GENTRY LOCKE

100 YEARS

Attorneys

2023 GENTRY LOCKE SEMINAR

THURSDAY, OCTOBER 12, 2023

THE DEWEY GOTTWALD CENTER

RICHMOND, VIRGINIA

100 YEARS OF EXCELLENCE

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2023 GENTRY LOCKE SEMINAR

THURSDAY, OCTOBER 12, 2023
RICHMOND, VIRGINIA

9:45 a.m.	**Welcome**
10:00 a.m.	**"Hot Employment Law Developments to Know."** Todd A. Leeson and Paul G. Klockenbrink
10:30 a.m.	**"Rising Importance of Attorneys General in White-Collar Enforcement."** Erin M. Harrigan and John G. Danyluk
11:00 a.m.	**Break**
11:15 a.m.	**"The Nuts and Bolts of Government Contracting: Paving the Way for Doing Business with the Government."** Spencer M. Wiegard and Ryan J. Starks
11:45 a.m.	**"The Federal Corporate Transparency Act: How to Get Ready."** Clark H. Worthy and William S. Fussy
12:15 p.m.	**Lunch**
1:00 p.m.	**"Ethics Game Show."** Brittany L. Mountjoy and Harrison E. Richards
2:00 p.m.	**Break**
2:15 p.m.	**"Positioned for Success: Critical Motions and Appeals."** Monica T. Monday, J. Scott Sexton, and Evans G. Edwards
2:45 p.m.	**"Adding Value: Helping In-House Counsel Navigate Crisis."** Noah P. Sullivan and Carlos L. Hopkins
3:15 p.m.	**Break**
3:30 p.m.	**"Sit Down and Shut Up: The Art of Self-Awareness and Editing in Jury Trials"** Ashley W. Winsky and Jeffrey P. Miller
4:00 p.m.	**"One Party Consent Recordings & Other Ethical Conundrums in Internal Investigations."** Melissa E. O'Boyle
4:30 p.m. – 6:30 p.m.	**Reception**

GENTRY LOCKE
Attorneys

K. Brett Marston

Managing Partner

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Brett Marston serves as Gentry Locke's Managing Partner and is a member of the firm's Construction Law practice group. 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 (2016-2022); Construction and Public Contracts Section, Chair (2012-2013), Board of Governors, (2003-2014), Treasurer (2009-2010), Secretary (2010-2011)
- Virginia Transportation Construction Alliance Board of Directors (2023)
- 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

- Recognized by Chambers USA in Band 4 for Construction Law (2023)
- Named "Roanoke Lawyer of the Year" for Construction Law (2013, 2015, 2017, 2024) by The Best Lawyers in America, and noted in the areas of Construction Law (2006-2024) and Construction Litigation (2011-2024)
- 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 (2009-2023), to the Top 10 List (2015-2017), the Top 100 List (2014-2019, 2020-2023), 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 (2007-2022) and the Young Lawyer category (2004-2006)
- Named a "Legal Eagle" for Construction Law and Litigation – Construction by Virginia Living magazine (2012)
- Named a "Top Rated Lawyer" for Construction law by American Lawyer Media (2013)
- Roanoke Bar Association President's Volunteer Service Award, Silver level, for 249-500 hours of community service (2006, 2007)
- R. Edwin Burnette, Jr. Young Lawyer of the Year Award, Virginia State Bar (2004)

Published Work

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

Case Studies

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

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

GENTRY LOCKE
Attorneys

Monica Taylor Monday

Chair

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Monica Monday heads the firm's Appeals and Critical Issues 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), as being "held in high esteem as a leading appellate lawyer" (2022), and as being "the dean of Virginia Supreme Court litigation" (2023). 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. She was a "Leaders in the Law" honoree and named a "Go To Lawyer for Appellate" 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.

Monica served as Managing Partner of the firm from 2013-2022, and now serves as Chair of Gentry Locke's Executive Board, leading the firm's recruiting, diversity, and pro bono efforts.

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

- Secured final judgment for bank in equitable subrogation case concerning entitlement to funds in deposit account. Arch Insurance Company v. FVCbank, 881 S.E. 2d 785 (2022)
- Court affirmed summary judgment in suit alleging discriminatory taxation. Norfolk Southern Ry. Co. 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 held that property owners had a vested right to the use of their property. Board of Supervisors of Richmond County v. Rhoads, 294 Va. 43, 803 S.E.2d 329 (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 and clarified the defenses to qualified immunity. Cashion v. Smith, 286 Va. 327, 749 S.E.2d 526 (2013)
- Obtained reversal of workers' compensation case where 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 $25 million jury verdict in maritime case relating to asbestos exposure. Exxon Mobil Corp. v. Minton, 285 Va. 115, 737 S.E.2d 16 (2013)
- Obtained reversal of decision striking down water and sewer rates that town charged to out-of-town customers; won final judgment in favor of town. Town of Leesburg v. Giordano, 280 Va. 597, 701 S.E.2d 783 (2010)

- In question of first impression, obtained dismissal of domestic relations appeal based upon terms of property settlement agreement, which waived the right of appeal. Burke v. Burke, 52 Va. App. 183, 662 S.E.2d 622 (2008)
- Obtained reversal of award of writ of mandamus against municipal land development official in subdivision application case. Umstattd v. Centex Homes, G.P., 274 Va. 541, 650 S.E.2d 527 (2007)
- Secured affirmance of compensatory and punitive damages awards for breach of fiduciary duty, tortious interference, and conspiracy. Banks v. Mario Industries of Virginia, Inc., 274 Va. 438, 650 S.E.2d 687 (2007)
- Successfully 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)
- 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, Boyd-Graves Conference (2011-present); Member, Steering Committee (2016-present); Secretary (2022-present)
- Member, Virginia Poverty Law Center Advisory Council (2022-present)
- Member, Virginia Trial Lawyers Foundation Board (2022-present)
- Member, Judicial Council of Virginia (2013-2023)
- The Virginia Bar Association Appellate Practice Section Council (2009-present), Chair (2019-2021), Past-Chair (2022-2023)
- 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)
- Board of Directors, The Harvest Foundation (2015-2023)
- Member, Special Committee to Study Appellate Mediation in Virginia
- Member, American National Bankshares, Inc., Virginia State Banking Board (2019-present)
- 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 (2021-2023), Band 1, Litigation: Appellate (Virginia)

- “Leading Individual” by Chambers and Partners USA (2017-2023), Band 1, Litigation: Commercial (Virginia)
- Named a “Go To Lawyer for Appellate” by Virginia Lawyers Weekly (2023)
- Recipient of the Gentry Locke J. Rudy Austin Pro Bono Service Award (2023)
- “Virginia Business Power 500” (2020, 2021, 2022, 2023)
- “Virginia Business Women of Leadership” (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 (2009-2024)
- Named to Virginia Super Lawyers for Appellate Law in Super Lawyers magazine (2010-2023), listed in Virginia Super Lawyers *Top 100* in Virginia (2013-2023), listed in Virginia Super Lawyers Top 50 Women in Virginia (2015-2023), listed in Virginia Super Lawyers Top 10 in Virginia (2019-2023), 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 (2011-2022)
- Named a “Legal Eagle” for Appellate Practice by Virginia Living magazine (2012, 2015)
- Named a “Leaders in the Law” honoree by Virginia Lawyers Weekly (2006)
- Sandra P. Thompson Award (formerly the Fellows Award), Young Lawyers Division, Virginia Bar Association (2003)
- Best Appellate Advocate, First Place Team, and Best Brief, 1991 National Moot Court Competition

Published Work

- 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
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Matthew W. Broughton

Partner

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Matt Broughton is a Senior Partner and serves on the Executive Board 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
- Boat Operator's License – owned and operated boats for over 40 years

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 verdict 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) (2000-2023)
- Past President of the IFR Pilots Club (1990-2015)
- 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 (1997-2024)
- 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 (2010-2023), 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**

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Partner

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

Education

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

Experience

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

Affiliations

- Member, Labor & Employment Section, Virginia Bar Association
- Member, Labor & Employment Section, American Bar Association
- Member, Virginia State Bar
- Member, California State Bar (inactive)
- Member, Society for Human Resource Management; National, Roanoke, and Lynchburg
- Member, Board of Directors, Roanoke Area Ministries (2017-Present)
- Board Member, Roanoke Wildlife Rescue (2014-Present)
- Member, University of San Diego Law Review, 1987-1988
- Co-Chair (2000-present) and Former Chair (1998-1999), Roanoke Jingle Bell Run for Arthritis Foundation (1998-1999)
- Member, Board of Directors, Arthritis Foundation – Virginia Chapter (1999-2005)
- Frequent speaker for business groups throughout region

Awards

- Named one of The Best Lawyers in America® in the field of Employment Law – Management (2009-2024) Labor & Employment Litigation (2011-2024)

- Named to Virginia Super Lawyers in the area of Employment & Labor (2007-2021) and Employment Litigation: Defense (2021-2023), included in Super Lawyers Corporate Counsel edition (2009) and Super Lawyers Business Edition US in the area of Employment & Labor (2012-2014)
- Designated one of Virginia's Legal Elite in Labor & Employment Law by Virginia Business magazine (2007, 2016, 2019-2022)
- American Jurisprudence Awards in Torts (1986) and Evidence (1987)

Case Studies

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

- Aug 4, 2016 — **Employer Defeats Hostile Workplace Claim**
- Sep 1, 2015 — **Allegation of Americans with Disability Act Discrimination Against Municipality Dismissed**
- May 29, 2015 — **University Prevails on Motion to Dismiss Claims by Former Employee**
- Apr 23, 2015 — **Company Prevails Twice in Hostile Work Environment Claim**

GENTRY LOCKE
Attorneys

Todd A. Leeson

Partner

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Todd Leeson is the Chair of Gentry Locke's Employment law practice group. He has almost 35 years of experience representing and advising Virginia employers in employment and labor law matters and litigation. He regularly defends employment claims in Virginia courts and before agencies including the EEOC, National Labor Relations Board (NLRB), DOL, OSHA (whistleblower and retaliation claims), and the corresponding Virginia agencies (DOLI, OCR). His experience includes the defense of companies as to alleged violations of Title VII, ADA, ADEA, FLSA, FMLA, the NLRA, and Virginia employment laws. Todd regularly drafts, enforces, and/or litigates non-compete agreements and executive employment contracts. In addition, he has considerable experience representing management in labor union matters including union avoidance campaigns, unfair labor practice charges and labor arbitrations. He also represents Virginia colleges in various student conduct matters including Title IX and sexual misconduct complaints.

Todd is rated "AV/Preeminent" by Martindale-Hubbell, is repeatedly named one of the *Best Lawyers in America* in Labor & Employment Law, and has regularly been named to various lists, including Virginia Legal Elite. As recent examples, in 2022, Virginia Lawyers Weekly named Todd a "Go-To Lawyer for Employment Law, and in 2022 Best Lawyers in America named Todd the "Lawyer of the Year" (Labor law-management) in Roanoke. Todd was also honored by Virginia Lawyers Weekly in 2021 as a "Leader in the Law."

Education

- University of Notre Dame Law School, J.D. cum laude
- College of William and Mary, B.A.

Experience

- Represents employers in employment-related litigation in federal and state courts in Virginia
- Has been counsel of record in over 90 employment cases in the Western District of Virginia
- Extensive advice to employers on various COVID-19 workplace questions, disputes, and issues
- Successfully defended companies in over 240 EEOC charges alleging various forms of harassment, discrimination and/or retaliation
- Obtained partial summary judgment in Virginia state court in business conspiracy and breach of fiduciary duty employment case that led to $400,000 settlement for corporation.
- Attained early dismissal or resolution of several OSHA whistleblower complaints including MAP-21, AIR-21, STAA and the FSMA
- Led team of lawyers to persuade Federal Government, and opposing counsel, to voluntarily dismiss a False Claims Act Complaint filed against a local company
- Trusted counsel to Board of Directors to negotiate separation of CEO
- Achieved dismissal of wrongful termination case filed against a global manufacturer by a terminated safety manager
- Obtained summary judgment of age discrimination case filed in Federal Court
- Prevailed in grievance hearing before City personnel board in which board upheld significant discipline against long-service manager
- Brokered settlement of challenging Title IX sexual misconduct case on behalf of college in which complainant and respondent had divergent interests
- Collaborated with college counsel to respond to OCR discrimination complaint filed by former student; OCR dismissed complaint
- Defended local restaurant in FLSA collective action tip pooling lawsuit which was recently dismissed by the court
- Moved to quash EEOC document subpoena resulting in dismissal of potential ADA class action
- Obtained dismissal of joint employer Title VII case against local company

- Negotiated early settlement of NLRB protected, concerted activity (PCA) case filed against local company
- Worked with DOL officials to resolve overtime claims filed against area restaurant
- Successful mediation of WARN Act cases filed against coal company
- Prevailed in labor arbitration upholding management right to modify union employee's work schedule
- Successful defense of College in case in which student challenged suspension decision pursuant to College's Student Conduct Code
- Achieved favorable resolution of ADA termination lawsuit filed in Virginia Federal Court
- Prosecution of business competition, trade secret, and business conspiracy case filed against global corporation who hired executive with various restrictive covenants
- Obtained dismissal of FMLA claim investigated by DOL
- Favorable resolution of a non-compete and non-solicitation case filed against a corporation and a newly-hired employee
- Favorable early resolution of an ADA termination lawsuit filed against company by a senior executive
- Successful defense in labor arbitration of management's right to demote a union president
- Attained summary dismissal of race and age discrimination case
- Expediently resolved purported FLSA collective action case filed against a construction company
- Advised company to withdraw recognition of longstanding union and prevailed on union challenge before the NLRB
- Achieved early resolution of challenging federal whistleblower claim filed against corporation
- Obtained summary judgment for nation's largest retail pharmacy chain in ADA disability discrimination lawsuit
- Represented one of the world's leading wealth management companies that was sued in a non-compete case in Virginia
- Successfully prosecuted trade secrets case resulting in $245,000 settlement for local manufacturer
- Persuaded court to dismiss a noncompete and trade secret action filed against an employer that hired a key employee
- Obtained summary judgment in sex discrimination lawsuit filed against global retailer with operation in Virginia
- Procured summary judgment for Fortune 100 insurer in a race discrimination case filed in Roanoke
- Retained by Executive Officer of Fortune 500 retailer to negotiate his executive employment contract with the Company
- Successfully represented management in several Union labor arbitration cases involving discharge or contract interpretation issues
- Acquired summary judgment for local college in tenure denial case
- Litigated significant ULP case with NLRB involving potential back pay or reinstatement of 23 terminated employees; case resolved on favorable terms
- Obtained summary judgment in ADA disability discrimination case against national bank
- Achieved partial summary judgment for Fortune 500 automotive supplier in sexual harassment and retaliation case
- Obtained defense verdict for local sheriff in race discrimination lawsuit; defense verdict affirmed on appeal
- Procured dismissal of wrongful termination case filed against health care employer by terminated nurse
- Obtained summary judgment for Fortune 500 company in Title VII equal pay case
- Procured summary judgment for employer in FLSA overtime lawsuit
- Represented several local businesses faced with Union organizing efforts and/or campaigns.
- Successfully conciliated case against local construction company in which EEOC had found "cause" in support of EEOC charge
- Obtained preliminary injunction for local software company in trade secrets and business conspiracy case
- Successfully represented local utility company as to several unfair labor practice allegations filed against it with the National Labor Relations Board
- Mediated employment-related cases on behalf of local companies in this region
- Obtained dismissal of Family Medical Leave Act (FMLA) case filed against one of the nation's largest food service distribution companies
- Achieved summary judgment in ADEA case arising out of reduction in force by local manufacturer
- Negotiated conciliation of EEOC religious discrimination charge on behalf of large fast food restaurant
- Successful defense of company in non-compete case in which company hired valuable executive from a competitor
- Favorable resolution of trade secrets and business competition case of behalf of a company who sued departing employees and their new employer
- Dismissal of ADA termination case filed against company by executive with alleged alcohol problems

Affiliations

- Board of Directors, Jefferson Center (2023-Present)
- Board of Directors, Downtown Roanoke, Inc. (2014-2023); Chair of board (2021-22)
- Board of Directors, Family Service of Roanoke Valley (2016-2023); Chair of board (2020)
- Council member, Labor Relations & Employment Law Section of Virginia Bar Association (2008-2013, new term beings Jan. 1, 2024)
- Virginia State SHRM Legislative Director (2012-14)
- Board member, Roanoke Valley SHRM (2007-2009); Past President (2000)
- Board of Trustees, Taubman Museum of Art (2007-2012)
- Board of Directors, Roanoke Regional Chamber of Commerce (2010-2012)
- Elder, Salem Presbyterian Church (2011-2013, 2016-2018)

- Member, Federal Bar Association (2011-Present)
- Faculty Member, The Management Institute at Roanoke College (2011-Present)
- Associate member, National Association of College and University Attorneys (2014-Present)
- Past President, Downtown Roanoke Rotary Club (2004-2005)
- Chair, Virginia State SHRM Conference (2002)
- Member, Labor & Employment Section, American Bar Association (1989-2018)
- Member, Labor & Employment Section, Virginia Bar Association (1989-Present)
- Member and Past President, William & Mary Roanoke Alumni Association
- Graduate, Trial Advocacy Institute of UVA Law School (2000)
- Frequent speaker for SHRM, business and college groups in Virginia
- Author of dozens of employment law articles

Awards

- Named “Go-To Lawyer” for Employment Law by Virginia Lawyers Weekly (2022)
- Named “Roanoke Lawyer of the Year” for Labor Law – Management (2022)
- Named one of The Best Lawyers in America® in the areas of Employment Law – Management (2011-2024), Labor & Employment Litigation (2011-2024), and Labor Law – Management (2019-2024)
- Designated one of the “Legal Elite” in the Labor/Employment law by Virginia Business magazine (2016-2017, 2019-2022)
- Named a “Leader in the Law” by Virginia Lawyers Weekly (2021)
- Designated a Virginia Super Lawyer in the area of Employment & Labor Law (2014-2019) and Super Lawyers Business Edition US in the area of Employment & Labor (2014)
- Named a “Legal Eagle” for Employment Law – Management and Litigation – Labor & Employment by Virginia Living magazine (2012)
- Named a Top Rated Lawyer for Labor and Employment law by American Lawyer Media (2013)
- VBA Community Servant with 50 hours or more of certified pro bono legal and nonlegal community service, The Virginia Bar Association (2004-2010)

Published Work

- **Beyond the headlines: Virginia Values Act poses significant legal risks to Virginia Employers**; Law360; May 15, 2020
- **#MeToo and the Male Business Executive: A Call For Proactive Leadership**; Corporate Counsel Magazine; April 27, 2018.
- **Preventing Harassment in the Workplace: An Updated Analysis of the EEOC’s Call for a “Reboot”**; Bloomberg BNA Daily Labor Report; January 6, 2017.
- **Five Steps Virginia Employers Should Take to Help Avoid Whistleblower or Retaliation Claims**; Virginia Human Resources Today; Winter/Spring 2014.
- **EEOC Seeks to Provide Job Protection for LGBT Employees**; Virginia Human Resources Today; Summer/Fall 2013.
- **Policy Prohibiting Wage Discussion Found Unlawful**; Virginia Human Resources Today; Winter/Spring 2013.
- **Employers Face Significant Challenges Complying with the ADA Amendments Act**; Virginia Human Resources Today;Summer/Fall 2012.

Case Studies

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

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

GENTRY LOCKE
Attorneys

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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 2023 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 OCDETF 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 (2021-2023), Band 2, Litigation: White Collar Investigations
- Recipient of the “Influential Women of Law” award by Virginia Lawyers Weekly (2023)
- Designated one of the “Legal Elite” in Criminal law by Virginia Business magazine (2022)
- 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

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Associate

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John Danyluk practices with the firm's White Collar practice group, ranked Band 1 by Chambers USA. An expert in data privacy and cybersecurity, John is a Certified Information Privacy Professional (CIPP/U.S.) with the International Association of Privacy Professionals (IAPP) and guides clients through complex and evolving data privacy and cybersecurity laws and regulations. John uses his intimate knowledge of federal and military regulations, which he first developed as an Army JAG Officer, to advise government contractors on a wide variety of compliance requirements under the FAR, DFARS (including CMMC), and ITAR.

John also represents both corporate and individual clients during their most difficult times, defending and guiding them through all phases of the criminal process. John conducts internal investigations for organizations of all sizes to identify exposure areas and provide proactive guidance to protect those clients from future litigation or criminal prosecution.

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. As a federal prosecutor in the Western District of Texas, John served as the lead trial attorney for Fort Hood's exclusive federal jurisdiction and litigated over 1,000 cases, including numerous federal jury trials. As an Administrative & National Security Law Attorney in Grafenwohr, Germany, John advised on internal investigations into a variety of misconduct and financial issues, and advised senior military leaders on regulatory requirements for construction and acquisition of defense equipment.

Education

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

Special Licenses

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

Experience

- Advised multiple clients on data privacy compliance, including compliance with the Virginia Consumer Data Protection Act (VCDPA), California Consumer Protection Act (CCPA), and General Data Protection Regulation (GDPR).
- Advised international defense contractors regarding compliance with federal regulations, including FAR, DFARS, ITAR, and CMMC 2.0.
- Advised several clients regarding substantial losses due to cyber-attacks, including business email compromise attacks and cyber-extortion.
- Defended multiple international pharmaceutical companies facing criminal charges or civil lawsuits related to healthcare fraud.
- Represented a key member of management of a major professional sports franchise during federal and state regulatory and criminal investigations.
- Represented a non-profit university throughout a 13-month long internal investigation, as part of a team of 70 lawyers, accountants, and IT members investigating the organization's financial and business operations.
- Conducted an internal investigation for a grant-funded non-profit organization during a nine-month long investigation that included allegations of financial misconduct, sexual misconduct, and discrimination.
- Represented a state agency during a U.S. Attorney's Office investigation into violations of the Affordable Care Act.
- Represented a minor student with physical and developmental impairments accused of sexual assault, leading to a finding of "not responsible" in a Title IX investigation.

- Represented a university student in criminal and Title IX investigations who was accused of sexual assault of a minor, leading to a full dismissal of the Title IX investigation and no criminal charges.
- Represented numerous clients accused of state and federal crimes, including fraud, sexual assault, criminal misbranding, Endangered Species Act violations, and violations of the Federal Insecticide, Fungicide, and Rodenticide Act.
- 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 numerous federal jury trials, bench trials, and hearings.
- As a Special Assistant U.S. Attorney, closely advised FBI and Army CID agents on criminal investigations.
- As an Administrative & National Security Law Attorney in Grafenwohr, Germany, advised on internal investigations into a variety of issues, including senior leader misconduct, discrimination, sexual harassment, death and suicide investigations, and financial loss investigations.
- As an Administrative & National Security Law Attorney in Grafenwohr, Germany, advised on regulatory requirements and reviewed multi-million dollar purchase agreements for construction and acquisition of defense equipment.
- 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 Military Magistrate, responsible for authorizing law enforcement search warrants and making pre-trial confinement determinations for criminally charged defendants.

Affiliations

- Criminal Justice Act Panel, Eastern District of Virginia
- Member, Virginia State Bar
- Member, Virginia Bar Association
- Member, American Bar Association
- Membership Chair – Criminal Section, Federal Bar Association
- Judiciary Committee, Richmond Bar Association
- Editor-in-Chief, Richmond Journal of Law and Technology, University of Richmond School of Law (2015-16)

Admissions

- Virginia State Bar
- Western District of Texas
- Eastern District of Virginia
- Western District of Virginia

GENTRY LOCKE
Attorneys

Ryan J. Starks

Associate

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Ryan Starks works in Gentry Locke's commercial litigation practice group, where he assists clients with complex business and civil disputes in state and federal courts throughout Virginia. Ryan has also practiced before the U.S. Government Accountability Office and the Court of Federal Claims. Ryan has wide-ranging experience in courts extending from the eastern shore to southwest corner of the state, including in construction, contract, employment, fair housing, government contracting, insurance, intellectual property, land use, landlord-tenant, and solar energy disputes. Ryan has worked with a broad range of large and small U.S. and international clients to achieve successful outcomes throughout the Commonwealth.

Education

- Washington and Lee University School of Law, J.D.
- State University of New York (SUNY) Albany, B.A.

Experience

- Represents businesses and individuals in lawsuits involving contract disputes, business torts, professional liability, personal injury, and other civil actions.
- Represents employers facing allegations of discrimination under Title VII of the Civil Rights Act.
- Counsels clients through investigations by the Department of Justice and the State Attorney's General Office including whistleblower litigation and alleged violations of the False Claims Act.
- Represents government contractors in bid protests, and disputes with prime and subcontractors.
- Represents construction professionals in disputes with subcontractors as well as the state and federal government, including disputes related to Miller and Little Miller Act payment bonds, mechanics liens, claims for delay damages, and other construction-related litigation.
- Counsels clients through multiparty alternative dispute resolution/mediation.

Affiliations

- Member: Virginia State Bar
- Member: Richmond Bar Association (CLE Committee)
- Member: Virginia Association of Defense Attorneys
- Member: Washington and Lee University Alumni Association, Richmond Chapter
- Member: New York State Bar
- Member: District of Columbia Bar

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Spencer Wiegard is a Partner and Chair of the firm's Construction Law practice group. 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 (2019-2022)
- 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
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Clark Worthy has a B.S. in Finance from the University of Virginia, McIntire School of Commerce and has spent over 25 years working with private corporations on governance, merger and acquisition, real estate, and financing matters, and with individuals on their personal financial matters. For the past 20 years, Clark has primarily devoted his practice to commercial real estate matters including purchases, sales, leases, tax-free exchanges, and financings. A partner in the firm, Clark is recognized among the *Best Lawyers in America* for Real Estate Law.

Education

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

Experience

- Frequently serves as local counsel for multi-state real estate and financial projects
- Worked on both the acquisition by and the sale of commercial properties to local banks for the location of new branch banks
- Worked on the acquisition and sale of several local businesses including a veterinary practice, dental practices and manufacturing companies
- Worked with individuals and corporations in 1031 Like-Kind and Reverse Like-Kind Exchange transactions
- Assist a large non-profit organization with low-income housing projects, general corporate work, and loan programs
- Corporate counsel for several local businesses including physician practices, a landscaper and developer, insurance agents, contractors and subcontractors, provider of assistance programs to disabled individuals and a mortgage broker

Affiliations

- Member, Board of Directors, Child Health Investment Partnership of Roanoke Valley (2015-Present); Board Chair (2018-2019)
- Past Member, Board of Directors, Apple Ridge Farm (2006-2014); former Board Chair
- Past Board Chairman, Presbyterian Community Center in Roanoke
- Past Board Member, Roanoke Regional Chamber of Commerce
- Graduate, Leadership Roanoke Valley
- Law Clerk to the Honorable H. Emory Widener, Jr., U.S. Court of Appeals, 4th Circuit, 1992-1993

Awards

- Named a “Go To Lawyer” for Commercial Real Estate by Virginia Lawyers Weekly (2023)
- Named “Roanoke Lawyer of the Year” for Real Estate Law (2022)
- Named one of The Best Lawyers in America® in Real Estate Law (2012-2024)
- Designated as one of the “Legal Elite” by Virginia Business magazine in Real Estate/Land Use (2017, 2021, 2022)
- Named a “Legal Eagle” for Real Estate Law by Virginia Living magazine (2012)

GENTRY LOCKE
Attorneys

William S. Fussy

Associate

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Will Fussy works in Gentry Locke's Roanoke office and is a member of the firm's general commercial practice group. Will advises a variety of clients, including business organizations and business owners, on matters concerning transactions and corporate governance. Will graduated summa cum laude from Hampden-Sydney College and received his law degree cum laude from Washington and Lee University School of Law.

Education

- Washington and Lee University School of Law (J.D., cum laude)
- Hampden-Sydney College (B.S., summa cum laude, Phi Beta Kappa)

Experience

- Represented clients in commercial real estate matters, including purchase and sale transactions and commercial leases
- Prepared stock and asset purchase agreements
- Assisted individuals with new business entity formation
- Performed due diligence reviews
- Advised clients with respect to complex commercial contracts

Affiliations

- Member: Virginia State Bar
- Member: Roanoke Bar Association
- Board of Directors, Blue Ridge Christian Counseling
- Deacon, Westminster Presbyterian Church

GENTRY LOCKE
Attorneys

Brittany L. Mountjoy

Associate

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Brittany Mountjoy practices with the firm's White Collar practice group, which is ranked Band 1 by Chambers USA. Brittany represents both corporate and individual clients during their most difficult times, defending and guiding them through all phases of the criminal process. Brittany also conducts internal investigations for organizations of all sizes to identify exposure areas and provide proactive guidance to protect those clients from future litigation or criminal prosecution.

Previously, Brittany worked as a Deputy State Public Defender at the Colorado State Public Defender's Office. There, she advocated for indigent clients in criminal matters, tried numerous jury trials, and worked on several appeals. Prior to and during law school, Brittany worked in Washington, D.C. and has considerable experience in international and U.S. legislative and regulatory affairs.

Education

- American University, Washington College of Law, J.D.
- Virginia Polytechnic Institute and State University, M.S. in Science and Technology Studies
- Virginia Polytechnic Institute and State University, B.S. in Animal and Poultry Sciences
- Virginia Polytechnic Institute and State University, B.A. in International Studies

Experience

- Represented numerous clients accused of state and federal crimes, including bribery, procurement fraud, criminal libel, sexual assault, animal cruelty, and Endangered Species Act violations.
- Conducted an internal investigation for a grant-funded non-profit organization during a nine-month long investigation that included allegations of financial misconduct, sexual misconduct, and discrimination.
- Advised and represented clients facing significant fines from allegations of violating the Virginia Consumer Protection Act.
- As a Deputy State Public Defender at the Colorado State Public Defender's Office litigated thousands of cases.
- As a Deputy State Public Defender at the Colorado State Public Defender's Office wrote and handled multiple appeals.
- Conducted legal research, authored publications, and provided support to local and federal policymakers on issues of sexual violence in custodial settings at Project on Addressing Rape in Washington D.C.
- Represented the specialty chemical industry on the International Trade Advisory Committee (ITAC) by providing detailed policy and technical advice and recommendations to the Department of Commerce and the United States Trade Representative in 2017.
- Represented the specialty chemical industry at the APEC Chemical Dialogues in Lima, Peru in 2016.
- Drafted and submitted comments on regulatory matters to federal and international agencies.
- Educated congressional staff, regulatory agencies, and embassy officials on trade issues.

Affiliations

- Criminal Justice Act Panel, Eastern District of Virginia
- Member, Virginia State Bar
- Member, Virginia Bar Association
- Member, Metropolitan Richmond Women's Bar Association
- Member, Kappa Kappa Gamma

Admissions

- Virginia State Bar

- Maryland State Bar
- Colorado State Bar
- Eastern District of Virginia
- Western District of Virginia

GENTRY LOCKE
Attorneys

Harrison E. Richards

Associate

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Harrison Richards is a member of the firm's Employment & Labor group where he regularly handles a wide variety of employment disputes and litigation.

Prior to joining Gentry Locke, Harrison worked in Washington D.C. at a boutique litigation firm. He has experience in state and federal courts as well as with arbitrations and administrative evidentiary hearings. Harrison earned his J.D. from The Catholic University of America's Columbus School of Law and received his B.A. from Roanoke College. He is a native of Roanoke, Virginia and is licensed in Virginia as well as Washington D.C.

Education

- The Catholic University of America, Columbus School of Law, J.D.
- Roanoke College, B.A., cum laude

Experience

- Experienced with arbitrations and administrative evidentiary hearings before the American Arbitration Association and the D.C. Office of Employee Appeals
- Labor law experience including grievances, collective bargaining, and arbitration
- Developed data processing and production specifications with clients to meet legal requirements
- Consulted with clients regarding technical, logistical, and legal issues related to data breaches
- Provided written legal research regarding various civil litigation issues presented in cases arising out of the Federal Tort Claims Act, the Privacy Act, the Tucker Act, and the Administrative Procedure Act

Admissions

- Virginia State Bar
- District of Columbia Bar

GENTRY LOCKE
Attorneys

J. Scott Sexton

Partner

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

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

Education

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

Experience

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

Energy Cases: Mineral, Energy, and Land Rights

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

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

Commercial Litigation

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

Catastrophic Injury and Complex Tort Litigation

- Successful representation for qui tam whistleblower case against Duke University alleging research grant fraud resulting in $112.5 million settlement, the largest in U.S. history
- Lead trial counsel for Rolling Stone magazine in defamation case regarding UVA false rape claim, Eramo v. Rolling Stone
- Successfully represented many clients in claims arising from contaminated steroid injections
- Obtained jury verdict in favor of client in complicated construction case
- Negotiated global settlement on behalf of Virginia injured parties in Multi-District Litigation case

Affiliations

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

Awards

- Named one of Virginia's Go To Lawyers in the area of Business Litigation by Virginia Lawyers Weekly (2023)
- Named a Virginia Leader in the Law by Virginia Lawyers Weekly (2010)
- Named one of The Best Lawyers in America® in the fields of Commercial Litigation (2008-2024) and Oil & Gas Law (2009-2021), also listed in Best Lawyers in America – Business Edition (2016)
- Named to Virginia Super Lawyers in the area of Business Litigation (2007-2023), included in Super Lawyers Corporate Counsel edition (2010) and Super Lawyers Business Edition US in the area of Business Litigation (2012-2014)
- Named a "Legal Eagle" for Commercial Litigation and Oil & Gas Law by Virginia Living magazine (2012)
- Designated as one of the Legal Elite in the field of Civil Litigation (2008-2010, 2012-2015, 2019-2020, 2022), Intellectual Property (2003-06), and Commercial Litigation (2021) by Virginia Business magazine

GENTRY LOCKE
Attorneys

Evans G. Edwards

Partner

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

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

Education

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

Experience

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

Affiliations

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

Case Studies

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

- Aug 25, 2020 — **$8,000,000 awarded in Products Liability Case**
- Nov 22, 2016 — **$1.75 Million Settlement for Fall Victim due to Nursing Malpractice**

GENTRY LOCKE
Attorneys

Noah P. Sullivan

Partner

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Noah Sullivan has a diverse litigation practice, focused on high-stakes trial and regulatory litigation. Noah has deep litigation experience in federal and state courts across the nation. Prior to joining Gentry Locke, Noah cut his teeth for over nine years at the Washington, D.C. office of Gibson, Dunn & Crutcher LLP. He also previously served as Deputy Counsel and then Counsel to Governor Terry McAuliffe of Virginia. At Gentry Locke, Noah combines his commercial litigation experience and Virginia-government experience to help clients navigate their most significant litigation, regulatory, and government-facing challenges.

Education

- Stanford Law School, J.D.
- University of Virginia, B.A. with Highest Distinction

Experience

- Represented clients in numerous cases in federal and state courts, tackling significant matters on a broad spectrum of legal and factual issues, including:
  - Litigating trademark dispute on behalf of plaintiff in the Eastern District of Virginia, leading to favorable global settlement.
  - Obtaining full defense victory for client in arbitration proceeding arising from tax dispute in a multi-billion dollar transaction.
  - Representing major insurance company in series of cases primarily pending in South Carolina state court related to novel theories of liability in asbestos exposure cases.
  - Defending large retail company in series of wage and hour litigations and arbitrations.
  - Representing Canadian lumber producer in countervailing duties dispute before the Department of Commerce and bi-national review panels.
  - Conducting discovery and preparation for retrial in False Claims Act case brought by the United States against a major government contractor, which led to favorable settlement.
  - Representing rail carriers in significant proceedings before the Surface Transportation Board.
  - Defending multiple medical practices in dispute with insurance company regarding termination and amendment rights, involving complex federal and state legal issues.
  - Representing technology company in appeal of major trade-secrets judgment on appeal to the Virginia Court of Appeals.
  - Obtaining reversal of multi-million-dollar False Claims Act judgment in the U.S. Court of Appeals for the Seventh Circuit.
  - Representing non-profit hospital in appeal of enormous False Claims Act judgment in the U.S. Court of Appeals for the Fourth Circuit.
  - Representing health care company in multi-jurisdictional health care fraud investigation.
  - Conducting internal investigation on behalf of client in response to sexual misconduct scandal with top executive.
  - Noah also maintains an active pro bono practice, which has included defending indigent litigants facing criminal charges in the Eastern District of Virginia and representing plaintiff in Section 1983 suit against locality in the District of Maryland.
- Served as chief legal advisor to the Governor of Virginia and Cabinet on all aspects of state government, including:
  - Overseeing review of all regulatory actions pending before executive branch agencies and took lead role in legislative efforts related to the Virginia Administrative Process Act.
  - Reviewing legislation passed by the General Assembly, as well as developing executive orders and directives to advance the Governor's priorities.

- Developing legal framework and litigation strategy for Governor's historic restoration of rights program, which successfully restored voting rights to over 175,000 ex-felons in Virginia.
- Advising Governor and Secretary of Public Safety and Homeland Security on issues surrounding 2017 white nationalist rally in Charlottesville, Virginia and follow-on executive orders and actions.
- Litigating remedial plan in Congressional redistricting case on behalf of Governor McAuliffe, which resulted in Governor's advocated creation of second minority opportunity district in Virginia.

* Some representative matters reflect work prior to joining Gentry Locke

Affiliations

- Member, Virginia State Bar
- Member, District of Columbia Bar

Admissions

- Admitted to practice law in Virginia and the District of Columbia
- Admitted to the U.S. District Courts for the Eastern and Western Districts of Virginia, the District of the District of Columbia, the District of Maryland, and the U.S. Court of Appeals for the Fourth Circuit

Awards

- Rated AV Preeminent by Martindale-Hubbell

GENTRY LOCKE
Attorneys

Carlos L. Hopkins

Partner

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Carlos Hopkins is a partner in both Gentry Locke's Criminal & Government Investigations and Government & Regulatory Affairs practice groups. Carlos previously served as Virginia's Secretary of Veterans and Defense Affairs where he was the state's top official for coordinating resources to support Virginia's veteran community. Carlos was also appointed by former Governor Terence R. McAuliffe in 2014 to serve on the Governor's Cabinet as Counsel to the Governor. At Gentry Locke, Carlos combines his criminal and civil litigation experience and Virginia-government experience to help clients navigate their most significant litigation, regulatory, and government-facing challenges.

Education

- University of Richmond School of Law, J.D.
- The Citadel, B.A. in Political Science, Law and Criminal Justice

Experience

- Appointed Virginia's Secretary of Veterans and Defense Affairs by Governors Terence R. McAuliffe and Ralph S. Northam (2017-2022)
- Appointed Counsel to the Governor on the Virginia Governor's Cabinet as the Governor's primary legal advisor (2014-2017)
- Served on the personal staff of the Commanding General (CG) of the 29th Infantry Division as Chief Legal Officer in the Virginia Army National Guard
- Mentored second and third year law students participating in the Criminal Law Placement Externship Program at the University of Richmond, TC Williams School of Law (2019-2021)
- Served as Deputy City Attorney and supervised the Special Litigation and Public Safety Division in the Richmond City Attorney's Office (2013-2014)
- Owned and operated a boutique law firm representing individuals charged with various classes of felonies and misdemeanors in state and federal court (2011-2013)
- Played an integral role in developing policies and procedures to manage Virginia's public defender system as the agency's Director of Training

Affiliations

- Member, Virginia State Bar
- Board of Directors, Richmond Ambulance Authority
- Board of Directors, Virginia Voice
- Board of Directors, Richmond Public Schools Education Foundation
- Richmond Steering Committee for Just the Beginning (JTB) Program
- Life Member, The Citadel Alumni Association
- Member, Alpha Phi Alpha Fraternity
- Chairman, Virginia Military Advisory Council (2017-2022)
- Member, Virginia Code Commission (2014-2017)
- Board of Directors, Virginia Association of Criminal Defense Lawyers (2010-2013)

Admissions

- Commonwealth of Virginia
- The Fourth Circuit Court of Appeals
- The United States Court of Appeals for Veterans Claims

- The United States District Court for the Eastern District of Virginia
- The United States District Court for the Western District of Virginia

GENTRY LOCKE
Attorneys

Ashley W. Winsky

Partner

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Ashley Winsky is a partner at Gentry Locke's Richmond office, specializing 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 Virginia 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), the Transportation Defense Advocates Council (TDAC), and Immediate Past 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 eleven 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

- First-chaired six-day federal trial involving allegations of negligence, punitive damages, and a request that the jury award $10 million, where plaintiff suffered an undisputed moderate traumatic brain injury and spinal fractures, and obtained a complete defense verdict for motor carrier and its driver
- 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
- In an admitted liability case, obtained jury verdict for tractor-trailer company within $5,000 of requested verdict
- 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 and tanker companies and drivers involved in accidents
- 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 of negligent hiring and retention claims for multiple motor carriers in various actions via motions to dismiss or summary judgment

- 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 dismissal with prejudice of a wrongful death action for marine terminal on personal jurisdiction grounds
- 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

- Immediate Past Chair of the Virginia Bar Association's Transportation Section (2023)
- Chair of the Virginia Bar Association's Transportation Section (2022)
- Vice Chair of the Virginia Bar Association's Transportation Section (2020-2021)
- Member, Transportation Lawyers Association (TLA)
- Member, American Trucking Association (ATA)
- Member, Trucking Defense Advocates Council (TDAC)
- 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
- Virginia Kids Belong, Business Advisory Council Member

Speaking Engagements

- Presenter, "Where Worlds Collide: Legal Issues at the Interstices Between Brokers and Motor Carriers," Transportation Lawyers Association Annual Conference, San Diego, CA, April 29, 2023
- Presenter, "You Start Walking My Way: Keys to a Successful Mediation," Gentry Locke Seminar, Richmond, VA, September 28, 2022
- 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 (2021-2023)

Published Work

- Article, "**Trucking Industry Dealt a Blow: What You Should Know**," Gentry Locke Website, July 20, 2022.
- Interview, "**How Plaintiffs Use Commercial Vehicle Regulations to Turn Simple Negligence Into Driver Malpractice**," Corporate Counsel Business Journal, September 11, 2018.

GENTRY LOCKE
Attorneys

Jeffrey P. Miller

Associate

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Jeff Miller is a member of the firm's Civil Defense Litigation practice group. Jeff represents his clients in Virginia's state and federal courts across a wide variety of practice areas, including transportation, hospitality, defamation, and business disputes, both at the trial and appellate level. Jeff has tried dozens of cases, defeated multiple claims at the motions stage, and served as second chair on multi-million-dollar brain injury trials before Virginia juries.

Jeff frequently defends trucking companies in catastrophic injury, brain injury, and wrongful death cases, in addition to his work defending retailers and amusement parks, and litigating various commercial and intentional tort claims. Jeff has extensive experience working with experts in the fields of accident reconstruction, human factors, biodynamics, brain injury medicine, engineering, and other professionals with a range of specialties. Jeff also assists our transportation clients as part of the rapid response team, helping them navigate the crucial minutes and hours immediately after an accident occurs.

Prior to beginning his law career, Jeff studied music and put his talents to use as a professional piano player and entertainer.

Education

- University of Richmond School of Law, J.D., magna cum laude
- Regis University, B.S., summa cum laude

Experience

- Litigated in all Virginia state courts and US District Courts for the Eastern and Western Districts of Virginia
- Tried dozens of General District Court cases to verdict, tried multiple Circuit Court trials to jury verdict as second-chair, and second-chaired two-week federal jury trial resulting in a defense verdict
- Won dismissal of million-dollar premises lawsuit on a pre-discovery motion to dismiss
- Secured dismissal on summary judgement of multimillion-dollar discrimination claim against amusement park security team
- As a research assistant for the Court of Appeals of Virginia, assisted in research and writing for an article on the "do's and don'ts" of appellate advocacy in Virginia, published in the University of Richmond Law Review's 2014 Annual Survey

Affiliations

- President of the Henrico County Bar Association (2023-2024); Board Member since 2017
- John Marshall Inn of Court (2018-Present)
- Richmond Bar Association (2015-Present)
- Virginia Bar Association (2015-Present)
- Virginia Association of Defense Attorneys (2015-Present)
- Defense Research Institute (2015-2020)

Speaking Engagements

- Co-Presented Defending Freight Brokers and Transportation Intermediaries: New FMCSA Guidance; Preemption Under Ying Ye v. GlobalTranz, a Strafford Webinar on September 28, 2023
- Presenter, "Managing the Insurance Relationship: Making Sure Your Coverage is There When You Need It," Gentry Locke Seminar, Richmond, VA, September 28, 2022, co-authored by Guy M. Harbert, III.

- Presented the Appellate Section's Annual Case Law Update: Virginia Cases at the Virginia Association of Defense Attorneys, Spring Sections Seminar 2020

Awards

- Named to Best Lawyers "Ones to Watch" List for Commercial Litigation, Personal Injury Litigation – Defendants, Product Liability Litigation – Defendants, and Transportation Law (2021-2024)
- Named a Virginia Super Lawyers Rising Star in "Civil Litigation: Defense" (2020-2023)
- Named a Virginia Business Legal Elite "Young Lawyer" (2019)
- Awarded Pro Bono Certificate by University of Richmond (2015)
- Order of the Coif (2015)
- CALI for 1st Amendment Law and Antitrust (2014)
- McNeil Honor Society (Inducted 2014)

Published Work

- Author, The Statute Has No Clothes! How Contemporary Free Exercise Clause Cases Stand to Expose the Failings of the Religious Freedom Restoration Act and the Merits of the Smith Standard, prize winning article in the 2015 McNeil Honor Society legal writing competition
- Co-Author with Laura D. Windsor, Another Hoop For Government Contractors: The Fair Pay and Safe Workplaces Executive Order, Summer 2014 Client Alert
- Research Assistant, University of Richmond Law Review: Appellate Law, authored by The Honorable Marla Graff Decker, published in the University of Richmond Law Review's 2014 Annual Survey

Case Studies

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

- Apr 5, 2022 — **Court Grants Summary Judgment from the Bench in Favor of Big Box Retailer**

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Melissa E. O'Boyle is a Partner in Gentry Locke's Criminal & Government Investigations practice group. Previously, Melissa worked for more than 15 years as an Assistant United States Attorney in the Eastern District of Virginia, litigating some of the District's most complex fraud and corruption cases, investigating and prosecuting a broad array of criminal matters, and coordinating relationships with law enforcement and regulatory partners. Most recently, she served as the chief of criminal prosecutions for Norfolk's Criminal Division, where she supervised over 19 federal prosecutors and managed the white-collar unit responsible for authorizing and managing fraud, public corruption, securities, national security, and civil rights investigations. Melissa has handled several high-profile criminal prosecutions, including a public corruption case against former Norfolk Vice Mayor Anthony Burfoot, and a complex bank fraud case against the senior executives responsible for the financial collapse of the Bank of the Commonwealth.

As a member of the firm's Criminal & Government Investigations practice, Melissa will work with clients on developing and implementing effective regulatory compliance programs, internal controls, and ethics programs across a variety of industries including banking, securities, government contracting, cyber security, insurance, and healthcare. Melissa also will work with clients to conduct internal investigations and will provide strategic advice aimed at mitigating any potential negative impacts on business operations, criminal, civil, or regulatory exposure, and reputational harm. Given her extensive trial experience, Melissa also will assist clients in analyzing and developing successful litigation strategies.

Melissa is admitted to practice in Virginia, the District of Columbia, and New York. In 2022, she was recognized with a Top Prosecutor Award by the Women in Federal Law Enforcement (WIFLE) for exemplary achievements in prosecutions of federal crimes. O'Boyle was also recognized with the EOUSA Director's Award for Superior Performance as an Assistant United States Attorney in 2011 and 2016 and received the FBI Director's Citation for Excellence in Prosecution in 2014.

Education

- Washington and Lee University School of Law, J.D. cum laude
- Capital University, B.A. summa cum laude

Experience

- Served as the Criminal Chief of the Norfolk Division of the United States Attorney's Office for the Eastern District of Virginia. Managed white-collar unit with responsibility for authorizing and managing fraud, public corruption, securities, national security, and civil rights investigations.
- Served as Assistant United States Attorney for the Eastern District of Virginia for over fifteen years.
- Investigated and prosecuted a broad array of federal criminal matters including, but not limited to, conspiracy, public corruption, securities fraud, bank fraud, healthcare fraud, wire and mail fraud, money laundering, identity theft and cybercrime.
- Served as lead prosecutor in successful ten-week criminal jury trial involving the former CEO of the Bank of the Commonwealth, other bank executives, and certain favored customers.
- Served as lead prosecutor in numerous successful public corruption jury trials involving local Virginia government officials including a former Vice Mayor, a former Sheriff, a former Police Detective, and a Congressional candidate.
- Served as lead prosecutor in successful five-week criminal securities fraud jury trial involving the CEO of a Virginia-based investment firm.
- Prepared and argued numerous appeals before the United States Court of Appeals for the Fourth Circuit.

Affiliations

- Member: Virginia State Bar

- Member: New York State Bar
- Member: District of Columbia State Bar

Awards

- Women In Federal Law Enforcement Association – Top Prosecutor Award (2022)
- EOUSA Director’s Award for Superior Performance as an Assistant United States Attorney (2016)
- EOUSA Director’s Award for Superior Performance as an Assistant United States Attorney (2011)
- FBI Director’s Citation for Excellence in Prosecution (2014)
- Office of the Inspector General Board of Governors of the Federal Reserve, Consumer Financial Protection Bureau – Award for Bank of the Commonwealth Prosecution (2014)
- Office of the Inspector General for the FDIC – Award for Bank of the Commonwealth Prosecution (2014)
- Virginia Bank Security Association – Honorary Award (2014)
- Virginia Bank Security Association – Star Award (2010)

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HOT EMPLOYMENT LAW DEVELOPMENTS TO KNOW

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Hot Employment Law Developments to Know

Todd Leeson
Paul Klockenbrink

Gentry Locke Seminar
Roanoke – October 6, 2023
Richmond – October 12, 2023

1. Cannabis and Virginia Employment Law
2. Employer Strategies to Protects Its Assets & To Prevent Unfair Competition by Departing Employees with Focus on Virginia Law
3. Workplace Violence
4. Artificial Intelligence, Real Discrimination

Some Recent Facts, Trends to Know

Recreational cannabis use is now legal in 21 states (including Virginia). Medical marijuana programs are permissible in 37 states. In November 2022, voters in Maryland and Missouri voted to legalize recreational cannabis use; voters in Arkansas, North Dakota and South Dakota rejected such proposals.

According to Pew Research Center study published October 2022, 59% of U.S. adults believe marijuana should be legal for recreational and medical use; 30% believe it should only be legal for medical use, and 10% believe it should not be legal.

The percentage of employees who tested positive for marijuana following an on-the-job accident rose to 7.3% in 2022, an increase of 9% compared to 2021.

Current Federal Law & Cannabis from Workplace Perspective

The Federal Controlled Substances Act of 1970, administered by the U.S. Drug Enforcement Administration (DEA), **continues to classify marijuana as a Schedule I substance**, meaning that it has no accepted medical use and a high potential for abuse.

Moreover, the Federal Drug-Free Workplace Act of 1988 (DFWA) requires certain federal contractors and grant recipients to maintain a drug-free workplace to receive federal funds.

In addition, the U.S. Department of Transportation (DOT) regulates safety-sensitive transportation employers and employees. The DOT position is that even though a state law may allow cannabis use, this does not preempt the Federal drug-related regulations.

DOT requires testing for persons in safety-sensitive positions (e.g., think about persons who operate a vehicle or who are exposed to hazardous materials.).

What Do Virginia Lawyers Need to Know about Cannabis & the Workplace? Va. Code § 4.1-600, et seq., the Cannabis Control Act (the "Act")

Generally stated, the Virginia law that took effect July 1, 2021, allows persons over 21 years of age to possess small amounts of marijuana, and cultivate up to 4 plants at home.

The Act establishes the Virginia Cannabis Control Authority as an independent authority responsible for issuing regulations, approving licenses, and enforcement.

There are 4 license categories: cultivation, product and manufacturing, wholesale and retail.

The Act contains restrictions on vertical integration and anti-labor activity.

Original law contained key provisions for geographic disbursement and social equity.

The potential tax rate is at least 21% with a maximum of 24%.

November 2021 election results (especially election of Gov. Youngkin) slowed the momentum for proactive cannabis legislation. Elections in November 2023 will be key regarding the timing and substance of any further legislation.

Virginia Law Permits Use of Cannabis Oils in Limited Situations

There is another Virginia law, Virginia Code § 40.1-27.4, that took effect July 1, 2021. The law prohibits an employer from disciplining an employee based on the employee's "lawful use of cannabis oil pursuant to a valid written certification issued by a practitioner for the treatment or to eliminate the symptoms of the employee's diagnosed condition or disease."

This law only applies to "cannabis oils," a narrowly defined term.[1] The definition is not the same as medical marijuana or a person's recreational use as a form of self-medication.

The law also includes the following exceptions:

1. An employer is not restricted from taking an adverse employment action for any work impairment caused by the use of cannabis oil or to prohibit possession during work hours.
2. An employer is not required to commit any act that would cause it to be in violation of federal law or that would result in the loss of a federal contract or federal funding.
3. Any defense industrial base sector employer or prospective employer is not required to hire or retain any applicant or employee who tests positive for TCH in excess of 50 ng/ml for a urine test or 10 pg/mg for a hair test.

Virginia Law Regarding Convictions for Simple Possession

In 2020, Virginia enacted a law that employers may not ask job applicants to disclose information regarding whether they were arrested, charged or convicted for simple possession of marijuana.

Aside from the above exception, a Virginia employer may still ask an applicant whether he/she has been convicted of a crime and, if so, to provide the details so the employer can make a fair decision. (In other words, a prior conviction alone is not an automatic bar—need to look at specific facts.)

What about Virginia law requiring reasonable accommodations on the basis of disability?

Similar to the federal ADA, effective July 1, 2021, Virginia has now amended the Virginia Human Rights Act to prohibit discrimination on the basis of disability.

Accordingly, employers must now provide reasonable accommodations to the known mental and physical impairments of an otherwise qualified person with a disability to assist such person in

[1] See Va. Code § 54.1-3408.3

performing a particular job unless the employer can demonstration that the accommodation would impose an undue burden on the employer.

An employer is required to engage in a timely, good faith interactive process with the employee who has requested an accommodation based on a purported medical impairment.

The term "mental impairment" does not include alcoholism or current drug use.

Real World Question: Assume an employee informs management that he has a medical impairment that his health care provider opines can be alleviated with the use of cannabis. He contends that this use would allow him to perform his job, and that he will not be "impaired" while working. The employee requests that the employer not discipline him for his cannabis use.

May the employer require that the employee's health care provider certify the need for the use and to ensure that the employee will be able to perform his duties in an unimpaired condition?

In my judgment, the employer should follow the interactive process with this employee. To evaluate the employee's request, the employer can obtain necessary information from the employee's health care provider to discern whether the employee will be able to perform the essential functions of the job in a safe and unimpaired condition.

There has been, and will be, litigation in which employees (or former employees) contend that their employer violated the ADA or Virginia Disabilities Act for failing to allow their use of cannabis for purported medical reasons. The analysis in these cases will be highly fact-specific that may include the following questions.

- What are the essential functions of the job?
- What is purported reason employee contends he needs to use?
- Is there medical certification or is this recreational use?
- What are circumstances in which question has arisen (Pre-employment? Random test? Reasonable suspicion? Post-accident?)
- How often use and in what amounts?
- Will health care provider certify that EE can use as prescribed & can safely perform the job in unimpaired condition?

Some Practical Thoughts about Employer Options Re: Lawful Cannabis Use by Employees

There is no Virginia law that prohibits an employer from taking disciplinary action against employees for their lawful, off-duty conduct, including cannabis use.

This is true of just about all off-duty conduct by "at-will" employees. Examples include unfortunate social media posts or other activity may cast the company in an unfavorable light.

Some states are enacting laws to prevent an employer from taking adverse action against an applicant or employee for his/her lawful use of cannabis. Examples include New Jersey, New York, Nevada, and Montana.

The Difficult Question of "Impairment"

Employers should continue to maintain policies and practices in which it will inform employees that they cannot work while "impaired" or under the influence of alcohol or drugs.

We know, however, that cannabis can be detected in a person's system for 30 days or longer.

Unlike a breathalyzer, there is not a reliable, accepted test to measure current impairment.

Company managers may always take action based on their observations of an employee or the reports of other persons they deem to be credible (e.g., odor of marijuana, slurred speech, unexplained errors, or inability to perform regular tasks).

Employers can also act based on the behavior or performance of the employee. This may include discipline for deficient performance or violation of Company policies.

The "Drug Testing" Conundrum

While employers have wide discretion to test applicants and employees for drugs, a key question, especially given the tight labor markets and increasing acceptance of cannabis use, is whether an employer should modify its "zero tolerance" drug policy or consider the facts and landscape in exercising its discretion.

For example, some employers are removing marijuana/THC from its panel of pre-employment drug tests, especially for employees who are not in safety-sensitive positions.

In addition, employers are less likely to terminate solely because the employee is found to have cannabis in his/her system. Employer can have candid discussion with employee, which may lead employer to refer to EAP or other steps short of termination.

Employer Strategies to Protects Its Assets & to Prevent Unfair Competition by Departing Employees with Focus on Virginia Law[2]
By Todd Leeson, June 30, 2023

A. Current Status of Legality of Non-Compete Agreements in Virginia

1. Traditional Non-Competition Agreements May Be Valid in Virginia if Narrowly Tailored

Although restraints against competition are not favored in Virginia law, they are enforceable when "the contract is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy." Omniplex World Servs. Corp. v. US Investigations Servs., 270 Va. 246, 249, 618 S.E.2d 340, 342 (2005). "In evaluating these factors, [courts] consider the function, geographic scope, and duration of the restriction." Preferred Sys. Sols., Inc. v. GP Consulting, LLC, 284 Va. 382, 393, 732 S.E.2d 676, 681 (2012).

The function element is assessed "by determining whether the prohibited activity is of the same type as that actually engaged in by the former employer." Home Paramount v. Schaffer, 282 Va. 412, 416, 718 S.E.2d 762, 764 (2011). In other words, where the restriction only precludes the employee from doing competing work (as opposed to doing any work for a competitor), it is generally enforceable. Compare Advance Marine Enterprises, Inc. v. PRC, Inc., 256 Va. 106, 501 S.E.2d 148 (1998) and Blue Ridge Anesthesia & Critical Care, Inc. v. Gidick, 239 Va. 369, 389 S.E.2d 467 (1990) with Motion Control Systems, Inc. v. East, 262 Va. 33, 546 S.E.2d 424 (2001) and Simmons v. Miller, 261 Va. 561, 544 S.E.2d 666 (2001). Enforceable restrictions prohibit "an employee from engaging in activities that actually or potentially compete with the employee's former employer." Omniplex, 270 Va. at 249, 618 S.E.2d at 342.

2. However, Non-Compete Agreements Are Under Attack in Virginia & Nationally

a. Virginia Ban on Non-Compete Agreements for So-Called "Low Wage Employees"

In 2020, Virginia passed a law that prohibits employers from enforcing or requiring "low-wage" employees to enter into a non-compete agreement, which is defined to include a restriction that would prohibit an employee from providing services or products to a customer post-employment, unless the employee initiates contact with or solicited the customer.

"Low-wage employee" is a misnomer. It is determined based on an "average weekly wage" in the Commonwealth that is currently $1,343 per week. Thus, a "low wage employee" is any person who makes less than $69,836. (This number will likely continue to rise as the Commonwealth's "average weekly wage" will likely continue to rise.)

There are some limited exceptions, most notably for employees who are "predominately" paid by commission.

[2] Some of the content for this update comes from two articles published on Gentry Locke's website written by my law partner, David Paxton. See *Assault on Noncompete Agreements Continued*, published June 6, 2023, and *FTC Wastes No Time - Takes Enforcement Action While Proposing Nationwide Rule to Invalidate Noncompete Agreements*, published January 31, 2023.

b. Federal Trade Commission Proposes Nationwide Ban on Non-Competes

On January 5, 2023, the Federal Trade Commission ("FTC") proposed a new rule that would ban employers from imposing non-competes on their workers.

In so doing, the FTC stated, among other things, as follows: company use of non-competes is a "widespread and often exploitative practice that suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses. By stopping this practice, the agency estimates that the new proposed rule could increase wages by nearly $300 billion per year and expand career opportunities for about 30 million Americans." (FTC Press Release, Jan. 5, 2023).

Since the FTC issued its proposed rule, more than 26,800 comments have been submitted. It has been suggested that it will take the FTC until the spring of 2024 to address all of these comments and issue a final version of the proposed ban.

This hiatus period has not stopped the FTC from taking additional enforcement action to invalidate targeted non-compete agreements. On March 15, 2023, for example, the FTC announced that it had accepted and entered into a new Consent Agreement with a company which, once approved, will invalidate more than 300 non-compete agreements that Anchor Glass has in place with a broad range of employees. The FTC finalized the consent order on May 18, 2023, and Anchor Glass is barred from entering into, maintaining, enforcing, or attempting to enforce or threatening to enforce non-compete restrictions, and is also banned from telling other employers that the employee is subject to a non-compete.

c. Remarkably, the National Labor Relations Board Also Seeks to Ban Non-Competes

In addition, the General Counsel ("GC") to the National Labor Relations Board ("NLRB") recently caused a stir when she announced that her office will begin taking the position that an employer who proposes, maintains, or seeks to enforce a post-employment non-compete agreement, even in a separation agreement, has violated Section 8(a)(1) of the National Labor Relations Act ("Act"), except in very limited circumstances. In the GC's view, most non-compete provisions are overbroad and chill employees in the exercise of their Section 7 rights. Her theory is that these restrictions deny the right to quit or change jobs thereby cutting off access to other opportunities, and this diminishes their bargaining power (i.e., unhappy employees cannot threaten as a group to resign to demand better working conditions because they cannot work elsewhere because of the non-compete covenants).

This position announced on May 30, 2023, if applied and upheld, will be available to be asserted by nearly any non-supervisory employee against any employer, even those without a union, because Section 7 rights apply to all employees. The GC's memo noted the NLRB's commitment to an interagency approach to this issue, noting the approach taken by the FTC and the Department of Justice in bringing criminal prosecutions based on what the Administration sees as the anticompetitive effects of non-compete provisions. The next day, the US Chamber of Commerce issued a statement announcing its intention to use "all available tools to fight this extreme and blatantly unlawful overreach" by the GC.

Tracking with the same logic used by the FTC in its Draft Rule, the GC argues that employers can protect their legitimate business interests in protecting propriety and trade secret information by narrowly tailored workplace agreements to protect those interests. But she also quickly noted that it will be hard for an employer to make a reasonable argument to impose noncompete provisions on low-wage or middle-wage workers who lack access to trade secrets or other protectible interests.

B. Other Options Available to Virginia Employers to Protect from Unfair Competition

1. Non-Solicitation Covenants

Companies are increasingly including "non-solicitation" covenants in their agreements with key employees, as a separate and distinct covenant that applies in the post-employment context.

Such covenants are well suited to executives, sales personnel, and key employees who are customer-facing. The concept can be summarized as follows:

> During your employment, you gained access to our trade secrets and other confidential information. If your employment ends, you agree not to solicit or perform work, directly or indirectly, for any known active customer or known active prospect for __ months.

These "non-solicitation" covenants must also be narrowly tailored. For example, assume a company has thousands of customers, and dozens of distinct product lines in various locations throughout the world. Assume also that a particular sales employee focuses upon a single product line in a limited region with a handful of customers. It would likely be invalid if the non-solicitation covenant can be interpreted to include thousands of customers unknown to this sales employee in other product lines or locations.

2. Non-Disclosure / Confidentiality Agreements

It is well-settled that a company can require that its employees not use, disclose, or otherwise misappropriate the company's trade secrets, or other information that is confidential or proprietary. Here too, however, companies may not overreach. Not all internal information can be kept confidential. For example, it is a violation of Federal and Virginia law to prevent an employee from discussing or disclosing his or her own compensation.

C. Virginia Law Provides Other Potential Remedies for Employee Misconduct[3]

1. Breach of Duty of Loyalty

Virginia has "long recognized that under the common law an employee owes a fiduciary duty of loyalty to his employer during his employment. Subsumed within this general duty of loyalty is the more specific duty that the employee not compete with his employer during his employment." Williams v. Dominion Tech. Partners, L.L.C., 265 Va. 280, 289, 576 S.E.2d 752, 757 (2003). An

[3] The information below is not intended to be exhaustive. We are providing some basic legal principles to outline some of the potential claims that may be available to an aggrieved party.

employee "is duty bound not to act adversely to the interest of his employer by serving or acquiring any private interest of his own in antagonism or opposition thereto." Horne v. Holley, 167 Va. 234, 241, 188 S.E. 169, 172 (1936). An employee breaches these duties by, among other things, misusing confidential information or trade secrets or soliciting the employer's clients or employees. Feddeman & Co. v. Langam Assoc., 260 Va. 35, 530 S.E.2d 668 (2000).

2. Virginia Uniform Trade Secrets Act

To prevail under the Virginia Trade Secrets Act, Va. Code §§ 59.1-336 et seq., a plaintiff must prove the existence of a trade secret and its misappropriation. MicroStrategy Inc. v. Li, 268 Va. 249, 263, 601 S.E.2d 580, 588 (2004). The Act defines a "trade secret" as information which "derives independent economic value . . . from not being generally known" and "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Va. Code § 59.1-336. Misappropriation includes disclosure or use of a trade secret without permission by someone under a duty to maintain its secrecy. Va. Code § 59.1-336. See e.g., MicroStrategy, Inc. v. Bus. Objects, S.A., 331 F. Supp. 2d 396, 416 (E.D. Va. 2004) ("In the present case, practically all of the information the plaintiff claims constitutes trade secrets is proper subject matter: customer lists, pricing information, marketing and sales techniques, information about products, etc."); Hilton Worldwide, Inc. v. Glob. Advert., Inc., Civil Action No. 1:15cv1001, 2016 U.S. Dist. LEXIS 189528, at *20 (E.D. Va. Apr. 8, 2016) ("customer list qualifies as a trade secret.").

3. Tortious Interference

In order to prove tortious interference with a business or contract expectancy, a plaintiff must establish "(1) it had a contract expectancy; (2) [defendant] knew of the expectancy; (3) [defendant] intentionally interfered with the expectancy; (4) [defendant] used improper means or methods to interfere with the expectancy; and (5) [plaintiff] suffered a loss as a result of [defendant's] disruption of the contract expectancy." Preferred Sys. Sols., 284 Va. at 403, 732 S.E.2d at 688. Improper means or methods includes the "misuse of inside or confidential information [and] breach of a fiduciary relationship." Preferred Sys. Sols, 284 Va. at 404.

However, if a contract is terminable at will or involves only a contract or business expectancy, "'a plaintiff, in order to present a prima facie case of tortious interference, must allege and prove not only an intentional interference . . . , but also that the defendant employed "improper methods."'" *Duggin v. Adams, 234 Va. 221, 226-27, 360 S.E.2d 832, 836 (1987)).*

4. Virginia Business Conspiracy Statute

Virginia Code § 18.2-500 creates a private cause of action for violation of Virginia's business conspiracy act, which establishes the following as a class 1 misdemeanor:

> Any two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever or (ii) willfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act . . .

Va. Code § 18.2-499. “In order to sustain a claim for this statutory business conspiracy, the plaintiff must prove by clear and convincing evidence that the defendants acted with legal malice, that is, proof that the defendants acted intentionally, purposefully, and without lawful justification, and that such actions injured the plaintiff's business.” Williams v. Dominion Tech. Partners, L.L.C., 265 Va. 280, 290, 576 S.E.2d 752, 757 (2003). "A common law conspiracy consists of two or more persons combined to accomplish, by some concerted action, some criminal or unlawful purpose or some lawful purpose by a criminal or unlawful means." Commercial Bus. Sys., Inc. v. BellSouth Servs., Inc., 249 Va. 39, 48, 453 S.E.2d 261, 267 (1995). Tortious interference qualifies “as the requisite unlawful act to proceed on a business conspiracy claim.” Dunlap v. Cottman Transmission Sys., LLC, 287 Va. 207, 211, 754 S.E.2d 313, 315 (2014). Violation of common law duty of loyalty or breach of a fiduciary duty also qualifies as unlawful means. Simmons v. Miller, 261 Va. 561, 578, 544 S.E.2d 666, 676-77 (2001); Feddeman & Company, 260 Va. at 46, 530 S.E.2d at 675; CaterCorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 26, 431 S.E.2d 277, 280-81 (1993).

Workplace Violence
By Paul G. Klockenbrink

I. Introduction

In the last decade, violence in the workplace has become tragically common. When acts of violence occur within the workplace, it is common for employees to levy accusations against their employer for failing to prevent the incident. Preventing violence in the workplace is one of the most important issues an employer faces, but addressing this issue is not simple. Employers have conflicting legal obligations and duties that inhibit their ability to take certain proactive measures to prevent violence in the workplace. They must comply with a variety of laws that govern employment and hiring practices, while also ensuring that their employees are safe and protected while at the workplace. This creates a dilemma for employers, as they are forced to balance the rights of an individual employee or prospective employee with their responsibility to protect their employees. This balancing act is a delicate one, but there are proactive steps an employer can take to prevent workplace violence while limiting liability if violence does occur. The best practices will be fact-specific and depend on the particular circumstances of each employer. But ultimately the analysis of liability may come down to what the employer knew and when it knew it, or when the employer should have known it.

II. Pre-Employment Screening

Implementing pre-employment screening measures is one way for employers to effectively prevent workplace violence. During the screening process, employers attempt to screen out applicants based on prior conduct, criminal background, and bad references.

There are a variety of techniques employers can use to screen prospective employees. Some techniques are more common than others (i.e., submitting an application and attending an interview), and some are particular to certain types of employment (i.e., integrity or personality tests). The background check is a screening technique that is inexpensive and provides important insight relating to a prospective employee's propensity for violence. The background check gives the employer an opportunity to review the prospective employee's criminal record, educational background, financial history, work history, social media pages, and even their medical history. This allows an employer to identify prospective employees with a history of unlawful or undesirable conduct, which may indicate a propensity for violence. Nevertheless, employers must ensure that the information is obtained in a manner that complies with both state and federal law.

A. The American's with Disabilities Act ("ADA")

The ADA limits an employer's ability to ascertain information about a prospective employee's mental history. Under the ADA, an employer is not permitted to question a prospective employee about mental illness, history, or treatment unless the questions are specifically tailored to the prospective employee's ability to perform a particular job function. The ADA also prohibits an employer from deciding not to hire a prospective employee based exclusively on the belief that mental illness or history will make them unstable and more inclined to commit acts of violence in the workplace. However, if an employer is able to show that the prospective employee has a violent history or background related to the mental illness and poses a "direct threat" to others, then the employer can decline to hire the prospective employee without running afoul of the ADA.

B. Fair Credit Reporting Act ("FCRA")

When employers use a third-party to run a background check for prospective employees, the employer must ensure they are complying with the FCRA. Contrary to the name, which references credit issues, the FCRA is not limited solely to background checks involving an individual's credit score or credit. If a background check (criminal records or history) is performed by a third-party, then the employer must comply with the FCRA. The FCRA regulates employer's use of these reports, and requires employer's notify prospective employees as to whether a background check will be conducted during the screening process. If the employer uses the background report in deciding not to hire a prospective employee, then they are required to make an additional notification to the prospective employee to comply with the FCRA.

C. Title VII of the Civil Rights Act

In recent years, there have been many lawsuits filed against employers alleging that their use of criminal background checks violates Title VII of the Civil Rights Act. Specifically, the employees allege that criminal background checks are discriminatory because they have a disproportionate effect on certain race groups that tend to have higher criminal conviction rates. To rebut these allegations, employers must be able to prove that a background check of a prospective employee is being used for a job-related purpose and is consistent with business practices.

III. During Employment – Maintaining a Safe Work Environment

It is not possible to filter out all potentially violent people through pre-employment screening. Some applicants may not have a history of questionable behavior or show signs of having violence tendencies during the pre-employment process. Also, some employees may develop violent tendencies or behaviors sometime during the course of their employment. For these reasons, it is important for employers to adopt and implement policies and practices to combat violent or potentially violent conduct in the workplace.

Listed below are proactive measures employers can implement to prevent violence in the workplace. If an employer implements these measures, they will be in a far better position to defend themselves in any lawsuit arising from workplace violence. The essential measures an employer should take are as follows:

a. Implement a policy that specifically lists what type of conduct is not acceptable, and assign oversight and prevention responsibilities to appropriate staff and management members.

b. Implement a policy that makes clear that workplace violence by or against employees of the company will not be tolerated, and those who engage in such conduct will be subjected to disciplinary action. If necessary, the employer will alert law enforcement of the violent conduct that has been reported.

c. Implement a policy that requires all incidents, threats, or concerns of workplace violence to be reported, and makes clear that each and every claim will be taken seriously. The policy should also set forth reporting guidelines for employees who observe or are subjected to workplace violence, and should make clear that all reports will be investigated thoroughly and promptly.

d. Educate employees on warning signs of violent conduct or tendencies, and ensure they are familiar with the policies and procedures for reporting any violence they observe or to which they are subjected.

e. Require all employees to participate in a violence training program that educates them on what conduct is unacceptable, what to do if they are subjected to or observe violent conduct, the process and procedures for reporting violent conduct, and the protocol to be followed if a violent incident does occur. Employees should also learn how to recognize warning signs that indicate someone has a propensity to engage in violent acts.

f. Designate management and staff members to review the employer's written policy concerning workplace violence so that it can be improved and updated on an annual basis.

g. Encourage employees to utilize the Employee Assistance Program ("EAP").

h. Allow employees who are eligible under the Family and Medical Leave Act ("FMLA") to take unpaid leave to deal with serious mental or emotional health issues.

i. Hire security staff and install electronic or physical security devices.

IV. Employer's Liability for Workspace Violence

Employers can be subject to liability for damages for injuries that are caused by their employees under various tort theories. These include, but are not limited to: assault and battery, negligent hiring, negligent retention, negligent supervision and respondeat superior.

A. Negligence Claims

i. Basic Principles

- An employer risks liability for the torts of employees it knew or should have known the employees present a danger to others.
- Negligent hiring and negligent retention may exist concurrently - the employer may potentially be liable for both torts.
- Direct liability: The employee's alleged wrongful acts need not be in the scope of employment – broader than respondeat superior liability.

ii. Negligent Hiring

Employers have a common law duty to exercise reasonable care in selecting and hiring employees. An employer breaches this duty by hiring an unsuitable person for a position that involves an unreasonable risk of harm to others.

iii. Negligent Retention

When an employer knows or should know of a current employee's incompetence, negligence, or unfitness for a position, the employer has a duty to respond appropriately.

iv. Negligent Supervision

This claim arises by an employer's failure to improperly supervise employees to avoid foreseeable risks of harm to others. It generally requires that the employer

had a duty to supervise the harming party, that the employer negligently supervised the harming party, and the negligence was the proximate cause of the other party's injuries.

B. Assault and Battery

i. Assault

To establish the tort of assault, the plaintiff must prove that the defendant performed an act intended to cause either harmful or offensive contact with another person, which contact creates in that other person's mind a reasonable apprehension of an immediate battery.

ii. Battery

The tort of battery is "an unwanted touching which is neither consented to, excused, nor justified."

C. Respondeat Superior – Vicarious Liability

Under the doctrine of respondeat superior, an employer may be liable for acts or omissions by an employee that cause injury to another person. Respondeat superior only imposes liability on employers for acts committed by an employee within the scope of employment.

D. Occupational Safety Health Administration ("OSHA") Sanctions

The general duty clause of the Occupational Safety and Health Act provides that "[e]ach employer [] shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]" Employers who breach this general duty are subject to OSHA sanctions.

E. Privacy and/or Defamation Claims

In an effort to protect its workforce, employers in some states can also subject themselves to privacy claims and/or claims for defamation, depending on how information is circulated within its workforce. These privacy laws that exist in different states can restrict an employer in terms of what information it can obtain either before or during employment.

F. Title VII Claims

Certain workplace violence (i.e., sexual assault and/or rape) can certainly result in related claims of strict liability and/or liability based on negligence under Title VII for sexual harassment.

G. Worker's Compensation

Worker's compensation claims often arise from workplace violence situations. In some states, worker's compensation claims can act as a bar to other claims but that is very specific to each state's law.

ARTIFICIAL INTELLIGENCE,
REAL DISCRIMINATION
By Paul Klockenbrink & Jessiah Hulle

"Success in creating AI could be the biggest event in the history of our civilization. . . . [But a]longside the benefits, AI will also bring dangers." – Stephen Hawking (2016).[1]

Recently, 73% of human resources leaders surveyed by Eightfold AI confirmed that they use artificial intelligence ("AI") for human resources ("HR") functions such as recruitment and hiring. In that same survey, over 90% of HR leaders stated an intent to increase future AI use, with 41% indicating a desire to use AI in the future for recruitment and hiring.[2] Already, "three in four organizations boosted their purchase of talent acquisition technology in 2022" alone and "70% plan to continue investing in [2023]," regardless of a recession.[3] Research by IDC Future Work predicts that by 2024, "80[%] of the global 2000 organizations will use AI-enabled 'managers' to hire, fire, and train employees."[4]

This increased use of AI for employment decisions such as recruiting, promoting, and firing has made headlines in the last five years.

Amazon is a prime example (no pun intended). Two years ago, various news outlets reported that Amazon uses AI "not only to manage workers in its warehouses but to oversee contract drivers, independent delivery companies and even the performance of its office workers." The AI is a cold but efficient human resources manager, comparing employees against strict metrics and terminating all underperformers. "People familiar with the strategy say Chief Executive Officer Jeff Bezos believes machines make decisions more quickly and accurately than people, reducing costs and giving Amazon a competitive advantage."[5]

Although that may be true, the practice is not without its risks.

1. AI-assisted discrimination

"Machine learning is like money laundering for bias." – Maciej Cegłowski.[6]

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[1] Dom Galeon, *Hawking: Creating AI Could Be the Biggest Event in the History of Our Civilization*, Futurism (Oct. 10, 2016), https://archive.is/M7DDD.
[2] Gem Siocon, *Ways AI Is Changing HR Departments*, Business News Daily (June 22, 2023), https://archive.is/Nf7rg.
[3] Lucas Mearian, *Legislation to Rein in AI's Use in Hiring Grows*, Computerworld (Apr. 1, 2023), https://archive.is/Lx9xD.
[4] Lucas Mearian, *The Rise of Digital Bosses: They Can Hire You – And Fire You*, Computerworld (Jan. 6, 2022), https://archive.is/NuZLo.
[5] Spencer Soper, *Fired by Bot at Amazon: 'It's You Against the Machine'*, Yahoo Finance (June 28, 2021), https://archive.is/Tpc5Q.
[6] Maciej Cegłowski, *The Moral Economy of Tech*, Idle Words (June 26, 2016), https://archive.is/t6q6m (quoting remarks given at the SASE Conference in Berkeley).

Employers can use AI to assist with a host of tasks. Some niche AI-assisted tasks, such as moderating internet content[7] and providing health care services,[8] implicate legal issues and invite civil litigation. Others do not. But the AI-assisted task currently receiving heightened legal scrutiny from the government is employment decision-making, including hiring, assigning, promoting, and firing. The reason for this scrutiny is simple: AI can, and sometimes does, discriminate against protected classes.

How does this happen? Put simply, the problem of AI discrimination can be boiled down to a single maxim: *garbage in, garbage out*.[9] An AI that "learns" how to think from biased information ("garbage in") will invariably produce biased results ("garbage out"). An example of this is Tay, a rudimentary AI chatbot designed by Microsoft that turned into a Nazi after only a day of "learning" on Twitter.[10] A more serious example is predictive policing software, which can unfairly target racial minorities after "learning" about crime rates from historical over-policing patterns in minority neighborhoods.[11]

In the field of human resources, "garbage in" fed to an AI can range from historical data tainted by past discrimination. The resulting "garbage out" formulated by AI is employment discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and other civil rights statutes.[12]

Again, Amazon is a prime example. In 2018, the company was forced to discontinue an AI program that filtered job applicant resumes because it developed an anti-woman bias. "Employees had programmed the tool in 2014 using resumes submitted to Amazon over a 10-year period, the majority of which came from male candidates. Based on that information, the tool assumed male candidates were preferable and downgraded resumes from women."[13]

2. State regulation

To curb AI-assisted discrimination, New York City and numerous states have enacted or proposed laws regulating bias in AI employment decision-making.

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[7] *See, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 60 (2d Cir. 2019) (rejecting claim that Facebook's AI-enhanced algorithm negligently propagated terrorism).

[8] *See, e.g.*, Sharona Hoffman & Andy Podgurski, *Artificial Intelligence and Discrimination in Health Care*, 19 YALE J. HEALTH POL'Y L. & ETHICS 1 (2020) (arguing that AI-assisted algorithmic discrimination, especially on the basis of race, in health care should be actionable under Title VI).

[9] R. Stuart Geiger et al., *"Garbage In, Garbage Out" Revisited: What Do Machine Learning Application Papers Report about Human-Labeled Training Data?*, 2:3 QUANTITATIVE SCIENCE STUDIES 795 (Nov. 5, 2021), https://archive.is/9D477 (quoting this maxim as a "classic saying in computing about how problematic input data or instructions will produce problematic outputs").

[10] Amy Kraft, *Microsoft Shuts Down AI Chatbot after It Turned into a Nazi*, CBS News (Mar. 25, 2016), https://archive.is/xScSA (reporting that Tay went from stating "humans are super cool" on March 23, 2016, to "Hitler was right I hate the jews" on March 24, 2016).

[11] Will Douglas Heaven, *Predictive Policing Algorithms Are Racist. They Need to Be Dismantled.*, MIT Tech. Rev. (July 17, 2020), https://archive.is/clURU.

[12] *See generally* Keith E. Sonderling et al., *The Promise and the Peril: Artificial Intelligence and Employment Discrimination*, 77 U. Miami L. Rev. 1 (2022).

[13] Guadalupe Gonzalez, *How Amazon Accidentally Invented a Sexist Hiring Algorithm*, Inc.com (Oct. 10, 2018), https://archive.is/INQrl.

i. New York City

New York City is the clear leader on this front. In 2021, the city enacted an ordinance that requires employers using AI for job application screening to notify job applicants about the AI and conduct an annual independent bias audit of the AI if it "substantially assist[s] or replace[s] discretionary decision making."[14] The city began enforcement of the ordinance for hiring and promotion decisions in July 2023. "The law [only] applies to companies with workers in New York City, but labor experts expect it to influence practices nationally."[15]

ii. Illinois and Maryland

On the state level, Illinois enacted the Artificial Intelligence Video Interview Act in 2019 to combat AI discrimination in screening initial job applicant interview videos.[16] The statute "requires employers that use AI-enabled analytics in interview videos" to notify job applicants about the AI, explain how it works, obtain the applicant's consent, and destroy any analytics video within thirty days upon the applicant's request. "If the employer relies solely on AI to make a threshold determination before the candidate proceeds to an in-person interview, that employer must track the race and ethnicity of the applicants who do not proceed to an in-person interview as well as those applicants ultimately hired."[17]

Maryland enacted a similar statute in 2020, requiring employers to obtain a job applicant's consent before using AI-assisted facial recognition technology during interviews.[18]

It appears that the impetus behind the Illinois and Maryland laws is a belief that AI-assisted facial recognition and analysis programs discriminate against less-privileged job applicants because such programs are trained on data from past, privileged applicants. As argued by Ivan Manokha, a lecturer at the University of Oxford, companies that use these programs "are likely to hire the same types of people that they have always hired." A possible result is "inadvertently exclud[ing] people from diverse backgrounds."[19]

iii. Other states

Outside New York City, Illinois, and Maryland, numerous states have also proposed laws or empaneled special committees to address AI-assisted employment discrimination. For instance,

[14] N.Y.C. Local Law 144; N.Y.C.R. §§ 5-300, 5-301, 5-302, 5-303, 5-304 (2021), https://archive.is/WmrAm.
[15] Steve Lohr, *A Hiring Law Blazes a Path for A.I. Regulation*, N.Y. Times (May 25, 2023), https://archive.is/mGYGU.
[16] 820 I.L.C.S. 42/1 *et seq*.
[17] Paul Daugherity et al., *States Scramble to Regulate AI-Based Hiring Tools*, Bloomberg Law (Apr. 10, 2023), https://archive.is/a6gZt.
[18] Md. Labor and Emp. Code § 3-717 (2020).
[19] Ivan Manokha, *Facial Analysis AI Is Being Used in Job Interviews – It Will Probably Reinforce Inequality*, The Conversation (Oct. 7, 2019), https://archive.is/9U2Jn.

the District of Columbia,[20] California,[21] and Massachusetts[22] have all introduced bills or draft regulations in the last two years to address this issue. And various states, including Alabama, Missouri, New York, North Carolina, and Vermont, have proposed or established committees, taskforces, or commissions to review and regulate AI issues.[23]

iv. Virginia

So far, Virginia has neither enacted nor proposed a law to specifically regulate AI-assisted employment discrimination. In January 2020, Delegate Lashrecse D. Aird introduced a Joint Resolution to "convene a working group . . . to study the proliferation and implementation of facial recognition and artificial intelligence" because "the accuracy of facial recognition is variable across gender and race,"[24] but it was tabled by a House of Delegates subcommittee.[25]

Nevertheless, it is possible that AI programs can still violate antidiscrimination laws in the state. Virginia antidiscrimination law --- which protects traits ranging from racial and ethnic identity[26] to lactation,[27] protective hair braids,[28] and (for public employees) smoking[29] --- presents a veritable minefield of legal issues for an AI program to traverse in screening job applicants and employees. For instance,

> Virginia . . . recently passed a law that protects employees who use cannabis oil for medical purposes. This law distinguishes "cannabis oil" from other types of medicinal marijuana and has specific definitions of what is and is not protected. An algorithm that fails to take these nuances into consideration might inadvertently discriminate against protected cannabis users.[30]

[20] J. Edward Moreno, *New York City AI Bias Law Charts New Territory for Employers*, Bloomberg Law (Aug. 29, 2022), https://archive.is/QLQVD ("District of Columbia Attorney General Karl Racine introduced a bill [in 2021] that would mirror New York City's law and would put the onus on employers to ensure AI tools they use aren't discriminating against certain candidates.").
[21] *Id.* ("The California Civil Rights Department announced [in early 2022] that it's drafting regulations to clarify that the use of automated decision-making tools is subject to employment discrimination laws.").
[22] Hiawatha Bray, *Mass. Lawmakers Scramble to Regulate AI Amid Rising Concerns*, Boston Globe (May 18, 2023), https://archive.is/uCAHh ("[Massachusetts state senator Barry] Finegold has filed a bill that would set performance standards for powerful 'generative' AI systems . . . . [C]ompanies would need to make sure that AI systems aren't used to discrimination against individuals or groups based on race, sex, gender, or other characteristics protected under antidiscrimination law.").
[23] *Report: Legislation Related to Artificial Intelligence*, Nat. Conf. of State Leg. (Aug. 26, 2022), https://archive.is/76Gjf (collecting proposed and enacted laws pre-August 2022).
[24] Va. H.J.R. No. 59 (2020 Session).
[25] *HJ 59 Facial recognition and artificial intelligence technology; Joint Com. on Science & Tech to study.*, Va. Leg. Info. Sys. (Jan. 29, 2020), https://archive.is/fpjn6.
[26] Va. Code § 2.2-3900(B)(2).
[27] Va. Code §§ 2.2-3901, 2.2-3902.
[28] Va. Code § 2.2-3901(D).
[29] Va. Code § 2.2-2902.
[30] Amber M. Rogers & Michael Reed, *Discrimination in the Age of Artificial Intelligence*, ABA (Dec. 7, 2021), https://archive.is/ujiCa.

3. Federal guidance

The federal government has also issued guidance condemning AI-assisted employment discrimination.

i. EEOC

Although the Equal Employment Opportunity Commission ("EEOC") has yet to issue a formal rule on AI-assisted employment discrimination, it has clearly condemned the practice through various informal guidance documents, a draft enforcement plan, and at least one civil lawsuit.

First, in May 2022, the EEOC issued a question-and-answer-style informal guidance document explaining that an employer's use of an AI program that "relies on algorithmic decision-making may violate existing requirements under [the ADA]."[31]

The EEOC explained that, most commonly, employers violate the ADA when they fail to provide a reasonable accommodation "necessary for a job applicant or employee to be rated fairly and accurately by [an AI program]" or rely on "an [AI] that intentionally or unintentionally 'screens out' an individual with a disability." A "screen out" occurs when a "disability prevents a job applicant or employee from meeting --- or lowers their performance on --- a selection criterion, and the applicant or employee loses a job opportunity as a result."

The EEOC provided multiple examples of AI-assisted screen-outs that possible violate the ADA. In one example, an AI chatbot designed to engage in text communications with a job applicant may violate the ADA by screening-out applicants who indicate "significant gaps in their employment history" because of a disability. In another example, an AI-assisted video interviewing software that analyzes job applicant speech patterns may violate the ADA by screening-out applicants who have speech impediments. In a third example, an AI-analyzed pre-employment personality test "designed to look for candidates . . . similar to the employer's most successful employees" may violate the ADA by screening-out job applicants with PTSD who struggle to ignore distractions but can thrive in a workplace with "reasonable accommodations such as a quiet workstation or . . . noise-cancelling headphones." All of these examples follow the same theme: AI programs often reject job applicants based on external data without considering reasonable accommodations.

The EEOC warned that employers remain liable under the ADA even if an AI program is administered by a vendor.[32]

Second, in May 2022 the EEOC filed a complaint against an international tutoring company for age discrimination resulting from an AI-assisted automated job applicant screening program. According to the complaint, the company's online tutoring application solicited birthdates of job applicants but automatically rejected female applicants aged 55 or older and male applicants aged 60 or older. The defendant filed an amended answer denying the allegations in March 2023. The case is currently pending.[33]

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[31] *Technical Guidance Document: The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*, EEOC (May 15, 2022), https://archive.is/OnMM2.
[32] *Id.*
[33] *EEOC v. iTutorGroup, Inc. et al.*, No. 1:22-CV-2565 (E.D.N.Y. May 5, 2022).

Third, in January 2023 the EEOC announced in its Draft Strategic Enforcement Plan for fiscal years 2023 to 2027 that it was committed to "address[ing] systematic discrimination in employment." The plan specifically announced the following subject matter priority for the agency:

> The EEOC will focus on recruitment and hiring practices and policies that discriminate against racial, ethnic, and religious groups, older workers, women, pregnant workers and those with pregnancy-related medical conditions, LGBTQI+ individuals, and people with disabilities. These include: the use of automated systems, including artificial intelligence or machine learning, to target job advertisements, recruit applicants, or make or assist in hiring decisions where such systems intentionally exclude or adversely impact protected groups.[34]

In accordance with this strategic plan, the EEOC "launched an agency-wide initiative to ensure that the use of software, including artificial intelligence (AI), machine learning, and other emerging technologies used in hiring and other employment decisions comply with the federal civil rights laws that the EEOC enforces."[35] The EEOC also held a four-hour public hearing on "Navigating Employment Discrimination in AI and Automated Systems," which is currently hosted on its website[36] and YouTube.[37]

Fourth, the EEOC joined a Joint Statement with the Consumer Financial Protection Bureau ("CFPB"), Department of Justice Civil Rights Division, and Federal Trade Commission ("FTC") promising to "monitor the development and use of automated systems," "promote responsible innovation" in the field of AI, and "vigorously . . . protect individuals' rights regardless of whether legal violations occur through traditional means or advanced technologies."[38]

Finally, in April 2023, the EEOC published a second technical guidance document explaining that AI-assisted employment decision-making programs may violate Title VII.

The EEOC noted that modern employers use a variety of algorithmic and AI-assisted programs for human resources work, including scanning resumes, prioritizing job applications based on keywords, monitoring employee productivity, screening job applicants with chatbots, evaluating job applicant facial expressions and speech patterns with video interview programs, and testing job applicants on personality, cognitive ability, and perceived "cultural fit" with games and tests. However, under this new EEOC guidance document, *all* algorithmic and AI-assisted programs "used to make or inform decisions about whether to hire, promote, terminate, or take similar actions toward applicants or current employees" fall within the ambit of the agency's Guidelines

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[34] *Draft Strategic Enforcement Plan 2023-2027*, 88 Fed. Reg. 1379 (Jan. 1, 2023).
[35] *Artificial Intelligence and Algorithmic Fairness Initiative*, EEOC (2023), https://archive.is/SBeWt (promising to "issue technical assistance to provide guidance on algorithmic fairness and the use of AI in employment decisions").
[36] *Id.*
[37] *Navigating Employment Discrimination in AI and Automated Systems*, YouTube (Jan. 31, 2023), https://www.youtube.com/watch?v=rfMRLestj6s.
[38] *Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems*, EEOC (2023), https://archive.is/9AybV.

on Employee Selection Procedures under Title VII.[39] In other words, if an AI program discriminates against a job applicant or employee in violation of Title VII, the EEOC evaluates the violation the same as if it was committed by a person.[40]

Again, the EEOC warned that employers remain liable under Title VII even if a discriminatory AI program is administered by a vendor.

It is expected that, in accordance with its four-year strategic plan and Joint Resolution, the EEOC will issue further guidance on this issue in the next few years.

ii. The White House

In 2022 the White House Office of Science and Technology Policy published a Blueprint for an AI Bill of Rights. The Blueprint reaffirmed that "[a]lgorithms used in hiring . . . decisions have been found to reflect and reproduce existing unwanted inequities or embed new harmful bias and discrimination" and suggested five principles to "guide the design, use, and deployment of automated systems to protect the American public." The second principle proposed the following right: "You should not face discrimination by algorithms and systems should be used and designed in an equitable way." According to the White House,

> This protection should include proactive equity assessments as part of the system design, use of representative data and protection against proxies for demographic features, ensuring accessibility for people with disabilities in design and development, pre-deployment and ongoing disparity testing and mitigation, and clear organizational oversight. Independent evaluation and plain language reporting in the form of an algorithmic impact assessment, including disparity testing results and mitigation information, should be performed and made public whenever possible to confirm these protections.[41]

Although this Blueprint is currently all bark, it portends the future bite of enhanced enforcement by the Biden Administration against AI-assisted discrimination.

iii. Congress

So far, Congress has proposed bills to regulate AI generally but not to regulate AI-assisted employment discrimination specifically.[42] But that does not mean that Congress is unaware of the issue. For instance, in March 2023, Alexandra Reeve Givens, the President and CEO of the Center

[39] 29 C.F.R. Part 1607.

[40] *Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964*, EEOC (Apr. 2023), https://archive.is/u1s5p.

[41] *Blueprint for an AI Bill of Rights*, The White House (Oct. 2022), https://archive.is/OBbK8; *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*, The White House (Oct. 2022), https://archive.is/17aZb.

[42] *See, e.g.*, *U.S. Congress to Consider Two New Bills on Artificial Intelligence* (June 8, 2023), https://archive.is/7nnwl (reporting that one bill "would require the U.S. government to be transparent when using AI to interact with people" and the other "would establish an office to determine if the United States is remaining competitive in the latest technologies").

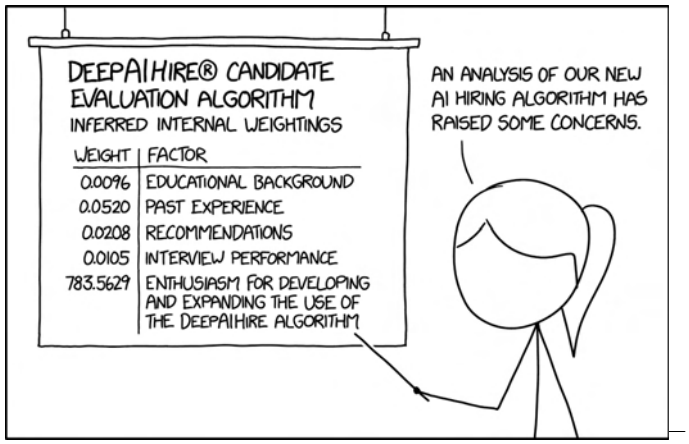
for Democracy & Technology, testified before the U.S. Senate Committee on Homeland Security and Government Affairs that "if the data used to train the AI system is not representative of wider society or reflects historical patterns of discrimination, it can reinforce existing bias and lack of representation in the workplace."[43]

4. Global regulation

Outside the United States, other countries are also working frantically to regulate AI, including its role in discrimination.

For example, the European Union ("EU") has already enacted "non-discrimination requirements for algorithmic profiling and a right to obtain an explanation of automated decisions that significantly affect users" in its General Data Protection Regulation ("GDPR").[44] Despite that, the EU is also drafting an Artificial Intelligence Act, which, according to the World Economic Forum, "includes requirements that aim to minimize the risk of algorithmic discrimination."[45] It is possible that this new AI law will significantly impact stateside employers, much like the GDPR did upon its enactment.

5. Takeaways



– xkcd[46]

In sum, as more employers use unregulated AI to assist with human resources tasks, the potential for inadvertent, disparate impact, and even intentional discrimination increases. New York City, Illinois, and Maryland have already enacted laws directly regulating AI-assisted recruiting. Other states and the European Union have proposed similar, or even stricter, laws. Accordingly, employers must tread this area of AI usage carefully.

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[43] *Testimony of Alexandra Reeve Givens, Artificial Intelligence: Risks and Opportunities*, U.S. Senate Committee on Homeland Security and Gov. Affairs (Mar. 8, 2023), https://archive.is/LH3gv.
[44] *See generally* Keith E. Sonderling et al., *The Promise and the Peril: Artificial Intelligence and Employment Discrimination*, 77 U. Miami L. Rev. 1 (2022).
[45] Saverio Puddu et al., *What the EU Is Doing to Foster Human-Centric AI*, World Economic Forum (May 3, 2021), https://archive.is/nf5tl.
[46] *AI Hiring Algorithm*, xkcd (n.d.), https://xkcd.com/2237/.

Perhaps the best takeaway for employers is a quote ostensibly taken from a 1979 presentation at IBM: "A computer can never be held accountable. Therefore, a computer must never make a management decision."[47]

Good HR staff know antidiscrimination laws inside and out. In this current wild west of AI regulation, employers should rely on well-versed HR staff to review AI work, just like employers rely on employees to review intern work. Moreover, employers should require a human to make final hiring, assigning, promoting, and firing decisions. In fact, requiring a human decision is a loophole in the New York City ordinance, which only requires a bias audit for AI programs that "*substantially assist* or *replace* discretionary decision making."[48] Additionally, employers should stay abreast of new regulatory guidance on AI from the EEOC as it releases.

The second-best takeaway for employers is the old joke: "The early bird gets the worm, but the second mouse gets the cheese."[49]

Many employers want to be an early bird in implementing new AI programs to boost HR functions. This desire is understandable. It seems like everyone else is already onboard the AI train. In 2017, the Harvard Business Review published an article claiming that "[t]he most important general-purpose technology of our era is artificial intelligence."[50] Now, in 2023, close to 75% of surveyed HR leaders report using AI for human resources tasks. And that percentage only increases as companies scramble to get the worm. As Jensen Huang, the co-founder and CEO of trillion-dollar-valued Nvidia, recently predicted in a speech, "Agile companies will take advantage of AI and boost their position. Companies less so will perish."[51]

However, employers --- especially small businesses --- should also consider the benefits of being the second mouse. Everyone, from Fortune 100 corporations to local, state, and federal governments, is currently testing the scope of liability for AI-assisted discrimination.[52] This beta testing phase exposes employers to high potential risk and cost.[53] Therefore, although not the "coolest" approach, it behooves many employers to simply wait until this issue is either litigated and regulated or solved by the invention of a relatively bias-proofed human resources AI.

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[47] *See, e.g.*, *An IBM slide from 1979*, CSAIL – MIT, Facebook, Dec. 19, 2022, https://archive.is/MQF2n (sharing viral picture of quote); Gizem Karaali, *Artificial Intelligence, Basic Skills, and Quantitative Literacy*, 16:1 Numeracy 1, 4-5, n.13 (2023) (attributing the quote to a 1979 IBM presentation).

[48] Steve Lohr, *A Hiring Law Blazes a Path for A.I. Regulation*, N.Y. Times (May 25, 2023), https://archive.is/mGYGU (quoting the president of the Center for Democracy and Technology as criticizing this loophole as "overly sympathetic to business interests").

[49] *See, e.g.*, Wesley Wildman, *Jokes and Stories: Wisdom Sayings*, Boston University: Wesley Wildman's Weird Wild World Wide Web Site (Jan. 1, 2000), https://archive.is/5wWhI.

[50] Erik Brynjolfsson & Andrew McAfee, *The Business of Artificial Intelligence*, Harv. Bus. Rev. (July 18, 2017), https://archive.is/RSvSb.

[51] Vlad Savov & Debby Wu, *Nvidia CEO Says Those Without AI Expertise Will Be Left Behind*, Bloomberg (May 28, 2023), https://archive.is/TLsR8.

[52] *Cf., e.g.*, Ryan E. Long, *Artificial Intelligence Liability: The Rules Are Changing*, LSE Bus. Rev. Blog (Aug. 16, 2021), https://archive.is/mdcEM (discussing corporate civil liability for AI work).

[53] *See generally* Keith E. Sonderling et al., *The Promise and the Peril: Artificial Intelligence and Employment Discrimination*, 77 U. Miami L. Rev. 1 (2022).

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2

RISING IMPORTANCE OF ATTORNEYS GENERAL IN WHITE-COLLAR ENFORCEMENT

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The Rising Importance of Attorneys General in White-Collar Enforcement

Erin Harrigan
John Danyluk

Gentry Locke Seminar
October 6, 2023 – Roanoke
October 12, 2023 – Richmond

I. Trending Activism of State Attorneys General

State attorneys general ("State AGs") have become increasingly influential, political, and activist in recent years. Historically, State AGs filed occasional consumer protection actions, but, particularly in Virginia, rarely handled white-collar criminal prosecutions or large-scale regulatory enforcement actions. The 1998 tobacco settlement, the culmination of coordinated litigation and enforcement action for causing smoking-related illnesses, netted states $246 billion – and became the bellwether for State AGs looking to turn that success on other industries. This marked the advent of states aggressively pursuing white-collar enforcement actions, turning State AGs into policymakers and altering the playing field for private businesses operating in highly regulated industries like pharmaceutical companies and financial institutions.

Recently, State AGs have increasingly used their broad enforcement authority to drive policy changes, thereby spring-boarding some political ambitions. Political parties have started investing heavily in State AG races in the states where they are elected, and have made appointments to high-profile cabinet positions where they are not. This mounts pressure on those seeking the top office to align their enforcement priorities with political party platforms. The media, for its part, has been paying closer attention to these offices, often running stories regarding enforcement actions that would have never made the paper 20 years ago.

State AGs have also become a check on the authority of the federal government, filing an increasing number of lawsuits against the Trump and Biden administrations to challenge federal policies and executive actions. The Trump administration was sued nearly twice as many times in his one term as either the Bush or Obama administrations in their respective eight years in office. The Biden administration has seen a similar surge in lawsuits over student debt relief, Covid-19 mandates, sex and gender discrimination, and immigration policies. These suits have a high rate of success, and, even when unsuccessful, these State AG actions drive policy and energize the base of their political party.

The key takeaway is that the win-win nature of these suits incentivizes State AGs to continue to pursue these actions at an increasing frequency. State AGs are heavily lobbied and are well-funded in election cycles, and State AG actions are not limited to suits challenging federal policies. State AGs are also becoming increasingly active in targeting private businesses in enforcement actions as a way to advance their policy priorities.

This trend of increased enforcement will likely continue to gain momentum. Regulated industries, as well as the lawyers who represent them, should be prepared

to litigate these cases more often, particularly when control of the White House or state capitol shifts, prompting a predictable flurry of legal activity from State AGs.

In this presentation, we will examine how these enforcement trends are playing out in the Commonwealth.

II. Consumer Protection

One of the most important and traditional functions of any state attorney general is consumer protection. In Virginia, the Office of the Attorney General (OAG) serves as the central clearinghouse for the receipt, evaluation, and referral of consumer complaints. During 2021, the OAG's Consumer Protection Section received and processed 5,036 consumer complaints. The Top 10 complaint subjects were[1]:

1. Automotive Sales
2. Credit, Loans & Debt Collection
3. Home Improvement, Service & Repair
4. Entertainment
5. Warranties & Rebates
6. Internet Sales & Service
7. Automotive Service & Repair
8. Medical/Health Professions
9. Other Professional Services
10. Timeshares & Recreation Property (tie)
10. Transportation & Freight (tie)

In addition to investigating consumer complaints, the OAG also actively litigates a wide array of enforcement actions aimed at protecting consumers pursuant to the Virginia Consumer Protection Act (VCPA), Va. Code § 59.1-196, *et. seq*.

A. Opioid Litigation

1. The opioid epidemic is one of the most critical public health emergencies in American history.

2. State attorneys general have led the litigation efforts to recoup the tax dollars spent addressing the crisis.

    a. Despite litigation filed by large groups of plaintiffs, including private actors in class actions and individual localities trying to recoup the cost of treating and managing the opioid epidemic, State AGs formed a

[1] *See* https://www.oag.state.va.us/media-center/news-releases/2330-march-7-2022-attorney-general-miyares-announces-top-10-consumer-complaints.

coalition to pursue litigation against manufacturers, distributors, and pharmacy benefit managers.

b. This coalition had different states taking the lead in pursuing litigation against different target defendants, some of whom went to trial.

c. A multi-State AG coalition jointly litigated discovery, and joined in depositions of defendant-employees. The opioid litigation cases have largely been consolidated as part of the multidistrict litigation (MDL) out of the Northern District of Ohio. Generally, the consolidation of suits into multidistrict litigation allows centralized oversight of many related cases by a single judge. When cases are not consolidated into the MDL, however, the defendant companies must endure large-scale litigation in disparate locations throughout the country.

    i. In Oklahoma, for example, the State AG filed suit under the state public nuisance law. This case ultimately went to a 33-day bench trial against Johnson & Johnson in May to July 2019, culminating in judgment against the defendants and an award of over $572 million to pay for the cost to abate the nuisance for one year.[2]

    ii. Similarly, Virginia filed suit in October 2019 against Teva Pharmaceuticals under the VCPA in the Circuit Court for the City of Richmond,[3] which advanced through discovery, depositions, and preliminary motions arguments before settlement negotiations began in earnest.

    iii. Thus, Teva (and other defendants subject to these standalone lawsuits) must engage local Virginia counsel, develop a general knowledge of Virginia civil procedure, and focus its legal efforts and energies in disparate state courts across the country.

        1. Even if the individual suit is ultimately resolved through a larger multistate settlement, as was the case here, the individual cases are actively litigated until the ink on the settlement agreement dries.

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[2] *See* Judgment Order, *State of Oklahoma v. Purdue Pharma L.P., et. al*, District Court of Cleveland County Case No. CJ2017-816 (August 26, 2019), available at: http://www.oscn.net/dockets/GetDocument.aspx?ct=cleveland&bc=1044673351&cn=CJ-2017-816&fmt=pdf. (Currently under appeal).

[3] *See* Complaint, *Commonwealth of Virginia v. Teva Pharmaceuticals, et. al,* Circuit Court for the City of Richmond Case No. 19-5566-5 (October 31, 2019), available at: https://files.constantcontact.com/bfcd0cef001/6c9c734f-8826-4ed8-9a29-3cef0bb2322d.pdf.

3. Following the blueprint from the litigation against big tobacco in the late 1990s, State AGs have recovered tens of billions of dollars from nearly every major corporation in the pharmaceutical industry. Drug manufacturers, distributors, and pharmacy benefit managers have been forced to defend these suits in all fifty states and thousands of localities.

    a. In February 2021, a bipartisan coalition of State AGs announced a $573 million settlement with consulting firm McKinsey for its role in advising opioid companies and helping them promote their drug.

    b. On July 21, 2021, a bipartisan coalition of State AGs announced final agreements with Johnson & Johnson, a manufacturer of prescription opioids, and the three major pharmaceutical distributors — Amerisource Bergen, Cardinal Health, and McKesson.

        i. These agreements resolved legal claims against those companies stemming from actions that fueled the opioid addiction epidemic in return for their payment of $26 billion and commitment to make major changes in how they do business to improve safety and oversight over the distribution of prescription opioid.

        ii. Numerous other settlements in excess of a billion dollars have been reached with other corporations in the pharmaceutical industry.

4. On June 9, 2023, Virginia Attorney General Jason Miyares announced the final approval of $17.3 billion in opioid agreements with drug makers Teva and Allergan, as well as pharmacies CVS and Walgreens. Virginia will receive up to approximately $365.6 million over 15 years, which is expected to start flowing to the state and local governments by the end of 2023.[4]

    a. The settlements will also require Teva's opioid business to comply with stringent injunctive relief that, among other things, will prevent all opioid marketing and ensure systems are in place to prevent drug misuse. Additionally, Allergan is required to stop selling opioids for the next 10 years. CVS and Walgreens have agreed to injunctive relief that requires the pharmacies to monitor, report, and share data about suspicious activity related to opioid prescriptions.

    b. To date, Virginia's share of national investigations and litigation against the pharmaceutical industry over the opioid crisis is nearly $1 billion. There are more settlements still pending.

[4] *See* https://www.oag.state.va.us/media-center/news-releases/2583-june-9-2023-attorney-general-miyares-secures-approximately-365-6-million-to-fight-the-opioid-crisis.

B. E-Cigarettes

1. Similar to the opioid litigation, 33 State AGs brought suits against the e-cigarette manufacturer JUUL Labs, which were consolidated into multidistrict litigation in the Northern District of California.

2. Allegations:

   a. JUUL relentlessly marketed to underage users with launch parties, advertisements using young actors, and manipulated the chemical composition of its product to make the vapor less harsh on the throats of the young and inexperienced users.

   b. To preserve its young customer base, JUUL relied on age verification techniques that it knew were ineffective.

   c. JUUL deceived consumers by not clearly disclosing on the original packaging that the product contained nicotine and implied it contained a lower concentration of nicotine than it did.

   d. JUUL misrepresented that its product was a smoking cessation device without FDA approval to make such claims.

3. Virginia and the other plaintiff states and territories joined a $438.5 million agreement with JUUL Labs. This settlement resolved a two-year bipartisan investigation into the e-cigarette manufacturer's marketing and sales practices.[5]

4. Virginia is set to receive $16.61 million over six to ten years. JUUL is also required to comply with a series of strict injunctive terms severely limiting their marketing and sales practices.

C. Washington Commanders Investigation

1. Attorney General Miyares announced an investigation into alleged financial improprieties committed by the Washington Commanders and the team's owner, Dan Snyder.

   a. Letter drafted to Team lawyer was leaked to the press:

      https://apnews.com/article/washington-commanders-nfl-business-sports-virginia-9e31b340d3462bba0173a3564e72d1e6

[5] *See* https://oag.state.va.us/media-center/news-releases/2448-september-6-2022-attorney-general-miyares-announces-438-5-million-agreement-with-juul.

https://www.washingtonpost.com/sports/2022/04/25/virginia-attorney-general-washington-commanders/

2. The Virginia OAG, along with the AGs from Maryland and Washington DC, investigated the allegations made by former Commanders employee Jason Friedman.

    a. Accused the team of withholding security deposits from season-ticket holders, including Virginia consumers, or making them hard to obtain.

    b. Alleged the team kept two sets of accounting books, allowing them to keep money that would have been earmarked for the NFL's revenue sharing pool.

D. TikTok Lawsuit[6]

1. In March 2023, Attorney General Jason Miyares joined 45 states and the District of Columbia seeking a court order requiring social media company TikTok, Inc., to fully comply with an ongoing investigation into whether the company violated consumer protection laws.

    a. As part of the multistate investigation, the State AGs seek to review internal TikTok communications to determine whether the company engaged in deceptive, unfair, and unconscionable conduct that harmed the mental health of TikTok users, particularly children and teens.

2. The State AGs argued that the conduct falls squarely within their investigatory authority and that TikTok repeatedly and knowingly failed to preserve relevant information and failed to provide internal communications in a useful format.

    a. For example, TikTok employees use an instant messaging service called Lark as their primary mechanism to communicate internally, but TikTok allegedly flouted their duty to preserve communications and provide them in a useable format.

    b. Instead, TikTok allegedly continued to allow employees to send auto-deleting messages over the Lark platform after the start of the investigation and have provided messages to the State AGs in a format that is allegedly difficult to use and navigate.

[6] *See* https://www.oag.state.va.us/media-center/news-releases/2546-march-6-2023-attorney-general-miyares-joins-46-state-bipartisan-coalition-asking-court-to-order-tiktok-to-comply-with-investigation.

3. The State AGs involved in the ongoing multistate investigation have emphasized that they have a duty to protect their citizens from illegal business practices, and that TikTok's alleged failure to preserve and share relevant internal communications hampers their investigation.

E. TurboTax[7]

1. In an exercise of the office's traditional role of protecting the Commonwealth's consumers from deceptive business practices, the Virginia OAG recently brought a lawsuit against TurboTax's owner Intuit, who allegedly duped consumers into paying for free tax services.

2. The $141 million multistate settlement was announced in May 2022.

   a. Approximately 4.4 million consumers nationwide will be paid as part of the multistate settlement.

   b. Virginia will receive more than $3.6 million for more than 119,000 consumers who were tricked into paying to file their federal tax return.

   c. Consumers who are eligible to receive part of the award include those who paid to file their federal tax returns through TurboTax for tax years 2016, 2017, and 2018 but were eligible to file for free through the IRS Free File Program.

III. Data Privacy & Virginia Consumer Data Protection Act

A. Data Privacy has become one of the most rapidly growing legal issues facing businesses worldwide. The United States, unlike the European Union, lacks a comprehensive federal privacy law. Instead, a patchwork of regulations enforced by varies regulatory agencies at the federal level, and State AGs at the state level, are responsible for protecting massive amounts of consumer data. While there is currently no comprehensive federal data privacy law, numerous states have enacted their own in recent years and many more have pending legislation.

B. On March 2, 2021, Governor Ralph Northam signed the Virginia Consumer Data Protection Act (VCDPA) into law, making Virginia the second state to pass a comprehensive state privacy law, following California's lead. Va. Code § 59.1-575, *et. seq.*

[7] *See* https://www.oag.state.va.us/media-center/news-releases/2567-may-4-2023-attorney-general-miyares-announces-distribution-of-141-million-settlement-to-millions-of-low-income-americans-deceived-by-turbotax-owner-intuit

1. The VCDPA, which draws from existing privacy laws in California and the European Union, had broad, bipartisan support in the General Assembly and went into effect on January 1, 2023.

2. Any company conducting business in the Commonwealth or marketing to Virginians will need to reassess its collection and use of consumers' personal information to determine whether it will need modify its practices to comply with the VCDPA.

3. Generally, the VCDPA will grant certain privacy rights to Virginia consumers and impose obligations on businesses operating in the Commonwealth.

    a. Virginia residents have the rights to access and confirm/correct/delete their data, and also opt-out of the sale and processing of their personal information for targeted advertising purposes. Va. Code § 59.1-577.

    b. Critically, the statute expressly prohibits companies from attempting to contractually limit these consumer rights.[8]

    c. The statute broadly defines "personal data" to include "any information that is linked or reasonably linkable to an identified or identifiable natural person,"[9] making the practical impact of this legislation incredibly significant for any business in Virginia operating online. Va. Code § 59.1-575.

4. The statute grants the OAG exclusive authority to enforce its provisions, subject to a 30-day cure period for any alleged violations. Va. Code §§ 59.1-584(A) & (B).

    a. The Attorney General may seek injunctive relief and damages for up to $7,500 for each violation, as well as "reasonable expenses incurred in investigating and preparing the case, including attorney fees." Va. Code §§ 59.1-584(C) & (D).

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[8] An important wrinkle to the VCDPA is that the term "consumer" is defined as "a natural person who is a resident of the Commonwealth acting only in an individual or household context," expressly excluding a person "acting in a commercial or employment context." Va. Code § 59.1-575. Thus, businesses need not consider employee personal data they collect and process when evaluating the law's applicability.

[9] The VCDPA also provides a safe haven for pseudonymous data (personal data that cannot be attributed to an individual "without the use of additional information") and "de-identified data or publicly available information." Va. Code § 59.1-581.

b. While the VCDPA is still in its infancy and the full breadth of its enforcement impact is not yet fully apparent, the Virginia OAG, like other State AGs, has been extremely active in bringing lawsuits against companies for what they allege are gross violations of consumer data privacy.

C. Google Location Data Settlement[10]

1. In November 2022, the Virginia OAG, along with 39 other attorneys general, reached a $391.5 million multistate settlement with Google over allegedly misleading consumers about their location tracking practices relating to Google Account settings.

   a. This is the largest multistate attorney general privacy settlement in the history of the U.S, and Virginia will receive $10,711,139.26 from the settlement.

2. The State AGs opened the Google investigation following a 2018 *Associated Press* article that revealed Google "records your movements even when you explicitly tell it not to."

   a. Location data is a key part of Google's digital advertising business.

      i. Location data is among the most sensitive and valuable personal information Google collects.

      ii. Even a limited amount of location data can expose a person's identity and routines and can be used to infer personal details.

   b. According to the State AGs, Google uses the personal and behavioral data it collects to build detailed user profiles and target ads on behalf of its advertising customers.

3. As detailed in the settlement, the State AGs found that Google violated state consumer protection laws by misleading consumers about its location tracking practices since at least 2014.

   a. Specifically, the State AGs investigation alleged that Google caused users to be confused about the scope of the "Location History" setting, the fact that the Web & App Activity setting existed and also collected location information, and the extent to which consumers who use Google

[10] *See* https://www.oag.state.va.us/media-center/news-releases/2487-november-15-2022-attorney-general-miyares-announces-391-5-million-settlement-with-google.

products and services could limit Google's location tracking by adjusting their account and device settings.

b. The settlement requires Google to be more transparent with consumers about its practices.

D. Data Breach Lawsuits

1. *Experian/T-Mobile* In the wake of the massive and highly publicized Experian data breach, Virginia joined with a number of State AGs to sue Experian (along with its client, T-Mobile).[11]

a. In September 2015, Experian, one of the big-three credit reporting bureaus, reported it had experienced a data breach in which an unauthorized actor gained access to part of Experian's network storing personal information on behalf T-Mobile.

i. The breach involved information associated with consumers who had applied for T-Mobile postpaid services and device financing between September 2013 and September 2015, including names, addresses, dates of birth, Social Security numbers, identification numbers (such as driver's license and passport numbers), and related information used in T-Mobile's own credit assessments.

ii. Experian's breach compromised the personal information of more than 15 million individuals and 340,004 Virginians who submitted credit applications with cellular phone service provider T-Mobile.

b. Under the settlements, the companies have agreed to improve their data security practices and to pay the states a combined amount of more than $15 million.

i. Virginia will receive a total of $346,085.82 from two multistate settlements with Experian and T-Mobile.

2. The Virginia OAG also obtained substantial settlements in 2022 in response to similar data breaches involving Wawa and Carnival Cruise Lines.

3. In light of the increasing frequency of cyber-attacks, coupled with the increasing codification of data privacy laws like the VCDPA, companies

[11] *See* https://www.oag.state.va.us/media-center/news-releases/2486-november-7-2022-attorney-general-miyares-announces-15-million-multistate-settlements-over-2015-experian-data-breach

that use, possess, or transmit customer should be cognizant of their cyber practices to avoid being the subject of an enforcement action.

IV. Healthcare Fraud

A. Healthcare fraud continues to be a strong area of white-collar enforcement for the Virginia OAG, resulting in the recovery of hundreds of millions of dollars in restitution and fines.

1. According to the 2021 Annual Report on State Medicaid Fraud Control Units (MFCUs) released by the U.S. Department of Health and Human Services' Office of the Inspector General (HHS-OIG), Virginia leads the country in Medicaid and federal health care program recoveries.[12]

2. The Virginia MFCU had over $444 million in court ordered restitution, fines and penalties for Medicaid and other federal health care programs.

B. Emerging Enforcement Priority: Behavioral Health & Developmental Services

As developmental and behavioral health services become increasingly important and prevalent areas of focus for patient populations and treatment providers, there has been a corresponding rise in the enforcement of fraudulent billing practices in these specialty areas.

1. For example, the Victoria Transcultural Clinical Center ("VTCC"), which provides mental health services and behavioral therapy to children and adolescents in northern Virginia, recently agreed to pay $263,280 to settle a federal FCA and VFATA case pending in the United States District Court for the Eastern District of Virginia.[13]

2. The U.S. Attorney's Office for the Eastern District of Virginia and the Virginia MFCU filed a complaint under the federal False Claims Act (FCA) and the Virginia Fraud Against Taxpayers Act (VFATA) alleging that VTCC engaged in a scheme to obtain payments from the Virginia Medicaid Program by inflating bills for services rendered, by billing for services not rendered, and by failing to take steps to repay overpayments within 60 days after VTCC identified these claims.

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[12] *See* https://www.oag.state.va.us/media-center/news-releases/2352-april-1-2022-attorney-general-miyares-announces-virginia-leads-the-country-in-medicaid-and-federal-health-care-program-recoveries.

[13] *See* https://www.justice.gov/usao-edva/pr/virginia-mental-health-agency-agrees-pay-263280-settle-civil-false-claims-act-lawsuit.

3. According to the allegations in the complaint:

   a. Three Qualified Mental Health Professionals and VTCC's Director of Operations knowingly inflated hours they spent providing services to children and adolescents in need of intensive in-home and behavioral therapy services by billing time for services provided while the minor patients were out of the country or no longer receiving treatment from VTCC.

   b. VTCC's management was aware of a general breakdown of VTCC's clinical supervision policy and protocols and of specific instances of billing for services not rendered.

   c. VTCC failed to take action to repay the Virginia Medicaid Program in a timely manner.

V. Antitrust Violations & Anti-Competitive Trade Practices

Antitrust violations and anti-competitive trade practices, two areas that have historically been the responsibility of the Federal Trade Commission, have increasingly been the subject of state attorney general enforcement actions.

A. Google Lawsuit[14]

1. The Commonwealth of Virginia recently joined the U.S. Department of Justice and a bipartisan coalition of State AGs suing Google for allegedly violating federal antitrust laws.

   a. The coalition alleges that Google has engaged in anticompetitive conduct, including exclusionary and deceptive practices, in an attempt to monopolize the online display advertising industry.

   b. The ongoing lawsuit alleges that Google undertook illegal acts to obtain and preserve its monopoly in the online advertising markets.

   c. The anticompetitive practices allegedly injured consumers all over the country by driving up the price of online advertising and decreasing innovation and efficiency in the industry.

[14] *See* https://www.oag.state.va.us/media-center/news-releases/2530-january-24-2023-attorney-general-miyares-joins-coalition-suing-google-for-antitrust-violations.

2. Virginia is also a plaintiff in two other multistate lawsuits against Google, one in D.C. District Court that alleges Google illegally maintains its monopoly power over general search engines and related advertising markets, and one in the Northern District of California that alleges exclusionary conduct relating to the Google Play Store for Android mobile devices and Google Billing.

VI. Virginia Fraud Against Taxpayers Act

A. The Virginia Fraud Against Taxpayers Act ("VFATA"), Va. Code § 8.01-216.1, *et. seq.,* is similar to the federal False Claims Act, 31 U.S.C. § 3729.

1. Permits private citizens with knowledge of fraud perpetrated against the government to bring a civil action on behalf of the Commonwealth and to share in any recovery obtained.

2. Applies to all businesses that contract with the state government or receive any taxpayer funds, including retails goods suppliers that register through eVA and those that provides services state agencies.

B. Recently, several chemical corporations paid a collective settlement of over $1 million dollars to resolve a VFATA suit brought by the Virginia Attorney General's Office. *Commonwealth of Virginia ex rel. Lawrence McShane v. Frank A. Reichl, et al.*, (Case No. CL 17-944).

1. The suit alleged that the defendants conspired to unlawfully rig and inflate prices during the public bidding process to defraud the Commonwealth and its taxpayers in the purchase of coagulant liquid aluminum sulfate, a chemical used in water treatment and purification.

2. Specifically, the Commonwealth alleged that the Defendants participated in a nationwide conspiracy to allocate territories and/or not to compete for each other's historical business by rigging bids, allocating customers, and fixing the price of liquid aluminum sulfate sold in the United States from January 1, 1997 through at least February 28, 2011, and that Defendants submitted or caused to be submitted false or fraudulent claims for payments to certain Commonwealth localities.

3. The Commonwealth's settlement is a part of a multi-jurisdictional $11.7 million settlement agreement.

VII. Environmental Regulations

A. The Virginia OAG's Environmental Section enforces environmental violations in the Commonwealth. In 2023, the OAG Environmental section brought lawsuits against two separate operators of landfills in Ruckersville and Bristol, Virginia, respectively.[15]

B. In April 2023, the Richmond City Circuit Court entered a consent decree between the City of Bristol, Virginia and the Department of Environmental Quality (DEQ), represented by the Office of the Attorney General.

    1. The consent decree requires the City of Bristol to implement a number of measures intended to help improve the landfill and area living conditions.

C. In Ruckersville, the Commonwealth of Virginia was awarded $250,000 in January 2023 in a civil enforcement action brought against the operator of an landfill.

    1. The recovery will go to the Virginia Environmental Emergency Response Fund, which helps fund emergency responses to environmental pollution and provides loans to small businesses to help with environmental pollution control.

VIII. Virginia Fair Housing Law

A. The Virginia Fair Housing Law, Va. Code § 36-96.1, *et. seq.*, proscribes discrimination in residential housing on the basis of race, color, religion, national origin, sex, elderliness, familial status, disability, source of funds, sexual orientation, gender identity, or military status.

B. Virginia OAG brought 13 lawsuits against 29 Richmond real estate companies for allegations of illegal "source of income" discrimination in denying Section 8 housing vouchers.[16]

    1. Under Va. Code § 36-96.3, it is unlawful for a landlord to (i) refuse to rent to someone based on their source of funds; (ii) impose terms, conditions, or privileges on the rental of a dwelling based on source of funds; (iii) make, print, or publish any notice, statement, or advertisement that indicates any

[15] *See* https://www.oag.state.va.us/media-center/news-releases/2528-january-20-2023-attorney-general-miyares-secures-250-000-civil-penalty-for-illegal-landfill; https://www.oag.state.va.us/media-center/news-releases/2557-april-4-2023-attorney-general-miyares-and-the-city-of-bristol-reach-agreement-over-bristol-landfill.

[16] *See* https://www.virginiamercury.com/2021/10/18/big-name-richmond-landlords-sued-for-refusing-section-8-vouchers/.

preference, limitation, or discrimination on the basis of source of funds; and (iv) represent to any person that a unit is not available because of their source of funds.

2. The lawsuits allege that the real estate companies categorically refused potential tenants who planned to pay using government vouchers ("Section 8 vouchers").

3. The lawsuits *each* seek $70,000 in damages and penalties and request a "reasonable period of monitoring" to ensure compliance going forward.

IX. Virginia Endangered Species

A. The Virginia OAG has even become involved in prosecuting violations of the federal Endangered Species Act, using the Va. Code § 29.1-563, *et. seq.*

1. The OAG's Animal Law Unit led an investigation and prosecution of Bhagavan Antle, more commonly known as "Doc Antle" from the Netflix series "Tiger King," after receiving a complaint from PETA.

2. Antle was accused of illegally purchasing lion cubs in Frederick County for display at his zoological facility in South Carolina without having obtained the proper federal permits.[17]

3. First ever prosecution using Va. Code § 29.1-564 – the Commonwealth relied entirely on violations of federal permitting regulations as its theory of guilt

B. The case culminated in a week-long trial in June 2023. Antle was convicted of four out of the original 17 charges he faced, but is currently challenging those convictions.

[17] *Commonwealth of Virginia v. Bhagavan Antle*, Frederick County Circuit Court Case Nos. CR20-818-828 & CR22-509-510.

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THE NUTS AND BOLTS OF GOVERNMENT CONTRACTING: PAVING THE WAY FOR DOING BUSINESS WITH THE GOVERNMENT

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The Nuts and Bolts of Government Contracting: Paving the Way for Doing Business with the Government

2023 Gentry Locke Seminar

October 6, 2023 – Roanoke
October 12, 2023 – Richmond

Spencer M. Wiegard, Esq.
Ryan J. Starks, Esq.

I. Overview of Government Contracting:

A. Commonly Used Definitions and Acronyms

ANC: Alaska Native Corporation

Applicant: Any person, firm, concern, corporation, partnership, cooperative or other business enterprise applying for any type of assistance from SBA. 13 C.F.R. § 103.1(c).

ASBCA: Armed Services Board of Contract Appeals

BD: Business Development

CBCA: Civilian Board of Contract Appeals

CDA: Contract Disputes Act of 1978

CO: Contracting Officer

COFC: Court of Federal Claims

CVE: Department of Veterans Affairs' Center for Verification and Evaluation

DBE: Disadvantaged Business Enterprise

DOD: Department of Defense

DSBSD: Virginia Department of Small Business and Supplier Diversity

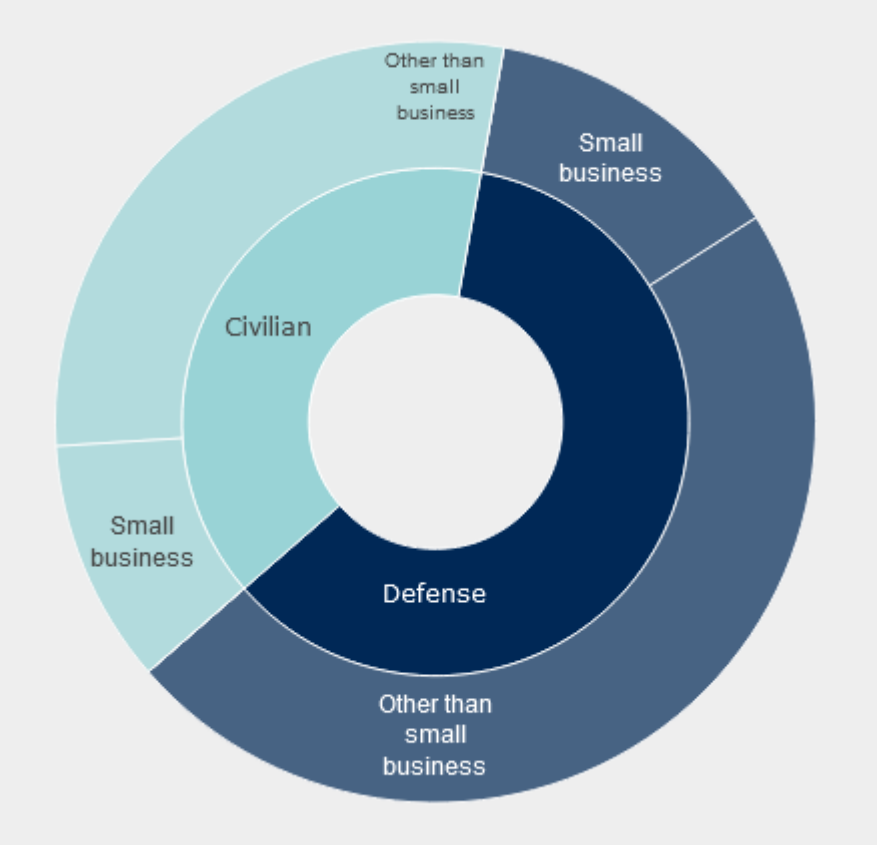
EDWOSB: Economically Disadvantaged Women-Owned Small Business

GAO: Government Accountability Office

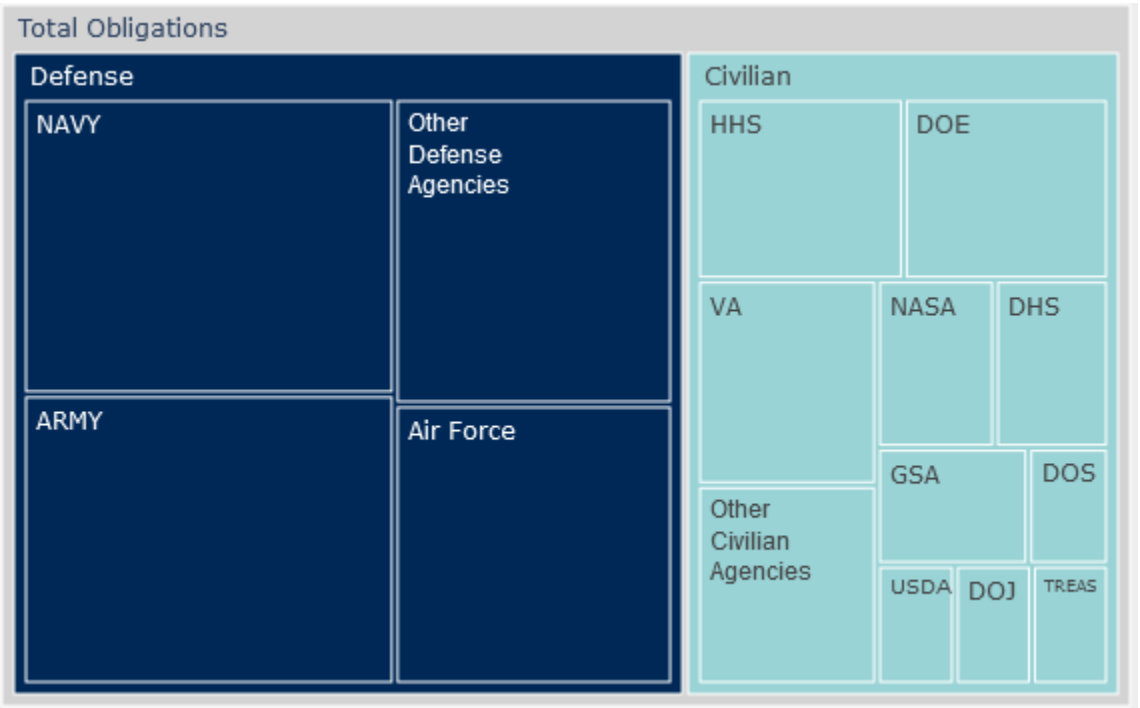
HUBZone:	Historically Under-Utilized Business Zone
JV:	Joint Venture
MPP:	Mentor Protégé Program
NAICS:	North American Industry Classification System
NHO:	Native Hawaiian Organization
OHA:	Small Business Administration's Office of Hearings and Appeals
OSBP:	Department of Defense's Office of Small Business Programs
Participant:	Participant means a person or entity that is participating in any of the financial, investment, or business development programs authorized by the Small Business Act or Small Business Investment Act of 1958. 13 C.F.R. § 103.1(g).
SBA:	Small Business Administration
SBC:	Small Business Concern
SDB:	Small Disadvantaged Business
SDVOSB:	Service-Disabled Veteran-Owned Small Business
SAM:	System for Award Management
SWaM:	Small, Women-Owned, and Minority-Owned
VA:	Department of Veterans Affairs
VOSB:	Veteran-Owned Small Business
WOSB:	Women-Owned Small Business

B. Federal and Virginia Spending on Government Contracts

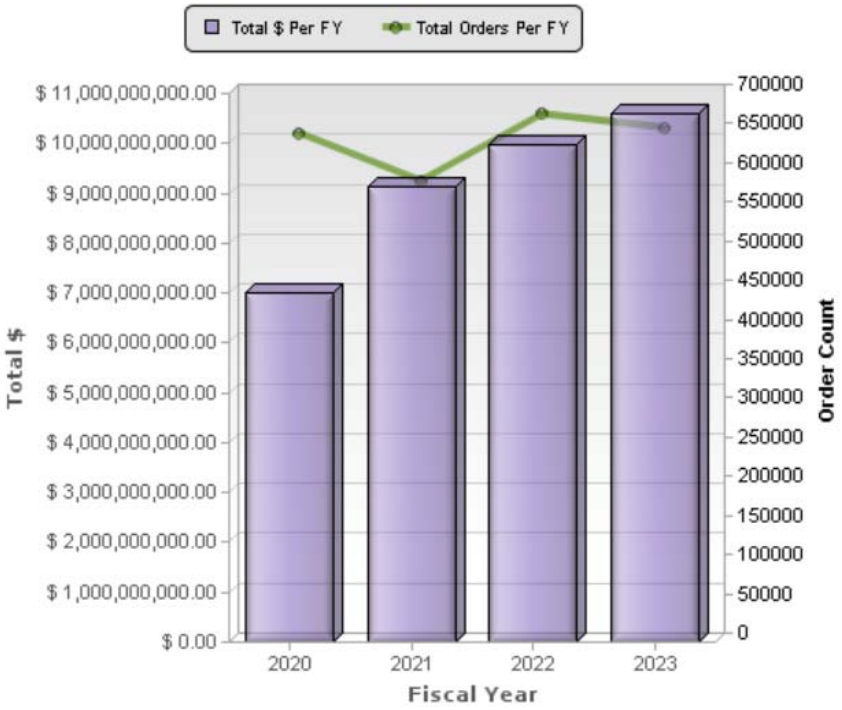
1. Federal Contracting (Source: GAO)

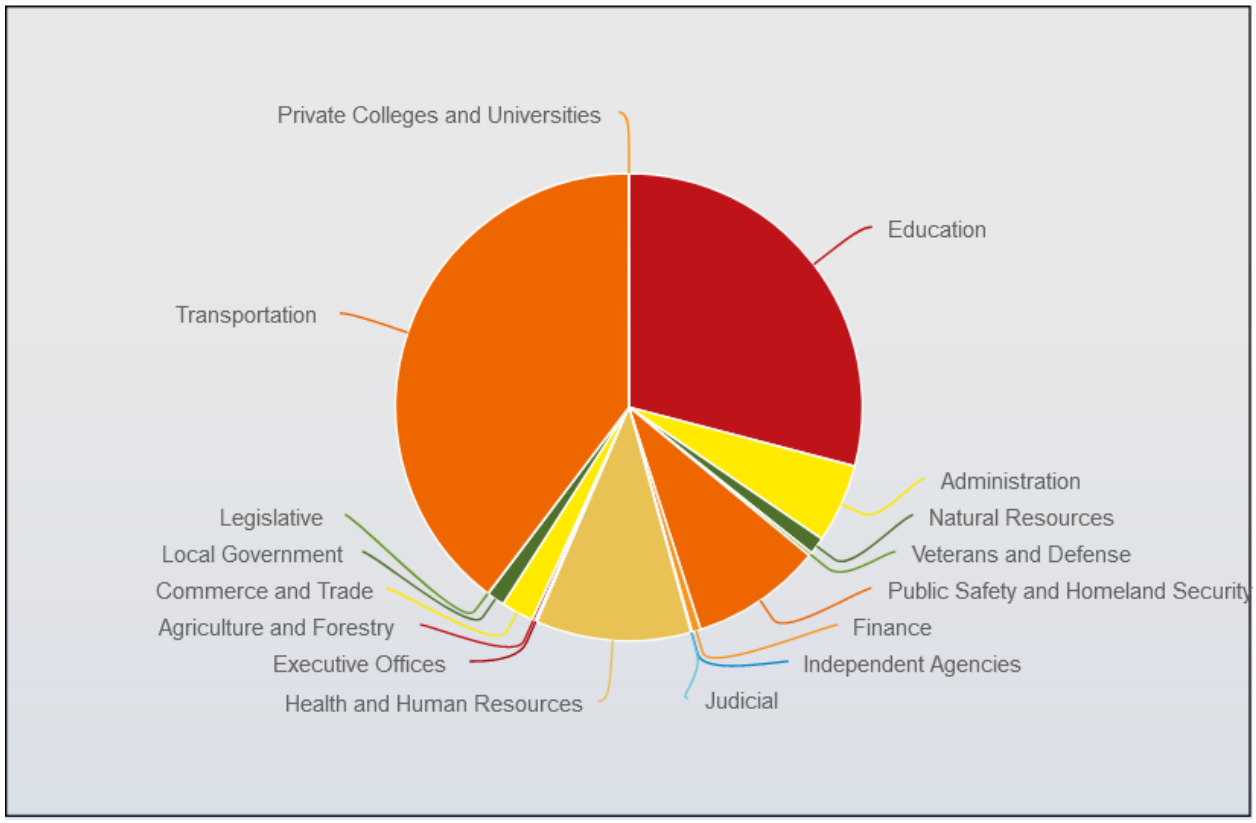


In 2021, the Federal Government awarded approximately $83.4B for defense-related contracts to businesses classified as small, and $66.1B for civilian contracts to businesses classified as small.



2. Virginia Contracting (Source: eVA)



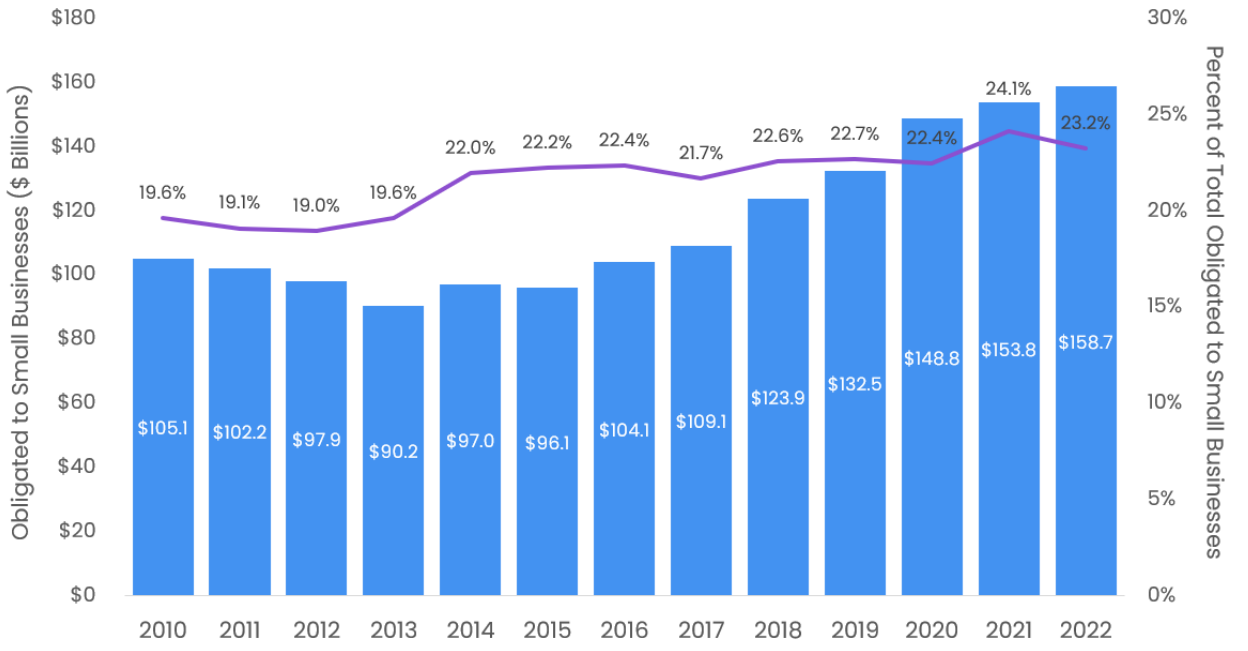


In fiscal year 2022, the Commonwealth awarded approximately $3.95B for transportation-related contracts, $2.9B for education-related contracts, $1.07B for health and human resources-related contracts, and $904.41M for public safety and homeland security-related contracts.

According to the Virginia Department of Small Business and Supplier Diversity ("DSBSD"), in fiscal year 2022, the Commonwealth awarded approximately $2.7B to Small, Woman Owned, and Minority Owned businesses.

II. Small Business Contracting

A. U.S. Small Business Administration ("SBA")

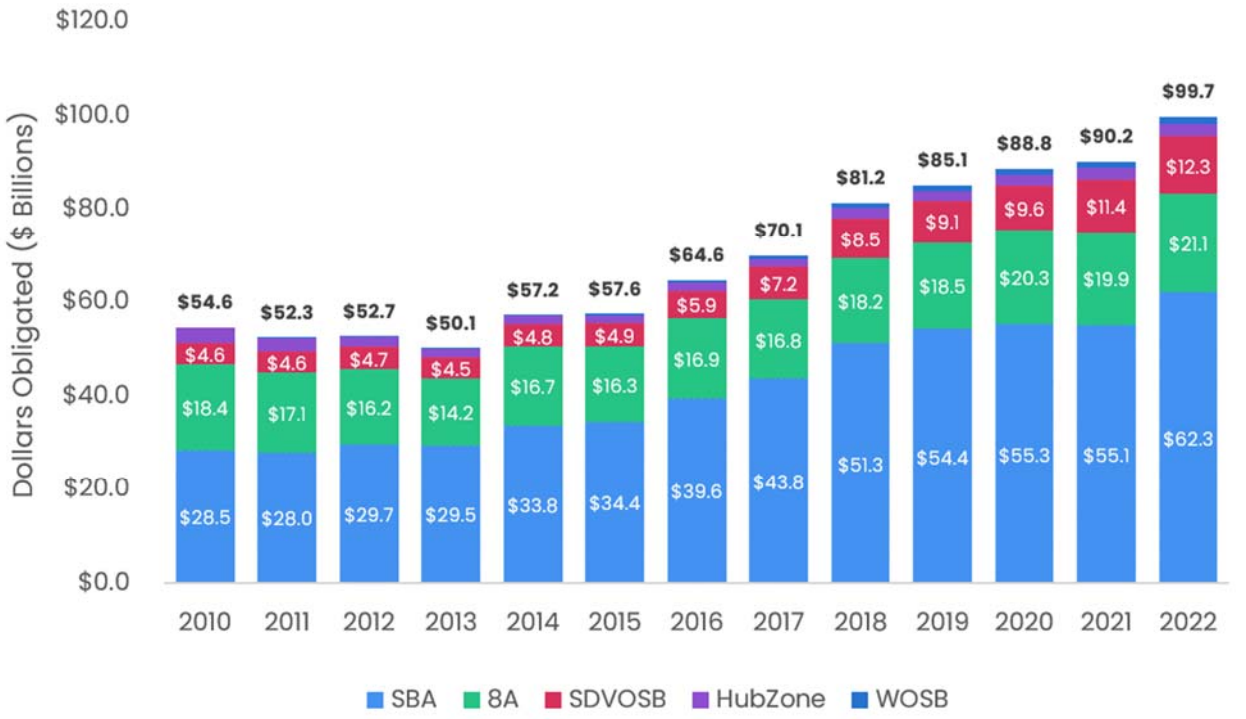


Source: HigherGov

1. Contracting Assistance Programs

The SBA is responsible for administering nine (9) contracting assistance programs: (1) Small Disadvantaged Business; (2) Women-Owned Small Business; (3) Service-Disabled Veteran-Owned Small Business; (4) 8(a) Business Development Program; (5) SBA Mentor-Protégé Program; (6) Joint Ventures; (7) 7(j) Management and Technical Assistance Program; (8) HUBZone Program; and (8) Natural Resource Sales Assistance Program.

SBA's size standards define whether a business entity is small and, thus, eligible for Government programs and preferences reserved for "small business" concerns. Size standards have been established for types of economic activity, or industry, generally under the North American Industry Classification System ("NAICS"). 13 C.F.R. § 121.101(a).



Source: HigherGov

i. Small Disadvantaged Business ("SDB") (13 C.F.R. § 1001)

Each year, the Federal Government awards about 10% of all federal contract dollars, or roughly $50 billion in contracts, to SDBs. To qualify:

- The SDB must be 51% "owned" and "controlled" by one or more disadvantaged persons.
- The disadvantaged person or persons must be "socially disadvantaged" and economically disadvantaged.
- The SDB must be small, according to the SBA's size standards.

As a general rule, "control" is not the same as "ownership." SBA regards control as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations. An Applicant or Participant's management and daily business operations must be conducted by one or more disadvantaged individuals.

There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA. 13 C.F.R. § 124.103(b)(1).

The phrase "socially and economically disadvantaged individuals" also includes Indian tribes, Alaska Native Corporations ("ANC"), Community Development Corporations, and Native Hawaiian Organizations ("NHO"). 13 C.F.R. § 1001(a).

The Alaska Native Claims Settlement Act provides that a concern which is majority owned by an ANC shall be deemed to be both owned and controlled by Alaska Natives and an economically disadvantaged business. Therefore, an individual responsible for control and management of an ANC-owned Applicant or Participant need not establish personal social and economic disadvantage. 13 C.F.R. § 124.109(a)(4).

Similarly, an individual responsible for the day-to-day management of an NHO-owned firm need not establish personal social and economic disadvantage. 13 C.F.R. § 124.110(d)(2).

A firm may represent that it qualifies as an SDB for any Federal subcontracting program if it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals. 13 C.F.R. § 1001(a).

ii. 8(a) Business Development Program (13 C.F.R. § 124 *et seq*.)

Sections 7(j)(10) and 8(a) of the Small Business Act (15 U.S.C. §§ 636(j)(10) and 637(a)) authorizes the U.S. Small Business Administration (SBA) to establish a business development program, which is known as the 8(a) Business Development program. Businesses that participate in the program receive training and technical assistance. Once certified, 8(a) program participants are eligible to receive federal contracting preferences and receive training and technical assistance designed to strengthen their ability to compete effectively in the American economy.

To qualify for the 8(a) program, businesses must meet the following eligibility criteria:

- Be a small business (13 C.F.R. § 124.102);
- Not have previously participated in the 8(a) program (13 C.F.R. § 124.204(a)(2));
- Be at least 51% owned and controlled by U.S. citizens who are socially and economically disadvantaged (13 C.F.R. § 124.101);
- Have a personal net worth of $850,000 or less, adjusted gross income of $400,000 or less, and assets totaling $6,500,000 or less (13 C.F.R. § 124.104);
- Demonstrate good character (13 C.F.R. § 124.108(a)); and
- Demonstrate the potential for success, such as having been in business for two years (13 C.F.R. § 124.107).

8(a) certification lasts for a maximum of nine years. 13 C.F.R. § 124.2(a). The first four years are considered a development stage and the last five years are considered a transitional stage. Continuation in the program is dependent on staying in compliance with program requirements.

Certified firms in the 8(a) program can:

- Efficiently compete and receive set-aside and sole-source contracts;

- Receive one-on-one business development assistance for their nine-year term from dedicated Business Opportunity Specialists focused on helping firms grow and accomplish their business objectives;
- Pursue opportunity for mentorship from experienced and technically capable firms through the SBA Mentor-Protégé program;
- Connect with procurement and compliance experts who understand regulations in the context of business growth, finance, and government contracting;
- Pursue joint ventures with established businesses to increase capacity;
- Qualify to receive federal surplus property on a priority basis; and
- Receive free training from SBA's 7(j) Management and Technical Assistance program.

The 8(a) certification qualifies your business as eligible to compete for the program's sole-source and competitive set-aside contracts. In addition, 8(a) program participants are eligible to compete for contract awards under other socio-economic programs or small business set-asides they qualify for.

iii. Veteran-Owned ("VOSB") and Service-Disabled Veteran-Owned ("SDVOSB") Small Business (13 C.F.R. § 128 *et seq*.)

The federal government aims to award at least 3% of all federal contracting dollars to SDVOSBs each year, and competition is limited for certain federal contract opportunities to businesses that participate in the SDVOSB program.

No Longer Administered by the Department of Veterans Affairs: SBA's Veteran Small Business Certification program implements changes from the National Defense Authorization Act for Fiscal Year 2021 (NDAA 2021) which transferred the certification function from the Department of Veterans Affairs (VA) to SBA as of January 1, 2023.

As a Result of the New Regulations – SDVOSBs may self-certify their status through 2023 to compete for set-aside contracts at most federal agencies. However, self-certified SDVOSBs must apply for SBA certification by January 1, 2024, to be able to compete for set-aside contracts with the federal government.

To qualify as a VOSB a business entity must be:

- A small business concern as defined in 13 C.F.R. § 121 under the size standard corresponding to any NAICS code listed in its SAM profile; and
- Not less than 51 percent owned and controlled by one or more veterans.

To qualify as an SDVOSB a business entity must be:

- A small business concern as defined in 13 C.F.R. § 121 under the size standard corresponding to any NAICS code listed in its SAM profile; and
- Not less than 51 percent owned and controlled by one or more service-disabled veterans or, in the case of a veteran with a disability that is rated by the Secretary of Veterans Affairs

as a permanent and total disability who are unable to manage the daily business operations of such concern, the spouse or permanent caregiver of such veteran.

One or more veterans (or service-disabled veterans) must unconditionally and directly own at least 51 percent of the concern. 13 C.F.R. § 128.202.

- To be considered direct ownership, the qualifying veteran must own 51 percent of the concern directly, and not through another business entity or trust (including an ESOP).

- To be considered unconditional, ownership must not be subject to any conditions, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity).

The management and daily business operations of the concern must be controlled by one or more veterans. Control by one or more qualifying veterans means that one or more qualifying veterans controls both the long-term decision-making and the day-to-day operations of the Applicant or Participant. 13 C.F.R. § 129.303(a).

A qualifying veteran must hold the highest officer position in the concern (usually President or Chief Executive Officer) and must have managerial experience of the extent and complexity needed to control the concern. 13 C.F.R. § 129.303(b).

The qualifying veteran who holds the highest officer position of the business concern may not engage in outside employment that prevents the qualifying veteran from devoting the time and attention to the concern necessary to control its management and daily business operations. 13 C.F.R. § 129.303(i).

iv. HUBZone Program (13 C.F.R. § 126 *et seq*.)

The purpose of the HUBZone program is to provide federal contracting assistance for qualified SBCs located in historically underutilized business zones in an effort to increase employment opportunities, investment, and economic development in such areas. The government has a goal of awarding at least 3% of federal contract dollars to HUBZone-certified companies each year.

Every five years the HUBZone program is required to update the HUBZone designations to ensure the program continues to serve the communities that are most in need of assistance. Most areas stay the same, but some change. The 2023 map will be updated again in July 2028 to reflect changes to Qualified Census Tracts ("QCT") and Qualified Non-Metropolitan Counties ("QNMC"), in 2026 to reflect expiring Redesignated Areas, and throughout any year to reflect new and expiring Governor-designated covered areas and Qualified Disaster Areas as appropriate.

- Qualified census tract means a census tract which is designated by the Secretary of Housing and Urban Development, and for the most recent year for which census data are available on household income in such tract, either in which 50 percent or more of the households

have an income which is less than 60 percent of the area median gross income for such year or which has a poverty rate of at least 25 percent. 13 C.F.R. § 126.103.

In order to be eligible for HUBZone certification, a concern's principal office must be located in a HUBZone. A concern that owns or makes a long-term investment (*e.g.*, a lease of at least 10 years) in a principal office in an area that qualifies as a HUBZone at the time of its initial certification will be deemed to have its principal office located in a HUBZone for at least 10 years from the date of that certification as long as the firm maintains the long-term lease or continues to own the property upon which the principal office designation was made. 13 C.F.R. § 126.200(c).

In addition, at least 35% of a concern's employees must reside in a HUBZone. 13 C.F.R. § 126.200(d).

A HUBZone small business concern may have affiliates. However, the employees of an affiliate may be counted as employees of a HUBZone applicant or HUBZone small business concern for purposes of determining compliance with the HUBZone program's principal office and 35% residency requirements in certain circumstances. 13 C.F.R. § 126.204.

v. Women-Owned Small Business ("WOSB") Program (13 C.F.R. § 127 *et seq*.)

The Federal Government's goal is to award at least 5% of all Federal contracting dollars to WOSBs each year. To be eligible for the WOSB Federal Contract program, a business must be:

- A small business according to SBA size standards (13 C.F.R. § 127.102); and
- Not less than 51 percent unconditionally and directly owned and controlled by one or more women who are United States citizens (13 C.F.R. § 127.200(b)(2)).; and

To qualify as an "Economically Disadvantaged" WOSB ("EDWOSB"), a business must:

- Meet all the WOSB requirements; and
- The woman's personal net worth must be less than $850,000, excluding her ownership interest in the concern and her equity interest in her primary personal residence (13 C.F.R. § 127.203(b)(1)).

For purposes of qualifying as an EDWOSB, when considering a woman's personal income, if the adjusted gross yearly income averaged over the three years preceding the certification exceeds $400,000, SBA will presume that she is not economically disadvantaged. The presumption may be rebutted by a showing that this income level was unusual and not likely to occur in the future, that losses commensurate with and directly related to the earnings were suffered, or by evidence that the income is not indicative of lack of economic disadvantage. 13 C.F.R. § 127.203(c)(3)(i). In addition, a woman will generally not be considered economically disadvantaged if the fair market value of all her assets (including her primary residence and the value of the business concern) exceeds $6.5 million. 13 C.F.R. § 127.203(c)(4). Assets that a woman claiming economic disadvantage transferred within two years of the date of the concern's certification will be attributed to the woman claiming economic disadvantage if the assets were transferred to an

immediate family member, or to a trust that has as a beneficiary an immediate family member. 13 C.F.R. § 127.203(d).

For both WOSB and EDWOSBs, to be considered ***unconditional***, the ownership must not be subject to any conditions, executory agreements, voting trusts, or other arrangements that cause or potentially cause ownership benefits to go to another (other than after death or incapacity). 13 C.F.R. § 127.201(b).

To be considered ***direct***, the qualifying women must own 51 percent of the concern directly. The 51 percent ownership may not be through another business entity or a trust (including employee stock ownership plan) that is, in turn, owned and controlled by one or more women or economically disadvantaged women. 13 C.F.R. § 127.201(c).

The woman or economically disadvantaged woman who holds the highest officer position of the business concern may not engage in outside employment that prevents her from devoting sufficient time and attention to the business concern to control its management and daily operations. 13 C.F.R. § 127.202(c).

Where a woman or economically disadvantaged woman claiming to control a business concern devotes fewer hours to the business than its normal hours of operation, there is a rebuttable presumption that she does not control the business concern. In such a case, the woman must provide evidence that she has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management and administration of the business. 13 C.F.R. § 127.202(c).

vi. SBA Mentor-Protégé Program (13 C.F.R. § 125.9)

As of November 16, 2020, the 8(a) Mentor-Protégé program and the All Small Mentor-Protégé program have merged into one SBA Mentor-Protégé program ("MPP").

The small business mentor-protégé program is designed to enhance the capabilities of protégé firms by requiring approved mentors to provide business development assistance to protégé firms and to improve the protégé firms' ability to successfully compete for federal contracts. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts (either from the mentor to the protégé or from the protégé to the mentor); trade education; and/or assistance in performing prime contracts with the Government through joint venture arrangements. Mentors are encouraged to provide assistance relating to the performance of contracts set aside or reserved for small business so that protégé firms may more fully develop their capabilities. 13 C.F.R. § 125.9(a).

In order to qualify as a ***mentor***, a concern must demonstrate that it:

- Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement;
- Does not appear on the Federal list of debarred or suspended contractors; and

- Can impart value to a protégé firm due to lessons learned and practical experience gained, or through its knowledge of general business operations and government contracting.

In order for SBA to agree to allow a mentor to have more than one protégé at time, the mentor and proposed additional protégé must demonstrate that the added mentor-protégé relationship will not adversely affect the development of either protégé firm (*e.g.*, the second firm may not be a competitor of the first firm). 13 C.F.R. 125.9(b)(3).

- A mentor (including in the aggregate a parent company and all of its subsidiaries) generally cannot have more than three protégés at one time. However, where a mentor purchases another business entity that is also an SBA-approved mentor of one or more protégé small business concerns and the purchasing mentor commits to honoring the obligations under the seller's mentor-protégé agreement(s), that entity may have more than three protégés (i.e., those of the purchased concern in addition to those of its own). 13 C.F.R. 125.9(b)(3)(ii).

In order to initially qualify as a ***protégé*** firm, a concern must qualify as small for the size standard corresponding to its primary NAICS code, or identify that it is seeking business development assistance with respect to a secondary NAICS code and qualify as small for the size standard corresponding to that NAICS code. 13 C.F.R. § 129.5(c).

A protégé firm may generally have only one mentor at a time. However, SBA may approve a second mentor for a particular protégé firm where the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship, and: (i) the second relationship pertains to an unrelated NAICS code; or (ii) the protégé firm is seeking to acquire a specific expertise that the first mentor does not possess. 13 C.F.R. § 129.5(c)(2).

SBA may authorize a small business to be both a protégé and a mentor at the same time where the small business can demonstrate that the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship. 13 C.F.R. § 129.5(c)(3).

Can Have Big Benefits for a "Big" Business: A protégé ***and mentor*** may joint venture as a small business for any government prime contract, subcontract or sale, provided the protégé qualifies as small for the procurement or sale. Such a joint venture may seek any type of small business contract (*i.e.*, small business set-aside, 8(a), HUBZone, SDVO, or WOSB) for which the protégé firm qualifies (*e.g.*, a protégé firm that qualifies as a WOSB could seek a WOSB set-aside as a joint venture with its SBA-approved mentor). Similarly, a joint venture between a protégé and mentor may seek a subcontract as a HUBZone small business, small disadvantaged business, SDVO small business, or WOSB provided the protégé individually qualifies as such. 13 C.F.R. § 129.5(d).

Must Have a Written Agreement: The mentor and protégé firms must enter a written agreement setting forth an assessment of the protégé's needs and providing a detailed description and timeline for the delivery of the assistance the mentor commits to provide to address those needs (*e.g.*, management and or technical assistance; loans and/or equity investments; bonding; use of equipment; export assistance; assistance as a subcontractor under prime contracts being performed

by the protégé; cooperation on joint venture projects; or subcontracts under prime contracts being performed by the mentor). 13 C.F.R. § 129.5(e).

The mentor-protégé agreement must:

- Specifically identify the business development assistance to be provided and address how the assistance will help the protégé enhance its growth, and/or foster or acquire needed capabilities;
- Identify the specific entity or entities that will provide assistance to or participate in joint ventures with the protégé where the mentor is a parent or subsidiary concern;
- Establish a single point of contact in the mentor concern who is responsible for managing and implementing the mentor-protégé agreement; and
- Provide that the mentor will provide such assistance to the protégé firm for at least one year.

2. Challenges to Entity Size and Status

Type of Protest	Number of Cases Handled within Timeframe	Total Number of Protests Received
Size Protests	276	327
Service-Disabled Veteran-Owned Small Business Status Protests	9	18
HUBZone Status Protests	6	12
Women-Owned Small Business Status Protests	2	7
Total	293	364

Source: SBA (Sept. 2022) – Reporting Fiscal Year 2021

i. Size Protests and Affiliation (13 C.F.R. § 121.103 *et seq.*)

In determining the concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit. 13 C.F.R. § 121.103(a)(6).

Receipts means all revenue in whatever form received or accrued from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. 13 C.F.R. § 121.104(a).

Annual receipts of a concern that has been in business for 5 or more completed fiscal years means the total receipts of the concern over its most recently completed 5 fiscal years divided by 5. 13 C.F.R. § 121.104(c)(1).

The average annual receipts size of a business concern with affiliates is calculated by adding the average annual receipts of the business concern with the average annual receipts of each affiliate. 13 C.F.R. § 121.104(d)(1).

a. Affiliation

Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. 13 C.F.R. § 121.103(a)(1).

Control may be affirmative or negative. Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders. 13 C.F.R. § 121.103(a)(3).

- **Affiliation based on stock ownership.** A person (including any individual, concern or other entity) that owns, or has the power to control, 50 percent or more of a concern's voting stock, or a block of voting stock which is large compared to other outstanding blocks of voting stock, controls or has the power to control the concern. 13 C.F.R. § 121.103(c).

    - Where a company has no single 50% or greater owner, a minority owner may be presumed to control the company. *Size Appeal of Government Contracting Resources, Inc*., SBA No. SIZ-5706 (2016) (under 13 C.F.R. 121.103(c)(2), "when a concern is owned by multiple owners with equal minority interests, all of those owners are presumed to control the concern.").

    - OHA has repeatedly rejected arguments that a concern with multiple owners is not controlled by any person or entity. *Size Appeal of Technibilt Ltd*., SBA No. SIZ-5304 (2011); *Size Appeal of Tech. Support Servs*., SBA No. SIZ-4794, at 15 (2006) ("[A]ll concerns must be controlled by someone or some group at all times. The alternative, to consider none of the minority stockholders as possessing the power to control the concern, would ignore reality and leave the locus of power uncertain and unresolved."); *Size Appeal of Zygo Corp.*, SBA No. SIZ-2514 (1986). A minority owner may rebut the presumption by showing that control rests with a different owner. *Allied Tech. Servs. Group, LLC*, SBA No. SIZ-5373, at 7 (2012); *Size Appeal of ADVENT Envt'l*., SBA No. SIZ-5325, at 8 (2012) (finding that presumption was not rebutted due to challenged firm's "direct, personal involvement in [the affiliate's] affairs, including oversight of its most important strategic decisions.").

    - OHA has found that an approximately equal distribution of ownership among minority shareholders is sufficient to find that each minority owner has the power to control the firm based on his or her minority interest. *Size Appeal of ADVENT Envt'l., Inc*., SBA No. SIZ-5325 (2012) (four 25%

owners each had the power to control); *Size Appeal of Vocare Servs., Inc*., SBA No. SIZ-5266, at 6 (2011) ("The Area Office correctly determined that the three individuals who own [the affiliate] can control that firm because they each hold equal shares of [the affiliate's] stock."); *Size Appeal of Taylor Consultants, Inc*., SBA No. SIZ-5049, at 9 (2009) (affirming finding that one of four individuals who each own 25% of the challenged firm had the power to control that firm based on his minority interest).

- **Affiliation arising under stock options, convertible securities, and agreements to merge.** SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a present effect on the power to control a concern. SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised. An individual, concern or other entity that controls one or more other concerns cannot use options, convertible securities, or agreements to appear to terminate such control before actually doing so. SBA will not give present effect to individuals', concerns' or other entities' ability to divest all or part of their ownership interest in order to avoid a finding of affiliation. 13 C.F.R. § 121.103(d).

- **Affiliation based on common management.** Affiliation arises where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns. 13 C.F.R. § 121.103(e).

- **Affiliation based on identity of interest.** Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. 13 C.F.R. § 121.103(f).

    - When there is a common familial interest, the consideration is whether the family members have the ability to control the respective entities (*e.g*., where the family member owns 50% or more of the entity, or there are three minority owners with equal shares). In either of those circumstances, the entities must establish that a "clear line of fracture" exists between the business entities. *See Size Appeal of: Trailboss Enterprises, Inc., Appellant*, SBA No. SIZ-5442 (Jan. 31, 2013) (no clear line of fracture where Mr. Tolliver controls Appellant, Ms. Dossman-Tolliver controls DTG, and the spousal relationship gives rise to an identity of interest under 13 C.F.R. § 121.103(f)); *Size Appeal of: Black Box Tech., Inc., Appellant*, SBA No. SIZ-5011 (Nov. 14, 2008) (no clear line of fracture where Jesse Fowler, the President and owner of Control Systems is the father of Jason Fowler, the Vice President and 51% owner of Appellant and Appellant: (1) has been in business for only one year; (2) performs work similar to that of Control Systems; and (3) has a substantial business relationship with Control

Systems, including teaming with Control Systems to submit an offer under the RFP).

- There is a rebuttable presumption of identity of interest based upon economic dependence if the challenged concern derives 70% or more of its receipts from another concern over the three previous fiscal years. 13 C.F.R. § 121.103(f)(2); *see also Size Appeal of Oak Grove Technologies, LLC*, SBA No. SIZ-6051 (2020); *Size Appeal of: Sc&a, Inc., Appellant Re: Unwin Co*., SBA No. SIZ-6059, 2020 (June 18, 2020). Such a presumption is rebuttable, however, and OHA has found the presumption to be rebutted under certain circumstances. In one such case, OHA found the presumption rebutted when the challenged firm, a wholly-owned subsidiary of an Alaskan Native Corporation ("ANC"), demonstrated that it had access to the resources of its ANC parent and sister companies, and thus was not dependent upon the revenues earned from the alleged affiliate, a company that was not associated with the ANC. *Size Appeal of: Navarro Research & Eng'g, Inc., Appellant Re: Rsi Entech, LLC*, SBA No. SIZ-6065, 2020 (Aug. 12, 2020) (citing *Size Appeal of Olgoonik Solutions, LLC*, SBA No. SIZ-5669 (2015)).

- **Affiliation based on the newly organized concern rule.** Affiliation may arise where former or current officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. 13 C.F.R. § 121.103(g).

    - Just as with the "identity of interest" rule discussed above, a concern may rebut such an affiliation determination by demonstrating that there is a clear line of fracture between the two concerns. *Id*; s*ee also Size Appeal of: Etouch Fed. Sys., LLC, Appellant*, SBA No. SIZ-5280 (Sept. 2, 2011).

    - OHA has described a key employee as follows: A key employee is one who, because of his position in the concern, has a critical influence or substantive control over the operations or management of the concern. Key employees are those who have influence or control over the operations of a concern as a whole, such as a Director of Operations. An employee who is not an owner, officer or executive of a concern and who supervises only 4% of its business is not a key employee. A Government Services Manager with no authority over substantive decision-making is not a key employee. A Human Resources Manager is not a key employee. An employee with no authority to hire and fire or to enter into contracts is not likely to be a key employee. Conversely, an employee who is critical to a concern's control of day-to-day operations is a key employee. A key employee then, is not

merely an employee with a responsible position or a particular title. A key employee is one who actually has influence or control over the operations of the concern as a whole. *Size Appeal of: Inv Techs., Inc., Appellant*, SBA No. SIZ-5818, 2017 (2017).

- **Affiliation based on joint ventures.** A joint venture is an association of individuals and/or concerns with interests in any degree or proportion intending to engage in and carry out business ventures for joint profit over a two-year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. Note that two firms approved by SBA to be a mentor and protégé may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement.

- **The "ostensible subcontractor" rule.** The SBA treats a prime contractor and its subcontractor "as joint venturers, and therefore affiliates, for size determination purposes" when the subcontractor "performs primary and vital requirements of a contract," or the prime contractor is "unusually reliant" upon the subcontractor. 13 C.F.R. § 121.103(h)(4). The rule, which applies equally to all set-aside contracts — including small business, 8(a), and HUBZone contracts — aims to "'prevent other than small firms from forming relationships with small firms to evade SBA's size requirements.'" *Size Appeal of Iron Sword Enters., LLC*, SBA No. SIZ-5503, 2013 SBA LEXIS 113, *13 (2013) (quoting *Size Appeal of Fischer Bus. Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009)).

    - OHA has identified "four key factors" that have contributed to the findings of unusual reliance: (1) the proposed subcontractor is the incumbent contractor and is ineligible to compete for the procurement; (2) the prime contractor (*e.g.*, the target firm) plans to hire the large majority of its workforce from the subcontractor; (3) the prime contractor's proposed management previously served with the subcontractor on the incumbent contract; and (4) the prime contractor lacks relevant experience and must rely upon its more experienced subcontractor to win the contract. *Size Appeal of: Charitar Realty*, SBA No. SIZ-5806, 2017 (Jan. 25, 2017) (citing *Modus Operandi, Inc*., SBA No. SIZ-5716, at 12; *Prof'l Sec*., SBA No. SIZ-5548, at 8; *Wichita Tribal Enters*., SBA No. SIZ-5390, at 9). Violation of the ostensible subcontractor rule is more likely to be found if the proposed subcontractor will perform 40% or more of the contract. *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5785, at 10 (2016).

    - The rule essentially asks "whether a large subcontractor is performing or managing the contract in lieu of a small business [prime] contractor." *See Size Appeal of: Northwind-Cdm Smith Advantage Jv, LLC, Appellant Re: Changeis, Inc*., SBA No. SIZ-6053, 2020 (May 11, 2020) (quoting *Size Appeal of Colamette Constr. Co*., SBA No. SIZ-5151, at 7 (2010). To ascertain whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, an area office must

examine all aspects of the relationship, including the terms of the proposal and any agreements between the firms. *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). Generally, "[w]here a concern has the ability to perform the contract, will perform the majority of the work, and will manage the contract, the concern is performing the primary and vital tasks of the contract and there is no violation of the ostensible subcontractor rule." *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 12 (2011).

- **Examining Negative Control**

  - An affiliation issue can arise where there are certain negative control rights or other protective provisions associated with the preferred shares. This "includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders." 13 C.F.R. § 121.103(a)(3). For that reason, the existence of veto power over an important aspect of a business constitutes negative control. *Kansas City LLC d/b/a Best Harvest Bakeries*, SBA No. SIZ-4574, at 7 (2003). Such negative control rights might include the minority shareholder's ability to: prevent the payment of dividends (*Team Waste Gulf Coast, LLC v. United States*, No. 17-1865C (Fed. Cl. Jan. 3, 2018)); block an executive's removal or changes to the executive's compensation (*Id*.); block "any changes in the [company's] strategic direction" (*Id*.); prevent a quorum at shareholder meetings (*Jensco Marine, Inc*., SBA No. SIZ-4330 (1998)); prevent the commission of any act that would alienate or encumber a concern's assets (*Dependable Courier Services, Inc*., SBA No. SIZ-2110 (1985)); restrict the ability to amend or terminate existing lease agreements (*Id*.); prevent the purchase of equipment (*Id*.); restrict the ability to incur debts or obligations (*Id*.); prevent changes to the budget (*Id*.); and block decisions to bring or defend lawsuits (*Id*.).

  - Alternatively, limited actions found to be protection of a stockholder's investment are not "important decisions in the operation of the business" and do not interfere with the concern's day to day operations and, therefore, will not result in a finding of negative control. *EA Engineering, Science, and Technology, Inc*., SBA No. SIZ-4973 (2008); *Novalar Pharmaceuticals, Inc*., SBA No. SIZ-4977 (2008). "OHA has held that a concern giving minority owners the ability to block certain extraordinary actions of the concern has not provided negative control to the minority members, if those supermajority provisions are crafted to protect the investment of the minority shareholders, and not to impede the majority's ability to control the concern's operations or to conduct the concern's

business as it chooses." *Southern Contracting Solutions III, LLC*, SBA No. SIZ-5956 (2018).

- Depending on the specific circumstances, such "extraordinary actions" – control over which would *not* result in a finding of affiliation – might include the minority shareholder's right to protect minority investors by preventing "actions which could have a severe impact upon the company" such as: selling all or substantially all of a company's assets (*Southern Contracting Solutions III, LLC*, SBA No. SIZ-5956 (2018)); mortgaging or placing an encumbrance upon all or substantially all assets of a company (*Id*.); engaging in any action that could result in a change in the amount or character of a company's contributions to capital such as by accepting additional capital contributions from a member (*Id*.); correcting a false or erroneous statement in a concern's Articles of Organization (*Id*.); submitting a company's claim to arbitration (*Id*.); confessing a judgment (*Id*.); issuing additional stock (*EA Eng'g, Sci. & Tech. Inc*., SBA No. SIZ-4973 (2008)); entering into substantially different lines of business (*Id*.); adding new members (*DHS Sys. LLC*, SBA No. SIZ-5211 (2011)); approving an increase or decrease in the size of the concern's Board (*Id*.); approving an increase or decrease in the number of authorized interests, or reclassifying interests (*Id*.); dissolving the company (*Carntribe-Clement 8AJV # 1, LLC*, SBA No. SIZ-5357 (2012)); amending the operating agreement in any manner that materially alters the rights of existing members (*Dooleymack Government Contracting, LLC*, SBA No. SIZ-5086 (2009)); and filing for bankruptcy (*Id.*).

B. Virginia Department of Small Business and Supplier Diversity ("SBSD")

The SBSD reviews applications and certifies eligible entities to bid on contracts reserved for those eligible Small, Women-owned and Minority-owned ("SWaM"), Disadvantaged Business Enterprise ("DBE"), and Service-Disabled Veteran Owned ("SDV"). Those programs are governed by Title 7 Agency 13 Chapter 20 of the Virginia Administrative Code ("VAC") and Title 2.2 Subtitle I Part C Chapter 16.1 of the Virginia Code.

1. Definition of a Small Business

Va. Code § 2.2-1604 defines a small business as "a business that is at least 51 percent independently owned and controlled by one or more individuals who are U.S. citizens or legal resident aliens and, together with affiliates, has 250 or fewer employees or average annual gross receipts of $10 million or less averaged over the previous three years."

One or more of the individual owners shall control both the management and daily business operations of the small business." *Id.*

SBSD adopts that definition as an "eligible small business" for purposes of certifying entities to participate in special contracting programs. 7 VAC13-20-40.

SBSD has an additional designation for so-called "micro" businesses. To qualify as an eligible micro business, "it is first certified as a small business pursuant to 7VAC13-20-40 and, together with its affiliates, has 25 or fewer employees and average annual gross receipts of $3 million or less averaged over the previous three years." 7VAC13-20-50.

2. Woman-Owned Business

To qualify as a Woman-Owned Business, it must be "at least 51 percent owned by one or more women who are U.S. citizens or legal resident aliens […] and both the management and daily business operations are controlled by one or more women." Va. Code § 2.2-1604; 7VAC13-20-60.

3. Minority-Owned Business

In order to be certified as a Minority-Owned Business, it must meet the definition of minority owned business as defined in Va. Code § 2.2-1604, and "[t]he minority owner [must be] regarded as such by the community of which the person claims to be a part." 7VAC13-20-70.

The business must be "at least 51 percent owned by one or more minority individuals who are U.S. citizens or legal resident aliens, […] and both the management and daily business operations are controlled by one or more minority individuals […]." Va. Code § 2.2-1604.

To determine whether the minority owned is regarded as such by his or her community, SBSD considers whether that person regularly describes himself as a member of the community; historically has held himself out as a member of the community; participates in business, educational, charitable, civic, or community organizations, or activities made up of or traditionally identified with or attended by members of the community; and other members of the community describe the person as a fellow member of the community. 7VAC13-20-70.

4. Service Disabled Veteran Owned Business

The Virginia SDV program is not a separate certification but is instead an election the business can make when applying for SWaM certification. Businesses seeking to make such an election, however, must be first certified by the Virginia Department of Veterans Services as a Service-Disabled Veteran-Owned Small Business, defined in Va. Code § 2.2-2000.1 as: "a business concern that is at least 51 percent owned by one or more service disabled veterans […] and both the management and daily business operations are controlled by one or more individuals who are service disabled veterans."

5. Defining Ownership

Ownership by the female, minority, or other individual owner of a small business "must be real, substantial, and continuing going beyond the pro forma ownership of the business." 7VAC13-20-100. They must "share in all risks and profits in proportion to their ownership interests." *Id*. Likewise, "[c]ontribution of capital, expertise, or both by women, minority, or individual owners

to acquire their ownership interest shall be real and substantial and be in proportion to the interests acquired." *Id*. Promises to contribute capital or expertise in the future do not meet this requirement. *Id*.

the organizational and governing documents of an applicant must not contain any provision that restricts the ability of the women, minority, or individual owners from exercising managerial control and operational authority of the business. 7VAC13-20-110. Those documents must demonstrate that the women, minority, or individual owners must possess the power to direct or cause the direction of the management and policies of the business and to make the day-to-day decisions as well as major decisions on matters of management, policy, and operations, and there can be no formal or informal restrictions limiting that discretion. *Id*. Finally, those individuals must possess expertise that is indispensable to the business's potential success. *Id*.

In a **sole proprietorship**, the woman, minority, or individual applying for certification must own 100% of the business and its assets. *Id*.

In a **corporation**, women, minority, or individual owners must own at least 51% of each class of voting stock outstanding and 51% of the aggregate of all stock outstanding. *Id*. Any shareholder voting agreements must not dilute the beneficial ownership, the rights, or the influence of the women, minority, or individual owners of the stock or classes of stock of the corporation and women, minority, or individual owners shall possess the right to all customary incidents of ownership (e.g., ability to transfer stock, title possession, enter binding agreements, etc.). *Id*.

In a **limited liability company**, women, minority, or individual owners must own at least 51% of membership interests and have at least 51% of the management and control among the members. *Id*.

In a **joint venture**, the women, minority, or individual owners must own at least 51% of the business venture, exert at least 51% of the control of the venture, and have made at least 51% of the total investment. *Id*.

6. Affiliation Concerns

A firm that is not at least 51% owned directly by the qualifying individuals, but instead is owned by another firm, cannot be certified as a small, women-owned, or minority-owned business. *Id*. Where the prospective small business is owned by a holding company, and the combined gross receipts or number of employees of the holding company, its affiliates, and its subsidiaries are greater than the size standard for the subsidiary seeking certification, the prospective small business would fail meet the size standard and cannot be certified. *Id*.

7. Disadvantaged Business Entity Program

The DBE program is a federal contracting program designed to increase participation of certified DBEs in projects funded by the U.S. Department of Transportation ("DOT"). These projects typically include heavy construction, such as building and designing roads, bridges, railroads, ports, and airports. It follows that the DBE program, aside from being managed by SBSD, is

governed by Federal DOT regulations. In sum, "DBE means a for-profit small business concern—(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it." 49 CFR § 26.5. The remainder of the requirements for participation in the DBE program can be found at 49 CFR § 26.1 *et seq.*

III. Roadblocks and Challenges

A. "Pre"-Contract Award[1]

1. Size Protests and Appeals

The issue of whether a size classification was properly made or whether a particular company or concern falls within those standards is a matter solely for review by the Small Business Administration. 15 U.S.C. § 637(b)(6). The procedure for handling size status protests is dictated 48 C.F.R. § 19.302; *see also* 13 C.F.R. 121.1001 through 121.1103. The protesting party bears the responsibility for supplying evidence in support of its allegations.

i. Time to file

When a set-aside procurement is negotiated, the contracting officer is required to notify offerors of the apparently successful offeror. 48 C.F.R. §§ 15.503, 15.504. Written filing of a protest and its reception by the contracting officer prior to the close of business on the ***fifth working day*** after the bid opening date or notification by the contracting officer is mandatory. Under the SBA regulations (*see* 13 C.F.R. § 121.1004), any protest which is received after the time limits must still be forwarded to SBA, which will dismiss untimely protests. Similarly, protests filed before bid opening or notification of the apparent awardee are premature and will be dismissed, 13 C.F.R. § 121.1004(e).

ii. Specificity of Protest

A protest before the SBA must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. 13 C.F.R. § 121.1007(a). Nonspecific protests will be dismissed. 13 C.F.R. § 121.1007(c); *Size Appeal of Bernard Packaging, Inc*., SBA No. 3644, 1992 SBA LEXIS 115 (July 15, 1992). Therefore, the protester must have some basis to believe that the protested concern is "other than small" before it submits its protest.

In Size Appeal of Management Systems Applications, Inc., SBA No. 3473, 1991 SBA LEXIS 91 (May 20, 1991), the OHA held that a protest which merely alleged, without elaboration or

[1] Status protests are governed by the procedures set forth in the relevant code section. For that reason, "[a]n interested party seeking to protest both the size and the EDWOSB or WOSB status of an apparent successful offeror on an EDWOSB or WOSB requirement must file two separate protests, one size protest pursuant to part 121 of this chapter and one EDWOSB or WOSB status protest pursuant to this subpart." 13 C.F.R. § 127.601.

documentation, that a concern was not small based upon a review of a Dun & Bradstreet report and other information was insufficiently specific. Similarly, a protest which was based on a Dun & Bradstreet report as well as information from suppliers was not specific when copies of the Dun & Bradstreet report were not provided and there was no detail concerning the information received from the suppliers. *Size Appeal of W. Harley Miller Contractors, Inc*., SBA No. 3647, 1992 SBA LEXIS 91 (July 16, 1992).

A protester may not cure a nonspecific protest by providing the necessary information on appeal.

iii. Protest Procedures

After it receives a protest from the contracting officer, the appropriate SBA regional office will notify the contracting officer, the protested concern, and the protester of the date it received the protest and whether the protest will be dismissed for lack of specificity. 13 C.F.R. § 121.1008(a). If the protest is sufficiently specific, the regional office will send a copy of the protest and an SBA Application for Small Business Size Determination, SBA Form 355, to the protested concern. *See* 13 C.F.R. § 121.1008(a); 48 C.F.R. § 19.302(e)(2).

The protested concern has three business days after it receives the protest to file a completed SBA Form 355 and a statement answering the allegations in the protest, and to furnish supporting evidence. 13 C.F.R. § 121.1008(c); 48 C.F.R. § 19.302(f). If the protested concern fails to submit the above information, the SBA regional office may draw an adverse inference. 13 C.F.R. § 121.1008(c).

Once the regional office has received the protest, it is required to issue a size determination within ten business days, if possible. 13 C.F.R. § 121.1009(a). The burden of persuasion is on the protested concern. 13 C.F.R. § 121.1009(c). Unless there is a need for additional information, the regional office may base its decision on the protested concern's completed SBA Form 355. *Size Appeal of Delta Food Service, Inc*., SBA No. 3557, 1991 SBA LEXIS 178 (Dec. 20, 1991); *Size Appeal of Contract Services, Inc.*, SBA No. 3411, 1991 SBA LEXIS 16 (Feb. 1, 1991).

The formal size determination is effective immediately, 13 C.F.R. § 121.1009(g)(1). It will remain in effect until either it is overturned on appeal by the SBA's Office of Hearing and Appeals ("OHA"), or the protested concern is recertified as small.

iv. Appeals

Any interested party may appeal a regional office's formal size determination to the OHA. 13 C.F.R. § 134.302 & 13 C.F.R. § 121.1001(a). The determination of when to appeal is dependent upon when there is a pending procurement. If there is a pending procurement, the appeal must be filed with the OHA no later than ***fifteen business days*** after the date of receipt of the size determination. 13 C.F.R. § 134.304(a).

2. Bid Protests

A "disappointed offeror" for a federal contract award ordinarily has three major options for contesting the award of a contract to a competitor or its failure to be awarded a contract. *S.K.J. & Assocs. v. United States*, 67 Fed. Cl. 218, 223 (2005).

The disappointed offeror may file a "bid protest" with (1) the agency (*i.e.*, an agency-level bid protest resolved by the Contracting Officer ("CO") or at a level above the CO), (2) the Government Accountability Office ("GAO"), or (3) the U.S. Court of Federal Claims ("COFC"). Similarly, a prospective offeror that files a bid protest before the submission of bids or proposals (*e.g.*, with respect to the terms of the solicitation) – or some other form of preaward protest – also has the choice of these three forums to file a preaward protest.

Below, we briefly examine the procedures for initiating and prosecuting a bid protest at the GAO – which is far and away the most common venue to initiate a bid protest related to a federal contracting opportunity.

i. Time to File

A protest based upon "alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals" must be filed prior to bid opening or the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1); *e.g.*, *Carter Indus., Inc.*, B-270702, 96-1 CPD P 99 (Comp. Gen. Feb. 15, 1996).

Any other protest must be filed "not later than 10 days after the basis of protest is known or should have been known (whichever is earlier)." 4 C.F.R. § 21.2(a)(2). Under the GAO bid protest rules, "[d]ays are calendar days." *Id*. § 21.0(e). That same rule continues that "[t]he day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday." *Id*.

ii. Competition in Contracting Act ("CICA") Stay

If the GAO notifies an agency of a timely filed protest before award of a contract, the agency may not award the contract until the protest is decided. 31 U.S.C. § 3553(c), (d) (2006). Only notice from the GAO triggers the automatic stay. *See Florida Professional Review Org.*, Inc., B-253908.2, 94-1 CPD P 17 (Comp. Gen. Jan. 10, 1994) (notice by protester is insufficient to trigger automatic stay). Nevertheless, a protester must also furnish a copy of its protest to the agency within one day after it files the protest with the GAO. FAR § 33.104(a)(1).

iii. The Agency Report and Comments

The agency must file a report on the protest with the GAO within 30 days of receiving telephonic notice of the protest from the GAO. 4 C.F.R. § 21.3(c); FAR § 33.104(a)(3)(i). The "agency may request an extension of time for the submission" of the agency report, which will be granted on a case-by-case basis. 4 C.F.R. § 21.3(f). The protester must respond to the agency report, providing

a copy of its response to the agency and other parties, within 10 days of receiving the report. 4 C.F.R. § 21.3(i); FAR § 33.104(a)(6). Otherwise, the protest will be dismissed unless the GAO grants an extension. 4 C.F.R. § 21.3(i); *e.g.*, *Keymiaee Aero-Tech, Inc.*, B-274803, B-274803.2, 97-1 CPD P 153 (Comp. Gen. Dec. 20, 1996).

iv. The Decision

The GAO must issue a decision on a protest within 100 days after it is filed. 31 U.S.C. § 3554(a)(1) (2006); 4 C.F.R. § 21.9(a); FAR § 33.104(f) (2008).

If the GAO sustains a protest, it may recommend that the agency: "(A) refrain from exercising any of its options under the contract; (B) recompete the contract immediately; (C) issue a new solicitation; (D) terminate the contract; (E) award a contract consistent with the requirements of such statute and regulation; (F) implement any combination" of the above, or, any other recommendations that the GAO determines necessary under principles of sound procurement law and practice. 31 U.S.C. § 3554(b)(1); 4 C.F.R. § 21.8(a).

v. Appeals

Protesters, intervenors, and agencies can seek reconsideration of GAO decisions. 4 C.F.R. § 21.14(a). A request for reconsideration must be filed at the GAO within 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. *Id*. §21.14(b); *see Speedy Food Serv., Inc.--Recons.*, B-274406, 97-1 CPD P 5 (Comp. Gen. Jan. 3, 1997). To obtain reconsideration, the requesting party "must show that [the GAO's] prior decision contains errors of either fact or law, or must present information not previously considered that warrants reversal or modification of [the] decision." 4 C.F.R. § 21.14(c).

The filing of a request for reconsideration at the GAO does not require the withholding of contract award or the suspension of contract performance. 4 C.F.R. § 21.6.

Where the protest is initiated, and later denied, by the GAO, the protester may still "re-file" its protest at the COFC. Note that, unlike at the GAO, the COFC does not enforce any hard deadlines other than the six-year statute of limitations generally applicable to claims. 28 U.S.C. § 2501.

In a protest filed at the COFC after the issuance of a GAO decision on that same procurement, it is the agency contract award decision – not the GAO's recommendation – that is subject to review by the COFC. *E.g.*, *Centech Group, Inc. v. United States*, 78 Fed. Cl. 496, 507 (2007), 49 GC P 410 ("[28 U.S.C.A. §] 1491(b) gives this Court jurisdiction to review an agency procurement decision, not the GAO's review of that agency procurement decision."). Because the GAO decision is a "recommendation," it is not controlling or diapositive for judicial review of the agency's actions. *S.K.J. & Assocs. v. United States*, 67 Fed. Cl. 218, 224 (2005) ("Should a bidder pursue its challenge to the bid award with GAO, GAO's ultimate determination is not binding upon the agency or this court; rather, it serves as a recommendation that becomes a part of the administrative record.") (citing *Honeywell, Inc. v. United States*, 870 F.2d 644, 647 (Fed. Cir. 1989)). Thus, the COFC "does not sit in appellate review of GAO decisions." *University Research*

Co., LLC v. United States, 65 Fed. Cl. 500, 501 n.2 (2005) (citing *Arch Chemicals, Inc. v. United States*, 64 Fed. Cl. 380, 383 n.4 (2005).

B. Post-Contract Award

The Contract Disputes Act of 1978 ("CDA") governs many of the Government contracts suits in the COFC and virtually all such suits before the boards. The CDA applies to express and implied-in-fact contracts entered into by an executive agency for (1) the procurement of property, other than real property in being, (2) the procurement of services, (3) the procurement of construction, alteration, repair, or maintenance of real property, or (4) the disposal of personal property. 41 U.S.C. § 602(a). The CDA, therefore, does not apply to all Government contracts or procurement actions. *See*, *e.g*., *Pasteur v. United States*, 814 F.2d 624, 627-28 (Fed. Cir. 1987); *Newport News Shipbldg. & Dry Dock v. United States*, 7 Cl. Ct. 549, 553-54 (1985).

The CDA does not provide jurisdiction for bid protests or for the recovery of bid preparation costs, but it does provide jurisdiction in connection with lease agreements for real property and the sale of timber by the Government. *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1561-62 (Fed. Cir. 1990); *Sierra Pac. Indus*., AGBCA No. 79-200, 80-1 BCA P 14,383.

The principal remedy available in contract disputes before the COFC and the boards is money damages, which is usually recovered in the form of expectation or reliance damages. *See, e.g*., *S. Cal. Fed. v. United States*, 422 F.3d 1319, 1334 (Fed. Cir. 2005); *Glendale Federal Bank, FSB v. United States*, 378 F.3d 1308, 1313 (Fed. Cir. 2004); *Hi-Shear Tech. Corp. v. United States*, 356 F.3d 1372, 1382-83 (Fed. Cir. 2004); *Energy Capital Corp. v. United States*, 302 F.3d 1314, 1324 (Fed. Cir. 2002). Neither the COFC nor the boards may grant specific performance, injunctive relief, or mandamus relief with respect to contract administration problems.

The CDA provides Government contractors with a choice of forum to challenge a Contracting Officer's ("CO") adverse Final Decision on a contract claim. 41 U.S.C. § 607 (2000); *see also* 41 U.S.C. §§ 601-613 (2000). A contractor can choose the forum to litigate its claim and either may file a suit in the United States Court of Federal Claims ("COFC") or may appeal to the appropriate agency board of contract appeals. 41 U.S.C. §§ 606, 609(a); *see also LaBarge Prods., Inc. v. West*, 46 F.3d 1547, 1554 (Fed. Cir. 1995); *S.J. Groves & Sons Co. v. United States*, 661 F.2d 171, 173 (Ct. Cl. 1981); *Holly Corp.*, ASBCA No. 24975, 80-2 BCA P 14,675. Once a contractor has filed an action in one of the forums, the choice ordinarily is final.

There are currently three boards of contract appeals: (1) the ASBCA, which has jurisdiction over Department of Defense ("DOD") (including the Departments of the Army, Navy, and Air Force and all other agencies, components and entities within the DOD) and National Aeronautics and Space Administration ("NASA") contracts; (2) the Civilian Board of Contract Appeals (CBCA or "Civilian Board"), which has jurisdiction over most civilian, federal executive agency contracts (with the exception of NASA, Tennessee Valley Authority ("TVA") and U.S. Postal Service related contracts); and (3) the Postal Service Board of Contract Appeals ("PSBCA"), which has jurisdiction over U.S. Postal Service and the Postal Rate Commission contracts.

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THE FEDERAL CORPORATE TRANSPARENCY ACT: HOW TO GET READY

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Full Transparency on the Corporate Transparency Act

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William S. Fussy
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2023 Gentry Locke Seminar

October 6, 2023 – Roanoke
October 12, 2023 - Richmond

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I. Background: Corporate Transparency Act (CTA)

The federal Corporate Transparency Act, 31 U.S.C. § 5336 "CTA" is changing the corporate world by requiring more ownership transparency from all "reporting companies." The CTA was enacted in 2021 under the National Defense Authorization Act (NDAA), and its purpose is to enable law enforcement to better counter money laundering and other criminal activity. It does this through introducing new reporting requirements as well as reforming aspects of the Bank Secrecy Act of 1970 (the "BSA"). The U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued a "final rule" in September 2022 requiring companies that fall under the Act to report beneficial ownership and company applicant information. These new requirements are an effort to peer into what is behind anonymous companies and for the government to attempt to crack down on shell companies used for money laundering. With over two million corporations and limited liability companies being created each year and tens of millions already registered, the CTA seeks to change the transparency in ownership to keep these entities accountable for illicit activity. However, in doing so, the collection burden will now fall on reporting companies.

II. Introduction to CTA Legislation and Final Regulations

1. The CTA represents the most significant reformation of the BSA since the US Patriot Act.

2. The CTA was enacted under the Fiscal Year 2021 NDAA on January 1, 2021 by the Senate, overriding a presidential veto.

3. Section 403 of the CTA amends the BSA by adding a new section, 31 U.S.C. § 5336, entitled "Beneficial Ownership Information Reporting Requirements."

4. On September 30, 2022, FinCEN finalized the reporting requirements to implement the CTA and published guidance on the final regulations.[1] The effective date of these regulations is January 1, 2024.

5. CTA reporting requirements cast a broad net, impacting all who advise on and carry out entity information, governance, planning, and tax compliance (e.g. lawyers, accountants, financial advisors, business consultants, and more).

6. CTA is designed to apply to smaller, private entities, which may not already be subject to other reporting requirements.

    i. For lawyers working with entities that fall under the CTA it is critical to:

        a. Identify existing entities that must comply.
            1. Company Applicants, as defined by the statute, need to be identified for entities created in 2024 and after.
        b. Address best internal practices.

[1] *See* Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (Sept. 30, 2022).

c. Implement internal protection measures on professional responsibility.
d. Prepare client alerts or letters.

III. General Requirements

1. Reporting: Requires reporting companies to disclose beneficial ownership information and information on Company Applicants to FinCEN.

    i. In General: In accordance with regulations set forth by FinCEN[2], each reporting company shall submit a report that contains the information required by 31 U.S.C. § 5336(b)(2)(A).

        a. Existing Entities: Entities that have been formed before January 1, 2024 shall, report the required information before January 1, 2025.

        b. Entities Formed After January 1, 2024: the required information must be reported within 30 calendar days.

2. Required Information: 31 U.S.C. § 5336(b)(2)(A).

    i. In accordance with regulations prescribed by the Secretary of the Treasury[3], a report delivered shall identify each beneficial owner of the applicable reporting company and each applicant with respect to that reporting company by—
        1. Full legal name
        2. Date of birth
        3. Current residential or business street address; and
        4. Unique identifying number from an acceptable identification document; or
        5. Unique identifying number set forth by FinCEN.

3. Reporting Companies are also required to report specific information on the Reporting Company to FinCEN. 31 C.F.R. § 1010.380(b)(1)(i).

    i. Full name of reporting company.
    ii. Business address of reporting company.
    iii. Jurisdiction of formation of the reporting company.
    iv. Unique identification number for reporting company.

IV. Reporting Companies

1. Includes foreign and domestic companies.

    i. Domestic reporting companies or other entities similar are:

[2] *See* Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (Sept. 30, 2022).
[3] *See* 31 U.S.C. § 5336(b)(2).

a. Created by the filing of a document with a Secretary of State or a similar office under the law of a State or Indian Tribe. 31 U.S.C. § 5336(a)(11)(A)(i).
b. Common law trusts are not considered reporting companies, but some trusts may fall under the definition of "Beneficial Owner" as set forth in 31 C.F.R. § 1010.380(d).

ii. Foreign reporting companies or other entities similar are:
a. Formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a Secretary of State or similar office under the laws of a State or Indian Tribe. 31 U.S.C. § 5336(a)(11)(A)(ii).

V. Reporting Companies Exemptions

6. Reporting company exemptions include the following under 31 U.S.C. § 5336(a)(11)(B) and 31 C.F.R. § 1010.380(c)(2).

i. Bank and bank-like entities.

ii. An investment company as set forth in 15 U.S.C. § 80a-3 or an investment as defined in 15 U.S.C. § 80b-2.

iii. Any organization described in Internal Revenue Code ("I.R.C.") § 501(c) and exempt from tax under I.R.C. § 501(a).

iv. Publicly-traded companies.

v. "Large operating companies" that employ over 20 employees on a full time basis in the United States, and, in the previous year, had more than $5 million in gross receipts.

vi. Any corporation, limited liability company or other similar entity of which the ownership interests are owned or controlled, directly or indirectly by one (1) or more entities.

vii. Inactive entities in existence for over one (1) year.

VI. Beneficial Owners

1. Beneficial Owner Under 31 U.S.C. § 5336(a)(3) & 31 C.F.R. § 1010.380(d)
Beneficial Owner means, with respect to an entity, an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—
i. Exercises "substantial control" over the entity; or
ii. "Owns or controls" not less than 25% of the ownership interests of the entity.

2. Substantial Control Under 31 C.F.R. § 1010.380(d)(1)(i)
a. Serves as a senior officer of a reporting company;

b. Authority over the appointment or removal of any senior officer or a majority or dominant minority of the board of directors of a reporting company; and
c. Direction, determination, or decision of, or substantial influence over, important matters affecting a reporting company, e.g.:
   - Major expenditures or investments
   - The selection or termination of business lines or ventures

3. Substantial Control Under 31 C.F.R. § 1010.380(d)(1)(ii)
An individual may directly, or indirectly, "including as a trustee of a trust or similar arrangement", exercise substantial control over a reporting company through:
   a. Board representation.
   b. Ownership and control of the majority of the voting power or voting rights of the company, rights associated with a financing arrangement, or interest in a company.
   c. Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company.
   d. Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees.
   e. Any other contract, arrangement, understanding, relationship, or otherwise.

4. Ownership/Control Under 31 C.F.R. § 1010.380(d)(2)(ii) as to Estate Planning & Trusts
An individual may directly or indirectly control an ownership interest in a reporting company through any contract, arrangement, understanding, relationship or otherwise, including:
   a. Joint ownership with one or more persons of an undivided interest in such ownership interest.
   b. Through another individual acting as a nominee, intermediary, custodian or agent on behalf of such individual.
   c. With regard to a trust or other individual (if any) with the authority to dispose of trust assets:
      - As a trustee or other individual (if any) with the authority to dispose of trust assets;
      - Beneficiary who (1) is the sole permissible recipient of income and principal; or (2) has the right to demand a distribution of or withdraw substantially all of the assets; or
      - Grantor/settlor who has the right to revoke the trust or otherwise withdraw the assets

VII. Beneficial Owners Exceptions

1. Beneficial Owner does not include—

   i. A minor child, as defined in the State in which the entity is formed if the information of the parent or guardian of the minor child is reported in accordance with this section.

ii. An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual.

iii. An individual acting solely as an employee of a corporation, limited liability company, or other similar entity and whose control over or economic benefits from such entity is derived solely from the employment status of the person.

iv. Right of inheritance exceptions:
1. The CTA refers to a "future" interest associated with the right of inheritance, not a present interest that a person may acquire as a result of exercising such a right.
2. The CTA definition of "Beneficial Owner" excludes an "individual whose only interest" in the entity "is through a right of inheritance."
3. FinCEN clarifies that individuals who may in the future come to own ownership interests in an entity through a right of inheritance do not have ownership interests until the inheritance occurs.

v. Comments Received—FinCEN provided more clarity on the application of the inheritor exception.
a. Once an individual has inherited an ownership interest in an entity that individual owns that ownership interest and is potentially subject to the beneficial owner reporting requirements. 31 C.F.R. § 1010.380(d).
b. Once an ownership interest is inherited and comes to be owned by an individual, that individual has the same relationship to an entity as any other individual who acquires an ownership interest through another means. 31 C.F.R. § 1010.380(d).
c. The precise moment at which an individual acquires an ownership interest in an entity through inheritance may be subject to a variety of existing legal authorities, such as the terms of a will, the terms of a trust, applicable state laws, and other valid instruments and rules. 31 C.F.R. § 1010.380(d).

VIII. Company Applicant

1. Under 31 U.S.C. § 5336(a)(2) and 31 C.F.R. § 1010.380(e) the term "Company Applicant" means any individual who—

i. Files an application to form a corporation, limited liability company, or other similar entity under the laws of a State or Indian Tribe; or

ii. Registers or filed an application to register a corporation, limited liability company, or other similar entity formed under the laws of a foreign country to do business in the United States by filing a document with the Secretary of State or similar office under the laws of a State or Indian Tribe.

2. The initial report of a Reporting Company formed on or after January 1, 2024, must include the required information under the CTA for the company applicant, the Reporting Company itself, and all Beneficial Owners under 31 C.F.R. § 1010.380(b)(1).

   i. The final rule no longer requires domestic reporting companies created prior to the effective date, or foreign reporting companies registered prior to the effective date, to submit company applicant information. Rather they will only need to report the fact that they were created or registered prior to the effective date and the required Beneficial Ownership Information ("BOI") and reporting company information. 31 C.F.R. § 1010.380(b)(2)(iv).

   ii. Updated reports only need to include the changes made along with the required information previously submitted to FinCEN. However, changes with respect to the Company Applicant do not need to be reported. 31 C.F.R. § 1010.380(a)(2)(i).

IX. Due Dates for Reports

1. Under 31 C.F.R. § 1010.380(a) reporting dates under the CTA for domestic reporting companies created or foreign companies registered:

   i. Domestic reporting companies created or foreign companies registered for the first time before the effective date will have one year from the effective date of the final regulations (January 1, 2025) to file their initial report to FinCEN.

   ii. Companies created on or after the effective date will be required to file their initial report to FinCEN within 30 days of the date of creation or registration.

   iii. If there is a change in previously reported information reporting companies would have 30 days to file an updated report.

   iv. Finally, any inaccurate information will need to be corrected within 14 days of the date the company knew or should have known of the mistake.

X. Penalties

1. Under 31 U.S.C. § 5336(h) and 31 C.F.R. § 1010.380(g):

   i. 31 U.S.C. § 5336(h)(1) Reporting Violations:
   It is unlawful for any person to—
   a. Willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document; or
   b. Willfully fail to report complete or updated beneficial ownership information.
   c. Penalties for Reporting Violations (31 U.S.C. § 5336(h)(3)(A)):
      1. Liable for a civil penalty of not more than $500 for each day that the violation continues or has not been remedied; and

2. May be fined not more than $10,000, imprisoned for not more than 2 years or both.

2. There are also unauthorized disclosure penalties under 31 U.S.C. § 5336(h)(2) Unauthorized Disclosure or Use Violations.

It is unlawful for any person to knowingly disclose or knowingly use the beneficial ownership information obtained by the person through a report submitted to FinCEN or a disclosure made by FinCEN.

a. Penalties for Unauthorized Disclosure or Use Violations (31 U.S.C. § 5336(h)(3)(B)):
    1. Liable for a civil penalty of not more than $500 for each day that the violation continues or has not been remedied; and
    2. Either (I) fined not more than $250,000, or imprisoned for not more than 5 years, or both; or (II) while violating another law of the United States or any illegal activity involving more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 10 years, or both.

XI. Access Regulations

1. Retention and disclosure of BOI by FinCEN under 31 U.S.C. § 5336(c).

i. Retention of Information:
- a. BOI relating to each reporting company shall be maintained by FinCEN for no less than 5 years after the date on which the reporting company terminates. 31 U.S.C. § 5336(c)(1).
- b. An officer or employee of the United states, State agency or financial institution may not disclose BOI information. 31 U.S.C. § 5336(c)(2)(A).

ii. Scope of disclosure by FinCEN to Federal and State Agencies:
- a. FinCEN may disclose BOI reported only upon receipt of a request, through appropriate protocols---
    - ➢ From a federal agency engaged in national security, intelligence, or law enforcement activity, for use in furtherance of such activity; or
    - ➢ From a state, local, or tribal law enforcement agency who seeks information in a criminal or civil investigation; or from the federal government acting on behalf of a foreign government.

2. Rejection of Request under 31 U.S.C. § 5336(c)(6).

i. The Secretary of the Treasury shall reject a request not submitted on the FinCEN authored form.

ii. May decline to provide information under this section upon finding that:
- a. The requesting agency has failed to meet any other requirement of this subsection;

b. The information is being requested for an unlawful purpose; or
c. Other good cause exists to deny the request.

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ETHICS GAME SHOW

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"Ethics" for $1000, Alex:
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Gentry Locke Seminar
October 6, 2023

Presenters:
William Spotswood
Harrison Richards

Format Overview: Using Virginia's Rules of Professional Conduct, the presentation will follow the natural progression of a representation, beginning with "Solicitation of Clients" (Rule 7.3) and highlighting key rules through "Terminating the Relationship" (Rule 1.16). The audience will be encouraged to participate through the use of the smartphone application "Poll Everywhere," which enables members of the audience to answer questions while providing a breakdown of the audience's answers.

This outline is in two sections: hypotheticals and answers. There are 24 hypotheticals, which are arranged by topic. The answers are at the end of the presentation along with the text of the applicable Rules.

List of Topics

Solicitation of Clients (Rule 7.3)

#1. Larry Lawyer obtains a list from the local tow shop of persons who had major car accidents within the last month, calls them on the telephone, and offers to provide legal services. None of the individuals who had car accidents are lawyers. Larry does not personally or professionally know, nor is he related to, any of the individuals. Is this a prohibited solicitation?

(A) Yes. You are not sure if the person is represented by counsel or if they are even open to solicitation.
(B) No. This is perfectly fine.
(C) Maybe – best to steer clear of this practice and come up with another way of identifying clients.

#2. An attorney asks a personal friend and colleague who works at a bank to provide the lawyer's name and contact information to any bank customer or employee who the banker thinks might need a will drafted. Is this a prohibited means of soliciting clients?

(A) Yes
(B) No
(C) Maybe

Conflicts Among Clients (Rules 1.7 / 1.8 / 1.9)

#3. During a telephone call, you learn that one of your largest clients has found a buyer for a prime piece of real estate it has been trying to sell. However, another attorney at your firm represents the buyer in nearly all of its real estate matters. Your client has asked if it is possible for your law firm to represent both the buyer and the seller in this real estate transaction. May your law firm represent both the buyer and the seller in a real estate transaction?

(A) Yes
(B) No
(C) Maybe

#4. You have represented a business for several years. It is not your largest client, but has been a steady source of business. On behalf of that client, you normally argue that a particular state statute does not allow a certain type of claim against the business. One of your partners just received a call from a potentially lucrative new corporate client, which is in the midst of litigation with another business that you have never represented. In that litigation, the company wants to take the position that the state statute does allow such a claim against this type of business. May you represent the corporate client in asserting its position on the meaning of the statute (without your long term business client's consent)?

(A) Yes
(B) No

#5 You and your firm regularly and currently handles litigation for Big Box Store Co. Recently, another attorney at your firm who takes plaintiff's cases has been contacted about a case where some of Big Box Store's boxes fell on a Plaintiff, which resulted in significant injuries. This could potentially be a seven-figure contingency case. Can your firm choose to represent Plaintiff?

(A) Yes
(B) No

Fees (Rule 1.5)

#6. Two firms have represented a client in a pro bono criminal matter. The client wishes both firms to represent them in a subsequent civil suit on a contingent basis. The civil suit is successful. Can the two firms divide the fees at the end of their representation?

(A) Yes
(B) No
(C) Maybe

#7. An attorney who regularly represents plaintiffs in personal injury cases wants to include the following language in her standard fee agreement: "Either Client or Attorney has the absolute right to terminate this agreement. In the event Client terminates this agreement, the reasonable value of Attorney's services shall be valued at $350 per hour for attorney time and $200 per hour for legal assistant time for all services rendered. In the alternative, the Attorney may, where permitted by law, elect compensation based on the agreed contingency fee for any settlement offer made to Client prior to termination."

Can the attorney include this provision in the fee agreement, allowing for alternative fee arrangements should client terminate representation mid-case without cause?

(A) Yes
(B) No
(C) Maybe

#8. Attorney Alvin represents a small, local business and has done so for many years. The business is owned and operated by Harold. One day, unexpectedly, Harold was involved in a traffic

accident while on his way home from work. Harold was not at fault for the accident, and he asked Attorney Alvin to represent him in bringing a personal injury case against the other driver. Attorney Alvin would like to assist, but explains to Harold that he has no experience with person injury litigation, and that the case would be better handled by Alvin's law school classmate Clint. Harold agrees to bring Clint on to the case. Nevertheless, given their long standing relationship, Harold says that he would feel more comfortable if Alvin stays involved in the matter, even though he has no experience with personal injury litigation. Clint and Alvin agree that Alvin will stay on the case given his long standing relationship with the client--Alvin will be jointly responsibility for the matter but the majority of the litigation will be run by Clint. For compensation, Alan will receive a referral fee out of the portion of any award that is made. Harold is aware of and agrees to the arrangement. Can Attorney Alvin accept the referral fee after obtaining written, informed consent from Harold?

(A) Yes, but only because he has agreed to accept "joint responsibility" for the matter.
(B) Yes, because he has obtained the consent of his client, Harold, after full disclosure that he will be receiving a referral fee.
(C) No, because Alvin does not know anything about personal injury law.

#9. Alex, who is not a lawyer, operates a "multiservice" business, and advertises his services and has his own separate office "across town" from Lawyer Liam. Alex, who has no affiliation with Liam, refers his clients to particular professionals who provide a variety of services (i.e. accounting, real estate, insurance, etc.). One day, Alex proposes to Liam that he put Liam on his referral list. In return, Liam charges the client 25% of any recovery on a personal injury matter, a reduced hourly fee for any civil litigation, and a reduced set fee for traffic and criminal cases. Alex assists in each case referred to Liam (i.e., obtaining witness statements, translating, photographing the accident scene, and driving the client to and from health care providers). Because he is assisting Liam, Alex charges a set fee for services in civil and criminal cases, and charges clients a fee that consists of a percentage of the client's recovery in personal injury cases (typically 8%). The clients all agree to this arrangement in writing. Is Liam running afoul of his ethical obligations by entering into this arrangement with Alex?

(A) No, because the clients have agreed to this arrangement in writing.
(B) No, because the ethical rules permit non-lawyers to receive referral fees for cases they refer to lawyers and to charge fees for the services they provide throughout the course of a case.
(C) Yes, because lawyers may not pay non-lawyers referral fees for soliciting clients.
(D) Yes, because attorneys may not pay non-lawyers a referral fee for soliciting clients and split fees with non-lawyers.

Competence (Rule 1.1)

#10. One of the best litigators of the firm began to develop Parkinson's disease with all the problems that it entails. Despite his gradual deterioration, he was compelled to continue to take

on new work so that he could pay his health insurance premiums. He has no client complaints and still makes deadlines. Is the attorney's competence in issue?

(A) Yes.
(B) No.
(C) Maybe.

#11. You are a civil litigator. One day the Federal Judge you clerked with calls you to see if you can represent the accused in a felony criminal case. It turns out that the public defender's office is conflicted-out because of a co-defendant. You worked on several criminal trials during your clerkship but you've never worked on a criminal case. The Judge tells you it will be good experience and won't be difficult because it's "straight-forward case" and one that should plead out. You've always been interested in criminal law. Also, there are no funds available to pay for the representation—for you or any other attorney. What do you tell the Judge? Will you do it?

(A) Yes.
(B) No.
(C) Maybe.

#12. An attorney at a firm has been working late hours, showing up to the office disheveled, and is missing multiple deadlines. It turns out that the attorney is going through a divorce and is having a lot of mental health issues. Does the firm have a duty to terminate the attorney?

(A) Yes
(B) No
(C) Maybe

Confidentiality (Clients) (Rule 1.6)

#13. You run a tax and real estate practice in Orange County, Virginia. Your new client Jim Dutton runs the nearby OrangeStone cattle ranch. Dutton's family and employees have a reputation in the community for being the kind of people who hold a pretty strong grudge.

Dutton and his ranch have been the target of a tax audit that has gone on for several years. After a recent meeting with the auditor, Dutton mentioned that the audit would "go on forever unless somebody decides to pull a trigger." He also mentioned something about wanting to give the auditor a "ride to the train station" with an eerie laugh.

Back at the ranch, you see Dutton's bearded employee, Mr. Hench Man, getting into his truck with a bulge under his shirt, which you think may be a concealed firearm. He says that "the boss says

it's time to take the auditor to the train station." You realize that the "train station" might be a weird euphemism for a violent act. What should you do?

(A) Nothing. It's common for folks on a ranch to carry a firearm. Besides, mind your own business.
(B) Notify the auditor that he should get out of town.
(C) Make an anonymous tip to law enforcement that you think the auditor may be in danger.
(D) Confront your client. Let him know your concerns and confirm that he's not intending to do anything illegal.

#14. Turns out you were all wrong about Hench Man and Mr. Dutton and everybody had a good laugh. That said, you decide to end your relationship with Dutton and the OrangeStone Ranch. You never observed anything illegal, but you always had a bad feeling about things. Years later, you're approached by some Hollywood screen writers who are looking for material for a show they're writing. They ask you about Dutton and his business. How do you respond?

(A) "Well let me tell you about this one time out on the ranch…"
(B) You don't share any new information but you confirm information they've already established through their own investigation.
(C) You tell them you don't discuss your client's confidential information, and that extends to former clients as well.

Confidentiality (Experts) (Rule 1.6)

#15. Attorney Alvin's client is a patient of Surgeon Sam, who recently performed a rhinoplasty on Alvin's client that went terribly wrong. To understand the ins and outs of rhinoplasties, Attorney Alvin has been working with Edward, an expert in rhinoplasties, to assist him in understanding the proper standard of care for this type of procedure. Alvin is considering the possibility of using Edward as an expert witness during his upcoming trial but has not made a firm decision as of yet. To get the ball rolling, however, Alvin sent his client's records to Edward for his review.

True or False: By sharing the confidential information with an expert who is not retained, you've breached your ethical duty to protect confidential information.

(A) True
(B) False

Dealing with Represented / Unrepresented Persons (Rules 4.2 / 4.3)

#16. Bobby Brown represents Defendant in a dispute concerning the right to goods. Defendant bought the disputed goods from Seller, a third-party, who contends that Plaintiff released its lien

prior to the sale to Defendant. Plaintiff says the lien was not released. Officer, an employee of Plaintiff, signed documents that Seller says were intended to release the lien. Seller says Officer's subsequent actions were consistent with a release of the lien, and Seller believes Officer's testimony would be favorable to Defendant. Officer no longer works for Plaintiff and is not represented by counsel. Is Bobby permitted to communicate *ex parte* with Officer to determine Officer's recollections concerning matters at issue in a lawsuit pending in a Virginia Circuit Court?

(A) Yes. He is not a party to the matter
(B) No. He is a former employee of the party Plaintiff and therefore you need the approval of Plaintiff's counsel.
(C) Maybe – so long as the privileged information is not sought and Officer knows that you are an attorney representing Defendant.

#17. In January, Bill Byrd and Patrick Henry entered into a construction contract wherein Byrd was to build a new addition onto Henry's house. After several months, Henry retains Max W. House as legal counsel after issues begin to arise over the quality of Byrd's work and the project's seemingly continuous delay. In May, Mr. House sends Byrd a Formal Termination Notice that terminates the Contract and instructs Byrd to leave the job site.

After receiving the Notice, Byrd retains Joey B. O'Donuts as legal counsel to represent him in the dispute. Byrd is still owed money, and wants to be paid for the work performed. Last week, in a seeming change of heart, Mr. O'Donuts receives a call from Henry, who tells Mr. O'Donuts that he simply wants to resolve the matter and move on without getting into formal litigation. Henry emphasizes that he is trying to avoid litigation expenses and desires to reach a simple settlement. After 15 minutes of discussion the two men reach a deal that will resolve the construction dispute and prevent litigation.

Is Mr. O'Donuts's conduct permissible?

(A) Yes. He knows from dealing with his client Byrd that he is also interested in a speedy resolution to the dispute.
(B) No. Joey is an attorney dealing a party who is represented by counsel.

Fairness to Opposing Party and Counsel (Rules 3.4)

#18. Andy is a lawyer representing Plaintiff in an employment discrimination case. Plaintiff alleges that the Defendant, a local restaurant, fired her solely on the basis of her race. Plaintiff is upset and angry. As a result, she has instructed Andy to "make life miserable for the defense and defense counsel." Defendant is represented by Sarah, a lawyer who Andy sees frequently in court and with whom Andy has maintained a friendly relationship as a fellow member of the profession.

At the conclusion of a motions hearing, in which Plaintiff is in attendance, the court asks the attorneys whether August 5th is an acceptable trial date. Sarah requests a later date because August

5th is her son's birthday and she plans to spend the day with him. Andy is available on August 5th and other dates. What should Andy do?

(A) Push for the August 5th trial date. He has an obligation to fulfill his client's intent.
(B) State a preference for August 5th, but state that he has limited availability on other dates—this is a good middle ground.
(C) Agree to another date.

#19. You represent Corporation X in a multi-million dollar merger with Corporation Y, the initial terms of which have been signed and agreed to. Corporation Y is now conducting its due diligence before the deal closes.

In reviewing Corporation X's financial documents, you find several signed, confidential settlement agreements from two years ago that show that the directors of Corporation X were actively concealing certain employee abuses from the public in order to benefit themselves financially. If disclosed, these agreements would significantly devalue the Corporation and may sink the deal.

When you confront the President of Corporation X, he says he understands it looks bad, but that the money was well spent. He proposes to take the documents with him on his upcoming family vacation to Europe, which conveniently ends after the due diligence period expires.

What should you do?

(A) Tell the President to FedEx the documents overseas, in case his luggage gets lost.
(B) Disclose the documents to Corporation Y based upon your duty of fairness to opposing counsel and the opposing party.
(C) You cannot disclose the documents to Corporation Y, but you advise the President of Corporation X that he should disclose the documents because if they are found at a later date, there could be a basis for a claim of fraud. At a minimum, he cannot take them out of the country to obstruct Corporation Y's due diligence.

#20. You are investigating an automobile accident in which your client was significantly injured. You are able to track down a witness who observed the accident but whose account calls into question your client's version of events. After interviewing the witness you tell her that other people may try to speak with her. You tell her *not to speak* with other attorneys because more than likely she will need to be deposed so she might as well just tell her story once.

Have you potentially violated the rule of fairness to opposing counsel?

(A) Yes – you can't direct a person who is not your client from speaking with other persons, including your opposing counsel.
(B) No – its ultimately the witness's choice to share her story, and she is free to disregard what you told her.

#21. You are investigating a claim involving an automobile accident where your client's vehicle allegedly impacted Plaintiff's vehicle. Your client is a local meal delivery company. The driver of your client's vehicle is no longer employed by the company, but you are able to track her down and interview her. You determine that liability will be contested and she'll likely be named as a defendant. After your interview, you request that she not to speak with anyone else, particularly plaintiff's counsel, about the accident without first contacting you. Have you violated the rule of fairness to opposing counsel?

(A) Yes – you should not request that persons who are not your client avoid speaking with other persons
(B) No – the request is permissible because she is a former employee.

Candor to the Tribunal (Rule 3.3)

#22. At 10:00 AM on Friday, Pauly Procrastinator realizes that he has a big brief due by 5:00 o'clock that afternoon. In a hurry to speed up his brief writing process, Pauly gets an AI software to perform some background legal research. Pauly feels very tech-savvy, and is relieved that this will save him hours in research time, while also saving his client hundreds of dollars. Pauly then proceeds to incorporate the AI legal research into his brief and manages to file it in the nick of time.

A few weeks later, while preparing for the hearing on his motion, Pauly realizes that some of the case law he cited in the brief looks unfamiliar. Pauly investigates further and realizes that not only were the cases not accurate, but that, in fact, the cases did not exist at all. Pauly knows that without these cases, he will lose the motion. Pauly knows that this is a high volume court and that the Judge rarely has the time to read all of the papers because "he knows what the law is."

What should Pauly do?

(A) Withdraw the motion and inform the Court of his false statement.
(B) Argue the motion and withdraw the citation to the erroneous authority during your argument without getting into the details.
(C) Let it ride.

Terminating the Relationship (Rule 1.16)

#23. You are approached by a prominent local politician who asks you to represent him on pending criminal charges related to fraud perpetrated by his business. You conduct a meeting with him to get the facts of the case and are considering the representation. The next day, a story breaks in the local news in which it appears there are emails from the politician in which he appears to admit to the fraudulent conduct. He never mentioned these emails with you during your meeting with him.

You ask him about the emails and he indicates that you can argue that his email was hacked and that the emails have been altered. He never directly answers your question as to whether they are authentic. Should you take the representation?

(A) Yes
(B) No
(C) Maybe

#24. Attorney Alvin represents his Client Christine in her divorce action from her estranged husband. One night after a particularly contentious deposition, Alvin and Christine decide to unwind with a few alcoholic beverages. One thing leads to another and the pair wind up sleeping together that night. To make matters worse, this begins an ongoing sexual relationship in the middle of the representation. After a few months, Alvin decides it is best to terminate the representation so that he can continue to pursue his romantic relationship with Christine. In doing so, has Alvin cured any potential violation of the ethical rules?

(A) Yes
(B) No

Answers

Solicitation of Clients

#1 Answer (B). No. The conduct is not prohibited under Rule 7.3(b). This is a solicitation because the communication was initiated by the lawyer to people However, if the attorney continues to harass the individuals, then that would be prohibited under the rule.

#2 Answer (B). No. The conduct is not prohibited solicitation under Rule 7.3(b). The communication was initiated by the lawyer. However, if the attorney continues to harass the customers, that would be prohibited under the rule.

Text of Rule 7.3 – Solicitation of Clients

a) A solicitation is a communication initiated by or on behalf of a lawyer that is directed to a specific person known to be in need of legal services in a particular matter and that offers to provide, or can reasonably be understood as offering to provide, legal services for that matter.
b) A lawyer shall not solicit employment from a potential client if:
    1) the potential client has made known to the lawyer a desire not to be solicited by the lawyer; or
    2) the solicitation involves harassment, undue influence, coercion, duress, compulsion, intimidation, threats or unwarranted promises of benefits.
c) Every written, recorded or electronic solicitation from a lawyer shall conspicuously include the words "ADVERTISING MATERIAL" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic solicitation, unless the recipient of the solicitation:
    1) is a lawyer; or
    2) has a familial, personal, or prior professional relationship with the lawyer; or
    3) is one who has had prior contact with the lawyer.
    4) is contacted pursuant to court-ordered notification.
d) A lawyer shall not compensate, give, or promise anything of value to a person who is not an employee or lawyer in the same law firm for recommending the lawyer's services except that a lawyer may:

1) pay the reasonable costs of advertisements or communications permitted by this Rule and Rule 7.1, including online group advertising;
2) pay the usual charges of a legal service plan or a not-for-profit qualified lawyer referral service;
3) pay for a law practice in accordance with Rule 1.17; and
4) give nominal gifts of gratitude that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

Conflicts Among Clients

#3 Answer (C). Maybe. Rule 1.7 Comment [27] states: "For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them." *See* Virginia LEO 1216 (5/8/89) (a lawyer may represent the buyer and seller in a real estate transaction as long there is consent after full disclosure); *see also* Virginia LEO 1149 (12/19/88) (a lawyer may represent the buyer and seller in a real estate transaction as long as both consent and are advised of their right to retain independent counsel).

#4. Answer (A). Yes. Probably. Rule 1.7 Comment [24 states]: "[24] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be materially limited. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court."

#5. Answer (B). No. The firm cannot accept the representation because it would be in direct conflict with and adverse to an existing client.

Text of Rules 1.7 / 1.8 / 1.9

Rule 1.7 – Conflicts of Interest: General Rule

a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
    1) the representation of one client will be directly adverse to another client; or
    2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:

1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2) the representation is not prohibited by law;
3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4) the consent from the client is memorialized in writing.

Rule 1.8 – Conflict of Interest: Prohibited Transactions

a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
    1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
    2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
    3) the client consents in writing thereto.
b) A lawyer shall not use information protected under Rule 1.6 for the advantage of the lawyer or of a third person or to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.
c) A lawyer shall not solicit, for himself or a person related to the lawyer, any substantial gift from a client including a testamentary gift. A lawyer shall not accept any such gift if solicited at his request by a third party. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, a person related to a lawyer includes a spouse, child, grandchild, parent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
d) Prior to the conclusion of all aspects of a matter giving rise to the representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
    1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
    2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
    1) the client consents after consultation;
    2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

3) information relating to representation of a client is protected as required by Rule 1.6.

g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement.

i) A lawyer related to another lawyer as parent, child, sibling or spouse, or who is intimately involved with another lawyer, shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
   1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
   2) contract with a client for a reasonable contingent fee in a civil case, unless prohibited by Rule 1.5.

k) While lawyers are associated in a firm, none of them shall knowingly enter into any transaction or perform any activity when one of them practicing alone would be prohibited from doing so by paragraphs (a), (b), (c), (d), (e), (f), (g), (h), or (j) of this Rule.

Rule 1.9 – Conflict of Interest: Former Client

a) 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.

b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
   1) whose interests are materially adverse to that person; and
   2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless both the present and former client consent after consultation.

c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
   1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Fees

#6. Answer (C). Maybe. A division of a fee between lawyers who are not in the same firm may be made only if: (i) the client is advised of and consents to the participation of all the lawyers involved; (ii) the terms of the division of the fee are disclosed to the client and the client consents thereto; (iii) the total fee is reasonable; and (iv) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

#7. Answer (B). No. This scenario implicates both Rule 1.4 and 1.5.The lawyer's fee shall be adequately explained to the client. Here, the termination clause is improper as it is misleading and fails to fully inform the client of the basis of the attorney's fee when a contingent fee representation is terminated by the client before its completion and fails to inform the client of the lawyer's entitlement to compensation in the event the client terminates prior to a recovery for the defendant.

#8. Answer B. Rule 1.5(e) does not require that a lawyer sharing in fees also share responsibility, thus allowing "referral fees" if the client consents after full disclosure. A division of a fee between lawyers who are not in the same firm may be made only if: (i) the client is advised of and consents to the participation of all the lawyers involved; (ii) the terms of the division of the fee are disclosed to the client and the client consents thereto; (iii) the total fee is reasonable; and (iv) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

#9. Answer D. The scenario implicates both Rule 1.5 and Rule 5.4. A lawyer may not engage in an arrangement with a non-lawyer under which the non-lawyer refers cases to the lawyer, assists in helping the lawyer for a fee and in personal injury cases receives a percentage of the client's recovery. The arrangement impermissibly involves a lawyer: (a) paying the non-lawyer a referral fee for soliciting clients and; (b) splitting fees with a non-lawyer. Here, the percentage fee is improper fee-splitting of fees with a nonlawyer. See Legal Ethics Opinion 1572.

Text of Rule 1.5 – Fees

1) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
    a) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
    b) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
    c) the fee customarily charged in the locality for similar legal services;
    d) the amount involved and the results obtained;

e) the time limitations imposed by the client or by the circumstances;
f) the nature and length of the professional relationship with the client;
g) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
h) whether the fee is fixed or contingent.

2) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
3) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
4) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:
   a) in a domestic relations matter, except in rare instances; or
   b) for representing a defendant in a criminal case.
5) A division of a fee between lawyers who are not in the same firm may be made only if:
   a) the client is advised of and consents to the participation of all the lawyers involved;
   b) the terms of the division of the fee are disclosed to the client and the client consents thereto;
   c) the total fee is reasonable; and
   d) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.
6) Paragraph (e) does not prohibit or regulate the division of fees between attorneys who were previously associated in a law firm or between any successive attorneys in the same matter. In any such instance, the total fee must be reasonable.

Text of Rule 5.4 – Professional Independence Of A Lawyer

a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
   1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
   2) a lawyer who undertakes to complete unfinished legal business of a deceased, disabled, or disappeared lawyer may pay to the estate or other representative of that lawyer that portion of the total compensation that fairly represents the services rendered by the deceased, disabled or disappeared lawyer;
   3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit sharing arrangement; and

4) a lawyer may accept discounted payment of his fee from a credit card company on behalf of a client.

b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
   1) a nonlawyer owns any interest therein, except as provided in (a)(3) above, or except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
   2) a nonlawyer is a corporate director or officer thereof, except as permitted by law; or
   3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Competence

#10. Answer (C). Maybe. The scenario implicates comment 7 of Rule 1.1, which states as follows: "A lawyer's mental, emotional, and physical well-being impacts the lawyer's ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law.

Rule 1.16(a)(2) may also be implicated, which requires that a lawyer terminate the relationship "[i]f mental or physical health begins to affect the lawyer's ability to practice law, they may no longer be competent." To the extent that a lawyer's condition, such as Parkinson's is not affecting his ability to effectively represent and advocate for the client clients, then he is competent to do so. His need for insurance is not a variable that should sway his judgment over his ethical duty to provide competent representation.

#11. Answer (A). Yes. You have the desire, thoroughness, and the time to prepare for the case. Also, a young, albeit inexperienced lawyer is better than no lawyer—which is a distinct possibility given the lack of funds for the representation. If you're uncomfortable about your level of experience, then you may ask the Judge if he is able to pair you with another more experienced attorney who can serve as a mentor on the case.

#12. Answer (C). Maybe. The first step should not be to terminate the attorney. If possible, the firm could allow him to take a leave of absence in order to seek out help/treatment. However, he cannot be permitted to continue missing case deadlines. If he does not take a leave of absence, then the firm may need to terminate the attorney.

Text of Rule 1.1 – Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Confidentiality of Information

#13. Answer (D). First, you really do not know anything for certain about your client's intentions. Accordingly, it is a bad idea to report that your client is engaged in a conspiracy to injure the auditor or maybe worse. You should promptly confront your client and let him know that you're uncomfortable about his suggestion of "pulling a trigger." Confirm that he does not intend to hurt anyone. If he tells you otherwise, then you inform him that you have an obligation to report it.

#14. Answer (C). Comment 18 to Rule 1.6 provides that the duty of confidentiality continues even after a representation has ended.

#15. Answer - False. The attorney may share confidential information from the client with other persons to the extent it is necessary to carry out the representation. That said, as a best practice, consulting experts, such as the one contemplated here, should be formally engaged before any confidential information is shared. In the alternative, you may share information with the potential expert subject to his entering into a non-disclosure agreement.

Text of Rule 1.6 – Confidentiality of Information

a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:
    1) such information to comply with law or a court order;
    2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
    3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;
5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;
6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential;
7) such information to prevent reasonably certain death or substantial bodily harm.

c) A lawyer shall promptly reveal:
   1) the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or
   2) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

Dealing with Unrepresented Persons

#16. Answer (C). Maybe. This is a sensitive area and one that requires thorough analysis. In the case of a represented organization, consent of the organization's lawyer is *not* required for communication with *former* constituents. *See* Va. R. Prof'l Conduct 4.2, cmt. 7. In the Western District of Virginia, the case of *Bryant v. Yorktowne Cabinetry, Inc.*, Judge Urbanski outlined explicit rules that should govern such a communication, to the extent that it is permissible.

> **1. Upon contacting any former employee, plaintiff's counsel shall immediately identify himself as the attorney representing plaintiff in the instant suit and specify the purpose of the contact.**
>
> **2. Plaintiff's counsel shall ascertain whether the former employee is associated with defendant or is represented by counsel. If so, the contact must terminate immediately.**

3. Plaintiff's counsel shall advise the former employee that (a) participation in the interview is not mandatory and that (b) he or she may choose not to participate or to participate only in the presence of personal counsel or counsel for the defendant. Counsel must immediately terminate the interview of the former employee if he or she does not wish to participate.

4. Plaintiff's counsel shall advise the former employee to avoid disclosure of privileged or confidential corporate materials. In the course of the interview, plaintiff's counsel shall not attempt to solicit privileged or confidential corporate information and shall terminate the conversation should it appear that the interviewee may reveal privileged or confidential matters.

5. Plaintiff shall create and preserve a list of all former employees contacted and the date(s) of contact(s) and shall maintain and preserve any and all statements or notes resulting from such contacts, whether by phone or in person, as they may be subject to *in camera* review to ensure compliance with this Order.

***Bryant v. Yorktowne Cabinetry, Inc.*, 538 F. Supp. 2d 948, 953-954 (W.D. Va. 2008).**

On January 6, 2021, the Supreme Court of Virginia amended Comment 7 to Rule 4.2, which now states in relevant part:

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.

This is a much broader universe of employees than the one covered by Virginia's prior interpretation of the Rule. By adopting the ABA model rule approach, Virginia's interpretation of Rule 4.2 is now consistent with neighboring states and what is likely the majority view nationwide.

#17. Answer (B). No. The Rule concerning represented persons covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." See Va. R. Prof'l Conduct 4.2, cmt. 8. Therefore, the Rule applies equally to matters where litigation is merely under consideration and matters where there is a pending action.

Text of Rule 4.2 – Communication with Persons Represented by Counsel

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.

Text of Rule 4.3 – Dealing with Unrepresented Persons

a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

Fairness to Opposing Party and Counsel.

#18. Answer (C). Andy should agree to a later trial date. The Rules acknowledge that, in adversary proceedings, ill will may exist between the parties. However, such ill will should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. *See* Va. R. Prof'l Conduct 3.4, cmt. 8 ("A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client."); *see also* Va. R. Prof'l Conduct 3.4, cmt. 7 ("The duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm.").

#19. Answer (C). You have a duty of confidentiality and cannot disclose the confidential information. Similarly, under the Rules, you may not allow the President to abscond with the documents. *See* Va. R. Prof'l Conduct 3.4(a).

#20. Answer (A). Yes. You cannot direct a witness that is not affiliated with your client to not give relevant information to the other party. Under Rule 3.4, a lawyer shall not … (h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

1. **the information is relevant in a pending civil matter;**
2. **the person in a civil matter is a relative or a current or former employee or other agent of a client; and**
3. **the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.**

#21. Answer (B). No. You can request that a former employee of your client to not speak with opposing counsel.

Text of Rule 3.4 – Fairness to Opposing Party and Counsel

A lawyer shall not:

a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.
b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.
c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:
    1) reasonable expenses incurred by a witness in attending or testifying;
    2) reasonable compensation to a witness for lost earnings as a result of attending or testifying;
    3) a reasonable fee for the professional services of an expert witness.
d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.
e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.
f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.
g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.
h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
    1) the information is relevant in a pending civil matter;
    2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and
    3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.
i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.
j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Candor to the Tribunal

#22. Answer (A) is the best answer because it shows the fullest candor to the tribunal. Pauly must notify the Court of his false statement of law. *See* Va. R. Prof'l Conduct 3.3(a)(1). Answer (B) still leaves the false statements on the record.

Text of Rule 3.3 – Candor Toward the Tribunal

a) A lawyer shall not knowingly:
    1) make a false statement of fact or law to a tribunal;
    2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
    3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or
    4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal.
e) The duties stated in paragraphs (a) and (d) continue until the conclusion of the proceeding, and apply even if compliance requires disclosure of information protected by Rule 1.6.

Declining or Terminating the Relationship

#23. Answer (C). Maybe A lawyer should not take a representation where he believes that will result in his violating the Rules of Professional conduct. However, you have not been asked to violate the rules of ethics. Rather than turn down the representation out of hand, you may counsel the potential client that if you take on the representation that you have a duty to of candor to the tribunal and that you cannot make knowingly false representations on his behalf. If the client understands this and agrees to be honest with you, then you can likely take the representation.

#24. Answer (B). In a recent opinion, the Supreme Court of Virginia found unsurprisingly that a divorce attorney who engaged in sexual relations with his client had violated Rule 1.7 (Conflict of Interest). The attorney argued, on appeal however, that his eventual withdrawal from the representation cured any potential conflict of interest. Regarding withdrawal from the representation, the Court stated that, "The plain language of Rule 1.16 does not establish a cure provision but, instead, operates as a statement that an attorney has an *additional duty* to withdraw if the representation would violate the Rules. In no way does the requirement of withdrawal equate with the absolution of a violation under a different Rule." *Brown v. Va. State Bar ex rel. Sixth Dist. Comm.*, 886 S.E.2d 492, 502 (Va. 2023).

Text of Rule 1.16 – Declining or Terminating the Relationship

a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
    1) the representation will result in violation of the Rules of Professional Conduct or other law;
    2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
    3) the lawyer is discharged.
b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
    1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;
    2) the client has used the lawyer's services to perpetrate a crime or fraud;
    3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
    4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
    5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
    6) other good cause for withdrawal exists.
c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable Rules of Court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.
d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).
e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client’s new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the

lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

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POSITIONED FOR SUCCESS: CRITICAL MOTIONS AND APPEALS

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2023 Gentry Locke Seminar

Roanoke – October 6th, 2023
Richmond – October 12th 2023

I. VIRGINIA TRIAL COURT MOTIONS IN CIVIL CASES[1]

1. Finality of Judgments, Orders, and Decrees

a. Demurrers:

i. An order sustaining a demurrer or a demurrer with prejudice or without leave to amend is sufficient to dispose of the claims or cause(s) of action subject to the demurrer, even if the claim(s) or causes of action(s) are not expressly dismissed in the order. Rule 1:1(c).

ii. An order sustaining a demurrer and granting leave to file an amended pleading by a specific time is sufficient to dispose of the claim(s) or cause(s) of action subject to the demurrer if the amended pleading is not filed within the specific time provided, even if the order does not expressly dismiss the claim(s) or cause(s) of action of issue. Rule 1:1(c).

b. Pleas in Bar and Motions for Summary Judgement:

i. An order sustaining a plea in bar or sustaining a plea in bar with prejudice or without leave to amend is sufficient to dispose of a claim(s) or cause(s) of action subject to the plea in bar, as is an order granting a motion for summary judgment, even if the order does not expressly dismiss the claim(s) or cause(s) of action at issue or enter judgment for the moving party. Rule 1:1(d).

c. Motions to Strike:

i. In a civil case, an order which merely grants a motion to strike without expressly entering summary judgment or partial summary judgment or dismissing the claim(s) or cause(s) of action at issue, is insufficient to dispose of the claim(s) or cause(s) of action at issue. Rule 1:1(e).

2. Service of Papers after the Initial Process

a. Service:

i. A motion is deemed served once received by or in the office of counsel of record through delivery, mailing, facsimile transmission or electronic mail as provided in Rule 1:12. Rule 4:15(e).

ii. Motions served after the initial process in an action (and not required to be served otherwise) must be served by delivering, dispatching by commercial delivery service for same-day or next-day delivery, transmitting by facsimile, transmitting by electronic mail when Rule 1:17 so provides, or when consented to in writing signed

[1] While some of these rules are applicable to all Virginia proceedings, practically this presentation addresses those motions raised in civil matters. Critical motions and preservations of matters for appeal in criminal cases are not addressed here.

by the person to be served, or by mailing, a copy to each counsel of record on or before the day filing. Rule 1:12.

iii. Subject to the provisions of Rule 1:17, service pursuant to Rule 1:12 is effective upon such delivery, dispatch, transmission or mailing. Service by electronic mail under this Rule is not effective if the party making service learns that the attempted service did not reach the person to be served.

iv. At the foot of such pleadings and requests must be appended either acceptance of service or a certificate of counsel, showing the date of delivery and method of service, dispatching, transmitting, or mailing.

v. When service is made by electronic mail, a certificate of counsel that the document was served by electronic mail, must be served by mail or transmitted by facsimile to each counsel of record on or before the day of service.

b. Format: Motions must be produced on pages 8½ by 11 inches in size and all typed material must be double spaced except for quotations. Rule 1:16(a)(1).

i. This rule does not apply to material that cannot be reasonably produced on paper that size (i.e., charts, tables, photographs and the like). Rule 1:16(a)(2).

ii. No paper will be refused for failure to comply with the provisions of this rule, but the clerk may require that the paper be substituted for a new one in compliance with this Rule. Counsel must certify that the substituted paper is identical in content to the paper initially filed. Rule 1:16(2)(b).

iii. In an Electronically Filed Case, motions filed with the court must be in the form of Electronic Documents except where otherwise expressly provided by the statute or the Rules of Court, or where the court orders otherwise in an individual case for good cause shown. Rule 1:17(d)(1).

3. Answers, Pleas, Demurrers, and Motions

a. Pleadings in Response:

i. Pleadings in response include an answer, demurrer, plea, motion to dismiss, motion for bill of particulars, motions craving oyer, and a written motion asserting any preliminary defense permitted under Code § 8.01-276. Rule 3:8(a).

ii. Pleadings in response are deemed responsive only to the specific count or counts addressed therein. Rule 3:8(a).

b. Timing of response after service:

i. A defendant must file a pleading in response within 21 days after service of the summons and complaint upon that defendant. Rule 3:8(a).

ii. If the service of the summons has been timely waived on request under Code § 8.01-276, the response must be filed within 60 days after the date of when the request for the waiver was sent. Rule 3:8(a).

iii. However, if the defendant was addressed outside of the Commonwealth, then a response must be filed within 90 days of when the request for the waiver was sent. Rule 3:8(a).

c. Bill of Particulars:

i. A bill of particulars may be ordered to amplify any pleadings that does not provide notice of a claim or defense adequately to permit the adversary a fair opportunity to respond or prepare the case. Rule 3:7(a).

ii. An order requiring or permitting a bill of particulars or amended bill of particulars must fix the time within which it must be filed. Rule 3:7(c).

iii. If the bill of particulars amplifies the complaint, a defendant must respond to the amplified pleading within 21 days after the filing, unless the defendant relies on pleadings already filed. If the bill of particulars amplifies any other pleading, any required response must be filed within 21 days of filing of the bill of particulars. Rule 3:7(d).

d. Timing of Response after Demurrer, Plea or Motion:

A defendant has 21 days to file an answer after the court has entered its order overruling all motions, demurrers, and other pleas filed by the defendant as a responsive pleading. Rule 3:8(b).

4. Motions for Summary Judgment

a. Timing:

i. Any party may make a motion for summary judgment at any time after the parties are at issues, except in an action for divorce or for an annulment of marriage. Rule 3:20.

b. When granted:

i. If it appears from the pleadings, the orders, if any, the admissions, if any, in the proceedings that the moving party is entitled to judgment, the court shall grant the motion. Rule 3:20.

ii. Summary judgment may be entered for the undisputed portion of a contested claim or on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgement may not be entered if any material fact is genuinely in dispute. Rule 3:20.

iii. No motion for summary judgment or motion to strike the evidence will be sustained when based in whole or in part upon any discovery depositions under Rule 4:5; unless all parties agree that the deposition may be used, or unless the motion is brought in accordance with Code § 8.01-420(B). Rule 1:17(d)(1).

iv. Depositions and affidavits can be used to support or oppose a motion for summary judgement in any action where the only parties are business entities and the amount at the issue is $50,000 or more. Rule 1:17(d)(1).

5. Motion Craving Oyer

a. Definition:

i. "[A] motion craving oyer is a request of the Court to require that a document sued upon, or a collateral document which is necessary to the plaintiff's claim, be treated as though it were part of the Plaintiff's pleadings." [2]

b. How to bring the motion:

i. The motion must be filed within 21 days after service of the summons and complaint upon the defendant. Rule 3:8(a).

c. Response after Motion:

i. If the court grants a motion craving oyer, the defendant must file an answer or another responsive pleading within 21 days after the plaintiff files the document(s) for which oyer was granted. Rule 3:8(b).

6. The Requirements of Motions Practice

a. Scheduling:

i. Motions may either be (1) presented on a day the court has designated for motion hearings, or (2) scheduled with the respective personnel in the clerk's office or the chambers of the judge. Rule 4:15(a).

b. Notice:

i. Prior to giving notice of a hearing, counsel of record must make a reasonable effort to confer to resolve the subject of the motion and determine a mutually agreeable hearing date and time. Rule 4:15(b).

ii. Notice of motions must be served in writing to all counsel on record seven days before the hearing, and include a certification that the moving party has attempted to

[2] Kevin Holt, *Motions Craving Oyer: A Powerful, but Limited Tool in Virginia Practice*, Gentry Locke (May 2018), https://www.gentrylocke.com/article/motions-craving-oyer-a-powerful-but-limited-tool

resolve the subject of the motion in good faith prior to seeking the court's assistance. Rule 4:15(b).

c. *Filing and Service of Briefs:*

i. Counsel may elect or the court may require parties to file briefs in support of or in opposition to a motion. Rule 4:15(c).

ii. Any briefs should be filed with the court and served on the parties sufficiently before the hearing to allow consideration of the issues resolved. Rule 4:15(c).

iii. For briefs five or fewer pages in length, the brief must be filed and served at least 14 days before the hearing and any brief in opposition must be filed and served at least 7 days before the hearing. Rule 4:15(c).

iv. Briefs may not exceed 20 pages double-spaced. Rule 4:15(c).

d. *Hearing*:

i. The court will hear oral argument on a motion upon its request or upon the request of counsel of record. Rule 4:15(d).

ii. A court at its discretion or upon the request of counsel of record may postpone the hearing of a motion or require the filing of briefs to assure fairness to all parties and the ability of the court to review all such briefs in advance of the hearing. Rule 4:15(d).

iii. On a motion for reconsideration or any motion in any case where a pro se incarcerated person is counsel of record, a hearing will be held only at the request of the court. Rule 4:15(d).

II. FEDERAL RULES OF CIVIL PROCEDURE

1. Commencing an Action; Service of Process, Pleadings, Motions, and Orders

Rule 6(c). Motions, Notices of Hearing, and Affidavits

a. *In General:*

i. A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, with the following exceptions:
   a. when the motion may be heard ex parte;
   b. when these rules set a different time; or
   c. when a court order—which a party may, for good cause, apply for ex parte—sets a different time. FRCP 6(c)(1)(A-C).

2. Pleadings and Motions

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

a. In General:

i. A request for a court order must be made by motion. The motion must:
   a. be in writing unless made during a hearing or trial;
   b. state with particularity the grounds for seeking the order; and
   c. state the relief sought. FRCP 7(b)(1)(A-C).

b. Forms:

i. The rules governing captions and other matters of form in pleading apply to motions and other papers. FRCP 7(b)(2).

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

a. Signature:

i. Every written motion must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless specified otherwise a pleading does not need to be verified or accompanied by an affidavit. The court must strike any unsigned paper unless the omission is promptly corrected. FRCP 11(a).

b. Representation:

i. By presenting to the court a written motion whether signed, filed, submitted or later advocated—an attorney or unrepresented party certifies that:
   a. the motion is not being presented for an inappropriate purpose,
   b. the claims, defenses, and other legal contentions are warranted by existing law or by nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
   c. the factual contentions have evidentiary support or if specifically identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
   d. the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information. FRCP 11(b).

c. *Motion for Sanctions:*

i. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented if the challenged paper is appropriately corrected within 21 days after service or within another time the court sets. FRCP 11(c)(2).

Rule 12. Defenses and Objections: when and How Presented; Motion for Judgment on the Pleadings; Consolidated Motions; Waiving Defenses; Pre-trial Hearing

a. *Motions to Dismiss under FRCP 12(b)*

i. Rule 12(b) sets out certain defenses or defects that may be presented by preliminary motion rather than being included in a responsive pleading:

1) **Lack of subject matter jurisdiction.** This defect cannot be waived by the parties and can be raised at any time in the course of a federal proceeding, even after the judgment!

Practice Pointers: In Federal Court, it is really important to get subject matter jurisdiction right. So what is subject matter jurisdiction? The two primary federal jurisdictions are diversity of citizenship and federal question. While federal question jurisdiction can be pretty straightforward, diversity of citizenship is not always so easy.

Corporations: A corporations is a citizen of the state in which it is incorporated and where it has its principal place of business. 28 U.S.C §1332(c). While finding out where the corporation is incorporated should be easy, knowing its principal place of business can be less obvious. For example, you might go to the SCC records and see that a potential defendant is a Delaware Corporation (many are), and that it lists Delaware as its principal place of business on the SCC form. You can count on that, right? **Wrong.**

If you elect to sue this corporation in federal court under diversity jurisdiction, the odds are that it will never object to that venue/jurisdiction at the time it answers the complaint. It likely will not give any thought to the citizenship of the plaintiff. However, if you happen to get a large verdict against that corporation, don't be surprised if its level of interest increases dramatically. If it can find a grounds to do so, it will file a Rule 60(b)(4) motion seeking to void the judgment for lack of subject matter jurisdiction. It might claim, for instance, that its principal place of business is not actually in Delaware (which it probably isn't), but actually in some completely different state – which might happen to be a state in which one

of the plaintiffs maintains citizenship. At that point, it does not matter what that corporate defendant wrote on its SCC form to transact business in your state because the plaintiff has the burden of proving subject matter jurisdiction – which, in the 4th Circuit turns on the "nerve center test" or the "place of operations test." *Peterson v. Cooley*, 142 F.3d 181, 184 (4th Cir. 1998).

Tax Pass-Through (unincorporated) Entities (partnerships, limited partnerships, LLC's, PLLC's, PLLP's, etc.): With modern business, it is far more likely that your case will involve some form of pass-through entity – most likely an LLC. For these entities, state of formation is meaningless and the entities' citizenship is determined by the citizenship of each of its members. *Cent. W. Virginia Energy Co. v. Mountain State Carbon, LLC*, 636 F.3d 101, 103 (4th Cir. 2011). This means that theoretically, your LLC plaintiff or defendant could be a citizen in all 50 states simultaneously.

Practice Pointer: A plaintiff's complaint must set forth "a short and plain statement of the grounds for the court's jurisdiction." FRCP 8(a)(1). Therefore, if you are suing on behalf of or against a limited liability company (or similar pass through entity), you must allege the membership (but not necessarily the names) of each member of the plaintiff LLC. But as to the defendant LLC, there is no publicly available way to find out the membership of an LLC. In this instance, most courts will likely find that it is sufficient to plead "on information and belief" that the defendant LLC's members have diverse citizenship from those of the plaintiffs. Most federal courts require corporate disclosures to be filed immediately, and they have interpreted those disclosures to require disclosure of membership and citizenship for members of LLCs. Others have allowed discovery on citizenship when confronted with this dilemma.

Potential Interplay of Rule 21(Misjoinder and Nonjoinder of Parties): It is possible that you get to the end of that big trial and get a big verdict just to then have the defendant move to vacate. In such circumstances, Rule 21 may come to the rescue. For example, if only part of our complaint implicates a diversity problem due to members citizenship or an incorrect understanding of a corporation's actual principal place of business, possibly the offending part can be severed into a separate case. We once did that – fixing the subject matter jurisdiction issue that had been present in the case all along, but only discovered after the verdict/judgment. *Levisa Coal Co. v. Consolidation Coal Co.,* No. 1:97CV00117, U.S. Dist. LEXIS 28642 (W.D. Va., Jan. 30, 2001).

2) **Lack of personal jurisdiction.** Unlike subject matter jurisdiction, the requirement of personal jurisdiction can be waived. If you intend to raise this defense/defect, do it first.

3) **Improper Venue.** If you intend to file a motion to dismiss or transfer for lack of personal jurisdiction, it is usually a good idea to include a motion alleging improper or onerous venue. Many courts considering the former ultimately grant the relief ostensibly on account of the latter. Federal courts generally find it hard to actually articulate lack of personal jurisdiction (which is a malleable concept at best).

4) **Insufficient Process.** This is a non-substantive grounds for dismissal, based on defects in the Complaint or Summons (not how those were served). For example, if the defendant receives an incomplete copy of the complaint, that could be insufficient process.

5) **Insufficient Service of Process.** As the name implies, this non-substantive grounds for dismissal turns on the manner in which the pleading was served. Typically, raising this defect seems to be a waste of time and money if the party actually received the complaint. However, in close calls where the attorney receives the complaint just before an answer is due, this one may be very relevant.

6) **Failure to State a Claim.** This is, by far, the most common preliminary motion and it is almost rare to find a case where the defendant actually answers without filing such a motion. Such motions to dismiss are where federal practice differs substantially from state court practice. As in state court, the federal court is required to accept all well-pled facts as true. However, as a practical matter, more specificity is required with federal complaints, so it is not at all uncommon for a federal court to at least winnow down the claims at this stage. And this closer scrutiny is not limited to matters that must be pled with specificity. Federal complaints are subject to attack for being too truncated and not showing sufficient facts to plausibly support the alleged claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("A complaint must be enough to raise a right to relief above [a] speculative level"), *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (courts "are not bound to accept as true legal conclusions couched as factual allegation[s]." "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," nor do allegations "of the facts that are merely consistent with a defendant's liability.").

b. FRCP 12(c) Motion for Judgment on the Pleadings:

i. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings. FRCP 12(c). But when are pleadings "closed"? *Burbach Broad. Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 405 (4th Cir. 2002) (pleadings are closed after answers are filed to the complaint and any counterclaims). This motion "is appropriate when all material allegations of fact are

admitted in the pleadings and only questions of law remain." *Republic Ins. Co. v. Culbertson*, 717 F. Supp. 415, 418 (E.D. Va. 1989).

Practice Pointers: Rule 12(c) motions can be a useful tool in cases where the result turns on judicial interpretation of a contract. However, we have also used it in situations where a party (usually the plaintiff) is asserting a claim for relief or damages that is utterly unsupported by the alleged claims (e.g., minority shareholder alleging breach of fiduciary duty and seeking a buyout as damages). By removing a claim for relief, the parties are then freed from the burden and expense of preparing relevant evidence and expert testimony. While the same thing could likely be accomplished on a limited motion for summary judgment, courts can be (and are) reluctant to address such motions until after the close of discovery. Even if the court hears the motion, the opposing party will argue that there are things yet to discover that *could* bear on the issue, and the court will likely hold its ruling in abeyance even if it agrees with your position.

c. *FRCP 12(e) Motion for a More Definite Statement:*

i. This motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement, the court may strike the pleading if the order is not obeyed within 14 days of notice. FRCP 12(e).

Practice Pointer: These motions are not favored. These motions will only be granted if the complaint is so vague and ambiguous that the defendant cannot frame a responsive pleading.

d. *FRCP 12(f) Motion to Strike:*

i. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

a. on its own; or

b. on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading. FRCP 12(f)(1)-(2).

Practice Pointer: The scope of this rule is broad enough to encompass striking exhibits or improper references to documents. For example, if the opposing party files a FRCP 12(b)(6) motion, but includes matters not alleged in the complaint/counterclaim, it is a good idea to file a motion to strike when responding to such motion, pointing out that the court should not consider such exhibits, etc., and asking that they be stricken. And occasionally, there are those litigants who just want to say scandalous (but irrelevant) things about their

opponent. Filing a 12(e) motion can address this type of behavior early on in the case and potentially lead to a less acrimonious litigation – particularly if the court takes the opportunity to scold the offending attorney.

e. Joining Motions:

i. A motion under this rule may be joined with any other motion allowed by this rule. FRCP 12(g)(1).

ii. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion. FRCP 12(g)(2).

Rule 56. Summary Judgment

a. Time to File a Motion:

i. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgement at any time until 30 days after the close of all discovery. FRCP 56(b).

- However, the best time to file a motion for Summary Judgment is at the end of discovery. This prevents the other party from using the defense that without discovery ruling on the motion would be "premature."

Legal Standard: Summary Judgment is proper in cases where "there is no genuine issue as to any material fact and the movant is entitled to judgement as a matter of law." *Tolan v. Cotton,* 572 U.S. 650, 657 (2014). Once a party has properly filed, it is the non-movants burden to establish the existence of such an issue. *Burgoon v. Porter,* 369 F. Supp. 2d. 789, 789 (E.D. Va. 2005). In considering a motion, the court must view the issue "in the light most favorable to the opposing party." *Tolan*, 572 U.S. 650, 657 (2014). On appeal, there is a de novo standard of review. *Fernandez-Pineiro v. Bausch & Lomb, Inc.*, 429 Fed. Appx. 249, 252 (4th Cir. 2011).

Rule 50. Motion for Judgment as a Matter of Law/Directed Verdict

a. Judgment as a Matter of Law:

i. If a party has been fully heard on an issue during a jury trial and the courts finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

a. Resolve the issue against the party; and

b. Grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a finding on that issue. FRCP 50(a)(1).

ii. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. FRCP 50(a)(2).

a. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

b. Renewing the Motion After Trial; Alternative Motion for a New Trial

i. If the court does not grant the motion for judgment as a matter of law, the movant has 28 days to file a renewed motion for judgment as a matter of law and may include alternative or joint request for a new trial under Rule 59. FRCP 50(2)(b).

a. In ruling on the renewed motion, the court may:

1. Allow judgment on the verdict, if the jury returned a verdict;
2. Order a new trial; or
3. Direct the entry of judgment as a matter of law

ii. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. FRCP 50(c).

a. Under rule 59 a party against whom judgment of the law is rendered has 28 days after the entry of the judgment to file a motion for a new trial.

iii. If the court denies the motion for judgment as a matter of law, the prevailing party may assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. FRCP 50(e).

<u>Rule 59. New Trial; Altering or Amending a Judgment</u>

a. Time to File a Motion for a New Trial:

i. A motion for a new trial must be filed no later than 28 days after the entry of judgment. FRCP 59(b).

III. TYPES OF TRIAL COURT MOTIONS

1. Responsive Pleadings

a. Demurrers
   i. Va. Code §8.01-273.
   ii. Rule 1:1(a).

b. Motion to Dismiss.
   i. Rule 3:18(a).
   ii. Federal: FRCP 12(b).

c. Motion for a More Definitive Statement.
   i. Federal: FRCP 12(e).

d. Motion for Bill of Particulars
   i. Rule 3:7.

e. Plea in bar
   i. Rule 1:1(b).

f. Motion Craving Oyer
   i. Rule 3:8.

g. Motion to Strike
   ii. Federal: FRCP 12(f).

2. Case Management Motions

a. Motion to Amend.
   i. Rule 1:18.
   ii. Federal: FRCP 15.

b. Motion for Scheduling Order.
   i. Rule 1:18.

3. Dispositive Motions

a. Motion for Summary Judgment.
   i. Rule 3:20.
   ii. Federal: FRCP 56.

4. Trial Motions

a. Motion in Limine.
   i. Rule 3A:9.

b. Motion to Strike the Evidence.
   i. Rule 1:11(e).

5. Post-trial Motions

a. Motion for a New Trial.
   i. Va. Code § 8.01-680.
   ii. Federal: FRCP 59.

IV. MOTIONS IN THE SUPREME COURT OF VIRGINIA

1. General requirements for motions.

a. *In writing:* Motions shall be in writing and filed with the clerk of the Court. This rule does not apply to motions for the qualification of attorneys at law to practice in the Court. Rule 5:4(a)(1).

b. *Certification*: All motions shall contain a statement by the movant that the other parties to the appeal have been informed of the intended filing of the motion. Rule 5:4(a)(1).

i. For motions where all parties are represented by counsel, the statement by the movant shall also indicate whether the other parties consent to the granting of the motion, or intend to file responses in opposition. Rule 5:4(a)(1).

ii. This rule does not apply to motions to dismiss petitions for a writ of habeas corpus, mandamus, and prohibition. Rule 5:4(a)(1).

c. *Filing*: All motions must be filed electronically. Rule 5:5(c).

d. *Format*: For rules on paper size, font and other requirements, see Rule 5:6(a).

2. General requirements for responses to motions.

a. *Filing deadline*: Responses to motions may be filed within 10 days after the filing of the motion. However, the Court may act on the motion before the 10 day period expires, if necessary. Rule 5:4(a)(2).

b. *Filing*: All responses must be filed electronically. Rule 5:5(c).

c. *Format*: For rules on paper size, font and other requirements, see Rule 5:6(a).

3. Replies: The Rules do not expressly mention or permit replies in support of a motion.

4. Orders: Promptly after the Court has entered an order, the clerk will send (by email) a copy of the order to all counsel. Rule 5:4(b).

5. Motions for Extension of Time.

a. *Mandatory filing deadlines*

i. The time for filing the notice of appeal, petition for appeal, petition for review pursuant to Code § 8.01-626, and petition for rehearing is mandatory. Rule 5:5(a), and (a1).

ii. For petitions for appeal, an extension may be granted in the discretion of the court for good cause shown. Rule 5:5(a1). For the notice of appeal, petition for review, and petition for rehearing, a single extension not to exceed 30 days may be granted if at

least two Justices concur in a finding that an extension for papers to be filed is warranted by a showing of good cause sufficient to excuse the delay. Rule 5:5(a).

b. *Briefs:* Upon motion and with permission of a Justice of the Court, the time for filing any brief may be altered. Rule 5:26(d).

c. *When motion for extension is timely*: Except as provided in 5(a) above, a motion for extension of time is timely if filed either within the original filing deadline or within any extension period specified by the governing rule. Filing the motion within the original filing deadline or within the specified extension period does not toll the original filing deadline or further extend the period of extension. Rule 5:5(e).

6. Motion to Dismiss. Rule 1:1B(b).

At any time after a notice of appeal has been filed and after the expiration of the 21-day period under Rule 1:1, any party to the appeal may file a motion in the appellate court to dismiss the appeal.

a. The motion may assert that the appeal is moot "or cannot proceed for some other sufficient reason."

b. The failure to file a motion to dismiss does not preclude a party from making such arguments in the appellate briefs.

c. The appellate court may decide the motion based on the existing record or, in its discretion, issue a temporary remand to the circuit court for the purpose of making findings of facts regarding factual issues relevant to the motion.

7. Motion for Appointment of Counsel. Rule 1:18(c).

a. At any time after a notice of appeal has been filed and after the expiration of the 21-day period under Rule 1:1, a party legally entitled to appointed counsel may file a motion for the appointment of appellate counsel.

b. The appellate court may decide the motion or may, in its discretion, refer the motion to the circuit court for appointment.

8. **Oral argument:** No oral argument on motions is permitted except by leave of the Court. Rule 5:6(a)(3).

V. MOTIONS IN THE COURT OF APPEALS OF VIRGINIA

1. General requirements for motions.

a. *In writing:* Motions shall be in writing and filed with the clerk of the Court. This rule does not apply to motions for the qualification of attorneys at law to practice in the Court. Rule 5A:2(a)(1).

b. *Certification:* All motions shall contain a statement by the movant that the other parties to the appeal have been informed of the intended filing of the motion. Rule 5A:2(a)(1).

i. For motions where all parties are represented by counsel, the statement by the movant shall also indicate whether the other parties consent to the granting of the motion, or intend to file responses in opposition. Rule 5A:2(a)(1).

ii. This rule does not apply to motions to dismiss petitions in original jurisdiction proceedings. Rule 5A:2(a)(1).

c. *Filing*: All motions must be filed electronically. Rule 5A:2(a)(1).

d. *Format*: For rules on paper size, font and other requirements, see Rule 5A:4(a).

e. *Certificate*: If a motion is subject to a word count, the motion must include a certificate that the document complies with the applicable word limit and state the number of words in the motion. Rule 5A:4(d).

2. General requirements for responses to motions.

a. *Filing deadline:* Responses to motions may be filed within 10 days after the filing of the motion. However, the Court may act on the motion before the 10 days expire, if necessary. Rule 5A:2(a)(2).

b. *Filing:* All responses must be filed electronically. Rule 5A:1(c)(1).

c. *Format*: For rules on paper size, font and other requirements, see Rule 5A:4(a).

3. Replies: The Rules do not expressly mention or permit replies in support of a motion.

4. Oral argument: No oral argument on motions is permitted except by leave of the Court. Rule 5A:2(a)(3).

5. Orders: Promptly after the Court has entered an order, the clerk will send a copy of the order to all counsel. Rule 5A:2(d).

6. Motions for Extension of Time.

a. *Extensions Generally:* Except as provided below in section *b*, the times prescribed in the Rules for filing papers may be extended by a Judge of the Court in which the papers are to be filed upon a showing of good cause shown. Rule 5A:3(b).

b. *Mandatory filing deadlines:*

i. The times for filing the notice of appeal, petition for appeal, petition for rehearing, and request for rehearing en banc are mandatory. Rule 5A:3(a).

ii. Except for the petition for appeal, an extension may be granted in the discretion of the Court on motion for good cause shown. Rule 5A:3(a).

c. *Transcripts:* The deadline for filing transcripts may be extended by a Judge of the Court of Appeals only upon a written motion filed within 90 days after the entry of final judgment. Timely motions will be granted only upon a showing of good cause to excuse the delay. Rule 5A:8(a).

d. *Briefs:* A motion for extension of the briefing deadlines shall be filed no later than 10 days after the expiration of the deadline. Rule 5A:19(b)(4) and (c)(4).

e. *When motion for extension is timely.* Rule 5A:3(c).

i. A motion for extension of time is timely if filed either:

1. Within any specific deadline governing motions to extend under Rule 5A:8(a) (transcript), Rule 5A:13(a) (brief in opposition), Rule 5A:14 (reply brief), Rule 5A:19(b) (brief in appeals as a matter of right), and Rule 5A:19(c) (brief in discretionary appeals).

2. If a Rule does not provide a specific deadline governing motions to extend, within 30 days after the filing deadline from which the extension is sought.

ii. Filing the motion for extension does not toll the applicable deadline or further extend the period of extension. Rule 5A:3(b).

7. Motion to Dismiss. Rule 1:1B(b).

At any time after a notice of appeal has been filed and after the expiration of the 21-day period under Rule 1:1, any party to the appeal may file a motion in the appellate court to dismiss the appeal.

a. The motion may assert that the appeal is moot "or cannot proceed for some other sufficient reason."

b. The failure to file a motion to dismiss does not preclude a party from making such arguments in the appellate briefs.

c. The appellate court may decide the motion based on the existing record or, in its discretion, issue a temporary remand to the circuit court for the purpose of making findings of facts regarding factual issues relevant to the motion.

8. Motion for Appointment of Counsel. Rule 1:1B(c).

a. At any time after a notice of appeal has been filed and after the expiration of the 21-day period under Rule 1:1, a party legally entitled to appointed counsel may file a motion for the appointment of appellate counsel.

b. The appellate court may decide the motion or may, in its discretion, refer the motion to the circuit court for appointment.

VI. MOTIONS IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1. General requirements for motions.

a. *When to file:* An application for an order or other relief is made by motion less the rules prescribe another form. FRAP 27(a)(1).

b. *In writing:* A motion must be in writing unless the Court permits otherwise. FRAP 27(a)(1).

c. *Required statement:* When all parties are represented by counsel, all motions shall contain a statement by counsel that counsel for the other parties to the appeal have been informed of the intended filing of the motion, and further state whether the other parties consent to the granting of the motion, or intend to file responses in opposition. Fourth Circuit Local Rule 27(a).

d. *Content:* A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it. Fourth Circuit Local Rule 27(a)(2)(A).

e. *Length limits:* A motion or response must not exceed 5,200 words exclusive of any accompanying documents unless the Court permits or directs otherwise. FRAP 27(d)(2)(A). A reply must not exceed 2,600 words. FRAP 27(d)(2)(C).

f. *Copies:* An original and three copies of the motion must be filed unless the Court requires a different number by local rule or by order in a particular case. FRAP27(d)(3). However, pursuant to Fourth Circuit Local Rule 25(a)(1), a person represented by an attorney must file electronically.

g. *Format:* For rules on paper size, font and other requirements, *see* FRAP 27(d).

h. *Separate motions:* The parties should not make requests for procedural and substantive relief in a single motion, but should make each request in a separate motion. Fourth Circuit Local Rule 27(c).

2. Accompanying documents.

a. Duty of Counsel: Counsel should always review carefully the specific rule which authorizes relief to ascertain the documents required by a specific rule. If a motion is supported by attachments, these materials should also be served and filed with the motion. Fourth Circuit Local Rule 27(c).

b. Documents that must be filed and served with the motion:

i. Any affidavit or other paper necessary to support a motion; an affidavit must contain only factual information, not legal argument. FRAP 27(a)(2)(B)(i) and (ii).

ii. Where a motion seeks substantive relief, a copy of the trial court's opinion or agency's decision must be included as a separate exhibit. FRAP 27(a)(2)(B)(iii).

iii. A Disclosure of Corporate Affiliations statement, unless previously filed with the Court. Fourth Circuit Local Rule 27(c).

c. Documents not to file with the motion. FRAP 27(a)(2)(C).

i. A separate brief supporting or responding to a motion.

ii. A notice of motion.

iii. A proposed order.

3. Responses to motions.

a. *Generally:* Although any party may file a response to a motion, a party need not respond to a motion until requested to do so by the Court. Fourth Circuit Local Rule 27(d)(1).

b. *Content:*

i. The content of a response to a motion is governed by FRAP 27(a)(2). FRAP 27(a)(3)(A).

ii. A response may include a motion for affirmative relief. FRAP 27(a)(3)(B).

c. *Responses requesting affirmative relief:* When a response to a motion includes a request for affirmative relief, the time to respond to the new motion, and to reply to that response, are governed by Rule 27(a)(3)(A) and (a)(4). The title of the response must alert the court to the request for relief. FRAP 27(A)(3)(B).

d. *Page limits*: A response to a motion must not exceed 5,200 words, exclusive of the corporate disclosure statement and accompanying documents unless the Court permits or directs otherwise. FRAP 27(d)(2).

e. *Filing deadline*:

i. A response to a motion must be filed within 10 days after service of the motion unless the Court shortens or extends the time. FRAP 27(a)(3)(A).

ii. The three-day mailing rule does not apply to responses requested by the Court or Clerk by letter wherein a response date is set forth in the request. Fourth Circuit Local Rule 27(d)(1).

f. *Copies:* An original and three copies of the response must be filed unless the Court requires a different number *by* local rule or by order in a particular case. FRAP 27(d)(3). However, pursuant to Local Rule 25(a)(1), paper copies of responses filed electronically are not required.

4. Reply to a response.

a. *Court practice:* The Court will not ordinarily await the filing of a reply before reviewing a motion and response. If the movant intends to file a reply and does not want the Court to actively consider the motion and response until a reply is filed, the movant shall notify the Clerk in writing of the intended filing of the reply and request that the Court not act on the motion until the reply is received. Fourth Circuit Local Rule 27(d)(2).

b. *Content:* A reply must not present matters that do not relate to the response. FRAP 27(a)(4).

c. *Filing deadline:* Any reply to a response must be filed within 7 days after service of the response. FRAP 27(a)(4).

d. *Page limit:* A reply to a response must not exceed 2,600 words. FRAP 27(d)(2)(C).

e. *Time to reply to request for affirmative relief in response to motion:*

i. When a response to a motion includes a request for affirmative relief, the times to respond to the new motion, and to reply to that response, are governed by Rule 27(a)(3)(A) and (a)(4).

ii. The title of the response must alert the court to the request for relief. FRAP 27(a)(3)(B).

5. Motions for extension of time. FRAP 26(b).

a. *Standard for granting extensions:* For good cause, the Court may extend the time prescribed by the Rules or by its order to perform any act, or may permit an act to be done after that time expires.

b. *When extensions not permitted:* The Court may not extend the time to file:

i. A notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

ii. A notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

6. Motions for Summary Disposition. Fourth Circuit Local Rule 27(f).

a. *When granted:* Motions for summary affirmance or reversal filed prior to completion of briefing should include a showing that the issues on appeal are in fact manifestly unsubstantial and appropriate for disposition by motion. Absent such a showing, the Court will defer action on the motion until briefing is complete.

b. *Motions to dismiss:* Motions for dismissal based upon the ground that the appeal is not within the jurisdiction of the Court or for other procedural grounds should be filed within the time allowed for the filling of the response brief.

c. *Motions for suspension of briefing:* Suspension of briefing pending ruling on a motion to summarily affirm, reverse, or dismiss should be requested by separate motion.

d. *Court practice:* The Court may *sua sponte* summarily dispose of an appeal at any time.

7. Indicative Ruling on a Motion for Relief that is Barred by a Pending Appeal. FRCP 62.1; FRAP 12.1

a. A party may make a motion in the district court for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending. FRCP 62.1(a).

b. If the district court states that it would grant the motion or that the motion raises a substantial issue, the movant must promptly notify the court of appeals. FRCP 62.1(b); FRAP 12.1(a).

c. If the district court states that if would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands

but retains jurisdiction, the parties must promptly notify the court of appeals clerk when the district court has decided the motion on remand. FRCP 62.1(c); FRAP 12.1(b).

8. Rulings and orders.

a. *Disposition of a motion for a procedural order:* The Court may act on a motion for a procedural order – including a motion under FRAP 26(b) seeking an extension of time – at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions. FRAP 27(b); Fourth Circuit Local Rule 27(b).

b. *Clerk to enter certain orders:* Motions and applications for orders if consented to, or if unopposed after due notice to all interested parties has been given or waived, or if the orders sought are procedural or relate to the preparation or printing of the appendix and briefs on appeal, or are such as are ordinarily granted as of course and without notice or hearing, need not be submitted to the Court, or to a judge thereof. Such orders may be entered for the Court by the Clerk, who shall forthwith send copies thereof to the parties. Fourth Circuit Local Rule 27(b).

c. *Single judge:* A judge of the Court may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. The Court may review the action of a single judge. FRAP 27(c).

d. *When motion granted*: A motion authorized by FRAP 8 (stay or injunction pending appeal), FRAP 9 (release in a criminal case), FRAP 18 (stay pending review), or FRAP 41 (staying the mandate) may be granted before the 10-day period runs for the filing of a response to a motion only if the Court gives reasonable notice to the parties that it intends to act sooner. FRAP 27(A)(3)(A).

e. *Reconsideration:*

i. If the Court acts upon a motion without a response, any party adversely affected by the Court's, or the Clerk's, action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed. FRAP 27(b); Fourth Circuit Local Rule 27(d)(1).

ii. Any party adversely affected by an order entered by the Clerk pursuant to Local Rule 27(b), shall be entitled to request reconsideration of the Clerk's action by the Court. Fourth Circuit Local Rule 27(b).

1. A motion for reconsideration shall be filed within 14 days after entry of the order.

2. A motion for reconsideration shall be in writing, state the grounds for the request, be filed with the Clerk, and be served upon the parties.

9. **Oral argument:** A motion will be decided without oral argument unless the Court orders otherwise. FRAP 27(e).

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100 YEARS

7

ADDING VALUE: HELPING IN-HOUSE COUNSEL NAVIGATE CRISIS

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Adding Value—Helping In-House Counsel Navigate Crisis

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2023 Gentry Locke Seminar
October 6, 2023—Roanoke
October 12, 2023—Richmond

I. Introduction

a. This presentation focuses on legal issues and practice pointers for being outside counsel when the 3AM phone call comes, and a crisis has occurred for your client—whether government or private organization. How can outside counsel provide value to in-house counsel in navigating uncertain waters, particularly in those early moments?

b. Presenters have perspective being both in-house and outside counsel, and for both government and private clients.

c. What do we mean by a Crisis?

i. Merriam-Webster defines "crisis," as we mean it here, "an unstable or crucial time or state of affairs in which a decisive change is impending, *especially*: one with the distinct possibility of a highly undesirable outcome."

ii. More specifically, we mean when something bad has happened or come to light; it has hit or will hit the papers soon; and it has legal implications for potential liability—criminal, civil, regulatory.

iii. Examples – headlines abound with them.

1. Allegations of repeated sexual misconduct by a high-level executive at the company.

2. Massive data-breach involving protected health or financial information of customers.

3. School system alleged to have discriminated against high-achieving students in delaying information about their receipt of National Merit Honors.

4. Unite the Right rally in Charlottesville, Virginia and the state and local response.

iv. We want to focus on considerations that will be relevant across the board, no matter what the subject matter of the crisis. Focusing on the need to gather information and assess it, resolve issues, and how the law may treat those efforts in the context of potential litigation or enforcement actions.

d. Topics to be Covered

i. Information Gathering and Assessment of the Crisis – what considerations need to be made early on in investigating a crisis moment? What law applies with respect to whether privilege will protect these efforts from disclosure?

ii. Transparency in a Crisis – what considerations need to be made in terms of what information or conclusions can or should be shared publicly? Will that impact whether privilege applies?

iii. Public v. Private -- what differences might exist if the client is a private company versus a government office, agency, or entity?

iv. Counselor Role – practice pointers on how to help in-house counsel (and the client) think through managing a crisis moment.

II. Information Gathering and Assessment of the Crisis

a. Presumably the first step in responding to a crisis is to investigate it to determine how to respond, whether it's ongoing or not.

b. WHO should gather information and assess?

i. Lawyers? Experts? Both?

1. It will depend on the particular situation, but most crises involve a mix of legal and other issues. There will be legal implications in almost every crisis, but there may also be some area for expertise that is non-legal in nature. Identifying what expertise is needed will be key.

2. Retention of Experts

a. Through counsel gives argument that privileged.

b. Gives argument that findings are privileged (in anticipation of litigation).

3. Special committees of the Board to investigate.

a. Could retain its own counsel.

ii. Many clients choose to have lawyers gather this information and assess it--why?

1. Lawyers are generally expert at developing facts and analyzing them—it's what we do all the time. So that is one reason lawyers can be good candidates for this project.

2. But clients also likely consider that if a lawyer does the information gathering and assessment, it will be privileged. But will it be privileged?

c. Attorney-Client Privilege

i. Could apply to communications between client and lawyer, potentially also involving experts retained by the lawyer. But purpose has to be for legal advice or services. What happens, though, when the communication serves multiple purposes, i.e. to investigate a crisis situation and inform the client as to recommended responses *and* to assess the legal (or other) implications of the information?

ii. The Decision that Wasn't – *In re Grand Jury*, slip op. at 1, No. 21-1397 (U.S. Jan. 23, 2023).

1. Case arose out of the Ninth Circuit from a grand jury proceeding. A grand jury had issued a subpoena to a law firm that was retained to provide tax advice on expatriation of assets and assist in preparing tax returns

for a client that subsequently was being investigated for criminal tax-law violations.

2. District Court ruled that some of the withheld documents, namely those that were not primarily for the purposes of legal advice, be disclosed. The law firm appealed, and the Ninth Circuit affirmed the District Court, finding that the attorney-client privilege, in the context of "dual purpose" communications, applies only if the primary purpose of the communication was legal in nature. *See In re Grand Jury*, 23 F.4th 1088 (9th Cir. 2021).

3. Petitioner law firm argued that the primary purpose test was too restrictive, and that a "significant purpose" test, adopted by the DC Circuit, was more appropriate. *See In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014). Discerning the "primary" purpose for a communication, when there are potentially multiple motivations for it, would leave the privilege uncertain and therefore defeat its purpose.

4. Government argued that the Ninth Circuit should be affirmed because the primary purpose test was broadly adopted and most consistent with the narrow scope of the attorney-client privilege. In addition, the Government argued that the documents at issue would not be privileged under either test.

5. Petitioner law firm had lined up significant support for its position, including from the American Bar Association and the U.S. Chamber of Commerce, and many thought the Supreme Court would embrace this broader view of the attorney-client privilege.

6. Ultimately, the Supreme Court dismissed the case (as improvidently granted) without decision. In short, they took back the decision to review the case, so there was no decision on the merits.

a. Commentators believe this issue may arise again and that the Supreme Court ultimately decided the particular facts of the case (and because the facts were vague given the posture of a sealed grand jury proceeding), the case was not an effective vehicle to clarify the law on the "dual purpose" issue.

b. Issue will remain unsettled for now.

iii. Fourth Circuit View

1. Likely primary purpose test, but not definitively decided in context of dual-purpose communications.

2. *In re Grand Jury Subpoena*, 341 F.3d 331, 335 (4th Cir. 2003) ("The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing **primarily** either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.") (emphasis added).

3. District Courts in the Fourth Circuit have relied on this articulation to adopt and apply a primary purpose test. *See, e.g. Mr. Dee's Inc. v. Inmar, Inc.*, No. 1:19-CV-141, 2021 U.S. Dist. LEXIS 163460, at *11 (M.D.N.C. Aug. 30, 2021) ("corporate documents prepared for simultaneous review by legal and nonlegal personnel are often held to be not privileged because they are not shown to be communications made for the primary purpose of seeking legal advice") (citation omitted); *McAirlaids, Inc. v. Kimberly-Clark Corp.,* No. 7:13-CV-

193, 2014 U.S. Dist. LEXIS 201138 *13 (W.D. Va. Sept. 26, 2014) (holding that the communication "must be for the primary purpose of soliciting legal, rather than business advice").

iv. Virginia law

1. Unsettled for dual-purpose communications, but likely "primary purpose" test.

2. *Commonwealth v. Edwards*, 370 S.E.2d 296, 301 (Va. 1988) is a leading authority articulating the attorney-client privilege in Virginia: "confidential communications between an attorney and client made because of that relationship and concerning the subject matter of the attorney's employment are privileged from disclosure."

3. *Virginia Elec. & Power Co. v. Westmoreland-LC&E Partners*, 259 Va. 319 (2000). There, the CFO had drafted a memo memorializing conversation with officer of another company, which the CFO shared internally and with in-house counsel at an affiliated company. Virginia Supreme Court held that because the CFO testified he drafted the memo for the purpose of obtaining legal advice as to its contents, the privilege applied.

4. *Chevalier-Seawell v. Mangum*, 90 Va. Cir. 420, 426-28 (Norfolk City 2015) ("Accordingly, where a communication neither requests nor expresses legal advice, but rather involves the soliciting or giving of business advice, it is not protected by privilege. The communication must be with an attorney for the express purpose of securing legal advice. For the attorney-client privilege to apply, the communication must be primarily or predominately of a legal character.") (citations omitted).

d. Attorney Work Product

i. Could apply to internal investigation undertaken in anticipation of litigation, including interview notes, analysis, and any reports. But same issue—when and to what extent does it apply when the purpose of the report is both for potential litigation and another business purpose?

ii. Federal law – key distinction is between documents created "in anticipation of litigation" and documents created in the "ordinary course of business." The former is protected work product; the latter is not.

1. FRCP 26(b)(3) is the rule, as amplified by case law.

2. Fourth Circuit adopts a "because of" standard, i.e. whether the document was created "because of the prospect of litigation when the preparer faces an actual claim or potential claim." *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992) (material "prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes are not documents prepared in anticipation of litigation").

3. EDVA has applied this rule to further articulate the "RLI Test," which asks (1) whether the document was created when litigation was a real likelihood, and (2) "whether the document would have been created in essentially the same form in the absence of litigation." *In re Capital One Consumer Data Security Breach Lit.*, No. 1:19-md-3915, 2020 U.S. Dist. LEXIS 112177, at *7 (E.D. Va. June 25, 2020) (citing *RLI Ins. Co. v. Conseco, Inc.*, 477 F. Supp. 2d 741 (E.D. Va. 2007), and affirming Magistrate Judge's order).

a. In *Capital One*, the company had contracted with a data security firm, Mandiant, to provide it services in the event of a breach. A breach occurred, and Capital One hired a law firm to conduct an investigative assessment, through a new engagement between the law firm and Mandiant,

and as directed by the law firm. The court rejected work product protection, emphasizing that there was no evidence to distinguish what Mandiant did under the direction of the law firm and what it would have done in the ordinary course of business.

b. The burden is on the proponent of the privilege claim to show it applies, and court found that Capital One had not demonstrated that the Mandiant report was distinctive litigation work-product as opposed to what it would have received in the ordinary course of business.

4. Also note decision in *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 230 F.R.D. 433 (D. Md. 2005). Company's outside counsel had conducted significant internal investigation into alleged accounting irregularities and fraud claims, including over 800 witness interviews. In related civil litigation, the court ordered disclosure of much of the investigation work product. In part, the court found that the purpose of the investigation was not for litigation, but to satisfy auditors and regulators for business purposes, and thus the work product doctrine did not apply.

iii. Virginia law – there is little binding precedent on the work product doctrine, much less how the work product doctrine applies in the context of potentially "dual purpose" work product.

1. Rule 4:1(b)(3) is the rule, which is similar to FRCP 26(b)(3), so Virginia circuit courts generally rely on federal precedent though with some differing outcomes, and little binding guidance.

2. *Smith v. AMTRAK*, 22 Va. Cir. 348 (Richmond City 1991), initial investigation of workplace injury prepared by AMTRAK was protected. Though not conducted by an attorney or at direction of attorney, and serving

multiple business purposes, court held that litigation was "reasonably foreseeable," and the rule does not limit protection only to "attorney" work product. The court therefore found the materials were produced in anticipation of litigation, and thus were not discoverable absent the required showing of substantial need.

3. *Massenburg v. Hawkins*, 70 Va. Cir. 13 (Greensville Cnty 2005), applied "bright line" rule that unless investigatory steps were at direction of counsel, could not be claimed to be "in anticipation of litigation" as opposed to in the "ordinary course," and therefore certain interview notes and recorded witness statements were not protected by the work product doctrine.

e. Takeaways

i. Courts are highly skeptical of both attorney-client and work-product claims related to internal investigations, even if undertaken by lawyers and even if undertaken by outside counsel. Indeed, the more severe the crisis and thus the business need to investigate, the *less likely* courts appear willing to protect those investigative efforts from disclosure.

ii. Thus, and perhaps surprisingly, crisis situations—the ones in which clients are most in need of the safe harbor that privilege is designed to protect—present difficult challenges for internal review and assessment that will be protected from disclosure, even if through outside counsel. They require careful consideration and navigation—from the very beginning—by experienced counsel to ensure privilege protections are maintained, as much as possible.

iii. Still, the function of lawyers in providing legal advice and preparing for anticipated litigation is protected, if that is what is being done. So any reviews that seek the benefits of that protection must actually be done for those legal and/or litigation purposes, and documented and conducted as such.

1. Engagement letters should be clear about legal purposes of the engagement—with the client and including any other experts retained to assist.

2. Actually conduct the review as privileged and for a legal purpose—cannot have mere window-dressing to demonstrate the legal function being performed.

III. Transparency in Crisis

a. Modern environment creates intense pressure for transparency and disclosure in crisis situations.

b. Waiver of Privilege – but if you've tried to protect your crisis review/investigation as privileged, will disclosing the results of the client's review waive privilege protections?

c. Attorney-Client Privilege

i. Federal law

1. In the Fourth Circuit, subject matter waiver results from any disclosure to third parties not sharing the privilege—meaning not just the disclosed communications, but other privileged communications about the same subject matter.

2. *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988) as leading precedent in the Fourth Circuit. There, the client conducted an internal investigation and developed a position paper for the DOJ and disclosed other information to other government agencies in connection with it. Court found that because Martin Marietta disclosed privileged materials to third parties, no privilege could apply to those communications or the underlying investigative work product as they were "the details underlying the data which was to be published" to a third party. *Id.* at 623 (quoting *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984)).

3. Note also *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 230 F.R.D. 433 (D. Md. 2005) – court relied on disclosure of investigation results in SEC filings as further waiver of privilege protection for both attorney-client and non-opinion work product.

ii. Virginia law – Virginia follows a similar rule of subject-matter waiver for attorney-client privileged material; however, in application it appears to be more limited than under federal law.

1. *Commonwealth v. Edwards*, 370 S.E.2d 296, 301 (Va. 1988), discussed above, dealt primarily with issue of waiver. There, Attorney General had subpoenaed certain records related to a facility's submission (by counsel) of amended annual cost reports to Medicaid. The facility's attorney had retained an accountant to assist in reviewing the prior reports and to provide legal advice on how to address potential issues in reimbursements claimed from Medicaid.

2. Relying in part on Fourth Circuit precedent, the Court stated that "[w]hen a client communicates information to his attorney with the understanding that the information will be revealed to others, the disclosure to others effectively waives the privilege not only to the transmitted data but also to the details underlying that information." 235 Va. at 509 (citation omitted). Because the facility had retained an attorney to assist in preparing amended cost reports which the client knew would be submitted to the State Medicaid agency, the Court found there had been an implied waiver of privilege.

3. However, the Court did not apply this waiver broadly. It looked at the contested documents and the nature of the attorney's engagement to "determine what underlying data the client" assumed would be disclosed and what information would remain confidential. In doing so, the Court found that all the contested working papers, notes, and communications by the attorney and the attorney's retained accountant were protected, as the client would

have reasonably expected that material *not* to be disclosed to the State Medicaid agency.

d. Attorney Work Product

i. Federal law

1. *In re Martin Marietta* also provides standard for waiver of work product protection. Disclosure to a third party, alone, is not dispositive; the key is whether a party has made a selective, testimonial use of the work product. 856 F.2d at 624-25 (finding that disclosure of investigative findings to DOJ and DOD was a testimonial use of the work product and thus subject-matter waiver applied to related material of the same subject matter).

2. Courts, however, do apply a more limited waiver rule to pure opinion work product—generally, protection is waived *only* as to the disclosed opinion work product.

ii. Virginia law – very little precedent here, but at least one Virginia circuit court applied the same rule articulated in *Edwards*, though later vacated its decision compelling disclosure based on a partial disclosure of work product. *See Gordon v. Newspaper Ass'n of Am.*, 51 Va. Cir. 183 (Richmond City 2000).

e. Takeaways – If client can avoid it, no knee-jerk reactions or early commitments to disclosing information publicly. Hard to know at the outset of assessing a crisis what the facts are, so client must evaluate the legal consequences balanced against other demands and needs—political, regulatory, PR, etc.

IV. Public v. Private Client

a. The most important factor for a private or public client is instilling confidence that the crisis is being managed and addressed.

i. During the Unite the Right Rally in Charlottesville, it was important for the public to hear the Governor condemn racism,

but it was also important to hear from law enforcement officials on steps taken to prevent further violence.

ii. At the height of the pandemic, the Governor could discuss the overall state response, but it was important for the public to hear of the coordination between the private medical sector, the state health agency as well as local and military services to provide tests and subsequent vaccinations.

b. Public entity considerations include: public opinion, politics, agency and governmental leadership, institutional interests and prerogatives.

i. Public bodies typically subject to FOIA and other disclosure laws, which will be strictly applied. *See* Va. Code § 2.2-3700, *et seq*.

ii. Public bodies also accountable through multiple avenues – legislative oversight, potential judicial review or litigation, inspectors general, federal oversight and investigatory power, etc.

c. Public/private company considerations include: shareholders, media (and PR problems), Board, customers, government regulators, and other constituencies.

i. Private clients not subject to mandatory disclosure in the same way as government entities; however, they often have disclosure obligations under the securities laws (if publicly traded) or to their regulators. So, even without litigation and the discovery process, public disclosures are often necessary when crises arise.

ii. Private clients more likely to face liability risk in ways that public bodies will not – no sovereign immunity, other limits on their exposure.

V. Counselor Role and Concluding Thoughts

a. Value of objective, honest advice. Know who your client is. Help in-house counsel know and think through the *legal issues*, but don't

neglect the important business or policy issues that the client needs to contend with.

b. Practice pointers from prior experience

i. Be aggressive about role of lawyer to protect client

ii. Educate on value of lawyers retaining other experts

iii. Communicate separately about legal issues versus business issues

iv. Don't over use the "privileged and confidential" heading thinking it will lead to broader protection (can backfire).

v. Given the above case law on privilege and waiver, if the client wants privilege protection, consider the following:

1. Articulate from the beginning—and memorialize in engagement letters and otherwise—the reasons for the lawyer's work, ie for legal advice and/or in anticipation of specific litigation or enforcement threats. Be specific and not generalized, as this will be the client's chance to articulate the basis for later privilege claims.

2. If other experts are also retained, similarly document the purpose of their role in association with the lawyer's role, ie to provide legal advice and prepare for potential litigation or enforcement action. Do not create separate reports from the experts, but incorporate any analysis into the lawyer's report. This will help maintain the distinct legal purpose of the work, distinguishing it from the ordinary course of business.

3. Do not disclose the *privileged material*, or risk waiver. If the client wishes to maintain privilege, it must treat the lawyer's advice and work product as privileged. The Fourth Circuit has distinguished between "disclosures based on the advice of an attorney, on the one hand, and the underlying attorney-client communication itself, on

the other." *In re Fluor Intercontinental, Inc.*, slip op., X, No. 20-1241, (4th Cir. Mar. 25, 2020) (finding no waiver of privilege when company disclosed certain general conclusions from internal investigation by in-house counsel where no evidence suggested the *actual* privileged communications were themselves disclosed). So, client must take care to ensure that, to the extent it needs to make disclosures regarding the same topic as an internal investigation, maintain this distinction and do not take short cuts.

vi. When advising a governmental entity, know the legal right and left limits of authority for the person making the key decisions. For example, understanding the limits on calling out the National Guard or requesting resources from other states or declaring an area under quarantine.

vii. Develop a solid understanding of your client's operating structure from day one and establish relationships with key players long before a crisis happens. It gives you greater credibility when providing legal advice and saves time having to get up to speed on the various roles of the key players.

viii. Make the communications team your friends. If issues of privilege occur, it's better to educate them on its importance so they can use their skills to educate the public. You can help ensure the organization's message to the public is legally sound. It is rarely a good press day if the lawyer has to explain something.

ix. Do not neglect external supporters/validators. Your communications will not be privileged, but in a crisis situation they can help share your organization's message and be important validators for complicated legal issues. For example, medical personnel can provide practical field examples of the importance of protecting medical information while lawyers discuss HIPAA's legal requirements when discussing infected persons during the pandemic.

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SIT DOWN AND SHUT UP: THE ART OF SELF-AWARENESS AND EDITING IN JURY TRIALS

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Sit Down and Shut Up: The Art of Self-Awareness and Self-Editing in Jury Trials

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2023 Gentry Locke Seminar
October 12th, 2023

Managing Unruly Opposing Counsel Before & During Trial (and How Not to Be "That Guy")

I. Depositions

a. Objections at depositions, in general.

i. **FED. R. CIV. P. 30(c)(2): Depositions by Oral Examination** – *Objections*: An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. *An objection must be stated concisely in a nonargumentative and nonsuggestive manner.* A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3). (emphasis added)

ii. **VA. SUP. CT. R. 4:5(c)(2): Depositions Upon Oral Examination** – *Objections*: Any objection must be stated concisely in a nonargumentative and nonsuggestive manner. (in pertinent part)

1. This section of the rule was added in 2013, ostensibly to address speaking objections at depositions.

iii. Typically, proper objections at depositions are those made about the form of the question, relevancy, or privilege.

iv. In general, objections for hearsay, related to a witness's opinion, and assuming facts not in evidence are *not* proper at depositions, even if they would be at trial.

b. Designations.

i. When counsel wants to introduce deposition testimony at trial, they must identify the witness and specific lines of the deposition transcript in advance. Opposing counsel can then object and/or make counter-designations.

ii. All deposition designations and corresponding objections are typically made and resolved ahead of trial.

iii. **FED. R. CIV. P. 26(a)(3)(A)(ii): Duty to Disclose; General Provisions Governing Discovery**: a party must provide to the other parties and promptly file … the designation of those witnesses whose testimony the

party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition.

c. Use of Video Depositions at Trial.

i. The traditional thinking on using videotaped depositions at trial in lieu of live witness testimony has been to avoid video wherever possible. However, now that many people are used to Zoom and other forms of video conferencing, the video deposition is not as problematic as it once was. If a fact witnesses or expert on a narrow topic is only available either remotely or by video deposition, it is unlikely to be a problem with the jury (though try to avoid playing a video immediately after lunch).

ii. If you are going to use a deposition at trial, or even remotely suspect that you or your opponents will use a deposition at trial in lieu of live testimony, be sure to raise objections – in particular, form objections that can be corrected on the spot – during the deposition.

iii. Keep them brief and on-point. This is true of every witness, live or video, but with video, try to make sure that you've edited the video appropriately to remove unnecessary dead space, objections, comments from the court reporter, or other irrelevant distractions/time-wasters.

II. Speaking Objections/Leading

a. When a lawyer inappropriately inserts narrative and/or legal argument into their objections or through leading questions, often in a manner that transmits information other than evidence to the witness or fact finder.

b. Generally presents in three different manners:

i. Speech/Miniature Closing Argument: rather than simply asking a question or stating the legal grounds for an objection, a lawyer inserts their characterization of and argument about the events. Prohibited form of communication with the jury because it attempts to persuade them that the attorney's characterization of events is accurate during the witness testimony phase of trial.

ii. Coaching a Witness: while a witness is testifying (either at trial or during a deposition), an attorney interrupts the line of questioning and attempts to shape the evidence through their objection. Either the witness will incorporate the language of the "objection" into their answer or, in effect, counsel ends up testifying. The same sort of coaching can be done through leading questions on direct examination.

iii. "Confused" Objection: when an attorney recognizes the question will produce bothersome evidence or argument, but does not know the appropriate grounds for the objection, the attorney will still make a timely objection. Not as problematic as the first two forms, especially where the attorney keeps their explanation short.

c. Speaking objections and leading questions are common at depositions because no judge is present.

d. Why are speaking objections and leading questions wrong?

i. It is an inappropriate interference in the line of questioning which suggests a proper answer from the lawyer.

ii. Speaking objections waste the time and money of the court, as they are often long-winded and without focus.

iii. Lawyers are typically not allowed to testify about the evidence, as they lack personal knowledge of the subject and as it can prejudice the tribunal.

1. **FED. R. EVID. 602: Need for Personal Knowledge**: A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. (in pertinent part)

2. **VA. RULES OF PRO. CONDUCT r. 3.7(a): Lawyer as Witness:** A lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness (in pertinent part).

a. Comment 1: Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

b. Comment 2: The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof.

e. What can *you* do?

i. Make your own objection to improper argument or commentary by counsel. If explanations are necessary, ask for a sidebar conference (during trial), or call the court if the issue becomes a problem during a deposition.

III. Sidebar Behavior

a. Refers to a quiet discussion between counsel of all parties and the judge. It occurs in open court without excusing the jury, but the jury cannot hear the discussion.

b. Sidebar conferences may be on or off the record depending on the jurisdiction.

c. While sidebar conferences are preferable to speaking objections, many judges encourage counsel to instead discuss anticipated objections before the trial day begins or during a recess. THE U.S. DISTRICT COURT SPEAKS § 3.3.2 (Mass. Continuing Legal Educ., Inc. 2015).

d. Sidebars should be infrequent and requested only for good reason.

e. **VA. SUP. CT. R. 2:104(b): Preliminary Determinations:** *Relevancy conditioned on proof of connecting facts:* Whenever the relevancy of evidence depends upon proof of connecting facts, the court may admit the evidence upon or, in the court's discretion, subject to, the introduction of proof sufficient to support a finding of the connecting facts.

i. When the decision on the admissibility of evidence requires disclosing material that may end up inadmissible, the jury should not hear that material. Arguments on admissibility in these situations should occur at sidebar or with the jury excused from the courtroom.

IV. Additional Ethical Responsibilities to the Court and the Jury Throughout Litigation

a. **MODEL RULES OF PRO. CONDUCT PREAMBLE (Am. Bar Ass'n 2020)**:

i. (1) A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

ii. (4) In all professional functions a lawyer should be competent, prompt and diligent.

iii. (5) A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. *A lawyer should*

demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process. (emphasis added)

b. **VA. RULES OF PRO. CONDUCT r. 3.5: Impartiality and Decorum of the Tribunal**: (f) A lawyer shall not engage in conduct intended to disrupt a tribunal.

   i. Comment 2 (in part): To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced.

   ii. Comment 4 (in part): The advocate's function is to present evidence and arguments so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants.

c. **VA. RULES OF PRO. CONDUCT r. 3.3: Candor Toward the Tribunal**: (a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal.

   i. Comment 4: Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal.

d. **Practical Issues**.

   i. As a practical matter, when and how does one call attention to transgressions of these rules? This is a case-by-case analysis, and considerations should include whether the breach was egregious or intentional, the degree of prejudice, if any, to your client, and whether it can be corrected.

   ii. The Rules of Professional Conduct also provide guidance on when and how an attorney should report any such breaches:

      1. **VA. RULES OF PRO. CONDUCT r. 8.3: Reporting Misconduct:** (a) A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority.

      2. Comment 1: Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial

misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

3. Comment 2: A report about misconduct is not required where it would involve violation of Rule 1.6. *See* Rule 1.6(c)(3).

4. Comment 3: If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

V. Additional Ethical Responsibilities to Opposing Party and Counsel Throughout Litigation

a. **VA. RULES OF PRO. CONDUCT r. 3.4: Fairness to Opposing Party and Counsel**: A lawyer shall not: (e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party. (f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, *or state a personal opinion* as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused. (g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings. (emphasis added)

   i. Comment 8: In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. *Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system. A lawyer should be courteous to opposing counsel and should accede to reasonable requests* regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client. A lawyer should

follow the local customs of courtesy or practice, unless the lawyer gives timely notice to opposing counsel of the intention not to do so. A lawyer should be punctual in fulfilling all professional commitments. (emphasis added)

ii. Examples, as discussed above: Improperly designating depositions, lengthy and convoluted objections during depositions, inability to resolve discovery related problems before trial, over-designating exhibits/discovery materials, contesting authenticity of documentary evidence without any basis to do so (i.e., just to force the other side to subpoena records custodians), etc.

iii. Just as with transgressions of any of the Rules of Professional Conduct discussed earlier, how and when to raise these issues requires case-by-case analysis. Again, the Rules of Professional Conduct provide guidance on when and how an attorney should report any such breaches. *See* VA. RULES OF PRO. CONDUCT r. 8.3 (a) and Comments (**a**bove).

Some Notes on Reptile Theory

Reptile Theory is a significant component in the modern practice of personal injury and similar litigation, and is frequently something discussed in its own specific presentation. We make a brief note of Reptile Theory here simply to highlight the fact that it can be one of the driving forces behind opposing counsel's unruly behavior – particularly in opening/closing arguments and voire dire.

The Reptile practitioner's goal is essentially to sneak otherwise impermissible "Golden Rule" arguments past the court and counsel, thus making the jurors feel as if their personal safety or the safety of their loved ones is somehow at stake in the trial before them (spoiler alert: it never is). The basic Reptile routine is this:

1. Establish a simple safety rule which should have protected the plaintiff and would also protect the jury.

2. Establish that the defendant violated that rule and put the plaintiff in danger, and thus put the jurors at risk for future harm (or that it could have been the jurors in Plaintiff's shoes).

3. Indicate that the defendant should be held responsible for violating the safety rule. Appeal to the jury to punish the defendant in order to protect their own safety.

Counsel will set up the tactic in discovery, but really begins crossing into impermissible territory at jury selection. Watch for counsel to expose jurors to concepts like danger, safety, and risk. Depending on how your trial court handles voir dire, these issues can be raised ahead of time and flagged for the court so that it cautions counsel to tread carefully, if at all.

During trial, especially during opening and closing arguments, Plaintiff's counsel will emphasize danger, safety, and risk, capitalizing on the primacy and recency effects to keep Plaintiff's reptile theory of the case in the forefront of the jury's mind. This is where an early objection – perhaps before argument begins and definitely outside the presence of the jury – can be useful to put the judge on alert. If you have prepared the court to expect Reptile arguments (either in a pre-argument objection or motion in limine), all you may need to do is begin to stand up and the judge will warn opposing counsel that they are treading on forbidden ground. Otherwise, defense counsel is left to play the delicate balancing game of whether an objection is necessary or might backfire and instead give credence to the point you are objecting to.

Defendants are not limited to purely reactionary defenses to Reptile tactics at trial. Try to work in a competing narrative focused on the *law* or on a company's culture of safety. You can also point out counsel's manipulation to the jury and appeal to their professionalism, and remind them of the applicable standard of care.

The legal marketplace has no shortage of available books and presentations on Reptile Theory, related tactics, history, and the underlying psychology. This note is simply to flag some of the Reptile issues that arise at trial and how to handle them.

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ONE PARTY CONSENT RECORDINGS AND OTHER ETHICAL CONUNDRUMS IN INTERNAL INVESTIGATIONS

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One Party Consent Recordings & Other Ethical Conundrums in Internal Investigations

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Gentry Locke Seminar
Roanoke – October 6, 2023
Richmond – October 12, 2023

I. Introduction

In representing a client, an attorney's various ethical obligations may, at times, appear to conflict. As a self-regulating body, the legal profession requires attorneys to recognize the bounds of permissible behavior. From prosecution to defense—and civil investigations that walk the line of both—attorneys often find themselves in circumstances that raise complex ethical questions. This session seeks to provide some guidance regarding a number of ethical conundrums that often arise in criminal and civil internal investigations.

Recently, attorneys have made headlines for recording conversations with witnesses and, in some instances, with their own clients. Laws governing when it is permissible to record private conversations vary from state to state, and it is extremely important for attorneys to understand such limitations. In Virginia, recent ethics opinions have provided some guidance for practitioners regarding when it is ethical or unethical for an attorney – or her agent – to surreptitiously record conversations. Overall, attorneys need to be aware that the Virginia State Bar will undertake a fact-based analysis involving a multitude of ethical provisions to determine whether attorneys' actions are in any way deceptive and therefore unethical.

When representing a whistleblower or defending against a whistleblower's claims, those ethical bounds (and the usefulness of information) vary depending on who takes what action. Attorneys representing whistleblowers must consider the limits of what they can ethically do themselves, what they can advise the client to do, and what a client can do on their own. The difference in how the attorney learns information in a whistleblower's case changes how that information can be used in later litigation. An attorney's duties to opposing counsel and the tribunal may protect the employer's own attorney-client privileged information and confidential information, even to the detriment of that attorney's own whistleblower client.

Typically, where a third party knows or learns of otherwise privileged information, the protection is destroyed. However, with joint defense agreements ("JDA"), the attorney-client privilege expands to protect all parties to the agreement. Attorneys here still must ensure they advocate to the fullest extent possible for their client, ensuring their individual interests, rather than jointly for all parties. While a party to this agreement, attorneys must remain wary of the government's questions on the topic and the potential for a party to the JDA to become a cooperating witness for the government.

In this presentation, we will explore the Virginia Rules of Professional Conduct implicated by recording conversations, addressing whistleblowers and navigating joint defense agreements. We will consider the bounds of what a lawyer can ethically do in Virginia, and compare these actions, where appropriate, with the ethical allowances in other states. We will suggest a number of steps to take and questions to ask yourself as you interact with these issues in practice.

II. Can you record? *Should* you record?

A. Is there a reasonable expectation of privacy?

1. In most states, consent requirements only apply where parties have a reasonable expectation of privacy. It is generally acceptable for individuals to record conversations in public places, with or without consent.

2. In a recent opinion, United States Court of Appeals for the Fourth Circuit analyzed whether a whistleblower violated Maryland's wiretap laws by secretly placing a recording device in a company warehouse near a busy area filled with desks and cubicles. *Greatwide Dedicated Transp. II, LLC v. U.S. Dep't of Labor*, No. 21-1797, 2023 U.S. App. LEXIS 16634, at *4 (4th Cir. June 30, 2023). The Fourth Circuit concluded that there was "no reasonable expectation of privacy" in "open space—on a warehouse floor with only cubicle dividers—and therefore the employee did not violate Maryland's restrictive wiretap laws. *Id.* at *14-*17.

B. Are the **other parties** in an all-party or one-party consent state?

1. Most state and federal law allow recording conversations when only one party consents. Legally, if all parties to the conversation are in a one-party consent state, any party can record the conversation without informing the others.

   a. Virginia is a one-party consent state. VA. CODE ANN. § 19.2-62 (2004); VA. CODE ANN. § 19.2-69 (2020).

2. In a two-party consent state, *all* parties (not just two) to the conversation must consent to the recording.

3. Nine states have wiretapping and eavesdropping laws that require "all party" consent requirements:

   a. California – CAL PEN. CODE § 630-632.7

   b. Florida – FLA STAT. ANN. § 934.03

   c. Illinois – 702 IL COMP. STATE. ANN. § 5/14-2

   d. Maryland – MD CODE ANN. CTS & JUD PROC. § 10-402

   e. Massachusetts – MASS GEN LAWS ANN. CH. 272

   f. Montana – MONT CODE ANN. § 45-8-213

   g. New Hampshire – NH REV. STAT. ANN. 570-A:2

h. Pennsylvania – 18 PA STAT. & CONST. STAT. ANN. 5703

i. Washington – WASH REV CODE ANN 9.73.030

4. Remember, it matters less where the recorder is located. If any party is unaware that someone is recording the conversation, then the conservative position is to assume the law which applies is that of the state of the unaware party.

   a. Some jurisdictions use the location of the recording device to determine which state's laws apply. Other jurisdictions use the location of the individual being recorded. *See Krauss v. Globe Int'l, Inc.*, 1995 Misc. LEXIS 787, *5 (N.Y. Sup. Ct. 1995) (finding that NY law applied since the place of the tort was where the injury occurred and defendant was recorded while he was in NY).

5. While one-party or "all party" consent requirements determine the *legality* of recording a conversation, *ethical* responsibilities of lawyers may be greater.

C. What ethical obligations of professional conduct restrict recording?

1. August 10, 1974: ABA issued a formal opinion recommending a blanket prohibition against attorneys recording "any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation." ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 337 (1974).

2. Reversed Course – ABA 2001 Opinion – "The mere act of secretly but lawfully recording a conversation inherently is not deceitful" and therefore is not *per se* unethical. ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

3. The Virginia Rules of Professional Conduct do not have a specific rule regarding recording clients, witnesses, or other individuals. The informal ethics opinions perform a fact-based analysis of whether an attorney's conduct was "deceitful".

4. **Virginia Legal Ethics Opinion 1738** (April 13, 2000) – Presented the question of whether "it would be ethical under the Virginia Rules of Professional Conduct for an attorney to participate in, or to advise another person to participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party."

a. **Virginia Rule of Professional Conduct 8.4(c)** – It is professional misconduct for a lawyer to: "engage in professional conduct involving dishonesty, fraud, deceit, or misrepresentation."

b. Overruled "prior opinions" that "sweep too broadly" that prohibited secret recordings in any and all circumstances.

c. Committee opined that Rule 8.4 does not prohibit a lawyer engaged in a criminal investigation or a housing discrimination investigation "to participate in, or to advise another person to participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, as long as the recording is otherwise lawful."

d. The Committee further opined that "it is not improper for a lawyer to record a conversation involving threatened or actual criminal activity when the lawyer is a victim of such threat."

e. The Committee recognized that "there may be other factual situations in which the lawful recording of a telephone conversation by a lawyer, or his or her agent, might be ethical," but declined to further extend opinion beyond the facts cited.

5. **Virginia Legal Ethics Opinion 1802** (September 29, 2010) –Presented the question "whether it is ethical for a lawyer to advise a client to engage in the undisclosed recording of the communications or actions of another."

   a. **Virginia Rule of Professional Conduct 4.4** – prohibits any means of obtaining evidence that violate a third party's legal rights or have no substantial purpose other than to embarrass, delay, burden a third person.

      i. Because "one-party consent recording is not illegal in most states, as long as the undisclosed recording has a reasonable purpose and does not violate the rights of the subject of the recording, it will not violate Rule 4.4".

         - However, "[i]t would be unethical for a lawyer in a civil matter to advise a client to use lawful undisclosed recordings to communicate with a person the lawyer knows is represented by counsel." **Virginia Rule of Professional Conduct 4.2.**

         - It would be unethical for a lawyer to advise a client to employ lawful undisclosed recording under pretextual circumstances

using conduct involving fraud, dishonesty, deceit, or misrepresentation. **Virginia Rule of Professional Conduct 8.4(c).**

- A lawyer cannot violate or attempt to violate the Rules of Professional Conduct by directing a third party, such as the client or an investigator, to engage in conduct prohibited by the Rules. **Virginia Rule of Professional Conduct 8.4(a).**

- If the undisclosed recording is illegal, then it is professional misconduct for a lawyer to commit a crime or a deliberately wrongful act that reflects adversely on the lawyer. **Virginia Rule of Professional Conduct 8.4(b)**

- A lawyer cannot counsel or assist a client in conduct that is illegal or fraudulent. **Virginia Rule of Professional Conduct 1.2(c).**

6. **Virginia Legal Ethics Opinion 1814** (May 3, 2011) – Raised a fact-specific question of whether it would be ethical for a criminal defense lawyer to participate in, or employ an investigator, to tape record the conversation of a third party without the third party's knowledge?

   a. In this opinion, the Committee recognized that this one-party recording may juxtapose some rules of professional conduct against other rules of professional conduct. This situation requires the lawyer to weigh the competing ethical obligations of a lawyer's duties to third parties against those owed to the client.

      i. **Virginia Rule of Professional Conduct 1.1** requires a lawyer to render competent representation to a client.

      ii. **Virginia Rule of Professional Conduct 1.3** requires a lawyer to act with diligence in representing a client.

      iii. **Virginia Rule of Professional Conduct 4.3** discusses obligations of lawyers – and their agents – in dealing with unrepresented persons.

      iv. **Virginia Rule of Professional Conduct 8.4(c)** prohibits the lawyer, or the lawyer's agent, from engaging in deceitful conduct that reflects adversely on the lawyer's fitness to practice law.

   b. Committee concluded that a criminal defense lawyer does not violate Rule 8.4(c) or engage in deceitful conduct when she approaches an unrepresented potential witness, identifies herself as an attorney for a particular client, and then uses a lawful undisclosed tape-recording to preserve the witness's statement.

c. **Critical fact** – The Committee emphasized that when a criminal defense attorney uses lawful methods, such as undisclosed tape recording, as part of interviewing witnesses or preparing his case, the lawyer – or his agent – must ensure that the unrepresented third party is aware of the lawyer or the agent's role.

7. **Virginia Legal Ethics Opinion 1845** (June 16, 2009) – Presented the question was it ethical for Staff Counsel for the Virginia State Bar to direct a bar investigator to engage in covert investigative techniques in the investigation of the unauthorized practice of law?

   a. Committee concluded that Staff Counsel's use of an undercover or "sting" operation by a lay investigator did not violate Rule 8.4(c) of the Virginia Rules of Professional Conduct.

      i. **Critical fact** – Staff Counsel are charged by law with the duty to investigate conduct that is unlawful or criminal. Government lawyers who are supervising undercover operations are not acting unethically despite the prohibition against conduct involving fraud, dishonesty, deceit, or misrepresentation.

D. Comparing Virginia law to other one-party consent jurisdictions:

1. Washington, D.C.:

   a. A lawyer may ethically record conversations with federal agency representatives during an investigation into the lawyer's client without disclosure, so long as the lawyer does not affirmatively misrepresent they are recording. D.C. Bar Ass'n, Op. 229 (1992).

   b. In seeking permission to speak with another attorney's client, failure to disclose the intent to record the discussion is deceitful and misrepresents the circumstances, in violation of Rule 8.4(c). D.C. Bar Ass'n, Op. 178 (1992).

   c. The circumstances surrounding recording conversations should be evaluated for dishonesty, fraud, deceit, and misrepresentation. D.C. Bar Ass'n, Op. 229 (1992).

2. North Carolina:

   a. A North Carlina lawyer may record conversations with opposing counsel without disclosure to the other lawyer. However, for professional courtesy, lawyers are encouraged to disclose. N.C. Bar Ass'n, Rules Pro. Conduct Op. 171 (1994).

3. West Virginia:

    a. West Virginia has yet to address if a lawyer may ethically record without disclosure. Carol Bast, *Surreptitious Recording by Attorneys: Is it Ethical*, 39 St. Mary's L.J. 661, 695 (2008).

4. Texas:

    a. A Texas lawyer can record conversations if: (1) the recording involves a client and the recording furthers a legitimate purpose for the lawyer or the client; (2) the lawyer protects any confidential client information recorded; (3) the recording is otherwise lawful; and (4) the lawyer does not misrepresent they are recording. Tex. Comm. Pro. Ethics, Op. 575 (2006).

    b. An attorney cannot direct a client to record where they would not be able to themselves, but an attorney can explain the recording law to the client. Tex. Legal Ethics Comm., Formal Op. 514 (1996).

    c. Legally made tape recordings have been admissible evidence in civil trials. Texas courts have declined to extend the fruit of the poisonous tree argument to illegal recordings in civil cases. Robert Gilbreath & Curtis Cukjati, *Tape Recording of Conversations: Ethics, Legality, and Admissibility*, 59 Tex. Bar J. 950, 953 (1996).

5. Kentucky:

    a. Like Texas, an attorney cannot suggest a client secretly record a conversation. However, the attorney can advise the client on the legality of secretly recording if the lawyer does so without violating any other ethics rules. Ky. Bar Ass'n, Ethics Op. 289 (1984).

6. States' positions vary greatly, with some states prohibiting secret attorney recording completely and forbidding attorneys from even providing advice to a client on the matter and other states allowing attorneys to record.

E. Other considerations in deciding whether to record conversations and whether to advise clients about recording conversations:

1. Is the recorded conversation protected by attorney-client or work-product privilege?

    a. Often, where surreptitiously obtained recordings are made in anticipation of litigation, they are protected by work product privilege. *See Haigh v. Matsushita Electric Corp.,* 676 F. Supp. 1332, 1357 (E.D. Va. 1987).

b. However, work-product privilege may be waived when a lawyer unethically records. *See Parrott v. Wilson*, 707 F.2d 1262, 1272 (11th Cir. 1983); *Chapman & Cole and CCP, Ltd v. Itel Container Int'l B.V.*, 865 F.2d 676, 686 (5th Cir. 1989).

2. Will the recording become discoverable?

a. Recordings may be discoverable after use in litigation. *See Herrmann v. General Tire & Rubber Co.*, 435 N.Y.S.2d 14, 16 (N.Y. App. Div. 1981) (finding that a privileged recording was discoverable after witness used it to refresh his recollection).

F. Example: Michael Cohen recorded telephone conversations with former President Donald Trump regarding payment to Stormy Daniels.

1. **Private:** There was a reasonable expectation of privacy, as Cohen and Trump were speaking over the phone, each in a private location.

2. **Legal:** New York is a one-party consent state. Both Cohen and Trump were in NY when the conversation occurred. Legally, Cohen did not violate consent laws when recording Trump.

3. **Ethical?** NY has a rule analogous to Rule 8.4, prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation."

a. NY has over 20 bar associations, which disagree on the ethics of a lawyer recording conversations with a client. One, the New York City Bar Association, opined that a lawyer can record a conversation if they have a reasonable basis for believing that disclosing they recorded would "significantly impair some societal good," but routine undisclosed taping is ethically impermissible. Formal Op. 2003-02. Cohen's personal attorney, Lanny Davis, asserts Cohen routinely records conversations with clients in lieu of taking notes. Deanna Paul, *Michael Cohen Secretly Recorded Trump. Does that Make Him a Bad Lawyer?*, WASHINGTON POST (July 26, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/07/25/michael-cohen-secretly-recorded-trump-does-that-make-him-a-bad-lawyer/.

b. The ABA discourages lawyers from undisclosed recording of their own clients, calling the practice "inadvisable" even where permissible. Otherwise, lawyers can record conversations ethically so long as legally permissible in the relevant jurisdiction. ABA Comm. On Ethics & Pro. Resp., Formal Op. 01-422 (2001).

G. Recording in Internal Investigations: Pros and Cons

1. First, consider if a law or policy prohibits recording. If not, ask if there is a reason *not* to record an internal investigation. Specifically, consider if this recording will later become discoverable or need to be turned over to government investigators in cooperation or as part of a defense.

2. If in a one-party consent state, consider if there is another reason to obtain the employee's consent to record. This can include an internal company policy, contract requirements, or collective bargaining obligations.

3. Benefits of recording: a reliable record and increased focus of the investigator (may allow better questions).

4. Drawbacks of recording: increases formality (assuming employee knows they are being recorded), costly, and decreases counsel's control over the narrative.

    a. In two-party consent states, if an investigator records, the witness likely also will. That witness will then have a copy of their interview to use as they wish. *See* Matthew Rose, *To Record or Not to Record? That is the Question*, Van Dermyden Makus Blog (July 13), https://www.vmlawcorp.com/blog/to-record-or-not-to-record-that-is-the-questionb9k7s#:~:text=Recording%20enables%20the%20investigator%20to,Limits%20attacks%20against%20the%20investigator.

III. Whistleblowers: What can counsel say? What can they do?

Document Collection

A. Can a whistleblower collect documents?

1. Ask if they signed any nondisclosure agreements ("NDA") with their employer. If yes, this may prohibit them from disclosing certain documents and information obtained while in the course of their employment.

2. Next, explore what fiduciary duties the whistleblower owes their employer. Typically, in the absence of fraud, the employee's fiduciary duty requires them to act for the benefit of their employer. Collecting and disclosing confidential documents to a third party would constitute a breach of that duty.

3. If the whistleblower divulges their employer's confidential information, the employer could assert a counterclaim against the whistleblower for breaching their NDA or their fiduciary duty.

4. Public Policy Exception: Although document collection and disclosure are largely impermissible, whistleblowers are typically protected from liability

when they disclose documents and information to the government in order to report a fraud.

a. Corporations cannot rely on contracts like NDAs to conceal their illegal activities, like fraud. Such NDA shields are void as against public policy. *X. Corp. v. Doe*, 805 F. Supp. 1298, 1310 n. 24 (E.D. Va. 1992).

    i. The False Claims Act ("FCA") requires relators to provide all material evidence and information within their possession to the government. Typically, sharing information with the whistleblower's attorney or the government to comply with the FCA is permissible.

b. However, this exception is narrow. Whistleblowers can only disclose what is plausibly connected to the potential fraud. *Id.*

    i. Disclosure of large volumes of files or knowing disclosure of unrelated materials may still breach the fiduciary duty that the employee owes the employer.

    ii. Employees who collect documents to use against their employers are still limited and may only take what is reasonable to take. *Netter v. Barnes*, 908 F.3d 932, 940 (4th Cir. 2018).

    iii. Reasonableness is a balancing test: Courts will balance the employer's legitimate interest in protecting confidential information against the employee's legitimate interest in expressing grievances and promoting their own welfare.

        - Consider, also, how the information was obtained. Was it done so innocently involving only limited dissemination? Was it targeted with specific information in mind?

        - California follows this reasonableness balancing test, balancing the need for evidence in reporting a fraud with the need to protect the employer's interest in confidentiality. *Erhart v. BOFI Holdings, Inc.*, Case No. 15-cv-2287, 2017 U.S. Dist. LEXIS 20959, *33 (S.D. Cal. Feb. 14, 2017).

5. So, can a whistleblower collect documents without repercussions?

    a. Likely, yes, if those documents are closely related to a potential fraud.

    b. The whistleblower's conduct must be reasonable in light of the circumstances. *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 233 (1st Cir. 1976).

B. Can the attorney for the whistleblower tell their client to take documents?

1. Lawyers may advise their client that, if they are going to take documents: 1) they should limit what they take to what is relevant and reasonable; 2) they should only take what they have access to in the ordinary course of their employment; 3) they should only provide the documents to their attorney or the government; and 4) they should not take information protected by attorney-client privilege.

C. What can/must the attorney do with documents that the whistleblower collected?

1. Read?

a. Lawyers should err on the side of caution when receiving documents. First, assume that disclosure of any information seemingly protected by attorney-client privilege or work-product privilege was inadvertent, unless circumstances indicate otherwise. Follow guidance from Rule 4.4(b).

i. **Virginia Rule of Professional Conduct 4.4(b): "**A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information is privileged and was inadvertently sent shall immediately terminate review or use of the document or electronically stored information, promptly notify the sender, and abide by the sender's instructions to return or destroy the document or electronically stored information."

ii. **Comment 2:** "If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently and is privileged, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures and to abide by any instructions to return or destroy the document or information that was inadvertently sent."

iii. **Comment 2:** If "the lawyer know[s] that the document or electronically stored information was inadvertently sent but not that it is privileged; in that case, the receiving lawyer has no duty under this rule."

iv. **Comment 3:** "The lawyer is prohibited from informing the lawyer's client of relevant, though inadvertently disclosed, information, and … the lawyer is prevented from using information that is of great significance to the client's case. In such cases, paragraph (b) overrides the lawyer's communication duty under Rule 1.4. As stated

in Comment [1], diligent representation of the client's interests does not authorize or warrant intrusions into privileged communications."

b. Exceptions to the general prohibition against use of such material exists, especially where it seems the privilege no longer exists.

i. "In Virginia, a lawyer who receives privileged materials unsolicited has no obligation (other than respect for professional courtesy) to make a disclosure to a tribunal or to an adverse party, and may review and use such materials." Va. Legal Ethics Comm., Formal Ops. 1076 (1988).

ii. However, in D.C., if the lawyer has reason to believe that the document is privileged, that the privilege was not waived, and that the document was obtained without authorization, reading, or using the document is unethical. If the lawyer reads the document and still does not realize it is protected by privilege, use does not violate ethical rules. D.C. Legal Ethics Comm., Formal Op. 318 (2002).

2. Return?

a. **Virginia Rule of Professional Conduct 1.6:** "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."

i. **Comment 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."

b. **Virginia Rule of Professional Conduct 3.4(a):** "A lawyer shall not … Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act."

c. In Virginia, if the information is confidential, but not subject to the opposing party's attorney-client privilege, the attorney for the whistleblower may make a copy and return the original (with the whistleblower's consent to return).

d. In DC, the attorney's duty of confidentiality to the client outweighs the attorney's duty of fairness to the opposing party and counsel. There, because returning a document may jeopardize the whistleblower interests, the attorney for the whistleblower need not return the documents. D.C. Legal Ethics Comm., Formal Op. 242 (1993).

3. Disclose?

a. The attorney for the whistleblower may NOT purposefully avoid questions about the source of a document. This amounts to misrepresentation and deceit in violation of Rule 8.4.

b. **Virginia Rule of Professional Conduct 8.4:** "It is professional misconduct for a lawyer to: ... (b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law."

c. Even if a lawyer does not violate ethical rules by reading a privileged document, disclosure (to third parties or opposing party) without your own client's approval may violate Rule 1.6 (above).

4. Use?

a. An attorney for the whistleblower can use materials collected by the client to report a fraud through the appropriate channels (for example, to the Securities Exchange Commission, Department of Justice, etc.).

b. However, disclosing materials, especially those which are either protected by attorney-client privilege or confidential, to other actors, including the press, is impermissible.

c. In Virginia, the attorney for the whistleblower may be able to use confidential information about the opposing party that they gained through their client, so long as it is not protected by attorney-client privilege. Va. Legal Ethics Comm., Formal Op. 1141 (1988) (Although this opinion addresses almost the same topic as LEO 1702, LEO 1702 does not discuss information obtained by a client. It only addresses information provided by a third party, and does not specifically address or overturn 1141.).

D. What if an unknown third party provided these documents? Va. Legal Ethics Comm., Formal Op. 1702 (1997).

1. Refrain from reviewing if they appear to be privileged or confidential.

2. Notify the adverse party and their lawyer.

3. Follow that lawyer's instructions.

4. If dispute over use of the information learned arises, seek advice from a court.

Note-Taking

A. Can a whistleblower take notes about their employer?

1. Is there a company policy prohibiting notetaking or keeping copies of notes at home?

2. If not, a whistleblower can take notes based on potential fraud that they learn of through their own course of work without taking the actual documents.

a. Personal notes concerning employment are generally protected. *Derderian v. Polaroid Corp.,* 121 F.R.D. 13 (D. Mass. 1988).

3. After relaying the claim to the government, the government may use the whistleblower notes to identify the existence of certain documents and lead the government to compel production from the employer.

B. What can an attorney tell the whistleblower to take notes on?

1. There are both legitimate and illegitimate reasons to ask a whistleblower to take notes.

2. Counsel can ask a client to take notes on what the client sees and hears in order to "aid memory as time passes, compl[y] with Rule 11 of the Federal Rules of Civil Procedure when filing or amending a complaint, avoid[] liability under 31 U.S.C. § 3730(d)(4), insur[e] that all supporting information is provided to the government as required by 31 U.S.C. § 3730(b)(2), compl[y] with the disclosure requirements of Rule 26(a)(1) of the Federal Rules of Civil Procedure after the matter is joined, and provid[e] complete discovery responses." *United States ex rel. Thomas v. Duke University*, Case No. 1:17-cv-276, 2018 U.S. Dist. LEXIS 150000, at *11 (M.D.N.C. Sept. 4, 2018).

3. However, counsel must avoid "direct[ing] or control[ling] the relator's underlying interactions" with coworkers. *Id.*

4. Counsel should instruct the whistleblower client to avoid seeking out new information. Client should only take notes on occurrences which have

always been within the scope of their employment. *Id.* at 12 (permitting relator's conversations with coworkers about the fraud which were "perfectly normal in this context" and "general and typical of ordinary conversation").

Discussions with Other Employees

A. Can an attorney for a whistleblower discuss the case with the employer's other employees?

1. Current Employees:

a. For many years, Virginia adhered to the *Upjohn* tests, and defined "represented person" within an organization as s someone who is in the organizations "control group" or serves as an "alter ego" for the organization. **However, this definition—and the *Upjohn* tests as a whole—are no longer applicable in Virginia.**

b. Effective January 6, 2021, the Supreme Court of Virginia approved LEO 1890, which explicitly adopted the definition of "represented person" set forth in Comment 7 to Rule 4.2.

i. **Va. Rules of Pro. Conduct r. 4.2 Comment 7:** "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."

ii. This definition is substantially broader than the "control group" or "alter ego" definitions.

iii. A copy of LEO 1890 is attached to this outline as **Appendix A**.

c. Under the LEO, a lawyer may have *ex parte* conversations with current employees so long as the conversation does not relate to the matters relating to the representation of the company.

d. Represented party? If the current employee falls outside the broad definition in Comment 7, the lawyer still must inquire about if they have their own independent counsel representing them in this matter.

2. Former Employees:

a. LEO 1890 endorsed the guidelines for communicating with former employees, as articulated in *Bryant v. Yorktowne Cabinetry Inc.*, 538 F.Supp.2d 948 (W. D. Va. 2008)

b. *First*, the lawyer should immediately identify themselves as an attorney representing an opposing party, and specify the purpose of the contact.

    i. **Virginia Rule of Professional Conduct 4.3: "**In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

c. *Second*, the lawyer should determine whether the former employee is associated with the company, or is represented by counsel on this matter.

    i. If yes, immediately terminate the conversation with that former employee.

    ii. **Virginia Rule of Professional Conduct 4.2:** "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."

    iii. **Comment 7:** "Consent of the organization's lawyer is not required for communication with a former constituent … 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."

d. *Third*, the lawyer must advise the former employee that participation in the interview is not mandatory and that they may choose not to participate or to participate only in the presence of personal counsel or counsel for the defendant.

    i. The lawyer must immediately cease contact if the former employee does not wish to participate.

e. *Fourth*, the lawyer must advise the former employee to avoid disclosure of privileged or confidential corporate materials. Va. Legal Ethics Comm., Formal Op. 1749 (2001).

i. The employer controls the attorney-client privilege, so only the employer may waive the privilege. The former employee who may know privileged information cannot waive the privilege.

ii. Therefore, the lawyer may not ask the former employee about any confidential communications the employee had with the organization's counsel while the employee was employed by the organization.

iii. During the course of the conversation, the lawyer should not attempt to solicit privileged or confidential information.

iv. If it appears that the former employee may reveal such information, the lawyer must immediately terminate the conversation.

f. *Fifth*, the lawyer must preserve all statements and notes concerning the contact with former employees.

i. Keep a list of all former employees contacted, and the dates of contact.

ii. Keep all statements or notes from those conversations

g. The attorney for the whistleblower must ensure the method of obtaining evidence does not violate that former employee's legal rights.

B. Can an attorney for the whistleblower tell the whistleblower to speak with other current or former employees?

1. In Virginia, "lawyer[s] may not use the client to circumvent Rule 4.2." "A lawyer may not use a client or a third party to circumvent Rule 4.2 by telling the client or third party what to say or "scripting" the communication with the represented adversary." This is despite the fact that clients are free to, on their own, speak with the adversary. Va. Legal Ethics Comm., Formal Op. 1890 (2021).

a. Why? Because **Virginia Rule of Professional Conduct 8.4** prohibits "knowingly assist[ing] or induc[ing] another [to violate or attempt to violate the Rules of Professional Conduct, or do[ing] so through the acts of another."

2. In contrast, the ABA "allows lawyers to advise their clients concerning" *ex parte* communications with represented adversaries, stating that the strict approach of other states "tends to harm unsophisticated clients who might

not recognize the benefit of such communications." ABA Comm. On Ethics & Pro. Resp., Formal Op. 11-461 (2011).

3. The ABA even permits a lawyer to "give substantial assistance to a client regarding a substantive communication with a represented adversary," to include subjects, topics, issues, and strategies. It further permits lawyers to redraft or approve letters or talking points prepared by the client. *Id.*

    a. Despite this broad reach, the ABA cautions lawyers from overreaching. At a minimum, a lawyer must advise their client to encourage the adverse party to discuss with their own counsel. *Id.*

Discussions with In-House Counsel

A. If in-house counsel knows that a whistleblower is represented, they should not engage with the whistleblower. **Va. Rules of Pro. Conduct r. 4.2:** Communication with Persons Represented by Counsel.

    a. **Comment 3**: "The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule. A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person, if that person is seeking a 'second opinion' or replacement counsel."

B. Once the existence of the whistleblower complaint comes to light, lawyers representing employers and those representing whistleblower's should consider (with each client's consent) making an agreement that covers communications between in-house counsel and the whistleblower. If the whistleblower typically interacted with in-house counsel in the scope of their employment, such an agreement could allow continued interaction on current business issues without ethical or whistleblower concerns. 29th Ann. Nat'l Inst. on Health Care Fraud, *Workshop for Defense and in-House Counsel*, ABA Law Library Collection Periodicals (2019).

Other Ethical Considerations

A. Relevant New Ethics Decisions:

    1. Where a lawyer represents themselves, they are still unable to speak with an adverse represented party about the subject of the representation without the consent of opposing counsel. ABA Comm. On Ethics & Pro. Resp., Formal Op. 22-502 (2022).

2. It is not a violation of Rule 4.2 for a lawyer, in replying-all to an email sent from opposing counsel, to send a response to both opposing counsel and their client. Should opposing council copy their client on an email, they have impliedly consented to a reply-all response. Va. Legal Ethics Comm., Formal Op. 1897 (2022).

IV. Navigating the Common Interest Privilege/Joint Defense Agreements with Cooperators

A. Typically, the attorney-client privilege is waived after disclosing the substance of attorney-client communications to a third party. However, the common interest privilege allows such disclosures without waiving attorney-client privilege if the parties have identical legal interests. A JDA is a version of the common interest privilege used only in reference to agreements made by the defense side. 6 James W. Moore et al., Moore's Federal Practice – Civil § 26.49 (3d ed. 2023).

B. To assert the common interest privilege, parties have to show an agreement about litigation interests, whether it be written or oral. The privilege only protects disclosures made while the parties shared a common legal interest, not any disclosures made earlier. *Id.*

C. The Common Interest Privilege only protect communications between actual or potential codefendants and their counsel. Counsel must be party to the conversation. *Id.*

D. Ethical Considerations:

1. **Virginia Rule of Professional Conduct 1.9:** "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."

   a. **Comment 9**: "Disqualification from subsequent representation is primarily for the protection of former clients but may also affect current clients. This protection, however, can be waived by both. A waiver is effective only if there is full disclosure of the circumstances, including the lawyer's intended role in behalf of the new client."

   b. Clients generally must consent to joint representation after consultation with counsel, otherwise counsel will be subject to an ethical challenge for ineffective assistance of counsel. *See United States v. Henke*, 222 F.3d 633, 638 (9th Cir. 2000).

c. When one JDA member becomes a cooperator and testifies adversely to the other members, counsel should be disqualified from continued representation, as they likely have confidential information and a conflict of interest now exists. *See United States v. Scott*, 980 F. Supp. 165, 168 (E.D. Va. 1997).

i. The alternative view: some attorneys honor the privilege of the communications prior to terminating the JDA with cooperation, but the attorney is permitted to continue in representation.

2. Counsel in JDAs owe ethical responsibilities only to their individual clients, not the codefendants in the JDA. *See Brown v. Doe*, 2 F.3d 1236, 1245 (2d Cir. 1993).

E. Benefits of JDAs: cost sharing and legal strategy agreement in complex cases.

F. Drawbacks of JDAs: creates conflicts of interest between co-counsel, limits opportunities for plea bargains, and governmental opposition to JDAs.

G. The Government's Role:

1. Can the government ask if a JDA exists?

a. Courts have denied discovery requests into the existence and membership within a JDA. *See United States v. McDade*, 1992 U.S. Dist. Lexis 11447, *5 (E.D. Pa. July 30, 1992).

2. Cooperation Agreements

a. After deciding to cooperate with the government, the cooperator often has to give notice to the other members of the JDA if the JDA was reduced to writing. Most written JDAs require the cooperator to withdraw from the JDA and return all copies of JDA work product. Charles W. Blau, *Criminal Enforcement of Environmental Laws: Communication and Privilege in a Criminal Environmental Case*, A.L.I. C.L.E. Course of Study (2001).

b. Cooperation agreements typically require cooperating witnesses to waive all privileges, including the attorney-client privilege protecting the JDA. *Id.*

i. However, cooperators may not disclose information learned while they were members of the JDA, as all parties to the JDA must agree to waive it. *See In re Grand Jury Subpoena,* 89-3 & 89-4, 902 F.2d 244 (4th Cir. 1990).

c. Testifying former members of the JDA present a general problem for JDA Counsel of ineffective cross-examination, as counsel for the JDA cannot question the witness on confidential matters learned while a member of the JDA. *See* Blau, *supra.* While this presents ethical issues with Rule 1.6 (below), courts find it insufficient grounds to disqualify counsel. *See McDade*, 1992 U.S. Dist. Lexis 11447 at *6-*8.

   i. **Virginia Rule of Professional Conduct 1.6:** "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."