is filed in the clerk's office in the county or city in which the building, structure or railroad, or any part thereof is located.⁴ The memorandum must, at a minimum, include (1) the name and address of the owner and claimant, (2) type of materials furnished by the claimant, (3) amount of the claim, (4) type of structure upon which the work was performed, (5) brief description of the property, (6) date from which interest is claimed, (7) a statement declaring the claimant's intention to claim the benefit of the lien, (8) whether any part of the amount claimed is not yet due, and, the date or event upon which that sum will be due, (9) the name, if any, of the general contractor, and (10) the claimant's Virginia contractor license number, date of issuance and date of expiration.⁵ The content of the memorandum will differ depending on whether the claimant is the general contractor or a subcontractor/supplier for the project.⁶ Additionally, a lien claimant who is a general contractor must also file, along with the memorandum, a certification of mailing of a copy of the memorandum of lien on the owner of the property at the owner's last known address.⁷

C. Payment Bond

On a public project, there should be a payment bond in place for the protection of the subcontractors. Public projects are not subject to mechanic's liens. Instead, prime contractors are typically required to provide payment bonds. These bonds are intended to secure payment of

⁴ Va. Code § 43-4.

⁵ Va. Code. §§ 43-4, 43-5, 43-8 and 43-10.

⁶ Va. Code. §§ 43-4, 43-5, 43-7, 43-8, 43-9, and 43-10.

⁷ Va. Code. §§ 43-4 and 43-5.

subcontractors and second-tier subcontractors for performance of their work. For subcontractors, bond claimants must file suit on the bond within one year of last supplying labor or material for the project but should not file sooner than 90 days to allow time for payment. Second-tier subcontractors (sub-subcontractors) must file suit within 90 days from the date on which it last supplied labor or materials for which the claim is made. The contract documents can require a general contractor to provide payment bonds on a private project. If the general contractor is required to furnish a payment bond, then it should require its subcontractors to also furnish payment bonds for their respective scopes of work.

D. Letter of credit or depositing funds into an escrow account.

Occasionally, a lower-tier party may require the party with whom it contracts to provide additional security for the payment obligation. One option is requiring the other party to furnish a letter of credit from its bank. Another option is requiring the other party to deposit funds into an escrow account to be released to the lower-tier contractor in the event of nonpayment.



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How to Excel in the Federal Jury Trial Sandbox

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Matthew W. Broughton
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Gentry Locke Seminar
Roanoke – September 16, 2022
Richmond – September 28, 2022

INTRODUCTION

Federal court jury trials are RULE INTENSIVE. Moreover, federal trials – like many state court trials – move along rapidly. There is never enough time in the heat of the battle to sit back and pontificate or conduct computer research in support of offering or objecting to the admissibility of evidence. Therefore, committing federal rules of evidence to memory is imperative, as is extensive preliminary work deciding whether and how each piece of evidence is “admissible.”

For each piece of evidence, three people must be quickly considering the applicable federal rules and exceptions which might lead to the admissibility or exclusion of the evidence. Those are – (1) the lawyer who offers the evidence; (2) the lawyer who may object to the evidence; and (3) the Judge who may need to make a decision about the admissibility and avoid reversible error.

The Judge’s role is similar, but much more complicated than an umpire calling balls and strikes. The Judge must assure that an accurate and well-developed record is made, which often involves giving a “limiting instruction.” In addition, the Judge should, when necessary, clearly state the basis of his/her ruling admitting or excluding evidence.

In any jury trial or bench trial, there is a lot at stake. Sometimes, evidence “slips in” and there is no objection, waiving the opportunity to prevent its admissibility. Even if the opposing

litigant recognizes “there is something wrong” with the evidence, general objections will likely not preserve the issue for appeal. Each objection should be specific and should be accompanied by multiple specific reasons why the evidence should be excluded. For example – it may not be enough to stand up in court and proclaim the evidence is “irrelevant or immaterial under Rule 401.”

The purpose of this outline is to help the reader/litigator remember or relearn many of the frequent objections and evidentiary issues which arise in the federal court arena and be ready to deal with each of them immediately and efficiently to build a strong record for both the trial and the appeal.

PRELIMINARY CONSIDERATIONS

Never delay in contemplating and preparing your witness and exhibit list. The sooner this document is complete, the more likely you will have time to consider how each piece of evidence will ultimately be considered admissible. Keep in mind that Judges consider this document to be a major part of their gatekeeping function.

When you receive your opposing counsel’s witness and exhibit list, immediately begin working on it to consider any appropriate objection and make it promptly – including the rules which apply and all grounds for the objection. Sometimes you and opposing counsel can agree on the removal of evidence or a witness from the list, but frequently a hearing and oral argument will be necessary. Any objections to the evidence, which are overruled, must be renewed at the time the evidence is offered at trial.¹

¹ Consider *Luce v. United States*, 469 U.S. 38 (1984), for whether a proponent should seek reconsideration at trial of certain evidence to preserve appeal.

Once the trial begins, keep in mind that timing is everything. Objections must be made as soon as it appears that the evidence is inadmissible.

Stand up in the courtroom and assert your objection prior to the witness having an opportunity to answer. If the supporting argument for the objection is sensitive and, itself, may draw further jury prejudice, ask the Judge to hear your argument outside the hearing of the jury. Most Judges will give you their preference regarding such “side bar” arguments at the pre-trial conference. Unfortunately, some Judges refuse side bar discussions or severely limit them during the course of trial. It is imperative that you know how things will proceed with your Judge.

Remember to carefully consider the results of any motions *in limine* in the case. Depending upon the evidence, it may be necessary to renew the offer of evidence or objection during the trial. Consider, too, that the evidence presented to that point at trial may strengthen your argument in a prior motion *in limine*, and could be grounds for the Judge to reverse a prior decision.

In those instances where evidence has been excluded, the attorney offering the evidence must quickly decide whether the evidence is worthy of “an offer of proof.” If so, the proponent of the evidence should inform the Judge of his/her desire to “proffer” the evidence. Sometimes the Judge will tell you how they prefer the proffer to occur. In the absence of the Judge’s pronouncement of how to proffer the evidence, the proponent can do any one of the following:

1. Simply and concisely state the substance of the evidence which has been excluded.
2. Actually swear in a witness and offer the evidence through the witness.
3. Provide a written document containing summary of the evidence, which the Judge should mark as excluded evidence; or
4. Submit an affidavit, deposition or other document containing the excluded information.

Rule 103 provides, “Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.” *See* Fed. R. Evid. 103(b).

Remember, it is generally a party’s duty to request a limiting instruction under Rule 105. Judges usually have their standard language they use for limiting instructions, but sometimes may request a suggestion from the proponent of the limiting instruction.

If you are a proponent of an exhibit which is excluded by the court, you should still ask that it be marked an exhibit for purposes of later identification. Of course, the jury will never see the exhibit and it will only be important should the case be appealed.

FREQUENT EVIDENTIARY CHALLENGES AND ISSUES

1. Relevance

a. Federal Rule 401: Test for Relevant Evidence

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

b. Federal Rule 402: General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible

c. Federal Rule 403: Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice,

confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

- d. Recent civil cases from the Fourth Circuit, and the District Courts of Virginia
 - i. Moore v. Equitrans, L.P., 27 4th 211, 223 (4th Cir. 2022): The Court held that the district did not abuse its discretion in excluding evidence of intentional trespass and evidence of numerous right-of way-agreements. The Court reasoned that because the district court had denied the plaintiff's motion to amend their complaint to pursue an intentional trespass claim, any evidence concerning an intentional trespass became irrelevant. Also, prior case law showed that evidence of right-of-way agreements and contracts involving third parties is irrelevant for determining the value of land (citing W. Va. Dep't of Highways v. W. Pocahontas Props., 777 S.E. 2d 619,637-38 (W. Va. 1982)).
 - ii. Riddick v. Norfolk Southern Ry., No. 2:21cv297, 2022 U.S. Dist. LEXIS 72973, at * 16, 17 (E.D. Va. Apr. 20, 2022): The Court granted a motion *in limine* to exclude an expert witness's testimony because it was prejudicial to the defendant. The court reasoned that the expert witness's testimony asserting that defendant was "negligent" and the plaintiff was neither "careless" nor "at fault" were legal conclusions prejudicial to the defendants and invades the role of the jury in evaluating and determining facts.
 - iii. Flores v. Va. Dep't of Corr., No. 5:20-cv-0087, 2021 U.S. Dist. LEXIS 241357, at * 11, 12 (W.D. Va. Dec. 17, 2021): The Court denied in part a motion in *limine* seeking to exclude expert testimony providing explanation about the use of feminine hygiene products. The matter concerned an unlawful termination claim. The court reasoned that (1) the evidence was relevant because some jurors did not have common knowledge or experience with menstruation; and (2) the plaintiff claimed that the defendant had determined that the contraband she carried was actually a tampon. The court, however, held that the expert testimony about menstrual shaming was not relevant because the plaintiff had not alleged she experienced it.

2. Judicial Notice

- a. Federal Rule 201: Judicial Notice of Adjudicative Facts
 - (a) **Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
 - (b) **Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:
 - (1) is generally known within the trial court's territorial jurisdiction; or

- (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
 - (c) **Taking Notice.** The court:
 - (1) may take judicial notice on its own; or
 - (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
 - (d) **Timing.** The court may take judicial notice at any stage of the proceeding.
 - (e) **Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
 - (f) **Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.
- b. Recent civil cases from the Fourth Circuit, and the District Courts of Virginia
- i. Bryant v. Woodball, 1 F.4th 280, 289 n.2 (4th Cir. 2021): The Court took judicial notice of the fact of the publication of an opinion piece published in a national newspaper.
 - ii. United States v. Walgreen Co., No. 1:2CV00032, 2021 U.S. Dist. LEXIS 231887, at *24 (W.D. Va. Dec. 2, 2021): In a motion to dismiss, the court took judicial notice of a letter issued by the Department of Health and Human Services, various forms and drug lists, and a Medicaid memo. These documents were not disputed by the parties even though they asserted differing interpretations.
 - iii. Nobrega v. Piedmont Airlines, Inc., No. 1:20-cv-105(LMB/IDD), U.S. Dist. LEXIS 90165, at *2 (E.D. Va. May 11, 2021): The court took judicial notice of a Judge’s order as a ‘matter of public record.’

3. Character

- a. Federal Rule 404: Character Evidence; Other Crimes, Wrongs or Acts
 - (a) Character Evidence.
 - (1) **Prohibited Uses.** Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
 - (2) **Exceptions for a Defendant or Victim in a Criminal Case.** The following exceptions apply in a criminal case:

- (A) a defendant may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
 - (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim’s pertinent trait, and if the evidence is admitted, the prosecutor may:
 - i. offer evidence to rebut it; and
 - ii. offer evidence of the defendant’s same trait; and
 - (C) in a homicide case, the prosecutor may offer evidence of the alleged victim’s trait of peacefulness to rebut evidence that the victim was the first aggressor.
- (3) **Exceptions for a Witness.** Evidence of a witness’s character may be admitted under Rules 607, 608, and 609.
- (b) Other Crimes, Wrongs, or Acts.
- (1) **Prohibited Uses.** Evidence of any other crime, wrong, or act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.
 - (2) **Permitted Uses.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.
 - (3) **Notice in a Criminal Case.** In a criminal case, the prosecutor must:
 - (A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
 - (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
 - (C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.
- b. Federal Rule 412: Sex-Offense Cases: The Victim’s Sexual Behavior or Predisposition
- (a) **Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
 - (1) evidence offered to prove that a victim engaged in other sexual behavior; or
 - (2) evidence offered to prove a victim’s sexual predisposition.
 - (b) **Exceptions.**
 - (1) **Criminal Cases.** The court may admit the following evidence in a criminal case:
 - (A) evidence of specific instances of a victim’s sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
 - (B) evidence of specific instances of a victim’s sexual behavior with respect to the person accused of the sexual misconduct, if offered

by the defendant to prove consent or if offered by the prosecutor;
and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) **Civil Cases.** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

(1) **Motion.** If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) **Hearing.** Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) **Definition of "Victim."** In this rule, "victim" includes an alleged victim.

c. **Federal Rule 415: Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation**

(a) **Permitted Uses.** In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

(b) **Disclosure to the Opponent.** If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) **Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

d. **Federal Rule 608: A Witness's Character for Truthfulness or Untruthfulness**

(a) **Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a

character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

- (b) **Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
- (1) the witness; or
 - (2) another witness whose character the witness being cross-examined has testified about. By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

e. Recent civil cases from the Fourth Circuit, and the District Courts of Virginia

- i. Carlisle v. Allianz Ins. Co. of N. Am., No. 2:19cv565, 2021 U.S. Dist. LEXIS 215282, at *7-8 (E.D. Va. Oct. 24, 2021) : The Court denied in part the defendant's motion in *limine* to exclude evidence pertaining to existence of insurance policies owned by non-parties. The case arose out of a lawsuit for financial harm caused by defendant's agent "Delevan". The defendant had argued that such evidence concerned Delevan's propensity to churn annuities. The Court rejected the propensity argument reasoning that the evidence did not show bad behavior from Delevan that would unfairly prejudice the defendant but that the continuing conduct is probative of an agency relationship after the official termination as it showed a pattern of continued dealing by the Defendant with Delevan.
- ii. Dorman v. Annapolis Ob-Gyn Assocs., P.A. 781 Fed. Appx. 136, 143-145 (4th Cir. 2019): The court held that admission of a Doctor's career history did not violate FRE 404 (b)(1) and 608(b). The case concerns a medical malpractice claim against certain doctors for improper delivery of a child. The doctor in question was the plaintiff's standard of care expert. The plaintiff had argued that the Doctor's dispute history with the defendants was inadmissible as a past wrongful act, had minimal probative value, and inappropriately suggested that he did not diligently review the medical records in the case at bar. The court reasoned that generally applicable evidentiary rules, such as Rules 404(b) and 608, limit inquiry in specific instances of conduct through the use of extrinsic evidence and through cross-examination with respect to general credibility attacks, but do not limit credibility attacks based upon motive or bias. *Id.* at 145 (citing Queens v. Haynes, 234 F.3d 837, 845 (4th Cir. 2000)).

- iii. Roe v. Howard, 917 F.3d 229, 246 (4th Cir. 2019) : The court found that testimony concerning sexual abuse suffered while working as a housekeeper was admissible. The court reasoned that such testimony fell within the exception for admissibility under Rule 404(a) as it described the defendant's effort to recruit Doe to work as a housekeeper, her knowledge and facilitation of her husband's repeated sexual assaults on Doe. As such the testimony constituted highly probative evidence regarding the defendant's interactions with Roe, the existence of a pattern of behavior towards live-in housekeepers and plaintiff's knowledge of abuse of their staff.

4. Habit

a. Federal Rule 406: Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit to routine practice.

b. Recent civil cases from the District Courts of Virginia

- i. Blount v. Tate, No. 7:11CV00091, 2012 U.S. Dist. LEXIS 135618, at *5-7 (W.D. Va. Aug. 24, 2012) : The court held three isolated incidents over three years was insufficient support a reasonable inference of habit. (citing Wilson v. Volkswagen of America, 561 F.2d 494, 511 (4th Cir. 1977)).
- ii. Freedman v. Am. Online, Inc., 325 F. Supp. 2d 638, n. 25 (E.D. Va. 2004): The court permitted the defendant's employee's testimony about the fact that she typically makes sure that a warrant is signed by a judge before releasing subscriber information was admissible as habit evidence under Rule 406.

5. Subsequent Remedial Measures

a. Federal Rule 407: Subsequent Remedial Measures

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

- b. Recent civil cases from the Fourth Circuit, and the District Courts of Virginia
 - i. Walker v. Alliance Outdoor Group, 2021 U.S. Dist. LEXIS 246897, at *12-13 (E.D. Va. Oct. 26, 2021): The Court granted the defendant’s motion in *limine* seeking to exclude evidence of a recall of a 2017 model of a tree stand, and post- sale evidence pertaining to the manufacture or design of the product. The court reasoned that such evidence is a subsequent remedial measure which the plaintiff seeks to admit as evidence showing negligence and notice of the defect in the product at issue.
 - ii. Hall v. DLC Mgmt. Corp., No. 7:11-cv-298, 2013 U.S. Dist. LEXIS 58467, at *25 (W.D. Va. Apr. 13, 2013): In a personal injury action, the court recognized that evidence of remedial measures after the plaintiff had slipped on ice in front of the defendant’s store was not admissible under FRE 407 to prove negligence of the defendant. The court however held such evidence remained admissible as to the questions of duty and control.
 - iii. Fussman v. Novartis Pharms. Corp., 509 Fed. Appx. 215, 222 (4th Cir. 2013): The Fourth Circuit found that the trial court did not err in denying the defendant a new trial on the basis of admitting evidence of a subsequent remedial measure. The defendants were distributors of “Zometa,” a drug designed to prevent the loss of bone mass. Although the district court had granted defendant’s pre-trial motion to exclude evidence of subsequent remedial measures, it reversed course during trial and admitted testimony from plaintiff’s cross examination of defendant’s witness concerning changes made to the Zometa 2003 label in the year 2007. The trial court reasoned that the 2007 revision was relevant to the defendant’s awareness of the dangers of Zometa and whether the drug had caused the plaintiff’s injury. The Fourth Circuit found that any alleged error in the lower court admitting the evidence was harmless.

6. Insurance

a. Federal Rule 411: Liability Insurance

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice or proving agency, ownership, or control.

- b. Recent civil cases from the Fourth Circuit, and the District Courts of Virginia
 - i. Rice v. Williams, No. 7:16-cv-00396, 2017 U.S. Dist. LEXIS 117504, at *2, *8-11(W.D. Va. July 26, 2017): the Court denied in part the defendant’s motion *in limine* seeking to exclude evidence of payments made by his liability insurer, State Farm, to his medical expert witness. The court reasoned that while the defendant had admitted liability for an automobile accident which involved the plaintiff, the payment of such a large amount of money by State Farm to its medical expert witness showed a substantial connection to State Farm and as such was relevant under FRE 401 to the issue of bias asserted by the plaintiff.
 - ii. McCloud v. Funaiock, No. 4:15-cv-5, 2016 U.S. Dist. LEXIS 189763, at *7-9 (E.D. Va. June 6, 2016): The Court granted the defendant’s motion *in limine* seeking to exclude evidence of or related to the defendant’s liability insurance coverage. The court reasoned that the defendant’s insurance coverage was not relevant to determining the issue of whether the defendant had conspired with another third party to cause the Plaintiff’s arrest.
 - iii. Gentry v. E. W. Partners Club Mgmt. Co., 816 F.3d 228 (4th Cir. 2016): The court found the district court did not err in refusing to admit evidence of the defendant’s insurance coverage and indemnification. The plaintiff had brought an employment discrimination claim under the ADA. The court reasoned that while the evidence was not strictly prohibited under FRE 411 as it was not offered to show that the defendant’s acted negligently or otherwise wrongfully, it was within the trial courts discretion to find that the evidence’s probative value was substantially outweighed by the danger of unfair prejudice under FRE 403.

7. Opinions

a. Federal Rule 701: Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness’s perception;
- (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

b. Federal Rule 702: Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

c. Federal Rule 703: Bases of an Expert's Opinion Testimony

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

d. Federal Rule 704: Opinion on an Ultimate Issue

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

e. Recent civil cases from the Fourth Circuit, and the District Courts of Virginia

- i. Seamster v. Taylor, No.4:21-cv-00021, 2022 U.S. Dist. LEXIS 106804, at *11-12 (W.D. Va. June 15, 2022) : In a summary judgment motion pertaining to a negligence claim, the court rejected defendant's argument that the plaintiff's lack of expert evidence as to the effectiveness of the slow moving vehicle (SMV) emblem on the plaintiff's tractor as it relates to visibility negates a genuine issue of material fact as to whether the SMV emblem was in good condition, visible and reflective. The court permitted lay opinion testimony regarding the emblem because such testimony was rationally based on the witness' perception and not based on a scientific, technical or other specialized knowledge.
- ii. Fantauzzo v. Sperry, No. 2:1CV4(RCY), 2022 U.S. Dist. Lexis 87105, at *6-10 (E.D. Va. May 13, 2022) : The district court rejected the defendant's motion objecting to the Magistrate's conclusion that a physician's opinions were sufficiently reliable under the Federal Rules of Evidence, Rule 702. The defendant argued that the plaintiff's self-

report to the doctors that she was involved in a car accident prior to her first encounter with the doctors was an insufficient basis to form a reliable opinion regarding the cause of her alleged injuries. The defendant also argued that the doctors admitted that they never evaluated or assessed the plaintiff's self-report that the accident was the cause of her injuries, nor did they form such opinion during the course of the her treatment. The court agreed with the Magistrate and reasoned the doctors' opinions were reliable because the doctors were well-qualified in their specialties and their opinions were derived from scientific, technical, or other specialized knowledge. The court further reasoned that the doctors' opinions were reliable under Rule 702 notwithstanding the opinions being first articulated during litigation. *Id.* at *10 (noting that doctors' opinions regarding causation stems from information acquired while treating plaintiff).

- iii. Bresler v. Wilmington Trust Co., 855 F.3d 178, 195 n.17 (4th Cir. 2017) The Court held a district court did not abuse its discretion in declining to exclude a witness' testimony under FRE 703. The defendant had asserted during trial that the plaintiff's expert accountant witness had impermissibly relied on a professional in the financial industry who did not testify and was not cross examined by the defendant. The court reasoned that an expert witness may not bolster the reliability of his opinion by testifying about a non-testifying expert witness's opinion. But, here, the expert only relied on a non-testifying expert's information about general premium financing concepts, and did not rely on the opinion he prepared for the present litigation.
- iv. Putman v. Harris, No. 1:20CV00063, 2022 U.S. Dist. LEXIS 55404, at *34 (W.D. Va. 2022): The court found an expert may give an opinion as to whether a reasonable officer would have concluded, based on the totality of the circumstances, that the use of a police dog was appropriate. The court reasoned such testimony was admissible under FRE 704 because it would be helpful to a trier of fact in determining a key issue in the case.

8. Hearsay

- a. Federal Rule 801: Definitions that apply to this Article; Exclusions from Hearsay
 - (a) **Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
 - (b) **Declarant.** "Declarant" means the person who made the statement.
 - (c) **Hearsay.** "Hearsay" means a statement that:
 - (1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

- (1) **A Declarant-Witness's Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
- (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
 - (B) is consistent with the declarant's testimony and is offered:
 - i. to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
 - ii. to rehabilitate the declarant's credibility as a witness when attacked on another ground;
 - (C) identifies a person as someone the declarant perceived earlier.

(2) **An Opposing Party's Statement.** The statement is offered against an opposing party and:

- (A) was made by the party in an individual or representative capacity;
- (B) is one the party manifested that it adopted or believed to be true;
- (C) was made by a person whom the party authorized to make a statement on the subject;
- (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
- (E) was made by the party's coconspirator during and in furtherance of the conspiracy. The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

b. Federal Rule 802: The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

c. Federal Rule 803: Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) **Present Sense Impression.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) **Excited Utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) **Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.
- (4) **Statement Made for Medical Diagnosis or Treatment.** A statement that:
 - (A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and
 - (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.
- (5) **Recorded Recollection.** A record that:
 - (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
 - (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
 - (C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

- (6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
 - (A) the record was made at or near the time by – or from information transmitted by – someone with knowledge;
 - (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
 - (C) making the record was a regular practice of that activity;
 - (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

- (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.
- (7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:
- (A) the evidence is admitted to prove that the matter did not occur or exist;
 - (B) a record was regularly kept for a matter of that kind; and
 - (C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.
- (8) **Public Records.** A record or statement of a public office if:
- (A) it sets out:
 - i. the office's activities;
 - ii. a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
 - iii. in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
 - (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.
- (9) **Public Records of Vital Statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.
- (10) **Absence of a Public Record.** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if:
- (A) the testimony or certification is admitted to prove that:
 - i. the record or statement does not exist; or
 - ii. a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and
 - (B) In a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.
- (11) **Records of Religious Organizations Concerning Personal or Family History.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

- (12) **Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:
- (A) made by a person who is authorized by a religious organization or by law to perform the act certified;
 - (B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and
 - (C) purporting to have been issued at the time of the act or within a reasonable time after it.
- (13) **Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.
- (14) **Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:
- (A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;
 - (B) the record is kept in a public office; and
 - (C) a statute authorizes recording documents of that kind in that office.
- (15) **Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.
- (16) **Statements in Ancient Documents.** A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.
- (17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.
- (18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:
- (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
 - (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

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

- (19) **Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.
- (20) **Reputation Concerning Boundaries or General History.** A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.
- (21) **Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.
- (22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:
 - (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
 - (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
 - (C) the evidence is admitted to prove any fact essential to the judgment; and
 - (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant. The pendency of an appeal may be shown but does not affect admissibility.
- (23) **Judgments Involving Personal, Family, or General History, or a Boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:
 - (A) was essential to the judgment; and
 - (B) could be proved by evidence of reputation.

d. Federal Rule 804: Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness

- (a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:
 - (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
 - (2) refuses to testify about the subject matter despite a court order to do so;
 - (3) testifies to not remembering the subject matter;

- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
 - (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.
- (b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
 - (1) **Former Testimony.** Testimony that:
 - (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
 - (B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.
 - (2) **Statement Under the Belief of Imminent Death.** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.
 - (3) **Statement Against Interest.** A statement that:
 - (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
 - (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.
 - (4) **Statement of Personal or Family History.** A statement about:
 - (A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or
 - (B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.
 - (5) [Other Exceptions.] [Transferred to Rule 807.]

(6) **Statement Offered Against a Party That Wrongfully Caused the Declarant’s Unavailability.** A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant’s unavailability as a witness, and did so intending that result.

e. Federal Rule 805: Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

f. Federal Rule 806: Attacking and Supporting the Declarant’s Credibility

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant’s credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

g. Federal Rule 807: Residual Exception

(a) **In General.** Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

- (1) the statement is supported by sufficient guarantees of trustworthiness— after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
- (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

(b) **Notice.** The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant’s name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

h. Recent civil cases from the Fourth Circuit, and the District Courts of Virginia

- i. Thweatt v. Prince George Cnty. Sch. Bd., No.3:21cv258-HEH, 2022 U.S. Dist. LEXIS 95376, at *5 n.4 (E.D. Va. May 26, 2022): The Court rejected the defendant’s objections to the admissibility of testimony of certain employees. It held that statements by school employees regarding the troubled nature of Route 23 were not hearsay and were

admissible because both employees had personal experience with the nature of Route 23.

- ii. Prince v. Norfolk S. Corp., No:21-cv-223, 2022 U.S. Dist. LEXIS 47254, at *4 (E.D. Va. Mar. 16, 2022): The court granted Plaintiff's motion in *limine* seeking exclusion of the defendant's employees Linked In profile as quintessential hearsay under FRE 801 reasoning that it is an out of court statement offered for the truth of the matter asserted, and therefore not admissible under FRE 802.
- iii. Vatter v. Woodson, No. 7:21cv00173, 2022 U.S. Dist. LEXIS 37679, at *30 (W.D. Va. Mar. 3, 2022): The court observed that toxicology reports used to diagnose a victim's condition and decide upon a course of treatment were admissible at trial despite their hearsay status as they fell within the regular business records exceptions under FRE 803(6). *Id.* (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305, 321 (2009)).
- iv. Du Gruyere v. United States Dairy Exp. Council, No. 1:20-cv-1174, 2021 U.S. Dist. LEXIS 250157, at *30, n. 4 (E.D. Va. Dec. 15, 2021): The court held USDA import data falls within the exception to hearsay rule in Rule 803(8) reasoning that the import data provided by the defendant was compiled by a public agency authorized by federal laws related to farming, forestry, agriculture, and food.
- v. Roe v. Howard, 917 F.3d 229, 247 (4th Cir. 2019): The Court observed that testimony concerning the defendant's husband's statement admitting to past assaults of former employees was not inadmissible as hearsay evidence and admissible under Rule 804 (b)(3). The court reasoned that such statement exposed the declarant to civil or criminal liability.
- vi. Cox v. Keller, No. 7:12CV00154, 2015 U.S. Dist. LEXIS 71657, at *28 n.5 (W.D. Va. June 3, 2015): The court held a witness's testimony was hearsay within hearsay and inadmissible under Rule 805. The court also observed that none of the combined statements conformed with an exception to the rule against hearsay.
- vii. Latson v. Clarke, 346 F. Supp 3d 831, 857 (W.D Va. 2018): The court found that the plaintiff's email evidence which contained hearsay statements could not defeat defendant's summary judgement motion because it did not conform to the requirements under Rule 807. The court reasoned that the sources of the information conveyed in the email were not clear and as such the information cannot be shown to be trustworthy.

9. Authentication

a. Federal Rule 901: Authenticating or Identifying Evidence

- (a) **In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
- (b) **Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement:
- (1) **Testimony of a Witness with Knowledge.** Testimony that an item is what it is claimed to be.
 - (2) **Nonexpert Opinion About Handwriting.** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
 - (3) **Comparison by an Expert Witness or the Trier of Fact.** A comparison with an authenticated specimen by an expert witness or the trier of fact.
 - (4) **Distinctive Characteristics and the Like.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
 - (5) **Opinion About a Voice.** An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.
 - (6) **Evidence About a Telephone Conversation.** For a telephone conversation, evidence that a call was made to the number assigned at the time to:
 - (A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or
 - (B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.
 - (7) **Evidence About Public Records.** Evidence that:
 - (A) a document was recorded or filed in a public office as authorized by law; or
 - (B) a purported public record or statement is from the office where items of this kind are kept.
 - (8) **Evidence About Ancient Documents or Data Compilations.** For a document or data compilation, evidence that it:
 - (A) is in a condition that creates no suspicion about its authenticity;
 - (B) was in a place where, if authentic, it would likely be; and
 - (C) is at least 20 years old when offered.
 - (9) **Evidence About a Process or System.** Evidence describing a process or system and showing that it produces an accurate result.
 - (10) **Methods Provided by a Statute or Rule.** Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

b. Federal Rule 902: Evidence that is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

- (1) **Domestic Public Documents That Are Sealed and Signed.** A document that bears:
 - (A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and
 - (B) a signature purporting to be an execution or attestation.
- (2) **Domestic Public Documents That Are Not Sealed but Are Signed and Certified.** A document that bears no seal if:
 - (A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and
 - (B) another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.
- (3) **Foreign Public Documents.** A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:
 - (A) order that it be treated as presumptively authentic without final certification; or
 - (B) allow it to be evidenced by an attested summary with or without final certification.
- (4) **Certified Copies of Public Records.** A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified as correct by:
 - (A) the custodian or another person authorized to make the certification; or
 - (B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.
- (5) **Official Publications.** A book, pamphlet, or other publication purporting to be issued by a public authority.

- (6) **Newspapers and Periodicals.** Printed material purporting to be a newspaper or periodical.
- (7) **Trade Inscriptions and the Like.** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.
- (8) **Acknowledged Documents.** A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.
- (9) **Commercial Paper and Related Documents.** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.
- (10) **Presumptions Under a Federal Statute.** A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.
- (11) **Certified Domestic Records of a Regularly Conducted Activity.** The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.
- (12) **Certified Foreign Records of a Regularly Conducted Activity.** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).
- (13) **Certified Records Generated by an Electronic Process or System.** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).
- (14) **Certified Data Copied from an Electronic Device, Storage Medium, or File.** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

c. Recent cases involving the authentication of electronic records

- i. Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 541-562 (D. Md. 2007): The court excluded documentary evidence because it was not

authenticated according to the methods required under Rule 901 or 902. The plaintiffs had sued defendant insurer to enforce an arbitration award. The relevant facts of the contract negotiations between the parties were established by copies of emails which were not authenticated, although attached to parties' summary judgment motions as exhibits. The court reasoned that the complete absence of authentication stripped the exhibits of any evidentiary value because it could not consider them to be evidentiary facts.

The court noted:

To prepare properly to address authentication issues associated with electronically generated or stored evidence, a lawyer must identify each category of electronic evidence to be introduced. Then, he or she should determine what courts have required to authenticate this type of evidence, and carefully evaluate the methods of authentication identified in Rules 901 and 902, as well as consider requesting a stipulation from opposing counsel, or filing a request for admission of the genuineness of the evidence under Rule 36 of the Federal Rules of Civil Procedure. With this analysis in mind, the lawyer then can plan which method or methods of authentication will be most effective, and prepare the necessary formulation, whether through testimony, affidavit, admission or stipulation. The proffering attorney needs to be specific in presenting the authenticating facts and, if authenticity is challenged, should cite authority to support the method selected.

CONCLUSION

In order to effectively represent clients in a federal court setting, litigators must have a clear working knowledge of the rules. Unfortunately, many of these concepts have not been revisited since our days back in law school evidence class.

As a practical matter, the litigator can often prepare for trial and foresee which technical areas he or she needs to concentrate on in advance of the trial. However, being well-prepared requires a working knowledge of the rules in general such that surprises are kept to a minimum during the heat of battle.

We encourage our attorneys to scan the Federal Rules of Evidence on at least a yearly basis to keep the technical rules at the forefront of their minds. If you have a command of the rules during the trial, you will be much more likely to excel in the federal jury trial sandbox.



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The Story of the Hard-Fought Legal Battle to Protect One of
the Most Fundamental Rights – Marriage

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**The Story of the Hard-Fought Legal Battle
to Protect One of the Most Fundamental Rights: Marriage**

Karen L. Cohen
Monica T. Monday

Gentry Locke Seminar
Roanoke – September 16, 2022
Richmond – September 28, 2022

I. Introduction

- a. In 1967, the Supreme Court issued the landmark civil rights decision of *Loving v. Virginia*, 388 U.S. 1 (1967). For the first time, the Court held that laws banning interracial marriage constituted a violation of both the Equal Protection and Due Process Clauses of the 14th Amendment to the U.S. Constitution. One of the two attorneys who argued the case in front of the Supreme Court was Bernard S. Cohen, father of Gentry Locke’s Karen Cohen. This presentation explores the story behind this seminal case and provides a behind the scenes look at the fight to protect a fundamental human right.

II. Attachments

- a. The following items are attached as reference materials:
 - i. Circuit Court of Caroline County Opinion (January 22, 1965).
 - ii. Interlocutory Order from the United States District Court for the Eastern District of Virginia (February 11, 1965).
 - iii. Supreme Court of Virginia Opinion (March 7, 1966).
 - iv. United States Supreme Court Opinion (June 12, 1967).

III. Virginia’s Miscegenation Statutes

- a. Virginia’s 1924 Racial Integrity Act criminalized all marriages between “white” people and those who were “colored”—meaning anyone “with a drop of non-white blood.”
- b. Va. Code § 20-54 (1960): “It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be

deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.”

- c. Va. Code § 20-57 (1960): “All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.”
- d. Va. Code § 20-58 (1960): “If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.”
- e. Va. Code § 20-59 (1960): “If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.”

IV. History of the Case

a. Initial Arrest

- i. June 2, 1958: Richard and Mildred Loving married in Washington, DC where it was legal. Shortly after, they returned to their home in Caroline County, Virginia.
- ii. July 11, 1958: Judge Robert W. Farmer issued a warrant for their arrest.
- iii. July 17, 1958: Sheriff Brooks arrested Richard and Mildred Loving.
- iv. October 1958: The Circuit Court of Caroline County Grand Jury issued an indictment charging the Lovings with violating Virginia’s ban on interracial marriages.

b. Sentencing

- i. On January 6, 1959, the Lovings were arraigned in the Circuit Court of Caroline County.
- ii. The trial court sentenced them to one year each in jail and suspended the sentences “for a period of twenty-five years upon the provision that both accused leave Caroline County and the state of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years.”

1. Initially, the Lovings pleaded “not guilty” and after the court heard the evidence and argument of counsel, the accused “change[d] their plea from ‘not guilty’ to ‘guilty’”.
- iii. Subsequently, the Lovings moved away from their friends and family to live with one of Mildred Loving’s cousins in Washington, DC. However, the Lovings yearned to be able to return to their home and families in Caroline County.
- c. Return to Virginia and Subsequent Arrest
 - i. On March 28, 1959, a Warrant for Violating Parole was issued.
 - ii. While visiting family in Virginia in 1963, they were arrested again for traveling together.
- d. The ACLU of the National Capital Region Takes the Lovings’ Case
 - i. In June 1963, the Lovings wrote a letter to Attorney General Robert F. Kennedy asking for help. Their case was then referred to the American Civil Liberties Union. The ACLU assigned the case to a volunteer attorney licensed to practice in Virginia. That attorney was Bernard S. Cohen.
 1. Mrs. Loving’s handwritten letter to Attorney General Kennedy was poignant: “We know we can’t live there, but we would like to go back once in a while to visit our families and friends.”

V. The Long Road to the Supreme Court

- a. Motion to Vacate the Judgment and Set Aside the Sentence
 - i. Cohen moved to have the 1959 judgment convicting the Lovings of violating Va. Code § 20-58 vacated and the suspended sentence set aside in November 1963.
 - ii. In the Motion, Cohen listed six enumerated grounds for vacating the judgement and setting aside the sentence, including that the statute was unconstitutional on its face.
 1. The sentence “is improper because it is based on a statute which is unconstitutional on its face, in that it denies the defendants the equal protection of the laws and denies the right of marriage which is a fundamental right of free men, in violation of Section 1 of the Virginia Constitution, and the 14th Amendment of the Federal Constitution.”
 - iii. The trial judge took the motion under advisement but issued no ruling.

b. July 1964

- i. In the summer of 1964, Cohen, a 1960 graduate of Georgetown Law, requested a meeting with his former constitutional law professor, Chester Antieau. Philip J. Hirschkop (Georgetown '64) was with the professor in the faculty lounge and Prof. Antieau recommended Cohen consult with Hirschkop, who had been active in civil rights.

c. The Federal Court Action

- i. October 28, 1964: Hirschkop and Cohen file suit in the United States District Court for the Eastern District of Virginia, “as a ‘class action’ to have the court declare that the Virginia statutes, designated as §§ 20-50 to 20-60 inclusive, Code of Virginia, 1950, prohibiting the intermarriage of white and colored persons, are invalid as in violation of the Fourteenth Amendment, and to restrain the enforcement of these statutes generally but particularly against the [Lovings]” *Loving v. Virginia*, 243 F. Supp. 231, 233 (E.D. Va. 1965) (interlocutory order).
- ii. November 16, 1964: Argued before the three judges (Bryan, Butzner and Lewis) in Richmond who took the matter under advisement.
- iii. February 11, 1965: The federal district court entered an interlocutory order continuing the case to allow the state court to address the Loving’s claims, while expressly leaving the door open to come back to federal court if the state failed to address the validity of the statutes under which the Lovings were sentenced:
 1. “[I]n view of the immediate pendency in the Circuit Court of Caroline County of the said criminal proceeding, comity requires that this court accede to the request of the defendant State officials to stay this suit for a reasonable time to allow the Commonwealth of Virginia and the plaintiffs herein to have the State courts determine in the said criminal proceeding the enforceability of the said judgment and sentence, and thus decide the issue of the validity of said statutes[.]” *Id.* at 233-34.
 2. The federal court ordered that “the further hearing of this suit be continued until the parties have a reasonable time to have the said issue decided in the said [state] criminal proceeding, but the continuance is subject to the right of the [Lovings] to again apply to this court to hear and determine said issue if, through no fault of theirs, the State courts for any reason rule they cannot or should not decide said issue;” *Id.* at 234.

d. Circuit Court of Caroline County Ruling

- i. The trial court finally ruled on Cohen’s motion to vacate on January 22, 1965—more than a year after the initial filing.
 1. This opinion, written by Judge Bazile, is a ruling on the “motion to vacate the judgment and set aside the sentence” (which had been filed on November 6, 1963).
- ii. The trial court denied the motion to vacate and reaffirmed the Lovings’ prior convictions for violating Va. Code § 20-58.
- iii. Judge Bazile, writing for the court, said: “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”

e. On to the State High Court

- i. March 3, 1965: Lovings filed a Notice of Appeal and Assignments of Error in the Virginia Supreme Court.
 1. This appeal was of “a final order entered in the Circuit Court of Caroline County on the 22nd day of January, 1965, denying defendant’s motion of November 6, 1963 to vacate the Circuit Court’s January 6, 1959 order and to set aside the sentence for conviction of violating the State’s anti-miscegenation statutes.”
 2. The Notice of Appeal and Assignments of Error assigned the following errors:
 - a. The Court erred in holding that the anti-miscegenation statutes did not violate the due process and equal protection clauses of Section 1 of the Constitution of Virginia and the fourteenth amendment of the Federal Constitution.
 - b. The Court erred in holding that the sentence and suspension was not a violation of due process of law.
- ii. June 15, 1965: Virginia Supreme Court issues writ (but no discharge from custody if in custody, no bond if on bail).
- iii. November 4, 1965: Lovings’ Petition for Writ of Error (Appeal) filed in Virginia Supreme Court.

f. Virginia Supreme Court Decision

- i. March 7, 1966: Virginia Supreme Court affirms convictions for leaving the state to get married, returning to the state, and cohabitating as man and wife. The Court reversed the sentence that had required the Lovings to leave Virginia and not return for 25 years, finding that Code § 20-59 instead required the couple to be imprisoned. *Loving v. Commonwealth*, 206 Va. 924, 930 (1966) (Carrico, J.).
- ii. In the opinion, the Court considered defendants' call to reverse the decision in *Naim v. Naim*, 197 Va. 80 (1955), which found Virginia miscegenetic marriage statutes to be constitutional.
 1. In *Naim*, the opinion quoted from *Plessy v. Ferguson*, 163 U.S. 537 (1896): "laws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the state."
 2. The *Naim* court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride."
- iii. The Court affirmed that laws forbidding the intermarriage of the races were within the state's police power and stated that the state had an overriding interest in the institution of marriage.
 1. The Court cited *Maynard v. Hill*, 125 U.S. 190 (1888): "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature."
 2. The Court stated reversing *Naim* would constitute "judicial legislation in the rawest sense of that term."
 - a. "Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate."
- iv. The court declined to overrule *Naim* and held that Va. Code §§ 20-58 and 20-59 did not violate the Virginia or the United States Constitutions.
 1. The Court held *Brown v. Board of Education*, 347 U.S. 483 (1954), which overruled *Plessy*, did not affect the language quoted from in the *Plessy* opinion.

2. Finding ‘no sound reason’ to depart from the *Naim* holding, the Court felt bound by *stare decisis* and felt it “binding upon us here and rule[d] that Code, §§ 20-58 and 20-59, under which the defendants were convicted and sentenced, are not violative of the Constitution of Virginia or the Constitution of the United States.” *Loving* at 929-930.
- v. The Court reversed the defendants' suspended sentences finding the sentences were not in line with the purpose of the statute: “to secure the rehabilitation of the offender, enabling him to repent and reform so that he may be restored to a useful place in society.” *Loving* at 931.
 1. The Court remanded the case to the trial court with directions to “re-sentence the defendants in accordance with Code, § 20-59.” *Loving* at 931.
 - a. In other words, the Court directed the trial court to impose a prison sentence, as § 20-59 states: “if any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.”
- g. Stay of Execution of Judgment
 - i. March 28, 1966: Chief Justice John W. Eggleston, Chief Justice of the Supreme Court of Appeals of Virginia (as then known) entered an order staying execution of the judgment entered on March 7, 1966, “in order that [the Lovings] may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for appeal to review the judgment of this court, . . .” The order gave the Lovings until June 4, 1966, to file a notice of appeal to the Supreme Court of the United States.

VI. *United States Supreme Court Case*

- a. December 12, 1966: The United States Supreme Court noted probable jurisdiction.
- b. April 10, 1967: Oral Argument
 - i. “*Mr. Cohen, tell the Court I love my wife and it is just unfair that I can’t live with her in Virginia.*” – Richard Loving
 - ii. For the Lovings, the advocates were Bernard S. Cohen and Philip J. Hirschkop.
 1. In his opening, Cohen argued that Richard and Mildred Loving have the right “to wake up in the morning or to go to sleep at night

knowing that the sheriff will not be knocking on their door or shining a light in their face in the privacy of their bedroom for illicit co-habitation.”

- a. “The Lovings have the right to go to sleep at night, knowing that should they not awake in the morning, their children would have the right to inherit from them under intestacy. They have the right to be secure and knowing that if they go to sleep and do not wake in the morning that one of them or survivor of them has the right to social security benefits.”

iii. For the State, the advocate was R.D. McIlwaine III.

iv. Also advocating was William M. Marutani for the Japanese American Citizens League, as *amicus curiae*, urging reversal.

1. “Those who would trace their ancestry to the European cultures where over the centuries, there have been invasions, cross-invasions, population shifts with the inevitable cross-breeding which follows, and particularly those same Europeans who have been part of the melting pot of America, I suggest would have a most difficult, if not impossible task of establishing what Virginia's antimiscegenation statutes require. Namely, and I quote, proving that, ‘No trace whatever of any blood other than Caucasian.’”
2. “[U]nder these antimiscegenation laws since only white persons are prevented from marrying outside of their race and all other races are free to intermarry... Virginia's laws are exposed for exactly what they are: a concept based upon racial superiority, that of the white race and white race only.”
3. “We submit that race as a factor has no proper place in state’s laws that govern whom a person by mutual choice may or may not marry.”

c. The Landmark Decision: *Loving v. Virginia*, 388 U.S.1 (1967)

i. In a unanimous decision, the Supreme Court overturned the Lovings’ convictions and held that laws banning interracial marriage violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution.

1. “This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.” *Loving* at 2.

- ii. Addressing the Virginia Supreme Court’s reliance on *Naim*, the Court stated the enumerated ‘legitimate purposes’ of the law were “obviously an endorsement of the doctrine of White Supremacy.” *Loving* at 7.
- iii. The Court rejected the State’s argument that the Equal Protection Clause only requires that laws must “apply equally to [both races] in the sense that members of each race are punished to the same degree.” *Loving* at 8.
 - 1. The State contended because the statute punished each race to the same degree, the statute does not constitute an invidious discrimination on race despite its reliance on racial classifications.
 - 2. The Court stated: “because we reject the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations, we do not accept the State’s contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose.” *Loving* at 10-11.
- iv. “There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy... There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” *Loving* at 16-17.
- v. “These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.” *Loving* at 17-18.
- vi. **“[T]he freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State.”** *Loving* at 18.

VII. The Legacy of *Loving* and Substantive Due Process

- a. *Obergefell v. Hodges*, 576 U.S. 644 (2015)
 - i. In its landmark decision that the Equal Protection Clause and Due Process Clause require states to allow same-sex marriage, the Supreme Court relied heavily on *Loving v. Virginia*.

- ii. “[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause.” *Obergefell* at 646.
 - iii. Quoting *Loving*, marriage is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” *Obergefell* at 665.
 - iv. “Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.” *Obergefell* at 672.
- b. Challenging Substantive Due Process: *Dobbs v. Jackson Women’s Health Org.*, 2022 U.S. Lexis 3057.
- i. In the majority opinion, the Court cited *Loving* when discussing their decision to overrule *Planned Parenthood v. Casey*, 505 U.S. 833 (1992):
 - 1. “*Casey* relied on cases involving the right to marry a person of a different race, *Loving v. Virginia*, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)...These attempts to justify abortion through appeals to a broader right to autonomy and to define one’s ‘concept of existence’ prove too much.” *Dobbs* at 52.
 - ii. In his concurring opinion, Justice Clarence Thomas urged the reconsideration of “all of this Court’s substantive due process precedents.” *Dobbs* at 150.
 - iii. While he did not cite *Loving* in his concurrence, Justice Thomas specifically cited to *Obergefell v. Hodges* as a precedent for which we have a “duty to correct the error.” *Dobbs* at 151.
 - 1. “After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated.” *Dobbs* at 151.
 - iv. In his concurring opinion, Justice Brett Kavanaugh stated the *Dobbs* decision did not threaten *Loving* or *Obergefell*:

“First is the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold v. Connecticut*, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *Eisenstadt v. Baird*, 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Loving v. Virginia*, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); and *Obergefell v. Hodges*, 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). I emphasize what the Court today

states: Overruling *Roe* does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents.” *Dobbs* at 168.

- v. The dissenting opinion disagreed with the potential implications the *Dobbs* decision might have for *Loving* and *Obergefell*, stating:
 1. “According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman’s choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in *Lawrence* and *Obergefell* to same-sex intimacy and marriage. It did not protect the right recognized in *Loving* to marry across racial lines... So if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too—whatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even ‘undermine’—any number of other constitutional rights.” *Dobbs* at 224-25.

Chronology of the Loving Case

June 2, 1958: Richard & Mildred Loving married in Washington, D.C.

July 11, 1958: Warrants issued and Lovings arrested on July 17, 1958, by Sheriff Brooks.

October 1958: Circuit Court of Caroline County Grand Jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriage.

January 6, 1959: Lovings arraigned in Circuit Court of Caroline County. They were convicted and sentenced to one year in jail. The sentence was suspended "upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together at the same time to said County and State for a period of twenty-five years."

March 28, 1959: Warrant issued to Sheriff stating that the Lovings violated parole.

June 20, 1963: Mrs. Loving writes to Attorney General Robert Kennedy seeking help.

June/July 1963: ACLU refers the case to volunteer attorney, Bernard S. Cohen. Cohen accepts representation of the Lovings.

November 6, 1963: Cohen files Motion to Vacate the Judgement and Set Aside the Sentence. Trial judge takes under advisement but does not rule.

July 1964: Cohen and Hirschkop team up on the case and become law partners.

October 28, 1964: Class action filed under Civil Rights Act of 1866 in the Eastern District of Virginia requesting a three-judge federal court be convened to declare sections of the Virginia Code unconstitutional and to enjoin the state officials from enforcing the prior convictions.

November 16, 1964: Argued before the three federal judges (Judges Bryan, Butzner, and Lewis) in Richmond who took the matter under advisement.

January 22, 1965: While the federal suit stood set for hearing on February 3, 1965, the Circuit Court of Caroline County, Judge Leon M. Bazile, entered an order denying the Motion to Vacate the Judgement and Set Aside the Sentence.

January 27, 1965: Commonwealth of Virginia and the Attorney General of Virginia moved to dismiss the federal case; attorneys appeared in Eastern District of Virginia (Richmond).

February 11, 1965: The three-judge federal court entered an interlocutory order continuing the matter and giving the Lovings the opportunity to submit the issue (Appeal to the Virginia Supreme Court) for final determination.

March 3, 1965: Notice of Appeal and Assignments of Error filed in the Virginia Supreme Court.

June 11, 1965: Virginia Supreme Court issued Writ.

November 4, 1965: Petition for Writ of Error (Appeal) filed in the Virginia Supreme Court.

March 7, 1966: Virginia Supreme Court affirms convictions and reverses sentences, finding that the statute required imprisonment.

March 28, 1966: Chief Justice of the Virginia Supreme Court enters Order Staying Execution of Judgment to allow the Lovings to present their case to the United States Supreme Court by the 4th of June, 1966.

June 1966: Appeal filed in the United States Supreme Court.

December 12, 1966: United States Supreme Court notes probable jurisdiction.

April 10, 1967: Case argued in front of the United States Supreme Court.

June 12, 1967: United States Supreme Court ordered reversal of conviction of the Lovings and held laws banning interracial marriage constituted a violation of both the Equal Protection and Due Process Clauses of the 14th Amendment to the U.S. Constitution.

IN THE CIRCUIT COURT OF CAROLINE COUNTY

COMMONWEALTH V. RICHARD PERRY LOVING AND
MILDRED DELORES JETER

BERNARD S. COHEN FOR THE PETITIONER
PEYTON FARMER, COMMONWEALTH ATTORNEY

OPINION

The Petitioners here were indicted in this Court at the October term, 1958, the indictment charging that on the 2nd day of June, 1958, " that Richard Perry Loving being a white man and the said Mildred Delores Jeter being a colored person did unlawfully go out of the State of Virginia for the purpose of being married and with the intention of returning to the State of Virginia, and were married out of the State of Virginia, to-wit in the District of Columbia on the 28th day of June, 1958 and afterwards returned to and resided in the County of Caroline, State of Virginia, co-habiting as man and wife against the peace and dignity of the Commonwealth."

On the 6th day of January, 1959, the accused were arraigned and after pleading not guilty withdrew said plea and pleaded guilty; thereupon the Court fixed their punishment at one year in jail; and then suspended said sentence for twenty-five years " upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together at the same time to said County and State for a period of twenty-five years. "After they paid the costs they were released from custody and further recognizance.

The Court file contains his birth certificate which shows that he is white and her birth certificate which shows that she is colored.

On the 6th day of November, 1963, they filed a motion to vacate the judgment and set aside the sentence.

1st It is contended the said sentence constitutes a cruel and unusual punishment within Section 9 of the Constitution of Virginia.

Section 9 of George Mason's Bill of Rights made a part of the Constitution of 1776 is in the identical same words as Section 9 of the Bill of Rights to the present Constitution (9 Henrys Statutes 111; Code of 1950, page 443).

In Hart V. Commonwealth, 131 Va., 726, 741, 109 S.E. 582, the Court said: " It has been uniformly held by this Court that the provisions in question which have remained the same as they were originally adopted in the Virginia Bill of Rights of 1776, must be construed to impose no limitation upon the right to determine and prescribe by statute the quantum of punishment deemed adequate by the legislature. That the only limitation so imposed is upon the mode of punishments, such punishments only being prohibited by such constitutional provision as were regarded as cruel and unusual when such provision of the Constitution was adopted in 1776, namely, such bodily punishments as involved torture or lingering death, such as are inhumane and barbarous, as for example, punishment by the rack, by drawing and quartering, leaving the body hung in chains, or on the gibbet, exposed to public view, and the like. Aldridge's case, 2 Va. Cas. 447, 449-450; Wyatt's Case, 6 Rand (27 Va.) 694; Bracey's Case, 119 Va. 867, 862, 89 S.E. 144.

See also Buck V. Bell, 143 Va. 310, 319, 130 S.E. 516 (1925)

In Aldridge's Case (2 Va. Case 447, 448)(1824) a free person of color was convicted of the larceny of bank notes. He was sentenced to be whipped, sold and transported beyond the bounds of the United States. The Court said " as to the ninth section of the Bill of Rights, denouncing cruel and unusual punishments, we have no notion that it has any bearing on this case."

In Wyatt's Case (6 Rand 694) (1825), the law provided " that when any person was convicted of any crime or offense now punishable by im-

prisonment in the penitentiary the Court could sentence such person to be imprisoned not exceeding two years in the jail of the County or Corporation where such conviction shall have taken place, for a period not exceeding six months, nor less than one month and he shall be punished by stripes at the discretion of the Court to be inflicted at one time provided the same do not exceed thirty-nine at any one time."

"The Court said the punishment of offenses by stripes is certainly odious, but cannot be said to be unusual."

The Court said 6 Rand 763 "This Court is of the opinion and doth decide that the motion in arrest of judgment and also the motion for a new trial ought to be overuled and the judgment should be rendered against the defendant of imprisonment and strips according to law.

In Buck v. Bell 143 Va. 310, 130 S.E. 516 (1925) a case in which it had been ordered that Buck be sterilized, it was contended that it violated the Federal Constitution and Sections 9, 11 of the Virginia Constitution and the 11th Amendment to the Federal Constitution. The Court held that the Sterilization Act did not violate any section of the Constitution of Virginia or any sections of the Federal Constitution.

In Re Kemmler, 136 U.S. 436 34 Fed. 519 (1889) it was held that punishments are cruel when they involve torture or a lingering death but the punishment of death is not within the meaning of that word in the Constitution.

The Court said that cruel and unusual punishments are "such as burning at the stake, crucifixion, breaking on the wheel or the like." (34 Fed. 524)

And the Supreme Court of the United States has held in Onell v. Vermont that whether a punishment is cruel and unusual within the provisions of a State Constitution does not present a Federal question.

In U.S. Supreme Court Enc. of U.S. Supreme Court Volume 4 p.513, it is said " The provision of the 8th Amendment that excessive fines shall not be imposed nor cruel and unusual punishment inflicted applies to National and not to State legislation.

It is next said that the sentence exceeds a reasonable period of suspension within the meaning of Section 53-273 of the Code of 1950.

The Court has examined this Section with care and it sees nothing in this statute which limits the time that the person may be put on probation.

It is said that the sentence constitutes banishment and thus is a violation of due process of law.

Section 20-58 provides that " If any white person and colored person shall go out of this state for the purpose of being married and with the intention of returning and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in Section 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of this cohabitation here as man and wife shall be evidence of their marriage."

Intermarriage between white and colored persons is prohibited by Section 20-54 of the Code.

Section 20-57 of the Code provides "all marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process."

And Section 20-58 of the Code provides "if any white person and colored person shall go out of this State for the purpose of being married and with the intention of returning and be married out of it, and shall afterwards return to reside in it, cohabiting as man and wife, they shall

be punished as provided in Section 20-20 and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

These laws were held valid in Kinney V. Commonwealth 30 Gratt, 858 (1878) Judge Christian who wrote the opinion said 30 Gratt 870): "If the parties desire to maintain the relations of man and wife, they must change their domicile and go to some State or Country where the laws recognizes the validity of such marriages."

Their marriage being absolutely void in Virginia they cannot cohabit in Virginia without incurring repeated prosecutions for that cohabitation.

It is next contended that these statutes are unconstitutional in violation of Section 1 of the Virginia Constitution and the 14th Amendment of the U. S. Constitution.

There is nothing in Section 1 of the Constitution of Virginia which relates to this matter, nor is there anything in the 14th Amendment which has anything to do with this subject here under consideration.

Marriage is a subject which belongs to the exclusive control of the States.

In State V. Gibson 16 Ind. 180, 10 Am. Rep. 42 a statute prohibiting the intermarriage of negroes and white persons was held not to violate any provisions of the 14th Amendment or Civil Rights Laws in the course of a well-reasoned and well-supported discussion of the powers retained by and inherent in the States under the Constitution said:

"... In this State marriage is treated as a civil contract, but it is more than a mere civil contract, it is a public institution established by God himself, is recognized in all Christian and civilized nations and is essential to the peace, happiness, and well being of society...."

"...The right in the States to control, to guard, protect and preserve this God-giving, civilizing and Christianizing institution is of inestimable importance, and cannot be surrendered, nor can the States suffer or permit any interference therewith. If the Federal Government can determine who may marry in a State, there is no limit to its power....
36 Ind. at p. 402-3)

In Main v. Nain, 196 Va. 80, 97 S.E. (2nd) 749 (1953) the Court of Appeals in a well considered opinion held that the Virginia statutes were constitutional and concluded its opinion as follows: "Regulation of the marriage relation is, we think, distinctly one of the rights guaranteed to the States and safeguarded by that bastion of States' rights, somewhat battered perhaps but still a sturdy fortress in our fundamental law, the tenth section of the Bill of Rights, which declares: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'"

In Pace v. Alabama 106 U.S. 583, 1 S.Ct. 637, 27 L. ed. 207, a prosecution for a white person marrying a colored person was upheld. Pace, the negro, contended that the Statute violated the Equal Protection of the 14th Amendment.

In Jackson v. State, 37 Ala. App. 519, 72 So. (2d) 114, as the party had been convicted under the miscegenation statute, the conviction was affirmed against the contentions that the right and privilege of marrying a white person violated the Due Process and Equal Protection clauses of the 14th Amendment the Supreme Court of the United States denied a writ of certiorari (1954).

In Greenhow & Als v. James' Executor 80 Va. 636 (1885) the Court held that the children of a marriage contracted in the District of Columbia

between a white person and a colored person could take under a will of a relative.

Such on marriage the Court said (80 Va. 51) ... " Yet that it can have application to a marriage contract entered into in a foreign country in contravention of public statutes of the country of their domicile which pronounces a marriage between them not only absolutely void but criminal. In the very nature of things every sovereign state must have the power to prescribe what incapacities for contracting marriage shall be established as the law among her own citizens, and it follows therefore that when the state has once pronounced an incapacity on the part of any of its citizens to enter into the marriage relationship with each other that such incapacity attaches itself to the person or parties and although it may not be enforceable during the absence of the parties, it at once revives with all its prohibitive power upon their return to domicile...."

In Toler v. Oakwood Smokeless Coal Corporation 173 Va. 425, 430 the Court speaking through Mr. Justice Spratley said:

"One state, however, cannot force its own marriage laws, or other laws, on any other state, and no state is bound by comity to give effect in its Courts to the marriage laws of another state, repugnant to its own laws and policy. Otherwise, a state would be deprived of the very essence of its sovereignty, the right of supremacy within its own borders. Such effect as may be given by a state to a law of another state is merely because of comity, or because justice and policy may demand recognition of such law. Such recognition is not a matter of obligation. Minor on conflict laws Sec. 4, 5, 6 and 126."

In 6 Am Eng Enc. of Law 2nd Ed P. 967 it is said " The right to marr is not such a privilege and immunity but a social institution of great

importance subject to state regulation and a statute prohibiting inter-marriage between white person and negroes is not a discrimination or unequal law contrary to the terms of the constitutional provisions."

It is next said that the sentence and the statute are unconstitutional as burdens on interstate commerce.

Marriage has nothing to do with interstate commerce. There is nothing more domestic than marriage; and this contentive is without merit.

It is next said such sentence has involved undue hardships upon the defendants by preventing them from together visiting their families from time to time as may be necessary to promote domestice tranquility .

This complaint relates to the terms of the suspension of this sentence which is as follows:

" And the Court doth suspend said setence for twenty-five years upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together at the same time to said County and State for a period of twenty-five years."

The Court knew that if they come to Caroline County or to the State of Virginia together that they would be subject to prosecution for unlawful cohabitation and therefore permitted each are to separately visit his or her people, but not together. If it works a hardship on them not to visit their people together it is the law that they cannot cohabit together in Virginia. Each one of them can come to Caroline separately to visit his or her people as often as they please.

Section 53-272 of the Code of Virginia provides in part: "In any case wherein the Court is authorized to suspend the imposition or execution of sentence, such Court may fix the period of suspension for a reasonable time having due regard to the gravity of the offense, without regard to the gravity period for which the prisoner might have been sentenced."

The parties were guilty of a most serious crime. As said by the Court in Kinney's Case 30 Gratt 865: "It was a marriage prohibited and declared absolutely void. It was contrary to the declared public law, founded upon motives of public policy—a public policy affirmed for more than a Century, and one upon which social order, public morality and the best interests of both races depend. This unmistakable policy of the legislature founded, I think, on wisdom and the moral development of both races, has been shown by not only declaring marriages between whites and negroes absolutely void, but by prohibiting and punishing such unnatural alliances with severe penalties. The laws enacted to further and uphold this declared policy would be futile and a dead letter if in fraud of these salutary enactments, both races might, by stepping across any imaginary line bid defiance to the law by immediately returning and insisting that the marriage celebrated in another state or county should be recognized as lawful, though denounced by the public law of the domicile as unlawful and absolutely void."

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

The awfulness of the offense is shown by Section 20-57 which declares "All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.

Then Section 20-59 of the Code makes the contracting of a marriage between a white person and any colored person a felony.

Conviction of a felony is a serious matter. You lose your political rights; and only the government has the power to restore them (Constituti

Sec. 73.) And as long as you live you will be known as a felony

"The moving finger writes and moves on
and having writ
Nor all your piety nor all your wit
Can change one line of it."

Leon M. Hazile

(Leon M. HAZILE, Judge)

VIRGINIA: IN THE CIRCUIT COURT OF CAROLINE COUNTY
COMMONWEALTH

VS.

RICHARD PERRY LOVING

and

MILDRED DELORES JETER

O R D E R

This day came the defendants, by counsel, and moved the Court to vacate the judgment and set aside the sentence heretofore entered in this cause.

Upon consideration thereof, for reasons stated in an opinion heretofore filed, it is ADJUDGED and ORDERED that the said motion is hereby denied.

It is further ordered that the Clerk of this Court send an attested copy of this order to Bernard S. Cohen, Lainof, Cohen & Cohen, Attorneys At Law, 1513 King Street, Alexandria, Virginia, and J. Peyton Farmer, Commonwealth's Attorney of Caroline County.

ENTER:

Herbert M. Bazell, Judge

22 January 1965

Entered in C. C. order Blk 15- p. 173
& certified copies given 1-23-65.

Loving v. Virginia

United States District Court for the Eastern District of Virginia, At Richmond

February 11, 1965

Civ. A. No. 4138

Reporter

243 F. Supp. 231 *; 1965 U.S. Dist. LEXIS 7370 **

Richard Perry LOVING and Mildred Jeter Loving,
Plaintiffs, v. The COMMONWEALTH OF VIRGINIA et
al., Defendants

Counsel: **[**1]** Lainof, Cohen & Cohen, Bernard S.
Cohen and Philip J. Hirschkop, Alexandria, Va., for
plaintiffs.

Robert Y. Button, Atty. Gen. of Virginia, R. D.
McIlwaine, III and Kenneth C. Patty, Asst. Attys. Gen. of
Virginia, Richmond, Va., for defendants.

Judges: Before BRYAN, Circuit Judge, and LEWIS and
BUTZNER, District Judges.

Opinion by: PER CURIAM

Opinion

[*232] INTERLOCUTORY ORDER

Upon consideration of the pleadings, the stipulations of the evidence and the arguments of counsel on brief and orally, the Court finds:

1. That Richard Perry Loving, one of the plaintiffs herein, is a white person and a member of the Caucasian race; that Mildred Jeter Loving, born Mildred Jeter, the other plaintiff herein, is a colored person and a member of the Negro race; that the plaintiffs prior to June 2, 1958 resided and were domiciled in the State of Virginia; that on June 2, 1958 they went to the District of Columbia for the purpose of being married and intending to return thereafter to the State of Virginia, to reside and cohabit there as man and wife; that they were married in the District of Columbia on June 2, 1958; and that thereupon they returned to the State of Virginia, and there lived **[**2]** together as man and wife in Caroline County;

2. That on July 11, 1958 the plaintiffs were arrested, and at term of the Circuit Court of Caroline County in the following October they were indicted, for a felony, that is

for conduct constituting a violation of § 20-58 of the Code of Virginia, 1950, which reads as follows:

' § 20-58. Leaving State to evade law. -- If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.'

3. That on January 6, 1959 the plaintiffs, appearing with counsel, each entered a plea of guilty to the indictment, the Court accepted the pleas and 'fix(ed) the punishment of both accused at one year each in jail', but the Court suspended 'said sentence for a period of twenty-five years upon the provision that both accused leave Caroline County and the State **[**3]** of Virginia at once and do not return together or at the same time to said County and state for a period of twenty-five years'; and that the plaintiffs then were released 'from custody and further recognizance';

[*233] 4. That after their conviction and release as aforesaid, on January 6, 1959, the plaintiffs did not return to the State of Virginia together or at the same time until after the commencement of the present action, but meanwhile on November 6, 1963 they filed a motion in the said criminal proceeding in the Circuit Court of Caroline County to vacate the said judgment of conviction and to set aside the suspended sentence; that in respect to the suspension, the grounds of the motion were that the condition of the suspension imposed a cruel and unusual punishment within the prohibition of § 9 of the Constitution of Virginia, that the period specified in the condition exceeded the limits permitted by the probation statute, § 53-272 of the Code of Virginia of 1950, as amended, and that the condition constituted a banishment in violation of due process of law; and that in respect to the judgment, the motion stated it was based on a statute invalid under the

Fourteenth **[**4]** Amendment of the Constitution of the United States because the statute denied the plaintiffs the equal protection of the laws and the 'right of marriage' and the sentence worked an undue hardship upon the plaintiffs by 'preventing them from together visiting their families from time to time as may be desirable and necessary';

5. That shortly after its filing the said motion was heard by the Circuit Court of Caroline County; and that in November or December 1963, the Judge of the Circuit Court, the Honorable Leon M. Bazile, who originally passed the judgment and sentence upon the plaintiffs and is a defendant here, rendered a memorandum opinion indicating the intention of the Court to deny the motion;

6. That after the filing of the memorandum opinion the plaintiffs took no further action until October 28, 1964 when they filed the present suit in this court, as a 'class action', to have the court declare that the Virginia statutes, designated §§ 20-50 to 20-60 inclusive, Code of Virginia, 1950, prohibiting the intermarriage of white and colored persons, are invalid as in violation of the Fourteenth Amendment, and to restrain the enforcement of these statutes generally but particularly **[**5]** against the plaintiffs under the said judgment and sentence;

7. That while this suit stood set for hearing on February 3, 1965, an order was entered by the Circuit Court of Caroline County on January 22, 1965 denying the said motion filed therein on November 6, 1963; that the plaintiffs are now residing and cohabiting in Caroline County, Virginia; and that they are immediately threatened with deprivation of their liberty through enforcement of the said judgment and sentence;

8. That in the present suit the Commonwealth of Virginia has moved to be dismissed as a party defendant because it is a sovereign and has not consented to be sued herein, and the Attorney General of Virginia has also moved to be dismissed as a party defendant for the reason that under the State law he does not have the duty of enforcing the said statutes; and

9. That all of the defendants including the Commonwealth's Attorney of Caroline County, who is the State prosecutor, and the Honorable Leon M. Bazile, Circuit Judge as aforesaid, have seasonably and appropriately sought dismissal of this suit on the ground that no such irreparable injury is threatened the plaintiffs as would entitle them to an injunction, **[**6]** because the plaintiffs may, and should be required to, assert the

alleged invalidity of the said statutes, judgment and sentence by way of defense to the enforcement of said judgment and sentence in the State courts.

CONCLUSIONS OF THE COURT

On consideration of their motions, the court holds that the Commonwealth of Virginia and Robert Y. Button, Attorney General of Virginia, should be dismissed as defendants herein.

Upon the facts, found as aforesaid, the court is of the opinion that it has jurisdiction of the present suit; that because of the imminent threat of imprisonment, the plaintiffs are entitled to have the issue **[*234]** of the validity of the said statutes, judgment and sentence forthwith decided in the State courts in the said criminal proceeding or by the Federal courts in this suit; that in view of the immediate pendency in the Circuit Court of Caroline County of the said criminal proceeding, comity requires that this court accede to the request of the defendant State officials to stay this suit for a reasonable time to allow the Commonwealth of Virginia and the plaintiffs herein to have the State courts determine in the said criminal proceeding the enforceability **[**7]** of the said judgment and sentence, and thus decide the issue of the validity of said statutes; and that this court should not now award an injunction pendente lite against the enforcement of the judgment and sentence; but that in lieu of such an injunction, in the event the plaintiffs are taken into custody in the enforcement of the said judgment and sentence, this court, under the provisions of title 28, section 1651, United States Code, should grant the plaintiffs bail in a reasonable amount during the pendency of the State proceedings in the State courts and in the Supreme Court of the United States, if and when the case should be carried there; and that if the Commonwealth of Virginia fails to submit the said issue of the validity of said statutes, judgment and sentence for decision to the State courts promptly, or if the State courts for any reason rule that they cannot or should not decide such issue, then the plaintiffs may again apply to this court to hear and determine said issue; and that if through fault of the plaintiffs the said issue is not or cannot be decided by the State courts, then the defendants may apply to this court for dismissal of this suit.

Accordingly it **[**8]** is now by the court

ORDERED:

(a) That the Commonwealth of Virginia and the Attorney General of Virginia be, and each of them is hereby,

dismissed as defendants to this action;

(b) That the preliminary injunction herein sought by the plaintiffs be, and it is hereby, denied at this time;

(c) That the further hearing of this suit be continued until the parties have a reasonable time to have the said issue decided in the said criminal proceeding, but the continuance is subject to the right of the plaintiffs to again apply to this court to hear and determine said issue if, through no fault of theirs, the State courts for any reason rule they cannot or should not decide said issue; and upon the right of the defendants to again apply to this court for dismissal of the suit upon the failure or refusal of the plaintiffs to timely submit said issue to the State courts for final determination;

(d) That this court retain jurisdiction of this action for the consideration of such matters, and the entry of such orders, as may hereafter be necessary.

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Present: All the Justices

RICHARD PERRY LOVING, ET AL.

-v- Record No. 6163

OPINION BY JUSTICE HARRY L. CARRICO
Richmond, Virginia, March 7, 1966

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF CAROLINE COUNTY
Leon M. Bazile, Judge

On January 6, 1959, Richard Perry Loving and Mildred Jeter Loving, the defendants, were convicted, upon their pleas of guilty, under an indictment charging that "the said Richard Perry Loving being a white person and the said Mildred Delores Jeter being a colored person, did unlawfully and feloniously go out of the State of Virginia, for the purpose of being married, and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife." (Code, § 20-58.)¹

¹ "§ 20-58. Leaving State to evade law. - If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

The trial court fixed "the punishment of both accused at one year each in jail." (Code, § 20-59.)² The court suspended the sentences "for a period of twenty-five years upon the provision that both accused leave Caroline County and the state of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years."

On November 6, 1963, the defendants filed a "Motion to Vacate Judgment and Set Aside Sentence" alleging that they had complied with the terms of their suspended sentences but asserting that the statute under which they were convicted was unconstitutional and that the sentences imposed upon them were invalid.

The court denied the motion by an order entered on January 22, 1965, and to that order the defendants were granted this writ of error.

There is no dispute that Richard Perry Loving is a white person and that Mildred Jeter Loving is a colored person within the meaning of Code, § 20-58. Nor is there any dispute that the actions of the defendants, as set forth in the indictment,

² "§ 20-59. Punishment for marriage. - If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

violated the provisions of Code, § 20-58.

The sole contention of the defendants, with respect to their convictions, is that Virginia's statutes prohibiting the intermarriage of white and colored persons are violative of the Constitution of Virginia and the Constitution of the United States. Such statutes, the defendants argue, deny them due process of law and equal protection of the law.

The problem here presented is not new to this court nor to other courts, both state and federal, throughout the country. The question was most recently before this court in 1955, in Nain v. Nain, 197 Va. 80, 87 S. E. 2d 749, remanded 350 U. S. 891, 100 L. ed. 784, 76 S. Ct. 151, affd. 197 Va. 734, 90 S. E. 2d 849, app. dismissed 350 U. S. 985, 100 L. ed. 852, 76 S. Ct. 472.

In the Nain case, the Virginia statutes relating to miscegenetic marriages were fully investigated and their constitutionality was upheld. There, it was pointed out that more than one-half of the states then had miscegenation statutes and that, in spite of numerous attacks in both state and federal courts, no court, save one, had held such statutes unconstitutional. The lone exception, it was noted, was the California

Supreme Court which declared the California miscegenation statutes unconstitutional in Perez v. Sharp, 32 Cal. 2d 711, 198 P. 2d 17 (sub nom. Perez v. Lippold).

The Naim opinion, written for the court by Mr. Justice Buchanan, contains an exhaustive survey and citation of authorities, both case and text from both state and federal sources, upon the subject of miscegenation statutes. It is not necessary to repeat all those citations in this opinion because the defendants concede that the Naim case, if given effect here, is controlling of the question before us. They urge us, however, to reverse our decision in that case, contending that the decision is wrong because the judicial authority upon which it was based no longer has any validity. Our inquiry must be, therefore, whether a change in the Naim decision is required.

The defendants say that the Naim opinion relied upon Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 S. Ct. 1138, but argue that the United States Supreme Court reversed the Plessy decision in Brown v. Board of Education, 347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686.

The Plessy case, decided in 1896, involved an attack upon the constitutionality of a Louisiana statute requiring

separate railway carriages for the white and colored races. The statute was upheld by the Supreme Court under the "separate but equal" doctrine there enunciated by the court.

In the Brown case, decided in 1954, the Supreme Court ruled "that in the field of public education the doctrine of 'separate but equal' has no place" and that "Any language in Plessy v. Ferguson contrary to this finding is rejected." 98 L. ed., at p. 881.

The Plessy case was cited in the Naim opinion to show that the United States Supreme Court had made no decision at variance with an earlier holding by the Tenth Circuit Court of Appeals in Stevens v. United States, 146 F. 2d 120, that "a state is empowered to forbid marriages between persons of African descent and persons of other races or descents. Such a statute does not contravene the Fourteenth Amendment."

The Naim opinion contained a quotation from the Plessy case that "Laws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the state." Nothing was said in the Brown case which detracted in any way from the effect of the language quoted from the Plessy opinion. As Mr. Justice Buchanan pointed out in the Naim opinion, the holding in the Brown case, that the

opportunity to acquire an education "is a right which must be made available to all on equal terms," cannot support a claim for the intermarriage of the races or that such intermarriage is a "right which must be made available to all on equal terms."

The United States Supreme Court itself has indicated that the Brown decision does not have the effect upon miscegenation statutes which the defendants claim for it. The Brown decision was announced on May 17, 1954. On November 22, 1954, just six months later, the United States Supreme Court denied certiorari in a case in which Alabama's statute forbidding intermarriage between white and colored persons had been upheld against the claim that the statute denied the Negro appellant "her constitutional right and privilege of intermarrying with a white male person," and that it violated the Privileges and Immunities, the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. Jackson v. State, 37 Ala. App. 519, 72 So. 2d 114, 260 Ala. 698, 72 So. 2d 116, cert. denied 348 U. S. 888, 99 L. ed. 698, 75 S. Ct. 210.

The defendants also say that the Naim opinion relied upon Face v. Alabama, 106 U. S. 583, 27 L. ed. 207, 1 S. Ct. 637, but contend that the United States Supreme Court overruled the Face decision in McLaughlin v. Florida, 379 U. S. 184, 13 L. ed.

2d 222, 85 S. Ct. 283.

The Pace case, decided in 1883, involved an attack upon the constitutionality of an Alabama statute imposing a penalty for adultery or fornication between a white person and a Negro. Another statute provided a lesser penalty "If any man and woman live together in adultery or fornication." A white woman and Pace, a Negro, were convicted and sentenced under the first statute "for living together in a state of adultery or fornication." Pace appealed, claiming that the statute under which he had been convicted was violative of the Fourteenth Amendment. The court rejected this claim, holding that "whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race." 27 L. ed., at p. 208.

In the McLaughlin case, decided in 1964, the Supreme Court had under review a Florida statute which made it unlawful for a white person and a Negro, "not married to each other," to "habitually live in and occupy in the night time the same room." The statute in dispute provided for a different burden of proof and a different penalty than were provided by other statutes relating to adultery and fornication generally. Florida sought

to sustain the validity of the statute under the holding in Pace v. Alabama. The court, however, ruled the Florida statute invalid, saying of Pace v. Alabama that it "represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." 13 L. ed. 2d, at p. 226.

The Pace case, like the Plessy case, was cited in the Main opinion to show that the United States Supreme Court had made no decision at variance with the rule that a state may validly forbid interracial marriages. The McLaughlin decision detracted not one bit from the position asserted in the Main opinion.

Both parties to the McLaughlin controversy cited Florida's miscegenation statute, making it unlawful for a white person to marry a Negro. McLaughlin contended that the miscegenation statute was unconstitutional because it prevented him from asserting, against the cohabitation charge, the defense of common law marriage. Florida argued that it was necessary that its cohabitation statute be upheld so as to carry out the purposes of its miscegenation statute which, it contended, was "immune from attack under the Equal Protection Clause." The court ruled

that it was unnecessary to consider McLaughlin's contention in this respect because the court was holding in his favor on the cohabitation statute. As for Florida's contention, the court said that, for purposes of argument, the constitutionality of the miscegenation statute would be assumed and that it was deciding the case "without reaching the question of the validity of the State's prohibition against interracial marriage." 13 L. ed. 2d, at p. 230.

The defendants direct our attention to numerous federal decisions in the civil rights field in support of their claims that the Naim case should be reversed and that the statutes under consideration deny them due process of law and equal protection of the law.

We have given consideration to these decisions, but it must be pointed out that none of them deals with miscegenation statutes or curtails a legal truth which has always been recognized - that there is an overriding state interest in the institution of marriage. None of these decisions takes away from what was said by the United States Supreme Court in Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 657, 8 S. Ct. 723:

"Marriage, as creating the most important relation in life, as having more to do with the morals and

civilization of a people than any other institution, has always been subject to the control of the Legislature."

The defendants also refer us to a number of texts dealing with the sociological, biological and anthropological aspects of the question of interracial marriages to support their argument that the Naim decision is erroneous and that such marriages should not be forbidden by law.

A decision by this court reversing the Naim case upon consideration of the opinions of such text writers would be judicial legislation in the rawest sense of that term. Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate.

Our one and only function in this instance is to determine whether, for sound judicial considerations, the Naim case should be reversed. Today, more than ten years since that decision was handed down by this court, a number of states still have miscegenation statutes and yet there has been no new decision reflecting adversely upon the validity of such statutes. We find no sound judicial reason, therefore, to depart from our

holding in the Naim case. According that decision all of the weight to which it is entitled under the doctrine of stare decisis, we hold it to be binding upon us here and rule that Code, §§ 20-58 and 20-59, under which the defendants were convicted and sentenced, are not violative of the Constitution of Virginia or the Constitution of the United States.

We turn now to the other contention of the defendants that the sentences imposed upon them are unreasonable and void.

It will be recalled that the trial court suspended the sentences of the defendants for a period of twenty-five years upon the condition that they leave the county and state "at once and do not return together or at the same time to said county and state for a period of twenty-five years."

The defendants first say that the effect of the sentences was to banish them from the state. They refer us to the case of State v. Doughtie, 237 N.C. 368, 74 S. E. 2d 922, where it was held that "banishment . . . is impliedly prohibited by public policy. . . A sentence of banishment is undoubtedly void."

Although the defendants were, by the terms of the suspended sentences, ordered to leave the state, their sentences did not technically constitute banishment because

they were permitted to return to the state, provided they did not return together or at the same time.

Thus, we do not agree with the defendants' contention that the sentences are void because they constitute banishment. We do agree with their further contention, however, that the conditions of the suspensions are so unreasonable as to render the sentences void.

The trial court acted under the authority of Code, § 53-272 in suspending the sentences of the defendants. The purpose of this statute is to secure the rehabilitation of the offender, enabling him to repent and reform so that he may be restored to a useful place in society. Marshall v. Commonwealth, 202 Va. 217, 219, 116 S. E. 2d 270; Slayton v. Commonwealth, 185 Va. 357, 365-366, 38 S. E. 2d 479; Wilborn v. Saunders, 170 Va. 153, 160-161, 195 S. E. 723.

To effect this statutory purpose, the courts are authorized to impose conditions upon the suspension of execution or imposition of sentence. But such conditions must be reasonable, having due regard to the nature of the offense, the background of the offender and the surrounding circumstances. Dyke v. Commonwealth, 193 Va. 478, 484, 69 S. E. 2d 483.

Here, the real gravamen of the offense charged against the defendants, under Code, § 20-58, was their cohabitation as man and wife in this state, following their departure from the state to evade Virginia law, their marriage in another jurisdiction and their return to Virginia. Without such cohabitation, there would have been no offense for which they could have been tried, notwithstanding their other actions.

When the defendants' sentences were suspended, the purpose which the trial court should reasonably have sought to serve was that the defendants not continue to violate Code, § 20-58. The condition reasonably necessary to achieve that purpose was that the defendants not again cohabit as man and wife in this state. There is nothing in the record concerning the defendants' backgrounds or the circumstances of the case to indicate that anything more was necessary to secure the defendants' rehabilitation and to accomplish the purposes envisioned by Code, § 53-272.

It was, therefore, unreasonable to require that the defendants leave the state and not return thereafter together or at the same time. Such unreasonableness renders the sentences void and they will, accordingly, be vacated and set aside. The case will be remanded to the trial court with

directions to re-sentence the defendants in accordance with Code, § 20-59, attaching to the suspended sentences, to be imposed upon the defendants, conditions not inconsistent with the views expressed in this opinion.

In this connection, although it has not been alluded to by either side to this controversy, it should be noted that Code, § 20-59 provides for a sentence in the penitentiary, and not in jail, as called for in the sentencing order of the trial court.

That portion of the order appealed from upholding the constitutionality of Code, §§ 20-58 and 20-59, and the convictions of the defendants thereunder, is affirmed; that portion of said order upholding the validity of the sentences imposed upon the defendants is reversed, and the case is remanded for further proceedings.

Affirmed in part, reversed in part and remanded.

CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES
AT
OCTOBER TERM, 1966.

LOVING ET UX. *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 395. Argued April 10, 1967.—Decided June 12, 1967.

Virginia's statutory scheme to prevent marriages between persons solely on the basis of racial classifications *held* to violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Pp. 4-12.

206 Va. 924, 147 S. E. 2d 78, reversed.

Bernard S. Cohen and *Philip J. Hirschkop* argued the cause and filed a brief for appellants. *Mr. Hirschkop* argued *pro hac vice*, by special leave of Court.

R. D. McIlwaine III, Assistant Attorney General of Virginia, argued the cause for appellee. With him on the brief were *Robert Y. Button*, Attorney General, and *Kenneth C. Patty*, Assistant Attorney General.

William M. Marutani, by special leave of Court, argued the cause for the Japanese American Citizens League, as *amicus curiae*, urging reversal.

Briefs of *amici curiae*, urging reversal, were filed by *William M. Lewers* and *William B. Ball* for the National Catholic Conference for Interracial Justice et al.;

by *Robert L. Carter* and *Andrew D. Weinberger* for the National Association for the Advancement of Colored People, and by *Jack Greenberg*, *James M. Nabrit III* and *Michael Meltsner* for the N. A. A. C. P. Legal Defense & Educational Fund, Inc.

T. W. Bruton, Attorney General, and *Ralph Moody*, Deputy Attorney General, filed a brief for the State of North Carolina, as *amicus curiae*, urging affirmance.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹ For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court

¹Section 1 of the Fourteenth Amendment provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1

Opinion of the Court.

of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

“Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The motion not having been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia antimiscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the antimiscegenation statutes and, after

modifying the sentence, affirmed the convictions.² The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966, 385 U. S. 986.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 20-58 of the Virginia Code:

“Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.”

Section 20-59, which defines the penalty for miscegenation, provides:

“Punishment for marriage.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.”

Other central provisions in the Virginia statutory scheme are § 20-57, which automatically voids all marriages between “a white person and a colored person” without any judicial proceeding,³ and §§ 20-54 and 1-14 which,

² 206 Va. 924, 147 S. E. 2d 78 (1966).

³ Section 20-57 of the Virginia Code provides:

“Marriages void without decree.—All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.” Va. Code Ann. § 20-57 (1960 Repl. Vol.).

respectively, define “white persons” and “colored persons and Indians” for purposes of the statutory prohibitions.⁴ The Lovings have never disputed in the course of this litigation that Mrs. Loving is a “colored person” or that Mr. Loving is a “white person” within the meanings given those terms by the Virginia statutes.

⁴ Section 20-54 of the Virginia Code provides:

“Intermarriage prohibited; meaning of term ‘white persons.’—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term ‘white person’ shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.” Va. Code Ann. § 20-54 (1960 Repl. Vol.).

The exception for persons with less than one-sixteenth “of the blood of the American Indian” is apparently accounted for, in the words of a tract issued by the Registrar of the State Bureau of Vital Statistics, by “the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas” Plecker, *The New Family and Race Improvement*, 17 Va. Health Bull., Extra No. 12, at 25-26 (New Family Series No. 5, 1925), cited in Wadlington, *The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective*, 52 Va. L. Rev. 1189, 1202, n. 93 (1966).

Section 1-14 of the Virginia Code provides:

“Colored persons and Indians defined.—Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians.” Va. Code Ann. § 1-14 (1960 Repl. Vol.).

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications.⁵ Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period.⁶ The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a "white person" marrying other than another "white person,"⁷ a prohibition against issuing marriage licenses until the issuing official is satisfied that

⁵ After the initiation of this litigation, Maryland repealed its prohibitions against interracial marriage, Md. Laws 1967, c. 6, leaving Virginia and 15 other States with statutes outlawing interracial marriage: Alabama, Ala. Const., Art. 4, § 102, Ala. Code, Tit. 14, § 360 (1958); Arkansas, Ark. Stat. Ann. § 55-104 (1947); Delaware, Del. Code Ann., Tit. 13, § 101 (1953); Florida, Fla. Const., Art. 16, § 24, Fla. Stat. § 741.11 (1965); Georgia, Ga. Code Ann. § 53-106 (1961); Kentucky, Ky. Rev. Stat. Ann. § 402.020 (Supp. 1966); Louisiana, La. Rev. Stat. § 14:79 (1950); Mississippi, Miss. Const., Art. 14, § 263, Miss. Code Ann. § 459 (1956); Missouri, Mo. Rev. Stat. § 451.020 (Supp. 1966); North Carolina, N. C. Const., Art. XIV, § 8, N. C. Gen. Stat. § 14-181 (1953); Oklahoma, Okla. Stat., Tit. 43, § 12 (Supp. 1965); South Carolina, S. C. Const., Art. 3, § 33, S. C. Code Ann. § 20-7 (1962); Tennessee, Tenn. Const., Art. 11, § 14, Tenn. Code Ann. § 36-402 (1955); Texas, Tex. Pen. Code, Art. 492 (1952); West Virginia, W. Va. Code Ann. § 4697 (1961).

Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.

The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California. *Perez v. Sharp*, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

⁶ For a historical discussion of Virginia's miscegenation statutes, see Wadlington, *supra*, n. 4.

⁷ Va. Code Ann. § 20-54 (1960 Repl. Vol.).

the applicants' statements as to their race are correct,⁸ certificates of "racial composition" to be kept by both local and state registrars,⁹ and the carrying forward of earlier prohibitions against racial intermarriage.¹⁰

I.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in *Naim v. Naim*, 197 Va. 80, 87 S. E. 2d 749, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy. *Id.*, at 90, 87 S. E. 2d, at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, *Maynard v. Hill*, 125 U. S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer v. Nebraska*, 262 U. S. 390 (1923), and *Skinner v. Oklahoma*, 316 U. S. 535 (1942). Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element

⁸ Va. Code Ann. § 20-53 (1960 Repl. Vol.).

⁹ Va. Code Ann. § 20-50 (1960 Repl. Vol.).

¹⁰ Va. Code Ann. § 20-54 (1960 Repl. Vol.).

as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, *Railway Express Agency, Inc. v. New York*, 336 U. S. 106 (1949), or an exemption in Ohio's ad valorem tax for merchandise owned by a non-resident in a storage warehouse, *Allied Stores of Ohio*,

Inc. v. Bowers, 358 U. S. 522 (1959). In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources "cast some light" they are not sufficient to resolve the problem; "[a]t best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect." *Brown v. Board of Education*, 347 U. S. 483, 489 (1954). See also *Strauder*

v. *West Virginia*, 100 U. S. 303, 310 (1880). We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished. *McLaughlin v. Florida*, 379 U. S. 184 (1964).

The State finds support for its "equal application" theory in the decision of the Court in *Pace v. Alabama*, 106 U. S. 583 (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin v. Florida, supra*, at 188. As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. *Slaughter-House Cases*, 16 Wall. 36, 71 (1873); *Strauder v. West Virginia*, 100 U. S. 303, 307-308 (1880); *Ex parte Virginia*, 100 U. S. 339, 344-345 (1880); *Shelley v. Kraemer*, 334 U. S. 1 (1948); *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961).

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U. S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu v. United States*, 323 U. S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they "cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense." *McLaughlin v. Florida*, *supra*, at 198 (STEWART, J., joined by DOUGLAS, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.¹¹ We have consistently denied

¹¹ Appellants point out that the State's concern in these statutes, as expressed in the words of the 1924 Act's title, "An Act to Preserve Racial Integrity," extends only to the integrity of the white race. While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry with-

the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

II.

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U. S. 535, 541 (1942). See also *Maynard v. Hill*, 125 U. S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed.

It is so ordered.

out statutory interference. Appellants contend that this distinction renders Virginia's miscegenation statutes arbitrary and unreasonable even assuming the constitutional validity of an official purpose to preserve "racial integrity." We need not reach this contention because we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the "integrity" of all races.

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STEWART, J., concurring.

MR. JUSTICE STEWART, concurring.

I have previously expressed the belief that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." *McLaughlin v. Florida*, 379 U. S. 184, 198 (concurring opinion). Because I adhere to that belief, I concur in the judgment of the Court.



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Virginia Legislative Update

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Virginia Legislative Update

2022 Bills of Interest Passed or Considered by the
2021 Session of the
General Assembly of Virginia

Gentry Locke Seminar

September 16, 2022 – Roanoke

September 28, 2022 – Richmond

Patrice L. Lewis

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2022 BILLS OF INTEREST – OVERVIEW

PASSED -SB 633 (Stanley) & HB 1145 (Leftwich) - **Civil actions; health care bills and records.** Defines the term "bill" for the purposes of evidence of medical services provided in certain civil actions as a statement of charges, an invoice, or any other form prepared by the health care provider or its third-party bill administrator identifying the costs of health care services provided. The bill also clarifies the procedures for introducing evidence of medical reports, statements, or records of a health care provider by affidavit in general district court.

PASSED -HB 1132 (Williams) **Payment of small amounts to certain persons without involvement of fiduciary; threshold.** Increases from \$25,000 to \$50,000 the amount under which a payment to certain persons may be made without the involvement of a fiduciary.

PASSED - SB 64 (Surovell) **Proceeds of compromise agreements; minors; investment in college savings trust accounts.** Permits a court to direct the payment of the proceeds of an approved compromise agreement, in the case of damage to the person or property of a minor, by investment in a college savings trust account for which the minor is the beneficiary pursuant to a college savings trust agreement with the Virginia College Savings Plan, provided that (i) the investment options pursuant to such agreement are restricted to target enrollment portfolios; (ii) the order or decree approving and confirming the

compromise requires the minor beneficiary's parent, as that term is defined in relevant law, to act as the custodian of the account; and (iii) except in the case of a distribution from the account to be applied toward the minor beneficiary's qualified higher education expenses, as that term is defined in relevant federal law, the order or decree approving and confirming the compromise prohibits the minor beneficiary's parent from making any transfer, withdrawal, termination, or other account transaction unless the court provides prior approval pursuant to a written order.

PASSED SB 350 (Surovell) **Health records; patient's right to disclosure.** Requires a health care entity to include in its disclosure of an individual's health records any changes made to the health records and an audit trail for such records if the individual specifically requests that such information be included in the health records disclosure. The bill permits the health care entity to charge the requester reasonable costs to produce an audit trail, if specifically requested.

PASSED SB 681 (Obenshain) **Duty of in-network providers to submit claims to health insurers; Virginia Consumer Protection Act.** Provides that a knowing violation of the existing requirement for an in-network provider that provides health care services to a covered patient to submit its claim to the health insurer for the health care services in accordance with the terms of the applicable provider agreement or as permitted under applicable federal or state laws is a prohibited practice under the Virginia Consumer Protection Act.

PASSED SB 124 (Obenshain) **Misuse of power of attorney; financial exploitation; incapacitated adults; penalty.** Makes it a Class 1 misdemeanor for an agent under a power of attorney who knowingly or intentionally engages in financial exploitation of an incapacitated adult who is the principal of that agent. The bill also provides that the agent's authority terminates upon such conviction. As introduced, this bill was a recommendation of the Virginia Criminal Justice Conference. This bill incorporates [SB 10](#) and [SB 690](#) and is identical to [HB 497](#).

PASSED SB 148 (Norment) **Public health emergencies; immunity for health care providers.** Expands immunity provided to health care providers responding to a disaster to include actions or omissions taken by the provider as directed by any order of public health in response to such disaster when a local emergency, state of emergency, or public health emergency has been declared.

PASSED SB 754 (Obenshain/Ballard) **Motor vehicle insurance; underinsured motor vehicle.** Changes the manner by which underinsured motorist coverage may be offset by amount of liability coverage available for payment, depending upon election of consumer. Also provides for changes in notifications to insured and insurance company. Bill was supported by Independent Insurance Agents of Virginia.

PASSED SB 689 (Wampler) **Workers' compensation; employer duty to furnish medical attention; cost limit.** Adds scooters to the list of medical equipment an employer is required to furnish to an employee under certain circumstances under the Virginia Workers' Compensation Act. The bill raises the limit on the aggregate cost of items and modifications required to be furnished by an employer to an injured employee from \$42,000 to \$55,000, to be increased on an annual basis.

PASSED SB 677 (Lewis) **Workers' compensation; cost of living supplements.** Provides that cost-of-living supplements shall be payable to claimants who are receiving disability benefits under the Virginia Workers' Compensation Act but are not receiving federal disability benefits.

PASSED SB 351 (Surovell) **Workers' compensation; permanent and total incapacity; subsequent accident.** Requires compensation for permanent and total incapacity to be awarded for the loss of both hands, both arms, both feet, both legs, both eyes, or any two thereof either from the same accident or a compensable consequence of an injury sustained in the original accident. Under current law, compensation for permanent and total incapacity is required only when such loss occurs in the same accident.

FAILED HB 1002 (Guzman) **Workers' compensation; injuries caused by repetitive and sustained physical stressors.** Provides that, for the purposes of the Virginia Workers' Compensation Act, "occupational disease" includes injuries from conditions resulting from repetitive and sustained physical stressors, including repetitive and sustained motions, exertions, posture stress, contact stresses, vibration, or noise. The bill provides that such injuries are covered under the Act. Such coverage does not require that the injuries occurred over a particular time period under the bill, provided that such a period can be reasonably identified. The bill failed in the House Commerce & Energy Subcommittee, 6-4.

PASSED SB 631 (Barker) **Fair Labor Standards Act; overtime; employer liability.** Replaces the current provisions of the Virginia Overtime Wage Act with the provision that any employer that violates the overtime wage requirements of the federal Fair Labor Standards Act,

and any related laws and regulations, shall be liable to its employee for remedies or other relief available under the Fair Labor Standards Act. The bill requires an employer to compensate employees of a derivative carrier, defined in the bill, at a rate not less than one and one-half times the employee's regular rate of pay for any hours worked in excess of 40 hours in any one workweek. The bill requires the Secretary of Labor to convene a work group that includes certain industry representatives and legislators to review overtime issues and the Virginia Overtime Wage Act and requires the work group to submit a report on its findings and recommendations to the Governor and the Chairmen of the House Committees on Appropriations and Commerce and Energy and the Senate Committees on Finance and Appropriations and Commerce and Labor by November 1, 2022. This bill is identical to [HB 1173](#).

FAILED SB 555 (Obenshain) **Liability for sale of alcohol to an underage person.** Creates a cause of action against an alcoholic beverage control retail licensee who sells alcohol to an underage person who was visibly intoxicated if the consumption of the alcohol caused or contributed to an injury to person or property while the underage person operated a motor vehicle. The plaintiff must prove such negligence by a clear and convincing evidence standard. The bill was defeated in the Senate Judiciary Committee, 4-10.

FAILED - SB 642 (Morrissey)

Preliminary analysis of breath to determine alcoholic content of blood; failure to advise person of rights.

Provides that if a police officer or a member of any sheriff's department fails to advise a person of his rights to refuse a preliminary breath test, any preliminary breath test sample shall not be admissible for the purpose of determining probable cause or used in evidence at any hearing or trial

FAILED SB 144 (Edwards) **Admissibility of statements of a deceased or incompetent party.**

Repeals the "dead man's statute," which provides that no judgment shall be entered against a person incapable of testifying based upon the uncorroborated testimony of the adverse party. Senator Edwards ultimately presented a bill to the full Senate Judiciary Committee that did not repeal the Deadman's statute but amended it. The full Committee did not look favorably on the substitute bill and decided to carry-over, effectively killing the bill.

FAILED HB 609 (Bourne) **Civil action for the deprivation of rights; duties and liabilities of certain employers.**

Creates a civil cause of action for the deprivation of any rights, privileges, or immunities pursuant to the constitutions and laws of the United States and the Commonwealth due to the acts or omissions of either a public employer or its employee and provides that a plaintiff may maintain an action to establish liability and recover compensatory damages, punitive damages, and equitable relief against the

public employer and its employee. The bill provides that sovereign immunity is not a defense to such an action. The bill further provides that public employers owe a duty of reasonable care to third parties in the hiring, supervision, training, retention, and use of their employees and that a person who claims to have suffered injury or sustained damages caused, in whole or in part, by a breach of this duty may maintain an action to establish liability and recover compensatory damages, punitive damages, and equitable relief against such public employer.

FINAL ACTION TO BE DETERMINED SB

440 (Boysko) **Unlawful hazing; penalty.**

Provides immunity for arrest and prosecution for hazing and involuntary manslaughter if a person in good faith seeks or obtains emergency medical attention for a person who has received a bodily injury by hazing or renders emergency care or assistance, including cardiopulmonary resuscitation (CPR), to a person who has received a bodily injury by hazing while another person seeks or obtains emergency medical attention for such person. The bill also clarifies that a prosecution of a hazing violation shall not preclude prosecution under any other statute. The bill also provides that the attorney for the Commonwealth may file a petition for mandamus or injunction against the president or other presiding official of any school or institution of higher education receiving appropriations from the state treasury seeking to enforce the required disciplinary and notifications provisions associated with acts of hazing.

PASSED HB 734 (Bell) **Virginia Freedom of Information Act; disclosure of certain criminal records.** Provides that (i) criminal investigative files relating to a criminal investigation or proceeding that is not ongoing are excluded from the mandatory disclosure provisions of the Virginia Freedom of Information Act, but may be disclosed by the custodian of such records to certain individuals except as otherwise provided in the bill, and (ii) no criminal investigative file or portion thereof shall be disclosed to any requester except (a) the victim; (b) members of the victim's immediate family, if the victim is deceased; (c) the victim's parent or guardian, if the victim is a minor and the parent or guardian is not a person of interest or a suspect in the criminal investigation or proceeding; or (d) an attorney representing a petitioner in a petition for a writ of actual innocence, unless the public body has notified any such individual of the request for such information. Upon notification of a request, such persons may file a petition in an appropriate court for an injunction to prevent disclosure of the records. The bill requires the court to consider certain information in making its determination and provides that a public body shall be prohibited from disclosing criminal investigative files if the court awards an injunction.

FAILED SB 669 (Surovell) **Alleged wrongdoing of law-enforcement employees.** Requires that all law-enforcement agencies that employ at least 10 law-enforcement officers, ensure that, in the case of all written citizen complaints or complaints submitted in an electronic format, the agency (i) allows for the

submission of citizen complaints through the agency's website or other electronic format; (ii) provides a receipt or written acknowledgment confirming the submission of the complaint to the individual filing such complaint; (iii) provides a written response to any individual who has filed a complaint indicating the complaint has been finalized, and (iv) provides notice to any individual who has filed a complaint if an investigation into a previously filed complaint has been reopened upon the submission of new materials after a final resolution for the previously filed complaint has been reached.

PASSED HB 496 (Mullin) **Abuse and neglect; financial exploitation; incapacitated adults; penalties.** Changes the term "incapacitated adult" to "vulnerable adult" for the purposes of the crime of abuse and neglect of such adults and defines "vulnerable adult" as any person 18 years of age or older who is impaired by reason of mental illness, intellectual or developmental disability, physical illness or disability, or other causes, including age, to the extent the adult lacks sufficient understanding or capacity to make, communicate, or carry out reasonable decisions concerning his well-being or has one or more limitations that substantially impair the adult's ability to independently provide for his daily needs or safeguard his person, property, or legal interests. The bill also changes the term "person with mental incapacity" to the same meaning of "vulnerable adult" for the purposes of the crime of financial exploitation. As introduced, the bill was a recommendation of the Virginia Criminal Justice Conference. The bill incorporates [SB 126](#).

PASSED HB 869 (Brewer)

Adoption. Allows a circuit court, upon consideration of a petition for adoption, to immediately enter an interlocutory order referring the case to a child-placing agency to conduct a visitation instead of entering an order of reference referring the case to a child-placing agency for investigation and makes other amendments to accommodate for and bolster this change. The bill allows petitions for adoption submitted by the persons listed as the child's parents on his birth certificate to be filed and granted under the provisions governing stepparent adoptions. The bill states that a putative father's registration with the Virginia Birth Father Registry is untimely regarding a child whose adoption has been finalized 180 days or more prior to such registration and in certain other instances set forth in the bill and allows written notice of an adoption plan to be

sent to a putative father by express mail with proof of delivery in addition to delivery by personal service or certified mailing as in current law.

FAILED HB 365 (Sullivan) **Parenting Coordinator Act.** Supported by the Virginia Family Law Coalition, the bill creates the Parenting Coordinator Act, which provides a framework for the use of a parenting coordinator in actions for divorce, separate maintenance, or annulment in which custody or visitation is in issue, petitions for custody or visitation, and written agreements between parties and parenting coordinators. The Act governs the qualifications, scope of authority, appointment and removal, confidentiality, communication, records maintenance, and fees of such parenting coordinators. The bill failed in the House Courts Civil Law Subcommittee.

2022 General Assembly Bills of Interest

Civil Procedure

Bill	Sponsors	Title	Last Action	Lists
HB 481	Dan I. Helmer	Hospitals; price transparency. Hospitals; price transparency. Requires every hospital to make information about standard charges for items and services provided by the hospital available on the hospital's website.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101862D: 32.1-137.05	House • Mar 11, 2022: Enrolled	Civil Procedure
HB 504	Michael P. Mullin	Expunged criminal records; use in civil action. Expunged criminal records; use in civil action. Allows any party to a civil action filed arising out of or relating to a criminal charge wherein criminal records have been expunged or a petition to expunge such records is pending to file a motion for the release of such records for use in such civil action.	House • Feb 15, 2022: Left in Courts of Justice	Civil Procedure
HB 505	Michael P. Mullin	Civil actions; filed on behalf of multiple persons. 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. The bill requires the Supreme Court to promulgate rules no later than November 1, 2022, governing such actions. The bill has a delayed effective date of July 1, 2023.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102203D: 8.01-267.1	House • Feb 15, 2022: Left in Courts of Justice	Civil Procedure
HB 515	Marie E. March	Malicious prosecution; creates civil cause of action, self-defense. Civil action for malicious prosecution; self-defense. Creates a civil cause of action for malicious prosecution in any case in which a criminal defendant charged with aggravated murder, murder in the first degree, murder in the second degree, or voluntary manslaughter is found to have acted solely in self-defense. The bill provides that such cause of action shall lie against the prosecutor who brought the charges or prosecuted such criminal case if such criminal defendant can prove that such prosecution was malicious and motivated by reasons other than bringing the alleged defendant to justice.	House • Jan 28, 2022: Stricken from docket by Courts of Justice (18-Y 0-N)	Civil Procedure
HB 555	C.E. Cliff Hayes, Jr.	Health care providers; transfer of patient records in conjunction with closure, etc. Health care providers; transfer of patient records in conjunction with closure, sale, or relocation of practice; electronic notice permitted. Allows health care providers to notify patients either electronically or by mail prior to the transfer of patient records in conjunction with the closure, sale, or relocation of the health care provider's practice. Current law requires health care providers to provide such notice by mail.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102359D: 54.1-2405	executive • Mar 09, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Civil Procedure
HB 573	Nadarius E. Clark	Statute of limitations; actions on contract for services provided by licensed health care provider. Statute of limitations; medical debt; judgment entered for medical debt. Provides that the statute of limitations for an action on any contract, written or unwritten, to collect medical debt, including actions brought by the Commonwealth, is three years. The bill further provides that no execution shall be issued and no action brought on a judgment, including a judgment in favor of the Commonwealth, rendered on medical debt after seven years from the date of such judgment; where the medical debt incurred was for life-sustaining treatment, no execution shall be issued and no action brought on such judgment more than three years from the date of such judgment. Under current law, the period within which such execution or action shall be brought is 20 years in circuit court and 10 years in general district court.	House • Mar 10, 2022: Enrolled	Civil Procedure
HB 599	Danica A. Roem	Virginia Freedom of Information Act; charges for production of public records. Virginia Freedom of Information Act; charges for production of public records. Prohibits a public body from charging a requester for any costs incurred during the first two hours spent accessing or searching for requested records when such requester has made four or fewer individual record requests to such public body within 31 consecutive days. The bill provides that for any additional time spent accessing or searching for such records, or when such requester makes five or more individual record requests to such public body within any 31-consecutive-day period, the public body shall not charge an hourly rate for accessing or searching for the records exceeding the lesser of the hourly rate of pay of the lowest-paid individual capable of fulfilling the request or \$33 per hour. The bill allows a public body to petition the appropriate court for relief from the \$33 per hour fee cap upon showing by a preponderance of the evidence that there is no qualified individual capable of fulfilling the request for \$33 per hour or less and requires such petition to be heard within seven days of when the petition is made, provided that the public body has sent and the requester has received a copy of the petition at least three working days prior to filing. The bill also provides that in certain instances a hearing on any petition shall be given precedence on a circuit court's docket over all cases that are not otherwise given precedence by law and that the time period the public body has t...	House • Feb 15, 2022: Left in General Laws	Civil Procedure

Bill	Sponsors	Title	Last Action	Lists
HB 609	Jeffrey M. Bourne	<p>Civil action for the deprivation of rights; duties and liabilities of certain employers.</p> <p>Civil action for the deprivation of rights; duties and liabilities of certain employers. Creates a civil cause of action for the deprivation of any rights, privileges, or immunities pursuant to the constitutions and laws of the United States and the Commonwealth due to the acts or omissions of either a public employer or its employee and provides that a plaintiff may maintain an action to establish liability and recover compensatory damages, punitive damages, and equitable relief against the public employer and its employee. The bill provides that sovereign immunity is not a defense to such an action. The bill further provides that public employers owe a duty of reasonable care to third parties in the hiring, supervision, training, retention, and use of their employees and that a person who claims to have suffered injury or sustained damages caused, in whole or in part, by a breach of this duty may maintain an action to establish liability and recover compensatory damages, punitive damages, and equitable relief against such public employer.</p>	House • Feb 15, 2022: Left in Courts of Justice	Civil Procedure
HB 611	Jeffrey M. Bourne	<p>Early Identification System (EIS); DCJS to establish.</p> <p>Conduct of law-enforcement officers; establishment of an Early Identification System. Requires the Department of Criminal Justice Services (the Department) to establish a best practices model for the implementation, training, and management of an Early Identification System (EIS). The bill defines an EIS as a system through which a law-enforcement agency collects and manages data to identify and assess patterns of behavior, including misconduct and high-risk behavior, or performance of law-enforcement officers and law-enforcement agency employees. The bill directs each sheriff or chief of police to implement an EIS by July 1, 2024, and requires that law-enforcement officers receive training prior to implementation of the EIS and annually thereafter. The bill also directs the Department to establish and administer written policies and procedures for law-enforcement agencies to report to the Office of the Attorney General all judgments or settlements in cases relating to negligence or misconduct of a law-enforcement officer.</p>	House • Feb 11, 2022: Tabled in Public Safety (11-Y 10-N)	Civil Procedure
HB 801	Marcia S. "Cia" Price	<p>Civilian deaths in custody; report.</p> <p>Civilian deaths in custody; report. Requires every law-enforcement agency and correctional facility to report to the Department of Criminal Justice Services certain information regarding the death of any person who is detained, under arrest or in the process of being arrested, en route to be incarcerated, incarcerated, or otherwise in the custody of such law-enforcement agency or correctional facility. The bill provides that any law-enforcement agency or correctional facility that fails to comply may, at the discretion of the Department, be declared ineligible for state grants or funds. The bill also requires the Department to analyze the submitted data to (i) determine the means by which such information can be used to reduce the number of such deaths and (ii) examine the relationship, if any, between the number of such deaths and the actions of management of such law-enforcement agencies and correctional facilities. The Director of the Department shall annually report the findings and recommendations resulting from the analysis and interpretation of the data to the Governor, the General Assembly, and the Attorney General beginning on or before July 1, 2023, and each July 1 thereafter. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101213D: 9.1-192</p>	House • Feb 15, 2022: Left in Public Safety	Civil Procedure
HB 984	Chris S. Runion	<p>Alcohol or marijuana product; liability for sale to an underage person.</p> <p>Liability for sale of alcohol or marijuana product to an underage person. Creates a cause of action against an alcoholic beverage control retail licensee or cannabis control retail licensee who sells alcohol or a marijuana product to an underage person if the consumption of the alcohol or marijuana product caused or contributed to an injury to person or property while the underage person operated a motor vehicle. The provisions of this act related to the sale of marijuana products have a delayed effective date of January 1, 2024.</p>	House • Feb 15, 2022: Left in Courts of Justice	Civil Procedure
HB 993	Kathleen Murphy	<p>Unlawful hazing; amends definition, civil and criminal liability, penalties.</p> <p>Unlawful hazing; penalty. Amends the definition of hazing to include the reckless or intentional act of causing another person to suffer severe emotional distress through outrageous or intolerable conduct when the severe emotional distress was caused by the outrageous or intolerable conduct. The bill also makes the crime of hazing a Class 5 felony if such hazing results in death or serious bodily injury to any person. The crime of hazing that does not result in death or serious bodily injury remains a Class 1 misdemeanor. The bill provides immunity for arrest and prosecution for hazing if a person in good faith seeks or obtains emergency medical attention for a person who has received a bodily injury by hazing or renders emergency care or assistance, including cardiopulmonary resuscitation (CPR), to a person who has received a bodily injury by hazing while another person seeks or obtains emergency medical attention for such person. The bill also creates a civil penalty for certain organizations if such organization had specific credible knowledge that its student members were participating, aiding, or assisting in any act of hazing and did not attempt to intervene to stop the hazing or report it to the appropriate local authorities. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103988D: 15.2-1627, 18.2-56</p>	House • Mar 12, 2022: Second conferees appointed by House	Civil Procedure
HB 1018	Kaye Kory	<p>Failure to wear a seatbelt; primary offense.</p> <p>Failure to wear a seatbelt; primary offense. Changes from a secondary offense to a primary offense the failure to wear a seatbelt as required by law. A primary offense is one for which a law-enforcement officer may stop a motor vehicle. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100505D: 46.2-1094</p>	House • Feb 01, 2022: Stricken from docket by Transportation (22-Y 0-N)	Civil Procedure

Bill	Sponsors	Title	Last Action	Lists
HB 1048	Phillip A. Scott	<p>Death of parent or guardian of a child resulting from driving under the influence; child support.</p> <p>Death of the parent or guardian of a child resulting from driving under the influence; child support. Provides that in any case where a person was convicted of involuntary manslaughter as a result of driving a motor vehicle or operating a watercraft under the influence where the victim was the parent or legal guardian of a child, the person who has custody of such child may petition the sentencing court to order that the defendant pay child support.</p>	House • Feb 15, 2022: Left in Courts of Justice	Civil Procedure
HB 1071	Kathy K.L. Tran	<p>Hospitals; determination of patient eligibility for financial assistance.</p> <p>Hospitals; debt collection; determination of patient eligibility for financial assistance. Requires every hospital to screen every patient to determine the patient's household income and whether the individual is eligible for medical assistance pursuant to the state plan for medical assistance, charity care, discounted care, or other financial assistance with the cost of medical care and provides that, notwithstanding any other provision of law, no hospital shall engage in extraordinary collection actions to recover a debt for medical services against any patient until such hospital has performed such screening.</p>	Senate • Mar 11, 2022: Conference report agreed to by Senate (40-Y 0-N)	Civil Procedure
HB 1132	Wren M. Williams	<p>Fiduciaries; payment of small amounts to certain persons without involvement, threshold amount.</p> <p>Payment of small amounts to certain persons without involvement of fiduciary; threshold. Increases from \$25,000 to \$50,000 the amount under which a payment to certain persons may be made without the involvement of a fiduciary. Statutes affected: House: Presented and ordered printed 22103555D: 8.01-606</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Civil Procedure
HB 1145	James A. "Jay" Leftwich	<p>Civil actions; health care bills and records.</p> <p>Civil actions; health care bills and records. Defines the term "bill" for the purposes of evidence of medical services provided in certain civil actions as a summary of charges, an invoice, or any other form prepared by the health care provider or its third-party bill administrator identifying the costs of health care services provided. The bill also clarifies the procedures for introducing evidence of medical reports, statements, or records of a health care provider by affidavit in general district court. Statutes affected: House: Presented and ordered printed 22103334D: 8.01-413.01, 16.1-88.2</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Civil Procedure
HB 1234	Christopher T. Head	<p>Judgments; limitations on enforcement, extensions and renewals.</p> <p>Limitations on enforcement of judgments; extensions and renewals. Provides that after a judgment has been extended twice, it may be extended in the same manner for additional 10-year periods only upon motion of the judgment creditor or his assignee in a circuit court in which the judgment is docketed or recorded as a lien, with notice to the judgment debtor, and an order of such court granting leave to the judgment creditor or his assignee to file such certificate of extension. The bill further extends from five to 10 years the timeframe within which a suit shall be brought to enforce the lien of a judgment. The bill allows a judgment creditor's assignee or such assignee's attorney or authorized agent to go through the process to extend the limitations period. Statutes affected: House: Presented and ordered printed 22104536D: 8.01-251</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Civil Procedure
SB 9	J. Chapman Petersen	<p>Eminent domain; payment of judgment, attorney fees.</p> <p>Eminent domain; payment of judgment; attorney fees. Provides for attorney fees to be awarded in eminent domain cases in which there is a judgment for a property owner if such judgment is not paid within the time required by law.</p>	House • Mar 08, 2022: Signed by Speaker	Civil Procedure
SB 64	Scott A. Surovell	<p>Proceeds of compromise agreements; investment in college savings trust accounts for minors.</p> <p>Proceeds of compromise agreements; minors; investment in college savings trust accounts. Permits a court to direct the payment of the proceeds of an approved compromise agreement, in the case of damage to the person or property of a minor, by investment in a college savings trust account for which the minor is the beneficiary pursuant to a college savings trust agreement with the Virginia College Savings Plan, provided that (i) the investment options pursuant to such agreement are restricted to target enrollment portfolios; (ii) the order or decree approving and confirming the compromise requires the minor beneficiary's parent, as that term is defined in relevant law, to act as the custodian of the account; and (iii) except in the case of a distribution from the account to be applied toward the minor beneficiary's qualified higher education expenses, as that term is defined in relevant federal law, the order or decree approving and confirming the compromise prohibits the minor beneficiary's parent from making any transfer, withdrawal, termination, or other account transaction unless the court provides prior approval pursuant to a written order. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100154D: 8.01-424</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Civil Procedure

Bill	Sponsors	Title	Last Action	Lists
SB 176	Mark J. Peake	<p>Emergency custody and temporary detention; transportation of person when transfer of custody.</p> <p>Emergency custody and temporary detention; transportation; transfer of custody. Makes clear that, in cases in which transportation of a person subject to an emergency custody order or temporary detention order is ordered to be provided by an alternative transportation provider, the primary law-enforcement agency that executes the order may transfer custody of the person to the alternative transportation provider immediately upon execution of the order, and that the alternative transportation provider shall maintain custody of the person from the time custody is transferred to the alternative transportation provider by the primary law-enforcement agency until such time as custody of the person is transferred to the community services board or its designee that is responsible for conducting the evaluation or the temporary detention facility, as is appropriate. The bill also adds employees of and persons providing services pursuant to a contract with the Department of Behavioral Health and Developmental Services to the list of individuals who may serve as alternative transportation providers. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22102915D: 37.2-808, 37.2-810</p>	Senate • Feb 03, 2022: Incorporated by Education and Health (SB650-Hanger) (15-Y 0-N)	Civil Procedure
SB 208	J. Chapman Petersen	<p>Civil actions; standing.</p> <p>Civil actions; standing. Provides that a person in a civil action shall be deemed to have standing if that person has a cognizable interest in the outcome of the matter, which may be represented by the ownership of an affected property interest or the suffering of an injury unique to that individual.</p>	Senate • Feb 02, 2022: Stricken at the request of Patron in Judiciary (15-Y 0-N)	Civil Procedure
SB 230	Emmett W. Hanger, Jr.	<p>Liability for sale of alcohol to an impaired customer; injury to another person.</p> <p>Liability for sale of alcohol to an impaired customer; injury to another person due to operation of vehicle while intoxicated. Creates a cause of action against an alcoholic beverage control retail licensee who sells alcohol to a customer who subsequently injures another by driving while impaired if the consumption of the alcohol caused or contributed to an injury to person or property while the customer operated a motor vehicle.</p>	Senate • Feb 02, 2022: Incorporated by Judiciary (SB555-Obenshain) (11-Y 0-N)	Civil Procedure
SB 245	Ghazala F. Hashmi	<p>Public hospitals; medical debt collection practices.</p> <p>Public hospitals; medical debt collection practices. Requires the University of Virginia Medical Center (the Medical Center) and the Virginia Commonwealth University Health System Authority (the Authority) to make payment plans available to each person who incurs a debt related to medical treatment. The bill (i) requires that such payment plans be provided in writing and cap monthly payments at no more than five percent of the person's household income, (ii) provides that the first payment under such payment plan shall not be due until a date that is at least 90 days after the date on which treatment was provided or the date on which the person discharged, and (iii) provides that a person who has made at least 10 payments pursuant to the payment plan in a 12-month period shall be deemed to be in compliance with the payment plan. The bill also prohibits the Medical Center and the Authority from charging interest or late fees for medical debt, requires the Medical Center and Authority to make information available in writing in languages other than English spoken in the service area and via oral translation service for other languages, prohibits the Medical Center and the Authority from selling medical debt to any person other than an organization that purchases medical debt for the purpose of paying such debt in full, and requires the Medical Center and the Authority to establish a Financial Assistance Ombudsman Office to assist patients and other persons with issues related t...</p>	Senate • Feb 03, 2022: Incorporated by Education and Health (SB201-Favola) (15-Y 0-N)	Civil Procedure
SB 350	Scott A. Surovell	<p>Health records; patient's right to disclosure.</p> <p>Health records; patient's right to disclosure. Requires a health care entity to include in its disclosure of an individual's health records any changes made to the health records and an audit trail for such records if the individual requests that such information be included in the health records disclosure.</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Civil Procedure
SB 633	William M. Stanley, Jr.	<p>Civil actions; health care bills and records.</p> <p>Civil actions; health care bills and records. Defines the term "bill" for the purposes of evidence of medical services provided in certain civil actions as a summary of charges, an invoice, or any other form prepared by the health care provider or its third-party bill administrator identifying the costs of health care services provided. The bill also clarifies the procedures for introducing evidence of medical reports, statements, or records of a health care provider by affidavit in general district court. Statutes affected: Senate: Presented and ordered printed 22103315D: 8.01-413.01, 16.1-88.2</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Civil Procedure
SB 681	Mark D. Obenshain	<p>Health insurers; duty of in-network providers to submit claims, prohibited practices.</p> <p>Duty of in-network providers to submit claims to health insurers; civil penalty. Provides that any in-network provider that provides health care services to a covered patient that does not submit its claim to the health insurer for the health care services in accordance with the terms of the applicable provider agreement or as permitted under applicable federal or state laws or regulations shall be subject to a civil penalty of \$1,000 per violation. Statutes affected: Senate: Presented and ordered printed 22104364D: 8.01-27.5</p>	Senate • Mar 10, 2022: Signed by President	Civil Procedure

Bill	Sponsors	Title	Last Action	Lists
SB 715	J. Chapman Petersen	<p>Injunctions; review by the Supreme Court of Virginia.</p> <p>Injunctions; review by the Supreme Court of Virginia. Restores the Supreme Court of Virginia's jurisdiction over appeals of injunctions. Under current law, injunctions must first be appealed to the Court of Appeals. Statutes affected: Senate: Presented and ordered printed 22104872D: 8.01-626</p>	House • Mar 08, 2022: Signed by Speaker	Civil Procedure

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2022 General Assembly Bills of Interest

Civil Rights

Bill	Sponsors	Title	Last Action	Lists
HB 493	Michael P. Mullin	<p>Virginia Freedom of Information Act; required release of law-enforcement disciplinary records.</p> <p>Virginia Freedom of Information Act; required release of law-enforcement disciplinary records; exceptions. Requires the release of law-enforcement disciplinary records related to completed disciplinary investigations. The bill defines "law-enforcement disciplinary records" as any record created in furtherance of a law-enforcement disciplinary proceeding or any other administrative or judicial proceeding arising from the law-enforcement officer's conduct, whether such proceeding takes place in the Commonwealth or in another jurisdiction. The bill allows for the redaction of certain personal contact information of the law-enforcement officer, complainant, and witness and of their families; social security numbers; certain medical and identifying information of the law-enforcement officer and complainant; and any technical infraction, as defined in the bill, by the law-enforcement officer. This bill is a recommendation of the Virginia Freedom of Information Advisory Council. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100266D: 2.2-3706</p>	House • Feb 15, 2022: Left in Public Safety	Civil Rights
HB 512	Marie E. March	<p>COVID-19 immunization; prohibition on requirement, discrimination prohibited.</p> <p>COVID-19 immunization; prohibition on requirement; discrimination prohibited. Prohibits the State Health Commissioner and the Board of Health, the Board of Behavioral Health and Developmental Services, the Department of Health Professions and any regulatory board therein, and the Department of Social Services from requiring any person to undergo vaccination for COVID-19 and prohibits discrimination based on a person's COVID-19 vaccination status (i) with regard to education, employment, insurance, or issuance of a driver's license or other state identification or (ii) in numerous other contexts. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101287D: 2.2-2901.1, 2.2-3004, 15.2-1500.1, 15.2-1507, 15.2-1604, 22.1-271.2, 22.1-271.4, 22.1-289.031, 22.1-295.2, 22.1-306, 23.1-800, 32.1-43, 32.1-47, 32.1-47.1, 32.1-48, 32.1-127, 38.2-3407.15, 38.2-3438, 38.2-3454, 44-146.17, 63.2-603, 65.2-402.1</p>	House • Feb 15, 2022: Left in Health, Welfare and Institutions	Civil Rights
HB 611	Jeffrey M. Bourne	<p>Early Identification System (EIS); DCJS to establish.</p> <p>Conduct of law-enforcement officers; establishment of an Early Identification System. Requires the Department of Criminal Justice Services (the Department) to establish a best practices model for the implementation, training, and management of an Early Identification System (EIS). The bill defines an EIS as a system through which a law-enforcement agency collects and manages data to identify and assess patterns of behavior, including misconduct and high-risk behavior, or performance of law-enforcement officers and law-enforcement agency employees. The bill directs each sheriff or chief of police to implement an EIS by July 1, 2024, and requires that law-enforcement officers receive training prior to implementation of the EIS and annually thereafter. The bill also directs the Department to establish and administer written policies and procedures for law-enforcement agencies to report to the Office of the Attorney General all judgments or settlements in cases relating to negligence or misconduct of a law-enforcement officer.</p>	House • Feb 11, 2022: Tabled in Public Safety (11-Y 10-N)	Civil Rights
HB 759	Les R. Adams	<p>Window tinting; vehicle stop.</p> <p>Window tinting; vehicle stop. Removes the prohibition on a law-enforcement officer from stopping a motor vehicle for a violation of provisions related to window tinting and the prohibition of evidence discovered or obtained at such stop from being admissible in court. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101500D: 46.2-1052</p>	House • Feb 15, 2022: Left in Courts of Justice	Civil Rights
HB 800	Marcia S. "Cia" Price	<p>Medical assistance services; eligibility, individuals confined in state correctional facilities.</p> <p>Medical assistance services; individuals confined in state correctional facilities. Requires the Department of Medical Assistance Services to enroll any person who is in the custody of a state correctional facility and who meets the criteria for eligibility for services under the state plan for medical assistance in the Commonwealth's program of medical assistance services; however, no services under the state plan for medical assistance shall be furnished to the person while he is confined in a state correctional facility unless federal financial participation is available to pay for the cost of the services provided. The bill also provides that, upon release from the custody of a state correctional facility, such individual shall continue to be eligible for services under the state plan for medical assistance until such time as the person is determined to no longer be eligible for medical assistance and that, to the extent permitted by federal law, the time during which a person is confined in a state correctional facility shall not be included in any calculation of when the person must recertify his eligibility for medical assistance.</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Civil Rights

Bill	Sponsors	Title	Last Action	Lists
HB 801	Marcia S. "Cia" Price	<p>Civilian deaths in custody; report.</p> <p>Civilian deaths in custody; report. Requires every law-enforcement agency and correctional facility to report to the Department of Criminal Justice Services certain information regarding the death of any person who is detained, under arrest or in the process of being arrested, en route to be incarcerated, incarcerated, or otherwise in the custody of such law-enforcement agency or correctional facility. The bill provides that any law-enforcement agency or correctional facility that fails to comply may, at the discretion of the Department, be declared ineligible for state grants or funds. The bill also requires the Department to analyze the submitted data to (i) determine the means by which such information can be used to reduce the number of such deaths and (ii) examine the relationship, if any, between the number of such deaths and the actions of management of such law-enforcement agencies and correctional facilities. The Director of the Department shall annually report the findings and recommendations resulting from the analysis and interpretation of the data to the Governor, the General Assembly, and the Attorney General beginning on or before July 1, 2023, and each July 1 thereafter. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101213D: 9.1-192</p>	House • Feb 15, 2022: Left in Public Safety	Civil Rights
HB 1000	Chris S. Runion	<p>Law-enforcement civilian oversight bodies; requirements of members.</p> <p>Law-enforcement civilian oversight bodies; requirements. Requires every member appointed to a locality's law-enforcement civilian oversight body to observe a law-enforcement officer employed with such locality's law-enforcement agency while such law-enforcement officer is engaged in his official duties. The bill also provides that any disciplinary determination recommended by a law-enforcement civilian oversight body shall be advisory and that if any law-enforcement agency declines to implement such recommendation, such agency shall create and make available to the public within 30 days from the date such recommendation is reported to such agency a written public record of its rationale for declining to implement such recommendation. The bill requires that such observation take place within 90 days of the member's appointment to the civilian oversight body and total no fewer than 24 hours, a portion of which includes a ride-along with a law-enforcement officer. The bill also requires each law-enforcement civilian oversight body to include at least one retired law-enforcement officer as a voting member; under current law, a retired law-enforcement officer may serve on such body as an advisory, nonvoting ex officio member. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100522D: 9.1-601</p>	Senate • Feb 28, 2022: Passed by indefinitely in Judiciary (9-Y 6-N)	Civil Rights
HB 1133	Wendell S. Walker	<p>Nondiscrimination in places of public accommodation, definitions.</p> <p>Nondiscrimination in places of public accommodation, definitions.</p>	House • Feb 15, 2022: Left in General Laws	Civil Rights
HJ 60	William C. Wampler III	<p>Constitutional amendment; qualified immunity for government officials (first reference).</p> <p>Constitutional amendment (first reference); qualified immunity for government officials. Establishes the right of government officials to qualified immunity. The amendment provides that a government official may not be found liable for the deprivation of any person's rights, privileges, or immunities secured by the Constitution of Virginia and the laws of Virginia if such official establishes that (i) the right, privilege, or immunity alleged to be violated was not clearly established at the time of the person's deprivation by the official, or that at such time, the state of the law was not sufficiently clear that every reasonable official would have understood that the conduct alleged constituted a violation of the Constitution or the laws of Virginia or (ii) a court of competent jurisdiction had issued a final decision on the merits holding that the specific conduct alleged to be unlawful was consistent with the Constitution and the laws of Virginia.</p>	House • Feb 15, 2022: Left in Privileges and Elections	Civil Rights
SB 177	Mark J. Peake	<p>Human rights and fair housing; religious organizations, promotion of religious principles.</p> <p>Human rights and fair housing; religious organizations; promotion of religious principles. Provides that nothing in the Virginia Human Rights Act prohibits a religious corporation, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, from taking any action to promote the religious principles for which it is established or maintained. The bill exempts any place of accommodation owned by or operated on behalf of a religious corporation, association, or society from the nondiscrimination in public places of accommodation provisions of the Virginia Human Rights Act. Under current law, such places of accommodation are exempt only when not open to the public. The bill adds preschools to the list of educational institutions that are exempt from discriminatory hiring practices with respect to the hiring and employment of employees of a particular religion when such institutions are owned, supported, controlled, or managed by a particular religion or religious corporation, association, or society. The bill clarifies that the term "religion" includes all aspects of religious observance and practice as well as belief for the purposes of the exemption from discrimination in employment of individuals employed to perform work associated with the activities of a particular religion by a religious corporation, association, educational institution, or society. The ...</p>	Senate • Jan 26, 2022: Passed by indefinitely in General Laws and Technology (8-Y 7-N)	Civil Rights

Bill	Sponsors	Title	Last Action	Lists
SB 246	Scott A. Surovell	<p>Law-enforcement officer; purpose of traffic stop.</p> <p>Law-enforcement officer; purpose of traffic stop. Provides that the operator of a motor vehicle, trailer, or semitrailer that has stopped on the signal of any law-enforcement officer shall exhibit his registration card, learner's permit, or temporary driver's permit for the purpose of establishing his identity upon being advised of the purpose of the stop within a reasonable time by the law-enforcement officer. Current law requires that such materials be exhibited upon the law-enforcement officer's request.</p>	House • Mar 08, 2022: Left in Courts of Justice	Civil Rights
SB 582	Amanda F. Chase	<p>Virginia Human Rights Act; nondiscrimination in places of public accommodation.</p> <p>Virginia Human Rights Act; nondiscrimination in places of public accommodation and certain private establishments; face coverings. Prohibits discrimination in places of public accommodations including public and private elementary and secondary schools and institutions of higher education and certain private establishments because the individual is or is not wearing a face covering for the purpose of preventing the transmission of COVID-19. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22103802D: 2.2-3904</p>	Senate • Jan 19, 2022: Passed by indefinitely in General Laws and Technology (8-Y 6-N)	Civil Rights

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2022 General Assembly Bills of Interest

Consumer

Bill	Sponsors	Title	Last Action	Lists
HB 160	Candi Mundon King	<p>Virginia Residential Landlord and Tenant Act; landlord obligations, tenant safety.</p> <p>Virginia Residential Landlord and Tenant Act; landlord obligations; tenant safety. Requires a landlord who owns more than four rental dwelling units, or more than a 10 percent interest in more than four rental dwelling units, to require all employees and applicants for employment to submit to fingerprinting and provide personal descriptive information to be forwarded along with the employee's or applicant's fingerprints through the Central Criminal Records Exchange and the Federal Bureau of Investigation for the purpose of obtaining criminal history record information regarding such employee or applicant. The bill allows a landlord to disqualify from employment any person who has been convicted of or found guilty of, or entered a plea of guilty or nolo contendere to, regardless of adjudication, a violent crime committed in any jurisdiction. The bill also provides that a landlord must (i) establish written policies and procedure for the storage and management of, access to, and return of all keys for each rental dwelling unit; (ii) regulate the secure storage of and access to unissued keys; and (iii) maintain a written log for the issuance and return of all keys. Finally, pursuant to the bill, all relevant landlords must submit certain information on a quarterly basis to the Department of Housing and Community Development to prove compliance with the provisions outlined in the bill.</p>	House • Feb 11, 2022: Tabled in Appropriations (10-Y 8-N)	Consumer
HB 259	Scott A. Wyatt	<p>Motor vehicle dealers and manufacturers; compensation for recall, warranty, and maintenance.</p> <p>Motor vehicle dealers and manufacturers; compensation for recall, warranty, and maintenance obligations. Provides that manufacturer or distributor compensated parts, service, diagnostic work, updates to a vehicle accessory or function, and associated maintenance are subject to compensation related to recall and warranty. The bill provides that certain parts and services cannot be considered in calculating recall and warranty compensation and clarifies what is required of manufacturers and dealers in compensating motor vehicle dealers for recall and warranty parts and service. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102121D: 46.2-1571</p>	executive • Mar 09, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Consumer
HB 376	Kelly K. Convirs-Fowler	<p>Virginia Residential Property Disclosure Act; residential property disclosure statement form.</p> <p>Virginia Residential Property Disclosures Act; Real Estate Board; residential property disclosure statement form. Requires the residential property disclosure statement form developed by the Real Estate Board and maintained on its website to include a statement signed by the parties acknowledging that the purchaser has been advised of the disclosures listed in residential property disclosure statement. Under current law, the form that contains the statement to be signed by the parties is not required to be included with the residential property disclosure statement form. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102247D: 54.1-2105.1</p>	House • Feb 15, 2022: Left in General Laws	Consumer
HB 381	Glenn R. Davis	<p>Consumer Data Protection Act; data deletion request.</p> <p>Consumer Data Protection Act; data deletion request. Authorizes a controller of personal data to treat a consumer request to delete data obtained by a third party about a consumer as a request to opt the consumer out of the processing of that data for (i) targeted advertising, (ii) the sale of personal data, or (iii) profiling in furtherance of decisions that produce legal or similarly significant effects concerning the consumer. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101391D: 59.1-577</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Consumer
HB 532	Kelly K. Convirs-Fowler	<p>Public accommodations, employment, and housing; prohibited discrimination.</p> <p>Public accommodations, employment, and housing; prohibited discrimination on the basis of political affiliation. Prohibits discrimination in public accommodations, employment, and housing on the basis of a person's political affiliation. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102253D: 2.2-2901.1, 2.2-3900, 2.2-3902, 2.2-3904, 2.2-3905, 15.2-853, 15.2-854, 15.2-965, 15.2-1500.1, 15.2-1604, 22.1-295.2, 36-96.1, 36-96.3, 36-96.4, 36-96.6, 55.1-1310</p>	House • Feb 08, 2022: Stricken from docket by General Laws (22-Y 0-N)	Consumer
HB 552	Israel D. O'Quinn	<p>Consumer Data Protection Act; clarifies definition of nonprofit organizations.</p> <p>Consumer Data Protection Act; nonprofit organizations. Provides, for the purposes of the Consumer Data Protection Act, that the definition for "nonprofit organization" includes certain nonprofit organizations exempt from taxation under § 501 (c)(4) of the Internal Revenue Code. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101082D: 59.1-575</p>	House • Feb 15, 2022: Left in Commerce and Energy	Consumer
HB 702	Mark L. Keam	<p>Virginia Residential Property Disclosure Act; required disclosures, maximum lot coverage.</p> <p>Residential Property Disclosure Act; required disclosures; maximum lot coverage. Requires an owner of a single-family detached residential property to disclose in writing to any prospective purchaser or lessee of the property the existing lot coverage and the maximum lot coverage for the property as permitted by zoning ordinance in the locality in which the property is located.</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Consumer

Bill	Sponsors	Title	Last Action	Lists
HB 714	C.E. Cliff Hayes, Jr.	<p>Consumer Data Protection Act; definitions, enforcement, abolishes Consumer Privacy Fund.</p> <p>Consumer Data Protection Act; enforcement; Consumer Privacy Fund. Authorizes the Attorney General to pursue actual damages to consumers to the extent they exist if a controller or processor of the personal data of Virginians continues to violate the Consumer Data Protection Act following a 30-day cure period offered by the Attorney General or breaches an express written statement provided to the Attorney General. Political organizations are classified as nonprofit organizations and thus exempt from the Act. The bill specifies that the Attorney General may deem whether a cure under the provisions of the Act is possible for consumers. In addition, the bill abolishes the Consumer Privacy Fund and all civil penalties, expenses, and attorney fees collected from enforcement of the Act shall be deposited into the Regulatory, Consumer Advocacy, Litigation, and Enforcement Revolving Trust Fund. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103039D: 59.1-585</p>	Senate • Mar 08, 2022: Signed by President	Consumer
HB 737	Paul E. Krizek	<p>Virginia Consumer Protection Act; certain disclosure in advertising required.</p> <p>Virginia Consumer Protection Act; certain disclosure in advertising required. Provides that is a violation of the Virginia Consumer Protection Act for a supplier in connection with a consumer transaction to fail to disclose in any advertisement for goods or services that the provisions of any contract or written agreement associated with the goods or services advertised restrict the consumer's rights in any civil action or right to file a civil action to resolve a dispute that arises in connection with the consumer transaction. The bill provides that such provisions shall be void and unenforceable in any instance where the supplier fails to provide the required notice. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100867D: 59.1-200</p>	House • Feb 15, 2022: Left in Commerce and Energy	Consumer
HB 802	Marcia S. "Cia" Price	<p>Virginia Residential Landlord and Tenant Act; enforcement by localities.</p> <p>Virginia Residential Landlord and Tenant Act; enforcement by localities. Provides that any county, city, or town may bring an action to enforce the provisions of the Virginia Residential Landlord and Tenant Act related to health and safety, provided that (i) the property where the violations occurred is within the jurisdictional boundaries of the county, city, or town; (ii) the county, city, or town has notified the landlord who owns the property directly or through the managing agent of the nature of the violations and the landlord has not remedied the violations within a reasonable time after receiving such notice to the satisfaction of the county, city, or town; and (iii) such enforcement action may include seeking an injunction, damages, or both. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22104059D: 55.1-1259</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Consumer
HB 803	Marcia S. "Cia" Price	<p>Virginia Residential Landlord & Tenant Act; landlord remedies, noncompliance with rental agreement.</p> <p>Virginia Residential Landlord and Tenant Act; landlord remedies; noncompliance with rental agreement. Increases from five days to 14 days the mandatory waiting period after a landlord serves written notice on a tenant notifying the tenant of his nonpayment of rent and of the landlord's intention to terminate the rental agreement if rent is not paid before the landlord may pursue remedies for termination of the rental agreement. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22104222D: 55.1-1245</p>	House • Feb 15, 2022: Left in General Laws	Consumer
HB 804	Marcia S. "Cia" Price	<p>Virginia Residential Landlord and Tenant Act; nonrefundable application fee, limitations.</p> <p>Virginia Residential Landlord and Tenant Act; nonrefundable application fee; limitations. Places limitations on when a landlord may charge a nonrefundable application fee in addition to a refundable application deposit. The bill prohibits a landlord with more than four rental dwelling units or more than a 10 percent interest in more than four rental dwelling units from charging prospective tenants any nonrefundable application fee in excess of the amount necessary to reimburse the landlord for any actual out-of-pocket expenses paid by the landlord to a third party performing a number of pre-occupancy checks on the applicant. The bill allows an applicant to choose to provide certain information to the landlord in the form of a portable tenant screening report in lieu of paying an application fee. When an applicant chooses not to provide such report, a landlord that owns four or fewer rental dwelling units may charge such applicant actual out-of-pocket expenses paid by the landlord to a third party performing certain pre-occupancy checks on the applicant or, in the case of an application for a public housing unit, an application fee of no more than \$32, including any actual out-of-pocket expenses paid to a third party by the landlord performing background, credit, or other pre-occupancy checks on the applicant. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22104105D: 36-96.2, 55.1-1203</p>	House • Feb 15, 2022: Left in General Laws	Consumer
HB 840	Alfonso H. Lopez	<p>Virginia Residential Landlord and Tenant Act; retaliatory conduct, rebuttable presumption.</p> <p>Virginia Residential Landlord and Tenant Act; retaliatory conduct; rebuttable presumption. Establishes a rebuttable presumption of retaliatory conduct pursuant to the provisions of the Virginia Residential Landlord and Tenant Act if a landlord increases rent beyond that which is charged for similar market rentals, decreases services, brings or threatens to bring an action for possession, or terminates the rental agreement within six months of having knowledge of certain actions made by a tenant. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102940D: 55.1-1258</p>	House • Feb 15, 2022: Left in General Laws	Consumer

Bill	Sponsors	Title	Last Action	Lists
HB 868	Alfonso H. Lopez	<p>Virginia Residential Landlord and Tenant Act; terms and conditions of rental agreement.</p> <p>Virginia Residential Landlord and Tenant Act; terms and conditions of rental agreement; warranty of habitability. Prohibits a landlord from waiving, either orally or in writing, his duty to maintain a fit premises, and requires a landlord to include in every rental agreement the terms and conditions governing such duty. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102953D: 55.1-1204, 55.1-1220</p>	House • Feb 15, 2022: Left in General Laws	Consumer
HB 882	Alfonso H. Lopez	<p>Virginia Residential Landlord and Tenant Act; tenant's assertion, condemnation of dwelling unit.</p> <p>Virginia Residential Landlord and Tenant Act; tenant's assertion; condemnation of dwelling unit; remedies. Provides a rebuttable presumption of a landlord's material noncompliance with the rental agreement if the leased premises was condemned by an appropriate state or local agency due to the landlord's or his agent's refusal or failure to remedy a condition for which he was served a condemnation notice. The bill requires a court, when such rebuttable presumption is established, to award the tenant the amount of three months' rent, any prepaid rent, and any security deposit paid by the tenant. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102913D: 55.1-1244</p>	House • Feb 15, 2022: Left in General Laws	Consumer
HB 888	Terry G. Kilgore	<p>Online Marketplace Consumer Protection Act; high-volume third-party sellers in online marketplace.</p> <p>Online Marketplace Consumer Protection Act; high-volume third-party sellers in an online marketplace; civil penalty. Establishes requirements for high-volume third-party sellers, defined in the bill as participants in an online marketplace that have entered into at least 200 discrete sales or transactions for 12 continuous months during the past 24 months resulting in accumulation of an aggregate total of \$5,000 or more in gross revenues. The bill requires high-volume third-party sellers to provide identifying information and contact information to the online marketplace and requires the online marketplace to verify the information upon receipt. The bill requires that high-volume third-party sellers make certain conspicuous disclosures to consumers on their product listing pages, with certain limited exceptions. The bill authorizes the Attorney General to initiate an action in the name of the Commonwealth against an online marketplace or high-volume third party seller that has violated the provisions of the bill and either failed to cure the violation within a 30-day cure period or failed to comply with an express written statement to the Attorney General that the alleged violations have been cured and no further violations will occur. The Attorney General may seek an injunction to restrain any such violations and civil penalties of up to \$7,500 for each such violation.</p>	House • Feb 08, 2022: Stricken from docket by Commerce and Energy (21-Y 0-N)	Consumer
HB 893	Michelle Lopes Maldonado	<p>Virginia Residential Landlord and Tenant Act; terms and conditions of rental agreement.</p> <p>Virginia Residential Landlord and Tenant Act; terms and conditions of rental agreement; automatic renewal; notice of rent increase. Requires a landlord that owns more than four rental dwelling units to, in the case of any rental agreement that provides for automatic renewal of such agreement, provide separate written notice to the tenant notifying the tenant of any increase in rent. The bill provides that such notice shall be provided to the tenant no less than 30 days before the automatic renewal takes effect. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103537D: 55.1-1204</p>	House • Feb 15, 2022: Left in General Laws	Consumer
HB 909	Alfonso H. Lopez	<p>Virginia Residential Landlord and Tenant Act; prohibited discrimination, national origin.</p> <p>Virginia Residential Landlord and Tenant Act; prohibited discrimination; national origin. Provides that a landlord may not discriminate against any person in the terms, conditions, or privileges with respect to the rental of a dwelling unit, or in the provision of services or facilities in the connection therewith, to any person because of such person's national origin.</p>	House • Feb 15, 2022: Left in General Laws	Consumer
HB 1062	Paul E. Krizek	<p>Manufactured Home Lot Rental Act; notice, sale of manufactured home park.</p> <p>Manufactured Home Lot Rental Act; notice; sale of manufactured home park. Changes from 180 days to 270 days the notice period a landlord has to give to a tenant before the sale of a manufactured home park. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102267D: 55.1-1308, 55.1-1308.1</p>	House • Feb 08, 2022: Stricken from docket by General Laws (22-Y 0-N)	Consumer

Bill	Sponsors	Title	Last Action	Lists
HB 1065	Paul E. Krizek	<p>Manufactured home lot rental agreements and public notices; work group to develop sample documents.</p> <p>Manufactured Home Lot Rental Act; notice of intent to sell. Requires the owner of a manufactured home park who offers or lists the park for sale to a third party to provide written notice of the prospective sale to the locality where the park is located. Under current law, such notice is only required to be sent to the Department of Housing and Community Development. The bill also provides that acceptance of an offer to purchase a manufactured home park is contingent upon the park owner sending written notice of the proposed sale, including certain information listed in the real estate purchase contract, to the locality where the park is located at least 90 days before the closing date. Under current law, such notice is required to be sent only to the Department of Housing and Community Development at least 60 days before the closing date. Additionally, these notices are to be provided to any tenant of the manufactured home park, in clear, understandable language and translated into the tenant's preferred language if the tenant is unable to speak or understand English adequately enough to understand the content of such notice. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102276D: 55.1-1308.2</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Consumer
HB 1092	Terry G. Kilgore	<p>Nonrepairable and rebuilt vehicles; repeals sunset clause.</p> <p>Nonrepairable and rebuilt vehicles; sunset. Repeals the sunset clause for certain amendments related to definitions of nonrepairable and rebuilt vehicles. As enacted in 2017, the amendments would have expired on July 1, 2021. However, language in Item 436 of Chapter 552 of the Acts of Assembly of 2021, Special Session I (the Appropriation Act), provided that, notwithstanding any other law, the amendments would remain in place until July 1, 2022. The bill makes the amendments permanent.</p>	House • Mar 10, 2022: Enrolled	Consumer
HB 1097	Emily M. Brewer	<p>Fair Housing Law; exemptions, tenant's source of funds.</p> <p>Fair Housing Law; exemptions; tenant's source of funds. Exempts an owner that, individually or through a business entity, owns more than a 10 percent interest in more than 10 rental dwelling units in the Commonwealth from the provisions of the Fair Housing Law that prohibit discrimination against a person based on such person's source of funds. Current law exempts owners that own more than 10 percent interest in more than four rental dwelling units in the Commonwealth. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101363D: 36-96.2</p>	House • Feb 03, 2022: Failed to report (defeated) in General Laws (10-Y 11-N)	Consumer
HB 1151	Dawn M. Adams	<p>Virginia Motor Vehicle Warranty Enforcement Act; adds autocycles to the vehicles protected by Act.</p> <p>Virginia Motor Vehicle Warranty Enforcement Act. Adds autocycles to the vehicles protected by the Virginia Motor Vehicle Warranty Enforcement Act (the Act), commonly known as the "lemon law." The bill applies the Act to vehicles purchased for business purposes by a business entity that owns or leases no more than five motor vehicles. The bill contains technical amendments. Statutes affected: House: Presented and ordered printed 22103657D: 59.1-207.11, 59.1-207.13, 59.1-207.16</p>	Senate • Mar 08, 2022: Signed by President	Consumer
HB 1259	Michael J. Webert	<p>Consumer Data Protection Act; sensitive data.</p> <p>Consumer Data Protection Act; sensitive data. Provides that, for purposes of the Consumer Data Protection Act, personal data revealing racial or ethnic origin, religious beliefs, mental or physical diagnosis, sexual orientation, or citizenship or immigration status shall only be considered sensitive data if used to make a decision that results in a legal or similarly significant effect for a consumer. Statutes affected: House: Presented and ordered printed 22104375D: 59.1-575</p>	Senate • Mar 02, 2022: Passed by indefinitely in General Laws and Technology (9-Y 6-N)	Consumer
SB 43	Barbara A. Favola	<p>Virginia Residential Landlord and Tenant Act; county and city enforcement.</p> <p>Virginia Residential Landlord and Tenant Act; county and city enforcement. Provides that any county or city may bring an action to enforce the provisions of the Virginia Residential Landlord and Tenant Act related to health and safety, provided that (i) the property where the violations occurred is within the jurisdictional boundaries of the county or city; (ii) the county or city has notified the landlord who owns the property directly or through the managing agent of the nature of the violations and the landlord has not remedied the violations within a reasonable time after receiving such notice to the satisfaction of the county or city; and (iii) such enforcement action may include seeking an injunction, damages, or both. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22101625D: 55.1-1259</p>	Senate • Feb 02, 2022: Stricken at request of Patron in General Laws and Technology (15-Y 0-N)	Consumer
SB 69	Barbara A. Favola	<p>Virginia Residential Landlord and Tenant Act; rental agreements, child care.</p> <p>Virginia Residential Landlord and Tenant Act; prohibited provisions in rental agreements. Prohibits a rental agreement from containing provisions that prohibit the operation of properly licensed and authorized child care services. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100311D: 55.1-1208</p>	Senate • Mar 11, 2022: Enrolled	Consumer

Bill	Sponsors	Title	Last Action	Lists
SB 215	Jeremy S. McPike	<p>Electronic vehicle titling and registration; permits DMV to expand existing program.</p> <p>Electronic vehicle titling and registration. Permits the Department of Motor Vehicles to expand the existing electronic titling program for new motor vehicles to all applications for original motor vehicle titles, thereby authorizing person-to-person online titling. The bill authorizes the Department to charge certain fees. The bill also allows for the online registration of such motor vehicles and the issuance of a temporary certificate of registration.</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Consumer
SB 216	Jeremy S. McPike	<p>Motor vehicle dealers and manufacturers; compensation for recall, warranty, and maintenance.</p> <p>Motor vehicle dealers and manufacturers; compensation for recall, warranty, and maintenance obligations. Provides that manufacturer or distributor compensated parts, service, diagnostic work, updates to a vehicle accessory or function, and associated maintenance are subject to compensation related to recall and warranty. The bill provides that certain parts and services cannot be considered in calculating recall and warranty compensation and clarifies what is required of manufacturers and dealers in compensating motor vehicle dealers for recall and warranty parts and service.</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Consumer
SB 284	Adam P. Ebbin	<p>Virginia Residential Landlord and Tenant Act; landlord's noncompliance as defense to action.</p> <p>Virginia Residential Landlord and Tenant Act; landlord's noncompliance as defense to action for possession for nonpayment of rent. Removes the requirement that a tenant, if in possession of a dwelling unit, must pay for the court to hold the amount of rent found to be due and unpaid pending the issuance of an order pursuant to an action by the landlord for possession based upon nonpayment of rent where the tenant has asserted a defense that there exists upon the leased premises a condition that constitutes, or will constitute, a fire hazard or a serious threat to the life, health, or safety of the occupant of the dwelling unit. The bill provides that (i) a tenant may assert such a defense if, prior to the commencement of the action for rent or possession, the landlord or his agent had notice of the condition, was given a reasonable opportunity to remedy the condition, and failed to do so and (ii) while the period of time that is deemed to be an unreasonable delay is left to the court, there shall be a rebuttable presumption that a period in excess of 14 days, changed from 30 days in current law, from receipt of the notification by the landlord is reasonable. Finally, the bill clarifies that, not only may the court issue an order that reduces rent by an equitable amount in consideration of the existence of an allowable condition asserted by the tenant, but the court may also refer any matter before it to the proper state or local agency for investigation and report and continue...</p>	Senate • Feb 09, 2022: Continued to 2023 in General Laws and Technology (12-Y 2-N)	Consumer
SB 309	John S. Edwards	<p>Consumer Protection Act; prohibited practices, certain restrictive provisions.</p> <p>Consumer Protection Act; prohibited practices; certain restrictive provisions in contract or written agreement. Provides that it is a violation of the Consumer Protection Act for a supplier in connection with a consumer transaction to use any provision in any contract or written agreement that restricts a consumer's right to file a civil action to resolve a dispute that arises in connection with a consumer transaction that does not involve interstate commerce. The bill provides that such provisions are void and unenforceable. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100501D: 59.1-200</p>	Senate • Feb 08, 2022: Read third time and defeated by Senate (19-Y 21-N)	Consumer
SB 341	George L. Barker	<p>Consumer protection; online marketplace, high-volume third-party sellers.</p> <p>Consumer protection; online marketplace; high-volume third-party sellers. Establishes requirements for high-volume third-party sellers, defined in the bill as participants in an online marketplace that have entered into at least 200 discrete sales or transactions for 12 continuous months during the past 24 months resulting in accumulation of an aggregate total of \$5,000 or more in gross revenues. The bill requires high-volume third-party sellers to provide identifying information and contact information to the online marketplace and requires the online marketplace to verify the information upon receipt. The bill requires that high-volume third-party sellers make certain conspicuous disclosures to consumers on their product listing pages, with certain limited exceptions. The bill provides that any violation of its provisions is a prohibited practice under the Virginia Consumer Protection Act. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22101756D: 59.1-200</p>	House • Mar 08, 2022: Left in Commerce and Energy	Consumer
SB 368	Bryce E. Reeves	<p>Vehicle history report companies; notifications.</p> <p>Vehicle history report companies; notifications. Requires vehicle history report companies, as defined in the bill, to notify a vehicle owner and lienholder, if any, if his vehicle has been deemed nonrepairable or any comparable term in the records of such company. The bill requires vehicle history report companies to establish and maintain a process for disputing such a designation and, if appropriate, having it corrected in a timely manner. The bill provides that a failure to notify the owner constitutes a violation of the Virginia Consumer Protection Act. The bill authorizes the Department of Motor Vehicles to release the name and address of the vehicle owner and lienholder for the purpose of such notification. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22104106D: 46.2-208</p>	Senate • Feb 10, 2022: Continued to 2023 in Transportation (14-Y 0-N)	Consumer

Bill	Sponsors	Title	Last Action	Lists
SB 410	Joseph D. Morrissey	<p>Uniform Statewide Building Code; lead-safe rental housing.</p> <p>Uniform Statewide Building Code; lead-safe rental housing. Provides that the local governing body of a locality may adopt an ordinance that requires the inspection and certification of a residential rental dwelling unit built prior to 1986 for the purpose of ensuring the absence of lead hazards in such dwelling unit. The bill requires any such inspection and certification to be completed by a person licensed and qualified pursuant to appropriate state and federal laws and regulations and prohibits the rental of any residential dwelling unit that does not receive a satisfactory post-inspection certification based on certain factors outlined in the bill. Pursuant to the provisions of the bill, any locality that adopts an ordinance shall establish a fund to pay for the cost of remediation or require the landlord to pay for remedying the lead hazard. Finally, the bill allows a locality to waive inspection requirements for certain reasons and permits the local governing body of a locality to adopt additional lead-safe and lead-free inspection and certification requirements or higher standards for inspection and certification, if it so chooses.</p>	Senate • Feb 09, 2022: Continued to 2023 in General Laws and Technology (12-Y 0-N)	Consumer

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2022 General Assembly Bills of Interest

Criminal

Bill	Sponsors	Title	Last Action	Lists
HB 16	Hyland F. "Buddy" Fowler, Jr.	<p>Safe haven protections; newborn safety device at hospitals for reception of children.</p> <p>Abuse and neglect of a child; safe haven defense. Increases from 14 days to 30 days the maximum age of an infant whom a parent may voluntarily deliver to a hospital or emergency medical services agency and claim an affirmative defense to prosecution for abuse or neglect if such prosecution is based solely upon the parent's having left the infant at such facility.</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
HB 25	Timothy V. Anderson	<p>Earned sentence credits; possession of child pornography.</p> <p>Earned sentence credits; possession of child pornography. Excludes a first offense for the crime of possession of child pornography from the crimes that will eligible for enhanced sentencing credits effective July 1, 2022.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100808D: 53.1-202.3</p>	Senate • Feb 28, 2022: Passed by indefinitely in Judiciary (9-Y 6-N)	Criminal
HB 42	Timothy V. Anderson	<p>Improper driving; person may be charged with offense when conduct constitutes reckless driving.</p> <p>Improper driving. Provides that a person may be charged with the offense of improper driving when his conduct is of the kind that constitutes reckless driving but when his degree of culpability is slight. Currently, a law-enforcement officer is not able to charge a person with improper driving, but a charge of reckless driving may be reduced to improper driving by the court or the attorney for the Commonwealth.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103504D: 46.2-869</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 159	Kathy J. Byron	<p>Emergency custody and temporary detention orders; transportation of minor, acceptance of custody.</p> <p>Emergency custody and temporary detention orders; custody. Requires a facility or location to which a minor or adult who is subject to an emergency custody or temporary detention order is transported to accept custody of the minor or adult upon completion of transportation and arrival of the minor or adult at the facility and specifies that the primary law-enforcement agency shall provide transportation of a person who is involved in the involuntary commitment process, rather than a sheriff, as provided under current law .</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 163	Margaret B. Ransone	<p>Emergency custody and temporary detention; governing transportation & custody of minors and adults.</p> <p>Emergency custody and temporary detention; transportation and custody. Amends numerous sections governing emergency custody and temporary detention of minors and adults to clarify duties of law-enforcement agencies and mental health facilities with regard to custody. The bill requires facilities to take custody of a minor or person who is the subject of an emergency custody order or temporary detention order immediately upon completion of transportation and arrival of the minor or person at the facility; specifies that if a facility does not take custody of a minor or person immediately upon completion of transportation and arrival at the facility, the order is void and the minor or person shall be released; provides that emergency custody orders shall not be extended; and makes other changes to clarify the role and obligations of law enforcement in the emergency custody and temporary detention process.</p>	House • Feb 15, 2022: Left in Appropriations	Criminal
HB 181	Margaret B. Ransone	<p>Criminal records; sealing of records.</p> <p>Criminal records; sealing of records; repeal. Repeals provisions not yet effective allowing for the automatic and petition-based sealing of police and court records for certain convictions, deferred dispositions, and acquittals and for offenses that have been nolle prossed or otherwise dismissed.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102320D: 19.2-72, 19.2-74, 19.2-340, 19.2-390, 9.1-101, 9.1-128, 9.1-134, 17.1-293.1, 17.1-502, 19.2-310.7, 19.2-389.3, 17.1-205.1</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 247	Margaret B. Ransone	<p>Grand larceny and certain property crimes; decreases threshold amount, penalty.</p> <p>Grand larceny and certain property crimes; threshold; penalty. Decreases from \$1,000 to \$500 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 decreases the threshold by the same amount for the classification of certain property crimes.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102219D: 18.2-23, 18.2-80, 18.2-81, 18.2-95, 18.2-97, 18.2-102, 18.2-103, 18.2-108.01, 18.2-145.1, 18.2-150, 18.2-152.3, 18.2-162, 18.2-181, 18.2-181.1, 18.2-182, 18.2-186, 18.2-186.3, 18.2-187.1, 18.2-188, 18.2-195, 18.2-195.2, 18.2-197, 18.2-340.37, 19.2-289, 19.2-290, 19.2-386.16, 29.1-553</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal

Bill	Sponsors	Title	Last Action	Lists
HB 322	Jeffrey L. Campbell	<p>Criminal records; changes to provisions to sealing of records.</p> <p>Criminal records; sealing of records. Makes changes to the sealing provisions as they shall become effective pursuant to Chapters 524 and 542 of the 2021 Acts of Assembly, Special Session I, related to the types of offenses eligible to be sealed by petition. The bill limits such offenses eligible for sealing by petition to convictions for a Class 2, 3, or 4 misdemeanor and deferral and dismissals of misdemeanor offenses, Class 5 or 6 felonies, or felony larceny-related offenses. Under the related provisions as they shall become effective pursuant to Chapters 524 and 542, a person convicted of or who has had a charge deferred and dismissed for a misdemeanor offense, Class 5 or 6 felony, or felony larceny-related offense is eligible to petition to have such conviction or charge sealed. The bill also changes the provisions related to criminal penalties for disclosure of sealed records to require proof that such disclosure was done maliciously and intentionally and reduces the penalty for such violation to a Class 1 misdemeanor. Under the related provisions as they shall become effective pursuant to Chapters 524 and 542, disclosure of such records done willfully is a Class 1 misdemeanor and disclosure done maliciously and intentionally is a Class 6 felony. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101250D: 19.2-392.5, 19.2-392.12, 19.2-392.14</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 345	Vivian E. Watts	<p>Robbery; conforms certain provisions of the Code of Virginia to the degrees of robbery offenses.</p> <p>Robbery. Conforms certain provisions of the Code referencing robbery to the degrees of robbery offenses established by Chapter 534 of the Acts of Assembly of 2021, Special Session I. These changes include: (i) limiting certain non-robbery crimes for which committing such crime with the intent to commit a robbery is an element to the offenses to the two higher degrees of robbery, (ii) allowing persons convicted of the two lesser degrees of robbery to be eligible for conditional release if they are terminally ill and for the enhanced earned sentence credits, (iii) allowing persons who are ineligible for parole as a result of being convicted of three certain enumerated offenses to be eligible for parole if convicted of an offense that would constitute any of the three lesser degrees of robbery, (iv) limiting the application of the three-strikes law to the two higher degrees of robbery and making persons convicted under the three-strikes law eligible for parole if one of the three convictions resulting in the mandatory life sentence would constitute one of the two lesser degrees of robbery, and (v) specifying that persons convicted of either of the two higher degrees of robbery while on administrative furlough or released for work release are ineligible for further furlough or work release and that persons convicted of such offenses are ineligible for home/electronic incarceration. The bill leaves unchanged the current law making all degrees of robbery predicate criminal acts by ...</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 366	Vivian E. Watts	<p>Assault and battery; penalties when committed against certain persons.</p> <p>Assault and battery; penalties. Provides that a simple assault or an assault and battery committed against a judge, magistrate, law-enforcement officer, correctional officer, person directly involved in the care, treatment, or supervision of inmates, firefighter, or volunteer firefighter or emergency medical services personnel by a juvenile who has not been previously convicted of or proceeded against informally or adjudicated delinquent for an offense that would be a felony if committed by an adult is punishable as a Class 1 misdemeanor. Currently, any such offense is a punishable as a Class 6 felony, with a mandatory minimum term of confinement of six months. The bill also provides that any person charged with such offense who has been diagnosed by a psychiatrist or clinical psychologist with a mental illness, developmental disability, or intellectual disability and the violation was caused by or had a direct and substantial relationship to the person's mental illness or disability, then such person is guilty of a Class 1 misdemeanor. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101630D: 18.2-57</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 369	Angelia Williams Graves	<p>Court appearance of a person not free on bail; changes to provisions regarding bail hearings, etc.</p> <p>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 counsel for the accused, (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. Effective in due course, the bill provides that the chief judge in each circuit shall create a plan to be completed by October 1, 2022, that establishes the means by which the jurisdiction will meet these requirements. The remainder of the bill has a delayed effective date of January 1, 2023. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101429D: 19.2-158</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 404	Karrie K. Delaney	<p>Sexual assault nurse & forensic examiners; testimony by two-way video conferencing.</p> <p>Admission into evidence of certain forensic medical examination reports by sexual assault nurse examiners and sexual assault forensic examiners; testimony by two-way video conferencing; notice and waiver procedures. Creates procedures allowing a forensic medical examination report conducted by a sexual assault nurse examiner or sexual assault forensic examiner to be admitted into evidence without the testimony of such examiner and allowing for such examiner to testify by two-way video conferencing if certain filing and notice provisions are met and the defendant does not object. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101617D: 17.1-275.5, 19.2-183, 19.2-243</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal

Bill	Sponsors	Title	Last Action	Lists
HB 415	Jason S. Ballard	Criminal cases; sentencing by jury. Criminal cases; sentencing by jury. Provides that if a jury finds a person guilty of a criminal offense, such jury shall ascertain the punishment of the offense. Under current law, unless the accused has requested that the jury ascertain punishment, the court shall fix punishment after the accused has been found guilty by a jury.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102281D: 19.2-288, 19.2-295, 19.2-295.1, 19.2-295.3	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 422	Charniele L. Herring	Writ of actual innocence; previously unknown or unavailable nonbiological evidence, etc. Writ of actual innocence; previously unknown or unavailable nonbiological evidence; contents and form of petition. Changes the provision requiring that a petitioner petitioning for a writ of actual innocence based on previously unknown or unavailable nonbiological evidence allege that such evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction or adjudication of delinquency by the circuit court to instead require that the petitioner allege such evidence could not have been discovered or obtained before the conviction or adjudication of delinquency became final in the circuit court.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102518D: 19.2-327.11	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
HB 423	Charniele L. Herring	Writ of actual innocence; previously unknown or unavailable nonbiological evidence. Writ of actual innocence; previously unknown or unavailable nonbiological evidence; contents and form of petition. Changes the requirement that a petitioner allege in a writ of actual innocence based on nonbiological evidence previously unknown or unavailable that such previously unknown or unavailable evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction or adjudication of delinquency by the circuit court to instead require that the petitioner allege such evidence was not discovered or obtained prior to such expiration of 21 days.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102523D: 19.2-327.11	House • Feb 11, 2022: Stricken from docket by Courts of Justice (18-Y 0-N)	Criminal
HB 451	Elizabeth B. Bennett-Parker	Stalking; venue, penalty. Stalking; venue; penalty. Allows a person to be prosecuted for a stalking charge in the jurisdiction where the person at whom the stalking conduct is directed received a communication from the person engaged in the stalking conduct that placed him in reasonable fear of death, criminal sexual assault, or bodily injury to himself or a family or household member. The bill also provides that evidence of any such conduct that occurred outside the Commonwealth may be admissible, if relevant, in any prosecution for stalking. Currently, such evidence is admissible as long as the prosecution is based upon conduct occurring within the Commonwealth.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103062D: 18.2-60.3	House • Mar 10, 2022: VOTE: Adoption (100-Y 0-N)	Criminal
HB 493	Michael P. Mullin	Virginia Freedom of Information Act; required release of law-enforcement disciplinary records. Virginia Freedom of Information Act; required release of law-enforcement disciplinary records; exceptions. Requires the release of law-enforcement disciplinary records related to completed disciplinary investigations. The bill defines "law-enforcement disciplinary records" as any record created in furtherance of a law-enforcement disciplinary proceeding or any other administrative or judicial proceeding arising from the law-enforcement officer's conduct, whether such proceeding takes place in the Commonwealth or in another jurisdiction. The bill allows for the redaction of certain personal contact information of the law-enforcement officer, complainant, and witness and of their families; social security numbers; certain medical and identifying information of the law-enforcement officer and complainant; and any technical infraction, as defined in the bill, by the law-enforcement officer. This bill is a recommendation of the Virginia Freedom of Information Advisory Council.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100266D: 2.2-3706	House • Feb 15, 2022: Left in Public Safety	Criminal
HB 496	Michael P. Mullin	Abuse and neglect; financial exploitation, changes term incapacitated adults, definitions, penalties Abuse and neglect; financial exploitation; incapacitated adults; penalties. Changes the term "incapacitated adult" to "vulnerable adult" for the purposes of the crime of abuse and neglect of such adults and defines "vulnerable adult" as any person 18 years of age or older who is impaired by reason of mental illness, intellectual or developmental disability, physical illness or disability, advanced age, or other causes to the extent the adult lacks sufficient understanding or capacity to make, communicate, or carry out reasonable decisions concerning his well-being or has one or more limitations that substantially impair the adult's ability to independently provide for his daily needs or safeguard his person, property, or legal interests. The bill adds the definition of "advanced age" as it is used in the definition of "vulnerable adult" to mean 65 years of age or older. The bill also changes the term "person with mental incapacity" to the same meaning of "vulnerable adult" for the purposes of the crime of financial exploitation. This bill is a recommendation of the Virginia Criminal Justice Conference.	House • Mar 10, 2022: Enrolled	Criminal

Bill	Sponsors	Title	Last Action	Lists
HB 499	Michael P. Mullin	<p>Grand jury, regular; provisions for court reporter, use and disposition of notes, etc.</p> <p>Regular grand jury; provisions for court reporter; use and disposition of notes, tapes, and transcriptions. Provides that a court reporter shall be provided for a regular grand jury to record, manually or electronically, and transcribe all oral testimony taken before a regular grand jury, but such reporter shall not be present during any stage of its deliberations. The bill provides that the foreman shall cause the notes, tapes, and transcriptions of the court reporter to be sealed, the container dated, and delivered to the court and that the court shall cause the sealed container to be kept safely. The bill provides for certain circumstances in which the court may authorize disclosure of such sealed notes, tapes, and transcriptions. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101915D:</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 501	Michael P. Mullin	<p>Discovery in criminal cases; copies of discovery for the accused.</p> <p>Discovery in criminal cases; copies of discovery for the accused. Provides that for any discovery materials or evidence that the accused is permitted to inspect and review, the accused may request the Commonwealth to copy or photograph such discovery materials or evidence, and the Commonwealth shall provide such copies or photographs to the accused or his counsel. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101913D: 19.2-265.4</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 502	Michael P. Mullin	<p>Credit for time spent in confinement while awaiting trial; separate, dismissed, etc.</p> <p>Credit for time spent in confinement while awaiting trial; separate, dismissed, or nolle prosequi charges. Provides that credit for time spent in confinement while awaiting trial shall include any time spent in pretrial confinement or detention on separate, dismissed, or nolle prosequi charges that are from the same act as the violation for which the person is convicted and sentenced to a term of confinement. This bill is a recommendation of the Virginia Criminal Justice Conference. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101926D: 53.1-187</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
HB 503	Michael P. Mullin	<p>Bail; subsequent proceeding arising out of initial arrest.</p> <p>Bail in subsequent proceeding arising out of initial arrest. Provides that any person who was previously admitted to bail shall be granted bail and have the terms of bond or recognizance fixed in the amount or manner consistent with the prior admission to bail, but if the court having jurisdiction of the subsequent proceeding believes bail is inappropriate, or the amount of bond or security inadequate or excessive, it may deny bail, or change the amount of such bond or security, require new and additional sureties, or set other terms of bail as are appropriate to the case. Under current law, any person who was previously admitted to bail is not required to be admitted to bail in any subsequent proceeding arising out of the initial arrest unless the court having jurisdiction of such subsequent proceeding deems the initial amount of bond or security taken inadequate. This bill is a recommendation of the Virginia Criminal Justice Conference. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101928D: 19.2-130</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 504	Michael P. Mullin	<p>Expunged criminal records; use in civil action.</p> <p>Expunged criminal records; use in civil action. Allows any party to a civil action filed arising out of or relating to a criminal charge wherein criminal records have been expunged or a petition to expunge such records is pending to file a motion for the release of such records for use in such civil action.</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 536	Kelly K. Convors-Fowler	<p>General district courts; filing an order of disposition from a criminal case.</p> <p>Filing an order of disposition from a criminal case in general district courts. Provides that any adult criminal disposition for a misdemeanor or felony in a juvenile and domestic relations district court may be submitted to the general district court of the same territorial jurisdiction to be filed as a general district court record upon a petition filed by the victim of the offense and with the consent of the juvenile and domestic relations district court.</p>	House • Feb 07, 2022: Stricken from docket by Courts of Justice (20-Y 0-N)	Criminal
HB 609	Jeffrey M. Bourne	<p>Civil action for the deprivation of rights; duties and liabilities of certain employers.</p> <p>Civil action for the deprivation of rights; duties and liabilities of certain employers. Creates a civil cause of action for the deprivation of any rights, privileges, or immunities pursuant to the constitutions and laws of the United States and the Commonwealth due to the acts or omissions of either a public employer or its employee and provides that a plaintiff may maintain an action to establish liability and recover compensatory damages, punitive damages, and equitable relief against the public employer and its employee. The bill provides that sovereign immunity is not a defense to such an action. The bill further provides that public employers owe a duty of reasonable care to third parties in the hiring, supervision, training, retention, and use of their employees and that a person who claims to have suffered injury or sustained damages caused, in whole or in part, by a breach of this duty may maintain an action to establish liability and recover compensatory damages, punitive damages, and equitable relief against such public employer.</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal

Bill	Sponsors	Title	Last Action	Lists
HB 613	Jeffrey M. Bourne	<p>Arrest/prosecution of individual experiencing mental health emerg.; assault against law enforcement.</p> <p>Arrest and prosecution of individual experiencing a mental health emergency; assault or assault and battery against a law-enforcement officer. Provides that no individual shall be subject to arrest or prosecution for an assault or assault and battery against a law-enforcement officer if at the time of the assault or assault and battery (i) the individual (a) is experiencing a mental health emergency or (b) meets the criteria for issuance of an emergency custody order pursuant to 37.2-808 and (ii) the law-enforcement officer subject to the assault or assault and battery was responding to a call for service requesting assistance for such individual. The bill provides that no law-enforcement officer acting in good faith shall be found liable for false arrest if it is later determined that the person arrested was immune from prosecution.</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 614	Jeffrey M. Bourne	<p>Appeals bond; removes requirement for indigent parties to post, appeal of unlawful detainer.</p> <p>Requirement for appeals bond; indigent parties; appeal of unlawful detainer. Removes the requirement for an indigent defendant in civil actions to post an appeal bond in any civil case appealed from the general district court. The bill also removes provisions of the Code allowing a plaintiff in an unlawful detainer case that has been appealed to the circuit court to request the judge to order a writ of eviction immediately upon entry of judgment for possession.</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
HB 617	Jeffrey M. Bourne	<p>Discretionary sentencing guidelines; prior convictions and juvenile adjudications.</p> <p>Discretionary sentencing guidelines; prior convictions and juvenile adjudications. Provides that, for the purposes of the discretionary sentencing, previous convictions shall not include (i) any adult conviction more than 10 years prior to the date of the commission of the present offense, unless the prior adult conviction was for a violent felony offense punishable by a maximum term of imprisonment of 40 years or more, the defendant was sentenced to an active prison term of more than 12 months for the offense, and the defendant has committed another violent felony within a 15-year period between the date of the defendant's sentencing for the prior offense and commission of the present offense and (ii) any juvenile adjudications of delinquency or any juvenile convictions, unless the juvenile was tried as an adult and the conviction was for a violent felony offense punishable by a maximum term of imprisonment of 40 years or more, the defendant was sentenced to an active prison term of more than 12 months, and the date of offense was within the 10 years preceding sentencing for the present offense. The bill also provides that juvenile adjudications of delinquency and certain adult prior convictions shall not serve as the basis for any sentencing enhancement in an adult criminal case.</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 618	Sally L. Hudson	<p>Barrier crimes; possession of controlled substances.</p> <p>Possession of controlled substances; barrier crimes. Removes from the definition of barrier crime a felony violation of possession of a controlled substance.</p>	House • Feb 15, 2022: Left in Health, Welfare and Institutions	Criminal
HB 619	Sally L. Hudson	<p>Controlled substances; substance shall not include mere residue that is not a usable quantity, etc.</p> <p>Possession of controlled substances; residue. Provides that for the purposes of the crime of possession of controlled substances, "controlled substance" shall not include mere residue of any substance that is not a usable quantity or a countable dosage unit.</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 620	Sally L. Hudson	<p>Criminal cases and traffic infractions; eliminates accrual of interest on fines and costs.</p> <p>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, 2022, shall cease to accrue interest on July 1, 2022, and any unpaid interest that has accrued on such fine or costs shall be automatically waived.</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 622	Sally L. Hudson	<p>Custodial interrogation of a child; advisement of rights.</p> <p>Custodial interrogation of a child; advisement of rights. Requires that prior to any custodial interrogation of a child by a law-enforcement officer, the child and, if no attorney is present and if no exception to the requirement that the child's parent, guardian, or legal custodian be notified applies, the child's parent, guardian, or legal custodian shall be advised that (i) the child has a right to remain silent; (ii) any statement the child makes can and may be used against the child; (iii) the child has a right to an attorney and that one will be appointed for the child if the child is not represented and wants representation; and (iv) the child has a right to have his parent, guardian, custodian, or attorney present during any questioning. The bill states that if a child indicates in any manner and at any stage of questioning during a custodial interrogation that he does not wish to be questioned further, the law-enforcement officer shall cease questioning. The bill also requires, before admitting into evidence any statement made by a child during a custodial interrogation, that the court find that the child knowingly, intelligently, and voluntarily waived his rights and states that no admission or confession made by a child younger than 16 years of age during a custodial interrogation may be admitted into evidence unless it was made in the presence of the child's parent, guardian, custodian, or attorney.</p>	House • Jan 28, 2022: Continued to 2023 in Courts of Justice by voice vote	Criminal

Bill	Sponsors	Title	Last Action	Lists
HB 658	Patrick A. Hope	<p>Juveniles; appointment of counsel, indigency.</p> <p>Juveniles; appointment of counsel; indigency. Removes provisions stating that when the court appoints counsel to represent a child in a detention hearing or in a case involving a child who is alleged to be in need of services, in need of supervision, or delinquent and, after an investigation by the court services unit, finds that the parents are financially able to pay for such attorney in whole or in part and refuse to do so, the court shall assess costs against the parents for such legal services in the amount awarded the attorney by the court, not to exceed \$100 if the action is in circuit court or the maximum amount specified for court-appointed counsel appearing in district court. The bill also removes provisions requiring that before counsel is appointed in any case involving a child who is alleged to be in need of services, in need of supervision, or delinquent, the court determine that the child is indigent. The bill provides that for the purposes of appointment of counsel for a delinquency proceeding, a child shall be considered indigent. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103997D: 16.1-266, 16.1-267</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 660	William C. Wampler III	<p>Search warrants; removes certain provisions in regard to execution of warrants.</p> <p>Search warrants; execution. Removes provisions requiring that search warrants for the search of any place of abode be executed by initial entry of the abode only in the daytime hours between 8:00 a.m. and 5:00 p.m. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102154D: 19.2-56</p>	House • Mar 12, 2022: Failed to pass in House	Criminal
HB 662	William C. Wampler III	<p>Multi-jurisdiction grand jury; investigation of elder abuse crimes.</p> <p>Multi-jurisdiction grand jury; elder abuse crimes. Adds the following to the list of crimes that a multi-jurisdiction grand jury may investigate: (i) financial exploitation of mentally incapacitated persons and (ii) abuse and neglect of incapacitated adults. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102157D: 19.2-215.1</p>	House • Jan 28, 2022: Incorporated by Courts of Justice (HB265-Campbell, R.R.) by voice vote	Criminal
HB 682	Patrick A. Hope	<p>Service of process; investigator employed by an attorney for the Commonwealth, etc.</p> <p>Service of process; investigator employed by an attorney for the Commonwealth or Indigent Defense Commission. Provides that all investigators employed by an attorney for the Commonwealth or by the Indigent Defense Commission while engaged in the performance of their official duties shall not be considered a party or otherwise interested in the subject matter in controversy and, thus, are authorized to serve process. The bill eliminates the requirement that the sheriff in the jurisdiction where process is to be served agrees that such investigators may serve process. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101921D: 8.01-293</p>	House • Mar 10, 2022: VOTE: Adoption (100-Y 0-N)	Criminal
HB 713	Mark L. Keam	<p>Family abuse; coercive control, penalty.</p> <p>Family abuse; coercive control; penalty. Makes it a Class 1 misdemeanor for a person to engage in coercive control, defined in the bill, of a family or household member. The bill also includes coercive control in the definition of "family abuse" used for the basis of the issuance of family abuse protective orders. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102744D: 16.1-228</p>	House • Feb 11, 2022: Continued to 2023 in Courts of Justice (18-Y 0-N)	Criminal
HB 719	Eileen Filler-Corn	<p>Physical evidence recovery kits; victim's right to notification, storage.</p> <p>Physical evidence recovery kits; victim's right to notification; storage. Provides that for a physical evidence recovery kit that (i) was collected by the Office of the Chief Medical Examiner as part of a routine death investigation, and the medical examiner and the law-enforcement agency agree that analysis is not warranted, (ii) was determined by the law-enforcement agency not to be connected to a criminal offense, or (iii) is connected to an offense that occurred outside of the Commonwealth or another law-enforcement agency has taken over responsibility of the investigation and such kit is not transferred to another law-enforcement agency, the law-enforcement agency that received the physical evidence recovery kit shall store such kit for a period of 10 years or until 10 years after the victim reaches the age of majority if the victim was a minor at the time of collection, whichever is longer. The bill provides that after the mandatory retention period, the law-enforcement agency may destroy the physical evidence recovery kit, or in its discretion, may elect to retain the physical evidence recovery kit for a longer period of time. The bill also requires the law-enforcement agency to inform the victim, parent, guardian, or next of kin of the unique identification number assigned to the physical evidence recovery kit utilized by the health care provider and provide information regarding the Physical Evidence Recovery Kit Tracking System, unless disclosing this information wo...</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
HB 731	Jeion A. Ward	<p>Juvenile law-enforcement records; inspection of records.</p> <p>Juvenile law-enforcement records; inspection. Provides that a juvenile, the parent, guardian, or other custodian of the juvenile, and counsel for the juvenile may inspect a law-enforcement record concerning such juvenile if (i) no other law requires or allows withholding of the record; (ii) the parent, guardian, or other custodian requesting the record is not a suspect, offender, or person of interest in the record; and (iii) any identifying information of any other involved juveniles is redacted. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103598D: 16.1-301</p>	Senate • Mar 08, 2022: Signed by President	Criminal

Bill	Sponsors	Title	Last Action	Lists
HB 736	Robert B. Bell	<p>Search warrants; execution.</p> <p>Search warrants; execution. Provides that a law-enforcement officer may seek, execute, or participate in the execution of a no-knock warrant if authorized by a judge for good cause shown by particularized facts. The bill also clarifies that a search warrant for any place of abode shall require that at least one law-enforcement officer be recognizable and identifiable as a uniformed law-enforcement officer and provide audible notice of his authority and purpose reasonably designed to be heard by the occupants of such place to be searched prior to the execution of such search warrant. The bill changes the hours of execution of a search warrant for the search of any place of abode from the daytime hours between 8:00 a.m. and 5:00 p.m. to between 6:00 a.m. and 9:00 p.m. The bill also provides that a magistrate may authorize the execution of such search warrant at another time as necessary for law-enforcement officers to obtain the objects or persons described in the warrant or in the interest of public safety. Currently, a judge or a magistrate, if a judge is not available, may authorize the execution of such search warrant at another time. The bill removes provisions stating that any evidence obtained from a search warrant in violation of any of the execution requirements shall not be admitted into evidence for the Commonwealth in any prosecution. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100839D: 19.2-56</p>	Senate • Mar 10, 2022: Conferees appointed by Senate	Criminal
HB 738	Robert B. Bell	<p>Competency to stand trial; order for evaluation or treatment.</p> <p>Competency to stand trial; order for evaluation or treatment; copy to the Department of Behavioral Health and Developmental Services. Provides that whenever a court orders an evaluation of a defendant's competency to stand trial, the clerk of the court shall provide a copy of the order to the Department of Behavioral Health and Developmental Services. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101063D: 19.2-169.8</p>	executive • Mar 09, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
HB 748	Robert B. Bell	<p>DNA data bank sample tracking system; replaces certain references in Code.</p> <p>Department of Forensic Science; DNA data bank sample tracking system. Replaces certain references in the Code to the Local Inmate Data System with references to the Department of Forensic Science DNA data bank sample tracking system.</p>	executive • Mar 09, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
HB 751	Robert B. Bell	<p>Suspected abuse; mandated reporters.</p> <p>Mandated reporters of suspected abuse. Adds practitioners of behavior analysis to the list of individuals required to report suspected adult or child abuse or neglect. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100593D: 63.2-1509, 63.2-1606</p>	executive • Mar 09, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
HB 759	Les R. Adams	<p>Window tinting; vehicle stop.</p> <p>Window tinting; vehicle stop. Removes the prohibition on a law-enforcement officer from stopping a motor vehicle for a violation of provisions related to window tinting and the prohibition of evidence discovered or obtained at such stop from being admissible in court. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101500D: 46.2-1052</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 794	Jason S. Ballard	<p>Criminal proceedings; evidence of defendant's mental condition.</p> <p>Criminal proceedings; evidence of defendant's mental condition. Repeals provisions permitting the admission of evidence by the defendant concerning a defendant's mental condition at the time of an alleged offense, including expert testimony, if such evidence is relevant, is not evidence concerning an ultimate issue of fact, and (i) tends to show the defendant did or did not have the intent required for the offense charged and (ii) is otherwise admissible pursuant to the general rules of evidence. The bill also removes provisions permitting a court to issue an emergency custody order in cases where such evidence was admitted and repeals provisions requiring the Office of the Executive Secretary of the Supreme Court to collect data regarding the cases that use such evidence. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102321D: 37.2-808</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 797	Marcia S. "Cia" Price	<p>Community service work in lieu of payment of fines and costs; underpaid work.</p> <p>Community service work in lieu of payment of fines and costs; underpaid work. Provides that in the program established by a court to provide an option to any person upon whom a fine and costs have been imposed to discharge all or part of the fine or costs by earning credits for the performance of community service work, underpaid work, as such term is defined in the bill, is added as an option for earning such credits before, during, or after such person is incarcerated in a state or local correctional facility, provided that such underpaid work is authorized by the court. The bill makes offering such option for community service work or underpaid work mandatory. The bill provides that a person who is performing underpaid work shall be credited at the same rate as the community service work rate less any wages received for the underpaid work. Under current law, a court is required to establish a program for providing an option for community service work in lieu of payment of fines and costs but offering such option was not mandatory. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101932D: 19.2-354</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal

Bill	Sponsors	Title	Last Action	Lists
HB 799	Marcia S. "Cia" Price	<p>Fines, costs, forfeitures, penalties, and restitution; collection fees.</p> <p>Fines, costs, forfeitures, penalties, and restitution; collection fees; assessment against incarcerated individuals. Provides that notwithstanding any other provision of law, no collection fees, including the fees of any private attorneys or collection agencies, administrative fees, or any other fees related to collection activities, shall be assessed for the collection of any fines, costs, forfeitures, penalties, or restitution imposed in a criminal case or in a case involving a traffic infraction (i) for any period during which the defendant is incarcerated and (ii) for a period of 90 days following the date of the defendant's release from incarceration if the sentence includes an active term of incarceration. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101223D: 19.2-349</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 805	Marcia S. "Cia" Price	<p>Barrier crimes; eliminates certain crimes from the definition, etc.</p> <p>Barrier crimes. Eliminates certain crimes from the definition of "barrier crime" and requires the State Board of Behavioral Health and Developmental Services, the Board of Education, the State Board of Health, and the State Board of Social Services to each adopt regulations that develop and implement a waiver process for individuals who have been convicted of a barrier crime and who serve in a position or seek to serve in a position with any qualified entity subject to the regulations of the board. The bill eliminates current exceptions and time limit mandates, as such information is required to be set out in each agency's waiver process. The bill sets out information to be included in the regulations of the individual boards. The bill also directs the Departments of Behavioral Health and Developmental Services, Education, Health, and Social Services to each publish information about the agency's waiver process in an easily accessible format on a website maintained by the department. The bill includes additional requirements for each waiver process, such as if an individual's application for a waiver is denied, the department must state the basis for denial in writing and provide such explanation to the individual. The bill provides that although a waiver granted to an individual by one department shall not be transferrable to a position under another department, proof of receipt of a waiver from one department shall be considered positively by another department when review...</p>	House • Feb 15, 2022: Left in Health, Welfare and Institutions	Criminal
HB 807	Marcia S. "Cia" Price	<p>Criminal history background checks; governing individuals providing certain services for adults.</p> <p>Criminal history background checks. Moves to separate sections of the Code of Virginia provisions governing background checks for individuals providing substance abuse and mental health services for adults. Currently, provisions governing background checks for individuals providing substance abuse and mental health services for adults are included together with provisions governing background checks for providers of substance abuse and mental health services for children and providers of developmental services for individuals of all ages.</p>	House • Feb 15, 2022: Left in Health, Welfare and Institutions	Criminal
HB 811	Wren M. Williams	<p>Admission to bail; rebuttable presumptions against bail.</p> <p>Admission to bail; rebuttable presumptions against bail. Creates a rebuttable presumption against bail for certain criminal offenses enumerated in the bill and for persons identified as being illegally present in the United States by U.S. Immigration and Customs Enforcement who are charged with certain offenses. The bill also provides that a magistrate, clerk, or deputy clerk of a district court or circuit court shall not admit 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 requires the court to consider specified factors when determining whether the presumption against bail has been rebutted and whether there are appropriate conditions of release. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100829D: 19.2-120, 19.2-124</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 812	Wren M. Williams	<p>Admission to bail; rebuttable presumptions against bail.</p> <p>Admission to bail; rebuttable presumptions against bail. Creates a rebuttable presumption against bail for certain criminal offenses enumerated in the bill and for persons identified as being illegally present in the United States by U.S. Immigration and Customs Enforcement who are charged with certain offenses. The bill also requires the court to consider specified factors when determining whether the presumption against bail has been rebutted and whether there are appropriate conditions of release. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100870D: 19.2-120, 19.2-124</p>	Senate • Feb 28, 2022: Passed by indefinitely in Judiciary (9-Y 6-N)	Criminal
HB 862	Alfonso H. Lopez	<p>Public defender; supplementing compensation.</p> <p>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 his deputies or employees, above the salary of any such attorney for the Commonwealth, deputy, or employee, to proportionally supplement the compensation of the public defender, or any of his deputies or employees, commensurate with the compensation of the attorney for the Commonwealth, or any of his deputies or employees.</p>	House • Feb 15, 2022: Left in Counties, Cities and Towns	Criminal

Bill	Sponsors	Title	Last Action	Lists
HB 890	Terry G. Kilgore	<p>Va. Freedom of Information Act; release of certain law-enforcement criminal incident information.</p> <p>Virginia Freedom of Information Act; repeal; release of certain law-enforcement criminal incident information and criminal investigative files. Repeals the provisions in the Virginia Freedom of Information Act (i) regarding the release of criminal investigative files that relate to a criminal investigation or proceeding that is not ongoing; (ii) that provide limitations to the mandatory release of criminal incident information relating to felony offenses and certain criminal investigative files; and (iii) that allow for, in the case of a request for certain criminal investigative files, an additional 60 work days to respond to such request after the initial allowable five-work-day response period. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101446D: 2.2-3704, 2.2-3706, 2.2-3711, 2.2-3714, 19.2-174.1, 19.2-368.3, 2.2-3706.1</p>	House • Feb 10, 2022: Incorporated by General Laws (HB734-Bell) by voice vote	Criminal
HB 906	Carrie E. Coyner	<p>Petition for modification of sentence; eligibility, procedures.</p> <p>Petition for modification of sentence; eligibility; procedures. Provides a petition process for a person serving a sentence for any conviction or a combination of any convictions who remains incarcerated in a state or local correctional facility and meets certain criteria to petition the circuit court that entered the original judgment or order to (i) suspend the unserved portion of such sentence or run the unserved portion of such sentence concurrently with another sentence, (ii) place such person on probation for such time as the court shall determine, or (iii) otherwise modify the sentence imposed.</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 960	William C. Wampler III	<p>Marijuana and certain traffic offenses; issuing citations, exclusion of evidence.</p> <p>Issuing citations; marijuana and certain traffic offenses; exclusion of evidence. Removes provisions that no law-enforcement officer may lawfully stop a motor vehicle for operating (i) with an expired safety inspection or registration sticker until the first day of the fourth month after the original expiration date; (ii) with defective and unsafe equipment; (iii) without a light illuminating a license plate; (iv) without brake lights, a high mount stop light, or headlights; or (v) without an exhaust system that prevents excessive or unusual levels of noise, and the accompanying exclusionary provisions. The bill also removes the exclusionary provisions for operating a motor vehicle (a) in violation of certain restrictions on people with a learner's permit, (b) while smoking with a minor present, (c) with certain sun-shading materials and tinting films, (d) with certain objects suspended in the vehicle, and (e) without the required use of seat belts, and for certain violations involving pedestrians crossing a highway. The bill also removes the exclusionary provision that no law-enforcement officer may lawfully stop, search, or seize any person, place, or thing solely on the basis of the odor of marijuana. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101174D: 4.1-1302, 15.2-919, 46.2-334.01, 46.2-646, 46.2-810.1, 46.2-923, 46.2-926, 46.2-1003, 46.2-1013, 46.2-1014, 46.2-1014.1, 46.2-1030, 46.2-1049, 46.2-1052, 46.2-1054, 46.2-1094, 46.2-1157, 46.2-...</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 1000	Chris S. Runion	<p>Law-enforcement civilian oversight bodies; requirements of members.</p> <p>Law-enforcement civilian oversight bodies; requirements. Requires every member appointed to a locality's law-enforcement civilian oversight body to observe a law-enforcement officer employed with such locality's law-enforcement agency while such law-enforcement officer is engaged in his official duties. The bill also provides that any disciplinary determination recommended by a law-enforcement civilian oversight body shall be advisory and that if any law-enforcement agency declines to implement such recommendation, such agency shall create and make available to the public within 30 days from the date such recommendation is reported to such agency a written public record of its rationale for declining to implement such recommendation. The bill requires that such observation take place within 90 days of the member's appointment to the civilian oversight body and total no fewer than 24 hours, a portion of which includes a ride-along with a law-enforcement officer. The bill also requires each law-enforcement civilian oversight body to include at least one retired law-enforcement officer as a voting member; under current law, a retired law-enforcement officer may serve on such body as an advisory, nonvoting ex officio member. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100522D: 9.1-601</p>	Senate • Feb 28, 2022: Passed by indefinitely in Judiciary (9-Y 6-N)	Criminal

Bill	Sponsors	Title	Last Action	Lists
HB 1037	Briana D. Sewell	<p>Emergency custody and temporary detention; transportation of person when transfer of custody.</p> <p>Emergency custody and temporary detention; transportation; transfer of custody. Provides that, in cases in which transportation of a person subject to an emergency custody order or temporary detention order is ordered to be provided by an alternative transportation provider, the primary law-enforcement agency that executes the order may transfer custody of the person to the alternative transportation provider immediately upon execution of the order, and that the alternative transportation provider shall maintain custody of the person from the time custody is transferred to the alternative transportation provider by the primary law-enforcement agency until such time as custody of the person is transferred to the community services board or its designee that is responsible for conducting the evaluation or the temporary detention facility, as is appropriate. The bill also adds employees of and persons providing services pursuant to a contract with the Department of Behavioral Health and Developmental Services to the list of individuals who may serve as alternative transportation providers. The bill also requires the Department of Behavioral Health and Developmental Services to expand its existing contract for the provision of alternative transportation of a person who is subject to a temporary detention order or enter into new contracts for alternative transportation of a person who is subject to a temporary detention order to ensure sufficient availability of alternative transp...</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 1043	Kathy K.L. Tran	<p>Youth sports leagues; background checks and training requirements for coaches and staff.</p> <p>Child abuse and neglect; background check and training requirements for youth sports coaches and staff. Requires youth sports leagues to (i) require all coaches, staff members, employees, and other volunteers who will be alone with, in control of, or supervising children to complete a fingerprint-based background check; (ii) provide to all coaches, staff members, employees, and other volunteers who will be alone with, in control of, or supervising children and the parent of any child participating in the sports league written notice of the duty of all coaches, directors, and persons 18 years of age or older employed by or volunteering with the sports league to report suspected child abuse or neglect, information regarding how to report suspected child abuse or neglect, an explanation of the penalties that may be imposed for failure to file a required report, contact information for the local department of social services, and the telephone number for the Department of Social Services' toll-free child abuse and neglect hotline; and (iii) require all paid coaches, staff members, and employees who will be alone with, in control of, or supervising children to complete no less than four hours of training annually regarding child abuse prevention and response and require all volunteers who will be alone with, in control of, or supervising children to complete no less than two hours of training annually regarding child abuse prevention and response. The bill directs the Board of Edu...</p>	House • Mar 16, 2022: Failed to pass in House	Criminal
HB 1073	James A. "Jay" Leftwich	<p>Probation, revocation, and suspension of sentence; penalty.</p> <p>Probation, revocation, and suspension of sentence; penalty. Repeals the limitations on the amount of active incarceration a court can impose as a result of a revocation hearing for a probation violation or violation of the terms and conditions of a suspended sentence. Under current law, there are limitations on the amount of active incarceration a court can impose for defined technical violations. The bill also removes limitations on the lengths of a period of probation and period of suspension of a sentence that may be fixed by the court. Under current law, a court may fix the period of probation for up to the statutory maximum period for which the defendant might originally have been sentenced to be imprisoned and any period of supervised probation shall not exceed five years from the release of the defendant from any active period of incarceration, with some exceptions. The bill also makes changes to the time periods within which a court must issue process to notify the accused of a revocation hearing. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102343D: 19.2-303, 19.2-303.1, 19.2-306, 19.2-306.1</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 1116	Candi Mundon King	<p>Child abuse and neglect; valid complaint.</p> <p>Child abuse and neglect; valid complaint. Removes from the elements of a valid complaint or report of child abuse or neglect the requirement that the alleged abuser be the alleged victim child's parent or caretaker. The bill requires a local department of social services (local department) that receives a complaint or report of child abuse or neglect over which it does not have jurisdiction to forward such complaint or report to the appropriate local department. Statutes affected: House: Presented and ordered printed 22104220D: 63.2-1508</p>	House • Feb 10, 2022: Stricken from docket by Health, Welfare and Institutions (22-Y 0-N)	Criminal

Bill	Sponsors	Title	Last Action	Lists
HB 1118	Don L. Scott	<p>Earned sentence credits; credits may be earned by any person committed to the custody of the DOC.</p> <p>Earned sentence credits. Provides that sentence credits may be earned by any person committed to the custody of the Department of Corrections (the Department), regardless of whether the person is confined in a state or local correctional facility. The bill allows inmates to earn more than 4.5 sentence credits for each 30 days served on a sentence for a conviction of robbery or carjacking, provided that the inmate did not use a weapon or threaten or harm another person during the commission of the offense. The bill allows inmates to earn enhanced sentence credits for consecutive sentences served after the completion of any offense that would otherwise limit the inmate to earning 4.5 sentence credits for each 30 days served. The bill allows an inmate to earn Level I sentence credits if, provided certain other requirements are met, the inmate had no more than one minor correctional infraction and no serious correctional infractions within the previous 12 months. The bill directs the Department to establish a program that allows victims to advocate on behalf of an inmate for reclassification of the inmate's sentence credits. The bill provides that the earned sentence credit provisions of § 53.1-202.3 of the Code of Virginia, which would become effective on July 1, 2022, shall apply retroactively to the entire sentence of any person who is committed to the custody of the Department and is participating in the earned sentence credit program on July 1, 2022. The bill requires the ...</p>	House • Jan 28, 2022: Stricken from docket by Courts of Justice (18-Y 0-N)	Criminal
HB 1119	Ronnie R. Campbell	<p>Va. Retirement System; loss of benefits for certain felony convictions.</p> <p>Pensions; loss of benefits for certain felony convictions. Provides that a law-enforcement officer shall not lose his benefits in any retirement system administered by the Board of Trustees of the Virginia Retirement System upon being convicted of a felony, unless such felony was (i) the result of gross negligence or intentional misconduct by such officer or (ii) resulted in any pecuniary benefit for such officer. Statutes affected: House: Presented and ordered printed 22104243D: 51.1-124.13</p>	House • Feb 09, 2022: Stricken from docket by Appropriations (22-Y 0-N)	Criminal
HB 1181	Michael P. Mullin	<p>Right to counsel; target of investigation.</p> <p>Right to counsel; target of investigation. Provides that whenever a person is informed in writing by the attorney for the Commonwealth, the Attorney General, or counsel or special counsel for a multi-jurisdiction grand jury or special grand jury that he is the target of a criminal investigation for a criminal offense, the penalty for which may be confinement in the state correctional facility or jail, including charges for revocation of suspension of imposition or execution of sentence or probation, that target may present the written target letter to the clerk of the circuit court to set a hearing for the circuit court to inform him of his right to counsel and provide the target a reasonably opportunity to employ counsel, or if appropriate, execute a statement of indigence. The bill provides that the target letter, statement of indigence, other documents, and proceedings shall be sealed until such time as the target is charged with a criminal offense related to the target letter or until good cause is shown that they be unsealed. Statutes affected: House: Presented and ordered printed 22104017D: 19.2-157, 19.2-159</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 1182	Michael P. Mullin	<p>Fraud-related crimes; penalties.</p> <p>Fraud-related crimes; penalties. Creates felony offenses for crimes related to wire fraud, mail fraud, bank fraud, and health care fraud, each described in the bill, punishable by a term of imprisonment of not less than one nor more than 20 years.</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 1213	Jackie H. Glass	<p>Minor victims of sex trafficking; arrest and prosecution.</p> <p>Minor victims of sex trafficking; arrest and prosecution; services. Provides that no minor shall be subject to arrest, delinquency charges, or prosecution for (i) a status offense, (ii) an act that would be a misdemeanor if committed by an adult, or (iii) an act that would be a felony if committed by an adult other than a violent juvenile felony if the minor (a) is a victim of sex trafficking or severe forms of trafficking and (b) committed such offense as a direct result of being solicited, invited, recruited, encouraged, forced, intimidated, or deceived by another to engage in acts of prostitution or unlawful sexual intercourse for money or its equivalent, regardless of whether any other person has been charged or convicted of an offense related to the sex trafficking of such minor. The bill also clarifies that it is not a defense to a commercial sex trafficking charge where the adult committed such violation with a person under 18 years of age that such person under 18 years of age consented to any of the prohibited acts. The bill also provides that the local department of social services shall refer any child suspected or determined to be a victim of sex trafficking to an available victim assistance organization that provides comprehensive trauma-informed services designed to alleviate the adverse effects of trafficking and victimization and to aid in the child's healing, including assistance with case management, placement, access to educational and legal services, and m...</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 1235	Jason S. Ballard	<p>Geriatric prisoners; conditional release.</p> <p>Conditional release of geriatric prisoners. Expands the list of offenses that would prohibit a person from petitioning the Parole Board for conditional release as a geriatric prisoner if the offense was committed on or after July 1, 2022. Statutes affected: House: Presented and ordered printed 22104674D: 53.1-40.01</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal

Bill	Sponsors	Title	Last Action	Lists
HB 1236	Clinton L. Jenkins	<p>Summons for unlawful detainer; notice to tenant, adverse employment actions prohibited.</p> <p>Summons for unlawful detainer; notice; adverse employment actions prohibited. Requires any summons for unlawful detainer to include a notice to the tenant that it is unlawful for his employer to discharge him from employment or take any adverse personnel action against him for appearing at an initial or subsequent hearing on such summons, provided that he has given reasonable notice of such hearing to his employer.Statutes affected: House: Presented and ordered printed 22104518D: 8.01-126</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
HB 1242	Don L. Scott	<p>Probation violations; periods of probation and suspension, technical violations.</p> <p>Probation violations; periods of probation and suspension; technical violations. Provides that the court may fix the period of probation and the period of suspension for up to the statutory maximum period for which the defendant might originally have been sentenced to be imposed for any offense; however, the court may fix the period of probation or suspension for up to two years for an offense punishable as a Class 1 or Class 2 misdemeanor if the sentence does not include any active period of incarceration. Currently, the limitation on periods of probation and periods of suspension is up to the statutory maximum period of imprisonment for any offense. The bill also specifies that a probationer's failure to maintain contact with the probation officer without reasonable excuse or justification whereby his whereabouts are no longer known to the probation officer shall not be treated as a technical violation; accordingly, if the court finds the basis of a violation is a probationer's failure to maintain such contact without reasonable excuse or justification, then the court is not subject to the limitations on sentencing and may revoke the suspension and impose or resuspend any or all of the period previously suspended.Statutes affected: House: Presented and ordered printed 22104530D: 19.2-303, 19.2-303.1, 19.2-306.1</p>	House • Jan 28, 2022: Stricken from docket by Courts of Justice (18-Y 0-N)	Criminal
HB 1279	Timothy V. Anderson	<p>Emergency and preliminary protective orders; expungement of orders.</p> <p>Expungement of emergency and preliminary protective orders. Provides that a person against whom an emergency or preliminary protective order has been issued may petition to have police and court records relating to such order expunged if the order expires or is dissolved by the issuing court or if a hearing for the issuance of a permanent protective order is scheduled or held and such permanent protective order is subsequently not issued.Statutes affected: House: Presented and ordered printed 22104750D: 19.2-392.4</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 1281	Jackie H. Glass	<p>Custodial interrogations; inauthentic replica documents prohibited.</p> <p>Custodial interrogations; inauthentic replica documents prohibited. Prohibits law-enforcement officers from using inauthentic replica documents during a custodial interrogation to secure a person's cooperation or confession or to secure a conviction. "Inauthentic replica document" is defined by the bill as any document generated by law-enforcement officers or their agents that (i) contains a false statement, signature, seal, letterhead, or contact information or (ii) materially misrepresents any fact.</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 1292	Angelia Williams Graves	<p>Right to counsel; target of investigation, accused appearing without counsel.</p> <p>Right to counsel; target of investigation. Provides that whenever a person is informed in writing by the attorney for the Commonwealth, the Attorney General, or counsel or special counsel for a multi-jurisdiction grand jury or special grand jury that he is the target of a criminal investigation for a criminal offense, the penalty for which may be confinement in the state correctional facility or jail, including charges for revocation of suspension of imposition or execution of sentence or probation, that target may present the written target letter to the clerk of the circuit court to set a hearing for the circuit court to inform him of his right to counsel and provide the target a reasonably opportunity to employ counsel, or if appropriate, execute a statement of indigence. The bill provides that the target letter, statement of indigence, other documents, and proceedings shall be sealed until such time as the target is charged with a criminal offense related to the target letter or until good cause is shown that they be unsealed.Statutes affected: House: Presented and ordered printed 22104358D: 19.2-157, 19.2-159</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 1306	Marcus B. Simon	<p>Firearms; removing, altering, etc., serial number, selling, etc., or possessing.</p> <p>Removing, altering, etc., serial number on firearm; selling, giving, etc., or possessing firearm with removed, altered, etc., serial number; penalty. Makes it a Class 1 misdemeanor for any person, firm, association, or corporation to knowingly possess any pistol, shotgun, rifle, machine gun, or any other firearm that has a serial number that has been removed, altered, changed, destroyed, or obliterated in any manner. The bill also makes it a Class 1 misdemeanor for any person, firm, association, or corporation to sell, give, or distribute any pistol, shotgun, rifle, machine gun, or other firearm that has a serial number that has been removed, defaced, altered, changed, destroyed, or obliterated in any manner.Statutes affected: House: Presented and ordered printed 22104748D: 18.2-311.1</p>	House • Mar 07, 2022: Conferees appointed by House	Criminal

Bill	Sponsors	Title	Last Action	Lists
HB 1321	Les R. Adams	<p>Admission to bail; rebuttable presumptions.</p> <p>Admission to bail; rebuttable presumptions. Creates a rebuttable presumption against releasing a person on his own recognizance or an unsecured bond in certain circumstances detailed in the bill. The bill provides that such presumption may be rebutted if the judicial officer finds, by clear and convincing evidence, that such person is not a flight risk and his liberty will not constitute an unreasonable danger to himself, family or household members, or the public. The bill also provides for an appeal, upon notice by the Commonwealth, of a district court's decision to release a person on his own recognizance or an unsecured bond over the presumption.</p>	House • Feb 15, 2022: Left in Courts of Justice	Criminal
HB 1334	Kathleen Murphy	<p>Child abuse and neglect; amends definition, valid complaint.</p> <p>Child abuse and neglect; valid complaint. Amends the definition of "abused or neglected child" to include a child who is sexually exploited or abused by an intimate partner of the child's parent or caretaker and allows a complaint of child abuse or neglect to be deemed valid by a local department of social services (local department) in such instances. The bill allows a complaint of child abuse or neglect that alleges child trafficking to be deemed valid regardless of who the alleged abuser is or whether the alleged abuser has been identified. The bill requires a local department that receives a complaint or report of child abuse or neglect over which it does not have jurisdiction to forward such complaint or report to the appropriate local department, if the local department that does have jurisdiction is located in the Commonwealth. Statutes affected: House: Presented and ordered printed 22104535D: 16.1-228, 63.2-100, 63.2-1508</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
HB 1339	James A. "Jay" Leftwich	<p>Facial recognition technology; redefines, local law enforcement and campus police to utilize.</p> <p>Facial recognition technology; local law enforcement; campus police. Redefines facial recognition technology, for the purposes of providing criteria for the lawful use of facial recognition technology by law enforcement, as conducting an algorithmic comparison of images of an individual's facial features for the purposes of verification or identification. The bill authorizes local law enforcement and campus police departments to utilize facial recognition technology for criminal investigative and administrative investigative purposes, provided that the technology meets specified criteria. Local law enforcement and campus police departments also are required by the bill to maintain records regarding the use of facial recognition technology and report the data annually to their communities. Additionally, the bill requires the Department of State Police to develop a model policy regarding the use of facial recognition technology. Under current law, a local law-enforcement agency or campus police department cannot purchase or deploy facial recognition technology unless it is expressly authorized by statute. Statutes affected: House: Presented and ordered printed 22102155D: 15.2-1723.2, 23.1-815.1</p>	Senate • Mar 10, 2022: Conferees appointed by Senate	Criminal
HB 1356	Timothy V. Anderson	<p>Fentanyl; selling, giving, etc., to another person, penalties.</p> <p>Manufacturing, selling, giving, distributing or possessing with intent to manufacture, sell, give, or distribute a controlled substance; fentanyl; penalties.</p>	Senate • Feb 28, 2022: Passed by indefinitely in Judiciary (9-Y 6-N)	Criminal
HJ 60	William C. Wampler III	<p>Constitutional amendment; qualified immunity for government officials (first reference).</p> <p>Constitutional amendment (first reference); qualified immunity for government officials. Establishes the right of government officials to qualified immunity. The amendment provides that a government official may not be found liable for the deprivation of any person's rights, privileges, or immunities secured by the Constitution of Virginia and the laws of Virginia if such official establishes that (i) the right, privilege, or immunity alleged to be violated was not clearly established at the time of the person's deprivation by the official, or that at such time, the state of the law was not sufficiently clear that every reasonable official would have understood that the conduct alleged constituted a violation of the Constitution or the laws of Virginia or (ii) a court of competent jurisdiction had issued a final decision on the merits holding that the specific conduct alleged to be unlawful was consistent with the Constitution and the laws of Virginia.</p>	House • Feb 15, 2022: Left in Privileges and Elections	Criminal
SB 79	William M. Stanley, Jr.	<p>Class 1 felonies; mandatory minimum term of imprisonment for life.</p> <p>Class 1 felonies; mandatory minimum term of imprisonment for life. Provides that any person convicted of a Class 1 felony who was 18 years of age or older at the time of the offense and is not determined to be a person with intellectual disability shall be sentenced to a mandatory minimum term of imprisonment for life. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22101412D: 18.2-10, 18.2-31</p>	Senate • Jan 19, 2022: Passed by indefinitely in Judiciary (8-Y 7-N)	Criminal
SB 104	Joseph D. Morrissey	<p>Mandatory minimum sentences; elimination, modification of sentence to mandatory minimum term.</p> <p>Elimination of mandatory minimum sentences; modification of sentence to mandatory minimum term of confinement for felony offenses; report. Eliminates all mandatory minimum sentences of confinement from the Code of Virginia. The bill directs the Secretary of Public Safety and Homeland Security to establish a work group to evaluate the feasibility of resentencing persons previously convicted of a felony offense that was punishable by a mandatory minimum term of confinement and to report its findings by November 1, 2022.</p>	Senate • Feb 14, 2022: Defeated by Senate (17-Y 23-N)	Criminal

Bill	Sponsors	Title	Last Action	Lists
SB 105	Joseph D. Morrissey	Law-enforcement officers; evidence obtained during prohibited stop. Chapters 45 and 51 of the Acts of Assembly of 2020, Special Session I; retroactive and prospective effect. Provides that the provisions of Chapters 45 and 51 of the Acts of Assembly of 2020, Special Session I, shall be given retroactive and prospective effect.	House • Mar 08, 2022: Left in Courts of Justice	Criminal
SB 108	Joseph D. Morrissey	Correctional facilities; prohibits use of isolated confinement. Correctional facilities; use of isolated confinement. Prohibits the use of isolated confinement in state correctional facilities and juvenile correctional centers, subject to certain exceptions. Isolated confinement is defined in the bill as confinement of an incarcerated person or juvenile to a cell, alone or with another incarcerated person or juvenile, for 20 hours or more per day, other than for the purpose of providing medical or mental health treatment. The bill has a delayed effective date of July 1, 2023.	House • Mar 11, 2022: VOTE: Adoption (93-Y 0-N)	Criminal
SB 109	Joseph D. Morrissey	Offenders under 21 years of age; parole. Offenders under 21 years of age; 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 under 21 years of age 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 under 21 years of age and who has served at least 20 years of such sentences shall be eligible for parole. Under current law, such parole provisions apply only to juvenile offenders. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22101929D: 53.1-136, 53.1-165.1	Senate • Jan 20, 2022: Read third time and defeated by Senate (19-Y 21-N)	Criminal
SB 110	Joseph D. Morrissey	Juvenile offenders; parole eligibility. Juvenile offenders; parole eligibility. Provides that 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 the lesser of at least 20 years of such sentences or 30 percent of the term of imprisonment imposed for such sentences shall be eligible for parole. Under current law, such person must have served at least 20 years before becoming parole eligible. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22101930D: 53.1-165.1	Senate • Feb 10, 2022: Read third time and defeated by Senate (19-Y 21-N)	Criminal
SB 112	Joseph D. Morrissey	Parole statutes; application for juveniles and persons committed upon certain felony offenses. Application of parole statutes for juveniles and persons committed upon felony offenses committed on or after January 1, 1995. Repeals the abolition of parole. The bill requires the Virginia Parole Board to establish procedures for consideration of parole for persons who were previously ineligible for parole because parole was abolished and to allow for an extension of time for the scheduling of a parole interview for reasonable cause. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22103312D: 53.1-165.1	Senate • Jan 31, 2022: Continued to 2023 in Judiciary (15-Y 0-N)	Criminal
SB 123	Mark D. Obenshain	Criminal cases; sentencing by jury. Criminal cases; sentencing by jury. Provides that if a jury finds a person guilty of a criminal offense, such jury shall ascertain the punishment of the offense. Under current law, unless the accused has requested that the jury ascertain punishment, the court shall fix punishment after the accused has been found guilty by a jury. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22102968D: 19.2-288, 19.2-295, 19.2-295.1, 19.2-295.3	Senate • Jan 19, 2022: Passed by indefinitely in Judiciary (9-Y 6-N)	Criminal
SB 124	Mark D. Obenshain	Misuse of power of attorney; financial exploitation of incapacitated adults by an agent, penalty. Misuse of power of attorney; financial exploitation; incapacitated adults; penalty. Makes it a Class 1 misdemeanor for any person granted authority to act for a principal under a power of attorney to knowingly or intentionally engage in financial exploitation of an incapacitated adult. The bill also provides that the power of attorney terminates upon such conviction. This bill is a recommendation of the Virginia Criminal Justice Conference. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100334D: 64.2-1608, 64.2-1621	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
SB 126	Mark D. Obenshain	Abuse and neglect; financial exploitation, changes term incapacitated adults, penalties. Abuse and neglect; financial exploitation; incapacitated adults; penalties. Changes the term "incapacitated adult" to "vulnerable adult" for the purposes of the crime of abuse and neglect of such adults and defines "vulnerable adult" as any person 18 years of age or older who is impaired by reason of mental illness, intellectual or developmental disability, physical illness or disability, advanced age, or other causes to the extent the adult lacks sufficient understanding or capacity to make, communicate, or carry out reasonable decisions concerning his well-being or has one or more limitations that substantially impair the adult's ability to independently provide for his daily needs or safeguard his person, property, or legal interests. The bill adds the definition of "advanced age" as it is used in the definition of "vulnerable adult" to mean 65 years of age or older. The bill also changes the term "person with mental incapacity" to the same meaning of "vulnerable adult" for the purposes of the crime of financial exploitation. This bill is a recommendation of the Virginia Criminal Justice Conference.	Senate • Feb 07, 2022: Incorporated by Judiciary (SB687-Mason) (15-Y 0-N)	Criminal

Bill	Sponsors	Title	Last Action	Lists
SB 136	John S. Edwards	<p>Court-appointed counsel; increases statutory caps for fees paid in indigent cases.</p> <p>Compensation of court-appointed counsel. Increases the statutory caps for fees paid to court-appointed counsel in indigent cases.Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100119D: 19.2-163</p>	Senate • Feb 10, 2022: Incorporated by Finance and Appropriations (SB475-McClellan) (16-Y 0-N)	Criminal
SB 137	John S. Edwards	<p>Discretionary sentencing guidelines; written explanation, appeal.</p> <p>Sentencing guidelines; written explanation; appeal. Requires that the written explanation the court files with the record of a case when departing from the sentencing guidelines adequately explains the sentence imposed to promote fair sentencing. The bill also provides that the failure to follow any of the required sentencing provisions, including the failure to provide a written explanation that adequately explains the sentence imposed, may be reviewable on appeal or the basis of any other post-conviction relief. Under current law, the failure to follow any or all of the provisions of the sentencing guidelines or the failure to follow any or all of such provisions in the prescribed manner is not reviewable on appeal and cannot be the basis of any other post-conviction relief. The provisions of the bill apply only to those sentencing hearings conducted and such sentences imposed on or after July 1, 2022.Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100360D: 19.2-298.01</p>	House • Mar 08, 2022: Left in Courts of Justice	Criminal
SB 138	John S. Edwards	<p>Discovery in criminal cases; copies of discovery for the accused.</p> <p>Discovery in criminal cases; copies of discovery for the accused. Provides that for any discovery materials or evidence that the accused is permitted to inspect and review, the accused may request the Commonwealth to copy or photograph such discovery materials or evidence, and the Commonwealth shall provide such copies or photographs to the accused or his counsel.Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100389D: 19.2-265.4</p>	House • Mar 08, 2022: Left in Courts of Justice	Criminal
SB 149	Thomas K. Norment, Jr.	<p>Juvenile law-enforcement records; inspection of records.</p> <p>Juvenile law-enforcement records; inspection. Provides that a juvenile, the parent, guardian, or other custodian of the juvenile, and counsel for the juvenile may inspect a law-enforcement record concerning such juvenile if (i) no other law requires or allows withholding of the record; (ii) the parent, guardian, or other custodian requesting the record is not a suspect, offender, or person of interest in the record; and (iii) any identifying information of any other involved juveniles is redacted.Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22103601D: 16.1-301</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
SB 150	John S. Edwards	<p>DNA data bank sample tracking system; replaces certain references in Code.</p> <p>Department of Forensic Science; DNA data bank sample tracking system. Replaces certain references in the Code to the Local Inmate Data System with references to the Department of Forensic Science DNA data bank sample tracking system.</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
SB 155	Emmett W. Hanger, Jr.	<p>Killing the fetus of another; guilty of manslaughter, penalties.</p> <p>Killing the fetus of another; manslaughter; penalties. Provides that any person who kills the fetus of another by an intentional act committed while in the sudden heat of passion upon reasonable provocation is guilty of voluntary manslaughter, which is punishable as a Class 5 felony. The bill also provides that any person who kills the fetus of another accidentally, contrary to the intention of the parties and while engaged in conduct so gross, wanton, and culpable as to show a reckless disregard for human life, is guilty of involuntary manslaughter, which is also punishable as a Class 5 felony.Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22102069D: 18.2-32.2</p>	Senate • Jan 26, 2022: Incorporated by Judiciary (SB122-Obenshain) (15-Y 0-N)	Criminal
SB 191	T. Montgomery "Monty" Mason	<p>Criminal cases; increases compensation for experts.</p> <p>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 for aggravated murder cases.Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100566D: 19.2-175</p>	House • Mar 08, 2022: Signed by Speaker	Criminal
SB 198	T. Montgomery "Monty" Mason	<p>Disposition when defendant found incompetent; involuntary admission of the defendant.</p> <p>Disposition when defendant found incompetent; involuntary admission of the defendant. Provides that when a defendant is found incompetent, the court may, after a preadmission screening report has been completed and the court has made a finding by clear and convincing evidence that a crime has occurred, without objection by counsel for the defendant as to the defendant's competency to stand trial and upon motion of the attorney for the Commonwealth or its own motion, permit the community services board or behavioral health authority to petition for involuntary admission of the defendant and enter an order of nolle prosequi or dismissal for the criminal charge. Under current law, the court is required to order that the defendant receive treatment to restore his competency. The bill also clarifies the process following the completion of the competency evaluation of a defendant.Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22103547D: 19.2-169.1, 19.2-169.2, 37.2-809</p>	Senate • Mar 12, 2022: Conference report agreed to by Senate (40-Y 0-N)	Criminal

Bill	Sponsors	Title	Last Action	Lists
SB 227	Mark D. Obenshain	<p>Misdemeanor sexual offenses where the victim is a minor; statute of limitations, penalty.</p> <p>Misdemeanor sexual offenses where the victim is a minor; statute of limitations; penalty. Provides that the prosecution of the misdemeanor offense of causing or encouraging acts rendering children delinquent where the alleged adult offender has consensual sexual intercourse with a minor who is 15 years of age or older at the time of the offense shall be commenced no later than five years after the victim reaches majority provided that the alleged adult offender was more than three years older than the victim at the time of the offense. Under current law, the prosecution of such offense shall be commenced within one year after commission of the offense.</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
SB 246	Scott A. Surovell	<p>Law-enforcement officer; purpose of traffic stop.</p> <p>Law-enforcement officer; purpose of traffic stop. Provides that the operator of a motor vehicle, trailer, or semitrailer that has stopped on the signal of any law-enforcement officer shall exhibit his registration card, learner's permit, or temporary driver's permit for the purpose of establishing his identity upon being advised of the purpose of the stop within a reasonable time by the law-enforcement officer. Current law requires that such materials be exhibited upon the law-enforcement officer's request.</p>	House • Mar 08, 2022: Left in Courts of Justice	Criminal
SB 252	John S. Edwards	<p>Mandatory minimum sentences; elimination, modification of sentence to mandatory minimum term.</p> <p>Elimination of mandatory minimum sentences; modification of sentence to mandatory minimum term of confinement for felony offenses; report. Except for aggravated murder of a law-enforcement officer, eliminates all mandatory minimum sentences of confinement from the Code of Virginia. The bill directs the Secretary of Public Safety and Homeland Security to establish a work group to evaluate the feasibility of resentencing persons previously convicted of a felony offense that was punishable by a mandatory minimum term of confinement and to report its findings by November 1, 2022.</p>	Senate • Jan 17, 2022: Incorporated by Judiciary (SB104-Morrissey) (15-Y 0-N)	Criminal
SB 279	Bill DeSteph	<p>Vicious dogs; law-enforcement officer, etc., to apply to a magistrate for a summons, etc.</p> <p>Vicious dogs. Authorizes a law-enforcement officer or animal control officer to apply to a magistrate for a summons for a vicious dog if such officer is located in either the jurisdiction where the vicious dog resides or in the jurisdiction where the vicious dog committed one of the acts set forth in the definition. The bill also requires any evidentiary hearing or appeal to be held not less than 30 days from the date of the summons or appeal, unless good cause is found by the court.</p>	Senate • Mar 10, 2022: Enrolled	Criminal
SB 282	Adam P. Ebbin	<p>Public defender; supplementing compensation.</p> <p>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 his deputies or his 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. The bill provides that such supplemental compensation is proportional if the public defender, his deputies, and his other employees are each paid in amounts commensurate to the closest equivalent position in the local Office of the Commonwealth's Attorney, as adjusted for seniority and experience level. The bill has a delayed effective date of July 1, 2024.</p>	Senate • Feb 10, 2022: Incorporated by Finance and Appropriations (SB475-McClellan) (16-Y 0-N)	Criminal
SB 291	R. Creigh Deeds	<p>Service of process; investigator employed by an attorney for the Commonwealth, etc.</p> <p>Service of process; investigator employed by an attorney for the Commonwealth or Indigent Defense Commission. Provides that all investigators employed by an attorney for the Commonwealth or by the Indigent Defense Commission while engaged in the performance of their official duties shall not be considered a party or otherwise interested in the subject matter in controversy and, thus, are authorized to serve process. The bill eliminates the requirement that the sheriff in the jurisdiction where process is to be served agrees that such investigators may serve process.</p>	Senate • Mar 10, 2022: Signed by President	Criminal
SB 404	Richard H. Stuart	<p>Search warrants; copy of search warrant and affidavit given to occupants.</p> <p>Search warrants; copy of search warrant and affidavit given to occupants. Clarifies that if the owner of the place to be searched is not present, a copy of the search warrant and affidavit shall be given to at least one occupant of the place to be searched. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100035D: 19.2-56</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal

Bill	Sponsors	Title	Last Action	Lists
SB 412	Joseph D. Morrissey	<p>Parental rights; termination, murder of a child.</p> <p>Termination of parental rights; murder of child. Requires the court to terminate the parental rights of a parent upon finding, based upon clear and convincing evidence, that termination of parental rights is in the best interests of the child and that the parent has been convicted of an offense under the laws of the Commonwealth or a substantially similar law of any other state, the United States, or any foreign jurisdiction that constitutes murder or voluntary manslaughter, or a felony attempt, conspiracy, or solicitation to commit any such offense, and the victim of the offense was the child of the parent over whom parental rights would be terminated. The bill also requires local boards of social services to file a petition to terminate parental rights in such instances. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22103115D: 16.1-283, 63.2-910.2</p>	Senate • Feb 09, 2022: Continued to 2023 in Judiciary (13-Y 0-N)	Criminal
SB 423	John S. Edwards	<p>Discretionary sentencing guidelines; midpoint for violent felony offenses.</p> <p>Discretionary sentencing guidelines; midpoint for violent felony offenses. Clarifies the Virginia Criminal Sentencing Commission's authority to recommend revisions to the discretionary sentencing guidelines based on historical sentencing data.</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
SB 424	John S. Edwards	<p>Probation violation guidelines; use of sentencing revocation report and discretionary sentencing.</p> <p>Probation violation guidelines; use of sentencing revocation report and discretionary sentencing guidelines in revocation proceedings. Authorizes the Virginia Sentencing Commission to develop, maintain, and modify a system of statewide discretionary sentencing guidelines for use in hearings conducted in circuit courts in which the defendant is cited for violation of a condition or conditions of supervised probation imposed as a result of a felony conviction. The bill provides that a court would be presented with such guidelines when a defendant is cited for violating a condition or conditions of supervised probation imposed as a result of a felony conviction and such person is under the supervision of a state probation and parole officer. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100695D: 17.1-803, 19.2-306</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
SB 425	John S. Edwards	<p>Barrier crimes; eliminates certain crimes from the definition, etc.</p> <p>Barrier crimes. Eliminates certain crimes from the definition of "barrier crime" and requires the State Board of Behavioral Health and Developmental Services, the Board of Education, the State Board of Health, and the State Board of Social Services to each adopt regulations that develop and implement a waiver process for individuals who have been convicted of a barrier crime and who serve in a position or seek to serve in a position with any qualified entity subject to the regulations of the board. The bill eliminates current exceptions and time limit mandates, as such information is required to be set out in each agency's waiver process. The bill sets out information to be included in the regulations of the individual boards. The bill also directs the Departments of Behavioral Health and Developmental Services, Education, Health, and Social Services to each publish information about the agency's waiver process in an easily accessible format on a website maintained by the department. The bill includes additional requirements for each waiver process, such as if an individual's application for a waiver is denied, the department must state the basis for denial in writing and provide such explanation to the individual. The bill provides that although a waiver granted to an individual by one department shall not be transferrable to a position under another department, proof of receipt of a waiver from one department shall be considered positively by another department when reviewi...</p>	House • Mar 08, 2022: Left in Health, Welfare and Institutions	Criminal
SB 563	Ryan T. McDougale	<p>Attorney General; instituting or conducting criminal prosecutions for acts of violence.</p> <p>Attorney General; instituting or conducting criminal prosecutions for acts of violence. Authorizes the Attorney General to institute or conduct criminal prosecutions in cases involving a violation of the criminal laws involving an act of violence when such prosecution is requested by the sheriff or chief of police investigating the violation. The bill also provides that, prior to instituting or conducting a criminal prosecution for such cases involving a violation of the criminal laws involving an act of violence, the Attorney General shall give notice to the local attorney for the Commonwealth where such violation occurred of his intent to institute or conduct such criminal prosecution. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22103980D: 2.2-511</p>	Senate • Jan 26, 2022: Passed by indefinitely in Judiciary (8-Y 7-N)	Criminal

Bill	Sponsors	Title	Last Action	Lists
SB 564	L. Louise Lucas	<p>Criminal records; sealing of offenses resulting in a deferred & dismissed disposition or conviction.</p> <p>Sealing of offenses resulting in a deferred and dismissed disposition or conviction. Provides that a person shall not pay any fees or costs for filing a sealing criminal records petition. Under current law, a person is required to file an indigence petition for any fees or costs to be waived. The bill also eliminates the lifetime cap on the number of sealing petitions that may be filed. The bill reduces from seven years to three years for a misdemeanor offense and from 10 years to seven years for a felony offense the minimum period of time between the offense to be sealed and the filing of the sealing petition during which the petitioner must not have been convicted of violating any law of the Commonwealth. The bill also adds convictions for (i) failure to pay child support, (ii) driving without a license, (iii) driving with a suspended or revoked license, and (iv) a misdemeanor violation of reckless driving to the list of offenses eligible for an automatic sealing. The bill also specifies that the sealing of records related to a conviction includes sealing any criminal history record information and court records related to any violation of the terms and conditions of a suspended sentence or probation for such conviction. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22104109D: 19.2-392.6, 19.2-392.12</p>	House • Mar 08, 2022: Left in Courts of Justice	Criminal
SB 573	Ryan T. McDougle	<p>Defendants; evidence of mental condition, specific intent crimes.</p> <p>Evidence of defendant's mental condition; specific intent crimes. Clarifies that a defendant may offer evidence concerning the defendant's mental condition at the time of the alleged offense in certain circumstances for specific intent offenses only. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100197D: 19.2-271.6</p>	Senate • Jan 26, 2022: Passed by indefinitely in Judiciary (9-Y 6-N)	Criminal
SB 614	William M. Stanley, Jr.	<p>Bail for a person accused of a crime that is an act of violence; notice to attorney.</p> <p>Bail for a person accused of a crime that is an act of violence; notice to attorney for the Commonwealth. Requires a magistrate to transmit the checklist for bail determination form to the attorney for the Commonwealth when a magistrate conducts a bail hearing for a person arrested on a warrant or capias for an act of violence. Statutes affected: Senate: Presented and ordered printed 22102935D: 19.2-121</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal
SB 639	Joseph D. Morrissey	<p>Overdoses; arrest and prosecution when experiencing or reporting.</p> <p>Arrest and prosecution when experiencing or reporting overdoses. Clarifies that the immunity afforded to the seeking of emergency help for an overdose also applies to a show cause, a probation revocation, or a parole violation.</p>	House • Mar 08, 2022: Left in Courts of Justice	Criminal
SB 642	Joseph D. Morrissey	<p>Analysis of breath to determine alcoholic content of blood; failure to advise person of rights.</p> <p>Preliminary analysis of breath to determine alcoholic content of blood; failure to advise person of rights. Provides that if a police officer or a member of any sheriff's department fails to advise a person of his rights to refuse a preliminary breath test, any preliminary breath test sample shall not be admissible for the purpose of determining probable cause or used in evidence at any hearing or trial.</p>	House • Mar 08, 2022: Left in Courts of Justice	Criminal
SB 645	John A. Cosgrove, Jr.	<p>Criminal proceedings; evidence of defendant's mental condition.</p> <p>Criminal proceedings; evidence of defendant's mental condition. Repeals provisions permitting the admission of evidence by the defendant concerning a defendant's mental condition at the time of an alleged offense, including expert testimony, if such evidence is relevant, is not evidence concerning an ultimate issue of fact, and (i) tends to show the defendant did or did not have the intent required for the offense charged and (ii) is otherwise admissible pursuant to the general rules of evidence. The bill also removes provisions permitting a court to issue an emergency custody order in cases where such evidence was admitted and repeals provisions requiring the Office of the Executive Secretary of the Supreme Court to collect data regarding the cases that use such evidence.</p>	Senate • Jan 26, 2022: Passed by indefinitely in Judiciary (10-Y 5-N)	Criminal
SB 658	Jennifer L. McClellan	<p>Physical evidence recovery kits; victim's right to notification, storage.</p> <p>Physical evidence recovery kits; victim's right to notification; storage. Provides that for a physical evidence recovery kit that (i) was collected by the Office of the Chief Medical Examiner as part of a routine death investigation, and the medical examiner and the law-enforcement agency agree that analysis is not warranted, (ii) was determined by the law-enforcement agency not to be connected to a criminal offense, or (iii) is connected to an offense that occurred outside of the Commonwealth or another law-enforcement agency has taken over responsibility of the investigation and such kit is not transferred to another law-enforcement agency, the law-enforcement agency that received the physical evidence recovery kit shall store such kit for a period of 10 years or until 10 years after the victim reaches the age of majority if the victim was a minor at the time of collection, whichever is longer. The bill provides that after the mandatory retention period, the law-enforcement agency may destroy the physical evidence recovery kit, or in its discretion, may elect to retain the physical evidence recovery kit for a longer period of time. The bill also requires the law-enforcement agency to inform the victim, parent, guardian, or next of kin of the unique identification number assigned to the physical evidence recovery kit utilized by the health care provider and provide information regarding the Physical Evidence Recovery Kit Tracking System, unless disclosing this information wo...</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Criminal

Bill	Sponsors	Title	Last Action	Lists
SB 664	J. Chapman Petersen	Sex trafficking; minors engaged in prostitution, etc. Minor victims of sex trafficking; services. Provides that a minor engaged in prostitution or keeping, residing in, or frequenting a bawdy place shall not be proceeded upon as delinquent and shall be referred to the local department of social services for an assessment and services. Statutes affected: Senate: Presented and ordered printed 22104186D: 18.2-346, 18.2-347	House • Mar 08, 2022: Left in Courts of Justice	Criminal
SB 669	Scott A. Surovell	Law-enforcement employees; alleged wrongdoing. Alleged wrongdoing of law-enforcement employees. Requires that all law-enforcement agencies that employ at least two law-enforcement officers, reduced from at least 10 under current law, ensure that, in the case of all written citizen complaints or complaints submitted in an electronic format, the agency (i) allows for the submission of citizen complaints through the agency's website or other electronic format; (ii) provides a receipt or written acknowledgment confirming the submission of the complaint to the individual filing such complaint; (iii) provides a written response to any individual who has filed a complaint within 30 days of the filing of such complaint indicating the status of such complaint; (iv) provides a written response to any individual who has filed a complaint within 60 days of the filing of such complaint indicating the final disposition of such complaint and if any action, including disciplinary action, was taken as a result of such complaint or, if after 60 days a resolution of the complaint has not occurred, the law-enforcement agency provides a written response indicating the reason for the delay in reaching a final disposition and an anticipated date of completion; (v) for any complaint that is not resolved within 60 days, provides a written response to any individual who has filed a complaint upon the resolution of such complaint indicating the final disposition of such complaint and if any action, including disciplinary action, was taken as a resu...	House • Mar 08, 2022: Left in Courts of Justice	Criminal
SB 674	Emmett W. Hanger, Jr.	Pretrial Intervention and Diversion Program; created. Pretrial Intervention and Diversion Program. Authorizes the attorney for the Commonwealth for each judicial circuit of the Commonwealth to create and administer a Pretrial Intervention and Diversion Program for the purpose of providing an alternative to prosecuting offenders in the criminal justice system. The bill provides that entry into such program shall be at the discretion of the attorney for the Commonwealth based upon written guidelines and that no attorney for the Commonwealth shall accept any offender into such program for an offense for which punishment includes a mandatory minimum sentence of imprisonment.	House • Mar 08, 2022: Left in Courts of Justice	Criminal
SB 680	Mark D. Obenshain	Geriatric prisoners; conditional release. Conditional release of geriatric prisoners. Expands the list of offenses that would prohibit a person from petitioning the Parole Board for conditional release as a geriatric prisoner if the offense was committed on or after July 1, 2022. Statutes affected: Senate: Presented and ordered printed 22104476D: 53.1-40.01	Senate • Feb 04, 2022: Passed by indefinitely in Rehabilitation and Social Services (8-Y 7-N)	Criminal
SB 687	T. Montgomery "Monty" Mason	Abuse and neglect; financial exploitation, changes term incapacitated adults, definitions, penalties Abuse and neglect; financial exploitation; incapacitated adults; penalties. Changes the term "incapacitated adult" to "vulnerable adult" for the purposes of the crime of abuse and neglect of such adults and defines "vulnerable adult" as any person 18 years of age or older who is impaired by reason of mental illness, intellectual or developmental disability, physical illness or disability, advanced age, or other causes to the extent the adult lacks sufficient understanding or capacity to make, communicate, or carry out reasonable decisions concerning his well-being or has one or more limitations that substantially impair the adult's ability to independently provide for his daily needs or safeguard his person, property, or legal interests. The bill adds the definition of "advanced age" as it is used in the definition of "vulnerable adult" to mean 65 years of age or older. The bill also changes the term "person with mental incapacity" to the same meaning of "vulnerable adult" for the purposes of the crime of financial exploitation. This bill is a recommendation of the Virginia Criminal Justice Conference.	House • Mar 11, 2022: VOTE: Adoption (97-Y 0-N)	Criminal
SB 728	Frank M. Ruff, Jr.	Children's residential facilities; criminal history background checks. Criminal history background checks; children's residential facilities. Provides that a person may be hired for and may begin compensated employment at a children's residential facility prior to receipt of the results of the criminal history background check and check of the central registry of records but prohibits that person from being alone with, in control of, or supervising one or more children until such time as the criminal history background check and the check of the central registry of records have been completed. Currently, no person who is required to undergo a background check as a condition of employment at a children's residential facility may work at the children's residential facility until the background check is complete. Statutes affected: Senate: Presented and ordered printed 22103543D: 37.2-408.1, 63.2-1726	Senate • Jan 28, 2022: Incorporated by Rehabilitation and Social Services (SB577-Mason) (14-Y 0-N)	Criminal

Bill	Sponsors	Title	Last Action	Lists
SB 742	Scott A. Surovell	<p>Marijuana; expungement of offenses, civil penalty.</p> <p>Expungement of offenses civil penalty. Provides for the automatic sealing of misdemeanor marijuana offenses and the petition-based sealing for certain felony marijuana offenses. The bill requires a business screening service, defined in the bill, to destroy all expunged records, as defined in the bill, and to follow reasonable procedures to ensure that it does not maintain or sell expunged records. The bill also provides that any petition for expungement shall be kept under seal and that an indigent person may file a petition for expungement without the payment of fees and costs and can request court-appointed counsel, who shall be paid from the Sealing Fee Fund. The bill has staggered delayed effective dates in order to develop systems for implementing the sealing provisions of the bill. Statutes affected: Senate: Presented and ordered printed 22104596D: 9.1-128, 17.1-205.1, 19.2-392.2, 19.2-392.6, 19.2-392.12, 19.2-392.16</p>	House • Mar 08, 2022: Left in Courts of Justice	Criminal
SB 746	Scott A. Surovell	<p>Minors; prohibition of deceptive tactics during custodial interrogation.</p> <p>Prohibition of deceptive tactics during the custodial interrogation of a minor. Provides that any confession of a minor, made as a result of a custodial interrogation conducted at a place of detention on or after July 1, 2022, shall be presumed to be inadmissible as evidence against such minor making such confession in any adjudication of delinquency or criminal proceeding for an act that if committed by an adult would be a criminal offense if, during the custodial interrogation, a law-enforcement officer knowingly engages in deception, as defined in the bill. The bill provides that the presumption of inadmissibility for such confession of a minor may be overcome if the confession was voluntarily given.</p>	House • Mar 08, 2022: Left in Courts of Justice	Criminal
SR 1	John S. Edwards	<p>Public defender offices; feasibility, expense, and implementation of statewide coverage, report.</p> <p>Feasibility, expense, and implementation of statewide coverage of public defender offices; study. Directs the Virginia Indigent Defense Commission (the Commission) to establish a work group to study the feasibility, cost, and implementation of statewide coverage of public defender offices. The bill directs the Commission to report its findings and recommendations to the chairmen of the Virginia State Crime Commission, the House Committee for Courts of Justice, the Senate Committee on the Judiciary, the House Committee on Appropriations, and the Senate Committee on Finance and Appropriations by November 1, 2022.</p>	Senate • Feb 07, 2022: Continued to 2023 in Judiciary (15-Y 0-N)	Criminal

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2022 General Assembly Bills of Interest

Employment/ Labor

Bill	Sponsors	Title	Last Action	Lists
HB 61	John J. McGuire, III	<p>Overtime pay requirements; volunteers.</p> <p>Overtime pay requirements; volunteers. Permits individuals who work as both employees and on a volunteer basis for a public body, church, or nonprofit organization to earn overtime wages for hours worked as an employee only and continues to exclude hours worked on a volunteer basis from overtime wage requirements.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102029D: 40.1-29.2</p>	House • Feb 15, 2022: Left in Commerce and Energy	Employment/Labor
HB 171	Daniel W. Marshall, III	<p>Minimum wage; removes certain provisions relating to increasing state wage.</p> <p>Minimum wage. Repeals certain provisions of the Code of Virginia related to increasing the state minimum wage to more than \$11.00 per hour. The bill also repeals provisions related to increasing the state minimum wage based on an annual adjusted minimum wage determined by the Department of Labor and Industry.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100720D: 40.1-28.10</p>	House • Feb 15, 2022: Left in Commerce and Energy	Employment/Labor
HB 296	Joseph P. McNamara	<p>Minimum wage; clarifies definition of wages.</p> <p>Minimum wage. Repeals certain provisions of the Code of Virginia related to increasing the state minimum wage to more than \$11.00 per hour. The bill also repeals provisions related to increasing the state minimum wage based on an annual adjusted minimum wage determined by the Department of Labor and Industry.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100725D: 40.1-28.10</p>	Senate • Feb 21, 2022: Passed by indefinitely in Commerce and Labor (11-Y 4-N)	Employment/Labor
HB 363	Nicholas J. Freitas	<p>School board employees, certain; grounds for dismissal, report.</p> <p>Certain school board employees; dismissal; grounds; continuing contract study; report. Prohibits school board employees who are not required to hold a valid license issued by the Board of Education and public school teachers from being dismissed based on a last-hired, first-fired dismissal policy or any other similar policy that mandates that, when considering more than one such employee for dismissal, the seniority of each such employee shall be the sole determinative factor in the dismissal decision. The bill also requires the Board of Education, the House Committee on Education, and the Senate Committee on Education and Health, in consultation with local school boards, to study and make recommendations to the General Assembly no later than November 1, 2022, regarding effective, alternative ways in which the performance of teachers may be evaluated for the purpose of awarding or rescinding continuing contract status.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102139D: 22.1-79, 22.1-307</p>	House • Jan 26, 2022: Continued to 2023 in Education by voice vote	Employment/Labor
HB 512	Marie E. March	<p>COVID-19 immunization; prohibition on requirement, discrimination prohibited.</p> <p>COVID-19 immunization; prohibition on requirement; discrimination prohibited. Prohibits the State Health Commissioner and the Board of Health, the Board of Behavioral Health and Developmental Services, the Department of Health Professions and any regulatory board therein, and the Department of Social Services from requiring any person to undergo vaccination for COVID-19 and prohibits discrimination based on a person's COVID-19 vaccination status (i) with regard to education, employment, insurance, or issuance of a driver's license or other state identification or (ii) in numerous other contexts.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101287D: 2.2-2901.1, 2.2-3004, 15.2-1500.1, 15.2-1507, 15.2-1604, 22.1-271.2, 22.1-271.4, 22.1-289.031, 22.1-295.2, 22.1-306, 23.1-800, 32.1-43, 32.1-47, 32.1-47.1, 32.1-48, 32.1-127, 38.2-3407.15, 38.2-3438, 38.2-3454, 44-146.17, 63.2-603, 65.2-402.1</p>	House • Feb 15, 2022: Left in Health, Welfare and Institutions	Employment/Labor
HB 790	Dave A. LaRock	<p>Collective bargaining; law enforcement, transparency and accountability.</p> <p>Collective bargaining; law enforcement; transparency and accountability. Prohibits a county, city, or town from entering into a collective bargaining contract with a labor union or other employee association representing law-enforcement officers or employees of a law-enforcement agency that (i) prevents the Attorney General from seeking equitable relief against a law-enforcement agency engaging in a pattern or practice of unconstitutional misconduct; (ii) includes any stipulation that delays officer interviews or interrogations after alleged wrongdoing for a set length of time; (iii) provides officers with access to evidence before interviews or interrogations about alleged wrongdoing; (iv) mandates the destruction or purging of disciplinary records from personnel files after a set length of time, or limits the consideration of disciplinary records in future employment actions; (v) prohibits the interrogation, investigation, or punishment of officers on the basis of alleged wrongdoing if a set length of time has elapsed since its alleged occurrence, or since the initiation of the investigation; (vi) prohibits supervisors from interrogating, investigating, or disciplining officers on the basis of anonymous civilian complaints; or (vii) requires arbitration of disputes related to disciplinary penalties or termination.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102743D: 40.1-57.2</p>	Senate • Feb 28, 2022: Passed by indefinitely in Commerce and Labor (12-Y 3-N)	Employment/Labor

Bill	Sponsors	Title	Last Action	Lists
HB 851	David A. Reid	<p>Paid sick leave; penalty, state tax deduction.</p> <p>Paid sick leave; penalty; state tax deduction. Requires employers, as defined in the bill, to provide 40 hours of paid sick leave, prorated to reflect the average number of hours worked per week by each employee, as defined in the bill, in the previous 12 months, for all existing eligible employees and eligible employees that have been employed for at least 12 months. For eligible employees who have been employed for less than 12 months, employers must provide 20 to 40 hours of paid sick leave, prorated to reflect the expected number of hours worked per week by each employee, as determined by the employer. Employers with at least 25 but not more than 49 full-time employees receive a nonrefundable state tax deduction equivalent to 120 percent of the value of any paid sick leave provided by an employer to an employee.</p> <p>Employers with existing paid sick leave policies providing at least 40 hours per year of paid sick leave are exempt from the requirements of the bill. The bill allows employers to request a hardship waiver from the Department of Labor and Industry for certain circumstances and requires employers to provide a written notice of information related to paid sick leave to each employee at the commencement of employment or by January 1, 2023. The bill requires that sick leave be available for any eligible employee to use at the commencement of employment and provides that paid sick leave may be used (i) for an employee's mental or physical illness, injury, or health con...</p>	House • Feb 15, 2022: Left in Commerce and Energy	Employment/Labor
HB 883	Kathy J. Byron	<p>Project labor agreements; prevailing wage, collective bargaining for employees of local governments.</p> <p>Project labor agreements; prevailing wage; collective bargaining for employees of local governments. Repeals certain provisions of the Code that (i) require contractors and subcontractors under any public contract with a state agency or certain localities to pay the prevailing wage rate; (ii) authorize any public body, when engaged in procuring products or services or letting contracts for construction, manufacture, maintenance, or operation of public works, to require bidders to enter into or adhere to project labor agreements on the public works projects; and (iii) authorize a locality to recognize any labor union or other employee association as a bargaining agent of any public officers or employees or to collectively bargain or enter into any collective bargaining contract with any such union or association or its agents. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101705D: 40.1-57.3., 40.1-57.2, 2.2-4321.3</p>	Senate • Feb 21, 2022: Passed by indefinitely in Commerce and Labor (12-Y 3-N)	Employment/Labor
HB 889	Terry G. Kilgore	<p>Nonpayment of wages; defense of contractor.</p> <p>Nonpayment of wages; defense of contractor. Provides that a contractor, regardless of tier, has a valid defense to a claim for nonpayment of wages if he obtains a written certification from the subcontractor stating that (i) the subcontractor and each of his sub-subcontractors has paid all employees all wages due for the period during which the wages are claimed for the work performed on the project and (ii) to the subcontractor's knowledge, all sub-subcontractors below the subcontractor, regardless of tier, have similarly paid their employees all such wages. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102768D: 11-4.6</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Employment/Labor
HB 1015	Tara A. Durant	<p>Protective orders; workplace violence.</p> <p>Workplace violence protective orders. Provides that an employer may petition the court for a preliminary protective order or a protective order to protect the health and safety of its employees. The bill provides that the venue for a workplace violence protective order is the jurisdiction where the workplace is located from which the petitioner seeks to have the respondent prohibited. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103928D: 19.2-152.11</p>	House • Feb 11, 2022: Continued to 2023 in Courts of Justice by voice vote	Employment/Labor
HB 1017	Elizabeth R. Guzman	<p>Overtime; definition, compensable hours worked, compensatory time.</p> <p>Overtime; compensable hours worked; compensatory time. Defines compensable hours worked, for the purposes of the Virginia Overtime Wage Act, as the amount of time an employee is on duty or at a prescribed place of work and any time an employee is suffered or permitted to work. The bill states that such time shall include work performed at home, travel time, waiting time, and training and probationary periods. Under the bill, an employee may elect, during any probationary period of employment, to receive compensatory time in lieu of overtime pay. As used in the bill, compensatory time is the time an employee works behind his regular schedule that is authorized by the employee's employer to be used as paid time off. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103151D: 40.1-29.2</p>	House • Feb 08, 2022: Stricken from docket by Commerce and Energy (21-Y 0-N)	Employment/Labor
HB 1040	Phillip A. Scott	<p>Minimum wage; small employers.</p> <p>Minimum wage; small employers. Exempts employers that are individuals or entities with 10 or fewer employees from the state minimum wage requirements. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101296D: 40.1-28.9</p>	Senate • Feb 21, 2022: Passed by indefinitely in Commerce and Labor (12-Y 3-N)	Employment/Labor

Bill	Sponsors	Title	Last Action	Lists
HB 1110	Michelle Lopes Maldonado	School boards, local; grievance procedure for certain employees, timing of resolution of disputes. Local school boards; grievance procedure for certain employees; timing of resolution of certain disputes. Requires each local school board's grievance procedure for school board employees, except the division superintendent, principals, assistant principals, teachers, supervisors, and other employees required to be licensed by the Board of Education, to afford a timely and fair method of the resolution of disputes arising between the school board and such employees before dismissal or other disciplinary actions, excluding suspensions. Current law requires such grievance procedures to afford a timely and fair method of the resolution of disputes arising between the school board and such employees regarding, but not before, dismissal or other disciplinary actions, excluding suspensions. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101450D: 22.1-79	House • Feb 15, 2022: Left in Education	Employment/ Labor
HB 1133	Wendell S. Walker	Nondiscrimination in places of public accommodation, definitions. Nondiscrimination in places of public accommodation, definitions.	House • Feb 15, 2022: Left in General Laws	Employment/ Labor
HB 1143	Kathy J. Byron	Virginia Overtime Wage Act; clarifies term "employee." Virginia Overtime Wage Act. Provides that for the purposes of the Virginia Overtime Wage Act, the term "employee" does not include certain persons excluded from the definition of "employee" under the federal Fair Labor Standards Act (the federal act). The bill provides that an employer may assert an exemption to the overtime requirement of the Virginia Overtime Wage Act for employees who meet certain exemptions set forth in the federal act. The bill also provides that a public agency, as defined in the federal act, may provide an employee compensatory time off in lieu of overtime compensation, in accordance with the federal act. Statutes affected: House: Presented and ordered printed 22103542D: 40.1-29.2	House • Feb 15, 2022: Left in Commerce and Energy	Employment/ Labor
HB 1160	Candi Mundon King	Health care providers and grocery store workers, etc.; employers to provide paid sick leave. Paid sick leave; health care providers and grocery store workers. Requires employers to provide paid sick leave to health care providers, grocery store workers, and home health workers who provide agency-directed services. Under current law, employers are only required to provide paid sick leave to home health workers who provide consumer-directed services. The bill removes requirements that workers work on average at least 20 hours per week or 90 hours per month to be eligible for paid sick leave. Additionally the bill provides that certain health care providers may waive their right to accrue and use paid sick leave and provides an exemption for certain other health care providers. Statutes affected: House: Presented and ordered printed 22103340D: 40.1-33.3	House • Feb 15, 2022: Left in Commerce and Energy	Employment/ Labor
HB 1173	R. Lee Ware	Fair Labor Standards Act; employer liability, overtime required for certain employees, report. Fair Labor Standards Act; overtime; employer liability. Replaces the current provisions of the Virginia Overtime Wage Act with the provision that any employer that violates the overtime wage requirements of the federal Fair Labor Standards Act, and any related laws and regulations, shall be liable to its employee for remedies or other relief available under the Fair Labor Standards Act. Statutes affected: House: Presented and ordered printed 22103494D: 40.1-29, 40.1-29.1, 40.1-29.2	House • Mar 10, 2022: Enrolled	Employment/ Labor
HB 1201	Kathy J. Byron	Unemployment compensation; disqualification for benefits, etc. Unemployment compensation; disqualification for benefits; misconduct does not include refusing COVID-19 vaccine. Provides that for the purposes of the Virginia Employment Commission determining if an individual was separated or partially separated from employment for misconduct and would be disqualified for unemployment benefits, the term "misconduct" does not include an employee's refusal to receive or receive in part any primary series or booster shot of a vaccine for the prevention of COVID-19. Statutes affected: House: Presented and ordered printed 22103654D: 60.2-618	Senate • Feb 21, 2022: Passed by indefinitely in Commerce and Labor (12-Y 3-N)	Employment/ Labor
HB 1220	Nadarius E. Clark	Right to work; repeals provisions of Code that refers to denial or abridgement. Right to unionize. Repeals the provisions of the Code of Virginia that, among other things, prohibit any agreement or combination between an employer and a labor union or labor organization whereby (i) nonmembers of the union or organization are denied the right to work for the employer, (ii) membership in the union or organization is made a condition of employment or continuation of employment by such employer, or (iii) the union or organization acquires an employment monopoly in any such enterprise.	House • Feb 08, 2022: Stricken from docket by Rules (18-Y 0-N)	Employment/ Labor
SB 173	Mark J. Peake	Minimum wage; removes certain provisions relating to increasing state wage. Minimum wage. Repeals certain provisions of the Code of Virginia related to increasing the state minimum wage to more than \$11.00 per hour. The bill also repeals provisions related to increasing the state minimum wage based on an annual adjusted minimum wage determined by the Department of Labor and Industry. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22102620D: 40.1-28.10	Senate • Jan 17, 2022: Passed by indefinitely in Commerce and Labor (12-Y 3-N)	Employment/ Labor

Bill	Sponsors	Title	Last Action	Lists
SB 179	Mark J. Peake	<p>Virginia Human Rights Act; employee safety, definition changes.</p> <p>Virginia Human Rights Act; employee safety; definition changes. Amends the definitions of "domestic worker" to exclude babysitters, nannies, caretakers, home health aides, and personal care aids; "employer" to one who employs at least three persons; and "domestic service" to exclude services performed by companions. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22103133D: 2.2-3905, 40.1-2, 40.1-49.3, 40.1-49.8</p>	Senate • Jan 26, 2022: Passed by indefinitely in General Laws and Technology (8-Y 7-N)	Employment/ Labor
SB 264	Ghazala F. Hashmi	<p>Public employees; collective bargaining.</p> <p>Collective bargaining for public employees. Provides for collective bargaining by public employees. The bill creates the Public Employee Relations Board, which will determine appropriate bargaining units and provide for certification and decertification elections for exclusive bargaining representatives of state employees and local government employees. The measure requires public employers and employee organizations that are exclusive bargaining representatives to meet at reasonable times to negotiate in good faith with respect to wages, hours, and other terms and conditions of employment. The measure repeals a provision enacted in 2013 that declares that, in any procedure providing for the designation, selection, or authorization of a labor organization to represent employees, the right of an individual employee to vote by secret ballot is a fundamental right that shall be guaranteed from infringement.</p>	Senate • Jan 17, 2022: Stricken at request of Patron in Commerce and Labor (15-Y 0-N)	Employment/ Labor
SB 331	Bryce E. Reeves	<p>Overtime pay requirements; volunteers.</p> <p>Overtime pay requirements; volunteers. Permits individuals who work as both employees and on a volunteer basis for a public body, church, or nonprofit organization to earn overtime wages for hours worked as an employee only and continues to exclude hours worked on a volunteer basis from overtime wage requirements. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22102129D: 40.1-29.2</p>	Senate • Feb 07, 2022: Stricken at request of Patron in Commerce and Labor (15-Y 0-N)	Employment/ Labor
SB 365	Richard H. Stuart	<p>Virginia Overtime Wage Act; clarifies term "employee."</p> <p>Virginia Overtime Wage Act. Provides that for the purposes of the Virginia Overtime Wage Act, the term "employee" does not include certain persons excluded from the definition of "employee" under the federal Fair Labor Standards Act (the federal act). The bill provides that an employer may assert an exemption to the overtime requirement of the Virginia Overtime Wage Act for employees who meet certain exemptions set forth in the federal act. The bill also provides that a public agency, as defined in the federal act, may provide an employee compensatory time off in lieu of overtime compensation, in accordance with the federal act. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22102524D: 40.1-29.2</p>	Senate • Feb 07, 2022: Incorporated by Commerce and Labor (SB631-Barker) (15-Y 0-N)	Employment/ Labor
SB 374	Mark D. Obenshain	<p>Project labor agreements; prevailing wage, collective bargaining for employees of local governments.</p> <p>Project labor agreements; prevailing wage; collective bargaining for employees of local governments. Repeals certain provisions of the Code that (i) require contractors and subcontractors under any public contract with a state agency or certain localities to pay the prevailing wage rate; (ii) authorize any public body, when engaged in procuring products or services or letting contracts for construction, manufacture, maintenance, or operation of public works, to require bidders to enter into or adhere to project labor agreements on the public works projects; and (iii) authorize a locality to recognize any labor union or other employee association as a bargaining agent of any public officers or employees or to collectively bargain or enter into any collective bargaining contract with any such union or association or its agents. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22101706D: 40.1-57.3., 40.1-57.2, 2.2-4321.3</p>	Senate • Jan 31, 2022: Passed by indefinitely in Commerce and Labor (12-Y 3-N)	Employment/ Labor
SB 582	Amanda F. Chase	<p>Virginia Human Rights Act; nondiscrimination in places of public accommodation.</p> <p>Virginia Human Rights Act; nondiscrimination in places of public accommodation and certain private establishments; face coverings. Prohibits discrimination in places of public accommodations including public and private elementary and secondary schools and institutions of higher education and certain private establishments because the individual is or is not wearing a face covering for the purpose of preventing the transmission of COVID-19. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22103802D: 2.2-3904</p>	Senate • Jan 19, 2022: Passed by indefinitely in General Laws and Technology (8-Y 6-N)	Employment/ Labor
SB 631	George L. Barker	<p>Fair Labor Standards Act; employer liability, overtime required for certain employees, report.</p> <p>Fair Labor Standards Act; overtime; employer liability. Replaces the current provisions of the Virginia Overtime Wage Act with the provision that any employer that violates the overtime wage requirements of the federal Fair Labor Standards Act, and any related laws and regulations, shall be liable to its employee for remedies or other relief available under the Fair Labor Standards Act. Statutes affected: Senate: Presented and ordered printed 22103916D: 40.1-29, 40.1-29.1, 40.1-29.2</p>	House • Mar 08, 2022: Signed by Speaker	Employment/ Labor

Bill	Sponsors	Title	Last Action	Lists
SB 646	John A. Cosgrove, Jr.	<p>Unemployment compensation; disqualification for benefits, etc.</p> <p>Unemployment compensation; disqualification for benefits; misconduct does not include refusing COVID-19 vaccine. Provides that for the purposes of the Virginia Employment Commission determining if an individual was separated or partially separated from employment for misconduct and would be disqualified for unemployment benefits, the term "misconduct" does not include an employee's refusal to receive or receive in part any primary series or booster shot of a vaccine for the prevention of COVID-19.</p>	Senate • Feb 07, 2022: Passed by indefinitely in Commerce and Labor (11-Y 4-N)	Employment/ Labor
SB 655	Adam P. Ebbin	<p>Unemployment compensation; electronic submission of information.</p> <p>Unemployment compensation; required written notice upon separation. Requires each employer to provide each individual who is separated from such employer a written notice that includes the individual's name and social security number, the employer's legal name and unemployment tax account number, the reason for separation, and information on the individual's right to apply for unemployment compensation. The bill requires that such written notice be mailed to the individual's last known address or otherwise provided to the individual within three days of the separation. The bill requires the Virginia Employment Commission to establish and make available a sample form notice that an employer may use to comply with such notice requirement. The bill authorizes the Virginia Employment Commission to request, at any time, that an employer submit information related to a claim including separation information through electronic means unless the employer has been granted a waiver by the Commission.</p>	Senate • Mar 10, 2022: Enrolled	Employment/ Labor

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2022 General Assembly Bills of Interest

Family

Bill	Sponsors	Title	Last Action	Lists
HB 69	Glenn R. Davis	<p>Best interests of the child; assuring frequent and continuing contact with both parents.</p> <p>Best interests of the child; assuring frequent and continuing contact with both parents. Provides that, in determining the best interests of a child for purposes of custody and parenting time arrangements, upon request of either party, the court shall assure a minor child of frequent and continuing contact with both parents so as to maximize the amount of time the minor child spends with each parent.</p>	House • Feb 15, 2022: Left in Courts of Justice	Family Law
HB 136	Jeffrey L. Campbell	<p>Wrongful death; death of parent or guardian of a child resulting from driving under the influence.</p> <p>Wrongful death; death of the parent or guardian of a child resulting from driving under the influence; child support. Provides that any action for death by wrongful act where the defendant, as a result of driving a motor vehicle or operating a watercraft under the influence, unintentionally caused the death of another person who was the parent or legal guardian of a child, the person who has custody of such child may petition the court to order that the defendant pay child support.</p>	House • Feb 07, 2022: Stricken from docket by Courts of Justice (20-Y 0-N)	Family Law
HB 359	Vivian E. Watts	<p>Termination of parental rights of person who committed sexual assault; evidence standard.</p> <p>Termination of parental rights of person who committed sexual assault; clear and convincing evidence standard. Provides that the parental rights of a person who has been found by a clear and convincing evidence standard to have committed rape, carnal knowledge, or incest, which act resulted in the conception of a child, may be terminated without the need for the person to have been charged with or convicted of such offense. The bill further provides that the consent of a person found to have committed such an offense is not necessary for the validity of an adoption of such a child.</p>	House • Feb 11, 2022: Continued to 2023 in Courts of Justice by voice vote	Family Law
HB 365	Richard C. "Rip" Sullivan, Jr.	<p>Parenting Coordinator Act; created.</p> <p>Parenting Coordinator Act. Creates the Parenting Coordinator Act, which provides a framework for the use of a parenting coordinator in actions for divorce, separate maintenance, or annulment in which custody or visitation is in issue, petitions for custody or visitation, and written agreements between parties and parenting coordinators. The Act governs the qualifications, scope of authority, appointment and removal, confidentiality, communication, records maintenance, and fees of such parenting coordinators.</p>	House • Feb 15, 2022: Left in Courts of Justice	Family Law
HB 424	Charniele L. Herring	<p>Guardianship; duties of guardian, visitation requirements.</p> <p>Guardianship; duties of guardian; visitation requirements. Requires a guardian to visit an incapacitated person at least once every three months and make certain observations and assessments during each visit. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102637D: 64.2-2019</p>	House • Feb 07, 2022: Stricken from docket by Courts of Justice (20-Y 0-N)	Family Law
HB 572	Don L. Scott	<p>Child support obligations; party's incarceration not deemed voluntary unemployment/underemployment.</p> <p>Child support obligations; party's incarceration not deemed voluntary unemployment or underemployment. Provides that a party's incarceration for 180 or more consecutive days shall not be deemed voluntary unemployment or underemployment for the purposes of calculating child support and imputing income for such calculation. The bill further provides that a party's incarceration for 180 or more consecutive days shall be a material change of circumstances upon which a modification of a child support order may be based.</p>	House • Feb 15, 2022: Left in Courts of Justice	Family Law
HB 622	Sally L. Hudson	<p>Custodial interrogation of a child; advisement of rights.</p> <p>Custodial interrogation of a child; advisement of rights. Requires that prior to any custodial interrogation of a child by a law-enforcement officer, the child and, if no attorney is present and if no exception to the requirement that the child's parent, guardian, or legal custodian be notified applies, the child's parent, guardian, or legal custodian shall be advised that (i) the child has a right to remain silent; (ii) any statement the child makes can and may be used against the child; (iii) the child has a right to an attorney and that one will be appointed for the child if the child is not represented and wants representation; and (iv) the child has a right to have his parent, guardian, custodian, or attorney present during any questioning. The bill states that if a child indicates in any manner and at any stage of questioning during a custodial interrogation that he does not wish to be questioned further, the law-enforcement officer shall cease questioning. The bill also requires, before admitting into evidence any statement made by a child during a custodial interrogation, that the court find that the child knowingly, intelligently, and voluntarily waived his rights and states that no admission or confession made by a child younger than 16 years of age during a custodial interrogation may be admitted into evidence unless it was made in the presence of the child's parent, guardian, custodian, or attorney.</p>	House • Jan 28, 2022: Continued to 2023 in Courts of Justice by voice vote	Family Law

Bill	Sponsors	Title	Last Action	Lists
HB 623	Sally L. Hudson	<p>Guardianship and conservatorship; duties of the guardian ad litem, report contents.</p> <p>Guardianship and conservatorship; duties of the guardian ad litem; report contents. Adds to the duty of a guardian ad litem appointed to represent the interests of a respondent in a guardianship or conservatorship case the requirement to recommend that counsel be appointed to represent such respondent upon the respondent's request. Under current law, the guardian ad litem is required to recommend counsel be appointed only when he believes appointment is necessary. The bill further directs the guardian ad litem to include in his report to the court an explanation by the guardian ad litem as to any (i) decision not to recommend the appointment of counsel for the respondent, (ii) determination that a less restrictive alternative to guardianship or conservatorship is not available, and (iii) determination that appointment of a limited guardian or conservator is not appropriate.</p>	Senate • Mar 08, 2022: Signed by President	Family Law
HB 686	Kaye Kory	<p>Death of parent or guardian of a child resulting from driving under the influence; child support.</p> <p>Death of the parent or guardian of a child resulting from driving under the influence; child support. Provides that in any case where a person was convicted of involuntary manslaughter as a result of driving a motor vehicle or operating a watercraft under the influence where the victim was the parent or legal guardian of a child, the person who has custody of such child may petition the sentencing court to order that the defendant pay child support.</p>	House • Feb 15, 2022: Left in Courts of Justice	Family Law
HB 716	Wendy W. Gooditis	<p>Kinship foster care; notice and appeal.</p> <p>Kinship foster care; notice and appeal. Requires local boards of social services (local boards), upon receiving a request from a child's relative to become a kinship foster parent, to provide the relative with an application to become a kinship foster parent within 15 days. The bill requires local boards, upon denying a relative's application to become a kinship foster parent, to provide to the relative (i) a clear and specific explanation of the reasons for denial, (ii) a statement that such denial is appealable, and (iii) an explanation of the procedure for filing such appeal. The bill allows relatives to file an appeal regarding such decisions with the Commissioner of Social Services and requires the Board of Social Services to adopt certain regulations regarding the timeline of such appeals. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100544D: 63.2-900.1, 63.2-915</p>	Senate • Mar 08, 2022: Signed by President	Family Law
HB 808	Marcia S. "Cia" Price	<p>Support orders; income withholding order, employer fees.</p> <p>Support orders; income withholding order; employer fees. Clarifies that a fee of up to a maximum of \$5 for each reply or remittance on account of a support obligor may be charged by an employer and withheld from the obligor's income in addition to the support amount to be withheld pursuant to an income withholding order. Currently, such amount is described only as a \$5 fee. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101231D: 20-79.3</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Family Law
HB 856	David A. Reid	<p>Child custody, visitation, and placement; best interests of the child.</p> <p>Child custody, visitation, and placement; best interests of the child. Requires consideration of a child's attachment to a parent or guardian when determining the best interests of the child. The bill defines "attachment" as an aspect of the child's relationship with a parent or guardian that promotes the child's use of the parent or guardian as a secure base from which to explore, learn, and relate and to feel value, security, comfort, familiarity, and continuity. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101992D: 20-124.3</p>	House • Feb 07, 2022: Stricken from docket by Courts of Justice (20-Y 0-N)	Family Law
HB 869	Emily M. Brewer	<p>Adoption; court to refer case to child-placing agency.</p> <p>Adoption. Allows a circuit court, upon consideration of a petition for adoption, to immediately enter an interlocutory order referring the case to a child-placing agency to conduct a visitation instead of entering an order of reference referring the case to a child-placing agency for investigation and makes other amendments to accommodate for and bolster this change. The bill allows petitions for adoption submitted by the persons listed as the child's parents on his birth certificate to be filed and granted under the provisions governing stepparent adoptions. The bill prohibits putative fathers from registering with the Virginia Birth Father Registry regarding a child whose adoption has been finalized and in certain other instances set forth in the bill and allows written notice of an adoption plan to be sent to a putative father by express mail with proof of delivery in addition to delivery by personal service or certified mailing as in current law. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22104018D: 17.1-275, 63.2-1201, 63.2-1208, 63.2-1210, 63.2-1228, 63.2-1233, 63.2-1241, 63.2-1250</p>	Senate • Mar 08, 2022: Signed by President	Family Law
HB 1048	Phillip A. Scott	<p>Death of parent or guardian of a child resulting from driving under the influence; child support.</p> <p>Death of the parent or guardian of a child resulting from driving under the influence; child support. Provides that in any case where a person was convicted of involuntary manslaughter as a result of driving a motor vehicle or operating a watercraft under the influence where the victim was the parent or legal guardian of a child, the person who has custody of such child may petition the sentencing court to order that the defendant pay child support.</p>	House • Feb 15, 2022: Left in Courts of Justice	Family Law

Bill	Sponsors	Title	Last Action	Lists
HB 1058	A.C. Cordoza	Child support; interest on arrearages. Interest on child support arrearages. Provides that no interest shall accrue on arrearages for child support obligations when the order for such support was entered on or after July 1, 2022.	House • Feb 15, 2022: Left in Courts of Justice	Family Law
HB 1077	A.C. Cordoza	Paternity; genetic tests to determine parentage, relief from paternity, certain actions, penalty. Paternity; genetic tests to determine parentage; relief from paternity; certain actions; penalty. Provides that any person who knowingly gives any false information or makes any false statements for the purpose of determining paternity is guilty of a Class 6 felony. The bill further requires an alleged father of a child be informed of his option to request the administering of a genetic test prior to being entered as the father on a birth certificate. The bill further states that, in addition to any other available legal relief, an individual relieved of paternity who previously paid support pursuant to a child support order entered in conjunction with the set-aside paternity determination may file an action against the other party for repayment of any such support. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103900D: 20-49.10, 32.1-257	House • Feb 11, 2022: Continued to 2023 in Courts of Justice by voice vote	Family Law
HB 1086	James A. "Jay" Leftwich	Adoption; death of joint petitioner prior to entry of final order. Death of joint petitioner prior to entry of final order of adoption. Provides that in cases in which married persons, or persons who were previously married and who are permitted to adopt a child, have jointly petitioned to adopt a child and one of the petitioners dies before entry of a final order of adoption, the adoption may proceed in the name of both petitioners upon request of the surviving petitioner. The bill further provides that, upon entry of a final order, the child shall be, for all intents and purposes, the child of both petitioners.	House • Jan 25, 2022: Continued to 2023 in Health, Welfare and Institutions by voice vote	Family Law
HB 1351	Nadarius E. Clark	Divorce; grounds of cruelty, abuse, desertion, or abandonment eliminates waiting period. Grounds for divorce; cruelty, abuse, desertion, or abandonment; waiting period. Eliminates the one-year waiting period for being decreed a divorce on the grounds of cruelty, reasonable apprehension of bodily hurt, or willful desertion or abandonment. Statutes affected: House: Presented and ordered printed 22103649D: 20-91	House • Feb 15, 2022: Left in Courts of Justice	Family Law
SB 113	Joseph D. Morrissey	Custody and visitation of a minor; grandparents petitions referred by court to mediation. Custody and visitation; grandparents; mediation. Requires any case in which a grandparent petitions the court for custody or visitation of a minor grandchild to be referred by the court to mediation. The bill requires the petitioning party to pay the fee of the mediator. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100696D: 20-124.2, 20-124.4	Senate • Feb 09, 2022: Passed by indefinitely in Judiciary (9-Y 4-N)	Family Law
SB 114	Joseph D. Morrissey	Court-ordered custody and visitation arrangements; petition for visitation by grandparent. Visitation; petition of grandparent. 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 his 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: (a) the historical relationship between the grandparent and child, (b) the motivation of the grandparent in seeking visitation, (c) the motivation of the living parent in denying visitation to the grandparent, (d) the quantity of time requested and the effect it will have on the child's daily activities, and (e) the benefits of maintaining a relationship with the extended family of the deceased parent. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100697D: 20-124.2	Senate • Jan 31, 2022: Passed by indefinitely in Judiciary (10-Y 5-N)	Family Law
SB 134	John S. Edwards	Juvenile and domestic relations district courts; raises maximum age for delinquency matters. Juvenile and domestic relations district courts; Department of Juvenile Justice; extending jurisdiction in delinquency matters to persons 18 years of age or older but less than 21 years of age. Raises the maximum age for delinquency matters in juvenile and domestic relations district courts from persons under 18 years of age to persons under 21 years of age. The bill defines "underage person" as an individual who is 18 years of age or older but less than 21 years of age. The bill adds underage persons to all provisions regarding delinquency proceedings in juvenile and domestic relations district courts, the transfer of delinquency matters to circuit courts, and criminal procedure as currently applies to juveniles only. The bill differentiates between juveniles and underage persons in specific circumstances, including consent for medical or mental health records or procedures, mental health screenings in secure detention facilities, and provisions regarding release on bail or recognizance.	House • Mar 08, 2022: Left in Courts of Justice	Family Law

Bill	Sponsors	Title	Last Action	Lists
SB 163	Mark J. Peake	<p>Surrogacy contracts; provisions requiring abortions or selective reductions unenforceable.</p> <p>Surrogacy contracts; provisions requiring abortions or selective reductions unenforceable. Provides that any provision of a surrogacy contract requiring an abortion or selective reduction is against the public policy of the Commonwealth and is void and unenforceable. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100591D: 20-163</p>	House • Mar 08, 2022: Signed by Speaker	Family Law
SB 202	Stephen D. Newman	<p>Alternative custody arrangements; options to increase use for certain individuals.</p> <p>Study; Secretary of Health and Human Resources and Secretary of Public Safety and Homeland Security; increase use of alternative custody arrangements for individuals subject to an emergency custody or temporary detention order; report. Directs the Secretary of Health and Human Resources, together with the Secretary of Public Safety and Homeland Security, to study options to increase the use of alternative custody arrangements for individuals who are subject to an emergency custody or temporary detention order and to report his findings and recommendations to the Governor and the Chairmen of the House Committees on Appropriations and Health, Welfare and Institutions and the Senate Committees on Education and Health and Finance and Appropriations by October 1, 2022.</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Family Law
SB 307	T. Montgomery "Monty" Mason	<p>Kinship foster care; notice and appeal.</p> <p>Kinship foster care; notice and appeal. Requires local boards of social services (local boards), upon receiving a request from a child's relative to become a kinship foster parent, to provide the relative with an application to become a kinship foster parent within 15 days. The bill requires local boards, upon denying a relative's application to become a kinship foster parent, to provide to the relative (i) a clear and specific explanation of the reasons for denial, (ii) a statement that such denial is appealable, and (iii) an explanation of the procedure for filing such appeal. The bill allows relatives to file an appeal regarding such decisions with the Commissioner of Social Services and requires the Board of Social Services to adopt certain regulations regarding the timeline of such appeals. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100568D: 63.2-900.1, 63.2-915</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Family Law
SB 348	Scott A. Surovell	<p>Support orders; retroactivity, arrearages, party's incarceration.</p> <p>Support orders; retroactivity; arrearages; party's incarceration. Makes various changes to provisions of law related to child and spousal support orders, including (i) providing that in cases in which jurisdiction over child support or spousal support has been divested from the juvenile and domestic relations district court and no final support order has been entered, any award for child support or spousal support in the circuit court shall be retroactive to the date on which the proceeding was commenced by the filing of the action in the juvenile and domestic relations district court and (ii) specifying that prejudgment interest on child support should be retroactive to the date of filing. The bill provides that a party's incarceration alone for 180 or more consecutive days shall not ordinarily be deemed voluntary unemployment or underemployment for the purposes of calculating child support and imputing income for such calculation. The bill further provides that a party's incarceration for 180 or more days shall be a material change of circumstances upon which a modification of a child support order may be based. The provisions of the bill related to imputation of income apply only to petitions for child support and petitions for a modification of a child support order commenced on or after July 1, 2022, and do not create a material change in circumstances for the purposes of modifying a child support order if a parent was incarcerated prior to July 1, 2022, and the incarcer...</p>	Senate • Mar 12, 2022: Conference report agreed to by Senate (40-Y 0-N)	Family Law
SB 349	Scott A. Surovell	<p>Division of marital property; Va. Retirement System managed defined contribution plan, etc.</p> <p>Division of marital property; Virginia Retirement System managed defined contribution plan; calculation of gains and losses. Provides that if the court enters an order to distribute any Virginia Retirement System managed defined contribution plan, the Virginia Retirement System shall, if ordered by the court, calculate gains and losses from the valuation date through the date of distribution of the benefits. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22101344D: 20-107.3</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Family Law
SB 412	Joseph D. Morrissey	<p>Parental rights; termination, murder of a child.</p> <p>Termination of parental rights; murder of child. Requires the court to terminate the parental rights of a parent upon finding, based upon clear and convincing evidence, that termination of parental rights is in the best interests of the child and that the parent has been convicted of an offense under the laws of the Commonwealth or a substantially similar law of any other state, the United States, or any foreign jurisdiction that constitutes murder or voluntary manslaughter, or a felony attempt, conspiracy, or solicitation to commit any such offense, and the victim of the offense was the child of the parent over whom parental rights would be terminated. The bill also requires local boards of social services to file a petition to terminate parental rights in such instances. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22103115D: 16.1-283, 63.2-910.2</p>	Senate • Feb 09, 2022: Continued to 2023 in Judiciary (13-Y 0-N)	Family Law

Bill	Sponsors	Title	Last Action	Lists
SB 418	Bill DeSteph	<p>Division of marital property; military retainer pay.</p> <p>Division of marital property; military retainer pay. Provides that, for the purposes of dividing marital property, military retainer pay shall be classified as separate property. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22101328D: 20-107.3</p>	Senate • Feb 09, 2022: Passed by indefinitely in Judiciary (8-Y 3-N)	Family Law
SB 455	Jennifer B. Boysko	<p>Child support; calculation of gross income for determination, rental income.</p> <p>Calculation of gross income for determination of child support; rental income. Provides that for the calculation of gross income for the purposes of determining child support, rental income shall be subject to the deduction of reasonable expenses. The bill further provides that the party claiming any such deduction has the burden of proof to establish such expenses by a preponderance of the evidence. This bill is in response to Ellis v. Sutton-Ellis, Va. App. No. 0710-20-1 (June 22, 2021).</p>	House • Mar 08, 2022: Signed by Speaker	Family Law

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2022 General Assembly Bills of Interest

Immunity

Bill	Sponsors	Title	Last Action	Lists
HB 609	Jeffrey M. Bourne	<p>Civil action for the deprivation of rights; duties and liabilities of certain employers.</p> <p>Civil action for the deprivation of rights; duties and liabilities of certain employers. Creates a civil cause of action for the deprivation of any rights, privileges, or immunities pursuant to the constitutions and laws of the United States and the Commonwealth due to the acts or omissions of either a public employer or its employee and provides that a plaintiff may maintain an action to establish liability and recover compensatory damages, punitive damages, and equitable relief against the public employer and its employee. The bill provides that sovereign immunity is not a defense to such an action. The bill further provides that public employers owe a duty of reasonable care to third parties in the hiring, supervision, training, retention, and use of their employees and that a person who claims to have suffered injury or sustained damages caused, in whole or in part, by a breach of this duty may maintain an action to establish liability and recover compensatory damages, punitive damages, and equitable relief against such public employer.</p>	House • Feb 15, 2022: Left in Courts of Justice	Immunity
HB 611	Jeffrey M. Bourne	<p>Early Identification System (EIS); DCJS to establish.</p> <p>Conduct of law-enforcement officers; establishment of an Early Identification System. Requires the Department of Criminal Justice Services (the Department) to establish a best practices model for the implementation, training, and management of an Early Identification System (EIS). The bill defines an EIS as a system through which a law-enforcement agency collects and manages data to identify and assess patterns of behavior, including misconduct and high-risk behavior, or performance of law-enforcement officers and law-enforcement agency employees. The bill directs each sheriff or chief of police to implement an EIS by July 1, 2024, and requires that law-enforcement officers receive training prior to implementation of the EIS and annually thereafter. The bill also directs the Department to establish and administer written policies and procedures for law-enforcement agencies to report to the Office of the Attorney General all judgments or settlements in cases relating to negligence or misconduct of a law-enforcement officer.</p>	House • Feb 11, 2022: Tabled in Public Safety (11-Y 10-N)	Immunity
HB 913	Emily M. Brewer	<p>Underground Utility Damage Prevention Act; duties of operator, liability of excavator.</p> <p>Underground Utility Damage Prevention Act; duties of operator; liability of excavator. Requires an operator of residential telecommunications or cable television service, after receiving notification of an interruption in service due to the installation of broadband service at a given premises, to restore telecommunications or cable television service, such that a person at the premises can telephone emergency services by dialing 911, within two days of receiving such notification. The bill prohibits an operator from giving false or misleading information to the notification center and requires the State Corporation Commission to investigate certain claims following an informal complaint. The bill requires an operator to indemnify and hold harmless an excavator when the excavator is installing facilities for purposes of broadband service and damages a utility line used for residential telecommunications or cable television and provides that no excavator is liable for any such damage occurring on or after July 1, 2022. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101983D: 56-265.19, 56-265.25</p>	House • Feb 15, 2022: Left in Commerce and Energy	Immunity
HB 1095	Kaye Kory	<p>Health care; decision making, end of life, penalties.</p> <p>Health care; decision making; end of life; penalties. Allows an adult diagnosed with a terminal condition to request and an attending health care provider to prescribe a self-administered controlled substance for the purpose of ending the patient's life in a humane and dignified manner. The bill requires that a patient's request for a self-administered controlled substance to end his life must be given orally on two occasions and in writing, signed by the patient and one witness, and that the patient be given an express opportunity to rescind his request at any time. The bill makes it a Class 2 felony (i) to willfully and deliberately alter, forge, conceal, or destroy a patient's request, or rescission of request, for a self-administered controlled substance to end his life with the intent and effect of causing the patient's death; (ii) to coerce, intimidate, or exert undue influence on a patient to request a self-administered controlled substance for the purpose of ending his life or to destroy the patient's rescission of such request with the intent and effect of causing the patient's death; or (iii) to coerce, intimidate, or exert undue influence on a patient to forgo a self-administered controlled substance for the purpose of ending the patient's life. The bill also grants immunity from civil or criminal liability and professional disciplinary action to any person who complies with the provisions of the bill and allows health care providers to refuse to participate in the...</p>	House • Feb 15, 2022: Left in Courts of Justice	Immunity
HB 1178	G. "John" Avoli	<p>Seizure first aid information; Department of Labor and Industry to disseminate information.</p> <p>Department of Labor and Industry; seizure first aid information. Directs the Department of Labor and Industry (the Department) to disseminate information regarding seizure first aid, defined in the bill, to all employers and employees in the Commonwealth and requires all employers in the Commonwealth to physically post this information in a prominent location in the workplace. The bill incorporates the "Good Samaritan" provision of the Code of Virginia that shields a person from liability when rendering emergency care in good faith under certain circumstances.</p>	Senate • Mar 08, 2022: Signed by President	Immunity

Bill	Sponsors	Title	Last Action	Lists
HB 1249	Glenn R. Davis	<p>Food donations; labeling, liability.</p> <p>Food donations; labeling; liability. Exempts individuals and entities that donate food and charitable organizations that accept food donations from criminal and civil liability for donating or receiving food past its best-by date or other non-safety labels so long as all parties are informed. The bill provides that immunity from liability shall not apply in instances of gross negligence or intentional misconduct. Statutes affected: House: Presented and ordered printed 22104344D: 3.2-5144, 35.1-14.2</p>	Senate • Mar 10, 2022: Signed by President	Immunity
HB 1293	Elizabeth B. Bennett-Parker	<p>Food donations; labeling, liability.</p> <p>Food donations; labeling; liability. Exempts individuals and entities that donate food and charitable organizations that accept food donations from criminal and civil liability for donating or receiving food past its best-by date or other non-safety labels so long as all parties are informed. The bill provides that immunity from liability shall not apply in instances of gross negligence or intentional misconduct. Statutes affected: House: Presented and ordered printed 22104304D: 3.2-5144, 35.1-14.2</p>	House • Feb 09, 2022: Stricken from docket by Agriculture, Chesapeake and Natural Resources (21-Y 0-N)	Immunity
SB 148	Thomas K. Norment, Jr.	<p>Public health emergencies; expands immunity for health care providers.</p> <p>Public health emergencies; immunity for health care providers. Expands immunity provided to health care providers responding to a disaster to include actions or omissions taken by the provider as directed by any order of public health in response to such disaster when a local emergency, state of emergency, or public health emergency has been declared. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22102585D: 8.01-225.01, 8.01-225.02</p>	Senate • Mar 10, 2022: Enrolled	Immunity
SB 175	Mark J. Peake	<p>Safe haven protections; newborn safety device at hospitals for reception of children.</p> <p>Safe haven protections; newborn safety device. Provides an affirmative defense in certain criminal prosecutions and civil proceedings regarding child abuse or neglect to a parent who safely delivers his child within the first 30 days of the child's life to a newborn safety device located at a hospital that provides 24-hour emergency services or at an attended emergency medical services agency that employs emergency medical services personnel. The bill also provides civil and criminal immunity to such hospitals and emergency medical services agencies for injuries to children received through such newborn safety devices, provided that (i) the injuries are not the result of gross negligence or willful misconduct and (ii) the hospital or emergency medical services agency meets certain requirements regarding the establishment, functioning, and testing of the device. Current law requires the child to be delivered within the first 14 days of the child's life at such hospital or emergency medical services agency.</p>	Senate • Jan 24, 2022: Incorporated by Judiciary (SB63-Ruff) (15-Y 0-N)	Immunity
SB 254	John J. Bell	<p>Alcoholic beverage control; delivery of alcoholic beverages, third-party delivery license.</p> <p>Alcoholic beverage control; delivery of alcoholic beverages; third-party delivery license; container. Creates a third-party delivery license that authorizes the licensee to deliver alcoholic beverages purchased by consumers from other retail licensees. The bill establishes conditions for the issuance of third-party delivery licenses, imposes eligibility requirements for delivery personnel, and sets forth requirements for a delivery to be made by such delivery personnel. The bill imposes a \$2,500 fine for first-time violations of the delivery requirements and a \$5,000 fine for second and subsequent violations. The bill also establishes container requirements for certain alcoholic beverages sold for off-premises consumption or delivery. The bill requires that such alcoholic beverages, if not contained in the manufacturer's original sealed container, (i) be enclosed in a container that has no straw holes or other openings and is sealed in a manner that allows a person to readily discern whether the container has been opened or tampered with; (ii) display the name of the licensee from which the alcoholic beverages were purchased; (iii) be clearly marked with the phrase "contains alcoholic beverages"; (iv) have a maximum volume of 16 ounces per beverage for certain beverages; and (v) be stored in the trunk of the vehicle, in an area that is rear of the driver's seat, in a locked container or compartment or, in the case of delivery by bicycle, in a compartment behind the bicyclist ...</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Immunity
SB 711	Amanda F. Chase	<p>Prescriptions; off-label use.</p> <p>Prescriptions; off-label use. Provides that a licensed health care provider with prescriptive authority may prescribe, administer, or dispense a drug that has been approved for a specific use by the U.S. Food and Drug Administration for an off-label use when the health care provider determines, in his professional judgment, that such off-label use is appropriate for the care and treatment of the patient and prohibits a pharmacist from refusing to dispense a drug for off-label use if a valid prescription is presented.</p>	Senate • Feb 10, 2022: Passed by Education and Health (9-Y 6-N)	Immunity

Bill	Sponsors	Title	Last Action	Lists
SB 737	Jennifer B. Boysko	<p>Early childhood care and education entities; administration of epinephrine.</p> <p>Early childhood care and education entities; administration of epinephrine. Requires the Board of Education to amend its regulations to require each early childhood care and education entity to implement policies for the possession and administration of epinephrine in every such entity, to be administered by any nurse at the entity, employee at the entity, or employee of a local health department who is authorized by a prescriber and trained in the administration of epinephrine to any child believed to be having an anaphylactic reaction. The bill mandates that such policies shall require that at least one school nurse, employee at the entity, or employee of a local health department who is authorized by a prescriber and trained in the administration of epinephrine has the means to access at all times during regular facility hours any such epinephrine that is stored in a locked or otherwise generally inaccessible container or area. This bill shall be known as Elijah's Law. Statutes affected:</p> <p>Senate: Presented and ordered printed 22103738D: 8.01-225, 54.1-3408</p>	<p>executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022</p>	<p>Immunity</p>

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2022 General Assembly Bills of Interest

Insurance

Bill	Sponsors	Title	Last Action	Lists
HB 446	Schuyler T. VanValkenburg	<p>Motor vehicle insurance policies; discrimination prohibited.</p> <p>Motor vehicle insurance policies; discrimination prohibited. Prohibits any policy for motor vehicle insurance that uses any of the following characteristics of a driver as a factor in calculating auto insurance rates or determining eligibility for a policy from being issued in the Commonwealth: education, occupation, employment status, homeownership status, credit score, gender, zip code, census tract, marital status, previous insurer, or previous purchase of insurance.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100873D: 46.2-475</p>	House • Feb 01, 2022: Stricken from docket by Commerce and Energy (21-Y 0-N)	Insurance
HB 481	Dan I. Helmer	<p>Hospitals; price transparency.</p> <p>Hospitals; price transparency. Requires every hospital to make information about standard charges for items and services provided by the hospital available on the hospital's website.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101862D: 32.1-137.05</p>	House • Mar 11, 2022: Enrolled	Insurance
SB 311	Adam P. Ebbin	<p>Real property; title insurance and duty to disclose ownership interest and lis pendens.</p> <p>Real property; title insurance and duty to disclose ownership interest and lis pendens. Provides that a real estate licensee has an affirmative duty, upon having substantive discussions about specific real property, to disclose in writing to the purchaser, seller, lessor, or lessee if he, any member of his family, his firm, any member of his firm, or any entity in which he has an ownership interest has or will have an ownership interest to the other parties to the transaction. The bill requires a settlement agent, in connection with any transaction involving the purchase or sale of an interest in residential real property, to obtain from the purchaser a statement in writing that he has been notified by the settlement agent that the purchaser may wish to obtain owner's title insurance coverage including affirmative mechanics' lien coverage, if available, and of the general nature of such insurance coverage in accordance with the standards of the American Land Title Association, and that the purchaser does or does not desire such coverage or desires coverage not consistent with the standards of the American Land Title Association. The bill requires such written notification to substantially comply with language provided in the bill. The bill requires that an owner of residential dwelling unit who has actual knowledge of a lis pendens filed against the dwelling unit to provide to a prospective purchaser a written disclosure of such fact to the purchaser on a form provided by the...</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Insurance
SB 408	Siobhan S. Dunnavant	<p>Sentencing documents; transmission to the DHP and DBHDS.</p> <p>Transmission of sentencing documents to the Department of Health Professions and Department of Behavioral Health and Developmental Services. Provides that the attorney for the Commonwealth or his designee shall request the clerk of the court to transmit certified copies of sentencing documents to the Director of the Department of Health Professions or to the Director of the Department of Behavioral Health and Developmental Services when a practitioner or person who is licensed by a health regulatory board or the Department of Behavioral Health and Developmental Services has been convicted of a felony, crime involving moral turpitude, or crime that occurred during the course of practice for which such practitioner or person is licensed. The bill also provides that no clerk shall charge for copying or making for or furnishing to the Department of Health Professions or Department of Behavioral Health and Developmental Services a certified copy of a criminal judgment order or criminal sentencing order.Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22101439D: 17.1-267, 19.2-310.01</p>	House • Mar 08, 2022: Signed by Speaker	Insurance
SB 681	Mark D. Obenshain	<p>Health insurers; duty of in-network providers to submit claims, prohibited practices.</p> <p>Duty of in-network providers to submit claims to health insurers; civil penalty. Provides that any in-network provider that provides health care services to a covered patient that does not submit its claim to the health insurer for the health care services in accordance with the terms of the applicable provider agreement or as permitted under applicable federal or state laws or regulations shall be subject to a civil penalty of \$1,000 per violation.Statutes affected: Senate: Presented and ordered printed 22104364D: 8.01-27.5</p>	Senate • Mar 10, 2022: Signed by President	Insurance
SB 733	Frank M. Ruff, Jr.	<p>Exempted vehicles; insurance.</p> <p>Exempted vehicles; insurance. Requires motor vehicles, trailers, and semi-trailers exempted from the registration requirement to be covered by motor vehicle insurance or an umbrella or excess insurance policy. The bill requires the owner of any such motor vehicle, trailer, or semi-trailer to provide proof of insurance within 30 days when requested by a law-enforcement officer and provides that failure to do so is punishable as a traffic infraction by a fine of \$600 to be paid into the Uninsured Motorists Fund.Statutes affected: Senate: Presented and ordered printed 22104317D: 46.2-684.1</p>	Senate • Mar 10, 2022: Signed by President	Insurance

Bill	Sponsors	Title	Last Action	Lists
SB 754	Mark D. Obenshain	<p>Motor vehicle insurance; underinsured motor vehicle.</p> <p>Motor vehicle insurance; underinsured motor vehicle. Requires any motor vehicle motor vehicle liability insurance policy issued, delivered, or renewed in the Commonwealth after July 1, 2022, to include a specific statement regarding the insurer requirements to provide underinsured motorist coverage that pays any damages due to an insured in addition to any bodily injury or property damage liability that is applicable to the insured's damages. Under the bill, underinsured motorist coverage shall be paid without any credit for the bodily injury and property damage coverage available for payment, unless any named insured elects to reduce any underinsured motorist coverage payments by notifying the insurer. If an injured person is entitled to underinsured motorist coverage under more than one policy, he may elect to receive a credit to the extent that the available liability coverage exceeds the amount of underinsured motorist coverage from a higher priority policy. The bill also provides that taxicab operators may fulfill their insurance filing requirement by showing evidence of a certificate of self-insurance. Statutes affected: Senate: Presented and ordered printed 22104918D: 38.2-2202, 38.2-2206, 46.2-2057</p>	Senate • Mar 11, 2022: Enrolled	Insurance

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2022 General Assembly Bills of Interest

Judicial Administration

Bill	Sponsors	Title	Last Action	Lists
HB 104	Timothy V. Anderson	<p>Judicial emergency; administrative delays, prosecution of felony due to lapse of time.</p> <p>Prosecution of felony due to lapse of time; judicial emergency; administrative delays. Provides that the speedy trial provisions shall be tolled upon a declaration of a judicial emergency. The bill also provides that the speedy trial provisions shall be tolled upon administrative delays resulting from the enactment of Chapter 43 of the Acts of Assembly of 2020, Special Session I, and creates a process by which a party may petition for an immediate interlocutory appeal of a trial date set outside of the speedy trial provisions if such trial could not be scheduled due to such administrative delays. The provisions of the bill related to such administrative delays sunset on December 31, 2024. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103646D: 19.2-243</p>	Senate • Feb 21, 2022: Passed by indefinitely in Judiciary (9-Y 6-N)	Judicial Administration
HB 378	Angelia Williams Graves	<p>Jury duty; allowance increase.</p> <p>Jury duty; allowance increase. Increases the jury duty allowance from \$30 to \$40 for each day of attendance upon the court effective July 1, 2022; to \$45 effective July 1, 2023; and to \$50 effective July 1, 2024, and thereafter. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101434D: 17.1-618</p>	House • Feb 15, 2022: Left in Appropriations	Judicial Administration
HB 536	Kelly K. Convirns-Fowler	<p>General district courts; filing an order of disposition from a criminal case.</p> <p>Filing an order of disposition from a criminal case in general district courts. Provides that any adult criminal disposition for a misdemeanor or felony in a juvenile and domestic relations district court may be submitted to the general district court of the same territorial jurisdiction to be filed as a general district court record upon a petition filed by the victim of the offense and with the consent of the juvenile and domestic relations district court.</p>	House • Feb 07, 2022: Stricken from docket by Courts of Justice (20-Y 0-N)	Judicial Administration
HB 594	Don L. Scott	<p>Magistrates; appointment and supervision.</p> <p>Magistrates; appointment and supervision. Gives supervisory control over the magistrate system to the chief circuit court judge and the Committee on District Courts and abolishes magisterial regions. Under current law, the Executive Secretary of the Virginia Supreme Court exercises such authority with a provision for consultation with the chief judges of the circuit courts in the region where the appointment is made.</p>	House • Feb 15, 2022: Left in Courts of Justice	Judicial Administration
HB 658	Patrick A. Hope	<p>Juveniles; appointment of counsel, indigency.</p> <p>Juveniles; appointment of counsel; indigency. Removes provisions stating that when the court appoints counsel to represent a child in a detention hearing or in a case involving a child who is alleged to be in need of services, in need of supervision, or delinquent and, after an investigation by the court services unit, finds that the parents are financially able to pay for such attorney in whole or in part and refuse to do so, the court shall assess costs against the parents for such legal services in the amount awarded the attorney by the court, not to exceed \$100 if the action is in circuit court or the maximum amount specified for court-appointed counsel appearing in district court. The bill also removes provisions requiring that before counsel is appointed in any case involving a child who is alleged to be in need of services, in need of supervision, or delinquent, the court determine that the child is indigent. The bill provides that for the purposes of appointment of counsel for a delinquency proceeding, a child shall be considered indigent. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103997D: 16.1-266, 16.1-267</p>	House • Feb 15, 2022: Left in Courts of Justice	Judicial Administration
HB 682	Patrick A. Hope	<p>Service of process; investigator employed by an attorney for the Commonwealth, etc.</p> <p>Service of process; investigator employed by an attorney for the Commonwealth or Indigent Defense Commission. Provides that all investigators employed by an attorney for the Commonwealth or by the Indigent Defense Commission while engaged in the performance of their official duties shall not be considered a party or otherwise interested in the subject matter in controversy and, thus, are authorized to serve process. The bill eliminates the requirement that the sheriff in the jurisdiction where process is to be served agrees that such investigators may serve process. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101921D: 8.01-293</p>	House • Mar 10, 2022: VOTE: Adoption (100-Y 0-N)	Judicial Administration
HB 761	Paul E. Krizek	<p>Judicial Inquiry and Review Commission; availability of complaint forms.</p> <p>Judicial Inquiry and Review Commission; availability of complaint forms. Requires that any standard complaint form utilized by the Judicial Inquiry and Review Commission shall be made available in paper form at every clerk's office in all courts across the Commonwealth. The bill also requires that a sign be posted in all state courts of the Commonwealth, in a location accessible to the public, detailing the availability and location of such form. Such sign shall also include information on how to access a downloadable electronic version of the form, which shall be made available on the official website of the judicial system of the Commonwealth, every individual appellate, circuit, general district, and juvenile and domestic relations district court website, if such website exists, and the website for the Division of Legislative Services. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102454D: 17.1-917</p>	House • Mar 10, 2022: Enrolled	Judicial Administration

Bill	Sponsors	Title	Last Action	Lists
HB 821	Luke E. Torian	Judges; increases from six to seven the maximum number in the Thirty-first Judicial Circuit. Maximum number of judges in each judicial circuit. Increases from six to seven the maximum number of authorized judges in the Thirty-first Judicial Circuit. This bill is a recommendation of the Judicial Council of Virginia. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100583D: 17.1-507	House • Mar 10, 2022: Enrolled	Judicial Administration
HB 1241	G. "John" Avoli	Pretrial Intervention and Diversion Program; created. Pretrial Intervention and Diversion Program. Authorizes the attorney for the Commonwealth for each judicial circuit of the Commonwealth to create and administer a Pretrial Intervention and Diversion Program for the purpose of providing an alternative to prosecuting offenders in the criminal justice system. The bill provides that entry into such program shall be at the discretion of the attorney for the Commonwealth based upon written guidelines and that no attorney for the Commonwealth shall accept any offender into such program for an offense for which punishment includes a mandatory minimum sentence of imprisonment.	House • Feb 15, 2022: Left in Courts of Justice	Judicial Administration
HB 1285	Richard C. "Rip" Sullivan, Jr.	Virginia State Bar; repeals sunset provision on Supreme Court's authority to assess members. Virginia State Bar; Clients' Protection Fund; sunset. Repeals the sunset provision on the Supreme Court's authority to adopt rules assessing members of the Virginia State Bar an annual fee of up to \$25 to be deposited in the Clients' Protection Fund.	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Judicial Administration
SB 83	William M. Stanley, Jr.	Judicial retirement; increases mandatory age from 73 to 75. Mandatory judicial retirement age. Increases the mandatory judicial retirement age from 73 to 75. This increase in mandatory retirement age includes judges subject to mandatory retirement during the 2022 Regular Session of the General Assembly and allows any sitting judge who has attained age 73 and has submitted a notice of retirement but not yet retired to revoke the notice of retirement by written request. The bill requires the revocation of any certification of need to fill the vacancy determined by the Judicial Council or Committee on District Courts based on the original notice of retirement if a written request to revoke the notice of retirement is submitted by the judge. The bill contains an emergency clause. Statutes affected: Senate: Prefiled and ordered printed with emergency clause; offered 01/12/22 22101421D: 51.1-305	Senate • Jan 19, 2022: Passed by indefinitely in Judiciary (12-Y 3-N)	Judicial Administration
SB 143	John S. Edwards	Court of Appeals of Virginia; makes various changes to procedures and jurisdiction of the Court. Court of Appeals of Virginia; emergency. Makes various changes to the procedures and jurisdiction of the Court of Appeals of Virginia, including (i) clarifying that an aggrieved party of certain pretrial orders may petition the Court of Appeals for review of such order and that such petitions shall be reviewed by a three-judge panel; (ii) providing that a party to an appeal that requests an extension for a filing deadline in the Court of Appeals must show good cause for the extension to be granted; (iii) clarifying that appeal bonds and security bonds are not required in criminal appeals; (iv) permitting the Court of Appeals to dispense with oral argument if the parties agree that it is not necessary; and (v) making consistent the grounds for seeking a delayed appeal in a criminal case in the Court of Appeals and the Supreme Court of Virginia. The bill additionally corrects the unintentional elimination of reviews of interlocutory decrees or orders involving certain equitable claims from the jurisdiction of the Court of Appeals. The bill contains an emergency clause that is applicable only to this correction. Statutes affected: Senate: Prefiled and ordered printed with emergency clause; offered 01/12/22 22103323D: 8.01-626, 8.01-671, 8.01-675.3, 8.01-675.6, 8.01-676.1, 17.1-403, 17.1-405, 17.1-408, 19.2-321.1, 19.2-321.2	Senate • Mar 11, 2022: Enrolled	Judicial Administration
SB 221	Mark D. Obenshain	Index of wills; Rockingham Circuit Court to establish pilot program. Circuit court clerks; will index; online database. Requires circuit court clerks to make their will indices available to the public in online, searchable databases.	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Judicial Administration
SB 561	J. Chapman Petersen	Virginia Attorney Disciplinary Commission; established, report. Virginia Attorney Disciplinary Commission; established. Establishes the Virginia Attorney Disciplinary Commission in the legislative branch of state government for the purpose of holding disciplinary hearings initiated by the Virginia State Bar against an attorney for a violation of the Virginia Rules of Professional Conduct or Unauthorized Practice Rules that would be the basis for a sanction to be imposed against such attorney and grants the Commission the power to hold issue sanctions against such attorney. The bill transfers any existing authority to discipline attorneys from the Virginia State Bar to the Commission. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22104232D: 17.1-406, 18.2-455, 54.1-3909, 54.1-3910, 54.1-3913, 54.1-3915, 54.1-3938.1, 54.1-3935, 54.1-3938	Senate • Feb 02, 2022: Passed by indefinitely in Judiciary (11-Y 4-N)	Judicial Administration
SB 640	Joseph D. Morrissey	Public defender office; establishes an office for the County of Henrico. Public defender offices; County of Henrico. Establishes a public defender office for the County of Henrico.	Senate • Feb 10, 2022: Incorporated by Finance and Appropriations (SB475-McClellan) (16-Y 0-N)	Judicial Administration

Bill	Sponsors	Title	Last Action	Lists
SB 696	William M. Stanley, Jr.	<p>Judges; maximum number in each judicial district.</p> <p>Maximum number of judges in each judicial district. Increases from two to three the maximum number of authorized general district court judges in the Twenty-second Judicial District.</p>	Senate • Jan 26, 2022: Passed by indefinitely in Judiciary (13-Y 1-N)	Judicial Administration
SB 730	Lynwood W. Lewis, Jr.	<p>Jurors; increases the daily compensation.</p> <p>Jurors; compensation. Increases the daily compensation for jurors from \$30 to \$100. Statutes affected: Senate: Presented and ordered printed 22104517D: 17.1-618</p>	House • Mar 07, 2022: Tabled in Appropriations (13-Y 9-N)	Judicial Administration
SR 1	John S. Edwards	<p>Public defender offices; feasibility, expense, and implementation of statewide coverage, report.</p> <p>Feasibility, expense, and implementation of statewide coverage of public defender offices; study. Directs the Virginia Indigent Defense Commission (the Commission) to establish a work group to study the feasibility, cost, and implementation of statewide coverage of public defender offices. The bill directs the Commission to report its findings and recommendations to the chairmen of the Virginia State Crime Commission, the House Committee for Courts of Justice, the Senate Committee on the Judiciary, the House Committee on Appropriations, and the Senate Committee on Finance and Appropriations by November 1, 2022.</p>	Senate • Feb 07, 2022: Continued to 2023 in Judiciary (15-Y 0-N)	Judicial Administration

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2022 General Assembly Bills of Interest

Long-Term Care

Bill	Sponsors	Title	Last Action	Lists
HB 97	Christopher T. Head	<p>Nursing homes; regulations, electronic monitoring.</p> <p>Nursing homes; regulations; electronic monitoring. Directs the Board of Health to include in regulations governing nursing homes a provision prohibiting a nursing home from refusing to admit, transferring, or discharging a patient on the grounds that the patient has implemented or requested to implement electronic monitoring, provided such request and electronic monitoring is in accordance with regulations of the Board. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100662D: 32.1-127</p>	House • Jan 20, 2022: Stricken from docket by Health, Welfare and Institutions (21-Y 0-N)	Long-Term Care
HB 265	Ronnie R. Campbell	<p>Multi-jurisdiction grand jury; investigation of elder abuse crimes.</p> <p>Multi-jurisdiction grand jury; elder abuse crimes. Adds the following to the list of crimes that a multi-jurisdiction grand jury may investigate: (i) financial exploitation of mentally incapacitated persons and (ii) abuse and neglect of incapacitated adults. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102393D: 19.2-215.1</p>	Senate • Feb 16, 2022: Passed by indefinitely in Judiciary (9-Y 4-N)	Long-Term Care
HB 330	Vivian E. Watts	<p>Nursing homes & certified nursing facilities; minimum staffing standards, administrative sanctions.</p> <p>Minimum staffing standards for nursing homes and certified nursing facilities; administrative sanctions; Long-Term Care Services Fund. Requires nursing homes to meet a baseline staffing level based on resident acuity in alignment with the Centers for Medicare and Medicaid Services staffing level recommendations. The bill requires nursing homes to collect and submit to the Department of Health certain data related to staffing. The bill gives the Commissioner of Health the power to impose administrative sanctions on nursing homes and directs the Board of Health to promulgate regulations related to the criteria and procedures for imposition of administrative sanctions or initiation of court proceedings for violations of the bill. The bill provides that nursing homes shall only be subject to administrative sanctions upon initial funding for the state share of the cost to implement the provisions of the bill. The bill establishes the Long-Term Care Services Fund for the purpose of making grants to assist in the provision of activities that protect or improve the quality of care or quality of life for residents, patients, and consumers of long-term care services. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22104129D: 32.1-27.1, 32.1-127</p>	House • Feb 10, 2022: Continued to 2023 in Health, Welfare and Institutions by voice vote	Long-Term Care
HB 481	Dan I. Helmer	<p>Hospitals; price transparency.</p> <p>Hospitals; price transparency. Requires every hospital to make information about standard charges for items and services provided by the hospital available on the hospital's website. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101862D: 32.1-137.05</p>	House • Mar 11, 2022: Enrolled	Long-Term Care
HB 496	Michael P. Mullin	<p>Abuse and neglect; financial exploitation, changes term incapacitated adults, definitions, penalties</p> <p>Abuse and neglect; financial exploitation; incapacitated adults; penalties. Changes the term "incapacitated adult" to "vulnerable adult" for the purposes of the crime of abuse and neglect of such adults and defines "vulnerable adult" as any person 18 years of age or older who is impaired by reason of mental illness, intellectual or developmental disability, physical illness or disability, advanced age, or other causes to the extent the adult lacks sufficient understanding or capacity to make, communicate, or carry out reasonable decisions concerning his well-being or has one or more limitations that substantially impair the adult's ability to independently provide for his daily needs or safeguard his person, property, or legal interests. The bill adds the definition of "advanced age" as it is used in the definition of "vulnerable adult" to mean 65 years of age or older. The bill also changes the term "person with mental incapacity" to the same meaning of "vulnerable adult" for the purposes of the crime of financial exploitation. This bill is a recommendation of the Virginia Criminal Justice Conference.</p>	House • Mar 10, 2022: Enrolled	Long-Term Care
HB 497	Michael P. Mullin	<p>Misuse of power of attorney; financial exploitation of incapacitated adults by an agent, penalty.</p> <p>Misuse of power of attorney; financial exploitation; incapacitated adults; penalty. Makes it a Class 1 misdemeanor for any person granted authority to act for a principal under a power of attorney to knowingly or intentionally engage in financial exploitation of an incapacitated adult. The bill also provides that the power of attorney terminates upon such conviction. This bill is a recommendation of the Virginia Criminal Justice Conference. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100840D: 64.2-1608, 64.2-1621</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Long-Term Care

Bill	Sponsors	Title	Last Action	Lists
HB 569	Nadarius E. Clark	<p>Hospices, home care organizations, private providers, etc; immunity from liability.</p> <p>Hospices, home care organizations, private providers, assisted living facilities, and adult day care centers; immunity from liability. Repeals the provision that a licensed hospice, home care organization, private provider, assisted living facility, or adult day care center that delivers care to or withholds care from a patient, resident, or person receiving services who is diagnosed as being or is believed to be infected with the COVID-19 virus shall not be liable for any injury or wrongful death of such patient, resident, or person receiving services arising from the delivery or withholding of care when the emergency and subsequent conditions caused by the emergency result in a lack of resources, attributable to the disaster, that render such hospice, home care organization, private provider, assisted living facility, or adult day care center unable to provide the level or manner of care that otherwise would have been required in the absence of the emergency and that resulted in the injury or wrongful death at issue.</p>	House • Jan 28, 2022: Stricken from docket by Courts of Justice (18-Y 0-N)	Long-Term Care
HB 646	Betsy B. Carr	<p>Nursing homes; standards of care and staff requirements, regulations.</p> <p>Nursing home standards of care and staff requirements; regulations. Requires the State Board of Health to establish staffing and care standards in nursing homes to require a minimum of direct care services to each resident per 24-hour period as follows: (i) a minimum of 2.8 direct care hours provided by a nurse aide per resident, per day; (ii) a minimum of 1.3 direct care hours provided by a registered nurse or licensed practical nurse per resident, per day; and (iii) a minimum of 0.75 hours out of total 4.1 required direct hours provided by a registered nurse per resident, per day. The bill requires nursing homes to provide quarterly staff training on first aid, medication administration, and compliance with nursing home policies and procedures. Additionally, the bill removes language requiring that each hospital, nursing home, and certified nursing facility establish protocols for patient visits from a rabbi, priest, minister, or clergy of any religious denomination or sect during a declared public health emergency related to a communicable disease of public health threat. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103792D: 32.1-127</p>	House • Feb 10, 2022: Continued to 2023 in Health, Welfare and Institutions by voice vote	Long-Term Care
HB 662	William C. Wampler III	<p>Multi-jurisdiction grand jury; investigation of elder abuse crimes.</p> <p>Multi-jurisdiction grand jury; elder abuse crimes. Adds the following to the list of crimes that a multi-jurisdiction grand jury may investigate: (i) financial exploitation of mentally incapacitated persons and (ii) abuse and neglect of incapacitated adults. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102157D: 19.2-215.1</p>	House • Jan 28, 2022: Incorporated by Courts of Justice (HB265-Campbell, R.R.) by voice vote	Long-Term Care
HB 690	Patrick A. Hope	<p>Assisted living facilities; involuntary discharge of a resident.</p> <p>Assisted living facilities; involuntary discharge of a resident. Provides that an assisted living facility shall not involuntarily discharge a patient except (i) in cases in which the resident's condition presents an immediate and serious risk to the health, safety, or welfare of the resident or others and emergency discharge is necessary to protect the health, safety, or welfare of the resident or others; (ii) for nonpayment of contracted charges; or (iii) for failure of the resident to substantially comply with the terms and conditions of the lease agreement between the resident and the assisted living facility. The bill requires an assisted living facility to take steps to prevent the involuntary discharge, requires an assisted living facility to provide at least 30 days' notice of the involuntary discharge, and requires the assisted living facility to provide a discharge plan for the resident prior to involuntary discharge. The bill also requires the Department of Social Services to establish a process by which a resident or the resident's representative may appeal the decision of the assisted living facility to involuntarily discharge a resident to the Department and requires the Department to conduct a review to determine whether the assisted living facility has complied with the requirements of the bill. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103628D: 63.2-1805</p>	House • Feb 15, 2022: Left in Appropriations	Long-Term Care
HB 900	G. "John" Avoli	<p>Public health emergency; hospital or nursing home, addition of beds.</p> <p>Public health emergency; hospital or nursing home; addition of beds. Creates an exemption from the requirement for a certificate of public need or a license for the temporary addition of beds located in a temporary structure or satellite location by a hospital or nursing home in cases in which the Board of Health or the Commissioner of Health (the Commissioner) has entered an emergency order for the purpose of suppressing a nuisance dangerous to public health or a communicable, contagious, or infectious disease or other danger to the public life and health and provides that such exemption shall apply for the duration of the emergency order plus 30 days. The bill also expands the duration of the existing exemption from the requirement for a certificate of public need or a license for the addition of temporary beds when the Commissioner has determined that a natural or man-made disaster has caused the evacuation of a hospital or nursing home and that a public health emergency exists due to a shortage of hospital or nursing home beds to the duration of such determination plus 30 days and makes clear that such exemption shall apply to the temporary addition of beds located in a temporary structure or satellite location by a hospital or nursing home. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102131D: 32.1-102.2, 32.1-127</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Long-Term Care

Bill	Sponsors	Title	Last Action	Lists
SB 406	George L. Barker	<p>Nursing homes & certified nursing facilities; minimum staffing standards, administrative sanctions.</p> <p>Minimum staffing standards for nursing homes and certified nursing facilities; administrative sanctions; Long-Term Care Services Fund. Requires nursing homes to meet a baseline staffing level based on resident acuity in alignment with the Centers for Medicare and Medicaid Services staffing level recommendations. The bill requires nursing homes to collect and submit to the Department of Health certain data related to staffing. The bill gives the Commissioner of Health the power to impose administrative sanctions on nursing homes and directs the Board of Health to promulgate regulations related to the criteria and procedures for imposition of administrative sanctions or initiation of court proceedings for violations of the bill. The bill provides that nursing homes shall only be subject to administrative sanctions upon initial funding for the state share of the cost to implement the provisions of the bill. The bill establishes the Long-Term Care Services Fund for the purpose of making grants to assist in the provision of activities that protect or improve the quality of care or quality of life for residents, patients, and consumers of long-term care services. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22103793D: 32.1-27.1, 32.1-127</p>	Senate • Feb 03, 2022: Failed to report (defeated) in Education and Health (6-Y 8-N 1-A)	Long-Term Care
SB 690	T. Montgomery "Monty" Mason	<p>Misuse of power of attorney; financial exploitation of incapacitated adults, penalty.</p> <p>Misuse of power of attorney; financial exploitation; incapacitated adults; penalty. Makes it a Class 1 misdemeanor for any person granted authority to act for a principal under a power of attorney to knowingly or intentionally engage in financial exploitation of an incapacitated adult. The bill also provides that the power of attorney terminates upon such conviction. This bill is a recommendation of the Virginia Criminal Justice Conference. Statutes affected: Senate: Presented and ordered printed 22104031D: 64.2-1608, 64.2-1621</p>	Senate • Jan 26, 2022: Incorporated by Judiciary (SB124-Obenshain) (15-Y 0-N)	Long-Term Care

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2022 General Assembly Bills of Interest

Medical Malpractice

Bill	Sponsors	Title	Last Action	Lists
HB 92	Christopher T. Head	<p>Health care providers; amends definition to include home care organizations and hospice.</p> <p>Health care providers; definition. Amends the definition of "health care provider" to include home care organizations and hospice. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100336D: 8.01-581.1</p>	House • Feb 15, 2022: Left in Health, Welfare and Institutions	Medical Malpractice
HB 242	Dawn M. Adams	<p>Professional counselors, licensed; added to list of providers who can disclose or recommend records.</p> <p>Practice of licensed professional counselors. Adds licensed professional counselors to the list of eligible providers who can disclose or recommend the withholding of patient records, face a malpractice review panel, and provide recommendations on involuntary temporary detention orders.</p>	executive • Mar 09, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Medical Malpractice
HB 243	Dawn M. Adams	<p>Medicine, osteopathy, chiropractic, and podiatric medicine; requirements for practitioners.</p> <p>Practitioners of medicine, osteopathy, chiropractic, and podiatric medicine; requirements. Increases the duration of postgraduate training required issuance of a license to practice medicine, osteopathy, chiropractic, or podiatric medicine from 12 months to 36 months requires every practitioner licensed to practice medicine, osteopathy, chiropractic, and podiatric medicine to obtain and maintain coverage by or to be named insured on a professional liability insurance policy with limits equal to the current limitation on damages set forth in the Code of Virginia. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101322D: 54.1-2930</p>	House • Feb 15, 2022: Left in Health, Welfare and Institutions	Medical Malpractice
HB 264	Christopher T. Head	<p>Public health emergency; out-of-state licenses, deemed licensure.</p> <p>Public health emergency; out-of-state licensees; deemed licensure. Provides that when the Board of Health has entered an emergency order for the purpose of suppressing nuisances dangerous to the public health or communicable, contagious or infectious diseases or other dangers to the public life and health, a practitioner of a profession regulated by the Board of Medicine who is licensed in another state, the District of Columbia, or a United States territory or possession and who is in good standing with the applicable regulatory agency in that state, the District of Columbia, or that United States territory or possession shall not be prevented or prohibited from engaging in the practice of that profession in the Commonwealth with a patient located in the Commonwealth when (i) such practice is for the purpose of providing continuity of care through the use of telemedicine services and (ii) the patient is a current patient of the practitioner with whom the practitioner has previously established a practitioner-patient relationship. The bill also provides that when the Board of Health has entered an emergency order for the purpose of suppressing nuisances dangerous to the public health or communicable, contagious or infectious diseases or other dangers to the public life and health, individuals licensed or certified to practice medicine, osteopathic medicine, or podiatry or as a physician assistant, respiratory therapist, advanced practice registered nurse, registered nurse, li...</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Medical Malpractice
HB 353	Rodney T. Willett	<p>Unaccompanied homeless youth; consent to medical care.</p> <p>Unaccompanied homeless youth; consent to medical care. Provides that except for the purposes of sterilization or abortion, a minor who is 14 years of age or older and who is an unaccompanied homeless youth shall be deemed an adult for the purpose of consenting to surgical or medical examination or treatment, including dental examination and treatment, for himself or his minor child. The bill describes evidence sufficient to determine that a minor is an unaccompanied homeless youth and provides that no health care provider shall be liable for any civil or criminal action for providing surgical or medical treatment to an unaccompanied homeless youth or his minor child without first obtaining the consent of his parent or guardian provided in accordance with the law, with the exception of liability for negligence in the diagnosis or treatment of such unaccompanied homeless youth. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103664D: 54.1-2969</p>	House • Feb 15, 2022: Left in Health, Welfare and Institutions	Medical Malpractice
HB 481	Dan I. Helmer	<p>Hospitals; price transparency.</p> <p>Hospitals; price transparency. Requires every hospital to make information about standard charges for items and services provided by the hospital available on the hospital's website. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101862D: 32.1-137.05</p>	House • Mar 11, 2022: Enrolled	Medical Malpractice
HB 527	Dan I. Helmer	<p>Interstate Medical Licensure Compact and Commission; created.</p> <p>Interstate Medical Licensure Compact. Creates the Interstate Medical Licensure Compact to create a process for expedited issuance of a license to practice medicine in the Commonwealth for qualifying physicians to enhance the portability of medical licenses while protecting patient safety. The bill establishes requirements for coordination of information systems among member states and procedures for investigation and discipline of physicians alleged to have engaged in unprofessional conduct. The bill creates the Interstate Medical Licensure Compact Commission to administer the compact.</p>	House • Jan 25, 2022: Stricken from docket by General Laws (22-Y 0-N)	Medical Malpractice

Bill	Sponsors	Title	Last Action	Lists
HB 555	C.E. Cliff Hayes, Jr.	<p>Health care providers; transfer of patient records in conjunction with closure, etc.</p> <p>Health care providers; transfer of patient records in conjunction with closure, sale, or relocation of practice; electronic notice permitted. Allows health care providers to notify patients either electronically or by mail prior to the transfer of patient records in conjunction with the closure, sale, or relocation of the health care provider's practice. Current law requires health care providers to provide such notice by mail. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102359D: 54.1-2405</p>	executive • Mar 09, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Medical Malpractice
HB 566	Sally L. Hudson	<p>Public hospitals; medical debt collection practices.</p> <p>Public hospitals; medical debt collection practices. Requires the University of Virginia Medical Center (the Medical Center) and the Virginia Commonwealth University Health System Authority (the Authority) to make payment plans available to each person who incurs a debt related to medical treatment. The bill (i) requires that such payment plans be provided in writing and cap monthly payments at no more than five percent of the person's household income, (ii) provides that the first payment under such payment plan shall not be due until a date that is at least 90 days after the date on which treatment was provided or the date on which the person discharged, and (iii) provides that a person who has made at least 10 payments pursuant to the payment plan in a 12-month period shall be deemed to be in compliance with the payment plan. The bill also prohibits the Medical Center and the Authority from charging interest or late fees for medical debt, requires the Medical Center and Authority to make information available in writing in languages other than English spoken in the service area and via oral translation service for other languages, prohibits the Medical Center and the Authority from selling medical debt to any person other than an organization that purchases medical debt for the purpose of paying such debt in full, prohibits the Medical Center and the Authority from initiating any extraordinary debt collection action including garnishment of wages or liens on a debtor's pri...</p>	House • Feb 15, 2022: Left in Health, Welfare and Institutions	Medical Malpractice
HB 573	Nadarius E. Clark	<p>Statute of limitations; actions on contract for services provided by licensed health care provider.</p> <p>Statute of limitations; medical debt; judgment entered for medical debt. Provides that the statute of limitations for an action on any contract, written or unwritten, to collect medical debt, including actions brought by the Commonwealth, is three years. The bill further provides that no execution shall be issued and no action brought on a judgment, including a judgment in favor of the Commonwealth, rendered on medical debt after seven years from the date of such judgment; where the medical debt incurred was for life-sustaining treatment, no execution shall be issued and no action brought on such judgment more than three years from the date of such judgment. Under current law, the period within which such execution or action shall be brought is 20 years in circuit court and 10 years in general district court.</p>	House • Mar 10, 2022: Enrolled	Medical Malpractice
HB 580	Schuyler T. VanValkenburg	<p>Covenants not to compete; health care professionals, civil penalty.</p> <p>Covenants not to compete; health care professionals; civil penalty. Adds health care professionals as a category of employee with whom no employer shall enter into, enforce, or threaten to enforce a covenant not to compete. The bill defines health care professional as any physician, nurse, nurse practitioner, physician's assistant, pharmacist, social worker, dietitian, physical and occupational therapist, and medical technologist authorized to provide health care services in the Commonwealth. The bill provides that any employer that violates the prohibition against covenants not to compete with an employee health care professional is subject to a civil penalty of \$10,000 for each violation.</p>	House • Feb 15, 2022: Left in Commerce and Energy	Medical Malpractice
HB 690	Patrick A. Hope	<p>Assisted living facilities; involuntary discharge of a resident.</p> <p>Assisted living facilities; involuntary discharge of a resident. Provides that an assisted living facility shall not involuntarily discharge a patient except (i) in cases in which the resident's condition presents an immediate and serious risk to the health, safety, or welfare of the resident or others and emergency discharge is necessary to protect the health, safety, or welfare of the resident or others; (ii) for nonpayment of contracted charges; or (iii) for failure of the resident to substantially comply with the terms and conditions of the lease agreement between the resident and the assisted living facility. The bill requires an assisted living facility to take steps to prevent the involuntary discharge, requires an assisted living facility to provide at least 30 days' notice of the involuntary discharge, and requires the assisted living facility to provide a discharge plan for the resident prior to involuntary discharge. The bill also requires the Department of Social Services to establish a process by which a resident or the resident's representative may appeal the decision of the assisted living facility to involuntarily discharge a resident to the Department and requires the Department to conduct a review to determine whether the assisted living facility has complied with the requirements of the bill. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103628D: 63.2-1805</p>	House • Feb 15, 2022: Left in Appropriations	Medical Malpractice

Bill	Sponsors	Title	Last Action	Lists
HB 800	Marcia S. "Cia" Price	<p>Medical assistance services; eligibility, individuals confined in state correctional facilities.</p> <p>Medical assistance services; individuals confined in state correctional facilities. Requires the Department of Medical Assistance Services to enroll any person who is in the custody of a state correctional facility and who meets the criteria for eligibility for services under the state plan for medical assistance in the Commonwealth's program of medical assistance services; however, no services under the state plan for medical assistance shall be furnished to the person while he is confined in a state correctional facility unless federal financial participation is available to pay for the cost of the services provided. The bill also provides that, upon release from the custody of a state correctional facility, such individual shall continue to be eligible for services under the state plan for medical assistance until such time as the person is determined to no longer be eligible for medical assistance and that, to the extent permitted by federal law, the time during which a person is confined in a state correctional facility shall not be included in any calculation of when the person must recertify his eligibility for medical assistance.</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Medical Malpractice
HB 896	Dawn M. Adams	<p>Nurse practitioner; patient care team provider.</p> <p>Nurse practitioner; patient care team provider. Replaces the term "patient care team physician" with the term "patient care team provider" in the context of requirements for collaboration and consultation for nurse practitioners and provides that a nurse practitioner who is authorized to practice without a practice agreement may serve as a patient care team provider providing collaboration and consultation for nurse practitioners who are not authorized to practice without a practice agreement. Currently, only a licensed physician may provide collaboration and consultation, as evidenced by a practice agreement, for a nurse practitioner. The bill also eliminates authority of a physician on a patient care team to require a nurse practitioner practicing as part of a patient care team to be covered by a professional liability insurance policy and the requirement that a nurse practitioner practicing without a practice agreement obtain and maintain coverage by or be named insured on a professional liability insurance policy. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101321D: 54.1-2957, 54.1-2957.01</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Medical Malpractice
HB 900	G. "John" Avoli	<p>Public health emergency; hospital or nursing home, addition of beds.</p> <p>Public health emergency; hospital or nursing home; addition of beds. Creates an exemption from the requirement for a certificate of public need or a license for the temporary addition of beds located in a temporary structure or satellite location by a hospital or nursing home in cases in which the Board of Health or the Commissioner of Health (the Commissioner) has entered an emergency order for the purpose of suppressing a nuisance dangerous to public health or a communicable, contagious, or infectious disease or other danger to the public life and health and provides that such exemption shall apply for the duration of the emergency order plus 30 days. The bill also expands the duration of the existing exemption from the requirement for a certificate of public need or a license for the addition of temporary beds when the Commissioner has determined that a natural or man-made disaster has caused the evacuation of a hospital or nursing home and that a public health emergency exists due to a shortage of hospital or nursing home beds to the duration of such determination plus 30 days and makes clear that such exemption shall apply to the temporary addition of beds located in a temporary structure or satellite location by a hospital or nursing home. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102131D: 32.1-102.2, 32.1-127</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Medical Malpractice
HB 931	Roxann L. Robinson	<p>Virginia Birth-Related Neurological Injury Compensation Act; publication of disciplinary actions.</p> <p>Virginia Birth-Related Neurological Injury Compensation Act; publication of disciplinary actions; award eligibility. Requires, to the extent permissible by state and federal law, the Board of Medicine to publish on its website disciplinary action taken against a physician as a result of an investigation under the Virginia Birth-Related Neurological Injury Compensation Act (the Act). The bill also permits compensation under the Act for birth-related neurological injury deaths occurring up to a person's eighteenth birthday; current law limits awards to such deaths occurring during the person's infancy. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102413D: 38.2-5004, 38.2-5009.1</p>	House • Feb 15, 2022: Left in Health, Welfare and Institutions	Medical Malpractice
HB 1071	Kathy K.L. Tran	<p>Hospitals; determination of patient eligibility for financial assistance.</p> <p>Hospitals; debt collection; determination of patient eligibility for financial assistance. Requires every hospital to screen every patient to determine the patient's household income and whether the individual is eligible for medical assistance pursuant to the state plan for medical assistance, charity care, discounted care, or other financial assistance with the cost of medical care and provides that, notwithstanding any other provision of law, no hospital shall engage in extraordinary collection actions to recover a debt for medical services against any patient until such hospital has performed such screening.</p>	Senate • Mar 11, 2022: Conference report agreed to by Senate (40-Y 0-N)	Medical Malpractice

Bill	Sponsors	Title	Last Action	Lists
HB 1095	Kaye Kory	<p>Health care; decision making, end of life, penalties.</p> <p>Health care; decision making; end of life; penalties. Allows an adult diagnosed with a terminal condition to request and an attending health care provider to prescribe a self-administered controlled substance for the purpose of ending the patient's life in a humane and dignified manner. The bill requires that a patient's request for a self-administered controlled substance to end his life must be given orally on two occasions and in writing, signed by the patient and one witness, and that the patient be given an express opportunity to rescind his request at any time. The bill makes it a Class 2 felony (i) to willfully and deliberately alter, forge, conceal, or destroy a patient's request, or rescission of request, for a self-administered controlled substance to end his life with the intent and effect of causing the patient's death; (ii) to coerce, intimidate, or exert undue influence on a patient to request a self-administered controlled substance for the purpose of ending his life or to destroy the patient's rescission of such request with the intent and effect of causing the patient's death; or (iii) to coerce, intimidate, or exert undue influence on a patient to forgo a self-administered controlled substance for the purpose of ending the patient's life. The bill also grants immunity from civil or criminal liability and professional disciplinary action to any person who complies with the provisions of the bill and allows health care providers to refuse to participate in the...</p>	House • Feb 15, 2022: Left in Courts of Justice	Medical Malpractice
SB 169	Mark J. Peake	<p>Practical nurses, licensed; authority to pronounce death for a patient in hospice, etc.</p> <p>Licensed practical nurses; authority to pronounce death. Extends to licensed practical nurses the authority to pronounce the death of a patient, provided that certain conditions are met. Current law provides that physicians, registered nurses, and physician assistants may pronounce death. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22102397D: 54.1-2972</p>	Senate • Mar 10, 2022: Signed by President	Medical Malpractice
SB 176	Mark J. Peake	<p>Emergency custody and temporary detention; transportation of person when transfer of custody.</p> <p>Emergency custody and temporary detention; transportation; transfer of custody. Makes clear that, in cases in which transportation of a person subject to an emergency custody order or temporary detention order is ordered to be provided by an alternative transportation provider, the primary law-enforcement agency that executes the order may transfer custody of the person to the alternative transportation provider immediately upon execution of the order, and that the alternative transportation provider shall maintain custody of the person from the time custody is transferred to the alternative transportation provider by the primary law-enforcement agency until such time as custody of the person is transferred to the community services board or its designee that is responsible for conducting the evaluation or the temporary detention facility, as is appropriate. The bill also adds employees of and persons providing services pursuant to a contract with the Department of Behavioral Health and Developmental Services to the list of individuals who may serve as alternative transportation providers. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22102915D: 37.2-808, 37.2-810</p>	Senate • Feb 03, 2022: Incorporated by Education and Health (SB650-Hanger) (15-Y 0-N)	Medical Malpractice
SB 245	Ghazala F. Hashmi	<p>Public hospitals; medical debt collection practices.</p> <p>Public hospitals; medical debt collection practices. Requires the University of Virginia Medical Center (the Medical Center) and the Virginia Commonwealth University Health System Authority (the Authority) to make payment plans available to each person who incurs a debt related to medical treatment. The bill (i) requires that such payment plans be provided in writing and cap monthly payments at no more than five percent of the person's household income, (ii) provides that the first payment under such payment plan shall not be due until a date that is at least 90 days after the date on which treatment was provided or the date on which the person discharged, and (iii) provides that a person who has made at least 10 payments pursuant to the payment plan in a 12-month period shall be deemed to be in compliance with the payment plan. The bill also prohibits the Medical Center and the Authority from charging interest or late fees for medical debt, requires the Medical Center and Authority to make information available in writing in languages other than English spoken in the service area and via oral translation service for other languages, prohibits the Medical Center and the Authority from selling medical debt to any person other than an organization that purchases medical debt for the purpose of paying such debt in full, and requires the Medical Center and the Authority to establish a Financial Assistance Ombudsman Office to assist patients and other persons with issues related t...</p>	Senate • Feb 03, 2022: Incorporated by Education and Health (SB201-Favola) (15-Y 0-N)	Medical Malpractice
SB 317	Barbara A. Favola	<p>Out-of-state health care practitioners; temporary authorization to practice.</p> <p>Out-of-state health care practitioners; temporary authorization to practice; licensure by reciprocity for physicians; emergency. Allows a health care practitioner licensed in another state or the District of Columbia who has submitted an application for licensure to the appropriate health regulatory board to temporarily practice for a period of 90 days pending licensure, provided that certain conditions are met. The bill directs the Department of Health Professions to pursue reciprocity agreements with jurisdictions that surround the Commonwealth to streamline the application process in order to facilitate the practice of medicine. The bill requires the Department of Health Professions to annually report to the Chairmen of the Senate Committee on Education and Health and the House Committee on Health, Welfare and Institutions the number of out-of-state health care practitioners who have utilized the temporary authorization to practice pending licensure and have not subsequently been issued full licensure. The bill contains an emergency clause.</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Medical Malpractice

Bill	Sponsors	Title	Last Action	Lists
SB 350	Scott A. Surovell	<p>Health records; patient's right to disclosure.</p> <p>Health records; patient's right to disclosure. Requires a health care entity to include in its disclosure of an individual's health records any changes made to the health records and an audit trail for such records if the individual requests that such information be included in the health records disclosure.</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Medical Malpractice
SB 408	Siobhan S. Dunnavant	<p>Sentencing documents; transmission to the DHP and DBHDS.</p> <p>Transmission of sentencing documents to the Department of Health Professions and Department of Behavioral Health and Developmental Services. Provides that the attorney for the Commonwealth or his designee shall request the clerk of the court to transmit certified copies of sentencing documents to the Director of the Department of Health Professions or to the Director of the Department of Behavioral Health and Developmental Services when a practitioner or person who is licensed by a health regulatory board or the Department of Behavioral Health and Developmental Services has been convicted of a felony, crime involving moral turpitude, or crime that occurred during the course of practice for which such practitioner or person is licensed. The bill also provides that no clerk shall charge for copying or making for or furnishing to the Department of Health Professions or Department of Behavioral Health and Developmental Services a certified copy of a criminal judgment order or criminal sentencing order. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22101439D: 17.1-267, 19.2-310.01</p>	House • Mar 08, 2022: Signed by Speaker	Medical Malpractice
SB 414	Jennifer A. Kiggans	<p>Nurse practitioners; patient care team physician supervision capacity increased.</p> <p>Nurse practitioners; patient care team physician supervision capacity increased. Increases from six to 10 the number of nurse practitioners a patient care team physician may supervise at any one time in accordance with a written or electronic practice agreement. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100912D: 54.1-2957.01</p>	House • Mar 08, 2022: Signed by Speaker	Medical Malpractice

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2022 General Assembly Bills of Interest

Torts

Bill	Sponsors	Title	Last Action	Lists
HB 50	C. Matthew Fariss	<p>Infant relinquishment laws; DSS to establish hotline to make information available to public.</p> <p>Safe haven protections; newborn safety device. Provides an affirmative defense in certain criminal prosecutions and civil proceedings regarding child abuse or neglect to a parent who safely delivers his child within the first 30 days of the child's life to a newborn safety device located at a hospital that provides 24-hour emergency services or at an attended emergency medical services agency that employs emergency medical services personnel. The bill also provides civil and criminal immunity to such hospitals and emergency medical services agencies for injuries to children received through such newborn safety devices, provided that (i) the injuries are not the result of gross negligence or willful misconduct and (ii) the hospital or emergency medical services agency meets certain requirements regarding the establishment, functioning, and testing of the device. Current law requires the child to be delivered within the first 14 days of the child's life at such hospital or emergency medical services agency.</p>	Senate • Mar 11, 2022: Conference report agreed to by Senate (40-Y 0-N)	Tort
HB 136	Jeffrey L. Campbell	<p>Wrongful death; death of parent or guardian of a child resulting from driving under the influence.</p> <p>Wrongful death; death of the parent or guardian of a child resulting from driving under the influence; child support. Provides that any action for death by wrongful act where the defendant, as a result of driving a motor vehicle or operating a watercraft under the influence, unintentionally caused the death of another person who was the parent or legal guardian of a child, the person who has custody of such child may petition the court to order that the defendant pay child support.</p>	House • Feb 07, 2022: Stricken from docket by Courts of Justice (20-Y 0-N)	Tort
HB 353	Rodney T. Willett	<p>Unaccompanied homeless youth; consent to medical care.</p> <p>Unaccompanied homeless youth; consent to medical care. Provides that except for the purposes of sterilization or abortion, a minor who is 14 years of age or older and who is an unaccompanied homeless youth shall be deemed an adult for the purpose of consenting to surgical or medical examination or treatment, including dental examination and treatment, for himself or his minor child. The bill describes evidence sufficient to determine that a minor is an unaccompanied homeless youth and provides that no health care provider shall be liable for any civil or criminal action for providing surgical or medical treatment to an unaccompanied homeless youth or his minor child without first obtaining the consent of his parent or guardian provided in accordance with the law, with the exception of liability for negligence in the diagnosis or treatment of such unaccompanied homeless youth. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103664D: 54.1-2969</p>	House • Feb 15, 2022: Left in Health, Welfare and Institutions	Tort
HB 409	Jason S. Ballard	<p>Statute of limitations; promises not to plead.</p> <p>Promises not to plead the statute of limitations. Specifies that a written promise not to plead the statute of limitations is valid only when such written promise is made to avoid or defer litigation pending settlement of any cause of action that has accrued in favor of the promisee against the promisor. The bill further replaces the current requirement of validity that such promise not be made contemporaneously with any other contract with the requirement that the written promise be signed by the promisor or his agent. Finally, the bill specifies that the promisee must commence an action asserting such cause of action within the earlier of the applicable limitations period running from the date the written promise is made or any shorter time provided for in the written promise for such promise to be valid; current law requires that any such written promise may be made for an additional term not longer than the applicable limitations period in order to be valid. This bill is a recommendation of the Boyd-Graves Conference. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101575D: 8.01-232</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Tort
HB 467	David L. Bulova	<p>Dangerous and vicious dogs; civil liability, knowledge of propensity not required.</p> <p>Dangerous and vicious dogs; civil liability; knowledge of propensity not required. Provides that a dog owner may be civilly liable for a bite or attack by his dog regardless of whether he knew or should have known of such dog's propensity for vicious, dangerous, or otherwise aggressive behavior.</p>	House • Feb 15, 2022: Left in Agriculture, Chesapeake and Natural Resources	Tort
HB 481	Dan I. Helmer	<p>Hospitals; price transparency.</p> <p>Hospitals; price transparency. Requires every hospital to make information about standard charges for items and services provided by the hospital available on the hospital's website. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101862D: 32.1-137.05</p>	House • Mar 11, 2022: Enrolled	Tort
HB 504	Michael P. Mullin	<p>Expunged criminal records; use in civil action.</p> <p>Expunged criminal records; use in civil action. Allows any party to a civil action filed arising out of or relating to a criminal charge wherein criminal records have been expunged or a petition to expunge such records is pending to file a motion for the release of such records for use in such civil action.</p>	House • Feb 15, 2022: Left in Courts of Justice	Tort

Bill	Sponsors	Title	Last Action	Lists
HB 505	Michael P. Mullin	<p>Civil actions; filed on behalf of multiple persons.</p> <p>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. The bill requires the Supreme Court to promulgate rules no later than November 1, 2022, governing such actions. The bill has a delayed effective date of July 1, 2023. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102203D: 8.01-267.1</p>	House • Feb 15, 2022: Left in Courts of Justice	Tort
HB 510	Marie E. March	<p>Employer medical mandates; cause of action.</p> <p>Employer medical mandates; cause of action. Provides for a cause of action for any employee that suffers any adverse reaction or injury sustained by reason of a medical mandate, defined in the bill, issued by the employer as a condition of employment. The bill provides that in any such action the employee may recover compensatory damages, punitive damages, and reasonable attorney fees and costs.</p>	House • Feb 15, 2022: Left in Commerce and Energy	Tort
HB 515	Marie E. March	<p>Malicious prosecution; creates civil cause of action, self-defense.</p> <p>Civil action for malicious prosecution; self-defense. Creates a civil cause of action for malicious prosecution in any case in which a criminal defendant charged with aggravated murder, murder in the first degree, murder in the second degree, or voluntary manslaughter is found to have acted solely in self-defense. The bill provides that such cause of action shall lie against the prosecutor who brought the charges or prosecuted such criminal case if such criminal defendant can prove that such prosecution was malicious and motivated by reasons other than bringing the alleged defendant to justice.</p>	House • Jan 28, 2022: Stricken from docket by Courts of Justice (18-Y 0-N)	Tort
HB 566	Sally L. Hudson	<p>Public hospitals; medical debt collection practices.</p> <p>Public hospitals; medical debt collection practices. Requires the University of Virginia Medical Center (the Medical Center) and the Virginia Commonwealth University Health System Authority (the Authority) to make payment plans available to each person who incurs a debt related to medical treatment. The bill (i) requires that such payment plans be provided in writing and cap monthly payments at no more than five percent of the person's household income, (ii) provides that the first payment under such payment plan shall not be due until a date that is at least 90 days after the date on which treatment was provided or the date on which the person discharged, and (iii) provides that a person who has made at least 10 payments pursuant to the payment plan in a 12-month period shall be deemed to be in compliance with the payment plan. The bill also prohibits the Medical Center and the Authority from charging interest or late fees for medical debt, requires the Medical Center and Authority to make information available in writing in languages other than English spoken in the service area and via oral translation service for other languages, prohibits the Medical Center and the Authority from selling medical debt to any person other than an organization that purchases medical debt for the purpose of paying such debt in full, prohibits the Medical Center and the Authority from initiating any extraordinary debt collection action including garnishment of wages or liens on a debtor's pri...</p>	House • Feb 15, 2022: Left in Health, Welfare and Institutions	Tort
HB 569	Nadarius E. Clark	<p>Hospices, home care organizations, private providers, etc; immunity from liability.</p> <p>Hospices, home care organizations, private providers, assisted living facilities, and adult day care centers; immunity from liability. Repeals the provision that a licensed hospice, home care organization, private provider, assisted living facility, or adult day care center that delivers care to or withholds care from a patient, resident, or person receiving services who is diagnosed as being or is believed to be infected with the COVID-19 virus shall not be liable for any injury or wrongful death of such patient, resident, or person receiving services arising from the delivery or withholding of care when the emergency and subsequent conditions caused by the emergency result in a lack of resources, attributable to the disaster, that render such hospice, home care organization, private provider, assisted living facility, or adult day care center unable to provide the level or manner of care that otherwise would have been required in the absence of the emergency and that resulted in the injury or wrongful death at issue.</p>	House • Jan 28, 2022: Stricken from docket by Courts of Justice (18-Y 0-N)	Tort
HB 609	Jeffrey M. Bourne	<p>Civil action for the deprivation of rights; duties and liabilities of certain employers.</p> <p>Civil action for the deprivation of rights; duties and liabilities of certain employers. Creates a civil cause of action for the deprivation of any rights, privileges, or immunities pursuant to the constitutions and laws of the United States and the Commonwealth due to the acts or omissions of either a public employer or its employee and provides that a plaintiff may maintain an action to establish liability and recover compensatory damages, punitive damages, and equitable relief against the public employer and its employee. The bill provides that sovereign immunity is not a defense to such an action. The bill further provides that public employers owe a duty of reasonable care to third parties in the hiring, supervision, training, retention, and use of their employees and that a person who claims to have suffered injury or sustained damages caused, in whole or in part, by a breach of this duty may maintain an action to establish liability and recover compensatory damages, punitive damages, and equitable relief against such public employer.</p>	House • Feb 15, 2022: Left in Courts of Justice	Tort

Bill	Sponsors	Title	Last Action	Lists
HB 611	Jeffrey M. Bourne	<p>Early Identification System (EIS); DCJS to establish.</p> <p>Conduct of law-enforcement officers; establishment of an Early Identification System. Requires the Department of Criminal Justice Services (the Department) to establish a best practices model for the implementation, training, and management of an Early Identification System (EIS). The bill defines an EIS as a system through which a law-enforcement agency collects and manages data to identify and assess patterns of behavior, including misconduct and high-risk behavior, or performance of law-enforcement officers and law-enforcement agency employees. The bill directs each sheriff or chief of police to implement an EIS by July 1, 2024, and requires that law-enforcement officers receive training prior to implementation of the EIS and annually thereafter. The bill also directs the Department to establish and administer written policies and procedures for law-enforcement agencies to report to the Office of the Attorney General all judgments or settlements in cases relating to negligence or misconduct of a law-enforcement officer.</p>	House • Feb 11, 2022: Tabled in Public Safety (11-Y 10-N)	Tort
HB 686	Kaye Kory	<p>Death of parent or guardian of a child resulting from driving under the influence; child support.</p> <p>Death of the parent or guardian of a child resulting from driving under the influence; child support. Provides that in any case where a person was convicted of involuntary manslaughter as a result of driving a motor vehicle or operating a watercraft under the influence where the victim was the parent or legal guardian of a child, the person who has custody of such child may petition the sentencing court to order that the defendant pay child support.</p>	House • Feb 15, 2022: Left in Courts of Justice	Tort
HB 913	Emily M. Brewer	<p>Underground Utility Damage Prevention Act; duties of operator, liability of excavator.</p> <p>Underground Utility Damage Prevention Act; duties of operator; liability of excavator. Requires an operator of residential telecommunications or cable television service, after receiving notification of an interruption in service due to the installation of broadband service at a given premises, to restore telecommunications or cable television service, such that a person at the premises can telephone emergency services by dialing 911, within two days of receiving such notification. The bill prohibits an operator from giving false or misleading information to the notification center and requires the State Corporation Commission to investigate certain claims following an informal complaint. The bill requires an operator to indemnify and hold harmless an excavator when the excavator is installing facilities for purposes of broadband service and damages a utility line used for residential telecommunications or cable television and provides that no excavator is liable for any such damage occurring on or after July 1, 2022. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101983D: 56-265.19, 56-265.25</p>	House • Feb 15, 2022: Left in Commerce and Energy	Tort
HB 920	Terry G. Kilgore	<p>Careless driving; vulnerable road users.</p> <p>Careless driving; vulnerable road users. Provides that a person is guilty of a Class 1 misdemeanor if he operates a vehicle in a careless or distracted manner and causes the death or serious bodily injury of a vulnerable road user. Current law only imposes the penalty if such careless or distracted operation causes serious bodily injury to the vulnerable road user. The bill also allows a court to suspend the driver's license or restrict the driver's license of a person convicted of careless driving for up to six months of a person. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103904D: 46.2-392, 46.2-816.1</p>	executive • Mar 09, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Tort
HB 931	Roxann L. Robinson	<p>Virginia Birth-Related Neurological Injury Compensation Act; publication of disciplinary actions.</p> <p>Virginia Birth-Related Neurological Injury Compensation Act; publication of disciplinary actions; award eligibility. Requires, to the extent permissible by state and federal law, the Board of Medicine to publish on its website disciplinary action taken against a physician as a result of an investigation under the Virginia Birth-Related Neurological Injury Compensation Act (the Act). The bill also permits compensation under the Act for birth-related neurological injury deaths occurring up to a person's eighteenth birthday; current law limits awards to such deaths occurring during the person's infancy. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102413D: 38.2-5004, 38.2-5009.1</p>	House • Feb 15, 2022: Left in Health, Welfare and Institutions	Tort
HB 970	Israel D. O'Quinn	<p>Public agencies; exclusion from mandatory disclosure, privacy of personal information, penalty.</p> <p>Public agencies; privacy of personal information. Provides that public agencies shall not request personal information, defined in the bill. The bill amends the Virginia Freedom of Information Act definition of "public record" to exclude personal information. The bill also exempts the Campaign Finance Disclosure Act of 2006 from the requirements that public agencies protect personal information and refrain from requesting personal information. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102746D: 2.2-3701, 2.2-3801, 2.2-3808</p>	Senate • Mar 08, 2022: Signed by President	Tort

Bill	Sponsors	Title	Last Action	Lists
HB 984	Chris S. Runion	<p>Alcohol or marijuana product; liability for sale to an underage person.</p> <p>Liability for sale of alcohol or marijuana product to an underage person. Creates a cause of action against an alcoholic beverage control retail licensee or cannabis control retail licensee who sells alcohol or a marijuana product to an underage person if the consumption of the alcohol or marijuana product caused or contributed to an injury to person or property while the underage person operated a motor vehicle. The provisions of this act related to the sale of marijuana products have a delayed effective date of January 1, 2024.</p>	House • Feb 15, 2022: Left in Courts of Justice	Tort
HB 993	Kathleen Murphy	<p>Unlawful hazing; amends definition, civil and criminal liability, penalties.</p> <p>Unlawful hazing; penalty. Amends the definition of hazing to include the reckless or intentional act of causing another person to suffer severe emotional distress through outrageous or intolerable conduct when the severe emotional distress was caused by the outrageous or intolerable conduct. The bill also makes the crime of hazing a Class 5 felony if such hazing results in death or serious bodily injury to any person. The crime of hazing that does not result in death or serious bodily injury remains a Class 1 misdemeanor. The bill provides immunity for arrest and prosecution for hazing if a person in good faith seeks or obtains emergency medical attention for a person who has received a bodily injury by hazing or renders emergency care or assistance, including cardiopulmonary resuscitation (CPR), to a person who has received a bodily injury by hazing while another person seeks or obtains emergency medical attention for such person. The bill also creates a civil penalty for certain organizations if such organization had specific credible knowledge that its student members were participating, aiding, or assisting in any act of hazing and did not attempt to intervene to stop the hazing or report it to the appropriate local authorities. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22103988D: 15.2-1627, 18.2-56</p>	House • Mar 12, 2022: Second conferees appointed by House	Tort
HB 1018	Kaye Kory	<p>Failure to wear a seatbelt; primary offense.</p> <p>Failure to wear a seatbelt; primary offense. Changes from a secondary offense to a primary offense the failure to wear a seatbelt as required by law. A primary offense is one for which a law-enforcement officer may stop a motor vehicle. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100505D: 46.2-1094</p>	House • Feb 01, 2022: Stricken from docket by Transportation (22-Y 0-N)	Tort
HB 1048	Phillip A. Scott	<p>Death of parent or guardian of a child resulting from driving under the influence; child support.</p> <p>Death of the parent or guardian of a child resulting from driving under the influence; child support. Provides that in any case where a person was convicted of involuntary manslaughter as a result of driving a motor vehicle or operating a watercraft under the influence where the victim was the parent or legal guardian of a child, the person who has custody of such child may petition the sentencing court to order that the defendant pay child support.</p>	House • Feb 15, 2022: Left in Courts of Justice	Tort
HB 1249	Glenn R. Davis	<p>Food donations; labeling, liability.</p> <p>Food donations; labeling; liability. Exempts individuals and entities that donate food and charitable organizations that accept food donations from criminal and civil liability for donating or receiving food past its best-by date or other non-safety labels so long as all parties are informed. The bill provides that immunity from liability shall not apply in instances of gross negligence or intentional misconduct. Statutes affected: House: Presented and ordered printed 22104344D: 3.2-5144, 35.1-14.2</p>	Senate • Mar 10, 2022: Signed by President	Tort
SB 144	John S. Edwards	<p>Deceased or incompetent party; admissibility of statements.</p> <p>Admissibility of statements of a deceased or incompetent party. Repeals the "dead man's statute," which provides that no judgment shall be entered against a person incapable of testifying based upon the uncorroborated testimony of the adverse party. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22102696D: 8.01-397</p>	Senate • Feb 09, 2022: Continued to 2023 in Judiciary (14-Y 0-N)	Tort
SB 148	Thomas K. Norment, Jr.	<p>Public health emergencies; expands immunity for health care providers.</p> <p>Public health emergencies; immunity for health care providers. Expands immunity provided to health care providers responding to a disaster to include actions or omissions taken by the provider as directed by any order of public health in response to such disaster when a local emergency, state of emergency, or public health emergency has been declared. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22102585D: 8.01-225.01, 8.01-225.02</p>	Senate • Mar 10, 2022: Enrolled	Tort

Bill	Sponsors	Title	Last Action	Lists
SB 176	Mark J. Peake	<p>Emergency custody and temporary detention; transportation of person when transfer of custody.</p> <p>Emergency custody and temporary detention; transportation; transfer of custody. Makes clear that, in cases in which transportation of a person subject to an emergency custody order or temporary detention order is ordered to be provided by an alternative transportation provider, the primary law-enforcement agency that executes the order may transfer custody of the person to the alternative transportation provider immediately upon execution of the order, and that the alternative transportation provider shall maintain custody of the person from the time custody is transferred to the alternative transportation provider by the primary law-enforcement agency until such time as custody of the person is transferred to the community services board or its designee that is responsible for conducting the evaluation or the temporary detention facility, as is appropriate. The bill also adds employees of and persons providing services pursuant to a contract with the Department of Behavioral Health and Developmental Services to the list of individuals who may serve as alternative transportation providers. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22102915D: 37.2-808, 37.2-810</p>	Senate • Feb 03, 2022: Incorporated by Education and Health (SB650-Hanger) (15-Y 0-N)	Tort
SB 208	J. Chapman Petersen	<p>Civil actions; standing.</p> <p>Civil actions; standing. Provides that a person in a civil action shall be deemed to have standing if that person has a cognizable interest in the outcome of the matter, which may be represented by the ownership of an affected property interest or the suffering of an injury unique to that individual.</p>	Senate • Feb 02, 2022: Stricken at the request of Patron in Judiciary (15-Y 0-N)	Tort
SB 230	Emmett W. Hanger, Jr.	<p>Liability for sale of alcohol to an impaired customer; injury to another person.</p> <p>Liability for sale of alcohol to an impaired customer; injury to another person due to operation of vehicle while intoxicated. Creates a cause of action against an alcoholic beverage control retail licensee who sells alcohol to a customer who subsequently injures another by driving while impaired if the consumption of the alcohol caused or contributed to an injury to person or property while the customer operated a motor vehicle.</p>	Senate • Feb 02, 2022: Incorporated by Judiciary (SB555-Obenshain) (11-Y 0-N)	Tort
SB 245	Ghazala F. Hashmi	<p>Public hospitals; medical debt collection practices.</p> <p>Public hospitals; medical debt collection practices. Requires the University of Virginia Medical Center (the Medical Center) and the Virginia Commonwealth University Health System Authority (the Authority) to make payment plans available to each person who incurs a debt related to medical treatment. The bill (i) requires that such payment plans be provided in writing and cap monthly payments at no more than five percent of the person's household income, (ii) provides that the first payment under such payment plan shall not be due until a date that is at least 90 days after the date on which treatment was provided or the date on which the person discharged, and (iii) provides that a person who has made at least 10 payments pursuant to the payment plan in a 12-month period shall be deemed to be in compliance with the payment plan. The bill also prohibits the Medical Center and the Authority from charging interest or late fees for medical debt, requires the Medical Center and Authority to make information available in writing in languages other than English spoken in the service area and via oral translation service for other languages, prohibits the Medical Center and the Authority from selling medical debt to any person other than an organization that purchases medical debt for the purpose of paying such debt in full, and requires the Medical Center and the Authority to establish a Financial Assistance Ombudsman Office to assist patients and other persons with issues related t...</p>	Senate • Feb 03, 2022: Incorporated by Education and Health (SB201-Favola) (15-Y 0-N)	Tort
SB 247	Scott A. Surovell	<p>Careless driving; vulnerable road users.</p> <p>Careless driving; vulnerable road users. Provides that a person is guilty of a Class 1 misdemeanor if he operates a vehicle in a careless or distracted manner and causes the death or serious bodily injury of a vulnerable road user. Current law only imposes the penalty if such careless or distracted operation causes serious bodily injury to the vulnerable road user. The bill also allows a court to suspend the driver's license or restrict the driver's license of a person convicted of careless driving for up to six months of a person.</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Tort
SB 254	John J. Bell	<p>Alcoholic beverage control; delivery of alcoholic beverages, third-party delivery license.</p> <p>Alcoholic beverage control; delivery of alcoholic beverages; third-party delivery license; container. Creates a third-party delivery license that authorizes the licensee to deliver alcoholic beverages purchased by consumers from other retail licensees. The bill establishes conditions for the issuance of third-party delivery licenses, imposes eligibility requirements for delivery personnel, and sets forth requirements for a delivery to be made by such delivery personnel. The bill imposes a \$2,500 fine for first-time violations of the delivery requirements and a \$5,000 fine for second and subsequent violations. The bill also establishes container requirements for certain alcoholic beverages sold for off-premises consumption or delivery. The bill requires that such alcoholic beverages, if not contained in the manufacturer's original sealed container, (i) be enclosed in a container that has no straw holes or other openings and is sealed in a manner that allows a person to readily discern whether the container has been opened or tampered with; (ii) display the name of the licensee from which the alcoholic beverages were purchased; (iii) be clearly marked with the phrase "contains alcoholic beverages"; (iv) have a maximum volume of 16 ounces per beverage for certain beverages; and (v) be stored in the trunk of the vehicle, in an area that is rear of the driver's seat, in a locked container or compartment or, in the case of delivery by bicycle, in a compartment behind the bicyclist ...</p>	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Tort

Bill	Sponsors	Title	Last Action	Lists
SB 279	Bill DeSteph	Vicious dogs; law-enforcement officer, etc., to apply to a magistrate for a summons, etc. Vicious dogs. Authorizes a law-enforcement officer or animal control officer to apply to a magistrate for a summons for a vicious dog if such officer is located in either the jurisdiction where the vicious dog resides or in the jurisdiction where the vicious dog committed one of the acts set forth in the definition. The bill also requires any evidentiary hearing or appeal to be held not less than 30 days from the date of the summons or appeal, unless good cause is found by the court.	Senate • Mar 10, 2022: Enrolled	Tort
SB 325	Bryce E. Reeves	Alcoholic beverage control; transportation of alcoholic beverages purchased. Alcoholic beverage control; transportation of alcoholic beverages purchased outside the Commonwealth. Removes the prohibition on transporting within the Commonwealth more than three gallons of alcoholic beverages purchased out of state. Under current law, such transportation constitutes a Class 1 misdemeanor.Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22101959D: 4.1-311	Senate • Mar 11, 2022: Enrolled	Tort
SB 350	Scott A. Surovell	Health records; patient's right to disclosure. Health records; patient's right to disclosure. Requires a health care entity to include in its disclosure of an individual's health records any changes made to the health records and an audit trail for such records if the individual requests that such information be included in the health records disclosure.	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Tort
SB 555	Mark D. Obenshain	Alcohol; liability for sale to an underage person. Liability for sale of alcohol to an underage person. Creates a cause of action against an alcoholic beverage control retail licensee who sells alcohol to an underage person who was visibly intoxicated if the consumption of the alcohol caused or contributed to an injury to person or property while the underage person operated a motor vehicle. The plaintiff must prove such negligence by a clear and convincing evidence standard.	Senate • Feb 02, 2022: Failed to report (defeated) in Judiciary (4-Y 10-N)	Tort
SB 599	William M. Stanley, Jr.	Medical malpractice actions, certain; limitation on recovery. Limitation on recovery in certain medical malpractice actions. Provides that the limits on recovery in medical malpractice cases shall not apply when the plaintiff has sustained certain, catastrophic injuries.	Senate • Feb 07, 2022: Passed by indefinitely in Judiciary with letter (12-Y 3-N)	Tort
SB 631	George L. Barker	Fair Labor Standards Act; employer liability, overtime required for certain employees, report. Fair Labor Standards Act; overtime; employer liability. Replaces the current provisions of the Virginia Overtime Wage Act with the provision that any employer that violates the overtime wage requirements of the federal Fair Labor Standards Act, and any related laws and regulations, shall be liable to its employee for remedies or other relief available under the Fair Labor Standards Act.Statutes affected: Senate: Presented and ordered printed 22103916D: 40.1-29, 40.1-29.1, 40.1-29.2	House • Mar 08, 2022: Signed by Speaker	Tort
SB 633	William M. Stanley, Jr.	Civil actions; health care bills and records. Civil actions; health care bills and records. Defines the term "bill" for the purposes of evidence of medical services provided in certain civil actions as a summary of charges, an invoice, or any other form prepared by the health care provider or its third-party bill administrator identifying the costs of health care services provided. The bill also clarifies the procedures for introducing evidence of medical reports, statements, or records of a health care provider by affidavit in general district court.Statutes affected: Senate: Presented and ordered printed 22103315D: 8.01-413.01, 16.1-88.2	executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022	Tort
SB 681	Mark D. Obenshain	Health insurers; duty of in-network providers to submit claims, prohibited practices. Duty of in-network providers to submit claims to health insurers; civil penalty. Provides that any in-network provider that provides health care services to a covered patient that does not submit its claim to the health insurer for the health care services in accordance with the terms of the applicable provider agreement or as permitted under applicable federal or state laws or regulations shall be subject to a civil penalty of \$1,000 per violation.Statutes affected: Senate: Presented and ordered printed 22104364D: 8.01-27.5	Senate • Mar 10, 2022: Signed by President	Tort
SB 766	Jennifer A. Kiggans	Schools; male students shall not participate in female sports, etc., civil cause of action. Schools; athletics; participation in female sports; civil cause of action. Requires each elementary or secondary school or a private school that competes in sponsored athletic events against such public schools to designate athletic teams, whether a school athletic team or an intramural team sponsored by such school, based on biological sex as follows: (i) "males," "men," or "boys"; (ii) "females," "women," or "girls"; or (iii) "coed" or "mixed." Under the bill, male students are not permitted to participate on any school athletic team or squad designated for "females," "women," or "girls"; however, this provision does not apply to physical education classes at schools. The bill provides civil penalties for students and schools that suffer harm as a result of a violation of the bill. Such civil actions are required to be initiated within two years after the harm occurred.	Senate • Feb 03, 2022: Passed by indefinitely in Education and Health (9-Y 4-N)	Tort

2022 General Assembly Bills of Interest

Workers' Compensation

Bill	Sponsors	Title	Last Action	Lists
HB 153	Marie E. March	<p>Unemployment/workers compensation; testing for the use of nonprescribed controlled substances.</p> <p>Unemployment compensation and workers' compensation; testing for the use of nonprescribed controlled substances. Requires, for an applicant for unemployment benefits for whom the only suitable work available is in an occupation that regularly requires drug testing, the applicant, as a condition of eligibility, to provide the Virginia Employment Commission with the results of a drug test that is negative for the use of a nonprescribed controlled substance. The bill also requires, under the Workers' Compensation Act, in order to determine the cause of a workplace accident that harmed an employee, an employer to require post-accident drug testing for the use of a nonprescribed controlled substance of any employee whose conduct could have contributed to the accident. The bill also prohibits an insurer from providing premium discounts for a drug-free workplace to an employer unless the employer has policies in place requiring such post-accident drug testing. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101885D: 60.2-612, 65.2-813.2</p>	House • Feb 15, 2022: Left in Commerce and Energy	Workers Compensation
HB 529	Amanda E. Batten	<p>Labor and employment; misclassification of workers.</p> <p>Labor and employment; misclassification of workers. Establishes criteria for classifying the difference between employees and independent contractors based on either (i) the common law 20-factor test established in Internal Revenue Service Ruling 87-41, (ii) an applicable determination of the Internal Revenue Service, or (iii) satisfaction of specific criteria for classifying a person as an independent contractor as described in the bill.</p>	House • Feb 15, 2022: Left in Commerce and Energy	Workers Compensation
HB 689	William C. Wampler III	<p>Workers' compensation; employer duty to furnish medical attention, cost limit.</p> <p>Workers' compensation; employer duty to furnish medical attention; cost limit. Adds scooters to the list of medical equipment an employer is required to furnish to an employee under certain circumstances under the Virginia Workers' Compensation Act. The bill raises the limit on the aggregate cost of items and modifications required to be furnished by an employer to an injured employee from \$42,000 to \$75,000, to be increased on an annual basis. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101147D: 65.2-603</p>	Senate • Mar 08, 2022: Signed by President	Workers Compensation

Bill	Sponsors	Title	Last Action	Lists
HB 730	Jeion A. Ward	<p>Workers' compensation; failure to market residual capacity.</p> <p>Workers' compensation; failure to market residual capacity. Provides that an employee is not barred from receiving workers' compensation benefits due to a failure to market residual work capacity if credible evidence supports that the employee (i) is reasonably unemployable based upon age, education, work history, or medical conditions or (ii) is employable in some capacity and has registered with the Virginia Employment Commission. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102549D: 65.2-502</p>	House • Feb 15, 2022: Left in Commerce and Energy	Workers Compensation
HB 742	Robert B. Bell	<p>Workers' compensation; anxiety disorder or depressive disorder incurred by law-enforcement, etc.</p> <p>Workers' compensation; anxiety disorder or depressive disorder incurred by law-enforcement officers and firefighters. Provides that an anxiety disorder or depressive disorder, as both are defined in the bill, incurred by a law-enforcement officer or firefighter is compensable under the Virginia Workers' Compensation Act on the same basis as post-traumatic stress disorder. The bill provides that a mental health professional must diagnose the law-enforcement officer or firefighter as suffering from anxiety disorder or depressive disorder as a result of a qualifying event, as defined in the Code, and includes other conditions for compensability. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101170D: 65.2-107</p>	House • Feb 15, 2022: Left in Appropriations	Workers Compensation
HB 926	Amanda E. Batten	<p>Workers' compensation; presumption of compensability for certain diseases.</p> <p>Workers' compensation; presumption of compensability for certain diseases. Provides that the occupational disease presumption for death caused by hypertension or heart disease will apply for full-time sworn members of the Department of Motor Vehicles Law Enforcement Division who have at least five years of service. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101734D: 65.2-402</p>	House • Feb 15, 2022: Left in Appropriations	Workers Compensation
HB 932	Roxann L. Robinson	<p>Workers' compensation; COVID-19, health care providers.</p> <p>Workers' compensation; COVID-19; health care providers. Extends from December 31, 2021, to December 31, 2022, the date by which COVID-</p>	Senate • Mar 08, 2022: Signed by President	Workers Compensation

Bill	Sponsors	Title	Last Action	Lists
		<p>19 causing the death or disability of a health care provider is presumed to be an occupational disease compensable under the Workers' Compensation Act.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102394D: 65.2-402.1</p>		
HB 995	Kaye Kory	<p>Workers' compensation; presumption of compensability for hypertension, heart disease, and COVID-19.</p> <p>Workers' compensation; presumption of compensability for hypertension, heart disease, COVID-19. Extends by one year the December 31, 2021, expiration date of the presumption that COVID-19 causing the death or disability of health care providers is an occupational disease compensable under the Workers' Compensation Act, if certain conditions for diagnosis are met. The bill adds employees of the Department of Juvenile Justice and the Department of Corrections to the COVID-19 presumption for workers' compensation, if diagnosed with COVID-19 before January 1, 2022. The bill adds correctional officers to the list of employees for whom hypertension or heart disease is considered covered for workers' compensation, if diagnosed with hypertension or heart disease before January 1, 2022.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22100961D: 65.2-402, 65.2-402.1</p>	<p>House • Feb 15, 2022: Left in Commerce and Energy</p>	<p>Workers Compensation</p>
HB 1002	Elizabeth R. Guzman	<p>Workers' compensation; injuries caused by repetitive and sustained physical stressors.</p> <p>Workers' compensation; injuries caused by repetitive and sustained physical stressors. Provides that, for the purposes of the Virginia Workers' Compensation Act, "occupational disease" includes injuries from conditions resulting from repetitive and sustained physical stressors, including repetitive and sustained motions, exertions, posture stress, contact stresses, vibration, or noise. The bill provides that such injuries are covered under the Act. Such coverage does not require that the injuries occurred over a particular time period under the bill, provided that such a period can be reasonably identified.Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102326D: 65.2-400</p>	<p>House • Feb 15, 2022: Left in Commerce and Energy</p>	<p>Workers Compensation</p>
HB 1042	Emily M. Brewer	<p>Workers' compensation; time period for filing claim, certain cancers.</p> <p>Workers' compensation; limitation upon filing a claim. Provides that for occupational cancer</p>	<p>executive • Mar 11, 2022: Governor's Action Deadline 11:59</p>	<p>Workers Compensation</p>

Bill	Sponsors	Title	Last Action	Lists
		<p>diseases, a claim shall be barred unless it is filed within two years of when the diagnosis of the disease is first communicated to the employee. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22102163D: 65.2-406</p>	p.m., April 11, 2022	
HB 1056	A.C. Cordoza	<p>Workers' compensation; cancer presumption, service requirement.</p> <p>Workers' compensation; cancer presumption; service requirement. Reduces from five to three the years of service required for firefighters and certain other employees to qualify for the cancer presumption of an occupational disease for the purposes of workers' compensation. Statutes affected: House: Prefiled and ordered printed; offered 01/12/22 22101784D: 65.2-402</p>	House • Feb 15, 2022: Left in Commerce and Energy	Workers Compensation
HB 1196	Wendy W. Gooditis	<p>Workers' compensation; domestic service employees.</p> <p>Workers' compensation; domestic service employees. Provides that individuals who are engaged in providing domestic service, defined in the bill, are not excluded from the Virginia Workers' Compensation Act. Statutes affected: House: Presented and ordered printed 22103829D: 65.2-101, 65.2-305</p>	House • Feb 15, 2022: Left in Commerce and Energy	Workers Compensation
HJ 11	Daniel W. Marshall, III	<p>Workers' compensation; study practice of charging premiums for bonus pay, vacations, etc.</p> <p>Study; Workers' Compensation Commission; prohibition on charging premiums for bonus pay, vacations, and holidays; report. Requests the Workers' Compensation Commission to study a prohibition on charging workers' compensation premiums on bonus pay, vacation time, and holiday time and consider the economic effect that such prohibition would have on the state. The Workers' Compensation Commission is requested to complete its meetings by December 1, 2022, and submit its findings no later than the first day of the 2023 Regular Session of the General Assembly.</p>	House • Mar 09, 2022: VOTE: Adoption (98-Y 0-N)	Workers Compensation
SB 181	Richard L. Saslaw	<p>Workers' compensation; presumption as to death or disability from COVID-19, vaccine.</p> <p>Workers' compensation; presumption as to death or disability from COVID-19; vaccine. Provides that the presumption that COVID-19 causing the death or disability of certain employees is an</p>	House • Mar 08, 2022: Left in Commerce and Energy	Workers Compensation

Bill	Sponsors	Title	Last Action	Lists
		<p>occupational disease compensable under the Virginia Workers' Compensation Act does not apply to an individual who fails or refuses to receive a vaccine for the prevention of COVID-19 either approved by or with an Emergency Use Authorization issued by the U.S. Food and Drug Administration, unless the person is immunized or the person's physician determines in writing that the immunization would pose a significant risk to the person's health. Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100495D: 65.2-402.1</p>		
SB 226	Jeremy S. McPike	<p>Workers' compensation; notice to employees.</p> <p>Workers' compensation; notice to employees. Requires each employer subject to the Virginia Workers' Compensation Act to provide notice to covered employees of the employees' right to dispute a claim through the Virginia Workers' Compensation Commission. Such notice must include specific text as included in the bill. The bill also provides that an employer who fails to provide such notice may be subject to the civil penalty provisions of the Virginia Workers' Compensation Act.</p>	<p>House • Mar 08, 2022: Left in Commerce and Energy</p>	<p>Workers Compensation</p>
SB 289	Bill DeSteph	<p>Workers' compensation; anxiety disorder or depressive disorder incurred by law-enforcement, etc.</p> <p>Workers' compensation; anxiety disorder or depressive disorder incurred by law-enforcement officers and firefighters. Provides that an anxiety disorder or depressive disorder, as both are defined in the bill, incurred by a law-enforcement officer or firefighter is compensable under the Virginia Workers' Compensation Act on the same basis as post-traumatic stress disorder. The bill provides that a mental health professional must diagnose the law-enforcement officer or firefighter as suffering from anxiety disorder or depressive disorder as a result of a qualifying event, as defined in the Code, and includes other conditions for compensability.</p>	<p>House • Mar 08, 2022: Left in Commerce and Energy</p>	<p>Workers Compensation</p>
SB 351	Scott A. Surovell	<p>Workers' compensation; permanent and total incapacity, subsequent accident.</p> <p>Workers' compensation; permanent and total incapacity; subsequent accident. Requires compensation for permanent and total incapacity to be awarded for the loss of both hands, both arms, both feet, both legs, both eyes, or any two thereof either from the same accident or a compensable consequence of an injury sustained in the original accident. Under current</p>	<p>House • Mar 10, 2022: Signed by Speaker</p>	<p>Workers Compensation</p>

Bill	Sponsors	Title	Last Action	Lists
		<p>law, compensation for permanent and total incapacity is required only when such loss occurs in the same accident.Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22100102D: 65.2-503</p>		
SB 562	Richard L. Saslaw	<p>Workers' compensation; time period for filing claim, certain cancers.</p> <p>Workers' compensation; time period for filing claim; certain cancers. Provides that the time period for filing a workers' compensation claim for certain cancers is two years after a diagnosis of the disease is first communicated to the employee or within 10 years from the date of the last injurious exposure in employment, whichever first occurs. Under current law, such time period is two years after a diagnosis of the disease is first communicated to the employee or within five years from the date of the last injurious exposure in employment, whichever first occurs.Statutes affected: Senate: Prefiled and ordered printed; offered 01/12/22 22103722D: 65.2-406</p>	<p>executive • Mar 11, 2022: Governor's Action Deadline 11:59 p.m., April 11, 2022</p>	<p>Workers Compensation</p>
SB 677	Lynwood W. Lewis, Jr.	<p>Workers' compensation; cost of living supplements.</p> <p>Workers' compensation; cost of living supplements. Provides that cost-of-living supplements shall be payable to claimants who are receiving disability benefits under the Virginia Workers' Compensation Act but are not receiving federal disability benefits.Statutes affected: Senate: Presented and ordered printed 22103325D: 65.2-709</p>	<p>House • Mar 10, 2022: Signed by Speaker</p>	<p>Workers Compensation</p>



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Appellate Ethics in an Appeal-of-Right Virginia

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Appellate Ethics in an Appeal-of-Right Virginia

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Gentry Locke Seminar
Richmond – September 28, 2022

I. Introduction to Appeals of Right

On March 31, 2021, Governor Northam signed legislationⁱ that expands the jurisdiction of the Court of Appeals of Virginia and dramatically changes the way that appeals are handled in Virginia. This historic legislation took effect on January 1, 2022, and ushers in the most significant changes to Virginia’s legal system since the Court of Appeals was created in 1985. For the first time in modern Virginia history, virtually every litigant has an appeal as a matter of right.

Formerly an appellate court of limited jurisdiction,ⁱⁱ the Court of Appeals now has jurisdiction to hear appeals in virtually all civil and criminal cases. In most civil cases, this means that parties will no longer appeal a circuit court order or judgment by filing a petition for appeal in the Supreme Court. Instead, disappointed litigants will appeal directly to the Court of Appeals. The Supreme Court will continue to consider appeals from the Court of Appeals in its discretion through the familiar petition process existing today.

In criminal cases, defendants no longer petition for an appeal with the Court of Appeals. Their appeals instead proceed as a matter of right.ⁱⁱⁱ The Commonwealth, on the other hand, still needs to file a petition for appeal.^{iv} For its part, the Supreme Court continues to review decisions of the Court of Appeals in criminal cases by petition.^v

Under the new statutory framework, Virginia’s appellate court system looks a lot like the federal system. The Court of Appeals is now an error-correcting court and the Supreme Court grants appeals to address matters of significant precedence, novel questions of law, and issues involving the development of the law.

This transformation of the appellate jurisdiction of the Court of Appeals and Supreme Court comes with a host of new rules and procedures for appeals in Virginia. With the now-complete overhaul of Virginia’s appellate system, there is much for Virginia litigators to learn about how appeals of right will inform trial and appellate practice.

II. Ethical Implications of Appeals of Right

Preamble to the Rules of Professional Conduct: “Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.”

1. Appellate Practice Begins at Trial

Appeals begin at trial. Even if you hope to never see the inside of an appellate court, conduct at trial can impact an appeal. For example, Virginia requires that there be a contemporaneous objection to preserve an issue for appellate review. Rule 5:25; 5A:18. The failure to contemporaneously object to evidence generally forfeits the right to challenge the alleged error on appeal. *Id.* Therefore, whether error is properly raised and preserved at trial often determines whether it will be considered as a basis for reversal on appeal.

Beyond preserving error, trial counsel must keep the endgame of a legal process in mind. Being a good trial lawyer means thinking about what lies ahead – whether your client wins or loses the case. The availability of an appeal of right to the losing party should be part of the analysis for both the victor and the loser.

The new appellate landscape requires new thinking about the endgame. Prior to 2022, a prevailing party in a civil case could be reasonably confident of holding onto a favorable judgment. This is because civil litigants previously had roughly a 20% chance that the Supreme Court would hear the merits of their case. Criminal litigants faced even stiffer odds.^{vi} But now those losing litigants have a right to have an appeal decided on the merits. This means that a losing party may be more likely to appeal. It may also

mean that a prevailing party may be more amenable to a post-judgment settlement to avoid the risk of an appeal.

It also means that lawyers need to be prepared to advise their clients about the new appellate dynamics so they can make informed decisions not just about the trial, but about what happens after the judgment is entered. In short, trial lawyers need to be aware of the ethical and professional standards that apply to post-trial practice. This presentation will address the ethical implications of the new appellate process in Virginia.

2. Duties of Trial and Appellate Counsel

The trial lawyer is responsible for informing the client of the options for appeal and for filing the notice of appeal and appeal bond. The trial lawyer is also responsible for obtaining and filing the necessary transcripts or written statement of facts required to perfect the appeal. These steps are necessary to initiate the appellate process and preserve the client's right to an appeal of right.

If appellate counsel is hired or appointed before the deadlines for performing these actions, the trial lawyer should cooperate with appellate counsel in ensuring that the record is complete. For the client's benefit, trial counsel should also be open to consulting with appellate counsel to coordinate a transition of the matter to appellate counsel and ensure that appellate counsel has the materials necessary for handling the appeal.^{vii}

When appellate counsel will take over the appeal for trial counsel, there is a period of time when both counsel risk having a deadline fall through the cracks and, thus jeopardizing the appeal, unless they have carefully delineated their responsibilities. Trial and appellate counsel should coordinate their efforts to ensure that responsibility for filings is clearly assigned so that no deadlines are missed. The client's interests in ensuring that the appeal is fully prosecuted remain paramount.

After appellate counsel has assumed full responsibility for the case, it is appropriate for the trial lawyer to file a motion seeking withdrawal as counsel of record. *See* **Rule 1.16(b)**: "Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished

without material adverse effect on the interests of the client . . . “ Alternatively, in many instances trial counsel remains counsel of record together with appellate counsel, who will file a notice of appearance when the client directs.

Counsel and the client may also wish to consider a "limited scope appearance" in a civil case on certain matters, hearings or issues. Such appearances are governed by Rule 1.2 and Rule 1:5(f), which contains notice requirements to the court and the parties. Rule 1:5(f).

3. Competency

A. General Rule

Attorneys have a duty to stay informed of and follow changes in the Rules of Court and the Rules of Professional Conduct. Under **Rule 1.1**, “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

B. Competency in the Appellate Courts

Appeals of right are expected to generate more appeals, both civil and criminal. Therefore, it is reasonable to expect that lawyers who may not be familiar with appeals or have only handled a few appeals will find themselves advising their clients about the appellate process and thus be in unfamiliar territory.

Appellate practice is a minefield filled with bombs that can result in a defaulted appeal. Therefore, attorneys who are venturing into the appellate courts must take steps to educate themselves about the appellate process and read and re-read the Rules of Court applicable to appeals (Parts 5 and 5A). *See* Comment [2] to **Rule 1.1**: “A lawyer can provide adequate representation in a wholly novel field through necessary study”; and Comment [1] to **Rule 1.1**: “Expertise in a particular field of law may be required in some circumstances.” Further, a lawyer must stay abreast of any changes – statutory or rule-based – during the pendency of an appeal. This will require continuing education and vigilance. *See*

Comment [6] to **Rule 1.1**: “To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged.”

There are many steps a lawyer may take to ensure that she can handle an appeal competently. CLEs, seminars, and articles about the new appellate process in Virginia abound. Lawyers may attend programs and read articles that explain the new appellate courts and rules, as well as best practices in Virginia’s appellate courts. And, as discussed, there is no substitute for a thorough reading and re-reading of the appellate statutes and rules. Further, a lawyer may wish to join a bar association section that focuses on appellate practice. The VSB, VBA, VADA, and VTLA all have appellate sections focused on educating lawyers about the appellate process and the successful handling of appeals. Finally, a lawyer handling her first appeal, her first appeal in a long time, or a complex appeal may wish to consult with appellate counsel and/or encourage her client to retain appellate counsel who can work with trial counsel to ensure that the appeal is handled correctly. *See* Comment [2] to **Rule 1.1**: “Competent representation can also be provided through the association of a lawyer of established competence in the field in question.”

Additionally, the Clerk of the Court is a great resource for information about the appellate courts and the appellate process. The Clerks may not provide legal advice, but can provide information about the courts and their processes.

There are many resources a lawyer can tap to educate herself about appeals:

- i. The Supreme Court of Virginia’s website contains the Rules of Court, recent amendments to the Rules of Court, information about the dockets for the Court of Appeals and Supreme Court, opinions from the Court of Appeals and Supreme Court, granted petitions for appeal in the Supreme Court, a listing of the judges/justices and staff, and a way to sign up to receive updates from both courts.
- ii. The Virginia State Bar website contains the latest proposed and adopted rule changes, information about VSB appellate CLE’s, and legal ethics opinions.

C. The Consequences for a Failure to Comply with the Appellate Rules

It is critical that counsel comply with the rules for filing, perfecting, and handling an appeal because the failure to do so has far-reaching consequences for the client and counsel. The failure to

comply with Parts Five (Supreme Court) and Five A (Court of Appeals) may result in a penalty or dismissal of the appeal. In the event of a dismissal, the Supreme Court and Court of Appeals may report counsel to the Virginia State Bar.

- a. *Penalty for client for non-compliance with Rules:* The Court of Appeals and Supreme Court “may dismiss an appeal or impose such other penalty as it deems appropriate for non-compliance with these Rules.” Rule 5A:1A(a); Rule 5:1A(a).
- b. *Penalty for counsel for non-compliance with Rules:*
 - i. “If an attorney’s failure to comply with these Rules results in the dismissal or an appeal, th[e] [Court of Appeals or Supreme Court] may report the attorney to the Virginia State Bar in accordance with **Rule 8.3** of the Rules of Professional Conduct.” Rule 5A:1A(b); Rule 5:1A(b).
 - ii. “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.” **Rule 8.3(a)**.
 - The dismissal of an appeal is an isolated violation that could be indicative of a pattern of misconduct. *See* Comment [1] to **Rule 8.3**: “An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.”
 - Further, the client may not always appreciate that dismissal resulted from an error committed by the attorney, therefore necessitating the report. *See* Comment [1] to **Rule 8.3**: “Reporting a violation is especially important where the victim is unlikely to discover the offense.”

4. Advising the Client About Appellate Rights

A. General Rule

Preamble to Rules of Professional Conduct: “As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications.”

B. The Duty to Advise of Appellate Rights

A lawyer must advise her client of the client’s appellate rights. Otherwise the client may lose the opportunity to appeal an adverse judgment. “A lawyer shall explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” **Rule 1.4(b)**. In the context of a possible appeal, a lawyer should explain to the client the right to an appeal of right, the nature and timing of the appellate process, the potential outcomes of an appeal (final judgment, a new trial, a remand, etc.), the likelihood of success, and other matters pertinent to a decision whether to exercise an right to an appeal.

The lawyer’s duty of communication also includes “the duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client’s goals than the initial process chosen.” *See* Comment [1] to **Rule 1.4**. Through a pilot mediation program, appellate mediation is available after an appeal is noted. The appellate court will advise counsel of the availability of mediation and that such mediation will include a 30 stay of the appellate deadlines to permit an opportunity for settlement. Lawyers should discuss the availability and benefits of mediation with their clients.

C. Must I File an Appeal Because My Client Now Has an Appeal of Right?

As discussed, the lawyer should communicate the availability of an appeal with her client so the client may make an informed decision about whether to pursue an appeal. That communication should include a discussion about the likelihood of success. But what if the lawyer has concluded that there are

not meritorious grounds for an appeal? An appeal is not frivolous simply because the lawyer believes that the client's position ultimately will not prevail.

“The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse the legal procedure.” Comment [1] to **Rule 3.1**. This comment sums up the tension between the lawyer's role as zealous advocate for the client and the lawyer's duties to the tribunal as an officer of the court. That tension will call upon the lawyer's skills to thoroughly advise the client about the merits of an appeal and the consequences of filing (or not filing) an appeal.

The client's wishes, after consultation with the lawyer, will control unless the course directed by the client is prohibited (as discussed below). Under **Rule 1.2(a)**, “[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.” Further, “[t]he client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations.” *See* Comment [1] to **Rule 1.2(a)**.

Keep in mind that a client's mental illness may affect how an attorney approaches communication and decision-making with the client. “In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to **Rule 1.14**.” *See* Comment [4] to **Rule 1.2**.

If the lawyer concludes that an appeal would be frivolous, she should explain that conclusion to the client. A lawyer should advise the client that a meritless appeal will subject both the client and the lawyer to potential sanctions. *See* **Rule 3.1**; Va. Code § 8.01-271.1.^{viii} A lawyer should review and, where appropriate, discuss her ethical obligations with the client. Those obligations make the following clear: (1) the lawyer may not file a frivolous appeal (**Rule 3.1**) and (2) the lawyer may not file an appeal when it would serve only to harass or maliciously injure the opposing party (**Rule 3.4**):

- **Rule 3.1:** “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”

- **Rule 3.4:** “A lawyer shall not . . . [f]ile a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.”

When a lawyer’s judgment and the client’s wishes conflict, the lawyer must ascertain whether their client’s wishes are “rational and stable.” If so, “the client’s decision controls, even if it is contrary to the lawyers’ professional judgment and advice.” **LEO 1737** (note: this LEO addresses representation in the penalty phase of a capital-murder trial).

In a criminal case, a court-appointed attorney must file an appeal when directed to do so by an indigent client, even when such appeal is deemed frivolous by the attorney. LEO 1880; *see also* Rule 5A:12(h) (procedure of an Anders appeal).

III. Appellate “Specialists” or “Experts”

A. General Rule

Under **Rule 7.1**, “[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”

B. Limitations on claim to be an appellate specialist or expert

So, you have now successfully handled an appeal or two. May you now hold yourself out to the public as an appellate specialist? The parameters of what a lawyer may say about her skills in a particular field of law are covered in the Rules of Professional Conduct. The general rule is that a lawyer may only claim to be a specialist or expert if that representation is not false, can be factually substantiated, and is not misleading. Generally, such claims are scrutinized by the Bar and reviewed under the following principles:

Comment [4] to **Rule 7.1** provides:

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who is a specialist in a particular field of law by

experience, specialized training, or education, or is certified by a named professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.

LEO 1750 provides:

Rule 7.1 permits a lawyer to hold herself out as limiting or concentrating the lawyer’s practice in a particular area or field of law as long as that is a true and accurate statement. Comment 4 to Rule 7.1 (formerly comment 1 to Rule 7.4) provides that a lawyer can generally state that she is a “specialist,” practices a “specialty,” or “specializes in” particular fields, as long as the statement is not false or misleading in violation of Rule 7.1. The 2017 amendments to the Rules removed the longstanding requirement that a lawyer who claims to be certified as a specialist include a disclaimer stating that no certifying organization has been recognized by the Supreme Court of Virginia. Instead, the lawyer is required to identify the name of the organization that purportedly conferred the certification, so that a prospective client or other member of the public can verify the validity of the certification and the criteria for conferring the certification. Any claim of certification as a specialist is still subject to the requirement that it is not false or misleading – the certifying organization must undertake some bona fide evaluation of lawyers rather than just awarding the certification to anyone who pays a required fee or joins an organization.

Aside from claims of being an “expert” or “specialist,” lawyers are permitted to represent to the public that they limit or focus their practice on appeals provided that this representation is accurate and not misleading. Such a claim must be factually supported by the lawyer’s actual practice. In short, in any public communication about the lawyer’s skills, a lawyer should ensure that her representations are accurate and not misleading.

ⁱ S.B. 1261, Va. Gen. Assem. (1st Spec. Sess. 2021). The final version of the bill can be found here: <http://leg1.state.va.us/cgi-bin/legp504.exe?212+ful+CHAP0489>.

ⁱⁱ The Court of Appeals previously had jurisdiction to hear only a limited category of cases as a matter of right: workers’ compensation, divorce/family law, and administrative cases.

ⁱⁱⁱ Va. Code § 17.1-406(A) (eff. 1/1/2022); Va. Code § 17.1-407(B) (eff. 1/1/2022).

^{iv} Va. Code § 17.1-406(A) (eff. 1/1/2022).

^v Va. Code § 8.01-670 (eff. 1/1/2022).

^{vi} In 2019, the Supreme Court of Virginia granted only 16% of the petitions for appeal in civil cases. That same year, the Court of Appeals of Virginia granted only 12% of the criminal petitions filed. *Virginia State of the Judiciary Report 2019*, Office of the Executive Secretary for the Supreme Court of Virginia (available at: https://www.vacourts.gov/courtadmin/aoc/judpln/csi/sjr/2019/state_of_the_judiciary_report.pdf).

^{vii} In a habeas corpus proceeding that alleges inadequate assistance of trial counsel, the relationship between appellate counsel and trial counsel presents unique ethical concerns and challenges. In a habeas proceeding, trial counsel is a witness, not a party-opponent. Trial counsel has a duty to his former client and the court to honestly and fully disclose the trial strategy and, if applicable, any known oversight, failure or impairment which impacted the client's case. Trial counsel may not willfully conceal errors.

^{viii} Va. Code § 8.01-271.1: "The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."



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Managing the Insurance Relationship: Making Sure Your Coverage Is There When You Need It

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Managing the Insurance Relationship; Making Sure Your Insurance Coverage Is There When You Need It.

Guy M. Harbert, III
Gentry Locke Seminar
Roanoke – September 16, 2022
Richmond – September 28, 2022

I. **How late is too late? When to give notice to your insurance company of an “event.”**

A. **Policy Language**

1. A typical Virginia Homeowners policy will contain the following language:¹

after an accident or occurrence, the insured must:

give written notice to us or our agent as soon as is practical, which sets forth:

- (1) the identity of the policy and the insured;
- (2) reasonably available information on the time, place and circumstances of the accident or occurrence; and
- (3) names and addresses of any claimants and witnesses.

Vermont Mut. Ins. Co. v. Everette, 875 F. Supp. 1181, 1187 (E.D. Va. 1995).

2. Automobile and Commercial Liability Policies have similar language.
3. “Claims made” policies, such as LPL policies, go by different rules.

B. **General Rules**

1. **Interpretation and Construction** - Applying Virginia’s “plain meaning rule” of insurance policy interpretation and construction,² Virginia courts have found such notice provisions to be unambiguous, reasonable, and enforceable. State

¹ While actual language can vary, this outline refers to common terms found in insurance policies.

² In Virginia “an insurance policy is a contract to be construed in accordance with the principles applicable to all contracts.” Seabulk Offshore, Ltd. v. Amer. Home Assur. Co., 377 F.3d 408, 419 (4th Cir. 2004) (citing Graphic Arts Mut. Ins. Co. v. C. W. Warthen Co., 240 Va. 457, 397, S.E.2d 876, 877 (1990). “As in the case of any other contract, the words used are given their ordinary and customary meaning when they are susceptible of such construction.” Salzi v. Virginia Farm Bureau Mut. Ins. Co., 263 Va. 52, 556 S.E. 2d 758, 760 (2002) (quoting Graphic Arts, 397 S.E. 2d at 877. “[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.” Blue Cross and Blue Shield of Virginia v. Keller, 248 Va. 618, 626, 450 S.E.2d 136, 140 (1994); see also Pilot Life Ins. Co. v. Crosswhite, 206 Va. 558, 561, 145 S.E.2d 143, 146 (1965).

Farm Mut. Auto Ins. Co. v. Porter, 221 Va. 592, 597, 272 S.E.2d 196 (1980); State Farm Mut. Auto. Ins. Co. v. Douglas, 207 Va. 265, 268, 148 S.E.2d 775, 777 (Va. 1966); Mason & Dixon, Inc. v. Casualty Co., 199 Va. 221, 224, 98 S.E.2d 702, 704 (Va. 1957).

2. **Purpose for the requirement** - “The rationale behind the rule requiring compliance with the notice provision is compelling. Absent the requirement of prompt notice by the insured of all accidents and occurrences which could implicate the policy, the insurer is at the mercy of its insured’s willingness to reveal such potential claims. As the Virginia Supreme Court has made plain, notice provisions are designed to afford the insurer the opportunity to make a timely investigation of all circumstances surrounding the accident and to prepare an adequate defense if necessary on behalf of the insured.” Atlas Ins. Co. v. Chapman, 888 F. Supp. 742, 745 (E.D. Va. 1995) aff’d, 92 F.3d 1176 (4th Cir. 1996), citing North River Ins. Co. v. Gourdine, 205 Va. 57, 62, 135 S.E.2d 120 (1964).
3. **Compliance Required** - Compliance with the notice provision is a condition precedent to coverage which, “if not complied with bars recovery under the policy”. State Farm Mut. Auto. Ins. Co. v. Douglas, 207 Va. 265, 268 148 S.E.2d 775, 777 (1966); Atlas Ins. Co. v. Chapman, 888 F. Supp. 742 (E.D. Va. 1995) aff’d, 92 F.3d 1176 (4th Cir. 1996); Vermont Mut. Ins. Co. v. Everette, 875 F. Supp. 1181, 1187 (E.D. Va. 1995); Norfolk & W. Ry. v. Accident & Casualty Ins. Co., 796 F. Supp. 925, 928 (W.D. Va. 1992); Craig v. Dye, 259 Va. 533, 537, 526 S.E.2d 9, 12 (2000); State Farm Fire and Casualty Co. v Walton, 244 Va. 498, 504, 432 S.E.2d 188, 192 (1992); Liberty Mut. Ins. Co. v. Safeco Ins. Co. of America, 223 Va. 317, 323, 288 S.E.2d 469, 473 (1982); State Farm Mut. Auto. Ins. Co. v. Porter, 221 Va. 592, 597, 272 S.E.2d 196, 199 (1980).
4. **Burden of Proof** – Because compliance with the notice provision is a condition precedent to coverage, the insured has the initial burden of establishing timely and reasonable notice was given. Erie Ins. Exch. v. Meeks, 223 Va. 287, 291, 288 S.E.2d 454, 456-57 (1982). However, once the insured establishes a *prima facie* case, the ultimate burden of persuasion shifts to the insurer. Id.; see also, State Farm Mut. Auto. Ins. Co. v. Porter, 221 Va. 592, 599, 272 S.E.2d 196, 200 (Va. 1980); North River Ins. Co. v. Gourdine, 205 Va. 57, 64, 135 S.E.2d 120, 125 (Va. 1964).

C. How and When Notice Is to Be Given

1. **To whom notice must be given.** Notice must be given to the insurer or its agent. Va. Code § 38.2-1801 – “For the purpose of notice of claim or suit, the agent or producer of record shall be deemed to be the agent of the insurer.”
2. **The trigger.** The duty is triggered by the occurrence of “an incident which was sufficiently serious to lead a person of ordinary intelligence and prudence to believe that it might give rise to a claim for damages covered by the policy.”

State Farm Fire and Casualty Co. v Walton, et al., 244 Va. 498, 504, 432 S.E.2d 188, 192 (1992), quoting Black's Law Dictionary, 10 80 (6th Ed. 1990).

3. **Substantial Compliance Required.** Although many policy provisions purport to require detailed information be given, the Virginia courts have held that “substantial compliance” will suffice. Erie Ins. Exchange v. Meeks, 223 Va. 287, 290, 288 S.E.2d 454, 456 (1982).
4. **Timing.** The requirement that notice be given “as soon as practicable” “means that notice must be give within a reasonable time after the [accident]”. State Farm Fire and Casualty Co. v. Scott, 236 Va. 116, 120, 372 S.E.2d 383, 386 (1988).
 - a. Where there is a delay in giving notice, the reasonableness of that delay must be judged by consideration of the “facts and circumstances in each particular case.” State Farm Mut. Auto. Ins. Co. v. Douglas, 207 Va. 265, 267, 148 S.E.2d 775, 777 (1966); see also, Liberty Mut. Ins. Co. v. Safeco Ins. Co., 223 Va. 317, 323, 288 S.E.2d 469, 472 (1982). North River Ins. Co. v. Gourdine, 205 Va. 57, 135 S.E.2d 120, 124 (1964) (such provisions “only require that insured act within a reasonable time, considering all of the circumstance”); State Farm Fire & Cas. Co. v. Scott, 236 Va. 116, 372 S.E.2d 383, 385, 5 Va. Law Rep. 552 (Va. 1988).
 - b. “What may be a reasonable time under some conditions may be unreasonable under certain other conditions,” State Farm Mut. Auto. Ins. Co. v. Douglas, 207 Va. 265, 267, 148 S.E.2d 775, 777 (1966).
 - c. This case by case approach renders the determination of whether there has been compliance with the notice provision:

... an inexact science. The Virginia Supreme Court has affirmed trial court rulings that delays of 51 days and 173 days constituted late notice, barring the insured from recovery under the policies. However, the court also affirmed a finding that notice given 75 days after an occurrence was not late notice. Obviously, the insured should give notice as soon as possible.

James W. Barkley, H. Carter Redd and Alexander H. Slaughter, “Commercial General Liability Insurance,” Insurance Law in Virginia, Chapter 16, Virginia CLE Publications, 2009, p. 456.³

5. In Nationwide Mut. Fire Ins. Co. v. Overstreet, 568 F. Supp. 2d 638, 644 (E.D. Va. 2008) the court provided an excellent overview of the Virginia case law,

³ The cases referred to in the quoted text are: Lord v. State Farm Mut. Auto. Ins. Co., 224 Va. 283, 288, 295 S.E.2d 796, 799-800 (1982) (delay of 173 days resulted in untimely notice); Liberty Mut. Ins. Co. v. Safeco Ins. Co., 223 Va. 317, 324, 288 S.E.2d 469, 473 (1982) (delay of 51 days resulted in untimely notice); State Farm Fire and Cas. Co. v. Scott, 236 Va. 116, 123-24, 372 S.E.2d 383, 387 (1988) (delay of 75 days did not result in untimely notice).

noted what appeared to be inconsistencies amongst the various opinions, and developed “six consistent principles that serve to harmonize the many cases.”

- a. Principle #1 - “Whether notice was given ‘as soon as practicable’ is normally a question of fact for the jury.” Id. at 644.
- b. Principle #2 – “Where there are extenuating circumstances for the delay, the jury may consider whether these circumstances furnish a justification or excuse for the delay.” Id.
- c. Principle # 3 – “An insured’s contention that a delay was caused by the insured’s mistaken, subjective belief that his policy would not be implicated is, as a matter of law, no excuse or justification for the delay; instead, the delay must be evaluated from an objective point of view.” Id. at 645.
- d. Principle #4 – “Even absent a justification or extenuating circumstances for a delay, it remains a jury issue whether notice was given “as soon as practicable” where an insured’s notice to the insurer was delayed by a relatively short amount of time. Id.
- e. Principle #5 - “In some circumstances, notice may be so long delayed as to violate an insurance policy’s notice provision as a matter of law.” Id. at 646.
- f. Principle # 6 - “An insurer need not demonstrate that it was prejudiced by the insured’s delay in providing notice, but lack of prejudice may be considered by the jury if the reasonableness of the delay is otherwise a jury question.” Id. at 647.

6. Prejudice to the Insurer.

- a. Homeowners Insurance – As indicated above, because compliance is a condition precedent to the existence of coverage, as a general rule an insurer need not establish that its rights have been prejudiced by the late notice. Liberty Mut. Ins. Co. v. Safeco Ins. Co., 223 Va. 317, 323, 288 S.E.2d 469, 473 (1982); see also, Erie Ins. Exch v. Meeks 223 Va. 287, 288 S.E.2d 454 (1982); State Farm Mut. Auto. Ins. Co. v. Porter, 221 Va. 592, 597-98, 272 S.E.2d 196, 199 (1980). This sets Virginia apart from the majority of other states, which require proof of prejudice before the carrier may deny coverage for late notice.
- b. Automobile Insurance – the provisions of 38.2-2204(D), imposing a prejudice requirement for non-cooperation and failure to forward suit papers, is inapplicable to requirement that insured give notice of occurrence: “the General Assembly intended [the statute] apply only to the ‘cooperation’ clause of the policy and that [t]he giving of notice of the accident, the giving of notice of suit, and the forwarding of suit papers were conditions precedent to coverage under the policy, requiring substantial compliance by the insured.” Erie Ins. Exch. v. Meeks, 223 Va. 287, 290,

288 S.E.2d 454, 456 (1982) quoting State Farm Mut. Auto. Ins. Co. v. Porter, 221 Va. 592, 599, 272 S.E.2d 196, 200 (1980).

II. Who is an “Insured” under your policy.

A. Policy Language – Typical Homeowners Policy:

1. “We” insure “you”
2. “‘We’, ‘us’ and ‘our’ mean the Company shown in the *Declarations*.”
3. “‘you’ and ‘your’ mean the person or persons shown as the “Named Insured” in the *Declarations*. If a ‘Named Insured’ shown in the *Declarations* is a human being, the “‘you’ and ‘your’ include:
 - a. a “spouse,” “a party to a civil union,” “a domestic partner” or “a person in a substantially similar legal relationship with a ‘Named Insured.’”
 - b. provided
 - i. “such relationship is recognized and valid in the state where, and at the time when, the legal relationship was established” and
 - ii. “so long as the person in the above relationship resides primarily with that ‘Named Insured.’”
4. “*insured*” means:
 - a. “‘you’”
 - b. “‘your relatives;’” and
 - c. any other person under the age of 21 in the care of a person described above.”
 - d. for liability coverage – “the person or organization legally responsible for animals or watercraft to which this policy applies.”
5. “*relative*” means any person related to *you* by:
 - a. blood;
 - b. adoption;
 - c. marriage; or
 - d. civil union, domestic partnership, or other substantially similar legal relationship that is recognized and valid in the state where, and at the time when, the legal relationship was established;and who resides primarily with *you*.

B. What does it mean to “reside primarily with you?”

1. “The meaning of ‘resident’ or ‘residence,’ a prolific source of litigation, depends upon the context in which it is used. Here we must interpret the meaning of ‘resident,’ when followed by ‘of the same household.’ The word ‘household’ denotes a settled status; a more settled or permanent status is indicated by ‘resident of the same household’ than would be indicated by ‘resident of the same house or apartment.’” State Farm Mutual Automobile Ins. Co. v. Smith, 206 Va. 280, 285, 142 S.E.2d 562, 565-566 (1965). See also Furrow v. State Farm, 237 Va. 77, 80, 375 S.E.2d 738, 740 (1989).
2. the term “household” has been defined as
 - a. “collective body of persons living together within one curtilage, subsisting in, and directing their attention to a common object, the promotion of their mutual interests and social happiness.” USAA v. Hensley, 251 Va. 177, 181, 465 S.E.2d 791, 794 (1996). See also Allstate Insurance Co. v. Patterson, 231 Va. 358, 344 S.E.2d 890 (1986); GEICO v. Allstate, 235 Va. 542, 369 S.E.2d 181 (1988).
 - i. In 1987 the United States Supreme Court defined “curtilage” as “the area immediately surrounding a residence that ‘harbors the “intimate activity associated with the sanctity of *a man’s home* and the privacies of life.’” United States v. Dunn, 480 U.S. 294 (1987) (emphasis added)
 - b. “The term ‘household’ embraces a collection of persons living together as a single group with one head under one roof, a unit of permanent and domestic character.” State Farm v. Furrow, 237 Va. 77, 80, 375 S.E.2d 738, 740 (1989).
 - i. There would seem to be reason to question whether “ordinary” people applying the “plain meaning” of this word would think in terms of there being a single head to every “household”.
 - c. Fortunately, the courts have provided us with some more practical guidance. In State Farm Mut. Auto. Ins. v. Bowles, 2011 U.S. Dist. LEXIS 89953, 4-5 (W.D. Va. 2011), the court analyzed many of the past Virginia court decisions and concluded that a number of “non-dispositive factors” should be considered, including the extent to which the person seeking coverage: (1) intends to be a permanent resident of the household; (2) has regular, versus erratic contacts with the household; (3) actually stays at the residence; (4) maintains a close, or strained relationship with other members of the household; (5) pays rent, board, or otherwise contributes to household expenses or maintenance; (6) keeps personal property at the residence; (7) receives substantial mail at the residence; and (8) maintains a room or other private space in the residence. The court further noted, “[t]he regularity and quality of contacts ... are the most significant factors for determining residence in a household.”

- i. The cases cited by the court include: Phelps v. State Farm Mut. Auto. Ins. Co., 245 Va. 1, 426 S.E.2d 484, 9 Va. Law Rep. 713 (1993); Allstate Ins. Co. v. Patterson, 231 Va. 358, 344 S.E.2d 890, 893 (1986); State Farm Mut. Auto Ins, Co, v. Smith, 206 Va. 280, 142 S.E.2d 562, 566 (Va. 1965) overruled on other grounds by State Farm v. Jones, 238 Va. 467, 383 S.E.2d 734, 6 Va. Law Rep. 624 (Va. 1989); Farmers Insurance Exchange v. Saunders, 78 Va. Cir. 74 (2008); Dawson v. Auto-Owners Ins. Co., 2008 U.S. Dist. LEXIS 33571, 2008 WL 1836506, at *4 (W.D. Va. Apr. 23, 2008).
 - ii. See also, Bryant v. Barker, 2017 U.S. Dist. LEXIS 78111 (W.D. Va. 2017).
- d. If these are indeed the controlling factors, it is probably true that this year’s class of high school graduates will likely remain “residents” of their parents’ “households” until there is some manifestation of intent, either expressly (by some declaration of intentions) or impliedly (by actions taken), to reside elsewhere.
- i. A child who goes to college, or any similar pursuit, but maintains a room at his or her parents’ house, intends to return there (or at least has no other planned residence) upon completion of that pursuit, and does not change address for purposes of drivers’ license, voter registration, taxes, etc., probably remains a resident of the household.
 - ii. However, a manifestation of intent to the contrary will result in a holding that the child is not a resident of the household, and therefore not an insured. See USAA v. Hensley, 251 Va. 177, 465 S.E.2d 791 (1996) (Child left parents’ home in Saudi Arabia and lived with relatives in Virginia while attending college. He had no intention of returning the Saudi Arabia, and the court concluded he was a resident of the U.S. relatives’ household, not that of his parents); Phelps v. State Farm, 245 Va. 1, 426 S.E.2d 484 (1993) (Daughter left mother’s household to attend college after being told by mother that, once she turned 18 she was “on her own. Daughter showed no intention of ever returning. Court found she was not a resident of her mother’s household).
 - iii. Once such an intent is manifested, consideration should be given to obtaining separate policies of insurance for that child.

III. Other Common Holes in Coverage

A. ATVs, Mini-bikes and Lawnmowers – when is a motor vehicle not a “motor vehicle?”

1. Policy Language.

- a. Automobile liability policies are generally restricted to “automobiles,” and usually do not cover an owned auto that is not listed on the policy.

b. Homeowners policies

i. The “motor vehicle” exclusion negates coverage for “*bodily injury or property damage* arising out of the ownership, maintenance, use, loading or unloading of ... a *motor vehicle* owned or operated by or rented or loaned to any *insured*.”

ii. “Motor vehicle is defined as:

- a. a motorized land vehicle designed for travel on public roads or subject to motor vehicle registration ...
- b. a trailer or semi-trailer designed for travel on public roads and subject to motor vehicle registration ...
- c. a motorized golf cart, snowmobile, motorized bicycle, motorized tricycle, all-terrain vehicle or any other similar type equipment owned by an *insured* and designed or used for recreational or utility purposes off public roads, while off an *insured location*.

iii. “Insured location” means

a. the **residence premises**;

[the “residence premises” is “a. the one, two, three or four-family dwelling, other structures and grounds; or b. that part of any other building; where *you* reside and which is shown in the *Declarations*”]

- b. that part of any other premises, other structures and grounds used by you as a residence ...
- c. any premises used by you in connection with the premises included in [a or b] above;
- d. any part of a premises not owned by an **insured** but where an **insured** is temporarily residing;
- e. land owned by or rented to an **insured** on which a one or two family dwelling is being constructed as a residence of an **insured**;
- f. individual or family cemetery plots or burial vaults owned by an **insured**;
- g. any part of a premises occasionally rented to an **insured** for other than **business** purposes;
- h. vacant land owned by or rented to an **insured** ...

- i. farm land (without buildings), rented or held for rental to others ...
2. ATVs and similar vehicles change status depending upon whether they are on or off the “insured location.”
3. If you have ATVs, get an ATV policy.

B. Water Damage

1. Policy language: “We will not pay for any loss ... that consists of, or is directly and immediately caused by ...

- a. *Water*, meaning:

- (1) flood;
 - (2) surface water.
 - (3) waves
 - (4) tides or tidal water;
 - (5) overflow of any body of water
 - (6) spray from any of the items (1) through (5) described above, all whether driven by wind or not;
 - (7) water or sewage from outside the *residence premises* plumbing system that enters through sewers or drains, or water or sewage that enters into and overflows from within a sump pump, sump pump well, or any other system designed to remove subsurface water that is drained from the foundation area; or
 - (8) water or sewage below the surface of the ground, including water or sewage that exerts pressure on, or seeps or leaks through a building structure, sidewalk, driveway, swimming pool, or other structure.

However, we will pay for any accidental direct physical loss by fire, explosion, or theft resulting from water, provided the resulting loss is itself a loss insured.

- b. seepage or leakage of water, steam, or sewage that occurs or develops over a period of time:
 - (1) and is: a) continuous; (b) repeating; (c) gradual; (d) intermittent; (e) slow; or (f) trickling; and
 - (2) from a:

- (a) heating, air conditioning, or automatic fire protective sprinkler system;
- (b) household appliance; or
- (c) plumbing system, including from, within or around any shower stall, shower bath, tub installation, or other plumbing fixture, including their walls, ceilings, or floors.

We also will not pay for losses arising from condensation or the presence of humidity, moisture, or vapor that occurs or develops over a period of time;

2. Considerable disagreement in the case law as to just what is and is not covered. For example, a simple term such as “water below the surface of the ground” has been the cause of much litigation: Does water leaking from a broken underground pipe qualify?
 - A. Yes – any intrusion by underground water is excluded, regardless of the source. Nabani Twin Stars, LLC v. Travelers Cos., 497 F. Supp.3d 1011 (D. N.M. 2020); Midwest Family Mut. Ins. Co. v. Hari Om Rudra Hotel, LLC, 416 F. Supp.3d 853 (W.D. Mo. 2019); Colella v. State Farm Fire & Cas. Co., 407 Fed. App’x. 616 (3d Cir. 2011); Harden-Doss v. County Mut. Ins. Co., 2015 U.S. Dist. LEXIS 181736 (N.D. Okla. 2015); Bilotto v. Allied Prop. & Cas. Ins. Co., 79 F. Supp. 3d 660 (W.D. Tex. 2014); Ark. Valley Drilling, Inc. v. Cont’l. W. Ins. Co., 703 F. Supp.2d 1232 (D. Colo. 2010); Platek v. Town of Hamburg, 3 N.Y.S.3d 312 (2015); Harleysville Ins. Co. of N.Y. v. Potamianos Props., LLC. 969 N.Y.S.2d 342 (2013); Thompson v. State Farm Fire & Cas. Co., 165 P.3d 900 (Colo. App. 2007); Carver v. Allstate Ins. Co., 76 S.W.3d 901 (Ark. App. 2002).
 - b. No – the exclusion is ambiguous and should be interpreted as applying only to apply only to situations where the water intrusion originates from a natural source, and not a plumbing leak or broken water main. See, e.g., UI, 4 F. Supp. 2d 1288 (D. N.M. 1998); UI, 542 S.E.2d 475 (W. Va. 2000); Rankin v. Generali-U.S. Branch, 986 S.W.2d 237 (Tenn. App. 1998); Wyatt v. Northwester Mut. Ins. Co., 304 F. Supp. 781 (D. Minn. 1969); Barash v. Ins. Co. of N. Amer., 451 N.Y.S.2d 603 (1982); Adrian Associates, General Contractors v. National Surety Corp., 638 S.W.2d 138 (Tex. App. 1982). The rationale is that the exclusion for sewer backup clearly references a manmade water source, and the exclusions for surface water, etc., clearly reference natural sources, but the groundwater exclusion is ambiguous in that it references neither yet the carriers would have it encompass both.

3. The best way to avoid this “hole” –
 - a. Purchase drain and sewer backup insurance.
 - b. Purchase flood insurance if you can – it may cover surface water losses that result from something other than what is traditionally thought of as a “flood.”
 - b. Practice good maintenance – many of the exclusions are aimed at losses that result over time due to leaks caused by bad maintenance.

C. Umbrella Coverage – Personal Protection from “Personal Injury” claims

1. The personal Umbrella Policy affords two primary benefits.
2. First, there is an additional amount of liability coverage on top of your Homeowners, Automobile and Boat liability policies.
3. Second, the Umbrella Policy provides coverage for “personal injuries” that are *not* covered by the underlying policies:

“*personal injury*” means injury other than *bodily injury* arising out of one or more of the following offenses:

- a. false arrest, false imprisonment, wrongful eviction, wrongful detention of a person;
 - b. abuse of process, malicious prosecution;
 - c. libel, slander, defamation of character; or
 - d. invasion of a person’s right of private occupancy by physically entering into that person’s personal residence.
4. Coverage for such “personal injuries” has been broadly interpreted. For example, the defamation coverage will extend not only to traditional claims of libel and slander, but also to claims for infliction of emotional distress, Billings v. Commerce Ins. Co., 936 N.E.2d 408 (Mass. 2010), Mich. Mun. Risk Mgmt. Auth. v. State Farm Fire and Cas. Co., 559 F.Supp.2d 794 (E.D. Mich 2008), or even breach of contract, Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co., 545 N.E.2d 1156 (1989), for spreading rumors or releasing disparaging information.
 - a. “The process [of determining coverage] is not one of looking at the legal theory enunciated by the pleader but of ‘envisaging what kinds of losses may be proved as lying within the range of the allegations of the complaint, and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the

terms of the policy.” Billings v. Commerce Ins. Co., 936 N.E.2d 408 (Mass. 2010),

- b. “The duty to defend [under the policy] cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party’s allegations to analyze whether coverage is possible. In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured’s favor.” Mich. Mun. Risk Mgmt. Auth. V. State Farm Fire and Cas. Co., 559 F.Supp.2d 794 (E.D. Mich 2008), quoting American Bumper & Mfg. Co. v. Hartford Fire Ins. Co., 550 N.W.2d 475, 481 (Mich. 1996).



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Attorneys

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What Every Lawyer Needs to Know About Cybersecurity and Data Privacy

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WHAT EVERY LAWYER NEEDS TO KNOW ABOUT CYBERSECURITY AND DATA PRIVACY

Christen C. Church
Andrew “Drew” E. Hayhurst
Gentry Locke Seminar
Roanoke – September 16, 2022
Richmond – September 28, 2022

“Cybersecurity Trends: 25% of Law Firms Have Been Breached”
- Attorney At Work, May 22, 2022

“Amid BigLaw Data Attacks, Breaches Surge For Smaller Firms”
- LAW360 June 15, 2022

“[Holland & Knight] Sued Over \$3M wire transfer to fraudster’s account”
- ABA Journal July 23, 2020

Security has always been important to attorneys. Our reputation is arguably our most valuable asset, and maintaining the confidentiality of client information is a priority. Adding the element of technology does not change our duty as lawyers to protect the information with which we are entrusted. What does change is that now someone can cause extraordinary harm in a short amount of time, barring access to files and records, compromising client data, and/or altering information and the content of communications.

When it comes to unauthorized access, use or disclosure of sensitive information, your obligations (including notification requirements) related to an incident will rarely turn on the intent behind the actions. Cybersecurity incidents resulting from mistakes and inadvertent disclosures may have no malicious intent but they can still cause harm to the individuals whose information was compromised and the companies experiencing the incident.

In response, ethical duties, data privacy and security laws, and contractual requirements are increasingly enhancing burdens – including potential liability – on attorneys and law firms.

I. What is Cybersecurity?

“Cybersecurity” is defined in Merriam-Webster as “measures taken to protect a computer or computer system (as on the Internet) against unauthorized access or attack.”

We still struggle to identify exactly what is required by a particular individual or company: cybersecurity measures that are reasonable and would be required for a 500 lawyer law firm with a 20 person IT department are not necessarily required for a 1-5 person law firm without an IT department. That said, some measures are universally required.

Over the past few years (and without losing sight of the importance of having preventative measures in place) the information technology industry began to realize that absolute prevention is not currently possible. Innovation began to focus on identifying cybersecurity incidents, mitigating the harm, and assisting affected companies and individuals in responding to these incidents.

II. Examples of Cybersecurity Related Laws, Regulations and Rules Applicable to Attorneys

The laws, regulations and rules that will be applicable during a cybersecurity incident may be influenced by a number of factors including: what information is involved, the form of the information involved (electronic, paper, encrypted, etc.), where the individuals reside, where the information is held, in what capacity the law firm is acting and who the law firm is representing, and the nature of any incident.

1. Virginia Code 59.1-575 et seq. Virginia Consumer Data Protection Act (“VCDPA”)
 - Law is scheduled to go into effect on January 1, 2023.
 - The VCDPA has a number of similarities, as well as a number of differences, from the European Union’s General Data Protection Regulation (GDPR) and the California Consumer Privacy Act (CCPA).
 - Targeted toward entities that conduct business in Virginia or produce products or services that are targeted to Virginia residents (but contains limiting thresholds for revenue and number of consumers whose data is controlled or processed by the business).
 - Explicitly excludes the personal data of users acting in a “commercial or employment context”.
 - Considers the “sale of personal information” to be “the exchange of personal data for **monetary** consideration...” which is much narrower than the exchange of value concept found under the CCPA.
 - Contains substantial exceptions at the entity-level (does not apply to many government entities or entities governed by national/sector-specific laws) and data level (will not apply to datasets governed by national/sector-specific laws).
 - The VCDPA will create rights and obligations:
 1. Rights.
 - a. **Right to access.** Consumers have the right “to confirm whether or not a controller is processing the consumer's personal data and to access such personal data.”
 - b. **Right to correct.** Consumers have the right to correct inaccuracies in their personal data.
 - c. **Right to delete.** Consumers have the right to delete personal data provided by or obtained about the consumer.
 - d. **Right to data portability.** Consumers have the right to obtain a copy of the consumer’s personal data that the consumer previously provided to the controller.

- e. **Right to opt out.** Right to opt out of the processing of the personal data for purposes of targeted advertising, the sale of personal data and profiling in advancing decisions that produce legal or similarly significant effects concerning the consumer.
 - f. **Right to appeal.** The right to appeal a business’s denial to act within a reasonable time.
2. Obligations.
- a. **Limits on collection.** Obligation to limit the collection of data to that which is “adequate, relevant and reasonably necessary in relation to the purposes for which the data is processed.”
 - b. **Limits on use.** Obligation to ‘not process personal data for purposes that are neither reasonably necessary to nor compatible with the disclosed purposes for which such personal data is processed, as disclosed to the consumer, unless the controller obtains the consumer’s consent.”
 - c. **Technical safeguards.** Obligation to “establish, implement, and maintain reasonable administrative, technical, and physical data security practices to protect the confidentiality, integrity, and accessibility of personal data.”
 - d. **Data protection assessments.** Obligation to conduct “data protection assessments” that evaluate the risks associated with processing activities.
 - e. **Data processing agreements.** Requires that processing activities undertaken by a processor on behalf of a controller be governed by a data processing agreement.
 - f. **Privacy policy.** Obligates controllers to provide consumers with a privacy policy stating:
 - i. The categories of personal data processed by the controller.
 - ii. The purpose for processing personal data.
 - iii. How consumers may exercise their consumer rights and appeal a controller’s decision regarding the consumer’s request.
 - iv. The categories of personal data that the controller shares with third parties, if any.
 - v. The categories of third parties, if any, with whom the controller shares personal data.
- Law lacks a private right of action and enforcement falls solely to the State Attorney General.
 - Once notified, entity will have a thirty (30) day cure period to cure any violation found by the State AG.
 - Failure to cure may subject entity to fine of \$7,500 per violation/piece of data violating the law.

2. Virginia Code §18.2-186.6¹. Breach of personal information notification

Excerpts:

“Breach of the security of the system” means the unauthorized access and acquisition of unencrypted and unredacted computerized data that compromises the security or confidentiality of personal information maintained by an individual or entity as part of a database of personal information regarding multiple individuals and that causes, or the individual or entity reasonably believes has caused, or will cause, identity theft or other fraud to any resident of the Commonwealth...”

“...Notice required by this section shall include a description of the following:

- (1) The incident in general terms;
- (2) The type of personal information that was subject to the unauthorized access and acquisition;
- (3) The general acts of the individual or entity to protect the personal information from further unauthorized access;
- (4) A telephone number that the person may call for further information and assistance, if one exists; and
- (5) Advice that directs the person to remain vigilant by reviewing account statements and monitoring free credit reports....”

“...‘Personal information’ means the first name or first initial and last name in combination with and linked to any one or more of the following data elements that relate to a resident of the Commonwealth, when the data elements are neither encrypted nor redacted:

1. Social security number;
2. Driver's license number or state identification card number issued in lieu of a driver's license number;
3. Financial account number, or credit card or debit card number, in combination with any required security code, access code, or password that would permit access to a resident's financial accounts;
4. Passport number; or
5. Military identification number.

The term does not include information that is lawfully obtained from publicly available information, or from federal, state, or local government records lawfully made available to the general public....”

3. Virginia State Bar Rules of Professional Conduct. Rule 1.6² -- Confidentiality of Information

Excerpts:

¹ See Exhibit A enclosed with this outline for Virginia Code §18.2-186.6 in its entirety.

² See Exhibit B enclosed with this outline for VSB Rule 1.6 in its entirety.

Rule 1.6(d): “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.”

Comment:

“Acting Reasonably to Preserve Confidentiality

[19] Paragraph (d) requires a lawyer to act reasonably to safeguard information protected under this Rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the employment or engagement of persons competent with technology, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

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

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

employing appropriate data protection measures for any devices used to communicate or store client confidential information.

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

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

(a) Periodic staff security training and evaluation programs, including precautions and procedures regarding data security;

(b) Policies to address departing employee's future access to confidential firm data and return of electronically stored confidential data;

(c) Procedures addressing security measures for access of third parties to stored information;

(d) Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused;

(e) The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and

(f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity.”

4. Virginia State Bar Rules of Professional Conduct. Rule 1.4 – Communication

Excerpts:

Rule 1.4(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.”

Lawyers have to advise clients about risks associated with email communications that may potentially compromise the client confidentiality depending on the server, device and transmission mode. (ABA Standing Comm. on Ethics and Prof. Resp., 11-459 Formal Opinion 2011.) When a lawyer reasonably believes that highly sensitive/confidential client information is being transmitted so that extra measures to protect the email are warranted, the lawyer should inform the client about the risks involved.

Use of unencrypted email generally remains acceptable if the lawyer has undertaken reasonable efforts to prevent inadvertent and unauthorized access to client information – BUT a lawyer may be required to take special security precautions to protect against the

inadvertent and unauthorized disclosure when required by agreement or by law. (ABA Formal Opinion 477 (May 2017)).

5. Other examples of laws and regulations that may apply?

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

III. Lawyers and Law Firms as Business Associates.

Questions to Ask:

1. Is my client a “Covered Entity” or a “Business Associate” under HIPAA³? Common Covered Entities and Business Associates include:
 - Health Care Providers: Physicians, Medical Practice, Hospital, Home Health, etc.
 - Insurance Companies
 - Health Plans
 - Companies that Service Covered Entities – Billing Companies, Mailing Companies, IT Vendors, etc.
2. If yes, will I have access to or receive, create, maintain, or transmit protected health information (as such term is defined under HIPAA) in the course of providing services to my Covered Entity or Business Associate client?
3. If yes, then I am acting as a Business Associate for my client and I am bound by the Business Associate obligations under HIPAA and a Business Associate Agreement is required.

What about the Business Associate Agreement (BAA)? Enclosed as Exhibit C is a “Model Business Associate Agreement” from the US Department of Health & Human Services. This BAA contains only those provisions required under HIPAA. Often the BAA will also contain additional contractual provisions like accelerated reporting obligations and indemnification obligations. One option to consider is incorporating a Business Associate Agreement into your Engagement Letter if the client is a Covered Entity of Business Associate.

A form fill version of the Model Business Associate Agreement may be found at: <https://www.hhs.gov/sites/default/files/model-business-associate-agreement.pdf>

Obligations of a Business Associate include, but are not limited to, data security protections, access and audit requirements, and notification requirements. This may require the law firm having a business associate agreement with certain of its vendors and suppliers.

³ Health Insurance Portability and Accountability Act of 1996, as amended.

Note that representing individual patients and receiving medical records on behalf of those patients from their treating providers does **not** make an attorney a Business Associate of the Covered Entity medical provider.

IV. So, what does Cybersecurity look like for law firms today?

There is no one size fits all, as outlined above, what is “reasonable” cybersecurity will vary based on the information that a law firm maintains as well as the size of, the resources of, and the burdens placed on a law firm in protecting the information.

Importantly, what is “reasonable” will also continue to change over time as the threats and available technology continues to evolve. For example, what is “reasonable” as to encryption of data at rest and in motion, software patching, physical safeguards, etc, is constantly evolving.

This evaluation process can be a daunting (and never-ending) task. One resource that is intended to focus efforts and allow you to respond to these changes in threats and technology is the National Institute of Standards and Technology (NIST) Framework for Improving Critical Infrastructure Cybersecurity (the “NIST Framework”). The NIST Framework was initially designed for use with protecting critical US infrastructure, but it allows flexibility for use by organizations of varying sizes and capabilities. Additional information regarding the NIST Framework is available at <https://www.nist.gov/cyberframework>.

V. NIST Framework “Core Functions”⁴:

1. Identify
2. Protect
3. Detect
4. Respond
5. Recover



This structure is useful in performing a self-analysis on your law firm and can also be used when advising clients. All Core Functions should be ongoing and are overlapping.

1. **Identify**: Identify information and obligations and control who has access to the information in your care. Develop an understanding of the information you hold to better understand and manage the cybersecurity risk to your systems and data.

Examples of questions to consider/action items:

- i. What types of information do you maintain?
 - E.g. Health Information, Financial Information, trade secrets, Intellectual Property
- ii. Have you agreed to any specific security requirements?
 - E.g. Business Associate Agreement, Terms of Representation, etc.
- iii. Who has access to firm and client information?
 - Look at both internal and third party vendors, physical access and virtual access
- iv. What agreements govern access to information?
 - E.g. firm policies, vendor contracts, confidentiality agreements, etc.
- v. Do you have the ability to track who specifically has accessed information?
- vi. Can you limit access of certain information or files?
- vii. What vetting is conducted of companies and individuals who have access to sensitive data?
- viii. Do you have sufficient policies and procedures in place governing access to and use of information?

⁴ For a more in-depth walk through of the NIST Framework Core Functions, see the NIST Framework at <https://www.nist.gov/cyberframework/framework>

- ix. When you take information, do you have a process in place to identify specific protections?

Note: There is increasing focus on risk shifting with regards to data security and supply chain risk management. Increasingly, data security, breach notification, and related indemnification obligations are included in third party vendor contracts, and corporations and insurance companies are requiring vendors and subcontractors to sign data security addenda (including law firms).

- 2. **Protect:** Protect the information you maintain, in order to limit the exposure or likelihood of a cybersecurity incident and to limit the impact of a potential cybersecurity incident. Develop safeguards to allow you to protect and ensure continued access to your critical data.

Examples of questions to consider/action items:

- i. Have you limited access to information where practicable?
- ii. Do you have a procedure in place to immediately terminate a user's access to sensitive information if needed?
- iii. Do you have sufficient physical security? Are you tracking access to information?
- iv. Do you have a plan to respond to power outages or damage to/the malfunction of your electronic systems? Are backups available offsite? Do you have a data recovery plan?
- v. How frequently are you checking for and installing software application patches?
- vi. What wireless resources are used and available to guests?
- vii. Are you utilizing firewalls and is your server (data at rest) encrypted?
- viii. What email and website filtering software do you use?
- ix. Can you send data in an encrypted manner?
- x. What security protections are on your computer equipment and phones? How do you dispose of devices that are damaged or have reached the end of their useful life?
- xi. Training – Have initial and ongoing training regarding how to handle and protect data. Revisit policies and procedures to bring up to date with current practice. Put in place an Incident Response Plan and Data Recovery Plan, and then educate employees on what to do in order to respond to an emergency or cybersecurity incident.

- 3. **Detect:** Timely discover cybersecurity incidents. Develop and implement the appropriate processes and procedures and utilize reasonable technology to quickly identify a cybersecurity incident.

Examples of questions to consider/action items:

- i. Update all incident detection software (anti-virus, anti-spyware, anti-malware).
- ii. Maintain and monitor logs generated by your software and related to information access.
- iii. Have clear procedures in place and a point person(s) for employees or clients to notify of suspicious emails or contacts received.

- iv. Consider cybersecurity assessment/testing/monitoring; conduct cost/benefit analysis.

4. **Respond**: Respond to any cybersecurity incident to contain it and reduce any negative impact.

Examples of questions to consider/action items:

- i. Do you have an Incident Response Plan in place? Develop a plan when you are not in the middle of an emergency to lead your response to an incident.
 - i. What constitutes an incident that triggers activation of the Incident Response Plan?
 - ii. To whom are incidents immediately reported?
 - iii. Who is on the response team, both internally and what third party vendors?
 - iv. What notification obligations are triggered? How can you help those impacted further mitigate risk and harm?
- ii. Develop a plan to isolate intrusions to the extent possible.
- iii. Do you have cybersecurity/data breach insurance? What are the terms of coverage? Are there any limitations on vendors you may use for coverage?

5. **Recover**: Recover from a cybersecurity incident and resume normal operation.

Examples of questions to consider/action items:

- i. Do you have backups of your information?
 - i. Are backups maintained offsite?
 - ii. Could a cybersecurity incident compromise your system as well as backups, or are backups isolated from the network?
 - iii. How quickly can you restore normal function while regaining and maintaining the integrity of the system?
- ii. Do you have cybersecurity/data breach insurance? What coverage is provided to assist with recovery and preparation for recovery?
- iii. Review existing policies and procedures to reduce the likelihood of a repeat incident, implement additional training if needed. Identify ways to improve your processes and response.

Exhibit A

Code of Virginia

Title 18.2. Crimes and Offenses Generally

Chapter 6. Crimes Involving Fraud

Article 5. False Representations to Obtain Property or Credit

§ 18.2-186.6. Breach of personal information notification

A. As used in this section:

"Breach of the security of the system" means the unauthorized access and acquisition of unencrypted and unredacted computerized data that compromises the security or confidentiality of personal information maintained by an individual or entity as part of a database of personal information regarding multiple individuals and that causes, or the individual or entity reasonably believes has caused, or will cause, identity theft or other fraud to any resident of the Commonwealth. Good faith acquisition of personal information by an employee or agent of an individual or entity for the purposes of the individual or entity is not a breach of the security of the system, provided that the personal information is not used for a purpose other than a lawful purpose of the individual or entity or subject to further unauthorized disclosure.

"Encrypted" means the transformation of data through the use of an algorithmic process into a form in which there is a low probability of assigning meaning without the use of a confidential process or key, or the securing of the information by another method that renders the data elements unreadable or unusable.

"Entity" includes corporations, business trusts, estates, partnerships, limited partnerships, limited liability partnerships, limited liability companies, associations, organizations, joint ventures, governments, governmental subdivisions, agencies, or instrumentalities or any other legal entity, whether for profit or not for profit.

"Financial institution" has the meaning given that term in 15 U.S.C. § 6809(3).

"Individual" means a natural person.

"Notice" means:

1. Written notice to the last known postal address in the records of the individual or entity;
2. Telephone notice;
3. Electronic notice; or

4. Substitute notice, if the individual or the entity required to provide notice demonstrates that the cost of providing notice will exceed \$50,000, the affected class of Virginia residents to be notified exceeds 100,000 residents, or the individual or the entity does not have sufficient contact information or consent to provide notice as described in subdivisions 1, 2, or 3 of this definition. Substitute notice consists of all of the following:

- a. E-mail notice if the individual or the entity has e-mail addresses for the members of the affected class of residents;
- b. Conspicuous posting of the notice on the website of the individual or the entity if the individual or the entity maintains a website; and

c. Notice to major statewide media.

Notice required by this section shall not be considered a debt communication as defined by the Fair Debt Collection Practices Act in 15 U.S.C. § 1692a.

Notice required by this section shall include a description of the following:

- (1) The incident in general terms;
- (2) The type of personal information that was subject to the unauthorized access and acquisition;
- (3) The general acts of the individual or entity to protect the personal information from further unauthorized access;
- (4) A telephone number that the person may call for further information and assistance, if one exists; and
- (5) Advice that directs the person to remain vigilant by reviewing account statements and monitoring free credit reports.

"Personal information" means the first name or first initial and last name in combination with and linked to any one or more of the following data elements that relate to a resident of the Commonwealth, when the data elements are neither encrypted nor redacted:

1. Social security number;
2. Driver's license number or state identification card number issued in lieu of a driver's license number;
3. Financial account number, or credit card or debit card number, in combination with any required security code, access code, or password that would permit access to a resident's financial accounts;
4. Passport number; or
5. Military identification number.

The term does not include information that is lawfully obtained from publicly available information, or from federal, state, or local government records lawfully made available to the general public.

"Redact" means alteration or truncation of data such that no more than the following are accessible as part of the personal information:

1. Five digits of a social security number; or
2. The last four digits of a driver's license number, state identification card number, or account number.

B. If unencrypted or unredacted personal information was or is reasonably believed to have been accessed and acquired by an unauthorized person and causes, or the individual or entity reasonably believes has caused or will cause, identity theft or another fraud to any resident of the Commonwealth, an individual or entity that owns or licenses computerized data that includes personal information shall disclose any breach of the security of the system following discovery or notification of the breach of the security of the system to the Office of the Attorney General

and any affected resident of the Commonwealth without unreasonable delay. Notice required by this section may be reasonably delayed to allow the individual or entity to determine the scope of the breach of the security of the system and restore the reasonable integrity of the system. Notice required by this section may be delayed if, after the individual or entity notifies a law-enforcement agency, the law-enforcement agency determines and advises the individual or entity that the notice will impede a criminal or civil investigation, or homeland or national security. Notice shall be made without unreasonable delay after the law-enforcement agency determines that the notification will no longer impede the investigation or jeopardize national or homeland security.

C. An individual or entity shall disclose the breach of the security of the system if encrypted information is accessed and acquired in an unencrypted form, or if the security breach involves a person with access to the encryption key and the individual or entity reasonably believes that such a breach has caused or will cause identity theft or other fraud to any resident of the Commonwealth.

D. An individual or entity that maintains computerized data that includes personal information that the individual or entity does not own or license shall notify the owner or licensee of the information of any breach of the security of the system without unreasonable delay following discovery of the breach of the security of the system, if the personal information was accessed and acquired by an unauthorized person or the individual or entity reasonably believes the personal information was accessed and acquired by an unauthorized person.

E. In the event an individual or entity provides notice to more than 1,000 persons at one time pursuant to this section, the individual or entity shall notify, without unreasonable delay, the Office of the Attorney General and all consumer reporting agencies that compile and maintain files on consumers on a nationwide basis, as defined in 15 U.S.C. § 1681a (p), of the timing, distribution, and content of the notice.

F. An entity that maintains its own notification procedures as part of an information privacy or security policy for the treatment of personal information that are consistent with the timing requirements of this section shall be deemed to be in compliance with the notification requirements of this section if it notifies residents of the Commonwealth in accordance with its procedures in the event of a breach of the security of the system.

G. An entity that is subject to Title V of the Gramm-Leach-Bliley Act (15 U.S.C. § 6801 et seq.) and maintains procedures for notification of a breach of the security of the system in accordance with the provision of that Act and any rules, regulations, or guidelines promulgated thereto shall be deemed to be in compliance with this section.

H. An entity that complies with the notification requirements or procedures pursuant to the rules, regulations, procedures, or guidelines established by the entity's primary or functional state or federal regulator shall be in compliance with this section.

I. Except as provided by subsections J and K, pursuant to the enforcement duties and powers of the Office of the Attorney General, the Attorney General may bring an action to address violations of this section. The Office of the Attorney General may impose a civil penalty not to exceed \$150,000 per breach of the security of the system or a series of breaches of a similar nature that are discovered in a single investigation. Nothing in this section shall limit an individual from recovering direct economic damages from a violation of this section.

J. A violation of this section by a state-chartered or licensed financial institution shall be enforceable exclusively by the financial institution's primary state regulator.

K. Nothing in this section shall apply to an individual or entity regulated by the State Corporation Commission's Bureau of Insurance.

L. The provisions of this section shall not apply to criminal intelligence systems subject to the restrictions of 28 C.F.R. Part 23 that are maintained by law-enforcement agencies of the Commonwealth and the organized Criminal Gang File of the Virginia Criminal Information Network (VCIN), established pursuant to Chapter 2 (§ 52-12 et seq.) of Title 52.

M. Notwithstanding any other provision of this section, any employer or payroll service provider that owns or licenses computerized data relating to income tax withheld pursuant to Article 16 (§ 58.1-460 et seq.) of Chapter 3 of Title 58.1 shall notify the Office of the Attorney General without unreasonable delay after the discovery or notification of unauthorized access and acquisition of unencrypted and unredacted computerized data containing a taxpayer identification number in combination with the income tax withheld for that taxpayer that compromises the confidentiality of such data and that creates a reasonable belief that an unencrypted and unredacted version of such information was accessed and acquired by an unauthorized person, and causes, or the employer or payroll provider reasonably believes has caused or will cause, identity theft or other fraud. With respect to employers, this subsection applies only to information regarding the employer's employees, and does not apply to information regarding the employer's customers or other non-employees.

Such employer or payroll service provider shall provide the Office of the Attorney General with the name and federal employer identification number of the employer as defined in § 58.1-460 that may be affected by the compromise in confidentiality. Upon receipt of such notice, the Office of the Attorney General shall notify the Department of Taxation of the compromise in confidentiality. The notification required under this subsection that does not otherwise require notification under this section shall not be subject to any other notification, requirement, exemption, or penalty contained in this section.

2008, cc. 566, 801;2017, cc. 419, 427;2019, c. 484;2020, c. 264.

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

Exhibit B

Exhibit B

Professional Guidelines

An agency of the Supreme Court of Virginia

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The Virginia State Bar

Professional Guidelines

Search the Professional Guidelines

Rule 1.6

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Confidentiality of Information

- (a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
- (b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:
- (1) such information to comply with law or a court order;
 - (2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - (3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;
 - (4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;
 - (5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;
 - (6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential;
 - (7) such information to prevent reasonably certain death or substantial bodily harm.

(c) A lawyer shall promptly reveal:

- (1) the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or**
- (2) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.**

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

Comment

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The common law recognizes that the client's confidences must be protected from disclosure. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[2a] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that clients usually follow the advice given, and the law is upheld.

[2b] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[3] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

[3a] The rules governing confidentiality of information apply to a lawyer who represents an organization of

which the lawyer is an employee.

[4] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

[5] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[5a] Lawyers frequently need to consult with colleagues or other attorneys in order to competently represent their clients' interests. An overly strict reading of the duty to protect client information would render it difficult for lawyers to consult with each other, which is an important means of continuing professional education and development. A lawyer should exercise great care in discussing a client's case with another attorney from whom advice is sought. Among other things, the lawyer should consider whether the communication risks a waiver of the attorney-client privilege or other applicable protections. The lawyer should endeavor when possible to discuss a case in strictly hypothetical or abstract terms. In addition, prior to seeking advice from another attorney, the attorney should take reasonable steps to determine whether the attorney from whom advice is sought has a conflict. The attorney from whom advice is sought must be careful to protect the confidentiality of the information given by the attorney seeking advice and must not use such information for the advantage of the lawyer or a third party.

[5b] Compliance with Rule 1.6(a) might include fulfilling duties under Rule 1.14, regarding a client with an impairment.

[5c] Compliance with Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.

[6] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6a] Lawyers involved in insurance defense work that includes submission of detailed information regarding the client's case to an auditing firm must be extremely careful to gain consent from the client after full and adequate disclosure. Client consent to provision of information to the insurance carrier does not equate with consent to provide the information to an outside auditor. The lawyer must obtain specific consent to disclose the information to that auditor. Pursuant to the lawyer's duty of loyalty to the client, the lawyer should not recommend that the client provide such consent if the disclosure to the auditor would in some way prejudice the client. *Legal Ethics Opinion #1723, approved by the Supreme Court of Virginia, September 29, 1999.*

Disclosure Adverse to Client

[6b] The confidentiality rule is subject to limited exceptions. However, to the extent a lawyer is required or permitted to disclose a client's confidences, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

[7] Several situations must be distinguished.

[7a] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. *See* Rule 1.2(c). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a

special instance of the duty prescribed in Rule 1.2(c) to avoid assisting a client in criminal or fraudulent conduct.

[7b] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(c), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[7c] Third, the lawyer may learn that a client intends prospective criminal conduct. As stated in paragraph (c)(1), the lawyer is obligated to reveal such information if the crime is reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another. Caution is warranted as it is very difficult for a lawyer to "know" when proposed criminal conduct will actually be carried out, for the client may have a change of mind. If the client's intended crime is perjury, the lawyer must look to Rule 3.3(a)(4) rather than paragraph (c)(1).

[8] When considering disclosure under paragraph (b), the lawyer should weigh such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the nature of the client's intended conduct, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take appropriate action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

[8a] Paragraph (b)(7) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.

Withdrawal

[9] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

[9a] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[9b] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning a Lawyer's Conduct

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and

request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[10a] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

[11] If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the attorney-client privilege when it is applicable. Except as permitted by Rule 3.4(d), the lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[12] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. *See* Rules 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Attorney Misconduct

[13] Self-regulation of the legal profession occasionally places attorneys in awkward positions with respect to their obligations to clients and to the profession. Paragraph (c)(2) requires an attorney who has information indicating that another attorney has violated the Rules of Professional Conduct, learned during the course of representing a client and protected as a confidence or secret under Rule 1.6, to request the permission of the client to disclose the information necessary to report the misconduct to disciplinary authorities. In requesting consent, the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure.

[14] Although paragraph (c)(2) requires that authorized disclosure be made promptly, a lawyer does not violate this Rule by delaying in reporting attorney misconduct for the minimum period of time necessary to protect a client's interests. For example, a lawyer might choose to postpone reporting attorney misconduct until the end of litigation when reporting during litigation might harm the client's interests.

[15 - 17] *ABA Model Rule* Comments not adopted.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated.

Acting Reasonably to Preserve Confidentiality

[19] Paragraph (d) requires a lawyer to act reasonably to safeguard information protected under this Rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the employment or engagement of persons competent with technology, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

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

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

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

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

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

of password and authentication measures; and

(f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity.

Virginia Code Comparison

Rule 1.6 retains the two-part definition of information subject to the lawyer's ethical duty of confidentiality. EC 4-4 added that the duty differed from the evidentiary privilege in that it existed "without regard to the nature or source of information or the fact that others share the knowledge." However, the definition of "client information" as set forth in the *ABA Model Rules*, which includes all information "relating to" the representation, was rejected as too broad.

Paragraph (a) permits a lawyer to disclose information where impliedly authorized to do so in order to carry out the representation. Under DR 4-101(B) and (C), a lawyer was not permitted to reveal "confidences" unless the client first consented after disclosure.

Paragraph (b)(1) is substantially the same as DR 4-101(C)(2).

Paragraph (b)(2) is substantially similar to DR 4-101(C)(4) which authorized disclosure by a lawyer of "[c]onfidences or secrets necessary to establish the reasonableness of his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."

Paragraph (b)(3) is substantially the same as DR 4-101(C)(3).

Paragraph (b)(4) had no counterpart in the *Virginia Code*.

Paragraphs (c)(1) and (c)(2) are substantially the same as DR 4-101(D).

Paragraph (c)(3) had no counterpart in the *Virginia Code*.

Committee Commentary

The Committee added language to this Rule from DR 4-101 to make the disclosure provisions more consistent with current Virginia policy. The Committee specifically concluded that the provisions of DR 4-101(D) of the *Virginia Code*, which required broader disclosure than the *ABA Model Rule* even permitted, should be added as paragraph (c). Additionally, to promote the integrity of the legal profession, the Committee adopted new language as paragraph (c)(3) setting forth the circumstances under which a lawyer must report the misconduct of another lawyer when such a report may require disclosure of privileged information.

The amendments effective January 1, 2004, added present paragraph (b)(4) and redesignated former paragraphs (b)(4) and (5) as present (b)(5) and (6); in paragraph (c)(3), at end of first sentence, deleted "but only if the client consents after consultation," added the present second sentence, and deleted the former last sentence which read, "Under this paragraph, an attorney is required to request the consent of a client to disclose information necessary to report the misconduct of another attorney."; added Comment [5b] and [6a]; rewrote Comment [13].

The amendments effective March 1, 2016, added paragraph 1.6 (d); added "*Acting Reasonably to Preserve Confidentiality*" before adding Comments [19], [19a], [20] and [21] paragraphs "a" through "f".

The amendments effective December 1, 2016, added paragraph (7); in paragraph (c)(1) added the language “reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another”, and rewrote the last sentence of the paragraph; deleted former paragraph (2) and redesignated former paragraph (3) as present paragraph (2); added the language to comment [7c] “if the crime is reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another”, substituted the language “Caution” is “warranted” in place of “Some discretion is involved”, and added the last sentence; in Comment [8] deleted the language “The lawyer’s exercise of discretion requires consideration of” and replaced it with “When considering disclosure under paragraph (b), the lawyer should weigh”, and added the language “and with those who might be injured by the client”; added Comment [8a]; and in Comments [13] and [14] substituted the language “(c)(3)” with “(c)(2)”.

Updated: November 29, 2016

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Exhibit C

Exhibit C

MODEL BUSINESS ASSOCIATE AGREEMENT

This BUSINESS ASSOCIATE AGREEMENT (the “BAA”) is made and entered into as of _____, 20____, by and between _____, a _____, organized under the laws of the _____ (“Covered Entity”) and _____, a _____, organized under the laws of the _____ (“Business Associate”, in accordance with the meaning given to those terms at 45 CFR §164.501). In this BAA, Covered Entity and Business Associate are each a “Party” and, collectively, are the “Parties”.

BACKGROUND

- I. Covered Entity is either a “covered entity” or “business associate” of a covered entity as each are defined under the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, as amended by the HITECH Act (as defined below) and the related regulations promulgated by HHS (as defined below) (collectively, “HIPAA”) and, as such, is required to comply with HIPAA’s provisions regarding the confidentiality and privacy of Protected Health Information (as defined below);
- II. The Parties have entered into or will enter into one or more agreements under which Business Associate provides or will provide certain specified services to Covered Entity (collectively, the “Agreement”);
- III. In providing services pursuant to the Agreement, Business Associate will have access to Protected Health Information;
- IV. By providing the services pursuant to the Agreement, Business Associate will become a “business associate” of the Covered Entity as such term is defined under HIPAA;
- V. Both Parties are committed to complying with all federal and state laws governing the confidentiality and privacy of health information, including, but not limited to, the Standards for Privacy of Individually Identifiable Health Information found at 45 CFR Part 160 and Part 164, Subparts A and E (collectively, the “Privacy Rule”); and
- VI. Both Parties intend to protect the privacy and provide for the security of Protected Health Information disclosed to Business Associate pursuant to the terms of this Agreement, HIPAA and other applicable laws.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein and the continued provision of PHI by Covered Entity to Business Associate under the Agreement in reliance on this BAA, the Parties agree as follows:

1. **Definitions.** For purposes of this BAA, the Parties give the following meaning to each of the terms in this Section 1 below. Any capitalized term used in this BAA, but not otherwise defined, has the meaning given to that term in the Privacy Rule or pertinent law.

- A. **“Affiliate”** means a subsidiary or affiliate of Covered Entity that is, or has been, considered a covered entity, as defined by HIPAA.
- B. **“Breach”** means the acquisition, access, use, or disclosure of PHI in a manner not permitted under the Privacy Rule which compromises the security or privacy of the PHI, as defined in 45 CFR §164.402.
- C. **“Breach Notification Rule”** means the portion of HIPAA set forth in Subpart D of 45 CFR Part 164.
- D. **“Data Aggregation”** means, with respect to PHI created or received by Business Associate in its capacity as the “business associate” under HIPAA of Covered Entity, the combining of such PHI by Business Associate with the PHI received by Business Associate in its capacity as a business associate of one or more other “covered entity” under HIPAA, to permit data analyses that relate to the Health Care Operations (defined below) of the respective covered entities. The meaning of “data aggregation” in this BAA shall be consistent with the meaning given to that term in the Privacy Rule.
- E. **“Designated Record Set”** has the meaning given to such term under the Privacy Rule, including 45 CFR §164.501.B.
- F. **“De-Identify”** means to alter the PHI such that the resulting information meets the requirements described in 45 CFR §§164.514(a) and (b).
- G. **“Electronic PHI”** means any PHI maintained in or transmitted by electronic media as defined in 45 CFR §160.103.
- H. **“Health Care Operations”** has the meaning given to that term in 45 CFR §164.501.
- I. **“HHS”** means the U.S. Department of Health and Human Services.
- J. **“HITECH Act”** means the Health Information Technology for Economic and Clinical Health Act, enacted as part of the American Recovery and Reinvestment Act of 2009, Public Law 111-005.
- K. **“Individual”** has the same meaning given to that term in 45 CFR §§164.501 and 160.130 and includes a person who qualifies as a personal representative in accordance with 45 CFR §164.502(g).
- L. **“Privacy Rule”** means that portion of HIPAA set forth in 45 CFR Part 160 and Part 164, Subparts A and E.

M. “Protected Health Information” or “PHI” has the meaning given to the term “protected health information” in 45 CFR §§164.501 and 160.103, limited to the information created or received by Business Associate from or on behalf of Covered Entity.

N. “Security Incident” means the attempted or successful unauthorized access, use, disclosure, modification, or destruction of information or interference with system operations in an information system.

O. “Security Rule” means the Security Standards for the Protection of Electronic Health Information provided in 45 CFR Part 160 & Part 164, Subparts A and C.

P. “Unsecured Protected Health Information” or “Unsecured PHI” means any “protected health information” as defined in 45 CFR §§164.501 and 160.103 that is not rendered unusable, unreadable or indecipherable to unauthorized individuals through the use of a technology or methodology specified by the HHS Secretary in the guidance issued pursuant to the HITECH Act and codified at 42 USC §17932(h).

2. Use and Disclosure of PHI.

A. Except as otherwise provided in this BAA, Business Associate may use or disclose PHI as reasonably necessary to provide the services described in the Agreement to Covered Entity, and to undertake other activities of Business Associate permitted or required of Business Associate by this BAA or as required by law.

B. Except as otherwise limited by this BAA or federal or state law, Covered Entity authorizes Business Associate to use the PHI in its possession for the proper management and administration of Business Associate’s business and to carry out its legal responsibilities. Business Associate may disclose PHI for its proper management and administration, provided that (i) the disclosures are required by law; or (ii) Business Associate obtains, in writing, prior to making any disclosure to a third party (a) reasonable assurances from this third party that the PHI will be held confidential as provided under this BAA and used or further disclosed only as required by law or for the purpose for which it was disclosed to this third party and (b) an agreement from this third party to notify Business Associate immediately of any breaches of the confidentiality of the PHI, to the extent it has knowledge of the breach.

C. Business Associate will not use or disclose PHI in a manner other than as provided in this BAA, as permitted under the Privacy Rule, or as required by law. Business Associate will use or disclose PHI, to the extent practicable, as a limited data set or limited to the minimum necessary amount of PHI to carry out the intended purpose of the use or disclosure, in accordance with Section 13405(b) of the HITECH Act (codified at 42 USC §17935(b)) and any of the act’s implementing regulations adopted by HHS, for each use or disclosure of PHI.

D. Upon request, Business Associate will make available to Covered Entity any of Covered Entity’s PHI that Business Associate or any of its agents or subcontractors have in their possession.

E. Business Associate may use PHI to report violations of law to appropriate Federal and State authorities, consistent with 45 CFR §164.502(j)(1).

- 3. Safeguards Against Misuse of PHI.** Business Associate will use appropriate safeguards to prevent the use or disclosure of PHI other than as provided by the Agreement or this BAA and Business Associate agrees to implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of the Electronic PHI that it creates, receives, maintains or transmits on behalf of Covered Entity. Business Associate agrees to take reasonable steps, including providing adequate training to its employees to ensure compliance with this BAA and to ensure that the actions or omissions of its employees or agents do not cause Business Associate to breach the terms of this BAA.
- 4. Reporting Disclosures of PHI and Security Incidents.** Business Associate will report to Covered Entity in writing any use or disclosure of PHI not provided for by this BAA of which it becomes aware and Business Associate agrees to report to Covered Entity any Security Incident affecting Electronic PHI of Covered Entity of which it becomes aware. Business Associate agrees to report any such event within five business days of becoming aware of the event.
- 5. Reporting Breaches of Unsecured PHI.** Business Associate will notify Covered Entity in writing promptly upon the discovery of any Breach of Unsecured PHI in accordance with the requirements set forth in 45 CFR §164.410, but in no case later than 30 calendar days after discovery of a Breach. Business Associate will reimburse Covered Entity for any costs incurred by it in complying with the requirements of Subpart D of 45 CFR §164 that are imposed on Covered Entity as a result of a Breach committed by Business Associate.
- 6. Mitigation of Disclosures of PHI.** Business Associate will take reasonable measures to mitigate, to the extent practicable, any harmful effect that is known to Business Associate of any use or disclosure of PHI by Business Associate or its agents or subcontractors in violation of the requirements of this BAA.
- 7. Agreements with Agents or Subcontractors.** Business Associate will ensure that any of its agents or subcontractors that have access to, or to which Business Associate provides, PHI agree in writing to the restrictions and conditions concerning uses and disclosures of PHI contained in this BAA and agree to implement reasonable and appropriate safeguards to protect any Electronic PHI that it creates, receives, maintains or transmits on behalf of Business Associate or, through the Business Associate, Covered Entity. Business Associate shall notify Covered Entity, or upstream Business Associate, of all subcontracts and agreements relating to the Agreement, where the subcontractor or agent receives PHI as described in section 1.M. of this BAA. Such notification shall occur within 30 (thirty) calendar days of the execution of the subcontract by placement of such notice on the Business Associate's primary website. Business Associate shall ensure that all subcontracts and agreements provide the same level of privacy and security as this BAA.
- 8. Audit Report.** Upon request, Business Associate will provide Covered Entity, or upstream Business Associate, with a copy of its most recent independent HIPAA compliance report (AT-C 315), HITRUST certification or other mutually agreed upon independent standards based third party audit report. Covered entity agrees not to re-disclose Business Associate's audit report.
- 9. Access to PHI by Individuals.**

 - A.** Upon request, Business Associate agrees to furnish Covered Entity with copies of the PHI maintained by Business Associate in a Designated Record Set in the time and manner

designated by Covered Entity to enable Covered Entity to respond to an Individual's request for access to PHI under 45 CFR §164.524.

B. In the event any Individual or personal representative requests access to the Individual's PHI directly from Business Associate, Business Associate within ten business days, will forward that request to Covered Entity. Any disclosure of, or decision not to disclose, the PHI requested by an Individual or a personal representative and compliance with the requirements applicable to an Individual's right to obtain access to PHI shall be the sole responsibility of Covered Entity.

10. Amendment of PHI.

A. Upon request and instruction from Covered Entity, Business Associate will amend PHI or a record about an Individual in a Designated Record Set that is maintained by, or otherwise within the possession of, Business Associate as directed by Covered Entity in accordance with procedures established by 45 CFR §164.526. Any request by Covered Entity to amend such information will be completed by Business Associate within 15 business days of Covered Entity's request.

B. In the event that any Individual requests that Business Associate amend such Individual's PHI or record in a Designated Record Set, Business Associate within ten business days will forward this request to Covered Entity. Any amendment of, or decision not to amend, the PHI or record as requested by an Individual and compliance with the requirements applicable to an Individual's right to request an amendment of PHI will be the sole responsibility of Covered Entity.

11. Accounting of Disclosures.

A. Business Associate will document any disclosures of PHI made by it to account for such disclosures as required by 45 CFR §164.528(a). Business Associate also will make available information related to such disclosures as would be required for Covered Entity to respond to a request for an accounting of disclosures in accordance with 45 CFR §164.528. At a minimum, Business Associate will furnish Covered Entity the following with respect to any covered disclosures by Business Associate: (i) the date of disclosure of PHI; (ii) the name of the entity or person who received PHI, and, if known, the address of such entity or person; (iii) a brief description of the PHI disclosed; and (iv) a brief statement of the purpose of the disclosure which includes the basis for such disclosure.

B. Business Associate will furnish to Covered Entity information collected in accordance with this Section 10, within ten business days after written request by Covered Entity, to permit Covered Entity to make an accounting of disclosures as required by 45 CFR §164.528, or in the event that Covered Entity elects to provide an Individual with a list of its business associates, Business Associate will provide an accounting of its disclosures of PHI upon request of the Individual, if and to the extent that such accounting is required under the HITECH Act or under HHS regulations adopted in connection with the HITECH Act.

C. In the event an Individual delivers the initial request for an accounting directly to Business Associate, Business Associate will within ten business days forward such request to Covered Entity.

12. Availability of Books and Records. Business Associate will make available its internal practices, books, agreements, records, and policies and procedures relating to the use and disclosure of PHI, upon request, to the Secretary of HHS for purposes of determining Covered Entity's and Business Associate's compliance with HIPAA, and this BAA.

13. Responsibilities of Covered Entity. With regard to the use and/or disclosure of Protected Health Information by Business Associate, Covered Entity agrees to:

- A.** Notify Business Associate of any limitation(s) in its notice of privacy practices in accordance with 45 CFR §164.520, to the extent that such limitation may affect Business Associate's use or disclosure of PHI.
- B.** Notify Business Associate of any changes in, or revocation of, permission by an Individual to use or disclose Protected Health Information, to the extent that such changes may affect Business Associate's use or disclosure of PHI.
- C.** Notify Business Associate of any restriction to the use or disclosure of PHI that Covered Entity has agreed to in accordance with 45 CFR §164.522, to the extent that such restriction may affect Business Associate's use or disclosure of PHI.
- D.** Except for data aggregation or management and administrative activities of Business Associate, Covered Entity shall not request Business Associate to use or disclose PHI in any manner that would not be permissible under HIPAA if done by Covered Entity.

14. Data Ownership. Business Associate's data stewardship does not confer data ownership rights on Business Associate with respect to any data shared with it under the Agreement, including any and all forms thereof.

15. Term and Termination.

- A.** This BAA will become effective on the date first written above, and will continue in effect until all obligations of the Parties have been met under the Agreement and under this BAA.
- B.** Covered Entity may terminate immediately this BAA, the Agreement, and any other related agreements if Covered Entity makes a determination that Business Associate has breached a material term of this BAA and Business Associate has failed to cure that material breach, to Covered Entity's reasonable satisfaction, within 30 days after written notice from Covered Entity. Covered Entity may report the problem to the Secretary of HHS if termination is not feasible.
- C.** If Business Associate determines that Covered Entity has breached a material term of this BAA, then Business Associate will provide Covered Entity with written notice of the existence of the breach and shall provide Covered Entity with 30 days to cure the breach. Covered Entity's failure to cure the breach within the 30-day period will be grounds for immediate termination of the Agreement and this BAA by Business Associate. Business Associate may report the breach to HHS.

D. Upon termination of the Agreement or this BAA for any reason, all PHI maintained by Business Associate will be returned to Covered Entity or destroyed by Business Associate. Business Associate will not retain any copies of such information. This provision will apply to PHI in the possession of Business Associate's agents and subcontractors. If return or destruction of the PHI is not feasible, in Business Associate's reasonable judgment, Business Associate will furnish Covered Entity with notification, in writing, of the conditions that make return or destruction infeasible. Upon mutual agreement of the Parties that return or destruction of the PHI is infeasible, Business Associate will extend the protections of this BAA to such information for as long as Business Associate retains such information and will limit further uses and disclosures to those purposes that make the return or destruction of the information not feasible. The Parties understand that this Section 14.D. will survive any termination of this BAA.

16. Effect of BAA.

A. This BAA is a part of and subject to the terms of the Agreement, except that to the extent any terms of this BAA conflict with any term of the Agreement, the terms of this BAA will govern.

B. Except as expressly stated in this BAA or as provided by law, this BAA will not create any rights in favor of any third party.

17. Regulatory References. A reference in this BAA to a section in HIPAA means the section as in effect or as amended at the time.

18. Notices. All notices, requests and demands or other communications to be given under this BAA to a Party will be made via either first class mail, registered or certified or express courier, or electronic mail to the Party's address given below:

A. If to Covered Entity, to:

Attn:
T:
E:

B. If to Business Associate, to:

Attn:
T:
E:

19. Amendments and Waiver. This BAA may not be modified, nor will any provision be waived or amended, except in writing duly signed by authorized representatives of the Parties. A waiver with respect to one event shall not be construed as continuing, or as a bar to or waiver of any right or remedy as to subsequent events.

20. HITECH Act Compliance. The Parties acknowledge that the HITECH Act includes significant changes to the Privacy Rule and the Security Rule. The privacy subtitle of the HITECH Act sets forth provisions that significantly change the requirements for business associates and the agreements between business associates and covered entities under HIPAA and these changes may be further clarified in forthcoming regulations and guidance. Each Party agrees to comply with the applicable provisions of the HITECH Act and any HHS regulations issued with respect to the HITECH Act. The Parties also agree to negotiate in good faith to modify this BAA as reasonably necessary to comply with the HITECH Act and its regulations as they become effective but, in the event that the Parties are unable to reach agreement on such a modification, either Party will have the right to terminate this BAA upon 30-days' prior written notice to the other Party.

[The remainder of this page intentionally left blank; signatures on the following page]

In light of the mutual agreement and understanding described above, the Parties execute this BAA as of the date first written above.

By: _____
Name:
Title:

By: _____
Name:
Title:



GENTRY LOCKE
Attorneys

11

The Outside General Counsel Role

Presented by:

Herschel V. Keller
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The Outside General Counsel Role

Herschel V. Keller

Gentry Locke Seminar
Richmond – September 28, 2022

I. Introduction

“Outside general counsel” is an attorney who takes on responsibilities similar to those of in-house lawyers, but who is not the client’s employee. Thus, this role can raise unique complexities for outside attorneys complying with the Virginia Rules of Professional Conduct, like determining who is the client, what constitutes a conflict of interest, which communications are and are not confidential, as well as who can be contacted by opposing counsel.

In this presentation, we will explore the challenges presented by those questions in navigating the ethical rules for attorneys serving as outside general counsel.

II. Duty of Competency

- a. Outside general counsel have a duty of competence under Rule 1.1, which states:
 - i. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” **Virginia Rules of Professional Conduct, Rule 1.1.**
- b. Virginia adopted the ABA Model Rule on Competency, but added a comment highlighting that the duty of competence extends not only to litigation, but also to negotiation techniques and strategies, including, critically for outside general counsel “problem-solving strategies.”
 - i. “Another important skill is negotiating and, in particular, choosing and carrying out the appropriate negotiating strategy. Often it is possible to negotiate a solution which meets some of the needs and interests of all the parties to a transaction or dispute, i.e., a problem-solving strategy.” **Virginia Rules of Professional Conduct, Rule 1.1, Comment 2(a).**

- c. In 2016, an amendment added comment language on continuing education on relevant technology.
 - i. “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. **Virginia Rules of Professional Conduct, Rule 1.1, Comment 6.**
 - ii. **Consider:** What does the duty of competency, particularly regarding technology, mean for outside general counsel for a client with data security and electronic records compliance obligations? What does that mean for your own legal files for that client?

III. Duty of Loyalty

- a. Who is the client?
 - i. The company is the client, not the CEO or other employee. That is who the lawyer owes the duty of loyalty to.
 - 1. Rule 1.13 provides that the client is the organization itself—not the officers, management, or even the board of directors. Many times executives or owners at companies treat in-house counsel as their own personal counsel, and this can lead to conflicts.
 - 2. **Virginia Rules of Professional Conduct, Rule 1.13(a)**
 - a. “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”
 - ii. However, under 1.13(e), a lawyer for an organization may also represent individuals within that organization:
 - 1. “When an organization’s lawyer is assigned or authorized to represent such an individual, the lawyer has an attorney-client relationship with both that individual and the organization. Accordingly, the lawyer’s representation of both

is controlled by the confidentiality and conflicts provisions of these Rules.” **Virginia Rules of Professional Conduct, Rule 1.13, Comment 12.**

2. “A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.” **Virginia Rules of Professional Conduct, Rule 1.13(e).**

b. Clarifying the lawyer’s role

- i. When the organization’s interest may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged. **Virginia Rules of Professional Conduct, Rule 1.13, Comment 10.**

IV. **Reporting Misconduct**

- a. **Situation:** An officer, employee, or other person associated with the company is doing something illegal.
 - i. “If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the **lawyer shall proceed as is reasonably necessary in the best interest of the organization.** In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the

organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

1. Asking for reconsideration of the matter;
2. Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization;
3. Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.” **Virginia Rules of Professional Conduct, Rule 1.13(b).**

V. Conflicts of Interest

- a. Loyalty and independent judgement are essential elements to the lawyer’s relationship to a client. **Virginia Rules of Professional Conduct, Rule 1.7, Comment 1.**
- b. With large corporations, there is an increasing array of potentially conflicting client interests.
 - i. There can be the parent company, wholly-owned subsidiaries, indirect subsidiaries, and other corporate affiliates and constituents.
 - ii. To make things more complicated, the legal and business interests of corporate affiliates are not always aligned.
- c. **Virginia Rules of Professional Conduct, Rule 1.7(a)**
 - i. Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 1. the representation of one client will be directly adverse to another client; or

2. there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

d. "Directly Adverse" Conflicts Under Rule 1.7(a)(1)

- i. When in-house counsel represents groups of related companies, or officers, directors, owners, or employees at the company where he is in-house, it is easy to develop a "directly adverse" conflict under **Virginia Rules of Professional Conduct, Rule 1.7(a)(1)**.
- ii. Representation of subsidiaries may occur in dealing with a third-party, and this can lead to a conflict when issues arise between the subsidiary and parent. In other cases, it may be mere inadvertence that creates the attorney-client relationship between outside general counsel and someone other than the company that employs him.
 1. For example, when an outside general counsel answers legal questions from officers, employees, or owners about their legal issues (not those of the company), this can create an attorney-client relationship directly with the individual, and thus the chance of a "directly adverse" conflict, particularly where the individual may be disclosing a failure to adhere to company policies or procedures that put the company at a compliance or enforcement risk.
- iii. Rule 1.7(a) expresses the general proposition that loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent.
- iv. Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is a potential conflict include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree. **Virginia Rules of Professional Conduct, Rule 1.7, Comment 26.**

- e. ****Be mindful of what creates an attorney-client relationship – can be small things****
 - i. ***Yanez v. Plummer*, 164 Cal. Rptr. 3d 309 (Cal Ct. App. 2013)**: the in-house lawyer gave advice to an employee on their way to the employee’s deposition. This created an attorney-client relationship between the lawyer and the employee, which in turn led to a conflict of interest for the lawyer that the lawyer failed to recognize. It also led to a malpractice suit against the in-house lawyer by the (by then former) employee.
 - ii. ***Dinger v. Allfirst Fin., Inc.*, 82 Fed. Appx. 261 (3d Cir. 2003)**: the in-house lawyer gave officers advice on when to cash in their stock options. This also led to a malpractice suit against the in-house lawyer, brought by the (by-then) former officers.
- f. **“Material Limitations” Conflicts under Rule 1.7(a)(2)**
 - i. These “material limitations” conflicts can arise based on the lawyers’ own interest in the company, the involvement of others with whom the lawyer has a personal relationship, or a myriad of other reasons. For example, if the outside general counsel has stock in the company and thinks about what will happen to his specific stock (as opposed to the good of the company, generally) when deciding on advice to the company, then he could have a “material limitation” conflict.
 - ii. Simply owning stock and wanting the company to do well, without more, does not create this conflict. What could create a conflict is if the company was considering two courses of action: one where the stock spikes in the short run, but may be riskier in the long run, and another with no spike, but more stable long-term growth. If the lawyer lets something like his personal retirement plans weigh into his analysis of the course to take, then he has a conflict of interest.
- g. **Rule 1.9 Conflict of Interest: Former Client**
 - i. Former subsidiaries can be former clients if counsel worked with them before splitting off from the parent company. If litigation were to arise between the parent and its former subsidiary, this may create a conflict of interest.
 - ii. **Virginia Rules of Professional Conduct, Rule 1.9(a)**
 - 1. A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or

a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

VI. Confidentiality and the Attorney-Client Privilege

- a. **Virginia Rules of Professional Conduct, Rule 1.6(a): Confidentiality of Information:**
 - i. A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
- b. Confidentiality versus attorney-client privilege
 - i. "The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law."
Virginia Rules of Professional Conduct, Rule 1.6, Comment 3.
- c. The attorney-client privilege only applies where communications are 1) between a lawyer and a client and 2) for the purpose of giving or receiving legal advice.
 - i. For example, when a CEO requests business advice from outside general counsel, neither the question nor the answer is protected by the attorney-client privilege. While the lawyer must not speak of this under Rule 1.6, that does not mean it is protected from discovery by a third-party should litigation ensue.
 - ii. Routine human resources or employment discussions may also not be protected by the attorney-client privilege.

- d. Who is a “client?”
 - i. Not everyone that works at the same company is a client for attorney-client privilege analysis.
 - ii. Generally, a person would have to be one who regularly consults with the lawyer regarding a particular matter or has the authority to bind the company regarding the matter to be the “client” for purposes of the attorney-client privilege.
 - iii. If communications are with others at the company, they may well not be covered by the attorney-client privilege. (Although, under Rule 1.6 you generally cannot voluntarily disclose any information about a representation without client consent, regardless of whether it is privileged.)
- e. *Upjohn Co. v. United States*, 449 U.S. 383 (1981), adopted the “subject matter test” to determine whether discussions between current employees and a corporation’s counsel are privileged. A communication is privileged if it:
 - i. Was made to the corporation’s counsel, acting as such;
 - ii. Was made at the direction of corporate superiors, for the purpose of securing legal advice from counsel;
 - iii. Concerned matters within the scope of the employee’s corporate duties; and
 - iv. The employee was sufficiently aware that he/she was being questioned so the corporation could obtain legal advice.
- f. Tips for Creating Privileged Communications
 - i. Only communications between counsel and client for the purpose of obtaining legal advice are privileged.
 - ii. Education is key. Educate early and often on how the attorney-client privilege works. Many executives think everything that goes to the lawyer is privileged, but that is not the case.
 - iii. Merely copying an in-house lawyer or outside general counsel on emails without asking for advice does not make the correspondence “privileged.”

- iv. Another common misjudgment is that sending an update email or other narrative addressed to counsel and copying several other employees (without asking for legal advice) somehow protects the communication.

- g. Corporate privilege versus attorney-client privilege
 - i. Because it is the *company* who is the client, not the CEO or employee, communications are not always privileged in a *personal* trial.

 - ii. In *United States v. Graf (2010)*, the Ninth Circuit laid out a five-prong test which a corporate officer or employee must show in order to have a personal attorney-client relationship:
 - 1. they approached counsel for the purpose of seeking legal advice;
 - 2. they made it clear that they are seeking legal advice in their individual, rather than in a representative, capacity;
 - 3. the counsel saw fit to communicate with the individual in their individual capacity;
 - 4. their conversations with counsel were confidential; and
 - 5. the substance of the conversations with counsel did not concern matters within the company or the general affairs of the company.

 - iii. Case Study: Elizabeth Holmes, Theranos, and attorney-client privilege
 - 1. Holmes (former CEO of Theranos) asked the court to keep communications with Theranos' counsel out of trial.
 - 2. The communications at issue discussed how Theranos should respond to investors, regulators, and the media, and also covered potential legal actions Holmes could pursue against the Wall Street Journal.
 - 3. Holmes argued counsel represented both her and Theranos on a variety of legal issues.

4. The Court held, however, that communications between Holmes and her counsel were subject to corporate privilege only and were admissible at her personal trial.
- iv. To mitigate the potential blurring of the line between employee and client, it is incumbent on lawyers to make sure their clients (and non-clients) understand the scope of representation.
- v. Straightforward engagement letters that clearly spell out who the client is and the boundaries of attorney-client privilege are a necessity.
- vi. Attorneys should also regularly remind clients – and their employees – about the difference between attorney-client privilege and corporate privilege, and recommend individual counsel if needed.

VII. Update to Rule 4.2

- a. **Rule 4.2.** Communications with Persons Represented by Counsel (“no-contact” rule)
 - i. In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
- b. On January 6, 2021, the Supreme Court of Virginia adopted Legal Ethics Opinion (“LEO”) 1890, which added Comment 7 to the rule.
- c. Rule 4.2, Comment 7 states the rule does not apply to communications with former constituents of a represented organization.
 - i. “In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization’s lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. *Compare* Rule 3.4(h). In communicating with a current or former constituent of an organization, a lawyer must not use

methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.” **Virginia Rules of Professional Conduct, Rule 4.2, Comment 7.**

- ii. *Ex parte* communications between plaintiff’s counsel and former employees are permissible. *See, e.g., Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 398 (S.D.N.Y. May 2, 2011); *Orlowski v. Dominick’s Finer Foods, Inc.*, 937 F. Supp. 723 (N.D. Ill. 1996).
 - iii. But counsel who speak with a former employee have a responsibility not to inquire into areas that may be subject to the attorney-client or work-product privileges, and should be careful not to induce the former employee to divulge any information that might violate the corporation’s attorney-client privilege. *See Smith v. Kalamazoo Ophthalmology*, 322 F. Supp. 2d 883 (W.D. Mich. 2004).
- d. Simply the fact that an organization has general counsel *alone* does not prevent another lawyer from communicating directly with the organization’s constituents; there could be particular matters where general counsel *cannot* represent the employees of the organization.
- i. Example: Corporate officer suspected of criminal conduct occurring at the workplace, but wholly outside the role and responsibilities (i.e. physical assault of coworker, embezzlement of corporate funds).
 - ii. **Securities Exchange Commission v. Lines**, 669 F. Supp. 2d 460 (S.D.N.Y 2009): In a securities enforcement action, neither organization nor president deemed represented by counsel in a particular matter simply because corporation has general counsel.
- e. May companies who make employees sign confidentiality agreements use those to restrict *ex parte* communications with opposing counsel once the employee is no longer employed?
- i. “To the extent that [the confidentiality] agreements preclude former employees from assisting in investigations of wrongdoing that have nothing to do with trade secrets or other confidential business information, they conflict with public policy in favor of allowing even current employees to assist in securities fraud investigations.” *In re JDS Uniphase Corp. Sec. Litig.*, 238 F.Supp.2d 1127 (N.D.Cal.2002).
 - ii. “Absent possible extraordinary circumstances . . . it is against public policy for parties to agree not to reveal, at least in the limited contexts of depositions or pre-deposition interviews concerning

litigation arising under federal law, facts relating to alleged or potential violations of such law.” *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441 (S.D.N.Y. 1995).

f. *Upjohn* Warning

i. What is it?

1. The notice an attorney (in-house or outside counsel) provides a company employee to inform the employee that the attorney represents only the company and not the employee individually.
2. The term originated with *Upjohn Company v. United States* (449 U.S. 383 (1981)). In *Upjohn*, the US Supreme Court held that the attorney-client privilege is preserved between the company and its attorney when its attorney communicates with the company’s employees, despite the rule that communications with third parties constitute a waiver of the attorney-client privilege.

ii. When is it used?

1. An attorney should caution company employees with an *Upjohn* warning when the company is involved in litigation or conducting an internal investigation.
2. *Upjohn* warnings are typically issued when an internal investigation is ongoing, or if the company is being investigated by regulators.
3. An *Upjohn* warning should be issued when an employee may disclose sensitive information to an attorney about the inner workings of a company. The attorney must inform the employee that the attorney-client privilege is not extended to individual employees, but, rather, the overseeing company.

iii. Who do they protect?

1. They are intended to protect employees, the company that has hired counsel, and the legal counsel, as well.
2. Providing an employee with an *Upjohn* warning should make it clear that:

- a. The attorney-client privilege over communications between the attorney and the employee belongs solely to, and is controlled by, the company.
- b. The company may choose to waive the privilege and disclose what the employee informs the attorney to a government agency or any other third party.